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CHEEK *v.* CHEEK.

5-2103 334 S. W. 2d 669

Opinion delivered April 11, 1960.

J. Allen Eades, for appellant.

Switzer & Switzer, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves the custody of a minor child, and the award granted for his support. Loretta Cheek was granted a divorce from Harold Cheek in the Ashley County Chancery Court on June 2, 1958. By the terms of the decree, she was given custody of the minor son, Ricky, then five years of age, and the court awarded $20 per week

for the child's support. The decree provided that Mr. Cheek should have custody of the child for "two periods of two months each twelve months until the child starts to school in September, 1959, at which time temporary custody period shall be reduced to three months during the summer vacation; * * *." The support payments, of course, were only required during the time that Ricky was in the custody of his mother.

On July 8, 1959, appellant filed a motion to amend the decree and reduce the support payment, and appellee subsequently petitioned the court, seeking a contempt citation for appellant's alleged failure to comply with the decree of June 2nd. In response to this petition, appellant further pleaded that appellee was not a fit person to have the custody of the child, and asked that he (appellant) be granted custody of Ricky. Following a hearing on September 15, 1959, the court modified the original decree of June 2nd, 1958, by reducing the $20 per week payments to the sum of $70 per month; giving the mother the right to move the child out of the state (subject to visitation rights of the father as set out in the original decree), and requiring appellee to file with the court a bond in the amount of $500, conditioned upon her compliance with further orders of the court. Judgment was rendered against appellant for $720, representing Cheek's arrearage in child support payments. From such judgment comes this appeal.

Appellant first contends that the trial court erred in the amount for which judgment was awarded for arrearage. This contention is based upon the argument that Mr. Cheek was entitled to custody of Ricky for four months in 1958, and four months in 1959, a total of eight months, even though there was only a fifteen month interval between the granting of the decree and the order for modification. We are unable to understand the basis for this argument. The provision of the decree relative to custody of the child, heretofore set out, provides that appellant shall have custody for four months of *each twelve months*[1]—not four months during each

[1] Emphasis supplied.

calendar year. The record reflects that the child was in the possession of appellant for sixteen weeks, the approximate four months, and the petition for modification was filed thirteen months after the original decree. It appears therefore, that appellant had possession of the child for the approximate period of time granted him under the decree. However, the court apparently miscalculated the amount of arrearage by $100, and this is admitted by appellee. The proper amount of judgment should have been $620.

Appellant next contends that the amount awarded per month for the support of the child is excessive and entirely beyond his ability to pay. The record reflects that Cheek earned $5,226 in 1958. In 1959, Cheek worked from the first of the year until March 4th, at which time he was laid off. He returned to work June 15th, and was working at the time of the trial. His total wages at the time of the hearing amounted to $2,328.15. In addition, he had drawn unemployment compensation at the rate of $26 per week during the period that he was off from work (three months, ten days). Of course, there still remained approximately three and one-half months in the year. The court arrived at its maintenance figure for the child on the following basis: $30 per month for food, $10 per month for clothing, school expenses, $8 per month; medical expenses, $10 per month; insurance, $4 per month; and $10 miscellaneous. This totals $72 per month, and the figure for support was fixed at $70 for each monthly period. Appellant argues that the total award should not exceed $40 per month. We do not agree that the amount awarded is excessive, nor do we feel that it is out of line with appellant's earnings. It is true, that because of the lay-off from work, he may have earned some less in 1959 than in 1958, but, as previously stated, he was working regularly at the time of the trial. Perhaps we would be more impressed with this argument if Mr. Cheek had fully complied with the court's order during the period of time he was regularly employed. From June 2, 1958, through December 31, 1958, appellant contributed $100 for the support of Ricky; from

January 1, 1959, through March 4, 1959 (at which time he ceased work, Mr. Cheek contributed $80 for child support. The total amount paid from the date of the divorce until the date of the hearing was $400. Be that as it may, we cannot say that this award is excessive. This Court has many times held that the amount of support is a matter within the sound discretion of the trial court under the facts of each case. See *Robbins* v. *Robbins,* 231 Ark. 184, 328 S. W. 2d 498, and cases cited therein.

Appellant contends that appellee is not the proper person to have the custody of Ricky, and that custody should be given to the father. We do not agree. In *Perkins* v. *Perkins,* 226 Ark. 765, 293 S. W. 2d 889, this Court said:

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

Certainly, no compelling reason appears in the instant case for changing custody. There are no allegations, or proof, of lewdness of drunkenness—or staying away from home—or improper treatment of the child—or neglect in any manner. In fact, appellant's evidence of unfitness was rather strained. This proof relates to the fact that appellee would not let Cheek have the child on one or two occasions, and her use of a credit card, made out to appellant, to obtain gasoline, wherein she signed her name "Mrs. Harold Cheek" after she had remarried a man named Zeagler. The total gas bill was $39.15, though it is not entirely clear that appellee purchased all of this gas, since only two tickets are in the record. Mrs. Cheek (Zeagler) testified that the child was staying with appellant in Fort Smith; that she called and asked that he bring the boy home, but he replied that she would have to come after Ricky. She stated he told her it was all right to use the credit card, and that, though the gas was charged to him, she actu-

ally paid the bill. At any rate, we do not consider this act so grievous as to merit a change of custody of the child, particularly when appellant, at the time of the occurrence (October 11th-12th) was several weeks behind in his payments.

The findings of the Chancellor carry particular weight in a case of this nature. As we stated in *Wilson* v. *Wilson,* 228 Ark. 789, 310 S. W. 2d 500:

"We know of no type of case wherein the personal observations of the court mean more than in a child custody case. The trial judge had an opportunity that we do not have, *i.e.,* to observe these litigants and determine from their manner, as well as their testimony, their apparent interest and affection, or lack of affection for the child."

The decree is modified to the extent that the judgment for $720 is reduced to $620, and is, in all other respects, affirmed. Attorney for appellee is awarded an additional attorney's fee of $150.00. Costs of this case shall go against appellant.

BACK *v.* J. C. PENNEY CO.

5-2109 334 S. W. 2d 672

Opinion delivered April 11, 1960.

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

Wright, Harrison, Lindsey & Upton, for appellee.

J. Seaborn Holt, Associate Justice. This appeal involves the construction and interpretation of the provisions of a lease. Appellants, Edward S. Back, Phillip G. Back and William S. Back as trustees, had leased to appellee, J. C. Penney Company, for a number of years a retail store building at 505 Main Street, Little Rock, Arkansas, which appellants owned. On April 9, 1952, the parties entered into a continuation lease on the property beginning June 1, 1952, for a period of ten (10) years, ending May 31, 1962. The building under lease was to be used by Penney for the sale of ready-to-wear clothing and similar lines of merchandise. The lease provided for a rental which would be three percent (3%) of the monthly net sales of the Penney Store. However, in no event was the rent in any one year to be less than $13,500.00. The lease provided that the Penney Company could, at its option, install a freight elevator and air conditioning to make the building more suitable. Penney, under the terms of the lease, would pay the initial cost and would recoup this capital outlay (or cost), which amount was admitted to be $76,698.75, by deducting one-tenth (1/10th) of the rentals each year in excess of $48,000.00. Penney elected to install the above mentioned items and proceeded to recoup its outlay according to lease provisions. Penney, on January 25, 1958, vacated the premises and continued to pay rent on the basis of $63,216.93, the yearly average, less the sum of $7,669.88 [being one-tenth the cost of improvements]. The contention of appellants, Back trustees, is that Penney should not be allowed to deduct $7,669.88 now that it has quit the premises and the trustees filed suit to recover this amount. The lower court dismissed appellants' complaint and this appeal followed.

For reversal, appellants rely on two points. (1) Upon vacating the leased premises, the J. C. Penney Company was obligated under the lease to pay a sum in lieu of percentage rentals, and the formula for the computation of said sum did not provide for a deduction for the cost of elevator, air conditioning, or other improvements. (2) Any language in the lease intimating that J. C. Penney Company had the right to

withhold for improvements from the sum paid in lieu of percentage rentals after it vacated the premises is in conflict with the formula previously mentioned, and any ambiguity so created should be construed against Penney since its employees prepared the lease.

We do not agree with either of these contentions. They are so related that we will consider them together. The lease, under *IMPROVEMENTS,* relating to Penney's right to deduct one-tenth (1/10th) of the cost of the air conditioning system and the freight elevator, provides: "If, as, and when Tenant shall complete installation of air conditioning and/or a freight elevator, and if the cost thereof shall be determined to be less than the aforesaid sum of Ninety Thousand Dollars ($90,000.00) that Landlord has agreed to contribute towards the cost thereof, then there shall be an adjustment of the amount to be withheld each lease year out of said percentage rentals as aforesaid, to the end that Tenant shall withhold or recover one-tenth (1/10th) of the actual amount so expended by Tenant for each lease year of the term hereof as aforesaid, provided always, however, that Tenant shall, in no event, recover or withhold an amount in excess of the sum actually expended by Tenant in connection with the installation of air conditioning system and/or a freight elevator, or the sum of Ninety Thousand Dollars ($90,000.00), whichever shall be the lesser of the two."

We think there could be no question, therefore, but that the parties clearly intended that Penney be fully reimbursed for the cost of the air conditioning and elevator if percentage rentals due in excess of $48,000.00 annually permitted recoupment, and it is undisputed that the percentage rentals averaging $63,216.93 annually from June 1, 1952 through January 25, 1958 have been paid by Penney to appellant and were sufficiently in excess of $48,000.00 per year to permit recoupment of $7,669.88 annually by Penney.

Appellants made no complaint about deductions under the lease until after Penney vacated the building on January 25, 1958. From that date they complain

about further deductions, or recoupments. After Penney vacated the building, Penney contended that it had the right, under the plain terms of the lease, to continue to deduct $7,669.88 out of its average annual payments of $63,216.93 due to the Backs until it had been fully repaid for the $76,698.75 it had advanced and expended in installing the air conditioning and freight elevator. The lease provided that if Penney vacated the building, the percentage rental formerly used up to the vacation date [January 25, 1958] would not apply but instead the lease provided that the rental should be: "An amount each month until the end of the term . . . equal to the average of the amounts actually received each month by the Landlord under the foregoing provision for rentals during the period between the beginning of the term of the lease and the time when the Tenant ceases to use the demised premises for its business." Clearly, then, under the above language, appellants [Backs] were entitled to receive for the remainder of their lease term what is admittedly being paid to them, namely $55,547.05 cash, which represents the average of $63,216.93 paid to them annually during the period that Penney occupied the building before vacating it, less the amount $7,669.88 deduction provided for. This lease appears to have been carefully drawn and agreed upon by the parties. Its meaning is clear and unambiguous. Under its plain terms we hold, as indicated, that Penney was clearly entitled to the annual recoupment of $7,669.88 until fully reimbursed in the amount of $76,698.75 for the improvements. Appellants will continue to receive, from May 28, 1958 until May 31, 1962, an annual cash rental of $55,547.05 and further will be allowed to retain valuable improvements on their property amounting to $76,698.75, all under a lease which contained a minimum guarantee rental of only $13,500.00 per year.

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

George Rose Smith, J., not participating.

5-2067 334 S. W. 2d 674

Opinion delivered April 11, 1960.

John F. Gibson, for appellant.

William H. Drew, for appellee.

ED. F. MCFADDIN, Associate Justice. The Chancery Court awarded appellee (husband) a divorce from appellant (wife); and this appeal challenges the correctness of that decree.

At the outset, we have a procedural question to decide. The case was heard on oral testimony, and the Chancellor delivered an opinion which is twenty-two transcribed pages. The decree was filed on April 27, 1959; notice of appeal on May 15th; designation of entire record on May 15th; extension granted on July 24th; and on October 22nd additional extension granted "until seven months from April 27, 1959". On October 22, 1959 appellant filed a "petition and affidavit", stating that she had no money with which to pay for the transcription of testimony and that the entire record should be furnished her without charge, under the provisions of Section 8 of Act No. 244 of 1957. This petition[1] was denied at a hearing on October 30, 1959. It was

[1] This petition by appellant, filed on October 22, 1959, was the first suggestion that the appellant was without funds. She never asked the Court to require appellee, as her former husband, to bear any part of the cost of the furnishing of the record.

shown that the Court Reporter had taken the testimony by the use of a recording machine; and the Court suggested that appellant might make a condensed statement in narrative form from the recordings which the Court Reporter was directed to furnish her.

In accordance with the Court's suggestion about a condensed statement in narrative form, the appellant filed with the Clerk of the Chancery Court on November 17, 1959, an unverified, uncertified, unagreed-to 46 page instrument purporting to be a condensed statement in narrative form of the testimony of all the witnesses in the case; but neither the appellee nor his attorney was ever notified of such filing, and no copy was ever furnished appellee or his counsel. On November 18, 1959 the appeal was filed in this Court; and the record contained only the pleadings, the Court orders, and the said narrative statement. Upon learning of the appeal, the appellee filed in this Court a motion to strike said condensed statement in narrative form, and such motion was passed until consideration of the case on its merits. We gave either party permission to file a duly certified copy of the Chancellor's opinion, as previously mentioned; and the appellee has filed the same with us.

The motion to strike the narrative statement must be sustained. Our statute allowing testimony to be supplied in narrative form is Section 10 of Act. No. 555 of 1953, as now found in § 27-2127.4, Ark. Stats., and reads:

"A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be submitted for all or part thereof."[2]

It is instantly apparent that if the appellant had wanted to file a "condensed statement in narrative form", such should have been prepared and filed when the record was designated on May 15, 1959, and not on

[2] This comes to us from Rule 75 (c) of the Federal Rules.

November 17, 1959. The purpose of the condensed statement in narrative form is to afford the parties a possibility of saving the additional expense of the questions and answers of various witnesses.[3] But, even so, when such statement is served on the opposite party, he may, if dissatisfied, "require testimony in question and answer form". In the case at bar, even if we bypass the fact that the condensed statement in narrative form was not filed with the appellant's designation of the record, still we cannot overlook the point, made by the appellee, that the condensed statement in narrative form was never served on the appellee or his counsel, so that he could require the testimony to be furnished in question and answer form—as he states he would have done. So the narrative statement must be stricken as filed out of time and filed without ample notice to appellee.

With the narrative statement stricken, there is no showing of error, and the decree must be affirmed. However, it is fair to all parties to say that we have carefully read and studied the said narrative statement, and also the Chancellor's opinion; and, even after considering the narrative statement, we would have affirmed the decree of the Chancery Court awarding a divorce to appellee. Since this is a divorce case, we adjudge that the husband shall pay the costs of this appeal.

Affirmed.

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[3] Appellant made no effort to prepare the kind of statement referred to under Section 19 of Act No. 555 of 1953, which may be found in § 27-2127.11 Ark. Stats.

5-2051 334 S. W. 2d 676

Opinion delivered April 11, 1960.

Donald Poe, Hardin, Barton, Hardin & Garner, for appellant.

Harper, Harper, Young & Durden, George F. Edwardes, for appellee.

GEORGE ROSE SMITH, J. This suit for personal injuries and property damages arose from a collision between two vehicles. One was a truck owned by the plaintiff McEntire and being driven by his fourteen-year-old grandson, the plaintiff Clifton Brown, Jr., who was traveling upon a mission of his own. The second vehicle was a tractor-trailer owned or leased by the

defendant Keaton and being driven by the defendant Welch. This vehicle was also occupied by a relief driver, the defendant Roseberry, who was asleep at the time of the collision.

McEntire and his grandson alleged in their complaint that Welch and Roseberry were employees of Keaton and that the accident was due to Welch's negligence in crossing the center line of the highway. By answer and cross complaint against the plaintiffs the defendants asserted that Welch was an independent contractor and that it was young Brown who was on the wrong side of the road. In response to special interrogatories the jury attributed the total negligence to Welch and Brown, 50 per cent each, and found that Welch was an independent contractor. The only recoveries were a $500 verdict against Welch for McEntire's property damage, a $3,142.16 verdict against Brown for Keaton's property damage, and a $7,500 verdict against Brown for Roseberry's personal injuries. The plaintiffs have appealed, and Welch has cross appealed.

The appellants argue two points for reversal. First, it is contended that the court erred in excluding paragraph 8 of a written contract by which Keaton, who owned the trailer, had leased the tractor from Welch. To show the relation between Keaton and Welch their attorney offered in evidence, and the court admitted, a copy of the lease contract from which paragraph 8 had been deleted. This contract, which is perfectly intelligible without the omitted paragraph, sets out the terms upon which Keaton leased Welch's tractor for a year.

Thereafter counsel for the plaintiffs offered the omitted paragraph, which provides in part that liability insurance "will be carried by Keaton at the expense of Welch, at the rate of 5%, to be deducted from each weekly check of Lessor." It is now insisted that this provision was admissible to show that Keaton exercised a measure of control over Welch and so might have been found to be his employer.

We agree that the contractual provision for liability insurance, though not admissible for all purposes, might

have been considered by the jury as bearing upon Welch's status as an employee or independent contractor. *Delamar* v. *Ward,* 184 Ark. 82, 41 S. W. 2d 760; *Pollock Stores Co.* v. *Chatwell,* 192 Ark. 83, 90 S. W. 2d 213. But both those cases point out that the jury should be instructed to consider the insurance arrangement only with respect to the narrow issue upon which it is admissible. It was therefore incumbent upon the plaintiffs, in offering proof not admissible for all purposes, to request the court to admit it for the limited purpose only. No such request was made, however, and it is settled that in the absence of such a request the exclusion of the evidence is not reversible error. *Kansas City So. Ry. Co.* v. *Leslie,* 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834; *Thacker* v. *Hicks,* 215 Ark. 898, 224 S. W. 2d 1.

Secondly, the jury's original answers to the special interrogatories were incomplete and conflicting. It is contended by the appellants that the trial judge erred in his successful efforts to elicit from the jury a set of harmonious answers, but we have concluded that no error was committed.

The first three interrogatories and the jury's original answers were, in substance, as follows: 1. Do you find that Welch was negligent? "No." 2. Do you find that Brown was negligent? "No." 3. If your answers to 1 and 2 are "Yes," then using 100% to represent the total negligence state what per cent you attribute to the following persons: Welch ——; Brown ——. The jury inserted "50%" in each of these blanks. Interrogatories 4 and 5 contained blank spaces for the insertion of the monetary damage suffered by each of the five litigants, but the jury did not originally fill in any of those blanks.

When Judge Wolfe examined the verdicts he first asked the jury how it was that in response to interrogatories 1 and 2 they found no negligence, but in the third interrogatory they divided the negligence 50-50. The jurors replied that by their answers to 1 and 2

they meant that neither Welch nor Brown was 100% negligent. The court explained that interrogatories 1 and 2 were merely intended to find out whether Welch and Brown were guilty of *any* negligence. With this explanation in mind the jurors returned to the jury room and corrected their answers to 1 and 2 to read "Yes." Up to this point the appellants make no complaint about the trial court's action, which was manifestly correct. The jury undoubtedly intended all along to find that Welch and Brown were both negligent, in equal degree.

The court next discussed with the jury the matter of fixing the pecuniary damages suffered by the various parties. In the course of this discussion the foreman of the jury remarked: "We are just assuming that by putting that 50-50 nobody would get anything." In view of this statement plaintiffs' counsel asked the court to inquire if the jury intended that no one should recover anything, but the court refused to put this question. Instead, the judge explained to the jury that the apportionment of fault and the fixing of damages are separate and independent matters. He pointed out that all the parties had stipulated that McEntire's property damage was $500 and that Keaton's was $3,142.16; there was at least an intimation that the jurors were bound by the stipulations. After this discussion the jury again retired and fixed the property damages at the stipulated sums and Roseberry's personal injuries at $7,500.

The appellants argue that Judge Wolfe made two errors in his efforts to assist the jury in arriving at the various litigants' recoverable damages. It is contended, first, that the court's intimation that the jury was bound by the stipulations amounted to a comment on the evidence, and, second, that the court should have asked the jurors if they really intended for no one to recover anything at all.

We think the court was right in both instances. On the first point the jurors *were* bound by the stipulations. When the evidence is wholly undisputed the court may and should take that issue from the jury. *Pacific Mut. Life Ins. Co.* v. *Walker,* 67 Ark. 147, 53 S. W. 675; *El*

Dorado & Bastrop R. Co. v. *Whatley,* 88 Ark. 20, 114 S. W. 234, 129 A. S. R. 93. A stipulation is the equivalent of undisputed proof; it leaves nothing for the jury to decide. Hence there was no need for the court even to submit to the jury the question of McEntire's and Keaton's property damages. The court might properly have submitted only the apportionment of fault, since that was the single missing factor that the court needed for the entry of a judgment in accordance with the stipulations.

On the second point the court's refusal to ask the jurors whether they meant to allow no one to recover was based upon a correct understanding of the comparative negligence statute. Ark. Stats. 1947, §§ 27-1730.1 and 27-1730.2. It is true that in returning a general verdict the jury may make findings that are not consistent or in harmony with either party's theory of the case. See, for example, *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49. But such results can hardly come about when the issues of comparative negligence are submitted on special interrogatories. In the present case McEntire's damages, for instance, were conceded to be $500, and the jury found that his adversary Welch was negligent, while McEntire was not. Upon these findings there is simply no way to prevent McEntire from recovering from Welch, who was the joint tortfeasor that McEntire elected to sue. Thus the appellants' second point really narrows down to an insistence that the trial court should have permitted the return of a general verdict, but we find no abuse of discretion in the court's submission of the case on special interrogatories. *Robertson* v. *Universal C. I. T. Credit Corp.,* 224 Ark. 293, 272 S. W. 2d 825; *St. Louis S. W. Ry. Co.* v. *Robinson,* 228 Ark. 418, 308 S. W. 2d 282.

By cross appeal Welch complains of the court's action in directing a verdict in favor of McEntire upon Welch's cross complaint. It does not appear from the abstracts of the record, nor even from the record itself, that any sufficient objection to the peremptory instruction was made prior to the filing of Welch's motion for

a new trial. It was then too late for the objection to be made for the first time. *De Queen & Eastern R. Co.* v. *Pigue,* 135 Ark. 499, 205 S. W. 888.

Affirmed.

DUNN *v.* DAULEY.

5-2066 334 S. W. 2d 679

Opinion delivered April 11, 1960.

Robinson, Sullivan & Rosteck, By: *Louis W. Rosteck,* for appellant.

Joseph C. Kemp and *William M. Stocks,* for appellee.

PAUL WARD, Associate Justice. This litigation was instituted by appellant, Dollie K. Dunn, against the Manager and Board of Directors of the City of Little Rock to recover retirement pay in accordance with the provisions of City ordinances. The Circuit Judge, sitting as a jury, resolved the issue against appellant and this appeal follows.

Appellant's Complaint, filed February 24, 1959, contained the following material allegations: She was in continuous employment of the City of Little Rock from May 19, 1946 to December 31, 1958; on or about the 16th day of December of 1958 she was ordered to quit work *due to ill health* by her personal physician, and she did quit three days later due to ill health; on

or about December 20, 1958 and again on January 6, 1959 she gave notice for retirement under the provisions of City Ordinance No. 6775; on January 29, 1959 she received written notice that her claim for disability retirement had been denied by the Board of Directors of the City of Little Rock; she was not present at the hearing before the Board of Directors, had no notice of said hearing, and does not know why her claim for disability retirement was denied; and, she was receiving a salary of $200.00 per month, and, under the provisions of the ordinances above mentioned, she is entitled to receive said salary for fifteen months or a total of $3,000.00. The above Complaint was later amended to include City Ordinance No. 10783.

After the Circuit Court had denied appellees' Demurrer to the above Complaint they filed an Answer, containing a general denial.

Both sides introduced testimony to support their contentions, and the Trial Judge, sitting as a jury by agreement of the parties, found: that City Ordinances No. 6775 and No. 10783 do not "create a pension system for the City, but are only an announcement of policy by the City. That any disability benefits created under these ordinances is a mere gratuity and creates no vested right in City employees to any benefit whatever. That the plaintiff did not sustain the burden of proof in establishing injuries or disability claimed by her or in showing that they were in any way related to or arising out of her employment". Thereupon the Court dismissed appellant's Complaint with prejudice.

That portion of the above mentioned City ordinances which has any relevancy to the issue in this litigation is Section 8 of Ordinance No. 10783 which reads as follows:

"A. It shall be the policy of the City to continue to pay disabled employees of the non-uniformed group, retirement pay, as in the past; until such times as a better retirement plan is worked out.

B. This shall include only, classified regular employees of the non-uniformed personnel who are compelled to retire from the City's employ because of sickness or because of a permanent disability growing out of an injury incurred in line of duty.

C. The retired employee must furnish a certificate from his physician stating the reasons or cause for retirement request and submit to a complete examination by the City Health Director, who must approve the employee's request for the disability retirement.

D. If request is granted the employee will be retained on the pay roll of the department by which he was last employed prior to retirement, for a period of months equal to the number of years for which said person had been employed by the City of Little Rock, and for a fractional period of a month to correspond with that fractional period of a year which he has been employed by the City of Little Rock. Upon death of employee payments shall cease.

E. The use of the masculine pronoun in the above shall include the feminine as well.

F. Members of the Police and Fire departments are excluded from the above provisions, because at the present time they have pension and retirement provisions created under the State statutes."

After careful consideration we have concluded that the judgment of the trial court must be affirmed on the ground that there is substantial evidence in the record to support the Trial Judge's finding that "the plaintiff did not sustain the burden of proof in establishing . . . disability claimed by her . . ." In reaching this conclusion we understand that appellant is relying on *ill health* and not on a *disability* to establish her claim. We interpret the ordinance to mean that ill health need not grow out of an injury incurred in the line of duty. Consequently, we do not pass upon the legal question whether the City Manager and the Board of Directors could arbitrarily refuse to make payments to appellant assuming the proof clearly showed she had to quit work because of her health.

Substantial Evidence. It is not disputed that appellant began working for the City of Little Rock on May 19, 1946 in the Women's Detention Center; that she continued to work until about December 19, 1958 or that she had high blood pressure when she began working for the City. In support of appellant's contention that she was forced to quit work because of ill health Dr. William A. Snodgrass, Jr. testified substantially as follows: I am a physician and surgeon and have been the family physician of appellant since August of 1946; I have treated her mainly for hypertension, high blood pressure due to arteriosclerosis; I had her in the hospital in April of 1958 and treated her for hypertension—she stayed in the hospital five days; on April 25, 1958 I wrote Dr. Lawson (the City Health Officer) advising him of her hypertension and recommending regular working hours; from April 25, 1958 to December 1, 1958 appellant made seven calls to my office mainly for hypertension; in November of 1958 she went into a mild congestive failure and her blood pressure dropped too rapidly; on December 16, 1958 I again wrote Dr. Lawson advising him that she had very high blood pressure and a mild congestive failure and told appellant to quit working immediately; and I saw her again on December 19, 1958 and her blood pressure was high and I ordered her to bed. I did not feel that she was able to work during the month of December and it is my opinion that she is unable to work now. On Cross-Examination the doctor stated that appellant's blood pressure was high in 1946 being 170/100 and that in his opinion she could have done housework in 1958.

Appellant testified that she began work as matron of the Women's Detention Center on May 19, 1946; that she alternated working days and nights; that after she came back to work in April of 1958 she worked until December 19, 1958 on which date she had a severe headache and the doctor ordered her to go to bed; she stated that she had dizzy spells while working but managed to keep on; that she received notice on December 18, 1958 that her job was discontinued and it was on December 19, 1958 during the lunch hour that she was forced

to go home and go to bed. She made application for retirement on December 20, 1958 by a letter to Dr. Lawson and on January 29, 1959 she received notice that the Board of Directors had denied her application. On Cross-Examination she stated that she received a letter from the City Manager on December 18, 1958 and became ill at noon the next day and had to leave work with a severe headache; that she had had such severe headaches before; she further stated that she remained in bed three days after going home on December 19th and that her doctor told her on December 16th she would have to retire. Appellant admitted to hearing rumors that her job would be abolished.

Dr. Mason Lawson, Public Health Director of the City of Little Rock, testified in substance: Appellant was under my supervision as matron of the Detention Center; I considered her work not too strenuous; I examined appellant on April 22, 1959 and she did have hypertension but I only gave her a superficial examination—a clinical examination; according to appellant's work record for the past ten years it is shown that she was off an average of 5.2 days per year which for a person of her age would indicate fairly good health; on the day I examined her I believe she could have worked. There had been some talk about closing the Detention Center and in November of 1958 it was definitely decided to do so and I believe I discussed this with appellant, however, I did not tell her in exact words that her job would be abolished. I believe that the letter to appellant stating that her job would be abolished might have caused emotional distress and the mild congestive failure, and might have caused her blood pressure to rise. On Cross-Examination, Dr. Lawson stated that he did not believe appellant's work at the Detention Center was any harder than the work done by the average housewife and that he tried to give them every consideration. Her further stated that he did not know the condition of appellant from November of 1958 to December of 1958 but that according to the records she was working during that period and never complained to him and never asked for relief. On Re-Direct Exami-

nation the doctor stated that he passed upon appellant's application for disability retirement but did not recommend that she receive disability retirement payments for the reason he thought she quit because she knew her job was going to be abolished.

Under the law and the peculiar facts of this case we must conclude that there is substantial evidence to support the findings and judgment of the trial court. Paragraph C of Section 8 of Ordinance No. 10783 sets out the things to be done by appellant before she would be entitled, under any circumstances, to retirement pay. First, she must furnish a certificate from her physician stating the reasons or cause for her retirement request, then she must submit to a complete examination by the City Health Officer, then the City Health Officer must approve her request. It is not contended here by appellant that the City Health Officer approved her request. It is also conceded, as shown by the record, that the Board of Directors denied appellant's request for retirement pay. The established rule appears to be that the courts will not override the findings of a Board unless it is first shown that the Board's action was fraudulent, arbitrary or capricious. Under the facts in this case we are unwilling to say that the Little Rock Board of Directors acted fraudulently, arbitrarily or capriciously. Such a principle has often been announced both by text writers and in judicial opinions. In Volume 3, pp. 561-562 of McQuillin, Municipal Corporations, you will find this statement:

"Unless the action of such officer or body is shown to have been fraudulent, arbitrary or capricious, usually it is held final, because the courts decline to substitute their judgment for that of the officer or body".

To the same effect we find in 40 Am. Jur., pp. 992-993 under "Pensions", Section 39, this statement:

"In an action by a city employee for a pension which had been denied to him by the pension governing body after a finding of facts by the body, which it was empowered by statute to make, that he was not entitled to the pension, it was held that in the absence of an

allegation in his petition that the action of the governing body was arbitrary and capricious, it did not state a cause of action and that the action of the governing body was final and not reviewable by the courts".

In the case of *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321, this Court in affirming the action of the City Council of Little Rock relative to a zoning situation made this statement: "The question is not what a member of the court might decide if the question were submitted to him as a matter of discretion, but rather is whether it can be said that the council abused its discretion, and we may not say that such was the case unless that fact clearly appears". Likewise in the case of *McKinney* v. *City of Little Rock,* 201 Ark. 618, 146 S. W. 2d 167, this Court, in upholding the action of the City Council relative to a zoning ordinance, and in approving the action of the trial court in sustaining the City Council, had this to say: "It was then tried by the chancery court, and it held that the classification was reasonable and the lower court's decision was not against the preponderance of the evidence. Moreover to set aside the decree and the finding of the Council would be substituting our judgment for that of the zoning authorities who are primarily charged with the duty and responsibility of determining the question. This we should not do unless we can say from the evidence that the action of the Council and the decision of the court are unreasonable and arbitrary".

We think the situations set forth in the above cited cases are somewhat similar to the situation in the case under consideration and that the rules above announced are applicable here. Also, the record shows that the City has no funds with which to make retirement payments in a case like this one. The administration of the entire program is in charge of the Health Officer, the City Manager and the Board of Directors. All of these have found that appellant was not entitled to retirement pay. The Circuit Judge, sitting as a jury, has approved the finding of the City authorities. We are unwilling to say that the findings of the trial court

are not supported by substantial evidence or that the City officers acted arbitrarily. Consequently, the judgment of the trial court must be, and it is hereby, affirmed.

Affirmed.

JOHNSON, J., dissents.

ROBINSON, J., not participating.

NEW ST. MARY'S GIN, INC. *v.* MOORE.

5-2147 334 S. W. 2d 683

Opinion delivered April 11, 1960.

Burke & Roscopf, for appellant.

John L. Anderson, for appellee.

SAM ROBINSON, Associate Justice. The appellant, New St. Mary's Gin, Inc., instituted this action to mandamus the assessor and members of the equalization board of Phillips County to assess appellant's property in accordance with a manual published by the Assessment Coordination Division of the Public Service Commission. The complaint alleges that the property was appraised at a value of $48,000 by the assessing authorities, but that the appraised value would have been only $23,600 if the method of appraising as set out in the

above mentioned manual had been used. The complaint further alleges that appellant by its attorney appeared before the equalization board and requested that appellant's property be appraised in accordance with the method set out in the manual and that the equalization board refused to comply with such request. The complaint alleges that the Arkansas Appraisal Service Co., Inc., was employed by the County to appraise the property within the county for tax purposes; that the appraisal of appellant's property was too high and that the appraisal value was adopted by the assessor and approved by the equalization board. In short, appellant seeks to reduce the appraised value by mandamus. Appellees demurred to the petition for mandamus. The trial court sustained the demurrer, and New St. Mary's Gin, Inc., has appealed.

Appellant concedes that ordinarily the remedy in a situation where the equalization board refuses to lower the assessed values of property is by appeal to the county court, but contends that under the authority of Act 153 of 1955 as amended by Act 307 of 1957, the court erred in refusing to grant mandamus requiring appellees to use the valuation for assessment as set out in the manual prepared by the Assessment Coordination Division of the Public Service Commission. The Acts mentioned set forth the procedure to be followed by county assessors, county boards of equalization, the Public Service Commission, county judges, and quorum courts, in a complete program of re-appraisal of the property in this State. It appears from the complaint that pursuant to these provisions the Assessment Coordination Division prepared certain manuals which are to be used in the re-appraisal program. As also authorized, Phillips County employed a private concern to make appraisals of the property within the county. Appellant complains that the assessment of the property as made by the private concern is not in conformance with the valuation set out in the manual as required by the above enactments. The specific language relied on by appellants is as follows:

"'Section 5 (A). It shall be the duty of the County Assessors and their deputies to use and follow the assessment Manuals and standards promulgated by the Assessment Coordination Department, and to use the forms prescribed and furnished by said Assessment Coordination Department in making such appraisal and assessment and to collect and record the date [data] thereby required. It shall also be the duty of the County Equalization Boards, in performing their duties, to recognize and follow such Manuals and standards, and the County Equalization Boards shall not change an assessment made by the County Assessor unless such change is necessary to provide uniformity in the assessment of similar classes of property. It shall also be the duty of the County Judges, in hearing appeals from the County Equalization Boards, to recognize and follow such Manuals and standards, and a County Judge shall not change an assessment unless such change is necessary to provide uniformity in the assessment of similar classes of property.'"

"SECTION 13. All duties imposed by this Act on all state and county officers are hereby declared to be mandatory, and any officer who neglects, fails or refuses to perform any such duty shall be subject to removal from office and liable on his official bond for such neglect, failure, or refusal. Upon the refusal or failure of any state officer to perform any duty imposed upon him under the provisions of this Act, any citizen of the State may, and the Attorney General of the State of Arkansas shall, institute in the proper court mandamus proceedings to compel such state officer to perform his duties. Upon the refusal or failure of any county officer to perform any duty imposed upon him under the provisions of this Act, any citizen of the county may, and the Prosecuting Attorney of the district including such county shall, institute in the proper court mandamus proceedings to compel such county officer to perform his duties."

It should be pointed out that the above language must be read in the light of the entire Act. Section 2 thereof contains the following expression:

"SECTION 2. The Arkansas Public Service Commission (in this Act hereinafter called the 'Commission') shall furnish guidance, instruction and assistance to the County Assessors in the performance of their duties under this Act. The Commission shall not have the authority to assess or re-assess any property now required by law to be assessed by County Assessors, or to order the assessment of the property of any designated taxpayer at any specified amount. It is the intention of this Act that the Commission have and exercise the duty and responsibility of coordinating and supervising the work of the County Assessors and County Equalization Boards in such manner as to provide uniformity of methods, procedures and results in the several counties of the State."

We have heretofore held that a taxpayer cannot enjoin an assessment where he has failed to exhaust his remedies of appeal from action or inaction by the county board of equalization. *Jones* v. *Crouch,* 231 Ark. 720, 332 S. W. 2d 238.

In the case of *State* v. *Board of Directors, School Dist. of Ashdown,* 122 Ark. 337, 183 S. W. 747, we said: "As early as *Fitch* v. *McDiarmid,* 26 Ark. 482, this court held that mandamus, with us, is not a writ of right, but is one within the judicial discretion of courts to issue or to withhold, and that a party, to be entitled to the writ must show that he has a clear legal right to the subject matter, and that he has no other adequate remedy. . . .

"In *Fitch* v. *McDiarmid, supra,* many authorities are cited, and among them the court quotes the following from *The People* v. *Thompson,* 25 Barb. 76 [N. Y.]: 'The invariable test by which the right of a party, applying for a mandamus, is determined, is to inquire, first whether he has a clear legal right and if he has, then, secondly, whether there is any other adequate remedy to which he can resort to enforce his right; if there is, he can not have a mandamus. The writ only belongs to such as have legal rights to enforce and find themselves without an appropriate legal remedy.' "

To the same effect are *Patterson* v. *Collison,* 135 Ark. 105, 204 S. W. 753, and *Snapp* v. *Coffman,* 145 Ark. 1, 223 S. W. 360. Act 153 of 1955, § 13, does not authorize mandamus where there is an adequate remedy by appeal.

It appears to us that the type of conduct for which mandamus would lie under the Acts in question is not the kind complained of in this instance. Here the county assessor was engaged in a program of re-appraisal as prescribed by the Legislature. The alleged erroneous assessment was not the result of failure on his part to act, but arose out of the mechanics of going forward with the reassessment program. Appellant was provided with a method of appeal from the board of equalization. Ark. Stat. § 84-708. This he did not choose to do.

Affirmed.

M. F. A. MUTUAL INSURANCE CO. *v.* WHITE.

5-2048 334 S. W. 2d 686

Opinion delivered April 11, 1960.

Hardin, Barton, Hardin & Garner, for appellant.

Douglas O. Smith, Jr., Warner, Warner & Ragon, Donald L. Poe, for appellee.

JIM JOHNSON, Associate Justice. Appellant, M. F. A. Mutual Insurance Company, as the insurer of George Hawkins on an automobile liability policy, instituted this suit for a declaratory judgment contending that George Hawkins' failure to notify them of the pendency of a suit against him by Mary White (Scott Circuit Court Case No. 2767) relieved them from liability as insurers. Appellee, Mary White, upon becoming cognizant of Hawkins' failure to notify the insurance company of the pendency of suit No. 2767, filed an identical action as suit No. 2783 in the same court and later dismissed without prejudice suit No. 2767.

The pertinent parts of the insurance policy here in question, which was admittedly in full force and effect on the date of the accident, are as follows:

* * *

"If a claim is made or suit is brought against the insured, he shall immediately forward to MFA Mutual every demand, notice of summons received by him or his representative. If any suit or counterclaim is brought which may result in a claim under Coverage E, a copy of any pleadings filed shall be immediately forwarded to MFA Mutual.

* * *

"Action against MFA Mutual: No action shall lie against MFA Mutual, under any Coverage, until after full compliance with all the terms of this policy, nor, as respects Coverages A and B, until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and MFA Mutual . . ."

From an adverse decree appellant appeals contending that: "Waiver, estoppel and res judicata are bars to Scott County Circuit Court Case No. 2783," and "The failure of Hawkins to turn over the summons in Case No. 2767 relieves appellant of any liability because of the breach of the policy conditions."

The material facts in this case are undisputed. Appellee, George Hawkins, was served with summons

in action No. 2767 on June 16, 1958, and did not notify appellant of the service until some 28 days thereafter. This lapse of time admittedly exceeds the statutory answer time. If this were the only issue before the Court in the case at bar we would be inclined to agree with the contentions of appellant, but that is not the case. Here, Appellee White dismissed her action No. 2767 without prejudice, even though at the time of dismissal she was entitled to a default judgment by authority of § 29-401, Ark. Stats. The case was never finally submitted for a judgment and no judgment was obtained. Section 27-1405, Ark. Stats. is as follows:

"Dismissal of Actions — 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 to the court, where the trial is by the court."

A dismissal without prejudice has been aptly described as being like a person blowing out a candle, which at his own pleasure may be lit again. We have held many times that if a plaintiff dismisses a suit before final submission, the order of dismissal is not *res judicata* in another suit involving the same parties and issues. See: *Jordan* v. *McCabe,* 209 Ark. 788, 192 S. W. 2d 538. Here another suit (action No. 2783) was filed involving the same parties and issues. Service was had on appellee Hawkins and it is not contended that he did not meet every requirement of his insurance policy. Nor is it contended that the policy was not in force at the time Miss White sustained her injuries complained of in action No. 2783.

Therefore, following the rule laid down in *Southern Surety Company* v. *Puryear-Meyer Grocer Co.,* 151 Ark. 480, 236 S. W. 841, we find that the delay of Hawkins to notify appellant of the service of summons in action No. 2767 affords no defense in the present action, for that action was dismissed without prejudice. The purpose of the stipulation in the policy was to afford the insurance company an opportunity to control the litiga-

tion and interpose a defense against the claim on the merits of the case. Since the first action was dismissed without prejudice there was no judgment, no payment, and no liability against appellant was sought; hence, it is clear that there was no breach of the conditions of the policy by failure of appellee to give notice of the first suit.

Affirmed.

DANIEL *v.* CITY OF CLARKSVILLE.

5-1204 334 S. W. 2d 645

Opinion delivered April 18, 1960.

Frank H. Cox, for appellant.

Edward H. Patterson, Townsend & Townsend, for appellee.

CARLETON HARRIS, Chief Justice. This appeal questions the validity of Act 180 of 1959. The title of that Act is "An Act to Enable Municipalities Owning and

Operating Utility Plants to Issue Revenue Bonds for the Purpose of Securing and Developing Industry within or Near Said Municipalities, Said Bonds to be Paid by Rentals from Property Acquired by the Use of the Proceeds of Said Bonds and Any Additional Amount That May be Needed from the Net Revenues of Said Utility Plants; Declaring an Emergency; and for Other Purposes." After reciting, in the preamble, the purpose of the legislation, the act provides that the legislative body of any municipality may issue revenue bonds, in the manner, and under the conditions set out in Section 3 of said act. The act then provides that the bonds are payable from the revenues derived from the property acquired with the proceeds of the bonds, and that surplus revenues derived from utilities owned by the municipality may be pledged. The legislation further provides that a statutory mortgage lien upon the property acquired by the proceeds of the bonds, shall be created in favor of the bond holders. Section 4, however, states that "any pledge of rentals or revenue shall be subject to the restriction that the municipality shall never in any fiscal year be bound in an amount that would together with the other expenditures and contracts of the municipality, call for a payment or payments in that fiscal year in excess of the total revenue for such municipality for that fiscal year, so that the municipality shall never at any time by its contract or pledge of net revenues and rentals violate the provisions of Amendment No. 10 to the Constitution of the State of Arkansas. The bonds issued under this Act shall not in any event constitute an indebtedness of such municipality within the meaning of the constitutional provisions or limitations, and it shall be plainly stated on the face of each bond that the same has been issued under the provisions of this Act and does not constitute an indebtedness of such municipality within any constitutional or statutory limitation."

Proceeding under this Act, the city council of Clarksville enacted a resolution on July 13, 1959, authorizing the publication of a notice of certificates of indebtedness to be sold under the authority of the aforementioned act. The notice of sale was duly published, and

the city received a valid bid of par plus accrued interest for $25,000 of its proposed issue of certificates of indebtedness (the total proposed issue was $150,000), bearing interest at the rate of 4% per annum. Prior to issuance of these certificates, this suit was instituted by appellant as a citizen and taxpayer of the city of Clarksville. The suit questioned the validity of Act 180, and sought, through injunction, to prevent appellees from proceeding further with the proposed issue of the certificates. The court, on hearing, declared Act 180 to be valid and constitutional, and entered its decree dismissing the complaint. From such decree, appellant brings this appeal.

We are of the opinion that the question herein presented has now become moot, for the aforecited provisions of Act 180 have been superseded by the provisions of Act 9 of the First Extraordinary Session of the Sixty-second General Assembly, the validity of which is being upheld in an opinion handed down by the Court this day. Both Act 9 and Act 180 deal with the issuance of bonds for the purpose of securing and developing industry. Act 9 is a much more comprehensive statute, but embraces the entire subject matter covered by Act 180 as far as the bonds are concerned, *i.e.*, both acts provide for the issuance of revenue bonds; both provide that the bonds are payable from the revenues derived from the property acquired by the proceeds of the bonds; both provide for the statutory mortgage lien upon the property acquired; and both permit the pledging of surplus revenues derived from utilities owned by the municipality. Likewise, Act 9 has the almost identical requirement of Section 4 of Act 180, heretofore cited. Furthermore, both acts give practically the same definition of surplus revenues. In fact, relative to the issuance and payment of revenue bonds, the provisions of the two acts are substantially the same — with one exception. Section 3 of Act 180 is in direct conflict with Section 4 of Act 9. The former authorizes the legislative body of any municipality, upon its own determination, to issue the bonds, while the latter provides that "revenue bonds may be issued only with the approval of a majority of the qualified

electors of the municipality or county voting at an election called for that purpose." Following approval of the electors, the legislative body of the municipality is authorized to act. While Act 9 contains no repealing clause, and in fact, provides that it is intended to supplement existing constitutional and legislative provisions designed to secure industry,[1] it is self-evident that the provisions (Section 3 of Act 180 and Section 4 of Act 9) are in irreconcilable conflict, for Act 9 is specific and definite in stating that the bonds may be issued *only* with the approval of a majority of the qualified electors. We recognize that repeals by implication are not, generally speaking, favored. Here, however, all the factors necessary to bring about a repeal by implication are present. As stated in Corpus Juris Secundum, Vol. 82, Sec. 291, page 489:

"Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, will, although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy."

In our own case of *C. R. I. & P. RR. Co.* v. *Cohen,* 223 Ark. 621, 267 S. W. 2d 774, this Court quoted the rule stated in *Coates* v. *Hill,* 41 Ark. 149, concerning repeals by implication:

"Repeals by implication are not favored. To produce this result, the two acts must be upon the same subject and there must be a plain repugnancy between their provisions; in which case the latter act, without the repealing clause, operates to the extent of repugnancy, as a repeal of the first. Or, if the two acts are not in express terms repugnant, then this latter act must cover the whole subject of the first and embrace new provisions, plainly showing that it was intended as a substitute for the first."

See also *Curlin* v. *Watson,* 187 Ark. 685, 61 S. W. 2d 701. Since Section 3 of Act 180 is in absolute conflict with

[1] This evidently refers to provisions dealing with other than this type of revenue bonds.

Section 4 of Act 9, we hold the former to have been repealed. This results in Act 180 being inoperative insofar as it relates to revenue bonds for the purposes mentioned in the act, for Section 3 is the provision that authorizes the issuance of the bonds. No bonds have actually been issued by the city of Clarksville, so the question of impairing the obligation of a contract does not arise.

Summarizing, the manner of issuing revenue bonds for the securing and development of industry is controlled and regulated by Act 9 of the First Extraordinary Session of the Sixty-second General Assembly. This act supersedes Act 180 of 1959, and the city of Clarksville may not now further proceed with the issuance of bonds except in conformity with the provisions of Act 9.

It follows that the decree of the Chancery Court must be reversed. It is so ordered.

STATE EX REL., ARKANSAS STATE HIGHWAY COMMISSION *v.* OTTINGER.

5-2113 334 S. W. 2d 694

Opinion delivered April 18, 1960.

Neill Bohlinger, Dowell Anders, Daniel Parnell, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

J. Seaborn Holt, Associate Justice. This appeal comes from a decree of the Pulaski Chancery Court which granted appellee, E. C. Ottinger's, d/b/a Ottinger Construction Company, prayer for cancellation of its bid for the construction of approximately eight (8) miles of highway in Arkansas, and also for cancellation of its bid bond in amount of $35,0000 which it had procured from appellee, Standard Accident Insurance Company.

The facts are to the following effect: Along with five (5) other contractors, appellee, Ottinger, submitted its sealed bid to appellant, Arkansas State Highway Commission, for construction of eight (8) miles of highway, at 10 o'clock A.M. on May 13, 1959. The six (6) bids were opened formally by the Commission and Ottinger's bid of $1,329,370.58 was announced to be the lowest. The second lowest bid, which was submitted by Reynolds and Williams, totaled $1,611,254.41, or approximately $281,-000.00 more than Ottinger's bid. It also appears that the bid of Reynolds and Williams was only $147,000.00 lower than the highest bid of all, which amounted to $1,758,216.88. Ottinger's bid had been submitted for it by its engineer, Ned B. Turner. When Turner heard over the radio the announcement of the various bids, he was convinced that such a disparity in the Ottinger bid and the others could only be due to some mistake. At 1:30 P.M. on May 13th, within three and one-half hours after the bids were opened, he, Turner, went to Ward Goodman,

chief engineer of the Highway Department, and informed Goodman of the mistake claimed by Ottinger. Goodman referred Turner to the Highway Commission which was then in session. About three hours later, at approximately 4:30 P.M., Turner appeared before the Commission, informed it of a mistake in Ottinger's bid and asked for permission to withdraw his employer's bid. At this time no award of contract by the Commission had been made on the bid. Two days later, on May 15, 1959, Ottinger telegraphed the Commission requesting that his bid be disregarded on the ground that it had made a mistake in computing the bid and this telegram was confirmed by letter by Ottinger to the Commission on May 16th. On May 18th, five days after the bids were opened and after appellant had been informed of Ottinger's request to withdraw its bid, appellant communicated to Ottinger by letter that the contract had been "tentatively" awarded to it, and within ten days of this notice, appellant, Commission, forwarded a contract to Ottinger which it refused to sign. Upon Ottinger's refusal to accept the contract, it was immediately given to the second lowest bidder, Reynolds and Williams.

The chancellor found that: "The contractor's mistake occurred when he overlooked this revision of the Special Provisions furnished by the State Highway Commission, which consisted of a single sheet revision of Sp-105 of Embankment Material. Through failure to observe this revision, which was an unnumbered single sheet among approximately 310 sheets embodying the Provisions applicable to this job, Ottinger bid 43¢ per cubic yard for 753,050 yards of embankment material when he should have bid 83¢ per cubic yard therefor. In the haste and pressure of working up the detailed bid, this mistake amounted to an error in computation of $294,020.00. The result of the mistake made Ottinger's bid approximately $300,000.00 lower than that of the next bidder."

For reversal, appellant relies on two points. (1) If a mistake was made, the cause thereof was appellee's

own negligence, and equity will not relieve it of the consequences of a unilateral mistake caused by negligence. (2) The Arkansas State Highway Commission, by accepting Ottinger's low bid, had the legal right to forfeit the proposal bond if Ottinger refused to enter into a contract to construct the road, and it was error for the court to restrain the Commission from forfeiting the said bond.

We are confronted here with the situation where a contractor makes a material mistake in the preparation of his bid and with the question whether, because of his unilateral mistake, he was entitled to rescind his bid. We think the trial court was correct in holding that he was entitled to rescind his bid.

It is undisputed here that immediately after discovery of the mistake, before any award of the contract and within a matter of hours after the bids were opened, Turner met with the Commission, explained the mistake, and asked that the bid be not considered. At this time, as indicated, Ottinger's bid had not been accepted nor had any of the other bids been rejected. Appellant had in no manner changed its position because of the mistake. The rule granting relief to a contractor for a unilateral mistake, in circumstances similar to what we have here, is announced by the annotator in 52 A. L. R. 2d at page 796. After reviewing a number of cases, he summarizes his findings in this language: "In the typical situation here presented, so firmly has the rule favoring equitable relief against unilateral mistake become established that no case has been discovered in which it has not been granted, by way of rescission or similar or appropriate relief, where there is proof of a combination of circumstances establishing remedial mistake and timely communication of knowledge to and assertion of the right to relief against the other party."

In the case of *Conduit & Foundation Corporation* v. *Atlantic City,* 2 N. J. Super. 433, 64 A. 2d 382 (1949), under a fact situation similar, in effect, to the present case, the Superior Court of New Jersey, Chancery Divi-

sion, used this language: "The essential conditions to such relief by way of rescission for mistake are (1) the mistake must be of so great a consequence that to enforce the contract as actually made would be unconscionable; (2) the matter as to which the mistake was made must relate to the material feature of the contract; (3) the mistake must have occurred notwithstanding the exercise of reasonable care by the party making the mistake, and (4) it must be able to get relief by way of rescission without serious prejudice to the other party, except for loss of his bargain. * * *

"It becomes important to determine whether the plaintiff promptly rescinded its option given to the defendant or, otherwise stated, whether it rescinded a unilateral contract, and whether the defendant's conduct was conscionable. From the facts as above set forth, which are uncontroverted, it appears that before the defendant had accepted the offer of the plaintiff, the plaintiff apprised it of the error and withdrew its offer or option. This, in effect, was a rescission of the option. Both notice of the error and advice of the rescission were promptly given to the defendant prior to the awarding of the contract to the plaintiff. * * *

"Therefore, it is held that a unilateral mistake existed in the preparation of the plaintiff's bid and that under the facts here present, such bid was promptly rescinded within time.

"It is further held that under the facts here present the plaintiff is entitled to the return of the money deposited with its bid."

In Williston, Contracts, Vol. 5, § 1573 (Rev. Ed.), the author says: "In two classes of cases mistake of one party only to a contract undoubtedly justifies affirmative relief as distinguished from a mere denial to enforce the contract specifically against him: (1) Where the mistake was known to the other party to the transaction * * *. The first of these rules is based on obvious justice;" and in § 1578, "As to other cases

than those referred to in a preceding section, the expressions are numerous that mistake, in order to justify relief, must be mutual or the error of one party must be known to the other. That this is true of reformation is nowhere doubted; but some cases afford countenance for the doctrine that unilateral mistake, while the contract is still executory and the parties can be put *in statu quo,* may afford ground for rescission, and doubtless the discretionary remedy of specific performance may be denied. Rescission has been most frequently sought where a price was bid which because of erroneous arithmetical processes or by the omission of items was based on a mistake. Relief has been allowed in several cases of this and other kinds, though denied in others. In some of them at least, it would seem that the party not in error should have suspected the existence of a mistake in which case clearly rescission and restitution should be allowed. Where relief is allowed it is generally said to be essential that the party seeking it shall not have been guilty of negligence.''

We also hold that the trial court was correct in holding that Ottinger was excused from the forfeiture of its bid bond. In *M. F. Kemper Construction Co.* v. *Los Angeles*, 37 Cal. 2d 696, 235 P. 2d 7 (1951), wherein the facts are strikingly similar to the facts in the present case, that court, in holding that the contractor should be excused from forfeiture of his bid bond, used this language: ''There is no merit in the city's contention that, even assuming the company is entitled to cancellation of the bid and is not liable for breach of contract, the bid bond should nevertheless be enforced because the company failed to enter into a written contract. It is argued that forfeiture of the bond is provided for by charter and that equity cannot relieve from a statutory forfeiture. We do not agree however that the city charter should be construed as requiring forfeiture of bid bonds in situations where the bidder has a legal excuse for refusing to enter into a formal written contract. Under such circumstances the contingency which would give rise to a forfeiture has not occurred. * * * In line

with the general policy of construing against forfeiture where ever possible, decisions from other jurisdictions permitting rescission of bids uniformly excuse the contractors from similar provisions relating to forfeiture of bid bonds or deposits.'' (Citing many cases)

Finding no error, the decree is affirmed.

EQUITY MUTUAL INSURANCE CO. *v.* SOUTHERN ICE CO.

4-2065 334 S. W. 2d 688

Opinion delivered April 18, 1960.

Wood, Chesnutt & Smith, for appellant.

James C. Cole, for Southern Ice Co. and *John Duke, Lawson E. Glover,* for Curtis Gober, *Wright, Harrison, Lindsey & Upton,* for The Borden Company.

ED. F. MCFADDIN, Associate Justice. This is a declaratory judgment proceeding (§§ 34-2501 *et seq.* Ark. Stats.) brought by the appellant against Southern Ice Company, John Duke, The Borden Company, Curtis Gober, and Bill Herron, all of whom are appellees herein. Each defendant counter-claimed against the plaintiff; and the Trial Court found for each such counter-claiming defendant. From such judgment, the appellant brings this appeal.

The present case was No. 4252 in the Hot Spring Circuit Court, and is the third in a series of three cases arising out of the same mishap. We will identify the cases by the number each had in the Circuit Court. In 1957 The Borden Company was engaged, *inter alia,* in the distribution of dairy products at Malvern, Arkansas. Curtis Gober was Borden's agent; and he employed Bill Herron as a delivery truck driver. The Equity Mutual Insurance Company (sometimes hereinafter called "Equity Company") issued its policy of automobile liability insurance, which covered The Borden Company, Curtis Gober, and Bill Herron; and under the policy the Equity Company was obligated: (1) "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile"; and (2) to ". . . defend any suit against the insured alleging such injury, . . . and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; . . ."

John Arnold, a 13-year-old boy, frequently rode with Bill Herron on the Borden delivery truck and helped with deliveries, and sometimes Herron gave the boy 50¢ or 60¢. On August 27, 1957 (while Equity Company's said

policy was in force) Herron drove the truck to the Southern Ice Company in Malvern to get crushed ice to cover the dairy products in the truck. John Arnold accompanied Herron; and while John Duke, an employee of Southern Ice Company, was crushing the ice to put in the truck, the little 13-year-old Arnold boy put his hand in the crusher and received injuries which precipitated the three cases herein mentioned.

In November 1957 John Arnold, by his father and next friend, filed Case No. 4168 in the Circuit Court, seeking damages against Southern Ice Company and John Duke for the hand injury. In that said case, Southern Ice Company and John Duke filed a third party complaint against The Borden Company, Curtis Gober, and Bill Herron, alleging, *inter alia*:

"On August 27, 1957, John Arnold was injured while, as said invitee and permittee of the third party defendants, he was engaged in the icing of the dairy truck at the defendants and third party plaintiffs' place of business. . . .

"The third party defendants were guilty of negligence which caused or contributed to the injuries, if any, sustained by John Arnold in either or all of the following particulars, to-wit:

"(a) In permitting and inviting a minor to assist in the operation of a dairy truck, under circumstances resulting in his injury, in violation of the law.

"(b) In failing to properly warn a minor under circumstances which resulted in his injuries.

"(c) In failing to properly instruct, guard, watch and supervise a minor's activities under the circumstances which resulted in his injuries.

"(d) In allowing, under the circumstances of this case, a dairy truck to become an attractive nuisance by inviting and permitting a minor to assist in the operation thereof when they knew or by the exercise of ordinary care should have known that said minor would be attract-

ed thereto and was likely to be injured in the course of the operation thereof.

"(e) In allowing, permitting and inviting a minor to perform the normal and customary duties incident to the icing of the dairy truck under the circumstances which resulted in his injury."

The Borden Company, Curtis Gober, and Bill Herron, requested Equity Mutual Insurance Company to defend the said third party complaint; but such request was refused because Equity Company contended that, "the policy did not cover the injuries suffered by John Arnold[1] . . ." While Equity Company was denying to its insureds any duty to defend the litigation, Southern Ice Company and John Duke settled with John Arnold for the injuries to his hand, and obtained a full release for the total amount of $3,045.50.

Then Southern Ice Company and John Duke filed in the Hot Spring Circuit Court, Case No. 4210, naming as defendants The Borden Company, Curtis Gober, and Bill Herron, alleging that the Arnold claim had been settled for $3,045.50, and also making the same allegations as those contained in the third party complaint in Case No. 4168, as heretofore copied. The prayer of the complaint was, that the Southern Ice Company recover from the three named defendants the full amount of $3,045.50 and interest and costs. The Borden Company, Curtis Gober, and Bill Herron again called on Equity Company to defend the Case No. 4210; and, again, Equity Company

[1] Here are the reasons Equity assigned for refusing to defend its insureds: "(a) That at the time and place the said John Arnold was injured, the said John Arnold was not engaged in loading or unloading the said milk truck operated by Bill Herron. (b) That the said loading of the milk truck with ice as contemplated by the terms of the policy would not begin until the crushed ice was properly sacked and ready for loading upon said truck. (c) That at the time and place the said John Arnold was injured, the ice and ice grinding machine were in the sole and exclusive custody of the said Southern Ice Company and John Duke, and that the ice had not been delivered to the said Bill Herron for loading until it had completed the grinding operation and was enclosed in a sack. (d) That the said John Arnold was an employee of the said Bill Herron and Curtis Gober, and was excluded from coverage under the policy."

refused for the same reasons it had assigned for refusing to defend the third party complaint in Case No. 4168. Thereupon, each of the defendants in Case No. 4210 undertook a separate defense. The Borden Company and Curtis Gober filed separate answers; and the case is still pending against those two parties. But a default judgment was rendered for Southern Ice Company and John Duke, against Bill Herron, in the sum of $3,045.50 and interest and costs. Execution against Bill Herron was returned *nulla bona*; and it is stated, and not denied, that he is insolvent.

Finally, on October 13, 1958, Equity Company filed the present declaratory judgment proceeding, as Case No. 4252 in the Circuit Court, naming as defendants Southern Ice Company, John Duke, The Borden Company, Curtis Gober, and Bill Herron, and made factual allegations substantially as hereinbefore stated.[2] Each named defendant answered the declaratory judgment complaint and sought affirmative relief against Equity Company; and at the trial, from whence comes this appeal, the Circuit Court rendered judgments against Equity Company as follows: (a) in favor of Southern Ice Company and John Duke for $3,228.23 (being the $3,045.50 and interest) and 12% penalty, plus $500.00 attorney's fee; (b) in favor of The Borden Company for $600.00 for attorney's fee; (c) in favor of Curtis Gober for $600.00 for attorney's fee; (d) in favor of Bill Herron for $200.00 for attorney's fee. It is from these judgments that Equity Company brings this appeal, presenting the matters now to be discussed.

[2] The prayer of the complaint of Equity Company was, that the Court determine and adjudge: "1. That none of the Defendants is entitled to recover from the Plaintiff any sum for damages suffered or for expenses incurred. 2. That each of the Defendants be restrained from instituting any action or continuing any action now instituted against the Plaintiff for the recovery of any sums as damages or expenses incurred. 3. That there is no liability on the part of the Plaintiff under the provisions of the aforementioned policy to defend the action on behalf of any of the Defendants herein. 4. That there is no liability on behalf of the Plaintiff under the policy to pay any part or all of any damages that might be awarded against any of the Defendants herein as hereinbefore set out. 5. That the plaintiff recover its costs. 6. For all other proper relief to which the Plaintiff might be entitled."

I. *The Judgment In Favor Of Southern Ice Company And John Duke.* The Trial Court refused to hear any evidence offered by Equity Company, and held that the default judgment against Bill Herron, together with the declaratory judgment complaint of Equity Company, entitled Southern Ice Company and John Duke to a summary judgment against Equity Company. Equity Company made proffer of its evidence, and it is before us. We hold that the Trial Court was in error in refusing to hear the evidence tendered by Equity Company for a finding of fact thereon. It is not for us to say what the finding of fact should have been; but we do hold that Equity Company had a right to present its evidence, and receive a factual finding.

As heretofore pointed out, the insurance policy issued by Equity Company was an obligation to pay on behalf of the insured (*i.e.,* Bill Herron, as one such insured), "all sums which the insured shall become legally obligated to pay as damages because of bodily injuries . . . sustained by any person caused by accident, and arising out of the ownership, maintenance, or use of the automobile". This is the "*obligation to pay*", as distinct from "*obligation to defend*", which will be later discussed. Equity Company claimed that the mishap to the Arnold boy did not arise within the insurance coverage, as above quoted. The taking of the default judgment against Bill Herron did not determine whether the mishap was within the insurance coverage. Somewhere in the course of the litigation, Equity Company had a right to have determined whether it was obligated to pay the judgment against Herron; and it chose to file this declaratory judgment[3] proceedings to have the question determined. It was certainly entitled to present its evidence and have the factual questions decided.

[3] For informative articles regarding declaratory judgment proceedings, we mention the following: Annotation in 13 A.L.R. 2d p. 777, entitled, "Jury trial in action for declaratory relief"; and annotation in 142 A.L.R. p. 8, entitled, "Application of declaratory judgment acts to questions in respect of insurance policies".

Our original declaratory judgment statute was Act No. 274 of 1953 (§§ 34-2501 *et seq.* Ark. Stats.); and Section 2 of the 1953 Act omitted all reference to "contracts". In *Lumberman's Mutual Casualty Co.* v. *Moses,* 224 Ark. 67, 271 S. W. 2d 780 (decided in 1954), we held that our then existing statute did not authorize a declaratory judgment involving an insurance contract. But the Arkansas Legislature, by Act No. 35 of 1957, amended Section 2 of the 1953 Act so as to include "a written contract or other writings constituting a contract". The 1957 amendment made Section 2 of our Declaratory Judgment Act read exactly like the Uniform Declaratory Judgment Act. Thus, insurance contracts now come within the purview of our declaratory judgment statute; and in *U. S. F. & G.* v. *Downs,* 230 Ark. 77, 320 S. W. 2d 765, we rendered a declaratory judgment in litigation involving insurance contracts.

There are many cases in which declaratory judgment proceedings (under the Uniform Law) have been invoked by insurers in similar or analogous situations. Some of them are: *State Farm Mut. Auto Ins. Co.* v. *Skluzacek,* 208 Minn. 443, 294 N. W. 413; *Farm Bureau Mutual Auto Ins. Co.* v. *Houle,* 118 Vt. 154, 102 Atl. 2d 326; *Hartford Accident & Indem. Co.* v. *O'Connor-Regenwether Post No. 3633,* 247 Iowa 168, 73 N. W. 2d 12; *Standard Cas. Co.* v. *Boyd,* 75 S. D. 617, 71 N. W. 2d 450; *Penn. Cas. Co.* v. *Suburban Service Bus Co.,* Mo. App., 211 S. W. 2d 524; and *State Farm Mut. Auto Ins. Co.* v. *Cardwell,* 250 Ala. 682, 36 So. 2d 75. The Equity Company had a right to use the declaratory judgment proceedings in this case to have determined its duty to pay and/or defend, just as was done in the cases previously cited. The Equity Company alleged, *inter alia*: (1) that the status of the Arnold boy made him an employee of The Borden Company; and (2) that the automobile insurance policy here involved specifically *excluded* employees. The factual issues required determination; and Equity Company was entitled to have the *facts* determined in the declaratory judgment proceedings.

If Southern Ice Company had proceeded against the Equity Company under the provisions of § 66-526 *et seq.* Ark. Stats., Equity Company, as the alleged insurer, could still have made the defense that the policy did not cover the situation out of which the injury arose. (*Home Indemnity Co.* v. *Snowden,* 223 Ark. 64, 264 S. W. 2d 642). The Trial Court should have heard the evidence offered by Equity Company insofar as regards Southern Ice Company and John Duke. For that error, the judgment in favor of Southern Ice Company and John Duke against Equity Company is reversed and the cause is remanded for a trial and factual determination.

II. *The Judgments In Favor Of The Borden Company And Curtis Gober.* These judgments were for the attorneys' fees expended by these two parties in defending the third party complaint in Case No. 4168; in defending the direct complaint in Case No. 4210; and in defending against Equity Company in the present case, which was No. 4252. These judgments are correct. No judgment has been rendered against these assureds, The Borden Company and Gober, in favor of Southern Ice Company, because these assureds have made their own defense; but they contend that Equity Company should have made the defense; and this brings us to the second part of the insurance policy coverage, which was to ". . . defend any suit against the insured alleging such policy injury . . . and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent". In *Lee* v. *Aetna Cas. & Sur. Co.* (2nd Circuit), 178 Fed. 2d 750, Judge Learned Hand clearly pointed out the obligation of the insurer as regards "the duty to defend", even though there was no duty on the insurer "to pay".

We hold that in the case at bar, Equity Company violated its obligation to defend these assureds. We have only to look at the allegations — previously copied — in the third party complaint (Case No. 4168) and the allegations against The Borden Company and Gober in Case No. 4210, to see that the Equity Company has breached its obligation to defend its insureds, as distinct

from its duty to pay. The great weight of authority, in cases like this and involving the insurer's duty to defend, is that the allegations in the pleadings against the insured determine the insurer's duty to defend.[4] It is not what the insurance company may have gleaned from its outside investigation: it is the allegations made against the insured — however groundless, false, or fraudulent such allegations may be — that determine the duty of the insurer to defend the litigation against its insured. In Am. Jur. Vol. 5A page 122 "Automobile Insurance" § 119, the holdings are summarized: "As a general rule, the obligation of an automobile liability insurer under a policy provision requiring it to defend an action brought against the insured by a third party is to be determined by the allegations of the complaint in such action."

In the case at bar, the allegations in the third party complaint against The Borden Company and Gober, were not mere legal conclusions, but were factual allegations; and Equity Company has breached its duty to defend. Very fortunately for Equity Company, no judgment has gone against The Borden Company or Gober; and Equity Company may, if it so desires, defend the Case No. 4210 still pending against The Borden Company and Gober; but Equity Company must pay the reasonable attorneys' fees which its insureds have paid. The Trial Court heard testimony about these amounts and rendered judgments against Equity Company; and the evidence sustains the judgments rendered. On appeal, The Borden Company and Gober ask additional attorneys' fees for services in this Court; and we find that they are entitled to such amounts and fix the same at a total of $250.00 for both The Borden Company and Gober.

[4] For informative articles on the duty of the insurer to defend, see: Annotation in 50 A.L.R. 2d p. 458, entitled: "Allegations in third person's action against insured as determining liability insurer's duty to defend"; annotation in 49 A.L.R. 2d p. 694, entitled: "Consequences of liability insurer's refusal to assume defense of action against insured upon ground that claim upon which action is based is not within coverage of policy"; and article in 11 Ark. Law Review p. 26, entitled: "Obligations of insured and insurer under automobile liability policies".

III. *The Judgment For Bill Herron Against Equity Company.* The Trial Court rendered judgment for $200.00 attorney's fee and expenses incurred by Bill Herron in the case No. 4168 and the present case; and he has not cross appealed or filed any brief in this Court. The Trial Court's judgment is affirmed as regards Bill Herron.

CONCLUSION

The judgment in favor of Southern Ice Company and John Duke against Equity Company is reversed; in all other respects the judgment is affirmed; and the entire cause is remanded to reinvest the Circuit Court with jurisdiction for further proceedings not inconsistent with this opinion.

DAVIS *v.* CHEMICAL CONSTRUCTION CO.

5-2122 334 S. W. 2d 697

Opinion delivered April 18, 1960.

Clint Huey, for appellant.

Bill F. Doshier and *Wright, Harrison, Lindsey & Upton,* for appellee.

George Rose Smith, J. This is a workmen's compensation claim by the appellant, for an injury to his foot. The commission denied the claim upon the single ground that the claimant, at the time of his injury, had completed his day's work at the job site and therefore (we infer) was barred by the coming and going rule. The circuit court affirmed the commission.

The facts are undisputed, so that the issue is one of law. The claimant's employer, Chemical Construction Company, was engaged in a construction job for Monsanto Chemical Company. To reach the job site upon Monsanto's extensive premises the construction company employees had to pass through two gates. The first gate abutted the public highway and could be entered by anyone without special permission. The second gate, apparently a mile or more down a private road from the Highway gate, provided access to what is referred to as the critical area, which was surrounded by a high cyclone fence. Upon entering or leaving this security gate the construction company employees were required to show their identification cards. Monsanto maintained a parking area outside the security gate, where the construction employees were required to leave their cars.

The job site was deep within the critical area, a mile from the security gate. The claimant and his fellow employees were paid for a workday ending at 4:30, but Monsanto required that the critical area be cleared by that time. To this end a whistle was sounded at 4:12, which gave all the employees, some 250 in number, eighteen minutes in which to walk to the security gate and leave the critical area.

On the afternoon of Davis's injury he quit work at 4:12 and started walking toward the security gate. On the way he and several other workmen caught a ride, which was not unusual, upon a truck belonging to an electrical subcontractor. At the security gate the several oc-

cupants of the truck were duly identified and permitted to leave. (The commission held that compensation coverage ended at that point.) As the truck was traveling toward the parking lot Davis saw that his son, who was working for a subcontractor, had gotten the Davis car from the parking area and started toward the security gate to meet his father. Davis called to the driver of the truck to slow down so that Davis could alight. As he was getting off the truck Davis caught his foot and sustained the injury for which compensation is sought. It was not yet 4:30 when the accident happened.

We think the injury to be compensable, for the case falls within the premises exception to the coming and going rule. This exception was discussed in *Johnson* v. *Clark,* 230 Ark. 275, 322 S. W. 2d 72, although there compensation was denied because the employee had actually left his employer's premises. By this qualification of the coming and going rule it is recognized that an employee is entitled to a reasonable time to leave his employer's premises and that an injury suffered within that interval may arise out of and in the course of the employment. The principle has often been applied in cases involving a parking lot maintained by the employer; the cases are collected in Schneider on Workmen's Compensation (Permanent Ed.), § 1719.

We do not attach controlling importance to the fact that this parking lot was owned by Monsanto rather than by the claimant's employer. The premises exception is not based solely upon the master's opportunity to make his own property safe and thus minimize the possibility of injury to his employees; for negligence is not an essential factor in compensation cases. Of equal weight is the fact that the employee is upon the premises by reason of his job, so that his injury has the necessary causal connection with his employment. For a case in point see *Downey* v. *Vanderlinde Elec. Corp.,* 276 App. Div. 1044, 95 N. Y. S. 2d 685. It does not seem to us that Davis should be held to have left his employer's

premises until he had passed through the second gate and joined the general traveling public.

Reversed.

THORNBROUGH, COMMISSIONER *v.* STEWART.

5-2096 334 S. W. 2d 699

Opinion delivered April 18, 1960.

Luke Arnett, and *Lowell D. Gibbons,* for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. Appellee, Earl H. Stewart, was employed by Ben Pearson, Inc. for approximately eleven months in 1956 where he received $1.05 an hour as a nonunion laborer. He was then employed for several months by the International Paper Company at Pine Bluff, where, as a member of a labor union, he performed common labor for $1.50 per hour. Appellee was laid off from work by the Paper Company on June 13, 1958. Appellee then registered for work at the Employment Security Local Office, by which office he was referred to his former employer, Ben Pearson, Inc., where employment was offered to him as a truck driver at $1.05 per hour for the duration of the job.

Appellee refused to accept employment with Ben Pearson, Inc. on the terms above stated. The reason appellee refused to accept employment was, as he con-

tends, because the rules of the labor union to which he belonged subjected him to a fine and possible discharge from the union for accepting a job paying less than the union scale.

The Local Office disqualified appellee pursuant to Section 5 (c) of the Employment Security Act (§ 81-1106 of Ark. Stats.) for failing without good cause to accept "available suitable work when so directed by the Employment Office". The Appeal Section and the Board of Review affirmed the disqualification by the Local Office, also holding claimant ineligible pursuant to Section 4 (c) of the Employment Security Act (§ 81-1105 of Ark. Stats.) on the grounds that appellee had not done "those things a reasonable, prudent individual would be expected to do to secure work" and was, therefore, "not available for such work". The Circuit Court, upon appeal to it, reversed the decision of the Board of Review on the ground that Section 5 (c)(2)(c) of the Employment Security Act (§ 81-1106 (c)(2)(c) of Ark. Stats.) made the work at Ben Pearson, Inc. unsuitable. Apparently the Circuit Court's decision was based on the belief that to require appellee to accept employment with Ben Pearson, Inc. at wages less than union scales amounted to requiring appellee to resign from his labor union. From the above decision of the Circuit Court, C. P. Thornbrough, Commissioner of Labor, has prosecuted this appeal.

The pertinent facts in this case are not in dispute. Appellee lost his job with the International Paper Company without blame on his part. He was, for all purposes of this opinion, entitled to receive benefit payments under the Employment Security Act UNLESS he forfeited his right to receive such payments by refusing to accept employment with Ben Pearson, Inc.

Whether or not appellee did forfeit his right to benefit payments presents a question of law involving the interpretation of a portion of the Act heretofore mentioned. The portions of said Act with which we are here concerned are found in Ark. Stats. § 81-1106. Under Subsection (c) [in the Supplement] of the above Sec-

tion appellee became disqualified to receive payments if he "failed without good cause to . . . accept available suitable work" when it was offered to him. It is not denied here by appellee that suitable work was offered to him except for one thing, that is, he would be subjected to the possibility of being fined or discharged by his union if he accepted work for less than union wages. It was, therefore, contended by appellee that he had good cause to refuse the job and that he was protected (from disqualification) by Subsection (c)(2)(c) of said Ark. Stats. § 81-1106 which reads: ". . . if as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any *bona fide* labor organization".

The trial court held, in effect, that the threat to appellee of being fined or discharged by his union amounted to requiring him to resign from his union. In so holding we think the trial court fell into error. It is true that the trial court had no precedent laid down by this Court by which to be governed in reaching its decision, but we find the question has been uniformly resolved adversely to appellee's contention by numerous decisions of other jurisdictions.

A similar factual situation under essentially the same statute with which we are here concerned was resolved as above indicated by the Supreme Court of Ohio in *Chambers* v. *Owens-Ames-Kimball Co., et al,* 146 Ohio 559, 67 N. E. 2d 439, 165 A. L. R. 1373. In that case the Court, in answer to the same contention here made by appellee, among other things, said:

". . . the interpretation of appellee would make the operative effect of a refusal to work depend entirely upon the whim or caprice of an organization to which the applicant for unemployment compensation might belong. It is within the range of possibility that a labor organization might adopt a rule that no member could work where negroes are employed, or where the employment calls for more than four hours as a day's work, or where the place of business of an employer is more than a mile from the residence of the unemployed member,

or where an employer fails to maintain certain facilities relating to the conditions of employment, even though not required by law so to do, or where an employer does not pay a wage equal to the union wage for the same kind of work.

Under such an interpretation, the right of the applicant for unemployment compensation would not be fixed or determined by the provisions of the statute but by rules adopted by organizations in which the applicant has membership. Such interpretation of the statute, and as a consequence its administration in conformity to such interpretation, is clearly untenable.

Under appellee's interpretation of the statute, an unemployed nonunion workman would be obliged to accept the same job which the appellee refused to accept and would be required to work without right to participate in the unemployment compensation benefits."

We have set out the above quotations for the reason that they set forth the basis upon which the Court made its determination, and because we think the reasoning set forth therein is sound and convincing.

Our research reveals that the conclusion and the reasoning in the *Chambers* case, *supra,* appears to be universally adopted in other jurisdictions. Among such decisions we call attention to the following: *Paulee Mills* v. *Mississippi Employment Security Commission,* 228 Miss. 789, 89 So. 2d 727, 56 A. L. R. 2d 1010; *Bigger* v. *Unemployment Compensation Commission,* 4 Terry 553, 43 Del. 553, 53 A. 2d 761; *Barclay White Company* v. *Unemployment Compensation Board of Review, Department of Labor and Industry,* 159 Pa. Super. 94, 46 A. 2d 598; *Dwyer* v. *Appeal Board of Michigan Unemployment Compensation Commission, et al,* 321 Mich. 178, 32 N. W. 2d 434; and *Unemployment Compensation Commission* v. *Tomko, et al,* 192 Va. 463, 65 S. E. 2d 524, 25 A. L. R. 2d 1071.

It is our conclusion, therefore, based on the foregoing, that the judgment of the trial court must be, and

it is hereby, reversed and the cause of action is dismissed.

Reversed and dismissed.

WAYLAND *v.* SNAPP.

5-2158 334 S. W. 2d 633

Opinion delivered April 18, 1960.

Knox Kinney, for appellant.

Fuller Highsmith, Mehaffy, Smith & Williams, for appellee.

PAUL WARD, Associate Justice. Recently the City of Batesville voted overwhelmingly to issue $1,000,000.00 in Revenue Bonds under the provisions of Act No. 9 of the General Assembly, approved January 21, 1960, and Independence County (the county in which Batesville is located) voted to issue $500,000.00 in General Obligation Bonds under the provisions of Amendment No. 49 to the Constitution of Arkansas (adopted at the General Election on November 4, 1958). The overall purpose of the City and County in authorizing said bond issues was to secure and develop new industries and thereby relieve unemployment. The manner in which this objective was to be achieved will be set out more fully later.

This litigation tests the legality of the above proposed bond issues and the proposed development program based thereon. A Complaint was filed by Paul T. Wayland (appellant herein), a citizen and taxpayer of

Batesville and Independence County, against the County Judge of Independence County and also against the Mayor, Clerk and Aldermen of the City of Batesville, all of whom constitute the appellees herein. To said Complaint appellees filed a Demurrer on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained appellees' Demurrer, whereupon appellant declined to plead further, and on March 3, 1960, appellant's Complaint was dismissed. From such action of the trial court this appeal is being prosecuted.

Complaint. After identifying all of the parties heretofore mentioned, and after setting out portions of said Amendment No. 49 and said Act No. 9, the Complaint, in substance alleges:

1. Some time ago negotiations were undertaken with Seiberling Rubber Company, Inc., a corporation with headquarters in Barberton, Ohio, and sometimes called "Seiberling" for the location of a substantial manufacturing plant within Independence County, the purpose being to alleviate unemployment, to increase employment opportunities and to make available increased payrolls in the City of Batesville and Independence County — all for the best interest of said City and and County; it was agreed that Seiberling would locate and operate an industrial plant near the City of Batesville provided the City and the County acquired the necessary land and constructed the necessary manufacturing facilities thereon; it was determined by said City and County that to obtain such objective it would be necessary for the City to issue Revenue Bonds in the amount of $1,000,000.00 and for the County to issue General Obligation Bonds in the amount of $500,000.00; the City of Batesville proposes to lease said building and premises after the completion to Seiberling and the rentals therefrom are to be applied first to the payment of principal and interest on the Revenue Bonds issued by the City and thereafter redeem, prior to maturity, the bonds issued by the County under Amendment No. 49; with the proceeds derived from the bonds the City proposes to acquire the necessary

land and to construct the necessary manufacturing facilities thereon and then to lease the same to Seiberling with the base period of the lease to cover the life of the proposed issue and the County will levy and collect a tax of five mills on each dollar of assessed valuation to retire the General Obligation Bonds issued pursuant to Amendment No. 49. To carry out the above project the City of Batesville has adopted an Ordinance calling for a special election in regard to the Revenue Bonds, and Independence County (through the County Court) has entered an order calling for an election with reference to said General Obligation Bonds, attaching copies of said Ordinance and said Order.

2. The issue and maturity dates of said bonds are set out and it was then alleged that the annual rental to be paid by Seiberling under said lease would not be sufficient to meet the annual principal, interest and agent's fee requirements of both the Revenue and the General Obligation Bonds referred to above.

3. As security for the Revenue Bonds the City will mortgage the land and manufacturing facilities constructed thereon, the mortgage giving the bondholders the right of foreclosure in event of a default; in addition, the City will grant to a trustee for the bondholders the right to have a receiver appointed for said land and facilities with the right of lease, rent and operation of the same during the duration of any default; and also, as provided in said Act No. 9 the City will pledge all of its surplus utility revenue for the payment of the principal of and the interest on the said Revenue Bonds.

4. There is widespread unemployment in Independence County which would be alleviated by the subject project, however, the actions of the defendants in calling an election for the purposes above stated, the issuance of said bonds and the levying and collection of taxes for the payment of the same and entering into a long time lease with Seiberling, are all in violation of the Constitution and laws of the State of Arkansas in the following respects:

(The Complaint here sets out several specific Constitutional and legal objections. These are not copied for the reason that included therein are the points relied on by appellant for a reversal of this case. These points will be discussed later in the opinion.)

5. In the prayer of the Complaint the trial court is asked to declare that the actions heretofore taken by appellees and actions proposed to be taken by them are unauthorized by and are contrary to the laws and Constitution of the State of Arkansas.

For a reversal appellant relies upon the following points: (1) The proposed issuance of bonds by appellees constitutes a violation of Article 12, Section 5, and Article 16, Section 1, as amended by Amendment No. 13, of the Arkansas Constitution; (2) Act No. 9 authorizes municipalities and counties to engage in activity and issue bonds for purposes which are not public, and, thus, is contrary to the Arkansas Constitution; (3) The proposed action of Independence County in making available proceeds of bonds issued under Amendment No. 49 for the construction of facilities to be owned by the City of Batesville is unauthorized by and contrary to said Amendment No. 49; (4) Since Act No. 2 requires that counties and municipalities engaging in cooperative efforts to secure industry form compacts, the failure to do so in this case causes the proposed method of financing to be invalid. (5) The contemplated pledge of surplus municipal utility revenues is contrary to Amendment No. 10 to the Arkansas Constitution; (6) The proposed granting of a forecloseable mortgage lien and the right to appointment of a receiver contrary to the laws of the State of Arkansas; (7) The representation that the manufacturing facilities in question will be exempt from ad valorem taxation and the proposed action of the City and County to implement the representation are contrary to Article 16, Sections 5 and 6, of the Arkansas Constitution; and (8) The proposed method of financing, constructing, leasing, taxing and applying funds and lease rentals is unauthorized and contrary to the Constitution and laws of the State of Arkansas.

We have given careful consideration to the exhaustive and well-presented arguments and authorities contained in the brief of appellant and the brief of appellees, but find ourselves in disagreement with appellant's conclusions on each and every point. There being no issue of fact involved, we proceed now to examine separately each of the points relied upon by appellant for a reversal:

(1)

The proposed issuance of bonds by appellees constitutes a violation of Article 12, Section 5, and Article 16, Section 1, as amended by Amendment No. 13 of the Arkansas Constitution. Although appellant, in the above statement, uses the plural in referring to appellees we will assume that his main contention relates to the City and not to the County. We say this because it is hard to understand how it could be logically contended that Amendment No. 49 conflicts with or in any way violates the sections of the Constitution referred to. It is understood by all, of course, that the General Obligation Bonds which the County proposes to issue are being issued under the authority granted in Amendment No. 49.

As it relates to the Revenue Bonds to be issued by the City of Batesville, Article 12, Section 5 of the Constitution, in all parts material here, reads: "No county, city, . . . shall become a stockholder in any company, association, or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual." Article 16, Section 1 of the Constitution, in all parts material here, reads: "Neither the State nor any city . . . in this State, shall ever lend its credit for any purpose . . ." For the purpose of this opinion Amendment No. 13 to the Constitution reads the same as Article 16, Section 1.

The Revenue Bonds to be issued by the City of Batesville in this instance are not, of course, a general obligation of the City. That is, the bonds will not be retired by levying any kind of tax upon the people of Batesville,

but they will be retired from revenues derived from lands, buildings, and facilities as well as from surplus revenues derived from certain utilities owned by the City (as described in Section 6 of said Act No. 9). Revenue Bonds, as distinguished from General Obligation Bonds, have been approved many times by this Court for public financing. Among other cases see *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5; *McGehee* v. *Williams,* 191 Ark. 643, 87 S. W. 2d 46; *Robinson* v. *The Incorporated Town of DeValls Bluff,* 197 Ark. 391, 122 S. W. 2d 552; *Austin* v. *Manning, Mayor,* 217 Ark. 538, 231 S. W. 2d 101; and *McCutchen* v. *Siloam Springs,* 185 Ark. 846, 49 S. W. 2d 1037. Likewise, this Court has repeatedly held that the issuance of revenue bonds, being special bonds as distinguished from general obligation bonds, does not violate any of the Constitutional provisions contained in the sections relied on here by appellant. See: *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S. W. 2d 223, wherein the Court stated at Page 824 of the Arkansas Reports: "It was manifestly the intention of the framers of Amendment No. 13 to prohibit cities and towns from issuing interest-bearing evidences of indebtedness, to pay which the people would be *taxed, or their property appropriated to pay the indebtedness,* or any indebtedness that placed any burden on the taxpayers. It was not the intention to prohibit cities and towns from making improvements and pledging the revenue from the improvements so made alone to the payment of the indebtedness." (Emphasis supplied.) It is clear in the case under consideration that the Revenue Bonds to be issued by the City of Batesville can never be a burden on the taxpayers, but that they must be paid alone from the revenue derived from the building and from the surplus revenue above mentioned. The legality of the pledging of the latter mentioned revenue will be discussed later.

The issuance of revenue bonds under statutes similar to Act No. 9 of 1960 have been upheld in other jurisdictions. See *In Re Opinion of the Justices,* 254 Ala. 506, 49 So. 2d 175; *In Re Opinion of the Justices,* 256 Ala.

162, 53 So. 2d 840; and *Newberry* v. *City of Andalusia,* 257 Ala. 49, 57 So. 2d 629.

Nor do we agree with appellant's assertion that the Revenue Bonds issued by the City of Batesville are for the benefit of a private corporation. Even though Seiberling may reap some benefit, yet such benefit is merely incidental and the main benefits are those to be derived by the people of Batesville and Independence County under the provisions of Act No. 9 and Amendment No. 49.

(2)

Act No. 9 authorizes municipalities and counties to engage in activity and issue bonds for purposes which are not public, and, thus, is contrary to the Arkansas Constitution. Again we assume that appellant has reference to the Revenue Bonds since the bonds issued by the County could not be in violation of the Constitution since they are being issued in accordance with part of the Constitution, that is, Amendment No. 49. Section 2 of said Act No. 9 reads as follows: "Any municipality and any county is hereby authorized to own, acquire, construct, reconstruct, extend, equip, improve, operate, maintain, sell, lease, contract concerning, or otherwise, deal in or dispose of any land, buildings, or facilities of any and every nature whatever that can be used in securing or developing industry within or near the municipality or county." We take appellant's argument to mean that the act of "securing or developing industry" is not a public purpose. There are several reasons why we cannot agree with this contention. In the first place, Section 1 of Amendment No. 49 makes such an activity a public purpose. Not only so but the courts seem to be in agreement that such activity constitutes a public purpose. In the case of *Albritton* v. *Winona,* 181 Miss. 75, 178 So. 799, 115 A. L. R. 1436, the Court said:

"The care of the poor, the relief of *unemployment,* and the promotion of agriculture and industry are undoubtedly proper governmental purposes and are so recognized everywhere and by all." (Emphasis supplied.)

For similar holdings see *Newberry* v. *City of Andalusia, supra; Dyche* v. *City of London,* (Ky.), 288 S. W. 2d 648; *Miller* v. *Police Jury of Washington Parish,* 226 La. 8, 74 So. 2d 397; and *Steward Machine Company* v. *Davis,* 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279.

(3)

It is appellant's contention that the proposed bond issue under Amendment No. 49 by the County is illegal because the County will not hold title to the building to be erected and also because the County will not reap the benefits. We are cited no authority to support this contention and we see no merit in it. This Court had occasion to consider the purpose of Amendment No. 49 in the case of *Myhand* v. *Erwin,* 231 Ark. 444, 330 S. W. 2d 68, decided December 21, 1959. In that case there was an undertaking to sell bonds under Amendment No. 49 to build a road to a site where Potlatch Forests, Inc. proposed to build a factory. The first objection raised on appeal was "that benefits from the proposed road will not be confined to Potlatch Forests, Inc., but will likewise benefit members of the traveling public." In reply the Court said: "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." Following the above the Court announced the principle that there was an implied authority to employ reasonable means to carry out the purpose of the amendment.

It must be admitted too that the prime objective to be achieved by the people of Independence County, in this entire undertaking, was not just to erect a building but it was to alleviate unemployment. If this objective is achieved it is obvious that the County, including the City of Batesville, will reap the benefits. It is well es-

tablished, of course, that the City has a right to own property and to hold the title to same in any situation unless it is prohibited from doing so by statute or the Constitution. We know of no such prohibition in this case.

(4)

We are not convinced by appellant's argument that the methods here proposed to issue bonds are illegal because the provisions of Act No. 2 of the First Extraordinary Session of 1960 were not followed. Said Act No. 2, among other things, provides in effect that two counties, two cities (whether or not in the same county) and a city and a county are "authorized and empowered" to join together in a compact to secure industries, etc. It is apparent, of course, that Act No. 2 did not compel the City of Batesville and Independence County to form a compact but merely authorized them to do so if they so desired. The ultimate implication of appellant's argument is that Amendment No. 49 cannot stand alone but must be implemented, in this instance, by Act No. 2. Such argument is not sound because this Court has already decided in the *Myhand* case, *supra,* that Amendment No. 49 is self-executing. In that case it was also decided that it was proper to proceed under the provisions of Amendment No. 49 independently of Act No. 121 of 1959. The same process of reasoning leads us to conclude that, likewise, appellees can here proceed under Amendment No. 49 independently of said Act No. 2. Act No. 9 of the First Extraordinary Session of 1960, under which the City proposes here to issue revenue bonds is likewise independent of Act No. 2. Consequently, we see no valid objection to the City operating under Act No. 9 and the County operating under Amendment No. 49, both independently of Act No. 2.

(5)

One of the most troublesome questions presented to us on this appeal is the one that grows out of the attempt by the City of Batesville to pledge the surplus revenues of municipally owned utilities to secure the pay-

ment of the proposed Revenue Bonds. It is the earnest contention of appellant that this attempt by the City of Batesville violates Amendment No. 10 to the Arkansas Constitution, and particularly as that amendment has been construed by this Court in the case of *Williams* v. *Harris, Mayor,* 215 Ark. 928, 224 S. W. 2d 9. The parts of Amendment No. 10 which are pertinent here are the following:

"The fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis . . . nor shall any city . . . enter into any contract or make any allowance for any purpose whatsoever or authorize the issuance of any contract . . . or other evidences of indebtedness in excess of the revenue for such city or town for the current fiscal year . . ."

It is readily conceded by appellees that for the year 1960 the proposed bond issue in the amount of $1,000,000.00 (together with other necessary city expenses) will exceed the total revenues of the City for said year. In the *Williams* case, *supra,* this Court gave a rather strict interpretation of Amendment No. 10 which, according to appellant's contention, invalidates the proposed bond issue in this case. In the cited case the City of Clarksville attempted to pledge the net revenues of its electric light and power plant to the payment of bonds issued for the purpose of securing a new manufacturing enterprise for the city. The attempted pledge was held unconstitutional by this Court in an opinion, which, in part, used this language:

"Self-supporting municipal activities may in a sense borrow on their own credit, independently of the city's credit. They may even lend their credit for the benefit of other municipal activities when the constitutional debt limit will not thereby be exceeded and the benefited activity is one for which the city has constitutional authority to issue bonds. The present case would go further, however, and free municipal borrowing altogether from the fetters fixed by these amendments in any case where the debt was to be paid from particular income-producing municipal property rather than from taxation.

If this were permitted, a city would by indirection be enabled to saddle upon legitimate municipal enterprises the burden of interest-bearing certificates of indebtedness in amounts forbidden by the Constitution, *for purposes not authorized by the Constitution.''* (Emphasis supplied.)

It was pointed out in the *Williams* case, *supra,* that the prohibition against pledging surpluses in excess of the constitutional prohibition (contained in Amendment No. 10) did not apply where the pledged revenue was for the purpose of repairing, improving or extending the subject utility or where there was a close similarity between that utility and the one receiving the benefits of the revenue. It must, of course, be admitted that in the case under consideration there was no such close resemblance and it must be conceded that, if this case had followed immediately after the decision in the *Williams* case, *supra,* that decision would be fatal to appellees' contentions in this case.

In our opinion, however, the case under consideration is distinguishable from the *Williams* case, *supra,* in at least two respects:

(1) We think the words italicized in that portion of the opinion copied above were used advisedly and are important to consider in connection with this case. The City of Clarksville was proceeding under statutory authority (Act No. 463 of 1949) while in the case under consideration the City of Batesville is proceeding under Constitutional authority (Amendment No. 49). Amendment No. 49, of course, was not in existence when the *Williams* decision was rendered.

(2) The people of Arkansas have for the third time decided that the provisions of Amendment No. 10 were too stringent and that the affairs of cities and counties cannot be successfully conducted within the limitations contained therein. In 1926 the Constitution was amended (Amendment No. 13) to provide for the development, improvement of public parks, flying fields, etc. None of these things could have been accomplished under

Amendment No. 10. Again in 1928, by Amendment No. 17, provision was made by which the county could construct and reconstruct a courthouse, a jail or a county hospital. The opinion in the *Williams* case noted: Amendment No. 13, among other things, limits the purposes for which cities of the first and second class may incur bonded indebtedness. The permissible purposes are set out in the third paragraph of the Amendment and do not include the *erection of factory buildings* . . ." (Emphasis supplied.) The implication, of course, is that if Amendment No. 13 had included those things then the bond issue in that case would have been legal and Constitutional. In this case it is our conviction that Amendment No. 49 also broadens the scope of Amendment No. 10 and authorizes the issuance of revenue bonds for the express purpose of alleviating unemployment. The first section of Amendment No. 49 reads in part: "Any city . . . may issue bonds . . . for the purpose of securing and developing industry . . ." Thus we find direct, positive authorization for the City of Batesville to issue revenue bonds. It is argued by appellant, however, that Section 1 of Amendment No. 49 must be read in connection with Section 3 and that when so read the Amendment only authorizes the issuance of bonds where they are to be retired from the levy of a special tax. In this we think appellant is in error as a casual reading of Section 3 discloses. While Section 1 of the Amendment authorizes the issuance of such bonds, Section 3 merely provides a permissible way for the retirement of the bonds. The pertinent portion of Section 3 reads as follows: "To provide for the payment of such bonds . . . the municipality or county *may* levy a special tax . . ." (Emphasis Supplied). Section 3 does not say that a tax *must* be levied in every instance where bonds are issued. We feel that this conclusion can be justified without resorting to a liberal interpretation of Amendment No. 49 which, as we have pointed out previously, is permissible. If the people of Arkansas were willing (as they were) to burden themselves with a tax (as they did in Amendment No. 49) then it is reasonable to think they intended, and were

willing, to pledge surplus revenues all in order to try to alleviate unemployment.

(6)

In appellant's brief this statement is made: "It is appellant's position that Act No. 9 does not (a) authorize the granting of a foreclosable mortgage and that if it does (b) it is contrary to Amendments No. 10 and No. 13 to the Arkansas Constitution."

(a) It seems that Section 8 of Act No. 9 refutes the first argument. In that section we find this language:

"There shall be created a statutory mortgage lien upon the land, buildings and/or facilities acquired or constructed with the proceeds of said revenue bonds which shall exist in favor of the holders of said bonds, and in favor of the holders of the coupons attached to said bonds. The land, buildings and/or facilities shall remain subject to such statutory mortgage lien until payment in full of the principal and interest of said revenue bonds." Insofar as enforceable rights are given to the bondholders we can see no substantial difference between the legal effect of the language copied above from Act No. 9 and the language used in appellant's complaint with reference to the mortgage that is to be given, where it is stated: "As security for the revenue bonds to be issued by it, the City of Batesville will mortgage the land and manufacturing facilities constructed thereon, which mortgage will grant to the Trustee for the City's said bondholders and to said bondholders the right of foreclosure in the event of a default . . ." Thus, there is, we think, ample authority in Act No. 9 for the City to execute the mortgage when the time comes to do so.

(b) The objection by appellant that the right to foreclose could result in the violation of Amendments No. 10 and No. 13 of the Constitution has been answered under Point 5 above and no further comment is necessary.

Appellant further contends that if the right of foreclosure is granted, any attempt by the bondholders to

foreclose would amount to a suit against the State contrary to Article 5, Section 20 of the Constitution of Arkansas.

We cannot concur in appellant's contentions. The general rule seems to be that the Legislature has the power to authorize a suit against a municipality. In Rhyne's book on "Municipal Law", published in 1957, this rule is repeatedly announced and sustained by a host of authorities. At Page 382, Section 16-12, Mr. Rhyne, after stating the general rule that property held by a municipality in its governmental capacity is immune from execution and sale for non-payment of debts, makes this statement: "On the other hand, it has been held that if a municipality has the power to mortgage its property it is subject to foreclosure on the breach of the condition." Mr. Rhyne further stated (Page 806) that a city, when acting in its governmental capacity is immune to being sued EXCEPT when and if authorized by statute. Although our research has not disclosed any decision of this Court directly in point we are led to conclude from a statement made in *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. 2d 993, that we will follow the principle above announced. In that case the Court, after affirming the well established rule that the State cannot be sued, made this statement: "Any departure from this rule, except for reasons most cogent (of which the *Legislature,* and not the courts, is the judge) . . ." (Emphasis supplied.) Confirming the above, see *St. Paul-Mercury Indemnity Company* v. *City of Hughes,* 231 Ark. 530, 331 S. W. 2d 106.

(7)

In his Complaint appellant alleges that: "The City of Batesville has respresented to Seiberling that the land and manufacturing facilities to be leased to Seiberling by the City will be exempt from ad valorem taxes" in violation of Article 16, Sections 5 and 6 of the Arkansas Constitution. Said Section 5, in all pertinent parts, reads as follows: "All property subject to taxation shall be taxed according to its value . . . provided further

that the following property shall be exempt from taxation: Public property used exclusively for public purposes." Section 6 states that: "All laws exempting property from taxation other than as provided in the Constitution shall be void." It is then stated that neither Act No. 9 or Amendment No. 49 makes any references to tax exemption. In this statement appellant is correct, however, those facts appear to us to be beside the point. As we understand the above provisions of the Constitution, for property to be exempted from taxation two elements must be present: (a) the subject property must be "public property", that is, it must be owned (in this instance) by the City of Batesville; (b) it must be used exclusively for public purposes. In our opinion both of these elements are present in the case under consideration as we shall attempt to show.

(a) It must be admitted here that the grounds, the building and facilities will be owned by the City of Batesville and will, therefore, be public property.

(b) Likewise, we think it is clear that the property will be used exclusively for a public purpose. If it is, it will be exempt from taxation under the Constitution and if it is not it must be taxed. After careful thought and consideration we cannot escape the conclusion that the whole purpose, and the only purpose, for the adoption by the people of Amendment No. 49, the passage by the Legislature of Act No. 9, and the efforts of the people of Batesville and Independence County (in attempting to implement said Amendment and said Act) was for the public welfare — obviously and undoubtedly a "public purpose". This result would follow only where the title to property is acquired and the property itself is used by a city or county (or by both) pursuant to Act No. 9 and/or Amendment No. 49.

It cannot be said that any part of the entire program was meant for any other purpose, and certainly not for the purpose of benefiting Seiberling. Any benefit Seiberling may receive from this entire undertaking will be entirely incidental it seems to us.

As to the second objection, obviously, Section 6 of Article 16 has not and will not be violated if, as we have held above, Section 5 has not been violated.

(8)

Finally, appellant makes a general objection to the method he conceives will be used in regard to the financing, constructing, leasing, taxing and applying funds and lease rentals. It is stated that there is no authorization in the Constitution or the statutes for the employment of these methods. Appellant does not indicate in just what way these activities will be unlawful or unconstitutional and we know of none. We believe that all of the objections raised under this point have been disposed of in our discussion of the previous points and that no further commentary is necessary or will be useful.

It is our conclusion, therefore, that the decree of the trial court in dismissing appellant's Complaint should be, and it is hereby, affirmed.

Affirmed.

McFaddin and George Rose Smith, JJ., dissent.

George Rose Smith, J., dissenting. I am unable to agree with the majority's conclusions upon the fifth and seventh points.

In holding that the proposed pledge of surplus utility revenues does not violate Amendment 10 the majority not only have disregarded the distressing financial experiences that brought about the adoption of that Amendment but also have in effect overruled our earlier decisions upon the subject. I regard those decisions as sound and would stand by them.

Before the adoption of Amendment 10 cities and counties were permitted to make purchases on credit and to pledge the expected revenues of future years as security for current obligations. It was then common knowledge, and is now familiar history, that many local governments traveled this avenue of deficit financing to the point of

insolvency. Warrants and other scrip issued by those local governments could not be paid immediately and at par, for cash was not available. The holder of public paper either had to sell it at a discount or keep it for months or years until its turn for payment was reached. In this situation public employees were compelled to work for a discounted salary. As might be expected, the cities and counties were overcharged for everything they bought, for the seller increased his price to offset the depreciated value of the public currency.

By their approval of Amendment 10 the people expressed their determination to bring about a sound system of local governmental financing. The amendment put the cities and counties upon a pay-as-you-go basis, limiting their permissible obligations to the revenues of the current year. The only exception in the amendment permitted the funding of existing indebtedness by means of a bond issue secured by a special three-mill tax levy. Later on Amendment 13 permitted cities to issue bonds, secured by a five-mill tax, for several specified public improvements, and still later Amendments 17 and 25 allowed the counties to issue bonds, secured by a five-mill tax, for the construction of courthouses, jails, and hospitals. And now Amendment 49 authorizes the issuance of bonds, secured by a five-mill tax levy, for the development of new industries.

Until today's decision this court had adhered to the spirit of Amendment 10. One of the earlier cases, *Johnson* v. *Dermott,* 189 Ark. 830, 75 S. W. 2d 243, is almost identical with the case at bar. There the city of Dermott sought to pledge the surplus revenues from its electric light plant to secure a loan for the construction of a hospital—an improvement specifically permitted by Amendment 13. (In like manner the city of Batesville now seeks to pledge similar surplus revenues to secure a loan for a purpose permitted by Amendment 49.) We held that a profit from the operation of a municipally owned utility constituted income that might be used for general purposes, but it was subject to the restrictions of Amendment

10. This language in the opinion should control the case at bar:

"We conclude, therefore, that it is not beyond the power of the city to enter into a contract to erect a hospital and to segregate the revenues arising from the water and light systems and to pledge these excess revenues for that purpose. But this power may not be exercised in violation of Amendment 10 to the Constitution. Any contract which the city makes in regard to uncollected revenues from any source must be construed with reference to this amendment. Parties cannot, by pleadings or stipulations of any kind, abrogate this amendment which will be read into any contract which the city may make. This amendment provides that the fiscal affairs of counties, cities, and incorporated towns shall be conducted on a sound financial basis, and that no allowance shall be made 'for any purpose whatsoever in excess of the revenues from all sources for the fiscal year in which said contract or allowance is made.' Beyond this inhibition there is a lack of power to contract."

The cases were reviewed in *Williams* v. *Harris,* 215 Ark. 928, 224 S. W. 2d 9, where the city of Clarksville wished to pledge surplus utility revenues for the payment of bonds to be issued for the attraction of a new industry. We held that the proposal violated the constitution in three respects: (a) It was for a purpose not authorized by the constitution; (b) it was "in an amount above the limit set by Amendment 10"; and (c) it involved a pledge of future utility revenues for an undertaking not connected with the utility. It is true, as the majority point out, that Amendment 49 has satisfied the first defect, the absence of constitutional authorization, but the other two objections still remain. Thus the majority's holding is directly contrary to both of the cases just cited.

Amendment 49 was needed to accomplish its purpose, because there were several provisions in the constitution (not merely Amendment 10) that prevented the issuance of bonds to attract industry and the levy of a property tax to pay those bonds. By its language the amendment is

directed only to the authorization of bond issues. Literally every sentence in this rather long amendment not only refers to, but also deals solely with, either the bonds themselves or the election at which they are to be voted upon. I find not one syllable in Amendment 49 to warn the voters that in approving the amendment they were partially repealing a basic safeguard previously placed upon local governmental financing. By the majority's reasoning one might as well say that the guaranty of free speech was also repealed to the extent that such speech might interfere with the acquisition of new industry. Industrial development is a worthwhile purpose; Amendment 49 should be liberally construed. I cannot, however, share the majority's belief that the people, in approving Amendment 49, meant to run roughshod over any other constitutional provision that might in practice hamper the most zealous of efforts to attract new industry.

The seventh point, involving the tax exemption of the new plant and its grounds, is not made absolutely clear by our prior decisions, but if the point is to be determined I think we should say that this property will be taxable. Were the matter left up to me I would not pass upon the question at all, for no justiciable issue is presented. The complaint merely asserts that the city has represented to Seiberling that the lands and facilities will be tax-exempt, and this representation is said to be contrary to the constitution. There is no actual controversy between these parties; we are simply being asked to give advice upon an abstract question of law that may arise if the taxing authorities seek to tax this property and if the city decides to resist the tax. It is not our duty, even under the declaratory judgment act, to pass upon academic questions. The majority, however, apparently think it best to give advice in this instance; so I must set forth my reasons for thinking it to be bad advice.

The constitution exempts "public property used exclusively for public purposes." Const., Art. 16 § 5. Obviously the framers did not mean to exempt all public property, for in that event there would have been no need to insert the phrase, "used exclusively for public pur-

poses." The inclusion of that phrase demonstrates conclusively that the exemption does not embrace all publicly owned property; it must also be used exclusively for a public purpose.

The question was thoroughly considered in *School District of Ft. Smith* v. *Howe,* 62 Ark. 481, 37 S. W. 717, where the school district owned property which was rented to private tenants, with the rents being used for school purposes. In holding that the property was subject to taxation we said: "It seems clear that the intention was to exempt only that public property which in itself directly subserved some public purpose by actual use, as distinguished from property belonging to the public but not used by it, and from which a benefit accrues to the public, not by the immediate use thereof by the public, but indirectly through selling or renting the same to private parties. To illustrate: Some of these lots have buildings upon them, and are rented to different tenants. One may be rented to a grocer, another to a butcher, and another to a saloon keeper. Although the object and effect of renting the property in such cases may be a benefit to the public, yet we cannot say that such property is used exclusively for public purposes. . . . The purpose for which these tenants use this property is their own private gain, and the fact that they pay rents to the public does not change the purpose of this use from a private to a public one."

We have many other cases to the same effect, holding that the tax exemption must be strictly construed and that property falls within one of the exemptions only if it is actually used for the exempt purpose. *Brodie* v. *Fitzgerald,* 57 Ark. 445, 22 S. W. 29; *Pulaski County* v. *First Baptist Church,* 86 Ark. 205, 110 S. W. 1034; *Burbridge* v. *Smyrna Baptist Church,* 212 Ark. 924, 209 S. W. 2d 685; *Hilger* v. *Harding College,* 231 Ark. 686, 331 S. W. 2d 851. The only contrary decision, *Hogue* v. *Housing Authority of North Little Rock,* 201 Ark. 263, 144 S. W. 2d 49, was, like the case at bar, based upon expediency, as the dissenting opinion of Judge Frank Smith pointed out. The *Hogue* case cited none of our decisions to support

its holding on this point. It has not been followed in later cases and does not, in my opinion, represent the law in Arkansas.

The majority disregard the constitutional requirement that the property be used *exclusively* for public purposes. Are we to say that Seiberling is not using the property at all, even though it is occupying it for the sole purpose of private gain? Of course not. Seiberling's business will incidentally redound to the public's benefit by reducing unemployment, but the same thing is true of any established business concern which owns or leases its site of operations. If the mere reduction of unemployment constitutes an exclusively public purpose then all the commercial property in the state should be declared to be exempt from *ad valorem* taxation.

Counsel for the appellees present a plausible argument to the effect that if the original purchase by the city and county can be justified as being for a public purpose it should follow that the use by Seiberling is also for a public purpose. This argument overlooks the fact that the constitutional reference to a tax-exempt public purpose is much narrower than many other senses in which the phrase may be used. For example, the power of eminent domain can be exercised only for a public purpose. Hence a railroad company is acting for a public purpose when it condemns a right of way for its tracks, but no one would suppose that the property is therefore tax-exempt after the railroad company acquires the title.

I regret that I cannot express more effectively my strong disagreement with the majority opinion in this case.

McFaddin, J., joins in this dissent.

Opinion delivered April 18, 1960.

Shaver, Tackett & Jones, for appellant.

Bruce Bennett, Atty. General by *John T. Haskins,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Larry Covey, was charged with murder in the first degree in the killing of Wilbur Short. He was convicted of voluntary manslaughter and his punishment fixed at four years in the penitentiary. Appellant admits the

killing but contends that he acted in self-defense. Ark. Stats. § 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." Section 41-2236 provides: "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."

On appeal Covey stoutly maintains that there is no substantial evidence to support the verdict. He is 21 years of age and had been having trouble over a period of months with one Denzil Jones. Covey testified that he had been accused by Jones of causing Jones' wife to leave him; that he and Jones had engaged in six or eight fights, and in the last fight with Jones he (Covey) was knocked in the head and had to go to a hospital for treatment; that Jones had offered a reward of $100 to anyone who would kill or "scar" Covey. Appellant testified that the last time Jones beat him up, the matter was in municipal court and Jones was fined for the act, and that later he, appellant, obtained a .22 caliber pistol and carried it for his protection.

It appears that on the night of the homicide, at a drive-in known as Lacey's No. 2, appellant got out of his car to speak to his cousin. At that time he was called by one Sonny Jackson and the two of them went into the restroom. Jackson told Covey that Wilbur Short was present at the drive-in; that he was drunk and crazy and had made threats against appellant. The testimony of Jackson, who was called as a witness by the State, and that of Covey is in accord in some respects; in others, it is in sharp conflict as to just what occurred and what was said in the restroom. Jackson warned Covey

against Short and endeavored to get Covey to leave the drive-in and thereby avoid Short. Covey stated that he knew Short only by sight and could not believe that Short would want to cause him any harm, but according to Jackson's version he explained that Short was then the boy friend of Jackson's ex-wife, and that Short had stated that Covey had taken the girl on an automobile ride and had caused her to walk home. Covey contends that Jackson finally stated that Short's ill feeling toward Covey was due to the influence of Denzil Jones, who was a friend of Short's. While in the washroom Jackson exhibited to Covey what Jackson says was Short's pistol, which Short had turned over to him a little earlier that night. Jackson did not state, however, that he told Covey it was Short's pistol. Covey says that the pistol Jackson exhibited to him was only an imitation pistol and not a real firearm at all; that Jackson made the remark to Covey "you know how that gang fights," implying that it was with weapons rather than just mere fair fist fighting. In any event, the two agreed that they would leave the washroom by Jackson going in front and if Short was near the door Covey would push Jackson into Short, thereby giving Covey an opportunity to run. But Covey says that upon leaving the washroom and seeing that Short was there, Jackson stepped aside, giving Short an opportunity to attack Covey. The most important facts in the case are the actions of the parties that followed immediately. Short ran at Covey and struck him with his fist and stepped back a couple of steps. Covey was not knocked down, but he also stepped back a couple of steps. Covey says that Short struck him with his left fist and had a pistol in his right hand. Jackson says that Short had nothing in his hand; that when he stepped back after striking Covey he assumed an "open boxing stance." Covey had his pistol in his right-hand pocket; he immediately pulled it and shot Short twice, killing him.

It is impractical to set out here an abstract of all the evidence in the case. The record is rather large and numerous witnesses testified. If Covey's testimony was true, it would be hard for anyone to say that he was not

acting in self-defense in slaying his assailant. But on the other hand, if Short had merely struck Covey with his fist and stepped back, assuming the pose of a boxer, ready to engage in a fair fist fight, and in those circumstances Covey shot him down, it cannot be said that the facts do not sustain the conviction of voluntary manslaughter.

"Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation, apparently sufficient to make the passion irresistible." Ark. Stats. § 41-2208. There was considerable other evidence in the case from which inferences could be drawn as to who was telling the truth, and undoubtedly the jury would have been completely justified in acquitting the defendant if they had believed his version of the killing. The jury had the opportunity to observe all the witnesses and their demeanors on the stand, and was therefore in a much better position than is this Court to judge the credibility of the witnesses.

Jerry Spencer was present at the time of the killing. He was called as a witness by the State and the prosecuting attorney asked him the following question concerning what the deceased said, if anything, immediately after the shooting: "Did you hear this person say anything? A. Seems like he said something like 'Please don't shoot me again', or —" The attorney for the defendant objected. The Court said: "The objection is well taken, because the witness said 'It seems like he said'. (To the witness) We can go into what it seemed like or what you guess he might have said. If you know what he said, you may so testify."

"Witness: I don't know his exact words, but it was something to that effect.

Q. To what effect?

A. To the effect of 'Please don't shoot me any more.' "

The defendant objected.

"The Court: This man is not a professional witness. I don't imagine you have testified too much before, have you, Jerry?

"Witness: No, this is the first time I've ever been here.

The Court: (To witness) Of course, you cannot testify as to any impression you might have gotten of what anyone has said. If you can remember his exact words, that is the best. If you cannot remember his exact words, but you definitely remember the approximate words spoken, then you may so state, but you cannot give an impression of what he said.

Witness: Well, that was approximately what he said."

The defendant made his objections and saved his exceptions, but no objections were made to the remarks of the court as such.

Of course, a witness cannot state his impressions, conclusions, inferences, suppositions or understanding of a matter unless such answer is equivalent to a statement of the fact asked for, but witnesses are not required to give their testimony with absolute positiveness. A witness who is not positive may make a statement of a fact to the best of his recollection or belief and his testimoney should not be excluded because he uses "it is my impression", "I think", or a similar expression where he means that he is testifying to the best of his recollection or an indistinct remembrance of facts within her personal knowledge. 98 C. J. S. 79. It appears that although Spencer may not have remembered the exact words spoken by the deceased, he stated what was said approximately, as he remembered it.

Appellant contends that the court erred in allowing him to be impeached on a collateral matter brought out on cross-examination, and if this were the case, it would be error. *Everett* v. *State,* 231 Ark. 880, 333 S. W. 2d 233. But appellant asserts here and contended at his trial in circuit court that his trouble with Short grew out of appel-

lant's difficulty with Denzil Jones. There was testimony from which the jury could have drawn the inference that Jones had paid Short $100 to harm Covey. Although Covey was not questioned on direct examination about a fight he had with Denzil Jones at Spero's Drive-in a few months before the killing, on cross-examination the prosecuting attorney asked him questions apparently calculated to establish that insofar as Covey's trouble with Jones was concerned Covey was the aggressor. On the occasion at Spero's Covey was in a car with Buford Hester. It was shown by cross-examination of Covey that before the fight with Jones started, Covey had made a phone call. He testified that it was to a young lady at Hooks, Texas. He was asked if, after making the call and returning to the car, he did not say to Buford Hester "he will be here in a minute." Appellant denied making the statement. He was also asked if he did not make the further statement "I am going to make him put up or shut up," and appellant denied making that statement. It was shown that Covey's father arrived at the scene and appellant was asked if he did not make the statement to Hester that appellant's father had hit him by mistake. Appellant denied making this statement.

Buford Hester was called by the State and testified that Covey did make the statement "he will be here in a minute", and also the other statement to the effect that he was going to make him "put up or shut up", and that Covey's father must have hit him by mistake. The implication of this impeaching testimony is that Covey called his father in anticipation of starting a fight with Jones. Appellant blames the killing on Jones and contends that he was wrongfully assaulted by Jones on more than one occasion and that Jones instigated this trouble and caused Short to make the attack upon Covey. In these circumstances we do not believe that it can be said that the State impeached appellant on a collateral matter. *Harris* v. *State,* 175 Ark. 1166, 2 S. W. 2d 66.

The court gave instruction No. 8 as follows:

"You are instructed that evidence is of two kinds, namely: direct or positive and circumstantial, and that any fact in the case or any element of the crime charged, may be proven by either kind or by both kinds of evidence; and if any fact in this case, or any element necessary to constitute the crime has been established by direct or circumstantial evidence, or by both kinds, then such fact or element has been sufficiently proved, and if upon a consideration of all the facts proven in the case you believe beyond a reasonable doubt, that the defendant is guilty of a crime it is your duty to so find."

Appellant says that no instruction on circumstantial evidence should have been given to the jury. We do not agree. There was a good deal of circumstantial evidence in the case. Much of this kind of evidence was in regard to whether Short was armed with a pistol at the time of the killing.

Appellant also complains of that part of instruction No. 10 wherein the court told the jury: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless the proof on the part of the State is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing the homicide." This was not error. The instruction is in the language of the statute (Ark. Stat. § 41-2246) and a similar instruction was approved in *Brown* v. *State,* 231 Ark. 363, 329 S. W. 2d 521.

Other assignments of error are argued, all of which we have examined carefully, but we find no error.

Affirmed.

WALTON *v.* STATE.

4969 334 S. W. 2d 657

Opinion delivered April 18, 1960.

W. Harold Flowers, for appellant.

Bruce Bennett, Atty. General by *Ancil M. Reed,* Asst. Attorney General, for appellee.

JIM JOHNSON, Associate Justice. The appellant was charged with the crime of murder in the first degree, and, when arraigned, entered his plea of guilty. A jury was impaneled and after the conclusion of the evidence the court told the jury that:

"The law provides that in cases of this kind where the accused confesses his guilt, the Court shall impanel a jury and examine testimony, and the punishment for the crime shall be found by such jury."

Having defined the term "murder in the first degree" the Court instructed the jury as follows relative to the issue here considered:

"In this case the defendant, Edward Walton, Jr., has entered a plea of guilty. In other words, he has confessed his guilt. The only question for the Jury to decide is the punishment to be imposed. Under the Information filed against the defendant, if you believe the evidence justifies it, it is competent for you to fix

his punishment at death in the electric chair, or at life imprisonment in the Arkansas State Penitentiary.

"You are instructed that ordinarily a defendant starts out in the beginning of the trial with the presumption of innocence in his favor, which presumption follows him throughout the trial, or until the evidence convinces the Jury of his guilt beyond a reasonable doubt. However, in this case no presumption of innocence attaches to this defendant, Edward Walton, Jr., since he has entered a plea of guilty, and has admitted his guilt in open court. The only question for you to decide is what his punishment should be. * * *

"You will consider, then, only the extent of punishment — death or life imprisonment . . ."

After the jury had been so instructed, and upon conclusion of the closing arguments, the Court thereupon addressed the Jury as follows:

"Members of the Jury, when you retire to deliberate, you will take with you for your consideration two forms of verdicts, one of which it will be your duty to approve under the law and the evidence. One of those forms reads as follows: 'We, the Jury, find the defendant, Edward Walton, Jr., guilty of Murder in the First Degree, and fix his punishment at death in the electric chair.' In the event you return that verdict, the punishment is death in the electric chair, as it explains itself.

"Another form of verdict will be: 'We, the Jury, find the defendant, Edward Walton, Jr., guilty of Murder in the First Degree and fix his punishment at life imprisonment.' That form also is self explanatory . . ."

The jury received the verdict forms and retired for their deliberation. Later, on the same day, the jury returned into court a verdict finding the defendant guilty of Murder in the First Degree, fixed his punishment at death in the electric chair, and the court entered judgment in accordance therewith. From such verdict and judgment comes this appeal.

The brief and argument filed on behalf of appellant is as follows:

"Appellant, Edward Walton, Jr., a Negro, was convicted of the murder of Roy T. Hallman, 61 year old white man, and sentenced to death.

"Appellant entered a plea of guilty.

"Point of Reliance for Reversal:

"Appellant contends that the judgment of the Court wherein the sentence of death in the electric chair was imposed is too harsh and severe.

"Appellant voluntarily entered a plea of guilty to the charge of murder in the first degree. The death sentence was imposed. Appellant's counsel made a futile effort to win for him a sentence of life imprisonment.

"Appellant, enjoying the benefit of Arkansas law, now rests his fate in the hands of this Honorable Court, whose duty it is under law to examine all matters pertaining to the trial.

"Appellant, while believing that a fair trial was accorded him for an unnecessary killing, prays the Court to invoke the Divine law, and commute the sentence of death to life imprisonment.

"Respectfully submitted,
(s) W. Harold Flowers,
Attorney for Appellant."

After a careful review of the record we cannot escape the conclusion that a brutal murder has been committed by appellant, therefore we find no merit in the lone point relied on for reversal. Appellant raised only two objections in the entire trial. The first was sustained and the second contained no merit. There was no motion for a new trial. The verdict and judgment not only should, but would be affirmed except for our obligation to examine the record for error on its face.

On December 17, 1838, shortly after the admission of this state into the Union, an act was passed, which

has since been unchanged, and now appears as § 43-2152, Ark. Stats. It reads as follows:

"The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but if the accused confess his guilt, the court shall impanel a jury and examine testimony, and the degree or crime shall be found by such jury."

It was under the authority of this statute that the court attempted to proceed in this case. At the conclusion of the evidence offered by the State, there being no evidence for the defendant, the court charged and instructed the jury as heretofore quoted. From such charge and instruction the jury was precluded from determining, finding or ascertaining the degree of the murder. The charge and instructions left the jury no choice but to find the appellant guilty of first degree murder. The jury was told: "You will consider then, only the extent of punishment — death or life imprisonment." In *Porter* v. *State,* 57 Ark. 267, 21 S. W. 467, Chief Justice Cockrill, speaking for the Court, said: "The object of the statute was to make sure that the accused should not be subjected to capital punishment unless the jury specially find that he is guilty of the first degree of murder." The Court restated this rule in *Lancaster* v. *State,* 71 Ark. 100, 71 S. W. 251 as follows: "The statute, it will be seen, requires that there should be a special finding of the degree of murder by a jury, even though the defendant confesses his guilt."

And Justice Hart, speaking for the Court in *Banks* v. *State,* 143 Ark. 154, 219 S. W. 1015, said: "The statute expressly requires the jury to ascertain the degree in all cases of murder." Also see: *Thompson* v. *State,* 26 Ark. 323; *Allen* v. *State,* 26 Ark. 333; *Trammell* v. *State,* 26 Ark. 534; *Neville* v. *State,* 26 Ark. 614; *Simpson* v. *State,* 56 Ark. 8, 19 S. W. 99; *Porter* v. *State,* 57 Ark. 267, 21 S. W. 467; *Carpenter* v. *State,* 58 Ark. 233, 24 S. W. 247; *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900; *Hembree* v. *State,* 68 Ark. 621, 58 S. W. 350; *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849; *Wells* v.

State, 193 Ark. 1092, 104 S. W. 2d 451; *Jones* v. *State,* 204 Ark. 61, 161 S. W. 2d 173; and for a case almost on all fours with the case at bar see: *Ray* v. *State,* 194 Ark. 1155, 109 S. W. 2d 954.

In the *Ray* case, *supra,* which opinion was not officially reported in the Arkansas reports, which within itself is an indication of how thoroughly the question is considered settled by this Court, the Court said:

"The appellant relies on section 3205, Crawford & Moses' Digest, section 4041, Pope's Digest (§ 43-2152 Ark. Stats.) as construed and applied by this court and especially in the recent case of *Wells* v. *State,* [193 Ark. 1092,] 104 S. W. (2d) 451. Appellee calls attention to the difference between the verdict returned in the Wells Case and that in the instant case. In the Wells case, the verdict was, 'We, the jury, find the defendant guilty and fix his punishment at death,' whereas, in the case at bar, the verdict is, 'We, the Jury, find the defendant, Hollis Ray, guilty of murder in the first degree as charged in the information and fix his punishment at death by electrocution.'

"In the Wells case, this court held the verdict was so defective as to call for a reversal. In the case at bar, however, it is pointed out that the verdict does not contain the defect of that considered in the Wells case. We went further than that. In that case, as in this, the trial court charged the jury, in effect — although not in positive terms — to find the defendant guilty of murder in the first degree and left for its consideration only the extent of the punishment to be inflicted. We held that the direction of the trial court in that case was error, and, while the case was reversed because of error in the instruction and defectiveness of the verdict, it is clearly indicated that either was sufficient to demand a reversal.

In all of the cases citing the section of the law above quoted, its provisions have been uniformly held to be mandatory. We may not ignore the statute by saying that it is technical or highly technical. Its terms are imperative and have become a fixed part of our criminal jurisprudence. It is the duty of courts to enforce legis-

lative provisions when the legislature acts within constitutional limits; and a departure by the courts from imperative rules established by the legislature for the protection of all in order to meet the exigencies of particular cases is an evil not to be thought of, let alone to be acted upon. It matters not that the errors in the instructions and charge have not been raised by appellant on appeal; *Hembree* v. *State, supra, Wells* v. *State, supra*; or that appellant in his brief concedes that he was accorded a fair trial; the judgment, for the errors indicated, must be reversed and the cause remanded for a new trial.

TALLEY *v.* MORPHIS.

5-2040 334 S. W. 2d 652

Opinion delivered April 25, 1960.

Ras Priest, for appellant.

Parker & Mobley, Wright, Harrison, Lindsey & Upton, and *Pickens, Pickens & Boyce,* for appellee.

CARLETON HARRIS, Chief Justice. On March 17, 1959, appellant, E. E. Talley, a resident of Jackson County, Arkansas, instituted suit against J. H. Morphis and Frank Anderson, in the Circuit Court of that county, for alleged injuries suffered, and damages sustained in Jackson County when Talley's automobile was struck by a freight truck owned by Morphis, and driven by Anderson, both residents of Pope County. Morphis and Anderson filed an answer denying any negligence, and further stated that "the damages, if any, sustained by the plaintiff, were caused by the unlawful and negligent acts of the plaintiff, E. E. Talley, and George Davis." Davis, a neighbor of Talley, had used his truck to push Talley's car, which would not start, from the latter's yard out onto the pavement of the highway, and for a short distance thereafter. A counterclaim was filed wherein Morphis sought recovery for damages to his tractor, trailer, and cargo of potatoes, and Anderson sought judgment for personal injuries.[1] Thereafter, on April 22nd, Morphis and Anderson instituted suit in the Circuit Court of Pope County against Davis, and obtained service on Davis the following day; on May 22nd, appellant filed a motion to make Davis a third party defendant in the Jackson County suit. Appellees, Morphis and Anderson, replied to the motion, asserting that because of the action instituted against Davis in Pope County, the Circuit Court of Jackson County was without jurisdiction to make Davis a third party defendant. The court granted the motion, and Talley filed his third party complaint against Davis, setting out the allegations of negligence, contended by Morphis and Anderson in their suit against Davis in the Pope Circuit Court. The prayer was "that plaintiff have judgment against the defendants, J. H. Morphis and Frank Anderson, as prayed in his original complaint.

[1] Interventions were filed by three insurance companies who had issued policies covering damages to the tractor, trailer, and load of potatoes, caused through collision, seeking subrogation in event of recovery by Morphis.

In the alternative, plaintiff prays that he have judgment against the defendants, J. H. Morphis and Frank Anderson, and against the third party defendant, George L. Davis, in the sum of $25,000 damages, if it should be found that the third party defendant, George L. Davis, so negligently operated his truck as to prevent the defendant, Frank Anderson, the driver of the tractor trailer of the defendant, J. H. Morphis, from avoiding collision with plaintiff's automobile by steering said tractor trailer to the right and the rear of plaintiff's automobile. As a second alternative, plaintiff prays that the proportion and extent of contribution as between the plaintiff and the third party defendant, George L. Davis, be determined by the court, if it should be found that the collision here in controversy, was the result of the concurrent negligence of the plaintiff and of the third party defendant, George L. Davis, and not the result of the negligence of Frank Anderson, the driver of the tractor trailer, belonging to defendant, J. H. Morphis." After the court had refused a motion by Morphis and Anderson to vacate its order of May 22nd, they, reserving their rights relative to the jurisdiction of the court to make Davis a third party defendant, filed their third party complaint against Davis, alleging the same concurrent negligence on the party of Talley and Davis, as previously alleged in their counterclaim against Talley. Davis denied any negligence, and on June 9th, the cause went to trial. The court directed a verdict in favor of the third party defendant, Davis, and the jury returned a verdict finding that Talley should be charged with 66 2/3% of the total negligence resulting in the collision, and appellees, Morphis and Anderson, should be charged with 33 1/3%. The jury found no damages were sustained by Talley or Anderson, but found that Morphis was damaged in the amount of $8,666. On June 19th, judgment was entered in favor of appellee Morphis, against appellant Talley, in the sum of $5,777.32. From such judgment, Talley brings this appeal, and Morphis and Anderson have cross-appealed.

In contending for reversal, appellant lists several points, but all relate to, and are included in, the conten-

tion that there was insufficient evidence to support the jury verdict.

Talley's version of the collision was as follows: On the morning of December 12, 1958, he started to town. His car would not start, and he asked his neighbor, George Davis, to give him a push, the latter complying with the request. Talley stated that he drove up the highway about three hundred yards, looked in his rear-view mirror, and saw a truck coming, but it was some distance back. He testified that he put out his hand and signaled a left turn, holding the hand out for a hundred feet or better before proceeding to start the turn; he heard no horn from any approaching vehicle. "Just as my wheels got off the slab, something hit me, and I went out, and I never knowed no more." Talley then detailed his injuries.

Davis testified that he pushed Talley for seventy or seventy-five feet on the highway before the latter's car started. According to the witness, Talley traveled about two-tenths of a mile before making a signal for a left turn. Davis, about fifty yards behind Talley, stated that he put on his brakes, slowing his car to permit Talley to get out of the way. "About that time, the truck pulled beside me and blew his horn. Well, when he blew his horn, Mr. Talley, I seen Mr. Talley was already in the turn. I seen there was going to be an accident." He first testified that Talley gave a turning signal about one hundred sixty feet before reaching the point of the collision, although on cross-examination he stated, "Well, he could have held it out 100 feet or he could have held it out five feet, but he held it out long enough that I could see he was going to make a left hand turn."

Anderson testified that he saw Talley and Davis enter the highway, being from three-tenths to four-tenths of a mile from them at the time . . . that he (Anderson) was driving at approximately fifty miles per hour . . . that he sounded his horn as he came up to Davis, who was about fifteen feet back of Talley . . . that he did not see Talley give any signal for a

turn . . . that after the collision he asked Davis if he saw Talley give any signal, and Davis replied, "I don't know, I knew he was going to turn."

Appellees contended at the trial that Talley was hard of hearing, and appellant admitted this to be true; they also contended that his eye-sight was not good. Talley, who was not wearing glasses at the time of the collision, stated that ten or fifteen years back he wore glasses, but was not presently using them. "Do you still have some glasses? A. No, sir, I have not, I broke my glasses. Q. But you used to wear them before you broke them? A. Oh, several years ago, but I lost them and never did get no more so I just went right on. Q. You do not have any glasses with you now in your back pocket? A. They are no good. They are broke. Q. But you do have some in your back pocket? A. Yes, sir, but they're no good. Q. But you didn't have those on, or any other glasses on, at the time of the accident? A. No, sir." Appellant testified that after first observing the truck through the mirror, he "didn't look back anymore." On cross-examination, he was less positive about giving the signal for the turn a hundred feet back, and admitted that he could have been closer to the point of the collision.

As was 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."

In *Alexander* v. *Botkins,* 231 Ark. 373, 329 S. W. 2d 530, we said:

"Accordingly, though appellants 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."

That same language is most pertinent here, for certainly there was sufficient evidence, if believed by the jury, to justify a verdict for appellant. On the other hand, the jury could have found that Mr. Talley did not signal a turn, or, could have believed, from the evidence, that even though his signal was given, it was not given in conformity with the statute, which provides that "A signal of intention to turn right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning."[2] Here, Talley admitted that the signal might not have been given for that distance. Appellant likewise admitted that he did not again look through the mirror to ascertain the whereabouts of the truck after first seeing it, at which time "it was a good piece down the road"; the jury could have found that Anderson blew his horn (which was also testified to by Davis), but that Talley, because of deafness, did not hear it. Any, or all, of these conclusions could have been reached by the jury, from which they found the negligence upon which their verdict was based. We conclude that the testimony was sufficient to support the findings of the jury.

The cross appeal relates to the action of the court in permitting Talley to bring in Davis as a third party defendant, it being contended that this was error. Our statutory provisions relative to venue are found in §§ 27-610 and 27-611, Ark. Stats. (1947) Anno. Appellees assert that, under our holdings involving the interpretation of these sections, where several parties are involved in an automobile collision, and actions are brought in more than one county having venue, the one first acquiring service of summons on his adversary has the right to litigate his claim or portion of the lawsuit in the jurisdiction or venue of his choice. We have so held. See *Kornegay* v. *Auten, Judge on Exchange,* and *Melton, Administrator* v. *Auten, Judge on Exchange,* 203 Ark.

[2] Paragraph B, § 75-618, Ark. Stats. Anno.

687, 158 S. W. 2d 473. The circumstances, however, in this litigation, present an unusual question, not previously passed upon, for § 34-1007 provides, *inter alia*:

"Before answering, a defendant seeking contribution in a tort action may move *ex parte* or, after answering, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable as a joint tortfeasor to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defense to the complaint of the plaintiff and to the third-party complaint in the same manner as defenses are made by an original defendant to an original complaint. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The plaintiff shall amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff as well as of his own liability to the plaintiff and to the third-party plaintiff. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable as a joint tortfeasor to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(2) When a counterclaim is asserted against a plaintiff he may cause a third-party to be brought in under circumstances which under this section would entitle a defendant to do so."

Talley, of course, sought to file his third-party complaint under paragraph (2). Considering the statutes, here under discussion, separately, it would appear that both appellant and appellees proceeded in accordance with statutory provisions; obviously, however, this cannot be done in the instant case, for a conflict arises.

Upon consideration, we have reached the conclusion that there are additional facts present in this litigation, which preclude a clear determination of which statute (venue, or third-party practice under uniform contribution among tort-feasors act) pre-empts the other when conflicts arise. Here, appellant had filed his complaint against appellees only. If, in filing their counterclaim, appellee had sought recovery against Talley solely because of his negligence, and Talley had then endeavored to bring in Davis as a third-party defendant — the question, heretofore posed, would be squarely before the Court. However, appellees alleged the sole proximate cause of the collision to be "the joint and concurrent negligence of E. E. Talley and George Davis." Accordingly, alleged negligence on the part of Davis was first averred by appellees, even though they sought no judgment against him in the Jackson Circuit Court. Also, suit was not instituted in Pope County by appellees until after the counterclaim had been filed against Talley in Jackson County. This suggestion of liability on the part of Davis by appellees undoubtedly precipitated Talley's motion to make Davis a party. We think, under those circumstances, it was within the sound discretion of the court to grant the motion. See *Rudolph* v. *Mundy,* 226 Ark. 95, 288 S. W. 2d 602. The error, if any (and we do not say it was error), though it cannot be strictly and technically classed as invited error, was certainly closely akin in principle, for appellant's motion, not only was likely initiated because of appellees' pleadings, but the logic of making Davis a defendant was supported by appellees' allegations.

Finding no error, the judgment of the court, both on direct and cross appeal, is affirmed.

McCULLOUGH *v.* LEFTWICH.

5-2130 334 S. W. 2d 707

Opinion delivered April 25, 1960.

J. H. Evans, for appellant.

R. S. Dunn, for appellee.

J. SEABORN HOLT, Associate Justice. This is a suit by appellees seeking reformation of a deed. The lower court granted the relief which appellees sought and this appeal followed.

On February 14, 1944, C. E. Mills (now deceased) and the appellant, David R. McCullough, entered into a written contract for the purchase of 480 acres of land in Logan County. This contract provided that McCullough was to pay Mills for the land over a period of years in installments, and that a clear title to the land would be delivered to McCullough by Mills upon receipt of the last installment subject, however, to the following reservation in the contract of the mineral rights in all of the 480 acres of land: "It is agreed and understood by all parties concerned that all oil, gas or/and mineral rights are reserved in, on and under the land described in this contract, and no oil, gas or mineral rights go to the party of 2nd part herein." McCullough was the second party referred to. Before all payments under the contract were completed, Mills died and his wife, acting as the personal representative of his estate, petitioned the probate court for permission to carry out the terms of her husband's contract with McCullough and deliver title to McCul-

lough upon receipt of all payments. The court granted this petition and on August 11, 1951, a deed was given by the personal representative, joined in by the heirs at law of the deceased, Mills, giving the appellant, McCullough, surface title to all the land and also mineral rights to the 80 acres now in dispute. In June of 1956, McCullough conveyed the surface rights to the 480 acre tract and reserved the mineral rights in this 80 acres to himself. On January 28, 1958, the appellees, heirs at law of C. E. Mills, Sr. and Maude Mills, both deceased, filed suit against McCullough to reform their deed of August 11, 1951, alleging that the 80 acres of mineral rights were conveyed to McCullough through mistake. The trial court granted appellees this relief and this appeal followed.

For reversal, appellant relies on the following points: "(1) The findings, conclusions and decree of the trial court were not supported by substantial evidence and on the case as a whole the appellees failed to prove they were entitled to the relief sought by clear and convincing evidence (2) The trial court erred in permitting appellees to introduce additional evidence after the filing of appellant's motion to dismiss because of insufficiency of the evidence (3) The trial court erred in failing to sustain appellant's motion to dismiss at the time it was filed (4) The trial court erred in overruling appellant's motion to dismiss after allowing appellees to introduce additional testimony."

Appellant's principal contention is that the appellees failed to meet by clear and convincing evidence the burden of proof that a mutual mistake had occurred. A review of the record presented discloses the following facts: Mrs. Callahan, a long-time secretary of Mr. C. E. Mills, testified that she drew the original contract between C. E. Mills and David R. McCullough to execute the deed and that the copy attached to the petition of appellees was a true and correct copy of the original contract, which, as above indicated, reserved the mineral rights in the 480 acres of land. Mrs. Phillips, the deputy circuit clerk, testified that a copy of the probate pro-

ceedings, above referred to, was true and correct. This order of the probate court, approving execution of the deed to Mr. McCullough, contained a specific reservation of the mineral rights, and gave authority to the administratrix to convey only the surface rights of the 480 acres. The reservation was as follows: "That on the 14th day of February, 1944, the decedent, C. E. Mills, did enter into a sales contract with the said David R. McCullough to sell and convey unto the said David R. McCullough the lands herein above described, except all oil, gas or/and mineral rights were reserved in on and under said lands, no oil, gas and or any mineral right to be conveyed to party of the second part, David R. McCullough."

There was in evidence a letter, dated December 11, 1957, written by McCullough to C. E. Mills, Jr., stating that he was under the impression that the Missouri Pacific Railroad had reserved all the mineral rights on the 480 acres because he, McCullough, had in his possession a letter written by Mr. Mills (C. E. Sr.,) on January 26, 1944, to that effect. This letter recites, in part — "On Jan. 26th, 1944, I have a letter from your father written to Tonopah, Nev. where I was running sheep at the time to the effect that the land involved of 480 acres was acquired from the Missouri Pacific Railroad Co. and they reserved the Oil, Gas and mineral rights on this 480 acres." There was other testimony that the Mills heirs, appellees, have been claiming and paying taxes on the mineral rights in this 80 acres at all times since the purported conveyance by them. Francis H. Leftwich testified that the Mills heirs have been leasing this 80 acres and drawing royalty checks from the Gulf Oil Company since 1956 and that the Mills heirs have assessed and paid taxes on it. Mrs. Norma L. Leftwich testified that she is the daughter of C. E. Mills, deceased, and prior to his death and after she was familiar with the land transactions; that she worked in his office after his death and was acquainted with the above contract between her father and McCullough: "Q. Do you recall, I will ask you to examine that instrument and state to the court if you signed it? A. Yes, sir, I did. Q. Was it or was it not the intention of your mother and of the C. E. Mills

children to convey any of the mineral rights in that deed or to reserve them? A. We meant to reserve them. Q. Under how many acres? A. 80 acres. Q. There is an error in the deed if it conveys 80 acres of mineral rights to Mr. McCullough? A. Yes, sir."

We have concluded, after reading the entire record, that the testimony set out above was sufficient to sustain the heavy burden on appellees to prove by clear and convincing evidence that a mutual mistake occurred and that the court correctly granted appellees the relief prayed. See *Black* v. *Been,* 230 Ark. 526, 323 S. W. 2d 545.

(2-3-4)

Appellant's contentions two, three and four, which we consider together, are without merit. We hold that the court did not err in allowing appellees to introduce additional evidence following appellant's motion to dismiss because of insufficiency of the evidence. This action of the court was clearly a matter within its sound discretion and unless abused, does not constitute error. We find no abuse of this discretion on the record before us. In *Oak Leaf Mill Company* v. *Cooper,* 103 Ark. 79, 146 S. W. 130, we held: "Where the plaintiff closed his case, whereupon defendant moved for a peremptory instruction to find in its favor, it was not an abuse of discretion for the court to permit the plaintiff thereafter to introduce other testimony in order to develop his case further." The text writer in 88 C. J. S. Trial § 105, p. 220 announces the rule in this language: "It is within the discretion of the court whether or not to admit further evidence after the party offering the evidence has rested, and this discretion will not be reviewed except where it has clearly been abused."

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

5-2121 334 S. W. 2d 660

Opinion delivered April 25, 1960.

Virgil D. Willis and *Eugene W. Moore,* for appellant.

Walker & Villines; and *Garvin Fitton* and *Arnold M. Adams,* for appellee.

ED. F. MCFADDIN, Associate Justice. This case results from a traffic mishap in the City of Harrison. Appellee, Flora Belle Villines, was a passenger in the taxicab owned by appellant, Swafford, doing business as People's Taxi. The taxicab was then operated by Swafford's agent, Erotha Oxford, a woman. There was a collision between the taxicab and a car driven by Alta Dixon, a man, resulting in property damage and personal injuries. Flora Belle Villines sued Swafford, Oxford, and Dixon, for damages. Dixon denied liability; and cross

complained against Swafford and Oxford for his damages. Swafford and Oxford denied liability to Villines and cross complained against Dixon.

Each driver claimed to be free of negligence, and alleged the other driver to have been guilty of negligence. At the trial, the jury returned a verdict for Villines for $10,000.00 damages; and apportioned the damages, $9,000.00 against Swafford and Oxford, and $1,000.00 against Dixon. No damages were allowed as between Swafford and Oxford on the one side, and Dixon on the other. From the judgment, Swafford and Oxford have appealed against both Villines and Dixon; and Dixon has cross appealed against Swafford and Oxford, and also against Villines.[1] We will refer to Oxford and Swafford as appellants; to Villines as appellee; and to Dixon by name. When the notices of appeal were given, there was a designation of the record and a statement of points relied on, just as provided by the statute. (§ 9 of Act 555 of 1953, as found in § 27-2127.3 Ark. Stats.) Some of the points originally stated by appellants have been abandoned; but there are three that are now urged.

I. *The Jury Finding That Appellants Were Guilty Of 90% Of The Negligence, And Dixon Guilty Of Only 10% Of The Negligence.* The case was submitted to the jury on interrogatories. The jury answered Interrogatory No. 1 affirmatively, finding that Oxford was guilty of negligence in the operation of the taxicab, ". . . and that such negligence contributed to cause, or proximately cause, the collision". The jury answered Interrogatory No. 2 to the effect that Dixon was guilty of negligence in the operation of his automobile, ". . . and that such negligence contributed to cause, or proximately cause, the collision". The Court also submitted this question to the jury:

"Interrogatory No. 3: If your answers to both Interrogatories No. 1 and No. 2 are Yes, then answer this question: Using 100 per cent to represent the total

[1] Dixon's cross appeal against Villines was really to protect his rights in the event of a reversal obtained by Oxford and Swafford. What we say in Topic I *infra* disposes of Dixon's claim that he was not negligent.

negligence involved in the collision, what percentage of negligence do you find that each of the defendants, Oxford and Dixon, contributed to cause the collision?"

The jury answered the interrogatory as follows: "Defendant Oxford 90; Defendant Dixon 10%". Swafford was liable for the negligence of his agent, Oxford; and the Court rendered judgment, apportioning 90% against Swafford and Oxford, and 10% against Dixon.

Appellants strenuously insist that there is no evidence in the record from which the jury could find that Oxford was guilty of 90% of the negligence. Appellants urge: that the collision occurred at a street intersection in Harrison around 6:45 in the evening in March of 1959; that it was dark enough to require the burning of headlights; that Dixon did not have on his headlights; that Oxford had driven the taxicab almost out of the street intersection, whereas Dixon had only travelled seven feet into the intersection; and that the front of Dixon's car hit the right rear side of the taxicab. Thus, appellants contend that if Oxford was guilty of any negligence, it could not have exceeded 10%; and that Dixon's negligence — if not 100% — was certainly 90%. But all of these matters were questions to be submitted to and decided by the jury. The speed of the Oxford car was disputed; the speed of the Dixon car was disputed; Dixon said Oxford speeded up to get into the intersection in front of him, whereas, he slowed down; it was shown that Dixon had skidded his car several feet in order to try to stop, whereas, Oxford had speeded up the taxi. It was further shown that, after the impact of the cars, Oxford's vehicle dragged Dixon's car several feet before the cars disengaged and the taxicab overturned. Firemen, who went to the scene of the accident, testified that it was not dark enough to have on headlights; and other witnesses disputed such testimony.

In short, there was a bitterly disputed question of fact, between appellants and Dixon, as to which party, if either, was negligent; and in such a dispute we leave it to the jury, who saw the witnesses, heard them testify, and evaluated their testimony, to determine the degree of

the negligence. There was ample testimony to support the verdict, believing some witnesses and disbelieving others, as the jury had a right to do. The jury system is the great bulwark of legal rights. As was very wisely said:

"It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a . . . conclusion. This average judgment thus given it is the great effort of the law to obtain."[2]

II. *The Testimony Of Dr. Breit About The X-ray Films.* In the collision, Oxford, the driver of the taxicab, was injured; and she sued Dixon, the driver of the other vehicle, for personal injuries and other damages. In the course of the trial, Dixon called Dr. Breit to testify about x-ray films of Oxford which Dr. Breit had examined.[3] He sent Oxford to a technician, who took the films, and gave them to Dr. Breit, who was not physically in the room when the x-ray films were taken, but who examined the films and read them, and testified as to his findings from the films.

The objection urged was, that since Dr. Breit was not physically present in the room when the films were taken, he could not testify as to what the films showed. The Court overruled the "hearsay objection", and permitted Dr. Breit to testify. We think the Court committed no error. Dr. Breit testified that he sent the patient to the technician to take the films; that he went to the laboratory where the films were taken, picked up the

[2] This is from the case of *Sioux City & Pac. RR. Co.* v. *Stout*, decided by the Supreme Court of the United States on January 26, 1874; 17 Wall. 657, 84 U. S. 657; 21 L. Ed. 745.

[3] No question is raised as to the patient-physician relationship; but it is claimed that Dr. Breit could not testify about the x-ray films because it would be a violation of the hearsay rule: that is the only point.

films, and read them. A logical chain of events was shown: there was no suggestion that anybody had switched films. The jury, as reasonable people, could decide whether the doctor's testimony was worthy of credence. We think that Dr. Breit was sufficiently "present" to constitute a *prima facie* authentication, or verification, of the x-ray films, since no question of identity was raised. In 20 Am. Jur. 615, in discussing the preliminary proof before the admission of x-rays, the rule is stated:

"The sufficiency of the verification of the x-rays is within the discretion of the trial judge . . . It is said that the identification of x-ray plates by the physician or surgeon under whose general direction and for whose use they were made, and by whom they were used in making a diagnosis of the patient's condition, is sufficient to admit them in evidence, although the pictures were not taken or developed in his presence, . . ."

III. *Villines' Instruction No. 1.* This is the strongest contention of the appellants. The instruction[4] told the jury that Swafford, as the owner of the taxicab, owed to the passenger, Villines, *the highest degree of care*; and that Dixon, as the driver of the other vehicle in the mishap, owed to Villines *ordinary care.* There can be no doubt about the correctness of that part of the instruction. In *Black and White Cab Co.* v. *Doville,* 221 Ark. 66, 251 S. W. 2d 1005, we said:

[4] The instruction, as finally given, reads: "You are instructed that it is not disputed that at the time of the accident here involved the Plaintiff, Flora Belle Villines, was a fare paying passenger in the taxicab of defendant, Swafford, being operated by his agent, Oxford, within the scope of her employment. You are further instructed that in that relation and circumstances that the defendant, Ward Swafford d/b/a People's Taxi Co., owed the duty of exercising the highest degree of care for the safety of its passenger, Flora Villines. Therefore, if you find from a preponderance of the evidence in this case that defendant Swafford, d/b/a People's Taxi Co., through his agent and employee, failed to exercise the highest degree of care for the safety of plaintiff Villines, and that such failure was the sole proximate cause of her injuries, if any; or, if such failure, combined with a concurrent failure of the defendent Dixon to exercise ordinary care, as defined in other instructions, if you so find was the proximate cause of her injuries, if any, then you will find for the plaintiff and against the defendants, Swafford and Dixon, or either of them, in such sum as you find will reasonably compensate her for her damages, if any."

"In *National Fire Ins. Co.* v. *Yellow Cab Co.,* 205 Ark. 953, 171 S. W. 2d 927, we said: 'The weight of authority is to the effect that the standards of care which prevail as to common carriers, generally, apply to those engaging in the business of operating taxicabs. 4 Blashfield, Automobile Law, § 2201, p. 46.' See, also, 37 Am. Jur. 598."

In 37 Am. Jur. 598, the holdings are summarized in this language:

"It has been held, in cases involving the right of a passenger to recover from a taxicab company, that a company of this character, which holds itself out to serve all who apply for transportation for a fixed or agreed fare, is a common carrier of passengers, and as such is bound to exercise that high degree of care for the safety of passengers for hire that is imposed on carriers generally with respect to their passengers, that is, the highest degree of care for the safety of its passengers, consistent with the proper conduct of its business."

The challenged instruction is not a model of rhetoric, but it is not inherently erroneous; and the only objection offered to the instruction was: "It is confusing and will confuse the jury as to the degree of negligence of the defendants". This was nothing more than a general objection. In *Emerson* v. *Stevens Grocer Co.,* 105 Ark. 575, 151 S. W. 1003, there was an objection to an instruction because it was "confusing and misleading to the jury"; and this Court, speaking by Mr. Justice HART, said:

"If instruction numbered 4 was not satisfactory to appellants for the reason that they thought it might be confusing and misleading to the jury, in fairness to the court, they should have specifically pointed out their objections, to it to the end that the court might correct it. If they had done so, doubtless the court would have changed the verbiage of the instruction so as to meet their objection. Having failed to make a specific objection to the instruction, we do not think that the judgment should be reversed for giving it."

This instruction told the jury that if both the taxicab operator and Dixon were guilty of negligence, then the jury would so indicate. In another instruction the Court told the jury:

"As tryers of the facts in this case, the following are issues for your determination:

"1. Which, if either, of the defendants, Oxford and Dixon, was guilty of negligence, which caused, concurred in, or contributed to cause the injuries complained of.

"2. The proportion of negligence attributable to each in the event you find more than one party guilty of negligence as a cause of their injuries.

"3. The extent of the damages which each suffered as a result of their injuries, if any, expressed in money values."

When we take this instruction, along with the special interrogatories submitted to the jury, as previously copied, and see the answers that the jury made, we conclude that such answers definitely establish that tthe challenged instruction did not confuse or mislead the jury.

Finding no error, the entire judgment is affirmed and costs taxed against the appellants.

MASSEY, TRUSTEE *v.* ROGERS.

5-2073 334 S. W. 2d 664

Opinion delivered April 25, 1960.

Kaneaster Hodges, for appellant.

Fred M. Pickens, Jr., Wayne Boyce, Claude M. Erwin, Judson N. Hout, and *J. Vernon Ridley,* for appellee.

GEORGE ROSE SMITH, J. This is a class suit brought by the appellant, as the trustee in bankruptcy for Leach-Rogers Funeral Home, Inc., to enforce what we may conveniently treat as three separate causes of action in favor of the bankrupt corporation. The question here is whether the trustee is entitled to maintain the suit as a class proceeding against ten named defendants as representatives of the Frank Leach Burial Association, an unincorporated association. The chancellor, hearing the matter upon the pleadings alone, sustained the appel-

lees' motion to dismiss the complaint insofar as it attempts to state a representative cause of action against the appellees as members of the burial association. We shall discuss separately the three counts in the complaint.

I. The complaint asserts that the burial association was organized in 1937 as a mutual benefit association and has been operated through the years as an adjunct of the now bankrupt funeral home. It is alleged that in 1957 the burial association became indebted to the funeral home in the sum of $3,225.00 for merchandise and funeral services furnished by the funeral home as death benefits under certificates issued by the burial association. In seeking a money judgment for $3,225.00 the plaintiff asserts that it is impracticable to bring all 1,607 members of the association before the court and that the ten named members should be required to defend for the benefit of all. Ark. Stats. 1947, § 27-809.

This count in the complaint asserts a cause of action that may properly be maintained as a class proceeding, and the chancellor erred in holding otherwise. An unincorporated association cannot be sued in its society name; so a representative proceeding is the usual and proper method of bringing suit against such an organization. *Baskins* v. *United Mine Workers of America,* 150 Ark. 398, 234 S. W. 464; *Smith* v. *Ark. Motor Freight Lines, Inc.,* 214 Ark. 553, 217 S. W. 2d 249. The judgment will determine the question of the association's liability and, if the plaintiff recovers, will entitle the plaintiff to proceed against the common property of the association.

II. The complaint next asserts that if the trustee in bankruptcy is unable to collect the $3,225.00 account from the property of the burial association he should be awarded a personal judgment against the individual members of the association for any deficiency. The chancellor was right in holding that the personal liability of the various members is not a matter to be determined in a class proceeding. Whether the association owes $3,225.00 for services rendered by the funeral home is, in the language of the statute, a question of common interest to all the members, Ark. Stats., § 27-809; but the

liability of any particular member is a question peculiar to him, upon which he is entitled to notice and an opportunity to present his defenses. See Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L. Jour. 383, where it is said: "Upon return of execution against the common property unsatisfied, supplementary proceedings . . . should be available against any or all of the *sui juris* members subject to process for the deficiency. Herein will the member have his day in court as to his individual responsibility."

III. The third count involves an entirely different cause of action. Here it is asserted that Neal and Betty Rogers, who were the owners of the corporate stock of the funeral home, sold the membership lists and management of the burial association to the Dillinger Funeral Home for $3,000.00. It is charged that these lists and management rights were in fact assets belonging to the bankrupt corporation and that Mr. and Mrs. Rogers should therefore be required to account to the trustee for the proceeds of sale. This controversy is between the trustee in bankruptcy and the stockholders of the funeral home; it is of no concern to the members of the burial association. The chancellor's order merely dismissed this count of the complaint to the extent that it seeks to assert a representative cause of action against the appellees as members of the unincorporated association. It appears that the dispute between the trustee and the Rogerses as individuals is still pending, not having been affected by the order of dismissal. The chancellor was plainly correct in holding that this portion of the complaint did not state a representative cause of action; indeed, we do not construe the appellant's brief as asserting any contention of error in this respect.

The decree is reversed as to the first count and is affirmed as to the other two.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.
v. EMPLOYERS MUTUAL LIABILITY INSURANCE CO.

5-2106 334 S. W. 2d 701

Opinion delivered April 25, 1960.

Daily & Woods, by *James E. West,* for appellant.

Harper, Harper, Young & Durden, for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case which calls for an interpretation of Arkansas Statutes § 81-1314(a)(6), in order to determine which of the two insurance carriers (either appellant or appellee) is legally bound to pay the claimant if and when it is later determined that he has a permanent partial disability caused by an occupational disease. There is very little, if any, dispute over the essential facts.

Monte D. Cotner was employed by the Eastern Metal Products Company (hereafter sometimes referred to as "Eastern") on July 9, 1956 and worked for the same company continuously, with the exceptions hereinafter noted, until June 27, 1958 when he was discharged for violating a company rule. It is important to note that appellant, Employers Liability Assurance Corporation, Ltd., was the Compensation insurance carrier at the time Cotner began work and continued as the carrier until

November 14, 1956 at 12:01 A.M., and also that on the last mentioned date and hour the appellee, Employers Mutual Liability Insurance Company, became the Compensation insurance carrier. It is conceded that Cotner became affected with dermatitis during the time that he worked for Eastern and that dermatitis is classified as an occupational disease.

When Cotner made application for compensation benefits on the ground that he was totally partially disabled it was agreed by all parties that first there would be a determination of which insurance carrier would be liable if permanent partial disability were found to exist. That is, it was agreed by all parties that the question of liability for permanent partial disability would be postponed until it was first determined which carrier would be liabile if liability is finally established. Upon the latter issue a hearing was had before the referee who fixed liability on appellant. This determination was affirmed by the Workmen's Compensation Commission and also by the Circuit Court. From the judgment of the Circuit Court appellant prosecutes this appeal.

The answer to the question here presented depends upon the interpretation given to the statute heretofore referred to. This statute, in all material parts, reads as follows:

"Where compensation is payable for an occupational disease, the employer in whose employment the employee was last *injuriously exposed* to the hazards of such disease, and the carrier, if any, on the risk when such employee was last *injuriously exposed* under such employer, shall be liable therefor . . ." (Emphasis supplied.)

Stated very simply the question is: When was Cotner last injuriously exposed? It is undisputed that Cotner became affected with dermatitis prior to November 14, 1956, but the troublesome question is was he *injuriously exposed* after that time. In order to determine the question it is necessary to examine carefully the testi-

mony relative to his exposures. In substance the record shows the following: Cotner became affected with dermatitis by reason of having been exposed to a "degreaser" which contains certain oils which in turn caused a rash to break out on his limbs and his body. He began working on July 9, 1956 but was not exposed to the "degreaser" until sometime in early October. Something like ten days after Cotner was exposed he noticed a body rash, and on October 11th he was examined by Dr. Lockwood. The doctor in his written reports stated that Cotner had contracted dermatitis but that no permanent defect would result and that there was no disability. Cotner continued to work but he was still bothered with the rash and on November 6, 1956 he was examined by Dr. Glenn who was of the opinion that Cotner was sensitive to the degreasing solution used in the "degreaser"; Dr. Glenn next saw Cotner on November 14, 1956 when he found that Cotner's condition was considerably improved and that he had no disability. Up until this time Cotner had continued to work steadily. After November 13, 1956 the record shows that on November 14, 1956 Cotner worked in the polishing and buffing department and that on November 15, 1956 he was transferred to the "basket line" where he worked for two or three days and where he was exposed to the degreasing solution, he became worse on November 18, 1956 and was sent to the hospital on November 18, 1956; on November 24, 1956 Cotner was discharged from the hospital and on the 28th day of the same month he went back to work and continued to work until December 14, 1956 when the plant shut down and Cotner was laid off for a while. On January 15, 1957 Dr. Glenn who had examined Cotner several times examined Cotner and found that he was "healed" and was dismissed from the treatment but advised to avoid the degreasing solution. About a week later, January 21, 1957, Cotner returned to work and soon had a recurrence of the rash; on January 31, 1957 Dr. Glenn saw Cotner and referred him to Dr. Shirmer. Cotner continued to work at the same place

until June 27, 1958 when he was discharged for violating a company rule.

Keeping in mind that neither of the two insurance carriers involved will be liable unless it is later established that Cotner has been permanently partially disabled, it seems to follow that the judgment of the trial court must be reversed. Although it may be conceded that Cotner became affected with dermatitis prior to November 14, 1956, there is no evidence that he was *permanently affected.* On the other hand the evidence is all to the effect (as heretofore set out) that he was not permanently affected. Therefore, the only logical conclusion deducible is that, if the claimant is later found to be permanently affected, he became so after November 14th. All authorities appear in agreement that the date of the first recognized appearance of symptoms of an occupational disease does not necessarily coincide with the date of the last "injurious exposure". In some instances, we can conceive, the dates might coincide but this fact would have to be shown by competent evidence — a thing that was not done in the case before us. Any other view, it seems to us, would have to be based on the assumption that an occupational disease (dermatitis in this instance) is an incurable disease and that the *first* injurious exposure always results in a permanent disability. If that were the case, however, then Section 81-1314(a)(6) would be unintelligible because it speaks of a *last* injurious exposure. If there can be a *last* exposure then there can also be a *first* exposure. The case of *Textileather Corp.* v. *Great American Indemnity Co.,* 108 N. J. L. 121, 156 A. 840, recognized that an occupational or industrial disease is not always permanent or incurable by the statement that "Sometimes a patient makes a complete recovery, sometimes it is only an apparent one."

Most authorities seem to agree that the date which determines liability is not the date when the symptoms of the disease first appear but rather the date when some kind of disablement (such as cessation from work) occurs.

In *Underwriters at Lloyd's, London* v. *Alaska Industrial Board,* (D. C. Alaska), 160 F. Supp. 248, the Court used this language: "In occupational disease cases there is generally a long period of exposure without any disability and the date of contraction of the disease is not ascertainable. Therefore, there has been difficulty in determining the moment when an employer and insurer become liable. The solutions which have been worked out are discussed by Larson in the second volume of his Workmen's Compensation Law. Section 95.21 says that most frequently liability is assigned to the carrier who was on the risk when the disease resulted in *disability,* if the employment at the time of disability was of a kind contributing to the disease." (Emphasis supplied.) In the case of *Masco* v. *Barnett Foundry & Machine Co.,* 53 N. J. Super. 414, 147 A. 2d 579, where the Court had under consideration the question similar to the one here presented, it is stated: ". . . full liability for permanent disability (fastens) upon that insurer which was on the risk at the time the employee ceased work, absolving any prior insurers regardless of the extremity of progression of the disease, short of cessation of work . . ." In that case the Court assigned the reason for so holding in saying that: "Because the development of occupational diseases is characteristically gradual, but variable in different diseases and with different persons, the earlier stages being frequently undetectable, the only rule which would insure the benevolent legislature objective of recovery in every meritorious case was one which would fix liability at the single and easily determinable point when there was *inability to work* or death." (Emphasis supplied.)

In the case under consideration it is admitted that Cotner lost no time from work prior to November 14, 1956 when appellant ceased to be the insurance carrier. It is also admitted that after said date Cotner worked for Eastern, that he was exposed to the degreasing solution, and that for the first time he quit work and went to the hospital.

Appellee contends that the case of *Hixson Coal Co.* v. *Furstenberg,* 225 Ark. 568, 284 S. W. 2d 120, is authority for the affirmance of the judgment of the trial court, but we do not agree. Our attention is directed to the circumstance that the claimant contracted silicosis in that case while in the employment of Hixson but that his disability did not commence until he was working for a subsequent employer. This is true but it also appears from a careful reading of that case that the claimant was not "exposed" during his subsequent employment to anything that would cause silicosis. It further appears from the Hixson opinion that the claimant not only suffered *symptoms* of silicosis while he was in the employment of Hixson but that "he was bothered with breathlessness; it progressed to such an extent that he could not walk out of the Hixson Mine without resting, and finally got to the point that it became necessary to ride out, being unable to walk." The opinion further reflects that the claimant had formerly made a statement in 1949 to the effect that he was compelled to terminate his employment with the Hixson Company due to the fact that his physical condition had progressed to a point where he was unable to perform his work. As we read the *Hixson* case, *supra,* therefore, we construe it to confirm rather than refute the conclusion which we have heretofore reached.

From the above it follows 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.

5-2117 334 S. W. 2d 666

Opinion delivered April 25, 1960.

D. D. Panich, for appellant.

Ivie C. Spencer, Glenn F. Walther, of Counsel, for appellee.

SAM ROBINSON, Associate Justice. This action was filed by appellants under the provisions of the Declaratory Judgment Act (Ark. Stats. § 34-2501, *et seq.*) against the Arkansas State Revenue Commissioner to determine the validity of Act 120 of 1959.

The complaint alleges that: Appellant Brown is the owner of Tia Wanna Club in Little Rock and owns in connection therewith one music vending machine, or "juke box", which is operated by a coin slot device; appellant Farr, a resident of Texarkana, Texas, does business as Central Music Company and owns and leases several music vending machines, all located in the State of Arkansas; both appellants have attempted to purchase privilege tax stamps for each machine as required by Ark. Stats. § 84-2604, but appellee has refused to sell them same because appellants have not complied with the provisions of Act 120 of 1959.

The Act in question declares the owning, operating or leasing of coin operated machines such as those owned

by appellants to be a privilege and requires, before the issuance of a license, that applicant must, among other things, pay an annual fee of $250, procure a surety bond of $3,000, be above 21 years of age, and be a resident of the State of Arkansas for at least one year prior to the date of application. At least one-half of any partnership or corporation applicant must be owned by an Arkansas resident who has been such for at least one year prior to the date of application.

There are a number of other provisions of the Act relating to requirements for issuance of a license and regulatory features thereafter, which need not be detailed here. Appellants' petition alleges that the provisions of the Act are "arbitrary, capricious and discriminatory and are confiscatory in their purpose" and violate the Arkansas Constitution, particularly §§ 2, 3, 18, 19 and 29 of Article 2, and are a denial of equality of privileges and authorize the creation of a monopoly and are a restraint of trade.

Appellee filed a demurrer to the petition on the ground it does not state facts sufficient to constitute a cause of action. The chancery court sustained the demurrer, and hence this appeal.

For reversal appellants make a number of arguments in addition to those alleged in their petition, but it is not necessary to set them out here. The petition alleges that Act 120 of 1959 is arbitrary, capricious, discriminatory and confiscatory, in violation of the Arkansas Constitution. Whether or not these allegations are true is a question of fact which if proved could render the statute unconstitutional. The provisions of the Declaratory Judgment Act set forth the manner by which determinations of issues of fact shall be made. Ark. Stat. § 34-2508. The decree must therefore be reversed with directions to overrule the demurrer and for further proceedings not inconsistent herewith.

MARTIN *v.* HICKEY.

5-2102 334 S. W. 2d 667

Opinion delivered April 25, 1960.

J. Kenton Cochran, for appellant.

Williams & Gardner, for appellee.

JIM JOHNSON, Associate Justice. This appeal seeks to determine whether Chancery Court has jurisdiction to hear a petition to challenge the sufficiency of a joint petition of independent candidates to place their names on the ballot for a general election to be held in an incorporated town.

The appellants are ten qualified electors and taxpayers of the incorporated town of London, Pope County. They filed in the Pope County Chancery Court a petition to challenge the joint petition of a slate of independent candidates who sought the elective offices in the town of London. The challenge was filed under the provisions of Ark. Stats., § 3-839, (Act 352 of 1955). There was no primary election conducted by any political party. Appellants allege that the independent candidates did not comply with the Arkansas Statutes, including the payment of filing fees, and the petition is a nullity. The appellants further seek to restrain appellees, the Board of Election Commissioners, from certifying the election results based upon the joint petition of the independent candidates.

Upon demurrer by appellees, the Pope County Chancellor held that the Chancery Court did not have jurisdiction to hear the challenge. This appeal followed.

The only point relied upon by appellants for reversal is that the Chancery Court erred in refusing to accept jurisdiction.

Section 3-839, Ark. Stats. reads as follows:

"Challenge of Petition. The sufficiency of any petition filed under the provisions of this Act (Sec's. 3-836—3-840, same being Act 352 of 1955), may be challenged in the same manner as provided by law for the challenging of initiative and referendum petitions."

The manner provided by law for the challenging of initiative and referendum petitions is set out in Ark. Stats., § 2-314, (Act 4, Sec. 13 of 1935). This section expressly confers upon any ten qualified electors and taxpayers of the county the right to contest the returns and certification of the vote cast, said contest to be brought in the Chancery Court within sixty (60) days.

Appellants' petition charging serious defects and irregularities in appellees' petition for the nomination of independent candidates appears on its face to have been filed in the proper court in compliance with the terms of Act 352 of 1955. Without further research we would have no choice but to agree with appellants' contention that Chancery Court had jurisdiction to hear the challenge. However, upon further research we find that this Court had occasion to pass upon the applicability of the Act here in question in the case of *Moorman* v. *Taylor,* 227 Ark. 180, 297 S. W. 2d 103. There the Court said:

". . . Any uncertainty that exists is completely dispelled when the legislative history of the 1955 act is examined. As originally introduced in the legislature, the bill which became Act 352 applied to city offices as well as to those of the State, a county, or district. Before its final passage the bill was amended to delete the word 'city' wherever it appeared. House Journal, 1955, p. 394. We certainly should not read into the act by implication a provision that the legislature itself expressly eliminated. *Mayo* v. *American Agricultural Chem. Co.,* 101 Fla. 279, 133 So. 885; *Grasso* v. *Cannon*

Ball Motor Freight Lines, 125 Tex. 154, 81 S. W. 2d 482."

Our research further revealed that Act 352 of 1955 was amended by Act 205 of 1957. We are unable to find anything in this amendatory act that would indicate the legislature intended to include cities in the terms of the act. Therefore, since this Court has expressly held that Act 352 of 1955 does not apply to cities or town and since jurisdiction with respect to challenge or contest of municipal offices is not expressly or by implication placed elsewhere, the Circuit Court, under Art. 7, Sec. 11 of the Constitution has residuary jurisdiction. See: *Whittaker* v. *Watson,* 68 Ark. 555, 60 S. W. 652; *State* v. *Tyson,* 161 Ark. 42, 255 S. W. 289; and *Wood* v. *Miller,* 154 Ark. 318, 242 S. W. 573.

In the words of the Court in *Purdy* v. *Glover,* 199 Ark. 63, 132 S. W. 2d 821, we held that:

"Since the contest was not instituted in the Court having jurisdiction of the subject matter, the demurrer to the complaint was properly sustained."

Affirmed.

WHEATLEY *v.* WARREN.

5-2108 334 S. W. 2d 880

Opinion delivered May 2, 1960.

[Rehearing denied May 30, 1960]

R. Julian Glover; Wootton, Land & Matthews; Wood, Chesnutt & Smith, for appellant.

Richard W. Hobbs, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a judgment of the Garland Circuit Court wherein the action of the County Judge, H. C. Warren, in dismissing the board members of the Ouachita General Hospital of Garland County, was upheld. The record reflects that Judge Warren assumed office as County Judge of Garland County on January 1, 1959, and attended a meeting of the Board of Governors on January 2d, at which meeting the Judge presided. At that time, Judge Warren asked for the resignation of all members of the board, stating that certain members had not conducted themselves properly, and that he would be unable to work with certain members of the board. No resignations were submitted, and Judge Warren obtained the appoint-

ment of a "Citizens Committee" to investigate conditions at the hospital. One member was appointed by the City Council, one by the Chamber of Commerce, one by the Garland County Medical Association, and one was appointed to represent the Quorum Court, Judge Warren being the fifth member. This committee went to the hospital, together with Judge Warren's attorney, and there heard testimony from various witnesses, mostly persons who held complaints against the hospital. No member of the board was present during the taking of testimony. Subsequently, a report was prepared by Judge Warren's attorney, setting forth the findings of the committee, and making the recommendation that the board should resign, but this report was not signed by any member of the committee. Thereafter, Judge Warren notified the members of the board that a hearing would be conducted for the purpose of determining whether the members should be removed from the board. Following the filing of various motions, such hearing was conducted, and on April 29, 1959, Judge Warren directed the following letter to the board:

"April 29, 1959

Board of Governors
Ouachita General Hospital
Hot Springs, Arkansas

Gentlemen:

This is to advise you that based upon the Citizen's Committee Report; facts developed at the hearing held as a result of my request that each of you tender your resignations, and based upon the Statutes of Arkansas relative to the duties placed upon members of the Board of Governors of county hospitals and the general law of Arkansas, I find that each of you should be removed from your present position as a member of the Board of Governors of the Ouachita General Hospital, and this action is taken for the general betterment of the operation of the hospital.

According to the evidence and testimony presented at the hearing, it does not appear that all of the mem-

bers of the present Board of Governors were aware of certain conditions that existed and of certain transactions that transpired, but that, in my opinion, does not excuse those members as it was the duty of each member to acquaint himself with all aspects of the operation of the Ouachita General Hospital.

You are hereby relieved from your duties as of the 1st day of May, 1959.

(signed) H. C. Warren
H. C. (Dusty) Warren,
County Judge''

Appellants filed a ''Petition for Review'' with the Circuit Court of Garland County, and on October 6th, 1959, that court affirmed the action of the County Judge in dismissing the board. From such judgment comes this appeal. For reversal, appellants assert three points, as follows:

''I.

The Board of Governors of Ouachita General Hospital were never informed of the causes of their removal and the letter of H. C. Warren, County Judge of Garland County, Arkansas, dated April 29, 1959, notifying the Board of Governors of their removal did not specify any of the causes or grounds for removal upon which the action was predicated.

II.

The causes for removal cited in the order of the Circuit Court of Garland County, Arkansas, of October 7, 1959, affirming the action of the County Judge in removing the members of the Board of Governors of Ouachita Hospital do not show sufficient grounds for removal.

III.

The hearing by H. C. Warren as County Judge of Garland County, Arkansas, conducted in connection with the removal of the Board of Governors did not meet

the requirements of due process or of Justice and fair dealing."

In view of the conclusion we have reached, only points one and three will be discussed, and will be considered in reverse order.

At the outset of the proceeding, appellants moved that Judge Warren disqualify himself from presiding at the hearing, alleging that he was personally and politically biased and prejudiced against the members of the board, was personally interested in the outcome of the hearing, and had individually instituted actions in the Chancery Court against members of the Board. Judge Warren ignored this motion to disqualify, and the Circuit Court refused to grant a petition for a writ of mandamus requiring Warren to disqualify. This Court, in a Per Curiam order of March 23, 1959, denied petition for writ of mandamus and for a stay order, holding that the county judge "is not disqualified to act in what is essentially an administrative matter." As a basis for the motion, appellants point out that Judge Warren requested the resignation of the board almost immediately upon being inaugurated as county judge, and that this fact clearly showed that his mind was already made up that the board should be removed, prior to conducting the hearing. Evidence also reflected that during the political campaign of 1958, Judge Warren ran a political advertisement wherein Hill Wheatley, chairman of the board, was accused of active political interest in behalf of Judge Warren's opponent; in their brief, appellants further state:

". . . that at a so-called 'Citizens Committee' hearing which drafted the report, the meeting was presided over by appellee, the witnesses were provided by him and that no member of the Board was called or asked to appear before the Committee; that appellee's mind had been made up prior to the hearing and that he had a personal interest in the outcome of two lawsuits pending in the Chancery Court of Garland County, Arkansas."

Of course, though the hearing was essentially administrative, it was "Quasi-judicial" in nature, and appel-

lants cite authority from McQuillin on Municipal Corporations and American Jurisprudence to support their contention that appellee should have disqualified. For instance, in 42 American Jurisprudence, § 137, p. 479, it is stated:

"... An administrative hearing in the exercise of judicial or quasi-judicial powers must be fair, open and impartial. The right to such a hearing is an inexorable safeguard and one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. The breadth of administrative discretion places in a strong light the necessity for maintaining in its integrity the essentials of a fair and open hearing. When such a hearing has been denied, the administrative action is void. The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

At page 311, § 21:

"An administrative officer exercising judicial or quasi-judicial power is disqualified or incompetent to sit in a proceeding in which he has prejudged the case, or in which he has a personal or pecuniary interest, where he is related to an interested person within the degree prohibited by statute, or where he is biased, prejudiced, or labors under a personal ill-will toward a party."

We agree that this correctly states the law; however, there is an exception, which is mentioned in § 22. That exception occurs where the authority of the administrative officer is exclusive, and no legal provision for calling in a substitute is provided. In Corpus Juris Secundum, Vol. 67, § 66, p. 277, a concise, though thorough statement relating to disqualification is found.

"A board or official assuming to try charges against an officer or employee must establish its jurisdiction to

do so when challenged, since there is no presumption as to its power in this respect. While it is sometimes provided that the trial or hearing may be conducted by the head of the department in which the person charged is serving, ordinarily it is necessary that the hearing be before an unprejudiced official, where a hearing before such a person can be had without disregard of the terms of the statute providing for the hearing and without defeating its purpose. *Where the statute clearly requires the hearing to be held before a designated administrative officer, and no other officer can hold the hearing, the language of the statute may not be disregarded, or the legislative intent defeated, by holding that the designated officer is disqualified.*[1]

Mere prejudice or alleged prejudice on the part of an official authorized by statute to remove does not affect his right to remove an officer or employee in conformity with statutory proceedings where no provision is made for a hearing before another official in such a case; and the fact that a superior officer authorized to try his subordinates on charges preferred had previously reprimanded or disciplined them does not *per se,* in the absence of statutory mandate prohibiting it, disqualify him from trying them on charges preferred. The power of removal is not confined to matters with respect to which the officer conducting the hearing has no personal knowledge or as to which charges have not been made or instigated by him, and such superior officer may make charges on his own knowledge and remove the officer or employee charged if, after a hearing, he determines that such charges are sustained.''

Our statute, relative to the appointment of county hospital boards, is § 17-1502, Ark. Stats. Anno., and provides that the board of governors shall consist of seven members, qualified electors of the county wherein the hospital is located, and who shall be appointed by the county judge for staggered terms from one to seven years. Further:

[1] Emphasis supplied.

"All appointments made to fill vacancies caused by expiration of terms or by death shall be for a period of seven (7) years and such method shall be followed in making such appointments until each member of the board shall be appointed for a term of seven (7) years. The duty to appoint the initial members of this board and to fill vacancies in case of death, resignation, expiration of terms, *or for any other reason*[2] shall be that of the County Judge. In the event of misconduct or refusal to act, any member of the Board may be removed for cause."

Since, under our statute, the sole authority to appoint and remove is placed in the County Judge, hearings for determination of whether board members should be removed are exclusively within his jurisdiction, and appellants' contention for disqualification cannot be sustained.

We come now to a consideration of appellants' listed point No. 1. Generally, proceedings for removal are commenced by furnishing an officer or employee with a notice or statement setting forth the reason or grounds for discharge or proposed discharge. In some states, there is a statutory requirement that this be done. Our statute makes no such requirement, but this Court has held that the authority to remove officials "for cause" carries with it the implied restriction, that upon accusation being made, the cause must be stated, with leave to the accused to present his defense. See *Williams* v. *Dent,* 207 Ark. 440, 181 S. W. 2d 29. Written charges were not preferred in the instant case; however, pursuant to a request by appellants' counsel, the attorney for Judge Warren, a few days prior to the hearing, directed a letter to appellants' attorney, specifying certain charges, as follows: a violation of Act 481 of 1949, as amended, which requires the submission of monthly reports of the hospital operations to the county judge and quorum court; the awarding of the laundry contract of the hospital to a member of the board;[3] disagreement between personnel of the hospital and the Welfare Department, which had resulted in the latter's refusal to send patients to the

[2] Emphasis supplied.
[3] See *Warren* v. *Reed,* 231 Ark. 714, 331 S. W. 2d 847.

hospital; refusal of the Board of Governors and Administrator to pay several thousand dollars due the Southwest Blood Banks; refusal to permit patients in the hospital to leave that institution until proper arrangements had been made for payment of their bills; and the use of $15,000 of hospital funds for the purchase of real estate, and the taking of the deed in the name of the hospital rather than the county.[4] Evidence relating to these charges was presented at the hearing, and evidence was also presented relative to alleged misconduct, not specifically included in counsel's letter; for instance, testimony was offered to the effect that state welfare patients, whose medical expense had been paid in full by the State Welfare Department, had received additional bills from the hospital.

Testifying at the hearing were Jerry Poe, Chamber of Commerce member of the Citizens Committee, Dr. Lon E. Reed, Citizens Committee representative of the Garland County Medical Society, Kenneth P. Cain, committee representative from the City Council, Fred Shelton, County Clerk of Garland County, Richard Hobbs, Judge Warren's attorney, George C. Allen, Secretary to the County Judge, Mrs. Iva Harris, Juvenile Probation Officer, Mrs. Gladys Ridgeway, Director of Public Welfare in Garland County, Harry Keaton, Certified Public Accountant, S. T. Whitworth, Administrator of the Hospital, DeVere Dierks, member of the board, J. Muriel Reed, member of the board, Hill A. Wheatley, member of the board, Mose Holiman, member of the board, and J. M. Lowrey, former County Judge. The "Citizens Committee" report was offered in evidence, though the testimony of the three committee members was not entirely in accord with the report. Various alleged offenses were included in the testimony, and the four board members, along with certain of the above witnesses who testified in their behalf, offered testimony in defense of the charges against them.

It is at once obvious, from a study of the transcript, that some of the accusations made at the hearing, even

[4] See *Warren* v. *Wheatley*, 231 Ark. 707, 331 S. W. 2d 843.

though sustained, would not justify removal. We are unable to determine whether the Judge was justified in ordering the removal of the board, for we do not know which charges and proof he relied upon.

This Court has emphatically stated upon two occasions that in removing an official from office, the specific charges upon which the removal was based, must be stated. In *Williams* v. *Dent, supra,* we said:

"It is not enough, in the affirmative language of a resolution, to throw a cloak of anonymity over the cause and arbitrarily assert that cause exists. * * * It may have been that purely personal dislike, or incompatibility not associated with official duties, animated the final result. If this were the basis of removal there was no cause within the meaning of the statute."

In *Martin* v. *Cogbill, Commissioner,* 214 Ark. 818, 218 S. W. 2d 94, this Court stated:

"The record in this case is a voluminous one and the review of all the testimony would require an opinion of interminable length, but it is certain that all the charges were not sustained and it is doubtful if any of them were. It cannot be known therefore whether Cogbill was removed upon testimony legally sufficient to support a charge constituting cause of removal. * * * Nevertheless the order of the Council in ordering Cogbill's removal imputes the finding that his presence and continued service on the board is inimical to the public welfare, or that he is unfit to occupy that position. He was entitled therefore to know upon what specific finding he was ordered removed.

It may also be said that testimony was offered as to certain alleged derelictions not specified in the petition to the Council praying Cogbill's removal, and for aught we know from the record before us the Council's action may have been based upon that testimony, and if so that action was unauthorized. See *Williams* case, *supra.*"

The latter paragraph might well apply in this case, for testimony was offered at the hearing in regard to certain alleged practices at the hospital which, if true, were inimical to the welfare of the institution.

It will be noted in reading Judge Warren's letter of dismissal to the Board, heretofore set out in full, that no specific reasons were given for removing the board. They are only told that the dismissal is "based upon the Citizen's Committee Report; facts developed at the hearing as a result of my request that each of you tender your resignations, and based upon the Statutes of Arkansas relative to the duties placed upon members of the Board of Governors of county hospitals and the general law of Arkansas * * *." This covers a multitude of matters and alleged infractions, and we are, of course, unable to determine the particular acts relied upon by the County Judge to sustain his action.

The judgment of the Garland Circuit Court is therefore reversed, but without prejudice to appellee's right to proceed in a manner not inconsistent with this opinion.

McFaddin, J., not participating.

Erhart *v.* Hummonds.

5-2054 334 S. W. 2d 869

Opinion delivered May 2, 1960.

[Rehearing denied May 30, 1960]

Jacob Sharp, Jr., J. W. Barron, for appellant.

Martin, Dodds & Kidd; Gordon & Gordon; Howell, Price & Worsham, for appellee.

J. Seaborn Holt, Associate Justice. This appeal comes from a judgment against appellants, architects, on a jury verdict awarding substantial damages to one injured workman and to the representatives of three other workmen who were killed. The record reflects that the Seventh & Main Street Realty Company, owner of the premises at Sixth and Main Street, entered into an agreement with J. C. Penney and Company to erect a building suitable for Penney to house and sell merchandise. Pursuant to this agreement, Seventh & Main Street Realty Company negotiated with the architectural firm of Erhart, Eichenbaum & Rauch to design and draw the necessary plans for a suitable building. This was done and a contract was let by Seventh & Main Street Realty Company to the J. A. Jones Construction Company of Shreveport, Louisiana. After this contract was let, it developed that Penney was not going to furnish supervision of the construction work, contrary to the owner's prior understanding that they would. Seventh & Main Street Realty employed the present appellants, architects, to guard its interest by supervising construction of the

building, in addition to their architectural duties. For this additional work, appellants were to receive an additional fee over and above their architectural fee. Work under the contract proceeded and the Jones Construction Company subcontracted the excavation to one Claude Machen. Due to the depth of the excavation and because of danger to adjacent buildings and workmen, the plans for the excavation were set out in some detail in the contract. As the excavation proceeded in depth, it became necessary to shore the walls to prevent sliding and caving of the earth. Serious questions were raised by the field supervisor of the architects, Vance A. Davenport, as to the adequacy of the shoring on the east wall, then seventeen (17) feet deep and perpendicular. Comments by Davenport were to the effect that the shoring of this wall was no better than a "whitewash" and "it wasn't worth a d---." With some dispatch, a call was placed by Mr. Eichenbaum, one of the architects, to the general office of Jones Construction Company at Shreveport, requesting that a new job superintendent be brought to the job at once; otherwise, they would ask the owners to stop work on the job immediately, as allowed under the contract. The next day, Friday, the new superintendent arrived on the job and promised to make shoring of the east wall the first order of business Monday morning. There was evidence that a slow drizzle of rain fell over the weekend causing the excavation walls to soften. Monday morning, as Vance Davenport, appellants' supervisor and superintendent, drove his automobile [which weighed 4,600 lbs.] into the alley near the edge of the east embankment wall, this wall caved in killing three employees and seriously injuring a fourth. It was stipulated: "It is further stipulated and agreed by the defendants Erhart, Eichenbaum & Rauch that Vance Davenport was their agent, servant, and employee and acting within the scope of his employment on the J. C. Penney Company job site at the time of the accident and prior thereto."

Suit was filed by the injured workman on behalf of himself and by the personal representatives of the three

estates of the three workmen who were killed alleging, in effect, that appellants, architects, were negligent in failing to inspect and direct the erection by the contractor of the necessary protection for the workmen according to the plans and specifications, in failing to require compliance in accordance with Little Rock Ordinance No. 2801 and that the negligence of the agent and supervisor, Vance A. Davenport, in driving his automobile through the alley above the excavation when he knew vibrations therefrom might cause the wall to fall, was imputable to them, and that appellants were negligent in failing to stop the work under their powers set forth in the contract until the dangerous conditions had been corrected. Appellants answered, in effect, with a general denial.

Upon a trial of the issues, as indicated, the jury found in favor of appellees and the following judgments rendered accordingly:

"Benjamin Hummonds—$10,000.00
Monteen Criswell— 48,000.00
Lucy Lewis— 48,000.00
Vernie Lowman— 12,000.00"

The points for reversal may be summed up as follows: (1) The appellees have no cause of action on the basis of contract provisions (2) The architects did not breach any contractual duty to the owner (3) There is no substantial evidence that the presence of the Davenport car in the alley caused the cave-in (4) That numerous instructions given by the court and numerous instructions refused by the court were error (5) The verdicts are excessive.

Appellants' contention under point one has been settled adversely to them in our recent case of *Hogan* v. *Hill,* 229 Ark. 758, 318 S. W. 2d 580. Hogan, a contractor, entered into a contract with the Arkansas Highway Commission to do certain work. Hogan violated the safety clause contained in a provision of the contract and as a result, Hill, not a party to the contract, was injured. We there stated: "It will be noted that Hill's complaint states a cause of action in tort based not only on the common law

of negligence, but based also on Hogan Company's failure to comply with the regulations in the contract relative to public safety. This, we think, he had a right to do. See *Prosser* on *The Law of Torts,* 1955, 2d Ed. § 81, p. 478 and 482; Ann. Cas. 1913C, p. 217; *Pugh* v. *Texarkana Light & Traction Co.*, 86 Ark. 36, 109 S. W. 1019; *Hill* v. *Whitney,* 213 Ark. 368, 210 S. W. 2d 800, and *Collison* v. *Curtner,* 141 Ark. 122, 216 S. W. 1059, 8 A. L. R. 760."

Assignment two presents the question of whether the architect breached any duty to the owner, and further the issue if there was a duty whether it did not arise until the excavation was completed. The issue here, we think, is not whether the architect breached any duty to the owner, but whether there was a breach of duty owed to the workmen by the architect arising out of the safety provisions of the contract. In the Hogan case above, Hogan did not breach any duty to the highway commission, but did breach a duty which it owed to the traveling public and for whom the safety provisions were intended. In the case here presented, we hold that there was substantial evidence that appellants, architects, breached a duty owed to the workmen whom the safety provisions of the contract specifically named. Appellants were further obligated to inspect the excavation upon completion and prior to the commencement of concrete work. Section 1-02 (d) of the contract, dealing with inspection and excavation, provides: "Upon completion of excavation, and prior to commencement of concrete work, excavations will be inspected by the Architect to insure that suitable earth foundation conditions have been obtained, and that compliance with the requirements of the specifications and the drawings have been maintained. No concrete shall be placed until this inspection has been made and approval of the Architect has been obtained."

Mr. Davenport, appellants' employee and supervisor, testified that the east wall footings were poured Friday afternoon before the accident on Monday; that he was the architects' inspector or supervisor to see that the plans and specifications were followed; that he did not

approve making a vertical cut on the wall, that it was a dangerous thing to do and dangerous to workmen underneath; that the vibrations of any vehicle in the alley would be a contributing factor to the cave-in; that he was familiar with the effect of rain on the banks of an excavation, that the dirt around the excavation was saturated with rain which created a greater tendency for cave-ins; it was his opinion that the wall was dangerous and the shoring inadequate and that one should have people trained to detect a dangerous wall like that, that it would not be noticeable to the average layman or citizen. Section 2801 of the Little Rock Building Code provides: "All excavations for buildings and excavations accessory thereto shall be protected and guarded against danger to life and property."

As indicated, the architects were paid, in addition to the fee for preparing the plans and specifications, $12,000.00 by the owners to see to it that the terms of the contract between the owners and the contractors were complied with. The contract provides that the general contractor "shall erect such protection as may be required, or as directed by the architect, maintain same, and maintain any existing protections, all in accordance with the governing laws, rules, regulations and ordinances." And, further, the "contractor shall do all shoring necessary to maintain the banks of excavations, to prevent sloughing or caving, and to protect workmen." The contract further provides: The architect "shall have general supervision and direction of the work —. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract." It was a question for the jury as to whether the architect was negligent in failing to stop all work until the shoring on the east wall was made safe for the workmen.

Under appellants' third assignment they argue that there is no substantial evidence that the presence of the Davenport car in the alley caused the cave-in. We do not agree. Without detailing the testimony here, so as not to unduly extend this opinion, we hold that there was

substantial testimony from which the jury could have found that the east wall, where the cave-in occurred, was dangerous; that the rain had saturated the ground, giving it a greater tendency to cave-in, that vibrations caused by motor vehicles in the alley above the east wall would have a tendency to cause the wall to fall. In *Missouri Pacific Railroad Company* v. *Henderson,* 194 Ark. 884, 110 S. W. 2d 516, we stated our oft quoted rule as follows: "The rule is, and has always been, that where there is any evidence of substantial nature, which, by positive statements or reasonable inference, when given its strongest probative value, tends to support the finding of the jury, that finding will be sustained, although from the record presented to this court it might seem to be against the preponderance of the evidence." In the case of *Lavender, Adm.*, v. *Kurn, et al, Trustees, et al,* 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, the rule is announced in this language: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

The fourth assignment of error is the refusal, and giving of numerous instructions over both general and specific objections of the appellants. In answer it suffices to say that we have carefully examined all instructions and objections thereto and find no prejudicial or reversible error in any of them.

The fifth assignment is that the verdict is excessive. Again we do not agree. The extent of injuries is always for the jury and when supported by any substantial evidence, the verdict should not be set aside or disturbed. In *Sinclair Refining Company* v. *Fuller,* 190 Ark. 426, 79 S. W. 2d 736, we said: "While the discretion of the jury is very wide, it is not arbitrary or unlimited discretion, but it must be exercised reasonably, intelligently and in harmony with the testimony before

them. The amount of damages to be awarded for breach of contract, or in actions for tort, is ordinarily a question for the jury; and this is particularly true in actions for personal injuries and other personal torts, especially where a recovery is sought for mental suffering. * * *

"The amount of recovery in a case of this sort should be such, as nearly as can be, to compensate the injured party for his injury." And in *Cohen* v. *Ramey,* 201 Ark. 713, 147 S. W. 2d 338, we said: "The extent of injuries like any other fact is for the jury and when supported by any substantial testimony the verdict should not be set aside or reduced. * * * It is just as much the province of the jury to determine the extent of one's injuries, and the amount of damages, as it is to determine the question of liability. His injury, pain and suffering are purely questions of fact, and should be left to the jury to determine."

A local physician, a Dr. Dishongh, who in his official capacity as coroner viewed the bodies of the three decedents to ascertain the cause of death, testified that decedent Abe Lowman sustained only a fracture of the left elbow; that Nathaniel Criswell sustained no bodily injuries whatsoever, and Anderson Lewis apparently sustained a chest injury and he fixed the cause of death of each as suffocation. Here the lips of the victims are sealed and it would be difficult to prove by direct testimony the extent of the decedents' conscious realization and understanding of the impending peril, agony and horror surrounding their death by suffocation—it could only be shown by circumstantial evidence. Appellants also argue that the awards were excessive for the reason that the jury awarded $12,000.00 to Lowman for conscious pain and suffering and awarded amounts greatly in excess of $12,000.00 to Lewis and Criswell. Jury verdicts do not have to be consistent. Here the jury no doubt took into consideration the fact that Criswell and Lewis each had several dependents, while Lowman had none. We cannot say that the award of $12,000.00 to Lowman

for conscious pain, mental anguish and suffering was excessive.

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

HARRIS, C. J., and GEORGE ROSE SMITH, J., not participating; WARD, J., dissents.

PAUL WARD, Associate Justice, dissenting. It is my best judgment that the cause of action should be reversed and remanded for a new trial. My reasons are briefly hereafter stated.

The trial court submitted to the jury two theories upon which to find appellants liable: (a) one was that appellants' agent, Davenport, was negligent in driving his automobile close to where the excavation gave way knowing that the ground was soaked by reason of excessive rains and, therefore, liable to cause the high, steep bank to collapse; (b) the other was that Davenport was negligent in not stopping all work until the defect was remedied.

(a) I agree with the majority that the trial court correctly submitted this issue to the jury, and further agree that there is substantial evidence in the record to support the jury's finding that Davenport was negligent.

(b) A careful reading of all the record convinces me that there is no substantial evidence in the record justifying the trial court's submission of this issue to the jury. Summarily stated, set out below are the facts and circumstances relative to this issue.

On Thursday afternoon Davenport detected the unstable condition of the excavation, inquired of the contractor's representative whether or not he had obtained the approval of the Safety Department of the Department of Labor, expressed his disapproval, and then very promptly telephoned Mr. Pugh, Vice President of the Prime Contractor at Shreveport, Louisiana. Davenport told Mr. Pugh of the condition and advised immediate action on his part. The result was that Mr. Pugh sent their regular Superintendent to Little Rock, arriving on the following morning (Friday) to take over the manage-

ment of the job. At that time there had been no collapse. The new representative of the Prime Contractor (a Mr. Wright) immediately conferred with an agent of appellant who pointed out the defects of the work, and Mr. Wright promised to take care of the situation. The following day, Saturday, no work was done on the excavation, and none was done on Sunday. On Monday morning, at 8 o'clock, work was resumed under the supervision of Mr. Wright who had all the shoring removed without telling Davenport. A short time later that morning, about the time Davenport appeared on the scene, the wall caved in on the workmen.

What I cannot understand, and the majority do not point out, is how any negligence can be imputed to Davenport or the appellants. The majority do point out that appellants were paid a substantial fee and thereby appear to infer that Davenport should have taken over the operation, but in this connection two other things must be considered. One is that appellants had many other duties to perform under its contract of employment. The other is that the Prime Contractor, under the terms of its contract, was specifically charged with the duties which the majority would impose on appellants. In part this contract reads: "Each contractor shall be responsible for his own work and every part thereof, and all work of every description used in connection therewith. He shall specifically assume, and does assume, *all risk of damage or injury from whatever cause to property or persons. . .*" (Emphasis supplied.) Not only so, but a witness for appellees (the Chief Safety Engineer for the Arkansas Department of Labor) stated that he looks to the Prime Contractor to make the job safe and not to the architects or a subcontractor.

Since there is no substantial evidence in the record to contradict the above factual situation it was, in my opinion, error for the trial court to permit the jury to base a finding of negligence on this point. Since there is no way for this court to determine on what ground the jury based its verdict, the cause should be reversed and remanded for a new trial.

CITY OF FT. SMITH *v.* MIKEL.

5-2111 335 S. W. 2d 307

Opinion delivered May 2, 1960.

[Rehearing denied June 6, 1960]

Pettus Kincannon; Heartsill Ragon; Hugh Bland; G. Byron Dobbs, for appellant.

Sam Sexton, Jr., John G. Holland, Lawrence S. Morgan, for appellee.

ED. F. MCFADDIN, Associate Justice. In this suit, brought by the City of Fort Smith seeking to quiet title to certain lands, there have been developed some very

interesting matters, involving both the early history of the Fort Smith area, and also the location of a portion of the western boundary of the State of Arkansas. It is a great temptation to lose sight of the legal issues in stating the matters of historical interest; but the applicable and governing rule of law is that stated by Mr. Justice BATTLE in *Chapman & Dewey* v. *Bigelow,* 77 Ark. 338, 92 S. W. 534, to the effect that a plaintiff seeking to quiet title must prove his own title and recover on the strength of his own title and not on the weakness of the title of his adversary.

As aforesaid, the City of Fort Smith brought this suit to quiet its title to certain described lots and also to all of the area lying between such described lots and the Arkansas and the Poteau Rivers on the west. The lots were Lots 1 to 19, in Block 3; Lots 1 to 16, in Block 4; and Lots 1 to 7, in Block 6, of West Fort Smith, an addition to the City of Fort Smith, Arkansas. Appellee Mikel asserted no title to the 42 lots, but asserted title to the area between the described lots and the two rivers. The Chancery Court rendered a decree quieting the title of the City of Fort Smith to the 42 lots, but refusing to quiet the title to the area between the said described lots and the two rivers; and from that decree the City of Fort Smith brings this appeal.

The facts developed, plus those known judicially, present the following picture: By the Act of June 15, 1836, the Congress of the United States admitted Arkansas as a Sovereign State, "on an equal footing with the original States in all respects whatever"; and this Act of Admission[1] defines the western boundary of Arkansas, as beginning at the southwest corner of the

[1] This is the Act of June 15, 1836, found in 5 U.S. Statutes at Large 50, Chapter 100; and also may be found on Page 297 of Vol. 1 of the Arkansas Statutes Annotated of 1947. The said Cherokee Treaty of May 26, 1828, may be found on Page 1011 *et seq.* of Volume 8 of the Laws of the United States of America, as published in 1835; and Article 1 of that treaty reads: "The Western boundary of Arkansas shall be, and the same is hereby defined, viz: A line shall be run, commencing on Red River, at the point where the Eastern Choctaw line strikes said river, and run due north with said line to the River Arkansas, thence in a direct line to the southwest corner of Missouri."

State of Missouri, "and from thence to be bounded on the west to the north bank of the Red River by the lines described in the first article of the Treaty between the United States and the Cherokee Nation of the Indians, west of the Mississippi, made and concluded at the City of Washington on the 26th day of May, in the year of our Lord one thousand eight hundred and twenty-eight; . . ."

The Arkansas Constitution of 1836, and each subsequent Constitution, contains similar language for the western boundary of the State.[2] But this western line boundary, ignoring natural boundaries such as water courses, proved unsatisfactory; so the Congress of the United States, by Act of February 10, 1905, gave Arkansas authority to extend its western boundary.* The Act of Congress reads:

"The consent of the United States is hereby given for the State of Arkansas to extend her western boundary line so as to include all that strip of land in the Indian Territory lying and being situate between the Arkansas State line adjacent to the city of Fort Smith, Arkansas, and the Arkansas and Poteau Rivers, described as follows, namely: Beginning at a point on the south bank of the Arkansas River one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running southwesterly along the south bank of the Arkansas River to the mouth of the Poteau; thence at right angles with the Poteau River to the center of the current of said river; thence southerly up the middle of the current of the Poteau River (except where the Arkansas State line intersects the Poteau River) to a point in the middle of the current of the Poteau River opposite the mouth of Mill Creek, and where it is intersected by the middle of

[2] Reference is made to Vol. 1 of Ark. Stats. Anno. of 1947: the Constitution of 1836 is on Page 239; the Constitution of 1861 is on Page 253; the Constitution of 1864 is on Page 264; the Constitution of 1868 is on Page 279; and the present Constitution of 1874 is on Page 23.

* This Act may be found in 33 U.S. Stat. at Large 714, Chapter 571; and may also be found on Page 302 *et seq.* of Volume 1 of Ark. Stats. Anno. 1947.

the current of Mill Creek; thence up the middle of Mill Creek to the Arkansas State line; thence northerly along the Arkansas State line to the point of beginning: Provided, That nothing in this Act shall be construed to impair any right now pertaining to any Indian tribe or tribes in said part of said Indian Territory under the laws, agreements, or treaties of the United States, or to affect the authority of the Government of the United States to make any regulations or to make any law respecting said Indians or their lands which it would have been competent to make or enact if this Act had not been passed."

The Arkansas Legislature accepted the additional territory by Act No. 41 of 1905, which, without the preamble, may now be found in § 5-101, Ark. Stats.; and the validity of such extension of boundary has been upheld by this Court. *State* v. *Bowman,* 89 Ark. 428, 116 S. W. 896; and *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80. The Act of Congress and the Act of Arkansas transferred the said territory to Arkansas, but did not affect the title of the Indians or others owning any of the ceded territory. In 1904 John J. Fisher had platted the "Town of West Fort Smith, Choctaw Nation Indian Territory"; and this town was immediately west of the then western boundary of Arkansas and east of the Arkansas and Poteau Rivers.[3] It was a strip approximately 5,400 feet north and south, and varying, east and west, from nothing to a width of approximately 635 feet. This town consisted of a number of lots, contained in thirteen blocks, which were numbered 1 to 13 from north to south. In 1909 the City of Fort Smith annexed the theretofore platted "Town of West Fort Smith, Choctaw Nation Indian Territory" to the City of Fort Smith, Arkansas. In 1908 town lot patents were issued from the Choctaw and Chickasha Nations to various individuals; and the City of Fort Smith claims title to the 42 lots by mesne conveyances from the said individuals.

[3] The interesting fact is, that the site of the old original 1817 fort was located in this strip.

The Chancery Court, in the present case, quieted the title of the City of Fort Smith to the 42 lots and abutting streets and alleys, but refused to quiet the title of Fort Smith to the area lying between the said lots and the Arkansas and Poteau Rivers. Such refusal resulted in this appeal. As stated in the early portion of this opinion, the law is well established that a plaintiff seeking to quiet title must prove his own title and recover on the strength of his own title and not on the weakness of the title of his adversary.[4] The learned Chancellor delivered an excellent opinion, applying this rule. The opinion is in the transcript and has proved of benefit to us. We consider now Fort Smith's claim to title to the area between the platted lots and the rivers.

I. *The City of Fort Smith claims that the* 1904 *Fisher plat of "West Fort Smith, Choctaw Nation Indian Territory", showing the lots and blocks, was intended to cover all of the area between the Arkansas boundary and the two rivers; and therefore the lots owned by Fort Smith extend to the two rivers.*

The basis of this contention is the statement of the surveyor on the plat, which says that he has surveyed and staked the town, "*comprising* the strip of land lying between the City of Fort Smith and the Arkansas and Poteau Rivers". The appellant contends that the word, "comprising", necessarily means all of the land. However, the surveyor did not say it was comprising "*all*"; and it could, and did in fact, comprise less than all. We cannot shut our eyes to obvious facts. The size and width of each lot, block, and alley in the Town of West Fort Smith is given in definite footage on the plat, and such measurements on the plat must prevail. See *Beardsley* v. *Nashville,* 64 Ark. 240, 41 S. W. 853.

Furthermore, there was introduced in evidence, without objection, a survey made in 1958, which showed that

[4] Heretofore we have cited *Chapman & Dewey* v. *Bigelow,* 77 Ark. 338, 92 S.W. 534, as stating the rule. We have many other cases to the same effect: See *Mason* v. *Gates,* 82 Ark. 294; 102 S.W. 90; *Sanders* v. *Boone,* 154 Ark. 237, 242 S.W. 66, 32 ALR 461; and the scores of other cases collected in West's Arkansas Digest, "Quieting Title", Key No. 10.

there is an area lying between the platted lots and the Arkansas and Poteau Rivers, and that this strip varies in width from a few feet to as much as 200 feet. It was clearly established by plaintiff's witnesses that the strip could not be the result of any accretions because the strip had a rock outcropping on the banks of the Arkansas and Poteau Rivers. There are still present iron rings fastened into this rock ledge, and history students tell us that these rings were used for boats to anchor many, many years ago. In *Chapman & Dewey* v. *Bigelow,* 77 Ark. 338, 92 S. W. 534, Mr. Justice BATTLE, speaking for the Court, quoted extensively from *Horne* v. *Smith,* 159 U. S. 40, 15 S. Ct. 988, 40 L. Ed. 68, to the effect that when a map shows a given distance in footage, the area cannot be extended to a distant water course far beyond the stated distance. That rule is applicable here. So we must — under the facts — hold that the 1904 plat by Fisher *did not cover the entire area* between the Arkansas boundary and the two rivers to the west.

II. *The City of Fort Smith claims: "The undisputed evidence shows that any land that might exist between the Arkansas and Poteau Rivers to the westerly lot lines in West Fort Smith has been used by the public for many years, and a title has been acquired by the City by prescription".* The use by the public could have created a prescriptive right in the public, but not in the City of Fort Smith as distinct from the public; and the City has offered no evidence of its own adverse possession so as to establish any sort of title as distinct from the public. In *Packet Co.* v. *Sorrells,* 50 Ark. 466, 8 S. W. 683, there was involved the use by a municipality for warehouse purposes, of a portion of a dedicated street. Mr. Justice BATTLE stated: ". . . land dedicated by the owner as a street to the use of the public cannot lawfully be used for any other purpose; . . . the authorities of the town or city in which the same is situate cannot lawfully appropriate or divert it to uses and purposes foreign to those for which it was dedicated; . . ." Those statements are applicable here. If the area between the described lots and the rivers became a public

way by prescription, then the City cannot use the public way for any purpose foreign to the public way. Certainly the City would acquire no proprietary rights distinct from the public. In short, no claim of "prescription" can give the City title to the area west of the lots.

III. *Finally, the City of Fort Smith claims that since it owns the lots which abut on the public area to the west, and since the area has not been developed, there is, therefore, an abandonment of the area, the same as the abandonment of a street or alley; and that the City's title, therefore, extends to the rivers.* But this contention overlooks entirely the fact that the plat made in 1958, and introduced in this case without objection, shows a street or roadway existing in 1958 and being between the platted lots and the area to the west. Furthermore, the City showed by its own witnesses that the river front area has been from time immemorial used as a landing place; so no abandonment has been shown. Use by the public, originally established by showing the rings imbedded in the stone ledge for boat landings, is never shown to have been abandoned. So the City can claim no title through abandonment.

CONCLUSION

We are tremendously impressed by the public spirit that has activated the citizens of Fort Smith to acquire title to the entire area, originally known as "Belle Point", but later identified by the name of "Coke Hill". Outstanding citizens of Fort Smith have made a detailed study of the project; and it is hoped that when title to the full area has been acquired, Belle Point will be made into an historic monument and the old 1817 Fort will be restored. It is a splendid historic undertaking; and we are impressed by the zeal of the Sebastian County Bar, which undertook to clear the title. But the Chancery Court correctly applied the applicable law, which is, that a plaintiff seeking to quiet title must prove his own title and recover on the strength of his own title and not on the weakness of the title of his adversary.

The City of Fort Smith was unable to show any title to the area between the platted lots and the rivers; and, therefore, the Chancery decree was correct to that extent. But when we hold — as we do — that the City cannot quiet title to such area, it does not follow by any means that the appellee Mikel is entitled to the area. Mikel's attorneys admitted in the oral argument before this Court that it was not the intent of the decree of the Chancery Court to quiet Mikel's title. There is a sentence in the decree — which probably came in by inadvertence — that, as between Mikel and Fort Smith, Mikel succeeded to the title.[5] It was never intended by this to quiet Mikel's title; and we modify the decree by striking out the said Finding No. 15 and the portion of the decree incorporating it; but in all other respects the decree of the Chancery Court is affirmed. It is not for us in this case to decide whether Mikel owns the land, which the City may undertake to acquire by eminent domain,[6] or whether the title to the disputed area is still in the Indian Tribes, which title the City may undertake to acquire by negotiation. These matters are beyond the purview of the present litigation: all we now hold is, that the Chancery decree was not in error in refusing to quiet title in the City of Fort Smith to the area lying between the platted lots and the two rivers.

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

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[5] This is Item 15 in the decree, and reads as follows: "The Court finds that as between Mikel and the City of Fort Smith by virtue of the aforesaid deed to William J. Ray in 1918 and 1919, William Mikel succeeded to title to any land lying west of the lot lines of West Fort Smith as platted by John F. Fisher, and east of the Arkansas River and Poteau River to the mean highwater mark on the Arkansas River, and to the center of the Poteau River insofar as it bounds the lands in controversy."

[6] See *Packet Co.* v. *Sorrells*, 50 Ark. 466, 8 S. W. 683.

5-2137 334 S. W. 2d 714

Opinion delivered May 2, 1960.

Clinton R. Barry; D. L. Grace, for appellant.

No brief filed for appellee.

GEORGE ROSE SMITH, J. This suit, although in form an adversary proceeding, is in substance an *ex parte* petition by which the appellant seeks a declaratory judgment finding that her first husband is dead and that her marriage to her second husband, the appellee, is valid. The chancellor refused to grant the requested relief, on the ground that the petitioner had not adduced sufficient proof to give rise to the statutory presumption of death.

The petition is based upon Ark. Stats. 1947, § 62-1601: "Any person absenting himself beyond the limits of this State for five years successively shall be presumed to be dead, in any case in which his death may come in question, unless proof be made that he was alive within that time." A related section, also part of the Revised Statutes, provides that where any husband abandons his wife and resides beyond the limits of the State for five years, without being known to his wife to be living during that time, his death shall be presumed, and any subsequent marriage entered into by the wife after

the end of the five years shall be valid. Ark. Stats., § 55-109.

The petitioner, then 18 or 19, and Frank Russell, then 36, were married in 1919 in Fort Smith, where they both resided. Except for a brief visit to Oklahoma soon after their marriage the couple continued to live in Fort Smith until Russell left his wife in about 1923. Mrs. Russell, without having sought a divorce, appears to have married Baxter in 1936. The present petition, which names Baxter as the sole defendant, was filed in 1959. It alleges that the federal Social Security Administration has refused to allow the petitioner's claim to benefits as the wife of the defendant. Baxter entered his appearance and in effect supported his wife's petition.

Owing to illness the petitioner was unable to appear in court to give her evidence. The chancellor, in an effort to develop the facts, appointed a master to visit the petitioner's home and take her testimony. Under questioning by the master Mrs. Baxter revealed no information that might be of value in an attempt to locate her first husband. Although she and Russell lived together for about four years she says that she did not know where he was brought up, that he never mentioned any of his relatives and that she knew nothing about them, and that Russell had no friends as far as she knew. She could not remember the name of the minister who performed the marriage ceremony. She said that Russell did not work at all, that she took in washing and made the living while Russell stayed around the house. Russell at times expressed a desire to go to Oklahoma, but apparently that was before their actual trip to that state soon after their wedding. When Russell deserted her he did not tell her that he was leaving nor indicate where he was going. She heard nothing from her husband after his departure.

We find it unnecessary to decide whether, in the circumstances of this case, a declaratory judgment proceeding may be employed in lieu of a suit for divorce, for we are unwilling in any event to say that the chancellor was wrong in holding that the petitioner did not offer suffi-

cient proof to justify the granting of her petition. Under this statute it is settled that neither the fact of death nor that of absence from the state can be inferred from the bare fact of a disappearance. *Metropolitan Life Ins. Co.* v. *Fry,* 184 Ark. 23, 41 S. W. 2d 766; *Metropolitan Life Ins. Co.* v. *Williams,* 197 Ark. 883, 125 S. W. 2d 441. Hence the petitioner had a burden of producing evidence from which the court might fairly conclude that Russell had lived continuously outside Arkansas for at least five years before the petitioner's remarriage in 1936.

In our prior cases the finding that the missing person had left Arkansas was based either upon evidence indicating that he intended to leave or upon proof of a diligent but unsuccessful search for him. Those were contested cases, with the safeguards inherent in any adversary proceeding. Here the *ex parte* request for a declaratory judgment is unsupported by comparable testimony that might take Frank Russell's whereabouts out of the realm of pure speculation. In *Wilks* v. *Mutual Aid Union,* 135 Ark. 112, 204 S. W. 599, we stressed the fact that the missing person had not been heard from by relatives, friends, or neighbors, "those who would naturally make inquiry concerning his whereabouts and who would most likely receive communication from him and be in a position to know whether or not he was living." Here the petitioner's testimony effectively shuts the door to any such inquiry, as she professes complete ignorance of her first husband's family and friends. There is no adversary to whom the burden of going forward with the evidence might be shifted. We do not feel compelled to lay down a rule that would leave to the chancellor, when confronted with a record like this one, no choice except to grant relief on the basis of testimony that he considered, conscientiously and with reason, as being improbable and unsatisfactory.

The decree must be affirmed.

WARD, J., dissents.

PAUL WARD, Associate Justice, dissenting. Assuming without deciding that it was proper to bring this proceed-

ing for a declaratory judgment, it is my best judgment that the Order of the trial court should be reversed.

It is fairly deducible from the record that appellant married Frank Russell in 1919; that Russell deserted her in 1923; that the best information shows that he went to the State of Oklahoma; that he has not been heard of since; and that appellant married her present husband in 1936 and has lived with him ever since.

Bearing in mind that the question of appellant's 1936 marriage was not a controversial issue in the opinion, I am of the opinion that certain presumptions of the law fully sustain the position I have taken.

Because of the fact that appellant has lived with her present husband for approximately a quarter of a century the law presumes a legal marriage as stated in *Phillips* v. *Phillips,* 182 Ark. 206, 31 S. W. 2d 134. Also in view of the factual situation as set out above it must be presumed, under Ark. Stats. § 62-1601, that appellant's first husband was dead in 1936, having been absent from the State and unaccounted for at that time for a period of approximately 13 years.

COBBS *v.* SPEIGHTS.

5-2110 334 S. W. 2d 886

Opinion delivered May 2, 1960.

[Rehearing denied May 30, 1960]

George E. Snuggs, for appellant.

Melvin E. Mayfield, for appellee.

PAUL WARD, Associate Justice. On August 26, 1957 appellant, G. E. Cobbs, filed a Complaint in Ejectment against appellees, Marvin E. Speights and wife, alleging that he was the owner of certain lots in the Town of Smackover and tracing his title thereto through conveyances from two successive predecessors dating back to 1946. It was further alleged that appellees had unlawfully erected and were wrongfully maintaining a fence on his land over his repeated demands for possession. The prayer was that appellees be evicted.

To the above Complaint appellees filed a general Demurrer, which the trial court treated as a motion to make more definite and certain and granted appellant twenty days to comply.

On November 5, 1957 appellant filed an Amended and Substituted Complaint to which appellees filed an Answer containing a general denial on January 8, 1958. On January 13, 1958 appellant filed a Motion to Strike said Answer because it was not filed in the time allowed by statute. The trial court overruled this motion and ordered appellees to file further defensive pleadings within thirty days.

On February 17, 1958 appellees filed an Answer alleging seven years adverse possession, and also asked that appellant's Complaint be dismissed. To that pleading appellant filed a Motion to Dismiss on the ground that it was not filed within the statutory time or within the time allowed by the trial court. Later appellant filed a Motion for Judgment and for a Finding of Facts and Declarations of Law, whereupon appellees filed an Amended and Substituted Answer. On August 20, 1959 appellant filed a Motion to Strike the above mentioned pleadings and the trial court again overruled appellant's Motion.

On September 5, 1959 appellant filed a Petition for Judgment on the Pleadings which the trial court once more overruled.

It will be noted from the above that at no time did the trial court dismiss appellant's Complaint or cause

of action, nor was appellant prevented from proceeding to a final decision on the merits. In other words the trial court made no final order from which an appeal will lie to this Court. The law in this respect was well settled in the case of *Arkansas State Board of Architects* v. *Larsen,* 226 Ark. 536, 291 S. W. 2d 269, and the numerous decisions cited therein.

In view of the above the appeal must be dismissed as premature.

Appeal dismissed.

TENNESSEE GAS TRANSMISSION CO. *v.* STATE.

5-2082-2083-2084 335 S. W. 2d 312

Opinion delivered May 2, 1960.

[Rehearing denied June 6, 1960]

C. H. Moses and *Ohmer C. Burnside,* for Tenn. Gas Transmission. *Ohmer C. Burnside* and *C. H. Moses, Steptoe & Johnson* and *Henry C. Ikenberry,* for Trunkline Gas Co. *O. C. Burnside* and *Harry E. Meek,* for American La. Pipe Line Co.

Bruce Bennett, Atty. General by *Ovid T. Switzer* and *Carneal Warfield,* for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether the appellants, Tennessee Gas Transmission Company, Trunkline Gas Company, and American Louisiana Pipe Line Company, are liable for nominal damages to the State of Arkansas for having constructed pipe lines used in transporting natural gas in interstate commerce under the bed of the Mississippi River at a point in Chicot County, Arkansas, the line crossing the river from Chicot County to the State of Mississippi. The trial

court ruled that the pipe line companies are liable for such damages. There is no dispute as to the facts; only questions of law are involved.

The State of Arkansas ex rel. the Attorney General of the State filed separate suits against the appellant companies, asking for judgments in ejectment requiring them to remove their pipe lines from that part of the bed of the river which is in Arkansas, and for large sums as damages. The cases were consolidated for trial. The Tennessee Gas Transmission Company has five lines crossing the river at the point involved; the Trunkline Gas Company has four lines; and the American Louisiana Pipe Line Company has two lines crossing the river. The trial court refused to order ejectment because U. S. Code, Title 15, § 717(f) provides that no natural gas company shall abandon any portion of its facilities without the permission and approval of the Federal Power Commission. There is no cross-appeal by appellee from the judgment. The court rendered judgments for the State against the Tennessee Company in the sum of $5,000, against Trunkline in the sum of $4,000, and against the American Company in the sum of $2,000 ($1,000 for each line), as nominal damages. Appellants make no point on appeal that the judgments are excessive as nominal damages, but do contend that the pipe line companies are not liable to the State of Arkansas in any amount by reason of the pipe lines having been laid across the bed of the Mississippi River.

The pipe line companies, acting pursuant to the Natural Gas Act (15 U. S. C. § 717), obtained from the Federal Power Commission certificates of convenience and necessity authorizing the construction of the gas lines. In making applications for certificates of convenience and necessity, maps of the exact routes the proposed lines would traverse were filed. The necessity of crossing the Mississippi River at a point in Chicot County is shown on the maps. Also, the pipe line companies obtained from the Secretary of the Army and the Chief of the United States Engineers "permits" showing no objec-

tion to laying the lines across the bed of the river. These so-called permits provide *inter alia*: "It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State *assent* to the work authorized. It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation."

The Rivers and Harbors Act of March 3, 1899 (U. S. Code, Title 33, § 403) does not authorize the Secretary of the Army or the United States Engineers to grant permits to build pipe lines or bridges across navigable streams. *Hubbard* v. *Fort,* 188 F. 987. The Act does provide, however, that such crossing of the river cannot be made without approval of the Chief of the United States Engineers and the Secretary of the Army.

The pipe line companies obtained permits or easements signed by the Governor, Secretary of State and Attorney General of the State of Arkansas, purporting to authorize the laying of the lines across the river. The Arkansas Legislature has not authorized the Governor, Secretary of State or Attorney General to grant such easements, although the Legislature could give to the officials named such authority. *State ex rel* v. *Southern S. & M. Co.,* 113 Ark. 149, 167 S. W. 854. But without such authorization the State is not bound by the act of the officials. *Pulaski County* v. *State,* 42 Ark. 118; *Rankin* v. *Chancery Court of Pulaski County,* 221 Ark. 110, 252 S. W. 2d 551; *Arkansas State Hwy. Commission* v. *McNeil,* 222 Ark. 643, 262 S. W. 2d 129.

It is the principal contention of appellants that Congress, by adoption of the Natural Gas Act, 15 U.S.C. § 717, gave the Federal Power Commission authority to grant permits to cross the beds of navigable waters with pipe lines used in transporting gas in interstate commerce and that the certificates of convenience and necessity

granted by the commission carry with them permits to make such crossing.

In *State ex rel.* v. *Southern S. & M. Co.,* 113 Ark. 149, 167 S. W. 854, the question was whether the State had the right to sell sand and gravel in navigable streams. It was held that the State has this right; that the State owns the beds of the navigable waters, subject to the paramount right of Congress to control navigation. Judge McCulloch quoted the language of the Supreme Court of the United States in *Scott* v. *Lattig,* 227 U. S. 229, 33 S. Ct. 242, 57 L. Ed. 490, as follows: ". . . 'it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and State Governments under the Constitution, that lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty, and may be used and disposed of as they may direct, subject, always, to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations.' "

The National Gas Act does not specifically give the Federal Power Commission authority to grant permits to lay pipe lines across the bed of the Mississippi River, nor does the Act imply such authority. In fact, if there is any implication one way or the other, it is to the effect that the Commission does not have such authority. The Act provides that the gas companies have the right of eminent domain in constructing their pipe lines in interstate commerce. State lands are subject to be taken by eminent domain. *State of Missouri ex rel and to Use of Camden County, Mo., et al* v. *Union Electric Light & Power Co., et al.,* 42 F. 2d 692; *City of Davenport* v. *Three-fifths of an Acre of Land,* 147 F. Supp. 794, *aff'd* 252 F. 2d 354; *Union Bridge Co.* v. *United States,* 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523.

Moreover, 43 U.S.C. § 1311 provides: "(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath naviga-

ble waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . ."

Appellants rely on *Stockton* v. *Baltimore & N. Y. Rd.*, 32 F. 9, as support for the assertion that Congress may grant an easement over the bed of a navigable stream without the grantee compensating the State. We do not need to discuss this point, because here Congress has not granted any easements to the pipe line companies, whereas in the *Stockton* case Congress did grant such authority. A pipe line company having no authority from Congress cannot legally lay a pipe line across the bed of a navigable stream separating two states without the consent of the states involved. *Hubbard* v. *Fort,* 188 F. 987. But of course the pipe line company can proceed by eminent domain as authorized by the Natural Gas Act. This was not done in the case at bar.

Appellants argue that the State's action to recover damages because of the use of the bed of the river by appellants tends to obstruct or interfere with interstate commerce. There is no merit to this contention. The State has not refused to permit appellants to lay their lines across the river. Of course, appellants are engaged in interstate commerce and the State could not prevent such crossings. As heretofore pointed out, the appellants have the right of eminent domain, which they failed to exercise. Furthermore, on appeal appellants do not contend that if they owe anything as nominal damages, the amount of $1,000 per line is excessive. Certainly $1,000 is a nominal sum, in view of the fact that it appears to have cost more than a million dollars to lay a line across the river.

Appellants further argue that Ark. Stats. § 35-601 gives to domestic corporations the right to lay pipe lines

across navigable streams, and to deny foreign corporations engaged in interstate commerce the same right is to discriminate against interstate commerce. In effect, the statute gives to the corporations engaged in the numerous businesses mentioned in the statute the right of eminent domain. The appellants have this same right under the Natural Gas Act. On this point appellants rely heavily on *Oklahoma* v. *Kansas Nat. Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716. That case turns squarely on the proposition that the Oklahoma statute was for the avowed purpose of preventing gas developed in the State of Oklahoma from being transported in interstate commerce. The United States Supreme Court said: "We place our decision on the character and purpose of the Oklahoma statute." Here it cannot be said that the purpose of Ark. Stat. § 35-601 is to interfere with interstate commerce.

The appellants have mentioned other points, all of which we have examined carefully, but we find no error.

The judgments are therefore affirmed.

George Rose Smith, J., not participating; Ward, J., dissents.

Harris *v.* Perron.

5-2101 334 S. W. 2d 705

Opinion delivered May 2, 1960.

Fred E. Briner, for appellant.

No brief filed for appellee.

JIM JOHNSON, Associate Justice. This case involves a suit on a promissory note, set-off and counterclaim.

Appellants, Robert H. Harris and Adelyn Harris, on May 30, 1952, sold to appellees, C. F. Perron and Ruby Perron, a house and lot located in Benton for the sum of $21,000, of which amount a down payment of $10,905 was made. The balance of $10,095 was to be paid in monthly installments of $100 each. The down payment of $10,905 consisted of a cash payment of approximately $1,000 and delivery of a promissory note in the face amount of $13,500, dated July 26, 1949. This note was executed by Carl L. Barnes and Jewel Barnes, payable to the order of Henry V. Young and Nelle F. Young. At the time of the making of the down payment there was a balance owing on the note of approximately $9,095. The note was endorsed by the payees to appellees. Appellees in turn endorsed the note in favor of appellants. Default was made in payment of the note and suit was instituted in the Circuit Court of Saline County against C. F. Perron and Ruby Perron as endorsers on the note for the sum of $5,783.48, representing the balance due on the note after allowing all credits. A set-off and counterclaim was filed by appellees for fixtures and shrubbery which were removed from the premises after the sale and prior to delivery of possession in the amount of $5,000. Upon trial of the case before a jury a verdict in the amount of $83.48 was returned in favor of appellants. Thereupon, appellants moved for a judgment notwithstanding the verdict which motion was granted in part by the trial court in the amount of $783.48. This appeal is from the verdict of the jury and the ruling of the court.

For reversal, appellants contend that there is no substantial competent evidence to support the jury verdict and that the trial court committed error in failing to enter a judgment notwithstanding a verdict in favor of appellants in the amount of $4,256.48.

The record reveals the testimony to be undisputed that there is a balance due on the note of $5,783.48. Endorsement of the note was admitted by appellees. Therefore, the only question presented in trial of the case was the amount of set-off due appellees. The only testimony introduced on behalf of appellees regarding the set-off claimed is that of appellee, Ruby Perron. This testimony consisted of claims for specific amounts for the removal, by appellants, of three specific items which, according to appellees' testimony, were to remain with the house. The first item claimed is for the removal of three rugs or carpets from the dining room, living room and front bedroom. Appellee, Ruby Perron, testified that the value of these items was "about $1,300 or $1,400." The second item claimed in the set-off is for a bamboo curtain which appellee testified appellant told her was worth $100. The third item claimed is for 17 camellias removed from the premises. The value of these was put at $7.50 each, being the replacement cost of each of the 17 camellias at $7.50 each, amounting to $127.50. This constitutes the only testimony introduced by appellee as to the value of property removed or damages claimed in the set-off. While giving appellee's testimony its strongest probative force, even though it was vigorously disputed by appellants, it is impossible for us to find, from appellee's own testimony, the value of the property removed and damages sustained to be in excess of $1,627.50.

The record contained other evidence which was immaterial to the issue here involved that could have easily confused the jury as to its duties and responsibilities in this case. However, on the basis of the competent evidence relative to the value of the property removed, or damages sustained by appellant, and since the jury had been instructed to award judgment to appellant in the amount of $5,783.48, reduced by the amount of the set-off, if any, the most the jury could have reduced the undisputed balance due on the note would have been $1,627.50.

Being unable to find any evidence in the record which would substantiate a reduction in a greater amount, we

are, therefore, compelled to follow our oft repeated rule that the question of sufficiency of evidence is a matter of law, there being no substantial evidence to sustain the verdict of the jury or the judgment of the trial court, and the cause appearing to have been fully developed, the judgment is reversed and the cause is remanded to the trial court with orders to enter judgment in favor of appellant in the amount of $4,155.98. See: *Shanks* v. *Clark,* 175 Ark. 883, 300 S. W. 453; *Jackson* v. *Carter,* 169 Ark. 1154, 278 S. W. 32.

HARKRIDER *v.* COX.

5-2133 334 S. W. 2d 875

Opinion delivered May 9, 1960.

Shaver, Tackett & Jones, for appellant.

Lookadoo, Gooch & Lookadoo by *J. Hugh Lookadoo,* for appellee.

CARLETON HARRIS, Chief Justice. This is the second appeal of this case. See *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226. The original judgment was reversed, and the cause remanded, because of an abstract instruction given.[1] On re-trial, the jury returned a verdict in favor of appellee, Oma Lee Cox, for $8,000, and for the appellee, J. C. Cox, Jr., the sum of $625. From the judgment so entered, appellant brings this appeal.

A brief resume of the facts show that on November 16, 1957, Oma Lee Cox, a young lady sixteen years of age, was living a short distance from Curtis Junction in Clark County, Arkansas. Miss Cox was a senior in high school, and worked on Saturdays and holidays at a department store in Arkadelphia. She generally would catch a bus to that city, but on occasion had ridden with a neighbor, G. W. Harkrider, who also was employed in Arkadelphia. On the aforementioned date, she was given a ride by appellant in his 1952 Chevrolet pickup truck. They proceeded on U. S. Highway 67, where traffic was heavy; there was an extremely dense fog, testimony establishing that visibility was limited to a distance of fifty to one hundred feet. In attempting to overtake and pass a cattle truck, which was proceeding in front of him at approximately 40 miles per hour, Harkrider

[1] On December 8, 1958, this Court reversed and dismissed the judgment obtained by appellee in the trial court, holding there was no substantial evidence in the record to establish wanton and willful negligence. On March 2, 1959, a rehearing was granted, the opinion of December 8th withdrawn, and a substituted opinion filed, wherein the judgment in the trial court was reversed and the case remanded.

moved to the left side of the highway, and collided with an oncoming vehicle. Miss Cox suffered serious injuries, and through her father as next friend, instituted suit against appellant. Mr. Cox sought recovery individually for hospital, medical, and nursing bills, and loss of services of his daughter. On trial, the amounts, hereinbefore mentioned, were awarded.

For reversal, appellant relies upon seven points, the first being a contention that the evidence was not sufficient to sustain a finding of willful and wanton disregard on the part of Harkrider. This point was thoroughly and fully discussed in the opinion of March 2, 1959, including a full recitation of the events leading up to, and including, the collision. The court concluded its discussion on this point by stating "the rule is, that when fair-minded men might differ, then the question is one for the jury", and held that a jury question was made as to whether Harkrider was guilty of willful and wanton negligence. The proof in the present case, relating to the collision, was practically the same as in the first trial, no less substantial, and no additional reasons or arguments are made which are persuasive of an erroneous holding.

Next, appellant complains of certain instructions given by the court (3, 4, 5, 6, 7, 11, 12, 13, 14 and 14½). Instruction No. 3 defines "proximate cause"; No. 4 defines "ordinary care"; No. 5, "negligence"; No. 6, "contributory negligence"; and No. 7, "gross negligence". These instructions correctly defined the terms involved, but appellant argues that the instructions led the jury to believe that appellees were entitled to recover on a showing of mere negligence, or negligence less than the willful and wanton degree. We disagree. As stated in *Pinkerton* v. *Davis,* 212 Ark. 796, 207 S. W. 2d 742:

"When all the instructions are thus considered we cannot say that they incorrectly presented the law, or that the jury could have been misled thereby."

In Instruction No. 8, the court defined "willful and wanton negligence". Such instruction was as follows:

"To operate an automobile in willful and wanton disregard of the rights of others is a course of conduct which involves deliberate, intentional or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. It is greater than gross negligence.

To be willfully negligent, one must be conscious of his conduct, and, although having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury."

In Instruction No. 18, the court instructed the jury as follows:

"It is agreed by the parties hereto that Oma Lee Cox was a guest in the pickup truck operated by the defendant Harkrider. Our law provides that no person transported as a guest shall have a cause of action against the operator unless the vehicle was willfully and wantonly operated in disregard of the rights of others.

Therefore, before Oma Lee Cox can recover in this case, she must establish by a preponderance of the evidence that her injuries received in this upset were due to some act or acts of willful and wanton misconduct on the part of her host, the defendant, Harkrider."

The jury therefore, was plainly told that recovery was predicated upon willful and wanton misconduct or disregard on the part of Harkrider, and this requirement was reiterated in Instructions 19 and 20. The latter reads as follows:

"You are told that even though you believe from a preponderance of the evidence that the defendant driver was guilty of gross negligence in the operation of his vehicle — that degree of negligence would not of itself entitle plaintiff Oma Lee Cox to recover. Oma Lee Cox must go further and show by a preponderance of the evidence that Harkrider persisted in a course of conduct which to the knowledge of an ordinarily prudent person would naturally or probably result in injury."

Appellant's contention is held to be without merit.

Instruction No. 11 told the jury that they could not speculate on the issue of negligence or any degree thereof. Appellant states:

"Willful and wanton disregard has often been described by this Court as greater than any degree of negligence. Therefore, this instruction concerning negligence and degrees thereof is abstract law, misleading, and erroneous. We are not dealing with negligence or any degree thereof. We are dealing with willful or wanton misconduct."

We do not agree that willful and wanton disregard or misconduct is an area, or field, of law entirely distinct and apart from negligence. Our previous opinion several times mentions "willful and wanton negligence". "Willful and wanton negligence" and "willful and wanton disregard" are synonymous in meaning, and as stated in the previous paragraph, the court properly instructed the jury in this regard.

Instructions 12, 13, 14, and 14½ all deal with "rules of the road", and were proper instructions. Appellant states:

"The jury should have been advised, in accordance with defendant's request, in each rule-of-the-road instruction, that plaintiff would not be entitled to recover unless the jury found that the defendant was guilty of willful and wanton disregard for the consequences of his acts when violating any rule of the road."

We reiterate that the "willful or wanton" feature was covered in the instructions heretofore set out. The same is true with regard to appellant's Requested Instruction No. 1.

Finally, appellant argues that the judgment for the benefit of Oma Lee Cox was excessive.[2] The testimony on this point reflected that she was hospitalized for seven

[2] The judgment given in the first trial was $3,000. Appellant makes no argument that the present judgment in favor of the father, in the amount of $625, was excessive.

days after the accident; after returning home, she stayed in bed most of the time for a week, and returned to school after about two weeks; that she constantly complained of pain in her head and back; she has been very nervous since the accident, and is upset by riding in an automobile; that she has headaches for three or four days at a time. Mr. Cox testified that Oma Lee was unconscious from Saturday morning until Tuesday morning, and further testimony reflected that the girl received cuts on her forehead, across her nose, over the eye, on each side of her jaw, and on her tongue. Mrs. Cox, the mother, testified that her daughter's legs were "swollen clear over her shoes", and that Oma was not able to help with household work; that the daughter is unusually nervous, and will "cry about anything"; two teeth were chipped and capped. Dr. Charles D. Yohe of Hot Springs, a psychiatrist, testified that he examined Miss Cox on two occasions (July 15, 1959, and September 21, 1959). The witness stated that on the first occasion he held a general exploratory interview, and gave a neurological examination. He also gave the Bender-Gestaldt test. On the second occasion, he gave the Stanford-Binet, the Revised Stanford-Binet, and the Rorschach test. The witness stated that on her first occasion, Miss Cox was pleasant and cooperative, but had little to say. "She was rather empty, vapid * * * her responses to most any question or subject were inadequate, apathetic, disinterested, *et cetera.* She didn't seem to grasp adequately most of the subjects brought up." He stated that the Bender-Gestaldt test was highly suggestive of organic brain damage, and the additional testing was subsequently performed. The doctor then testified: "It is quite apparent from the findings I have here that there is definite organic brain damage, and that her intelligence is at present that of a moron; that her mental capacity and intelligence has been reduced to 74." He then explained that IQ test scores of 50 to 75 are generally referred to as scores of a moron, and that general intelligence is in the area of from 90 to 100. Further, "it also could be stated that the pattern of her test scores were those typical for organic deterioration of intelli-

gence. By that I mean it is very suggestive that once her intelligence was higher, and that it has been reduced to its present level." Dr. Yohe then stated that, in his opinion, this was a permanent condition, but if there should be any change, "it would be in a downward direction, rather than in an upward direction." The doctor was firmly of that view, despite the fact that on cross-examination, it was developed that the young lady's school grades were substantially the same after the accident, as before. He testified that injuries producing several days of unconsciousness are very often associated with permanent reduction in intelligence. The witness stated that it was fortunate that Miss Cox had already had considerable education prior to the accident, because, in his opinion, her peak of education has been reached. Based on information that he had obtained concerning the mentality of Miss Cox, prior to the collision, including an IQ test given the young lady sometime during the year preceding the crash (wherein she made a score of 96), it was the opinion of Dr. Yohe that the injuries sustained in the wreck were the cause of the reduction in mental capacity.

Dr. William I. Porter, a neurosurgeon of Little Rock, testified that he could find nothing abnormal about Miss Cox's legs or hands, and found no evidence of any brain damage. He further stated that he could not detect any gross deficits in her mental function, and considered her alert and cooperative. He found nothing to indicate that the girl was a moron, though admittedly, he did not give the tests referred to. The doctor was obviously of the opinion that some of the tests were of little value in determining whether one had suffered a brain injury. He found no evidence of injury to the spinal cord or nerves, but did mention the scars which Miss Cox had shown the jury. Dr. Porter indicated that these might be "smoothed out" by careful plastic surgery. He testified that she did receive a severe cut on her tongue, but that the tongue had healed, and was not, in any manner, deformed. The doctor was unable to say whether the headaches complained of could be traced to the injuries received in the collision, but did state that

he found no nerve or tissue damage to the brain, and was of the opinion that Oma Lee received no permanent injury to the brain at the time of the collision.

It is not for us to say which diagnosis was correct. That question was properly one to be considered by the jury. As was stated in *Arkansas Power and Light Company* v. *Mart,* 188 Ark. 202, 65 S. W. 2d 39:

"It is contended also that the verdict of the jury is excessive. The evidence is in conflict as to the extent of appellee's injuries. The jury may have believed the evidence of appellee's witnesses, and, if so, it was justified in returning the verdict it did. This was a question of fact which was the province of the jury to determine, and as we have many times said, although we might not agree with the jury, yet if there was any substantial evidence to sustain its verdict, we are not authorized to disturb it. In other words, the jury is the judge of the facts, and we cannot substitute our judgment of the facts for the judgment of the jury."

Likewise, we have, on innumerable occasions, held that in determining the sufficiency of the evidence to support a verdict, such evidence must be viewed, with every reasonable inference arising therefrom, in the light most favorable to appellee. *Missouri-Pacific Railroad Company* v. *Dotson,* 195 Ark. 286, 111 S. W. 2d 566. The evidence on behalf of appellee, if believed by the jury, was sufficient to sustain the verdict.

Finding no reversible error, the judgment is affirmed.

VINES *v.* ARK. POWER & LIGHT CO.

5-2135 337 S. W. 2d 722

Opinion delivered May 9, 1960.

[Rehearing denied September 19, 1960]

Melvin T. Chambers, Stein & Stein, for appellant.

House, Holmes, Butler & Jewell; McKay, Anderson & Crumpler, for appellee.

J. SEABORN HOLT, Associate Justice. This is an action for the wrongful death of Leonard Vines who was appellant's husband.

On June 10, 1955, while Leonard Vines was employed by the Southwest Unit Structures, Inc., and while moving a beam with the aid of a "gin pole", the pole came in contact with a high voltage line built and maintained by appellee, and the electricity coming down the "gin pole" caused Leonard Vines' death. Alice Vines, widow of Leonard Vines, on March 28, 1957, brought suit under Ark. Stats., §§ 27-903—27-904, against appellee for her husband's alleged wrongful death. She prayed

judgment: "Individually, — against the defendant in the sum of $80,000.00 for the loss of love, affection, association and consortium; and also the sum of $116,563.04 for the loss of earnings; and as administratrix she prays for judgment against the defendant in the sum of $25,000.00 for pain and suffering that Leonard Vines endured prior to his death". As indicated, the death of Leonard Vines occurred June 10, 1955. The original, or first suit was filed on March 28, 1957. The case was reached for trial October 20, 1958, at which time appellant [Alice Vines] took a non-suit. Later, a second suit was filed by appellant on July 10, 1959. Appellee [defendant below] demurred to this last complaint on the grounds that since the present suit was instituted under the above sections of the statute and a non-suit was taken by appellant and another suit was filed more than two (2) years from the date the cause of action arose [June 10, 1955], this second suit was barred by the statute of limitations. The trial court sustained this demurrer and dismissed this complaint. This appeal followed.

For reversal appellant says: "(1) That if a new suit be filed within one year from the time of non-suit, then the cause of action is saved even though more than two years had passed since the cause of action arose. (2) That Alice Vines had a personal cause of action, and it was saved from the running of the Statute of Limitations."

The two provisions of the statute under which this suit was brought, commonly known as the "Lord Campbell Act", were enacted in 1883 and provide: "Wrongful death.—Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although

the death shall have been caused under such circumstances as amount in law to a felony." And "27-904. Parties—Beneficiaries—Damages—Limitation of action.—Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. Provided, every such action shall be commenced within two [2] years after the death of such person." Ark. Stats., § 27-908.

Prior to 1883, a cause of action for injuries resulting in death did not survive the deceased person or exist at common law, and our legislature enacted the above act obviously to give a cause of action to the widow and next of kin and the personal representative of a deceased person. It will be observed that this act, which creates a cause of action, also has a built-in statute of limitations [§ 27-904] of two years which was in effect when Vines was killed June 10, 1955.

Appellant contends that since suit was first filed on March 28, 1957, well within the two year period following Vines death on June 10, 1955, then non-suited on October 20, 1958, and within a year following the date of the non-suit the present suit was filed, that it was filed in time under our non-suit statute [Ark. Stats., § 37-222] which provides for one year within which to file a new action after non-suit. We do not agree. In *Smith v. Missouri Pacific Railroad Company,* 175 Ark. 626, 1 S. W. 2d 48, a case in which suit was instituted almost three years after the death of the intestate and based on the above sections [27-903—27-904], we said:

"The general rule is that, where a cause of action does not exist at common law, but is created by the statutes of a State, it only exists in the manner and form and for the length of time prescribed by the statutes of the State which created it. * * * Therefore we conclude that it is now well settled that, where a statutory right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right of action, and will control, no matter in what forum the action is brought."

But appellant says: "(2) * * * that Alice Vines joins in this suit individually for the loss of services and companionship of her husband. This is an individual action on her part, and she should not be deprived of it" and "* * * since her damages in the loss of services and companionship had to be brought in this suit she should not be barred even if the action by the administratrix is barred." Again we do not agree.

We think it was the intention of the legislature when it enacted Lord Campbell's Act creating a cause of action, that did not exist before or at common law, "for the exclusive benefit of the widow and next of kin of such deceased person, * * * and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person," [Ark. Stats., § 27-904] to cover and include every right of recovery of pecuniary damages to which the widow would be entitled growing out of her husband's death, including consortium, loss of services and companionship, and to limit to one cause of action [thus avoiding a multiplicity of suits] which must be brought within a period of two years from the date of her husband's death. "The term 'cause of action' is generally understood as meaning the whole cause of action; that is, all the facts which together constitute plaintiff's right to maintain the action; every fact which

it is necessary to establish in order to support the right to judicial relief." 1 C. J. S. Actions § 8 (g) p. 986.

Finding no error, the judgment is affirmed.

COWARD *v.* BARNES.

5-2062 334 S. W. 2d 894

Opinion delivered May 9, 1960.

Douglas Bradley, for appellant.

E. D. McGowan, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal necessitates a study of the law relating to garnishments. C. C. Coward, appellant, recovered judgment against Pfeifer on September 2, 1958 for $821.03 and interest and costs. On September 30, 1958 Coward had a writ of garnishment served on appellee, Luther Barnes, ". . . to answer what goods, chattels, moneys, credits, and effects he may have in his hands or possession belonging to said defendant, Ralph Pfeifer, to satisfy

the judgment aforesaid". On October 3, 1958 Barnes filed answer, stating that Pfeifer was then indebted to him, and that he (Barnes) had nothing in his hands then belonging to Pfeifer. On September 24, 1959 trial in the Circuit Court, without a jury, resulted in a judgment discharging[1] Barnes as garnishee; and from that judgment Coward prosecutes the present appeal.

At the outset it is well to mention that the factual findings of the Circuit Judge have the force and effect of a jury verdict. (*Pate* v. *Fears,* 223 Ark. 365, 265 S. W. 2d 954.) Barnes testified that Pfeifer was his sharecropper for 1958; that he furnished Pfeifer $817.40 in cash during the crop year; that half of the gross crop would go to Pfeifer, less — from Pfeifer's said half — all advances; that when the garnishment was served and answer made on October 3, 1958, only three bales of the 1958 crop had been gathered, and that no proceeds[2] had been determined because the remainder of the crop had not even been picked. One who cultivates land for a specified portion of the crop, the landlord furnishing the land, team, and tools, is not a tenant, but a laborer. *Gardenshire* v. *Smith,* 39 Ark. 280; *Hammond* v. *Creekmore,* 48 Ark. 264, 3 S. W. 180; *Douglas* v. *Lamb,* 157 Ark. 11, 247 S. W. 77; *Houck* v. *Birmingham,* 217 Ark.

[1] Our cases hold that unless the answer of the garnishee is denied by written pleadings, it is taken as conclusive. See *Kochtitzky & Johnson* v. *Malvern Gravel Co.,* 195 Ark. 84, 111 S. W. 2d 478, and cases there cited. The transcript before us does not contain a written pleading by Coward controverting the answer of Barnes; but we will not rest our opinion on that omission because it is not even mentioned or suggested in the appellee's brief, and such a pleading controverting the garnishment might have been filed and inadvertently omitted from the transcript, since the absence of such denial is not mentioned.

[2] It was shown — at the trial in September, 1959 — that the total 1958 cotton crop was thirty bales, which, after paying ginning, brought a gross sum of $5,392.59; and that one-half of what remained of this sum, after paying advances and expenses for which Pfeifer was liable, ultimately belonged to Pfeifer. The calculation appears to be as follows:

Sharecropper's ½ gross		$2,696.29
Less cash advances by Barnes to make the crop	$ 817.40	
Less cost of fertilizer and poison	340.76	
Less advance for cotton picking	1,223.36	
Total charged against Pfeifer		2,381.46
Net balance to Pfeifer from crop		$ 314.83

449, 230 S. W. 2d 952. Barnes, being thus an employer of Pfeifer, was subject to garnishment proceedings under § 31-501 Ark. Stats., just as any other employer would be subject to garnishment proceedings; and our statute (§ 31-502) recognizes that wages may be garnisheed.

The question presented is, whether the undetermined amount due the sharecropper Pfeifer, was subject to garnishment on September 30, 1958 or on October 3, 1958 (*Harris* v. *Harris,* 201 Ark. 684, 146 S. W. 2d 539). Did Barnes have anything in his hands definitely belonging[3] to Pfeifer on either September 30, 1958 or October 3, 1958? Did it belong to Pfeifer at all events, or was any such amount entirely contingent? In *Wyatt Lbr. Co.* v. *Hansen,* 201 Ark. 534, 147 S. W. 2d 366, we had occasion to consider the matter of contingent obligations not subject to garnishment proceedings. In that case there had been a garnishment of the owner, Hansen, for whatever might be due by him to a building contractor, whose work had not been completed or finally accepted at the time of garnishment or answer. We held that any amount due to the contractor by the owner was entirely contingent[4] and, therefore, not subject to garnishment at the times involved in the case. Mr. Justice Frank G. Smith, speaking for a unanimous Court, said:

"Another reason why relief by way of garnishment may not be awarded the Wyatt Company is that the building contract was not fully completed. It is argued that there had been a substantial compliance with the original written building contract. But the court made a specific finding to the contrary; and we cannot

[3] This is really the point on which the learned Circuit Judge decided the case; for he stated, after argument of counsel: "I cannot find any evidence that Mr. Barnes tried to beat the creditor out of the debt. If I did, I wouldn't hesitate to hold him responsible for it. I think he, under advice of counsel, stated what the situation was on September 30th."

[4] To the same effect see 4 Am. Jur. p. 682, "Attachment and Garnishment" § 200; annotation in 2 A.L.R. 506, entitled: "Money due only on further performance of contract by debtor as subject to garnishment;" and annotation in 134 A.L.R. 853, entitled: "What amounts to a contingency within statute or rule permitting garnishment or similar process before an obligation is due or payable, if payment or delivery is not dependent upon a contingency".

say that this finding is contrary to the preponderance of the evidence. But, even so, by the terms of the written contract, additions thereto became a part thereof . . .

"There is an extended annotator's note to the case of *McKendall* v. *Patullo,* 52 R. I. 258, 160 Atl. 202, 82 A. L. R. 1111, and the annotator cites many cases in support of the following note: 'It is held that, in order that a garnishee may be charged, there must be an existing debt at the time of the service of the garnishment, and not a mere conditional or contingent liability. So, in the case of a construction contract, where the employer is not to become indebted to the contractor until performance in all particulars, there is no indebtedness owing to the contractor which may be reached in a garnishment proceeding until the terms of the contract have been performed.'

"Here, as has been said, the contract price for the work was payable 'Upon the completion of the work.'

"In the case of *Medley* v. *American Radiator Co.,* 27 Tex. Civ. App. 384, 66 S. W. 86, it was said: 'In order for a fund or liability to be subject to garnishment, there must be no condition precedent, no impediment of any sort between the garnishee's liability and defendant's right to be paid . . .' "

Even though the 1958 cotton crop may have been matured at the time Barnes answered the garnishment, nevertheless the major portion of the cotton had not been picked, and it was Pfeifer's duty to pick this cotton and carry it to the gin. The cost of picking was a sizeable advance. The gin tickets were introduced in evidence, and twenty-three of them are dated after October 6, 1958. Who could have told on October 3, 1958 how many bales of cotton Pfeifer would make, when part of the cotton was still in the field ungathered? Who could have told the price to be received from the cotton? Barnes testified: "We always wait until we get through before we settle up". So on October 3, 1958, whether Barnes might owe Pfeifer any amount was entirely contingent on future events. We cannot view the results as they

were at the time of the trial in September 1959. The issue is, what was the situation on October 3, 1958? In the annotation in 2 A. L. R. 506, the holdings are summarized in this language:

"But where a further performance of a contract is necessary before money payable thereon becomes due, the payment is conditioned on the performance, and is not subject to garnishment until the condition has been fulfilled . . . The rule rests on the view that 'as a plaintiff can have no greater right against the garnishee than the defendant would have, and can occupy no better position with respect to the garnishee than the defendant could in a suit brought by him against the garnishee, it follows that, where a contract between the defendant and the garnishee had not been fully performed by defendant at the time of attachment by plaintiff, the garnishee is not chargeable'. *Johnson* v. *Healey* (1913), 35 R. I. 192."

We therefore conclude that the evidence is amply sufficient to support the finding and judgment of the Circuit Court to the effect that on September 30, 1958, as well as on October 3, 1958, any amount Barnes might ever owe Pfeifer was entirely too contingent to be subject to garnishment process.

Affirmed.

5-2139 334 S. W. 2d 891

Opinion delivered May 9, 1960.

[redacted]

Lyman L. Mikel, A. A. McCormick, for appellant.

Rose & Kizer, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellant to foreclose a real estate mortgage executed by Henry Dodd on February 9, 1957, securing a note for $256. The debtor died, insolvent, on November 13 of that year, and his estate was administered in the probate court. In the course of those proceedings the adminis-

trator obtained an order for the sale of the land in question, for the payment of debts. The land was duly sold on April 14, 1959, to the appellee Estes, who bid and paid $260 for the property. The sale was promptly confirmed, and Estes received a deed from the administrator.

Thereafter, on June 22, 1959, the appellant filed this foreclosure suit against Estes and the mortgagor's heirs. The complaint seeks an *in rem* foreclosure decree against the land. After a trial on the merits the chancellor announced two reasons for dismissing the complaint: First, the plaintiff had failed to prove that Dodd executed the note sued upon, and, secondly, the proceedings in the probate court were a bar to the maintenance of a suit to foreclose the mortgage.

Upon the first point the statutes simplifying the proof of written instruments are not involved, for the complaint was not accompanied by an affidavit of merit, as required by Ark. Stats. 1947, § 27-1142, and the deceased mortgagor was of course not a party to the case within the provisions of § 28-927.

At the trial the plaintiff introduced the original mortgage, which Dodd had signed by mark, before witnesses, and had acknowledged before a notary. The mortgage contains a description of the note and was recorded on November 15, 1957. (The appellees point out that the instrument was not placed of record until two days after Dodd's death, but we do not see how this fact makes any difference. *Martin* v. *Ogden,* 41 Ark. 186.) After the plaintiff had rested the chancellor permitted him to reopen his case and introduce the original note, which was also signed by mark and witnessed. The defendants objected to the introduction of the note, on the ground that the plaintiff had not called anyone to prove its execution by Dodd, but the chancellor permitted the note to be received in evidence.

We are unable to agree with the chancellor's decision to dismiss the case for want of proof that Dodd signed the note. The mortgage, having been recorded,

was admissible without proof of its execution. *Straughan* v. *Bennett,* 153 Ark. 254, 240 S. W. 30. Hence the case seems to fall within our holding in *Goodman* v. *Pareira,* 70 Ark. 49, 66 S. W. 147, where it was said: "But the deed of trust contained a full description of the notes, and it was duly acknowledged and filed for record. This was sufficient proof of the execution of the notes."

Moreover, it will be remembered that the court admitted the note in evidence over the same objection that is now urged by the appellees. Had the court sustained the objection the plaintiff might have produced a witness to show that the note was genuine. Thus the reception of the note into evidence may have led the plaintiff astray, and it would be manifestly unfair for us now to hold that his proof is fatally deficient.

The chancellor's second point concerned the effect of the probate proceedings upon the present suit. It is unfortunate that Estes fell into the error of purchasing encumbered property, but that fact does not entitle him to take free of the mortgage, as a *bona fide* purchaser. A court can offer at a judicial sale only such title as is held by the person or estate whose interest is being sold. Consequently it is firmly settled that the rule of *caveat emptor* applies to such a sale, so that the purchaser takes subject to outstanding liens. *McIlroy* v. *Fugitt,* 182 Ark. 1017, 33 S. W. 2d 719, 73 A. L. R. 1223. Estes was bound by constructive notice of the appellant's recorded mortgage.

The record does not support the appellees' suggestion that the appellant participated in the probate proceedings to such an extent as to waive the lien of his mortgage or to be estopped from asserting it. The appellant filed a claim against the estate, showing it to be a secured claim, but a mortgagee is entitled to prove his claim against the estate of the deceased mortgagor, for otherwise the statute of nonclaim would prevent the mortgagee from reaching other assets if the mortgaged property proved insufficient to satisfy the debt. Hughes, Arkansas Mortgages, § 322. The mere filing of the claim did not affect the appellant's right to foreclose.

The probate court might have ordered the property sold free of the appellant's lien by giving him a preferred claim against the proceeds of sale, Ark. Stats., § 62-2609 (e); but there was no attempt to follow this procedure. The administrator simply applied for and obtained a routine order for the sale of the land to pay debts of the estate. It is argued that the appellant should have resisted the order of sale or appealed from it; but there are two short answers to this argument. One, there is no showing that the appellant was given any notice of the order, and, two, any protest by him would have been unavailing, since the probate court unquestionably had the power to order that the estate's equity in the property be sold for the payment of debts. There is not the slightest intimation in the record that the appellant took any affirmative step that might have induced prospective purchasers at the sale to suppose that the property was being sold free from his mortgage lien.

In the record and in the briefs there is some passing mention of the fact that Estes's wife is not a party to this proceeding. It is true that Estes has succeeded to the original mortgagor's interest in the land, and hence his wife's inchoate dower entitles her to redeem. But the fact that she has not been joined as a defendant does not call for a dismissal of the case; it means only that her right of redemption is not being foreclosed. See Hughes, *supra,* §§ 369 and 379. Upon remand the plaintiff should be permitted to bring Mrs. Estes into the case if he so desires.

Reversed and remanded for further proceedings.

5-2143 334 S. W. 2d 887

Opinion delivered May 9, 1960.

[redacted]

James R. Hale, for appellant.

Thompson & Thompson by *Edgar R. Thompson,* for appellee.

PAUL WARD, Associate Justice. J. Hal Jones died testate on October 16, 1958, and shortly thereafter appellant was appointed executrix. On the 25th of the same month the first notice to creditors was published which meant that April 25, 1959 was the last date (as provided by Ark. Stats. § 62-2601) on which a claim could be filed against the Jones estate. On November 6, 1958 appellee, Arkansas Farmers Association, Inc., filed its claim against said estate in the amount of $495.00. This claim purportedly was for the sale of chicks by appellee to said Jones although it was not so stated in the claim as filed. The executrix disallowed appellee's claim on May 28, 1959. Later, after a full hearing on the merits, the Probate Court ordered appellee's claim paid in full. It is from said Order that appellant prosecutes this appeal.

For a reversal of the Order of the Probate Court appellant contends (a) that the said claim was not made out and filed according to the provisions of Ark. Stats. § 62-2603; (b) that the Probate Court erred in admitting testimony offered by appellee to explain and prove its claim; and (c) that there is no competent proof that any goods or property were sold or delivered by appellee to said Jones. Other objections are discussed by appellant which we shall briefly note later. We are unable, however, to agree with appellant in any of the three contentions above mentioned.

(a) The claim heretofore mentioned which was filed by appellee merely showed the invoice number and a balance of $495.00 on what appears to be a statement blank or letterhead of appellee. It was certified by Waymond W. Elrod, Comptroller. Attached to the claim was an affidavit by appellee's attorney to the effect that all payments on the account had been credited, that there were no offsets, and that the amount of the claim ($495.00) was correct. It is appellant's contention that the above stated claim does not satisfy the requirements of said § 62-2603 in that it does not *describe the nature* of the claim. The pertinent part of this section reads: "No claim shall be allowed against an estate . . . unless it shall be in writing, describe the nature and amount thereof, if ascertainable, . . . that the amount is justly due, . . ."

We think it is unnecessary to decide (and we do not here decide) whether in this instance appellee's claim was sufficiently described to meet the requirements of the statute, because we have reached the conclusion that the executrix waived any possible non-compliance on the part of appellee by failing to deny the claim or to object to its form until the statute of non-claim had run. As heretofore noted, the last day for filing claims was April 25, 1959 and the executrix did not deny appellee's claim until May 28, 1959. There are several sections of the statutes (§ 62-2601, § 62-2602, § 62-2603, and § 62-2604) which deal with the filing of claims against an estate. It appears to us that the overall purpose of

these statutes is to effect and facilitate the payment of just claims against an estate within the specified time and not to defeat a just claim on a technicality that might entrap the claimant. The rule which we think achieves the above purpose, and which we hereby approve, is well stated in 21 Am. Jur., Page 593, § 373, *Form and Requirements of Claim.* It is there stated: "If there is any uncertainty in a claim filed against a decedent's estate, it is incumbent on the personal representative to call for clarification. Where no objection is made by the executor or administrator against the sufficiency of the form in which a claim is stated he may be deemed to have waived the insufficiency. If he relies on defects in form in refusing to allow a claim, he should make known his objection seasonably."

(b) In view of what we have heretofore said and the conclusion heretofore reached it must necessarily follow that appellee had the right to introduce testimony in Probate Court in an attempt to establish the validity of its claim. This is what appellee attempted to do in the introduction of its testimony and we are unable to see how appellant was prejudiced in any way because she had full opportunity to show that the claim was not a valid one if she desired to do so.

(c) Appellant's assertion that "there is no competent proof in the record showing that any goods or property were ever sold or delivered to J. Hal Jones", is not substantiated by the record. Waymond W. Elrod, appellee's employee in the capacity of Comptroller and Chief Accountant, states that he was in charge of all of the records, that the records reflect the transactions between appellee and Hal Jones; that they reflect "the sale to Mr. Jones of 4,500 Ozark White Cornish chicks" at ten cents each plus debeaking and vaccination. Also the record contains, as an exhibit, a full sheet showing numerous transactions on numerous dates between appellee and Hal Jones, verified by Elrod, and showing a balance due by Jones to appellee in the amount of $495.00. We find nothing in the record to contradict the

above. In fact it does not appear that appellant seriously challenged the validity of the claim on its merits.

The record reflects that appellee filed a suit in the Circuit Court on exactly the same account mentioned above against J. Hal Jones approximately forty days before Mr. Jones died. Appellant makes several objections based on the contention that the suit was not properly revived against the executrix and on the fact that Ark. Stats. § 62-2602 was not followed in an attempt to perfect his claim by filing a copy of the Circuit Court petition in the Probate Court, etc. It is sufficient to say, we think, that this suit was voluntarily dismissed by appellee and that it chose to present its claim as heretofore set out.

It must follow, therefore, from what has been heretofore said that the Order of the Probate Court must be, and it is hereby, affirmed.

Affirmed.

KAGEN AND TIBBETT *v.* STATE.

4974 334 S. W. 2d 865

Opinion delivered May 9, 1960.

J. Sam Wood, Martin L. Green, Jack Rose, for appellant.

Bruce Bennett, Attorney General by *Ben J. Harrison,* Asst. Attorney General, for appellee.

SAM ROBINSON, Associate Justice. Appellants appeal from convictions of involuntary manslaughter and sentences of three years each in the penitentiary. The only point we reach is whether the evidence sustains the verdicts.

On August 19, 1959, the appellants, Bruce Kagen and Jimmie Tibbett, and Clinton Silvey and Claudine Gilliam, met at the DeLuxe Cafe in Fort Smith. They all agreed to go swimming near Sugar Loaf Mountain. They left in Silvey's car and went to two or three places attempting to get other girls, but were unsuccessful in that respect. They then proceeded to buy some whiskey, gin and vodka. Silvey was driving the car and did not go to the swimming place near Sugar Loaf, but drove to a strip pit full of water, made in a mining operation. On the way Claudine Gilliam became very drunk and passed out, and either she or someone else took her clothes off, and apparently she had vomited on herself.

According to the evidence, Tibbett took her down to the water in the strip pit, washed her and bathed her face; brought her back to the car and put her clothes on. According to the statements of appellants, they endeavored to get Silvey to take all of them back to town because of the condition of the girl. Silvey became very angry and got out of the car with a pair of metal knucks on his hand and made an attack on the appellant Kagen. The two clinched, and Tibbett came up and caught hold of Silvey, who then asked them to turn him loose, that everything was all right; but when they turned Silvey loose, he ran away a short distance and began throwing rocks at Kagen and Tibbett, who were standing near Silvey's car. It is indicated that the rocks struck the car, because pictures introduced in evidence show damage to the vehicle.

The appellants did not testify at the trial, but made statements subsequent to the tragedy that they had thrown one rock each in the direction of Silvey at the time and that he could have been struck by one of the rocks. Appellants also stated that Silvey then ran to the strip pit and entered the water; that they threw nothing at him while he was in the water, only endeavoring to get him to come back and drive them to town, but that Silvey swam on out into the water and they heard nothing more of him. They concluded that he drowned or had come out on the other side of the pit. Appellants attempted to start Silvey's car, but could not do so. They then walked to Eugene Johnson's house about a half-mile away, taking Claudine Gilliam with them. Tibbett assisted her in walking. The Johnsons had no telephone, but the Johnson boy went with one of the appellants to a neighbor's house about two and one-half miles distant, and the sheriff was called.

The sheriff went to the scene immediately and after searching around the strip pit and seeing no evidence of anyone having come out of it, made arrangements to obtain grappling hooks for the purpose of dragging the strip pit, which was very deep. Two sets of grappling hooks were obtained, one of which was made of an iron

bar about four feet long, with sharp hooks about three inches long extending from it. After dragging the pit for a considerable time with both sets of grappling hooks, the body had not been located. Skin diving apparatus was then obtained, and by the use of this equipment Silvey's body was found at the bottom of the pit in water about 60 feet deep, at a point about the middle of the pit, which is approximately 125 feet wide, and about 60 feet from the end of the pit. In other words, the body was at least 60 feet from dry land in any direction. When the body was brought to the surface, it was found that there was a gash in the scalp to the rear of the top of the head, about three-quarters of an inch long. When found, the body was lying face down, with the hands under the body, and there were marks where grappling hooks had passed close to the body. In fact, mud had been stirred up by the hooks and settled on the body. No doubt the gash in Silvey's head could have been made by the grabs. An autopsy was made and the autopsy report contains this statement: "The autopsy findings indicated that the cause of death was due to asphyxia (drowning). A laceration was found at the top of the scalp. This was strictly in the skin and was superficial. No evidence of fractured skull or traumatic injury to the brain could be seen. The other findings are incidental." The autopsy report also shows that the body contained 191.4% of alcohol, and the undisputed evidence is that with this amount of alcohol in the body a person would be very drunk.

If appellants made a vicious attack on Silvey, causing him to jump into the strip pit in an effort to save his life or to prevent great bodily injury, they would be guilty of homicide. *Tharp* v. *State,* 99 Ark. 188, 137 S. W. 1097. But there is no substantial evidence that this occurred. The deceased could not have got to a point above where the body was found except by swimming. There is no current in the pit, and the record does not indicate that there was a boat. And of course if appellants had struck him in the head with a rock while he

was in the water and knocked him unconscious, causing him to drown, they would be guilty. There is no substantial evidence to sustain either theory. Even assuming that the appellants were throwing rocks at Silvey and he felt it necessary to make a hasty retreat, it was wholly unnecessary that he jump into the water in order to get away. Pictures of the scene of the killing were introduced in evidence, and there is a clear strip of ground about 50 feet wide around the strip pit. Silvey could have gone in any one of three directions without going into the pit. The fact that Silvey did jump into the pit, as stated by appellants, is corroborated by the fact that his shoes were found at the place 30 or 40 feet from the pit, where they said he ran. The shoes were about 25 feet apart, indicating that they had come off while he was running. They were not laced up. In 25 A. L. R. 2d 1187, it is stated that one may be found guilty of some degree of homicide by causing another to jump to his death, but it must appear that the act of the deceased was such a step as a reasonable man might take and that his apprehension was of immediate violence or injury and must have been well grounded. Cases from eight states are cited in support of this doctrine.

When Silvey's body was found, there was a pair of metal knucks on his left hand. The evidence is that there was no indication that Tibbett had been drinking, and Kagen showed no signs of intoxication, although he stated to the sheriff that he had taken some drinks. Claudine Gilliam was so drunk that according to her own testimony she passed out before arriving at the strip pit and still needed help in walking to Johnson's after the tragedy occurred, and the sheriff testified that she was groggy when he got to the Johnson house. The State lays much stress on the fact that at just about the place where appellants said Silvey was when the rock throwing occurred there are some blackberry vines, and although Silvey had on no shirt, there were no scratches on his body. A picture of the vines is in the record and they do not appear to be so high as to indicate that they would necessarily scratch the top part of a person's body.

Moreover, there is no evidence in the record that Silvey was actually in the blackberry vines. The State cites the cases of *Tharp* v. *State,* 99 Ark. 188, 137 S. W. 1097, and *Padgett* v. *State,* 151 Ark. 290, 236 S. W. 603, in support of the proposition that when one is killed in trying to avoid an unlawful assault, such a happening will sustain a homicide conviction, but in neither case are the facts similar to the case at bar.

There is no evidence whatever that any rocks were thrown at Silvey while he was in the water, and to say that the accused threw at him in such circumstances would be pure speculation. Professor Wharton, in his work on Criminal Evidence, Vol. 2, § 872, states: "To sustain a conviction, proof of the criminal agency is as indispensable as the proof of death. The fact of death is not sufficient; it must affirmatively appear that the death was not accidental, that it was not due to natural causes, and that it was not due to the act of the deceased. Where it is shown by the evidence, on one side, that death may have been accidental, or it may have been the result of natural causes or due to suicide, and on the other side, that it was through criminal agency, a conviction cannot be sustained. Proof of death cannot rest in the disjunctive. It must affirmatively appear that death resulted from criminal agency."

In *Taylor* v. *State,* 211 Ark. 1014, 204 S. W. 2d 379, in holding that the evidence was not sufficient to sustain conviction, the Court quoted from *Bowie* v. *State,* 185 Ark. 834, 49 S. W. 2d 1049, 83 A.L.R. 426, as follows: "In a case depending on circumstantial evidence the circumstances relied upon must be so connected and cogent as to show guilt to a moral certainty and must exclude every other reasonable hypothesis than that of the guilt of the accused. Circumstances, however strong they may be, ought never to coerce the mind of the jury to a conclusion of guilt if they can be reconciled with the theory that one other than the defendant has committed the crime or that no crime has been committed at all."

From a careful study of the record it does not appear that appellants were at any time mad at Silvey or

wanted to harm him. Appellants stated that Silvey made an attack on Kagen with a pair of metal knucks and appellants merely held him and let go of him when he asked to be turned loose. When Silvey's body was recovered the knucks were on his hand. It does not appear that appellants were intoxicated; in fact, it does not appear that Tibbett had been drinking at all, and certainly Kagen had drunk very little. The sheriff said he showed no sign of intoxication. Moreover, only three half pints of liquor were bought. Claudine Gilliam said she drank all the whiskey; and from the amount of alcohol in Silvey's body, he must have drunk practically all of the half pint of gin and the half pint of vodka. Even though appellants threw some rocks at Silvey while he was throwing rocks at them, certainly there is no evidence, circumstantial or direct, that they wanted to kill him, and surely no one in his right mind would throw rocks at anyone swimming in deep water unless a homicide was intended. Nothing in the record would indicate that appellants were not in their right minds. They went out with Silvey and the girl in Silvey's car to go swimming. Kagen drank very little and it appears that Tibbett drank nothing. Before they got to go swimming, the girl became intoxicated and sick and unconscious. Tibbett tried to help her by bathing and putting her clothes on her, all except her panties, and when Silvey's body was recovered, they were found in his pants pocket, as were the keys to the car, along with a contraceptive. It appears that if anyone had sexual relations with the girl, it was Silvey, and not either of appellants.

Eugene Johnson testified that while appellants and the girl were at his house the girl said: "They're lying to you. They know where the body is. It's over there all right but they know how it is there, and they're the ones that put it there." One of the appellants replied: "She's sick. She doesn't know what she is saying." The alleged statement of the girl was hearsay, and to be admissible it must come within one of the exceptions to the hearsay rule. There is at least grave doubt that it comes within such an exception. The girl who is alleged to have made the statement was in court and tes-

tified as a State's witness, but she did not testify that she made the statement attributed to her by Johnson. However, she did testify:

"Q. How many different stories have you told the officials here, including Mr. Glenn Abbott. —Of different things you thought you might have remembered?

A. I don't know. I must have told him something the night I came in but I don't know what I told him. — The night they picked us up.

Q. Was that because you were still intoxicated?

A. No, not exactly. I was a little drunk. —I was passed out when they came after us.

Q. You were passed out when they came to Johnson's to get you?

A. Yes, sir.

Q. And you were passed out when you got to the strip pit, weren't you, Claudine?

A. That's right, but I walked up to the farmhouse by myself.

Q. Did you just walk in a trance?

A. Well, Jimmie might have been holding me up a little."

In order to bring hearsay evidence of an implied admission within the exceptions to the hearsay rule, not only must it be shown that the statement was made, but it must also be shown that the accused heard the statement; that he understood it, and remained silent or evaded a response. It is the failure to deny that is significant. If the total response adds up to a clear-cut denial, this theory of implied admission is not properly available. McCormick on Evidence, pp. 528-530. Here one of the appellants — the record does not show which one — spoke up and said, "She's sick. She doesn't know what she is saying." In the circumstances it appears that the reply is all that was required and the girl's statement therefore does not have any proba-

tive value, although no objection was made to the admissibility of it.

The law presumes a defendant innocent until proved guilty beyond a reasonable doubt. Where the State depends on circumstantial evidence, this Court has said: "The evidence against the accused was entirely circumstantial. In such cases it is required that the evidence relied on must show the guilt of the accused to a moral certainty and must exclude every other reasonable hypothesis than that of the defendant's guilt. We conclude that the testimony adduced was not sufficient to establish the guilt of appellant with the certainty that the law requires in cases of this kind. We cannot say that the circumstances shown could not be reasonably explained except upon the hypothesis of appellant's guilt." *Johnson* v. *State,* 210 Ark. 881, 197 S. W. 2d 936.

It is our conclusion that the evidence in the case at bar is not sufficient to sustain the verdicts. The judgment is therefore reversed and the cause remanded for new trial.

BROWN *v.* GARDNER.

5-2124 334 S. W. 2d 889

Opinion delivered May 9, 1960.

Gordon & Gordon, for appellant.

R. S. Dunn, for appellee.

JIM JOHNSON, Associate Justice. This case involves the violation of an agreement which was made in order to accomplish the consolidation of two school districts.

In 1947 a majority of the qualified electors of Cherry Hill School District No. 21 of Perry County signed a petition requesting that that District be dissolved and the territory annexed to Perryville School District No. 7 of Perry County. Prior to the signing of the petition the electors and patrons of the Cherry Hill School District had an agreement with the School Board of the Perryville School District that a ward school with one teacher would be maintained at Cherry Hill schoolhouse so long as at least ten students were in average daily attendance at said ward school.

On August 26, 1947, the Perry County Board of Education entered its order dissolving the Cherry Hill District. In accordance with the agreement and the order of the County Board of Education, the School Board of the Perryville District continued to maintain the ward school at Cherry Hill until the opening of school on August 31, 1959. At that time the Perryville School Board refused to maintain the ward school at Cherry Hill and forced the students to attend school at Perryville.

The plaintiffs, who are qualified electors and patrons of Perryville School District No. 7, and also qualified electors and patrons of what was formerly Cherry Hill School District No. 21, filed suit against the Directors and Superintendent of the Perryville School District to require them to continue to operate the ward school at Cherry Hill, and in the alternative, asking that the order of the County Board of Education dissolving the Cherry Hill District and annexing said District to the Perryville District be set aside, and the Cherry Hill District be restored as it was prior to the order of the County Board of Education.

The defendants demurred to the complaint on the ground that the complaint, as amended, did not state

a cause of action. The Chancery Judge sustained the demurrer and dismissed the complaint. The plaintiffs bring this appeal alleging error by the trial court in sustaining the demurrer and dismissing the complaint.

The appellants urge that the agreement to operate the ward school at Cherry Hill was a condition to the annexation and that this agreement was made a part of the order of the County Board of Education when they dissolved the district. It is true that the agreement was made a part of the order of the County Board of Education. It is further true that ethics is on the side of appellants. Even so, our research reveals the cold letter of the law to be on the other side. This being so, we have no choice but to find contrary to appellants position. School District Directors can only enter into agreements which bind their districts and the inhabitants thereof by reason of express statutory authority. *School District No.* 18 *of Jackson County* v. *Grubbs Special School District,* 184 Ark. 863, 43 S. W. 2d 765. A person contracting with a Board of Education is presumed to know the limitations of its powers and can acquire no right by contract which said board is not clearly authorized to make. *Rural Special School District No.* 50 v. *First National Bank,* 173 Ark. 604, 292 S. W. 1012.

There is no statutory authority giving school directors the power to enter into contracts agreeing to maintain a school at a certain place indefinitely. The powers of school directors are conferred by law for public purposes, and the exercise thereof, involving as it does a matter of future policy properly subject to change to meet changing conditions, cannot be restricted by an agreement of the nature of the one here involved. To hold otherwise would create a school at Cherry Hill not subject to change by anyone as long as the condition is met.

Based upon this reasoning, appellants' remaining contention that the action of the Perryville School Board is in the nature of a collateral attack on the order of annexation made by the County Board must also fail since the part of the order concerning the future opera-

tion of the Cherry Hill School was void because the school board possessed no authority to make the agreement.

Equity being bound to follow the law, we conclude that the decree of the Chancellor must be affirmed.

ARK. STATE HIGHWAY COMMISSION *v.* UNION PLANTERS NATIONAL BANK.

5-2004 334 S. W. 2d 879

Opinion delivered May 9, 1960.

Bill Demmer and *W. R. Thrasher,* for appellant.

Hale & Fogleman, for appellees.

GEORGE ROSE SMITH, J. The appellees have filed a motion asking us to modify our original holding to the extent of taxing the costs of appeal against the Highway Commission. It is contended that the assessment of any costs against the landowner in a condemnation proceeding would deprive him of his constitutional right to full compensation for his land.

It is true that when the only issue in a case of this kind is the value of the land the owner should not be

compelled to pay the costs of a proceeding brought for the purpose of taking his property. Nichols on Eminent Domain (3d Ed.), § 4.109. But this rule does not necessarily apply when there are other issues in the case. Nichols points out, for instance, that when the landowner unsuccessfully contests the validity of the taking he may be compelled to pay the costs. Here, in like manner, the landowners wrongfully demanded and obtained a judgment for the amount of their expert witnesses fees. The Commission was therefore compelled to appeal, and since it obtained a reversal and a substantial recovery upon this issue the case does not fall within the rule relied upon by the appellees.

The motion to retax the costs is denied.

CARNAHAN *v.* CARNAHAN.

5-2131 335 S. W. 2d 295

Opinion delivered May 16, 1960.

William H. Drew, for appellant.

Thomas L. Cashion, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Francis N. Carnahan, was granted a divorce from appellant, Virginia Mae Carnahan, on December 17, 1956. Prior to the rendition of such decree, the parties entered into an agreement regarding care and custody of their minor child, Carolyn Sue Carnahan, born May 8, 1947, and also entered into a property settlement, the agreements being incorporated into the decree. The decree, *inter alia,* provided:

"That the said Francis Carnahan, on or before January 1, 1957, and on or before the first day of every Calendar month thereafter, pay to the said Virginia Carnahan the sum of $125.00 per month until the minor child of the parties hereto, Carolyn Sue Carnahan, reaches the age of 18. That out of said payments the said Virginia Carnahan is to provide for the care and maintenance of herself and minor child, Carolyn Sue Carnahan."

A few months subsequent to the divorce, appellant moved to Greenville, Mississippi, where she and Carolyn have resided since that time.

On September 8th, 1959, Mrs. Carnahan filed a motion with the court, asserting that Mr. Carnahan was delinquent in the monthly payments, and seeking judgment for the alleged arrearage. On the same date, Mr. Carnahan filed a motion, setting up that he "has for some time passed been acutely financially embarrassed, and is threatened with bankruptcy, and has been unable to make the payments ordered by the court"; that his income was insufficient to make the payments, and he prayed a reduction in "the support and maintenance and alimony to a sum that the plaintiff can pay, and the plaintiff believes that if given sufficient opportunity, he will be able to pay the arrears on an installment basis." Appellee further sought an amendment of the custody order to permit him to have custody of the minor child during the summer months. On October 13th, the date set for the hearing, appellee amended his motion, alleging further as a defense that appellant had taken the minor child to the State of Mississippi without the permission of the Chicot Chancery Court. Following a hearing on that date,[1] the court found that Mr. Carnahan was in default in payments totaling seven months, or a total amount of $875, but refused to enter judgment, finding as follows:

[1] Counsel for appellee requested that he be permitted to take a nonsuit on his motion for reduction in support payments, and part-time custody, and the court permitted the motion to be withdrawn.

"The Court further finds that said child is now and has been since 1957, outside of the jurisdiction of this Court with her mother; that permission was never sought or granted by this Court for authority for the removal of said child outside of the jurisdiction of this Court; that a judgment for said $875.00 should be refused for the reason that said child is not now nor has she been within the jurisdiction of the Court during the period of delinquency as above found. The plaintiff-respondent should not be held in contempt for willful violation of the order of this Court incorporated in the decree of December 17, 1956, for the reason that the child has been removed from the jurisdiction of this Court without the Court's permission. It is further found that the defendant-petitioner should be granted authority and permission to remove said child from the jurisdiction of the Court upon the filing of a good and sufficient bond with the Clerk of this Court, conditioned that defendant-respondent will comply with all orders of this Court relating to the care, custody, support and general welfare of the child involved in this action, and a written appointment of the Clerk of this Court and/or her successor in office designating said Clerk and/or her successor as agent for service for all writs that may be issued in this action relating to the care, custody, support and general welfare of said child."

A decree was entered in accordance with the findings, and from the court's order refusing to render judgment for the back payments, appellant brings this appeal.

The Chancellor evidently relied on the case of *Pence* v. *Pence,* 223 Ark. 782, 268 S. W. 2d 609, in which case, this Court held that the right of the mother to claim support payments was suspended during a period when she kept the minor child outside the jurisdiction of the court, at a place unknown to the father; *i.e.*, such payments were remitted. This opinion somewhat modified the holding in *Sage* v. *Sage,* 219 Ark. 853, 245 S. W. 2d 398. In the *Sage* case, the mother had taken the children to Virginia, and the trial court relieved the father of the obligation to pay past due installments amounting to

$450. This Court reversed the trial court on that point holding that the court had no power to remit accumulative payments under the circumstances of the case. See also *Allison* v. *Binkley,* 222 Ark. 383, 259 S. W. 2d 511 (1953).

The case at bar is, we think, easily distinguishable from the *Pence* case. There, the mother refused the father the right to have the child visit him during the father's coming furlough from the Navy, sometime in 1944; just prior to the father's return to this state, Mrs. Pence, without permission of the Chancery Court, took the boy to the Pacific Northwest. Pence and his family made diligent effort to find the child, but were unable to do so. After living for a time in Washington and Oregon, Mrs. Pence and her subsequent husband returned to Joplin, Missouri, and in 1950, returned to Arkansas to live. During this entire period of time, Mr. Pence was without knowledge of the whereabouts of the child, and never had the opportunity to visit with him. Nor did Mrs. Pence endeavor to collect any payments from Mr. Pence during that period. This Court said: "Now, after a lapse of years, Mrs. Pence wants all of the accumulative payments — without having allowed Mr. Pence — in all the intervening years — to have the pleasure of seeing his child. Equity cannot aid her in such a situation." Here, the situation is vastly different. Appellee has known at all times the whereabouts of the child; the evidence reflects that he has visited the child in Greenville, and it is further indicated (though this is not entirely clear from the transcript) that the child has visited him. The distance from appellee's home in Eudora to Greenville is approximately 35 miles, and certainly, this distance did not occasion undue hardship or inconvenience to appellee when he desired to visit the child. There is absolutely no evidence in the record that Mrs. Carnahan has refused Mr. Carnahan the right of visitation, nor is such a fact even alleged.

Mr. Carnahan made these payments from the time of the decree, all through the year of 1958, and into 1959, without complaint that the child had been removed.

As heretofore mentioned, appellee only asserted this defense on the day of the hearing, after previously setting up other defenses. It would appear that Mr. Carnahan's failure to pay was based on something other than the removal of the child to another state. However, no testimony was offered on behalf of appellee; in fact, the sole testimony in the hearing was offered by Mrs. Carnahan.

While appellant noted her exceptions to the entire order of the court, the notice of appeal relates only to that portion denying her the back payments. Likewise, this is the only point argued in the brief. Accordingly, we are not called upon to determine whether the court was justified in requiring the compliance bond, and in directing appellant to designate the clerk of the court as her agent for service in all matters relating to the custody and support of the minor child.

The court should have awarded appellant judgment for sums due for the following months of 1959: March, April, June, July, August, September, and October, or a total amount of $875. The decree is accordingly reversed, and the cause remanded with directions to enter judgment for appellant in the said amount of $875. Appellant's attorney is awarded an attorney's fee of $150. Costs against appellee.

CENTRAL ARK. MILK PRODUCERS ASSOCIATION *v.* SMITH.
5-2138 335 S. W. 2d 289
Opinion delivered May 16, 1960.
[Rehearing denied June 6, 1960]

Thompson & Thompson, for appellant.

J. E. Simpson, for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, Willard Smith, brought suit against appellant, Central Arkansas Milk Producers Association (an association of dairy farmers which was organized under the laws of Arkansas for the purpose of collectively selling milk produced by the members thereof), for appellant's alleged failure to purchase appellee's milk truck in accordance with the terms of a previous oral contract, or agreement, between the parties wherein appellant agreed to purchase the truck at its then or above value; and as a further condition of purchase of said truck, appellee, Smith, agreed to assist appellant in obtaining contracts with

people for whom he, Smith, hauled milk to become members of Central Arkansas Milk Producers Association, appellant. Appellee alleged that he fully performed his contract or agreement with appellant, but that appellant had refused to purchase his truck.

From a judgment, on a jury verdict in favor of appellee, in the amount of $600.00 is this appeal. For reversal appellant relies on the following points: "(1) The proof in the case clearly fails to establish that a contract was entered into by the Appellant to purchase the Appellee's truck or any part thereof. (2) If the jury could under the evidence find that there was a contract, the plaintiff completely failed to prove any damage suffered by reason of a breach thereof. (3) Since the most any witness said the truck bed was valued at, at the time of the alleged contract, was Six Hundred Dollars, plaintiff should have been limited to a recovery of Three Hundred Dollars since Defendant in open court at the time of the instructions of the jury offered to pay plaintiff, * * *."

The record reflects that Smith, appellee, was the owner of a milk route in Carroll County and a truck used in connection with collecting milk along the route. Appellee desired to dispose of his milk route and he contracted appellant to induce it to take his milk route over. Several meetings were held between the appellant's representative, Dwight Hull, Smith, and the producers along Smith's milk route. The evidence shows that the general consensus arrived at in these meetings was that the producers would sell their milk to appellant if appellant would purchase the milk truck of appellee. Appellant was equipped for bulk collection of milk and most of the producers had facilities for only canned milk collection and difficulties arose over the collection of the milk. The result was that a number of the producers signed with appellant and the remaining producers found other outlets for their milk.

We think there was substantial evidence adduced that there was a contract or agreement between the parties

for appellant to purchase Smith's truck. Smith testified that appellant agreed to buy his truck: "Mr. Hull (appellant's representative) never did tell me how many dollars he would pay for the truck, said he would pay more than it was worth. He told me to go down here to the garage somewhere or to some of these dealers and find out what it was worth." Kenneth Pinkley testified that he (appellant's representative, Hull) stated that appellant would buy Smith's truck, at its value or above, that the truck was suitable as a bulk tank truck by just putting a tank on Smith's truck. Witness Hoyt Pinkley testified that there was discussion that appellant would buy Smith's truck and equipment. Appellant's representative, Hull, when asked if Smith would be "taken care of," answered, in effect, that appellant would take care of the hauler, that they had never taken a route yet where they hadn't taken care of the hauler and they would buy Smith's truck, — "He told Smith he would reasonably compensate him for the truck, that it was their policy to compensate for the truck when he took their route."

Logan Stafford testified that it was the general impression of the meeting that appellant would buy Willard Smith's truck and equipment. King Hale's testimony was of a corroborative nature. All of the witnesses, in effect, agreed that appellant was to purchase Smith's truck and the only thing that was not mentioned was the price of the truck which was never agreed upon.

As indicated, we hold that the above was substantial evidence that a contract or agreement was entered into between the parties. But, says appellant, "this record is devoid of any meeting of the minds on the price to be paid Williard Smith by appellant for his truck." We do not agree. The rule of law seems to be well settled that where, as here, no definite contract price was agreed upon between the parties, this alone does not invalidate the agreement or contract. The law invokes the standard of reasonableness and the fair value of the property may be shown and recovered where, as here,

the complaining party has duly performed his side of the agreement. "It is by no means uncommon for those who offer or agree to employ others, or to buy goods, to make no statement as to the wages or price to be paid. The law invokes here (as likewise where an agreement is indefinite as to time) the standard of reasonableness. Accordingly the fair value of the services of property is recoverable on the implied in fact contract. * * *", Williston, Contracts, Vol. I, § 41 at p. 115. And, "There is no more settled rule of law applicable to actions based on contracts than that an agreement, in order to be binding, must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liability of the parties. Indefiniteness may relate to the time of performance, the price to be paid, work to be done, property to be transferred, or other miscellaneous stipulations of the agreement. If the contract makes no statement as to the price to be paid, the law invokes the standard of reasonableness, and the fair value of the services or property is recoverable, * * *" *Corthell* v. *Summit Thread Co.,* 132 Me. 94, 167 A. 79, 81, 92 A. L. R. at p. 1394.

Here, as indicated, there was substantial testimony that the price to be paid was the market value or above "what it's worth", indicating that the price to be paid was the market value. Here it appears that the trial court had no testimony before it as to the value of the truck, other than the owner's (Smith) testimony, and he testified that it was worth far more than the jury found it to be worth. It further appears that appellant offered Smith $300.00 for the truck and offered to pay this sum into the registry of the court.

Appellant also contends "that there was no testimony in this record to go to the jury establishing appellee's damages for the breach of the alleged contract." The court gave the following instruction on damages: "* * * you are told that the measure of damages would be the difference in the value of the truck at the time it was supposed to have been purchased by the

defendant and the value at the time it was refused to be purchased, which I believe, under the evidence, is the sum of twenty-one days. The difference in the change of the value of this article during that time. You are told that it would be limited to $600.00 which, testimony shows, was the value of the bed on the truck, as special damages. There is no evidence that the truck changed in value, but there is evidence that the $600.00 was the cost of the milk bed that was on the truck, which he says he couldn't find a sale for, or find any use for." Appellant says, with reference to this instruction, that "the trial court, therefore, decided against appellee's contention that he was entitled to damages by reason of breach of contract to purchase his truck and took that part of the case away from the jury. There has been no appeal from the court's ruling. The only question before this court is the correctness of the instruction of the court and the jury's finding with reference to the milk bed that was on the truck." As we read the above instruction, it, in effect, told the jury that the only issue in the case to consider was the value of the milk bed which has no other use than for hauling milk. There was testimony by the appellee that it was worth $600.00. In other words, the court found that the evidence showed no depreciation of the truck in the twenty-one day period from the date it was supposed to be purchased by appellant and its value twenty-one days later; but the evidence showed that the milk bed had been destroyed as regard to its value. We think the court was justified in giving the above instruction on the record presented.

Finding no error, the judgment is affirmed.

McFaddin, J., concurs.

Ed F. McFaddin, Associate Justice, concurring. I concur for the purpose of emphasizing: (1) that there was a contract between Campa and Smith; (2) that Smith had performed his part of the contract; and (3) that under such a situation Campa cannot escape liability by

claiming that no price was agreed upon for the bed of the truck.

If the conversations had been executory (*i. e.*, unperformed) on both sides, then I doubt if there would have been a contract. But when Campa accepted Smith's services it thereby became liable to pay a reasonable value therefor, which was the purchase of the truck.

CARTER *v.* REAMEY.

5-1970 335 S. W. 2d 298

Opinion delivered May 16, 1960.

Ike Murry and *W. P. Switzer*, for appellant.

Arnold & Hamilton; A. James Linder, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a mandamus action brought by appellant, Carter, against appellees, Reamey *et al.* From a judgment of the Circuit Court denying the prayed relief, there is this appeal, which necessitates a decision as to the validity of Act No. 359 of the General Assembly of 1957, captioned:

"An Act Granting and Empowering Counties and Municipalities to Hold Certain Types of Elections Under Amendment Number Seven to the Constitution of the

State of Arkansas and the Enabling Acts Pertaining Thereto; and for Other Purposes."

Ashley County is a "dry" County — the sale of intoxicating liquor therein having been prohibited several years ago. In 1958 West Crossett was an incorporated Town[1] in Ashley County; and appellant, Carter, as a citizen and taxpayer of West Crossett, sought to have an election held in the Town under the provisions of said Act No. 359 of 1957. A petition was filed, praying for said election on the issue: "An Act to Legalize the Sale of Beer for Off-premise Consumption Only Within the Corporate Limits of West Crossett, Arkansas". At first, the County Board of Election Commissioners (appellees here) voted to put the issue on the ballot at the General Election in November, 1958; later, two of the three Commissioners attempted to rescind the action; but the third Commissioner claimed the rescinding action was illegal and had a typewritten sticker prepared and used at the General Election in November, 1958. After the said election, the County Board of Election Commissioners, by a majority vote, refused to recognize the validity of the election or the typewritten ballot, and also refused to certify the result of the election regarding the liquor issue. Thereupon, appellant, as a citizen and taxpayer in West Crossett, filed this mandamus action, and the Circuit Court denied the prayed relief after an extended hearing. This appeal resulted.[2]

The election on the beer issue in West Crossett was attempted under the provisions of said Act No. 359, so the first essential of the appellant is to sustain the validity of the said Act. It would be an idle thing to mandamus the Election Commissioners to certify the vote on the beer issue in West Crossett if the Act No. 359 be

[1] The records in the Office of the Secretary of State show that West Crossett became an incorporated Town on June 18, 1937; but a Certificate of Revocation was filed in the office of the Secretary of State on February 11, 1959, which was after the Circuit Court proceedings in this case and is mentioned only for information.

[2] The record of this case in this Court deserves explanation. The appeal was submitted on November 16, 1959; the Court then asked for additional briefs; and counsel for both sides graciously complied with such request. Then the Court invited all counsel to appear for further discussion; and that invitation was likewise accepted.

invalid: there could have been no valid election under the Act unless the Act itself be valid. Our research discloses that the said Act No. 359 is invalid, because it did not receive enough votes to amend or repeal any part of the Initiated Act No. 1 of 1942, which was the controlling Act regarding elections for the sale of intoxicating liquor.

Initiated Act No. 1 of 1942 (hereinafter called "Initiated Act No. 1") was adopted by the People of Arkansas at the General Election of 1942. It may be found at Pages 998 *et seq.* of the printed Acts of 1943, and may also be found in § 48-801 *et seq.* Ark. Stats. The Initiated Act is captioned:

"An Act to Amend The Liquor Laws of the State of Arkansas So As To Provide for Better Local Option Laws, for Prohibiting the Manufacture or Sale, or the Bartering, Loaning or Giving Away of Intoxicating Liquors, for Defining Intoxicating Liquors, for Fixing Penalties for the Violation of the Law in Territory Made Dry Under the Provisions of This Act, and for Other Purposes".

The Initiated Act applies to all types of intoxicating liquor: the last sentence of Section 2 being: "Intoxicating liquor is hereby defined to include any beverage containing more than one-half of one percent of alcohol by weight." The Arkansas Legislature had previously defined beer: "The term 'beer' means any fermented liquor made from malt or any substitute therefor and having an alcoholic content of not in excess of 3.2 percent by weight". (Section 1 of Act No. 7 of the Extraordinary Session of the Legislature of 1933, as now found in § 48-503 Ark. Stats.) In the case of *Denniston* v. *Riddle,* 210 Ark. 1039, 199 S. W. 2d 308, which was followed in *Tabor* v. *O'Dell,* 212 Ark. 902, 208 S. W. 2d 430, it was held that after a county as a whole votes dry no subdivision within the county may thereafter hold a separate wet-dry election. Our holding was based upon the fact that the Thorn Liquor Law was a borrowed Kentucky statute which had already been so construed in Kentucky when it was adopted by our legislature. In the *Denniston* case we quoted

from a Kentucky decision that adopted the following rule: "When a statute provides that after the lapse of a specified time the question of revoking an order declaring prohibition to be in force by virtue of a prior adoption may be submitted, the resubmission must be to the voters of the entire territory embraced in the former election."

We pointed out in the *Denniston* opinion that nothing in Initiated Act No. 1 had repealed the pertinent parts of the Thorn Liquor Law, but it was not then necessary to say whether those sections of the Thorn Law had been substantially re-enacted by the Initiated Act. That is the question now posed. We are of the opinion that there was such a re-enactment. The sentence that we have quoted above from the Kentucky court's decision is applicable not only to the Thorn Law but also to this provision in the Initiated Act: "If a majority of said electors voting at said election vote 'AGAINST the Manufacture or sale of Intoxicating Liquors', then it shall be unlawful for the Commissioner of Revenues of the State or Arkansas, or any County or Municipal official to issue any license, or permit, for the manufacture, sale, barter, loan, or giving away of any intoxicating liquor as defined in this act, for at least two years, and thereafter, unless the prohibition shall be repealed by a majority vote as provided for in Section 1 of this Act." Ark. Stats. 1947, § 48-802. It is therefore our conclusion that the Initiated Act in substance re-enacts that portion of the Thorn Law which was construed in the *Denniston* case as preventing any subdivision of a dry county from having a separate vote upon the liquor question.

. . . . . .

It is the claim of the appellant in this case that the Act No. 359 of 1957 allows the municipality of West Crossett to have a separate election for the sale of beer in West Crossett, even though Ashley County is "dry". It is clear, in the light of our decisions, that if said Act No. 359 could accomplish any such purpose, then it would be an amendment of the Initiated Act No. 1, as

heretofore mentioned. Section 8 of Amendment No. 7 of the Arkansas Constitution says:

"No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any City Council, except upon a yea and nay vote on roll call of two-thirds of all the numbers elected to each house of the General Assembly, or of the City Council, as the case may be."

The records of the General Assembly, of which we take judicial notice,[3] disclose that the Act No. 359 of 1957 was H. B. No. 459, and that the measure passed the House of Representatives by a vote of 52 to 30, and passed the Senate by a vote of 18 to 11. To validly amend the Initiated Act No. 1, the Legislative Act No. 359 would have been required to receive 67 votes in the House and 24 votes in the Senate — being two-thirds of all elected members of each House: Section 8 of Constitutional Amendment No. 7 so prescribes. The Act No. 359 did not receive the required number of votes to amend Initiated Act No. 1 of 1942 so as to allow a municipality in a "dry" County to have a separate vote on the sale of beer in such municipality.

We, therefore, conclude that the Act No. 359 of 1957 was ineffectual to accomplish the election here sought by the appellant, and that it would be an idle thing for the Election Commissioners to be required to certify the result of the election when such result could have no possible effect looking toward the sale of beer in West Crossett.

Affirmed.

HARRIS, C. J., concurs.

ROBINSON, J., dissents.

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[3] *Fulkerson* v. *Refunding Board*, 201 Ark. 957, 147 S. W. 2d 980; *Connor* v. *Ricks*, 212 Ark. 833, 208 S. W. 2d 10; and other cases collected in West's Arkansas Digest "Evidence" § 33.

ALUMINUM CO. OF AMERICA *v.* WILLIAMS.

5-2099 335 S. W. 2d 315

Opinion delivered May 16, 1960.

[Rehearing denied June 6, 1960]

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

McMath, Leatherman, Woods and *Youngdahl,* for appellee.

ED. F. MCFADDIN, Associate Justice. The appellee, Williams, was employed by appellant, Aluminum Company of America; and we will identify the parties as Williams and Alcoa. This appeal requires a decision on two points: (a) whether there is substantial competent evidence to support the finding of the Workmen's Compensation Commission; and (b) the liability of the employer to compensate an employee for a second injury which arose because of the first injury and without any intervening independent cause.

Chronologically, here are the salient dates:

(a) On April 24, 1957 Thurman S. Williams received a low back injury while employed by Alcoa at its refining plant in Bauxite.

(b) On May 4, 1957 a myelogram was done on Williams, which revealed "a herniated nucleus pulposus at

the 4th interspace on the right". Dr. Murphy performed surgery for the alleviation of this condition on May 7, 1957. This was the first operation; and as so identified will be mentioned later.

(c) On June 20, 1957 Williams returned for light work; and Alcoa, after first resisting Williams' claim, finally, under orders of the Circuit Court, paid the expenses of the operation and compensation of 10% permanent partial disability as a whole. A lump sum settlement was made.

(d) On October 4, 1957 Williams again complained of his back and received some treatment, but later returned to work on November 18, 1957.

(e) On January 18, 1958 Williams was laid off from work by Alcoa because of reduction in the number of employees; and Williams drew unemployment benefits for some time.

(f) On November 2, 1958 Williams commenced working as a carpenter for his brother, John Williams, at Dermott, Arkansas, and was engaged in the repair of a filling station and diner which had been damaged by fire. As a part of his duties he nailed light boards (like plywood) on the walls and ceiling of the rooms. He worked at this for several weeks; and several times in November and December 1958 complained of his back hurting him.

(g) Williams testified that on the night of December 19, 1958, while he was off work and seated in a chair, he tried to arise from the chair and got a "catch" in his back which caused him to give up his work.

(h) On December 20, 1958 Williams signed up for supplemental unemployment benefits at the Alcoa plant.

(i) On January 2, 1959 Williams went to Dr. Murphy, who had performed the first operation and removed the disk material as previously mentioned in Item (b) *supra*; and Williams told Dr. Murphy of persistent back pains. Dr. Murphy had Williams hospitalized; and on January 6, 1959 Dr. Murphy performed the second operation, which was a removal of additional disk material

at the fourth lumbar interspace and also a spinal fusion of the fourth and fifth lumbar vertebrae.

(j) On February 3, 1959 Alcoa learned of the second operation and Williams' claim for additional compensation, and promptly resisted, claiming, *inter alia,* that the first injury, operation, and award ended all of Alcoa's responsibility; that the Dermott work was an independent intervening cause for the second operation; and that Alcoa was not liable for the second operation or any additional Workmen's Compensation benefits.

So much for the chronological detail. The Referee and the Full Commission agreed with Alcoa and denied Williams' 1959 claim. The Circuit Court reversed the Commission and directed that the compensation be allowed Williams;[1] and Alcoa prosecutes this appeal, claiming that there is substantial evidence to support the finding of the Referee and the Full Commission, which was that the second operation (that of January 6, 1959) was not necessitated by reason of the old injury of 1957 and the first operation, but rather was because of an intervening and independent cause which was an injury received while Williams was working for his brother, John Williams, as a carpenter in Dermott.

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[1] Here is a portion of the opinion of the Circuit Court: "The Court sees no point in relating history of the injuries and the evidence, but reaches the following findings of fact and conclusions of law:

"1. The record upon being viewed in the strongest probative light in favor of the findings of the Referee and the Commission does not, in the opinion of this Court, support the finding of the Referee and the Commission. The Court believes there is a complete absence of testimony upon which to base the findings of the Referee and the Commission in this respect.

"2. It is noted that in the Referee's statement of the case which the Commission affirmed, the Referee makes the following statement of fact: 'That the injury causing the need of claimant's second operation resulted from his employment by John Williams.' The Referee and the Commission went further and related that a second operation performed by Dr. Murphy was a result of this additional accident or trauma, basing their finding upon the doctor's testifying that the operation was a success.

"3. After examining the record with great care, the Court finds no evidence to support the statement that the injury occurred while in the employ of John Williams, or any statement by any medical witness that the claimant was cured by the operation. But, to the contrary, the doctor's testimony was directed wholly to the removal of disc material which should have been removed at the first operation and was not done because of the technical difficulty in removing same.

We recognize the rule to be, that viewing the evidence in its strongest light to sustain the Commission's findings, if there be sufficient evidence to support such factual findings, then the Circuit Court was in error in reversing the Commission. *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; *Sturgis Bros.* v. *Mays,* 208 Ark. 1017, 188 S. W. 2d 629; and other cases cited in West's Arkansas Digest "Workmen's Compensation" § 1939. But a careful study of the record fails to reveal any evidence that Williams suffered any trauma or injury while working in Dermott in 1958 sufficient to constitute an independent intervening cause for the 1959 operation. Only four witnesses testified. They were Williams, Dr. Murphy, Doyle Green and Lowell White. Williams testified, as abstracted by appellant:

"I worked for my brother for a period of about five or six weeks down at Dermott, Arkansas. I done mostly painting. I did not do anything that would hurt my back. That's why I worked with my brother, because he knew I had trouble with my back, and I didn't do no heavy work. I sure didn't injure my back in any way while working for my brother. I got up out of a chair when I first noticed it, started to get up out of the chair and that's what started it off. The pain hit my back and it kept getting worse. It's been leaving, you know, in two or three days the pain would leave but it didn't leave that time. So that's when I went on to see Dr. Murphy later and he taken a myelogram. I was in a tourist cabin in Dermott when I got up out of the chair . . .

"The incident that occurred when I arose from a chair was about two days before the job was finished. Prior to that time I had not been having any trouble . . .

". . . I was sitting in the chair and when I started to get up that's when it caught me."

Doyle Green was called by Alcoa. He was the owner of the filling station and diner at Dermott that was being repaired. He had contracted with John Williams to do the repair work, and John Williams had employed

appellee, Thurman S. Williams, to help him. Doyle Green testified that the carpentry work done by Williams was very light work, such as taking down old paneling and putting up new; and taking down the old ceiling squares (16-inch plywood) and putting up new. Green testified (as abstracted by appellant):

"As far as I know Thurman didn't hurt himself or injure himself on the job down there. He didn't quit work because of having hurt his back . . .

"When he made mention about his back hurting him, I gathered that was just a general condition of his back from a previous injury . . .

"I am just sure he didn't hurt himself while he was here. It was more of a recurrence from a previous ailment of some kind he had."

It will be seen that Doyle Green's testimony shows that no trauma or new injury occurred to Williams while he was working in December 1958. Alcoa called Lowell White, who was safety supervisor of Alcoa. He testified as to Williams' complaints in October 1957, and that thereafter Williams refused to "co-operate". None of White's testimony indicated any trauma suffered by Williams or any undue exercise by him except the October 1957 incident.

We come then to the testimony of Dr. Horace R. Murphy, who was the doctor that performed both the operations on Williams; and we are tremendously impressed by Dr. Murphy's absolute candor and frankness. His testimony shows that the second operation was necessitated because of the first operation, and not because of any new trauma or injury. Dr. Murphy testified that when he performed the first operation he removed all of the nucleus pulposus that could be removed with safety from the fourth and fifth interspace, and that he hoped that a fusion operation would not be subsequently required; that, as a usual thing, if all of the nucleus pulposus material was not removed, then within eighteen months or two years the patient frequently had to have another operation and fusion. Dr. Murphy testified that

when Williams came back to him on January 2, 1959 and told him of continuous pains, the doctor knew that a fusion was indicated and that the second operation was the direct result of the first operation and not of any trauma or intervening independent cause between the two operations.[2]

Having reviewed the entire record, we conclude that the Commission was in error in finding, as it did, that the second operation was necessitated by an intervening independent cause. All the evidence shows that the second operation was necessitated by reason of the first operation, and that no intervening independent cause was established.

Having concluded that no independent intervening cause was shown to require Williams' second operation, we examine now to see if Williams is entitled under the law to recover the expenses of the second operation and compensation for additional disability, if any, resulting

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[2] We copy a few questions and answers found in Dr. Murphy's testimony:

"Q. Well, at least, is it your opinion based on what you actually saw when you went in the second time that his pain was primarily caused by this additional piece of fragment pressing against the nerve root?

"A. I believe so because it was a very definite finding and of course, the fact that he was relieved as far as his hip pain. I mention hip pain because it was quite significant. It's one of the components of sciatica. In other words, the nerve root being pressed upon by the disc material can give you a complete radiation down the leg or it can merely give you hip pain and at that time he was having a rather excruciating hip pain. Following the surgery he actually has been relieved as far as leg symptoms are concerned . . .

"Q. Just one question to more or less sum up. Then it is your testimony that Thurman Williams' condition when you saw him in January, 1959, as a result of which you did the myelogram and subsequent operation, his condition was a result of the extrusion of some bits or particles of the same interspace that had been operated on in April, 1957, by an extrusion of those materials causing his trouble. Now, of course, in his history and in your examination that was not associated with any other particular strain or trauma that you know about?

"A. May I answer it in parts?

"Q. Yes.

"A. The answer of part 1 of your question, it is true this represents a recurrence and the same interspace, the same disc material which unfortunately could not be gotten in the first. Part two of your question, from my history which is turned in the report, was there was no previous history of trauma and that a month before or thereabouts he stated that he started having trouble."

therefrom. In 99 C.J.S. p. 607, "Workmen's Compensation" § 180, the holdings are summarized: "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury received, such further disability is compensable. Thus, where an employee suffers a compensable injury and thereafter returns to work and as a result thereof his injury is aggravated and accelerated so that he is further disabled than before, he is entitled to compensation for his entire disability".

In Larson's two-volume treatise on "Workmen's Compensation Law", that writer states the holdings in Vol. 1 § 13.00: "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own negligence or misconduct". In 58 Am. Jur. p. 775, "Workmen's Compensation" § 278, cases from various jurisdictions are cited to sustain the text: "A subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury".[3]

There is no evidence of any "independent intervening cause" in this case, so Williams' second operation requiring a spinal fusion was the result of his original injury on April 24, 1957 and his first operation on May 7, 1957. We therefore hold that he is entitled to recover the expenses of the second operation and compensation for additional disability. The parties stipulated in the Circuit Court to these matters; and the Circuit Court judgment showing the stipulation reads as follows:

"It has been stipulated by and between the parties that the claimant's period of temporary total disability ended August 4, 1959, and he reached the maximum heal-

[3] There is an annotation in 7 A.L.R. 1186 entitled: "Workmen's Compensation: Compensation as affected by external infection from, or subsequent incident of, original injury"; and cases are there collected from various jurisdictions. See also annotation on related matters in 102 A.L.R. 790 and 39 A.L.R. 1276.

ing period from the second operation on this date: it is further stipulated that as a result of the spinal fusion performed in the second operation the claimant, Thurman S. Williams, has suffered an additional 10% disability to his body as a whole, for which he should be paid benefits at the rate of $35 per week for a period of 45 weeks, beginning August 4, 1959, said benefits of 45 weeks consisting of the permanent partial disability benefits due the claimant.[4]

In the light of the record and the said stipulation, we conclude that the Circuit Court was correct. The judgment is therefore affirmed, and the cause remanded to the Circuit Court in order that the cause may be remanded to the Commission to see that the Circuit Court judgment is performed.

HOLT, J., dissents.

GEORGE ROSE SMITH, J., not participating.

[4] Also in the last paragraph of the judgment of the Circuit Court it was adjudged that Alcoa should pay all hospital, doctors, medical, and drug bills incurred by the said Thurman S. Williams, as a result of the recurrence of the injury to his back; and that Alcoa should pay attorney's fees and costs.

SUTTON *v.* NOWLIN & SONS COMPANY.

5-2116 335 S. W. 2d 292

Opinion delivered May 16, 1960.

[Rehearing denied June 6, 1960]

James C. Cole and *Joe W. McCoy,* for appellant.

Lookadoo, Gooch and *Lookadoo* and *B. S. Clark* and *Robert S. Lindsey,* for appellees.

ED. F. MCFADDIN, Associate Justice. This case results from injuries received by appellant, Lewis Sutton, while unloading, in Arkadelphia, a crated piano which had been shipped by motor carrier from Gulbransen Company in Melrose Park, Illinois, to Nowlin Furniture Company[1] in Arkadelphia. Campbell 66 Express, Inc. (hereinafter called "Campbell") was the motor carrier which picked up the crated piano at point of origin in Illinois, transported it to Little Rock, and transferred it to Superior Forwarding Company (hereinafter called "Superior"), another carrier, for final delivery in Arkadelphia. Appellant, Lewis Sutton, was the truck driver for Superior, and had made delivery of other freight to Nowlin, whose unloading zone was on the sidewalk in front of the store. From the bed of the Superior truck down to the street level was approximately 56 inches. Sutton requested two of Nowlin's employees (Calloway and Davis) to assist him in unloading the crated piano from the truck to the street; and it was while this unloading was in process that Sutton received the back injuries which led to this litigation.

The mishap occurred in September 1956. In October 1958 Sutton filed suit against Nowlin; and later,

[1] Nowlin Furniture Company is the trade name of either Nowlin & Sons Company, or Nowlin, Inc. Both companies are parties defendant, and we will refer to them, jointly and severally, by the name, "Nowlin".

joined Campbell as a defendant.[2] Sutton claimed that Nowlin was responsible for his injuries because Sutton alleged that Nowlin was negligent, *inter alia,* in these respects: that Nowlin had no unloading platform; that Nowlin failed and refused to furnish a lower bodied truck into which the crated piano could be placed from the Superior truck; that Nowlin failed to furnish enough helpers in the unloading; and that the helpers supplied by Nowlin were negligent. Sutton also claimed that Campbell was negligent because the bill of lading under which the crated piano moved showed the weight to be 400 pounds, whereas, in truth and in fact, the crated piano weighed as much as 486 pounds; and that Sutton relied on the weight shown on the bill of lading in trying to unload the piano, and his injuries came about because the weight was greater than stated on the bill of lading.

At the trial Sutton testified that no one directed the unloading, but each person acted on his own initiative. Calloway testified that he and Davis merely acted as an accommodation to Sutton, and that Sutton directed the method of unloading. The evidence showed that the three men undertook the task of unloading; they edged the crated piano to the rear end of the Superior truck; and then began to lower one end of the crated piano to the street. Davis was in the truck, and Calloway and Sutton were on the street level. While one end of the piano was being thus lowered to the street, Sutton claimed that Calloway let an excessive weight rest on Sutton, so that Sutton's back gave way and he fell to the street. Calloway denied putting an excessive weight on Sutton, and testified that Calloway and Davis completed unloading the piano without Sutton's help. The case was tried to a jury, which answered two interrogatories, as follows:

1. "Do you find from a preponderance of the evidence in this case that the defendants, Nowlin & Sons

[2] Sutton received Workmen's Compensation payments from Superior and its insurance carrier; and when Sutton filed the present suit against Nowlin and Campbell, Superior and its insurance carrier intervened and asked that Superior's insurance carrier be subrogated, as provided by Workmen's Compensation Statute — § 81-1340, Ark. Stats.

Company, and Nowlin's Incorporated, by its servants, agents and employees, were guilty of negligence and that such negligence, if any, was a proximate cause of the accident and injuries complained of, if any? ANSWER: No."

2. "Do you find from a preponderance of the evidence in this case that the defendant, Campbell 66 Express, Inc., by its servants, agents and employees, was guilty of negligence and that such negligence, if any was a proximate cause of the accident and resulting injuries complained of, if any? ANSWER: No."

Based on the said interrogatories, the Court rendered judgment against Sutton; and he has prosecuted this appeal, claiming (1) that improper testimony was admitted, and (2) that erroneous instructions were given.[3]

I. *Objection Regarding Testimony.* Both of the two officers and owners of Nowlin's Furniture Store testified that Sutton never made any request of either of them for Nowlin's employees to assist in unloading the piano. This occurred:

Q. Mr. Nowlin, is it the duty of either of these employees of Nowlin Furniture Store to ever assist in unloading any freight?

MR. COLE: To which we object, may it please the Court.

A. No, sir.

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[3] Here is the exact statement of appellant's points: "POINT NO. 1. IMPROPER TESTIMONY WAS ADMITTED.

A. Nowlin's testimony that its employees owed no duty to unload freight.

B. Nowlin's testimony to falsify and contradict its informal judicial admission.

"POINT NO. 2. ERRONEOUS INSTRUCTIONS WERE GIVEN.

A. Nowlin's requested No. 1-A on duty not owed, defining common carriers, etc.

B. Nowlin's requested No. 8 on lending employees.

C. Campbell's requested No. 8 substituting custom and usage for ordinary care and prudence.

D. Campbell's requested No. 16 on assumed risk.

E. Campbell's requested No. 18 submitting wrong comparative negligence law.

F. Campbell's requested No. 19 excusing negligence of defendant's employees."

THE COURT: What is the basis of your objection?

MR. COLE: The basis of the objection is, first, it's just his opinion as to whether it's his duty or not; second, that is a question of law whether there is any duty imposed upon them; third, it's a question for the jury to determine whether or not they failed in that duty.

THE COURT: Overruled."

Certainly Mr. Nowlin would have a right to testify what were the duties of his employees. He testified that he never instructed his employees either to assist or not to assist in unloading any freight from a motor truck; that the employees, Calloway and Davis, were paid at a standard rate of pay per week; and that this unloading occurred at about 11:00 o'clock A.M. on a regular work day. Calloway was asked: "Now, I want to ask you about being paid. Why were you helping Mr. Sutton at this particular time?" Calloway answered that he was helping Sutton as a favor to him.

The point that the appellant urges is that, since Calloway and Davis were on Nowlin's payroll at the time they were helping Sutton, they thereby were Nowlin's employees and it was improper to allow Calloway to say that he was merely helping Sutton, and it was likewise improper to allow Nowlin to say that it was not a part of the duty of Calloway and Davis to help unload the truck. It is claimed that the admission by Nowlin that Calloway and Davis were being paid by Nowlin on the day in question constitutes an "informal judicial admission" that they were working for Nowlin and that, therefore, Nowlin is liable for any negligence by them. The jury's answer to Interrogatory No. 1 renders this argument moot. It does not make any difference for whom Calloway and Davis were working, or whether Nowlin owed any obligation to assist Sutton in unloading the piano, because the jury has found that Nowlin, "by its servants, agents and employees", was not guilty of any negligence that proximately caused Sutton's injuries. The interrogatory has heretofore been copied; and when the jury answered that interrogatory as it did,

such answer rendered moot all questions of who employed whom.

II. *Instructions.* The appellant questions six instructions that were given: two of these were on the request of Nowlin; and four on the request of Campbell. These instructions related to such matters as: common carriers and their duties; weights of shipments; negligence and proximate cause; lending of employees; contributory negligence; and assumption of risk. To copy them *in extenso* would unduly prolong this opinion. We have carefully considered each questioned instruction; and we conclude that appellant's objections to them are without merit to all of the instructions except Campbell's Instruction No. 18. It is true that the Court submitted the wrong Comparative Negligence Statute. The Court framed its instruction under Act No. 296 of 1957; whereas, on the date of Sutton's injuries, the applicable statute was Act No. 191 of 1955; and the Court should have used the Comparative Negligence Rule as stated in the 1955 Act. See *St. L. S. W.* v. *Robinson,* 228 Ark. 418, 308 S. W. 2d 282; and *Mo. Pac. Rr. Co.* v. *Yarbrough,* 229 Ark. 308, 315 S. W. 2d 897. But when the jury answered Interrogatory No. 2 as it did and found that Campbell 66 Express, Inc., "by its servants, agents and employees", was not guilty of any negligence, then the verdict cancelled any error in the matter of the Comparative Negligence Instruction and rendered harmless the giving of the wrong Comparative Negligence Instruction.

Finding no error, the judgment is affirmed.

ODOM *v.* ODOM.

5-2149 335 S. W. 2d 301

Opinion delivered May 16, 1960.

Gentry, Gentry & Mott, for appellant.

George F. Hartje Jr. and *Opie Rogers,* for appellee.

GEORGE ROSE SMITH, J. The appellee's husband, Walter Odom, owned eighty acres of land at the time of his death, intestate and without issue, in 1957. Odom was survived by his widow and by four brothers, six sisters, and the five children of a deceased sister. The widow, who received a half interest in the land as her dower, at first attempted to obtain deeds from her husband's heirs to the other one half interest. Most of the heirs signed such a conveyance, but there is a question whether those deeds were ever delivered to the grantee.

This proceeding was originally a partition suit filed by the appellee against those of her husband's heirs who refused to sign a deed to her. By an amendment to her complaint the appellee asserted as an alternative ground for relief that in about 1955 her husband had conveyed the land to himself and the appellee as tenants by the entirety, that the deed had been destroyed

under the mistaken belief that it was of no validity, and that the title to the land should be quieted in the appellee as the surviving tenant by the entirety. The original defendants, joined by other heirs who intervened in the case, filed a motion to strike the alternative prayer for relief on the ground that the widow had elected her remedy by initially basing her complaint upon the conveyances assertedly signed by part of her husband's heirs. The chancellor denied this motion and eventually upheld the appellee's title under her claim to be the surviving tenant by the entirety.

The chancellor was right in refusing to strike the alternative count in the amended complaint, for the case does not fall within the doctrine of election of remedies. In the typical situation involving that doctrine a single transaction presents the plaintiff with a choice of inconsistent remedies. For example, in the leading case of *Belding* v. *Whittington,* 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107, cited by the appellants, the vendors in a contract for the sale of land had refused to execute a deed to the property. This breach of contract afforded the vendees a choice between suing at law for damages or suing in equity for specific performance. We held that the purchasers had elected their remedy by filing an action at law for breach of contract, which precluded them from dismissing that case and bringing a suit in equity for specific performance.

In the case at bar the widow's choice is not between two remedies stemming from the same transaction; it is between two entirely separate causes of action. In substance her amended complaint says that she is entitled to have her title quieted pursuant to the unrecorded destroyed deed that created a tenancy by the entirety during her husband's lifetime. If, however, she is unable to prove that cause of action then she seeks alternative relief pursuant to the deeds executed after her husband's death.

We see no real distinction between this case and our holding in *Allen* v. *First Nat. Bank of Batesville*, 231 Ark. 201, 321 S. W. 2d 750. There the plaintiffs, as the

heirs of C. M. Edwards, sought to recover property upon either of two alternative inconsistent theories: (*a*) Edwards was incompetent to make a will, or (*b*) if he should be found to have been competent then the other claimants to the property had chosen to accept only a small portion of the estate. The trial court required the plaintiffs to elect between these contradictory theories, but we held the alternative prayers to be permissible, saying:

"The court placed too great a burden on the plaintiffs. It was impossible, or at least exceedingly difficult, for the plaintiffs to know at that time whether C. M. Edwards was competent or incompetent to make the wills in question. In fact they would never know for a certainty until the issue was decided in court. The two causes of action were pleaded, we think, alternatively as shown by the complaint and the prayer . . .

"In reaching the conclusion that appellants (the plaintiffs) should not have been required to elect, we are not overlooking the authorities presented by the appellees, and we recognize that the dividing line between when an election should be required and when it should not be required is not always clear and distinct, as is the case here. However, we feel that in equity matters any doubt should be resolved in favor of the pleader to the end that there may be a decision on the merits rather than on the pleadings and thereby avoid a possible miscarriage of justice."

In the case at hand the appellee was faced with the necessity of proving by clear and convincing evidence that her husband had executed a deed creating a tenancy by the entirety. She, like the plaintiffs in the *Allen* case, could not foretell with certainty that she would be able to sustain her burden of proof. We perceive no injustice to the appellants in a rule that permits an alternative precautionary pleading, so that both possible causes of action may ultimately be decided upon the merits.

As a second ground for reversal the appellants insist that the existence of the missing deed was not estab-

lished by the required quantum of proof. This question is not free from doubt, but after studying the record we are unable to say that the chancellor was in error in finding the plaintiff's proof to be sufficiently clear and convincing.

The appellee testified that her husband, in order to assure her the ownership of the property in case of his death, executed a deed to himself and her. (This would create a tenancy by the entirety. *Ebrite* v. *Brookhyser*, 219 Ark. 676, 244 S. W. 2d 625, 44 A. L. R. 2d 587.) She describes the deed as being just like the one they already had except that her name was added. She kept the deed until her husband took it to the county seat with the intention of recording it, but upon his return he told her that he had not recorded the instrument, as someone in the courthouse had informed him that the conveyance was not needed for his wife's protection. The unrecorded deed was burned up with some trash.

There is no sound reason to doubt the veracity of the appellee's testimony. She and her husband had been married for about thirty-five years; it was quite natural for him to safeguard her interest in the property. The fact that the deed was executed is confirmed by the testimony of the notary who prepared it, an apparently disinterested witness. There is no testimony whatever to the contrary. In view of all the circumstances we are of the opinion that the appellee sustained her burden of proof.

Affirmed.

WOOD *v.* SETLIFF.

5-2119 335 S. W. 2d 305

Opinion delivered May 16, 1960.

Brown & Compton, for appellant.

Shackleford and *Shackleford,* for appellee.

PAUL WARD, Associate Justice. This is the second appeal by appellant to this Court in connection with the same subject matter. For a full understanding of the background issues and subject matter, reference is made to the opinion of this Court in the case of *Wood* v. *Setliff,* 229 Ark. 1007, 320 S. W. 2d 655.

Summarily stated, the essential facts leading up to this appeal are those presently set forth. In 1951 appellant, for consideration of $14,000.00, executed a General Warranty Deed to Setliff and his wife (appellees herein) purporting to convey a parcel of land in the City of El Dorado 80 feet by 220 feet. Later appellees

filed suit in the Chancery Court against appellant for breach of warranty, alleging that a substantial portion of the above parcel of land had been dedicated to the City of El Dorado; that appellant had no title and appellees received no title to that portion of the land; and that appellees were entitled to damages in a substantial amount. The trial court agreed with appellees' contentions and entered a decree awarding damages for the value of that portion of the land to which title had failed. The court also awarded to appellees attorneys' fees and damages for removal of a building. On appeal by appellant this Court affirmed the decree of the trial court in all respects except as to the last two mentioned items, and remanded the cause for further proceedings.

Upon remand appellant filed a Petition in which he asked the trial court to require appellees, upon payment of the judgment, "to convey, without warranty of title" all of their right, title, and interest in and to that parcel of the land to which title had failed. This Petition was denied, and appellant prosecutes this appeal.

There are no disputed questions of fact and it is agreed by both parties that the sole question for decision is one of law. The essence of appellant's contention is set forth in his brief in this statement: "When the appellant paid this money to appellees, it would be grossly inequitable to allow the appellees to keep the money and the land too. They have the money to make them whole — if they keep the land, too, they are more than whole — they have both land and money."

The strongest legal support which we find for this contention is the statement in 91 C.J.S. p. 1131, Section 170 c., under the subject of Reconveyance. There we find this statement: "Where title has vested in the purchaser he must, as a general rule, reconvey or offer to reconvey the property by a conveyance which will put the vendor in *status quo*." Following the above quoted headnote we find this: "Ordinarily where title has vested in the purchaser, a reconveyance of the property or offer to reconvey is necessary; . . ." However there is an exception to the above rule announced in the same

paragraph where it is stated: "A tender of reconveyance is not necessary, however, where the purchaser has never acquired legal title or where the right acquired by the purchaser under his deed is absolutely worthless." Authority for the above statement is found in the case of *Bailey* v. *Gilman Bank,* 99 Mo. App. 571, 74 S. W. 874. See also *McCracken* v. *San Francisco,* 16 Cal. 591; *Upton* v. *Archer,* 41 Cal. 85, 10 Am. R. 266; and *Lewis* v. *Mote,* 140 Iowa 698, 119 N. W. 152.

As is more clearly set forth in our former opinion, appellant apparently had no title to subject land because it had been dedicated to the City of El Dorado, and for the same reason appellees received no title.

It occurs to us, moreover, that appellant is now in the same position as he would be if appellees executed a quitclaim deed to him. In the case of *Mackintosh et al* v. *Stewart,* 181 Ala. 328, 61 So. 956, where a similar issue was under consideration, the Court said: "A recovery in an action on a covenant for title works a rescission *pro tanto* by revesting in the convenantor the title, such as it is, which he has conveyed." Apparently appellees concede the above announced principle because in their brief and in the oral argument here, they disclaim all right, title and interest in the subject property, and they further agree that a court order to that effect may be entered.

Since appellant expresses the belief that he can someday perfect his title to the subject parcel of land against any claim of the City of El Dorado and since he wants to be in the best possible position to do so, and since all records affecting title to real estate should, when possible, be entered in the County where it is situated, we are remanding the cause to the trial court with instructions to enter an order reinvesting in appellant the title to the subject land, such as it is, which he conveyed to appellees.

As so modified the cause is remanded for the purpose above stated.

Modified and remanded with directions.

PHILLIPS COOPERATIVE GIN CO. *v.* TOLL.

5-2098 335 S. W. 2d 303

Opinion delivered May 16, 1960.

[redacted]

Griffin Smith, for appellant.

Thorp Thomas and *Tom Gentry,* for appellee.

SAM ROBINSON, Associate Justice. On the 27th day of September, 1955, a car occupied by Richard F. Toll, Sr. collided with a large truck pulling a trailer, driven by W. T. Jackson. Mr. Toll received injuries from which he died. The administratrix of his estate sued W. T. Jackson and the Phillips Cooperative Gin Company, alleging that the collision was due to the negligence of Jackson and that he was the agent, servant and employee of the Gin Company at the time of the collision. There was a judgment for the administratrix. Jackson did not appeal. The Gin Company did appeal and the judgment was reversed because of the giving of an erroneous instruction. But this Court held that the evidence was sufficient to sustain the verdict. *Phillips Cooperative Gin Company* v. *Toll,* 228 Ark. 891, 311 S. W. 2d 171.

When the case was tried anew, the only issue submitted to the jury was whether at the time of the col-

lision W. T. Jackson, the driver of the truck which collided with the car occupied by Mr. Toll, was the agent of the appellant Gin Company. The jury found by its verdict that Jackson was an agent of the appellant. As above mentioned, in the first case this Court held that the evidence was sufficient to take the case to the jury on the question of the sufficiency of the evidence to establish the relationship of master and servant between the Gin Company and W. T. Jackson. There is no substantial variance between the evidence in the case at bar and the evidence in the first case on the point of agency. There is a slight difference in the evidence regarding the registration of the trailer attached to the truck involved in the collision. In the first case it was shown that the trailer was registered in the name of C. T. Jackson, who is the president of the Gin Company and father of W. T. Jackson. In the case at bar no evidence was introduced showing in whose name the trailer was registered, but C. T. Jackson did testify that at one time he owned the trailer. We do not think this slight deviation is material. Moreover, additional evidence of agency was introduced.

Kay Matthews, a witness for appellee, testified that he is an attorney and acting chairman of the Arkansas Commerce Commission; that the Commission has to do with matters relating to transportation by common carriers, participating carriers and other carriers; that carriers of cotton seed are not required to obtain certificates of convenience and necessity, but they are required under the law to file securities in the form of a policy of public liability insurance; that he had searched the records of the Arkansas Commerce Commission back to 1950 and there was no record whatever of W. T. Jackson having filed anything. Matthews further testified that a company that hauls its own products is not required to file anything with the Commission.

It is contended by the Gin Company, and Jackson also testified, that he had been hauling as an independent contractor for the Gin Company over a period of several years. If this was true, Jackson had failed to comply with the requirement that he deposit evidence of

liability insurance. On the other hand, if Jackson was merely acting as agent for the Gin Company, there was no requirement that anything be filed with the Commerce Commission. In these circumstances the fact that nothing had been filed with the Commission was a fact from which a jury could draw the inference that the truck was being operated by the Gin Company. The jury had a right to consider this fact for whatever it was worth. They could draw such an inference from the proven facts, if they so interpreted the facts. There is no merit to appellant's contention that the question of insurance was injected into the case in violation of the rule discussed in *Derrick* v. *Rock,* 218 Ark. 339, 236 S. W. 2d 726.

On cross-examination W. T. Jackson was asked if a short time after the collision occurred he did not state to Officer Cone that he was on his way back to the Phillips Gin Company at Wycamp. The witness replied that he did not remember. Appellee put Officer Cone on the stand and asked him if Jackson had not said that he had been to the Southern Oil Mill to haul a load of seed up there for Phillips Cooperative. Appellant objected and the objection was sustained. Cone gave additional testimony, but no further objection was made to it.

Appellant complains of certain instructions given by the court. We have examined all of the instructions carefully, but find no error.

Affirmed.

SIMMS *v.* TINGLE.

5-2050 335 S. W. 2d 449

Opinion delivered May 16, 1960.

[Rehearing denied June 6, 1960]

Dinning & Dinning by *W. G. Dinning, Jr.*, for appellant.

Barber, Henry, Thurman & McCaskill, for appellee.

JIM JOHNSON, Associate Justice. This case arises out of an automobile collision. The sole question presented is whether appellant was a guest in appellee's car as a matter of law. The complaint, insofar as pertinent, alleged:

"That the plaintiff's (appellant's) presence in the automobile driven by the defendant was necessary by reason of the joint undertaking of the plaintiff and the defendant in selling and distributing 'Go to Church Stamps' for the Church of God of the City of West Helena, Phillips County, Arkansas, where the plaintiff's husband is the regular pastor and the defendant is a member of the said church. That the plaintiff and the defendant were jointly engaged in the undertaking, for their joint benefits, under a plan adopted by them whereby the defendant's husband's car was used in the morning and the plaintiff's husband's car would be used in the afternoon for the joint purpose of selling and distributing the religious media."

From a judgment of the trial court sustaining a demurrer and dismissing the complaint, the appellant, upon appeal, relies upon the following three points for reversal.

1. The appellant was engaged in a joint venture with the appellee for their mutual benefit and as such may maintain a suit for the recovery of damages based upon allegations of ordinary negligence;

2. The appellant was not a guest or invitee of the appellee but was a passenger in the automobile under a plan of sharing the expenses which constitutes a passenger for hire; and

3. The question of fact, presented by the allegations in the complaint as to whether the appellant was

a guest of appellee, is one of fact and could be determined only by a jury.

The general rule for determining the status of a passenger in an automobile is that if the transportation or carriage in its direct operation confers a benefit only on the person to whom the ride is given and no benefits other than such as are incidental to hospitality, companionship, or the like, upon the person extending the invitation, the passenger is a guest within the statutes (Ark. Stats. § 75-913 to 75-915), but if the carriage tends to the promotion of the mutual interests of both the passenger and the driver for their common benefit, or if the carriage is primarily for the attainment of some objective or purpose of the operator, the passenger is not a guest. *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30.

We have repeatedly held that when the status of an occupant of a car is questioned and conclusions must be drawn from the evidence, then the issue is one for the jury. *Corruthers* v. *Mason,* 224 Ark. 929, 227 S. W. 2d 60; *Whittecar* v. *Cheatham,* 226 Ark. 31, 287 S. W. 2d 578; *Rogers* v. *Lawrence,* 227 Ark. 117, 296 S. W. 2d 899. Certainly in testing, on demurrer, the sufficiency of the allegations in the complaint as regards status, the analogy would be that evidence should be allowed to clarify the allegations. This is true because on a demurrer the complaint, together with all reasonable inferences deducible therefrom, is to be construed most strongly in favor of the plaintiff. (See cases collected in West's Arkansas Digest, Pleadings, Sec. 214.) The complaint in this case alleged that the plaintiff and defendant were engaged in a joint undertaking. If it was a joint enterprise then the guest statute would not apply because in Am. Jur. Vol. 5A, p. 560, "Automobiles and Highway Traffic", § 521, cases and annotations are cited to sustain this text:

"The automobile guest statutes, relieving the owner or operator of an automobile from consequences of ordinary negligence which result in injury to a passenger in the car do not apply if the owner or driver of a motor

vehicle and a passenger therein are engaged in or embarking on a joint adventure or joint enterprise for their mutual advantage and the ride is an integral part of the venture or if the joint enterprise is a motivating influence in providing the transportation for the passenger . . ."

When the complaint alleged that the ladies were on a joint undertaking, certainly the plaintiff had a right to introduce evidence to establish that fact and bring herself within the quoted rule above which is that on a joint enterprise the guest statute does not apply. There is an annotation in 59 A. L. R. 2d, p. 336 entitled: "Mutual Business or Commercial Objectives or Benefits as Affecting the Status of a Rider under the Automobile Guest Statute" and in that annotation cases from various jurisdictions are reviewed. It seems clear to us that the allegations in the case at bar were sufficient to allow the introduction of evidence.

The appellee, while recognizing the rule permitting recovery for ordinary negligence where the carriage or transportation of a passenger is for the mutual benefit of both the passenger and the driver, points to the case of *Henry* v. *Henson,* 1943, Tex. Civ. App., 174 S. W. 2d 270, and to our own case of *Payne* v. *Fayetteville Merc. Co.,* 202 Ark. 264, 150 S. W. 2d 966, and argues that the benefit accruing to the driver must be a business or pecuniary benefit and that since any pecuniary benefit resulting from the fund-raising drive in this instance flowed directly to the church, the transportation of appellant in no way resulted in a business or pecuniary benefit to appellee.

In the case of *Henry* v. *Henson,* Tex. Civ. App., 174 S. W. 2d 270, which was appealed from a jury verdict finding that the passenger was not a guest on the basis that certain courtesies had been performed by the passenger to the driver, the Texas Court of Civil Appeals said:

"Mrs. Henry and Mrs. Henson, the record shows, were friends and co-workers in the Women's Missionary Society of the Methodist Church. It is undisputed that

each gave a great deal of her time and talents to that work. They were engaged in advancing missionary work, which is a necessary function of that great religious institution, the Methodist Church. These ladies were devoting much of their time to the spiritual uplift of their community through the channel of their society. Their work was for the church, and the benefit accruing to them was the advancement of the Christian religion through their joint efforts as delegates to this conference and the Christian education there received by each of them. But we are unable to say from the facts in this record that such mutual benefit accruing to each of them, or that the benefit to be derived from the trip by Mrs. Henry, the transporter, was of such nature 'as to change the status of plaintiff (appellee) from that of a guest.' As said in the recent case of *Franzen* v. *Jason,* Tex. Civ. App., 166 S. W. 2d 727, 728, writ refused:

'In Blashfield's Cyclopedia of Automobile Law and Practice (Perm. Ed.), in the 1942 pocket part of Vol. 4, § 2292, in construing said Article 6701 b, it is said that "the benefit accruing to or conferred upon the operator of one of the guest class must be a tangible one growing out of a definite relationship." '

"In support of that statement of the Law the author has cited the case of *Voelkl* v. *Latin,* 58 Ohio App. 245, 16 N. E. 2d 519, 523, wherein the Court of Appeals of Ohio said in part: 'The relationship which will give rise to the status of a "passenger" rather than a "guest" must confer a benefit upon the owner of a definite tangible nature.'

"The positive testimony of Mrs. Henson, appellee, part of which is set out above, negatives the contention that appellant furnished her transportation to and from College Station in exchange for certain courtesies to be performed by appellee . . ."

Thus, this authority relied upon by appellee does not substantiate her contention that the benefit flowing to the driver which takes the passenger out of the guest statute must necessarily be a business or pecuniary benefit measured in dollars and cents. The complaint here

alleges that the plaintiff and defendant were engaged in a joint undertaking in selling and distributing the "Go to Church Stamps." The appellee's contention that no benefit flowed to the appellee in collecting money for the church we hold to be without merit for otherwise a great host of religious workers have wasted many valuable hours. Nor is the contention supported by the case of *Payne* v. *Fayetteville Mer. Co., supra.* There the liability of the Fayetteville Mercantile Company depended upon the doctrine of respondeat superior and it was readily apparent that if the driver, who was primarily responsible for the injury, was not liable in that he received no benefit from the transportation, then of course his employer was not.

The question of whether the arrangement for the sharing of car expenses by using appellee's husband's car in the morning and the appellant's husband's car in the afternoon constituted a payment for transportation is one of fact. See: *Brand* v. *Rorke,* 225 Ark. 309, 280 S. W. 2d 906, where we said: ". . . It is certainly true that when a trip is undertaken for social and recreational purposes, a passenger may be found to be a guest even though he buys a tankful of gasoline for his host or contributes in some other way to the expense of the journey. Ordinarily, however, the issue is one of fact . . ." The appellee's argument that only the church benefited from the car pool agreement we do not consider to be logically sound for it nowhere appears that the coffers of the church were benefited nor charged with respect to any arrangement made by the parties for transportation.

Reversed.

HOLT, GEORGE ROSE SMITH, and WARD, JJ., dissent.

PAUL WARD, Associate Justice, dissenting. A careful consideration of the wording of the Complaint in this case and review of the many authorities dealing with the question here under consideration leads me to a different conclusion than that reached by the majority.

First, attention is called to the well established rule that a Demurrer will be sustained to a Complaint which does not state a cause of action or to one that pleads only conclusions of the law. See: Civil Code Page 96, Section 109; *Keith* v. *Freeman, et al,* 43 Ark. 296; *Southern Orchard Planting Company* v. *Gore,* 83 Ark. 78, 102 S. W. 709; *Pharr* v. *Knox,* 145 Ark. 4, 223 S. W. 400; *Driesbach* v. *Beckham,* 178 Ark. 816, 12 S. W. 2d 408; *Seubold* v. *Fort Smith Special School District,* 218 Ark. 560, 237 S. W. 2d 884.

Since the Complaint (as is conceded in this case) does not allege willful and wanton negligence on the part of appellee (Tingle) appellant cannot recover under the wording of her Complaint because of Ark. Stats. § 75-913-§ 75-915, the "guest statute" *unless* she was a "passenger" and not a "guest" in appellee's car.

The decisive question, therefore, is: Does the Complaint show appellant to be a "passenger" or a "guest"? It is apparent that this is a question which calls for close distinctions—distinctions which this Court has not heretofore made clear.

The many authorities which I have reviewed, some of which are hereafter set out, are practically unanimous in approving the following principles which are applicable to the case under consideration.

[a] If both the passenger and the owner-driver derive a tangible and substantial benefit then the rider is a passenger and can recover on simple negligence.

[b] "Tangible and substantial benefit" means something more than that based on companionship.

[c] If the owner-driver derives any special benefit (possibly either tangible, substantial or otherwise) over and above that received by the rider, then the rider is a passenger and can recover.

In the case of *Leete* v. *Griswold Post, No. 79, American Legion,* 114 Conn. 400, 158 A. 919, it was held that the benefit must be tangible. *Raub* v. *Rowe,* Tex. Civ. App., 119 S. W. 2d 190, reiterates a principle that there must be ". . . the element of material benefit to the defendant driver in the form of possible profits, where the elements

of friendship and hospitality were not involved, and where the ride was taken as an integral part of a business transaction. . . ."

In the case of *Rogers* v. *Vreeland,* 16 Cal. App. 2d 364, 60 P. 2d 585, the Court in construing the "guest" statute of that State among other things said:

> "Doubtless the Legislature intended to change the rule heretofore adopted in this state, that an invited guest could recover for simple negligence, and to provide that such a person could not recover in the absence of a showing of intoxication or willful misconduct; and we are of the opinion that the section is applicable to a case such as the one now before us, where the riders, on a trip purely social, and without any commercial or business element, agreed to pay their share of the running expenses of the automobile and their share of any other expense on the trip. We do not consider such an arrangement between the rider and the driver as the giving by the former to the latter of such compensation as removes the riders from the status of 'guest' within the meaning of the act."

Blashfield, in his Cyclopedia of Automobile Law and Practice, 1942 Pocket Part of Volume 4, Section 2292, in dealing with this same question says that: ". . . the benefit accruing to or conferred upon the operator of one of the guest class must be a tangible one growing out of a definite relationship." The same author further states: "One important element in determining whether a person is a guest within the meaning and limitations of such statutes is the identity of the person advantaged by the carriage. If, in its direct operation it confers . . . no benefits, other than such as are incidental to hospitality, companionship or the like, upon the person extending the invitation, the passenger is a guest within the statutes . . ." The above quotation was approved in the case of *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30.

In the case of *Iles* v. *Lamphere,* 60 Ohio App. 4, 18 N. E. 2d 989, appellant sued appellees to recover damages for personal injuries sustained as a result of the negligent operation by appellee of an automobile in which they were riding. In material part the Complaint stated: "That Mrs. Lamphere was President and Mrs. Iles was Treasurer of the Ladies Aid Society of the Seventh Day Ad-

ventist Church of West Clarksfield; that solely as officers and agents of this society and in pursuance of arrangements by the officers and members thereof and of a 'common purpose of purchasing of food supplies to be served by said society at a public sale to be held some days thereafter, proceeded to travel in Mrs. Lamphere's automobile. . . ' " The trial court sustained a demurrer and Mrs. Iles appealed. The Court stated in its opinion that: "The sole question in controversy is whether Mrs. Iles was a guest passenger of Mrs. Lamphere within the meaning of Section 6308-6, General Code." (Said statute contains the same terms with regards to willful and wanton misconduct of the drive that are found in our statute above referred to). The Court of Appeals, in sustaining the trial court, among other things, stated: "There must have been some beneficial consideration flowing from Mrs. Iles to Mrs. Lamphere to exclude Mrs. Iles from its operation (operation of the statute). Now, what benefit was bestowed by her upon Mrs. Lamphere? Neither of them was engaged in any personal business or undertaking. . . There is no allegation of fact from which may be inferred any benefit pecuniary or otherwise received by Mrs. Lamphere from Mrs. Iles."

A careful analysis of the facts and the holdings in the case of *Henry, et ux* v. *Henson, et ux*, Tex. Civ. App., 174 S. W. 2d 270, which is relied on so heavily by the majority, convinces me that it supports the statements and principles above set forth. In that case appellee (Henson) recovered a judgment against appellant in the trial court which the Appellate Court reversed and dismissed. The facts which were proven in that case are, to my mind, stronger to show that appellee (Mrs. Henson) was a passenger than are the allegations in the Complaint under consideration to show that Mrs. Simms was a passenger. It would unduly lengthen this dissent to reiterate fully the testimony in the cited case but it does show, when construed in the light most favorable to an affirmance of the judgment, that Mrs. Henry received more benefits from the trip which they were making as delegates to the Conference of Missionary Societies than Mrs.

Simms could possibly receive under the allegations of her Complaint. On this point it is revealing to compare the *Henry* case with the present case. The benefits accruing to Mrs. Henry were: [a] As the incoming president of the Missionary Society she would receive valuable advice and direction from Mrs. Henson who had just served in that capacity, and [b] she would get the benefit of shorthand notes which Mrs. Henson was going to make. All these were special benefits expected to accrue to Mrs. Henry. On the other hand, Mrs. Simms alleges no benefits, special or otherwise, that were to accrue to Mrs. Tingle. In fact all expected benefits from their undertaking would accrue to the Church and not to either of the parties. Moreover, the logical inference is that Mrs. Simms had more special interest in the undertaking because she was the wife of the pastor of the Church.

To be sure this Court does not want to unnecessarily discourage public spirited women from jointly engaging in church activities, but I submit that more discouragement would result from the decision of the majority. Hereafter, under that decision, any accommodating woman who extends a ride to a friend on a church mission must take into account the extra risk to which she will be subjected.

Justices HOLT and SMITH join in this dissent.

SILAS *v.* STATE.

4978 337 S. W. 2d 644

Opinion delivered May 23, 1960.

[Rehearing denied September 12, 1960]

Hugh W. Trantham, Comrade Warrington Knauts, for appellant.

Bruce Bennett, Atty. General by *Clyde Calliotte,* Asst. Atty. General, for appellee.

J. Seaborn Holt, Associate Justice. January 6, 1960, appellant, A. C. Silas, was tried and convicted on an information charging the crime of possessing stolen

goods, under § 41-3938, Ark. Stats., 1947 (1959 Supp.). His punishment was fixed at ten years in the penitentiary.

The original information, filed August 6, 1959, charged "the defendant, A. C. Silas, of the crime of Possession and disposal of stolen goods, committed as follows, to-wit: The said defendant in May and July, 1959, in the Eastern District of Clay County, Arkansas, did unlawfully, willfully, knowingly, and feloniously possess stolen goods which exceeded the aggregate value of thirty-five dollars ($35.00), knowing said goods to be stolen, with the intent to deprive the true owner thereof, and did dispose of same for a valuable consideration, and that said goods possessed are as follows: One 10 horsepower Evinrude outboard motor, Serial No. 10008-02643; One 10 horsepower Johnson outboard motor, Serial No. 1927540; One 10 horsepower Evinrude outboard motor, Serial No. 10014-09212; One 12 horsepower West Bend outboard motor, Serial 1652, Model 12902; One 2 horsepower West Bend outboard motor, Serial 1983 or 1980 Model 2901; and against the peace and dignity of the State of Arkansas."

The information was later amended by striking out the words "and disposal" from the charge; by correcting and changing the serial number of one of the motors from 10008-02643 to 10018-02643; and by adding another outboard motor describing it as follows: "One 18 horsepower Evinrude Outboard Motor, Serial No. 15024-14804." A long list of the State's witnesses was also attached to this information at appellant's request.

From the judgment comes this appeal. For reversal appellant contends that the trial court erred in allowing the information to be amended, as indicated above, and in refusing to quash it; that the court erred "in allowing the trial to proceed after amending the original information by striking the words 'and disposal' without any notice to the Appellant or Appellants Counsel;" that the court erred in refusing to grant appellant a continuance; and "by proceeding to trial without the State having first filed a Bill of Particulars as requested by Appellant." And finally Silas contends

that on account of the above alleged errors, he has been deprived of due process of law. We do not agree to any of these contentions.

Appellant, although a barber by trade, dealt in buying and selling many things, among them being automobiles, firearms and outboard marine motors. The evidence appears to be overwhelming that appellant induced several teenage boys to steal outboard motors for him and pursuant to this arrangement, six outboard marine motors were stolen and possession delivered to Silas. Silas paid the boys $300.00 for four of these motors. The owners of the stolen motors testified as to the ownership and identified them. One of the youths instrumental in stealing them testified that he, along with companions, delivered the stolen goods to Silas during the late hours of night. Serial numbers of the motors stolen corresponded with those in Silas' possession. Numerous advertisements appeared in the local newspaper offering the sale of motors by Silas with horsepower identical with those stolen.

At the outset appellant is confronted with the fact that he did not file a motion for a new trial incorporating his alleged errors. Therefore, under our long established rule, only such errors as may appear on the face of the record will be considered by this court on appeal. In *Holliman* v. *State,* 213 Ark. 876, 213 S. W. 2d 617, we said: "There is no motion for a new trial in this record, and * * * it is a well settled rule of this court that, where there is no motion for a new trial, only errors appearing on the face of the record will be considered on appeal." As to what constitutes "the record", we said in *Baker* v. *Allen,* 204 Ark. 818, 164 S. W. 2d 1004: "The record proper includes the pleadings, any exhibits thereto, statement showing service of summons, any material order of court preceding judgment, the judgment iself, motion for new trial, the order overruling same, and the grant of appeal."

The trial court did not err in allowing the State to amend the information by striking out the charge of "disposal" of stolen goods and thereby eliminating and

reducing the charge to the one charge of "possession" of stolen goods. Obviously the nature and degree of the crime charged (§ 43-1024, Ark. Stats.) was not changed. The change made was clearly to appellant's benefit and he cannot complain. "The only limitation on such amendment is that it relates to 'matters of form,' and not 'change the nature or the degree of the crime charged,' " *Ingle and Michael* v. *State,* 211 Ark. 39, 198 S. W. 2d 996. In 42 C. J. S., Indictments and Informations, § 237, the author says: "No amendment of the information is necessary in order that the prosecuting attorney may abandon a greater charge and proceed against accused on a lesser one included therein; a simple motion, made verbally in open court, or an announcement of such intention, suffices if made before the trial begins," and § 240, "Accused is not prejudiced by an amendment of an information to charge an offense included within that stated in the original information; and it has been held that an amendment which diminishes the accusation cannot injure accused."

In 27 American Jurisprudence, Indictments and Informations, § 118, we find this language: "Amendments in respect to the description of the offense or of the property involved, where they do not change the nature or degree of the offense are generally held to be proper under statutory authority permitting amendments as to form," and § 121, "* * * it has been held proper, where no substantial change in the nature or degree of the offense is worked thereby * * * to permit an amendment * * * as to the property forming the subject matter thereof."

Appellant contends that the amendment to the information "correcting the serial number of one of the outboard motors, which was otherwise properly described, by the changing of one number, was prejudicial error, and that the amendment of the information by the addition of an outboard motor also constituted error, alleging that these amendments were made without leave of the court." The record reflects that these alleged errors were not made in appellants motion to quash the

information, in his motion for bill of particulars, or in his motion for a continuance and were not made to the court prior to trial, and, as indicated, were not presented in a motion for a new trial; therefore, these contentions came too late and he is now estopped.

We find no merit in appellant's contention that the trial court abused its discretion in refusing to grant his motion for a continuance. Since this alleged error, as indicated, was not preserved in a motion for a new trial, it comes too late. We also quickly dispose of it on its merit by holding that the court did not abuse its discretion in denying a continuance. The court pointed out in overruling this motion that Mr. Hugh Trantham, appellant's attorney of record, contacted the court concerning the bond at the time of appellant's arrest in August and that attorney Trantham had represented appellant since August, 1959. "The fundamental principle running throughout the subject of continuances is that the granting or refusal of a continuance rests in the discretion of the court to which the application is made. Its ruling in reference thereto will not be disturbed by an appellate tribunal unless an abuse of discretion is shown . . .", 12 Am. Jur., Continuance, § 6.

We also hold that the trial court properly denied appellant's request that the State be required to file a bill of particulars. This too was a matter within the sound discretion of the trial court. Our statute relating to Bill of Particulars, § 43-804 Ark. Stats., 1947, provides: "The bill of particulars now required by law in criminal cases shall state the act relied upon by the State in sufficient details, as formerly required by an indictment; that is, with sufficient certainty to appraise the defendant of the specific crime with which he is charged, in order to enable him to prepare his defense . . ." The amended information here clearly charged appellant with the possession of stolen goods (Describing them) which is a felony. The information here itself was sufficient compliance with the law. In addition to the information, appellant, as indicated, was furnished with a copy of the State's witnesses before the trial.

Finally, appellant's contention that he was deprived of due process of law by being put to trial without being informed of that with which he was charged and not furnished a bill of particulars, after a request for same, may also be disposed of against appellant's contention since appellant made no objection on this ground at the trial and did not incorporate it in a motion for a new trial. We point out, however, that in 16-A, C. J. S., Constitutional Law, § 587, under Form and Contents of Indictments or Informations, the text writer has this to say on due process: "* * * a statement of the facts as to matters of detail is not essential. Due process is not denied by charging accused in an indictment containing several counts, each count alleging a different offense, by grouping several misdemeanor counts in one indictment, or by charging that both principals and accessories committed the crime in question . . .

"While it is not doubted that in a sufficiently extreme case, refusal of a bill of particulars would be a deprivation of due process, such refusal does not deny due process where accused has long understood the general nature of the charge and it is evident that, if given, a bill of particulars would be confined to the overt acts alleged.

"* * * So accused is not deprived of his liberty without due process of law by a verdict convicting him of a lesser offense than that charged in the indictment or information, but of the same generic class, or by a statute permitting accused to be charged as a principal and convicted as an accessory."

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

COMMISSIONER OF REVENUES *v.* ARK. STATE HIGHWAY COMMISSION.

5-2144 337 S. W. 2d 665

Opinion delivered May 23, 1960.

[Rehearing denied September 12, 1960]

Lyle Williams, for appellant.

Neill Bohlinger, H. Clay Robinson, for appellee.

ED. F. MCFADDIN, Associate Justice. The question presented on this appeal is whether the Highway Commission[1] is required to pay the Use Tax on merchandise it purchased outside of the State and used inside the State. The facts have been stipulated. The Revenue Commissioner assessed a tax of $999.70 against the Highway Commission under the Use Tax Act. The amount was paid under protest; and the Highway Commission brought this suit to recover the amount paid — a procedure provided in the said Use Tax Act (§ 84-3120, Ark. Stats.). The Chancery Court rendered a decree in favor of the Highway Commission; and the Commissioner of Revenues brings this appeal, presenting for decision the question first stated.

[1] The full style of the appellant, as contained in the record of this case, is "Office of Commissioner of Revenues and Arkansas State Revenue Department, J. Orville Cheney, Commissioner, E. E. McLees, Assistant Commissioner". The full style of the appellee, as contained in the record, is "Arkansas State Highway Commission". For convenience we will refer to the appellant as, "Revenue Commissioner", and to the appellee as, "Highway Commission".

The Commissioner of Revenues urges: that by the Use Tax Act[2] a tax was levied on the use of all merchandise purchased by any *person* outside the State and used in the State; that in defining the word "person" in § 4(h) of the Use Tax Act (§ 84-3104(h), Ark. Stats.) it is stated that the word "person" means "any . . . agency"; that the Highway Commission is an *agency*; that in the emergency clause of the Use Tax Act (§ 84-3128, Ark. Stats.) it is stated that the purpose of the Act is to remove discrimination; and that unless the Highway Commission is subject to the tax, its purchases outside of the State will mean discrimination against local merchants. The Commissioner of Revenues also urges most forcibly that, under § 6(c) of the Act (§ 84-3106 (c), Ark. Stats.), a "governmental agency" may apply in certain instances for a refund of the tax paid; that a "governmental agency" could not apply for a refund if the governmental agency had not previously paid the tax; that the governmental agency would not have paid the tax in the first instance if not liable therefor; and that if a "governmental agency" is liable to pay the tax then the Highway Commission is liable in this case because the Highway Commission is a "governmental agency".

These are very logical and forceful arguments by the Commissioner of Revenues; but we conclude that our holding in *Scurlock* v. *City of Springdale,* 224 Ark. 408, 273 S. W. 2d 551, points unalterably to our holding in the case at bar. In the Springdale case, the Commissioner of Revenues claimed that the City of Springdale was liable for the Use Tax on articles purchased outside of the State and used in the State. In holding that the Use Tax Act did not apply to a municipal corporation, such as the City of Springdale, we called attention to the definition of "person" as contained in § 4(h) of the Use Tax Act (§ 84-3104(h), Ark. Stats.)

[2] The Use Tax is officially called "The Arkansas Compensating Tax Act of 1949". It is Act No. 487 of 1949, and, as amended, may be found in § 84-3101 *et seq.*, Ark. Stats. The Sales Tax Act is officially called "The Arkansas Gross Receipts Act of 1941". It is Act No. 386 of 1941, and, as amended, may be found in § 84-1901 *et seq.*, Ark. Stats.

as compared with the definition of "person" as found in § 2(a) of the Sales Tax Act (§ 84-1902(a), Ark. Stats.). In the said Sales Tax Act the Legislature had specifically said that ". . . 'person' includes . . . this State, any County, City, Municipality, School District, or any other political sub-division of the State . . ."; whereas, in the Use Tax Act the definition of "person" did not contain any such language. We therefore concluded that the Legislature, by defining "person" in the Sales Tax Act to include the State and its subdivisions, and in failing to likewise define "person" in the Use Tax Act, thereby necessarily intended to exclude the State and its sub-divisions from the Use Tax Act.

In *Scurlock* v. *Springdale, supra,* we furthermore quoted from *U-Drive-'Em Service Co.* v. *Hardin,* 205 Ark. 501, 169 S. W. 2d 584:

" 'It is the general rule that a tax cannot be imposed except by express words indicating that purpose. The intention of the Legislature is to be gathered from a consideration of the entire act, and where there is ambiguity or doubt it must be resolved in favor of the taxpayer, and against the taxing power.' "

Then in *Scurlock* v. *Springdale* we concluded our opinion with this statement:

"The argument that cities should not be allowed to make out of state purchases tax free, when they are compelled (under Act 386 of 1941) to pay a tax on purchases made within the state, is a matter which addresses itself, not to the judiciary, but to the legislative branch of our government."

The opinion in *Scurlock* v. *Springdale* was rendered on December 20, 1954. Since that time there have been three regular sessions of the Legislature and several extraordinary sessions, yet there has been no amendment of the definition of the word "person" in the Use Tax Act. We must, therefore, conclude that our holding in *Scurlock* v. *Springdale* was in accord with the legislative intentions and desires. That holding, as aforesaid, points

unalterably to our conclusion here: that in the light of all the facts the definition of "person" in the Use Tax Act is not broad enough to apply to the Highway Commission.

The decree of the chancery court is affirmed.

WALLER *v.* YARBROUGH.

5-2115 337 S. W. 2d 641

Opinion delivered May 23, 1960.

[Rehearing denied September 12, 1960]

Wright, Harrison, Lindsey & Upton, for appellant.

Parker & Mobley, for appellee.

GEORGE ROSE SMITH, J. On the night of November 22, 1958, Noble Waller, who was then almost nineteen years old, was driving his father's car in the city of Dardanelle. Shortly before midnight the youth ran a stop sign at an excessive speed and struck the appellees' car, inflicting personal injuries and property damage. The appellees brought suit against Noble Waller, alleg-

ing carelessness in his operation of the automobile, and also against his father, the appellant Eugene Waller, alleging that the elder Waller was negligent in permitting his son to drive "after having prior knowledge that his son habitually drove in a fast, reckless, and wanton manner." The jury imposed liability upon both the father and the son, fixing the plaintiffs' total damages at $10,-300. Eugene Waller alone has appealed, contending that there is no substantial evidence to show that he was negligent in entrusting his car to his son. We are of the opinion that this contention must be sustained.

Before this accident Noble had been driving for at least two years, and probably somewhat longer than that. During that time he was never arrested for any traffic violation. The city marshal, called as a witness by the appellees, testified that he had closely observed young Waller's driving for 32 months preceding the trial, that he had never seen the youth driving in a fast or careless manner, and that he had never had occasion to caution the boy. There is no substantive proof (disregarding some testimony admitted for impeachment purposes only) that Noble had ever been involved in a traffic accident before this one.

The appellees produced fourteen witnesses whose testimony was intended to indicate that young Waller was an incompetent driver. Much of this testimony related to conduct not inherently dangerous to others, such as proof that Noble would start off so rapidly that his wheels would spin or spurt gravel, that his tires often squealed as he turned a corner, and that he was inclined to stop too suddenly. Several witnesses, however, also expressed their belief that Noble Waller drove "too fast," "pretty fast," "at what I thought was too fast a speed," "a little too fast," "too fast to be in town," and "pretty recklessly." One witness, a schoolmate of Noble's, described an occasion upon a trip to Russellville when Noble was "doing somewhere around ninety," but otherwise the criticism of Noble's driving consisted of generalized statements of opinion like those that we have mentioned.

In order for the appellees to make a case for the jury it was incumbent upon them to show not only that Noble Waller was an incompetent driver but also that his father knew or should have known that fact. It is not necessary to decide whether the proof sufficiently established Noble's incompetence as a driver, for even if that fact be conceded the appellees failed to show that Eugene Waller had notice of his son's driving habits. Since the family purpose doctrine is not recognized in Arkansas, the appellees had the burden of showing that Eugene Waller was at fault in allowing his son to use the car. *Norton* v. *Hall,* 149 Ark. 428, 232 S. W. 934, 19 A. L. R. 384; *Richardson* v. *Donaldson,* 220 Ark. 173, 246 S. W. 2d 551.

On the issue of the appellant's awareness of his son's faulty driving the appellees offered only one witness, W. W. Warren, a former city marshal who went out of office on December 31, 1956 — about two years before this accident. Warren testified that during his tenure as marshal he talked to Noble two or three times about his driving. "I just talked to him like I would to anyone else about his driving. He needed to slow down." Warren also testified that he discussed the matter at different times with Noble's father. He does not relate what was said in his discussions with the elder Waller, but the jury might fairly have inferred that Warren warned the appellant that his son "needed to slow down." There is no basis for an assumption that anything more than this was said.

We are unwilling to hold that Warren's testimony established a *prima facie* case for the plaintiffs. The one affirmative fact shown is that the city marshal, at some time before the end of 1956, told Mr. Waller that his boy needed to slow down. At most Noble was then barely seventeen years old. His father continued to let him use the car for two years or more, and in that time Noble was not arrested nor involved in any sort of traffic accident. Mr. Waller says, and there is no testimony to the contrary, that he had no reports of any kind about his son's driving, that Noble "was always

pretty careful when I was with him," and that he never had any occasion to inquire about how his son drove. It seems to us that we should really have to adopt the family purpose rule in order to fix liability upon the appellant on the basis of the marshal's mild warning some two years before this accident happened.

In addition to the proof that we have mentioned the plaintiffs offered to show that Noble Waller had the reputation of being a reckless and incompetent driver. The defendants' objection to this proof of reputation was sustained, but under our decisions the evidence was admissible. *Ozan Lbr. Co.* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341, 8 A. L. R. 2d 261; *Ark. La. Lbr. Co.* v. *Causey,* 228 Ark. 1130, 312 S. W. 2d 909. Inasmuch as the plaintiffs may be able to show by such evidence that the appellant had notice or knowledge of his son's incompetency as a driver, the case cannot be said to have been fully developed and will therefore be remanded for a new trial.

Reversed.

McFaddin, J., dissents.

Reid *v.* Karoley.

5-2118 337 S. W. 2d 648

Opinion delivered May 23, 1960.

[Rehearing denied September 12, 1960]

U. A. Gentry, for appellant.

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

SAM ROBINSON, Associate Justice. This is the fourth time the parties hereto have been before this Court as the result of a series of controversies arising out of a contract executed by them on November 13, 1951. At that time the parties were joint owners of certain real and personal property located in Little Rock. The agreement required appellee to relinquish her interest in this property to appellant in consideration for which appellant agreed to pay appellee $250 per month for the remainder of her life or until she married. The contract further required that should appellant predecease appellee, then a payment by his estate to appellee would be made in the sum of $10,000. Pursuant to the agreement appellee conveyed her interest in said property to appellant and the $250 monthly payments were commenced. Thereafter the validity of the contract was raised by appellant in a suit brought for arrearages and we held the contract was valid. *Karoley* v. *Reid,* 223 Ark. 737, 269 S. W. 2d 322. Subsequently appellee was awarded a judgment totaling $8,500, but the lower court refused to grant appellee specific performance under the contract. This latter point was appealed and we held that since the body of the complaint did not state a cause of action for specific performance, such relief could not be

granted. *Karoley* v. *Reid,* 226 Ark. 959, 295 S. W. 2d 767.

In the meantime appellant had taken voluntary bankruptcy on September 14, 1955, and the above judgment and all future payments to become due under the contract were scheduled as a part of his liabilities. Appellee filed a claim in the bankruptcy proceeding for the amount of the judgment, but did not include in her claim any future payments to become due under the contract. Appellant was discharged in bankruptcy on November 13, 1956.

Appellee then filed the present suit in chancery court for further arrearages which had become due under the contract dating from appellant's adjudication as a bankrupt, and the lower court rendered appellee a judgment on the pleadings. This decision was reversed and the cause remanded for further proceedings. *Reid* v. *Karoley,* 229 Ark. 90, 313 S. W. 2d 381. Appellee then filed an amended complaint. The case was tried on its merits and a judgment was rendered for appellee in the amount of $12,000. The present appeal is from that judgment.

Appellant contends that the chancery court did not have jurisdiction because appellee has an adequate remedy at law. The record reflects that the first real objection to the jurisdiction of the court on this ground was made orally immediately preceding the taking of testimony on the merits when appellant's counsel asked that the cause be transferred to circuit court. Appellant argues that the question of jurisdiction was raised prior to this time by the filing of a demurrer, but we have held a number of times that the proper method of procedure in this type situation is by a motion to transfer and not by demurrer. *The Church of God in Christ* v. *The Bank of Malvern,* 212 Ark. 971, 208 S. W. 2d 770; *Higginbotham* v. *Harper,* 206 Ark. 210, 174 S. W. 2d 668.

Further, it is well established that where a defendant has answered and not reserved any objection to the jurisdiction of the court on the ground that there is an adequate remedy at law, he cannot insist on it at the

hearing unless the court is wholly incompetent to grant the relief sought. *Cockrell* v. *Warner,* 14 Ark. 345; *Trapnall, Ex'r., etc.,* v. *Hill, et al,* 31 Ark. 345.

The remainder of appellant's arguments for reversal are discussed together. Under the provisions of the U. S. Code a discharge in bankruptcy releases a bankrupt from all his provable debts, with some exceptions not applicable here. 11 U. S. C. § 35. Appellant contends that appellee's claim for future payments under the contract was provable; that it was scheduled by appellant in the bankruptcy action, and was therefore discharged.

Payments due under the contract can be terminated by either death of the appellee or her marriage; the first contingency can be calculated by reference to tables on life expectancy, yet it would be impossible to ascertain with any degree of certainty when the second or alternative contingency might occur. An analogous situation was presented in *Dunbar* v. *Dunbar,* 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084, where the court said: "Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the bankruptcy act of 1898, . . . yet this contract, so far as regards the support of the wife, is not dependent upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which, in our opinion, is within the purview of the act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood. A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables. . . . But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question: inclination, age, health, property, attractiveness, children. These would, at least, enter into the question as to the probability of continuance

of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question."

The appellant further urges that whether this claim was provable can only be decided by the court in the bankruptcy action and therefore the chancery court could not delve into the problem. Appellant contends that since appellee failed to file a claim for the future payments under the contract in the bankruptcy proceeding, and have that claim ruled on there, the question is now *res judicata*. We do not agree. In order to properly adjudicate the rights of the parties, the court in which the action is pending must look to the characteristics of the claim upon which suit is brought to determine whether the nature of the debt is such that would make it dischargeable in bankruptcy. *Raia* v. *Goldberg*, 33 Ala. App. 435, 34 So. 2d 620, and *Dick* v. *Dick*, 11 N. J. Super. 533, 78 A. 2d 580. As a matter of fact, a footnote to the order of discharge in the bankruptcy proceeding contains the following language: "The Court is not obligated and therefore does not rule as to the question whether future payments (after date of adjudication) due on the contract signed October, 1951, between the bankrupt and Mary Karoley, comes within the discharge granted herein." We hold that the chancery court was correct in taking up the question of whether the claim for future payments under the terms of the contract was the type of debt which could be proved in appellant's proceeding in bankruptcy.

Under the authority of the *Dunbar* case cited above, we find the claim to be contingent and not provable within the requirements of the Bankruptcy Act, the debt was therefore not discharged, and the decree must be affirmed.

KAPP *v.* BOB SULLIVAN CHEVROLET CO.

5-2132 335 S. W. 2d 819

Opinion delivered May 23, 1960.

James M. Roy and *Elsijane Trimble Roy,* for appellant.

Gardner & Steinsiek, Reid & Burge and *Charles M. Love,* for appellee.

JIM JOHNSON, Associate Justice. This case involves the question of whether bringing an action for tortious conduct (negligence and misrepresentation) growing out of a particular set of facts will bar the bringing of a later suit on implied and express warranty, also based on the same set of facts.

Appellants, C. W. Kapp and Mrs. Nancy B. Kapp, are residents of Blytheville, and appellee, Bob Sullivan Chevrolet Company, has its place of business there. Appellee sold and installed a set of seat belts on the Kapp automobile in December 1956. While wearing one of the seat belts during an automobile collision near Amarillo, Texas, on October 12, 1957, Mrs. Kapp received severe and permanent injuries as a consequence of the belt webbing breaking. Appellants first filed suit No. 5133 for personal injury damages against appellee in the Civil Division of the Chickasawba District, Mississippi Coun-

ty Circuit Court, on December 6, 1958, alleging liability in negligence. Upon refusal of the trial court to permit joinder of warranty claims with the original negligence action in said suit No. 5133, appellants on September 12, 1959, filed the present suit No. 5221 in the same court against the same parties for personal injury damages grounded in breach of warranty. Upon appellee's motion on November 21, 1959, the trial court dismissed appellants' separate warranty action holding as follows:

"After hearing the argument of counsel, the court finds from the face of the pleadings, as a matter of law, that the plaintiffs have made an election of remedy, by reason of which this present action sounding in warranty should be dismissed."

From such ruling comes this appeal.

For reversal appellant contends that the trial court erred in holding plaintiffs'-appellants' prior personal injury suit based in negligence was an election of remedies barring a subsequent personal injury suit based in warranty.

Ark. Stats., § 27-1301 sets out what causes of action may be joined. The trial court was correct in its refusal to permit the joinder of the warranty claim with the original negligence action since this Court has repeatedly held in the application of this statute that an action for the recovery for damages for tort cannot be joined in an action on contract. See: *Harris* v. *Trueblood,* 124 Ark. 308, 186 S. W. 836; *Unionaid Life Ins. Co.* v. *Crutchfield,* 182 Ark. 825, 32 S. W. 2d 806. However, we have been unable to find where this Court has interpreted the statute to mean that an action in tort and an action in contract are necessarily, under all circumstances, inconsistent. In the two cases mentioned, the appellant alleges, in effect that the appellee intentionally misrepresented the quality of the belts and that he negligently selected them, and that he was charged with knowledge that they were not sufficient for the job he sold them for, and that he should be held liable for:

(1) Negligently selecting inferior materials for a given purpose and misrepresenting that they were sufficient when he knew, or by the use of reasonable care could have known they were not sufficient.

(2) That defendant expressly promised (warranted) that they were "the best" and would hold in a collision as well as any belt made.

(3) That even if he didn't make express representations, that he selected and recommended two belts for the job of preventing persons from being tossed around in a collision and that his implied warranty of fitness for the job intended was breached.

As we view these actions, the facts that would support (1) would support recovery under (2) and (3), and the facts developed to support (2) would support recovery under (3). (1) and (2) require proof of express statements, (1) with intent to defraud and with knowledge of the actual untruth; and (2) requiring only that appellee made the representations and appellant relied upon them. Finally (3) requires only that seller sold the goods for a given purpose and that he held them out as being fit for that purpose and purchaser relied upon this.

Therefore, from the facts in this case, we cannot say that the remedies sought by appellants are inconsistent. The doctrine of election does not apply to two actions, one upon a contract and the other for fraud on its procurement, when both depend upon an affirmance of the contract. See: *Dilley* v. *Simmons National Bank,* 108 Ark. 342, 158 S. W. 144.

As was held in *Davis* v. *Lawhon,* 186 Ark. 51, 52 S. W. 2d 887, it is only in cases where the causes of action are inconsistent that the prosecution of one suit bars the other. Where the two remedies are cumulative and not inconsistent, both suits may be prosecuted at the same time. Also see: *Sturdivant* v. *Reese,* 86 Ark. 452, 111 S. W. 261; *Craig* v. *Meriwether,* 84 Ark. 298, 105 S. W. 585.

The Court in the Lawhon case, *supra,* quoting a Florida decision, *American Process Co.* v. *Florida Pressed Brick Co.,* 56 Fla. 116, 47 So. 942, 16 Ann. Cas. 1054, very clearly stated the rule as follows:

"Where the law affords several distinct but not inconsistent remedies for the enforcement of a right, the mere election or choice to pursue one of such remedies does not operate as a waiver of the right to pursue the other remedies. In order to operate as a waiver or estoppel, the election must be between coexistent and inconsistent remedies. To determine whether coexistent remedies are inconsistent, the relation of the parties with reference to the right sought to be enforced as asserted by the pleadings should be considered. If more than one remedy exists, but they are not inconsistent, only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies."

From what we have said above, the judgment of the trial court dismissing the warranty action is reversed and since the causes of action are of a like nature growing out of the same accident and are pending before the same court involving the same litigants, we have been unable to find a valid reason to prevent, on proper motion, the consolidation of the causes for trial under the terms of Ark. Stats., § 27-1305, and proper determination under special interrogatory. See: *Waters-Pierce Oil Co.* v. *Van Elderen,* 84 Ark. 555, 106 S. W. 947.

Reversed and remanded.

McFaddin, J., concurs.

5-2141 335 S. W. 2d 713

Opinion delivered May 30, 1960.

[redacted]

Wright, Harrison, Lindsey & Upton, for appellant.

Talbot Feild, Jr., O. Wendell Hall, Jr., Mehaffy, Smith & Williams, Robert V. Light, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a judgment for $12,000 entered by the Saline Circuit Court in favor of appellee against appellant. The jury found Ford Motor Company guilty of negligence in the manufacture of a certain Ford truck, subsequently purchased and driven by appellee, and that such negligence was the cause of injuries sustained by Fish.

About April 12, 1956, Fish, employed by the State Game and Fish Commission as a game refuge commissioner in Lafayette County, purchased the Ford pickup truck from the Ford dealer in Stamps, L. D. Galloway, Jr. Five days later, while traveling highway 67 out of Little Rock, going toward Benton, the truck left the right side of the highway, turned over twice, and Fish was injured. This occurred shortly after 2 p.m., and the testimony establishes that the truck had been driven a total of approximately 550 miles at the time of the occurrence.

On January 9, 1958, Fish instituted suit in the Saline Circuit Court against the Ford Motor Company and Milton Green,[1] d/b/a Stamps Auto Company, alleging the purchase of the Ford pickup truck from Stamps Auto Company. Appellee averred that he drove the truck for five days in a careful manner, and had allowed no one else to drive the vehicle; that it had been driven 550 miles; that he had not in any way tampered with, altered, or disturbed, the braking assembly or mechanism, nor allowed any other person to do so; that such mechanical parts and assemblies were sealed, and locked by the Ford Motor Company in the process of manufacture, by means of screws, bolts, rivets, and pins, and "were at the time of the injury to plaintiff hereinafter described in the same condition, position and alignment as they were when this vehicle left defendant Ford Motor Company's factory except for whatever changes, if any, to condition, position and alignment as may have been caused by approximately 550 miles of careful operation of the vehicle." Paragraph four alleged "that on April 17, 1956, plaintiff was driving this vehicle at a speed of approximately 45 miles per hour on U. S. Highway 67-70 in Saline County, Arkansas, at which point said highway is a smooth, level, unobstructed concrete public roadway, when the right front wheel of the truck suddenly 'grabbed' twice in rapid succession and immediately thereafter that wheel 'locked' causing the vehicle to

[1] Subsequently, service of summons upon Green was quashed, and the complaint amended naming L. D. Galloway as the defendant owner of Stamps Auto Company rather than Green.

overturn, and causing the injuries and damages to plaintiff hereinafter described." The complaint further charged, insofar as Ford Motor Company was concerned, that the company negligently failed to exercise the degree of care owed by a manufacturer of a vehicle to the vendee and public "in the manufacture, testing, inspection, design and engineering of its product" and as a result of this failure, placed this vehicle in the channels of trade for sale with mechanical defects which caused, or contributed to cause, the injuries and damages to plaintiff. Further allegations were that the defective parts "were closed up, sealed and locked by defendant Ford Motor Company by means of screws, bolts, rivets and pins and thus continued to be in the exclusive control of this defendant until the time of the injuries to the plaintiff, and therefore their nature is within the exclusive knowledge of this defendant. All of the foregoing defects would have been discoverable by this defendant in the exercise of reasonable inspection and testing." The complaint sought damages in the amount of $64,844.10. After the filing of various motions and interrogatories, both the Ford Motor Company and L. D. Galloway filed separate answers, denying liability and asserting that if appellee sustained any injuries or damages, such injuries or damages were proximately caused or contributed to by negligence or carelessness on the part of appellee. The case was heard on October 15, 1959, at which time the jury found the defendant, L. D. Galloway, d/b/a Stamps Auto Company, guilty of no negligence, found Charlie Fish guilty of no negligence, but found the Ford Motor Company guilty of the entire and total negligence, or 100%. Verdict was returned in the amount of $12,000.[2]

For reversal, appellant urges three points, as follows:

"I.

The evidence was insufficient to sustain a verdict against appellant, and the trial court should have directed a verdict in appellant's favor.

[2] The excessiveness of the verdict is not questioned.

II.

The Court erred in admitting, over the objection of appellant, certain incompetent testimony offered on behalf of appellee.

III.

The Court erred in giving, over the general and specific objections of appellant, plaintiff's instructions numbered 1, 4, 5, and 6."

We proceed to a discussion of these contentions, though not under separate headings.

The evidence reflected that appellee had been in possession of the truck five days, and had driven it 551 miles. Fish testified that no one else had driven the truck, and that he had not inspected or tampered with the mechanical parts in any way. Appellee is a game refuge keeper in Lafayette County, and on April 17th, he drove the vehicle to Little Rock for the purpose of having a two-way radio installed, leaving Bradley (a distance of 163 miles from Little Rock) about 1 or 1:30 a.m., and arriving in Little Rock between 6 and 6:30 a.m. Installation of the radio was completed around 12:30, and appellee started back to Bradley, taking highway 67 out of Little Rock. He passed a heavily loaded truck, while traveling at a speed of 40 or 45 miles per hour, and after getting back on his own side of the highway, noticed that his right front wheel was pulling to the right. "It grabbed two or three little short grabs, and then it grabbed and held, and pulled me to the right." The car left the highway and turned over twice; the right door came open, and appellee, in sliding down, had both legs pinned to the ground by the running board. The radio was on, and Fish called the Game and Fish office, and asked that help be sent. According to the witness, no traffic was approaching at the time the mishap occurred. In the meantime, William Rider, a state policeman, arrived, and with the help of bystanders, removed Fish from the wreckage.[3] Appellee testi-

[3] Rider testified that Fish told him that the reason he (Fish) did not pull to the left, was because of oncoming traffic.

fied that, while being carried away, he observed two or three short, black marks, three or four feet in length, some thirty or forty feet back of where the truck left the highway. Appellee's contention is that these marks were left by the right front wheel, and show that the wheel did lock. Both Aubrey Fowler, Chief Enforcement Officer for the Game & Fish Commission, and Rider testified that they observed the skid mark, though they testified that it was a single (rather than two or three short marks), black, straight, mark, that ran straight for a few feet, and then veered, at first gradually, and then sharply, to the right. Fowler stated that he drove the truck back to the Game & Fish Commission Building in Little Rock, a distance of approximately 15 miles, at a speed of 12 to 15 miles per hour. He observed nothing wrong with the operation of the vehicle, though he testified that he did not apply the brakes at all before stopping at the Game & Fish Building.

In endeavoring to establish liability on the part of the Ford Motor Company, appellee relied, to some extent, on the doctrine of *res ipsa loquitur*. This Latin phrase is generally interpreted to mean "the thing itself speaks" or "the transaction speaks for itself", and is a concise way of stating that circumstances attending an accident are of themselves of such character as to justify an inference of negligence on the part of one having control over such circumstances. Interesting discussions of this doctrine are found in various legal volumes, and it is evident that all jurisdictions are not in accord in determining what fact situations properly come under the doctrine. However, in those states which recognize the doctrine, certain conditions are necessary before *res ipsa loquitur* may be applied. As stated in Corpus Juris Secundum, Vol. 65, para. 220 (4), page 999:

"There are several conditions, aside from those directly pertaining to the nature and happening of the accident or injury as such, which are generally recognized as essential to make the doctrine of *res ipsa loquitur* applicable to a given case and to lay the foundation for the presumption or inference arising therefrom. These

conditions or essential elements include superior knowledge on the part of defendant as to the cause of the accident, * * * the absence or unavailability of direct evidence of negligence, * * * the existence of a sufficient duty on the part of defendant to use due care, * * * and proof of the accident or injury and defendant's relation thereto.

In order that the doctrine of *res ipsa loquitur* may apply, plaintiff must first present sufficient proof of the existence of the elements necessary to bring the doctrine into operation; the inference arising from the rule does not supply the foundation facts from which the rule arises, and the application of the doctrine to a particular state of facts cannot be based on speculation alone."

In paragraph 220 (6):

"Although, * * * the doctrine of *res ipsa loquitur* provides a substitute for direct proof of negligence, the rule is nevertheless one of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available."

In *Words and Phrases,* Vol. 37, page 484:

"For application of doctrine of '*res ipsa loquitur*' accident must be of a kind which ordinarily does not occur in the absence of some one's negligence, it must be caused by an agency or instrumentality within defendant's exclusive control, and it must not have been due to any voluntary action or contribution on part of plaintiff."

Further, on page 488, paragraph 5:

"The mere happening of accident does not justify recourse to '*res ipsa loquitur*' rule in personal injury suit, but accident must further appear to be without explanation in light of ordinary experience, except on theory of defendant's negligence to render rule applicable." Still further, paragraph 12:

"The '*res ipsa loquitur*' doctrine applies only when the damage caused, which is the basis of the action, is of such a nature that it can be said that according to com-

mon experience the event which caused the damage would not have occurred without some fault on the part of the persons sought to be held responsible."

Finally, in 7A *Blashfield, Automobile Law and Practice,* 217, Sec. 4818, it is stated:

"The mere occurrence of an accident resulting in injuries to the buyer of an automobile or other third person does not raise a presumption that the manufacturer or dealer was negligent, or that the vehicle had a latent defect, and plaintiff must prove that the alleged manufacturer was such, and he has the burden of proving that the manufacturer was negligent in the manufacture of the automobile. * * *

However, the doctrine of *res ipsa loquitur* may be applied in a proper case, as, for example, in the case of an explosion of a solvent used for the tune-up of automobile motors."

Through the testimony of Artie Bearden, an automobile mechanic of Benton, and W. C. "Dutch" Mayer, a garage operator in Little Rock, appellee sought to prove that the right brake was defective. Mayer testified, "The brake was binding", and he took it to Cook's Machine Shop to see "if the drum was out of round". He stated that the drum was placed on a machine which could be used for determining whether the drum was out of round. Mayer testified that "it was an eighth of an inch off". The witness stated that, based on his experience as an automobile mechanic, if a drum is an eighth of an inch out of round and the brakes are applied, or if the brakes are set too tight, the vehicle will be thrown to one side. He testified this would not happen every time, but that if the drum is out of round and it happens to revolve at the proper point, it would cause it to "lock up". Mayer further stated that a brake could also be caused to lock by brake fluid or grease on the brake lining, or that it could be caused by a rough lining. However, on cross examination, the witness testified that if a drum is as much as an eighth of an inch out of round, the driver of the vehicle would feel this defect by pres-

sure on the brake pedal; that the pedal would work backward and forward, and the driver could easily tell that something was wrong; also, if the car had been driven for 550 miles, a "hot spot" would be created at the high point, and that this "hot spot" would be visible by looking at the brake drum; however, his examination revealed no "hot spot" on this particular drum. Mayer found no foreign matter of any nature on the brake lining, and in fact, found nothing wrong with either the brake shoes or the brake lining except "that the lining was scored a little bit". Mr. Mayer testified that the brake linings "shouldn't score within four to five thousand miles".

Counsel for appellee propounded to the witness Bearden the following hypothetical question:

"Assume that a buyer purchased a new 1956 model Ford pick-up truck and drove it for four days and on the fifth day, at a time when he had about 550 miles on that pick-up truck, and at a time when no other driver but him had driven it since he bought it, and at a time when he had not tampered with any of the mechanical parts of that vehicle, nor had permitted anyone to, and at a time when he had had no mechanical difficulty with the pick-up truck, that he was driving down a straight, level, concrete highway, under favorable weather conditions, it was a pretty day, the pavement was dry, and, as he would describe it in his layman's language, the right front brake grabbed one, two or three times in rapid succession, and releasing each time, and then it grabbed and locked, resulting in the vehicle making a single black skid mark on the pavement for a short distance in a straight line, then veering off gradually to the right shoulder, then more sharply to the right across the shoulder and off the highway, resulting in the vehicle turning over, I believe, twice; now, assuming that state of facts, do you have an opinion as to what might have caused that reaction? . . . Assume one further fact — that during this four days that the vehicle had been driven, that it had been driven on some paved roads, some gravel roads, some dirt roads; and, assume one fur-

ther fact — that the driver of that vehicle had arisen on the morning of the incident so as to leave his home at approximately 1:30 in the morning, and consequently had been up all morning and the incident occurred approximately 2:00 o'clock in the afternoon, and he had not slept during that period of time and had had approximately 5 hours of sleep the night before; now, then, do you have an opinion, under those circumstances, as to what might have caused this incident?"

To this question, objected to by appellant, the witness replied that he had an opinion, the opinion being "it could be caused by foreign matter in the wheel or a bearing". Bearden explained that by foreign matter, he meant something that was not supposed to be there, *i.e.*, in this instance, grease or brake fluid on the brake lining. One addition was then made to the hypothetical set of facts, and the witness was asked, "Assume that some application was made on the brake pedal, would there be any change or do you have an opinion as to what might happen in this instance?" To this question, Mr. Bearden replied, "It would lock the wheel." Appellant continued with his objections to the question and answer.

Appellant offered the testimony of Robert Riding, an engineer and employee of Ford Motor Company for 19 years. Riding testified that a drum cannot be tested properly in the manner testified to by Mayer, and that the use of the spindle is not an accurate way to test a drum for "out of round".[4] The witness stated that the "run out" on the drum was measured at seven thousandths; and that the manufacturer's permissible tolerance is five thousandths; that a run out of up to five thousandths is considered perfect; however, he testified that a run out of seven thousandths would not be noticed in the operation of the drum. The witness testified that if a drum were one-eighth of an inch out of round, one could not get a brake adjustment, and the pedal would bounce up and down; further, that under such a condition, the brake would not have lasted 500 miles; that a

[4] "Out of round" means when the center point is not where it should be, and "run out" means a wobbling of the drum.

"hot spot" would have been evident, and he found no evidence that heat had ever been applied to the drum, nor did he notice any unusual scoring or wear on the linings. Of course, we are not here concerned with the conflict in evidence, for conflicts are resolved by juries. We are only concerned with whether the court committed error in permitting the case to go to jury on the theory advanced.

We have reached the conclusion that, under the evidence offered, the doctrine of *res ipsa loquitur* was inapplicable. Appellees rely heavily upon *Coca-Cola Bottling Co. of Ft. Smith* v. *Hicks,* 215 Ark. 803, 223 S. W. 2d 762 (1949) and *Coca-Cola Bottling Co. of Helena* v. *Mattice,* 219 Ark. 428, 243 S. W. 2d 15 (1951). Both of those cases involved the explosion of a bottle of coca-cola, and we held that the mere fact that a bottle explodes raises a presumption of negligence in bottling, since reasonable men know that when bottles are properly manufactured and filled, they do not blow up. Appellee considers these cases analogous to the one before us, for he argues that the evidence reflects that appellant had exclusive control over the brake assembly up until the time of the accident. It is at once apparent that there is a vast difference between the handling of a coca-cola bottle and the driving of an automobile. There is much room for mishandling in operating a car; in fact, we think it can be safely said that automobiles ordinarily depart the road through negligence of the operator, rather than through negligence of the manufacturer. There is still another clear distinction. After the bottle explodes, there is little that can be done by the injured person to determine the cause of the explosion. The bottle cannot be reassembled, and checked for defects. The cited cases would be more similar if the motor of a car exploded, or a wheel suddenly disintegrated. In such event, a determination of the exact cause would be extremely difficult; however, brakes are not a complicated mechanism. The average auto repairman can determine the exact nature of the malfunction of brakes, — and all parts of the brake mechanism were available for inspection. In *General Motors Corporation* v. *John-*

son, 137 F. 2d 320 (1943) and *Hupp Motor Car Corporation* v. *Wadsworth,* 113 F. 2d 827 (1940), cited by appellee, direct proof of negligence in the manufacturer of automobiles was found, and the doctrine of *res ipsa loquitur* was not relied upon. A case which seems to be somewhat similar to the case at bar is *Haas* v. *Buick Motor Division of General Motors Corporation,* 20 Ill. App. 2d 448, 156 N. E. 2d 263. There, a new automobile had been driven about 1,300 miles when smoke began coming from under the dashboard. When an attempt was made to turn off the ignition, the key would not turn. The fire melted the dashboard, and windows were smoked. A verdict was directed for the manufacturer, and this action was sustained by the Appellate Court of Illinois (Second District, Second Division). Although the suit was brought on express warranties, we feel that the logic is applicable to the present case. The Court said, *inter alia*:

"The mere fact that an occurrence resulting in damage to property has happened does not authorize any presumption or inference that the defendant was at fault. *Rotche* v. *Buick Motor Co.,* 1934, 358 Ill. 507, 193 N. E. 529, *Huff* v. *Illinois C. R. R. Co.,* 1935, 362 Ill. 95, 199 N. E. 116. The mere fact that a fire evidently occurred here, resulting in damage to the property, does not authorize any presumption or inference that the defendant was responsible therefor — the burden was on the plaintiff to prove, among other things, that there was some material defect in materials or workmanship. * * * This is not a case for the application of some doctrine analogous to that of *res ipsa loquitur.*"

In line with the definitions and authorities herein cited, we conclude that the facts do not make a proper case for the application of *res ipsa loquitur*. There was evidence that the car left the highway without fault of the driver. There was evidence that the brake mechanism was sealed and locked by the motor company, thus in their exclusive control, and that this mechanism had not been disturbed. Of course, it cannot be said that the accident (leaving the highway) was without explanation in the light of ordinary experience; however, be that as

it may, the alleged defective mechanism was not destroyed, was available to the injured party for inspection and examination, was examined, and the testimony reflected that specific defects were found.

Appellant complains that appellee was permitted to testify that the right front wheel of his truck caused the marks on the highway. Appellant states that this was an unsupported conclusion or opinion, and violates the rules of evidence which exclude conclusions or opinions of all witnesses except experts. We do not agree. This was not a matter of a witness coming to the scene after the occurrence was over, viewing the skid mark and then testifying that it was caused by the right front wheel. Appellee's testimony was based on the "feel" of the drag in the front wheel, through steering, as the car went to the right.

We think the court committed error in permitting the answer of the witness Bearden, in response to the hypothetical question, to be considered by the jury. Mr. Bearden's testimony amounted to a suggestion that there was the possibility that grease or brake fluid within the braking assembly could have caused the accident. Yet, all witnesses were unanimous in stating that no such foreign matter was found within the assembly. The jury was told by the court that the witness had given his opinion as an expert "as to what might have happened, and the jury will consider it in that manner." Since there was absolutely no evidence upon which to base this possibility, the answer should not have been considered, as it afforded the opportunity for speculation on the part of the jury.

We are also of the opinion that the court erred in giving Plaintiff's Instructions 4 and 5. Without going into detail, it suffices to say that these instructions, in effect, permitted the jury to apply the doctrine of *res ipsa loquitur,* which we have held inapplicable under the facts developed at the trial. Objections to other instructions are held without merit.

There was evidence of specific negligence, though not of the strongest nature. For instance, the witness

Mayer testified that the brake was binding, which occasioned his taking it to Cook's Machine Shop to see if the drum was out of round; there was the evidence of the skid mark, the evidence of Fish himself as to the pull to the right; the testimony that the mechanism had not been disturbed and had remained sealed, and that the drum was an eighth of an inch out of round.

In accordance with the reasons set forth in this Opinion, the judgment is reversed, and the cause remanded.

McFaddin, J., dissents in part.

Ed. F. McFaddin, Associate Justice, dissenting in part. My dissent is because I am of the opinion that the rule of *res ipsa loquitur* applies in this case. As I see matters, the majority opinion means that we now have one rule for the use of *res ipsa loquitur* as regards bottled drinks, and another rule for the use of *res ipsa loquitur* as regards automobiles. This seems entirely irregular as far as I am concerned. The rule of *res ipsa loquitur* should apply uniformly.

McKinnon, Admx. *v.* Southern Farm Bureau Casualty Ins. Co.

5-2150 335 S. W. 2d 709

Opinion delivered May 30, 1960.

Denman & Denman, for appellant.

Shaver, Tackett & Jones, for appellee.

J. Seaborn Holt, Associate Justice. Appellant, Mrs. Clyda McKinnon, Administratrix of the Estate of Harvey McKinnon, Deceased, brings this appeal from a judgment in favor of appellee, Southern Farm Bureau Casualty Insurance Company, on a claim of appellant against appellee for $5,000.00 under the terms of one of appellee's policies. The insurance policy named as the insured: "Kenneth McKinnon and/or Harvey McKinnon" and covered bodily injury liability, property damage liability, medical payments, comprehensive damages and collision damages. The present appeal deals only with the extent of the medical coverage.

Harvey McKinnon was killed in an automobile accident while riding in an automobile owned and operated by his son, Kenneth, and insured by appellee casualty insurance company. Kenneth was a minor when he purchased the car and when it was first insured on his initial application. This original policy was renewed from time to time, each time in the name of "Kenneth McKinnon and/or Harvey McKinnon" (his father) and even after Kenneth reached his majority, the policy (the one here involved) continued the name of "Kenneth McKinnon

and/or Harvey McKinnon." Appellant alleged in her complaint: "That the defendant issued their policy number A280601 to 'Kenneth McKinnon &/or Harvey McKinnon.' That among the provisions of said policy there was a 'Medical payment' coverage known as 'Coverage C' that this coverage was paid for and applicable to this policy and to this insured. ¶ That the said 'Medical Payment—Coverage C' in said policy reads as follows: 'II. Medical Payments—Coverage C: To pay all reasonable expenses incurred within one year from the date of accident for necessary ambulance, hospital, professional nursing and funeral services to or for: Division 1 (a) The named insured and, while residents of the same household, his spouse and any relative of either, who sustains bodily injury, caused by accident while in or upon entering or alighting from, or through being struck by any automobile; (b) in the event of the death of the *first individual named as insured* caused by accident while in or upon, entering or alighting from, or through being struck by any automobile, the sum of $5,000.00 less any payments otherwise made hereunder on account of such injury. * * * ¶ That 'Medical Payment-Coverage C' Division 1 (b) section of said policy and by reason of the clause naming the insured 'Kenneth McKinnon &/or Harvey McKinnon,' the defendant is liable to pay, because of the death of Harvey McKinnon, the sum of $5,000.00, as provided for in said policy." (Emphasis ours) Appellee answered with a general denial. Trial was had by agreement before the court and as indicated, there was a judgment in favor of appellee, casualty company.

For reversal, appellant contends: "The appellee by using '&/or' in naming the insured created an ambiguity, and said ambiguity must be construed most strictly against the appellee insurer; that the phrase '&/or' is typed and the phrase 'first individual named' is printed, — under well settled rules of construction the written phrase takes precedence over the printed phrase; The effect of the appellee's theory is that the appellee intended to and did, perform a nullity by placing Harvey

McKinnon's name in the clause naming the insured in this policy, because under the appellee's theory the placing of Harvey McKinnon's name in the clause naming the insured did nothing more than was done by the printed policy."

It thus appears that one clause in the policy refers to the *named insured* and another clause to the *first individual named as insured.* Both clauses were correctly set out in appellant's complaint above. Appellant's counsel insists that since the phrase "&/or" is used, this means that either of the persons named can be chosen as the first named insured. It is further argued that the phrase "&/or" is susceptible of more than one meaning and creates an ambiguity which under our long established rule of strict construction against the company, the appellant should prevail. While it is true that we resort to such rule of construction when there is ambiguity, our rule is equally well established that where no ambiguity exists, we are not required to use a forced construction which is plainly outside the language of the policy. Here, we think, the policy is clearly susceptible to but one construction under its term, "in the event of the death of the *first individual named as insured* caused by accident * * *," which are definite and certain and the language used unmistakably insured the life of Kenneth McKinnon only, the *first individual named* as insured. Plainer language could not have been used.

Appellant's further contention "that the phrase '&/or' is typed and the phrase 'first individual named' is printed; under well settled rules of construction the written phrase takes precedence over the printed phrase we hold to be without merit. It is only where the written (or typed) and printed words are so contradictory that an ambiguity arises that one must yield to the other. As indicated, we find no ambiguity or contradiction here. The controlling rule is clearly announced in 29 Am. Jur. Insurance No. 161: Variance — Between Written and Printed Matter: It is the rule with reference to insurance policies, as well as other contracts, that the

written portion of an insurance policy must be taken as more immediately expressive of the intention of the parties than the printed portion, if there is any repugnancy or conflict between them, and that in such case the written portion prevails. This rule however, applies only where the written and printed words so contradict each other that the one must yield to the other; where they do not, the policy must be so construed as to give effect to every part of it, and the writing and the print are to be construed so that both can stand, if possible," and in Insurance Law and Practice, Appleman, § 7522, we find: "In construing an insurance policy or certificate, all parts, both printed and written, should be given effect, if possible. In construing insurance contracts, the court must take the policy as it finds it, and where it is in printed form with written parts introduced into it, must take the whole together, both written and printed. Wherever possible, the courts will harmonize such clauses if they can be reconciled by any reasonable construction, since it cannot be assumed that the parties intended to insert inconsistent provisions. ¶ Of course printed parts of a policy may be modified by written endorsement. And the general rule is that while written and printed portions of a policy will be reconciled, if possible, if they are definitely repugnant, the written clauses will be given effect over the printed. Accordingly, where written and printed portions of the policy are inconsistent, the written clauses will prevail. The same preference is given to a typewritten expression as to one in writing . . ."

We said in *State Farm Mutual Automobile Insurance Company* v. *Belshe,* 195 Ark. 460, 112 S. W. 2d 954: " 'It will not be questioned that the parties can make any contract of insurance not prohibited by law, and there appears to be good reason why an indemnity company would not be willing to assume the risk for damages resulting from cars being driven or operated by persons under sixteen years of age.' (Citing authorities.) We think the foregoing quotation is a well-considered expression of opinion, sound from every viewpoint; that the

insurance company may make use of such language as it may please to express the conditions upon which it is willing to issue its policy. The insured, by acceptance, approves such policy with all the conditions therein contained, so long as they are reasonable and not contrary to public policy. Our attention has been called by appellant to an opinion in which we find well stated the same principle; but, * * * contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense. * * * ¶ The distinction we think these authorities make is one that is found in the construction or meaning of a policy as written. The courts have made no effort in any of the cases to fix or determine liability not contracted for; and only in those cases wherein there is ambiguity has the court found reason to resort to a construction most strongly against the insurance company."

Finally, appellant's argument that if the life of Harvey McKinnon were not insured, his name as an insured served no beneficial purpose whatever to him or his estate. We do not agree. Under the plain terms of the policy here, Harvey McKinnon and his wife were clearly afforded the following benefits: "(1) Bodily Injury and (2) Property Damage Liability while using the insured vehicle without the consent of Kenneth * * * (3) Comprehensive and (4) Collision Damages and Losses to the insured car while using same without the consent of Kenneth or while the insured vehicle was being used by any other person with their consent, * * * (5) Bail Bonds required because of accident or traffic law violations while using the insured vehicle without the consent of Kenneth and to release any other vehicle being used by them not owned by a member of their household; (7) Emergency Road Service, including first aid, delivery of gasoline, oil, battery and tires, and towing of car while using insured vehicle without Kenneth's consent * * * (8) Medical, Hospital, and Funeral ex-

penses incurred by or for them because of accidental injury while in or upon entering or alighting from, or through being struck by ANY AUTOMOBILE, even though Kenneth not be a member of their household."

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

ED. F. MCFADDIN, Associate Justice concurring. The purpose of this concurrence is to give my views for affirmance of the judgment of the Trial Court.

The appellant insists that the words and symbols, "and/or", created an ambiguity. Even if we admit that an ambiguity was so created, then the effect of the ambiguity would be to admit testimony to explain it. This case was tried before the Circuit Court without a jury and testimony was introduced which had the effect of explaining the ambiguity.

The Circuit Judge found for the appellee, and that finding has the force and effect of a jury verdict. So, as I see it, the only way the appellant could prevail now would be to contend that she was entitled to an instructed verdict even with the testimony introduced. I cannot support that contention, even if made. The insistence that there was an ambiguity falls far short of the claim for an instructed verdict.

COLEY *v.* GREEN.

5-2142 335 S. W. 2d 720

Opinion delivered May 30, 1960.

William H. Drew, for appellant.

Spitzberg, Bonner, Mitchell & Hays, for appellee.

Ed. F. McFaddin, Associate Justice. This litigation is for the proceeds of insurance money, and arises because a fire damaged the mortgaged premises. Green and wife, as mortgagors, were plaintiffs; and Coley and wife, as mortgagees, were defendants. The Trial Court rendered a decree in favor of the Greens and the Coleys prosecute this appeal.

O. T. Coley and wife owned a combination restaurant, truck stop, filling station, and motel, called "Twin City Diner", and located near Dermott. In March 1958 Coley sold the entire property and all furnishings to Green. The unpaid balance of the purchase price was $63,000.00, payable monthly for a number of years, and secured by a first mortgage on the real estate. Green was required to maintain fire insurance policies on the buildings, with loss payable clause in favor of Coley; and this requirement was performed by having policies in four insurance companies, being United States Fidelity & Guaranty Company, Federal Insurance Company, Hartford Fire Insurance Company, and Great American Insurance Company.

In September 1958 a fire materially damaged the two-story building called the "diner". The four insurance companies agreed that the total amount to be paid for the fire damage was $12,600.00. Coley then agreed with Green that the entire insurance money ". . . would be paid over to Mr. Green in the event the property was restored to as good a condition as it was prior to the fire". The four insurance companies issued and delivered drafts totalling $12,600.00 payable to Coley. Green undertook the repair work and after he had completed it to his own satisfaction he asked Coley to endorse and deliver the four insurance drafts. Coley refused, claiming that such repair work as Green had done did not restore the building as to as good a condition as it was before the fire.

Thereupon Green and wife instituted this suit against Coley and wife and the four insurance companies. The complaint was entitled, "Petition for Declaratory Judgment". The four insurance companies claimed that they were mere stake-holders and paid the $12,600.00 into the registry of the Court by interpleader (§ 27-816 Ark. Stats.) and they were discharged with attorneys' fees and costs. Trial in the Chancery Court resulted in a finding that Green was entitled to all of the $12,600.00 insurance money; and from that decree Mr. and Mrs. Coley prosecute this appeal, presenting the issues here discussed.

I. *Venue.* Appellants raise two points on venue. First, they claim that the Chancery Court did not have venue because of the provisions of Section 301 of Act 148 of 1959 (as now found in § 66-3234 Ark. Stats.). This case was filed in April 1959 and the decree from which comes this appeal was entered on October 26, 1959. Section 697 of Act 148 of 1959 provides that in certain situations, as here, the said Act did not go into effect until January 1, 1960. So there is no merit to this contention of the appellant.

The other phase of the venue claim of the appellants is an attempt to invoke § 27-615 Ark. Stats., which provides that when a defendant is summoned to appear in an action outside his own county and the action is dismissed against co-defendants resident of the county in which the action is pending, then, upon proper objection, no judgment can be rendered against the defendant non-resident of the county. The appellants state that the action was filed in Pulaski County; that the Coleys were residents of White County; that when the insurance companies paid the money into the Court they ceased to be parties defendant; and, therefore, the action should have been dismissed as to the Coleys. But the answer to the appellants' contention rests on two facts: (a) the insurance companies were not real defendants but were mere stake holders and any objection as to venue should have been made before answering; and (b) the answer did not raise the question of venue so the appellants have waived it. The complaint was filed on

April 7, 1959. On April 30, 1959 Mr. and Mrs. Coley filed an answer denying all allegations in the complaint and praying, ". . . that the Court order the proceeds herein paid as prescribed in Paragraph 8 of the complaint filed herein . . . and for all other relief to which the proof may show defendants to be entitled". There was no objection as to venue in the said answer. It was not until May 26, 1959 — nearly a month later — that the Coleys first raised any question of venue. The case of *Murdock Acceptance Corp.* v. *Spear,* 225 Ark. 948, 286 S. W. 2d 485, is ruling here. In a long line of cases this Court has held that a general appearance will subject the defendant to the Court's jurisdiction, even though the suit is in the wrong venue.

II. *The Merits Of The Case.* Coley agreed that Green could have all of the insurance money of $12,600.00 if Green restored the building to as good condition as it was before the fire. Whether the repair work done by Green reached such prescribed requirement is the real issue in this case. To state in detail the testimony of each witness would unduly prolong this opinion. The contractor making the repairs used only a small portion of the timbers and rafters that he had listed as necessary when he made the estimate for the insurance companies. He never removed the charred timbers between the first and second floors. Pictures made shortly before the trial clearly indicate that after the repair work was made, there remained holes and visible cracks in many places; and no claim is made that these defects existed before the fire. A careful review of the record convinces us that, while Green made some repairs to the premises, he spent not in excess of $8,000.00 toward making the prescribed repairs, and that he is entitled to only that amount of the insurance money.

We come then to the difficult question as to the power of this Court to apportion the insurance proceeds on the basis of the repairs made. The older cases hold that, when a special contract had been performed only in part, then there could be no recovery on a *quantum meruit* basis. *Simpson* v. *McDonald,* 2 Ark. 370; *Manuel* v.

Campbell, 3 Ark. 324. But over the years there has been a constant tendency to find a way to prevent the working party from losing his entire outlay. In *Selig* v. *Botts,* 128 Ark. 167, 193 S. W. 534, the Court in effect, divided the contract, and allowed recovery for the part that was performed; and in *Mitchell* v. *Caplinger,* 97 Ark. 278, 133 S. W. 1032, a contractor was allowed part recovery even though the owner had to make further expenditures to complete the building. The present litigation is in equity, and on appeal we try the case *de novo* on the record. The rules regarding restitution and unjust enrichment apply to the situation here. In 12 Am. Jur. 916 *et seq.,* "Contracts" § 352 *et seq.,* the text, in discussing acceptance of performance as basis for implied promise, reads:

"Under some circumstances, a *quasi* contract arises independent of the intention of the parties where a special contract has been partly performed, and such *quasi* contract is founded upon the doctrine of unjust enrichment. The basis of liability under a *quasi* contract resulting from part performance of a special contract is the benefit conferred upon a defendant by the part performance of a special contract, and not the detriment incurred by the plaintiff . . . In some cases language may be found to the effect that even though the contract has not been completed or has not been completed in accordance with its terms, the law implies a promise by the opposite party to pay if he has been benefited by such partial or insufficient performance . . . Under the strict common-law rule where a party failed to comply with an unapportionable agreement, he could not recover for what had been done. This rule has been so far modified that where anything has been done from which the other party has received a substantial benefit which he has appropriated, a recovery may be had based upon such benefit. The basis of this recovery is not the original contract, but a new implied agreement deducible from the delivery and acceptance of some valuable service or thing."

Coley allowed Green to undertake the restoration or repair, and has accepted the benefits of such as Green made. Green expended up to $8,000.00 in restoration or repairs and has accomplished that much benefit to the mortgaged premises. But Green's other expenditures were for matters such as pavement, additional bathroom, or other items which were not matters of repair or restoration. Green certainly could not use Coley's insurance money to make these other improvements; but, under the rules regarding restitution and unjust enrichment, Green is entitled to $8,000.00 of the insurance money, less all costs and expenses of this proceeding in both courts, and this includes the attorneys' fees paid for the interpleading by the insurance companies.

When Green makes proof that all labor and material items used in repairing the premises have been paid, so that there is no lien possible on the mortgaged premises, then Green will be entitled to the amount of money previously stated. The remaining $4,600.00 of the insurance money should be paid to Coley and applied on the mortgage indebtedness. This $4,600.00 is to be applied now on the final amount due, and Green's regular payments will be made each month until the balance of the indebtedness is fully discharged. The Chancery decree is reversed and the cause remanded, with directions to enter a decree and have further proceedings, as indicated in this opinion.

RANEY *v.* VILLINES.

5-2155 335 S. W. 2d 725

Opinion delivered May 30, 1960.

Virgil D. Willis, for appellant.

J. Nelson Truitt, for appellee.

GEORGE ROSE SMITH, J. This is a contempt proceeding in which the appellants caused the appellee to be cited for an alleged violation of a chancery decree that was entered on October 14, 1959. After hearing the appellants' evidence the chancellor dismissed the contempt citation on the ground that the complainants had not made a *prima facie* showing that the earlier decree had been violated. In appealing from the order of dismissal the appellants contend that the chancellor erred in finding their proof to be insufficient.

The parties are adjoining landowners, the appellee owning a forty-acre tract just east of the appellants' eighty acres. By the original decree the chancellor found (*a*) that the plaintiffs (appellants) were the owners of the East Half of the Northwest Quarter of a certain section, (*b*) that the defendant (appellee) was the owner of the Northwest Quarter of the Northeast Quarter of the

same section, and (*c*) that the defendant had an easement for a roadway "consisting of a strip 20 feet wide along the east side of the above described lands of the plaintiffs." The decree confirmed the defendant's right to the easement, which was described by metes and bounds as the east 20 feet of the eighty-acre tract, and restrained the defendant from trespassing upon other land of the plaintiffs.

The appellants, in asking that the appellee be punished for contempt of court, insist that the appellee has overstepped the 20-foot limitation fixed by the October decree and has actually been using a roadway about 27 feet wide. To prove this assertion the appellants introduced testimony to show that for about 75 years a fence has been recognized as the boundary between the two tracts and, further, that the appellee is using a roadway that extends about 27 feet west of the fence. The appellants failed, however, to prove that the fence is in fact situated upon the true east line of their eighty acres, as that line would be determined by the governmental survey of this particular section. The appellants did not offer any qualified surveyor as a witness. A layman was permitted to describe his efforts to find the boundary line in question, but his testimony is deficient in that he readily admitted that he did not know whether he used the true corner as a starting point. See *DuPriest* v. *Anthony,* 226 Ark. 894, 294 S. W. 2d 769. During the trial the chancellor indicated several times that the controlling issue was the location of the true boundary line, and his dismissal of the citation was based upon the complainants' failure to supply that proof.

The chancellor's decision was right. The appellants rely upon cases such as *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18, holding that a division fence, even though it is incorrectly located, may become the boundary line as a result of long acquiescence on the part of the adjoining landowners. Those decisions, however, do not govern the case as it now stands. The record before us does not include the proof upon which the original decree was based. That testimony might or

might not have supported a finding that the fence line had become the boundary by acquiescence. But even if the appellants were originally entitled to such a finding, the point is that the decree as entered made no reference whatever to the fence that is now shown to separate the properties. The decree simply recited that the present appellants were the owners of the East Half of the Northwest Quarter and that the appellee was entitled to an easement along the east 20 feet of that tract. This language of the decree cannot simultaneously refer to two conflicting boundary lines; it cannot be taken to mean both the fence line and the true line according to the governmental survey. The decree describes the boundary only by reference to governmental subdivisions, and hence the original surveyed line must be regarded as controlling. *Desha* v. *Erwin,* 168 Ark. 555, 270 S. W. 965. If the parties really intended to establish the boundary line in accordance with a fence that varied from the true line, that fact should have been stated in the decree. In the absence of such a statement in the original decree the appellants' proof in the present proceeding must be considered insufficient to support a finding that the appellee is in contempt of court.

Affirmed.

CONNELLY *v.* STATE.

4970 335 S. W. 2d 723

Opinion delivered May 30, 1960.

G. W. Lookadoo, Holt, Park & Holt, for appellant.

Bruce Bennett, Atty. General by *Russell J. Wools,* Asst. Atty. General, for appellee.

George Rose Smith, J. On the afternoon of April 28, 1959, the appellant shot and killed her husband, Joseph E. Connelly, from whom she had been separated for several months. Charged with murder in the first degree the appellant was convicted of second degree murder and was sentenced to fourteen years imprisonment. We find it necessary to discuss only one of the points relied upon for reversal, an asserted error in the admission of incompetent evidence.

The prosecution, presumably for the purpose of showing that the deceased was unarmed, introduced a number of articles found upon his person, such as a wallet, a cigarette lighter, cards, pictures, a bunch of keys, a ring, etc. These items are conceded to have been admissible, but the appellant complains of the court's action in permitting the State to introduce an unsigned letter, apparently written by the decedent to his estranged wife and also found upon his person, which read as follows:

"I have every right to hurt you — but to hurt you I have to hurt someone very dear to me. You have depended upon that for some many years. You thought you had me under some kind of trance. But there has been only one reason you got by, by treating me as you did. If you had loved Bonnie Jo [the couple's only child] half as much as I we would still be together. You have only thought of yourself and had only one thing in mind to destroy the two persons in your life — the two that lived in hell to be with you. I know you are very

proud of yourself. It is too bad you can't hear what some of the ones you know say. By sending you this money in your name — I'm losing what little self respect I have left — if I have any at all, that you left me." (The reference to "this money" seems to have meant a check for $20, drawn by the decedent in favor of the appellant, which was also found upon Connelly's person, though it had been torn in two.)

This letter, unsworn and not subject to cross-examination, was manifestly not competent proof of the truth of the statements contained in it. Indeed the State does not suggest in its brief that the document was admissible; it is argued only that no objection was made by the defense. As we read the record, however, there was a sufficient objection, as reflected by this excerpt from the transcript:

"Mr. Holt: We object on the ground it is incompetent, irrelevant, and immaterial.

"The Court: Let me see it, Mr. Hebert.

"Mr. Hebert: It is what they found on his body, it is in his handwriting.

"The Court: Overrule the objection. It will be admitted.

"Mr. Holt: Note my exceptions."

The point that has given us concern is whether the letter, even though incompetent, can be said to have been prejudicial to the accused. The note certainly suggests that there had been discord between Connelly and his wife, but there is much other evidence to this effect, including the testimony of the appellant herself. If the existence of marital disharmony were the only inference to be drawn from the letter then we might say with confidence that it could not have had any prejudicial effect upon the jury.

There are, however, other conclusions that may be derived from the language of this note. The statement that Mrs. Connelly meant to destroy the two persons in

her life might be taken in retrospect to support the charge of premeditated murder. Much more important is the letter's positive implication that it was the appellant who had mistreated her husband, rather than the other way around. This implication stands almost alone as the State's contradiction of the testimony of the appellant and her daughter, who both say that Connelly struck and bruised his wife upon a number of occasions. Thus the letter had a direct bearing upon the appellant's credibility and at least an indirect bearing upon her insistence that she acted in self-defense. In criminal cases in the absence "of an affirmative showing to the contrary" we must presume that incompetent testimony was prejudicial to the accused. *Doles* v. *State,* 166 Ark. 37, 265 S. W. 663. In the case at bar we are left in doubt, which means that the presumption of prejudice has not been completely rebutted.

Reversed and remanded for a new trial.

HOLT, J., not participating.

WOOTTON *v.* STATE.

4975 337 S. W. 2d 651

Opinion delivered May 30, 1960.

[Rehearing denied September 12, 1960]

W. S. Atkins, R. L. Searcy, Jr., for appellant.

Bruce Bennett, Atty. General by *Ancil M. Reed,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. Richard Wootton, appellant herein, was convicted of murder in the second degree and sentenced to 15 years in the State Penitentiary allegedly for killing one Ulice Miller in the late evening of October 17, 1959.

About noon on the above mentioned date appellant and the deceased, after completing a business transaction, planned to have a fish fry that evening at a designated site. It was also mentioned that others might be invited. Pursuant to this plan the deceased and one Dowell Clark went by appellant's home around 3 o'clock that afternoon and loaded appellant's boat on Clark's pick-up truck and then returned to the home of the deceased. Appellant purchased the necessary groceries and drove by deceased's home about 4 o'clock when the three white men decided to send three negro men ahead to the "water hole" in Clark's truck to make preparation for the fish fry. The three white men had some liquor, or one of them had some liquor, when they left the home of the

deceased for the fish fry, and on the way they bought and drank some more liquor, arriving at the designated site around 5 o'clock. Appellant took along a .351 caliber rifle, Clark took a .22 caliber rifle, and the deceased took a 12-gauge shotgun. Later, around 8:30 o'clock while supper was being served appellant and Clark engaged in a controversy, and presently in a fight, over a cup of coffee. It seems that one of the negro men filled appellant's cup too full of coffee after being told to only partially fill it. After this difficulty was apparently settled temporarily appellant and Clark engaged in one or two more fights in which the deceased intervened in behalf of Clark for the alleged reason that Clark was physically handicapped. The outcome of these difficulties was that appellant shot the deceased twice with his .351 rifle.

On appeal appellant relies on four designated grounds for a reversal of the judgment of the trial court. One challenges the sufficiency of the evidence, and relates to an Instruction refused by the trial court. The other three grounds challenge Instructions given by the court.

One. We cannot agree with appellant's contentions that the evidence is insufficient to support the conviction of murder in the second degree. Appellant's main point, in this connection, is that there is no evidence from which the jury could find the necessary element of malice. It is pointed out that the three white men involved had been the very best of friends up until the time this unfortunate occurrence took place. We agree that malice is a necessary element to constitute murder in the second degree. In *Ballentine* v. *State,* 198 Ark. 1037, 132 S. W. 2d 384 (at page 1039 of the Arkansas Reports) this Court said: "Malice, however, is a necessary element of murder, either in the first or second degree, and it must be either express or implied."

The testimony relied on by appellant in his brief is substantially as hereafter set out. One of the negro men, known as "Sundown", testified: We were all sitting around eating and I started to pour Mr. Wootton a

cup of coffee; he said he just wanted a half a cup and I had it a little fuller than he wanted — he squeezed the paper cup a little too tight and some of the coffee ran out on his hand; I started pouring him some coffee in a glass cup and Mr. Clark spoke up and said "He don't want no whole cup"; appellant looked around to Mr. Clark and asked what he had to do with it; they talked around a little bit but I don't know just what they said; I looked around when appellant reached up and snatched Mr. Clark off the bumper of his truck and Mr. Clark just lay there with his legs crossed; the deceased said "You all quit that"; then the deceased pulled appellant off of Mr. Clark, and they started back to eating. Later while I was standing with my back to them I looked around and saw that appellant had Mr. Clark down again; the deceased walked up and said "You boys stop this, we want to have a good time"; the deceased caught Mr. Wootton in the back of his shirt collar and said "Get up off of that boy, Richard" (meaning the appellant); we started eating again when appellant reached for Mr. Clark again and the deceased ran up to stop him and the next thing I knew appellant and the deceased were "tussling" around; the deceased walked toward the fire and appellant walked between the trucks — he took a gun out of a scabbard and said "I am going to kill both of you s---of--b----." I saw Mr. Miller as he was falling and he didn't have anything in his hands. Dowell Clark's testimony was substantially as follows: We were eating and "Sundown" was pouring coffee; the cup he poured for appellant was too full and he said "I told you to pour me a half a cup"; "Sundown" got a glass cup and poured appellant coffee in it — I told him to pour a half a cup and appellant jerked me down; the deceased talked to appellant and got him to get up; I got up and appellant ran into me and knocked me down and the deceased helped me up; the deceased got between us and he and appellant scuffled; the deceased got up and started walking toward the fire, and appellant got up and went to his truck and pulled the rifle out and said "I am going to kill both of you s---of--b------." One of the negro men named Easter testi-

fied in substance: Appellant told "Sundown" to get some coffee — he didn't want a full cup; from then on I don't know what happened until I saw appellant on Mr. Clark; and I didn't pay much attention; in a little while I saw appellant had Mr. Clark down again and about that time the deceased got on appellant; the next thing that came to my attention was appellant taking a gun out of a scabbard and when I heard the shooting I was gone. The other negro man, Anthony Herron, testified: It seemed like Clark hit appellant on the head with something and then appellant grabbed him around the leg and they went down — the deceased wasn't in it then but he got up and pulled appellant off of Clark and said "Don't fight that crippled man"; the deceased got appellant loose from Clark, but they all continued fighting again; while they were out there I heard a gun fire and I left — later I heard two shots. Appellant testified substantially as follows: About 8:30 o'clock we had just finished eating and a negro poured a cup of coffee — I reached and got my cup; I reached and got the one mug of coffee and Clark said: "I want that cup" and I said your wife ought to have fixed you a cup if you wanted one and the next thing I knew he hit me with a bottle, I just reached and knocked his feet out from under him and we piled up there — we were all three fighting; we fought over an area as big as 10 or 15 feet and when I knew anything Clark had got to his pickup and fired a shot; I broke loose from Miller and made for my pickup and Miller ran around to where Clark was — and I came to my truck and opened the door and drug my rifle out and said "S---o--b------ put your guns down and come out" and they said "You put yours down and come out." I said "No, it's two against one". They didn't say a word and when I knowed anything Miller came around within 50 feet and that is when I shot — it was dark; I fired two shots although I had more cartridges in my gun; I quit shooting because I saw Miller fall. I had known the deceased six or seven years and we were friends; when I first saw the man that I shot he was between the trees and he squared himself with a shotgun; I couldn't tell in the dim light

who it was; I fired the shot at the man I shot to save my life; I saw the gun and when he fell I quit shooting.

From the above it will be seen that there are some conflicts in the testimony of the eyewitnesses who were present. In the case of *Higgins* v. *State,* 204 Ark. 233, 161 S. W. 2d 400, this Court said: "It is a well settled rule that the evidence admitted at the trial will, on appeal, be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict of the jury, it will be sustained", citing cases. Viewed in that light we are unable to say there is no substantial evidence to support the verdict of the court in this instance.

While malice is a necessary element of the crime for which appellant was convicted it is well settled by the decisions of this Court that malice may be implied from the facts and circumstances in the case, and it is our opinion that the facts and circumstances in this case justify an implication of malice on the part of appellant. In the case of *Clardy* v. *State,* 96 Ark. 52, 131 S. W. 46, we find this statement: "The law will imply malice where there is a homicide with a deadly weapon and no circumstances of mitigation, justification or excuse appear; and proof of a homicide under such circumstances will warrant a conviction of murder in the second degree. The passion that will reduce a homicide from murder to manslaughter may consist of anger or sudden resentment, or of fear or terror; but the passion springing from any of these causes will not alone reduce the grade of the homicide. There must also be a provocation which induced the passion, and which the law deems adequate to make the passion irresistible." We find nothing in the testimony to force the conclusion that appellant was faced with such provocation that it induced in him a sudden and irresistible passion such as would be necessary to reduce the crime of second degree murder to that of voluntary manslaughter.

In view of what we have heretofore said we cannot, of course, agree with appellant's contention that the court committed reversible error in refusing to give the

Requested Instruction No. 2. This Instruction reads: "You are instructed to find the defendant not guilty of murder in the second degree."

Two. It is here insisted that the trial court erred in giving its Instruction No. 1. This is a very lengthy general Instruction covering the different degrees of homicide and it would serve no useful purpose to set it out in full. Appellant's principal contention is that the instruction was argumentative and placed special emphasis on murder in the second degree. We are unable to agree with this contention. In this Instruction the court first told the jury that "Under the indictment it is competent for you, if you think the evidence justifies it, to convict the defendant of murder in the first degree, murder in the second degree, or of manslaughter, or to acquit him outright." Appellant cannot complain that he was convicted of a lower degree of crime when he could have been, under the Instruction, convicted of a higher degree. See *Bone* v. *State,* 200 Ark. 592, 140 S. W. 2d 140. We have read the Instruction carefully and cannot agree with appellant that the Instruction places special emphasis on the crime of murder in the second degree.

In addition to the above it is pointed out that appellant made no proper objection and exception to the above mentioned Instruction. Before any of the court's Instructions, consisting of sixteen in number, were given but after they had been discussed with the court appellant offered "a general objection to all of the Instructions to be given by the court." This being a general objection *en masse* it does not properly present a question for the decision of this Court if any one of the Instructions is good. Some of the sixteen are not challenged. See *Neal et al* v. *Peevey,* 39 Ark. 337 and *Jones* v. *State,* 226 Ark. 566, 291 S. W. 2d 501. In addition to the form of the objection referred to above we fail to find that appellant saved his exceptions to the giving of the Instruction. This was necessary. See *Yarbrough* v. *State,* 206 Ark. 549, 176 S. W. 2d 702, and the cases cited therein.

Three. It is insisted by appellant that the court erred in giving its Instruction No. 7 regarding the law of self-defense, to parts of which he had a proper objection and exception. In this Instruction, among other things, the court said: "If there was no danger, and his belief in the existence thereof be imputable to negligence, he is not excused, however honest the belief may be." We find, however, that this same language was approved in the case of *Smith* v. *State,* 59 Ark. 132, 26 S. W. 712.

It was insisted by appellant that Instruction No. 7 was erroneous in that it permitted the jury to find that appellant provoked or invited the deceased to make the attack on him. Again we are unable to agree with appellant's contentions. As pointed out above, and taking the evidence in the light most favorable to the State, there was testimony, we think, from which the jury might have reached that conclusion.

Four. Finally, appellant insists that the court erred in giving its Instruction No. 11 regarding reasonable doubt. We have read this Instruction carefully and in our opinion it is a correct statement of the law. It is also pointed out that the objection to this Instruction was the same as that made to Instruction No. 1 heretofore discussed, and that likewise no exception was saved to the giving of the Instruction. Therefore, as heretofore pointed out, no question is properly presented for this Court's consideration.

In addition to the above appellant brought forward a number of alleged errors in his motion for a new trial, many of which relate to instructions given and refused by the court. In most instances we find no proper objections were made and no exceptions saved, however, we have carefully examined each of these assignments and find in them no reversible error.

It is our conclusion, therefore, that the judgment of the trial court must be, and it is hereby, affirmed.

Affirmed.

JOHNSON, J., dissents.

MABRY *v.* COVINGTON.

5-2134 337 S. W. 2d 643

Opinion delivered May 30, 1960.

[Rehearing denied September 12, 1960]

C. Van Hayes, for appellant.

J. B. Milham, for appellee.

SAM ROBINSON, Associate Justice. The appellant Geraldine Mabry is the daughter of appellee, J. W. Covington. This suit was filed by Covington, contending that he is the owner of Lots 1 and 4, Block 2, North Benton Addition to Benton, Arkansas; that he bought the lots May 22, 1950; paid the down payment of $1,180; and had the property conveyed to his daughter, Geraldine Mabry, under an oral agreement with her that she was to pay the balance of the purchase price in monthly installments of $33.70 each, and that Covington and his wife would have the right to occupy the premises for the remainder of their natural lives. Covington also alleges that in June, 1957, Mrs. Mabry took possession of the real estate and, without his knowledge or consent, moved his household furnishings out of the house and converted them to her own use. He prayed that the title to the property be vested in him and for damages for the conversion of the personal property.

Mrs. Mabry denied the allegations of the complaint and by way of cross complaint contended that her father

is indebted to her for something over $9,000. Of this amount she claims as damages the sum of $1,950, alleging that the house has a monthly rental value of $75.00 and that it remained vacant for 26 months because of threats made by her father that he would "burn out" any renters. Her cross appeal is only from the failure of the chancellor to give her judgment for the alleged rental value. Covington testified in support of the allegations in the complaint, but there is very little corroborating evidence. The chancellor found that he had made three monthly payments of $33.70 each and that all of the remaining payments on the property, from the time it was purchased in 1950, had been made by Mrs. Mabry, who is a school teacher. Covington occupied the property for about seven years. Mrs. Covington died in January, 1957.

The chancellor found that Mrs. Mabry owned the real property and had not converted the household furnishings of her father but had merely moved them out of her own house, which she had a right to do. She offered to return this property to Mr. Covington, and the court ordered her to do so. In addition, the court gave Covington a judgment for $101.10, covering the three monthly installments he had paid on the place. We do not find a preponderance of the evidence shows that the house remained vacant because of threats made by Mr. Covington. Mrs. Mabry testified that she and her father were not on good terms but that she bought the property to give her mother a comfortable place to live the balance of her life. The parties were before the chancellor, who had a better opportunity than this Court to judge the veracity of the witnesses. We cannot say that the chancellor's decree is against the preponderance of the evidence.

Affirmed both on appeal and on cross appeal.

5-2127 335 S. W. 2d 727

Opinion delivered May 30, 1960

Frank C. Douglas, for appellant.

Taylor & Sudbury by *Graham Sudbury,* for appellee.

JIM JOHNSON, Associate Justice. This case involves a claim for damages arising out of a breach of warranty.

In 1958, appellee, Harold B. Wright, purchased five lots in Block One of Wilson's Third Addition to the City of Blytheville, from appellants, Joe Gude and Velma Gude, his wife, and Orval Gude and Margaret Evelyn Gude, his wife, for a total consideration of $10,000. The conveyance was made by warranty deed and upon execution and delivery of the same appellee paid appellants $1,000 of the purchase money and executed three notes for the balance. These notes were secured by a deed of trust on the property sold.

On October 3, 1958, appellee filed suit alleging that after he started his foundation for a building, Drainage District No. 17 gave him notice to remove part of this foundation extending south on part of the drainage district easement for right-of-way for Ditch 37; that said

easement extends onto these lots a distance of 34 feet, and appellee asked for damages by reason of breach of warranty. He secured a restraining order to prevent the appellants from disposing of the three notes.

Appellants denied the claim of appellee for damages, and alleged that the appellee was familiar with the location of the drainage ditch and purchased with full knowledge of the conditions; that the easement for right-of-way was a matter of record, and the appellee is charged with such record. When the appellee's suit was filed, the appellants filed cross-complaint making their grantors, Mrs. Molly Sternberg, and Blytheville Development Company, parties. Mrs. Sternberg then made her grantor, the Georges, parties to the suit.

The cause was submitted and heard upon the pleadings, exhibits, records, testimony of several witnesses taken in open court, and stipulations of counsel placed in the record; from all of which the learned chancellor decreed as follows:

"1. That the plaintiff, Harold B. Wright, do have and recover of and from the defendants, Joe Gude and Velma Gude, his wife, and Orval Gude and Margaret Evelyn Gude, his wife, the sum of $1,416.66, for breach of warranty; that said amount is adjudged to be a set-off against the $9,000 balance of the purchase prices of the lots involved, leaving a balance as of September 12, 1958, of $7,583.34 due said defendants, plus interest thereon from said date until paid and judgment is hereby rendered against the said plaintiff in favor of said defendants for said sum, plus six per cent interest from September 12, 1958, until paid.

"2. The plaintiff is hereby given 30 days from the date of the entry of this decree in which to pay the amount of said judgment; and if said amount is not paid to the defendants or into the treasury of this Court, the defendants may apply to the Court for decree of foreclosure under their purchase money deed of trust. Payment into court will stop interest on said money. The plaintiff to have judgment for his cost herein expended,

which may also apply as a credit on the judgment in favor of the defendants.

"3. That the temporary restraining order issued herein was proper but there is no longer any need for same because the defendants Gude have brought into Court the notes given for the balance of the purchase price of the said property in the amount of $9,000 and therefore same have not been negotiated or sold; and the surety on the bond for restraining order obtained by the plaintiff, Harold B. Wright, be and is hereby discharged and exonerated together with the principal upon said bond from any liability by reason thereof.

"4. Any and all issues between the defendants and the cross-defendants are reserved for further consideration and determination by the Court upon application of the said parties."

From such decree comes this appeal.

On trial *de novo* we find the record reveals that the lots here in question join one another and make as a complete whole one lot 160 feet by 600 feet: That the lots were bought for business purposes because of the 160 feet of frontage on U. S. Highway No. 61: That the drainage ditch is located on the section line and the invisible easement for right-of-way is 100 feet — 50 feet on each side of the center of the ditch: That the easement on the north side of the ditch does extend 34 feet over on the south side of the lots here involved; That no part of the ditch is located on the lots: That the extension of the drainage district right-of-way for said ditch, being in existence at the time of platting and selling of the lots involved, the existence of which failing to appear on the recorded plat from which appellee purchased, is a breach of the covenants of warranty contained in the deed from appellants to appellee: That appellee has been legally evicted to the extent of the easement: That the south 34 feet of appellee's property was useless for his purposes since he planned to construct buildings on his property fronting on U. S. Highway 61: That in addition to appellee's estimate of damages sus-

tained in the amount of $2,100 or $2,200, there was ample competent evidence adduced from an experienced realtor to sustain the amount of damages found by the Chancellor.

It is a well settled rule of law that covenants of warranty are taken for protection and indemnity against known and unknown encumbrances or defects in title. Knowledge or notice, however full, of an encumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. See: *Magee* v. *Robinson,* 218 Ark. 54, 234 S. W. 2d 27; *Texas Company* v. *Snow,* 172 Ark. 1128, 291 S. W. 826.

Concluding, therefore, that the weight of the evidence on the whole case supports the findings of the Chancellor, the decree is affirmed.

PAGE *v.* JOHN E. BRYANT & SONS LUMBER CO.

5-2156 335 S. W. 2d 809

Opinion delivered June 6, 1960.

[redacted]

Charles F. Cole, for appellant.

Murphy & Arnold, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves the question of priority of liens. Vernon Page and Geraline Page, his wife, were the owners of a tract of land near Batesville. On June 13, 1958, the Pages gave a deed of trust to D. C. Davis to secure a loan of $4,000, and such trust deed was filed for record in Independence County the next day. Appellees, John E. Bryant & Sons Lumber Company, Inc., furnished materials used in repairing a structure on these lands. An alleged portion of the materials was furnished between July 1, 1957, and August 7, 1957, but no lien was filed as to these materials within 90 days after being furnished; the balance of the materials was furnished between June 24, 1958, and November 7, 1958, in the amount of $411.93, and a lien claim, as provided by statute, was filed within the statutory period. The parties entered into a stipulation providing, *inter alia,* that all the materials purchased subsequent to June 24, 1958, were furnished and used in the remodeling of an existing house on the property involved.

T. D. Penn, d/b/a Penn Plumbing and Electric Company, furnished materials and labor for Page in the amount of $618.22 between October 8, 1958, and November 10, 1958, and filed his claim for lien within the proper period. Complaint was instituted by appellees seeking judgment in the amounts mentioned, praying that a lien be declared on the Page property herein involved to secure the payment of the judgments, and asking that such lien be declared superior to the claim of Davis. The Pages and Davis separately answered, denying the allegations of the complaint, the Pages denying that ap-

pellees were entitled to a lien on the property, and Davis praying that his lien be declared superior to the lien of appellees. Upon hearing, the court made the following findings:

"2. That the plaintiff Bryant is entitled to judgment against Vernon H. Page and Geraline Page, his wife, for the sum of $411.93, with interest at the rate of 6% per annum from January 1, 1959, in a sum of $22.50, or a total of $434.43; that plaintiff Penn is entitled to judgment against Vernon H. Page and Geraline Page, his wife, for the sum of $618.22, plus interest at the rate of 6% per annum from January 20, 1959, in the sum of $31.93, or a total of $650.15.

3. That Penn is entitled and is hereby granted a mechanic's lien for the sum of $650.15 on Lot 7, Vernon Page Sub-division, being a part of the North Half of the Northeast Quarter of Section 33, Township 13 North, Range six West, as shown by survey recorded in Deed Book D-7, page 171-173 of the records of Independence County, Arkansas, and that said lien is superior to the lien of D. C. Davis, except that the lien of Penn as between D. C. Davis and Penn extends only to the improvements on said lands and not to the lands proper.

4. That Bryant is entitled to and is hereby granted a lien in the sum of $427.70 on said lands described in paragraph 3 above, it being found by the court that the lien claim for the items furnished from July 1, 1957, to August 7, 1957, in the amount of $76.23, is disallowed but that payments in the aggregate sum of $69.50 should be applied to these items, so the net effect is to disallow lien in the sum of only $6.73; that the lien of $427.70 is superior to the lien of D. C. Davis, except that the lien of Bryant as between Bryant and Davis extends only to the improvements on said lands and not to the lands proper.

5. That the liens of Bryant and Penn are on a parity with each other and the amount of the lien of D. C. Davis is determined to be $3,100.00 as of the date of the trial, December 1, 1959."

Judgment was entered in accordance with these findings, and from such decree, appellant[1] brings this appeal. Appellees cross-appeal from that portion of the decree which denied a lien for the material furnished in 1957. It therefore appears that there are only two issues in this litigation. The paramount issue is whether the materialman's and mechanic's liens of the appellees are superior to the lien of the deed of trust held by Davis, and the second issue is whether the Chancellor properly disallowed the claim of the lumber company for a lien because of material furnished in 1957. These issues can be resolved in a more orderly manner by considering the cross-appeal first.

Appellees' proof consisted of the testimony of Donnie Bryant, an official in charge of sales for the lumber company, and the testimony of Archie Adkerson, deliveryman for Bryant. Bryant testified that Page had been a good customer for several years, and that one day the latter advised him that he (Page) had bought a house, and was going to move it to one of his back lots behind the residence, and remodel same. Bryant stated, that after using about $80 worth of material, Page told him that he had "run out of money", and the owner quit working on the house. According to the witness, some months after that, (over 10 months) Page returned to the office, wanted further material, stated that he (Page) was going to apply for a loan, and assured Bryant "as soon as we get the house completed, why we'll have the money to pay you all of it off." Further material was then sold. Bryant stated that materials were only furnished Page for remodeling of the house that had been moved on the lot beyond the Page residence. On cross-examination, however, the witness admitted that Page might have purchased materials for other improvements, "but it if was, it was a cash sale." Adkerson testified that he delivered the materials purchased by Page during the summer of 1957, and identified the house

[1] D. C. Davis died on December 31, 1959, and the cause was revived in the name of Gertrude E. Davis, Administratrix of the estate of D. C. Davis, deceased.

as the same involved in the delivery of additional building materials in the summer of 1958. The driver stated that he took material to only one place, and that he actually saw some of the sheetrock nailed up by carpenters who were present, though he was unable to identify any of the workers. The witness testified that the house had a blue hex roof on it at the time of the deliveries; however, he admitted that he also delivered shingles of this color and type in 1958. Contrary to this evidence, Page, and his father, C. H. Page, testified that all of the items purchased in 1957 were used in the beauty shop, operated by the younger Page's wife, and that all of the work was performed by the father, son, and a brother-in-law. According to the testimony of the younger Page, this shop was located on lot No. 2, whereas the house, which had been moved onto his premises, was located on lot No. 7. Vernon Page also testified that no improvements were made on the house in question in the summer of 1957, except for a hardwood floor that was laid from flooring which had been left over when his residence was completed. Both men testified that the house did not have a blue hex shingle roof on it in 1957, but instead, had a sheet iron roof. D. C. Davis testified that, at the time he took the mortgage (June 13, 1958), he looked at the house, but saw no evidence of any recent work having been done. "I knew the house before it was moved, and it looked to me just like it did." He further testified that the Pages had worked on the beauty parlor some time prior to his lending the money. In *Sebastian Building & Loan Association* v. *Minten,* 181 Ark. 700, 27 S. W. 2d 1011 (1930), this Court stated:

"A delivery of material upon the ground where the building is to be constructed is furnishing material within the meaning of the statute, and proof of such fact by the materialman makes a *prima facie* case in his favor. The owner or other party interested may show that the material was not used in the construction of the building, in order to defeat the lien for the material thus furnished."

Cases are then cited in support of this statement. In accordance with the rule, so stated, we are unable to say that this finding was against the preponderance of the evidence. Were it otherwise, appellee still could not prevail, for the lien was not filed within 90 days, and the facts in this case do not bring the account within one of the exceptions to the statutory requirement. See *Streuli* v. *Wallin-Dickey & Rich Lumber Co.,* 227 Ark. 885, 302 S. W. 2d 522.

The more important question is that of the priority of the appellees' liens and the lien of the appellant mortgagee, Davis. Appellees argue that the evidence shows that the mortgage was given for construction, and the failure to so provide within the terms of the instrument causes the situation to come within the rule in *Jack Collier East Company* v. *Barton,* 228 Ark. 300, 307 S. W. 2d 863 (1957). In that case we held that before a construction money mortgage becomes superior to a mechanic's lien, the purpose for which the money is advanced must be shown in the mortgage instrument as recorded.

We do not agree that the preponderance of the evidence shows the deed of trust to have been given for construction purposes. Page stated that the $4,300 received from Davis was used to pay off a previous existing mortgage on the property to a Mr. John Polk. Page subsequently stated, "Mr. Davis knew what the money was to be used for. The amount must be used for construction." This statement by Page and the aforementioned testimony by Bryant constitutes the only evidence in the record which refers in any way to construction. Just what Page meant by this statement that "the amount must be used for construction" is not shown, though the record reflects that he had engaged in several construction projects. Nor is it clear what Page meant by use of the term "construction", *i.e.,* whether he was using it in its literal sense, or as a general term which would include repairs or remodeling on existing property. Page, however, did positively state that the money

was used to pay Polk's mortgage, and it is undisputed, and in fact, stipulated, that the materials were used and labor performed on an already existing house on the land. In the case of *Imboden* v. *Citizens Bank,* 163 Ark. 615, 260 S. W. 734 (1924), the trial court held a mortgage lien to be superior to a mechanic's and materialman's lien. In affirming the decree, this Court said:

"It is clear from the proof that the building is not separate from the original building so as to constitute a distinct improvement which is separable from the original building. Appellant's claim of priority therefore calls for a construction of the statute quoted above.

Our construction of the statute is that, as between the lien of a mechanic or the furnisher of material and the lien of a prior mortgage, the lien of the former is superior only upon a separate building constructed on the land with the labor and material furnished, or to such an addition as is separable from the original building. In other words, in order to give a lien to a mechanic or furnisher of material superior to a prior mortgage, the improvement must be separate from the original improvement, or, if connected in any way with the original improvement, it must be so connected as to be removable without injury to the original building. Under the statute the lien of a mechanic or furnisher of material is not superior to a prior mortgage on the entire improved building, nor even to the extent of the betterment accruing from the repair, extension or enlargement of the original building. It is clear that there was no intention on the part of the lawmakers to attempt to impair the obligation of a prior mortgage or the remedy of the mortgagee. On the contrary, the purpose is clear to give a subsequent lienor a distinct remedy for an independent improvement, or what amounts to an independent and separable improvement."

In *Morrilton Lumber Company* v. *Groom,* 176 Ark. 520, 3 S. W. 2d 293 (1928):

"According to our former decisions, if a new building had been erected entirely out of materials furnished

by the plaintiff, its lien might have been enforced against such building, and the purchaser would have had the right to remove it from the lots in a reasonable time, notwithstanding there was a prior mortgage on the lots. The lien can be enforced as prior lien only by a sale of the building as a separate and distinct entity from the land. Such priority of lien exists only when a new building has been put upon the land subsequent to the execution of the mortgage, and the one claiming a prior lien for materials furnished must have furnished the materials for the erection of an entirely new building. * * *"

Since the evidence does not establish that the money was obtained from Davis for construction purposes, and the deed of trust was filed for record prior to the date the materials, used on the house, were furnished, it necessarily follows that the Chancellor erred in holding the materialman's and mechanic's liens to be paramount to the lien under the deed of trust. The decree is therefore reversed, and the cause remanded, with directions to hold the Davis lien superior to the liens of appellees.

WARD, J., concurs.

GREEN *v.* JONES-MURPHY PROPERTIES, INC.

5-2162 335 S. W. 2d 822

Opinion delivered June 6, 1960.

Warren & Bullion, for appellant.

Cockrill, Laser & McGehee, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal by Walter Green, a real estate broker of Pulaski County, from a judgment entered against him in the Pulaski Circuit Court in the sum of $2,000. Jones-Murphy Properties, Inc., is an Arkansas corporation, whose principal stockholders and officers are Drs. Kenneth Jones and Horace Murphy, the corporation being principally engaged in purchasing properties for investment. Ten acres, belonging to Mrs. A. D. Taylor and the heirs of her deceased husband, were purchased by appellee through appellant. Appellee paid $15,000 for the tract, and subsequently learned that the Taylors only received $13,000. The $2,000, less closing expense, was retained by Green as his commission. Appellee contended that Green was acting as its agent, and had thus wrongfully retained the amount in excess of the selling price. Green contended that the amount was simply his commission on property which had been exclusively listed with him for sale by the Taylors, *i.e.,* he was an agent for the Taylors, rather than for appellee. Suit was instituted by the corporation for the $2,000 difference between the amount paid for the property by the company, and the amount received by the seller from the company, it being alleged that appellant wrongfully concealed the fact that he had entered into an agreement with Mrs. Taylor; that she had agreed to sell the property for $13,000, and that Green had made a personal profit of $2,000 in violation of his fiduciary relationship with appellee. On trial, the jury returned a verdict for appellee. Judgment was entered in accordance with the verdict, and from such judgment comes this appeal. For reversal, appellant

contends that there was no proof of employment of Green as an agent, and further avers that the court erred in giving its instruction number two.

Proof on the part of appellee was as follows: Dr. Jones testified that in early November of 1958, while on his way to Rotary Club, he passed the property owned by the Taylors, and observed a homemade sign, "10 acres for sale"; the witness and Dr. Murphy had discussed the purchase of land for long term investment, and this unimproved land interested him; he became acquainted with appellant in the Rotary Club, and asked Green if he was familiar with the property. Appellant informed Jones that he was familiar with it, and that the price was too high. Subsequently, Jones purchased another ten acres from Green and Mrs. Josephine Graham for $10,000. In the meantime, Jones learned from Mrs. Taylor's daughter that the Taylor property was still for sale. The evidence reflects, that sometime between the middle of November and the first of December, Jones called Green and informed him that he and Murphy were still interested in purchasing that property, and asked appellant to contact, in their behalf, the Taylor family, and see if the price "could not be brought down." According to the witness, Green agreed to do this. Jones considered that Green was working for appellee for the purpose of obtaining the best price possible for the Taylor property, The witness stated no mention was made relative to compensation, it being his thought that the fee for services would be discussed when the deal was closed. According to the Doctor, sometime between the 10th and 15th of December, Green advised him that he had talked with the Taylor family, and the property could not be purchased for less than $15,000. Appellant considered this a "good price". Relying upon the broker's judgment, Jones, on December 20th, in behalf of appellee, entered into an "offer and acceptance" agreement, which was signed in the following manner:

"10. This offer is binding upon Buyer if accepted within 2 days from date.

(Signed) Walter Green
Agent

Kenneth G. Jones, M.D.
Buyer

The above offer is accepted this Dec. 20, 1958.

(s) Mrs. A. D. Taylor
Seller

By W. Green, Agent
Seller."

In January, 1959, Green informed Jones there was a defect in the title to five of the ten acres; that they should go ahead and close the five acres without defect, but that the other five would have to go through guardianship proceedings. According to Jones, after some persuasion by Green, he agreed to this procedure. Appellant brought the papers and closing statement to his office for signing, though he did not read the papers in detail, and did not remember their contents. On January 31, 1959, sale of the five acres without title defect was consummated, and title conveyed to appellee; on the same date, unknown to appellee, a new contract for the sale of the remaining five acres was executed with signatures as follows:

"10. This offer is binding upon Buyer if accepted within ..... days from date.

Walter Green
Agent

Jones-Murphy Prop., Inc.
By Walter Green,
Buyer Agent

The above offer is accepted this Jan. 31, 1959.

Jessie Taylor, Seller

Jesse Taylor, agent for heirs of
A. D. Taylor"

In the latter part of February or early March, Jones learned that the Taylor family had agreed to sell the property for $13,000, and he confronted Green with this fact.

Appellant testified that he had talked to Mrs. Taylor and her daughter about selling the property on several occasions prior to his discussions with Jones, but that he only obtained his exclusive listing contract on December 6, 1958. Admittedly, he did not tell Jones that he had the exclusive listing; likewise, he admitted that he did not place a sale sign on the property. The witness stated that he did not consider himself an agent for Jones, and had no reason to think that Jones regarded him as an agent; that the only contract he had was with Mrs. Taylor. Green testified that he had been out some expense in closing the transaction, and only realized $1,-453 for his commission. Relative to obtaining the exclusive listing, Green testified:

"Mrs. Taylor not being versed in real estate, being the only piece of property she had owned, she asked me to give her a guaranteed net price on the property and me pay all the expenses. When I had talked to her about the property, I talked to her daughter first, and she told me she wanted eighteen thousand for the property. When I called at their home I asked her to bring her family in to my office and discuss the lowest possible price she would accept and after figuring the price I would have to sell it to the doctors for to get my 10% commission, she agreed to accept, she told me, she said, 'I have got to have $13,000 net to me. Anything you get above that, I don't care what you get.' I was acting as agent for Dr. Jones and Murphy, I mean agent for Mrs. Taylor to sell the property to Jones and Murphy because I had no written contract at all with Jones and Murphy prior to their making me an offer and acceptance contract. The only contract I had was with Mrs. Taylor, she wanted me to guarantee her $13,000, she didn't care who I sold it to."

He testified that he signed the January 31st agreement as agent of Jones-Murphy Properties as a matter of "convenience." On re-direct:

"I couldn't get Kenneth or Horace to come down. I had to take it to their office. At the suggestion of the insurance company and somebody at Pulaski Heights

Bank, they had already put all the money up, they felt like there ought to be another contract drawn and signed by Mrs. Taylor and Jones and Murphy, and it was merely a contract of convenience more than anything."

On cross-examination, he testified:

"Q. Did you tell Dr. Jones you signed that contract?

A. No, he said whatever I saw fit to do.

Q. After signing that contract did you tell him you had signed it?

A. I told him everything was all right.

Q. Did you tell him about this?

A. I don't think I mentioned it.

Q. Did you furnish him a copy of it?

A. I don't know. Everything was left up to me. I would call him maybe three days before I would hear from him."

Under appellant's primary contention of error, we are only concerned with whether there was sufficient evidence to support the verdict of the jury. *Walthour* v. *Pratt,* 173 Ark. 617, 292 S. W. 1017 (1927), is a case very similar to the one at bar. As here, the broker was instructed by the buyer to ascertain the amount that the owner of certain lots would accept for purchase, and there was no written agreement, or express oral agreement, that the broker would serve as agent for the buyer of the lots. On judgment being rendered against Walthour, he appealed to this Court, and in affirming the trial court's judgment, this Court held the contention to be without merit, stating:

"The appellant earnestly contends that there is no evidence to show that he was the agent of appellee, and that, for that reason, the court should have directed a verdict in his favor. As to whether he was the agent of Mrs. Pratt is a question of fact properly submitted to the jury, and, under the facts as developed in this case,

the jury might have found either way. They might have found that there was no agency. They however found that the agency did exist, and there is some substantial evidence to support this finding, and their finding of this fact is binding on this court.

It has been held many times that the findings of a jury on questions of fact, where there was any substantial evidence to support it, could not be disturbed by this court. It is not necessary, in order to establish agency, that the evidence show any express agreement.

'It is not essential that any actual contract should subsist between the parties or that compensation should be expected by the agent; and while the relation, in its full sense, invariably arises out of a contract between the parties, yet the contract may be either express or implied. * * * Whatever evidence has a tendency to prove an agency is admissible, even though it be not full and satisfactory, and it is the province of the jury to pass upon it. Direct evidence is not indispensable — indeed, frequently is not available — but, instead, circumstances may be relied on, such as the relation of the parties to each other and their conduct with reference to the subject-matter of the contract.' 21 R. C. L. 819-820. * * *

In the case at bar the evidence tends to show that the appellee requested appellant to see the owner of the lots, and appellees testify that the appellant told them it was Mr. Cox; that an offer of $1,850 was made; that afterwards appellant told appellee the offer had been accepted, a contract was signed, and afterwards deeds were executed and money paid. Tipton Cox testified that, when Walthour came to him or talked to him, he understood that Pratt was purchasing the lots, or that Pratt was the one making the offer, and that he was to make the deed to Bailey because some financing was to be done. * * *

. . . we think there was substantial evidence from which the jury might have found that the appellant was the appellee's agent, and, while acting as her agent, pur-

chased the property from Mr. Cox for $1,500, and had the deed made to Bailey and then conveyed to appellee for $1,850."

In the case at bar, there was evidence that Jones requested Green to talk to the Taylors about the lots before Green obtained the exclusive listing contract, and that Green agreed to do this; no indication was given by appellant that he had obtained the exclusive listing contract from the Taylors, nor did he tell Jones the net price to Mrs. Taylor; Green never placed his own sign on the property, and in fact, the evidence reflected that the old homemade sign remained on the premises. Appellant admitted that in his discussion with the Taylor family, Mrs. Taylor agreed to the listing after he figured the price that the property would have to be sold for, in order for him to obtain the desired commission. Green likewise admitted that he had appellee in mind at the time as the sale prospect, and of course, the signing of the offer and acceptance agreement on January 31st by Green as agent of Jones-Murphy was rather potent evidence. Counsel for appellant point out in their brief, that Green also signed as agent for Mrs. Taylor, but we are not concerned with other possible agency relationships held by Green. As was stated in the *Walthour* case:

"He also objects to the instruction because he says that he was entitled to represent both Cox and Bailey and entitled to a commission from each. There is no doubt but that he was entitled to represent anybody he wished and charge a commission for representing them, but the question here is whether he was representing the appellee, and whether he made a secret profit, and these questions were both submitted to the jury, and its verdict settles these questions against the appellant. It was not necessary to prove fraud in order to entitle plaintiff to recover in this case. It is the duty of an agent representing a principal to faithfully represent that principal and to be loyal and faithful to his interest, and he cannot acquire any interest for himself in opposition to the interest of his principal. And the fact that an

agent acts gratuitously and without commission does not relieve him of liability for wrongful acts or negligence, whether they amount to fraud or not."

We conclude that there was sufficient evidence to support the verdict of the jury that Green was the agent of appellee.

Appellant contends that the court's instruction No. 2 was erroneous, in that it permitted the jury to find that there was an agency, even though Green did not understand that he was being looked upon as an agent, and no specific contract had been entered into. We think that the *Walthour* case, heretofore quoted, answers this contention. Likewise, in 2 American Jurisprudence, § 24, pages 26 and 27:

"Whether an agency has in fact been created is to be determined by the relations of the parties as they exist under their agreements or acts. If relations exist which will constitute an agency, it will be an agency whether the parties understood the exact nature of the relation or not. * * * If an act done by one person in behalf of another is in its essential nature one of agency, the former is the agent of the latter, notwithstanding he is not so called."

At any rate, no specific defect in the instruction was called to the trial court's attention, a general objection only being made. Unless, therefore, the instruction was inherently erroneous, the general objection was not sufficient. This instruction was not inherently erroneous, and in fact, appellant admits that, under some circumstances, the instruction would be a proper statement of the law. The contention is without merit.

No reversible error appearing, the judgment is affirmed.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* FULLER.

5-2159 336 S. W. 2d 60

Opinion delivered June 6, 1960.

Cockrill, Laser & McGehee, for appellant.

McMath, Leatherman, Woods & Youngdahl, for appellee.

J. SEABORN HOLT, Associate Justice. On June 22, 1958, Mr. Frank F. Fuller and his wife, appellee, Mrs. Verna Fuller, along with their two children, were occupants of an automobile driven by Orville E. Smith which collided with an automobile driven by A. C. Taylor and as a result of this collision, Mr. Fuller was killed and his wife, appellee, seriously injured. After emergency treatment Mrs. Fuller, a veteran of the U. S. Armed Forces, was admitted to a Veterans Administration Hospital after she had signed a form statement provided by the V. A. Hospital stating that she was unable to pay the necessary expenses of hospital treatment and domiciliary care. Her medical expenses at the V. A. Hospital amounted to $1,681.67. She was sent a bill for these expenses which she later paid. In September of 1958, Mrs. Fuller, appellee, filed suit against A. C. Taylor for personal injuries sustained in the automobile collision. When the V. A. learned of this suit, Mrs. Fuller, at its request, assigned to the V. A. any recovery of damages that she

might obtain against a third party, Taylor, in payment for medical treatment resulting from her injuries. The V. A. charge for hospital care for appellee was $1,681.67, the reasonableness of which is not in dispute.

Thereafter, the V. A. Hospital notified appellee's attorney of their claim and forwarded copies of the assignment. Continuous demands were made by the V. A. Hospital on appellee's attorney until appellee finally paid the hospital bill out of funds which she received from her damage suit against A. C. Taylor. Appellee first made demand on the Southern Farm Bureau Casualty Insurance Company (insurer of Orville E. Smith, driver of the car in which the Fullers were riding) for payment of the V. A. charges against her and for payment of other medical expenses actually incurred and this company paid all the bills except the V.A. charges in amount of $1,681.67 which they refused to pay. At the time of the collision and injuries to appellee, as indicated, Frank Fuller, appellee's husband, had in force an automobile insurance policy with appellant, State Farm Mutual Automobile Insurance Company, which contained these provisions: "Coverage C—Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services. ¶ Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom hereinafter called 'bodily injury,' caused by accident, while occupying or through being struck by an automobile." This policy was issued in Louisiana. Premiums were paid and the policy was in effect at the time of the accident above described.

Upon appellant's refusal to pay, appellee filed the present suit against appellant, insurance company, in which she sought recovery in amount of $1,681.67, plus statutory penalty and reasonable attorney's fee. Trial was had on September 1, 1959, before the court without

a jury on stipulation of facts with exhibits introduced. No witnesses were called by either party. Following the hearing, the court took the case under advisement and on November 12, 1959, entered a judgment for appellee in the amount sued for, $1,681.67, a 100% penalty, $336.33 as fee for appellee's attorney, or a total judgment of $3,-699.67, together with costs. This appeal followed.

For reversal, appellant relies on the following points: "I. The court erred in concluding from the undisputed facts that the cost of the VA hospital care furnished appellee was medical expense incurred by appellee within the terms of appellant's Family Automobile Policy. II. (A) The court erred in applying the law of Louisiana instead of the law of Arkansas to the assessment of statutory penalty and attorneys' fees against appellant. (B) If the Louisiana law governs, the court applied an incorrect provision thereof."

Appellant states its position and contention as follows: "Appellant refused to pay to appellee the amount of the VA bill for the reason that it did not represent medical expense 'incurred' by her. The VA did not charge appellee for the cost of her hospital care. ¶ Appellee had first made demand upon Southern Farm Bureau Casualty Insurance Company for payment of the VA charges and for payment of other medical expenses actually incurred. Southern Farm paid all of these bills but refused to pay the VA charges. ¶ * * * Appellant admitted its policy was issued to Frank F. Fuller; that it was in force at the time of the collision in June 1958; that appellee was hospitalized at the VA Hospital in Little Rock; and that $1,681.67 was the cost of hospital care. Appellant denied liability under its policy for the reason that the purported charges of the VA Hospital were not medical 'expense incurred' within the terms of its policy because appellee qualified for admission to said hospital under laws of the United States as a veteran entitled to free care and treatment for her injuries; that the VA was without authority to make any charges against her for care and treatment; that any

charges attempted to be made against her would not constitute a legal obligation; that the VA did not attempt to make any charge against her."

In short, it appears to be appellant's contention that appellee, Mrs. Fuller, was not entitled to be reimbursed for her hospital bill in amount of $1,681.67 on the grounds that these expenses "were not incurred" by Mrs. Fuller since she was a veteran and could have obtained hospitalization in the veterans hospital free of charge. We do not agree. It appears undisputed that at the time appellee entered the hospital she was, in fact, unable to pay for hospital services and had so stated in her written application. Therefore, at the time of her entry, being a veteran, she would have been entitled to free hospital services. However, it is also undisputed that after Mrs. Fuller had left the hospital, spending 79 days therein, on January 19, 1959, she effected a settlement of her damage suit against Taylor and out of the proceeds of this settlement she, on demand, paid the Veterans Hospital $1,681.67. We think that it was the intent of appellant, insurance company, and Frank Fuller, its insured in this case, that appellant company, in return for premiums paid by the insured, would pay the medical and hospital expenses on insured and members of his family in the event that they were injured in an automobile accident such as here.

The Supreme Court of Wisconsin, in a similar situation as here presented, interpreted the meaning of a provision in an automobile liability policy, which provision was identical with that now before us. This Wisconsin case, *Herman Kopp* v. *Home Mutual Ins. Co.*, 6 Wis. 2d 53, 94 N. W. 2d 224, involved an action on an automobile liability policy by the insured to recover under the medical payment coverage for hospital expenses resulting from an accident while driving insured automobile. In that case it appears that the plaintiff was a subscriber to the Blue Cross Benefit Plan which plan was in addition to plaintiff's liability policy *supra* with the defendant insurance policy which included medical pay-

ment coverage. It further appears that Blue Cross agreed to furnish insured hospital benefits in any affiliated hospital free of charge. The hospital where the insured was hospitalized was an affiliate member. Following the plaintiff's hospitalization, he submitted to the insurance company a statement for hospital expenses which the insurance company refused to pay on the ground that it was not an "incurred expense" within the provisions of defendant's policy. As indicated, the provisions of defendant's policy in that case were identical with those in the present case. The Wisconsin Supreme Court, in holding in favor of the insured plaintiff, used this language: "The defendant contends that, under the above-quoted policy provisions, it is a condition precedent to the insured's right of recovery upon the policy for his hospitalization that he shall first have incurred a debt for the same. It is clear from the undisputed facts that no such debt was incurred by the plaintiff to pay for such hospitalization. However, a debt was incurred on the part of Blue Cross to pay such expense to Luther Hospital, and the plaintiff had paid quarterly premiums to Blue Cross as consideration for Blue Cross undertaking so to do. Thus expense was incurred for hospital services furnished '*to or for*' the plaintiff insured. ¶ The afore-quoted policy provisions do not state *who* is required to incur the expense in order for the insured to recover for medical or hospital services supplied to or for him. There thus exists an ambiguity. It is a generally accepted rule of construction that ambiguities in a contract of insurance are to be resolved against the insurer who drafted the same and in favor of the insured. * * * Furthermore, policies of insurance are to be given a reasonable construction, and not one that leads to an absurd result."

Just as the Blue Cross was held to have "incurred" the hospital costs, we think here the federal government, in effect, "incurred" the hospital costs of appellee in consideration for her services in the armed forces. The government provided these services to appellee even

though her disabilities were not service connected, provided she were unable to pay for such needed hospital services. In the present case, just as soon as Mrs. Fuller became able to pay her hospital costs (as indicated, from the proceeds of her recovery of damages against Taylor) she did so in the amount of $1,681.67 and at this point the said medical expenses, which are conceded to be reasonable, were, in fact, "incurred" by appellee within the terms of the policy, and the judgment of the trial court allowing recovery was correct.

Appellant is correct in its contention that the trial court erred in applying the law of Louisiana instead of the law of Arkansas on the assessment of the statutory penalty and attorneys' fees against appellant.

Appellant's contention that the trial court's assessment of 100% penalty was error and that a penalty of only 12% may be allowed under our statute § 66-514 is correct and must be sustained. In a case of this nature the law of the forum, Arkansas, controls. In *Aetna Casualty & Surety Co.* v. *Simpson,* 228 Ark. 157, 306 S. W. 2d 117, we held § 66-514 to be a rule of procedure and applicable to an extrastate automobile insurance policy. We there said: "Appellant (liability insurance company) contends that Arkansas Statute § 66-514, providing for the payment of attorneys' fees, does not apply in this case because a Tennessee contract is involved, although it matured in Arkansas. Notwithstanding the policy of insurance is a Tennessee contract, procedural matters must be in accord with the Arkansas statutes. The statute provides that attorneys' fees shall be taxed as part of the costs. Where the policy matured in Arkansas and the action is brought in Arkansas, the Arkansas statute providing for attorneys' fees and penalties applies. (Citing cases)."

The allowance by the trial court of an attorney's fee of $336.33 appears to be reasonable and will be sustained. Appellee's contention that her attorneys should be allowed additional compensation on appeal will not

be granted because appellant has effected a substantial reduction in the judgment as heretofore indicated.

Modified and affirmed.

ANDERSON *v.* RYLAND.

5-2195 336 S. W. 2d 52

Opinion delivered June 6, 1960.

Joe Holmes, for appellant.

Coleman, Gantt & Ramsay, E. Harley Cox, Jr., for appellee.

ED. F. MCFADDIN, Associate Justice. The question here presented is the power of a court of equity to sanction a deviation from one portion of a charitable trust instrument in order to accomplish the larger purpose of the charitable trust. Stated another way, the question is the power of a court of equity to permit a sale of the

trust property, even though the trust instrument states that the property cannot be sold.

In 1889 Joseph Merrill executed a trust indenture creating the Merrill Institute in Pine Bluff. The instrument recited in part:

"Know All Men by These Presents, that I Joseph Merrill of the City of Pine Bluff, in the County of Jefferson in the State of Arkansas being desirous of doing all the good I can while living and that the benefits may last when I am gone, and believing the most effectual way to accomplish this object is to provide some place of instruction and amusement to attract the young white people and bring them under influences calculated to elevate and improve them physically, mentally, morally and spiritually; Now therefore in consideration of One Dollar ($1.00) in hand paid and the premises herein set out, I Joseph Merrill do hereby give, grant, bargain, sell and convey . . ."

Then were named certain trustees, and there was conveyed to them a parcel of real estate which is situated at the corner of Fifth Avenue and Main Street in Pine Bluff. Specific wishes of Mr. Merrill were given for the use of the property as a gymnasium, lecture room, library, and that there be ". . . such other instructions in said Hall as will improve and elevate the physical, mental, moral and spiritual condition of those who attend them; Provided that no Sectarianism or Partisan Politics shall ever be taught therein. No gambling, no intoxicating drinks, no immoral books or other like publications shall ever be allowed in the said Institution. Should the means at the command of the Board of Trustees justify they shall in addition to the above provide and maintain a library with such Literature as shall further the objects of the Institution." The instrument also recited — and this is the portion that causes the litigation:

"The Trustees shall have no power to sell, convey, or in any manner encumber the property herein conveyed or any part thereof. . . . But a breach of these

restrictions herein or any of them, on the part of the Board of Trustees, or by their knowledge or consent shall in no case work a forfeiture of this grant, but shall only give the said Joseph Merrill, his heirs and assigns, and on his or their failure to act, then any resident citizen of the City of Pine Bluff, Arkansas the right to take such actions as will lawfully and promptly secure and maintain all rights and privileges herein granted."

With funds provided by Mr. Merrill the trustees[1] erected a building on the property, and the Merrill Institute has continued to this day. In *Atkinson* v. *Lyle,* 191 Ark. 61, 85 S. W. 2d 715, there was an effort by the trustees to mortgage the property; but this Court denied the trustees the power to execute the mortgage. For the past several years the trustees have allowed all of the building of the Merrill Institute — except for two store buildings which are rented for revenue purposes — to be used by the Boys' Club of Pine Bluff; and a splendid youth program has been maintained, with instruction in crafts, physical welfare, showing of moving pictures, etc. But the location of the Merrill Institute is at the most traveled intersection in the City of Pine Bluff, and it is hazardous for youth to go through the traffic to reach the Institute.

Recently, a public spirited citizen of the City has agreed to donate to the Merrill Institute a large tract of land located in a residential district so that a new building may be erected for the Merrill Institute. The trustees can sell the present property at Fifth Avenue a Main Street for $150,000.00; and they propose to use a substantial part of this money to erect a building at the new location; and the trustees are very desirous to accomplish all of this. To test the power of the trustees to sell the original property at Fifth Avenue and Main Street and to use the proceeds for the new building, the appellant, as a citizen and taxpayer, brought this suit against the trustees. After a patient hearing the Chancery Court found that the trustees should be accorded the

[1] The trust instrument provided that the trustees could select their successors, and the standing of the present trustees is unquestioned.

power to proceed as they planned. The Chancellor delivered a lengthy opinion, a major portion of which we copy:

CHANCELLOR'S OPINION

"This is a friendly suit brought by a taxpayer of Pine Bluff for himself and other taxpayers against the trustees of the Merrill Board. The Defendant Trustees filed an answer and in the answer they pray that this court give them authority to sell property belonging to the Merrill Trust. The Court will treat the prayer contained in the answer as a request for instructions by the Trustees concerning their duties and responsibilities as Trustees.

"The facts as brought out by the evidence, briefly stated, are as follows:

"One Joseph Merrill created the Merrill Institute, a trust, in February, 1889, for the purpose, using the language in the Trust instrument: —'. . . to attract the young white people and bring them under influences calculated to elevate and improve them physically, mentally, morally and spiritually'. To carry out this Trust, he conveyed to the Trustees a tract of real property located at 5th and Main Streets in Pine Bluff, and provided for the erection of a building thereon.

"One of the terms of the Trust provides that the trustees shall have no power to sell, convey or in any manner incumber the property.

"There are three issues to be determined by this Court, namely: (1) Is the trust property being used today for the purpose or purposes designated by the settlor? (2) If the Trust property is being used in a manner that accords with the Settlor's intention, will the Settlor's intention be thwarted and will the innocent beneficiary suffer if the trustees' request is denied? (3) If this Court should find that the Settlor's intention is being thwarted due to no fault of the trustees, but because of unusual circumstances having arisen not foreseen or anticipated by the Settlor, and if the Court should fur-

ther find that the innocent beneficiary will suffer, does this Court have the right, in the exercise of its inherent equitable powers, to permit the trustees to sell the trust property in deviation from the express terms of the trust instrument?

"These issues will be discussed in the order listed.

"(1) Is the trust property being used today for the purpose or purposes as set forth in the deed in trust?

"The evidence indicates that since 1946, the property has been used and occupied by the Boys Club of Pine Bluff. Even though Boys Clubs as we know them today were not in existence in the year 1889, the year the deed in trust was executed, nevertheless, there is no question that the present use of the property is completely within the meaning of the trust purposes as set forth in the deed in trust. Mr. Merrill wanted to provide some place of instruction and amusement to attract the young white people and bring them under influences calculated to elevate and improve them physically, mentally, morally and spiritually. It is the opinion of this Court that no youth organization of our community or any other community could meet this requirement any more than a Boys Club. If Mr. Merrill were living today, it is beyond the shadow of a doubt that he would say 'well done' to these trustees for the manner in which they have used this property.

"(2) If the trust property is being used in a manner that accords with the Settlor's intention, will the Settlor's intention be thwarted and will the innocent beneficiary suffer if the trustees' request is denied?

"The Court finds that the Settlor's intention will not only be thwarted, but that the beneficiary, the Boys Club of Pine Bluff, is suffering and will suffer more as time goes by. The undisputed facts reveal that when Mr. Merrill created this trust in 1889, the City of Pine Bluff was a small town; that there was no vehicular traffic; that there were no thoroughfares running adjacent to the property. The evidence further reveals that since that time, the city of Pine Bluff has grown in population to

a metropolis exceeding 50,000 in and around the city. The location of the trust property is in the busiest location in the city, being adjacent to Main Street on the west and Fifth Avenue on the South. Fifth Avenue also is Highway 65, a U. S. Highway running the entire length of the State and heavily travelled. Both of these streets are crowded with vehicular traffic every day to such an extent that an extreme hazard now exists to the young boys who go to and from the Boys Club.

"The Court will observe that it has only been by an act of providence that only two boys have been injured in and around this location . . . It is the opinion of the Court that the circumstances have so changed since execution of Mr. Merrill's trust declaration that his wishes and purposes are being thwarted. The Court further finds unless relief is granted to the trustees, the innocent beneficiary will greatly suffer, whereas, if their request is granted the wishes and intention of the Settlor will be more fully carried out and the trust property preserved.

"(3) If this Court should find that the Settlor's intention is being thwarted due to no fault of the trustees, but because of unusual circumstances having arisen not foreseen or anticipated by the Settlor, and if the Court should further find that the innocent beneficiary will suffer, does this Court have the right, in the exercise of its inherent equitable powers, to permit the trustees to sell the trust property in deviation from the express terms of the trust instrument?

"The recent case of *The George W. Donaghey Foundation* v. *Little Rock University,* decided in the Supreme Court of Arkansas on the 29th day of February, 1960, and found in Vol. 106 of the Law Reporter, No. 8, at page 245,* will become the land-mark case in Arkansas on the authority of trustees to relieve innocent beneficiaries from injury in cases such as is now before the Court.

"The Supreme Court in that case, in placing much emphasis upon the Settlors' intention, stated as follows:

*231 Ark. 748, 332 S. W. 2d 497.

'Will equity permit an innocent beneficiary to suffer under such circumstances? The answer has been given many times.'

"Then the Court quoted from 1 Restatement of Trusts 2nd, Section 167, under the heading of 'Change of Circumstances', as follows:

'. . . "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 forbidden by the* terms of the trust." ' (My emphasis.)

"The Supreme Court in this important case also quoted from 89 C. J. S. Trusts, Section 87e (2), to the following effect:

' "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 endeavor 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." '

"The general rule as to the powers of a court of equity to act in matters such as this and under circumstances previously set out is found in 54 American Jurisprudence, page 225, where it is stated:

'While generally the administration of a trust must accord strictly with the intent of the settlor and the terms of the trust, and while ordinarily even a court of equity has no right to authorize the trustee to depart therefrom, and will do all within its power to see that the trust is executed in accordance with its terms, it is

generally agreed that a court may, upon the occurrence of emergencies or unusual circumstances not anticipated by the settlor, in order to carry out his ultimate purpose, and to preserve, or to prevent loss or destruction of, the trust estate, in the manifest interest of the trust estate, or, according to some authority, *in the interest of beneficiaries or to save them from some plight,* permit the trustee, to the extent necessary to such an end, to deal with the trust estate contrary to or in deviation from the express or literal terms of the trust instrument or declaration.' This citation continues with this statement:

'In this connection, the court is required to stand in the place of the creator of the trust and authorize what he would have authorized had he anticipated the exigencies rendering some change in his scheme necessary in order to prevent the loss of the subject of it.'

"In 54 American Jurisprudence at page 226, section 284, the writer makes this statement: 'The Court should not substitute its judgment for the judgment and wishes of the trustor, and any power of a court to authorize departures from the trust directions should be exercised no further, it has been held, than necessary for the preservation of the trust property.'

"The basis of this Court's action in allowing the trustees to sell the trust property and reinvest the proceeds in a more desirable property in a more desirable location is to preserve the trust property and estate for the benefit of the beneficiary.

"In a rather thorough Annotation on this subject in 168 A. L. R. at page 1019, the text writer makes this statement: 'With scarcely any real dissent the cases, whether of charitable or of private trusts, are to the effect that a court of equity has power, or "inherent power", to authorize a sale of property contrary to express or implied provisions or the patent general intent of the will or other trust instrument that the property shall not be sold. The statements commonly run to the effect that the power is one which exists in circumstances of

emergency or exigency, and especially in circumstances not anticipated or foreseen.'

"At page 1029 of the above mentioned Annotation, we find this statement:

'Passing notice may be taken of the fact that the proceeds of a sale of trust property sold in emergency stand in place of the property sold and are to be applied to the same general purposes . . . A Court may decline to authorize a sale for purposes of reinvestment in the absence of any sufficient showing as to the availability, character, and propriety of reinvestments contemplated.'

"This Court, prior to entering its Decree allowing a sale, made certain requirements of the trustees. These requirements, which have been met, were as follows:

1. The present property to be appraised by three qualified appraisers;

2. The sale of the present property to be for not less than the appraised value after all expenses paid;

3. Evidence that the Trust held fee title to the property at Ninth and Mulberry, the proposed new location of the Boys Club;

4. Detailed plans for the construction of the new building on the new site, including architect's drawings, said drawings to include two store rooms to be used for business purposes in accordance with settlor's wishes;

5. Bids to be accepted on the basis of the architect's drawings, with successful contractor posting a good and sufficient bond for his good performance of said contract:

6. Under no circumstance is the new building and property to be encumbered and the proceeds from the sale of the present property is to be sufficient to pay all indebtedness connected with the change of location into new building.

'Under these circumstances, considering Mr. Merrill's wishes as expressed in his trust instrument, considering the change of circumstances not foreseen by Mr. Merrill in 1889, considering the fact that he expressed a desire in his trust instrument to not only do good during his lifetime, but that 'the benefits may last when I am gone', considering all of these matters along with other relevant points, this Court feels that it would be abusing its powers if the request were not granted on the petition of the trustees in this friendly suit. Certainly, no Court should take the arbitrary view under the facts here that a Court of equity cannot act to relieve the situation and preserve the trust estate, in view of the overwhelming majority rule as set out in the above mentioned citations, among many others.

"This Court, in making its ruling herein, is cognizant of the case of *Atkinson* v. *Lyle,* 191 Ark. 61. The Atkinson case involved the Merrill trust, the same trust now before the Court. However, this Court is of the opinion that the Atkinson case is not controlling in the case presently before the Court for the reason that the facts of the Atkinson case are different from the facts of the present case. The Atkinson* case went to the Supreme Court from the Jefferson Chancery Court. In that case, the trustees of the Merrill Trust proposed to mortgage the building involved in this case, and sell some other property not involved in these proceedings. So, for the purpose of this case, the Atkinson case involved a mortgage of the trust property at Fifth and Main Streets in Pine Bluff, whereas the case at bar involves a sale of this property, with a reinvestment of the proceeds in a more desirable location and a more desirable building.

"On the basis of the facts before the Supreme Court in the Atkinson case, the Court had no alternative but hold as it did, because it can be readily seen that there is a vast difference between placing a mortgage on the

*Quoting the Trial Court's opinion as regards *Atkinson* v. *Lyle* is not an approval of that holding in *Atkinson* v. *Lyle*. Permissible deviation in charitable trust cases is now allowed, just as is being done in the case at bar.

property and selling the property under circumstances present in this case. To encumber the property with a Mortgage could certainly create a risk for the trust in that if the mortgage was not discharged, it could be foreclosed and thus the failure and destruction of the trust estate. However, on the basis of the facts before the Court, there is no possibility for the trust to fail or be destroyed. The trustees, under the supervision and control of this Court, have made fool-proof plans to see that Mr. Merrill's wishes are carried out, the only change being in the location of the property. And as to the change in location, this Court would observe that however evident it might be that the Settlor designed and expected that the lot at Fifth and Main Streets should be the seat of his charity, it is still more evident from the scope and tenor of the deed in trust that it was the charity itself, and not the perpetual use of the location at Fifth and Main Streets for the stated purpose, which the donor had mainly in mind. The testimony was more than substantial to indicate that a continuance of Mr. Merrill's charity at its present location would fail to secure the object manifestly intended by the donor in his trust instrument.

"So, the opinion in the Atkinson case is not binding and conclusive on this Court or any other court in the State of Arkansas because of the different facts involved. See *Beck* v. *State,* 14 S. W. 2d 1101, 179 Ark. 102. Also, the doctrine of *stare decisis* has no application where the subject matter in a subsequent suit is not identical with that in prior cases. *Kincade* v. *C. & L. Electric Co-operative,* 299 S. W. 2d 69, 227 Ark. 321.

"The real holding in the Atkinson case as far as this case is concerned, was that the attempt by the trustees to mortgage the trust property was void because in contravention of the settlor's express wishes. That portion of the Atkinson opinion that applied to sales of the trust property would be dicta in the case at bar because of the different facts involved. And as was stated in the case of *Campbell* v. *Beaver Bayou Drainage District,* 219 S. W. 2d 934, 215 Ark. 187, in following prece-

dents, Courts are guided by the real holding which is essential rather than by dicta which is incidental.

"For the reasons stated, the complaint will be dismissed and defendants' request to sell the trust property involved is granted."

We need add but little to the foregoing opinion. The Chancery Court correctly held that the main purpose of Mr. Merrill's trust indenture was to ". . . attract the young white people and bring them under influences calculated to elevate and improve them physically, mentally, morally, and spiritually", just as stated in the trust instrument. The other matters were specific details, or suggestions, or restrictions. The trust instrument executed in 1889 provided that the property at Fifth Avenue and Main Street could not be sold. But at that time the said location was outside the business district of Pine Bluff. In the transcript before us there is a picture of Main Street in Pine Bluff in 1890 which shows that Fifth Avenue and Main Street was then a timber covered area. Today that location is the hub of the metropolitan area of the City. To keep that specific property today for a youth center will be of danger to youth who might go there for lectures, physical development, etc.; whereas, youth will be greatly benefited by a new location of the Institute. As aforesaid, the prime purpose of the trust is to ". . . provide some place of instruction and amusement to attract the young white people and bring them under influences calculated to elevate and improve them physically, mentally, morally, and spiritually". With that as the main purpose of the trust, equity has the power to permit the trustees to deviate from the restriction against the sale of the property at Fifth Avenue and Main Street, when it is shown — as here — that the deviation is necessary to accomplish the main purpose of the trust. *Henshaw* v. *Flenniken,* 183 Tenn. 232, 191 S. W. 2d 541, 168 A. L. R. 1010; *Amory* v. *Attorney General,* 179 Mass. 89, 60 N. E. 391; *Catholic Bishop of Chicago* v. *Elliott,* 14 Ill. App. 2d 495, 144 N. E. 2d 874; *Town of S. Kingstown* v. *Wakefield,* 48 R. I. 27, 134 A. 815, 48 A. L. R. 1122; *Foust* v. *Wm. E. English Foundation,* 118

Ind. App. 484, 80 N. E. 2d 303; and *Shoemaker* v. *American Security & Trust Co.*, 163 Fed. 2d 585.

In *Slade* v. *Gammill,* 226 Ark. 244, 289 S. W. 2d 176, we allowed the trustees to make a disposition of a portion of the trust property on the doctrine of *cy pres.* That doctrine is not invoked in the case at bar because the change of location is not a change of purpose of the trust; but what we said in *Slade* v. *Gammill* is applicable here in that these trustees have made a ". . . very fine common sense solution of serious difficulties"; and ". . . equity should approve such a solution. . .". We affirm the decree of the Chancery Court.

George Rose Smith, J., concurring. I agree with the majority's reasoning and conclusion, but I would express somewhat more emphatically my disagreement with the decision in *Atkinson* v. *Lyle,* 191 Ark. 61, 85 S. W. 2d 715. Insofar as that case holds that a court of equity is without power to permit any deviation from the exact language of a charitable trust I think the decision to be erroneous, and I would overrule it outright.

The power of chancery to sanction a deviation is generally recognized in the case of private trusts as well as charitable trusts. Rest., Trusts, §§ 167 and 381. We have approved the doctrine with respect to private trusts, as in *Biscoe* v. *State,* 23 Ark. 592, where we said that if the compensation fixed by the declaration of trust was insufficient to attract competent trustees a court of equity could make an order for additional compensation.

The power is even more urgently needed in the field of charitable trusts, where the public interest demands that the trust be protected from destruction owing to some change in circumstances not foreseen by the settlor. We have often applied the *cy pres* doctrine, which permits the court to apply the property of a charitable trust to some similar objective when the settlor's original purpose fails. *McCarroll* v. *Grand Lodge,* 154 Ark. 376, 243 S. W. 870; *State ex rel. Atty. Gen.* v. *Van Buren School Dist. No. 42,* 191 Ark. 1096, 89 S. W. 2d 605. If we are willing to approve a principle that permits the fundamental purpose of the

trust to be changed, as the *cy pres* doctrine does, there is no sound reason for refusing to permit a deviation in mere administrative detail. We actually approved a deviation in the recent case of *Donaghey Foundation* v. *Little Rock University*, 231 Ark. 748, 332 S. W. 2d 497, and I think we should take the present opportunity to set all doubts at rest by specifically overruling the contrary doctrine that was announced in *Atkinson* v. *Lyle*.

HOLT and ROBINSON, JJ., join in this concurrence.

ALEXANDER *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION.

5-2097 336 S. W. 2d 64

Opinion delivered June 6, 1960.

Tom Gentry and *L. M. Alexander,* for appellant.

Mehaffy, Smith & Williams, B. S. Clark, for appellee.

George Rose Smith, J. This is a suit by the appellant to recover total and permanent disability benefits at the rate of $200 a month. It was stipulated that if the jury found that the plaintiff was disabled for the entire period involved (extending from the thirtieth day after his injury in an automobile accident up to the date of trial) then he would be entitled to recover $2,975. The jury returned a general verdict for the plaintiff for only $2,250, and both parties appeal.

The opposing contentions could not be more completely at variance. On direct appeal the insured contends that there is no substantial evidence to justify the jury in reducing his award, so that we should either increase the judgment to the full amount or grant a new trial. On cross appeal the insurance company contends that there is no substantial evidence to support any recovery at all, so that the judgment should be reversed and the cause dismissed.

We first consider Alexander's direct appeal. He is the president and principal stockholder of Alexander Incorporated, an automobile parts rebuilding business which at the time of trial had eighteen employes. Before his accident on February 11, 1958, Alexander, according to his own testimony, devoted from 12 to 15 hours of physical activity to the business seven days a week. When he was on the road Alexander put in long hours driving in Arkansas and neighboring states, calling upon dealers, garages, and wrecking yards. On these trips he bought used transmissions, weighing as much as 210 pounds, and loaded them into his car. He also solicited orders for the resale of transmissions after they had been rebuilt by his company. On alternate weeks Alexander stayed at home and worked in the shop at Little Rock. There he tore down used transmissions, which required strenuous exertion, stood for extended periods at the lathe, supervised and instructed his employees, attended to administrative work, etc.

In the accident Alexander suffered a broken nose, crushed chest, broken ribs, injured knees, and, most

serious, a spinal injury. He was in the hospital for a few days and submitted to traction treatment for several months. After about two weeks Alexander was able to return to work for an hour a day, and by the time of the trial he was working 5 or 6 hours a day for five and a half days a week. He testified, and his doctor corroborated this, that he was unable to do heavy lifting, that he could no longer drive the long hours required for road trips, that he can stand at the lathe for no longer than 15 minutes, and that his activity has been curtailed in other respects that we need not detail. A medical witness for the defendant gave testimony from which the jury might have found that Alexander could perform all his former duties, although with restrictions which amounted in the witness's opinion to a 5% disability to the body as a whole.

On direct appeal there are two answers to the insured's contention that there is no basis for any award other than the full amount sued for. First, there is substantial evidence to support the view that Alexander is no longer totally disabled. The jury could, of course, have found that the insured was completely incapacitated soon after his accident, while he was in the hospital or in traction. But the testimony about his condition at the time of trial consists either of his own statements or of the opinions of others who depended at least in part upon what Alexander told them about himself. The jury was not compelled to accept this testimony as undisputed, especially in view of the opinion expressed by the appellee's medical witness, and hence the verdict may represent the jury's belief that the plaintiff is no longer totally disabled.

Secondly, where there is substantial evidence to support a finding for either side we are not at liberty to increase the amount of a general verdict to the full amount called for by the plaintiff's theory of the case. In this situation we have recognized in *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49, and similar cases, that the partial award may be the result of a compro-

mise in the jury room. It is plain enough that if we undertook to tamper with such a verdict the arguments in favor of increasing it would be equally balanced by those in favor of decreasing it.

The question presented by the cross appeal is more difficult. It cannot be said that Alexander's earning capacity has been completely destroyed. His efforts at the shop, even though on a part-time basis, contribute something to the earnings of the corporation. On the other hand, the jury may have believed that Alexander's earning power has been substantially reduced. He testified that he had found it necessary to employ two new men to take care of the road trips, and he had increased his working force at the shop. It is really impossible to say to what extent Alexander's earnings have been reduced by his injuries, for part of his income is attributable to his almost complete ownership of the business.

In view of the evidence the appellee insists that the case falls within our decisions holding that an insured is not totally and permanently disabled if he is able to earn a livelihood, even though his earning power is reduced. The appellant answers this argument by citing our cases that say the test is whether the insured can perform all the substantial and material duties of his occupation. In candor it must be conceded that all our decisions upon the subject cannot be harmonized.

Without undertaking to discuss every pertinent case in our reports we may illustrate the problem by examining a few of our principal cases supporting each of the divergent views. In *Metropolitan Life Ins. Co.* v. *Guinn,* 199 Ark. 994, 136 S. W. 2d 681, the insured had been a coal miner earning four or five dollars a day. As a result of a leg injury he could no longer work in the mines, but he was able to earn about $7.50 a week as a dishwasher and menial helper in a restaurant. We held that he was not totally and permanently disabled, because he was able to do at least some work for compensation. This case cannot be reconciled with *Metropolitan Life Ins. Co.* v. *Hawley,* 210 Ark. 855, 198 S. W. 2d 171,

where the insured was compelled to give up his work as a newspaper circulation manager, but he was able to earn a reduced income as a part-time salesman. We held that the proof that the insured had been forced to resort to some other occupation, from which he could not earn a livelihood reasonably comparable to that which he was earning when he obtained the insurance, presented a jury question on the issue of total disability.

Several of our cases, like the one at bar, involve persons owning their own businesses. In *General Am. Life Ins. Co.* v. *Chatwell,* 201 Ark. 1155, 148 S. W. 2d 333, the insured conducted a paint and paper store. After his injury he continued to operate the business, but he could not carry out some of his former activities, such as lifting paint cans and rolls of paper, and he employed an additional clerk. We denied recovery, holding that Chatwell was not "wholly prevented from engaging in any gainful occupation whatever." The same result was reached upon essentially similar facts in *Mutual Life Ins. Co. of N. Y.* v. *Phillips,* 202 Ark. 30, 149 S. W. 2d 940.

The cases just cited are hardly consistent with the more liberal construction that we placed upon disability policies in decisions before and after those cases. In *Aetna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. 2d 310, the owner of a truck and produce business, although afflicted by arthritis, was able to carry on his occupation by taking his sons into partnership and limiting his own participation to supervisory and administrative duties. We upheld a finding of total and permanent disability. Similarly in *Monarch Life Ins. Co.* v. *Riddle,* 193 Ark. 572, 101 S. W. 2d 781, the proprietor of a beer distributorship lost the use of his right arm and so was unable to handle beer barrels or to drive a truck as he had formerly done. He was nevertheless able to continue his business, which expanded and prospered, by employing others to do the work under his supervision. A finding of total incapacity was upheld by a closely divided court. More recently we sustained a verdict

for the insured in *Franklin Life Ins. Co.* v. *Burgess,* 219 Ark. 834, 245 S. W. 2d 210, despite the fact that the plaintiff was able to engage in limited activity as a clerk in a grocery store.

After reconsidering the whole question we are unwilling to follow cases such as the *Guinn, Chatwell,* and *Phillips* decisions, which hold that there can be no recovery even though the insured is unable to perform all the substantial and material duties of his occupation and even though his incapacity results in a substantial and demonstrable loss of earning power. In such a situation we think the proof presents a question of fact for the jury to decide. It is therefore our conclusion that the verdict for the appellant in this case is supported by substantial proof.

The appellee also suggests that the policy in question is unlike those considered in our prior cases, because it refers to a total loss of time and to a partial loss of time rather than to total disability. We have consistently refused to construe such clauses literally, for in that event the insured could recover only if he were continuously and helplessly confined to his bed. We perceive no real distinction between the language of the appellee's policy and the clauses construed in our earlier decisions. Indeed, in some of our prior cases, such as *Monarch Life Ins. Co.* v. *Riddle, supra,* and *Aetna Life Ins. Co.* v. *Orr,* 205 Ark. 566, 169 S. W. 2d 651, the contract referred to a loss of time, but the opinions attached no importance to that particular wording.

Affirmed on direct and cross appeal.

ARK. AIRMOTIVE DIVISION OF CURREY AERIAL SPRAYERS, INC. *v.* ARKANSAS AVIATION SALES, INC.

5-2163 335 S. W. 2d 813

Opinion delivered June 6, 1960.

Coleman, Gantt & Ramsay, E. Harley Cox, Jr., for appellant.

Mehaffy, Smith & Williams by *W. A. Eldredge, Jr.,* for appellee.

George Rose Smith, J. This is an action by the appellant for conversion. On August 14, 1957, the appellant bought an airplane from the appellee, under a conditional sales contract by which the seller retained title until the purchase price was fully paid. The contract was later transferred by the appellee to a Pine Bluff bank. The appellant's complaint asserts that on January 8, 1959, the appellee wrongfully and surreptitiously entered the appellant's premises, removed the airplane from its hangar, and converted the plane to its own use. The complaint sought damages totaling $76,000 for the conversion and also sought a judgment for $574.92 upon an account for labor and materials furnished to the appellee.

The appellee filed an answer stating that the appellant had defaulted in its monthly payments and had in other respects breached its contract. It was asserted that the bank had accordingly elected to declare the entire balance immediately due and had demanded and received payment of that balance from the appellee. The appellee alleged that it had rightfully repossessed the airplane pursuant to the conditional sales contract. To this answer the appellant filed a reply, asserting that the bank was still the owner of the conditional sales contract on the date that the appellee repossessed the plane and that the bank, by accepting a check from the purchaser that same morning, had waived its right to accelerate the maturity of the indebtedness. Both the defendant's answer and the plaintiff's reply contained a general denial of all allegations not specifically admitted.

At this point in the case the appellee filed a motion for a summary judgment upon the pleadings. For the purpose of this motion it was stipulated that the conditional sales contract was executed in Arkansas and that on the date of its execution the plaintiff, an Illinois corporation, was transacting business in this state without having qualified to do business herein as a foreign corporation. The trial court sustained the appel-

lee's motion for judgment, finding that the plaintiff could not prove its cause of action for conversion without relying upon the conditional sales contract, which the court considered to be unenforceable under Act 313 of 1907. Ark. Stats. 1947, § 64-1202.

The appellant argues two points for reversal. First, it is contended that § 2 of the 1907 statute, which provides that an unlicensed foreign corporation cannot make any contract in the state which can be enforced by it, was impliedly repealed by Act 131 of 1947, compiled as Ark. Stats., §§ 64-1205 *et seq.*

We are unable to agree with the contention that the earlier law was impliedly repealed by the 1947 act. Section 1 of the older statute required a foreign corporation to qualify by filing a copy of its charter and appointing an agent for service. Ark. Stats., § 64-1201. The next section provided a dual penalty for the doing of business without complying with the act: (a) The unlicensed corporation was subject to a fine of not less than $1,000, to be recovered at the instance of the prosecuting attorney, and (b) the corporation's contracts were unenforceable.

Act 131 of 1947 did not expressly repeal the 1907 statute. The 1947 act increased the fine to not less than $5,000, made it recoverable at the instance of either the prosecuting attorney or the attorney general, and contained administrative provisions not relevant to the present discussion.

There is no conflict between the 1947 act, which dealt mainly with the pecuniary penalty, and that portion of the 1907 act which rendered contracts unenforceable. In the absence of such a conflict an implied repeal can be found only if it appears that the legislature intended for the later statute to cover the entire field and thus to serve as a substitute for the original law. *Forby* v. *Fulk,* 214 Ark. 175, 214 S. W. 2d 920.

We think it clear that Act 131 of 1947 was not meant to be a recodification of § 2 of Act 313 of 1907. Sec-

tion 1 of the older statute outlined the basic steps by which a foreign corporation might qualify to do business in Arkansas. This section was left untouched by the 1947 act, which by its terms applies to any corporation which fails to file a copy of its charter "as now provided by law." Furthermore, it had been the state's policy for forty years to supplement the monetary penalty by the additional provision that the contracts of unlicensed foreign corporations should be unenforceable. We are not persuaded that the lawmakers, merely by increasing the fine from $1,000 to $5,000, intended by that action to declare by implication that the state's longstanding policy was being abandoned. The precise point was decided in *Hicks Body Co.* v. *Ward Body Works,* 8th Cir., 233 F. 2d 481, where the court held that the 1947 act did not impliedly repeal the 1907 law. We think the Court of Appeals correctly interpreted the Arkansas statutes, and we are in agreement with its reasoning and conclusion.

The appellant's second point is that the trial court erred in concluding from the pleadings and stipulation that in no event could the plaintiff prove its cause of action without asking the court to enforce the conditional sales contract. The court below, in announcing its decision, relied upon this language in *Republic Power & Service Co.* v. *Gus Blass Co.,* 165 Ark. 163, 263 S. W. 785: "The test to determine whether the plaintiff is entitled to recover in an action like this, or not, is his ability to establish his case without any aid from the illegal transaction. If his right to recover depends on the contract which is prohibited by statute, and that contract must necessarily be proved to make out his case, there can be no recovery."

In our opinion there are two controlling reasons for concluding that the *Republic* case does not govern the case at bar. First, the present case arises upon a motion for a summary judgment upon the pleadings. Such a motion, in a situation like the one now before us, has not traditionally been recognized as a part of our prac-

tice. See the remarks of Judge Charles W. Light in a panel discussion reported in 12 Ark. L. Rev. 57, 63-66. The summary judgment procedure has been approved by us when the admissions in the pleadings left no justiciable issue for the court to decide. *Trinity Universal Ins. Co.* v. *Robinson,* 227 Ark. 482, 299 S. W. 2d 833, commented upon in 12 Ark. L. Rev. 178. It cannot be said that the pleadings in the case at hand leave no justiciable issue for the court. Both the answer and the reply contain denials as well as admissions. The motion for summary judgment may be likened to a demurrer to the plaintiff's reply, and it is plain enough that that pleading is not subject to demurrer.

Secondly, at this stage of the litigation it cannot be declared with certainty that the appellant will necessarily be compelled to rely upon the conditional sales contract. A foreign corporation, even though unlicensed, is nevertheless permitted to bring suit to protect its property as long as the suit does not unavoidably involve the enforcement of a prohibited contract. Fletcher, Cyclopedia of Corporations (Perm. Ed.), § 8796. Quite obviously a corporation's failure to qualify to do business should not have the effect of enabling third persons to misappropriate its property with impunity.

Here the appellant alleges a conversion. Although it is sometimes loosely said that the plaintiff in trover must recover upon the strength of his own title, the cases actually recognize that possession alone is sufficient as against a person having no better right to the property. "But the true rule is, and it is believed that on principle the adjudications may be harmonized upon this: That possession, or the right of present possession at the time of a conversion of chattels is sufficient as a predicate for trover in all cases where the defendant cannot show a better right, since possession carries with it a presumption of ownership." Bowers, The Law of Conversion, § 432; accord, Rest., Torts, § 248. Upon the pleadings alone we do not attempt to decide — and indeed cannot decide — whether the appellant can prove its case with-

out running afoul of the statute that applies to the contracts of an unlicensed foreign corporation. That is a matter that should be allowed to arise and be decided in the normal course of a trial upon the merits.

Reversed.

SIMMONS NATIONAL BANK *v.* DALTON.

5-2164 337 S. W. 2d 667

Opinion delivered June 6, 1960.

[Rehearing denied September 12, 1960]

Coleman, Gantt & Ramsay, E. Harley Cox, Jr., for appellant.

George Howard, Jr., for appellees Daltons; *Carlton Currie,* for appellee Universal C. I. T.

PAUL WARD, Associate Justice. One of the principal questions presented on this appeal is whether there was a novation which discharged the maker of a note. The other question involved is whether certain transactions created a constructive trust. The trial court held that there was a novation but that there was no constructive trust. Appellant seeks a reversal on both questions.

The factual background out of which these questions arise is substantially as presently set forth.

On December 21, 1956 Ulysses G. Dalton, III, and his wife, Helen, (hereafter sometimes referred to merely as Dalton) purchased a 1957 Model Ford car from N. F. Trotter, executing to Trotter a conditional sales contract and also a note payable in monthly installments of $70.24 — the last payment falling due August 5, 1959. The contract and note were purchased by appellant, The Simmons National Bank of Pine Bluff. On December 19, 1957 Dalton's car was involved in a collision with another car near Beebe, Arkansas, resulting in considerable damage to Dalton's car. The record discloses that the insurance carrier on the other car involved paid $750.00 for the damage done to Dalton's car. A few days after the collision Dalton traded his wrecked 1957 Ford for a new 1958 Ford (sales price of the new Ford being $3,180,000) with Guy Thompson who was at the time a Ford dealer at Beebe. In accordance with the trade agreement between Dalton and Thompson the latter received the $750.00 insurance payment heretofore mentioned, the wrecked 1957 Ford (valued at $2,180.00) and a note (with the conditional sales contract executed by Dalton to Thompson) in the amount of $2,400.00 payable in equal monthly installments. In addition, and as a part of said trade agreement, Thompson agreed with Dalton that he would pay the balance (amounting to approximately $1,400.00) due appellant by Dalton on the

note and conditional sales contract heretofore mentioned. Thompson transferred, with recourse, to the Universal C.I.T. Credit Corporation (hereafter referred to as "C.I.T.") the $2,400.00 note and conditional sales contract and received from C.I.T. a check for the full amount of $2,400.00.

Early in January 1958 Thompson mailed appellant a check for the balance due on the said Dalton note but about a month later appellant returned the check to Thompson (uncashed) because Thompson had asked to have the title to the 1957 Ford attached to the check and appellant did not have the title in its possession. It appears from the record that Dalton had not paid the sales tax on the 1957 Ford and consequently the Revenue Department of this State had not issued to him the said title. While appellant was holding Thompson's check it notified Dalton about the absence of the title to the 1957 Ford and asked him to obtain same. Dalton made an effort to obtain a title certificate from the Revenue Department but for some reason failed to do so — and that was when appellant returned the $1,400 check to Thompson.

Following the above Thompson made three or more payments to appellant on the Dalton note but he did not make sufficient payment to keep the monthly payments current. Appellant in an effort to get Thompson to make regular payments on the note wrote him some nine or ten letters beginning on January 6, 1958 and ending on October 22, 1958. On or about the last mentioned date, when it became fully apparent to appellant that Thompson was insolvent and that he was not going to continue making payments on the note, it so informed Dalton, and it also told Dalton at that time that it was looking to him to pay the balance due on the note. Dalton, however, informed the Bank that he did not consider himself bound on the note for the reason that Thompson had agreed to pay it and thereupon appellant instituted this litigation.

In its Complaint in the Circuit Court appellant sought judgment not only against Dalton and his wife in

the sum of $1,109.36, with interest, (the balance due on said note), but also asked that Dalton and the Credit Corporation "be made trustees to the extent of the aforesaid judgment of the 1958 four door Ford sedan" then in the possession of Dalton. Dalton filed a Cross Complaint, making Thompson a party defendant, and asked for judgment against him and C.I.T. C.I.T. entered a general denial and stated that it was a *bona fide* purchaser of the note and conditional sales contract executed for the purchase of the 1958 Ford. The cause was transferred to the Chancery Court.

After a hearing the Chancellor decree that there was a novation and relieved Dalton of all liability on the note, but refused to hold C.I.T. and Dalton, or either of them, liable to appellant as trustees. The Chancellor also dismissed Dalton's Cross Complaint against Thompson and C.I.T. On appeal appellant contends (a) that the trial court erred in failing to hold C.I.T. and Dalton as constructive trustees, and (b) that it was error to release Dalton from the indebtedness.

Constructive Trust. In our opinion the Chancellor correctly refused to hold Dalton and C.I.T. liable to appellant as trustees. Apparently appellant concedes, as well it may, that neither of the above named parties was guilty of participating in any fraudulent transaction even though they both knew at the time the 1958 Ford was purchased that Dalton owed a balance on the 1957 Ford to the Bank. This is true because Dalton had a legal right to sell and Thompson had a legal right to buy or trade for the 1957 Ford without the knowledge or consent of appellant. See *Dedman* v. *Earle,* 52 Ark. 164, 12 S. W. 330, and *Fairbanks, Morse & Company* v. *Parker,* 167 Ark. 654, 269 S. W. 42. However, appellant says, citing authorities, that fraud is not always a necessary basis out of which a constructive trust relationship may arise. Even so, the cited authorities are of no avail to appellant under the facts of this case. Appellant relies on 89 C. J. S., Trust, Section 142, Page 1027, and also Restatement of the Law of Restitution, Section 160, Page 640, for authority that Dalton and C.I.T. hold funds

which in equity and good conscience belong to it — the appellant — and that C.I.T. will be unjustly enriched if it is not held to be a trustee. We fail to see how this result would follow. Neither Dalton or C.I.T. has in any way impaired appellant's security or imperiled its position — it still had Dalton on the note and it had a right to repossess the 1957 Ford. See *Olson* v. *Moody, Knight & Lewis, Inc.,* 156 Ark. 319, 246 S. W. 3, and the cases cited therein. It is not denied that C.I.T. paid $2,-400.00 for the note and conditional sales contract given by Dalton to Guy Thompson and we know of no theory, under the facts of this case, that would constitute it a constructive trustee in favor of appellant. The same thing can be said in behalf of Dalton who legally purchased, for value, the 1958 Ford which he now has possession of. Nor do we agree with appellant that C.I.T. became a trustee in favor of appellant because it had knowledge that the $750.00 (paid by the insurance company for damage to Dalton's 1957 Ford) was paid to Thompson as part of the purchase price for the new 1958 Ford. Even if it be conceded, as we do not here concede, that notice of the above facts would constitute C.I.T. as a trustee, we fail to find anything in the record to show that C.I.T. had such knowledge. No one testified to that fact and it was not shown on the conditional sales contract which C.I.T. purchased.

Novation. After careful consideration we have concluded that the trial court erred in holding that there was a novation, thereby relieving Dalton (and his wife) from the obligation to pay the note held by appellant. The learned Chancellor held, and it seems to be conceded by everyone, that there was no such novation at the time Dalton purchased the new 1958 Ford. It is undisputed that Thompson did agree to assume the debt to appellant but it is not conceded by anyone that appellant knew of this agreement much less that it consented to release Dalton when the trade was made. Therefore, it must be assumed that if any novation occurred it took place later during the year 1958. The record fails to show, and Dalton does not even contend, that appellant at any time expressly agreed with Dalton that it would

release him from the debt and look solely to Thompson for payment.

The learned Chancellor, however, took the view, and correctly so, that it was not necessary for appellant to expressly agree with Dalton that he would be relieved of liability and that he would look solely to Thompson, but that such agreement and intent on the part of appellant could be inferred from appellant's actions. We do not agree, however, that such an inference is tenable under the facts of this case.

Let us take a look, therefore, at the record to see what appellant did and what transpired with reference to its dealings with Thompson and Dalton. Appellee Dalton lays much stress on the fact that appellant made an effort to collect from Thompson and it must be conceded that appellant did just that. Early in January 1958 (only a few days after Dalton traded cars with Thompson) Thompson mailed the $1,400.00 check to appellant with instructions to cash it only if the title to the 1957 Ford was attached. Appellant did not have said title, but it contacted Dalton and advised him of the situation. Appellant also, on January 10, 1958, wrote Thompson about the absence of the title, stating that they were informed that the sales tax had never been paid. In the letter appellant also stated that it had talked with Dalton about the matter and that Dalton was going to Little Rock to see about it. Again on January 23, 1958 appellant wrote Thompson that it had talked with Dalton that day and that Dalton was going to take the necessary papers to Little Rock the next day and that Dalton would let it know the outcome of his visit. On February 14, 1958 appellant wrote Thompson, returning his check, and stated that it was unable to secure the said title and also stated that there was a balance of $1,318.15 due on the Dalton note. The letter also advised Thompson that it was unwilling to continue carrying the account under the conditions without further payment. On March 5, 1958 appellant wrote Thompson another letter to the same effect. On March 28, 1958 appellant again wrote Thompson that "we will

expect you to pay U. G. Dalton's car in full as soon as possible". On May 2, 1958 appellant wrote Thompson to "please send another remittance on the account of Dalton". On May 19, on August 5, and October 22, 1958 appellant wrote Thompson urging him to make payment.

The only two witnesses who were in position to testify relative to whether appellant Bank released Dalton from his obligation were W. E. Ayers, Assistant Cashier of appellant Bank, and Dalton himself. The relative portions of their testimony not heretofore mentioned are substantially as set out below.

Ayers was asked if there was any contact whatever with Dalton in regard to the delinquency of his account. He replied:

A. "Yes, on several occasions. I talked with him by 'phone and later he came to our office."

Q. "What was the nature of these conversations?"

A. "Briefly, it was to determine if he knew the reason for the delay in the title reaching our office, and if he knew any reason why it was being held up and *also informed him that it was his responsibility to see that the account was paid in full.*" (Emphasis supplied.)

Q. "Did he try to assist you in collecting this account."

A. "Yes, it is our policy to assist our customers in any way we can, and naturally we followed that pattern in this case, agreeing to assist him in any way we could, *at the same time indicating that so far as our records were concerned, the obligation was his.*" (Emphasis supplied.)

Q. "Did you ever indicate to Ulysses G. Dalton he was no longer liable on this account?"

A. "No."

On Cross Examination:

Q. "In reply to your attorney's question whether or not you had any understanding with defendant Dalton regarding this unpaid balance, you stated it was the policy of the Bank to assist the customers. Did you have any other understandings? What was the discussion had between you and Dalton regarding this account and payment of it?"

A. "Briefly, the discussion boiled down to this: *So far as our records were concerned the obligation was U. G. Dalton's.*" (Emphasis supplied.)

Dalton's testimony:

Q. "Did you receive any oral demands from The Simmons National Bank regarding the balance due?"

A. "I don't think in the form of a demand. I did talk to them and they referred to the balance, but not in the form of a demand."

Q. "Did they specifically ask you to make this payment at this time?"

A. "They didn't specifically ask me to make the payment, but asked if anything could possibly be worked out, and I told them I assumed Mr. Thompson would take care of it."

Q. "When was the last time they checked with you by 'phone regarding this matter?"

A. "I think it was the month of May or June, by 'phone."

Q. "Did you have any arrangements with the Bank to the effect they would collect it for you?"

A. "Not for me. I assumed it was his (Thompson's) obligation to pay it; I was relieved of it."

Q. "Were you not advised at that time the balance would have to be paid by someone primarily liable?"

A. "I was told it would have to be paid in order to clear your books, and you said you held me responsible, and I did mention to you that I did not feel I was obligated."

Q. "Did you ever state to me (the Bank's attorney) you didn't feel you were obligated?"

A. "I stated that Mr. Thompson assumed the obligation to pay it off, at which time you mentioned I might consult a lawyer."

Referring to the time when the automobile trade was made the witness was asked:

Q. "At that time you knew you were indebted to The Simmons National Bank?"

A. "Yes, sir."

Q. "You knew they were holding retaining title on the vehicle?"

A. "Yes, sir."

Q. "Did you notify the Bank of the collision?"

A. "I didn't."

Under the above factual situation we can see nothing, even in Dalton's testimony, from which it can be legally inferred that appellant Bank agreed to or intended to release Dalton from his obligation on the note. Neither is there anything in Ayers' testimony, or in the numerous letters referred to above, from which it could be presumed that the Bank would in fact release Dalton. It appears conclusively to us, as it was stated by appellant's employee, that what the Bank did amounted to nothing more than an effort to accommodate Dalton in its efforts to have Thompson pay Dalton's debt. In this the Bank's actions were in no way inconsistent with its intention to have Dalton remain liable on the note. In the case of *Elkins* v. *Henry Vogt Machine Company,* 125 Ark. 6, 187 S. W. 663, where the facts were somewhat similar to the facts here, the appellee company brought suit on three promissory notes signed by Elkins and others. The notes were given for machinery to be used in the erection of an ice plant owned by Elkins, et al. Elkins alleged that they had sold their interest in the machinery to C. C. Edwards, et al, with the understanding that they (Elkins, et al) were to be relieved from the pay-

ment of the note and that for a valuable consideration, consisting of the execution of a mortgage, to secure the payment of the indebtedness, and that the appellee Company released them from all liability. In that case this Court quoted with approval from 29 Cyc. 1130: "It is not essential that the assent to and acceptance of the terms of the novation be shown by express words to that effect, but the same may be implied from the facts and circumstances attending the transaction, and in the conduct of the parties thereafter. *Such consent is not to be implied merely from the performance of the contract by the substitute, for that might well consist with the continued liability of the original party . . .*" (Emphasis supplied.)

In a case of this kind the burden was on Dalton to show that he had been released by appellant Bank. In *Brewer & Son* v. *Winston, Ad.*, 46 Ark. 163, it was so held. Brewer & Son brought an action against appellee Winston on a promissory note and recovered judgment before a Justice of the Peace. Winston appealed to the Circuit Court where he filed an answer stating that he had sold his equity of redemption in the mortgaged premises to a person by the name of Elliott who had assumed the debt as part of the purchase price, and that Brewer & Son had consented to accept Elliott as their debtor and to release the defendant Winston. The cause was tried in equity and a decree entered in favor of Winston. On appeal the Court stated the facts to be substantially as follows: The mortgaged premises had a grist mill on them valued at $325.00. Elliott was willing to purchase at the price, provided he was not pressed by the mortgage creditor whose debt was already past due; Brewer & Son assented to this arrangement — they were willing to receive payments from Elliott and give credit to Winston therefor but refused to give up Winston's note and take Elliott's note in lieu thereof; Winston swore that Brewer & Son consented to accept Elliott as their debtor and to release the original debtor, but Brewer and Elliott contradicted him. This Court in reversing the judgment of the trial court said: "But the judgment was wrong upon the merits. The burden was

upon the defendant to prove that he had been discharged by a novation of the contract." This statement relative to the burden of proof has been approved in many other decisions of this Court.

Our decisions and the text-writers appear to be uniform in holding that it is necessary to show an *intent* on the part of the creditor to release an old debtor and substitute therefor a new debtor. In *Home Life Insurance Company* v. *Arnold,* 196 Ark. 1046, 120 S. W. 2d 1012, this Court, in dealing with this same question, said: ". . . the effect of the novation is the *intention* of the parties." (Emphasis supplied.) Likewise, at Pages 266 and 267 of Volume 39 Am. Jur., it is stated, among other things, that: "In order to effect a novation there must be a *clear and definite intention* on the part of *all* concerned that such is the purpose of the agreement." (Emphasis supplied.) In Williston on Contracts, Volume 6, Revised Edition, at Page 5254, Section 1870, under the sub-title "*Necessity for the assent of all parties to a simple novation*" it is stated: "It is undoubtedly a *commonplace* in the discussion of novations that the *assent* of all parties is necessary; and certainly . . . no old debtor can be discharged without the creditor's consent, . . ." (Emphasis supplied.) Numerous cases therein are cited sustaining the above announcement.

In this case we are driven to the conclusion that Dalton did not, by his testimony, or the testimony of anyone else, discharge the burden which the law places upon him, and further that there is insufficient testimony to establish a clear and definite intention, or for that matter any intention at all, on the part of the appellant Bank to discharge Dalton from his obligation on the note. This conclusion is further substantiated by the concession of both parties and by the judgment of the Chancellor that there was not any novation at the time Thompson agreed to pay Dalton's debt to this Bank, and by the undisputed proof that appellant did not know at the time of the arrangements made between Dalton and Thompson. If there was not any novation at that

time then it would be interesting to speculate as to when the novation occurred. It is impossible it seems to us to fix such time under the record in this case. It follows, therefore, that the Chancellor erred in dismissing appellant's Complaint against Dalton and to that extent the decree must be reversed.

Since the trial court held that Dalton was not liable, it then consistently held that Dalton had no right of action against Thompson and thereupon dismissed Dalton's Cross Complaint. Since we are holding Dalton liable the cause must be remanded with directions that Dalton's Cross Complaint against Thompson be reinstated.

The decree of the Chancellor is affirmed in part and reversed in part as heretofore indicated, and the cause is remanded with directions to enter a decree in accordance with this opinion.

Affirmed in part, reversed in part and remanded with directions.

HARRIS, C. J., not participating.

4984 337 S. W. 2d 663

Opinion delivered June 6, 1960.

[Rehearing denied September 12, 1960]

Thad D. Williams and *Christopher C. Mercer,* for appellant.

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

SAM ROBINSON, Associate Justice. On the 11th day of April, 1959, appellant, Lonnie B. Mitchell, was convicted of rape and sentenced to death. On appeal to this Court the judgment was affirmed on September 21, 1959. *Mitchell* v. *State,* 230 Ark. 894, 327 S. W. 2d 384. On January 14, 1960, appellant filed in the Union Circuit Court, where he was originally tried, a motion to vacate the judgment. This is an appeal from an order overruling the motion.

It is alleged in the motion that appellant is a Negro and that it is the custom and practice in Arkansas to sentence Negro men to death for raping white women, but that white men are not sentenced to death for rape; that Negroes were systematically excluded from the jury which tried him; that he is an ignorant youth (he was 23 years of age at the time); that he did not have access to effective assistance of counsel; that a purported confession made by appellant was coerced and not volun-

tary; that at the time of the trial he was insane and not mentally present at the trial; that he was insane at the time of the commission of the rape; that he is presently insane; and that he was denied an examination by a private psychiatrist prior to his trial. Nothing is alleged in the motion that was not or could not have been raised on appeal in the first instance except the allegation of present insanity.

In affirming the original judgment, this Court said: "We have carefully examined the entire record. The appellant had a fair trial free from error." The judgment was affirmed and the mandate issued. In these circumstances the trial court did not have jurisdiction to set aside the judgment. In the case of *Fortenberry* v. *Frazier, et al,* 5 Ark. 200, this Court said: "The Supreme Court, except where bills of review, in cases of equity, and writs in the nature of a writ of error *coram nobis,* in suits at law, may be prosecuted, possesses no power to review, revise, or reform its adjudications and opinions after the expiration of the term in which they are pronounced and recorded, unless they are suspended by an order made at that term; and they irrevocably conclude the rights of the parties thereby adjudicated. Whatever was before the Court, and is disposed of, is considered as finally settled. *The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate, and settle such matters as have been remanded, not adjudicated by the Supreme Court.*" (Emphasis supplied.)

The Court said, in *Freeman* v. *State,* 158 Ark. 262, 250 S. W. 522: "An appeal was prosecuted to the Supreme Court from the original judgment of conviction and sentence, which was affirmed. The appeal lifted the cause out of the circuit court; and, as the judg-

ment was affirmed, it was beyond the power of that court to afterwards modify or change it in any respect."

In the case of *Swagger* v. *State,* 227 Ark. 45, 296 S. W. 2d 204, a void judgment was set aside on defendant's motion, but in that case there had been no appeal from the judgment of conviction. The case had not been before this Court previously. There had been no determination by this Court that the judgment was valid.

The motion has no merit, even if considered as a petition for a writ of error *coram nobis*. Ever since the case of *State* v. *Hudspeth,* 191 Ark. 963, 88 S. W. 2d 858, it has been the rule in this State that subsequent to the affirmation of a judgment by this Court petitions for writs of error *coram nobis* cannot be made to the trial court without permission of this Court. No application was made to this Court for permission to file with the trial court a petition for writ of error *coram nobis*. Moreover, it was pointed out in the Hudspeth case that the writ will not lie where the party complaining knew the facts complained of at the time of or before the trial. All the alleged facts appellant now complains of were known at the time of the trial and at the time of the appeal to this Court except the condition of his mind at this time. That question can be determined, as provided by Ark. Stat. § 43-2622.

Affirmed.

HAYNES *v.* STRANGE.

5-2161 337 S. W. 2d 661

Opinion delivered June 6, 1960.

[Rehearing denied September 12, 1960]

[redacted]

Arnold & Hamilton, for appellant.

Robert B. Gibson, for appellee.

SAM ROBINSON, Associate Justice. Appellee, Nannie Strange, filed this suit to quiet title to 80 acres of land. From a decree in her favor appellants have appealed. George Strange, deceased husband of appellee, bought the property in 1928 and occupied it as his homestead until his death in 1936, when he died intestate, leaving surviving him his widow and seven children, five of whom were of age. Shortly after his death Mrs. Strange, the appellee, notified the five children who were of age that she was claiming ownership of the land, and gave the minor children the same notice when they became of age, which was more than seven years before the commencement of this suit in 1957. Four of the heirs, for the consideration of $500 each, conveyed their interest in the remainder to appellants, Leroy Haynes and Belle Haynes. The issue is whether Mrs. Strange has acquired the fee title in the property by adverse possession, or whether she owns only dower and homestead rights.

In her complaint Mrs. Strange alleges that her husband bought the property in 1928. She makes no claim

to having been one of the purchasers. The complaint alleges: "That in approximately the month of February, 1928, her husband, George C. Strange, purchased and obtained a deed to the following property, to-wit: . . ." Mrs. Strange bases her claim of ownership solely on adverse possession. The complaint alleges in that respect: "That since the death of the said husband and father, on December 15, 1936, the widow and petitioner, Nannie Strange, has exercised exclusive, open, notorious, actual, adverse, possession of the aforementioned property as against the world and the defendants named in the style of the case and the individuals named in the body of the petition, and is now in actual possession of said property, and has disavowed and has not recognized the claim or interest of the named individuals or any other persons as to the property since the death of George C. Strange."

Upon the death of her husband, Mrs. Strange acquired by operation of law dower and homestead interest in the property. Before she could acquire the fee by adverse possession, she would have to renounce the rights of dower and homestead in an unequivocal manner. This she failed to do. She merely told the children that she was claiming to be the owner of the property, but she did not say she was renouncing her dower and homestead rights. In *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002, this Court 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 disseizin of the heir and an entire denial of his rights, so as to result in an ac-

quisition 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 her 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; or that her disclaimer and hostile possession was so open and notorious as to raise the presumption of notice to him." (Emphasis supplied.)

In Restatement — Law of Property — § 222, comment (f), it is said: "*Owner of present interest as adverse possessor against owner of future interest.* In cases within the rule stated in this Section, since the owner of the present estate is entitled to possession and the owner of the future estate is not, no adverse possession by the former against the latter is possible until the future interest becomes a present interest. It is immaterial that the present owner claims a larger interest under color of title, or informs the future owner that he claims an estate in fee simple absolute, or does both."

Here Mrs. Strange had the right of possession by reason of her dower and homestead interest, and even though it be conceded that she announced to the world that she was claiming the fee ownership in the property, from a practical standpoint there was nothing the remaindermen could do, since she had not repudiated her interest growing out of dower and homestead. And, furthermore, if she had repudiated such interest at that time, she would have had no interest in the property at all, because she did not begin claiming adversely until shortly after the death of her husband, and of course it would take seven years for her claim to ripen into owner-

ship. The evidence is not sufficient to show that she repudiated or renounced her dower and homestead rights, and therefore she could not claim adversely to the remaindermen.

Reversed, with directions to dismiss the complaint.

POWELL *v.* STATE.

4972 335 S. W. 2d 816

Opinion delivered June 6, 1960.

Clifton Bond, for appellant.

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

JIM JOHNSON, Associate Justice. This is an appeal from a conviction for the violation of Liquor laws.

On October 7, 1958, appellant, John Powell, was arrested for the offenses of Possession of Intoxicating Liquors over the legal limit in a dry territory, and, Possession of Intoxicating Liquors for Sale without a license, alleged to have been committed on October 4, 1958. This appellant was tried before the Municipal Court of Monticello on October 9, 1958. The appellant pleaded not guilty and upon a hearing before the Monticello Municipal Court appellant was found guilty of the offense

of Possession of Intoxicating Liquors over the legal limit in a dry territory and fined $250, and was found guilty of the offense of Possession of Intoxicating Liquors for sale without a license and fined $250, or, was fined a total of $500 and costs, and was sentenced to one (1) year on the County Farm, with the sentence of imprisonment being upheld on good behavior.

The appellant appealed this decision to the Circuit Court of Drew County and a trial was had before a jury on September 30, 1959. The officers who made the arrest related in their testimony that at about 1:30 p.m. on October 4, 1958, the officers went to appellant's house located on State Highway 4, east of Monticello and outside the city limits, and that on arriving at the house two of the officers met appellant coming up the path to the house from an outside privy with 4 half pints of whiskey in his pockets and hands. These 4 half pints of whiskey were taken into possession by the officers and either one or both of the officers entered appellant's house to search for more whiskey while one of the officers out of the three officers present began to search the premises outside the house.

In a dresser drawer inside the house the officers found 12 additional half pints of whiskey which with the 4 half pints taken from appellant equalled exactly one (1) gallon, the legal limit for possession in a dry territory. The officers thoroughly searched appellant's house and premises and found one gallon of whiskey upon property belonging to the appellant.

The officers then searched the Municipal Airport property belonging to the City of Monticello which is adjacent to the home of appellant and in two caches found approximately 35 or 40 half pints of whiskey of various brands on the Municipal Airport property.

The record reveals that this case was first tried before a jury in the Circuit Court of Drew County on April 21, 1959. The jury after deliberating 2 hours and 35 minutes was deadlocked 7 to 5 and a mistrial was declared. The case was tried before another jury in the

Circuit Court of Drew County on September 30, 1959, and the jury deliberated approximately 35 minutes when they were released for the night. The next morning the jury deliberated approximately 1 hour and returned a verdict of guilty and assessed the minimum fines of $50 for the offense of Possessing Intoxicating Liquors over the legal limit in a dry territory and of $100 for the offense of Possessing Intoxicating Liquors for Sale without a license, or a total fine of $150. This appeal followed.

This being a misdemeanor case, the appellant is required to argue all the points on which he relies. All assignments not argued in his brief are waived. *Fields* v. *State,* 219 Ark. 373, 242 S. W. 2d 639. For reversal appellant relies upon and argues eight points, one of which contends that it was error for the trial court to allow the Judge of the Monticello Municipal Court to testify upon the trial in the Circuit Court since the appellant was tried by this witness in the Municipal Court and found guilty. This point gave us a great deal of concern; but the issue need not be decided as the appellant failed to properly save his exceptions. As was said by this Court in *Yarbrough* v. *State,* 206 Ark. 549, 176 S. W. 2d 702: "Appellant, in the instant case, has not been convicted of a capital offense. We are not permitted, therefore, to review alleged errors to which no exceptions have been saved." Thus, this point not being properly before the Court, we can find no error. Six of the other points were found to be without merit and will not here be discussed.

Appellant earnestly contends in his remaining point that:

"It was error for the trial court to allow the prosecuting attorney to attempt to impeach the credibility of the defendant by independent testimony as to matters brought out by the prosecuting attorney on his own cross examination."

The prosecuting attorney in an effort to impeach the testimony of the defendant and to question the credibility of his testimony cross examined the defendant exten-

sively concerning a second conviction of the defendant for a violation of the liquor laws in 1951 and questioned the defendant on cross examination as follows:

"By Mr. Linder: I want to ask you this question, Mr. Powell, I want to know if this second conviction is the time the man drove up in his car and you were sitting under a tree and he hollered, 'Bring me some Early Times', and you said, 'I don't have that I have Sunny Brook'.

"A. That is not what was said. He drove in and said Doctor Pepper and I knew what he was saying. I had seen him hide it the day before and I brought it on to him about that time I saw Youngblood."

The prosecuting attorney introduced two witnesses in rebuttal, Sheriff Jack Towler and Mr. Dallas Youngblood, to contradict this testimony of the defendant brought out by the prosecuting attorney on cross examination.

This Court has repeatedly held that when a witness is cross examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party asking the question. *Eddington* v. *State,* 225 Ark. 929, 286 S. W. 2d 473 (1956); *Brock* v. *State,* 101 Ark. 147, 141 S. W. 756 (1911); *Abbott* v. *Herron,* 90 Ark. 206, 118 S. W. 708 (1909); *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405 (1908). See also: *Spence* v. *State,* 184 Ark. 139, 40 S. W. 2d 986 (1931); *Terrell* v. *State,* 176 Ark. 1206, 2 S. W. 2d 87 (1938).

It was held in *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684 (1911), 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 issues, he cannot, as to his answer, be subsequently contradicted by the party putting the question, and where the State, to impeach a witness asked him concerning a collateral matter, and was then permitted to contradict his answer, this constituted prejudicial error. Following this well settled rule of law, we have no choice but to find that the trial court in allowing the testimony of Sheriff Jack Tower and Mr. Dallas Youngblood in rebuttal to be intro-

duced in evidence to contradict testimony brought out by the prosecuting attorney on cross examination committed reversible error.

For the error indicated the judgment is reversed and the cause is remanded for a new trial.

PRICE *v.* EDMONDS.

5-2074 337 S. W. 2d 658

Opinion delivered June 6, 1960.

[Rehearing denied September 12, 1960]

W. H. Dillahunty, Hale and *Fogleman,* for appellant.

Fletcher Long, for appellee.

JIM JOHNSON, Associate Justice. This is an action brought by appellee as a citizen and taxpayer of the City of West Memphis against the mayor, treasurer, and aldermen of said city, alleging that the mayor and aldermen are making and executing contracts on behalf of the City of West Memphis with and for the financial benefit of themselves personally in violation of law. The al-

legations regarding the treasurer are to the effect that he has made expenditures for such contracts as a part of his duties as treasurer. Appellee asks that appellants be enjoined permanently from continuing such actions and that the appellants be required to repay the City all tax revenues so unlawfully expended.

A temporary injunction was entered by the trial court restraining such practices. Upon a full hearing and in an extremely penetrating memorandum opinion, the Chancellor made the temporary injunction permanent and denied the second request, that of requiring appellants to repay the tax funds so expended. Appellants have appealed that part of the order making the injunction permanent.

For reversal, appellants argue first that the court erred in overruling their motion to make appellee's petition more definite and certain.

This case was originally filed on March 24, 1959. A hearing was held on April 3, 1959, to determine whether a temporary restraining order should be issued. Appellants were present, both in person and by counsel. Based on the testimony of four witnesses the temporary restraining order was issued. Some 30 days following this hearing the appellants' motion to make more definite and certain was filed. The record of the testimony taken at the hearing details the allegations contained in the complaint. The purpose in granting a motion to make more definite and certain is to inform the parties of the facts upon which the alleged claim is based so as to enable them to prepare a defense. See: *Wassell* v. *Sprick,* 208 Ark. 243, 185 S. W. 2d 939; *Gunter* v. *Fletcher,* 217 Ark. 800, 233 S. W. 2d 242; *Spikes* v. *Hibbard,* 225 Ark. 939, 286 S. W. 2d 477; Ark. Stats. § 27-1160.

Without question, at the time the motion was filed appellants were sufficiently advised of the allegations made in the complaint in order to prepare a defense, and the court was not in error by denying their motion to make more definite and certain. The remainder of appellants' argument for reversal is based on Ark. Stats. § 19-909, the pertinent language of which is as follows:

"No alderman or member of any council, which, during the term for which he shall have been elected, or one (1) year thereafter . . . be interested, directly or indirectly, in the profits of any contract or job, for work or services to be performed for the corporation."

Appellants' basic premise is that this statute does not prohibit them from entering into contracts with themselves on behalf of the City for the purchase of "materials", and in fact, by the enactment of this statute the legislature has made an expression of public policy to this effect.

The record reflects that the appellants have engaged in the practices complained of for some time. The quite candid words of the Chancellor's opinion in this regard are more appropriate:

"It has been the position and attitude of the respondents in their pleadings, briefs, and oral arguments throughout this proceeding that expenditure of tax funds belonging to the people of West Memphis by the mayor and city council under contracts of various kinds either with themselves or with companies and enterprises in which they have a beneficial interest — for the specific purpose and with the express intent to create a financial profit to said mayor and councilmen — is not in violation of any law existing in Arkansas. Moreover, from all of the proceedings that have taken place in the progress of this cause of action the conclusion on the part of the court is inescapable that the respondents hold a firm and abiding conviction that even if their practices aforesaid should be found to be in violation of the law they are nevertheless good for the City of West Memphis. The implication in the position and attitude of the respondents stands out in bold relief that this court should ignore any laws that seem to get in the way and defer to the good judgment of the officials concerned.

"Petitioner's allegation that the mayor and city Council were spending the tax money of the people of West Memphis under contracts which they as public officials made with themselves as private individuals with the

purpose and intent to make a financial profit for themselves was admitted by each and every witness which the court now recalls. It is clear beyond the peradventure of a doubt that such practices constituted a continual, consistent, planned course of handling the peoples' money. Not a single official denied these facts. . ."

It is well settled that the common law rule prohibited municipal officers from self-dealing in regard to the sale of materials as well as in contracts or jobs for work or services. 10 McQuillin, Municipal Corporations, § 29.97 *et seq.* See also: *Warren* v. *Wheatley*, 231 Ark. 707, 331 S. W. 2d 843. But counsel for appellants urge the common law rule is no longer in effect by passage of the act pertaining only to work and services. It is their argument that since the lawmakers have seen fit to legislate on the subject and by the above enactment have put restraint only on the performance of work or services, this must be accepted as abrogating the common law rule pertaining to all other contracts between a municipality and its officers. This position is untenable. Appellants rely on the maxim *expressio unius est exclusion alterius.* True, contracts for materials are not prohibited by the statute but there can here be no reason for invoking a maxim to give validity to a contract void at common law as against public policy simply because it does not fall within the prohibitions of the statute. As we have said, both contracts for services and contracts of sale were prohibited at common law. The legislature has done nothing more than emphasize the prohibition relating to services. It would be absurd to give effect to the statute as evidencing a change of view respecting public policy and as a declaration that all contracts heretofore within the prohibition of common law are now legal, save those directly dealt with by the statute.

Appellants rely also on the holding in *Frick* v. *Town of Brinkley,* 61 Ark. 397, 33 S. W. 527. Without analyzing that opinion to determine whether it is inconsistent with the above language, we now hold that the law in

respect to contracts for both materials and work and services is as set forth herein.

Affirmed.

HARRIS, C. J., and MCFADDIN, J., dissent in part.

WOMACK *v.* BRICKELL.

5-2123 337 S. W. 2d 655

Opinion delivered June 6, 1960.

[Rehearing denied September 26, 1960]

Frank Sloan, Jack Segars, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

JIM JOHNSON, Associate Justice. This case involves claims for damages arising out of an automobile and tractor collision.

Appellees, J. B. Brickell and Broadway Packing Company, Inc., brought this action for damages for personal injuries sustained by Brickell while driving an automobile owned by the appellee company and for property damages to the automobile, respectively, in an accident occurring May 28, 1959, with a tractor owned by appellant Tom Womack and driven by appellant Foy Wisham.

Trial to a jury resulted in a verdict rendered upon special interrogatories finding appellants liable for damages as a result of concurring negligence with appellees and fixing the respective percentages of fault at 70% against appellants and 30% against appellees.

After the jury returned a special finding of total damages for personal injury in favor of appellee Brickell for $63.10, the court interrogated the jury as to whether they had allowed Brickell anything for pain and suffering, and upon being advised in the negative and being further told by the jury that only medical and hospital cost had been allowed, directed the jury to return a verdict for pain and suffering and ordered them to retire for further deliberation.

Upon returning the second verdict, the jury increased the figure for total damage for personal injuries to Brickell from $63.10 to $163.10.

Appellants objected to the interrogation of the jury when it returned its first verdict and to the direction that an allowance had to be made for pain and suffering as being an invasion of the province of the jury by the trial judge.

For reversal, appellants rely on three points. We find no merit in two of the points, therefore, only the above objection will be discussed in this opinion.

After the jury had returned its verdict into open court awarding appellee Brickell $63.10 for his total

damages, instead of accepting the verdict, the court, over objection, inquired as to the basis of the finding and was told by a juror that the jury intended to return a verdict for hospital and medical cost and did not award anything at all for pain and suffering. Since no member of the jury dissented to this statement, it was equivalent to a special finding by the jury. See annotation: "Propriety of court questioning jury as to meaning of their verdict, or for purpose of correcting it in matter of form." 164 A.L.R. 989, 993, Sec. II a, l, d.

The court then told the jury, over specific objection that it was invading their province, that Brickell was entitled under the law to recover for physical pain and mental anguish and directed the jury to retire.

The jury then returned a different verdict allowing Brickell $163.10, whereupon the court discharged the jury.

After careful consideration, we cannot escape the conclusion that the action of the trial court in this respect was an invasion of the province of the jury requiring a reversal of this cause.

The Constitution of Arkansas, Art. 2, Sec. 7, provides:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law . . ."

Ibid, Art. 7, Sec. 23, provides:

"Judges shall not charge juries with regard to matters of fact, but shall declare the law . . ."

In 89 C. J. S. 203, Sec. 517 c. (2), it is stated:

"As a general rule where the determination of the amount of recovery is exclusively within the province of the jury the court has no power to amend the verdict by increasing the amount found by the jury." (Citing: 64 C. J., p. 1099, n. 29, which cites *Rice & Holiman* v. *Henderson,* 183 Ark. 355, 35 S. W. 2d 1016). Accord: 53 Am. Jur. 758, Sec. 1094.

In *Beckley* v. *Miller,* 96 Ark. 379, 131 S. W. 876, this Court held that the trial court exceeded its power in

reducing a verdict rendered on evidence of plaintiff in the sum of $506.40 to $214, as shown by evidence offered for defendant. There it was said:

"The trial court may tell the jury in a proper case that there is no question of fact for it to determine, and may also set aside a verdict for errors committed by the jury and grant a new trial; but it can never substitute its judgment for that of the jury on a disputed question of fact. It is obvious that, if the trial court could do this, the verdict of the jury would have no binding force but would be persuasive merely as is the case of the verdict of a jury in a chancery court. The amount to be recovered by the plaintiff was a disputed question of fact, and it was the exclusive province of the jury to determine it . . ."

So, also, we have held that the trial court is without power to add to the verdict as in *Rice & Holiman* v. *Henderson, supra,* where the jury returned a verdict for a stated sum "with hospital and doctor's bills to be paid by defendants" and there was no evidence as to the amount of the hospital bill.

As we view the case at bar, the only proper course to follow was as provided in Ark. Stats. Sec. 27-1738:

"The verdict shall be written, signed by the foreman and read by the court or clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case."

Of course, the testimony of appellee Brickell as to his personal injuries should not have been treated as uncontradicted because he was a party. *Conway* v. *Hudspeth,* 229 Ark. 735, 318 S. W. 2d 137; and, further, different inferences might have been drawn from both his testimony and the testimony of his physician, W. M. Douglas, introduced by stipulation. Brickell testified that he told Foy Wisham he didn't think he was hurt and the physician reported: "Physical examination of the

neck and adjacent areas revealed no significant findings except the subjective tenderness on motion of his neck."

Certainly "fair minded men may differ" about the inferences to be drawn as to pain and suffering, and might consistently say that there was no proof thereof convincing to their minds. The court was, therefore, not justified in peremptorily instructing the jury that Brickell was entitled to recover for physical pain and mental anguish and directing further deliberation. See: *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226; and *Thiel* v. *Dove,* 329 Ark. 601, 317 S. W. 2d 121.

From a careful review of the record it is apparent that the jury had, in effect, found that no pain and suffering had been endured by Brickell. Therefore, the judgment insofar as it pertains to appellee J. B. Brickell is reversed and the cause is remanded for a new trial. Regarding appellee Broadway Packing Co., Inc., the situation is entirely different. This case was submitted to the jury on separate interrogatories and separate findings were returned as to damages sustained by each appellee. That, in effect, amounted to the return of two separate verdicts. Therefore, the rule recognized in *Wilson* v. *Davis,* 230 Ark. 1013, 328 S. W. 2d 249—that the verdict in a law case being an entirety could not be divided by affirming in part—does not here apply. The error here committed affected only the verdict or judgment in favor of appellee Brickell: there being no contention that error existed in the verdict or judgment in favor of appellee Broadway Packing Company, Inc., such judgment is affirmed.

Reversed in part. Affirmed in part.

5-2128 336 S. W. 2d 46

Opinion delivered June 6, 1960.

[redacted]

Earl J. Lane, for appellant.

Jerry Witt and *Wood, Chesnutt & Smith,* for appellee.

JIM JOHNSON, Associate Justice. Appellees, J. M. Malone and Gertrude Malone, his wife, instituted this action in the Chancery Court against appellants, William P. Kirkham and Ruby Kirkham, his wife, to set aside a deed because of failure of consideration. At the time of the conveyance, out of which this suit arises, appellant, William P. Kirkham, was married to appellees' daughter, Carrie Belle Kirkham, who is now dead.

In 1955, appellant, William P. Kirkham, and his then wife, Carrie Belle Kirkham, who will be hereinafter referred to as the Kirkhams, were living in Hot Springs, Arkansas, where Mr. Kirkham worked as a clerk in one of the gambling houses or "bookie joints", and the ap-

pellees lived in Texas. The appellees had in their custody and took care of Carrie Belle's daughter by a former marriage. On December 30, 1955, earnest money in the sum of $500 was paid to the real estate agent, Mr. Franks, on the property here in question. This $500 was paid with $300 in cash furnished by Carrie Belle Kirkham and a $200 check drawn on appellees' account in a Greenville, Texas, bank. On January 2, 1956, the transaction was closed out and a deed received wherein the balance of the consideration in the amount of $2,500 was paid in twenty-five one hundred dollar bills. The Kirkhams and appellees were all present at the time of this transaction. On March 11, 1956, a baby was born to the Kirkhams and not long thereafter it was learned that Carrie Belle Kirkham had a cancer. On August 20, 1957, the appellees executed a deed to the Kirkhams to the property wherein the consideration as recited is Ten Dollars and other good and valuable consideration. In December of 1957 Carrie Belle Kirkham died. This suit to set aside the deed made in August 1957 was filed on April 30, 1959, after appellant, William P. Kirkham, had married appellant, Ruby Kirkham, and alleges that the true consideration for the August 1957 deed was the promise of the Kirkhams that they would modernize the house, all of which the said William P. Kirkham has failed to do. The appellants filed a general denial and from a decree entered after the hearing of testimony setting aside the deed, the appellants bring this appeal based upon the theory that appellees failed to establish the alleged failure of consideration by the necessary clear, satisfactory, cogent and convincing evidence.

At the outset it must be recognized that the law is firmly established that to justify the setting aside of a deed for failure of consideration, the evidence of such failure must be clear, cogent and convincing. See: *Carnall* v. *Wilson,* 14 Ark. 482; *Rector* v. *Collins,* 46 Ark. 167; *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52; *Goerke* v. *Rodgers,* 75 Ark. 72, 86 S. W. 837; *McCracken* v. *McBee,* 96 Ark. 251, 131 S. W. 2d 450; *Adkins* v. *Hoskins,* 176 Ark. 565, 3 S. W. 2d 322; *Swim* v. *Brewster,* 177 Ark. 1171, 9 S.

W. 2d 560; *Bell* v. *Castleberry,* 96 Ark. 564, 132 S. W. 649; *Polk* v. *Brown,* 117 Ark. 321, 174 S. W. 562; *Johnson* v. *McAdoo,* 222 Ark. 914, 263 S. W. 2d 701. A careful review of the record fails to reveal any evidence that the deed in question was given in consideration of a promise by Kirkham to repair the house except the testimony of the plaintiffs, the Malones. Of course, they are interested parties and the courts are not bound to accept their testimony as true. *Stovall* v. *Stovall,* 228 Ark. 1077, 312 S. W. 2d 337; *McDaniel* v. *Johnson,* 225 Ark. 6, 278 S. W. 2d 657.

Some of the Malones' relatives did testify that they had heard Kirkham say that he intended to repair the house, and Kirkham himself says he had such intentions, but the relatives of Malone did not say that Kirkham's statement about intending to repair the house amounted to a promise or that such statement was given in consideration of a deed. As we view this entire matter on trial *de novo,* we are convinced that not only does the evidence produced by the Malones fail to make out a case by clear and convincing testimony, but it would be hard for us to say that they proved their case to any degree of satisfaction. Malone did not merely testify that he owned the property and conveyed it to the Kirkhams in consideration of an alleged promise to repair the premises, but at the very outset of his testimony Malone went into great detail as to how he acquired his alleged ownership of the property. He introduced the deed he received from Charles Dittman showing a consideration of $3,000. He went into all the details of how he had made a down payment of $300 in cash and the giving of a check for $200; that his daughter, Carrie Belle, let him have the $300 in cash to make the down payment and, further, while still testifying on direct examination, he tried to show where he got the balance of $2,500 used in making the purchase. The $2,500 was in one hundred dollar bills. He never explained where he got the one hundred dollar bills. He said he got the money from various sources — from the Government and from the sale of two farms, but he did not say such money was paid to him in one hundred dollar bills. He was asked on direct examination:

"Q. The money that you paid for that farm, except for the $300.00, was your money, is that correct?

"A. That's right."

He then stated that Carrie Belle gave him the $300. Malone was further asked on direct examination:

"Q. Mr. Malone, what was the consideration for that deed?

"A. Well, Bill Kirkham and his wife, Carrie Bell, wanted me to have——"

The sentence was not completed. He further stated that Kirkham's alleged promise to improve the property was made after the property was deeded to Kirkham and his wife, but later changed his testimony to say that the deed was made after the promise to repair. Furthermore, he testified that the repairs were to be done immediately after the deed was executed in August 1957. The suit was filed almost two years later after appellant had remarried and in the meantime it does not appear that the Malones made any demand on Kirkham to repair the house. Malone's testimony on cross-examination, in explaining where he got the $2,500, is as follows:

"Q. Where did you get the twenty-five one-hundred dollar bills?

"A. Well, I sold the farm for part of it.

"Q. When did you sell the farm?

"A. Well, it's been several years ago.

"Q. What did you get for the farm?

"A. Oh, I think I got about four or five thousand dollars for it.

"Q. In what year did you sell it?

"A. Well, I don't remember.

"Q. You ought to be able to remember that, Mr. Malone.

"A. Well, I don't though.

"Q. Was it ten years ago?

"A. No, I just don't remember that well.

"Q. Well, you remember the amount of money, but you don't remember the year you sold the farm?

"A. Well, I can remember the money.

"Q. Who did you sell it to then?

"A. I can't even think of him.

"Q. You can think of the money, but you can't think who you sold to? Are you sure you had a farm? What was the description of it, where was it located, in what County?

"A. About a mile or a mile and a half out of Whitmore.

"Q. What county is that?

"A. Well, I just can't think of the name of the county.

"Q. You can't think of the name of the County, and you can't think of the name of the person you sold it to, and you don't know the year you sold it. Now, who did you buy it from, then?

"A. I bought it from a man by the name of, he's a land dealer there, I don't believe I can recall his name.

"Q. You don't know who you bought it from?

"A. Yes, I know who I bought it from, I can't call his name, I forgot his name.

"Q. When did you buy it?

"A. Well, I thought I just told you I didn't remember the exact time when I bought it.

"Q. And you saved the money all that time, and carried it around in your pocket?

"A. I didn't say I carried it a hundred years or so, I said I had that money in my pocket, and I did, and every darn nickel of it was mine."

On the other hand, Mrs. Malone testified that they sold the land near Whitmore in 1953, and that she had been carrying the money around with her in cash since that time. Mr. Malone had testified that he was the one who carried the money in his pocket. Mrs. Malone testified that she had no confidence in banks and that is the reason she didn't have the money in the bank, but on the other hand she did give a check for $200 as a down payment on the place and the other $300 paid at that time she got from Kirkham's wife, although she testified that at the time she had $3,000 in her purse in cash.

Kirkham testified that he is a professional gambler; that he carries his money in his pocket, and when questioned on cross-examination with reference to this point he pulled out his roll and offered to let counsel for the Malones count it. He testified he let his wife have 25 one hundred dollar bills to let the Malones use in purchasing the property; that he and his wife were there at the time the property was purchased; that the deed was made to the Malones, but later at the insistence of his wife the Malones deeded the property to the Kirkhams. He testified that he wanted to help the old people all he could; that he had no intention of taking the property away from them during their lifetime, and that in the beginning he did intend to have some repairs done on the house, but that his wife became sick with a cancer and that she was in a hospital for many months at great expense and died from the disease.

Regardless of Kirkham's occupation, we cannot say that his testimony does not have the ring of truth; on the other hand, we are unable to say that the testimony of the Malones is so unreasonable as to be unworthy of belief. Consequently, herein lies the reason we must find that the Chancellor erred in setting aside the deed. The burden was on the appellees, as plaintiffs, to establish that the deed was given in consideration of appellants having the house repaired by clear, cogent and convincing evidence. See: *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517. This, they failed to do.

In our body of law there have grown up a number of rules and principles governing the law of real estate which have become known as "Rules of Property." While it may be argued that many of such rules are based upon technicalities, it is nevertheless true that these rules, and the technicalities upon which they are based, have come into existence and have been continued because of the ever present need for stability and predictability in this field of the law. Were this not the case then chaos soon would be the result and property values would diminish in direct relationship to the degree of instability existing in the law of this or any other state as it might be applied to real property. Consequently, economic and moral necessity have dictated the establishment of such rules and the technical basis of many of them. Thus it is that the maintaining of the integrity of such rules devolves upon this tribunal. The general welfare requires a continuation of the observance of such rules and may in special cases, as in the case at bar, be found to require a decision in accordance with these principles even though the Court may entertain great sympathy for individuals in a particular situation.

Since appellants in their prayer for relief ask that appellees be given a life estate in the property here involved, the case will be remanded for that purpose.

Reversed and remanded.

HOLT, MCFADDIN, and WARD, JJ., dissent.

PAUL WARD, Associate Justice, dissenting. I am firmly convinced that the result reached by the majority is not in accord with equity or the law. As I understand that opinion it is based principally on two things: (1) that Kirkham, and not the appellees, paid the $2,500.00 in question to Charles Dittman and his wife, and (2) that the Chancellor's finding is not supported by clear and convincing testimony. My reasons for dissenting could not be adequately expressed without reviewing the case in its entirety.

Pleadings. On April 30, 1959 appellees filed a verified complaint which in all material parts states: On

August 20, 1957 appellees were the owners of the 40 acres of land in question; on that date they executed a Warranty Deed conveying the land to William P. Kirkham and his wife (appellants herein); said deed recites a consideration of $10.00 and other good and valuable considerations; that said deed was executed in consideration and reliance upon the promise of appellants to remodel and modernize the house located on said land for the use and benefit of appellees during their lifetime; that appellants failed and refused to carry out said agreement and the deed should be cancelled for lack of consideration. The prayer was in accordance with the above Complaint stating "that they deny each and every allegation of the plaintiffs' complaint."

The Chancellor's Findings. On the above joint issue there was a full and complete hearing before the Chancellor who made the following findings: (a) "The plaintiffs, J. M. Malone and Gertrude Malone, paid the original purchase price of the land hereinafter described out of funds belonging to said plaintiffs with the exception of the sum of $300.00 provided by the plaintiffs' daughter"; (b) the deed from the plaintiffs to Kirkham conveying subject land was executed in consideration and reliance upon the promise of Kirkham to remodel and modernize the house on said land for the use of plaintiffs during their lifetime; (c) the defendant, Kirkham has failed and refused to carry out the said agreement and the said deed should be cancelled for the lack of consideration and the title to said lands are vested in the plaintiffs.

For a reversal appellants contend it is not shown by clear, satisfactory, and convincing testimony that, in return for the deed to them, they agreed to modernize the house for appellees to occupy as long as they lived.

The testimony is substantially as hereinafter set out. Appellee J. M. Malone who was 73 years of age at the time of the trial testified that the deed was executed to Kirkham in consideration of Kirkham's promise to modernize the house which he and his wife were to occupy for as long as they lived or either one of them lived.

"Q. What was he (Kirkham) supposed to do to make it a modern home?

"A. Well, you might say a general overhaul inside and outside, put in a pump and bath.

"Q. What else was he to do?

"A. Well, he was just to improve the house and make it a perfect modern home, that's what he said he would do.

"Q. What was the condition of the house when you moved in?

"A. Well, you could live in it, but it wasn't too good.

"Q. What did the outside walls consist of?

"A. It was boxes, stripped up.

"Q. What were the inside walls?

"A. Just had paper on it.

"Q. Was there to be any change in the outside walls?

"A. Yes.

"Q. What was he to do on that?

"A. Shingle them.

"Q. What was he to do on the interior of the house?

"A. Well, he was to put cardboard, or whatever you call it, on the inside.

"Q. You mean sheetrock?

"A. Yes, sheetrock.

"Q. He was to install a bath?

"A. Yes.

"Q. When did he agree to do that?

"A. He said he was going to do it right away.

"Q. Was that agreement made before the deed was made?

"A. No, I believe it was after we made it—no, we made it before the deed was made.

"Q. Was that agreement of William Kirkham the reason you made the deed?

"A. That's right, and no other reason.

"Q. Did Mr. Kirkham do anything to improve the property after he got the deed?

"A. He bought one small load of lumber.

"Q. Did he ever put a bath in the place?

"A. He didn't put anything in it.

"Q. Did he install the pump?

"A. Nothing.

"Q. Did he put the sheetrock in?

"A. Nothing.

"Q. Have you asked Mr. Kirkham to fix the house up?

"A. I could never even get him to talk to me.

"Q. No when was it (the deed) made?

"A. I don't remember just the exact day.

"Q. Well, was it made before or after you gave the deed to Billy (Kirkham)?

"A. It was made before we gave the deed to Billy."

Mrs. Malone in regard to the improvements to be made testified substantially as follows: Mr. Malone and I have been married fifty years and we have three living children. One of our daughters, Carrie Bell, was the wife of William Kirkham.

"Q. How did it happen that you and Mr. Malone made a deed to Mr. and Mrs. Kirkham?

"A. For them to fix our home.

"Q. Well, what was the transaction, tell us about it?

"A. He was to modernize the house, fix it in the inside, put sheetrock on the inside, and put boards on the outside, fix the bedroom, and we was to live there as long as we live, and then it went back to him and Carrie Bell.

"Q. Would you have signed that deed if you had known he was not going to fix the house up?

"A. No, I had confidence in him, I loved him like I loved a son.

"Q. Did he ever fix the house?

"A. Never, since my daughter died.

"Q. Did he ever do anything on it except put the load of lumber there?

"A. No, it's out there in the barn now.

"Q. Have you had a telephone conversation with him since your daughter died?

"A. Yes, he called me down at Chester Wright's one day, and Chester Wright got into his car and come over there and I went; Billy called me and said, 'Grandma, that's your place, and any damn thing you want to do with it,' over the telephone. Chester Wright was standing there and heard every word of it. He said 'its yours, so later do anything you want to'. That was a long distance call.

"Q. Who paid the insurance on the place the whole time you had it?

"A. I have and Mr. Malone.

"Q. Did Billy (Kirkham) ever pay the insurance?

"A. No, I paid it this year and last."

Mrs. Hignight, a sister to Mr. Malone, testified that she and her husband, Mr. and Mrs. Benrus, her sister and her daughter were all at the home of Mr. and Mrs. Malone in 1957 at the time Mr. Kirkham stated before all of them that he was going to fix up the home and modernize it.

"Q. What did he say he was going to do?

"A. He said he was going to put the sheetrock in, just said he was going to modernize the home for them.

"Q. Was the home ever modernized?

"A. No, it wasn't."

Mrs. Carrie McGee and Mrs. Carl H. Vineyard were present at the meeting above referred to at the home of Mr. and Mrs. Malone and they testified substantially the same as Mrs. Hignight.

In the face of the above testimony appellants offer practically nothing to the contrary. Mr. Kirkham even admits that he did promise that he would make some repairs and he further admits that he did nothing. In spite of all of this the majority would overturn the direct and positive finding of the Chancellor (set out above) who had the opportunity (which we do not have) to observe the witnesses on the stand.

The conclusion reached by the majority appears to be based largely if not primarily on the ground that the $2,500.00 payment was made by Mr. Kirkham and not by appellees. My remarks hereafter are addressed to that point.

First, under the pleadings in this case the payment of the said $2,500.00 is not an issue vital to the decision. The important thing is (and this is undisputed) that the title to subject property was in appellees and not in appellants, and that appellees then deeded it to appellants. The payment of the $2,500.00 to my mind could have no bearing in the case except possibly to go to the credibility of the witnesses. Viewed in that light a reference to the testimony in this case is indeed revealing.

It is obvious that the majority do not believe appellees were in possession of the $2,500.00 which they admittedly paid to Dittman. This means, therefore, that the majority believe Kirkham's version. I can only point out from the record that Mr. Malone who appears to be a substantial citizen of the age of 73 years testified that they had saved that amount of money and explained where he got it; that

his wife, Mrs. Malone, testified to the same thing; and that the real estate man testified that he received the money from them. Over and against this testimony stands only the uncorroborated statement of Kirkham who is a confessed lifetime gambler, and who made no effort to explain where he got the money or the reason why he carried it around on his person. On the other hand appellees explained that they had lost all of their money along about 1930 because of the bank failure. I submit in all seriousness that the above statement of facts confirms rather than refutes the credibility of appellees.

There is of course no definite workable rule by which to tell when testimony is clear and convincing—especially one that fits all people. Therefore we should, I believe, be guided by what was satisfactory to the Chancellor, especially where any doubt exists. This thought was impliedly expressed in the recent opinion of *Odom* v. *Odom*, 232 Ark. 229, 335 S. W. 2d 301, where we said: "This question is not free from doubt, but after studying the record we are unable to say that the chancellor was in error in finding the plaintiff's proof to be sufficiently clear and convincing."

4979 337 S. W. 2d 865

Opinion delivered September 12, 1960.

N. L. Schoenfeld and *Tilghman E. Dixon,* for appellant.

Bruce Bennett, Attorney General, by *John T. Haskins,* Asst. Attorney General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, E. W. Edwards, was charged by Information with violation of the Overdraft Act (Ark. Stat. Anno., 1947, Sections 67-714 to 67-716), was found guilty by the jury, and his punishment fixed at six months imprisonment in the State Penitentiary. Several points are raised in urging a reversal, but the first contention effectively disposes of the appeal, *viz.,* the Garland County Circuit Court was without jurisdiction.

The undisputed proof reflects that appellant, a building contractor, issued a payroll check upon the Worthen Bank and Trust Company of Little Rock in the amount of $48.10 on May 29, 1959, to an employee, Howard Duff. The check was delivered to Duff, a resident of Hot Springs, in appellant's office in Little Rock. Duff subsequently cashed the check at Halsell's service station and grocery store in Hot Springs. Thereafter, the bank at Hot Springs processed the check for payment, but it was returned by Worthen Bank and Trust Company with the notation "insufficient funds." On two later occasions, the check was presented for pay-

ment, but was returned with the same notation. Thereafter, the prosecuting attorney of Garland County filed the Information against Edwards. An oral motion to dismiss for lack of jurisdiction was made, both during the trial, and at the end of the State's evidence, on the ground that the State had failed to prove that the crime was committed in Garland County. A written motion in arrest of judgment and motion to set aside the verdict of the jury and dismiss for want of jurisdiction was filed at the end of the trial. All of these motions were denied.

Appellant's primary assertion, that the Garland County Court was without jurisdiction, is well founded. Section 10, Article II, of the Arkansas State Constitution provides:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury *of the county in which the crime shall have been committed;*[1] provided that the venue may be changed to any other county of the judicial district in which the indictment is found, upon application of the accused, in such manner as now is, or may be, prescribed by laws; . . ."

We have held that jurisdiction of statutory offenses is within the county where the crime is committed, *Smith* v. *State,* 169 Ark. 913, 227 S. W. 530. The venue of the offense charged herein is not transitory, *Cousins* v. *State,* 202 Ark. 500, 151 S. W. 2d 658, and the alleged violation was consummated when the check was executed in Pulaski County and delivered to the payee in Pulaski County. In *Shepherd* v. *State,* 221 Ark. 191, 252 S. W. 2d 621, this Court said:

"Appellant contended that the venue was in Clark, his home county, and not in Hempstead County, where he was charged and tried. It appears undisputed that the check in question was executed in Arkadelphia, but there is conflict in the testimony as to whether it was delivered in Clark or Hempstead County. If delivered in Clark County, as appellant contended, then the venue would be in Clark, and not Hempstead."

[1] Emphasis supplied.

It is therefore clear, in the cause before us, that if Edwards committed a criminal offense, same was committed in Pulaski County, and not in Garland County, and the Circuit Court of the latter county was without jurisdiction.

Reversed.

NEWSOM *v.* STATE.

4981 337 S. W. 2d 866

Opinion delivered September 12, 1960.

Blair & Blair, Robert J. White, for appellant.

Bruce Bennett, Attorney General, by *Ben J. Harrison,* Asst. Attorney General, for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, Ernest Newsom, a man of mature years and a lifelong resident of Logan County, Arkansas, was sentenced to a term of three years in the State Penitentiary for the crime of unlawfully fondling a child under Ark. Stats. §§ 41-1128—29. For reversal of the judgment appellant contends: "(I) The verdict is contrary to the evidence and not supported by the evidence, and is not sufficient to overcome the presumption of innocence. (II) The verdict is so excessive as to amount to cruel and unusual punishment."

We do not agree with either of these contentions. (I) The record reflects that a child, age 10, daughter of Mr. and Mrs. Roy Stallings, was left at Newsom's

home by her father. This was not unusual for this little girl had often spent some time with the Newsoms. About 9 o'clock on the evening in question Newsom walked the little girl home and her mother testified that when she arrived she was nervous and looked as if she wanted to cry. The mother found blood on the child's clothing. Her sexual organs were red. The child was taken to Dr. Charles Smith who examined her and his findings were, in effect, that there was evidence of trauma and slight physical damage and bruising. Also there were two small areas that were raw as though mucous membrane or the skin had been scratched off. He further noted there was no evidence of any entrance into the vaginal cavity.

The little girl testified, in substance: I don't know what happened, Mr. Newsom touched me. He touched me with his hand, it was underneath my clothing, he just bothered me, he put his hand under my dress, just had on my dress and underclothing. He put his hands inside my panties, this was around four or five minutes. He said not to tell anybody or I couldn't visit him any more. He kissed me on the mouth, don't know how many times he had his hands on me when he kissed me. Don't recall whether he had shaved or not. He just messed around.

The above evidence was ample to support a conviction. Here the testimony of this little girl alone, if believed by the jury and it evidently was, was sufficient to convict when viewed in the light most favorable to the State as we must view it, *Higgins* v. *State*, 204 Ark. 233, 161 S. W. 2d 400: "It is a well-settled rule that the evidence admitted at the trial will, on appeal, be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict of the jury, it will be sustained."

(II) As pointed out, we cannot say the verdict was excessive in the circumstances. Section 41-1129, Ark. Stats., *supra* provides that the punishment for one guilty of the revolting crime here involved shall be not less than one year or more than five years in the State Peni-

tentiary and the trial court correctly so instructed the jury.

The jury returned the following verdict: "We, The Jury, find Defendant Guilty as Charged. The Court to Assess the Penalty." Whereupon the court fixed his punishment at a term of three years in the State Penitentiary. It thus appears that the jury, by its verdict, directed the court to fix the punishment and this the jury had the right to do under provisions of Ark. Stats. § 43-2306 which provides: "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."

Finding no error in the trial of this case the judgment is affirmed.

RIDER, EXECUTRIX *v.* CUNNINGHAM, JUDGE.

5-2168 337 S. W. 2d 868

Opinion delivered September 12, 1960.

Wayne Boyce, for petitioner.

Kaneaster Hodges, for respondent.

ED. F. MCFADDIN, Associate Justice. This is an original suit filed in this Court by Mrs. Nettie Rider as Executrix of the Estate of E. C. Rider, seeking a writ to prohibit the Chancery Court of Jackson County from proceeding in a cause therein pending wherein Hutson

et al. are Plaintiffs and Rider *et al.* are Defendants, and referred to as the "Hutson-Rider case."

On March 31, 1959 Hutson *et al.* filed complaint in the Jackson Chancery Court against E. C. Rider, Dene Hook, Mary Hook, and the Dene Hook Motor Company, Inc. The complaint alleged that in a series of transactions at various times E. C. Rider, as President and chief executive officer of the Dene Hook Motor Company, Inc., had used funds of the corporation wrongfully and fraudulently to his personal gain and had thereby become a trustee for the corporation of certain properties purchased and standing in the name of E. C. Rider. The complaint alleged that the plaintiffs were at all times stockholders in the corporation but had only recently learned of the wrongful activities of E. C. Rider; and that Dene Hook and Mary Hook, as the other stockholders and as the officers of the corporation, had refused to allow the corporation to proceed against E. C. Rider. The complaint was for an accounting by E. C. Rider, the impressing of a trust for the benefit of the corporation on certain properties standing in the name of E. C. Rider, judgment for money, and for costs and other relief.

Summons was duly served on E. C. Rider in person on April 1, 1959; but he departed this life on April 20, 1959 before filing any defensive pleading. Mrs. Nettie Rider was appointed executrix of the Estate of E. C. Rider; and Hutson *et al.,* as Plaintiffs in the Hutson-Rider case, had the cause revived against the Executrix by Order of Revivor of the Jackson Chancery Court (see § 62-2602, Ark. Stats.). Thereupon Mrs. Rider, as Executrix, filed this original proceeding in the Supreme Court to prohibit the Chancery Court from further proceedings in the Hutson-Rider case. The theory of the Executrix is, that the alleged cause of action against E. C. Rider did not survive his death: and, therefore, the Chancery Court was without jurisdiction to enter an order of revivor.

While we entertain grave doubts as to a writ of prohibition being the proper remedy in a case like this

one, we forego a decision on that point because it is not briefed and because, even if prohibition should be a remedy available to a petitioner in a case like this, we nevertheless deny the writ because we conclude that the Chancery Court Order of Revivor was correct.

Our applicable statute on survival of actions is § 27-901, Ark. Stats. which provides that for wrongs done to the person or property of another an action may be brought against wrongdoer, ". . . or after his death, against his executor or administrator . . ." In 1 Am. Jur. page 82 ("Abatement and Revival" § 107), the holdings of the various jurisdictions are summarized:

"Where the cause of action against an officer of a corporation arises from a breach of a fiduciary relation by which he enriches himself, his death does not abate the action. Therefore, a cause of action against such officer for misappropriation of corporate property by him while in office, the cause of action having arisen from a breach of a fiduciary relation by which the officer enriched himself, survives his death. An action in equity against a director of a corporation to recover secret profits made under a contract with the corporation survives against his executor or administrator."

In 79 A. L. R. 1517 there is an extensive and enlightening annotation: "Abatement upon death, of cause of action to enforce personal liability of corporate officer, director, or trustee"; and the holdings are summarized:

"In various cases involving causes of action for negligence or misconduct of officers, directors, or trustees of corporations, or misappropriation of corporate property, it has been held that the cause of action survived the death of the officer, director, or trustee."

Our own case of *Hughes* v. *Kelley*, 95 Ark. 327, 129 S. W. 784, points to the conclusion that we reach. There, the officers of the corporation had failed to file

an annual report as required by statute.[1] A creditor of the corporation brought action against the individual officers of the corporation. One of the officers was deceased and his executor was made a party. The question was, whether the cause of action under the statute survived against the estate of the deceased officer. In holding that such cause of action did survive, we quoted from our earlier case of *Nebraska National Bank* v. *Walsh,* 68 Ark. 433, 59 S. W. 952:

" 'Having reached the conclusion that this is a statutory liability, and not a penalty, the statute of limitations would be that applicable to all actions founded upon any contract of liability, expressed or implied not in writing; for before the forms of action were abolished, debt was the proper action for enforcing a statutory liability of the kind under consideration.' "

In the case at bar the proceeding is for an accounting, impressing of a trust on property, and obtaining a judgment for whatever may be shown due the corporation by the accounting. This is not a penal proceeding, but is in all respects a proceeding to redress a wrong to the corporation. We conclude that the Order of Revivor was correct and the Writ of Prohibition is, therefore, denied.

[1]The statute read: "If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 848 and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

NEELY *v.* JONES.

5-2170 337 S. W. 2d 872

Opinion delivered September 12, 1960.

Howard & McDaniel, Barrett, Wheatley, Smith & Deacon, for appellant.

Frierson, Walker & Snellgrove, for appellee.

GEORGE ROSE SMITH, J. This boundary line dispute involves the ownership of a strip of land, less than an acre, lying between the appellants' property to the east and the appellees' property to the west. The case began as an action in ejectment but was later transferred to equity. At the close of the plaintiffs' proof the chancellor sustained a demurrer to the evidence, and this appeal is from the ensuing order of dismissal. The only question is whether the demurrer to the evidence was properly sustained. This depends, under our holding in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, upon whether the proof, viewed in its most favorable light, would have presented a question of fact for the jury if the case had been tried at law.

The appellees have record title to a tract of about ten acres, which includes the strip now in controversy.

Some twenty or more years ago their predecessors in title erected a fence near their eastern boundary, but for some reason not disclosed by the record the disputed strip was left outside the fence. The appellants' land, a three or four acre tract, lies just east of the strip in question and includes a dwelling house that has been occupied by the appellants and their predecessors in title. Except for a few isolated acts neither the appellants' actual possession nor that of their predecessors has extended to the disputed strip, which is largely made up of gullies not suited to cultivation or other use. This litigation arose in 1959 as a result of the appellees' having moved the fence over to the true line and having thereby attempted for the first time to exercise dominion over the area in controversy.

We are of the opinion that the demurrer to the evidence should have been overruled, for the appellants' proof raised a question of fact as to the existence of a boundary by acquiescence. As we said in *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S. W. 2d 490: "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. [Citing cases.]" In such cases the existence of a boundary line by acquiescence is an issue of fact, to be determined upon the evidence in each individual case. Thompson on Real Property (Perm. Ed.), § 3309. In the record now before us there is substantial evidence to support the view that the landowners' tacit recognition of the fence line for more than twenty years created a new boundary line.

The appellees rely principally upon *Cossey* v. *House,* 227 Ark. 100, 296 S. W. 2d 199, where we said that "a landowner who puts his fence inside his boundary line does not thereby lose title to the strip on the other side. That loss would occur only if his neighbor should take possession of the strip and hold it for the required period of years." We adhere to the basic principle followed in the *Cossey* case, but there are at least two important

points of distinction between that case and this one. First, there the adjoining land on the far side of the fence was wild and unimproved, so that its owner could hardly be regarded as having consciously acquiesced in the fence as a boundary line. Here the fact that both tracts have been improved and occupied might well support an inference that the fence has been accepted as the line. Secondly, the *Cossey* case was tried upon its merits; the question on appeal was where the preponderance of the evidence lay. Here the trial court's action in sustaining a demurrer to the evidence can be affirmed only if the plaintiffs offered no substantial testimony upon the controlling question of fact. We are unable to say that their proof falls completely short of establishing a *prima facie* case.

Reversed and remanded.

McCulloch *v.* McCulloch.

5-2172 337 S. W. 2d 870

Opinion delivered September 12, 1960.

D. A. Bradham and *Stanley E. Price,* for appellants.

Max M. Smith, for appellees.

Paul Ward, Associate Justice. This appeal involves the disposition of United States Series E Bonds by a testator. The trial court held that the bonds were included in the word "cash", and this appeal follows.

Robert McCulloch executed his will on October 14, 1939 and died, testate, January 11, 1949. Certain legatees filed a petition in the Probate Court in July 1949 asking

to have the will construed. A final determination was not made by the Probate Court until September, 1958, but the executors in the meantime administrated the estate and kept the assets practically intact.

The subject will, in all essential parts reads as follows:

". . ., first I direct that all my just debts be paid out of my estate, second I give Finch McCulloch and Luciel McCulloch my home place consisting of one hundred (105) and five acres more or less, Second I give to Finch McCulloch and Luciel McCulloch all my personal property Store and goods therein and all accounts due me except *money* to my Grandaughter Ella May Parrott I give the sum of one hundred dollars to Irine McCulloch I give the sum of one hundred dollars to Florence McCulloch I give the sum of one hundred dollars to Luciel McCulloch I give the sum of Five Hundred dollars all remaining *cash* to be divided equally between Finch McCulloch James R. McCulloch Lydia Parrott and Luciel McCulloch. I hereby appoint James R. McCulloch and Finch McCulloch sole executors of this Will without bond." (Emphasis supplied.)

It was stipulated and agreed by all parties that the assets of the estate (with the amounts and valuations calculated at the time of the final order of the Probate Court in 1959) consisted of the following:

(a)	The home place, 103.50 acres, value	$2,000.00
(b)	Household goods, value	119.00
(c)	Farm equipment, value	38.00
(d)	Deposits in New Edinburg Bank	717.12
(e)	Deposits in Merchants & Planters Bank	1,575.40
(f)	Deposits in Warren Bank	1,507.26
(g)	Five Series E Bonds, maturity value	3,600.00
(h)	Three notes signed by James McCulloch (amount and disposition not in dispute).	

The testator was survived by two sons and two daughters; James R. McCulloch, Finch McCulloch,

Luciel McCulloch and Lydia (McCulloch) Parrott, all of whom are beneficiaries under the will. He was also survived by three grandchildren; Ella May Parrott, Florence McCulloch and Irine McCulloch, all of whom are likewise beneficiaries.

The proof shows, and it is not here disputed, that: (a) the store and its contents were owned by the testator at the time the will was made but were disposed of by him before his death in 1949; and, (b) the testator did not own the Series E Bonds at the time the will was made but purchased them in his own name before his death.

This litigation arises over the ownership of the Series E Bonds. It was and is the contention of Finch McCulloch and Luciel McCulloch that these bonds belong to them by virtue of the language in the first part of the will. In other words, these appellants contend that the said bonds constituted personal property and should not be classified as *cash.* On the other hand appellees contend that the said bonds should be treated as cash the same as the bank deposits. As so classified, appellees contend that the proceeds of the E bonds should "be divided equally" between the children of the testator under the latter portion of the will. It will be seen therefore that this contest is between Finch McCulloch and Luciel McCulloch (appellants herein) who claim all the proceeds of the said E bonds, and James R. McCulloch and Lydia (McCulloch) Parrott (appellees herein) who contend that they should each receive ¼ of the proceeds of the said E bonds.

The trial court, in a somewhat comprehensive opinion dated September 9, 1958, among other things found; that the store and its contents had been sold prior to the testator's death and that this bequest to the appellants lapsed; that the only question is, does the words "personal property" in the will necessarily include the E bonds; that said bonds were not transferable and can only be cashed and the proceeds transferred; that the E bonds were purchased by the testator after the will was executed, and since the testator did not make the

bonds payable to appellants he thereby indicated an intent to treat the bonds as cash, and; the E bonds should be distributed equally among the appellants and appellees. (The ..... judge was not surviving when these findings were made.)

After careful consideration we have arrived at the conclusion that the result reached by the learned Chancellor cannot be sustained. Although we have received little assistance from our own decisions cited in the briefs or revealed by our own research, other authorities appear to be harmonious to the effect that ordinarily the word "cash" does not include bonds. Set out below are pertinent excerpts from some of the many authorities examined.

In *Jordan* v. *Chamberlain et al,* 46 Cal. App. 2d 16, 115 P. 2d 235, in construing a will the court said:

"In the instant case there is nothing to indicate that the decedent intended that the word 'cash' be used in any other or different sense from that which ordinarily attaches to it. Cash is 'current money in hand or readily available'."

In that same case, the court cited with approval: " 'Cash' means especially 'ready money' at command, subject to free disposal; not tied up in a fixed state. It is almost equivalent to the term 'loose money'." The Supreme Court of New Mexico, in *Hanny* v. *Joyce et al,* 37 N. M. 569, 25 P. 2d 806, in dealing with the allowance of fees of an administrator, stated (at page 573): "The trial court also announced the view that government bonds were to be deemed 'cash' within the meaning of the statute. We think the statute incapable of such interpretation." In the matter of *In re Feist's Will,* 170 Misc. 497, 10 N. Y. S. 2d 506, where a will was being construed, the court said: " 'Cash' means especially 'ready money' at command, subject to free disposal; not tied up in a fixed state." Similarly in *In re Hinds' Will,* 270 App. Div. 408, 61 N. Y. S. 2d 748, we find the court holding that "money" did not include stocks and bonds.

We do find however that there are circumstances under which the courts are inclined to give a broader meaning to the word "cash" than is indicated above. One circumstance is where other language in the will would indicate such broader meaning but we find no such language in the will under consideration here. The other circumstance is where a part of the testator's estate would be undisposed of by the will unless a broader meaning is given to the word "cash". See: *In re Feist's Will, supra, In re Hinds' Will, supra,* and *Campbell* v. *St. Joseph's Industrial School,* 30 Del. Ch. 84, 53 A. 2d 768. But this circumstance is not found in McCulloch's will. Regardless of whether we accept the view of appellants or the view of appellees all his property is disposed of by the will.

We recognize the wholesome and well established rule of construing a will so as to carry out the intentions of the testator. However, we find very little in this will to reveal McCulloch's intentions. If any intention at all is revealed it could well be to give the bonds to appellants. We refer to the fact that he gave appellants the store and its contents, but these items were disposed of before his death. It could be reasonably inferred that he intended them to have the bonds in the place of the other items. We see no force in the argument that McCulloch would naturally want to treat all his children alike, and, therefore, intended to divide the bonds equally among them. This argument is refuted by other terms of the will which are not challenged.

For the reasons heretofore set forth the decree of the trial court is reversed.

Harris, C. J., and George Rose Smith, J., not participating.

5-2166 338 S. W. 2d 193

Opinion delivered September 19, 1960.

[redacted]

Henry, Boyett & Nutt, for appellants.

L. B. Smead, for appellees.

CARLETON HARRIS, Chief Justice. This is a boundary dispute. The parties to the action derived title to their respective properties from a common grantor, W. L. Furlow, who at one time owned the entire tract. Appellants instituted suit in the Calhoun Chancery Court, seeking to quiet title to certain lands in themselves, alleging that they had been in possession of such lands since 1932; that Furlow had attempted to convey a portion of their property to appellees on September 14, 1957; that such deed constituted a cloud upon the title of appellants, and they prayed that the deed from Furlow to appellees be cancelled. On hearing, the court dismissed the complaint for want of equity, and found that title to the land in dispute should be quieted and confirmed in appellees. From such decree comes this appeal.

At the outset, it might be mentioned that appellants do not predicate their claim in any respect on adverse possession, but rather base their title solely upon the description in the deed.

The disputed boundary is the northern border of the appellants' property and the southern border of appel-

lees' property. In 1925, W. L. Furlow acquired title by warranty deed to certain lands from Hugh McKinnie, under the following description:

"Starting at the Southeast corner of said Subdivision, run North along the Section line Eighty (80) feet to the Branch or Little Creek, to the point of beginning; thence continuing North along said Section line, two hundred and twenty (220) feet, more or less; to the right-of-way of the Thornton and Alexandria Railroad; thence West along said right-of-way, about Two Hundred Twenty Feet (220), more or less, and thence in a Southwesterly direction, continuing along said right-of-way about Two Hundred Ninety (290) feet, more or less, to the place where said right-of-way crosses said Branch or Little Creek, thence East along said Branch or Little Creek about Five Hundred Feet (500), more or less, to said point of beginning."

In February, 1927, Furlow conveyed, by warranty deed, to W. S. Nutt, a portion of the above property described as follows:

"Commencing at the Southeast Corner of said Northeast Quarter (NE ¼) of the Northeast Quarter (NE ¼) and running North on the Section Line 80 feet to a corner on North side of Branch; the point of beginning; thence running North on said line 184 feet; thence running West 192 feet to the right-of-way of Thornton and Alexandria Railway Company, thence running in a southwesterly direction along said right-of-way, to where said right-of-way crosses said Branch, thence running East along said Branch back to the point of beginning, containing two acres, more or less."

This description is substantially the same as that in which Furlow acquired title, except that the distance north from the beginning point is stated to be 184 feet instead of 220 feet, and the distance west is stated to be 192 feet rather than 220 feet (this latter difference is not explained by the testimony at the trial and apparently does not raise an issue on this appeal). This land, under the same description, was conveyed by warranty

deed from W. S. Nutt and wife to Victor L. Nutt on April 13, 1943. The appellants are the sole surviving heirs and surviving spouse of Victor L. Nutt.

On September 14, 1957, W. L. Furlow conveyed to the appellee and his wife, land on the northern part of his original plot. This land is described in the deed as follows:

"Beginning at the Southeast corner of said Northeast Quarter of the Northeast Quarter, run thence North 264 feet to a point of beginning; running thence North 36 feet to the South line of the right-of-way of the Thornton and Alexandria Railway; thence West 192 feet; thence South 36 feet; thence East 192 feet to the point of beginning, containing 16/100ths of an acre, more or less."

It is noted that the distance to the beginning point in this deed is the sum of the 80 feet to the point of beginning in the appellants' deed, plus the 184 feet to the northern boundary of their property, or a total of 264 feet.

This litigation was occasioned by the fact that appellees commenced construction of a building near the boundary of the properties, and appellants contend that the construction was partly placed on a portion of the land which had been deeded to Nutt. According to appellants' surveyor, the proposed building overlapped about twelve feet on appellants' premises.

The Nutts' principal contention is that references to a monument in a deed prevail over references to distances. In their brief, they state:

"Appellants contend that the location of the Southeast Corner is immaterial for the reason that the deeds from the common grantor, W. L. Furlow, of appellant and appellee described the point of beginning as being a corner on 'North side of Branch' and that monument prevails over the distance of 80 feet referred to in said deeds."

Further:

"Appellants contend that the call distance in their deed of 80 feet was a mistake in fact and that the reference to the Branch or Little Creek controls."

Appellants have correctly stated the legal doctrine, that generally speaking, monuments prevail over courses and distances; however, the difficulty in the instant litigation is in locating the designated monuments, and this applies to both the natural and artificial monuments mentioned in the deeds. Six witnesses testified in the case, three for each side. R. N. Lyons, Jr., a surveyor, and two of the appellants, testified in support of the Nutts, and Allison Means, county surveyor of Calhoun County, appellee Hamilton Strickland, and W. L. Furlow, common grantor to both sides, testified in behalf of appellees. According to the evidence, in 1933, a highway was built along the eastern boundary of the property, and a concrete bridge replaced the wooden structure which had spanned the branch. Witnesses for appellants largely directed their testimony to the effect that the location of the branch was not changed in any manner when the highway was paved. The widow of Victor Nutt stated, on direct examination, that the location had not been changed; however, she subsequently testified that she did not especially remember the old wooden bridge, except to know that such a bridge existed. Lyon was unable to state whether the concrete bridge was placed in the same position as the wooden bridge. Furlow testified that the course of the branch was first changed by the railroad when it constructed ditches, and subsequently, the Highway Department, in building the highway, "straightened" the branch, and the concrete bridge was moved some distance north of the location of the old wooden bridge. While this evidence was very much in dispute, all parties agreed that the railroad right-of-way could not be located.

Appellants admit that their case is dependent upon establishing that the monument, referred to in the deed, was situated at the time of the conveyance in the same location as at present. We cannot say that this fact was

established by a preponderance of the testimony. As we have frequently stated, the Chancellor heard the witnesses, observed their demeanor on the stand, and was therefore in better position to judge the weight of the evidence. See *Willis* v. *Denson,* 228 Ark. 145, 306 S. W. 2d 106. The findings of the Chancellor on a fact question, of course, will not be disturbed unless clearly against the preponderance of the evidence.

Appellants assert that the property conveyed to Strickland by Furlow had previously been conveyed to Nutt by the same grantor; *i.e.,* that the thirty-six feet deeded to Strickland was embraced in the broader description by which Nutt acquired title. Appellees, of course, contend to the contrary. The correctness of this assertion is dependent upon the original location of the branch, and as stated in the previous paragraph, we are unable to say that the Chancellor's findings were incorrect.

Finally, appellants urge that there is sufficient land north of the present location of the branch to allow them a full 184 feet and the appellees 36 feet. They argue that the lower court should have corrected the boundary to this extent. However, this argument appears fallacious, for appellants subsequently state that if there is any impinging upon the railroad right-of-way as a result of this action, "any dispute over the grant conveying railroad right-of-way property can be settled by the railroad and appellee." If this is a possible result, then appellants are not correct in stating there is sufficient land north of the present location of the branch to allow each party the full distance called for in their respective deeds. In any event, having failed to establish the original location of the branch, the reference to this monument is no longer controlling because of uncertainty and the courses and distances in the deeds are binding upon the parties, and the boundaries established thereby.

Affirmed.

NORWOOD *v.* GLOVER, JUDGE.

5-2167 338 S. W. 2d 198

Opinion delivered September 19, 1960.

Amis Guthridge and *Roy Finch, Jr.,* for appellants.

Joseph C. Kemp and *Perry V. Whitmore,* for appellee.

J. SEABORN HOLT, Associate Justice. This appeal comes from a judgment of the Pulaski Circuit Court denying appellants' petition for a Writ of Prohibition against Judge Quinn Glover, a municipal judge of Little Rock, Arkansas. Appellants were accused of committing certain misdemeanors triable in the Little Rock Municipal Court. While the cases were pending, appellants, on October 1, 1959, filed applications for change of venue, alleging that the Judge of the Court was so prejudiced against them that they could not obtain a fair and impartial trial. Accompanying appellants' motions were affidavits of two persons who stated in their opinion the appellee was so prejudiced against the appellants that they could not obtain a fair and impartial trial before the court. The court overruled appellants' motions after hearing and determining that the affiants used in support of their motions were not credible witnesses as contemplated by Ark. Stats. §§ 22-721—22.

Thereafter, on October 15, 1959, appellants attempted to file an amended and substituted application for change of venue identical to the first application except a substitution of different persons as supporting affiants. The Municipal Court refused to allow this latter application for change of venue as a substituted application for change of venue, but allowed it to be filed as an amendment to the original application of appellants.

Thereafter, on October 28, 1959, appellants filed a petition for a Writ of Prohibition against appellee to prohibit him from continuing to hear the actions. On November 21, 1959, Pulaski County Circuit Court denied the Writ of Prohibition. This appeal followed.

Appellants, for reversal, rely on the following point: "The Court erred in determining as a matter of law that the change of venue statutes, *i.e.*, Ark. Stats., Anno., (1947) §§ 22-721 and 22-722 were not mandatory upon the Municipal Court, and by virtue of the said ruling, the decision of the lower court is contrary to the law, the evidence, and the law and evidence."

We do not agree with this contention. The sections of our statutes relied upon by appellants provide: "Ark. Stats. § 22-721. Change of venue—Affidavit for change—In all Counties within the State of Arkansas wherein there are two or more Municipal Courts the defendant in any criminal case pending either for trial or preliminary examination before any such Municipal Court *may** take a change of venue from the Municipal Court in which said cause is pending to some other Municipal Court within said County; provided, the defendant shall, at or before the commencement of such trial or examination, file in the Municipal Court in which said cause is pending an Affidavit setting forth that the Judge of said Court is a material witness in said cause, or that such Judge is so prejudiced against the defendant that he cannot obtain a fair and impartial trial before said Court." And—"Ark. Stats. § 22-722. Verification of affidavit—of two credible persons—The application of any defendant for a change of venue as herein provided for shall be verified by the

*Emphasis Ours

affidavit of said defendant setting forth the grounds upon which said change of venue is sought, and shall be supported by the affidavit of at least two (2) other credible persons."

It is conceded by appellee that there is more than one municipal court in Pulaski County and that appellants had the right to apply, *i.e.*, "*may*" apply, for a change of venue upon a proper showing that the trial judge (appellee) was so prejudiced against them that they could not obtain fair and impartial trials before him. However, such change of venue was not a mandatory right in favor of appellants, as they insist, just by merely applying for change of venue. They must go further and support their application for change of venue by the affidavits of at least two other *credible persons* and we hold this appellants failed to do.

We have consistently adhered to the rule which we announced in *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346, as follows: "A credible person is one who has the capacity to testify on a given subject and is worthy of belief; and one who lacks knowledge on the subject under investigation is not a credible person to be accepted as worthy of belief in that particular inquiry." The use of these words, "credible persons", means that the supporting affiants should have fairly accurate information of the facts alleged by appellants seeking a change of venue, *Williams* v. *State*, 162 Ark. 285, 258 S. W. 386, and *Hedden* v. *State,* 179 Ark. 1079, 20 S. W. 2d 119.

Appellants introduced two witnesses. Their first, Mrs. R. G. Taylor, testified: "Q. Do you think those defendants can get a fair trial in this court? A. No, sir, I do not. Q. Will you tell the Court why you think — believe that, please? A. Your Honor, let me assure you that I mean no reflections on this Court or the Judge of this Court, but due to the circumstances and the environment surrounding this Court I do not believe that they can get a fair and impartial trial. That is the reason that I come with this request. THE COURT: You don't know me, personally? A. I have known of you, Judge Glover, for years; yes, sir. THE COURT: You

hold no prejudice? A. I hold no prejudice against you as judge, let me assure you of that. THE COURT: All right, do you have another witness? MR. GUTHRIDGE: That is sufficient with her? THE COURT: Yes, sir."

Their other witness, A. E. Cooper, testified: "Q. Did you and Mrs. Taylor, who just testified, are you the two who filed those affidavits for each of these defendants in each charge? A. Right. Q. You did? A. Yes sir. Q. Now, you swore that you thought that those defendants could not get a fair and impartial trial in this court, is that true? A. I did. * * * Q. Would you please state to the court on what you base your belief? A. I just think there is a prejudice among the City Officials at this particular time against the defendants. And as I have no interest, personally, in all due respect to the Court, so far as that is concerned, I just think there is a feeling of prejudice against the defendants among the City Officials. Q. You don't think they can get a fair trial in this Court due to that prejudice which you believe is rampant in the City Hall? A. Right. Q. I would like to ask him this, Your Honor. Do you know Judge Glover, personally? A. No, sir, I do not. Q. You don't. In other words, it is based on the atmosphere, not directed against him, personally, is that right? A. Right. Q. As a man? A. Nothing whatever. * * * Q. Mr. Cooper, specifically, is there anything that you know of of your own knowledge regarding the City Hall that would lead you to believe the City Hall has such a prejudice? A. Well, not anything more than has been stated — the atmosphere and the feeling that has been from the newspapers and radio and reports. * * * Q. Have you ever heard anyone in the City Hall express prejudice regarding this particular matter? A. No, I haven't. * * * Q. Do you know of any evidence of Judge Glover's prejudice in this matter? A. No, I do not."

We hold that the testimony of these two witnesses falls far short of proving that Judge Glover was so prejudiced against the appellants that they could not obtain a fair and impartial trial before him. It will be ob-

served that there was no testimony as to any statement or assertions by Judge Glover to anyone indicating any prejudice against appellants. In fact, witness Cooper did not know Judge Glover personally, as indicated by Mr. Cooper's testimony: "Q. Do you know of any evidence of Judge Glover's prejudice in this matter? A. No, I do not." And Mrs. Taylor testified: "THE COURT: You don't know me, personally? A. I have known of you, Judge Glover, for years; yes, sir."

Finding no error, the judgment is affirmed.

McPherson *v.* Hicks.

5-2079 338 S. W. 2d 201

Opinion delivered September 19, 1960.

Macom & Moorhead and *James Ross,* for appellant.

D. A. Clarke, for appellee and cross-appellant; *Smith & Smith, J. F. Wallace, Botts & Botts, J. B. Gillison, Robert B. Gibson, Bridges & Young, Lloyd B. McCain, W. H. Howard,* for appellee intervenors.

ED. F. MCFADDIN, Associate Justice. This litigation results from dealings between the appellant McPherson and the appellee Hicks involving a rice mill and also a farm. McPherson owned a rice mill in McGehee, which he had operated under the name of "McPherson Rice Milling Company." He also owned a farm in Desha County known as the "Hally Farm." Under date of May 1, 1956 McPherson, as lessor, and Hicks, as lessee, entered into a contract[1] involving the rice mill. Hicks

[1] Some of the provisions of the contract were:

"1. Lessor, . . . does hereby let, lease and demise unto the lessee, for the term beginning the 1st day of May, 1956 and ending the 31st day of December 1956, the following land and property in Desha County, Arkansas, to-wit:

"That property known as the McPherson Rice Milling Company of McGehee, Arkansas, consisting of all land, buildings, machinery and equipment, used for storage, drying, cleaning, milling and any other services necessary and suitable to the operation of said milling company.

"2. Lessee agrees to pay and lessor agrees to accept as rent, . . . the net income from drying, cleaning, storage, processing and milling. Net income for the purpose of this agreement is defined as the total income from said services less the expenses necessary and incidental to the production of said income and said expenses to include $500.00 per month fee to be paid lessee for management services. Major repairs, new construction and depreciation on buildings, machinery and equipment shall not be considered an operating expense for the purpose of this agreement . . .

"9. If lessee shall fail or refuse to pay the rentals aforesaid at the times and in the manner set out or to do or perform any other of the covenants on his part herein contained or shall violate in any particular any of the conditions hereof or make an assignment for creditors, or a receiver be appointed for lessee, lessor may at his option declare the lease terminated, have the right to enter upon and take possession of said property and premises, either with or without notice, and evict and expel the lessee in any or all of his property, belongings and effects therefrom without process of law and without being guilty of any man-

took possession of the rice mill and all contents, and operated the plant under the name of "Hicks Grain Elevator and Rice Milling Company"; and in the course of the operation he incurred debts to various creditors, hereinafter called "Interveners". In addition to leasing the rice mill Hicks subsequently leased the Hally Farm from McPherson for 1956 under an oral contract, which is also involved in this litigation.

After December 31, 1956 Hicks remained in possession of the rice mill, but on July 23, 1957 McPherson filed in the Desha Circuit Court an action of unlawful detainer against Hicks to recover possession of the rice mill, the claim being that Hicks had failed and refused to pay the 1956 rent, had otherwise breached the lease, and had failed to vacate after due notice. The complaint prayed for possession and judgment for rent and damages. By specific attachment all the grain in the mill was attached. McPherson took possession of the plant and all contents; and then, on August 12, 1957, McPherson filed a second amendment to the unlawful detainer action, alleging:

"That during the periods of time mentioned in said Complaint, the plaintiff advanced from time to time large sums of money to defendant to be used by said defendant in the operation of said business mentioned in said complaint. That the defendant on many occasions made payments on said loans, but at this time is indebted to this plaintiff on said account for an undetermined amount of money.

"That said account, along with the account mentioned in said Complaint for rents due, is involved and includes numerous charges and credits and will require an accounting between said parties to determine the ac-

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ner of trespass either at law or in equity, and without prejudice to any remedies or rights which he may for the collection of any delinquent rents, possession, damages, or otherwise. And no delay in the exercise of the option aforesaid by the lessor shall be deemed a waiver of his right to exercise the same at a later time."

Originally the parties contracted for the lease to end December 31, 1957; but by subsequent written contract between the parties the period was shortened so as to expire at all events on December 31, 1956. We have used the earlier date for purposes of clarity.

tual amount due this plaintiff by the defendant. That said accounting should include the entire operation of said business operated as 'Hicks Grain Elevator and Rice Milling Company' for the times mentioned in said Complaint.

"This plaintiff has been unable to obtain an accurate and just accounting of said operations, or of the open account between said parties set out above, and this Court should order an accounting of said accounts."

This Amendment was accompanied by a Motion to transfer to equity on the ground that the cause, ". . . will involve a multiplicity of actions, and will also involve an accounting between the plaintiff and defendant for the operation of a large and complex business, and that said accounting will necessarily be made up of innumerable charges and credits and a Receiver will be needed to take charge of the assets of the business involved." The entire cause was transferred to equity over Hicks' objection; and he preserved his objections by Motion to retransfer to law; and this point will be discussed in Topic I, *infra,* captioned: "Hicks' Objection To Trial In Chancery."

In the Chancery Court, various creditors of Hicks Grain Elevator and Rice Milling Company intervened and prayed for judgment against McPherson and Hicks individually and against the assets of the Hicks Grain Elevator and Rice Milling Company. On trial in the Chancery Court all of these interventions were allowed as against Hicks and the assets of the rice mill, and in addition the Chancery Court awarded the Arkansas Power & Light Company a judgment against McPherson individually for a part of the power account. McPherson claims that it was error to allow the parties to intervene, that it was error to subject the assets of the Hicks Grain Elevator and Rice Milling Company to the payment of judgments, and that it was error to render personal judgment against him in favor of the Arkansas Power & Light Company. These matters will be discussed in Topic II, *infra,* captioned: "The Interventions".

In the Chancery trial there were also claims and counterclaims between McPherson and Hicks in regard to the operation of the Hally Farm, as well as the rice mill. In the final decree from which comes this appeal, there were certain allowances in favor of McPherson and certain allowances in favor of Hicks, and there is either an appeal or a cross appeal on these matters, which will be discussed in Topic III, *infra,* captioned: "The Accounting".

I. *Hicks' Objection To Trial In Chancery.* After Hicks surrendered possession of the rice mill McPherson filed a pleading asking for an accounting between himself and Hicks, and that the cause be transferred to equity. The Circuit Court transferred the *entire* case to Chancery; but the Chancery Court retransferred the unlawful detainer action to the Law Court, and retained the accounting angle of the case. The Chancery Court thereby gave Hicks his right to a jury trial in the unlawful detainer action. In *Cortiania* v. *Franco,* 212 Ark. 930, 208 S. W. 2d 436, we said that an unlawful detainer action should proceed in the Law Court independent of any other suits between the parties: "They could not, by interposing equitable claims, convert the unlawful detainer action into another form of proceeding, because other forums were open to them." That an accounting was needed between McPherson and Hicks is shown by the enormous record in this case; and the accounting could, and did, proceed in Chancery, separate from the unlawful detainer action. We cannot see how Hicks' right to jury trial in the unlawful detainer action has been prejudiced by the Chancery Court hearing the accounting suit; and we conclude that, in accordance with *Cortiania* v. *Franco, supra,* the unlawful detainer action was properly remanded to the Circuit Court, and that the allegations for the accounting gave the Chancery Court jurisdiction to proceed as it did.

II. *The Interventions.* In his operation of the Hicks Grain Elevator and Rice Milling Company, Hicks incurred indebtedness with various creditors who were allowed to intervene, prove their claims, and recover

judgments against the proceeds of the rice, oats, and other products in the plant. McPherson denied that he was a partner with Hicks in the business and denied that the interveners had any claim on any of the assets of the Hicks Grain Elevator and Rice Milling Company so as to be superior to McPherson's claim. He contends that his judgment against Hicks is prior and superior to the interventions because he had a special attachment.

We see no merit in McPherson's contention. The evidence in this case probably would have supported a Chancery finding that McPherson was liable to all the creditors as a partner of Hicks; certainly as a partner by estoppel if not *inter se*. But the Chancellor took the view that when McPherson surrendered the grain elevator and its contents to Hicks on May 1, 1956, McPherson thereby allowed Hicks to receive credit on such assets, *i.e.,* rice, oats, and other contents, and therefore McPherson could not defeat the claims of the creditors who had extended credit to Hicks on the faith of these assets in his possession. The Chancellor reached the correct conclusion. In *Pearce* v. *Chas. J. Upton Co.,* 210 Ark. 524, 196 S. W. 2d 761, a mother had entrusted her business affairs to her son who had operated as though he were the real owner. He incurred personal indebtedness, and pledged assets of his mother's business. She sought to recover these assets from a third party but such recovery was refused by this Court. We quoted from Judge Eakin's opinion in *Jowers* v. *Phelps*, 33 Ark. 465, and the full text is more emphatic than the mere quotation:

"A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed, afterwards, to come in and assert his right, to the detriment of the person so mislead. That would be a fraud. But it is difficult to define special acts or conduct which in all cases would amount to an estoppel. Generally it is said that if the owner of the property, *with a full knowledge of the facts, stands by,* and *per-*

mits it to be sold to an innocent purchaser, without asserting his claim, he will be estopped."

We have a number of cases applying the rule of estoppel against the owner of property who stands by and knowingly allows a third person to sell the property under claim of title and who neither asserts title nor gives the purchaser any notice. *Danley* v. *Rector,* 10 Ark. 211, 50 Am. Dec. 242; *Haffke* v. *Hempstead County Bank,* 165 Ark. 158, 263 S. W. 395. See also 19 Am. Jur. 667 *et seq.,* "Estoppel" § 56; and 31 C.J.S. p. 310, "Estoppel" § 91. Such rule is applicable in the case at bar. The evidence shows that while Hicks was operating the rice mill McPherson was at the mill from one to ten times a day, gave orders around the plant, and on one occasion ordered supplies which were charged to him and which Hicks claims to have repaid. Certainly McPherson knew that Hicks' creditors were looking to the assets of the rice mill. Under these facts, McPherson is estopped to assert his claims as superior to the claims of the creditors of the Hicks Grain Elevator and Rice Milling Company.

That portion of the account of the Arkansas Power & Light Company which was incurred while Hicks was in charge of the rice mill (before July 23, 1957), was allowed against the assets of the rice mill; and such holding was correct, in view of what we have just stated. That portion of the account of the Arkansas Power & Light Company which was incurred after McPherson took possession of the rice mill (on July 23, 1957) was allowed as a personal judgment against McPherson. The Chancery Court was correct in so doing: because after McPherson took possession of the plant and continued to allow electric service to be furnished to it, he certainly became individually liable for such account.

We affirm the decree of the Chancery Court in all the intervention matters.

III. *The Accounting.* The accounting between McPherson and Hicks involved both the rice mill and the Hally Farm; and the correctness of the Chancery decree in this accounting matter consumes the major portion of

the testimony and argument. The transcript contains 1690 typewritten pages and the printed abstracts and briefs consume more than 500 pages. The Chancellor made written findings covering 20 typewritten pages, and the decree incorporates these findings. On the direct appeal McPherson claims many errors prejudicial to him; and on the cross appeal Hicks claims many errors prejudicial to him. To list each point and the arguments pro and con, and to review the evidence would extend this opinion to enormous lengths.

It is sufficient to say that we have carefully examined all the claims and counterclaims and find only one in which error has been shown. That one relates to a judgment of $1,509.75 against McPherson. In rendering such judgment the Chancellor said: "The 125,430 pounds of rice had a market value of $4.50 per hundredweight when the defendant could have sold it and applied the proceeds to the intervenors' claims or become an asset of the business entity. The plaintiff is liable for the difference between the price the rice would have sold for and the price it did sell for, or a total of $1,509.75." Hicks did sell some rice of $4.50 per hundred-weight but it was only a small lot and he admitted that at the time of such sale he was not prepared to sell the remaining rice on hand. Furthermore, we find no evidence that the 125,430 pounds of rice had a market value at any time of $4.50 per hundred-weight. There is testimony that some of this rice was of low grade and the value of the 125,430 pounds was not shown by evidence sufficient to make McPherson liable for damages for failure to sell, or allow the rice to be sold, at any particular time. The result is, that the $1,509.75 judgment against McPherson on this rice item is reversed and set aside. In all other respects the Chancery decree is affirmed, both on direct appeal and cross appeal; and the cause is remanded to the Chancery Court for further proceedings in accordance with this opinion. The costs of this appeal are assessed one-half against the appellant and one-half against the appellee Hicks.

GARDNER *v.* FARMERS ELECTRIC CO-OP. CORP.

5-2125 338 S. W. 2d 206

Opinion delivered September 19, 1960.

Hout & Thaxton, for appellant.

Kaneaster Hodges and *John M. Lofton, Jr.,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellant for personal injuries resulting from a severe electrical shock. At the close of the plaintiff's proof the trial court directed a verdict for the defendant. The principal question is whether the plaintiff's evidence made a case for the jury.

At the outset the appellee asks that the judgment be affirmed on account of the appellant's failure to abstract any of the testimony heard in the court below. The appellee, however, has sufficiently supplied the defect to enable us to pass upon the principal issue, and consequently we determine the case upon its merits. See Supreme Court Rule 9 (e).

Gardner, the appellant, was employed by Allbright Brothers Construction Company, a firm of contractors. Allbright maintained a storage yard for heavy equipment in an open field near Newport. The storage yard was crossed by the appellee's high-voltage distribution lines, the lowest line being 17 feet 8 inches above the ground.

On the day of the accident Allbright's employees were using a winch truck, equipped with a boom, to pick up and move heavy objects on the storage yard. It was Gardner's job to fasten the cable to the object being shifted about and to guide the article during its movement. As a heavy sledge was being moved in this fashion the upper five inches of the boom came in contact with the appellee's line. An electric current traveled down the cable being held by Gardner and inflicted severe and extensive burns to his body.

The complaint alleged that the appellee was negligent in maintaining its line in violation of the minimum clearances fixed by Rule 232A of the National Electrical Safety Code, which seems to be a set of regulations adopted by the electrical industry. The rule cited in the complaint provides minimum clearances for overhead wires in five specific topographical situations, one of which is the crossing of "driveways to residence garages." In that situation the minimum height for the lines is twenty feet. It is conceded that Allbright's storage yard did not contain either a driveway or a garage and so did not fall within the literal language of the rule relied upon.

In this court the appellant argues that the safety code evidently could not enumerate all the countless varieties of terrain crossed by overhead lines. Hence, it is suggested, the five physical situations described in the code should be interpreted as representative types, each applying to all other situations most nearly similar to it. Upon this theory it is contended that a storage yard is more comparable to a residential driveway than to any of the other four situations; therefore such a yard calls for a minimum overhead clearance of twenty feet.

In view of the record before us we cannot justify a reversal of the trial court upon the appellant's theory. The complaint contained a specific allegation of negligence, that the appellee maintained a high-voltage line in violation of the clearances set forth in Rule 232A of the code. The appellee, acting upon a reasonable construction of the complaint, was entitled to (and apparently did) prepare its defense upon the assumption that the plaintiff would attempt to bring the case within one of the five situations described in Rule 232A. These situations included the crossing of wires over railroad tracks, public streets and alleys, driveways to residential garages, and spaces accessible to pedestrians only. The plaintiff's proof, as we have seen, did not bring the case within any of the specific situations covered by the rule.

The alternative theory now urged by the appellant is not covered by the allegations of the complaint, for this theory does not involve a violation of Rule 232A. Instead, it involves a violation of a common law duty of ordinary care, with the safety code provision as to residential driveways having evidentiary value by way of analogy. It appears from the appellee's abstract of the testimony that the plaintiff offered some expert testimony tending to support his present theory. The court did not err in sustaining an objection to this proof, as ordinarily it is not error to exclude evidence relating to an issue not pleaded. *Bluff City Lbr. Co.* v. *Hilson,* 85 Ark. 39, 107 S. W. 161. The court might, in its discretion, have permitted a new issue to be introduced during the progress of the trial, *Manufacturers' Furn. Co.* v. *Read,* 172 Ark. 642, 290 S. W. 353; but we perceive no abuse of the court's discretion. See also *Jonesboro Coca-Cola Bottling Co.* v. *Holt,* 194 Ark. 992, 997, 110 S. W. 2d 535. At the end of the plaintiff's case the court ruled that the code provision relating to wires crossing residential driveways was not applicable to this case. In response to the court's inquiry about additional evidence the plaintiff's counsel elected to stand upon their pleadings and proof. In these circumstances no reversible error has been shown.

Affirmed.

ARK. ASSOCIATION OF COUNTY JUDGES *v.* GREEN.

5-2145 338 S. W. 2d 672

Opinion delivered September 19, 1960.

[Rehearing denied October 24, 1960]

A. James Linder and *William S. Arnold,* for appellant.

Reed Williamson, Roy Canaday, Charles R. Garner, for appellees.

PAUL WARD, Associate Justice. This is a class action brought in the Chancery Court by citizens and taxpayers of Ashley County to enjoin the County Judge of said county from paying dues (and making other contributions) to the Arkansas Association of County Judges, and asking for a refund of such payments theretofore made. The trial court granted the injunctive relief and rendered judgment for the previous payments, but refused authorization of execution against the association. The association now prosecutes this appeal.

The pertinent facts are not in dispute.

The defendants in the class action, filed January 29, 1957, were: W. T. Higginbotham, County Judge of Ashley County (hereafter referred to as Judge); The Arkansas Association of County Judges (a non-profit corporation hereafter referred to as Association), and; Arthur Carter, Secretary of the Association (hereafter referred to as Secretary).

The complaint contains, in substance, the following essential allegations: (a) The Association is a non-profit corporation organized February 10, 1948; (b) On January 29, 1957, the Secretary (both individually and acting for the Association) conspired with the Judge to fraudulently, willfully and maliciously deprive the taxpayers of Ashley County of county funds in that he presented a claim in the amount of $50, on behalf of the Association, for "Magazine Legislative Work"; (c) All said mentioned parties knew the claim was false, fraudulent and illegal, and that it constituted a fraud on the taxpayers of Ashley County; (d) The Judge (individually and as County Judge), knowing the claim to be false, approved the same and directed the issuance of a warrant in payment thereof; (e) As a direct and approximate result of the aforementioned transaction the

Secretary, while acting on behalf of himself and the Association, unlawfully accepted and collected Warrant No. 101 in the amount of $50 from the Ashley County Clerk and thereafter presented said warrant to the County Treasurer, who paid the same contrary to law on January 31, 1957; (f) All the defendants knew at the time that the said $50 were to be used for them in the interest of said Association and were not to be used for any authorized or legitimate county purpose nor in payment of any goods furnished or service rendered to Ashley County; (g) *The defendants will continue to conspire and to present illegal, false, and fraudulent claims* in behalf of themselves and said Association, to Ashley County and *the Judge will continue to allow said illegal claims unless enjoined by order of the court,* and, therefore, plaintiff's remedy at law is inadequate, and; (h) Plaintiffs believe and allege that the defendants, acting together, have allowed and paid other false, fraudulent and illegal claims of the Secretary and the Association, and all of said defendants should be ordered to account to these plaintiffs for the use and benefit of themselves and all other citizens, residents and taxpayers of Ashley County for all money previously received by the Secretary and the Association. The prayer of the plaintiffs was that this court *enjoin the defendants from presenting, allowing, paying and accepting payment for any and all such false, fraudulent and illegal claims; that they be ordered and directed to account to these plaintiffs for all similar funds heretofore received;* that judgment be entered against the defendants in the amount of $50 plus any other such false and illegal claims, and; for such equitable and proper relief to which the plaintiffs may be entitled. (Emphasis supplied.)

Appellants filed a demurrer to the above complaint on the ground that the Chancery Court had no jurisdiction. Upon the demurrer having been overruled appellants filed an answer in which they admitted presenting the said claim for $50 and also admitted the payment of said sum and receipt thereof. All other allegations in the complaint were specifically denied. The answer fur-

ther stated that the Judge, in allowing said claim, acted in his judicial capacity and his action thereon is not subject to review by the Chancery Court. Thereafter, and before the decree was rendered, the defendants filed an Objection to Judgment under the provision of Ark. Stats. § 27-615.

On a hearing before the Chancellor it was shown that, in addition to the $50 item mentioned above other payments of a like nature, some of which were barred by the statutes of limitation, were also made to the Association. It appears that these payments were made for dues to the Association, for advertisement in the association's magazine, and for "legislative work".

For convenience and clarity the points relied on by appellants for reversal will be discussed under the following classification and in the order named: (a) The Chancery Court had no jurisdiction; (b) The Objection to Judgment should have been sustained, and; (c) The claims were legal and should have been allowed.

(a) *Jurisdiction.* It is here argued that the County Court, in passing on a claim presented to it, acts in a judicial capacity, citing *Hutson* v. *States,* 171 Ark. 1132, 287 S. W. 398, *Farmer* v. *Franklin County,* 179 Ark. 373, 16 S. W. 2d 10, and *Logan County* v. *Anderson,* 202 Ark. 244, 150 S. W. 2d 197. It was pointed out that, under Article 7, Section 51 of the Arkansas Constitution and Arkansas Statutes, § 27-2001, the proper remedy is to appeal to the Circuit Court, citing the *Anderson* case *supra; Ladd* v. *Stubblefield,* 195 Ark. 261, 111 S. W. 2d 555, and; *Monroe County* v. *Brown,* 118 Ark. 524, 117 S. W. 40. Appellants however concede some exceptions to the above rule particularly when an *illegal exaction* is involved and where the judgment of the County Court is procured through *fraud,* asserting that in this case there is no *illegal exaction,* or *illegal tax* involved and also that no fraud has been shown.

We must agree with appellants that there is nothing in the record to justify a finding that appellants acted with any fraudulent intent. On the other hand, the rec-

ord reveals that they acted in accordance with legal advice and in accordance with the custom or usage followed in other counties. In other words, we find nothing to show that appellants were not acting in good faith for what they considered to be to the best interest of Ashley County. In our opinion, however, the complaint is based upon the theory of an *illegal exaction,* and that it is not necessary that an *illegal tax* be involved. In the case of *Lee County* v. *Robertson,* 66 Ark. 82, 48 S. W. 901, the court was dealing not with an illegal tax but with a question of an illegal use or appropriation of county funds. At page 87 of the Arkansas Reports, this statement was made: "The order of reappropriation was tantamount to an allowance and enforcement of an *illegal exaction* against every taxpayer of the county. Each taxpayer was therefore individually interested in such order." Article 16, Section 13, of the Arkansas Constitution provides that: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any *illegal exactions* whatever." (Emphasis supplied.) This court has many times construed the above constitutional provision but has never limited its application to an *illegal tax* but has uniformly construed it to apply to an *illegal exaction* as heretofore defined. In the case of *Ward* v. *Farrell,* 221 Ark. 363, 253 S. W. 2d 353, under facts somewhat analogous in principle to the facts of this case, in referring to the above mentioned constitutional provision, the court quoted with approval the following:

"This court has construed that provision to mean that a misapplication by a public official of funds arising from taxation constitutes an exaction from the taxpayers and empowers any citizen to maintain a suit to prevent such a misapplication of funds."

"There is eminent authority for holding, even in the absence of an express provision of the Constitution, such as referred to above, that a remedy is afforded in equity to taxpayers to prevent misapplication of public funds on the theory that the taxpayers are the equitable owners

of public funds and that their liability to replenish the funds exhausted by the misapplication entitle them to relief against such misapplication."

Appellants' contention that since appellees had a right to appeal to the Circuit Court which provided them an adequate remedy at law, the Chancery Court has no jurisdiction can not be sustained. Such an argument was presented and rejected in the *Farrell* case, *supra*. Equity jurisdiction may also be invoked to avoid a multiplicity of suits which would otherwise result. In the case under consideration it is not denied that several payments of the nature here complained of have been made over a period of years not only in Ashley County but in other counties, and the complaint alleges that many more such efforts will be attempted in the future.

Thus it is seen that *jurisdiction* in this case, as it relates to injunctive relief, may be open to doubt, but we do not believe it is necessary to resolve that exact issue here. The question of whether the several counties can expend public funds to support the Association is the prime issue. It is a matter that affects the general public and one that should be resolved for future guidance of all concerned. Therefore we feel justified in treating appellees' petition (insofar as it relates to injunctive relief) as one for a declaratory judgment. We did this, and for much the same reason, in the case of *Culp* v. *Scurlock, Commr. of Revenues,* 225 Ark. 749, 284 S. W. 2d 851. It was there said:

"It is suggested by the appellee's pleadings and brief that the issuance of a writ of mandamus would not terminate the dispute, since the form of retail permit used by the revenue department merely authorizes the holder to sell cigarettes, without reference to the matter of taxation. Even so, the complaint may equally well be treated as one for a declaratory judgment — a remedy peculiarly appropriate to controversies between private citizens and public officials about the meaning of statutes." (Citing authorities)

It was there also said:

"Since the effect of a declaratory judgment in this case will be to terminate an actual controversy in a matter of public interest, it is manifestly desirable that the case be decided on its merits."

We will proceed, therefore, to examine the other points relied on by appellants.

(b) *Objection to Judgment.* It is pointed out by appellants that this action was brought in Ashley County against the County Judge, who of course was a resident of that county, but that the other defendants were non-residents of the county. It is also stated that no judgment was rendered against Judge Higginbotham. Appellants' Objection to Judgment was filed under Ark. Stats. § 27-615, which provides, generally, that there can be no judgment rendered against non-resident defendants if none is rendered against the resident defendant. We cannot sustain this contention. The statute referred to above states that "the person should not be entitled to judgment against any of them (defendants) on the *service of summons* in another county court . . ." (Emphasis supplied.) In the case under consideration the "other" defendants were not served with a summons but voluntarily came into court and filed a demurrer, an answer and a motion. Under these circumstances the appellants are not entitled to the protection of the statute. In the case of *Federal Land Bank of St. Louis* v. *Gladish,* 176 Ark. 267, 2 S. W. 2d 696, the court said:

"A court acquires jurisdiction over the person of a plaintiff whenever the plaintiff appears and invokes the power or action of the court in any manner, and when the defendant voluntarily appears in any case and, without objection, proceeds, the court thereby acquires jurisdiction over his person, whether any summons was issued or served or not."

It is well established by the decisions of this court that although the parties to a suit cannot by agreement confer jurisdiction of the subject matter upon the court,

they can by agreement waive improper venue. In the case of *Arkansas State Racing Commission* v. *Southland Racing Corporation,* 226 Ark. 995, 295 S. W. 2d 617, this court recognized "the settled rule that an objection to venue is waived by a defendant who enters his appearance by the filing of a demurrer . . ." Again the court in that case said: "The statute providing that suits against State officers and boards must be brought in Pulaski county relates only to venue, not jurisdiction, and falls within the general rule that the issue of improper venue may be waived."

(c) *Was the Claim Legal.* The important question involved in this litigation concerns the legality of the claims filed by the Association for payment by Ashley County. Appellant makes the assertion that said claims were valid but cites no authorities and makes no extended argument to support that assertion. In this connection appellant relies principally on the proposition that Ashley County has received substantial benefits from the activities of the Association and that, therefore, said claims should be sustained upon a *quantum meruit* basis. This argument could apply only to payments already made but has no application to future claims of like nature. It is noted here (and will be referred to later) that appellees' complaint covers two separate and distinct matters. One, it seeks to recover payments already made; and, two, that other claims will be filed and paid which should be enjoined.

Our own research, assisted by the briefs, reveals no constitutional or other legal ground for sustaining claims of the nature here involved.

In the case of *Allen* v. *Barnett,* 186 Ark. 494, 54 S. W. 2d 399, this court said:

"The county court is a creature of the Constitution, and it is not to be doubted that it has only such power as is expressly granted by the Constitution and statutes in aid thereof, or which are necessarily implied from the authority conferred."

Here it is not contended that the Constitution or any statute gives the county court specific authority to pay dues to the Association. The only question then is: Is such authority implied? We think the answer must be in the negative. Former decisions of this court support this view. In *Pressley* v. *Deal, County Judge,* 192 Ark. 217, 90 S. W. 2d 757, the quorum court of Cleburne County appropriated $300 to pay the county judge's expenses. The claim was filed and allowed by the county judge. A citizen and taxpayer intervened and appealed to the Circuit Court where it was also allowed. On appeal this court reversed the County Court on the ground that there was no statute authorizing such claim. Likewise in *Johnson* v. *Donham,* 191 Ark. 192, 84 S. W. 2d 374, we held that there was no authority in the law for the county court to purchase a law library for the use of the prosecuting attorney.

In the *Pressley* case, *supra,* this court, in construing subdivision No. 7 of Section 1982 of Crawford & Moses' Digest (the same as Ark. Stats. § 17-409), said: "It will be noticed that the other expenses mentioned for which an appropriation may be made must be such 'as are allowed by the laws of this State.'" The legislature has passed numerous statutes giving counties the authority to expend money for a variety of purposes, such as: To purchase a flag pole (Ark. Stats. § 17-501); to publish reports of county officers (Ark. Stats. § 23-408); for a county planning board (Ark. Stats. § 17-1101); to pay county defense attorneys (Ark. Stats. § 43-2415) and to pay Municipal Court expenses (Ark. Stats. § 22-720). In none of these and many other instances was it considered that the expenditures were "necessarily implied." In like manner we are unwilling to say now that the expense of financing a County Judges Association is a necessarily implied obligation of the counties — in this instance, of Ashley County. It is easy to see how it could lead to extreme abuse of the use of county funds to hold otherwise.

We agree with appellant that the Chancery Court had no jurisdiction to order repayment of claims already

allowed. In the absence of fraud (and we think no fraud was shown here) the remedy was by appeal to the Circuit Court. See: Art. 7 § 33 Constitution, Ark. Stats. § 27-2001, and *Jones* v. *Capers,* 231 Ark. 870, 333 S. W. 2d 242.

Since, as before stated, we treat the petition as one for a declaratory judgment, and in view of what we have already said, it was not appropriate for the Chancellor to enjoin the Association from filing claims and the Judge from allowing the same. These are matters involving judicial procedure and should be decided on the peculiar facts of each case. The trial court did have authority to enter a declaratory decree, and it should have done so, in accordance with this opinion, thereby setting at rest the present controversy. Therefore the case is remanded for the entry of such a declaratory decree.

Modified and remanded with directions.

JOHNSON, J., not participating.

HARRIS, C. J., and MCFADDIN, J., dissent.

CARLETON HARRIS, Chief Justice, dissenting.

In my opinion, the decree of the Chancery Court should be reversed.

We have repeatedly held that a county court, in allowing claims against the county, acts judicially, and its judgments are not open for collateral attack except for fraud or lack of jurisdiction. See *Monroe County* v. *Brown,* 118 Ark. 524, 117 S. W. 40. Certainly, the county court had jurisdiction. As stated in *Ladd* v. *Stubblefield,* 195 Ark. 261, 111 S. W. 2d 555:

"The county court, and that court only, has the power to allow claims against the various funds involved in this controversy."

The court very clearly held in that opinion that the county court had jurisdiction of the subject matter, *i.e.,* allowing claims.

Nor is there any finding by the Majority in this case that the claim was fraudulent. In fact, the Majority state:

"We must agree with appellants that there is nothing in the record to justify a finding that appellants acted with any fraudulent intent."

Further, from the majority opinion:

"We find nothing to show that appellants were not acting in good faith for what they considered to be to the best interests of Ashley County."

Therefore, in accordance with the language cited in *Monroe County* v. *Brown, supra,* since the county judge acted judicially in approving the claim here in question, and this Court has said there was no fraud, the judgment (allowance of claim) was not open to collateral attack. Rather, the correct remedy, by any taxpayer feeling aggrieved at the allowance of such claim, was by appeal to the Circuit Court. This is the remedy provided by our Constitution. Section 51, Article 7 of the Constitution of the State of Arkansas provides:

"In all cases of allowances made for or against counties, cities or towns, an appeal shall lie to the circuit court of the county, at the instance of the party aggrieved, or on the intervention of any citizen or resident and taxpayer of such county, city or town, on the same terms and conditions on which appeals may be granted to the circuit court in other cases; and the matter pertaining to any such allowance shall be tried in the circuit court *de novo.*"

In view of the citations herein set out, I am strongly of the opinion that the Chancery Court was without jurisdiction to hear this cause. This is the first point raised by appellants, and since I consider this argument well founded, a discussion of the merits of the cause is unnecessary. In my view, the Chancery Court was without power to issue an injunction in this case, and I deem it appropriate to add that the very fact that this Court has seen fit to change the nature of the proceeding, treating it as a petition for declaratory judgment, is evidence enough that appellees pursued an improper remedy.

Ed. F. McFaddin, Associate Justice, dissenting.

My dissent is along the same line as that taken by Chief Justice Harris.

1. I am of the opinion that equity jurisdiction cannot be invoked by appellees since they should have resisted the claim in the County Court and appealed to the Circuit Court from any decision adverse to their views.

2. Furthermore, I am of the opinion that this Court should not "reform" the present case to treat it as a declaratory judgment proceeding. Sometimes it is permissible to so "reform" cases, but this is not such a case.

3. Finally, I do not understand the majority opinion as saying that a claim such as this $50 item can *never* be allowed if the Legislature should pass a law (like Act 331 of 1935 or Act 44 of 1927), authorizing County Courts to pay such a claim as the $50 item here involved. I make this observation because I am reasonably confident that the Legislature will pass such an act when its attention has been called to the holding of the majority in this case.

RAINES *v.* RICHTER.

5-2185 338 S. W. 2d 331

Opinion delivered September 26, 1960.

W. M. Herndon and *H. B. Stubblefield,* for appellant.

Spitzberg, Bonner, Mitchell & Hays, for appellee.

CARLETON HARRIS, Chief Justice. This is a will contest. Mary Gavet, a resident of Little Rock, died on July 19, 1959, at the age of 82. Mrs. Gavet had executed a will on April 14, 1953, wherein certain bequests were made to various institutions and individuals, the bulk of the estate, including real estate located at 806 Center Street in Little Rock, being bequeathed and devised to Theresa Korte Raines, appellant herein. Mrs. Raines was not related to Mrs. Gavet, but had been a good friend for a long number of years. This will was turned over to Mrs. Raines, named co-executrix in the instrument, by Mrs. Gavet, together with a codicil, executed in 1955, and remained in possession of appellant until after the death of Mary Gavet. On October 23, 1956, Mrs. Gavet executed a second will, wherein all former wills were revoked, and some twenty-eight bequests were made to institutions and individuals, including a bequest to appellant in the amount of $4,000. C. H. Richter and Warren Baldwin of Little Rock were named executors. Item 12 of this will, which occasions the present litigation, provides:

"12. At the present time I own and reside in my home place, which contains rental units, located at 806 Center Street, Little Rock, Arkansas. If I am the owner of this property at the time of my death, I direct that the Roman Catholic Bishop of the Diocese of Little Rock be given the first opportunity to buy the property at its fair market value. If the Bishop elects to make an offer for the purchase of the property, the court having jurisdiction of my estate shall pass upon the reasonableness of the offer and shall direct the sale of the property to the Bishop if the court determines that the offer represents fair market value of the property at the time."

Following the death of Mrs. Gavet, Mrs. Raines offered the 1953 will and the 1955 codicil for probate; subsequently, the 1956 will was offered for probate. Following a hearing, at which numerous witnesses testified, the Probate Court found that the testamentary dispositions executed by Mrs. Gavet on April 14, 1953, and December 14, 1955, "are not the last will and testament of the decedent"; and admitted to probate the will dated

October 23, 1956. From the order refusing to admit to probate the earlier instruments, and admitting the latter will, Mrs. Raines brings this appeal. For reversal, appellant relies upon two points:

"I.

"The execution of the 1956 will was procured through undue influence at a time when deceased did not possess testamentary capacity.

"II.

"Deceased was mentally incompetent to execute a will on October 23, 1956."

I.

The proof reflected that the title to property on either side of 806 Center Street was held by the Catholic Bishop of Little Rock, and the evidence reflected that the Bishop, through Richter, had endeavored on several occasions over the years, to purchase Mrs. Gavet's property. Mrs. Gavet did not consent to sell the property. Mrs. Raines contends that undue influence was exercised over Mrs. Gavet by Harry Richter, as agent of the Bishop; next, by the attorney who prepared the 1956 will, as an agent of the Catholic Church; and finally, by "somebody"—"I'm saying she was influenced to make this will by somebody, because she would not have done it." When interrogated as to her reason for stating that the attorney who prepared the will exercised undue influence, and that such attorney represented Bishop Fletcher, appellant answered: "Just because I believe that is what it is. * * * I know that somebody influenced her." She then mentioned several priests that she thought exercised undue influence over deceased, but when asked her basis for making this statement, said: "Well, those are the people it would be since she did it. Somebody influenced her, and those are the people it would be since she did it. Those are the people that are closest connected to it that I could put a finger on."

Appellant admitted on cross-examination that she did not know whether Richter ever mentioned anything to

Mrs. Gavet about the provisions of her will. The only other person testifying on behalf of appellant, whose testimony even remotely touched the issue of undue influence, was Beatrice Anthamatten. Mrs. Anthamatten testified that Mrs. Gavet did not want the Bishop to have her property, and told her (Mrs. Anthamatten) that she was leaving her place to "the one that has done the most for me. The Bishop has never raised his hand for me." The witness testified that Mrs. Gavet stated that her deceased husband would not have wanted the property sold to the Bishop. "They felt that they had done enough for the church." She stated that Richter had tried to purchase the property several times from Mrs. Gavet, and that these conversations would always upset the latter. This is the sum total of the evidence offered by appellant on this point, and obviously falls far short of establishing undue influence. In fact, appellant was unable to point to any specific person who suggested the disposition of the property as made in the 1956 will — or any specific act of undue influence. Mrs. Raines simply feels that undue influence must have been exercised, because, in appellant's view, Mrs. Gavet would not have otherwise thusly disposed of the property. In *Dunklin* v. *Black,* 224 Ark. 528, 275 S. W. 2d 447, this Court quoted with approval from the case of *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590, as follows:

"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 specially directed toward the object of procuring a will in favor of particular parties."

We find no merit in this contention.

II.

The record reflects that Mrs. Gavet was declared incompetent on July 3, 1957, some eight months after the

1956 will had been executed. Evidence on behalf of appellant discloses that she underwent an operation in the latter part of 1954, and another in the summer of 1955. She suffered a broken hip in December of 1955, and was hospitalized until the middle of the following January. From January 13th through May, Mrs. Gavet lived with Mrs. Raines. Six witnesses, in addition to the latter, testified at the hearing in behalf of appellant, namely, Beatrice Anthamatten, heretofore referred to, and her daughter, Margaret Rose Anthamatten, a registered nurse, both of whom were long time friends of Mrs. Gavet; Josephine Branscum, who took care of Mrs. Gavet from October, 1957, until May, 1958; Addie Thomason, a tenant of Mrs. Gavet's; Fred Perry, an acquaintance of Mrs. Gavet for the last fifteen years of her life; and Dr. Elizabeth D. Fletcher, a physician of Little Rock specializing in psychiatry. Testimony from the lay witnesses was to the effect that during the year 1955, Mrs. Gavet became confused, disorientated (in that she did not seem to realize where she was living), was unable to carry on a coherent conversation, suffered a loss of memory, and did not recognize people she had known for a long period of time; several of the witnesses stated that Mrs. Gavet was of the opinion that her mother (who had been dead for many years) was living in the house with her. Further, according to some of the witnesses, though she had formerly been a quiet, kind, and religious person, Mrs. Gavet became loud, "almost wild", would curse, and Margaret Rose Anthamatten testified that she called the Catholic priest a vile name; that she underwent a complete personality change. Dr. Fletcher testified that she saw Mrs. Gavet on October 12, 1957, December 26, 1957, and January 1, 1958. The Doctor stated that she found the patient to be a very sick woman, physically and mentally; that she was psychotic, incompetent, suffering from arteriosclerosis, both generalized as well as the cerebral type. Dr. Fletcher was emphatically of the opinion that Mrs. Gavet was not mentally competent in October, 1956 (a year prior to the first visit of the doctor), to make a will, and that probably she had been incompetent for several years. However, on cross-examination, Dr. Fletcher admitted

that the rate of progress of arteriosclerosis varies considerably in different patients.

Mrs. Raines testified that Mrs. Gavet was not mentally capable of making a will after she left appellant's home in the latter part of May, 1956, and stated that the names of some of the legatees of the 1956 will were listed incorrectly by Mrs. Gavet, though the latter had known these legatees quite well.

In contrast to this testimony, Edward L. Wright, attorney of Little Rock, testified that his first professional contact with Mrs. Gavet was in 1953 when he prepared a will for her, covering her property in France; that in July of 1956, in response to her request, he went to her residence, and obtained the information for a will relating to her American property. Mrs. Gavet gave him complete information about her property and the bequests she desired to make, entirely from memory, without any sort of written memorandum. The witness stated that he had never represented Bishop Fletcher, nor any of his predecessors. Mr. Wright testified that Mrs. Gavet made it plain to him, that though she was grateful to Mrs. Raines for personal ministrations following the breaking of her hip, the testatrix was apprehensive that appellant was seeking to "get her property"; further, she did not want her will in the physical custody of Mrs. Raines. The Attorney stated that he had known Mrs. Gavet quite well, and there was no question in his mind as to her complete mental competence to make the will. Subsequently, on October 19th, Mrs. Gavet called Mr. Wright and desired to make some small changes in the July 27th will. Since he was scheduled to be away from the city the following day, his partner, Wayne Upton, was requested to draft the new will. These changes did not relate to the property at 806 Center Street, for the provisions of the July 27th instrument and the October 23d instrument, relative to that property, are identical. Mr. Upton, and James D. Storey, who witnessed both wills, testified that Mrs. Gavet was very alert, and apparently clearly understood what she was doing. This testimony was concurred in by Robert Schults and Alston Jennings, who witnessed the will of October 23d.

Daisy Pinkley, one of Mrs. Gavet's tenants, testified that, in her opinion, deceased was competent throughout 1956, though she began to have hallucinations after returning from the hospital in 1957. Judge and Mrs. Audrey Strait of Morrilton, who had known Mrs. Gavet for a long number of years, and who visited with her a number of times throughout 1956, testified that she appeared entirely rational, and discussed business matters on a clear basis. She always recognized both, and Judge Strait testified that Mrs. Gavet expressed the desire that the church acquire title to the 806 Center Street property. Mrs. Strait testified that during the visits in the latter part of 1956, Mrs. Gavet appeared as normal as ever.

Dr. Amail Chudy, engaged in general medical practice in North Little Rock, and Dr. Jerome S. Levy, a physician of Little Rock, specializing in Internal medicine, testified in behalf of appellee. Dr. Chudy expressed the opinion that Mrs. Gavet was competent in 1956, and stated that she seemed to be rather alert for a person of her age. Dr. Levy, likewise, commented as to her alertness in 1956, and observed no evidence of mental confusion until she entered a hospital in June, 1957.

The competency — or incompetency — of Mrs. Gavet was, of course, entirely a fact question, and the testimony was in irreconcilable conflict. We have frequently stated, —so frequently as to require no citation of authority,— that we will not disturb the findings of a Chancellor on a question of fact, unless such findings are clearly against the preponderance of the evidence. In the case before us, we think the evidence fully supports the findings of the trial court. This is not a case wherein a beloved and close relative is left destitute for the benefit of strangers. Rather, though Mrs. Raines was not a blood relative, she was left a substantial bequest of $4,000. For that matter, the property in question was not devised to the Bishop of the Catholic Church; instead, he was only given the opportunity to purchase it, and only then, after the Probate Court passed upon the reasonableness of his offer, and determined that it represented a fair market value of the property.

Summarizing, we are of the opinion that the weight of the evidence reflects that Mrs. Gavet was entirely competent to execute a will on October 23, 1956, and that the provisions of the will so executed on that date, were arrived at by her own mental processes, and entirely free from undue influence or duress.

Affirmed.

BURFORD *v.* UPTON.

5-2112 338 S. W. 2d 929

Opinion delivered September 26, 1960.

[Rehearing denied October 31, 1960]

Spitzberg, Bonner, Mitchell & Hays, for appellants.

Carl Langston, Paul B. Pendleton, and *Moore, Chowning, Mitchell, Hamilton & Burrow,* for appellees.

J. Seaborn Holt, Associate Justice. This case comes to this court on appeal and cross-appeal from an award of $113,875.00 to appellees, P. C. Upton and wife for certain lands condemned by the City of Little Rock for a dam site and water reservoir known as Lake Maumelle. The City acquired 15,000 acres in all for this project but only 975.4 acres, the property acquired from the Uptons, is involved in this litigation. The Uptons contend that the amount of damages awarded to them by the City was insufficient and the City, on the other hand, contends that, in effect, it paid them too much damages.

The record reflects that shortly after World War II, increased population and industrial growth in the Little Rock area made it apparent that an additional supply of water would be needed to supplement the City's then supply of water from Lake Winona Reservoir. As early as 1947 this need became so apparent that the Little Rock Water Commission employed a firm of engineers to make a study of the possibilities of expanding existing facilities and to determine additional reservoir sites that might be available. Several sites were then considered and a tentative decision was made on another site (called the Congo site) and some land was acquired at that site. The Uptons, as early as 1942, purchased 351 acres in the Maumelle site and acquired additional acreage between 1942 and 1954, prior to the decision of the Waterworks Commission to locate a reservoir in the Maumelle area. In 1945 Upton drilled test holes for a dam position on both sides of the present dam and, during 1947, impounded about 12 to 15 acres of water by building an earthen dam, the purpose being to test the soil under actual reservoir conditions. In 1950 the Uptons employed Max Mehlburger to make a survey to

determine the feasibility of creating a lake by a dam at the approximate location of the Commission's present Maumelle Dam. Mehlburger made an extensive study of the site and concluded that the Maumelle site offered an opportunity to supply a large quantity of good quality water for either municipal or industrial purposes. Three dam sites were suggested in his report, one of which (the Maumelle site) the Commission later acquired through condemnation. After Mehlburger concluded his deductions, Upton began to canvass a number of potential water users, his idea being to build a reservoir and sell water to such users. No successful negotiations were made, however.

Mehlburger was so convinced that the Maumelle River site was the proper one for the City that he asked to be relieved of his employment by the Uptons to be able to present the Maumelle Project on his own to the Commission. Upton acquiesced in this matter and as a result, Mehlburger and Mr. LeFever, another Little Rock engineer, offered to make a report on the Maumelle site for the Little Rock Waterworks Commission without charge. This offer was accepted by the Commission without a commitment, and the report of these two engineers to the Commission caused it to consider seriously for the first time the Maumelle site. Thereafter, after further consideration, the Commission employed an independent engineering firm to make a recommendation of the various sites involved, including the Maumelle site, and the report of this firm overwhelmingly recommended the Maumelle site. A bond issue was floated by the Waterworks Commission to finance the project. About the time construction of the Maumelle Dam was to be commenced, the property owners within the Maumelle area and the Commission had reached no agreement as to the value and extent of the land to be taken. At the request of the Commission, and in order not to delay the construction program, the Uptons, on July 5, 1956, granted the Commission permission to take possession of the lands needed for the dam's construction and when further negotiations failed to bring about an agreement on the price of the land, the Commission filed

suit to condemn the land. The trial court, after hearing voluminous testimony and being favored with extensive briefs by both parties, awarded a total of $113,875.00 to the Uptons for the 975.4 acres of land involved here and, as indicated, both parties have appealed from the decree. For convenience of discussion, the various contentions of the parties have been grouped under separate categories.

The Dam Site: It is the rule in this state that private property may not be damaged or appropriated for any public use by any agency, whether state or municipal, without just compensation to the individual. *Ark. Const.* Art. 2, § 22; *Ark. State Highway Comm.* v. *Partain,* 192 Ark. 127, 90 S. W. 2d 968. The generally accepted standard in arriving at just compensation is the fair market value of the property involved. See *Orgel, Valuation under Eminent Domain,* § 17; *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792. The market value is the value to which the property can best be put, or value for the best use of the property, and not necessarily the use to which the property is presently being put. See *Little Rock & Ft. Smith Railway Co.* v. *McGehee,* 41 Ark. 202; *Orgel, Valuation Under Eminent Domain,* § 30; *Yonts* v. *Public Service Company of Ark.,* 179 Ark. 695, 17 S. W. 2d 886.

In the case at bar it is contended by the Uptons, and denied by the City of Little Rock, that the highest and best use of the land involved below the 290′ elevation was for dam site purposes. The gist of the City's argument is that an owner should not be allowed to value his land for the very purpose for which the City wishes to condemn the land. In *Yonts* v. *Public Service Company of Arkansas, supra,* a dam was to be built in the neck of a gorge. The defendant's land extended some distance up the gorge and in the valley. This land was to be used for reservoir purposes. The land owned by the Yonts was adapted for a dam site across a creek. The gorge, having almost perpendicular sides, came to a narrow neck and a creek supplying ample water flowed through the gorge and through the lands owned

by the Yonts. There was other evidence that this was the only suitable place for a dam or reservoir in the area of Booneville. We there said: "* * * the owner had the right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it can be used, whether so used or not. In other words, while the testimony of these witnesses as to the value was admissible, the owners in this case had the right to a judgment for the market value of the land for a damsite and reservoir, and not for agricultural purposes. They had the right to have a judgment for its value based upon its availability as a damsite and reservoir."

Another case is that of *Gurdon & Fort Smith Railroad Co.* v. *Vaught,* 97 Ark. 234, 133 S. W. 1019. The railroad built a roadbed through a gap owned by Vaught. The evidence showed that the defendant's land was the only feasible place the railroad could lay its tracks for the proposed railroad line due to the mountainous terrain. On the measure of damages we said: "* * * The measure of the compensation which the landowner is entitled to recover from a railroad company which has appropriated same for its right-of-way is the market value of the land so taken. In estimating that market value it is perfectly competent to consider the availability and adaptability of the land for the very purpose for which it is taken by the railroad company as an element of value which would attract any buyer for that purpose."

We conclude that it was proper in the present case to consider the value of the land as a dam site for the purposes of condemnation.

Bloating Clay Deposits: Up from the dam site and forming the bottom of part of the reservoir is a large acreage of bloating clay from which a lightweight aggregate can be processed and used in the making of building blocks. It is the contention of the Uptons that this clay is extremely valuable and the total award is inadequate because it does not reflect the value of these deposits. On the other hand the City of Little Rock maintains the

deposits were comparatively worthless when viewed in the light of other deposits of a similar nature underlying nearly the entire county. Just a sampling of the testimony will show how hotly disputed the issue was.

Mr. Upton, owner of the property in question, stated that he thought the clay deposits were worth $2,055,000.00 but gave no basis for his opinion. Mr. Bickel, a man of limited experience in the manufacture of lightweight aggregate, testifying for the owner, stated he thought the clay deposits were worth between $754,000.00 if he were representing the buyer and double that figure if he were representing the seller. Mr. Williams, a man engaged in the manufacture of lightweight aggregate in Texas, testifying for the owner, stated he valued the lands at $900,000.00 but on cross-examination revealed that he did not know of the presence of other clays in the county and conceded that the supply might have an effect upon the price paid for land. The last witness for the landowner was Mr. Vaughan, a professional appraiser of extremely wide experience, whose estimate on the value of the clay deposits was $473,000.00.

The following witnesses appeared for the City of Little Rock. Mr. McElwaine, a graduate geologist with many years of experience in locating clay and mineral materials in Arkansas, testified he had investigated the Pulaski County area to determine the availability and supply of bloating clays. On one exhibit alone he showed the presence of 500,000,000 cubic yards of clay, or a 4,444 year supply at the present rate of consumption in the State of Arkansas. A second witness, Mr. Willson, a highly qualified engineer-businessman who has been in the cement and aggregate business most of his life and an engineer acting as vice president of Texas Industries, the largest lightweight aggregate company in the world, whose company operates some 32 plants in the United States engaged in the manufacturing of heavy and lightweight aggregate, ready-mix concrete, concrete pipe, blocks and related concrete lines, testified that in all his experience he had never known of land being purchased for lightweight aggregate purposes other than

on the basis of the going value of the land; meaning the price the land is being offered and sold for in the area without regard to the presence of the clay, — the reason being the abundance of such a clay in the mid-western area of the United States.

In view of the highly conflicting testimony which the chancellor had before him and further in view of the fact that the award was a lump sum so that we cannot tell how much consideration the chancellor gave to the clay deposits in arriving at its value, we cannot say that the award was against the preponderance of the evidence either as being excessive, as argued by the City, or as being inadequate as argued by the Uptons. Incidentally, for the same reason we cannot say the chancellor was wrong in fixing the value of the dam site.

Value of Land Taken Above 290′ Mark: The Uptons also contend the trial court erred in rejecting certain evidence relative to the value of the land taken above the 290′ level because of its alleged enhanced value the lake would create. Again we do not agree. The evidence does not show what amount was allowed for the land taken above the high water mark, or the 290′ line. The Uptons further argue that the City condemned and took more land above the 290′ elevation than was necessary. We think this contention is without merit. We will not set aside what constitutes an appropriate taking unless there has been an abuse of discretion. See *State Game & Fish Comm.* v. *Hornaday,* 219 Ark. 184, 242 S. W. 2d 342; *Woollard* v. *State Highway Comm.,* 220 Ark. 731, 249 S. W. 2d 564 and *Patterson Orchard Company* v. *Southwest Arkansas Utilities Corp.,* 179 Ark. 1029, 18 S. W. 2d 1028, 65 A.L.R. 1446. However, here there is an abundance of testimony to show there was a necessity to take acreage above the water mark and along the lake front to prevent pollution of the water from possible sewage affluent and contamination from any undesirable farming practices which might be carried on. Also, a preponderance of the evidence shows that the land taken below the dam is necessary for protection of the dam. We cannot

say from a review of the evidence there was an abuse of discretion.

Finding no error, we affirm on both direct and cross-appeal.

ARK. STATE HIGHWAY COMMISSION *v.* COVERT.

5-2176 338 S. W. 2d 196

Opinion delivered September 19, 1960.

Dowell Anders, O. Wendell Hall, Jr., Thomas B. Keys, for appellant.

Ben M. McCray, for appellees.

SAM ROBINSON, Associate Justice. This appeal arises from an action of eminent domain brought by the appellant, Arkansas State Highway Commission, to condemn about one-half acre of land in Saline County belonging to appellees, G. N. Covert and Fannie Covert, his wife. The land was condemned for the purpose of constructing an interchange on Highway 67-70 near Benton.

On January 24, 1958, appellant filed a complaint and declaration of taking and deposited $9,500 as estimated just compensation for the land. Upon trial the jury returned a verdict in favor of appellees and fixed their damages at $16,500.

Appellant filed a motion for new trial on the ground that the jury verdict was not supported by substantial evidence. The lower court denied this motion and the sole issue on appeal is whether such denial was error.

Appellees offered the testimony of three witnesses as to the value of the land. Mr. Covert, the landowner, testified the value to be $17,500. Mr. John Huchingson, a real estate broker, testified the value to be $16,000 or $16,500. Mr. Fred Harville, a real estate salesman, testified the value to be $15,000. In contrast, appellant offered as evidence the testimony of Mr. Ernest P. Shumaker, the president of mortgage, real estate and appraisal firms, whose value was $9,200, and Mr. Herbert Hooten, an appraisal reviewer for the Highway Department, whose value was $9,500.

Whether there is substantial evidence to support the verdict is a question of law. *Ark. State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738; *Ark. State Highway Comm.* v. *Dupree,* 228 Ark. 1032, 311 S. W. 2d 791.

Only two of the five witnesses testified that the value of the land taken was as much as the award made by the jury. We must, therefore, examine their testimony to determine if it is of such force as to substantially support this award.

Mr. Covert, who was 78 years of age at the time of trial, testified that he acquired the land in 1945. It is a lot 315′ x 80′ on which were situated a house and a blacksmith shop. The house was 16′ x 50′ and contained three rooms and a bath. The blacksmith shop was 30′ x 70′, constructed of wood, with a paper and sheet roof and a dirt floor. Near the close of Mr. Covert's testimony, the following occurred:

"Q. Taking into consideration, Mr. Covert, that if you were willing to sell that property and somebody came along willing and able to buy, what would you consider to be the fair market value of the property?

A. $17,500.00."

As we said recently in *Lazenby* v. *Ark. State Highway Comm.,* 231 Ark. 601, 331 S. W. 2d 705, the owner of the land being condemned may be allowed to testify regarding the market value of the land if the testimony shows he is familiar with such matters. The record does

not reflect that appellee's right to so testify was questioned.

On direct examination Mr. Huchingson related the location and dimensions of the land and described the improvements. He stated he was familiar with the term "fair market value" as meaning that value arrived at by a seller willing to sell and a buyer willing to buy. He stated the value of the property in his opinion was $16,000 or $16,500.

On cross-examination Mr. Huchingson testified that he arrived at the valuation by using his experience in buying, selling and listing property in Saline County over a period of twelve years. He said there were no sales of similar property with which he could compare appellee's property. He classified the property as commercial rather than residential and said he figured the property as a unit and did not separate it as to land and improvements. He did not place individual values on the house or blacksmith shop.

This is the type of case that presents one of the most difficult problems this Court must face. It is well established that if there is any substantial evidence to support a verdict, it must be affirmed on appeal. However, whether there is substantial evidence to support the verdict is, as we said earlier, a question of law and not of fact. As we pointde out in the *Byars* case, *supra,* the problem becomes more complex in differentiating between *any* evidence and *substantial* evidence. Although appellant presents a strong argument to the contrary, we cannot say that the evidence of the two witnesses detailed above does not substantially support the verdict of the jury.

Affirmed.

CALVERT FIRE INSURANCE CO. *v.* HARDWICKE.

5-2136 338 S. W. 2d 329

Opinion delivered September 26, 1960.

Cockrill, Laser & McGehee, by *Jacob Sharp, Jr.,* for appellant.

No brief filed for appellee.

ED. F. MCFADDIN, Associate Justice. From a decree reforming an insurance policy and rendering judgment for loss claimed, the appellant prosecutes this appeal.

On July 27, 1953 appellee Hardwicke purchased a truck from King Motor Company in Clarksville. For the unpaid portion of the purchase money Hardwicke executed a title retaining note, payable monthly over a period of twenty-four months. The note, dated July 27, 1953 and providing for twenty-four monthly payments, was forthwith assigned by King Motor Company to Commercial Credit Corporation. Included in the note was $143.40 as the amount of the insurance premium which was paid by the holder of the note to the appellant, Calvert Fire Insurance Company. The insurance policy (covering collision damage) issued by appellant Calvert Fire Insurance Company, was dated July 27, 1953, and clearly stated that it expired on July 27, 1955. The policy was delivered to Hardwicke and was at all times in his possession.

On August 4, 1955, after the expiration date stated on the policy, Hardwicke's truck was damaged beyond repair and he filed this suit in equity to reform the insurance policy so as to extend its expiration date beyond August 4, 1955, and to recover on the reformed policy for the loss he had sustained on August 4, 1955. Trial in the Chancery Court resulted in a decree granting Hardwicke the prayed relief; and this appeal challenges the correctness of such decree.

The appellant claims that the evidence is insufficient to support a reformation of the policy; and such claim requires a statement of the applicable law, and a determination whether the evidence was sufficient to justify reformation. Our cases recognize that an insurance policy, like any other contract, which by reason of mistake in its execution does not conform to the real agreement of the parties, may be reformed in a court of equity. See *Phoenix Insurance Co.* v. *State,* 76 Ark. 180, 88 S. W. 917, and cases there cited. But the party seeking to reform the insurance policy must offer testimony that is clear and convincing. See *Moline Timber Co.* v. *Schaad,* 181 Ark. 854, 28 S. W. 2d 336.

Under the rules thus stated, we examine the evidence to see if it is sufficient to support the decree rendered. Hardwicke did not establish that there was, in 1953, any mistake as to the date of the beginning and the date of the end of the insurance coverage, *i.e.,* from July 27, 1953 to July 27, 1955. Rather, he claimed that he was subsequently led to believe that the insurance coverage would be extended beyond July 27, 1955 because the Commercial Credit Corporation had agreed to extend the final payment on the title retaining note. If there had been such subsequent agreement it would not have reformed the original policy, but it would be in the nature of an oral agreement to extend the period of the insurance coverage. Even the preponderance of the evidence is against Mr. Hardwicke on this extension theory:

1. The only persons with whom Mr. Hardwicke had any conversations were representatives of the Commercial Credit Corporation, and they were not representatives of the Calvert Fire Insurance Company. Both of these representatives testified unequivocally that they did not make, and could not have made, any agreement with Mr. Hardwicke about extension of the insurance coverage.

2. Mr. Hardwicke offered evidence that the Calvert Fire Insurance Company was owned by the Commercial Credit *Company* which also owned Commercial Credit *Corporation,* the holder of the title retaining note; but such evidence, standing alone as it did, was not sufficient to support a decree to pierce the fiction of the corporate entity and make the agents of the Commercial Credit *Corporation, ipso facto,* the agents of the Calvert Fire Insurance Company. It was definitely established that there was only one person in this State recognized by the Insurance Department of Arkansas as legally qualified to countersign insurance policies for the Calvert Fire Insurance Company; and Mr. Hardwicke did not claim to have even seen or heard of that person.

3. Mr. Hardwicke claimed that after July 27, 1953 the Insurance Department of Arkansas reduced the premiums to be paid on insurance policies like the kind Calvert Fire Insurance Company had issued to Hardwicke, and that, therefore, the reduced rate should apply here so as to extend the period of the Hardwicke policy. But the fallacy of this contention is found in the testimony of a deputy of the State Insurance Commissioner of Arkansas who stated, without contradiction, that the reduced premium applied only to policies issued after September 4, 1953, unless the old policies previously written were surrendered and new policies issued in lieu thereof. Mr. Hardwicke did not claim to have complied with such rule of the State Insurance Department.

After a careful study of all the evidence we are forced to the conclusion that Mr. Hardwicke made no case against appellant Calvert Fire Insurance Company. The Chancery decree is reversed and the cause remanded, with directions to set aside the decree and dismiss the complaint.

WHEELER *v.* HARRIS.

5-2189 339 S. W. 2d 99

Opinion delivered September 26, 1960.

[Rehearing denied October 31, 1960]

Boyce Love and *Lasley & Lovett,* for appellants.

Wiley A. Branton, for appellee.

George Rose Smith, J. This is a suit by the appellants for partition of a 77-acre tract which they assertedly own as tenants in common with the appellee Ernest Harris. Harris defended upon the ground that he had acquired title to the land by adverse possession, and the chancellor so found. The correctness of that ruling is the principal issue on appeal.

The land in question was owned by the parties' ancestor, E. W. Wheeler, at his death in 1935. By the terms of Wheeler's will the property was left to his only surviving child, Alberta Johnson, for life, with remainder in eleven equal parts to the testator's ten grandchildren and to Dess Hampton, the husband of one of the granddaughters. The life tenant had possession of the property until her death in 1942. During her lifetime she purchased an outstanding drainage district tax title to the land, but of course this amounted only to a redemption, as it was her duty to pay the taxes and special assessments. Ark. Stats. 1947, § 84-925; *Williams* v. *Anthony,* 182 Ark. 810, 32 S. W. 2d 817; *Higginbotham* v. *Harper,* 206 Ark. 210, 174 S. W. 2d 668.

Upon the death of the life tenant in 1942 the right of possession passed to the eleven remaindermen, as tenants in common. As a matter of fact only one of the tenants in common, Ella Hampton, who was the life tenant's only child, took possession of the property. Without objection from her cousins Ella Hampton held the land until her death, either farming it herself or renting it to others. In 1947 she conveyed twenty acres

to her son, the appellee Ernest Harris, who thereafter received the rents from those twenty acres. It is not shown that any of the other cotenants had knowledge of Ella's deed to the appellee nor of a later deed by which Ella and her son conveyed two acres to a church. Ella died in 1952, and the appellee had been in possession for slightly less than seven years when this suit was filed by the appellants, who are the other nine grandchildren or their successors in title. The other tenant in common, Dess Hampton, was joined as a defendant but made no defense.

In claiming title by adverse possession the appellee must rely upon his own possession and that of his mother, both of whom were tenants in common with the appellants. It is a familiar rule that mere possession by a tenant in common is insufficient to show the necessary element of hostility, for each cotenant has an equal right to occupy the property. For the possession of a tenant in common to be adverse it is necessary that knowledge of his hostile claim be brought home to his cotenants, either directly or by notorious acts of such an unequivocal character that notice may be presumed. *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W. 2d 809; *Woolfolk* v. *Davis,* 225 Ark. 722, 285 S. W. 2d 321. Even stronger evidence is required where, as here, a family relationship exists. *Staggs* v. *Story,* 220 Ark. 823, 250 S. W. 2d 125.

We consider the proof quite insufficient to establish the claim of title by adverse possession. There is no showing that either the appellee or his mother ever notified the other cotenants, or any of them, that a hostile claim of ownership was being asserted. Nor were there notorious acts of such an unequivocal character that notice must be presumed. Possession alone carries no implication of hostility to the cotenants. Harris and his mother paid the taxes, but such payments were to be expected in view of their enjoyment of possession and their collection of the rents. The execution of the deeds that we have mentioned added nothing to their claim, as the appellants did not have knowledge of these conveyances and were not required to take notice of instru-

ments outside their own chain of title. *Etchison* v. *Dail,* 182 Ark. 350, 31 S. W. 2d 426.

We do not regard as controlling the cases cited by the chancellor and relied upon by the appellee: *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96; *Toomer* v. *Murphy,* 198 Ark. 610, 129 S. W. 2d 937; and *Hildreth* v. *Hildreth,* 210 Ark. 342, 196 S. W. 2d 353. In those cases the cotenant's assertion of a hostile claim was strongly supported by proof of positive acts of ownership, such as the making of costly improvements. Here the bare possession of the appellee and his mother stands almost alone, unsupported by affirmative acts that might be considered to be a tacit repudiation of the tenancy in common.

Reversed and remanded for further proceedings.

George Rose Smith, J., on rehearing. The appellee insists that we were in error in failing to recognize a distinction as between the twenty acres conveyed to the appellee in 1947 and the rest of the land. It is contended that, in view of the 1947 conveyance, the appellee's possession thereafter should be considered to have been adverse to his contenants.

This contention is unsound. It is true that if Ella Hampton had executed a deed purporting to convey the entire fee simple in the twenty acres to a stranger to the title, and if the grantee had then openly taken possession, there might have been such an ouster of the other co-owners as to set the statute in motion. *Parsons* v. *Sharpe,* 102 Ark. 611, 145 S. W. 537. But that is not this case. During Ella Hampton's lifetime there was no visible change in the possession of the twenty acres. The appellee testified that even after the 1947 deed his mother continued to collect the rents, accounting to him; he admits that until his mother's death he did nothing to proclaim his assertion of ownership except pay the taxes. Hence there was no such outward evidence of a possessory change as to put the appellants on notice of a hostile claim.

Rehearing denied.

KEATHLEY *v.* YATES.

5-2175 338 S. W. 2d 335

Opinion delivered September 26, 1960.

M. V. Moody, for appellants.

Wright, Harrison, Lindsey & Upton, for appellee.

PAUL WARD, Associate Justice. This is an automobile collision case in which the appellants (plaintiffs below) secured a jury verdict and now appeal therefrom on the sole ground that the defendant's attorney committed reversible error in asking a certain question on cross examination of the doctor who was their witness. No facts are in dispute.

On May 30, 1959 appellant, Lucy Keathley, attended by her ten year old daughter, Brenda, while driving her husband's automobile on 3rd Street in North Little Rock, had a collision with a tractor-truck being driven by appellee, W. J. Yates, Jr. As a result, so it is alleged, Mrs. Keathley and Brenda were injured and the car was damaged. They filed suit in circuit court against Yates to recover for said injuries, and they were joined by Woodrow Keathley (husband of Lucy and father of Brenda) to recover for loss of consortium and for medical expenses. Yates filed an answer, and a trial resulted in the following jury verdicts; for Lucy, $225; for Brenda, $50, and; for Woodrow, $275.

From the judgments entered on the above verdicts the Keathleys prosecute this appeal. The Designation

of the Record called for only the following; the judgments, the order overruling the Motion for a New Trial, the testimony of Doctor Carruthers (a witness for appellants), and the objections to the cross examination of the said doctor. Appellants' only point relied on for a reversal reads:

"The lower court erred in not sustaining appellants' objections to a highly prejudicial question asked by appellee's counsel to one of appellants' witnesses, resulting in the assessment of grossly inadequate damages by the jury to each of the appellants."

After Doctor Carruthers had testified concerning the extent of the injuries received by Lucy and Brenda and the treatment given therefor the following occurred on cross examination:

Q. "In other words, you mentioned tension in the muscles of the neck causing her continuing discomfort. Is it not the history of cases like this that when the lawsuit is over the patient is relieved and gets much better?"

MR. MOODY.

"Object to asking about her actions when the lawsuit is over."

THE COURT.

"He has laid a foundation for it. Let's see what the doctor has to say about it?"

Q. "Is it not the history and have not studies been made in injuries of this type that when the lawsuit is over that the patient is relieved and that the patient gets much better?"

MR. MOODY.

"Object to that. He don't know anything about that."

THE COURT.

"Overruled."

MR. MOODY.

"Save our exceptions."

A. "I don't know whether they would or not."

Q. "Haven't these competent medical studies been made?"

A. "I don't know."

Appellants contend that the above question was prejudicial and therefore calls for a reversal. Appellee cites medical authorities tending to show justification for the question, contending that it was a proper one. We do not deem it necessary here to decide the propriety of the challenged question for the reason that no prejudice is shown or appears from the record which justifies a reversal.

The general principle regarding harmless errors frequently announced by this and other courts is well stated in 5A C. J. S., Appeal & Error, page 677, § 1676, in this language: "It is a fundamental principle of appellate procedure which is universally recognized and applied that a party cannot assign as error that which is not prejudicial to him; and harmless error, that is error unaccompanied by prejudice or injury, is not ground for reversal." The fact that no prejudice resulted here is shown by the negative answer given by Doctor Carruthers, as above set forth. The same contention made here by appellants for a reversal has many times been rejected by this court. In *Bodcaw Lumber Co.* v. *Ford,* 82 Ark. 555, 102 S. W. 896, where an admittedly improper question was asked, the court, at page 560 of the Arkansas Reports, said:

"We see nothing prejudicial in the question, since it was answered in the negative. Though the question was improper, the answer removed all prejudice. Of course, we can imagine a case where an improper question might be repeated often enough to become prejudicial, even though each time it elicited a negative answer. But that was not done in this case."

For similar announcements by this court see: *St. Louis, Iron Mountain & Southern Railway Co.* v. *Freeman,* 89 Ark. 326, 116 S. W. 678; *Harrelson* v. *Eureka Springs Electric Company,* 121 Ark. 269, 181 S. W. 922, and *Zorub* v. *Missouri Pacific Railroad Company,* 182 Ark. 232, 31 S. W. 2d 421.

It follows from what we have said above that the judgment of the trial court must be, and it is hereby, affirmed.

Affirmed.

MASON *v.* BARRINGER.

5-2181 338 S. W. 2d 337

Opinion delivered September 26, 1960.

W. W. Shepherd, for appellant.

Dean R. Morley, for appellee.

SAM ROBINSON, Associate Justice. This appeal arises out of a suit in chancery court brought by appellee, Pearl Barringer by Izola Ferguson, her next friend, against appellant, John T. Mason, asking that deeds to certain lands in Pulaski County be set aside. The chancellor found that at the time appellee executed same she was incompetent and therefore the deeds should be cancelled. From this ruling appellant has appealed.

In October, 1958, and April, 1959, appellee, an aged Negro woman, executed three warranty deeds conveying

eight lots to appellant. She also revoked a power of attorney previously given to a daughter, Frances Smith. Each of the deeds was properly acknowledged and valid on its face.

The chancellor heard the testimony of a number of witnesses, some of whom were relatives and close friends of appellee and had known her for many years. It appears from the record that in 1955 appellee had deeded two of the lots to a third party and appellant had assisted in having that transaction set aside. A great number of incidents were related which support the allegation that at the time the deeds were executed appellee was incompetent. It would serve no useful purpose to recite this testimony here. We cannot say that the finding of the chancery court that the deeds should be cancelled because of appellee's incompetency at the time they were executed is not supported by a preponderance of the evidence. *Fikes* v. *Lee,* 225 Ark. 192, 280 S. W. 2d 230; *Oliphant* v. *Oliphant,* 217 Ark. 446, 230 S. W. 2d 653.

Appellant urges, also, that the chancery court should have ordered the return of the consideration paid for the deeds. The chancellor found that this consideration, if any, was either returned to appellant or dissipated by appellee during her incompetency. We cannot say he erred in this finding. *First National Bank* v. *Tribble,* 155 Ark. 264, 244 S. W. 2d 33; *Reaves* v. *Davidson,* 129 Ark. 88, 195 S. W. 19.

Affirmed.

STRASNER *v.* STRASNER.

5-2182 338 S. W. 2d 679

Opinion delivered September 26, 1960.

[Rehearing denied October 24, 1960]

[redacted]

Digby & Tanner, for appellant.

Jack L. Lessenberry, for appellee.

JIM JOHNSON, Associate Justice. This appeal concerns a separation and property settlement agreement between L. M. Strasner, Sr., appellant, and his wife, Mildred E. Strasner, appellee.

The parties were married on July 14, 1941. They are the parents of one child, a son who was 18 years of age and a freshman at the University of Arkansas at the time of the trial. On February 10, 1959, the parties separated and have not resumed their marital relationship. On that date, appellee, with her cousin as a witness, followed appellant and at about 7:30 in the evening they observed appellant in the company of another woman. Appellant was inside an apartment house in the lighted living room, and appellee saw them through the door. She stated that they were preparing to leave on a date. Appellee confronted them as they came out of the building and told them they would hear from her lawyer. This was the only instance of alleged infidelity of the appellant. On February 13, 1959, appellant went back to the home to get his clothes and personal effects. At that time appellee told him she was going to sue the other woman for alienation of affections. A couple of weeks later, appellee's attorney contacted appellant in regard to the separation and domestic situation of the parties and a settlement of their property rights. Negotiations continued for a couple of weeks between appellant and appellee's attorney which culminated in the execution of a property settlement agreement, which is the subject matter of this action. No action for divorce has ever been instituted by either party.

This agreement, dated March 13, 1959, awarded appellee the unencumbered home of the parties worth approximately $12,000 to $15,000; the household furniture; title to an automobile worth approximately $2,000; a bank account of approximately $360; and in addition, appellant agreed to pay appellee $200 a month for her lifetime and $50 a month for the support and maintenance of their son until he completed his education. The only property which appellant retained was a savings account of $124. However, the agreement provided that: in the event either party instituted a divorce action, the property settlement agreement would constitute a full and complete settlement of all property rights in such action, and that neither party would have the

right to obtain any part of the property of the other; neither party would claim or demand suit money, alimony or attorney's fees should either party institute an action against the other (except any proceeding made necessary to enforce the terms of the agreement); *appellee would not prosecute any legal cause she may have acquired prior to the date of the agreement*[1] except any action she may have acquired against appellant; each party would have the right to enjoy all property they now owned, or which they might acquire, independent of any claim or right of the other party with the right to dispose of the same; each party would have the right to dispose of by last will and testament property now owned or which either might acquire, independent of any claim of the other; each party would execute whatever documents were necessary to promptly carry out the terms of the agreement.

At the time of the settlement, the parties possessed a washing machine which was not paid for. Appellee declined to make monthly payments upon the indebtedness existing against the washing machine and appellant contends he was told by appellee's attorney that he was required to do so, and he has continued to make these payments. Appellant executed proper deed of conveyance to real property to appellee and transferred title to the automobile to appellee and performed all other conditions and covenants incumbent upon him to perform until August 15, 1959, at which time he ceased making the monthly payments specified in the agreement to appellee. On August 19, 1959, appellee instituted this action in Chancery Court seeking specific performance of the written property settlement agreement. A trial on the merits was held on October 19, 1959, the only witnesses being the appellee, appellee's attorney and the appellant. The execution of the instrument was not disputed and the sole issue presented to the court for consideration was the validity of the instrument sued upon. The Chancellor ruled in favor of appellee, decreed specific performance of the property settlement agreement, awarded judgment for delinquent payments and

[1] Emphasis ours.

ordered appellant to make future payments in accordance with the terms and provisions of the property settlement agreement. The decree was rendered by the Chancellor on November 20, 1959, and this appeal was duly prosecuted and perfected.

For reversal, appellant relies upon the following points:

1. Court lacked jurisdiction of subject matter; 2. Trial Court was biased and prejudiced; 3. Instrument sued upon is invalid for lack of consideration; 4. Appellee has breached the agreement.

We will discuss the points in the order in which they are raised.

Jurisdiction. Appellant eloquently argues that the breach of the contract, if any, of the appellant's refusal to make monthly payments as provided in the agreement was compensable by damages and that appellee had a plain, complete and adequate remedy at law. Appellant further argues that the criterion for suits for specific performance is whether or not there is an adequate remedy at law and cites in support of his argument the leading case of *McDaniel* v. *Orner,* 91 Ark. 171, 120 S. W. 829. Except for the nature of the agreement here involved, ordinarily the theories pursued by appellant are sound law. However, in the instant case our research reveals that the Legislature settled the matter of jurisdiction by the passage of Act 290 of 1941, the pertinent part of which is as follows:

"Courts of equity may enforce the performance of *written agreements* between husband and wife made and entered into *in contemplation of either separation or divorce* and decrees or orders for alimony and maintenance by sequestration of the defendant's property, . . . or by such other lawful ways and means, including equitable garnishments or contempt proceedings as are in conformity with rules and practices of courts of equity." (Emphasis supplied.)

This act follows the general rule as set out in 17A Am. Jur., Divorce and Separation § 919; and 81 C. J. S.

Specific Performance § 86, and 42 C. J. S. Husband and Wife § 606. In addition, this Court in *McCue* v. *McCue,* 210 Ark. 826, 197 S. W. 2d 938, relative to alimony which is applicable here, reasoned as follows:

"It was recognized in *Shirey* v. *Hill,* 81 Ark. 137, 98 S. W. 731, that a husband's contract for separate maintenance of his wife is binding. Mr. Justice Wood, in disposing of the argument that Lawrence Chancery Court was without jurisdiction, cited *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459. Effect of the decisions is that enforcement of a contract for alimony is an action *for* alimony, as distinguished from an action on debt, although the debt, as such, is recognized as subsisting by reason of agreement between the parties."

Prejudice: Appellant forcefully urges that the trial court was biased and prejudiced, and that the appellant did not receive a fair and impartial trial. Appellant further contends that "It is apparent from the examination of the remarks in the record by the trial court that the court was sympathetic to the appellee, and that the appellant did not receive fair consideration of his presentation of the facts." Even though we noted a number of remarks in the record which would have been best left unsaid, upon careful examination we cannot say that such remarks indicated such a personal bias toward the appellant as a matter of fact which would justify our agreement with the contention of appellant under the law. This Court has repeatedly said, even in criminal cases, that "There is no provision of our Constitution or statutes that disqualifies a judge for prejudice." See: *Jones* v. *State,* 61 Ark. 88, 32 S. W. 81. In considering an application for a change of venue, this Court in *Hudspeth* v. *State,* 188 Ark. 323, 67 S. W. 2d 191, very aptly said:

"That personal bias . . . toward the defendant . . . must be shown as a matter of fact, and not as a matter of opinion of the defendant or any other person. The words 'bias' and 'prejudice', as used in the law of the subject under consideration, refer to the mental attitude . . . of the judge towards a party to

the litigation, and not to any views that he may entertain regarding the subject matter involved."

Consideration: Appellant, in support of his contention that "The instrument sued upon is invalid for lack of consideration," cited the case of *McCue* v. *McCue, supra,* as follows:

"Courts generally enforce covenants and promises respecting wife's maintenance and spouses' property in separation deeds, if based on *sufficient consideration,* fair and equal, reasonable and not the result of fraud or coercion, and if separation actually occurred before agreement was made or immediately follows it." (Emphasis supplied.)

The briefed contents of the property settlement agreement as heretofore set out renders unnecessary our quoting verbatim the lengthy instrument. A casual reading of the agreement in its entirety reveals that at least seven paragraphs contained therein are beneficial to appellant. Even the appellant on cross-examination admitted that there were "a few" provisions which are advantageous to him. We therefore cannot say that the findings of the Chancellor that the agreement was based upon sufficient consideration was against the weight of the evidence.

Breach: The last point relied upon for reversal is that the appellee has breached the terms of the contract. Included among the personal property and household furniture and furnishings awarded to the appellee under the property settlement agreement was a washing machine, upon which an indebtedness existed, payable in deferred monthly payments of $26 each. Both parties testified that the washing machine had been purchased in the name of the appellant. This item was not specifically mentioned in the written contract, but there is no dispute as to the appellee being entitled to same. After the execution of subject contract, the question arose as to whose liability it was to make future payments upon this indebtedness. Appellant asked appellee's attorney for information and was told at first that

it was not his obligation. Appellant testified as to a later conversation with appellee's attorney as follows:

"Q. Did I say you would have to pay for it?

"A. You said that she *insisted* on it or words to that effect, so I paid it then." (Emphasis supplied.)

As we view this conversation it amounted to appellee's *interpretation* and not a *requirement* which would constitute a breach of the entire agreement.

From what we have said above on the whole case it necessarily follows that the Chancellor's opinion being supported by the weight of the evidence, the decree is affirmed.

Affirmed.

ALLSTATE INSURANCE COMPANY *v.* MATHIS.

5-2188 339 S. W. 2d 132

Opinion delivered October 3, 1960.

[Rehearing denied November 7, 1960]

Barber, Henry, Thurman & McCaskill, for appellant.

Pope, Pratt & Shamburger, by *Richard L. Pratt* and *Joseph L. Buffalo, Jr.,* for appellees.

J. SEABORN HOLT, Associate Justice. Rachel Anderson was the named insured in an assigned risk automobile liability insurance policy issued by the appellant, Allstate Insurance Company. Dee Mathis and two of his children were injured when an automobile owned by Rachel Anderson collided with the Mathis car. At the time of the collision the automobile was not being driven by Rachel Anderson but by Harry Davidson, a friend of Rachel Anderson's brother, James Vines. James Vines lived in the home of his sister Rachel Anderson. The present suit was commenced by Mathis against Allstate to enforce the policy provisions which Mathis claims covered Davidson, and which Allstate denies. A jury trial resulted in a verdict in favor of appellee, Mathis, and Allstate has appealed.

For reversal appellant relies on the following points:

(1) That the trial court erred in refusing to instruct a verdict in favor of appellant, Allstate Insurance Company, and

(2) In giving certain instructions requested by appellee, and in refusing to give Defendant's requested instructions No. 2 and No. 4 and

(3) Erred in allowing appellee an attorneys' fee of $2,000.00.

The insurance policy here involved, contained this provision:

"With respect to insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either."

The evidence discloses that Rachel Anderson had expressly told her brother, James Vines, on several occasions not to let Davidson drive the car, however, on the Saturday preceding the collision on the following day, Sunday, Davidson came to the home of Rachel Anderson and asked for her car to go to his mother's home. Miss Anderson testified that she allowed him to have the car but did not let him drive alone but accompanied him to his mother's home. While at his mother's home Miss Anderson allowed Davidson to take the car to a nearby store to procure medicine for his mother. Later that day, Rachel Anderson gave permission to her brother, James Vines to use the car. Vines and Davidson left in the car and drove by to pick up their girl friends. After picking the girls up, it was decided to drive to Louisiana. They drove all night to Louisiana and arrived back in Little Rock Sunday morning. The boys drank beer and Vodka during the trip and they both drove the automobile. After arriving back in Little Rock, they went to a motel where Vines registered and remained with his date. Vines instructed Davidson to take the other girl to work. While Davidson was gone on this trip to town, after delivering the girl to her work, the collision occurred.

After a careful review of the evidence presented, viewed in the light most favorable to appellee as we must, we do not agree with appellant's contention that the Court should have instructed a verdict in its favor. We hold that there was some substantial evidence sufficient to take the case to the jury, and if it had been properly instructed, to have sustained the jury's verdict.

Among the instructions given were the following:

Plaintiff's Instruction No. 3

"You are instructed that if you find from a preponderance of the evidence that James Vines had permission of Rachel Anderson to use the automobile in question, and further that at the time the automobile was involved in the accident it was being used for a benefit, advantage or purpose of James Vines, then you are advised that the automobile was being used within the

permission given and your verdict will be for the Plaintiffs. Unless you find that Harry S. Davidson had actually been forbidden to drive the automobile by Rachel Anderson and that such refusal had not been revoked."

This instruction was correct.

Plaintiff's Instruction No. 2

"You are instructed that if you find from a preponderance of the evidence that Harry Steve Davidson was told by the named insured, Rachel Anderson, not to use the automobile in question, if at all, and further that after such refusal of permission was made, if at all, she knowingly permitted Harry Steve Davidson to drive said automobile, then you are instructed that her previous refusal of permission to the said Harry Steve Davidson, if at all, was thereby revoked and in determining whether or not there was implied permission for Harry Steve Davidson to use the automobile in question, you should consider all of the facts and circumstances of the case relating to that particular matter."

We would affirm but for the error in giving, over appellant's general objections, appellee's instruction No. 2. The vice in this instruction is in the use of the phrase:

"... then you are instructed that her previous refusal of permission to the said Harry Steve Davidson, if at all, was thereby revoked."

Whether Rachel Anderson's permission to Davidson to drive the automobile after she had previously refused him permission, automatically revoked her previous refusal of permission to Davidson, was a question of fact for the jury under a proper instruction.

Accordingly, the judgment is reversed and the cause remanded.

WONDER STATE MFG. CO. *v.* HOWARD.

5-2165 338 S. W. 2d 682

Opinion delivered October 3, 1960.

[redacted]

Frierson, Walker & Snellgrove, for appellants.

Howard A. Mayes, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a Workmen's Compensation case in which the Commission denied recovery and the Circuit Court reversed the Commission. The decisive question is, whether there is substantial competent evidence to sustain the Commission: if so, the Circuit Court was in error in reversing the Commission. Such is our well established rule. *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600; *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; *Moore* v. *Long-Bell Lbr. Co.,* 228 Ark. 345, 307 S. W. 2d 533; and *Chapman* v. *Finkbeiner,* 230 Ark. 655, 324 S. W. 2d 348. In *J. L. Williams & Sons* v. *Smith, supra,* we said:

"The circuit court cannot go into the question of the weight of the evidence. The only issue confided, by the act, to its determination is whether there is sufficient evidence as a matter of law to warrant an honest and reasonable trier of facts in making the finding which was made. There was sufficient competent evidence to warrant the finding of fact of the commission and the circuit court erred in setting it aside."

With the foregoing rule in mind, we examine the case at bar. The claimant, Henry H. Howard, was employed as a sheet metal worker for the Wonder State Manufacturing Company in Paragould on August 28, 1958. Howard went to work at 7 A. M. and after about 25 minutes' work he became ill and went to the hospital, where his condition was diagnosed as peptic ulcer and myocardial infarction. He was unable to resume work until October 30, 1958, and this is a claim for total temporary disability. The Commission found that the claimant had failed to establish any connection between his work and his disability, and disallowed the claim. We quote at length from the Commission's opinion:

"There is little, if any, controversy with respect to facts relating to claimant's employment and his becoming disabled on August 28, 1958. He had previously had great discomfort either as a result of a stomach ulcer or from pains resulting from a heart condition. The Surgeon's Report following claimant's treatment in the hospital at Paragould described the nature of claimant's injury as 'acute anterior myocardial infarction.' Dr. Andrews testified that X-ray reports indicated that the claimant had a stomach ulcer of long standing duration. An electrocardiogram was made and claimant gave a history of hard work for the past few days and Dr. Andrews stated that as a basis of the electrocardiogram and the history of very heavy work, he could not say with certainty that the work caused the heart attack, but he was of the opinion that it did.

"On cross-examination, Dr. Andrews stated that such a heart condition as claimant had is often brought on by hardening of the arteries and that heart attacks are less common among hard working people than people who have sedentary work. After considerable cross-examination, Dr. Andrews made the following statement: 'Well, as I understand it, the man started having symptoms the day before and on the day he left work he had only been there a little while and, in other words, I see no connection between the work on the morning that he left work and any

possible heart attack that morning.' Then follow the following questions and answers:

" 'Q. Then as far as the work he was doing on the morning when he quit, you see no relation between that work and his heart attack? A. I see no strong relation as far as heavy work causing a heart attack, no sir. Q. Nothing to indicate to you that that work he was doing that morning produced that heart attack? A. None in the history, no, sir. Q. Now, from what you know of this case from the history that has been given, Doctor, isn't it a fact that it would be impossible for you to put your finger on the time that this man had his heart attack? A. That is true.'

"We shall now dwell on the testimony given by Dr. Stern. The claimant was examined by Dr. Stern on January 20, 1959. He closed his report on this examination with the following paragraph:

" 'The degree to which the heart attack is related to the work is difficult to assess. The underlying disease or coronary arteriosclerosis was present previously, was the basic cause of the attack and has no relationship to his work. It is quite possible that the exertion of his work was the precipitating incident that caused the attack to occur at the time it did. These attacks, of course, will occur spontaneously at rest, so that it cannot be proven that the work was the precipitating cause; on the other hand, since the attack did come on while working, there must be a presumption that the work contributed to the initiation of the attack.'

"Counsel for claimant is of the view that Dr. Stern's report supports the claim of a compensable injury in this paragraph, wherein it is stated that there must be a presumption that the work contributed to the initiation of the attack. With reference to this statement in his report, Dr. Stern testified as follows:

" 'A. I would like to change that sentence to read: It may have contributed to the initiation of the attack. It may, in other words, have contributed theoretically, and there is no way of telling which particular piece of

physical exertion will contribute to the attack. There is a theoretical way in which an expenditure of energy can precipitate an attack, some movement may have contributed to the starting of the heart attack. Q. It is a fact, is it not, Doctor, that these attacks occur in all stages of one's life? A. That is correct. It may occur without any precipitating cause. Q. Quite frequently occur in sleep? A. Yes, sir. Q. And it would be absurd to say that sleep contributed to it? A. It may be entirely coincidence, and one cannot say about that. Q. Confining it to reasonable medical certainty, can you make any statement as to whether or not it may have caused or contributed towards causing the heart attack? A. I can say with reasonable medical certainty that it probably did not precipitate the attack, but I cannot say with medical certainty that it absolutely did not.'

"In view of this testimony, the Commission is unable to find that the claimant has furnished sufficient proof to establish his contention that he received an accident that arose out of or in the course of his employment."

The claimant urges that the case at bar is ruled by such cases as *Simmons Natl. Bank* v. *Brown,* 210 Ark. 311, 195 S. W. 2d 539; *Scobey* v. *Southern Lbr. Co.,* 218 Ark. 671, 238 S. W. 2d 640; *Triebsch* v. *Athletic Mining Co.,* 218 Ark. 379, 237 S. W. 2d 26; *Bryant Stave Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436; and *Bettendorf* v. *Kelly,* 229 Ark. 672, 317 S. W. 2d 708. The employer urges that this case is ruled by such cases as *Moore* v. *Long-Bell Lbr. Co.,* 228 Ark. 345, 307 S. W. 2d 533; *Ark. P. & L. Co.* v. *Scroggins,* 230 Ark. 936, 328 S. W. 2d 97; *Shipp* v. *Tanner,* 229 Ark. 815, 318 S. W. 2d 821; and *Chapman* v. *Finkbeiner,* 230 Ark. 655, 324 S. W. 2d 348. We conclude that the case at bar is ruled by such cases as *J. L. Williams & Sons* v. *Smith, supra,* wherein we held that the findings of the Commission must be sustained if supported by substantial competent evidence. There is evidence in the record which would have sustained an award in favor of the claimant: likewise, there is evidence in the record that

sustains the Commission's finding in favor of the employer. The claimant admitted that he was sick all the night before August 28th, with pressure in the upper part of his stomach and in his chest. From that evidence, and from the medical evidence, the Commission could have found that the heart attack suffered by the claimant had already occurred before he reported for work on the morning of August 28th. Such a finding would have been in line with *Chapman* v. *Finkbeiner, supra.* Without further detailing of the evidence, we conclude that the Commission's findings should not have been reversed by the Circuit Court.

The Circuit Court judgment is reversed and the cause is remanded to the Circuit Court with directions to affirm the Commission.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting.

I do not agree with the majority for two reasons: (1) The majority state the decisive question is whether there is substantial competent evidence to sustain the Commission. I believe this is one of two decisive questions involved, the other being whether the triers of fact have forgotten, in this instance, that the Workmen's Compensation Law is remedial legislation and should be liberally construed with doubtful cases resolved in the claimant's favor.

This is a doubtful case, with the evidence on both sides based only on medical theory. The claimant has been required to prove that which cannot be proven, that is, the effect of exertion on the pre-existing disease arteriosclerosis. By any measuring device, the evidence is equal and a finding in keeping with the spirit of the Act would have allowed compensation. (2) In order for a decision of an administrative tribunal to be constitutional, a disappointed litigant must be allowed to appeal to some part of the judiciary. A disappointed Workmen's Compensation claimant may appeal to the Circuit Court of his county. Under the decisions of this Court, particularly that of *Reynolds Metal Co.* v. *Robbins,* 231 Ark. 158, 328 S. W.

2d 489, wherein it was said the strongest rule in Workmen's Compensation Law was that the Commission would be affirmed if there was any substantial evidence to support their findings, the Circuit Judge has been relegated to a position which could not have been intended by the framers of the Act.

The findings of the Workmen's Compensation Commission are accorded the same weight as a jury verdict, *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82.

A Circuit Judge may set aside a jury verdict because it is not sustained by sufficient evidence. Ark. Stats. Sec. 27-1901.

A Circuit Judge's rejection of a jury verdict involves judicial discretion, which will not be interfered with on appeal in the absence of the abuse thereof. *Texas & Pacific Railway Co.* v. *Stephens,* 192 Ark. 115, 90 S. W. 2d 978.

It is, therefore, apparent that in all areas except Workmen's Compensation Law, the Circuit Judge has broad powers in weighing the evidence, yet this Court, in the field of Workmen's Compensation Law, has taken this discretion away from the Circuit Judge. Under our holdings the Circuit Judge must affirm the Commission if there is any substantial evidence to support their findings and is not allowed to exercise his own knowledge of the weight and sufficiency of evidence.

As previously stated, in order to provide due process of law, a litigant before an administrative tribunal must be allowed to appeal to the Judiciary. Under the decisions of this Court, I am unable to distinguish a situation where a litigant is not allowed to appeal and a situation such as we have where a Circuit Judge must affirm the Commission and cannot exercise discretion on the matter of sufficiency of evidence. The Circuit Judges are elected by the people and are answerable to them whereas the Workmen's Compensation Commissioners, with all respect to them, are political appointees, which, under the afore-

mentioned decisions of this Court is not now but could be a dangerous situation.

It is my opinion that when we require a Circuit Judge to affirm the Commission if there is any substantial evidence to support their findings, then we relegate him to a position inferior to that of the Workmen's Compensation Commission, a quasi-judicial administrative tribunal.

Against my position in attempting to show the inconsistency involved when a Circuit Judge is allowed to set aside a jury verdict for lack of substantial evidence and his being bound by the decision of the Workmen's Compensation Commission on the question of substantial evidence, it might be argued that the Circuit Judge only has a cold record before him whereas the Commission sees the witnesses. The answer to this is that in this case, as in many others, the Full Commission reached their decision on the record without the introduction of new evidence. As I view it, it is no argument to say that the Commission affirmed a single referee who did see the witnesses because had they reversed a single referee the situation would be the same since the appeal to the Circuit Court is from the Full Commission and not a referee.

Therefore, I reach the inescapable conclusion that by court decision we have made the findings of the Commission superior to a jury verdict in direct conflict with our repeated holdings that the findings of the Workmen's Compensation Commission are to be accorded the same weight as a jury verdict.

For the reasons stated above, I would affirm the findings of the Greene County Circuit Court.

ARK. LA. GAS CO. *v.* EVANS.

5-2148 338 S. W. 2d 666

Opinion delivered October 3, 1960.

Daily & Woods, by *James E. West,* and *Blanchard, Goldstein, Walker & O'Quin,* Shreveport, La., for appellants.

Sexton & Holland, by *Sam Sexton, Jr.,* for appellee.

GEORGE ROSE SMITH, J. The basic question here is whether the lessee of an oil and gas lease is estopped to deny the title of the lessor, especially when the lease contains a clause requiring payment of royalties to the lessor only to the extent of his mineral ownership. The chancellor held that the ordinary rule of estoppel as between landlord and tenant is applicable to oil and gas leases. Upon that premise he required the appellants, as lessees, to pay royalties to the appellee, their lessor, who holds only a void tax title to the minerals within the 120 acres covered by the lease.

The facts are these: In 1935 the Missouri-Pacific Railroad Company owned the minerals in question and paid the taxes for that year in the Charleston district of Franklin county, where the land is located. By mistake, however, the same mineral rights were also assessed on the tax books in the Ozark district of the county and were erroneously sold and certified to the State for nonpayment of the taxes. It is settled, of course, that a tax sale is void if the taxes have actually been paid. *Spradling* v. *Green,* 226 Ark. 420, 290 S. W. 2d 430.

In July of 1947 the appellee, for a consideration of $3.92, purchased the State's tax title, which, as we have indicated, was void. Two months later the appellee executed an oil and gas lease to one of the appellants, Arkansas Louisiana Gas Company, purporting to cover these minerals. In December of 1947 the lessee conveyed a half interest in the lease to Arkansas-Oklahoma Gas Company, and in 1954 the latter's interest was acquired by Stephens Production Company, a partnership composed of the appellants W. R. Stephens, J. T. Stephens, and Vernon Giss. In 1955 the original lease was superseded by a new lease that was executed by the appellee to Arkansas Louisiana Gas Company and Stephens Production Company. It may be observed in passing that under the two leases the appellee has collected a total of some eight hundred or nine hundred dollars, as delay rentals.

Both the leases executed by the appellee were for a term of ten years and as long thereafter as oil or gas is produced, and both leases contained this reduction clause: "Lessor hereby warrants and agrees to defend the title to said land . . . . Without impairment of Lessee's right under the warranty in event of failure of title, it is agreed that if Lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately." The 1955 lease was still in force when the present suit was filed by the appellee on October 2, 1958.

Not only do the appellants hold a lease from the appellee; they also hold a lease from the real owner of the minerals. In 1952 Arkansas-Oklahoma Gas Company

acquired an oil and gas lease from the Missouri-Pacific, covering extensive acreage including the land now in controversy, and later that year Arkansas-Oklahoma conveyed a half interest in the lease to the appellant Arkansas Louisiana Gas Company. In 1954 Arkansas-Oklahoma's half interest was acquired by Stephens Production Company. Thus the appellant lessees hold two leases upon these minerals, one from the appellee, whose tax title is invalid, and one from the Missouri-Pacific, which was the true owner when it leased the property.

In May of 1958 Stephens, Inc., a corporation owned by the two Stephenses, purchased from the Missouri-Pacific more than 2,900 acres of mineral rights in and near Franklin county, including the 120 acres now in dispute. The purchase price of $112,251 was based upon an independent appraisal previously procured by the Missouri-Pacific, and according to that appraisal $9,000 of the total value was allocated to these 120 acres. In making the purchase Stephens, Inc., took the title in the name of the remaining appellant, J. A. Carter, as trustee.

It was not until 1958 that the lessees began drilling operations. The acreage now in controversy was unitized with other lands, and in August of 1958 the lessees completed a producing gas well upon other land within the unitized block. The appellee then filed this suit, asserting that the lessees are estopped to deny his title and must therefore pay him royalties upon that part of the gas production that is attributable, under the unitization agreement, to the 120 acres in question. The chancellor upheld the theory of estoppel and entered a decree requiring the lessees to account to the appellee for his share of the royalties. The practical effect of the decree is to compel the lessees to pay full royalties to both lessors.

Counsel for the appellee opens his brief by contending that the issue of estoppel is to be determined by the law of Louisiana, because the appellee's lease to the appellants was executed and delivered in that state. We are inclined to believe that the Louisiana courts do not consider an oil and gas lessee to be estopped to deny his lessor's title, so that the Louisiana law is actually unfavorable to the

appellee. See *Nabors Oil & Gas Co.* v. *La. Oil Ref. Co.,* 151 La. 361, 91 So. 765; *Powell* v. *Rapides Parish Police Jury,* 165 La. 490, 115 So. 667; and *Gulf Ref. Co. of La.* v. *Glassell,* 186 La. 190, 171 So. 846, as later explained in *Serio* v. *Chadwick,* La. App., 66 So. 2d 9. We do not, however, rest our decision upon the law of Louisiana, for we think it plain that the issue is to be determined by the law of Arkansas, where the land lies.

"Covenants to pay royalties run with the land so that an assignee of a royalty interest is entitled to receive the royalty from the lessee or his assignee." *Standard Oil Co. of La.* v. *Craig,* 202 Ark. 168, 150 S. W. 2d 744. It is an established principle that covenants which run with the land are governed by the law of the state where the land is. *Beauchamp* v. *Bertig,* 90 Ark. 351, 119 S. W. 75, 23 LRANS 659; Rest., Conflict of Laws, § 341. As Leflar explains in his work on Conflict of Laws (1959), § 144: "Those [covenants] which run with the land . . . create more than an *in personam* right, since they attach themselves to the land and are transferred as a part of the ownership of the land to all subsequent takers thereof. For that reason their existence, nature and effect are all determined by the law of the place where the land is located."

The rights and the duties that arise from a covenant to pay royalties are not personal to the contracting parties; they run with the land and apply with equal force to successors in interest of either the lessor or the lessee. If the rule of estoppel as between landlord and tenant applies to this situation it has a substantive effect upon the rights of the parties and thus really determines the extent of their interest in the land. The law rightly holds, both as a matter of logic and as a matter of convenience and uniformity, that such questions are governed by the law of the place where the land lies.

Coming then to the principal issue, which is a matter of first impression in Arkansas, we are firmly of the view that the doctrine of estoppel does not apply in the present case.

The inability of an ordinary tenant to deny his landlord's title ultimately goes back to basic considerations of good faith and fair dealing. Thompson gives the reason for the rule in his work on Real Property (Perm. Ed.), § 1735: "On becoming tenant of land under another, the tenant, in contemplation of law and on grounds of public policy and in maintenance of sound morals and good faith, undertakes to preserve the possession of the landlord and redeliver it, and he can not do otherwise without a violation of faith." Later on the author adds: "The rule that a lessee holding possession by virtue of a lease can not dispute the title of his lessor does not apply to an ordinary mining lease, which is more like a sale than a lease." *Ibid.*, § 1745.

There are compelling reasons for recognizing a distinction between the two situations. In the usual case a tenant of business property or farm land is not concerned with any question of title. All he pays for is the right of possession, and if his occupancy is undisturbed he has no ground for complaint. To permit him to question his landlord's title would prevent the latter from bringing an action to collect the rent except at the risk of placing his title in jeopardy. See Tiffany, Real Property (3d Ed.), § 135. On the other hand, if the lease should give the tenant an option to purchase the property it cannot be doubted that he would be allowed to question his landlord's title to the extent of insisting that a merchantable title be conveyed.

A mineral lessee is unquestionably more in the position of a purchaser than in that of a mere occupant of the land. By our law an oil and gas lease conveys to the lessee an interest in the land. *Clark* v. *Dennis,* 172 Ark. 1096, 291 S. W. 807. Unlike an ordinary tenant a mineral lessee is not concerned with possession alone. He does not merely undertake, as Thompson observes, *supra,* "to preserve the possession of the landlord and redeliver it." Instead, both parties to the lease intend and hope that the lessee will redeliver the premises only after the oil, gas, coal, or other minerals have been removed, with payment of royalties to the lessor. Thus the lessee is a purchaser

as well as an occupant, and in this situation considerations of good faith and fair dealing require that the lessor have good title to the minerals for which he is receiving a royalty.

If we had any feeling of doubt in the case at bar that doubt would be set at rest by the fact that the appellee's lease contained the reduction clause quoted above. "In the cases involving this type of clause it has been uniformly held that if there is a failure of the lessor's title he is entitled only to a proportionate interest in the rents and royalties and that the lessee is not estopped from taking leases from adverse claimants on the theory that a lessee cannot deny his landlord's title." Summers, Oil & Gas (Perm. Ed.), § 609.2. It is plain enough that the parties, by inserting the reduction clause in the lease, recognize the lessee's right to question the lessor's title, and thus they eliminate by contract any possibility of estoppel. Indeed, counsel for the appellee recognizes the controlling force of this clause and merely argues that it should not be applied where, as here, the lessor has no title whatever. In short it is contended that if the appellee owned only one per cent of the fee simple he would be entitled to only one per cent of the royalties, but since he owns no valid interest at all he should be entitled to one hundred per cent of the royalties. This argument does not require an extended answer.

Only one other matter need be mentioned. The appellants requested, in substance, that the appellee admit that the appellant Carter, as trustee, is the owner of the minerals in question. The appellee, by failing to answer the request, admitted the truth of the appellants' assertion. Ark. Stats. 1947, § 28-358; *Brown* v. *Lewis,* 231 Ark. 976, 334 S. W. 2d 225. The record also shows that the appellee's tax title is void, as the taxes for 1935 were paid in the Charleston district. It follows that the appellants are entitled to a decree dismissing the appellee's complaint for want of equity and canceling his tax deed as a cloud upon Carter's title to the minerals. The cause will

therefore be remanded for the entry of a decree to that effect.

Reversed and remanded.

WALLER *v.* RHYNE.

5-2179 338 S. W. 2d 670

Opinion delivered October 3, 1960.

J. Allen Eades, for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. Testator gave his widow the rents and profits each year during her natural life from 80 acres of land with the remainder to go to his two sons. The sons deeded their interest to one Williams through whom such interest was acquired by the appellee, Ed Rhyne. The widow (by her guardian) filed suit to cancel the deed to appellee. From a decree adverse to the widow comes this appeal. There are no disputed questions of fact.

U. G. Waller executed his will in 1934 and died in 1935, leaving his widow Nonnie Waller and two sons, Royal Waller and Everett Waller. The deceased's will, which was duly probated, contained this pertinent paragraph: "I hereby give and bequeath to my beloved wife Nonnie Waller, the rents and profits each year from my farm during her natural life . . . after having first paid the taxes, and upkeep of the farm. Said rents for her support and benefit. It is my will that my lands be not sold until my wife's death." Paragraph 4 of the will reads: "It is my will and desire that after the death of my wife that my land be divided equally between my two sons Royal Waller, and Everett Waller, share and share alike."

In 1938, Parker C. Craig was appointed guardian of Nonnie Waller, who was incompetent. As such guardian he executed a farm lease to J. A. Williams (who at the time was executor of U. G. Waller's estate) for a period of five years. Under the terms of this lease Williams was to pay all taxes and pay $42.50 a year to the guardian for the use of the land. Later the two sons above mentioned executed a warranty deed to Williams. Thereafter Williams executed a deed and assigned the farm lease to Dimon Sparks. Sparks and his wife in turn assigned the farm lease and executed their warranty deed conveying said lands to appellee, Ed Rhyne. On April 3, 1958, Rhyne and his wife executed an Oil, Gas and Mineral Lease to L. S. Youngblood, wherein Youngblood was to pay $1.00 per acre per year to Rhyne.

On August 31, 1959, Nonnie Waller, incompetent, by Parker C. Craig, Guardian, filed a complaint in equity against Ed Rhyne in which, among other things, the facts above related were set forth. The prayer was "that the deed executed to Rhyne be cancelled, set aside and held for naught and that he be required to pay to the guardian, Parker C. Craig, the sum of $160 . . . " which was the amount of rentals alleged to have been paid by Youngblood to Rhyne.

After a full hearing the chancellor refused to cancel the deed to appellee, refused to order the oil and gas rent-

als paid to appellant, and dismissed the complaint. We think the chancellor must be sustained.

As set forth by the chancellor, the deed to appellee in no way affects or detracts from the rights of appellant to receive the rents and proceeds from the farm which still go to the widow. Appellant's contention that the widow alone had the right to execute the oil and gas lease on the land under the provisions, Ark. Stats. §§ 53-302 *et seq.*, cannot be sustained. Said statutes clearly apply to one who holds property in fee tail, which is not the position of the widow in this case. The two sons as remaindermen, had a right to convey their interest, hence no reason is shown which justifies the cancellation of the deed to appellee.

It is argued by appellant that the five year farm lease to Williams (with the option to renew) was invalid because it was not executed in accordance with the provisions of Ark. Stats. § 62-427, which limits such lease to a period of one year. As again pointed out by the Chancellor, appellant has all this time accepted the rentals without objection. Whether this constitutes a waiver or an estoppel we need not decide at this time. The reason being that appellant did not in this litigation ask for a cancellation of said lease. Neither was the lessee made a party to this suit. Likewise, the oil and gas lessee was not made party to this litigation.

The record discloses that Williams (the farm rental lessee) was the Executor of the U. G. Waller estate at the time the lease was executed. Whether or not this fiduciary relationship affected the validity of the lease cannot be resolved at this time for the reason this was not an issue raised by the pleadings.

Our conclusion therefore is that the decree of the chancellor must be, and it is hereby affirmed, but without prejudice to further litigation relative to the above mentioned issues and parties not involved in this litigation.

Affirmed.

ARK. RACING COMMISSION *v.* HOT SPRINGS KENNEL CLUB, INC.

5-2177 339 S. W. 2d 126

Opinion delivered October 3, 1960.

[Rehearing denied November 7, 1960]

Conway & Webber, for appellant.

Warren & Bullion, by *Eugene Warren,* for appellee.

JIM JOHNSON, Associate Justice. The question for decision is: Did the Racing Commission act contrary to

the law and the evidence in cancelling the temporary franchise of the Hot Springs Kennel Club, Inc.?

A general review of the events leading up to the cancellation of appellee's temporary franchise will, we believe, lead to a better perspective of the issues here involved. Very briefly they are as set out below.

March 8, 1957, Act 191 of 1957 (Ark. Stats. §§ 84-2801 to 84-2842) was approved, authorizing dog racing in Arkansas under the supervision of the Arkansas Racing Commission.

December 6, 1957, the Hot Springs Kennel Club, Inc., was incorporated. Eleven days thereafter the articles of incorporation were amended to issue 500,000 shares of promotional stock.

February 6, 1958, the Kennel Club filed with the Racing Commission its application for a temporary franchise. It was known by everyone at that time that dog racing would first have to be approved by the electors in Garland County.

On May 6, 1958, an election was held. It was not known whether the results of the election were favorable to dog racing until the decision of this court became final on May 20, 1959—holding that dog racing had been approved.

By July 1, 1959, it had become known that there were disputing factions existing in the Kennel Club. The directors appeared before the Commission where these disputes were examined by the Commission. Ned Stewart, as chairman and spokesman for the Racing Commission, warned the Kennel Club that it must get its house in order or their franchise would be revoked.

On August 12, 1959, it appearing to the Commission that the Kennel Club had not heeded the warning of the Racing Commission, the Kennel Club's temporary franchise was revoked.

On September 4, 1959, after the Kennel Club had requested a hearing, a full hearing was held before the

Racing Commission, and the revocation was sustained and made permanent.

Following the revocation, the Kennel Club filed a petition for a Writ of Certiorari in the Circuit Court of Pulaski County. Upon that hearing before the Circuit Court the record made before the full Commission on September 4th was reviewed, and the order of the Racing Commission (revoking the temporary franchise) was reversed. From that decision of the Circuit Court an appeal is now prosecuted by the Racing Commission.

The Judgment of the Circuit Court. This judgment was based on two propositions, both of which we think were erroneous. One, the order of the Commission is void because no notice was given to the Kennel Club. Two, the order of the Commission was void because it amounted to the taking of the Kennel Club's property without due process of law.

One. While it is true that the revoking order issued on August 12, 1959, might be subject to the charge that no notice was given, however, it must be remembered that some 40 days previously the Kennel Club was warned that it must set its house in order or its franchise would be cancelled. The record reflects aboundingly that this warning was not complied with. Regardless of whether the above amounted to notice, it is undisputed that a full hearing was held on September 4, 1959, at the request of the Kennel Club. At this hearing a voluminous record was made, containing the testimony of officers of the Kennel Club and specific findings by the Commission. This record was the basis of seeking redress in the Circuit Court and it is the basis of this appeal. Appellee has had its day in court with ample notice.

Two. What we have said above also refutes the finding of the Circuit Court that property was taken from the Kennel Club without due process of law. It is well recognized by all authorities that a franchise granted by the State to conduct dog racing, just a franchise to sell liquor, is a privilege and not a property right. The State

gives the privilege and it can take away that privilege by the same token. In this instance it appears from the record that the Kennel Club had spent approximately $70,000 at the time its temporary franchise was revoked. This, of course, does constitute a loss of money by the Kennel Club, however, Ark. Stats. § 84-2826 (A) makes it very clear that if the law is not complied with the Kennel Club could have its franchise cancelled after it had spent approximately a million dollars. The Kennel Club had access to "due process of law" when it had a full hearing before the Racing Commission, before the Circuit Court, and now before this Court.

However, regardless of the reasons assigned by the trial court for reversing the Commission, it still remains to be considered whether the Commission was justified, under the law and the facts, in cancelling the temporary franchise. The several arguments presented by appellee to sustain the judgment of the Circuit Court in reversing the order of the Commission are included under the following groupings: (a) The franchise could be revoked only for one of the causes contained in the statutes and, in the alternative, (b) the testimony given at the hearing did not justify the Commission in revoking the temporary franchise.

(a) We cannot agree that the temporary franchise could be revoked only for one of the two causes mentioned in the statute. The statute referred to is Ark. Stats. § 84-2826. In substance, this statute provides that the temporary franchise *shall* be *forfeited* if appellee fails to acquire a site and commence construction of buildings and facilities within 90 days after notification of the result of the election. It further provides if such construction is begun and appellee fails to complete it and be open for business within one year after the end of the aforesaid 90 day period, in accordance with the plans and specifications, the Commission *shall cancel* the temporary franchise. In the first place it will be noted, and we think it is significant, that in these instances the Commission has been given no discretion. To so limit the power of the

Commission to cancel a temporary franchise would make it an automation, and would not be in harmony with other provisions of the dog racing statute. Ark. Stats. § 84-2819, which defines the power and duty of the Commission, among other things, provides that the Commission shall "hear and determine all matters properly coming before the Commission, and grant rehearings thereon. Take such other action, not inconsistent with law, as it may deem necessary or desirable to supervise and regulate, and to effectively control *in the public interest,* Greyhound Racing in the State of Arkansas." (Emphasis supplied.)

It is not disputed that the Commission has the right and duty to investigate thoroughly in selecting the character of people who propose to conduct dog racing before a temporary franchise is issued. This is in line with the Commission's duty to protect the public interest. If, after the Commission had selected proper personnel and had issued a temporary franchise, the personnel should be changed to include undesirable characters, it would be almost ridiculous to say that the Commission was powerless to revoke the franchise. To accept appellee's contention in this matter would amount to eliminating all distinction between the words "temporary franchise" and "permanent franchise", and would leave the Commission powerless to protect the public interest.

(b) *Was the Commission Justified by the Evidence.* Having arrived at the conclusion that the Commission has the power to exercise discretion, we now proceed to consider whether or not it was justified in this instance in revoking appellee's temporary franchise. However, before proceeding to this discussion it is necessary to determine the rule by which the Circuit Court must review the findings of the Commission on a Writ of Certiorari.

If the Circuit Court in this instance was authorized and empowered to try the issue *de novo,* this fact would lend support to an affirmance of its judgment reversing the Commission, but even then, we think, it would not be a justification. However, the Circuit Court in this instance had no right to try the case *de novo.* In the case of

Merchants & Planters Bank v. *Fitzgerald,* 61 Ark. 605, 33 S. W. 1064, among other things, said: "but it does not follow that the court, on hearing the writ, proceeds *de novo* and tries the case as if it had never been heard in the inferior court . . . the office of the writ . . . is merely to review for errors of law." See also *Hall* v. *Bledso,* 126 Ark. 125, 189 S. W. 1041; *Dixie Downs, Inc.* v. *Arkansas Racing Commission,* 219 Ark. 356, 242 S. W. 2d 132, and *North Hill Memorial Gardens* v. *Hicks,* 230 Ark. 787, 326 S. W. 2d 797. In the *Hicks* case the Cemetery Board, pursuant to Act 250 of 1953, issued a permit to one Russell to construct and maintain a cemetery near North Little Rock. Aggrieved parties applied to the Chancery Court to enjoin Russell. Following a hearing the Chancellor revoked the Board's permit. On appeal this Court reversed the Chancellor and in doing so approved this rule: "It has been uniformly held by this Court that where Boards are lawfully appointed and charged with the duty to investigate and determine certain facts, the court cannot substitute its judgment for the judgment of the Board, and the judgment of the Board provided for the purpose of ascertaining the facts is controlling unless there is evidence that it was *arbitrarily exercised.*" (Emphasis Supplied) In addition to the above, this Court in that same case also said: "The burden of proving that the Board's action in granting appellants' permit was arbitrary rested on the appellees." In applying the above announced rules to the case under consideration, it is in order to see whether the Commission was justified by the testimony in revoking the temporary franchise. This question we now proceed to examine.

A careful reading of the voluminous testimony taken before the Commission on September 4, 1959, reveals, in substance, the following situation with reference to the Kennel Club at the time of the hearing. When the application for a temporary franchise was filed February 6, 1958, the Kennel Club had been incorporated. The application showed that among others the directors included Charles S. Harriman, Alex T. Jamieson and Milan S. Creighton.

It developed later that these were the main promoters of the organization. Included among the directors also were J. O. Bennett of Lonoke, Leo Kuhn of Texarkana, W. P. Davis of Newport, James J. Dowds of Hot Springs, J. Bruce Streett of Camden and Jim Evans of Hot Springs. It is noted here that the last six directors later resigned or were deleted from the board, and their testimony in this connection will be set out later. It was stated in the application that two million shares had been authorized and that sufficient stock had been sold to promote the purposes of the corporation.

It appears further that a stockholders meeting was held in December 1951, (prior to the filing of the application) at which time, and after objections, the directors authorized the issuance of 500,000 additional shares (of which one-half carried no voting privileges) for promotional purposes. *None of this was shown in the application* which was filed February 6, 1958. Following that the election was held resulting in an appeal to this Court. Almost immediately after the decision of this Court became final, the latter part of May 1959, authorizing dog racing, there was another meeting of the Board at which time there arose the controversy which resulted in the action of the Commission. At this meeting it seems that four promoters, headed by Creighton, wanted the Board to give them 59,000 additional shares for promotional purposes. The promoters refused to tell the other members of the Board exactly the reason for this additional stock. In somewhat hazy phraseology, Creighton contended that it was necessary to pay promotional expenses. Also, at this meeting there was a proposal to hire Mr. Harriman at a salary of $18,000 per year plus an *unlimited expense account*. The controversy that arose over these and other matters apparently caused the removal of the above mentioned six directors, and it apparently brought on and engendered much litigation which finally resulted in a warning from the Commission on July 1, 1959, that if things were not straightened out the Commission would revoke the temporary franchise. A summary review of the

testimony given at the hearing is sufficient, we think, to justify the action of the Commission.

J. O. Bennett. Mr. Bennett testified that when Mr. Creighton approached him about stock in the Kennel Club that he asked Mr. Creighton ". . . if this was going to be for the benefit of the people of Arkansas, and be governed by the people of Arkansas, and he assured me it was, and I said in a case like that I will be glad to go along with you, but if it's going to result in two or three hogging it up, and be in court like this West Memphis track, then I didn't care to get into it." He said that Creighton assured him that he and Mr. Harriman would take approximately 20% of the entire issue to promote the deal. He further stated that: "We find now that there was very little stock that had been used for promotion." Q. "Now what was the purpose in asking for the additional 50,000?" A. "Something they promised somewhere, they wouldn't tell us. We asked if they would give us the names it was going to and they wouldn't give us the names." Bennett further testified that he objected to hiring Mr. Harriman at $18,000 a year plus an unlimited expense account. He also stated: "Personally I can't go along with that and I will resign and you can get someone in my place . . . and that is the last meeting I attended." The witness stated that he still owned 5,000 shares of stock for which he paid $2,500, although his name apparently did not appear on the books (a partial explanation of this was offered).

BRUCE STREETT. This witness has 5,000 shares of stock for which he paid $2,500. He testified, "I do not agree with the policies of Mr. Creighton and Harriman . . . and very openly and perhaps rather bluntly expressed my disagreement." He stated that he was testifying merely because he had been given a subpoena, and that he held no ill will toward anyone. Mr. Streett further stated that he was astonished when Mr. Creighton first made the proposition that he and the other three promoters wanted 500,000 shares. He stated that when Creighton first talked to him about it he asked him this question: "Creighton, is the thing going to be eaten up

with a lot of promotional stock which happened in West Memphis, or is it to be operated by Arkansas stockholders and controlled by Arkansas people, and he assured me only a nominal amount of organizational or promotional stock would be required." He further stated that Creighton told him that the stock would be worth a minimum of $2.00 per share shortly after it got on the market. Witness stated that this would give the four promoters a million dollars and that he "thought it represented a rather high price tag on the value of the services of these men." In speaking of the stockholders meeting, the witness said: "Some changes were made in the minutes. I never attended a stockholders meeting, but at that time I said, according to my memory, the minutes of the stockholders meeting did not speak the truth . . . " Witness further stated that according to his recollection, "Mr. Creighton said that that stock was to be voted for not only services rendered up to then, but services they would continue to render, these four men, in carrying through the election period and any litigation which might follow . . . " Streett is no longer a member of the Board.

JIM EVANS. This witness' testimony was similar to that given by Mr. Streett. He also owned 5,000 shares of stock for which he paid $2,500. He likewise objected to the issuance of 59,000 shares of stock to the four organizers for promotional purposes, and is no longer on the Board.

LEON KUHN. This witness owned 5,000 shares of stock for which he paid $2,500, and likewise objected to the issuance of the promotional stock and particularly the extra 59,000 shares heretofore mentioned. In speaking of what occurred at one of the directors meetings the witness had this to say: "Well, of course, there was some discussion . . . and then something come up there about we need some more stock to be issued to take care of some things we had to do to get this thing done and, of course, that's when I hit the ceiling and a few more of us in the same bunch sitting on that side of the table hit the ceiling, and that's what brought the fly in the ointment,

and from then on step by step it went from bad to worse." Kuhn is no longer a member of the Board.

RICHARD W. HOBBS. This witness was originally the attorney for the organization and was paid $5,000 for his services. He stated that when he filed the application on February 6, 1958, for a temporary franchise that he made it out like Mr. Creighton told him to, and no mention was made of promotion stock. He testified that the application stated that: "The present stockholders have purchased and fully paid for a sufficient amount of stock so as to enable the corporation to proceed with its corporate purpose and by agreement no stock will be sold to anyone other than the original stockholders unless the original stockholders do not fully subscribe to all of the authorized issue. In any event whatever stock remains unsold will be offered to the citizens of Arkansas." In speaking of the directors meeting the witness stated that: "Mr. Creighton was then questioned as to why they had used such a small proportion of the half a million shares when they were supposed to use the stock and why they in turn used the corporate cash rather than the stock in getting the election over and for promotional purposes, and they had no explanation other than they had used that much and that was all." In speaking of what occurred at the directors meeting, the witness further stated: "I told them I didn't want to have any part of that (referring to promotional stock). I had rather not even listen to it, and I asked to be excused, and I left the room." Q. "Well, why didn't you want to know?" A. "I will say I think I discussed it with Mr. Streett at the time and I told him I didn't like the smell of it."

Mr. Creighton testified at length and although he was pressed to do so he failed to give the Commission any explanation of what use he had made of the promotional stock or the money paid into the corporation by the stockholders relative to the expense of the election and the litigation. The record reveals that over $50,000 had been paid for stock and that less than $11,000 was in the treasury. Also, this appears in his testimony: Q. "Mr. Creighton,

there has been some litigation filed against this Kennel Club with which the Commission is familiar. Let me ask you this, what percentage of the stock does your group represent?" A. "Our group represents in excess of, I believe it's in excess of 90 per cent; might be 1 or 2 points either way, but approximately."

So the picture before the Commission was that Creighton and his group, who were supposed to have 20% of the stock to get the "show on the road" now has 90% of the stock, and the treasury is nearly depleted; large sums of money had been and were still to be expended for suspicious and unexplained purposes, and; the activities of Creighton and his group were such that some of the original stockholders felt obliged to sever their connections with the Board even at the risk of losing the money they had invested.

In view of that picture, this Court is unable to say the Commission acted arbitrarily or even that it acted against the weight of the evidence. Consequently the judgment of the Circuit Court should be, and it is hereby reversed.

George Rose Smith and Robinson, JJ., dissent.

5-2151 338 S. W. 2d 923

Opinion delivered October 10, 1960.

Lightle & Tedder, for petitioner.

James C. Cole and *Gerald W. Scott,* for respondent.

CARLETON HARRIS, Chief Justice. This is an action wherein petitioner, Wanda A. Naylor, seeks a Writ of Mandamus, directed to the Grant County Chancery Court.

On January 2, 1958, G. C. Naylor filed suit for divorce in the Grant Chancery Court against Wanda A. Naylor, on grounds of three years continuous separation. Mrs.

Naylor, a resident of Baltimore, Maryland, employed Mr. Sid Reid, an attorney of Sheridan, to represent her, and Mr. Reid filed an answer and moved for an order allowing attorney's fees and suit money. In compliance with this motion, the court entered its order allowing a total of $50. Mr. Reid subsequently died, and Mrs. Naylor employed her present attorneys to represent her. Thereafter, the discovery deposition of Naylor was taken, and Mrs. Naylor filed a cross-complaint, seeking a decree of separate maintenance; also, she sought temporary maintenance, suit money, and attorneys' fees *pendente lite.* The Court, on May 8, 1959, entered an order allowing $100 as suit money and $100 as attorneys' fees. Depositions of Mrs. Naylor and four others were taken in Baltimore.

On September 17, 1959, Naylor entered a voluntary non-suit, and on the same day, filed a new complaint for divorce, based upon the same grounds, but designating a different period of time in alleging the three years separation. On October 9th, attorneys for the two parties (following a letter written by petitioner's attorney in which he advised Naylor's counsel that he would be present in court on that date) appeared before Judge Goza, and according to the petition for writ filed by petitioner,

"requested the court to hear the merits of the cross-complaint, that being the only undisposed matter remaining in the original suit. In support thereof, Mrs. Naylor offered in evidence the deposition in chief of herself, her daughter, Mrs. Carolyn Alice Hoare, and three others. The court orally refused to allow the introduction of any evidence and declined to hear the merits of the cross-complaint. * * *

"That the court has refused to enter a formal order in accordance with its rulings allowing the plaintiff's nonsuit or its refusal to hear the cross-complaint, or to set a date certain for a hearing of the merits thereon.

"As a result of the action of the court, Mrs. Naylor has been unable to obtain a hearing of the merits of the cross-complaint, to obtain a specific setting for such a hearing, or to obtain an order of the court setting forth its rulings

from which an appeal could be taken, and has, therefore, been deprived of her legal and equitable rights."

The court apparently did enter an order requiring Mr. Naylor to pay into the registry of the court $35 per week temporary maintenance, though this order does not appear in the transcript[1].

In her brief, petitioner states the issues to be:

"(a) whether or not plaintiff could effectively dismiss his complaint and thereby deprive the court of jurisdiction of defendant's cross-complaint and, at the same time, deprive cross-complainant of a hearing in that case, and (b) whether or not the plaintiff could effectively dismiss his complaint in the original cause of action, and file an identical cause of action, before the cross-complaint had been disposed of and before the court had acted upon the plaintiff's attempt to dismiss."

The record does not reflect that respondent considered the nonsuit taken in the first case (No. 1533), to be applicable to the cross-complaint, and in fact, as already pointed out, an order for temporary support was apparently entered in this case, and such order was made after Naylor's taking of the non-suit. As to point (b), we are not here concerned with this question in the proceeding before us. The sole question is whether mandamus will lie, and the prayer of the petition is that this Court issue a writ of mandamus directing the Chancellor "to execute and cause to be filed orders in conformity with his oral rulings" made on October 9th.

As stated in Corpus Juris Secundum, Vol. 55, § 114, p. 183:

"The general rules governing mandamus apply in actions for divorce. Mandamus may lie to compel the court in divorce proceedings to hear and decide the cause and enter a decree unless there is an adequate remedy by appeal; * * *."

Also, in § 53, p. 88:

[1] The petition indicates that Naylor had, at least part of the time, paid this amount voluntarily.

"Since * * * the purpose of a writ of mandamus is not to establish a legal right but to enforce one which has already been established, it is essential to the issuance of the writ that the legal right of plaintiff or the relator to the performance of the particular act of which performance is sought to be compelled must be clear, specific, and complete, or, as otherwise stated, plaintiff or the relator must have a clear and certain legal right to the relief or remedy sought by the writ; and, according to some decisions, the right to the writ must be clear, undoubted and unequivocal, so as not to admit of any reasonable controversy."

See also *State* v. *Board of Directors, School District of Ashdown,* 122 Ark. 337, 183 S. W. 747. The record before us is rather incomplete, *i. e.,* many pertinent questions remain unanswered. For instance, the petition states that certain oral rulings were rendered; if these rulings were recorded by the court reporter, then, of course, there is a record, and petitioner is afforded the remedy of appeal. On the other hand, if the rulings were not recorded, a writ from this Court directing the Chancellor to reduce his findings and orders to writing, would be improper, since the then Chancellor recently passed away, and the present occupant of this judicial office would have no way of knowing the nature of the rulings rendered by his predecessor. The petition of Mrs. Naylor further states that her attorneys prepared precedents, embodying their interpretation of the court's rulings on that date, and forwarded same to the court for its approval; though petitioner states that copies of these proposed orders are attached to the petition, a search of the transcript fails to reveal these copies. Be that as it may, we have no right to direct the Chancellor to sign a particular precedent unless it be clearly established that such precedent correctly reflects that court's rulings. Certainly, there is no "clear, undoubted, and unequivocal" right to the writ shown by this record.

Actually, from remarks of counsel during oral argument, it appears that petitioner is really complaining that she is unable to obtain a trial. While it is true that the cause has been pending for some time, there is nothing in

the petition or accompanying exhibits which suggests that petitioner has sought to have the case set for hearing on its merits, other than the oral request which was made on October 9th. The proceedings on that date were not at the direction of the court; *i.e.*, the matter was not set for hearing, and Naylor's counsel was only present because of the notice from petitioner's attorney, advising that the latter would seek some sort of relief at that time. Courts, of course, and properly so, set their dockets and arrange dates for contested matters that will not conflict with other court business.

As was stated in the citation from Corpus Juris Secundum, mandamus will lie to compel the court to hear, and decide the cause in divorce proceedings, but there is nothing contained in the record before us which establishes that the court has arbitrarily refused to hear the case. Of course, Mrs. Naylor is entitled to a trial, and we are confident that if counsel for petitioner will request the Grant Chancery Court to set this cause down for hearing on its merits, on a day certain, the request will be complied with, and the litigation can be disposed of promptly and expeditiously.

Writ denied.

ADKINS *v.* MORGAN.

5-2202 338 S. W. 2d 921

Opinion delivered October 10, 1960.

D. D. Panich, for appellant.

Frank H. Cox, for appellee.

J. SEABORN HOLT, Associate Justice. This is a suit to foreclose a mortgage. For reversal of the decree appellant says: "(1) This is a simple foreclosure action, (2) A deed must be construed most strongly against the grantor, and (3) The agreement between the plaintiff and defendant was for sale by the acre."

Appellee, Ava Morgan, on May 4, 1953, borrowed $7,500 from appellant, Merle Adkins, giving as security for the loan a mortgage on some business property known as the "Rock-A-Way Court". This property is described in the mortgage by metes and bounds description. On August 11, 1955, Mrs. Morgan borrowed $1,200 additional from appellant which was also secured by the above mortgage (of May 4, 1953). Sometime in September,

1958, appellee began negotiations with appellant to sell to her this business property, and on October 17, 1958, appellant's written offer to purchase the business property for $45,000 was accepted in writing by Mrs. Morgan, the appellee, and a deed drawn up describing the property by metes and bounds and stating that it contained 2.5 acres and a down payment of $5,000 would be required. The record reflects that a part of the down payment and consideration to be paid by the purchaser, Mrs. Adkins, to the seller, Mrs. Morgan, was the cancellation of the debt that Mrs. Morgan owed to the purchaser, Mrs. Adkins, upon the property, and on October 20, 1958, Mrs. Adkins satisfied the mortgage record and when it subsequently developed that the property did not contain 2.5 acres, but only 2.13 acres, Mrs. Adkins brought the present suit to foreclose the mortgage, alleging that cancellation was procured without any consideration and was void.

On the facts presented, about which there appears little if any dispute, we think the evidence shows that there was ample consideration for the satisfaction of the mortgage by Mrs. Adkins which she now seeks to foreclose. She admitted execution of the contract to purchase the mortgaged property from Mrs. Morgan, and also that her act of satisfaction of the mortgage on the margin of the record was "part of the down payment for the property". This was ample consideration. Mrs. Morgan testified that she was ready and willing to complete the sales contract but that Mrs. Adkins has failed and refused to perform.

We said in the recent case of *Baker* v. *Taylor & Co.*, 218 Ark. 538, 237 S. W. 2d 471:

". . . where the vendor is in no default, and is ready and willing to perform the contract on his part, the vendee cannot recover back money paid by him on the contract. . . "

". . . It may be asserted with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed

and fulfill all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done . . . It would be an alarming doctrine to hold, that the plaintiffs might violate the contract; and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have."

On the contention of appellant that appellee misrepresented the amount of property she owned in acreage, *i.e.*, that she represented she owned 2.5 acres when in fact she only owned 2.13, was sufficient alone to set aside the sales contract, we do not agree. In the first place the sale involved here was not made by the acre but by a metes and bounds description. It appears well settled by our own decisions that when property is described by metes and bounds or definite lines as in the present case, the inclusion of any words indicating acreage is a matter of the description and not of the essence of the contract.

We said in *Glover* v. *Bullard,* 170 Ark. 58, 278 S. W. 645:

"The general rule on this question is clearly stated in *Weart* v. *Rose,* 16 N. J. Eq. 290. It is there said that the general rule as laid down by Chancellor Kent is that where it appears by definite boundaries, or by words of qualification, as 'more or less', or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is a mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case.

"On the other hand, where the sale is by the acre, and the statement of the quantity of acres is of the essence of the contract, the purchaser, in case of a deficiency, is entitled in equity to a corresponding deduction from the price."

And in *Hays* v. *Hays,* 190 Ark. 751, 81 S. W. 2d 926, we find this language:

"The mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specifications, is but matter of description, and does not amount to any covenant, or afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount. . . ."

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

George Rose Smith, J., concurring. I add these words of concurrence, perhaps needlessly, to mention one further point which the majority have not thought it necessary to discuss.

That point is this: There is no inflexible rule of law which invariably prevents a vendee from recovering his down payment after he has breached the contract by refusing to go through with his purchase. ". . . The right of a contractor, who is himself vitally in default, to some compensation of a restitutionary character, has been recognized and enforced in too many cases to deny such a right to a purchaser merely because he is in default. As in other cases, we must consider why he is in default, and the terms of the contract, and the amount that he was paid, and the extent of injury that his breach has caused." Corbin on Contracts, § 1129. Williston's statements to the same effect, appearing in § 1473 of his treatise on Contracts (Rev. Ed.), were quoted by us with approval in *Williams Mfg. Co.* v. *Strasberg,* 229 Ark. 321, 314 S. W. 2d 500.

Thus it is not the bare fact of default that prevents the appellant from recovering what amounted to her down payment under the contract of purchase. Her difficulty lies in her failure to offer any proof showing the damages suffered by the appellee as a result of the appellant's unjustified refusal to complete the purchase. The appellant's situation falls precisely within the following excerpt from Corbin's text:

"Whether the vendor has 'rescinded' for the purchaser's breach or not, and whether there is an express provision for forfeiture or not, it is clear that the pur-

chaser in default should in no case be given restitution of money paid unless it affirmatively appears that the money so paid is in excess of the injury caused to the vendor by the breach. The purchaser sues because he asserts that retention of the money is unjust enrichment; but there is no injustice if the defendant is retaining no more than the amount of injury caused by the plaintiff's breach. In cases where the plaintiff may have a right of restitution, he should be permitted to show that the defendant's injury is less than the instalments paid; but unless he successfully shows this, he should recover nothing." Corbin, *supra*, § 1132.

GEOMINERALS CORPORATION *v.* GRACE.

5-2107 338 S. W. 2d 935

Opinion delivered October 10, 1960.

Pickens, Pickens & Boyce, by *Fred M. Pickens, Schwartz, Schwartz* and *Landsman,* by *Burnett Schwartz,* St. Louis, Mo., *Lee Young,* Union, Mo., for appellant.

James A. Finch, Jr., Cape Girardeau, Mo., *M. F. Highsmith,* for appellee.

ED. F. MCFADDIN, Associate Justice. The appellant, Geominerals Corporation, seeks relief against appellees: Grace, one of its stockholders, and Potashnick, one of its directors. The claimed relief arises because of dealings the appellees had with the Corporation. Geominerals is a Delaware corporation, undertaking to make money through mineral leases and developments. Its principal place of business is in Louisiana, but it is duly domesticated in Arkansas. At all times herein, appellees Grace and Potashnick were stockholders in Geominerals Corporation; and from October 1957 to October 1958 Potashnick was a director of Geominerals.

In February 1957 Geominerals paid Grace $175,000 for 250,100 shares of stock in U. S. Manganese Corporation, which is an Arkansas corporation organized, *inter alia,* to engage in manganese development. This sale by Grace to Geominerals is not under attack in this case. In order to pay Grace the $175,000 Geominerals borrowed $109,000 from appellee Potashnick, who was then a stockholder, but not a director, of Geominerals. The debt was evidenced by a note due in thirty days, bearing 5% interest,

and secured by a pledge of the 250,100 shares of stock in U. S. Manganese Corporation. As aforesaid, in October 1957, Potashnick was elected a director of Geominerals, and was such director until October 1958.

At the request of Geominerals, Potashnick several times extended the due date of the note, but in the fall of 1957 he began to press Geominerals for payment. In early December 1957 he set a date for the sale of the collateral (the 250,100 shares of U. S. Manganese stock); and appellee Grace was prepared to make a bid on this stock for the amount of the note and interest, and then proposed to sell one-half of the 250,100 shares of stock to Potashnick for one-half of the amount that Grace had paid. Because he was importuned by some of his fellow directors of Geominerals, Potashnick postponed the scheduled December sale of the collateral, but set a final date in January, 1958, when, if not paid, he would foreclose his collateral, and also proceed against the directors who had endorsed the note.

When Geominerals learned of Grace's interest in the stock he was requested to make a loan to Geominerals for sufficient to retire the Potashnick note and interest; and Geominerals offered Grace 50,100 shares of the stock as a bonus if he would make Geominerals such a loan. Grace advised that he was not interested in making any loan, but was interested in buying all or a part of the 250,100 shares of the U. S. Manganese stock. Since the stock had cost Geominerals $175,000 it wanted some opportunity to try to sell the stock either for a profit or for enough to pay the cost; and the President of Geominerals (Mr. Tschirn) and Grace had telephone conversations about the matter. On January 17, 1958 there was a meeting of the directors of Geominerals held in Louisiana — at which Potashnick was absent — and the following Resolution was adopted:

"RESOLVED, that Charles W. Tschirn be given the authority to execute a sales contract in behalf of the Corporation to sell 250,100 shares of presently held U. S. Manganese Corporation stock under the following terms and conditions:

"(1) Geominerals will sell 250,100 shares of U. S. Manganese Corporation stock to R. B. Potashnick and Preston W. Grace in exchange for a note being held by R. B. Potashnick in the amount of $109,000 plus accumulated interest.

"(2) Geominerals will receive an option from R. B. Potashnick and Preston W. Grace to purchase 200,000 shares of U. S. Manganese Corporation stock for the sum of $125,000. Said option shall become effective on August 2, 1958 and shall become null and void on October 1, 1958 . . ."

Clothed with the authority stated in the resolution, Mr. Tschirn acting for Geominerals, entered into the following contract with Potashnick and Grace:

"THIS CONTRACT, Made and entered into this 29th day of Jan. 1958, by and between GEOMINERALS CORPORATION, a Delaware Corporation hereinafter referred to as 'Seller', and R. B. POTASHNICK, of Cape Girardeau, Missouri, and PRESTON W. GRACE, of Batesville, Arkansas, hereinafter referred to as 'Buyers', WITNESSETH:

"(1) Seller agrees to sell and Buyers agree to buy 250,100 shares of stock in U. S. Manganese Corporation for the sum of $113,798.99, and Seller agrees to deliver the said stock certificate with stock power duly executed attached, and Buyers agree, upon receipt of said stock certificate on this date, to pay the purchase price to Seller.

"(2) Buyers hereby grant to Seller an option to purchase from them on or after August 2, 1958, for a period extending to and ending on October 1, 1958, all or any part of 200,000 shares of U. S. Manganese Corporation stock at a price of 62½¢ per share. If Seller herein elects to exercise said option, it shall give written notice thereof to Buyers, specifying the number of shares to be purchased. If such notice is given, Buyers agree to deliver stock certificate, with properly executed stock power attached, to Seller upon receipt of the purchase price therefor. This option to purchase shall expire October 1, 1958.

"IN WITNESS WHEREOF, the parties hereto have executed this instrument, Seller executing it by and through its President, Charles W. Tschirn, and Buyers executing this instrument by having the same executed on behalf of them by R. B. Potashnick."

These copied instruments are hereinafter referred to as the "Resolution" and the "Contract". Grace and Potashnick had the 250,100 shares of U. S. Manganese stock transferred on the books of U. S. Manganese Corporation and reissued: 125,000 shares to Grace and 125,100 shares to Potashnick. On September 30, 1958, Geominerals notified Grace and Potashnick that Geominerals would exercise its full option to purchase, but never made any tender of money. On October 14, 1958 Grace and Potashnick filed the present suit in the Independence Chancery Court against Geominerals, praying: ". . . that a declaratory Judgment be entered herein construing the terms and provisions of the written contract executed by the plaintiffs and defendants on January 29, 1958, and determining the rights of the plaintiffs and defendant under the terms of said contract and declaring specifically that defendant, Geominerals Corporation, has no right, title or interest in and to all or any part of the 250,100 shares of U. S. Manganese Corporation stock . . ." By answer and cross complaint Geominerals claimed, *inter alia*: (1) that the contract of January 29, 1958 involving the stock was not a sale of the stock with an option to repurchase, but was, in fact, a loan and a cloak for usury; and (2) that Grace, as a stockholder, and Potashnick as a director of Geominerals, did not deal fairly with the Corporation. Trial in the Chancery Court resulted in a decree in favor of Grace and Potashnick on all points; and from that decree Geominerals brings this appeal, presenting the issues now to be discussed.

I. *The Contract Of January 1958.* Geominerals most vigorously urges that the contract of January 1958 (as previously copied) was a loan, and not a sale of the stock with an option to repurchase. Of course, if Geominerals should prevail on this point it would recover the entire 250,100 shares of stock and the debt would be cancelled

because it is practically conceded that there would be usury[1] in the transaction. So the first question is, whether the transaction of January 29, 1958 was in fact a loan. The rule is, that one who seeks to convert an absolute conveyance into a defeasanced instrument has the burden of proving the defeasance by evidence that is clear, unequivocal, and convincing. *Newport* v. *Chandler,* 206 Ark. 974, 178 S. W. 2d 240, 155 A.L.R. 1096; and *Marshall* v. *Marshall,* 227 Ark. 582, 300 S. W. 2d 933.

Tested by the rule of these cases, we cannot say that the Chancery Court was in error in holding that Geominerals failed to discharge such burden. It is true that the President of Geominerals, Mr. Tschirn, and three of the Directors testified that *they intended* all the time for the transaction to be a loan. But there are many circumstances which negative the effect of such testimony. Grace was approached to make a loan and he said he was not interested in a loan but that he was interested in buying the 250,100 shares because at that time it was believed that U. S. Manganese would be involved in a merger which would increase the value of its stock. Furthermore, the Potashnick note had on it the personal endorsement of some of the Directors of Geominerals, and by the sales contract of January 1958 these Directors escaped all personal responsibility. If the transaction were to be a loan, certainly Potashnick would not have released the personal endorsements on the obligation. Again, after executing the contract on January 29, 1958, the President of Geominerals advised all the stockholders that by paying the note of $109,000 the financial position of Geominerals had been considerably improved, and that Geominerals still had the option to reacquire the stock. The same directors, who testified that they *intended* the transaction to be a loan, admitted on cross examination that they voiced no objection when they saw the financial reports to the stockholders which stated that the transaction was a sale.

[1] This is true because the debt on January 18, 1958 was $113,798.99, whereas the option figure for repurchase was $125,000; and in addition 50,100 shares of stock would be retained by Grace and Potashnick.

Finally, on September 26, 1958, Geominerals, while still unable to obtain funds to reacquire the stock, nevertheless wrote a letter to Potashnick and Grace as follows:

"Please accept this letter as notice that Geominerals will exercise a certain option dated January 29, 1958 by and between Preston W. Grace, R. B. Potashnick, and Geominerals Corporation.

"Geominerals will exercise the full option to purchase 100,000 shares of U. S. Manganese stock from Preston W. Grace at 62½¢ per share, and 100,000 shares of U. S. Manganese stock from R. B. Potashnick at 62½¢ per share.

"Please make the stock available on October 1, 1958 at which time Geominerals will deliver the full purchase price."

If Geominerals had thought on September 26th that the transaction was a loan, then it would not have been writing about exercising *the option to purchase.* Potashnick and Grace waited all of October 1st for Geominerals to pay the money to exercise the option to repurchase, but no money was ever paid and no money has ever been tendered. Instead, sometime in October 1958 Geominerals entered into a contract with a Mr. Hess, who agreed to finance the litigation to try to recover some part of the 250,100 shares of stock.

Without further discussion of the evidence, we conclude that Geominerals failed to offer the quantum of proof required to sustain its contention of a loan; and such holding disposes of all question of usury since the transaction was not shown to be a loan.

II. *Geominerals' Claim Against Grace.* Geominerals urges that even though we should hold — as we have — that the transaction of January 1958 was in fact a sale and option, nevertheless we should set the sale aside because appellee Grace[2] was a stockholder of Geominerals and

[2] Of course, Geominerals urges the same arguments against Potashnick *as a stockholder* that are urged against Grace; but we reserve the claim against Potashnick for Topic III of this opinion because he was also a director of Geominerals, and we are considering in this topic only the stockholder phase of the case.

could not lawfully exercise, as he did, the duress and business compulsion[3] on Geominerals which culminated in the contract of January, 1958.

As heretofore recited, Grace was only a minority stockholder in Geominerals and was never an officer or employee of the corporation. In 13 Am. Jur. p. 468, "Corporations" § 415, the holdings are summarized: "Shareholders, it is said, have as much right to contract with a corporation as if they were strangers, provided the contract is *bona fide*, . . . Stockholders of a corporation have the same right that strangers have to purchase its property, . . ." In Fletcher's "Cyclopedia of Corporations", Permanent Ed., Vol. 13, § 5737, many cases are cited to sustain the text: "As stated in a preceding chapter, there is nothing in the relation between a corporation and its stockholders which *per se* prevents dealings between them. A stockholder may deal with the corporation through its duly authorized officers and agents, making any contract with it which a stranger might make, and the transaction is just as valid as if it were between the corporation and a stranger, . . ." See also 18 C.J.S. p. 1163 "Corporations" § 489, *et seq.*; and see also annotation in 31 A.L.R. 2d p. 663. Tested by these rules, and bearing in mind that Grace was only a minority stockholder, we fail to see wherein Geominerals can now complain against Grace. That he drove a hard bargain is quite apparent, but he dealt with the corporation at arm's length and the Board of Directors of Geominerals understood the bargain that Grace was driving when it adopted the resolution (previously copied) authorizing the execution of the contract. Thus, insofar as Grace is concerned, the Chancery decree is affirmed.

III. *Geominerals' Claim Against Potashnick.* This is the point in the case that has given us the most concern. In February 1957, when Potashnick loaned Geominerals the $109,000, he was only a stockholder; and what we have said about Grace would apply to Potashnick if he had

[3] Appellant cites us to the annotation in 79 A.L.R. 655 entitled: "Doctrine of business compulsion"; but the facts in this case show no application for such a doctrine, even if permissible under our cases.

remained as only a stockholder. But in October 1957 Potashnick became a director in Geominerals and so continued until the annual stockholders' meeting in 1958. It was during the time when he was a director that he pressed Geominerals for the repayment of the loan and finally took the contract of sale in January 1958. A stockholder may deal with a corporation as Grace dealt in this instance; but a director owes the corporation a higher duty than does a mere stockholder. In *Ward* v. *McPherson,* 87 Ark. 521, 113 S. W. 42, we said:

"... contracts between corporations and their directors, dealing with the corporate assets, are not void but voidable. Where they are held voidable, however, all agree that they are more closely scrutinized than ordinary contracts; and the burden is upon those claiming under them to prove that they are made in good faith and fair to the corporation. 2 Thompson on Corporations, §§ 4040-4049, 4060-4064; 3 Clark & Marshall on Corporations, p. 2302-2307, § 761; Helliwell's Supp. to Clark & Marshall, § 76; *Jones, McDowell & Co.* v. *Ark. Mech., etc. Co.,* 38 Ark. 17; *Searcy* v. *Yarnell,* 47 Ark. 269, 1 S. W. 319. The burden was upon Ward to show the fairness to the corporation of this lease, and this he has wholly failed to do."

To the same effect see also *Walker-Lucas* v. *Hudson Oil Co.,* 168 Ark. 1098, 272 S. W. 836; *Oliver* v. *Henry Quellmalz Co.,* 170 Ark. 1029, 282 S. W. 355; *Harris* v. *United Service Co.,* 182 Ark. 779, 32 S. W. 2d 618; and *Oil Fields Corp.* v. *Hess,* 186 Ark. 241, 53 S. W. 2d 444. The Arkansas rule is the rule generally. In Fletcher's "Cyclopedia on Corporations", Permanent Ed., Vol. 3, § 921, the above quoted Arkansas cases and cases from many other jurisdictions are cited to sustain this statement; "... the burden is on the director seeking to uphold the transaction not only to prove the good faith of the transaction, but also to show its inherent fairness from the viewpoint of the corporation and those interested therein." In 31 A.L.R. 2d 663 there is an annotation on dealings between a director and the corporation, and in regard to loans by a director the holdings are summarized in this language: "... a director or an officer of a corporation will not

be permitted to make a profit of his official position. He must give to the corporation the benefit of any advantage which he has obtained thereby . . ."

Tested by the holdings just summarized, we conclude that Potashnick did not offer sufficient proof to satisfy the burden resting on him to establish that the contract of January 1958 between him and the corporation was fair to the corporation. In January 1958 Geominerals owed Potashnick a debt and interest which amounted to $113,-798.99 and this debt was secured by 250,100 shares of stock in U. S. Manganese Company. Potashnick knew, or had notice, that Geominerals had paid $175,000 for this stock. The burden was on Potashnick to show that in January 1958 the 250,100 shares of U. S. Manganese stock had no greater value than the $113,798.99 which was the debt and interest then due Potashnick. If the stock had a greater value than $113,798.99 it was Potashnick's duty, as a director of Geominerals, to attempt the sale of the stock for the greater value and, after liquidation of his debt and interest, render the remaining balance to the corporation. He could not reap a windfall profit by pressing the corporation into delivering to him the stock at anything less than its full value.

Furthermore, in dealing with the corporation Potashnick accepted the benefits under a contract (*i.e.,* of January 1958) whereby if Geominerals should ever exercise its option it could never recover the entire 250,100 shares of U. S. Manganese stock but could only recover 200,000 shares; and that at a price in excess of what the Potashnick note and interest would have been at the time the option was exercised. We cannot say that this contract between Potashnick and Geominerals was fair to the corporation. It was a hard bargain to drive with a financially weak corporation that was struggling for its very existence. That this was known, or should have been known, to Potashnick is shown by the recitals in the minutes of the January 1958 meeting, which was the same meeting that authorized the Potashnick-Grace contract. These minutes read:

"Mr. Tschirn submitted an up-to-date financial statement to the Directors which showed the critical financial position of the Company at the present time. He stated that the Company had to secure $15,000 financing immediately, or the Company was in danger of Bankruptcy . . ."

Without further reviewing the evidence we conclude that Potashnick has not discharged the duty imposed on him of proving that his contract with Geominerals of January 1958 was fair to the corporation. The result is, that Geominerals must still have the right to pay Potashnick one-half of the original debt and interest[4] and recover of him the 125,100 shares of U. S. Manganese stock (which he received by virtue of his contract with the corporation in January, 1958), together with any dividends received by Potashnick on the stock since January 28, 1958. Geominerals should have sixty days from the date of this opinion in which to make said tender, but upon failure to make such tender, all rights of Geominerals to the said stock will be terminated. Only insofar as concerns Potashnick is the decree reversed. In all other respects the decree of the Chancery Court is affirmed, and the cause is remanded to the Chancery Court for further proceedings in accordance with this opinion. The costs of this Court are taxed, one-fourth against Potashnick and three-fourths against Geominerals.

Robinson, J. dissents on the first point. He is of the opinion that the sale was a loan and was usurious.

[4] As we calculate this figure, it would be $56,899.50 (one-half of the $113,798.99 for which amount Potashnick receipted Geominerals on January 29, 1958), together with interest thereon at the rate of 5% per annum (the rate of interest stated in the original note) from January 29, 1958 until paid.

WESTON *v.* HILLIARD.

5-2196 338 S. W. 2d 926

Opinion delivered October 10, 1960.

Thomas, Phillips & Warner, for appellant.

Wood, Chesnutt & Smith, by *James W. Chesnutt,* for appellee.

GEORGE ROSE SMITH, J. This is a boundary line dispute between the owners of two adjoining forty-acre tracts. For about fifty years the line now in controversy was marked by a fence that was maintained between the two forties. In 1959 the appellant, who owns the tract lying east of the disputed line, attempted to extend his possession by the construction of a new fence along what he contends to be the true line, which lies from 37½ to 62 feet west of the old fence. The appellee then filed this suit for an injunction, and the chancellor found the old fence line to be the correct boundary.

The proof is amply sufficient to show that the fence line became the established boundary by acquiescence. The Hilliard property was occupied by the appellant's parents from 1909 until her mother's death in 1941. During those years the Weston land was occupied either by the appellant, who bought it in 1926 or 1927, or by his predecessor in

title. For thirty-two years the adjoining owners silently acquiesced in the location of the fence as the visible evidence of the boundary line. These facts bring the case within the principles recently reaffirmed in *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S. W. 2d 490, and *Neely* v. *Jones,* 232 Ark. 411, 337 S. W. 2d 872. The appellant relies upon *Cossey* v. *House,* 227 Ark. 100, 296 S. W. 2d 199, but that case was distinguished in *Neely* v. *Jones, supra,* and need not be discussed again.

The appellant urges two other points for reversal. First, he insists that the trial court erred in refusing to permit him to prove that at some time after 1941 he acquired title to the disputed strip by adverse possession. The record does not support this contention. It merely appears that the appellee's attorney objected to one question on the ground that adverse possession had not been pleaded; but the court made no ruling, and in any event the appellant is not in a position to complain, as he failed to show what the proffered testimony would have been. *Wallace* v. *Riales,* 218 Ark. 70, 234 S. W. 2d 199.

Secondly, the appellant contends that after 1941 the Hilliard land was wild and unimproved and that therefore he acquired title to the full extent of his governmental subdivision of forty acres (including the disputed strip) by the payment of taxes for more than seven successive years. Ark. Stats. 1947, §§ 37-101 and 37-102. In answer to this contention it is enough to say that the proof does not show that the Hilliard land was unimproved and uninclosed for seven years after 1941. The house was unoccupied and eventually fell into disrepair, but it appears that the dwelling was still standing at the date of trial. It is also indicated that underbrush had grown up to some extent while the land was unoccupied. The present point, however, was not really developed at the trial, and the proof falls decidedly short of showing that the property had reverted to its original natural state and thus could be found to have become unimproved and uninclosed within the intent of the statute. See *Moore* v. *Morris,* 118 Ark. 516, 177 S. W. 6.

Affirmed.

HAMMON *v.* DIXON.

5-2206 338 S. W. 2d 941

Opinion delivered October 10, 1960.

J. Loyd Shouse, W. S. Walker and *Eugene W. Moore,* for appellants.

Virgil D. Willis, and *Fitton & Adams,* for appellees.

GEORGE ROSE SMITH, J. On August 17, 1951, the city of Harrison conveyed a tract of about three acres, lying within the city and across the street from the county hospital, to Boone Lodge No. 314, Free and Accepted Masons. In 1959 the Lodge announced its intention of constructing

a shopping center upon the land. This proposal aroused at least a limited amount of opposition, especially on the part of certain physicians who felt that the tract was needed for the future expansion of the county hospital. In the course of the controversy the Lodge's right to use the property for commercial purposes was questioned. In order to settle the dispute the appellees, officers of the Lodge, brought this suit on June 16, 1959, to quiet the Lodge's title. The city made no defense, but the county and the doctors, who were joined as representative taxpayers, attacked the city's 1951 deed to the Lodge. This appeal is from a decree upholding the deed and quieting title in the Lodge.

The appellants first contend that the tract in question was dedicated to park purposes by the city council in 1948 and that the restriction is still in force. The facts pertinent to this contention are these:

Back in 1943 the city had purchased a tract of about ten acres which was known as Johnson Park (though it was not used as a park) and included the land now in issue. Five years later the city sold the west half of Johnson Park to Boone county as a site for a county hospital. In preparing to build the hospital the county applied, through the State Board of Health, for a grant of federal funds. The Board of Health, before approving the proposed site, asked the county to obtain from the city a written agreement that the east half of Johnson Park would be maintained as a park and would never be used for business or residential facilities. To this end the city council, on April 21, 1948, adopted a resolution reading in part as follows:

"That the City of Harrison enter into an agreement with Aubrey Hickenbottom, Boone County Judge, wherein for the consideration of the construction of the Boone County Hospital on the west half of Johnson Park, the City of Harrison agrees that the east portion of said park shall be hereafter maintained by the city as a park and shall never be used for the construction of business or residential facilities."

A signed and attested copy of the resolution was filed with the Board of Health, but nothing else was done toward

putting the resolution into effect. The resolution was left in the city recorder's office, unsigned and unpublished. No written agreement between the city and the county, as contemplated by the resolution, appears to have been made. No instrument of any kind, giving notice of the resolution, was placed of record in the county recorder's office. And there is no proof that the Lodge, in buying the property from the city three years later, had any knowledge of the resolution.

Upon these facts the tract was not irrevocably impressed with its asserted character as a public park. By the resolution the city council expressed its intention to execute a contract dedicating the land to park purposes, but the intent was not carried into effect. No notice of the city's proposal was given, either by publication of the resolution, by the recordation of an acknowledged instrument in the county recorder's office, or by actual use of the property as a park.

Regardless of the city council's expectations, the mere passage of the resolution did not create in any one a vested right to demand that the land be devoted forever to public use. Legislative measures are, in the absence of vested rights, subject to repeal by later action of the legislative body. *Files* v. *Fuller,* 44 Ark. 273. It is our opinion that the resolution was effectively abrogated by the 1951 ordinance which authorized a sale of the property to the Masonic Lodge without any restrictions upon the use of the land.

A second contention is that this 1951 ordinance, by which the sale was authorized, was not properly enacted, for the reason that the aldermen's yeas and nays were not recorded. Ark. Stats. 1947, § 19-2403. The minutes of the council meeting recited that seven aldermen, who were named, were present and that one alderman, also named, was absent. In recording the passage of the ordinance in question the minutes recited that all the aldermen present voted in favor of it.

These facts constitute a substantial compliance with the statute. The purpose of recording the votes is "to

make the members of the council feel the responsibility of their action when important measures are before them, and to compel each member to bear his share in the responsibility, by a record of his action which should not afterwards be open to dispute.'' *Cutler* v. *Russellville,* 40 Ark. 105. The procedure in this case satisfied the purpose of the statute, by making the position of each alderman a matter of record, and consequently this procedure has uniformly been held to be sufficient. McQuillin, Municipal Corporations (3d Ed.), § 14.04.

We do not reach the merits of the appellants' other two attacks upon the city's sale to the Lodge. It is contended that the purchase price of $1,000 was so grossly inadequate as to indicate fraud and that the sale should be set aside because five of the seven aldermen who voted for the sale were members of the Lodge, though not themselves pecuniarily interested in the transaction. Even if these two charges be conceded to be well founded the sale would at most be voidable, not void. Ordinary principles of limitations and laches operate against the city with respect to a proprietary matter such as the sale of land. *Helena* v. *Hornor*, 58 Ark. 151, 23 S. W. 966; *Jensen* v. *Fordyce Bath House,* 209 Ark. 478, 190 S. W. 2d 977. Any right the city may have had to avoid the sale for inadequacy of price or for conflict of interest is evidently barred by its unexcused inaction for nearly eight years.

Affirmed.

ARK. STATE HIGHWAY COMMISSION *v.* DOBBS.

5-2146 340 S. W. 2d 283

Opinion delivered October 10, 1960.

[Rehearing denied December 5, 1960]

Dowell Anders and *Thomas B. Keys,* for appellant.

Jack Yates, Clinton R. Barry and *D. L. Grace,* for appellees.

PAUL WARD, Associate Justice. This litigation relates to the taking of property for highway purposes, and the principal question involved is the sufficiency of the notice of entry by the State Highway Department. The chancellor held in effect that there was no sufficient notice of entry, hence this appeal by the Highway Department.

The essential facts are not in dispute.

At the July, 1929 term of the Johnson County Court there was placed of record, at the request of the Arkansas Highway Commission, an Order appropriating certain lands for the purpose of making "changes" in State Highway No. 64 (commonly known as the Ozark-Clarksville Road). The lands affected by this Order extended along or near highway 64 a distance of 6 or 7 miles, and they were described relative to a Centerline, starting at the Franklin-Johnson County Line and running west. Said Centerline was designated by a lengthy compilation of survey notes setting forth "Stations", degrees, and distances—there being 39 Stations in all. Following this there was a separate compilation of figures showing the extent of the appropriated lands north and south of each Station, vary-

ing in an overall width of from eighty feet to one hundred eighty feet. At the end of the Order was a warning that the affected landowner "must present his claim to the court within one year from the date of this Order (July 13, 1929) or be forever barred."

A portion of the Centerline ran along a street in the town of Coal Hill upon which street abutted the property of the three appellees herein. At this place the Order affected property forty feet on each side of the Centerline, whereas the existing street was apparently only twenty feet wide. None of the appellees made a claim for damages within the said one year period.

In 1932 or 1933 the State Highway Department improved and surfaced the entire width of the said street without objections from appellees. After this and up to the year 1959 the Highway Department, according to the great weight of the evidence, did nothing to indicate it was claiming control over or intended to use any of appellees' property abutting the street or highway, but it did maintain the street or highway for a width of approximately twenty feet. Also, at no time after the Order and before it began its improvements in 1932 or 1933 did the Highway Department mark off, stake off, or otherwise physically indicate it was claiming use of more land than the original street.

In 1959, when the Highway Department undertook to improve and widen the street or highway in front of appellees' property they refused to give possession or entry, and the Highway Department asked for injunctive relief in the Chancery Court to obtain possession of and entry upon the additional land covered in the County Court Order. The chancellor granted the Highway Department the right of entry to the extent it desired, but only on condition that it post a cash bond "to guarantee payment of the defendants' damages, if any" for the land so appropriated.

In reaching the conclusion to affirm the Chancellor, in requiring the Highway Department to post a bond to guarantee payment to appellees for their land used in

widening the street or highway in front of their homes, we by-pass certain procedural questions raised by the pleadings and argued in the briefs, and base our decision on the ground that, under the facts and circumstances of this particular case, appellees had no adequate notice of entry by the Highway Department relative to the subject lands.

Underlying our approach to this issue is Article 2, Section 22 of the Arkansas Constitution which reads: "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." It is conceded that appellees' property has been taken and that they have received no compensation therefor. It is also reasonably certain that they will not receive compensation unless it is paid by the Arkansas State Highway Department.

For a reversal appellant relies heavily on the general rule well established by many decisions of this court that a landowner has a limited time to file a claim for land condemned for public purposes under a lawful court order, and that this limited time begins to run when the land is actually taken, that is, when an entry is made by the condemner. Thus it is here argued that the Highway Department made an entry in 1932 or 1933 when it improved the street or highway in front of appellees' property, that such entry was made pursuant to a lawful Order by the County Court in 1929, and that appellees filed no claim within the time provided by the Order. It is taken as conceded that the County Court Order was lawful and that appellees filed no claims within the time allowed by the Order. It is appellees' contention however that under all the facts and circumstances shown by the record here the entry by the Highway Department in 1932 or 1933 did not constitute notice to them that the State was entering upon or was taking any land outside the bounds of the original street or highway. As heretofore indicated we agree with appellees' contention.

From a practical or common sense standpoint, it is not unreasonable to believe that appellees were lulled into inaction and entrapped into a failure to file claims. It is

axiomatic that insufficient notice is no notice at all. Certainly the County Court Order would have conveyed to appellees no clear conception of the extent of the taking had they known about it. The Order was not even published and it is not shown that appellees had actual knowledge of its existence. Therefore the entry by the Highway Department on the already existing street was not actual notice that abutting lands were being taken or would ever be used. It is not unreasonable to assume that appellees, like most people in similar circumstances, would not object to but would be pleased with the improvement that was being made, and consequently they had no desire to seek compensation. Under these circumstances the chancellor was properly alert to prevent an obvious injustice to appellees, providing he could do so without violating previous decisions of this court. A careful examination of some of our decisions leads us to conclude that the Chancellor's findings were proper and justified.

In *Bollinger* v. *Arkansas State Highway Commission,* 229 Ark. 53, 315 S. W. 2d 889, there existed a factual situation almost parallel to the one in this case, and the court there gave Bollinger an opportunity to file his claim with the county court some 30 years after the condemning order was made and after the first taking by the Highway Department. Also in that case, unlike this case, there was evidence that the landowner had actual notice of the original taking. In *State Highway Commission* v. *Holden,* 217 Ark. 466, 321 S. W. 2d 113, where there was a County Court Order without notice to the landowners the court approved this language:

"It is our view that the act of taking is not complete *when the judgment of condemnation* is rendered. Since such judgment may be without notice, the lawmaking body must have had in mind an order of condemnation followed by entry upon the land. *Such entry, being physical and visible, affords the proprietor an opportunity to exact payment or to require a guaranteeing deposit.*" (Emphasis supplied)

In that case the Court said ". . . that the landowner is entitled to damages as of the date when the act of

taking is *complete*—that is, when his lands are actually entered and taken under the order." (Emphasis supplied) The Court also said: "The fact that the Highway Commission had put stakes through Holden's land before he planted the crop is not determinative. There were several sets of stakes; and the highway was not constructed along one line of stakes, but went according to another line."

Appellant cites several cases to sustain the proposition that entry upon part of a right-of-way is an entry on all of it. Typical of the cases cited are *Campbell* v. *Southwestern Telegraph & Telephone Company,* 108 Ark. 569, 158 S. W. 1085, and *Arkansas Fuel Oil Company* v. *Downs,* 205 Ark. 281, 168 S. W. 2d 419. In the former case the right-of-way was deeded by the landowner, hence there could be no question about the extent of the right-of-way. In the latter case appellee sued in tort for injuries received on the right-of-way, and the decision in no way affects the issue here involved. The cases heretofore cited emphasized the important distinction between a situation where the landowner is a party to the condemnation proceedings and a situation, as here, where the landowner was not a party and where he had no actual notice.

Our conclusion therefore, based on the facts and circumstances of this case as heretofore set forth, is that appellees did not have such notice, either in 1929, 1932 or 1933, of appellant's intention to take to the full extent of the Order so as to start the running of the statute of limitations against their claims. Consequently, the decree of the trial court is affirmed, but the cause is remanded to give appellees an opportunity to prove their damages and recover judgments therefor. Also, in order to avoid further misunderstanding and litigation, we here announce that when and if such judgments are obtained they must be paid by appellant provided they are not paid upon proper presentation to the County Court of Johnson County.

Affirmed and remanded.

Paul Ward, Associate Justice, on rehearing. Appellant strenuously contends that if the original opinion is allowed to stand it will seriously interfere with its Pri-

mary Road Program. This fact if true has, of course, no binding legal significance, but the assertion does impel us to carefully re-examine the opinion in the light of other suggestions of error.

The essence of appellant's objections appears to be: (1) There is no evidence in the record to sustain the finding that the new highway construction in 1932 or 1933 was along an already existing road or street; (2) If there was such a street there is no evidence to sustain the finding that it was 40 feet wide, and (3) The evidence does not sustain the finding that appellees had no notice of the taking by the Highway Department when the entry was made in 1932 or 1933. A careful re-examination of the record reveals no support for appellant's contentions.

(1) On this point, a re-examination of the record sustains our finding that the 1932 or 1933 road was constructed where a street already existed in the Town of Coal Hill. The opening statement in appellees' brief on appeal contains this statement: "The appellees own property adjacent to and fronting upon a street in the incorporated town of Coal Hill, Arkansas. This street was dedicated to public use and was in actual use as a public highway long prior to 1929; its width was 20 feet on each side of the center line, or a total width of 40 feet." This statement was not contradicted by appellant although the case was orally argued.

(2) Appellant, on rehearing, says: "There is no evidence in the record that there was a forty-foot street." In the opinion there is this statement: "At this place the Order affected property forty feet on each side of the Centerline, whereas the existing street was approximately only twenty feet wide."

(3) This objection begs the answer to the one fundamental issue of sufficient notice. It is obvious from the entire record that appellees knew appellant was engaged in improving (concreting a strip 18 feet wide) along the existing street, and also that the shoulders were being maintained for a few feet on each side. The

essence of the opinion is that this kind of notice, under the facts in this case, was insufficient as to the full extent of the land described in the County Court Order.

In the last paragraph of the opinion we stated that it was "based on the facts and circumstances of this case." To further emphasize the limited scope of the opinion we here reaffirm that statement, now that the facts and circumstances have been re-examined.

Rehearing denied.

FRANCIS *v.* THOMAS.

5-2174 338 S. W. 2d 933

Opinion delivered October 10, 1960.

G. W. Lookadoo, for appellant.

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

SAM ROBINSON, Associate Justice. The issue here is the priority of liens. On August 17, 1959, appellees filed suit against Bonnie N. Connelly for an attorney's fee in the sum of $3,559.90. On the same date the plaintiffs filed an affidavit and bond for the attachment of a certain Ford automobile alleged to be owned by Mrs. Connelly. The summons and attachment were served by the sheriff on August 20th and the sheriff took possession of the automobile under the order of attachment. On August 29, 1959, appellant Francis filed an intervention alleging that on July 23, 1959 he had loaned Mrs. Connelly $1,000 on the

automobile later attached by the appellees and that his mortgage was superior and paramount to the attachment which appellees had caused to be executed against the automobile. Later the case was tried and there was a judgment in favor of appellees against Mrs. Connelly for the amount asked in the complaint. The order of attachment was sustained and on order of the court the sheriff sold the automobile. It sold for $1,475, and the court ordered this money paid to appellees to be credited on the judgment. Francis, the intervenor and mortgagee, has appealed.

Ark. Stat. § 75-160 provides, among other things: "(a) No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances with or without notice until the requirements of this article . . . have been complied with. (b) There shall be deposited with the department [Department of Revenues] a copy of the instrument creating and evidencing such lien or encumbrance, which instrument is executed in the manner required by the laws of this State with an attached or indorsed certificate of a notary public stating that the same is a true and correct copy of the original and accompanied by the certificate of title last issued for such vehicle."

In *Cross* v. *Fombey*, 54 Ark. 179, 15 S. W. 461, this Court said: "We have no hesitation in saying that, under the statutes of this State, an order of attachment becomes a lien upon the property of the defendants, subject to seizure on execution for the debts of the defendant in the county, from the time the order comes to the hands of the officer, and that, by levy of the attachment and judgment sustaining the same, such inchoate lien is perfected, and takes precedence of the lien of a mortgage executed before the order of attachment came to the hands of the officer, but not recorded until afterwards."

In the case at bar, a copy of the mortgage was not filed with the Department of Revenues, as required by the foregoing statute. Section 60, par. (c), of Act 142 of 1949 originally required that holders of title retaining notes or contracts of purchase on registered vehicles must record same with the circuit clerk in the county where the payor resides. By Act 208 of 1951, paragraph (c) was specifically repealed. In 1959 a new title registration act (Act 307) was passed, which in many respects is indentical with Act 142 of 1949, but which omits any requirement that liens or encumbrances be recorded in the county of the purchaser. We therefore conclude that it was the intention of the Legislature to eliminate any requirement that such instruments be recorded by the circuit clerk. See *West* v. *General Contract Purchase Corp.*, 221 Ark. 33, 252 S. W. 2d 405.

Affirmed.

CARNEY *v.* BARNES.

5-2203 338 S. W. 2d 928

Opinion delivered October 10, 1960.

Douglas Bradley, for appellants.

Gerald E. Pearson, for appellees.

JIM JOHNSON, Associate Justice. This case involves a boundary line dispute. Appellants H. A. Carney and

Olva Carney, his wife, own a farm in the Western District of Craighead County. This farm is situated immediately north of the farm owned by appellees D. A. Barnes and Ethel Barnes, his wife. Appellee Lloyd Browning is a tenant on the Barnes farm. The disputed boundary line runs between these two farms.

At the conclusion of appellants' proof, appellees filed a written demurrer to the evidence which was sustained by memorandum opinion of the court. Appellants made formal objections and were granted leave to file specific objections to the court's ruling which were duly filed, and the court thereafter entered its order sustaining the demurrer and dismissed appellants' complaint, from whence comes this appeal.

The only real question presented here is whether the demurrer to the evidence was properly sustained. This depends under our holding in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, upon whether the proof, viewed in its most favorable light, would have presented a question of fact for the jury if the case had been tried at law.

Viewing appellants' proof under this rule, we find evidence to the effect that as early as the year 1921 there existed a woven wire fence with two strands of barb wire between appellants' land and the adjoining owner to the South and said fence and/or fence row remained in position through the years until the Spring of 1959. The record gives the exact geographic location of most of that fence. In the Spring of 1959 appellee Barnes (owner of South Farm) tore the fence down, or what remained thereof, and cleared out and disked down the elevation of the fence row and cut ditches across the fence row and the land immediately beyond, draining his land to the North thereby changing the drainage from a natural southern and eastern flow to a northern and western flow into an old slough bed on appellants' farm which had no natural outlet.

Appellant had possession and claimed ownership of all the lands lying North of the fence and fence row from the time of his purchase in 1938, and former adjoining owners to the South, at least as early as 1941 and 1946,

acquiesced in the fence and fence row being the line between the adjoining owners. Appellees acquiesced in the fence and fence row being the line between the adjoining owners until the Spring of 1959.

Certainly we cannot say that the proof set out above is not substantial upon the controlling question of fact. Therefore, we must conclude as we did in the recent case of *Neely* v. *Jones*, 232 Ark. 411, 337 S. W. 2d 872:

"We are of the opinion that the demurrer to the evidence should have been overruled, for the appellants' proof raised a question of fact as to the existence of a boundary by acquiescence. As we said in *Tull* v. *Ashcraft*, 231 Ark. 928, 333 S. W. 2d 490: '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. [Citing cases.]' In such cases the existence of a boundary line by acquiescence is an issue of fact, to be determined upon the evidence in each individual case. Thompson on Real Property (Perm. Ed.), § 3309."

Reversed.

5-2280 339 S. W. 2d 112

Opinion delivered October 17, 1960.

Ben B. Williamson, Nobe J. Henley and *Caldwell T. Bennett,* for appellant.

Marcus Fietz, Ivan Williamson and *Kaneaster Hodges,* for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to an election contest. Appellee, Dexter Brewer, following the Democratic Primary on July 26, 1960, was certified on July 29th, as the nominee for the office of

Sheriff of Stone County, by the Democratic Central Committee of that county. Appellant, Jake Cullen Storey, was his opponent in that election. On August 18th, which, under our statute, was the last day for the filing of an election contest (Sec. 3-245, Ark. Stats., 1956 Replacement), appellant took a complaint and summons (which had been prepared by one of his attorneys) to the office of the clerk for filing, but the clerk refused to file same until one of the attorneys listed as counsel for appellant signed the complaint. Appellant offered to sign this attorney's name, but the clerk would not permit this, and the latter placed a long distance call for the attorney at Harrison, but was unable to reach him. Appellant then took the papers back to the office of his Stone County attorney, but returned to the clerk's office about one hour later, and filed his complaint. In the meantime, the summons had been handed to Dr. T. J. Burton, coroner of Stone County,[1] by either this attorney or his secretary, and Dr. Burton took the summons and proceeded to the court house. Before entering the building, he met appellee at the west steps, and according to the testimony of this witness, Brewer stated, " 'I understand you've got some papers for me.' And I said, 'I do, and I appreciate it. I thought I'd have to hunt you.' " Burton then handed one copy of the summons to Brewer, and returned his copy to the office of appellant's Stone County attorney, where it has remained since that time.

Shortly after Burton and Brewer met on the court house steps, Storey offered his complaint for filing in the clerk's office, and the clerk filed same and accepted the fee for the filing. The record does not reflect that Storey asked that summons be issued on the complaint, though he stated that the fee included issuance of summons. Apparently appellant, knowing that Burton was in possession of the summons, was under the impression that the coroner would properly take care of that phase of instituting the suit. Later on in the day, Anita Vickers, secretary to appellant's Stone County attorney,

[1] Appellee contends that Burton was not legally serving as coroner, but a discussion of this contention is not necessary.

took the unsigned summons to the clerk, and according to Miss Vickers, requested the clerk to sign that summons or issue another. She stated that the clerk refused to do so. The testimony on this point is in conflict. The clerk's version, which was verified by Luther Avey (who happened to be in the clerk's office), was that she remarked "this is for Dexter Brewer, and he's done been summoned". The clerk stated that she did not refuse to sign it nor refuse to issue a new one, but after the aforementioned remark, Miss Vickers "picked it up and took it with her".

Appellee, appearing especially, and without entering his appearance, filed a Motion in Abatement, setting up that since no summons had been issued, the complaint had not been filed within the twenty days, and he asked that the cause be abated. On the same day, subsequent motions and pleadings were also filed in the following order:

(b) Motion in Abatement (Ineligibility of appellant to become nominee).

(c) Motion to Quash Summons.

(d) Demurrer.

(e) Motion to Strike.

(f) Motion to Strike.

(g) Answer and Response.

In each of these motions and pleadings, appellee commenced by stating that he was "not waiving any rights under any or either of the motions or pleas heretofore filed, but still insisting thereon". On September 15th, after the taking of testimony, the Circuit Court found "that the Contestee by his attorneys * * * filed with the Circuit Clerk of Stone County, certain motions and pleadings; that the Contestee was not entering his general appearance, but was appearing specially and reserving his right to question the jurisdiction of the court; that the court considered these motions to be filed before the demurrer and answer and so ruled; that no summons had ever been issued by the Clerk of the Court and, therefore, suit was never begun and the motion to abate

should be granted." Judgment was accordingly entered dismissing the complaint. From such judgment comes this appeal. For reversal, appellant first contends that appellee, by his conduct, is estopped from questioning the validity of the service, and second, that the pleadings filed by appellee had the effect of entering his general appearance.

Article VII, Section 49, of our State Constitution, provides:

"All writs and other judicial process shall run in the name of the State of Arkansas, bear teste and be signed by the clerks of the respective courts from which they issue."

This provision is reiterated in Section 27-303 (Ark. Stats., Anno.). Section 27-306 provides:

"The summons shall be dated upon the date it is issued, and signed by the clerk."

Further, Section 27-313:

"No summons or order for a provisional remedy shall be issued by the clerk in any action before the plaintiff's complaint or petition therein is filed in his office."

While there is some authority to the effect that acceptance or acknowledgment of service precludes a party from taking advantage of defects or irregularities in the service,[2] it will be noted here that this is not the case of a defective summons; rather, *no summons was ever issued.* In other words, this suit was not properly commenced, and appellant is accordingly compelled to rely upon one of the two points heretofore mentioned for reversal. We do not agree that the doctrine of estoppel can apply in this case. Appellant refers to the testimony of Dr. Burton, who testified that Brewer took the "summons" willingly and stated "I understand you've got some papers for me. They didn't have to do this. I would have been glad to have volunteered anyway". The testimony of the clerk, wherein she stated, "This is for

[2] For instance, failure to properly sign a summons after issuing same, signed by an improper party, or other clerical omission of the clerk.

Dexter Brewer and he's done been summoned", is also relied upon.[3] In addition, appellant contends that the clerk refused to issue a new summons. Of course, appellee is not responsible for the actions of the clerk, and whatever statements were made by her are not binding upon him unless it be shown that the sheriff and clerk were acting in concert. This was not shown. At any rate, an essential element of estoppel is that the complaining party relied upon the act or statement of the person sought to be estopped, and suffered detriment because of such reliance. It is readily apparent in the instant cause that appellant did not rely upon either the alleged statement made by Brewer to Dr. Burton, or the statement attributed to the clerk, for Miss Vickers, who testified on behalf of appellant, was subsequently sent to the clerk's office to get the clerk's signature and seal, and, according to her evidence, also requested the issuance of a new summons. As to the contention that the clerk refused to issue a new summons, this was disputed, and was purely a question of fact. We have repeatedly held that we will not reverse the Circuit Court upon a question of fact if there is any substantial evidence to support the findings. Even if it were shown that appellant had relied upon Brewer's statement to his (Storey's) detriment, we are of the opinion that appellant still could not prevail. In Corpus Juris Secundum, Vol. 72, § 113, p. 1168, it is stated that a defendant may waive certain defects or irregularities in process or service, by failure to assert the irregularity by timely plea or motion, or by participating in the trial on the merits of the case — but where the defect in the process or service is so substantial as to render same void, it cannot be cured by waiver, consent or agreement. On page 1169, "acceptance or acknowledgment of service precludes the party from taking advantage of any defects or irregularities in the service, but such a waiver cannot bind third parties; *nor does it apply to any de-*

[3] Other alleged acts are also mentioned in appellant's brief, but all took place after August 18th, which was the last day for filing suit. Reliance upon these acts could not have worked to the detriment of appellant, for it was then too late to institute action.

fects in the summons itself."[4] In other words, a defendant may, by his conduct, be estopped to object to the manner in which service is made, but estoppel does not apply where the defect in the summons itself is so substantial as to render the process void. Certainly, this litigation deals with a substantial defect, for the summons was never issued by the clerk, and the "summons" served on Brewer by Dr. Burton, prepared away from the clerk's office, bearing no signature, and no return made to the office of the clerk as required by law, was totally ineffective.

We likewise find appellant's second contention to be without merit. It is the position of Storey that the filing of the demurrer to the complaint, and the various motions thereafter, prior to any action being taken on the first motion, had the effect of entering the appearance of appellee. The filing of either a general demurrer or answer would have had this effect. We so held at least as far back as 1892. See *Hawkins* v. *Taylor,* 56 Ark. 45, 19 S. W. 105. As previously mentioned, the first line in this demurrer contains the language "not waiving any rights under any or either of the motions or pleas heretofore filed, but still insisting thereon", and each pleading or motion following the original motion in abatement contains substantially the same language.

Appellant cites, in support of his contention, the cases of *Nichols* v. *Lea,* 216 Ark. 388, 225 S. W. 2d 684, and *Federal Land Bank of St. Louis* v. *Gladish,* 176 Ark. 267, 2 S. W. 2d 696, but these cases are not applicable to the cause before us. In each of those cases, the defendant appeared specially by motion for the purpose of questioning the jurisdiction of the court over the defendant; however, in each case, the defendant filed a cross-complaint, and we held that the question of jurisdiction was accordingly waived. The determining factor is whether defendant seeks affirmative relief, *i.e.,* whether the pleading filed is more than a defensive action. In the *Federal Land Bank* case, *supra,* the Court said: "Where he preserves his protests he cannot be

[4] Emphasis supplied.

said to waive his objection. But certainly he cannot go into Court and ask affirmative relief and enter into the stipulations entered into in this case, without entering a general appearance". No affirmative relief was sought in the cause before us, and the mere fact that the various pleadings were filed before action was taken on the first pleading is without significance. Actually, it would seem that the filing of the several motions and pleadings, each conditioned upon the failure of the prior defense, would have been of benefit to the court and all parties, since this was an election contest, and an early trial advisable.

Though perhaps it seems that appellant, while apparently seeking in a *bona fide* manner to institute suit, was somewhat the victim of circumstances, the provisions of our Constitution and Statutes were not complied with, and this appeal must fail.

Finding no reversible error, the judgment is affirmed.

LEIGH AND THOMAS *v.* HALL, SECRETARY OF STATE.

5-2273; 5-2274 339 S. W. 2d 104

Opinion delivered October 17, 1960.

Wright, Harrison, Lindsey & Upton, for plaintiff Leigh; *Rose, Meek, House, Barron & Nash,* for plaintiff Thomas.

Bruce Bennett, Attorney General, for defendant; *McMath, Leatherman, Woods & Youngdahl,* for intervenor.

J. Seaborn Holt, Associate Justice. These two actions (No. 2273 and No. 2274) are original actions under Amendment Seven (7) to the Constitution of the State of Arkansas to test the sufficiency of the popular name and ballot title of an initiated measure sponsored by Arkansas State AFL-CIO bearing the popular name "Arkansas Minimum Wage And Overtime Act" and questioning the following ballot title:

"An Act to prescribe for employees, with certain exceptions, a minimum wage of eighty cents per hour increasing after one year to ninety cents per hour and increasing after two years to one dollar per hour. Further to prescribe for employees, with certain exemptions and exceptions, overtime wages of at least one and one-half times their regular rate for all hours worked over

forty-eight in each workweek, for all hours worked over forty-four in each workweek after one year; and for all hours worked over forty in each workweek after two years; and to provide for the administration of minimum and overtime wage provisions by the Arkansas Department of Labor; to provide for the enforcement of such provisions; and for other purposes."

Specifically, the plaintiffs, Leigh and Thomas, present for our consideration (1) the sufficiency of the popular name, (2) the sufficiency of the ballot title and (3) the sufficiency of the publication of the measure.

(1)

We have only a small body of case law dealing with the sufficiency of the popular name title of initiated measures. In *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 272, the term "A Statewide Prohibition Act" was attacked. The opponents argued that since the measure actually allowed possession of a single quart of intoxicating liquor, the name was misleading. But this court upheld the title concluding: "It seems too clear for argument that the popular name need not have the detailed information as is required for the formal ballot title, else there would be no difference between the two . . ."

We did, however, point out in *Moore* v. *Hall,* 229 Ark. 411, 316 S. W. 2d 207, that catch phrases and slogans which tend to mislead and to color the merit of a proposal would be rejected. In *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470, the popular name "Modern Consumer Credit Amendment" which was considered along with the ballot title was rejected. We there said: ". . . no convincing explanation is offered for the use of the word 'modern'. It is certainly not descriptive of the amendment, unless we are to say that every amendment is modern merely because it is new. Rather, the word is used as a form of salesmanship, carrying the connotation that the original constitution is old-fogyish and outmoded, while the proposed amendment is modern and therefore

desirable. Even though the popular name need not be as explicit as the ballot title, *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72, it should not be used as a vehicle for unnecessary praise of the measure. In studying his ballot the voter is not bound by the rule of *caveat emptor.* He is entitled to form his own conclusions, not to have them presented to him ready-made."

Plaintiff Thomas argues that the word "Arkansas" is useless in the popular name and that it tends to give partisan coloring to the act and is calculated to arouse state pride. Only a general response need be made to this contention. The term "Arkansas" seems most appropriate in view of the fact that the act would apply only in the State of Arkansas. It is also argued that the word "overtime" in the popular name is misleading because it does not say overtime for what. Although individual words may be singled out for attack in a popular name title, their meaning should be ascertained from their context. Only the most naive would not understand the meaning of overtime when he reads the title "Arkansas Minimum Wage and Overtime Act". Besides, as we have previously pointed out, the popular name need not have detailed information in it. We see no merit in the contention that the popular name is partisan colored and misleading.

(2)

As to the sufficiency of the ballot title, the general principles of law applicable to ballot titles were well stated in *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470: "On the one hand, it is not required that the ballot title contain a synopsis of the amendment or statute . . . It is sufficient for the title to be complete enough to convey an intelligible idea of the scope and import of the proposed law . . . We have recognized the impossibility of preparing a ballot title that would suit everyone . . . Yet, on the other hand, the ballot title must be free from 'any misleading tendency, whether of amplification, of omission or of fallacy', and it must not be tinged with partisan coloring."

In the order in which they appear in the court's opinion, a ballot title must be (1) intelligible (2) honest, and (3) impartial. The ballot title here in question is intelligible, concise and clear. It summarizes in about 130 words an act containing over 4,000 words and 18 sections. We have in some of our cases indicated that a ballot title of unusual length would be objectionable. See *Newton* v. *Hall,* 196 Ark. 929, 120 S. W. 2d 364. In the case of *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248, we said: ". . . The real objection urged to the title of the act . . . is the fact that it is not sufficiently elaborate. Any other ballot title would be susceptible of the same criticism unless it were in itself a complete abstract of the act which would be impracticable under ordinary conditions." And further, ". . . it has never been understood that the title of a statute should disclose the details embodied in the act. It is intended simply to indicate the subject to which the statute relates . . . When the *general subject* is indicated, no detail matters need be mentioned in the title." (emphasis supplied)

The title of a measure does not have to constitute a synopsis of the measure, *Bradley* v. *Hall, supra.* Here the act in question informs the voter that a minimum wage of $1.00 per hour will take effect in three years; stair-stepping from $ .80 an hour the first year to $ .90 an hour the second year and finally to $1.00 an hour the third year. Further, that all time worked over 48 hours, then 44 hours, and finally 40 hours is to be paid at the rate of time and one-half over a period covering three years from enactment. Also, that the administration of the minimum wage is provided for and that the Arkansas Department of Labor will administer the provisions of the act. The voter is also apprised of the fact there are certain exceptions and exemptions in the act. We conclude that the title meets the requirement that it must be intelligible.

The second requirement of a ballot title is that it must be honest. There can be no misleading tendency, whether of amplification, omission, or of fallacy. *West-*

brook v. *McDonald,* 184 Ark. 740, 44 S. W. 2d 331. It would be difficult to find a title which more honestly conveys an idea of what the act is intended to enact. The act provides for a stair-stepping of the minimum wage from $. 80 to $1.00 per hour and the ballot so states. The act provides for certain exemptions and the ballot so states. The act provides for administration of the act and the ballot title so states. The act provides for overtime wages and the ballot title so states. We find no dishonesty or improper amplification in the title

A third requirement is that the title be impartial. It is interesting to note that although both plaintiffs refer to the rule against partisan coloring, neither apparently is able to create specific allegations to this effect in relation to the ballot title. Crawford, *Statutory Construction,* pp. 85-86, states: "It would appear sufficient if the title would fairly convey to the average voter the general purpose and tenor of the law, without a tendency to mislead or to give a partisan coloring, since the ballot title is obviously intended to be a means of identification of the measure submitted to the electorate." We fail to find any misleading tendency in the ballot title.

(3)

The last contention of the plaintiffs is that the defendant did not comply with the publication requirements of Amendment Seven (7) of the Arkansas Constitution. Amendment Seven (7) to the Arkansas Constitution provides in relevant part that:

"Initiative petitions for State-wide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the afore-mentioned filing, the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation."

The publication of the initiated act was had on June 5, 1960. Parts of the petition were filed on June 27, some 22 days later; the remaining parts of the petition were

filed on July 7, 32 days after the publication. It is urged by the plaintiffs that the petition was not published 30 days before the filing of the petition.

We cannot agree with the plaintiffs for a number of reasons. We have previously held that the filing of several parts constitute but one petition. Such was the holding in *Hammett* v. *Hodges,* 104 Ark. 510, 149 S. W. 667, decided under our previous Initiative and Referendum Amendment (referred to as number ten in the case but more accurately number four) to the Constitution which was superseded by the present Amendment Seven. Although there was no provision for a thirty-day publication of the act in this previous Initiative and Referendum Amendment, the language with reference to filing petitions is practically the same as the language in the present Amendment Seven. The court, in passing upon the question of filing petitions, there held that all names in an initiated petition, even though on different sheets and *filed on different dates* should be considered as one petition. We there stated:

"We are of the opinion that the requisite number may be ascertained by adding together the names of the legal voters signed to the separate sheets that have been filed with the Secretary of State within the time prescribed by the act where these separate sheets, embodying the petition of the signers thereto, are in the form prescribed by the statute, and all containing the same subject-matter, the language of each petition being the same. The separate sheets, thus presented and filed in the contemplation of the Constitution and statute, constitute but one petition."

To support the above ruling, the court in the same case cited *Bridewell* v. *Ward & Key,* 72 Ark. 187, 79 S. W. 762, decided under our old three-mile local option law which provided for local option within three miles of any church or school upon petition for a majority of the voters within the three-mile area. Several petitions were filed with the county court, a remonstrance was filed and allowed by county court, whereupon it was discov-

ered by the petitioners that several petitions were not filed and it was asked that they be allowed to file them in support of their original petition. This was denied. Several days later another group of citizens asked leave to file supplemental petitions which the county court denied. This court, on reviewing the proceedings of the lower court, reversed the action of the county court saying of the petitions: "The fact that there were many of them, and that they were filed on different times, did not change their prayer or lessen the number of petitioners. The filing of the remonstrance made no such change, nor did it cut off the right of the petition. They were in effect only one petition and were evidently intended to be used as one."

To the same effect is *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. 2d 72, decided under the present Initiative and Referendum Amendment, where we said: "Amendment No. 7 to the Constitution of the State is the Initiative and Referendum Amendment, and provides, among other things, that the petition for an act to be initiated by the people may be circulated and presented in parts, but each part of any petition shall have attached thereto the affidavit of the persons circulating the same, etc. This means necessarily, that the 'parts' constitute but one petition for any proposed act filed with the county clerk, who shall pass upon the sufficiency of the petition."

Thus it can be seen that there is a definite thread running through our cases which says that all petitions in initiated measures should be counted as one petition even though filed on different dates. The only reasonable conclusion we can draw from the above citations is that the filing on June 27 and the filing on July 7 were but one petition.

The remaining problem then is, what is the proper date to consider the filing of the petition (since all parts are one); should it be June 27 or July 7? In considering this the following rules must be taken into account. This court is definitely committed to the proposition that Amendment Seven should be liberally construed to

effectuate its purpose. In the case of *Reeves* v. *Smith, supra,* this court enunciated the following guide posts for interpreting Amendment Seven: ". . . Amendment No. 7 necessarily must be construed with some degree of liberality in order that its purposes may be well effectuated. Strict construction might defeat the very purposes, in some instances, of the amendment.

"Another reason, not less cogent, is that Amendment No. 7 permits the exercise of the power reserved to the people to control, to some extent at least, the policies of the State, but more particularly of counties and municipalities, as distinguished from the exercise of similar power by the Legislature, and, since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction. We are supported in this idea of more liberal construction by the following case: '*Ferrell* v. *Keel,* 105 Ark. 380, 385, 151 S. W. 269, 272. In construing this amendment, it is our duty to keep constantly in mind the purpose of its adoption and the object it sought to accomplish. That object and purpose was to increase the sense of responsibility that the lawmaking power should feel to the people by establishing a power to initiate proper, and to reject improper legislation.'

"In *Townsend* v. *McDonald,* 184 Ark. 273, 278, 42 S. W. 2d 410, 413, Chief Justice Hart, discussing *State ex rel* v. *Olcott,* 62 Ore. 277, 125 Pac. 303, said: 'This would make each sheet a separate petition and would be putting form above substance. No matter how many signers there are to a petition and how many sheets are used, they are pasted together and become a constitutent part of the same petition. It is only necessary that a full and correct copy of the measure on which the referendum is asked be filed with the petition and attached thereto, in order that the petitioners may have the opportunity to read it and inform themselves as to the act to be referred before signing the petition, if they wish to do so.'

"A realization that behavior and conduct in all affairs of life is never perfect, requires due allowances must be made for human frailties. Therefore only a substantial compliance is required. *Westbrook* v. *McDonald,* 184 Ark. 740, 746, 43 S. W. (2d) 356, 43 S. W. (2d) 331."

In this particular case there are sound reasons for applying the liberal construction rule. In the first place, the pertinent language in Amendment Seven (7) relative to 30 days notice is far from being unambiguous. In the second place, we can conceive of no purpose for requiring the 30 days advertisement other than to inform the electors of the provisions of the proposed act so that they may vote intelligently at the November election. The purpose manifestly was not to inform the electors so that they might decide whether or not to sign the petition. This is true for in many instances most or all of the signatures are obtained before the act is published. It is common knowledge that it requires much time and effort to obtain petitions on a state-wide basis, and that it is necessary to have a large number of petitions, and further that these petitions are filed from time to time with the Secretary of State. This being true, we think the only reasonable interpretation and conclusion to be drawn is that the filing date must be as late as the date the last petition is filed and this would be July 7, which was more than 30 days after publication.

The act was properly certified by the Secretary of State and the prayer for an injunction is denied.

McFaddin and Robinson, JJ., dissent.

George Rose Smith, J., not participating.

Ed. F. McFaddin, Associate Justice (dissenting). I find myself unable to agree with the majority opinion, because I am thoroughly convinced that the sponsors of the proposed Act failed to comply with the clear requirements contained in Amendment No. 7 to the Constitution relating to the publication of the proposed Act thirty days before filing. Here is the said provision in the Constitution:

"Initiative — The first power reserved by the people is the initiative. . . . Initiative petitions for State-wide measures shall be *filed* with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least *thirty days* before the aforementioned *filing,* the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation. . . ." (Emphasis supplied.)

The Constitution says that at least *thirty days* before the petition is filed the proposed measure shall have been published in a newspaper. On June 5, 1960 the proposed measure was published; on June 27, 1960 the petition was filed; and that is twenty-two days after publication and not thirty days. Twenty-two does not equal thirty: that is the basis of my dissent.

I say the petition was filed on June 27th, and such is the record before us. Under the provisions of Amendment No. 7 the sponsors of a proposed initiated measure were required to file signatures of 8% of the legal voters. That would mean 22,950 signatures were required on this petition. On June 27th the sponsors of the measure filed a petition containing 40,103 signatures, and the Secretary of State on June 27th (in keeping with § 2-210 Ark. Stats.) notified the sponsors as follows: "I have examined your petition and according to our count you have 40,013 signatures. Since 22,950 signatures are required for an initiated act, this is to advise you that your petition has met this requirement. . . ."

What was that filing date? The answer is, June 27, 1960, because on that date the certificate was issued by the Secretary of State and the filing was complete. Anything occurring after that date is mere surplusage. The present lawsuit was filed in this Court on September 7, 1960; and one of the attacks against the measure was the failure to comply with the thirty-day publication requirement. Under date of September 20, 1960 (thirteen days after the filing of this suit in this Court), the Secretary of State issued a certificate reading: "This is to certify

that the sponsors of the proposed initiated act, which has for its popular name, 'Arkansas Minimum Wage and Overtime Act', completed the filing of their petitions on the 7th day of July, 1960 when they filed petitions containing 1057 signatures proposing said measure. Dated this 20th day of September, 1960." So, after this lawsuit was filed in this Court, the sponsors went back to the Secretary of State and obtained a certificate that on July 7th 1057 additional signatures had been filed; and the sponsors say that this 1057 additional signatures filed on July 7th "completed the filing", and made the "substantial compliance" to be on that day. I cannot follow such reasoning: the Secretary of State had already issued a certificate on June 27th, as required by § 2-210 Ark. Stats., that the petition had been filed on June 27th. The filing on July 7th was entirely an afterthought, just as was the September 20th certificate from the Secretary of State, which was obtained by the sponsors after this lawsuit had been filed, and which was brought into the record by amendment to the sponsors' original answer. If the July 7th filing of 1057 additional signatures had been required by law, then the Secretary of State (under § 2-210, Ark. Stats.) was obligated to issue his certificate of that filing within fifteen days from July 7th; and the Secretary of State is too careful an official to have failed to comply with § 2-210, Ark. Stats. He would have issued a certificate within fifteen days of July 7th (rather than on September 20th) if anyone had thought that July 7th was the filing date. It is crystal clear that the July 7th filing has been seized on by the sponsors as a crutch to support a broken limb. July 7th cannot have been a date of "substantial compliance" because the whole filing had been completed and certified on June 27th.

As to why Constitutional Amendment No. 7 required that the publication of the measure must be thirty days before the filing, I do not know. Some say that the purpose of the thirty-day publication requirement prior to filing was to inform the *voter,* rather than the *signer,* of the proposed measure. Such an argument is making a surmise to be stronger than plain words. I do know that

this provision of thirty days publication is in the Amendment No. 7; and its presence is quite commanding. Arkansas originally adopted[1] the Initiative and Referendum by a Constitutional Amendment in 1909, which is *not* the present Amendment No. 7. Nowhere in the said 1909 Initiative and Referendum Amendment was there any requirement of thirty days publication before filing. At the General Election in November, 1920 there was adopted by the people our present Amendment No. 7; and in our present Amendment No. 7 there appears, for the first time, the provision requiring the publication of the proposed measure to be thirty days before the filing of the petition. The point I am making is, that this language was put into the amendment deliberately and after we had operated under a previous Initiative and Referendum Amendment for a number of years. So it must have been thought that there should be publication before the proposed petition was filed. The framers of the Constitutional Amendment said thirty days; I cannot make twenty-two days equal thirty days.

In tax sales we have repeatedly held that when a statute states a number of days for publication such provision is mandatory. In *McWilliams* v. *Clampitt,* 195 Ark. 908, 115 S. W. 2d 280, the statute required the notice to be published weekly for two weeks before the sale. Notice was published on June 1st and June 8th and the sale was held on June 12th. The Court found that the notice was published for only eleven days, and held the sale was, therefore, void. Some of the other tax sale cases holding the time of publication to be mandatory are: *Laughlin* v. *Fisher,* 141 Ark. 629, 219 S. W. 199; and *Thweatt* v. *Howard,* 68 Ark. 426, 59 S. W. 764. In 82 C. J. S. 235 the general holdings are summarized: "Constitutional and statutory

[1]The 1909 Initiative and Referendum Amendment is listed as Amendment No. 10 to the Constitution and may be found on pages 121 and 122 of Kirby & Castle's Digest of 1916, and on pages 1239 and 1240 of the Acts of the Legislature for the year 1909. It may also be found listed as Amendment No. 7 on pages 131 and 132 of Crawford & Moses' Digest of 1921. To provide procedural matters for the 1909 Amendment, the Arkansas General Assembly of 1911 adopted Act No. 2 of the Extraordinary Session that convened on May 22, 1911 (see pages 582 *et seq.* of the printed Acts of 1911).

provisions with respect to the publicity which must be given initiative and referendum measures are mandatory; . . ."

The sponsors say that the filing on July 7th was "substantial compliance"; but there is another rule of law which says that before an election the provisions of the election law are mandatory, even though after the election they may be held merely directory. *Orr* v. *Carpenter,* 222 Ark. 716, 262 S. W. 2d 280; and *Horn* v. *White,* 225 Ark. 540, 284 S. W. 2d 122. We are now considering this case *before* the election; and in that situation the thirty-day provision for publication is mandatory. It has not been complied with in this case.

Therefore, I respectfully dissent.

HULSIZER *v.* JOHNSON-BRENNAN CONSTRUCTION CO.

5-2178 339 S. W. 2d 116

Opinion delivered October 17, 1960.

Little & Enfield, for appellant.

Pearson & Pearson, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a Workmen's Compensation case. Mrs. Alta Hulsizer filed

claim because of the death of her husband, Ivan Hulsizer, who suffered an attack and died while employed by Johnson-Brennan Construction Company at Rogers, Arkansas. The Referee allowed the claim; the Full Commission, reversing the Referee, disallowed the claim; the Circuit Court affirmed the Full Commission; and Mrs. Hulsizer appeals to this Court. Appellant recognizes the long established rule that if there be substantial competent evidence to support the finding of the Full Commission, then we will affirm such finding.

The appellant points out, however, that the Full Commission reversed the Referee and decided the case against Mrs. Hulsizer because of the testimony of Dr. Riggall; and the appellant urges that Dr. Riggall's testimony was not competent evidence because, in answering a hypothetical question, he assumed facts not contained in the question or otherwise shown in the record. We reach the conclusion that the appellant is correct and the Circuit Court judgment must be reversed.

In allowing the claim the Referee delivered a written opinion from which we copy pertinent excerpts:

"The deceased, Ivan Hulsizer, was 51 years of age on the morning of September 27, 1957, and reported to work at his usual hour of 7:30 A.M. at Rogers, Arkansas. He was employed as a common laborer for said construction company and had been employed by it for a period of two years prior to the date of his death . . . On the morning of September 27, 1957, the deceased commenced his work at 7:30 A.M. and continued his work until approximately 8:15 A.M., when he collapsed at work and was taken by ambulance to the Rogers Memorial Hospital in Rogers, Arkansas where he expired a few minutes after arrival in the emergency room of said hospital. An autopsy was performed on the body of the deceased and a finding was made by Dr. Grier Warren that the deceased had died from a cerebral hemorrhage . . . On the morning of September 27, 1957, the deceased, along with co-workers, was carrying and stack-

ing wet or damp lumber that had been used in the laying of concrete floors and foundations. These pieces of lumber carried individually by the workers weighed from sixty to seventy pounds and were picked up from the floor and carried approximately twelve to sixteen feet where they were stacked. The deceased was in the process of carrying one of these pieces of lumber when he collapsed on the job. The death certificate, along with the autopsy report and various medical reports, was introduced and made a part of the record in this claim. This evidence, together with the testimony of Dr. John Rollow, Dr. Grier Warren, Dr. Neal Compton, Dr. Stewart Wilson, and Dr. D. H. Butler, together with the claimant's widow and two lay witnesses, was presented for the benefit of the Referee in this claim . . .

"A great deal of time and effort have been devoted to reading and studying all of the testimony and evidence introduced and made a part of the record in this claim. The Referee is of the opinion that two decisions of the Arkansas Workmen's Compensation Commission and of the Supreme Court of the State of Arkansas are determining factors in the decision of this claim. In the well known case of *Bryant Stave Company* v. *White,* 227 Ark. 147, 296 S. W. 2d 436, the Supreme Court defined the term 'accidental injury' to cover the condition of the deceased in this claim. In the later case of *E. P. Bettendorf & Co.* v. *Kelly,* 229 Ark. 672, 317 S. W. 2d 708, the Court went further in making a determination of what is an accidental injury arising out of and in the course of employment.

"A study of the evidence in this claim, taken together with the medical testimony, shows, in the opinion of the Referee, that the worker had a pre-existing condition which taken together with the work load that the deceased was undertaking on September 27, 1957, and the resulting death were all related to his work and that his work was the causal connection in his death. The medical evidence shows that if the claimant did have a pre-existing condition it was a weakening of one of the ves-

sels near the brain which weakness was ruptured by the heavy work and stress and strain that were placed upon the workman on the date of his death causing his instant death."

The cases cited by the Referee clearly sustained his conclusions. The facts here are strikingly similar to those in *Bettendorf* v. *Kelly,* 229 Ark. 672, 317 S. W. 2d 708, wherein we reaffirmed our unanimous holding in *Bryant Stave Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 438, and also said:

"Every time a mortal is born everyone knows that some time the mortal will die, so the death of a mortal is never unforeseen or unexpected in the light of human existence. But just when the death will occur and under what circumstances, is certainly unforeseeable and unpredictable. So it was with the heart attack of Mr. Kelly in the case at bar: no one could tell when it would occur. He was engaged in a line of work, he was exerting himself by the driving of nails into the pallets, he collapsed: his death was, therefore, accidental and within the scope of his employment."

One of the witnesses who testified before the Referee was Dr. Grier Warren, who made the autopsy of Ivan Hulsizer; and the portion of that report germane to the issue here is as follows:

"BRAIN: The skull was opened and there was evidence of intra-cranial bleeding throughout. There was no evidence of fracture as noted on the entire surface of the skull which was smooth. Blood covered the whole area of the brain and extended down into the spinal column. *The blood vessels could not be traced out due to the amount of blood and hematomas on the upper surfaces. No areas of hemorrhage or softening are noted on the cut surfaces of the brain.*

"GROSS PATHOLOGY: Specimen of brain revealed evidence of intra-cranial bleeding with large hematomas over entire surface of specimen. *Entire brain*

was examined. No evidence of hemorrhage or softening within the brain tissue was noted.

"DIAGNOSIS: Cerebral Hemorrhage." (Emphasis supplied.)

When the case was heard before the Full Commission the transcribed testimony, heard before the Referee, was presented and the only other additional witness was Dr. Riggall, who testified as an expert as to the cause of Ivan Hulsizer's death. There is no claim that Dr. Riggall ever saw Ivan Hulsizer, alive or dead. The doctor stated that he had read a transcript of the testimony before the Referee and was then asked a hypothetical question as to the cause of Ivan Hulsizer's death. The hypothetical question incorporated in it the autopsy report about the brain of Hulsizer:

"And upon opening the cranium free blood covered the whole area of the brain and it was found throughout the cavity extending down into the spinal column. *No ruptured vessels could be demonstrated and no areas indicative of previous trauma* to the head were found and that death resulted from shock due to cerebral hemorrhage." (Emphasis supplied.)

The hypothetical question ended:

"From the foregoing assumed facts, do you have an opinion to a reasonable medical certainty whether the work caused or contributed to the cause of the death of the hypothetical Ivan Hulsizer?"

Dr. Riggall giving an answer covering three typewritten pages concluded that Hulsizer died because of a congenital pathological defect known as a congenital aneurysm. In so concluding the doctor said:

"I find it easy to reconstruct the picture and I am certain from those facts that death occurred from the *rupture of a congenital aneurysm of one of the internal carotid vessels and this was not found by the maker of the post mortem,* because it is on the floor of the brain and could not be seen unless the brain had been removed

and that is the usual method of showing this lesion. (Emphasis supplied.)

Promptly the attorney for Mrs. Hulsizer objected, saying:

"I object and ask that the entire answer be stricken from the record for the specific reason that the autopsy report and report of the autopsy surgeon does not show such defect. He is assuming such defect to be there and that the autopsy surgeon did not do a proper job of autopsy and is presupposing facts without the record and the whole response should be stricken from the record." The Commission allowed the doctor's answer to remain; and therein we consider reversible error to have occurred. It is readily apparent when the autopsy report is compared with Dr. Riggall's answer — as we have emphasized the portions — that he assumed a fact contrary to the autopsy report: *i.e.,* that a blood vessel had ruptured in a portion of the brain not discovered by the doctor making the autopsy. On this assumption — contrary to the autopsy report — Dr. Riggall predicated his conclusion. Dr. Riggall's testimony must be discarded as stating something to be a fact that was not shown on the autopsy report. Dr. Riggall's entire testimony is bottomed on his position that because of his medical experience he knew more about the brain than did the physician who made the autopsy report and that certain facts had to be true as regards the autopsy even though such facts were not shown. Superior knowledge is a wonderful attribute; but an expert in answering a hypothetical question must base the answer on admitted facts and cannot assume facts contrary to or in addition to the admitted facts. That is the vice of Dr. Riggall's testimony.

There are two sources from which an expert can gain facts in a case like this. One is from a personal examination, and the other is the factual statement in the hypothetical question. As previously stated, Dr. Riggall never saw Ivan Hulsizer, alive or dead: so Dr. Riggall's only source from which he could gain facts on which to

testify must be the facts stated in the hypothetical question. As the Supreme Court of Washington stated in *Clayton* v. *Dept. of Labor,* 48 Wash. 2d 754, 296 P. 2d 676:

"If his opinion is based upon a hypothetical question and he assumes the existence of material conditions not established by the evidence or not included in the question or inferable therefrom, he destroys the validity of his answer . . ."

The same Court in *Berndt* v. *Dept. of Labor,* 44 Wash. 2d 138, 265 P. 2d 1037, said:

"It is equally clear that, when an expert who knowns nothing about an individual except what is included in a hypothetical question assumes the existence of certain conditions not included in that question and not necessarily inferable therefrom, he destroys the validity of his answer. See *Rich* v. *Philadelphia Abattoir Co.,* 1947, 160 Pa. Super. 200, 50 A. 2d 534. In that case the expert assumed the existence of arteriosclerosis, which was not established by the evidence. In this case, the expert assumes worries about economic security and a diseased coronary artery, neither of which was established by the evidence or included in the hypothetical question."

In *Atlantic Coast Line R. Co.* v. *Shouse,* 83 Fla. 156, 91 So. 90, the Supreme Court of Florida said:

"The answer of an expert witness to a hypothetical question must be given upon the basis of the facts stated in the question, and without recourse to other facts within his own knowledge. See *Fuller* v. *City of Jackson,* 92 Mich. 197, 52 N. W. 1075; *City of Wichita* v. *Coggshall,* 3 Kan. App. 540, 43 Pac. 842; *Link* v. *Sheldon,* 136 N. Y. 1, 32 N. E. 696; *Burns' Ex'r.* v. *Barenfield,* 84 Ind. 43. But the witness in this case not only declined to answer the question upon the basis of the facts stated, but had recourse, not to facts within his own knowledge, but to an imaginary case of his own construction, built in part from some of the facts embraced in the question, his deductions from conflicting evidence referred to in

the question, and in part from his imagination, and a case which had no basis whatever in the record."

Other courts have recognized the same rule. See *Fidelity & Cas. Co.* v. *Van Arsdale,* Tex. Civ. App., 108 S. W. 2d 550; *Mounsey* v. *Bower,* 78 Ind. App. 647, 136 N. E. 41 and *Ballance* v. *Dunnington,* 241 Mich. 383, 217 N. W. 329, 57 A. L. R. 262. See also Rogers on "Expert Testimony", 3rd Ed. § 54; and 32 C. J. S. 366 *et seq.,* "Evidence", § 557 *et seq.*

The Commission committed error in allowing Dr. Riggall's answer as competent. Therefore, the judgment of the Circuit Court affirming the Commission is reversed and the cause is remanded to the Circuit Court with directions to reverse the Commission's award and remand the cause to the Commission for further proceedings in accordance with this opinion.

George Rose Smith and Robinson, JJ., dissent.

George Rose Smith, J., dissenting. I agree that the opinion of an expert witness cannot properly be based upon a set of hypothetical facts for which there is no proof in the record. For instance, in *Payne* v. *Thurston,* 148 Ark. 456, 230 S. W. 561, a medical witness was asked a hypothetical question which included an assumption that the plaintiff had suffered an injury to her left side. There was actually no evidence of such an injury. It was correctly held that the question was defective, for neither the jury nor the court could possibly determine the extent to which the witness's opinion was based upon the fact that was assumed but not proved.

That is not the situation in the case at bar. Here the physician performing the autopsy concluded that the cause of death was cerebral hemorrhage, but he did not attempt to specify the exact spot at which the hemorrhage occurred. On this point he merely reported that the entire brain was examined and that no evidence of hemorrhage within the brain was noted.

Dr. Riggall simply attempted by a process of reasoning to determine the situs of the hemorrhage. He stated

that within the cranium there are only three arteries of sufficient size to produce a hemorrhage such as that disclosed by the autopsy. Two of these arteries are so situated that the jet of blood from a fatal hemorrhage would plow a channel within the brain tissue so large that it could not be missed at the post mortem examination. But, reasoned Dr. Riggall, if the rupture occurred in the third artery—the internal carotid artery—it would account for the condition actually found and yet might not be observed by the maker of the post mortem, as the rupture would be on the floor of the brain and not readily discernible. From this conclusion Dr. Riggall went on to give his basis for thinking that the decedent's work would not have contributed to a hemorrhage within the internal carotid artery.

I think the majority are misapplying the rule which precludes an expert witness from basing his opinion upon a fact not in evidence. If, for instance, this autopsy had contained a positive finding that the hemorrhage took place in one of the two arteries first mentioned by Dr. Riggall, then of course he could not have based his opinion upon an assumption that the damage happened within the internal carotid artery. In that situation the rule in question would be properly applied.

But this is not the case at hand. The autopsy actually contained an affirmative finding of a cerebral hemorrhage, and by definition such a hemorrhage must occur within the brain. But the author of the post mortem report did not attempt to say just where within the brain the hemorrhage took place; he merely stated that no evidence of the hemorrhage within the brain was noted. All that Dr. Riggall did was to attempt by a chain of logic to demonstrate where the hemorrhage probably occurred. His opinion was of course open to contradiction by other testimony and to rejection for want of persuasiveness, but it was clearly admissible. Otherwise we are driven to the patently untenable position that is being adopted by the majority. That position boils down to this: (1) If the autopsy report affirmatively shows the situs of the hem-

orrhage that fact cannot be disputed by expert opinion, for that would contradict the report. But (2) if the autopsy report fails to show the situs of the hemorrhage the missing fact cannot be supplied by expert opinion, for that too would contradict the report. Thus it makes no difference whether or not the post mortem examiner makes a finding of the cause of death, for in either case his report constitutes the final word. I cannot agree with such questionable logic and therefore dissent.

ROBINSON, J., joins in this dissent.

GENTRY *v.* LITTLE ROCK ROAD MACHINERY CO.

5-2218 339 S. W. 2d 101

Opinion delivered October 17, 1960.

Jeff Duty and *Wayne Foster,* for appellant.

Moore, Chowning, Mitchell, Hamilton & Burrow, for appellee.

George Rose Smith, J. This is a suit by the appellant for rescission of a conditional sales contract by which he bought a secondhand tractor from the appellee, for $6,875. The complaint asserted two grounds for cancellation of the contract: First, that the seller had made false representations about the condition of the tractor, and, secondly, that there had been a breach of an express or implied warranty. The chancellor granted rescission upon the second ground and entered a decree canceling the contract and adjusting the account between the parties. An appeal and cross appeal bring the whole case up for review in the form of a trial *de novo.*

The really basic issue is the appellant's right to a cancellation of the agreement, either for fraud or breach of warranty. Gentry testified that in making the purchase he cautioned the appellant's salesman that he knew nothing about this kind of tractor and that he was relying upon the salesman's word as to the condition of the machine. Gentry says that the salesman, after receiving this warning, assured him that the tractor was in A-1 condition. The salesman disputes Gentry's testimony, but the chancellor found that the representation was actually made, and this finding cannot be said to be against the weight of the evidence.

The proof shows clearly enough that the tractor was not in A-1 condition and that the seller's repeated efforts to repair it were unavailing. We need not discuss this evidence, for the appellee does not, and indeed could not, contend that the machine was in A-1 condition.

The chancellor set aside the contract for breach of warranty despite the fact that the written agreement recites that the seller makes no express warranty with respect to the property and that the buyer waives any warranty implied by law. The appellee relies upon this contractual disclaimer of all warranties to support its argument that the trial court erred in decreeing a rescission of the agreement for breach of warranty.

It is true that we held in *Moss* v. *Gardner,* 228 Ark. 828, 310 S. W. 2d 491, that § 71 of the Uniform Sales Act permits the parties to agree that all implied warranties will be excluded from their agreement. Ark. Stats. 1947, § 68-1471. The *Moss* case involved a conditional sales contract, but we overlooked § 76 c of our Sales Act, by which the legislature expressly excepted conditional sales from the operation of the statute. Ark. Stats., § 68-1479; *Cloud Oak Flooring Co.* v. *J. A. Riggs Tractor Co.,* 223 Ark. 447, 266 S. W. 2d 284. Hence § 71 of our Sales Act is not properly applicable to the conditional sales contract now before us.

We do not find it necessary to analyze in detail the appellant's asserted cause of action for breach of warranty, for we are convinced that the cancellation decree should in any event be affirmed upon the alternative ground of misrepresentation by the seller. In the circumstances of this case, where the purchaser was paying a very substantial sum, amounting to about 40 per cent of the price for a brand-new tractor, we do not regard the seller's representation as a mere expression of opinion and therefore not actionable. See *Cannaday* v. *Cossey,* 228 Ark. 1119, 312 S. W. 2d 442. A representation that a used truck was in A-1 condition has been held to be a statement of fact and hence a warranty rather than a mere expression of opinion. *Maurice* v.

Chaffin, 219 Ark. 273, 241 S. W. 2d 257. By the same reasoning such a representation, when falsely made, gives rise to a cause of action in tort. *Fausett & Co.* v. *Bullard,* 217 Ark. 176, 229 S. W. 2d 490.

As a subsidiary argument the appellee insists that the appellant waived his right to rescission by not bringing suit until one year after the sale, *Jones* v. *Gregg,* 226 Ark. 595, 293 S. W. 2d 545. This defense was not raised in the appellee's answer, which consisted only of a general denial. There was thus no occasion for the appellant to offer proof of facts tending to excuse his delay, and it would be manifestly unfair to reject his cause of action upon a ground that was not developed at the trial and appears to be raised for the first time on appeal.

The remaining points relate to the accounting between the parties after the contract has been set aside. The appellant made one monthly payment of $593.06 upon the contract, but the chancellor refused to allow him to recover this amount, finding that it constituted a reasonable rental for the machine during the time that the purchaser used it. The record contains no evidence at all relating to the rental value of the tractor, nor is there any proof that the plaintiff derived any benefit from his vain attempts to operate the machine. The decree will therefore be modified to permit the appellant to recover the amount of his cash payment, with interest.

The appellant also sought to recover the value of a small used tractor that he traded in upon the one purchased. The written contract allowed the purchaser a credit of $1,250 for the machine traded in, but the appellee sold it six months later for only $470. We cannot say that the chancellor was in error in limiting the appellant's recovery to the smaller figure. The issue is the market value of the little tractor on the date that it was traded in. Its actual selling price a few months later, as determined in a transaction apparently entered into at arm's length, was competent evidence of value.

Perkins v. *Ewan,* 66 Ark. 175, 49 S. W. 569. On the other hand, it is well known that a trade-in allowance may have little relation to the true value of the property. "The difference between a cash price and a trade in price is too marked and too familiar to require discussion." *Lawrence Const. Co.* v. *Harnisch-Feger Sales Corp.,* 164 Tenn. 651, 51 S. W. 2d 837. The parties were content to present only the scanty evidence of value that we have mentioned, and the chancellor was justified in accepting the actual selling price as the more reliable of the two figures suggested.

Finally, the appellant seeks to recover damages for a loss of business that occurred as a result of his inability to operate the tractor that he bought. The machine was to have been used in the operation of a limestone quarry, and its repeated break-downs caused the appellant to lose certain orders for agricultural lime. The appellant merely proved the gross selling price represented by these orders, with no proof whatever touching upon the costs that would have been involved in filling the orders. His evidence is therefore fatally defective, for there is no way for the court to estimate the amount of profits that were lost. *Singer Mfg. Co.* v. *W. D. Reeves Lbr. Co.,* 95 Ark. 363, 129 S. W. 805.

Modified as indicated and affirmed.

PARKER *v.* WALRATH.

5-2204 339 S. W. 2d 121

Opinion delivered October 17, 1960.

Richard Mobley, for appellant.

Gannaway & Gannaway, for appellee.

PAUL WARD, Associate Justice. The question posed by this appeal is whether the plaintiff who was under guardianship can dismiss a complaint filed in her name. The trial court held that she could, and the guardian prosecutes this appeal for a reversal. The Revenue Commissioner is a nominal party and will be guided by this opinion. Hereafter the word "appellee" will refer only to Mrs. Walrath.

Much of the background of this case is found in a former appeal to this court involving the same parties. See: *Parker* v. *Parker,* 231 Ark. 635, 331 S. W. 2d 694. A summary statement of the evidence leading up to this litigation will be helpful to a proper understanding of the issues involved.

On October 23, 1956, Mrs. John M. Parker (appellant) executed an assignment to her daughter, Mrs. Johnie Parker Walrath (appellee), purporting to convey title to a 1955 model Oldsmobile. On September 30, 1957, Mrs. Parker's son (Parker Parker) was appointed guardian of the estate but not of the person of Mrs. Parker. On October 23, 1957, Mrs. Parker filed a suit in chancery court asking to have the assignment cancelled.

Set out hereafter is a brief summary of what occurred at the hearing before the chancellor. Numerous statements made and letters written by Mrs. Parker prior to the filing of the complaint were introduced on interrogatories to show that Mrs. Parker did not intend to give the automobile to her daughter, that she thought her daughter was taking an unfair advantage of her, and that she wanted to regain possession of the automobile. At the hearing all parties gave testimony in open court. Appellee's testimony was to the effect that her mother did give her the automobile, that she executed the assignment to her, and that she used the automobile for the pleasure of her mother, that it was available to her mother at any time she wanted it, and that she did not intend to take exclusive possession of the automobile until after her mother's death. Mrs. Parker testified emphatically that she wanted her daughter to have the automobile and that she wanted the complaint dismissed. Mrs. Parker's son and guardian, Parker Parker, was made a party plaintiff and objected strenuously to the action of the court in dismissing the complaint.

The principal contention of the guardian on appeal is that the Chancellor had no right or authority to dismiss the complaint, citing as authority Arkansas Stat-

utes, Sections 57-626, 57-627 and 57-628. In substance, as related to this case, these sections of the statutes are as presently set out. Section 57-626 provides that the guardian of an estate shall take possession of all of the ward's personal property, the title to which shall be in the ward and not in the guardian. Section 57-627 provides that all actions between the ward or the guardian and third persons shall be prosecuted by or against the guardian. Section 57-628 provides that all contracts for the sale of personal property entered into by a person subsequently put under guardianship may be approved or rejected by a court of proper jurisdiction.

We think it is clear that the first two mentioned statutes are not controlling under the facts of this case for the reason that Mrs. Parker assigned the automobile to her daughter (appellee) a year before she was declared incompetent. The last mentioned statute would not apply because we are not herein dealing with a contract to sell but with a completed gift.

Mrs. Parker was competent to testify. Without referring to any of our decisions which hold that the trial judge, within the exercise of sound discretion, can determine who is or who is not competent to testify, this matter is settled by Ark. Stats. § 28-601, which provides in substance as follows: All persons of unsound mind at the time of being produced as witnesses shall be incompetent to testify in a civil action provided however "that no person shall be denied the right to testify who is in possession of his or her mental faculties during a lucid interval, and provided further that it shall be within the sound discretion of the Trial Court to permit any person to testify who understands the obligation of an oath and who has sufficient understanding, and the fact that such person has been adjudged of unsound mind shall only affect his or her credibility as a witness, . . ." The record in this case discloses several facts and circumstances which lead us to conclude that the trial court did not abuse its sound discretion in allowing Mrs. Parker to testify, and also in attaching significance to the testimony which she gave. The reason given by the

Probate Court for appointing a guardian for Mrs. Parker was that she "is suffering from hypertension, arteriosclerosis and cardiovascular disease which prevents her from being able to personally manage her farm and city property." In the same order the court stated that it found Mrs. Parker "is not physically able to see after her large number of rent houses and farm property." Apparently an effort was made to have a guardian appointed for the person of Mrs. Parker but the court found that it was not necessary to do so. Also, a reading of Mrs. Parker's testimony leaves the impression that she was in full control of her mental faculties and that she had definite and sound reasons for assigning the automobile to her daughter.

In view of the above it is our conclusion that the judgment of the Trial Court should be, and it is hereby, affirmed.

Affirmed.

KEETON, ADMR., *v.* BOZARK.

5-2205 339 S. W. 2d 123

Opinion delivered October 17, 1960.

Kirsch, Cathey & Brown and *Frierson, Walker & Snellgrove,* for appellant.

Robert Branch, for appellee.

SAM ROBINSON, Associate Justice. This appeal is from an order of the probate court allowing the claim of appellee, Annie Bozark, against the estate of William Franklin Irvin, deceased. Appellee filed a claim for $2,570.00 for furnishing room, board, nursing care, ambulance service and medical expense to deceased. The administrator refused to allow the claim, and after hearing the court allowed $1,275 for services rendered and $20 for ambulance and medical expense.

Appellee lives in Marmaduke, where she owns her home. In May of 1957, the deceased, who was appellee's uncle, moved his house trailer onto appellee's property immediately behind her house, and lived there until September of the same year. In the spring of 1958 deceased returned to Marmaduke and shortly thereafter once again moved his trailer into appellee's back yard. He lived there until his death on April 5, 1959, except for an interval of two weeks while he stayed in Paragould.

Deceased was past 80 years of age when he died. It is abundantly clear that during the time he lived on appellee's property he was unable to care for himself and needed a great deal of attention. It was necessary for appellee, with the help of her son, to prepare his meals, wash and iron his clothes, clean his trailer and care for him almost constantly. During cold weather deceased moved into appellee's home so he would be more comfortable. There is ample testimony to the effect that deceased was an elderly feeble person who required someone to look after him. There is sufficient evidence to support the court's finding that the services were performed by appellee.

Appellant argues that the services of appellee to the deceased were gratuitous at the time they were rendered

and she cannot now say there was an implied contract to pay for them. We agree with the ruling of the court below that this case comes within the fundamental principle that where a party accepts the beneficial results of another's services the law implies a previous request and a subsequent promise to pay for them. *Nissen* v. *Flournoy,* 160 Ark. 311, 254 S. W. 540. Appellant also urges that there is a presumption that the services are gratuitous where they are rendered by members of the deceased's family. Appellee was 49 years of age and her uncle was over 80. They had not seen each other for fifteen years prior to 1957. We have said the presumption urged by appellant is less strong where the relationship becomes more remote. *Capps* v. *Cline,* 227 Ark. 201, 297 S. W. 2d 654. We cannot say that all of the elements which give rise to the presumption were present here.

Appellant further argues that the allowance of the claim was excessive. Deceased had two bank accounts totaling about $9,800 when he died. He was receiving each month $100 from a teachers' retirement fund, $45 from one daughter and approximately $150 from another daughter, both of whom lived in California. Despite this income, he showed miserly qualities and contributed very little, if any, to his own support. On the other hand, appellee worked as a waitress for as little as $12 per week, yet it appears that she paid for practically all of deceased's support. The award of the court was on the basis of $75 per month for 17 months. We cannot say this was in excess of the value of the services rendered. In this same vein appellant questions the admissibility of the testimony of Martha Newberry, who appeared as an expert on the value of services in caring for elderly people. Her testimony is challenged on the ground that the services rendered by appellee were not similar to the services used by the witness in setting the value. Whether or not the qualification of a witness with respect to knowledge or special experience is sufficiently established is a matter resting in the discretion of the court, whose determination is usually final and will

not be disturbed by an appellate court except in extreme cases where it is manifest that the trial court has fallen into error or has abused its discretion and that prejudice to the complaining party has resulted. *Firemen's Ins. Co.* v. *Little,* 189 Ark. 640, 74 S. W. 2d 777. We find no error here.

Affirmed.

HOOD *v.* HUNT.

5-2197 339 S. W. 2d 97

Opinion delivered October 17, 1960.

Spitzberg, Bonner, Mitchell & Hays, for appellant.

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

JIM JOHNSON, Associate Justice. This case involves an offer and disputed acceptance for the sale of a house and lot. The appellees are the joint owners in an estate by the entirety of a one story, two bedroom house located at 1716 South Buchanan Street in Little Rock. On August 13, 1959, appellees gave an exclusive listing for the sale of this property at $14,500 to Jack Collier East Company, Inc., a real estate firm. The listing was signed by Mr. Hunt as the owner and by Mrs. Hunt, as wife, who agreed to execute a warranty deed conveying her dower and homestead in the property. On August 22, 1959, appellants were shown the property by a sales-

man employed by the real estate firm and while still on the premises the appellants executed an offer to purchase the property at $14,500 upon the customary printed real estate form furnished them by the salesman and earnest money in the amount of $202.50 in the form of a check was tendered with the offer. The offer was then presented to the appellee, Mr. Hunt, and he accepted the offer by signing his name. Mrs. Hunt was not at home while this transaction was taking place. Before leaving, Dr. Hood and Mr. Hunt went into the back yard where Mr. Hunt called attention to the fact that a part of the wire fence had been removed and that he planned to replace it with a white picket fence. Mr. Hunt offered to build the picket fence but Dr. Hood said he preferred the wire fence to be replaced since he had a dog. Mr. Hunt agreed to replace the wire fence and in accordance with this agreement did replace it.

When Mrs. Hunt returned home later that afternoon she was informed of the sale. She inquired about the necessity of her signing the acceptance and was told by the salesman for the real estate firm that this was not necessary since she had already signed the listing in which she obligated herself to execute a deed should a purchaser be found in accordance with the listing.

After the Hoods left (August 22nd) other prospects came by to see the house but Mrs. Hunt informed them that the house had been sold and did not show it to them.

The Hunts, thinking that their house was sold, purchased another residence and signed the papers therefor either on Wednesday or Thursday following the Hoods' offer on Saturday. On the following Friday morning Mrs. Hunt phoned Mrs. Hood that mail had come for the Hoods. It turned out that the Hoods had bank checks printed showing their new address to be 1716 South Buchanan and this was the mail which had arrived. In the course of that conversation Mrs. Hunt informed Mrs. Hood that they could have possession on September 1st, which was agreeable with Mrs. Hood. In the meantime,

Mrs. Hunt had communicated her acceptance of the offer to the representative of Jack Collier East Company, Inc., who were the agents for the Hoods in making the offer. On Friday afternoon when Mrs. Hood came by to pick up the mail, she informed Mrs. Hunt that Dr. Hood had been transferred to another city where they would be furnished living quarters. The Hoods refused to go through with the transaction. Appellees filed a complaint in the Pulaski Chancery Court to specifically enforce a sale of the property. Abstract of title and a proper deed were tendered by appellees. The Chancellor granted specific performance and this appeal followed.

The only real question presented here is whether the contract lacked mutuality of remedy.

Appellants very persuasively argue that since Mrs. Hunt did not sign the acceptance and because this was an estate by the entirety, Mrs. Hunt was not bound, and since she was not bound, neither were the Hoods. However, the record reveals that it is undisputed that Mr. Hunt did actually sign the acceptance of the Hood offer thereby making him legally obligated to give a good conveyance; consequently there was mutuality as between Mr. Hunt and the Hoods. It is further undisputed that he tendered such a conveyance in which his wife joined as grantor. Based upon these facts we are bound by our rule that it was sufficient that Hunt was able to make a good conveyance any time before the decree for specific performance was rendered. See: *Drennan* v. *Boyer,* 5 Ark. 497; *Chrisman* v. *Partee and Wife,* 38 Ark. 31; *Elliott* v. *Hogue,* 113 Ark. 599, 168 S. W. 1097. Also see: 49 Am. Jur. Specific Performance, § 37; 81 C. J. S. Specific Performance, § 11, p. 429; 5 Corbin Contract, §§ 1185 and 1195.

The *Chrisman* case, *supra,* is directly in point and the doctrine it enunciates has been followed and approved by this Court repeatedly, the most recent case being *Ray* v. *Robben,* 225 Ark. 824, 285 S. W. 2d 907.

The record further reveals that not only did Mrs. Hunt join in the execution of a deed with her husband, which was tendered to the appellants, but she also joined in the suit as a plaintiff and thus ratified her husband's acceptance. The above cited authorities hold that her joining in the deed was enough to supply mutuality but the fact that she submitted herself to the jurisdiction of the court likewise supplied mutuality. See: *Vance* v. *Newman,* 72 Ark. 359, 80 S. W. 574.

The *Chrisman* case, *supra,* holds that the incapacity to perform a contract must be judged not at the time the contract is made but at the time its performance is sought. Consequently, when one comes into court seeking specific performance and submits himself to the jurisdiction of the Court, "the institution of the suit supplies the mutuality which was wanting in the first instance."

Affirmed.

George Rose Smith, J., not participating.

Hobbs *v.* Cobb.

5-2199 339 S. W. 2d 318

Opinion delivered October 24, 1960.

B. W. Thomas and *Robert D. Ridgeway,* for appellant.

C. A. Stanfield, for appellee.

Carleton Harris, Chief Justice. Jennie Sherman, a resident of Hot Springs, executed her last will and testament on December 4, 1953, and died the following July at Miami Beach, Florida. The will was admitted to probate by the Garland Probate Court July 14, 1954, and letters testamentary were issued to the appellant executor, Richard W. Hobbs. The deceased was survived by her husband, Samuel Sherman, a son, Nathan Sherman, and a daughter, Edna Karp Cobb, also called "Ginger"; two sisters, Becky Hunt and Mildred Shapiro, and two granddaughters, Joyce Karp and Ellen Sherman.

A short time prior to her death, Mrs. Sherman purchased a hotel in Hot Springs, and this hotel, known as the Sherman Hotel, was devised to her trustee, Richard W. Hobbs, in trust, granting the power to retain this hotel, or to sell, lease, mortgage, or dispose of the property or any part thereof, and to re-invest in securities or other properties which the trustee might deem advisable. However, the instrument provided that in the event of the sale of the hotel, the trustee should pay to the testatrix' son and daughter the sum of $55,000, each to share equally, the payment to the son to be made in a lump sum, and the daughter, appellee herein, to be paid at the rate of $300 per month until she should reach the age of 35 years, at which time the balance of her share would be paid to her in a lump sum. Item 7 then directs the trustee to distribute the remainder of the balance of the

purchase price over and above the sum of $55,000 as follows:

"$1,000.00 to be given and paid unto my sister, Becky Hunt; $1,000.00 to be given and paid unto my sister, Mildred Shapiro; $200.00 unto the Hadassah Medical Organization of Hot Springs, Arkansas; $300.00 to the Jewish Temple of which I may be a member at the time of my death."

Item 8 then provides that after payment of the aforementioned bequests, the remaining balance shall be disposed of by paying one-half to her husband, and one-half to her grandchildren, Joyce Karp and Ellen Sherman.

On July 17, 1956, Mrs. Cobb (then Karp) filed a petition asking the court to construe the will, and alleging the invalidity of the provisions vesting title to the hotel property in Hobbs, as trustee; the invalidity of the section conferring upon the trustee the right to retain, sell, lease or mortgage the property, and asserting the provisions to be contrary to public policy and the law against perpetuities. In August, the executor filed a petition requesting authority to sell the hotel, and also setting forth that the best interests of the estate would be served by compromising and settling certain lawsuits filed against the estate by Samuel Sherman in Florida, and suits filed by the estate against Sherman. The order sought was granted by the court, and the executor was directed to sell the hotel for $85,000; from such amount, Samuel Sherman was to be paid $17,300 in full settlement of his claims, the balance of the money to be held subject to the orders of the court. On November 7, 1956, the court passed upon the petition filed by Mrs. Karp in July, and entered its order finding that the provisions of the trust relative to appellee were null and void, and that she should share under the proceeds of the estate in the same manner as her brother; the executor was directed to pay to appellee her share of the estate. Subsequent thereto, the executor filed his petition for partial distribution of the estate, and for the payment of executor's and attorneys' fees, and on November 14th,

the court entered its order directing the payment of these fees, and ordered the balance of the monies in said estate, less $1,000 (for possible expenses), to be paid to Nathan Sherman and Mrs. Karp. On March 25, 1957, the executor filed a written motion, setting up that the petition for partial distribution was in error, and that the order entered thereon should be amended *nunc pro tunc* to show, *inter alia,* that the parties had agreed that it was their intent to pay the special bequests, heretofore set out in paragraph two of this opinion. The executor further stated that Mrs. Karp had been overpaid in the amount of $533.33,[1] and that this amount was due to the estate from Mrs. Karp. In compliance with the petition, the court entered its order finding that the order entered November 14th should be amended to provide, *inter alia,* for the payment of the items reflected in the petition, and on June 24th, an order was entered directing Mrs. Karp to refund the sum of $500[2] to the estate, finding "that there are not sufficient funds or assets in the hands of the executor to pay the debts of the estate and the special bequests mentioned therein."

On July 11th, the executor filed his accounting with the court, and on July 15th, appellee and Nathan Sherman, through their attorneys, P. E. Dobbs and Michael B. Heindl, filed a second petition to construe Mrs. Sherman's will, alleging that the accounting filed by the executor provided for the payment of the special bequests, and that they (petitioners) were entitled to all of the proceeds remaining in the hands of said executor which had been derived from the sale of the hotel, in that the petitioners had not received a sum equal to $55,000. The executor filed his response to this petition, asserting that petitioners had previously asked for a construction of the will, "were bound to raise all questions pertaining to the construction of the will at that time, and therefore are estopped to raise further issues as to the construction of said will"; that partial distribution of the

[1] Nathan Sherman had been paid $15,068.18, and appellee had been paid $16,601.51.

[2] Why the order was entered for $500 instead of $533.33 is not explained in the record.

estate had already been made, such distribution being based on a settlement between petitioners and Samuel Sherman, the settlement also including the provision that the special bequests in the amount of $2,500 would be paid to the several legatees. The latter, through their attorney, also filed a response to the petition, setting up that they had approved the compromise settlement, and "that said heirs are estopped to raise any question relative to the special bequests by reason of the aforementioned settlement." Mrs. Karp, on November 10, 1958, then filed a motion asking that the order requiring her to refund $500 be set aside. Following a hearing, and the taking of testimony, the court, on February 1, 1960,[3] entered its order quashing the prior order wherein appellee was ordered to repay $500, and further finding "that the petition to construe the will as providing that the contingent beneficiaries mentioned in paragraph seven take nothing thereunder until after petitioners are paid the sum of $55,000, should be granted." From this order, the executor brings this appeal.

While the recitation of pertinent facts is rather lengthy, the litigation can really be disposed of through determination of one issue, *viz.,* have the provisions of the will been superseded by what is commonly known as a family settlement? Family settlements are recognized and enforced in Arkansas. See *Sursa* v. *Wynn,* 137 Ark. 117, 207 S. W. 209; *Pfaff, Administratrix* v. *Clements,* 213 Ark. 852, 213 S. W. 2d 356 (1948). The executor, Hobbs, testified that all the parties agreed to the payment of the special bequests, and that this agreement was reached on the basis of a compromise between the children and husband of the deceased; that appellee and her brother were not on good terms, and that Samuel Sherman, the surviving spouse, and step-father of Edna and Nathan, "was fighting both of the children." Hobbs stated that the two children desired the bequests

[3] The record does not reflect the reason for the 16 months lapse from the time of the filing of the second petition to construe the will, and the filing of the motion by appellee to quash the order requiring her to refund $500; nor is there any explanation for the 15 months lapse between the time of the filing of this motion and the time of hearing.

paid, since close relatives were the recipients, and likewise agreed to the payment of the bequests to the Jewish Medical Association and Temple since such bequests were in small amounts. According to his testimony, the payment of the special bequests was approved by both appellee and her attorney, Mr. Heindl. Robert Ridgeway and B. W. Thomas, attorneys for the estate, likewise testified that the agreement was reached. The only testimony offered on the part of appellee was by Mr. Heindl. He testified that he made no agreement with respect to the contingent beneficiaries being paid, nor did he definitely understand that they were to be paid. Mr. Heindl did agree that, through error, appellee had been overpaid to the extent of $500. Appellant offered in evidence copies of two letters, one dated September 19, 1956, and the other, March 21, 1957. The former letter was directed to Mr. Heindl by Mr. Hobbs, and set out, first, that the hotel could be sold for $85,000 cash; thereafter, listing the charges against this amount, including the figure for special bequests,[4] and finally, stating the balance to be divided between appellee and her brother. The latter letter, directed to Mr. Heindl and Mr. Dobbs, stated:

"I am enclosing herewith a copy of a Motion to Amend Order for Partial Distribution in the above styled cause which we will ask an order to be entered on Monday, March 25, 1957, at 10:00 A.M. I am also enclosing herein a copy of the Order which the Court will be asked to enter and in the event either of you, as attorneys for Ginger Sherman and Nat Sherman, have any objections to the motion and order, Mr. Thomas and I request that they be raised at that time."

Mr. Heindl stated that he presumed he received both of these letters. He admitted that he made no objection to the suggested order, stating: "I never saw any necessity for it, if I was satisfied there was a clear understanding between all of the lawyers involved that the

[4] The bequests, as mentioned in the will and which are involved in this litigation, totaled $2,500, but the various motions, petitions, and accounting sometimes use the figure $2,500, and at other times, the figure $2,300.

special bequests would lay dormant until such time involving the two children and the father were taken care of, and this took care of the two children and the father."

The testimony aside, we think the agreement was clearly established. The record reflects that the amount which Samuel Sherman was to receive under the agreement, $17,300, was paid to him on November 15, 1956, and Mr. Sherman had executed a Renunciation on September 13th, renouncing all rights under the will.[5] It will be recalled that, since the property was sold, Mr. Sherman, under the terms of the will, "came behind" the legatees who were to receive the $2,500, *i.e.*, he was to receive nothing under the instrument until these bequests had been paid. It is therefore apparent that the provisions of the will were disregarded, and the money distributed in accordance with some agreement. It is also obvious that Samuel Sherman could not have been paid, as herein stated, except with the approval of the legatees of the smaller bequests.

It is true that the amount received by Mrs. Karp and her brother was considerably less than $55,000, and it is likewise true that the other bequests were not to be paid under the terms of the will until Mrs. Sherman's children

[5] According to the record, Mr. Sherman held legal title to an undivided one-half interest in the hotel property. However, as shown by the testimony, he did not pay any of the purchase price for the hotel, and had executed a promissory note in the amount of $55,000, payable to his wife, together with a mortgage covering his interest in the property. Following the filing of a petition by the executor, the court found that Sherman was in default on the note and mortgage in the sum of $55,000; also, that other sums were due and payable to the estate by Sherman, and authorized the executor to institute suit. Sherman's possible interest, under the deed, is immaterial in this litigation, for the record reflects that the payment of $17,300 was at least partly in settlement of his claims under the will. In the instrument of Renunciation, Sherman states that for and in consideration of the sum of $17,300, he does "finally renounce and reject for myself and my heirs, legatees, devisees and legal representatives any and all bequests, gifts and share in the Estate of my wife, Jennie Sherman, Deceased, which I might have under the last will and testament of my said wife, Jennie Sherman, Deceased, who died on or about the 3rd day of July, * * * And I further renounce and reject any and all provisions for my benefit under said last will and testament above mentioned and referred to, with any and all interest in the Estate of my deceased wife under said will, and in the Estate of my said wife however such interest may arise, and I refuse to accept any and all provisions of said will."

had received that amount. It cannot, however, be successfully argued that the beneficiaries of the lesser amounts, incurred no detriment under the compromise, because they would not have taken anything under the will itself, and therefore suffered no loss. In *Pfaff, Administratrix* v. *Clements, supra,* it is stated:

"Likewise, it is not essential that the strict mutuality of obligation or the strict legal sufficiency of consideration — as required in ordinary contracts — be present in family settlements. It is sufficient that the members of the family want to settle the estate: one person may receive more or less than the law allows; one person may surrender property and receive no *quid pro quo.* Thus, in *Turner* v. *Davis,* 41 Ark. 270, there was claimed that one — Watkins — had no interest in the property sufficient to support a family settlement; but in disposing of that contention, Mr. Justice Eakin said: 'We cannot go behind the agreement to ascertain the interest of Watkins. It is a matter of no consequence whether he had curtesy or had nothing . . . The agreement stands on the ground of family settlements . . . They are supposed to be the result of mutual good will, and imply a disposition to concession for the purpose, regardless of strict legal rights; always excepting cases of fraud, of which nothing, in this case, appears.' "

While the persons directly affected by the court's order, which occasions this appeal, are those who were recipients of the bequests, the executor was a proper party to act in behalf of these beneficiaries. As stated in Corpus Juris Secundum, Vol. 33, § 142, p. 1099:

"An executor or an administrator acts in a representative capacity, representing and acting for all parties and all interests in the estate. It is said that he occupies a double role, being not only the personal representative of decedent, but also, to a very great extent, the representative of the creditors, and of the heirs, legatees, or distributees."

Mr. Hobbs was under a $10,000 bond. Certainly, with particular regard to the fact that Samuel Sherman, who, under the terms of the will, was to receive nothing from the proceeds of the sale until after the payment of these legacies, the executor acted circumspectly and properly in seeking to carry out the provisions of the agreement.

The order of the court of February 1, 1960, wherein that court quashed the prior order directing appellee to refund $500 to the estate, and further holding that the "contingent" beneficiaries take nothing until "petitioners are paid the sum of $55,000", is hereby reversed, annulled, and set aside, and the cause is remanded to the Garland Probate Court with directions to reinstate the order of June 24th, 1957 (wherein appellee was directed to refund the amount of $500), and to authorize the executor to pay the bequests to the "contingent" beneficiaries heretofore mentioned.

Costs of this appeal are to be borne by appellee.

ASH *v.* MORGAN.

5-2209 339 S. W. 2d 309

Opinion delivered October 24, 1950.

Reinberger & Eilbott and *Don H. Smith,* for appellant.

Brockman & Brockman, for appellees.

J. SEABORN HOLT, Associate Justice. This appeal is from the judgment of the Jefferson County Probate Court denying appellant's motion to probate the alleged will of Mattie Rikard.

Mattie Rikard, aged 79, died on April 27, 1959, after having purportedly executed a will on April 14, 1959, at the home of Dan Ash, sole beneficiary under the will. An objection was made to the probate of the will and a hearing was held, at which time the only question considered by the lower court was whether the will was properly executed or not. Questions of undue influence, fraud, or mental capacity of the testatrix, were not considered. At this hearing it was stipulated by the parties that the two attesting witnesses, Mrs. Ira Dean and R. Z. Hillis, were not present when Mattie Rikard signed the will by her mark, nor were they in the presence of each other, nor did the testatrix acknowledge her signature in their presence.

Our applicable statute relative to the proper execution and attestation of a will is § 60-403, Ark. Stats. 1947 Ann., which provides:

"Execution.—The execution of a will, other than holographic, must be by the signature of the testator and of at least two witnesses as follows:

"a. TESTATOR. The testator shall declare to the attesting witnesses that the instrument is his will and either

"(1) Himself sign; or

"(2) Acknowledge his signature already made; or

"(3) Sign by mark, his name being written near it and witnessed by a person who writes his own name as witness to the signature; or

"(4) At his discretion and in his presence have someone else sign his name for him, (the person so signing shall write his own name and state that he signed the testator's name at the request of the testator); and

"(5) In any of the above cases the signature must be at the end of the instrument and the act must be done in the presence of two or more attesting witnesses.

"b. WITNESSES. The attesting witnesses must sign at the request and in the presence of the testator."

We think it evident from the above admitted facts that the sections of § 60-403 specifically requiring that a will to be valid must be executed "in the presence of two or more attesting witnesses . . . [and] the attesting witnesses must sign at the request and in the presence of the testator", were not complied with, and therefore the will must be and is declared invalid.

But, says appellant, there was substantial compliance with the statute here involved (Ark. Stats. § 60-403). What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case. Here neither of the alleged attesting witnesses signed in the presence of the testator, nor in the presence of each other. And at the trial neither of them was called to testify, nor did the proponent of the will offer any explanation as to their absence or failure to testify. Under the facts of the case at bar we hold that the will was not validly executed in the presence of the two persons who signed their names as subscribing witnesses.

Despite the fact that the subscribing witnesses were not pesent when the will was executed the appellant contends that the will can be proved by the testimony of two other persons, Sylvia Ash and Laura Woods, who were present when the will was executed but who did not sign their names as attesting witnesses. This contention is not sound. The statute requires that the attesting witnesses sign the will. Ark. Stats. 1947, § 60-403. "It is essential to due execution of a will that it be signed or subscribed by the number of witnesses required

by the law governing the particular will being made, and subscription by fewer renders the transaction a nullity." Thompson on Wills (2d Ed.), § 116. See also Page on Wills (1960 Ed.), § 19.75, and *Johnson* v. *Hinton,* 130 Ark. 394, 197 S. W. 706. We therefore conclude that the will in question was not executed and attested in the manner required by the statute.

Affirmed.

COUSINS *v.* COOPER.

5-2180 339 S. W. 2d 316

Opinion delivered October 24, 1960.

Wright, Harrison, Lindsey & Upton, for appellant.

Murphy & Arnold and *Alton Bittle,* for appellee.

ED. F. MCFADDIN, Associate Justice. Cooper (appellee) was injured in a traffic mishap while riding in Cousins' (appellant's) car. Cooper sued Cousins for damages, and recovered judgment; and this appeal ensued. Appellant urges only one point: that he was entitled to an instructed verdict in his favor. All other questions are waived.

Cousins claims that he was entitled to an instructed verdict because of: (a) the Arkansas Guest Statutes, which are Act No. 61 of 1935 and Act No. 179 of 1935 (§§ 75-913 and 75-915 Ark. Stats.); or (b) assumption of risk by Cooper as under our holding in *Bugh* v. *Webb,* 231 Ark. 27, 328 S. W. 2d 379. In testing a case on the claim for an instructed verdict, the evidence must be given its strongest probative force in favor of the side against whom the instructed verdict is asked. *Barrentine* v. *Henry Wrape Co.,* 120 Ark. 206, 179 S. W. 328; *St. L. S. W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215. With this rule in mind, we state the uncontradicted facts. Cooper, aged 22, and Cousins, aged 16, drove from Cleburne County into White County, obtained whiskey, drank some, and started back to the point of origin, which was the settlement of Concord in Cleburne County. Enroute home they chanced to overtake, on Ramsey Mountain outside of Batesville, Samuel Lambert, aged 21, who was driving his car. The three stopped, each had a drink of liquor; and Lambert, going toward Concord, departed in his car. Cousins, driving his car, with Cooper seated therein, followed Lambert for several miles. Finally, Cousins undertook to pass Lambert, but just at that time Lambert was overtaking and passing a car driven by Baker. In attempting to pass Lambert, Cousins lost control of his car and it was overturned, and Cooper was injured. Originally Cooper sued Lambert for damages and later added Cousins as an addi-

tional defendant. Lambert was exonerated by the jury, Cousins held liable.

Cousins is faced with difficult problems of evidence. In the traffic mishap Cooper suffered several injuries. He was unconscious for a number of days, and suffered from retrograde amnesia, so that he remembered nothing of being with Cousins, or anything else connected with the entire mishap.[1] Cooper could not testify as to the relationship or status of the parties and the pleadings contained a denial. Since Cousins is one of the parties in the litigation, his testimony cannot be regarded as undisputed in testing its legal sufficiency. In *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. 2d 462, we said:

"Another rule established by this court is that the testimony of a party to an action, who is interested in the result, will not be regarded as undisputed in determining the legal sufficiency of the evidence. *K.C.S.R. Co.* v. *Cockrell,* 169 Ark. 698, 277 S. W. 7; *Gish* v. *Scantland,* 151 Ark. 594, 237 S. W. 98."

As to whether Cooper was a guest or a passenger: we have no undisputed evidence on that issue. As to whether Cousins was guilty of willful and wanton negligence even if Cooper was a guest: there was evidence to show that Cousins was traveling between 80 and 90 miles an hour when he tried to pass Lambert, and also that there was fog which, to some extent, might have obstructed the vision. So without detailing the other evidence, we conclude that there was sufficient evidence to take the question of willful and wanton negligence to the jury, even if Cooper had been a guest, which is itself not undisputed in this case.

The next point is whether Cooper, if a guest, was guilty of assumption of risk as a matter of law, within the rule of *Bugh* v. *Webb,* 231 Ark. 27, 328 S. W. 2d 379. Cousins argues that there was a joint enterprise on a drinking expedition and that Cooper assumed the

[1] Maloy's Medical Dictionary for Lawyers defines retrograde amnesia as, "a form which prevents the patient from recalling memories which have been acquired previously, resulting in loss of memory for events that occurred before the onset of amnesia."

risk. (See annotation in 15 A. L. R. 2d 1165). Whether there was a joint enterprise is not undisputed. Assumption of risk is generally a question of fact for the jury unless the facts are undisputed and present a situation so plain that the minds of intelligent men could not draw different conclusions to the effect thereof. *St. L. I. M. & S. Ry. Co.* v. *Hawkins,* 88 Ark. 548, 115 S. W. 175. It is only in the rarest of cases, like *Bugh* v. *Webb, supra,* where the essential facts were undisputed, that the assumption of risk appears as a matter of law. With Cooper suffering from retrograde amnesia and unable to affirm or deny any of the facts, and with Cousins' testimony disputed as a matter of law, it brings into effect the well established rule that assumption of risk is a question of fact.

Without reviewing our numerous cases on the Guest Statutes, we conclude that under the peculiar situation here existing Cousins was not entitled to an instructed verdict; and that is the only question presented.

Affirmed.

CROSSETT CHEMICAL COMPANY *v.* SEDBERRY.

5-2213 339 S. W. 2d 426

Opinion delivered October 24, 1960.

[Rehearing denied November 21, 1960.]

Paul Sullins and *Robert R. Wright,* for appellant.

Ovid Switzer and *Roy Finch, Jr.,* for appellee.

GEORGE ROSE SMITH, J. This is a death claim under the workmen's compensation law, filed by the appellee as the widow of Guy Sedberry. The commission allowed the claim, finding that Sedberry's death from a heart attack arose out of and in the course of his employment by the appellant. This appeal is from the circuit court's affirmance of the award.

The only material conflict in the evidence is in the medical testimony. Sedberry had worked for the appellant for fifteen years. At the time of his death he was the senior member of a maintenance crew. On the afternoon of December 18, 1958, the crew finished repairing a heavy cooler and moved it back into position. The proof indicates that this work was not unusually strenuous and did not involve extraordinary exertion. After resting a few minutes Sedberry began to write out a list of things his crew needed in its work. While so engaged Sedberry suffered a coronary occlusion, was taken to a clinic, and died within an hour after the onset of the attack.

As witnesses for the employer Dr. Agar and Dr. Kahn, specialists in internal medicine, testified that in their opinion the decedent's coronary occlusion was the result of a diseased condition within the heart and was not caused or contributed to by his work on the day of his death. On the other hand Dr. Hamilton, another internist testifying for the claimant, believed that Sedberry's work caused the attack or contributed to it. The opposing views of the medical witnesses cannot be reconciled.

The case is controlled by our decision in *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436, where we upheld an award of compensation based upon proof that the claimant's ordinary work, without unusual strain or exertion, had aggravated a pre-existing condition. The principle has since been followed in

cases involving heart seizures. *Safeway Stores* v. *Harrison,* 231 Ark. 10, 328 S. W. 2d 131; *Reynolds Metal Co.* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489.

The appellant insists that in the case at bar the commission's opinion discloses a misunderstanding of our recent decisions, in that the commission regards any heart attack occurring on the job as being automatically compensable. Such a view would indeed be a mistake, for the *Bryant* case stressed the necessity of there being a causal connection between the claimant's work and his disability. See also *Ark. Power & Light Co.* v. *Scroggins,* 230 Ark. 936, 328 S. W. 2d 97. But we have carefully studied the commission's opinion in the case at hand, and we do not find that it reflects any misconception of the law as announced by this court. To the contrary, the commission discussed the matter of causation, reviewed the conflicting medical testimony, and explained its reasons for accepting the opinion of Dr. Hamilton, "whose unequivocal view," said the commission, "is that there was a causal relationship between the heart attack of Guy Sedberry and his exertions on the day of his death." The question before the commission was fundamentally one of fact, and we find its decision to be supported by substantial evidence. This concludes our inquiry.

Affirmed.

WYATT *v.* W. B. SMITH HATCHERY, INC.

5-2224 339 S. W. 2d 323

Opinion delivered October 24, 1960.

W. M. Thompson, for appellants.

Caldwell T. Bennett, for appellee.

PAUL WARD, Associate Justice. One of the principal questions involved on this appeal is whether the trial court erred in refusing to allow appellants (defendants below) to join a third party defendant. Correlative to that question is the trial court's refusal to grant a continuance at the request of appellants.

A summary statement of the pleadings and proceedings involved in the litigation will be sufficient for an understanding of the issues hereafter discussed.

On May 22, 1958, appellees, W. B. Smith Hatchery, Inc., filed a complaint against Wayne Wyatt, d/b/a

Wayne Wyatt Co., to collect the sum of $4,879.61 for approximately 25,000 chicks sold to Wyatt at divers times. (Later Wyatt's wife was made a party defendant and hereafter we refer to them as appellants). On June 10, 1958, appellants (by an attorney not now of record) entered a general denial. No further steps were taken until November 17, 1958, when appellants filed an Answer and a Cross-Complaint alleging that they had been damaged in the amount of $5,412.37 because of defective chicks sold to them by appellees or because of defective feed sold to them by the Quaker Oats Company. Among other things, the Answer contained this statement: "That it is true that the plaintiff by its invoices hereinafter set forth sold and delivered to the defendant the following listed checks:" Following the above was listed the same number of chicks as listed in the complaint. Also in their Answer was a statement to the effect that had the chicks been good quality, and had they not been fed poison feed, the profit on their operation would have been in excess of $10,000, and also that the defendants have sued Quaker Oats Company for damages for poison feed, and that their loss was due either to defective chicks furnished by plaintiff or defective feed furnished by the Quaker Oats Company or both and that the Quaker Oats Company should be made a party to this suit or this suit should be consolidated with the suit now pending in the Federal Court in Little Rock. According to the record it was the contention of appellee, concurred in by the trial judge that appellants abandoned their request to have the Quaker Oats Company made a party to the litigation. The present attorney for appellants was of the opinion that no such withdrawal was made.

On April 20, 1959, on Motion by appellants' attorney (who had replaced the former attorney) a continuance was secured until the fall term of court. On October 19, 1959, when the court met in preparation for the opening of the fall term of court to be held on October 27, 1959, the present attorney for appellants (the third attorney to appear for appellants in the case) filed an Amended Answer and Cross-Complaint in which ap-

pellants again requested to have the Quaker Oats Company made a party defendant. After considerable discussion by the attorneys before the trial judge, the court stated that it would allow appellants to bring the Quaker Oats Company into court as a defendant provided they could do so by October 27, 1959, but that no continuance would be granted at that time if they were not successful in doing so. When the case was called for trial appellants filed a Motion for a Continuance on the ground that they had been unable to get the Quaker Oats Company in court since said company was allowed twenty days after service of summons in which to file an answer.

It may be admitted that if appellants had a right to have Quaker Oats Company made a party defendant, then the court was in error in refusing to grant a continuance. It is our opinion, however, based on the record before us, that appellants had no such right.

Ark. Stats. § 27-814, in all material parts, reads as follows: ". . . when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to be brought in." In construing the above statute in the case of *Smith* v. *Moore,* 49 Ark. 100, 4 S. W. 282, the court said: "The obvious intention of the statute is to require all persons to be made parties to an action who will be necessarily and materially affected by its result, . . ." The court then held that a joinder was necessary under the facts of that case. However, in the case of *Thompson* v. *Grace,* 91 Ark. 52, 120 S. W. 397, the court found that a joinder was not necessary because "Appellee was in no wise concerned with any grievance that appellant claimed to have against Jacoway." Paraphrasing the above quoted language, we likewise find from the record here that appellee was in no wise concerned with any grievance Wyatt had with the Quaker Oats Company. The record reflects that the Quaker Oats Company had sued appellants and others in the Federal Court for feed furnished but Wyatt's own testimony shows that that suit was completely divorced from the one before this court now. The

court asked Wyatt this question: "There is a suit in Federal District Court involving an account that Quaker Oats Company says you owe them for this same feed that was used to feed the chicks for which Smith Hatchery is suing you now?" Answer, "No Sir, the feed they sued me on don't have nothing to do with the feed that went into these particular chicks; it is a different suit altogether." From the foregoing we are unable to see why the Quaker Oats Company was a necessary party to the present litigation.

Another point raised by appellants is that the court erred in refusing to allow them to show their losses. This point is not stressed in argument, no authorities are cited, and no erroneous ruling by the court is pointed out to us. On the other hand, the record reflects that Wyatt testified at great length in support of his claim, but his testimony reveals that he was referring to a large flock of defective chicks, some of which were furnished by appellee and some furnished by someone else. There was no error on the part of the court in refusing to admit testimony of this kind.

Finally it is contended by appellants that the court erred in not allowing their attorney to make the opening and closing argument to the jury, but we are unable to agree with this contention. The rule that this court has many times recognized is well stated in 53 Am. Jur., p. 71, § 69, as follows: "The true rule, however, except as modified by statute, . . . is that the party holding the affirmative of the issues joined in the pleadings and who would be defeated if no evidence were given on either side has the right to open and close the evidence and the argument, . . ." Ark. Stats. § 27-1727, subsection "Sixth" reads: "In the argument the party having the burden of proof shall have the opening and conclusion; . . ." As heretofore stated the appellants first entered a general denial. Later they admitted that they got the number of chicks which appellees claim to have sold them but they did not admit the price agreed on. The record also shows that William B. Smith, Jr., a member of appellee corporation, was called to the

stand as the first witness and testified at length without objection upon the part of the appellants. The only logical conclusion to be drawn from this is that appellants themselves considered appellee was charged with the burden of proof, and we think rightly so.

In accordance with what we have heretofore said, the judgment of the trial court should be, and it is hereby, affirmed.

Affirmed.

DUNAWAY *v.* TROUTT.

5-2153 339 S. W. 2d 613

Opinion delivered October 24, 1960.

[Rehearing denied November 28, 1960.]

Rose, Meek, House, Barron & Nash, for appellant Gazette Publishing Co.; *Alston Jennings,* for appellants Dunaway and Hill.

Howell, Price & Worsham, for appellee.

SAM ROBINSON, Associate Justice. This is a libel action wherein appellee, Bob Troutt, was awarded a judgment in the sum of $100,000 against appellants, Harold F. Dunaway, Cecil B. Hill and Gazette Publishing Company. The publishing company publishes the Arkansas Gazette, a daily newspaper having statewide circulation. Dunaway and Hill are engaged in the business of the distribution and operation of music and pinball

machines. Troutt is a newspaper reporter employed by the Arkansas Democrat, a daily newspaper published in Little Rock and circulated throughout the State.

On March 9, 1959, Troutt filed the complaint in this action in the Pulaski Circuit Court, alleging that on the 26th day of February, 1959, the defendants falsely and maliciously accused him of extortion, blackmail and accepting a "pay-off"; that the defendants "did unlawfully, wrongfully, and maliciously fabricate, invent and cause to be prepared certain tape recordings of purported telephone conversations and interviews" with him and caused such tape recordings to be materially altered and spliced and changed so as to distort and falsify the purported conversations. The complaint further alleges that Dunaway and Hill entered into a scheme and conspiracy with the Gazette to use the alleged "spurious and falsified tape recordings for the purpose of publicly discrediting the plaintiff, Bob Troutt, with his newspaper and destroying his reputation as a competitive newspaper reporter by depicting and portraying him as an extortionist and blackmailer, thereby exposing him to the public hatred, ridicule and contempt." And the complaint further alleges "that on or about the 27th day of February, 1959, the defendant Gazette Publishing Company falsely and wilfully and maliciously published in the Arkansas Gazette the said defamatory articles."

The defendants answered and admitted the publication of the alleged conversations between Troutt and Dunaway and Hill and alleged as a defense that such conversations as shown by the tape recordings did take place. The newspaper account of the alleged conversations is libelous per se, and since defendants admitted the publication of the defamatory matter, the burden was on them to prove that such alleged conversations between Troutt and Dunaway and Hill did occur. *Stallings* v. *Whittaker,* 55 Ark. 494, 18 S. W. 829; 33 Am. Jur. 256.

In support of Dunaway's and Hill's testimony that the conversations with Troutt took place as alleged, it was shown that on February 26, 1958, Dunaway and Hill

bought a tape recording machine and installed it in their place of business at 11th and Main in Little Rock. The machine is such as will record on a tape telephone conversations without the knowledge of those using the telephone. It does not appear that at the time of purchasing the tape recorder on February 26th Hill and Dunaway knew Troutt, but on March 4th Dunaway called Troutt and told him that someone had been making pictures of Dunaway's and Hill's place of business and wanted to know if Troutt knew anything about it. Both Dunaway and Hill testified that subsequently they had telephone conversations with Troutt which resulted in Hill's paying to Troutt the sum of $2,000 for the purpose of preventing him from publishing in the Arkansas Democrat false articles that would be detrimental to Dunaway's and Hill's business. By its verdicts the jury necessarily found that Dunaway and Hill did not pay Troutt $2,000 as they claimed they did, and that the purported conversations as recorded on the tapes produced by Dunaway and Hill in corroboration of their testimony did not occur. The tapes were introduced in evidence, appellants contending that they are what they purport to be, a true record of the conversations between the parties; that they are the original tapes and have not been spliced or altered in any respect. On the other hand, Troutt maintains that Dunaway and Hill paid him no money whatever; that the proposition of Dunaway and Hill paying money to him was never discussed; that the only conversation he had with them about money was when they called him in February, 1959, and indicated that the pinball operators' organization wanted to donate $2,000 to the March of Dimes and that pursuant to such conversation that organization did donate $2,050 to the proper officials of the March of Dimes. Troutt contends that Dunaway and Hill changed, altered and spliced the recorded tapes to make it appear that they made a deal with him whereby he was paid $2,000 for an improper purpose, as heretofore mentioned.

In support of his contention that the tapes were altered, Troutt produced as a witness Mr. Robert Oakes

Jordan, a qualified expert in the field of recording devices. He testified that it is easy to alter tapes like the ones introduced in evidence and that in his opinion those particular tapes had been altered and spliced. Mr. Jordan testified that there are 50 or 60 spots in the tapes that indicate they have been altered in one way or another and that about 15 of such places give him absolute assurance that the tapes are altered. Mr. Jordan used the tapes to point out to the jury those things upon which he based his opinion that they have been altered. Troutt's testimony, coupled with that of Jordan, is substantial evidence to support a verdict in favor of the plaintiff. Moreover, Mr. William S. Bachman, an expert called as a witness by appellants, testified that in his opinion the tapes had not been altered, although he said they showed evidence of having been spliced. Defendants produced weighty evidence to support their version of what transpired but of course here we do not consider the weight of the evidence. On that point the only question considered is whether there is substantial evidence to support the verdict. *Providence Washington Ins. Co.* v. *Eagle Milling Co., Inc.,* 214 Ark. 918, 219 S. W. 2d 233; *Bockman* v. *World Ins. Co.,* 223 Ark. 665, 268 S. W. 2d 1.

Hill testified that he paid $2,000 to Troutt in the presence of Judge Robert Laster of the Little Rock Municipal Court. Prior to the trial of the case, appellants gave due notice that the discovery deposition of Judge Laster would be taken. Before the date set for the taking of such deposition, appellants petitioned the trial court for an order authorizing the issuance of a subpoena duces tecum requiring the production of records of Judge Laster's bank transactions along about the time Dunaway and Hill claimed they paid $2,000 to Troutt. This was on the theory that Troutt may have given some of the money to Judge Laster. The petition was denied. Ark. Stat. § 28-256 provides that upon the motion of any party showing good cause the court may order the production of documents, etc. The trial court has a wide discretion in determining whether good cause is shown

for the production of documents. *Vale* v. *Huff,* 228 Ark. 272, 306 S. W. 2d 861. We cannot say the trial court abused its discretion where the appellants were asking for an investigation of the financial affairs of one who was not a party to the case and was never called as a witness in the case.

The complaint alleges that the defendants schemed and conspired together to use spurious and falsified tape recordings for the purpose of publicly discrediting the plaintiff. The Gazette requested the following instruction which was refused by the court: "You are instruct that there is no evidence that the defendant Gazette Publishing Company schemed or conspired with the co-defendants Hill and Dunaway to discredit the plaintiff or impeach his reputation, and you will therefore find for the defendant Gazette Publishing Company on that issue." In view of the evidence the court did not err in refusing this instruction. Mr. Hugh Patterson, called as witness by appellee, testified that he is the publisher of the Arkansas Gazette; that he was out at Mr. Dunaway's house the day before the press conference at which the transcript of the tape recordings was released to the press; and at that time, the day before the press conference, he heard the tapes played. No written transcript of the recordings had then been made, but later, and before the press conference, the attorney for Dunaway and Hill furnished to Mr. Patterson a written transcript of the recordings. Patterson drove by and picked up the transcript but did not stay. A reasonable inference deducible from the testimony is that the day before the transcript was released to the press, Dunaway and Hill, their attorney and Patterson agreed that such a release would be made. The court therefore did not err in refusing to give the above mentioned requested instruction.

The court gave appellee's requested instruction No. 1, as follows: "You are instructed that the article published by the defendant, Gazette Publishing Company, on February 27, 1959, and set out in the complaint and exhibits thereto, is actionable of itself and that it is not

privileged, and the plaintiff is entitled to recover against the defendant, Gazette Publishing Company, such compensatory damages as will fully and adequately compensate him by reason of the publication of the defamatory article by the defendant, Gazette Publishing Company, not in excess of the amount sued for, unless you find the matters concerning the plaintiff contained in the article to be true or substantially true." This instruction was copied from an instruction approved by this Court in *The State Press Co., Inc.* v. *Willett,* 219 Ark. 850, 245 S. W. 2d 403. In the case at bar, by instructions No. 3 and No. 11 the court properly informed the jury as to the law on measure of damages.

Appellants complaint of appellee's instruction No. 2 given by the trial court, as follows: "You are instructed that in an action for libel where the words or article published are libelous of themselves, the law implies some damage from the publication of the libelous matter, if any, and the law further implies that the person, or persons, if any, publishing such libelous matter intended the injury the libelous matter is calculated to effect, and in this case you have been told that the article and tapes complained of herein are libelous of themselves unless true or substantially true and that the burden rests upon the defendants to prove the truth of the contents of said publications."

In contending that the instruction is erroneous, appellants first say that the law does not imply some damages from the publication of libelous matter, but appellants concede that "where the slanderous words are actionable per se, the plaintiff is entitled as a matter of law to compensatory damages and is not required to introduce evidence of actual damages in order to recover substantial damages." It is hard to understand how under the law as just quoted and conceded by appellants to be correct, a plaintiff who makes out a case of libel to the satisfaction of the jury is not entitled to some damages as a matter of law. In fact, appellants say "In an ordinary case a plaintiff has to prove that actual damages were sustained. Libel is made the exception be-

cause of the difficulty in proving actual damages." In *Taylor* v. *Gumpert,* 96 Ark. 354, 131 S. W. 968, the Court said: "Where the slanderous words are actionable *per se,* the plaintiff is entitled as a matter of law to compensatory damages, and is not required to introduce evidence of actual damages to entitle him to recover substantial damages. In such a case the plaintiff need not prove actual damages in order to recover substantial damages. [Citing *Murray* v. *Galbraith,* 95 Ark. 199.]"

Next, appellants contend that although the publication was libelous per se, it was error to tell the jury that the defendants intended the injury the libelous matter is calculated to effect. The great weight of authority is to the effect that if the publication is libelous per se, the publisher is presumed to intend the natural consequences of his own act. Restatement, Torts, Vol. 3, § 580; 33 Am. Jur. 114; 53 C. J. S. 124.

Appellants further argue that the instruction is a comment on the weight of the evidence. We do not find that the instruction is defective in that respect, and, moreover, no specific objection was made in that regard. Dunaway and Hill complain of the instruction because, they say, it treats the tapes, transcript and newspaper article as one publication. For all practical purposes, it was one publication. Dunaway and Hill made the tape recordings, made a written transcript thereof, and furnished such transcript to the publishing company, which published it in the Arkansas Gazette.

Appellee's instruction No. 12 given by the court submitted to the jury the issue of punitive damages. The Gazette objected specifically on the ground that there had been no showing of the financial condition of the Gazette. There had been some evidence introduced as to the worth of the other defendants, Dunaway and Hill. This phase of the case has caused us considerable concern. The jury returned two verdicts, one in the sum of $50,000 for compensatory damages, and one in the sum of $50,000 as punitive damages. The point is whether that part of

the judgment based on punitive damages can be allowed to stand. At the trial evidence was introduced shedding some light on the financial worth of Hill and Dunaway, but there is no direct evidence in the record as to the financial condition of the Gazette. True, the record shows the Gazette is the oldest newspaper west of the Mississippi River and that it has a statewide circulation with some circulation throughout the United States, but such meager evidence is not sufficient to show just how severe the punishment would be by causing it to pay all or a pro rata part of a $50,000 judgment for punitive damages. While the payment of $50,000 or a pro rata part thereof may be practically no punishment at all for a very wealthy person or corporation, it may be the most severe punishment and ruinous to other. Where there are joint defendants and a judgment is against them jointly, as in the case at bar, all or any one of such defendants is liable to the plaintiff for the entire judgment. *Southwestern Gas & Electric Co.* v. *Godfrey,* 178 Ark. 103, 10 S. W. 2d 894. The individual liability of joint tort-feasors to the injured party is unaffected by the Contribution Among Tort-feasors Act, Ark. Stat. §§ 34-1001—34-1009. Section 34-1003 provides: "Nothing in this act . . . shall be construed to effect the several joint tort-feasors' common law liability to have judgment recovered and payment made from them individually by the injured person for the whole injury; . . ." Under our contribution Among Joint Tort-feasors statutes, one defendant may proceed against others liable to the injured party for his pro rata share, but this does not affect the right of the injured party to recover from the joint tort-feasors individually or collectively.

This kind of action, involving punitive damages, has given rise to two lines of decisions. First, the majority holds that since the judgment for punitive damages against joint tort-feasors may actually result in greater punishment for one or more of those jointly liable, than to another who is equally liable, the right to recover such punitive damages is waived when two or more par-

ties are made defendants in a case where punitive damages may be assessable.

There is an annotation on the subject in 63 A. L. R. 1405. In support of the majority rule cases are cited from the United States Supreme Court and from the states of Illinois, Missouri, Texas, Vermont, Virginia, Washington and Wisconsin. On the other hand, in support of the minority rule cases are cited from the states of Mississippi, Ohio and Pennsylvania. Perhaps the leading case in support of the majority is that of *Washington Gas-Light Co.* v. *Lansden,* 172 U. S. 534, 19 S. Ct. 296, 43 L. Ed. 543. There the Supreme Court of the United States said: "Punitive damages are damages beyond and above the amount which the plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff. While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages, in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only. As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that, when a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them." And in *Leavell* v. *Leavell,* 114 Mo. App. 24, 89 S. W. 55, the Missouri court quoted with approval the above language of the United States Supreme Court. See, also, *Chicago City R. Co.* v. *Henry,* 62 Ill. 142; *Schafer* v. *Ostmann,* 148 Mo. App. 644, 129 S. W. 63; *Smith* v. *Wunderlich,* 70 Ill. 426; *Lister* v. *McKee,* 79 Ill. App. 210; *Singer Mfg. Co.* v. *Bryant,* 105 Va. 403, 54 S. E. 320. And in *McAllister* v. *Kimberly-Clark Co.,* 169 Wis. 473, 173 N. W. 216, the court said: "Plaintiff here, however, having an option to sue one or more of the joint tort feasors concerned in this transaction has elected to sue more than one. Having so elected, whatever judgment is to be en-

tered in such action must be entered as against all such defendants found liable. Such defendants necessarily stand on the same footing so far as compensatory damages are concerned; but when, for the purpose of enhancing what may be given by the jury for punitory damages, evidence is offered as to the financial ability of the one, it cannot but affect the amount of punitory damages to be recovered against the others, for these also must be assessed against all or none. There is no provision of the statute by which the amount of punitory damages may be assessed separately against the several defendants and we have no inclination, even if we had the power so to do, to establish by decision any such innovation in favor of this element of damage. Where, as here, the financial ability of the several defendants is different, as manifestly it would be in the vast majority of cases, a number of authorities have held the admission of such evidence as against the one to be prejudicial error against the other, and we adopt that view."

In support of the minority view it is argued that a wealthy person may join with him one of meager means and thereby avoid the risk of having a judgment for punitive damages rendered against him. In the Mississippi case of *Bell* v. *Morrison,* 27 Miss. 68, the court said: "The action was for the joint tort of the defendants, who joined in their pleas. In such a case, it is held to be proper for the jury to assess damages against all the defendants jointly, according to the amount which, in their judgment, the most culpable of them ought to pay . . . Whatever, therefore, would be competent evidence with that view as to one, would be competent as to all of the defendants. Otherwise a wealthy defendant, who is principally implicated in a wrong of this character, might escape the payment of just and reasonable damages, by having others, without character or property, associated in the unlawful act."

Up to this time this Court has not had occasion to rule on the question, and there is no statute covering the situation. After reviewing all of the authority on the subject, we are of the opinion that the better rule is that

the plaintiff waives the right to punitive damages when more than one party is made defendant in a case where ordinarily punitive damages would be assessable. Compensatory damages are awarded for the purpose of making the injured party whole, as nearly as possible. To accomplish this result, Troutt was given a judgment for $50,000, based on the verdict for that amount as compensatory damages. The $50,000 verdict based on punitive damages was not to compensate him for any damages he had sustained, but was to punish the defendants for the wrong the jury found they had committed. When a plaintiff is awarded a judgment based on punitive damages, it is somewhat of a windfall for him, because punitive damages cannot be assessed unless compensatory damages are awarded. *Kroger Gro. & Baking Co.* v. *Reeves,* 210 Ark. 128, 194 S. W. 2d 876.

By adopting the majority view, it is possible that one wrongfully publishing a libel may go unpunished by not having a judgment for punitive damages rendered against him. But on the other hand, if the minority view were adopted, a joint tort-feasor may be unjustly punished. The principle is firmly established and recognized in all courts and in every civilized country that it is better that several guilty persons go unpunished than that one innocent person be punished. Having reached this conclusion, it follows that the judgment based on punitive damages must be reversed and dismissed. This leaves intact the judgment to the extent of $50,000 for compensatory damages.

Appellants have argued other points, all of which we have examined carefully, but we find no other error.

It follows that the judgment will be reduced to the sum of $50,000, and judgment be rendered here in favor of appellee against appellants for that amount. Since the judgment is reduced by a substantial amount, the costs of the appeal will be awarded to the appellants. *Hodges* v. *Smith,* 175 Ark. 101, 298 S. W. 1023.

WARD, J., concurs.

McFaddin and George Rose Smith, JJ., not participating.

Paul Ward, Associate Justice, concurring. What I have to say hereafter is confined strictly to the question of punitive damages.

I agree with the result reached by the majority for the reasons that the judgment in this case was rendered against all three of the defendants, for the reason that a separate judgment against each individual defendant was not requested, for the reason that the Gazette's ability to pay was not shown, and for the reason that this court had no way of equitably dividing the judgment. Under these circumstances the court could do nothing except remit the judgment entirely. The majority, however, did not reach its decision on the above stated ground, and that is the reason for this concurrence.

The majority opinion contains the following statement based on what it calls the majority rule: "The right to recover (such) punitive damages is waived when two or more parties are made defendants in a case where punitive damages may be assessable."

I do not agree with the so-called majority rule, and I do not think it was necessary to rely on such a rule in this case. Since it was not necessary, I feel that the court should have waited until the specific question is raised and carefully briefed in this court.

I see no logical or practical reason why separate judgments cannot, in the same case, be rendered against separate defendants. It must be conceded that the plaintiff can recover punitive damages against one person and then in a separate suit likewise recover against another person. In either event the court and the jury acted on precisely the same law and the same evidence. Not only would my view avoid a multiplicity of suits, but any other procedure might run afoul of Ark. Stats. § 27-814, which require a joinder of parties.

The view which I have above set forth has been approved in the case of *Charles E. Faroux, et al.* v. *H. H. Cornwell, et al.*, 40 Tex. Civ. App. 529, 90 S. W. 537;

Walker, et al. v. *Kellar*, Tex. Civ. App., 226 S. W. 796; and *St. Louis Southwestern Railway Company of Texas* v. *W. Z. Thompson*, 102 Tex. 89, 113 S. W. 144.

In the latter mentioned case the court had this to say:

"If the defendants or either of them were actuated by malice in making the charges against Thompson or in procuring the same to be made and in prosecuting the same before the order, thereby procuring his expulsion, then the plaintiff may in the discretion of the jury recover exemplary damages against either or all of the said defendants, in such sum as the jury may believe should be assessed against the said defendants or either of them. It is not necessary, as in case of actual damages recovered, that all of the defendants should be subjected to the same verdict, because some of the defendants may have acted without malice, but in combination with others, and as to such defendants there would be no right to recover exemplary damages."

DUNCAN *v.* CROWDER.

5-2120 339 S. W. 2d 310

Opinion delivered October 24, 1960.

Rex W. Perkins, Charles Bass Trumbo and *E. J. Ball,* for appellants.

Wade & McAllister, for appellee.

JIM JOHNSON, Associate Justice. This is a child custody case. On March 19, 1956, the Chancery Court of Tippah County, Mississippi, entered a decree of divorce in favor of Jeanne Duncan Crowder against her husband, Frank Lindoerfer, and awarded sole custody of said parties' minor child, Nettie Katherine Lindoerfer, then aged two years, to Jeanne Duncan Lindoerfer, appellee herein, but with the provision that the maternal grandfather, T. E. Duncan, one of the appellants herein, be awarded temporary custody of said minor child until such time as the child's mother was able to provide a suitable home for her child.

On August 23, 1958, the child's mother married James Alvin Crowder and on October 31, 1958, filed a petition for writ of habeas corpus in the Washington Circuit Court to obtain custody of her minor child from her maternal grandparents, the appellants herein.

The cause was subsequently transferred to the Washington Chancery Court and on July 17, 1959, the Washington Chancery Court entered a decree directing appellants to deliver custody of the child, then five years of age, to appellee on or before 12:00 o'clock noon, July 20, 1959.

On July 18, 1959, appellants filed notice of appeal to this Court and a supersedeas bond, which bond was approved by the Washington Chancery Court. On July 24, 1959, appellee petitioned the Washington Chancery Court for an order citing appellants to appear before the Washington Chancery Court and show cause why they should not be adjudged in contempt of the decree of the Washington Chancery Court rendered July 17, 1959, for failure to deliver custody of said minor child to appellee prior to 12:00 o'clock noon, July 20, 1959.

On July 29, 1959, the Washington Chancery Court entered an order dismissing appellee's petition for citation for contempt for want of jurisdiction and on August 12, 1959, three Justices of this Court during recess entered a temporary per curiam order subject to action of the Full Court referring the matter of fixing custody of

said minor child, pending appeal to this Court, back to the Washington Chancery Court.

On August 13, 1959, the Washington Chancery Court directed appellants to appear and show cause why the custody of said minor child should not forthwith be delivered to appellee, and on August 18, 1959, the Washington Chancery Court awarded temporary custody of said minor child to appellee pending determination of appellants' appeal to this Court and at the hearing approved a $1,000 bond filed by appellee conditioned to redeliver custody of said child to the jurisdiction of the Washington Chancery Court upon order therefor by either the Washington Chancery Court or this Court, following a final decision of the case upon its merits by this Court.

Upon reconvening, this Court entered on September 7, 1959, the following order:

"The temporary order made during recess confirmed. The trial court had discretion and power to fix custody pending our decision. There is no absolute right of supersedeas in child custody cases."

This appeal is now before this Court for a final determination upon its merit.

Appellee, Jeanne Duncan Crowder, is the only daughter of Talmadge Edward Duncan and Mary Evelyn Duncan, appellants herein. Mrs. Duncan is now over 58 years of age. Mr. Duncan is now over 60 years of age. The Duncans reside at 416 North Washington Avenue, Fayetteville, Arkansas. Nettie Katherine Lindoerfer, the appellee's first born child, was born March 23, 1954.

Mrs. Crowder lived with her daughter, Nettie, in the home of the maternal grandparents during the first year and a half of the child's life. During that period of time the mother rendered normal care for Nettie and evidenced love and affection for her. To better prepare herself to provide for her child Mrs. Crowder earned a master's degree at the University of Arkansas. This graduate study was pursued and accomplished with the

complete knowledge, consent and approval of the Duncans. Later Mrs. Crowder maintained an active interest, love, and affection for her minor child through cards, letters, gifts, and visits to her while participating in the doctoral programs in universities in Atlanta, Georgia, and New Orleans, Louisiana. During this time a divorce decree was rendered in favor of Mrs. Crowder by the Chancery Court of Tippah County, Mississippi, on March 19, 1956, in which decree the sole custody of Nettie was awarded to Mrs. Crowder with temporary custody of Nettie awarded to Mr. Duncan until such time as Mrs. Crowder could provide a suitable home for her daughter.

At no time did the Duncans challenge Mrs. Crowder's fitness as a mother of her lawful right to sole custody of Nettie until after it became evident to them that following their daughter's marriage to James A. Crowder that she was then able to provide a suitable home for the child.

The record is clear that at no time since Nettie's birth did Mrs. Crowder abandon her. Mrs. Crowder rendered the normal care any young mother would for her first born child, and although she was away from home for her graduate studies, she visited her daughter at the normal vacation periods such as Thanksgiving, Christmas, Easter and all other opportunities. The transcript lists the many letters and cards from Mrs. Crowder to Nettie which were recognized in Mrs. Duncan's letters to Mrs. Crowder; a list of gifts from Mrs. Crowder which were recognized in Mrs. Duncan's letters to Mrs. Crowder; and a list of Mrs. Crowder's gifts to Nettie which were not mentioned in Mrs. Duncan's letters to Mrs. Crowder. Six weeks prior to their wedding, on August 23, 1958, in the home of Mr. and Mrs. Duncan, Mr. and Mrs. Crowder discussed Nettie's future with Mr. and Mrs. Duncan. A discussion was held in a drug store in Blue Mountain, Mississippi, which resulted in a verbal understanding between them and the Duncans that Nettie would make several visits to the Crowders during the ensuing fall, winter, and spring, leading to her living with the Crowders permanently

after the spring or summer of 1959, this period of several months being considered as an adjustment period for all parties concerned.

Mr. Crowder, the son of a retired Baptist minister, is employed as a psychiatric social worker at the Southeast Louisiana Hospital and the Bogalusa Guidance Center, and earns in excess of $400 per month. He carries over $10,000 insurance upon his life with his wife as beneficiary. He also carries hospitalization insurance and an income protection insurance policy which would pay him $300 per month in the event of his disability. He holds a master's degree in social work from Louisiana State University; served as county director of Alabama Department of Public Welfare for a number of years, having administrative and supervisory responsibility for the county adoption and aid to dependent children programs. For two years he served as probation and parole officer of the local juvenile court. His moral character and general reputation are unquestioned.

Mr. and Mrs. Crowder rent a five room duplex apartment at 2118 Charlton Lane, Metaire, Louisiana, a suburb of New Orleans. The street is a private dead-end drive. In addition to a fenced back yard, there is a large wooded lot next door. The house has a living room, dining room, two bedrooms, kitchen and bath. It is completely furnished with furniture most of which was refinished by the Crowders' own hands. It is located in a residential neighborhood near a school and is sheltered from heavy traffic.

Mr. and Mrs. Crowder are members of the St. Charles Avenue Baptist Church and are regular in their attendance there.

At the time of the trial, Mrs. Crowder was pregnant with a second child — to become a brother or sister of Nettie's. The record shows that Nettie went into the Crowder home prior to the expected birth of her sibling. The record reflects that the Crowders felt it important for Nettie to anticipate and participate in the approach-

ing birth of the second child in the Crowder family. Reputable people in the Crowders' home community attested to the fact that Mr. and Mrs. Crowder have established and are maintaining a suitable home for the complete and absolute care and control of Nettie.

The record of this case is voluminous. A detailed statement of the facts would serve no useful purpose. We have deliberately drawn the mantle of judicial discretion around the somewhat sordid details brought into the evidence by the grandparents in their determined efforts to keep the little girl. We find no merit in such evidence. As in all child custody cases, the tender consideration we have for the future of the child involved causes us more concern than we experience in any other type of case. Of course it is a universal rule of law that the paramount consideration in awarding custody of minor children is the best interest and welfare of the child. However, in accomplishing this end, in order to as nearly as possible maintain a uniformity in the law, we must follow our rules heretofore laid down in prior decisions.

In *Kimberling* v. *Rogers,* 227 Ark. 221, 297 S. W. 2d 722, this Court said:

"Because human nature is as it is, no two child custody cases can ever be exactly the same; so the policy is to examine our other similar child custody cases and then see which one more nearly resembles the case at bar."

Our research reveals that the case of *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726, resembles the case at bar a great deal. In this case the mother sought to obtain custody of her 3 year old daughter from the paternal grandparents. After marriage the mother and father resided with the paternal grandparents where the child was born. The mother nursed and cared for the child while living with the paternal grandparents. When the husband died the mother and her child lived with her sister, her parents, her sister again, with the paternal grandparents and then back with her parents. The mother went to work leaving her child with the paternal grandparents

and visited the child during the six months she was working prior to her second marriage. After her marriage she got her child and kept it for about two weeks. She became ill and requested the paternal grandparents to keep the child until she got well, at which time they refused to give it to her. The grandparents contended that the mother was not a fit person to have the custody of her child, and endeavored to show that the mother was an immoral woman. This Court in awarding custody to the mother held:

"There can be no question in the law that, as between a mother and grandparents, the mother is entitled to the custody of her child, 'unless incompetent or unfit, because of poverty or depravity, to provide the physical comforts and moral training essential to the life and well being of her child.' *Washaw* v. *Gimble,* 50 Ark. 351, 7 S. W. 389; *Baker* v. *Durham,* 95 Ark. 355, 129 S. W. 789.

". . . Her reputation for immorality was based largely upon the fact that she went riding at nights during that period with a married man or two. There is nothing in the record of consequence tending to show that she had continued this alleged conduct or that she has been guilty of any indiscretion since she married (her second husband) . . . The child is barely four years of age at this time, and, if her mother is conducting herself discreetly, we can see no good reason why she should be deprived of the joy of parental relationship. If she is leading and will continue to lead a righteous life, the pleasures incident to motherhood should be accorded her by the courts. According to the record, she is not lacking in affection for her child. She is keeping house in Halley, and her husband is amply able and willing to maintain, support, and educate the child. We are unable to discern anything in the record to indicate that the present and future welfare of the child will be imperiled by placing it under the care and control of the respondents." See also: *Servaes* v. *Bryant,* 220 Ark. 769, 250 S. W. 2d 134 (1952).

The case of *Parks* v. *Crowley,* 221 Ark. 340, 253 S. W. 2d 561 (1952) involved the custody of a 5-1/2 year old

girl child, the Court in reversing the trial court and awarding custody to the mother as against the paternal grandparents said:

". . . the child's father is not a party to this action. According to this record, he has never shown the slightest interest in Pamela and has never provided a home or any support for her . . . On February 28, 1949, Frances (the mother) married Parks (second husband) and they now have a son two years of age. The record discloses that on September 4, 1946, Jack Crowley (the father) secured a Florida divorce from Frances and seven days later she gave birth to Pamela. Shortly thereafter, Frances took her baby to the home of her parents in Paragould and later secured employment to support herself and child. During this period, Frances had allowed the child to stay in the home of its paternal grandparents (appellees) a greater part of the time. Appellees are good people and their affection for the child and desire to care for it are not questioned . . ." In reversing the trial court, this Court in the *Parks* case said:

"In considering this case, we do not lose sight of the fact that we are dealing with the welfare of a little girl of the tender age of five years when obviously she is most in need of the loving care of its real mother unless the mother is so depraved morally or otherwise as would render her unfit to have her child. While appellees have had her custody for most of her life, when the real mother shows that she is entitled to its custody, we must know, human nature being what it is, that the love and attachment of this little girl for her grandparents (appellees) cannot have become so deep rooted and attached that it could not, within a very short time, be transferred to her real mother by proper treatment, love and care, if given opportunity."

In the recent case of *Rayburn* v. *Rayburn,* 231 Ark. 745, 332 S. W. 2d 230, this Court reiterated the principles announced in the decisions cited hereinabove in awarding a natural parent custody of a minor child, saying:

". . . 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."

From what has been said above, the record before us, and finding no merit in the points urged by appellants for reversal, on trial *de novo* we are unwilling to say that the Chancellor's opinion (which was rendered after having observed the witnesses testifying and after having interviewed the little girl in chambers) awarding custody of the child to appellee is against the weight of the evidence.

Affirmed.

HARRIS, C. J., and HOLT, J., dissent.

CARLETON HARRIS, Chief Justice, dissenting. I feel that the Court should have granted custody of the child, Nettie Katherine, at least for the time being, to the grandparents, Mr. and Mrs. Duncan, rather than to the mother, Jeanne Duncan Lindoerfer Crowder.

The Majority have not seen fit to relate the evidence which most strongly supports the view that Mrs. Crowder is unsuitable to be given the custody of the child. Since they have not done this, I shall follow suit, for the testimony is, as the Majority state, rather sordid, and nothing would be gained by discussing the charges of immorality against appellee (a substantial part of which was admitted), other than to considerably strengthen this dissent, which, after all, is unimportant.

Suffice it to say, that the conduct referred to occurred some seven or eight years before this trial, while appellee was a student at a girls' school in a neighboring state. It may be, as Mrs. Crowder stated, in defending her conduct, that it was "mostly a case of delayed adolescence", but the admitted acts occurred during the course of a year when appellee was 19 to 20 years of age. Be that as it may,

this testimony was only a part of the evidence which I consider to indicate Mrs. Crowder's emotional instability or immaturity. A short time after her graduation, she married Frank Lindoerfer, father of Nettie, but they separated after five months. Subsequently, she went to Emory University, where she had been awarded a fellowship, in furtherance of an expressed intention to obtain advanced degrees in psychology. During this period, though still married to Mr. Lindoerfer, she dated a man named Sheldon Fein, admittedly thought she was in love with him, and discussed the subject of future marriage. The relationship with Fein was terminated because the appellants herein wrote Fein, and apparently threatened to attempt to obtain his dismissal from the school. Sometime subsequently, the fellowship awarded appellee was cancelled by the Dean of Emory University, because of her unsatisfactory scholastic record. Mrs. Crowder had been married to her present husband less than eleven months at the time of the rendition of this decree, which, under my view, is not a sufficient period of time in which to determine whether this marriage will provide a suitable home environment, or whether appellee has attained that degree of stability which is so desirable and necessary for one having the custody of a small child.

Certainly, I have no desire to punish Mrs. Crowder for "indiscretions" of youth, if, in fact, the acts mentioned in the testimony were indiscretions, rather than evidence of a fixed behavior pattern. I also recognize there are two sides to this lawsuit, and that perhaps appellants are not entirely blameless, but I am firmly of the opinion that the Court's order giving appellee custody of this child was premature; *i.e.,* her change in habits and attitudes should be more firmly established before entrusting her with the care of this little girl.

I therefore respectfully dissent.

Mr. Justice Holt joins in this dissent.

5-2201 339 S. W. 2d 430

Opinion delivered October 31, 1960.

George F. Edwardes, for appellant,

Stroud & McClerkin, for appellee.

CARLETON HARRIS, Chief Justice. This is the second appeal involving these parties. In *Walls* v. *Walls,* 227 Ark. 191, 297 S. W. 2d 648, this Court upheld the action of the Chancellor in refusing to grant appellee, Pearl Roberson Walls, a divorce, but modified the court's decree by directing that appellant, D. C. Walls, be given custody of the three older children born of the marriage, and Mrs. Walls retain custody of the two younger children. The trial court's order directing appellant to vacate the farm home, owned as an estate by the entirety by Mr. and Mrs. Walls, was set aside. Since that time, appellant, and the children whose custody was placed in him, have continued to occupy the home place.[1] Mrs. Walls did not return to the home, and has lived with the two younger children at the Bramble Courts in Texarkana. She is presently employed, and earns "take home pay" of $37 per week.

Appellant instituted suit for divorce on February 16, 1959, alleging desertion, and continuous separation for a period of three years without cohabitation. An answer was filed by appellee, admitting the three years separation, but denying that Mr. Walls was the injured party. On hearing, the court granted appellant a divorce upon the ground of three years separation; awarded the custody of the two older children, Clovis Wayne Walls, age 15, and Janice Walls, now 13, to appellant, and awarded the custody of the two younger children, Cathy Ann Walls, age 9, and Terrell Walls, age 5, to appellee. Appellant was directed to pay to Mrs. Walls the sum of $25 per week for the care and support of the minor children in her custody. The court further ordered appellant to pay certain hospital and medical bills that had accrued, and an additional fee[2] of $100.00 to appellee's attorneys. No order was made relative to the home property, other than a finding by the court that Mr. and Mrs. Walls owned this property as an estate by the entirety. From such decree, appellant brings this appeal.

[1] The eldest child, a daughter, has since married and moved away.
[2] Appellant had already paid $100.00 to appellee's attorneys.

Appellant contends (1) that the court erred in awarding the custody of the two younger children to Mrs. Walls, (2) that the decree should have granted appellant the right of subrogation upon payment of the mortgage indebtedness on property belonging to the parties, (3) that the court erred in ordering the payment of attorneys' fees to appellee's attorneys because she was the party at fault, (4) the court erred in ordering Mr. Walls to pay hospital and doctor bills for the reason that appellant had adequate insurance for such purposes, and was entitled to co-operation from appellee in filing proof of loss, (5) that the court erred in failing to protect the equitable estate of Mrs. Zora Walls, mother of appellant, in the property involved in this litigation, and (6) that the award for maintenance for the two smaller children was excessive.

Appellant argues that since Mrs. Walls left her husband, and the home, without cause (See *Walls* v. *Walls, supra*), the awarding of custody of the two younger children to her was improper. In the first case we stated:

"Determining the custody of the children presents a more difficult problem. It is well established that children, where possible, should remain together. It is likewise true that the law favors granting custody of small children to the mother. This, however, is not a 'hard and fast' rule, and each case must be governed by its own particular circumstances. We feel that the two young children, taken away from the home by the mother, should remain with her. We think, however, that the Chancellor should have left the custody of the three remaining at home, with the father. As far as the record shows, the children, in each location, have been well cared for, and both parents seem to be morally qualified to have the custody. Near the home place, appellant constructed a residence for his invalid mother and sister, and the sister seems capable of looking after these children, all of whom are of school age. It is with reluctance that we separate these youngsters, but it is felt that under the circumstances, their best inter-

ests will be served, as well as the best interests of their parents."

There was no evidence in the present hearing which indicates that circumstances have varied to the extent that a change in custody would be justified. We have held that "a decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child." See *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455, and cases cited therein.

Relative to his second contention, the record reflects that the home property was mortgaged in the amount of $1600.00, payable in annual installments of $400.00, for which the parties hereto are jointly liable. In the first place, the right of subrogation is not sought in the pleadings, appellant only asking "that the title to his property be clear"; nor is there anything in the record to suggest that appellee will not join in the payments. At any rate, it appears that the indebtedness has not yet been satisfied, and we have held on numerous occasions that subrogation cannot be claimed until the entire indebtedness is paid. See *North Arkansas Milling Company* v. *Lipari,* 231 Ark. 965, 333 S. W. 2d 713, and cases cited therein.

In regard to point three, the awarding of attorneys' fees is within the sound discretion of the trial court, and the order of that court will not be disturbed unless there has been an abuse of discretion. In *Laird* v. *Laird,* 201 Ark. 483, 145 S. W. 2d 27 (1940), a divorce was granted the husband, the court finding the wife to be at fault. The trial court allowed alimony, and an attorney's fee for appellant's attorney. This Court, though affirming the decree of divorce, and thereby sustaining the trial court's view that the wife was at fault, not only upheld the right of the trial court to award alimony, and fix an attorney's fee for the wife's attorney, but also held that the amounts granted by the trial court

were too small, and directed that larger allowances be made. We find no abuse of discretion by the Chancellor in the order relating to attorneys' fees in the cause before us.

Appellant was ordered to pay accrued medical bills (the record is silent as to the amounts involved), which appellee testified were bills due for services rendered to the children in her custody. We have held that the father is liable for medical services rendered to his children. *Bradas* v. *Downing,* 202 Ark. 90, 150 S. W. 2d 27 (1941). Appellant does not question the amount involved; his complaint is that he carried insurance which would have covered these bills, but that appellee did not notify him in time for a claim to be timely filed. Mrs. Walls testified that she did not know that the insurance provided complete medical care for the children, until so advised by appellant, and this knowledge was obtained at a time when it was too late to file for benefits. Of course, appellee could not be expected to give notice concerning coverage which she knew nothing about. We think it well, however, to point out, that Mrs. Walls certainly is now aware of the fact that Mr. Walls carries this type of insurance, and henceforth, she should co-operate in every respect with appellant by notifying him immediately of any medical bills incurred, and assisting, as may be required, in filing claims for benefits.

The next alleged error deals with the failure of the court to convey one acre of the property herein involved to Mrs. Zora Walls, mother of appellant. The record reflects that at the time the house was built on the land, the mother and a sister of Mr. Walls provided approximately $650.00 to apply on the construction of the house. According to both appellant and appellee, there was an agreement that the mother and sister could stay in the house as long as they lived, but Mr. Walls, though admitting the agreement, testified: "I feel like we should deed her an acre of ground myself." Since an agreement to deed an acre is neither alleged nor testified to by any party, it is apparent that no consid-

eration can be given this contention. The interest of this mother and sister, Zora Walls and Bessie Scoggins, seems to be fully protected in conformity with the agreement reached, as appellee testified, "As long as they live and want it as a home, it is theirs, as far as I am concerned."

Finally, appellant contends that the amount of maintenance ordered for the support of the minor children is excessive. As stated, this amount was $25 per week, or $12.50 per child. The proof reflects that Mr. Walls has "take home pay" of approximately $360.00 per month. He has possession of the home place, while it is necessary that appellee, from her earnings, rent quarters in which to live, together with the children placed in her custody. Under these circumstances, we cannot say that the maintenance awarded is excessive.

The decree is affirmed.

Appellee's attorneys seek a further fee on this appeal, and of course, additional time and labor have been required to represent Mrs. Walls in this Court. We think, considering appellant's income, the obligations presently incumbent upon him under the decree, and the fact he has already paid the sum of $200.00 to Mrs. Walls' attorneys, that an additional fee of $50 is proper and equitable. Costs against appellant.

BOLAND *v.* BELLIS.

5-2227 339 S. W. 2d 424

Opinion delivered October 31, 1960.

[redacted]

I. C. Burgess, for appellant.

Richard Mobley, for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, S. O. Boland, brought this suit to cancel an alleged forged mineral deed. Appellees, J. H. Bellis and Heirs of J. H. Bellis, L. H. Owens, Heirs of L. H. Owens, W. E. Witt and Unknown Heirs of W. E. Witt, answered with a denial that the deed was forged. From a decree denying appellant the relief prayed is this appeal.

The record reflects that on March 1, 1929, E. A. Woods and wife [the record title owners of a tract of land containing 102 acres] purportedly conveyed a one-half undivided interest in and to the minerals under this land to J. H. Bellis. On April 29, 1930, following the death of J. H. Bellis, his heirs conveyed a part of their mineral rights in the above land to the appellees, Owens and Witt. It further appears that on January 2,

1935 [and recorded January 19, 1935] E. A. Woods and wife had executed and delivered a Federal Land Bank mortgage which recited that it was subject to the above mineral conveyance in question. On November 28, 1947, E. A. Woods and wife sold the 102 acre tract of land here involved to S. L. Boland.

In the trial, Boland claimed that the deed to Owens and Witt was a forgery and in an effort to prove his claim, produced two witnesses, himself and E. A. Woods. They both testified, in effect, that the deed to Owens and Witt was a forgery. As indicated, the testimony of these two witnesses was all the evidence introduced by appellant, Boland. At this point, appellant offered no further testimony. Appellees filed a demurrer to appellant's evidence, challenging its sufficiency to grant the relief sought under authority of Act 470 of 1949 [Ark. Stats. (1947) § 27-1729 as amended]. After hearing arguments the trial court sustained the demurrer and dismissed appellant's complaint and this appeal followed.

Appellees argue that, (1) appellant did not produce that quantum of proof required to set aside the mineral deed in question which was acknowledged, recorded, and allowed to remain unchallenged for over thirty years (2) appellant's proof, even when viewed in its most favorable light, shows that his case is barred by limitations and laches. Here we are confronted with a procedural question, a question of law and not of fact. The present case appears to be practically on all fours with our holding in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, under a similar fact situation. We there pointed out that it was the duty of the trial court to give the plaintiff's [appellant] evidence its strongest probative force and to hold against the plaintiff only when after so considering the evidence it should fail to make a *prima facie* case. "What, then, is the effect of a demurrer to the evidence or a similar pleading in jurisdictions recognizing that practice? The question may arise either in equity cases, where the chancellor is the arbiter of the facts, or in cases tried at law without a jury, where also the trial judge decides all issues of fact. By

the overwhelming weight of authority it is the trial court's duty, in passing upon either a demurrer to the evidence or a motion for judgment in law cases tried without a jury, to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence when so considered fails to make a *prima facie* case." We reaffirmed this holding in the recent case of *Weaver* v. *Weaver,* 231 Ark. 341, 329 S. W. 2d 422.

On this record, we cannot say that there was no substantial evidence offered by appellant to make a *prima facie* case in his favor. We are not here deciding as to what the chancery court would hold on final weighing of the evidence. We hold that the court erred in sustaining appellees' demurrer and motion to dismiss and accordingly, the decree is reversed and the case remanded for further proceedings.

Reversed and remanded.

WARD and ROBINSON, JJ., concur.

PAUL WARD, Associate Justice, concurring. I am writing this concurrence to save for future consideration a point of law which the majority opinion does not mention. This question of law may be briefly stated as follows: Shall the grantee of real estate take notice, under any circumstance, of a forged deed which appears in his chain of title?

To better understand the point which I wish to make in this concurrence it will help to set forth the following brief statement of facts.

Eunice Woods owned the lands here in question prior to 1929; on March 2, 1929, there appeared of record a mineral deed (apparently) executed by Woods conveying a ½ interest in mineral rights to J. H. Bellis; in 1947 Woods conveyed the land to S. L. Boland (appellant) by warranty deed showing no exceptions to the full fee; when Boland bought the land and the abstract was delivered to him he had the abstract examined by an attorney of his choice. Eleven years later Boland instituted this action

to cancel the said mineral deed on the ground that it was a forgery.

The majority opinion reverses the case under the rule in *Werbe* v. *Holt,* but did not discuss the question which I have mentioned above. It is my distinct understanding that the majority opinion makes no attempt to decide one way or the other the aforementioned question. It is with that understanding that I now concur and do not dissent.

I fully recognize and readily agree that the forged mineral deed (if it was forged) constituted no constructive notice to Woods as long as he held the land. If this were not true then Woods would be forced to search the records periodically to see if there was anything of record affecting his title. However in this case, when Boland bought the land in 1947 and had his abstract examined he could have, by the exercise of ordinary care, found the mineral deed as a cloud on his fee title. At that time he had a right to bring an action to set aside that cloud. That right however should not, for practical reasons, exist forever. It must follow therefore that he could lose this right under one of several statutes of limitations, none of which extend for a period of more than seven years. In this instance he waited eleven years and thereby, I think, lost his right to maintain this action.

I have been unable to find where this exact point of law has been considered in any of our opinions. However there is support for my view in other jurisdictions. In the case of *Duphhorne* v. *Moore,* 82 Kan. 159, 107 P. 791, the court was concerned with setting aside a deed induced by fraud and the court said: "For the purpose of setting the statute of limitations in operation, the fraud is deemed to be discovered whenever it is discoverable by the exercise of the diligence reasonably to be expected of one in the position of the person defrauded under all the circumstances."

Applying the reasoning in the above cited case only one result can be reached under the facts and circumstances in this case. If Boland had exercised the slightest diligence he would have discovered that a mineral deed

had been executed some twenty-five years previously; he must have known that there was a chance that his fee was likely to be impaired; he must be charged with lack of diligence when he paid Woods the full purchase price for the full fee knowing that he might not be getting ½ of the mineral rights. Therefore it is unreasonable and impractical to say that Boland did not have some kind of notice, or to say that this notice did not set in motion the statute of limitations.

SAM ROBINSON, Associate Justice, concurring. I concur for the purpose of pointing out that as I understand it, this case is decided here strictly on a point of procedure, in which we adhere to the rule announced in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. The Court does not reach the point of whether Boland, under all the circumstances, is barred by the principle of laches from proving the deed from Woods to Boland is a forgery.

BERRY *v.* HALL, SECRETARY OF STATE.

5-2296 339 S. W. 2d 433

Opinion delivered October 31, 1960.

Josh W. McHughes, for plaintiff.

Mehaffy, Smith & Williams, by *Wm. J. Smith,* for Intervenors.

ED. F. MCFADDIN, Associate Justice. This case is an eleventh hour attempt—by original action in this Court—to prevent proposed Constitutional Amendment No. 51 being submitted to the voters at the November 1960 General Election.

The General Assembly of Arkansas at its 1959 session adopted Senate Joint Resolution No. 4, which may be found on pages 1973 *et seq.* of the Acts of Arkansas for the year 1959. The entire Joint Resolution need not be copied, but we set out enough of it to identify what we will later discuss:

"SENATE JOINT RESOLUTION NO. 4.

"*Be It Resolved by the Senate of the State of Arkansas, and by the House of Representatives, a Majority of All Members Elected to Each House Agreeing Thereto*:

"That the following is hereby proposed as an amendment to the Constitution of the State of Arkansas, and upon being submitted to the electors of the State for approval or rejection at the next general election for Representatives and Senators, if a majority of the electors voting thereon at such an election adopt such amendment, the same shall become a part of the Constitution of the State of Arkansas, to-wit:

"SECTION 1. In addition to other powers granted by constitutional or statutory authority, cities of the first and second class may issue, by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election as follows: . . ."

To prevent this Senate Joint Resolution No. 4 being submitted to the voters of Arkansas at the November 1960 General Election, as proposed Constitutional Amendment No. 51, the present case was filed as an *original action in this Court* on October 18, 1960. It is

claimed that the ballot title is defective and misleading. The Arkansas Municipal League has intervened to resist this action; and one point of resistance is that the action is improperly brought in this Court as *an original proceeding*. We find this point to possess merit because this proposed Constitutional Amendment was submitted by the Legislature; and the Arkansas Supreme Court has no original jurisdiction, regarding procedure on proposed constitutional amendments, except those amendments submitted under Amendment No. 7. We will elucidate on these conclusions.

I. *Distinction In The Methods Of Submitting Amendments.* There are two entirely different methods (ways) by which constitutional amendments may be submitted to the voters of Arkansas. One is for the Legislature to propose an amendment; and the other is for the People to initiate a proposed amendment. Article 19, Section 22 of the Arkansas Constitution is concerned with amendments submitted by the Legislature;[1] and Amendment No. 7 to the Constitution is concerned with proposed amendments initiated by the People. In Section 1 of Amendment No. 7 this difference is recognized in these words:

"The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the

[1] This Section reads: "Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution; but no more than three amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately."

power, at their own option, to approve or reject at the polls any entire act or any item of an appropriation bill."

In *Coulter* v. *Dodge,* 197 Ark. 812, 125 S. W. 2d 115 (decided in 1939, which was several years after Amendment No. 7 had been declared adopted), this Court recognized the distinction between constitutional amendments proposed by the Legislature and those initiated by the People; and Mr. Justice Frank G. Smith used this language in the opinion:

"Let it be remembered that we are considering now only proposals to amend the Constitution submitted by the General Assembly. An entirely different procedure is applicable to amendments proposed under the Initiative and Referendum Amendment No. 7."

The plaintiff insists that Section 6 of Amendment No. 7 (in the heading, "Definition"),[2] and Section 10 of Amendment No. 7 (in the heading, "Majority"), show that Amendment No. 7 was designed to include both kinds of amendments—*i.e.,* legislatively proposed and initiated; but we find these contentions by the plaintiff to be without merit. We hold that amendments proposed by the Legislature are entirely different from those initiated under Amendment No. 7 and are governed by an entirely different procedure.

II. *Jurisdiction.* With the point established that Amendment No. 7 does not apply to the procedure of amendments submitted by the Legislature, we turn now to the vital question of jurisdiction. In Section 16 of Amendment No. 7 there is this language in regard to the original jurisdiction of this Court:

"The sufficiency of all State-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State,

[2] In the dissenting opinion in *Dixon* v. *Hall,* 210 Ark. 891, 198 S. W. 2d 1002, the sections of Amendment No. 7 are numbered and identified; and such numbering is used herein.

which shall have original and exclusive jurisdiction over all such causes. . . ."

So in any case involving an amendment submitted under the procedure outlined in Amendment No. 7, the Supreme Court of Arkansas has original jurisdiction.[3] But there is no language in Article 19 of Section 22 of the Constitution—regarding a constitutional amendment proposed by the Legislature—that gives the Arkansas Supreme Court any original jurisdiction in litigation challenging the validity of submission of such proposed amendment. On the contrary, the Constitution in Article 7 of Section 4 restricts the jurisdiction of the Arkansas Supreme Court to *appellate jurisdiction.* Here is the germane language:

"The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which may be coextensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and, other remedial writs, and to hear and determine the same. . . ."

In *Sauve* v. *Ingram,* 200 Ark. 1181, 143 S. W. 2d 541, this language appears:

"Section 4 of art. 7 of the Constitution of the State of Arkansas provides, among other things, that except in cases otherwise provided, the supreme court shall have appellate jurisdiction only. This court has no authority to decide a question like this unless it has been

[3] *McAdams* v. *Henley,* 169 Ark. 97, 273 S. W. 355, 41 A. L. R. 629, involved the procedure whereby the Legislature submitted an amendment; and that case reached this Court by appeal from the Chancery Court. On the other hand, original actions were filed in this Court in each of the following cases which involved attacks on measures initiated under Amendment No. 7, to-wit: *Hope* v. *Hall,* 229 Ark. 407, 316 S. W. 2d 199; *Washburn* v. *Hall,* 225 Ark. 868, 286 S. W. 2d 494; *Ellis* v. *Hall,* 219 Ark. 869, 245 S. W. 2d 223; *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72; *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 547; *Hargis* v. *Hall,* 196 Ark. 878, 120 S. W. 2d 335; *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81.

decided by the lower court. In other words, we have no original jurisdiction, but only appellate jurisdiction.

"This court said, in the case of *Road Imp. Dist. No. 4 of Prairie County* v. *Mobley,* 150 Ark. 149, 233 S. W. 929: 'The jurisdiction of this court is, under the Constitution, merely appellate and supervisory, except in the single instance of the exercise of original jurisdiction in the issuance of writ of *quo warranto.* Constitution of 1874, art. 7 §§ 4 and 5. The various writs authorized to be issued by this court are merely in aid of such appellate or supervisory jurisdiction. *Ex parte Jackson,* 45 Ark. 158; *Arkansas Industrial Co.* v. *Neel,* 48 Ark. 283, 3 S. W. 631. . . .'"

A careful study of the Constitution and all of its Amendments fails to disclose any provision that gives the Arkansas Supreme Court original jurisdiction in a case like the present one, which is attacking the regularity of submission to the voters of a constitutional amendment *proposed by the Legislature.* Such an action should have been filed in the Chancery Court and not in the Supreme Court. So we must conclude that we cannot take original jurisdiction in this case; and such conclusion makes it improper for us to discuss any of the other issues raised.

The case is dismissed.

FREEMAN *v.* FARMERS BANK & TRUST CO.

5-2210 339 S. W. 2d 427

Opinion delivered October 31, 1960.

Gardner & Steinsiek, for appellant.

Reid & Burge and *Oscar Fendler,* for appellee.

GEORGE ROSE SMITH, J. The appellee, as trustee under the will of W. T. Kitchen, filed an annual accounting in the chancery court and asked that it be approved. This request was resisted by the appellant, a life beneficiary of the trust, who contended that the trustee had erred in charging certain mortgage payments and life insurance premiums against income rather than against principal. This appeal is from a decree holding that the payments were properly chargeable to income. That is the only question before us.

The testator Kitchen, at his death in 1957, was the owner of all the capital stock (except two qualifying shares) in a corporation called Kitchen Farms Company. The principal assets of the corporation consisted of about 2,500 acres of farm land which the corporation had mortgaged to a life insurance company to secure a debt of $200,000. By the terms of the mortgage the corporation was required to pay the interest upon the debt and to pay $5,000 upon the principal each year.

Kitchen's will bequeathed all his stock in the corporation to the appellee, with directions that the stock be divided into three shares and be held upon three separate trusts. We are here concerned with the largest of the three trusts, as to which the will provided: "Share No. Three, consisting of fifty (50%) per cent of my stock or other interests in the Kitchen Farms Company shall be assigned to my Trustee to hold, in trust, on the following terms: The Trustee shall control and manage same and shall receive the income therefrom, and after paying the reasonable expenses of the trust, shall pay the income at least annually as long as she lives to Mrs. Tanna Freeman [the appellant]." Various remainders are to take effect at the death of the life tenant. Forty per cent of the corporate stock was left to the appellee upon a second trust, and the other ten per cent upon a third trust.

The will also contained this provision about a policy of life insurance: "I have been paying the premiums for several years on a $20,000.00 double indemnity life insurance policy on the life of Mr. Edward Reese, the farm manager of the Kitchen Farms Company, and of which I am the beneficiary. All of my rights, title and interest in this policy, I give, devise and bequeath to the Kitchen Farms Company and express the wish that the company continue to make payments of the premiums thereon."

Kitchen's widow elected to take against the will, and in settlement of her dower rights she received half the corporation's farm land in fee and assumed half

the mortgage debt. It was then decided that the trustee would effect certain tax savings by dissolving the Kitchen Farms Company and thereafter operating the farms without using a separate corporate entity. With the consent of all concerned the corporation was dissolved, after first conveying its remaining half of the farm lands to the trustee.

In the accounting now in dispute the trustee proposes to treat as current expenses both the life insurance premium payment of $757.40 and the trustee's $2,500 share of the annual principal payment upon the mortgage. Under this method of accounting the life beneficiaries of the three trusts will receive only the net income after the two disputed items and all other current expenses have been paid. The appellant insists that the premium and mortgage installment should be paid out of the principal of the trust.

If this were a run-of-the-mill case involving nothing more than a simple allocation of current and fixed expenses the appellant's position would be sound. As a general rule only the interest upon a mortgage debt is to be charged against the life beneficiary's income. The corpus of the trust normally bears the burden of fixed capital charges such as principal payments upon a mortgage debt or premiums for the purchase of a life insurance policy that will eventually be paid into the corpus of the trust. Rest., Trusts (2d), § 233, Comments e and f; Scott on Trusts (2d Ed.), §§ 233.2 and 233.3. This method of allocation may, however, be modified by the terms of the trust instrument. Scott, § 233.5.

Upon the particular facts of this case we are convinced that Kitchen did not intend for the trustee to employ the system of allocation now urged by the appellant. Kitchen saw fit to utilize a closely held corporation as a means of operating his farms. There is no direction in the will that the corporation be dissolved, nor any especial indication that Kitchen expected a dissolution. Rather the opposite, Kitchen left the corpo-

rate stock itself to his trustee and expressly authorized the trustee to retain the stock. Furthermore, the stock could conveniently be divided into shares of exactly 50%, 40%, and 10%, while a similar attempt to divide the land itself might have run into difficulties.

Thus it is fair to conclude that the testator contemplated the continued existence of the corporation. Hence he must have expected the life beneficiaries' income to arise from corporate dividends. Such dividends would not have been declared until the corporation's fixed obligations had first been paid. Fletcher on Corporations (Perm. Ed.), § 5340. If the corporation had not been dissolved the life beneficiaries would have had no claim to any corporate earnings not distributed as dividends. Rest., Trusts (2d), § 236, Comment y.

We have not overlooked two New York cases holding that in a somewhat similar situation the life beneficiary should not be charged with principal payments upon a mortgage. *In re Adler's Estate,* 164 Misc. 544, 299 N. Y. S. 542; *In re McLaughlin's Estate,* 164 Misc. 539, 299 N. Y. S. 559. But the court's decision in those companion cases was based upon a statute which was construed to contain an absolute prohibition against paying the mortgage debt from current income. McKinney's Consol. Laws of N. Y., Personal Property Law, § 16. Hence the settlor's intention was immaterial, as he was powerless to direct that the mortgage be paid out of income. We have no similar statute.

In the circumstances of this case we are convinced that Kitchen expected the corporation to continue in being and intended for the two charges now in controversy to be paid out of the farm profits before the declaration of dividends. There is no sound basis for holding that the testator's intention should be defeated by a corporate dissolution that resulted only from a desire to save taxes for all concerned.

Affirmed.

5-2184 339 S. W. 2d 417

Opinion delivered October 31, 1960.

[redacted]

Weems, Trussell and *McMath, Leatherman, Woods & Youngdahl,* for appellant.

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

PAUL WARD, Associate Justice. This is a Workmen's Compensation case in which the Commission denied compensation to appellant, the widow of Buford M. Robbins who, until his death, was a regular employee of Elwood C. Jackson, a sawmill operator. The Circuit Court approved the finding of the Commission. Jackson's insurance carrier was made a party to the proceedings, but hereafter we will refer to Jackson as the appellee.

The Commission disallowed compensation on the ground that Robbins was not acting within the scope of

his employment when he was killed. Appellant seeks a reversal on the ground that the Commission failed to apply what is sometimes called the "concurrent benefit" rule. The argument is that other jurisdictions have adopted this rule in workmen's compensation cases and that this court should do likewise.

There is very little, if any, dispute about the material facts out of which the claim arose. Jackson was the owner of two sawmills, one located near the town of Bethlehem and the other near Magnet Cove. At the time Robbins was killed the mill at the former location had not been in use for some three or four weeks, but the other mill where Robbins worked was in operation. The Bethlehem mill had been engaged in cutting timber, under contract, on land belonging to the International Paper Company. Under this contract appellee was obligated to cut the unmerchantable hardwood trees that were within 60 feet of a utility line, fence, or building, or within 100 feet of a public road. The remainder of such timber was to be "girdled".

On Friday, October 10, 1958, after appellee and his mill crew (including Robbins) had completed a usual day's work at the Magnet Cove mill, appellee asked the crew to meet him at the Bethlehem mill on the following morning for the purpose of loading and moving that mill to his home for storage. The process of moving the mill began at about 7:00 a.m. and was completed about 10:30 a.m. Robbins, who usually was a sawyer, helped in the moving and was paid for a full day's work and all employees were dismissed for the day. Several trees at the Bethlehem site had not at that time been "girdled" or cut as called for in the contract.

While at the Bethlehem site and while in the moving process Robbins pointed to four or five unmerchantable trees which had not been "girdled" (not trees that were to be cut) and stated to appellee that he might come back and cut some firewood for his own use. Accordingly, Robbins did return alone, after leaving appellee's house, to cut the trees with his own saw. In the process of cutting one of the trees it fell on him and killed him.

Appellee admits that he gave Robbins permission to cut the trees, and also stated that "the cutting of unmerchantable hardwood on the International Paper Company land" was for his own benefit. Likewise, appellee stated that "the removal of this unwanted, unmerchantable hardwood timber from the International Paper Company land (was) in the furtherance of (his) business and (his) obligation under the timber contract." Appellee also stated that the cutting of these trees by Robbins was of mutual benefit to him and Robbins, and that all of the unmerchantable trees had to be "girdled". Later all these trees were "girdled" but none of them were cut down.

Appellant apparently concedes that, under the former decisions of this court, the findings of the Commission should be sustained, but it is ably and earnestly insisted that under the "concurrent benefit" rule the claim is compensable, that such rule has been adopted in other jurisdictions, and that this court should also adopt that rule.

Insofar as it applies to this case, Ark. Stats. § 81-1305, provides that every employer shall provide compensation for a death "arising out of and in the course of employment." Before appellant can recover it must appear Robbins' death arose (a) out of his employment and also (b) in the course of his employment. *Pearson* v. *Faulkner Radio Service Company,* 220 Ark. 368, 247 S. W. 2d 964, and, *American Casualty Company* v. *Jones,* 224 Ark. 731, 276 S. W. 2d 41.

To fully understand appellant's argument in regard to the "concurrent benefit" rule and its application to a case of this nature, we deem it appropriate to examine briefly some of the authorities from other jurisdictions which are relied on to support the rule.

Wamhoff v. *Wagner Electric Corporation,* 1945, 354 Mo. 711, 190 S. W. 2d 915, 161 A. L. R. 1454. Appellant, as an employee of appellee, was engaged in electroplating metal parts. While so engaged he also undertook to plate a metal toy for his son and was injured. In affirming an

award for compensation the court, among other things approved this quotation from 71 C. J., p. 675, § 420:

"An injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment. Accordingly an injury resulting from such an act arises out of and in the course of the employment; and this rule is applicable even though the advantage to the employer is slight."

Phoenix Indemnity Co. v. *Industrial Accident Commission,* 1948, 31 Cal. 2d 856, 193 P. 2d 745. Marion Robert Hamilton was an employee of the Weggers Airplane Seeding and Dusting Company and was engaged in flying planes in seeding and dusting services. In addition the company offered instructions in aviation for a fee with Hamilton as the flight instructor. On one occasion he took his 12 year old daughter for a free ride with the company's consent and both were killed. There was testimony to the effect that the daughter expected to take up flying sometime later. In approving an award for the widow the court approved this statement from a cited authority:

"The true rule * * * is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do."

Kimberly-Clark Co. v. *Industrial Comm. et al.,* 1925, 187 Wis. 53, 203 N. W. 737. Dominic Darne, an employee of appellant, was engaged in keeping machinery in repair, necessitating the use of many tools some of which, if not all, belonged to him. While on the regular job he undertook to make a box in which to keep the tools for his convenience, and was injured. Again the court affirmed an award and said: "the commission could reasonably draw the conclusion that the service the employee performed was within the scope of and incidental to his

employment, because its performance inured to the benefit of the employer." The court also said there was a "concurrent benefit."

Tallent v. *M. C. Lyle & Son,* 1948, 187 Tenn. 482, 216 S. W. 2d 7. Tallent, as an employee of appellee, was supposed (according to the findings of the trial court) to carry fellow employees to and from work in his car. The car got out of order and while Tallent was trying to fix it his index finger was injured. In affirming an award for the injury the court, among other things said: "Acts for the employer's benefit are usually held to arise out of the employment, if expressly, impliedly or reasonably authorized." The court also approved this statement: ". . . where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured."

Appellant quotes from Schneider's work on Workmen's Compensation Law, Vol. 6, page 59:

"Two or more causes may operate to cause the disability of an employee. They are spoken of as "concurrent", "contributing", "exciting", and "superinducing" causes. If all contribute to the ultimate result, they are all proximate causes of that result."

Appellant cites additional decisions from other states in support of the "concurrent benefit" rule. We have carefully examined these and find that they are merely cumulative to those heretofore mentioned.

We express at this time no dissatisfaction with the so-called "concurrent benefit" rule as it has been applied in the cases above referred to and relied on by appellant. We are not convinced however that its application calls for a reversal of this case. As we view the rule it merely calls for a liberal construction of the requirements of the statute that requires the injury (resulting in death) must "arise out of and in the course of employment." In this case the Commission, after reviewing all

the facts, found that Robbins, at the time he was killed, "was not acting within the scope of his employment." This finding of the Commission must be affirmed if it is supported by substantial evidence. *Wren* v. *D. F. Jones Construction Company,* 210 Ark. 40, 194 S. W. 2d 896; *White* v. *First Electric Cooperative Corp.,* 230 Ark. 925, 327 S. W. 2d 720. On this point, it cannot reasonably be contended that there is any lack of substantial evidence to support the findings of the Commission. It found, and we must agree, that Robbins "ended his day's work at approximately 10:00 to 10:30 a.m. on the morning of the day on which he met his death. At that time his duties of employment ended for the day. Nothing further was requested, expected, or needed of him. "The deceased's injury (death) did not occur while he was performing the duties of his employment; there was no connection between the conditions under which his work was required to be performed and his injury nor can the injury be traced to the employment as a contributing proximate cause." "The deceased's sole purpose in going upon the premises of the mill site was to cut stove wood for himself." To the above it may be added it appears from testimony that appellee was not interested in having this particular tree (or trees) cut down—he was only interested in having the tree (or trees) "girdled". Had the deceased not attempted to cut the tree obviously he would not have been killed.

Under numerous decisions of this court the above state of facts would call for an affirmance of this case. Impliedly, at least, appellant concedes the validity of the above statement because reliance on the "concurrent benefit" rule is invoked for a reversal. The essence of appellant's contention appears to us to be that the "rule" is applicable here and therefore calls for a reversal because the act of cutting the tree by Robbins was of some small, but doubtful, benefit to Jackson. We are unable to agree with this contention.

As before indicated we do not take the position that the "rule" is not sound when properly applied to a given state of facts. Our position is that such "rule" has no

application to the facts of this case, because it has been shown and found by the Commission, that Robbins was not in the course of his employment when he was killed.

In all of the cases cited by appellant the courts relied not only on some benefit to the employer but also on other facts and circumstances which placed the claimant within the scope of employment, and in each case the injury occurred during the time of employment. Those cases are distinguishable from the case under consideration on the facts.

In the *Wamhoff* case, the claimant was injured during regular working hours and the court found that the employer not only "should have anticipated the activities of respondent and other employees in doing private work, but that it encouraged such activities." In the *Phoenix* case, the employee was killed during work hours, and he was employed in an activity approved as a part of his employment. The same thing was true in the *Kimberly-Clark* case and in the *Tallent* case.

It appears to us that, to bring the facts of this case on a parallel with the facts in the above mentioned case, the facts here would have to be altered so as to show that Robbins was engaged in cutting or "girdling" trees as a part of his usual employment and at the time and place of such employment, and that he was killed while cutting a tree for his own private use for firewood. Some of the cited cases seem to also require a further showing that, in so doing, Robbins must be engaged in an activity recognized by Jackson as a customary procedure. Under the above supposed facts we can understand how an application of the "concurrent benefit" rule might be applicable and helpful, but not so under the facts and circumstances of this case. The "rule" cannot, we hold, be applied to circumvent the necessity of a claimant first showing that his injury arose out of *and* in the course of employment.

It therefore follows that the judgment of the trial court (affirming the Commission) must be, and it is hereby, affirmed.

Affirmed.

JOHNSON, J., dissents.

BOURQUE *v.* EDWARDS.

5-2226 339 S. W. 2d 436

Opinion delivered October 31, 1960.

William S. Walker, for appellant.

J. Nelson Truitt, for appellees.

PAUL WARD, Associate Justice. In this case, wherein appellants purchased a farm from appellees, the disputed question is whether a butane gas tank was included with the property as contended by appellants. The issue was joined in a replevin suit in the Circuit Court brought by appellees to get possession of the tank. The trial judge, sitting as a jury, found in favor of appellees, ordering the tank delivered to appellees and awarding damages against appellants in the amount of $4.00. Appellants now prosecute this appeal for reversal.

Except for the testimony later to be discussed the facts are not in dispute.

Appellees listed for sale their 76 acre farm with Robert W. Read, a real estate agent associated with the Strout Realty Company. On September 12, 1959, Read wrote a letter to appellants who lived in Houston, Texas. This letter, which described the farm relative to location, buildings, tillable soil, price and terms, contained this sentence: "Electricity and butane in." The result was that appellants and appellees entered into a Sales Agreement on September 22, 1959, and a down payment of $1300 was made by appellants without them having seen the property. Among other things, the agreement provided that the deed to appellants would be delivered on or before the 15th day of October, 1959, and that possession would be given on October 1, 1959. Appellants took possession of the property on October 1, 1959, and soon thereafter this controversy arose over the ownership and possession of the tank. The 250 gallon butane tank was located on top of the ground several feet from the house and was connected thereto by a metal pipe. The principal contentions of appellants are that the appellees are bound by the acts and representations of their real estate agent, Mr. Read; that having acted upon the written representation of said agent appellees cannot be heard to deny or to vary those representations, and; that the trial court erred in interpreting the law on what constitutes fixtures, as between vendor and vendee. On the other hand, appellees contend that on the first day appellants took possession and one day before the deed was signed it was made known to appellants that the butane tank did not go with the property and that appellants agreed to this and tacitly consented by their silence therein, and that therefore they are estopped now to contend otherwise. The testimony in this connection is in conflict.

Mrs. Edwards, one of the appellees, stated that she met appellants at the farm on October 1st in the presence of Mr. Read and Mr. and Mrs. Houston; that she told appellants the butane tank didn't go with the place;

that later that day she saw Mrs. Bourque and told her again that the tank didn't go with the place; that Mr. Read said he thought the tank might have "went," but that she told him no, and; that Mr. and Mrs. Bourque did not say anything. She also stated that early that day appellants didn't say anything when Mr. Edwards told them the tank didn't go, and at that time no deed had been executed. She also stated that she refused to sign the deed until she heard Mr. Read say the tank didn't go. The deed was signed the following day. On cross examination she further testified that Mr. Read stated that he knew the tank didn't go; that he thought the tank was listed but he found out later it was not. Harley Houston testified in substance: He was present on the occasion mentioned by Mrs. Edwards; they talked about the tank and Mrs. Edwards said the tank didn't go with the place but didn't hear Mr. Bourque say anything about it. Mrs. Harley Houston testified that she was present when Mrs. Edwards told them the tank didn't go with the place and that she didn't hear the appellant say anything. Mr. Read testified that he was present at the meeting described by Mrs. Edwards and that he didn't know whether Mr. and Mrs. Houston were there or not, but he did hear Mrs. Edwards say that the tank didn't go; that the deal was consummated in his office later when Mr. and Mrs. Edwards signed the deeds, and they said at that time the tank didn't go. On cross examination he stated that nothing was said about the tank when the place was listed for sale but up until the above conversation took place he assumed that the tank did go with the place.

Mr. Bourque testified that he also relied upon the representations made in the letter of September 12th and that he never did agree that the tank didn't go. He further stated that Mr. Edwards did not tell them that the tank didn't go on the morning of the 2nd—that the tank was not mentioned that morning—and that he didn't recall it being mentioned in Mr. Read's office that evening. He further stated that he didn't know there was a tank until he saw it on the morning of October 2nd.

Mrs. Bourque stated that they relied upon the representations made by the agent's letter dated September 12th.

John Poyner, the Justice of the Peace before whom this case was first tried, stated that at the hearing before him Mr. Bourque stated that while they were in that office and before the deed was signed it was stated to him that the tank didn't go.

Without entering upon a legal discussion of the circumstances under which an attachment to a house becomes real estate, we have concluded that there is substantial evidence to sustain the findings of the trial judge "sitting as a jury" to the effect that it was not the intention of the parties at the time the deed was executed to include the butane tank. It was the province of the judge to evaluate the testimony and his findings will not be disturbed as they are supported by substantial evidence. In this case we think there was such evidence.

The objection might be made, though it is not specifically made by appellants, that parol evidence was not admissible to vary a written instrument—the deed in this case. We think, however, that appellants are in no position here to benefit by such rule for several reasons. The evidence tending to show the tank was not included in the transfer was introduced without objection, and this court has said many times, in effect, that such evidence cannot be challenged for the first time on appeal. See: *Gage* v. *Melton,* 1 Ark. 224; *Heaslet* v. *Spratlin,* 54 Ark. 185, 15 S. W. 461; *Lisko* v. *Uhren,* 130 Ark. 111, 196 S. W. 816; *Missouri Pacific Transportation Co.* v. *Moody,* 199 Ark. 483, 134 S. W. 2d 868; and *Tucker* v. *Ford,* 201 Ark. 680, 146 S. W. 2d 542.

Also the facts and circumstances of this case are such as to indicate the butane tank was a proper subject for a side agreement. In the first place the letter relied on by appellants stated that "butane" was "in"—nothing was said about a tank—and the parties themselves appear to have treated the tank as personal property since it was separated from the house. Under such circumstances we think the holding by this court in *Magee* v.

Robinson, 218 Ark. 54, 234 S. W. 2d 27, supports the conclusion we have already reached. There the court, in discussing the admissibility of parol evidence to vary a written instrument in connection with a "side agreement," the court approved this statement:

"Though this assumption in most cases conforms to the facts, and the certainty attained by making the rule a general one affords grounds for its existence, there are cases where it is so natural to make a separate agreement, frequently oral, in regard to the same subject-matter, that the Parol Evidence Rule does not deny effect to the collateral agreement. This situation is especially likely to arise when the writing is of a formal character and does not so readily lend itself to the inclusion of the whole agreement as a writing which is not limited by law or custom to a particular form. . . ."

It follows from what we have said that the judgment of the trial court must be, and it is hereby, affirmed.

Affirmed.

POLAND AND STEPHENS *v.* STATE.

4982 339 S. W. 2d 421

Opinion delivered October 31, 1960.

[Amended November 22, 1960.]

McKnight and *Blackburn,* for appellant.

Bruce Bennett, Atty. General, by *Clyde Calliotte,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Appellants, Poland and Stephens, white men, were charged in separate felony informations with the crimes of concubinage. Two informations were filed against Poland, one charging him with committing the crime of concubinage with Ruthie Lee Smith, a Negress, on December 11, 1959, and the other information charging him with a like offense committed with the same woman on the 17th day of December. The felony information filed against Stephens charged him with committing the crime of concubinage on the 17th day of December, 1959, with Lula Mae Wallace, a Negress. All the cases were consolidated for trial. The only issue we reach is whether according to the undisputed facts the appellants are innocent as a matter of law of the crimes charged.

Concubinage is a felony. Ark. Stat. § 41-806. The crime is defined by Ark. Stat. § 41-807, which provides: "The living together or cohabitation of persons of the Caucasian and of the Negro race shall be proof of the violation of provisions of section one [§ 41-806] of this act. For the purpose of this act [§§ 41-806—41-810], concubinage is hereby defined to be the unlawful cohabitation of persons of the Caucasian race and of the Negro race, whether open or secret."

The question is: Did the white men and the Negro women cohabit within the meaning of the statute? According to the evidence, the appellant Poland on two separate occasions, the 11th and the 17th of December, went to a tourist court with the Negress, Ruthie Lee Smith, and engaged in sexual intercourse, and appellant Stephens went to the same tourist court with Lula Mae Wallace on December 17th and engaged in sexual intercourse. There is not any evidence of any illicit relationship between the individuals at any other time or place. This case is controlled by other cases heretofore decided by this Court. In *Hovis* v. *State,* 162 Ark. 31, 257 S. W.

363, Mr. Justice FRANK SMITH said: "The testimony shows that appellant had met the colored girl for the purpose of having sexual intercourse with her on the night of his arrest, and that he had met her on frequent prior occasions for the same purpose. This, however, does not constitute concubinage as defined by the statute. The statute creates and defines the offense. There is no testimony that the appellant and the colored woman were living together, or had ever done so." In *Wilson* v. *State,* 178 Ark. 1200, 13 S. W. 2d 24, evidence proved beyond a reasonable doubt that a white person and a Negro had engaged in sexual intercourse. Mr. Justice Mehaffy, speaking for the Court, said: "The testimony in this case is ample to show that the appellant and the negro were guilty of adultery, but that does not constitute concubinage."

In *McClure* v. *McClure,* 205 Ark. 1032, 172 S. W. 2d 243, a divorce case, the Court held that cohabitation *as used in the three year separation statute* means an act of sexual intercourse; but that in determining the meaning to be given to words used by the Legislature, recourse often must be had to the context in which the language is used. The Court cited and left unimpaired the decisions in *Sullivan* v. *State,* 32 Ark. 187; *Taylor* v. *State,* 36 Ark. 84; *Bush* v. *State,* 37 Ark. 215; *Turney* v. *State,* 60 Ark. 259, 29 S. W. 893; and *Hovis* v. *State,* 162 Ark. 31, 257 S. W. 363, all of which hold that cohabitation as used in the unlawful cohabitation and concubinage statutes means something more than occasional acts of sexual intercourse.

The State contends that Act 108 of 1959 amending Ark. Stat. § 41-805 has the effect of amending the concubinage statute. The 1959 act has no application to the concubinage statute at all. It applies to Ark. Stats. § 41-805, making it unlawful for a man and woman of any race to cohabit together as husband and wife without being married. Under § 41-805 as amended by Act 108 of 1959 the first two offenses are misdemeanors, whereas any violation of the concubinage statute is a felony.

Reversed and dismissed.

4987 339 S. W. 2d 423

Opinion delivered October 31, 1960.

[redacted]

Harold Sharpe and *Carroll C. Cannon,* for appellant.

Bruce Bennett, Atty. General, by *Clyde Calliotte,* Asst. Atty. General, for appellee.

JIM JOHNSON, Associate Justice. Appellant J. A. Hardin, a white man, was convicted of the crime of concubinage which is a felony. See Ark. Stats. §§ 41-806, 41-807. It was established that J. A. Hardin took a negro woman to a tourist court and had sexual intercourse with her. There was no effort on the part of the State to prove that Hardin and the Negro woman ever lived together in any way except in the act of sexual intercourse at the tourist court.

Hardin contended in the lower court and contends here that sexual intercourse standing alone is not sufficient evidence of the crime of concubinage. He raises other questions in this Court but we need not discuss them.

This case of Hardin was consolidated for oral argument in this Court with the case of *Poland and Stephens* v. *State,* 231 Ark. 669, 339 S. W. 2d 421, and the opinion delivered this day in the Poland and Stephens appeal clearly disposes of the present case. Therefore, in light of the opinion in the said *Poland and Stephens, supra,* the judgment of the Circuit Court in this case is reversed and the cause dismissed.

LAVENDER *v.* CITY OF ROGERS.

5-2232 339 S. W. 2d 598

Opinion delivered November 7, 1960.

Bob Scott and *Walter Davidson,* for appellant.

J. Wesley Sampier, for appellees.

CARLETON HARRIS, Chief Justice. Appellant entered into a contract with Rogers School District No. 30 to construct a high school building. Appellees required appellant, under authority of City Ordinance No. 385, to obtain a building permit, which appellant obtained by paying the sum of $382. Thereafter, Lavender instituted suit in the Benton County Chancery Court, alleging that the "exaction of $382.00, was and is an illegal and unconstitutional exaction from the plaintiff, under the laws and constitution of the State of Arkansas. That the laws of the State of Arkansas do not authorize cities of the State of Arkansas to regulate the construction

of public school buildings, but rather delegate such power to the State Board of Education"; appellant further alleged that he made the payment required by the ordinance under protest, and had made demand for refund to the City Council of Rogers; that the City Inspector for Rogers had frequently harassed his employees, threatened to stop work on the job, and engaged in other activities to cause considerable loss and damage to appellant; that if work on the project were stopped, he (appellant) would suffer irreparable injury. The prayer was that the Court restrain the City of Rogers and O. B. Hanks, the city inspector, from attempting to regulate the construction of the new facilities for the Rogers School District No. 30; that Ordinance No. 385 be held unconstitutional "in its application to this public work," and that judgment be given appellant in the amount of $382. Appellee demurred to the complaint, and the court sustained the demurrer, giving appellant twenty days in which to plead further. Following the filing of an amended complaint (which elaborated on certain allegations in the original complaint),[1] to which appellee also demurred, the court again sustained the demurrer, and no further pleadings being filed by appellant, dismissed the amended complaint as stating no cause of action. From this order of the court, appellant brings this appeal.

Appellant seeks relief in two respects. First, he seeks injunctive relief, and secondly, he desires a refund of the permit fee. Under the view that we take, it is unnecessary to discuss whether the allegations reflect the permit fee to have been paid voluntarily or involuntarily, for unless the allegations are sufficient to show the ordinance totally invalid in its application to the construction of school buildings, relief cannot be granted. In other words, no charge is made that the tax is unreasonable or confiscatory, or that the ordinance is arbitrary or discriminatory. In fact, appellant does not argue that the ordinance is generally invalid, but only

[1]Appellant also alleged that he had entered into an additional contract with the School District for the construction of an auditorium in conjunction with other facilities, but had not obtained a permit.

asserts that it is invalid as it relates to regulation of the construction of public school buildings, it being the contention of appellant that the Legislature has delegated full authority to the State Board of Education in this field.

The statutory authority upon which appellant relies, is found in Ark. Stats. Anno., Sections 80-113 (1960 Replacement), 80-3505 (1960 Replacement), and 80-3506 (1960 Replacement). Those sections provide as follows:

"FUNCTIONS OF BOARD. — The Board shall have general supervision of the public schools of the State; prepare and distribute plans and specifications for the construction and equipment of school buildings, and approve plans and expenditures of public school funds for all new school buildings; recommend courses of study for the public schools and teacher training institutions; . . .

STANDARDS FOR SCHOOL HOUSE CONSTRUCTION. — The State Board of Education shall establish reasonable minimum standards for school house construction and said standards may be revised from time to time as educational problems and methods of procedure develop and change. Such standards shall take into consideration the recommendations of the Arkansas Chapter of the American Institute of Architecture, the Fire Prevention Bureau, and the Arkansas State Board of Health.

SCHOOL BUILDING PLANS APPROVED BY STATE BOARD OF EDUCATION. — After the first day of July following the passage and approval of this Act, no new school house shall be built except in accordance with the plan finally approved by State Board of Education for all projects where the Board requires its approval thereof. A copy of approved plans and specifications of all new school houses or additions, shall be filed with and approved by the State Board of Education, before construction shall be commenced, where so required by the Board."

It will be noted that these sections do not contain any language expressly taking away *all* authority (in matters relating to building schools) granted municipal corporations to regulate construction. Section 19-2801, Ark. Stats. Anno. (1947) provides as follows:

"They (municipal corporations) shall have the power to regulate the erection, construction, reconstruction, alteration and repair of buildings; to make regulations for the purpose of guarding against accidents by fire; to require the use of fireproof or fire-resistant materials in the erection, construction, reconstruction, alteration or repairs of buildings; and to provide for the removal of any buildings or additions thereto erected contrary to such prohibition."

Appellant did not see fit to attach a copy of the ordinance in question to his complaint, asserting that his position is simply that the city of Rogers is without authority to pass *any* ordinance relating to this type of construction; therefore, the invalidity of the ordinance must rest upon the allegation in his pleadings "that the laws of the State of Arkansas do not authorize cities of the State of Arkansas, to regulate construction of public school buildings, but rather, delegate such powers to the State Board of Education." Where, in equity, exhibits are attached to the complaint, such exhibits control its averments, and may be looked to for the purpose of testing the sufficiency of the allegations of the complaint. *Hendrickson* v. *Farmers' Bank and Trust Co.,* 189 Ark. 423, 73 S. W. 2d 725. Here, however, we do not know the provisions of the ordinance, nor the manner in which the city seeks to regulate this construction.

The Planning Commission Act (Ark. Stats. Anno., 1959 Supplement), Section 19-2827, expressly provides that no public building shall be constructed unless the plan for such construction has been approved as conforming with the overall plan adopted by the City Planning Commission.[2]

[2] This is only mentioned as an example of city power to regulate a particular phase of public building construction. Apparently no zoning ordinance was violated since the city granted the permit.

Section 71-1206 (Ark. Stats., 1957 Replacement), gives the State Board of Health general supervision of plumbing in buildings in this state, and provides:

"The construction, installation and maintenance of plumbing in connection with all buildings in this State, including buildings owned by the State or any political subdivision thereof, shall be safe, sanitary and such as to safeguard the public health."

Section 71-1209 provides:

"Nothing in this Act [§§ 71-1205 — 71-1217] shall prohibit cities and towns from having full authority to provide full supervision and inspection of plumbing and plumbers by the enactment of codes, rules and regulations in such form as the council may determine appropriate. * * *"

It is apparent therefore, that cities, in certain instances, do have the authority to regulate some features relating to public buildings. As stated, the ordinance is not before us, and we are unwilling to make a sweeping finding that a municipality—in this case, the city of Rogers—cannot regulate in *any* manner, *any* phase, aspect, or feature relating to the construction of a public school building.

Affirmed.

HOLT, J., dissents.

J. SEABORN HOLT, Associate Justice, dissenting.

We are concerned here with whether a city ordinance requiring a contractor to purchase a building permit is applicable to the school district and the school district's contract to construct a high school building.

Appellant, Lavender, had been given a contract to construct a public school building in the City of Rogers. That city has attempted to force him to purchase a building permit costing $382.00. Lavender has complied and paid the permit fee demanded, but under strong protest, in order not to halt construction of the building. Article

14, § 3 of the Constitution of the State of Arkansas provides: "The General Assembly shall provide by the general laws for the support of common schools by taxes. . . The General Assembly may . . . authorize school districts to levy by vote . . . a tax . . . for the maintenance of schools, the erection and equipment of school buildings. . ." And § 80-113 Ark. Stats. (1947) contains these provisions: "The Board [State Board of Education] shall have general supervision of the public schools of the State; prepare and distribute plans and specifications for the construction and equipment of school buildings and approve plans and expenditures of public school funds for all new school buildings; . . ." It seems clear to me, therefore, that public schools and public school buildings are arms of the state government, are of great public interest, and subject to direct control of the state legislature.

While it appears that we have no Arkansas case on the question presented, the case of *Guy Hall* v. *The City of Taft,* 47 Cal. 2d 177, 302 Pac. 2d 574, appears to be directly in point and holds contrary to the majority opinion here. In that case a contractor had been required to pay a permit fee of $300.00 and the Supreme Court of California held: "That the Public school system is of state-wide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. Constitutional provision giving any county, city, town or township power to enforce within its limits all local, police, sanitary and other regulations are not in conflict with general laws, does not confer upon local units of government power to regulate construction of public school buildings. The state has completely occupied the field of regulating public school building construction, and construction of such school buildings by school districts is not subject to the building regulations of a municipal corporation in which the building is constructed.

I think the decree should be reversed.

5-2291 339 S. W. 2d 624

Opinion delivered November 7, 1960.

O. E. Gates and *Paul K. Roberts,* for appellant.

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

J. SEABORN HOLT, Associate Justice. In this action appellant, Curtis L. McClellan, sought to compel the circuit clerk of Cleveland County, Arkansas to file a complaint at law. The evidence discloses that McClellan, who was a candidate for the office of representative of Cleveland County, had attempted to file a complaint, prepared by his attorney, in a suit to contest the results of the election in which he was unsuccessful in securing the Democratic nomination. The deputy circuit clerk, in charge at the time, refused to file the complaint. It is undisputed that the appellant did not tender any filing fees at that time. Thereupon McClellan sought the circuit clerk, Henry Young, in an effort to have the complaint filed. Young informed the appellant that he would file the complaint if a $500.00 bond to secure the cost of the contest were filed. No bond was offered or filed.

In the opinion and judgment of the trial court we find this language: "* * * the Court doth find:

That Petitioner attempted to file with Henry Young, Clerk, his petition to contest the nomination of Raymond C. Mays in the Primary Election of August 9, 1960, on the 29th day of August, 1960; that the Clerk refused to file the same for the reason that no fees for filing and issuing process were paid or tendered, although demand was made for same; * * * The Court finds that said petition for writ of mandamus should be denied for the following reasons: 1. The Clerk was not legally bound to file the complaint until and unless the fee for filing same and issuing summons was tendered or paid. * * *"

This appeal followed and for reversal appellant says: "The Court erred in failing to issue its Writ of Mandamus requiring appellee to file said Complaint at Law and issue summons thereon."

In the circumstances here we hold that the judgment of the trial court was correct. Arkansas Statutes (1947) § 27-302 provides: "Payment of fees prerequisite to entry of action or issuance of writ.—No action shall be entered upon the docket of any court nor any original mesne or final process issued therein, except in criminal cases and cases where the State is plaintiff, until the fees for entering the case upon the docket and for issuing such writ, and the taxes thereon, if any, be paid, or bond and security, to the approval of the clerk, given therefor; and no clerk shall be liable to an action for refusing to docket a cause or issue any writ, unless the fee and tax thereon be first tendered or secured as herein provided." It appears undisputed here that the fees required by this section were not tendered, paid, or secured to appellee by appellant in spite of the demands made by the appellee to appellant.

Therefore, appellant's petition for mandamus must be and is denied. Accordingly, the judgment is affirmed.

TROTTER *v.* KEMP.

5-2229 340 S. W. 2d 274

Opinion delivered November 7, 1960.

[Rehearing denied December 5, 1960.]

Chas. B. Thweatt, for appellant.

John L. Sullivan, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a claim against an estate for personal services rendered the deceased. The claimant is the appellant, M. J. Trotter; and the appellee, Mrs. Helen K. Kemp, is the executrix of the estate of Mrs. Josephine Page, who departed this life testate on May 17, 1958 at an age in excess of 90 years. Appellant Trotter presented his claim against the estate for $11,850.00. The Probate Court allowed the claim in the amount of $120; and Trotter has appealed.

Entirely disregarding Trotter's testimony, the facts clearly establish that he lived in the home of Mrs. Page and cared for her for the last three years of her life; that he was not related to her in any way; and that the decedent recognized her obligation to the appellant and contemplated compensating him in addition to what he had been paid. He is entitled to some compensation. See *Harris* v. *Whitworth, Admr.,* 213 Ark. 480, 211 S. W. 2d 101.

Except for Mr. Wills' testimony (subsequently mentioned in this paragraph), there is no testimony as to

any contractual amount for Trotter's services, but he could recover on a *quantum meruit* basis. See *Nissen* v. *Flournoy,* 160 Ark. 311, 254 S. W. 540; and *Suits* v. *Chumley,* 218 Ark. 488, 236 S. W. 2d 1001. Trotter failed to show the *quantum meruit* value of his services. Mr. Wills testified, when called by the executrix, that Trotter told Wills about six months before Mrs. Page's death that he (Trotter) ". . . was staying there every night he was in town and that Mrs. Josie Page was paying him $2.00 a night and his evening and morning meal." Since this is the only value stated, Trotter is limited to the figure of $2.00 per night.

Even though Trotter had cared for Mrs. Page for many years it must, of course, be conceded that Trotter could make no claim for services in excess of three years prior to Mrs. Page's death, since there was no written contract. § 37-206, Ark. Stats. So the maximum amount that the evidence would support is a total of 1095 nights (3 years) at $2.00 a night, which would be $2190. But Mrs. Page was in the hospital for seven nights immediately preceding her death, and that would leave only 1088 nights, or a total of $2176 as the maximum amount that could be allowed Trotter in this case. The executrix introduced checks issued to Trotter by Mrs. Page dated within three years of her death and totalling $809. These checks would constitute evidence of payment to that amount in the absence of any proof to the contrary, and there was none. Deducting the $789 from the $2176 would leave $1367 as the maximum amount that Trotter can recover under the evidence in this case.

The Probate Court allowed Trotter only $120. This was on the basis that, calculating from some date in October 1957, and assuming that Trotter was paid in full up to that time, there would only be a balance of 60 nights for which he was not paid. But we try these probate cases *de novo* on the record (see *Suits* v. *Chumley,* 218 Ark. 488, 236 S. W. 2d 1001); and we find nothing in the record to substantiate the assumption that Trotter was paid in full to any date in October 1957, or to any other date. Of course, Trotter insists

that his services were worth far more than $2.00 a night; but the answer is, he did not prove his services. The executrix contends that Trotter has been paid; but the answer is that payment was not established. The claim of Trotter should have been allowed for $1387, according to the calculation heretofore made.

The judgment is reversed and the cause is remanded, with directions to enter a judgment as herein stated.

GEORGE ROSE SMITH, WARD and ROBINSON, JJ., dissent.

PAUL WARD, Associate Justice, dissenting.

I am dissenting to the majority opinion because I believe the evidence justifies the conclusion that appellant had been paid for his services except, of course, for the amount allowed by the trial court. My reasons are hereafter set forth.

Mrs. Page died May 17, 1958, at the age of 90. The majority would pay appellant at the rate of $2.00 per day for a period of three years preceding Mrs. Page's death, with the exceptions noted in the opinion.

It is undisputed that from August, 1957, Mrs. Page signed and delivered to appellant 62 separate checks for a total of $509—the last check being dated March 11, 1958. It was undisputed that these checks were written out by appellant for Mrs. Page to sign.

It is hard to understand how anyone can reasonably believe that either Mrs. Page or appellant knew or even thought that Mrs. Page was, during that time, indebted to appellant for past services in the amount of approximately $1500. If appellant did feel that Mrs. Page owed him such a large amount it seems only reasonable that he should have done or said something about it, and I think it was his duty to have done so. I doubt if he would have been so bold as to have demanded $1500 from Mrs. Page while she was still alive. Now that she is dead he demanded, in this litigation, a sum in excess of $10,000. These were circumstances which the Chancellor had a right to consider in arriving at his decision.

The Chancellor had all of the evidence as it was presented to him in open court and, in view of the facts and circumstances above set forth, I am most unwilling to disturb the Chancellor's findings.

GEORGE ROSE SMITH and ROBINSON, JJ., join in this dissent.

ROYSTER *v.* ROYSTER.

5-2251 339 S. W. 2d 607

Opinion delivered November 7, 1960.

ED. F. MCFADDIN, Associate Justice. The transcript in this case was filed in this Court on August 4, 1960, and appellant seasonably filed his abstract and brief. Now, in advance of submission of the case on its merits, the appellee has filed a motion asking us to dismiss the appeal because, "The appellant has failed to file an abstract or abridgment of the record in such manner as to give the Court a clear understanding of all the questions presented to the Court for decision."[1] There seems to be some general misunderstanding as to the effect of the present Rule 9 since we frequently have motions like the present one. Therefore, we again explain the rule, just as was done in *Milum* v. *Clark,* 225 Ark. 1040, 287 S. W. 2d 460.

[1] After a paragraph in the motion undertaking to demonstrate the deficiency of the abstract filed by the appellant, the appellee concludes: "Appellee submits that under the decisions in the cases of *Speed* v. *Mays,* 226 Ark. 213, *Griffin* v. *Mo. P. Rd. Co.,* 227 Ark. 312, *Smock* v. *Corpier,* 226 Ark. 701, and *Ellington* v. *Remmel,* 226 Ark. 569, this appeal should be dismissed or affirmed. Wherefore, appellee prays that the appeal herein be dismissed or affirmed for noncompliance with Rule 9 of this Court."

For many years prior to January 10, 1954 we had a Rule 9 which we call "the old rule," and which read in part:

"In all civil cases the appellant shall . . . file abstract and brief. . . . The abstract or abridgment of the transcript shall set forth the material parts of the pleadings, proceedings, facts, and documents upon which appellant relies, together with other matters from the record as are necessary for an understanding of all questions presented to this Court for decision. . . ."

Likewise, prior to January 10, 1954, we had a Rule 12 which we call "the old rule," and which read in part:

"If the abstract and brief have not been filed by the appellant in accordance with Rules 9 and 10 when the case is called for trial the appellee may have the appeal dismissed or the judgment affirmed as of course."

On January 10, 1954 the foregoing rules were materially and radically changed. We now quote the germane portion of the new Rule 9(d) which reads:

"The appellant's abstract or abridgment of the record should consist of an impartial condensation, without comment or emphasis, of *only* such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this court for decision. . . ."

And the present Rule 9(e) reads in part:

"Motions to dismiss the appeal for insufficiency of the appellant's abstract will not be recognized. If the appellee considers the appellant's abstract to be defective he may, at his option, submit with his brief a supplemental abstract. . . ."

In *Milum* v. *Clark,* 225 Ark. 1040, 287 S. W. 2d 460 (decided February 27, 1956), we commented on the effect of the changes in these rules; and of the new rule 9 we said:

"Since the new rule has not previously been discussed in an opinion, an explanatory comment may be of assistance to the bar as a whole. In its old form Rule 9 required the appellant to submit a fair abstract of the record, under penalty of dismissal of the appeal if the abstract were found to be insufficient. The penalty was so severe that it caused lawyers to resolve all doubts in favor of making a complete abstract of everything in the record, whether relevant to the issues on appeal or not. The result was that nearly every abstract was unnecessarily long, to the detriment alike of the lawyer who labored to prepare it, of the client who paid for its printing, and of the judges who were required to study much irrelevant matter.

"It was to remedy this situation that Rule 9 was revised in 1954. The present rule requires that the abstract consist of 'an impartial condensation, without comment or emphasis, of *only* such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this court for decision.' The penalty of dismissal for insufficiency of the appellant's abstract has been eliminated, the rule now permitting the appellee at his option to supplement an abstract thought deficient. Compensation for the cost of the supplement may be awarded by the court in its discretion.

"It is the purpose of the revised rule to encourage the submission of abstracts that are confined to those matters pertinent to the points involved in appeal. . . ."

Since the adoption of the new rules,[2] as of January 10, 1954, we have a number of cases in which we have affirmed the Lower Court when the appeal was reached

[2] The procedural rules of this Court, revised to January 10, 1954, may be found on page 961 *et seq.* of Volume 221 of the Arkansas Reports. Subsequent revisions to December 10, 1956 may be found on page 1043 *et seq.* of Volume 226 of the Arkansas Reports. There have been no changes in the rules since December 10, 1956 except in Rule 7 and Rule 11, each of which now requires the filing of seventeen printed copies of the abstract and briefs instead of ten copies, as theretofore. Printed copies of the procedural rules in pamphlet form may be obtained from the Clerk of this Court by any attorney.

in this Court on the merits of the case;[3] but we find no case decided since January 10, 1954 in which we have entertained a motion to dismiss an appeal because of the failure of the appellant to abstract. It is only when the case is reached on the merits that the matter of the abstract arises.

The net result of the present Rule 9 is this: In advance of the hearing on the merits we do not dismiss an appeal for failure of the appellant to comply with Rule 9 as to abstracting. Rather, we permit the case to be submitted in this Court on its merits. If appellee considers appellant's abstract to be deficient, appellee may supply the deficiency in whole or in part, or may leave the deficiency unsupplied. If this Court cannot adequately ascertain the facts in the situation from the appellant's abstract, and if the appellant's abstract has not been supplemented by the appellee to supply the deficiency, then we affirm the case because the appellant has failed to show error to have been committed by the Trial Court. In advance of the submission on the merits we do not consider any motion to dismiss the appeal because of appellant's failure to abstract. Consideration of such a motion would require us to ferret through the transcript, and compare it with the appellant's abstract, in order to reach a conclusion. To avoid such labor—and for other reasons—the present Rules 9(d) and 9(e) were promulgated.

In the present case the motion to dismiss the appeal is denied; and the case remains on the docket for submission on the merits when reached in the regular call.

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[3] Here are such cases: *Speed* v. *Mays*, 226 Ark. 213, 288 S. W. 2d 953; *Ellington* v. *Remmel*, 226 Ark. 569, 293 S. W. 2d 452; *Smock* v. *Corpier*, 226 Ark. 701, 292 S. W. 2d 260; *Porter* v. *Time Stores*, 227 Ark. 286, 298 S. W. 2d 51; *Griffin* v. *Mo. P. Rd. Co.*, 227 Ark. 312, 298 S. W. 2d 55; and *Farmers Union Co.* v. *Watt*, 229 Ark. 622, 317 S. W. 2d 285.

HINTON *v.* BRYANT.

5-2235 339 S. W. 2d 621

Opinion delivered November 7, 1960.

[redacted]

Duty & Duty, for appellant.

Davis & Mills, for appellees.

GEORGE ROSE SMITH, J. This is an action by the appellees, who purchased a ten-acre tract of land from the appellant, to recover the value of a set of platform scales that were on the land at the time of the conveyance. The appellees insist that the scales were fixtures passing with the land, while the appellant contends that they were personal property that might later be removed by the grantor. The trial court, sitting without a jury, found the scales to have been part of the realty and therefore awarded the appellees a judgment for $500 as damages for the appellant's wrongful removal of the property.

The court was right in holding the device to be part of the land. The scales were used for the weighing of trucks and consisted principally of a platform thirty-four feet long and ten feet wide. This platform was suspended over an excavation of commensurate size, thirty-eight inches deep and lined with concrete. There was also a scale house containing the indicating mechan-

ism. The removal of the platform left the land burdened with the large, useless, concrete-lined excavation. In *Waldo Fertilizer Works* v. *Dickens,* 206 Ark. 747, 177 S. W. 2d 398, upon substantially identical facts we held that the scales were fixtures that passed with a conveyance of the land. That case is controlling here.

The appellant is correct, however, in his contention that the circuit court erred in permitting the introduction of incompetent evidence of the value of the scales. Over objection the court allowed Bryant to testify that two other men, Kendrick and Tyson, had tried to buy the scales from him, each offering $500. The court must have relied upon this testimony, as there is very little other proof of value, and indeed no other reference to the exact figure adopted by the court.

Isolated offers for the purchase of property are not ordinarily competent evidence of its value. *Jonesboro, L. C. & E. R. R. Co.* v. *Ashabranner,* 117 Ark. 317, 174 S. W. 548; *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14, 3 A. L. R. 2d 593. Orgel, in discussing the rule, points out that such offers are mere hearsay declarations of third parties, not under oath and not subject to cross-examination. Orgel, Valuation Under Eminent Domain (2d Ed.), § 148.

The appellees suggest that their proof did not involve "isolated" offers, since there was evidence of two offers rather than only one. This fact does not meet the objection. As Wigmore indicates, a merchant or a stockbroker who repeatedly receives and either accepts or rejects offers in the regular course of business may thereby arrive at an admissible opinion of value. Wigmore, Evidence (3d Ed.), § 719. The testimony of such a witness represents an informed independent judgment and not the mere repetition of hearsay. In the case at bar, however, Bryant's testimony falls in the latter category and should have been excluded.

The appellant also complains that the appellees failed to show that he is legally responsible for the

removal of the scales, which were taken away by third persons not parties to this suit. We do not find it necessary to reach this question. Owing to the error indicated the case must be retried, and upon a new trial the plaintiffs may offer additional evidence tending to fix responsibility upon the appellant. When reversible error appears in a law case it is our practice to remand the cause for a new trial unless it appears that the case has been fully developed and should be dismissed. *Fidelity Mut. Life Ins. Co.* v. *Beck,* 84 Ark. 57, 104 S. W. 533, 1102; *Ark. Nat. Gas Co.* v. *Gallagher,* 111 Ark. 247, 163 S. W. 791. This cause will therefore be remanded for a new trial.

Reversed.

WARD, J., dissents.

PAUL WARD, Associate Justice, dissenting.

It appears to me that the majority opinion decides this case on an issue foreign to the one on which the case was tried and decided by the trial court.

It is true that the complaint is somewhat indefinite as to the exact theory on which appellees sought relief, but among other things, the complaint fairly states an action for *damages* to the land because of the removal of the scales from the scale house. Among other things, it is stated in the complaint that appellant gave appellees a deed containing a convenant of general warranty and that appellant or his privies removed the scales from the land. In plaintiffs' prayer they ask for "the amount of $500 for permanent damages to the plaintiffs' 10 acre tract of land."

There are several other things which indicate that the case was tried on this theory by the court sitting as a jury. ONE: The judgment of the court, found at page 17 of the record states: "That the plaintiff do have and recover against the defendant, W. L. Hinton, judgment in the sum of $500 as *damages* to the premises for the removal of the platform scales." (Emphasis supplied.)

TWO: The record contains three pictures showing the scale house with the scales removed. These pictures would have no meaning if the plaintiffs were suing merely for the value of the scales. They do have meaning on the theory that the plaintiffs were suing for damages, either to the 10 acre tract or the scale house.

THREE: Several remarks by the court and by the attorneys indicate that this was a suit for damages to the property. At one time the attorney for appellant stated: "He's suing for damages and he's trying to set the value of this property by what the prices were on some scales that were quoted to him." Following this the court stated to appellees' attorney: "... you can state the value of the scales before and after the alleged removal. And what the scales *in toto,* their reasonable value before and after." Appellant's attorney replied: "That is right."

The only remaining question then is did appellees prove damages to the extent of the judgment—$500? It is clear to my mind, from the proceedings hereafter set out, that they did.

Q. "What is the value of the scale house, or what was the value of the scale house with the scales affixed thereto, in your opinion?" (The question was directed to Mr. Bryant.)

THE COURT: "Immediately before the alleged taking and immediately after, those are the essential elements."

MR. DUTY: "Object to the question. He hasn't qualified as an expert."

THE COURT: "He can—as owner of the property, he can state the value. It can be rebutted by experts. . ."

A. "I would say $2,000.00."

Q. "And what, in your opinion, is the value of the scale house without the scale?"

A. "It's more a liability than it is an asset at the present time."

In my opinion the above testimony was admissible as competent evidence on the theory of damages. It was not rebutted or denied, and it sustains the judgment of the court in the amount of $500.

Under this theory of the case the testimony regarding the offer by two people to pay $500 for the scale was inadmissible but it merely constituted harmless error on the part of the court. I would affirm the case.

HAMMOND *v.* STATE.

4991 340 S. W. 2d 280

Opinion delivered November 7, 1960.

[Rehearing denied December 5, 1960.]

Shelby C. Ferguson and *Wm. C. Jenkins,* for appellant.

Bruce Bennett, Atty. General, by *Russell J. Wools,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. Appellant was charged with stealing a chain saw valued at more than $35. He was convicted on circumstantial evidence and sentenced to one year in the penitentiary. On appeal appellant insisted that the circumstantial evidence was insufficient to sustain the verdict and judgment.

Mack Henry, the owner of the chain saw, testified in substance to the following: I live three miles south of Salem, and I am the owner of a chain saw which was taken from my property on July 5, 1959, (Sunday) around 5 p.m.; later the saw was brought back to me by the deputy sheriff; I can identify the saw by the chain in which one screw was missing; the saw cost $239 and the market value would be about $125. Gwen Logan in substance stated: I passed by Mr. Henry's place on the 5th day of July, 1959, about 4:30 or 5 p.m., there was a dark blue or black 1949 or 1950 Ford sedan car with two men standing by it—the car had a cracked windshield. Kathleen Logan in substance stated: I was coming back from church on 5th of July, 1959, and when I passed the Henry place I saw a Ford car parked, two men were standing beside the car, one of them dressed in khaki, one of the men was the appellant Bynum Hammond. Cornell Wayne Cheek in substance stated: I have known appellant for several years. On July 5, 1959, I saw him driving a black 1949 or 1950 Ford; the windshield was out; when I saw appellant I was on the road to Mack Henry's place and it was late in the afternoon. David Jones, a state policeman, in substance stated: I went to appellant's place on the 19th of July and asked him if he had seen the property that had been reported stolen; he went to the smokehouse and brought out a saw and told me he had bought the saw in West Plains; that he did not know who he had bought it from and did not have a bill of sale; there was a 1949 or 1950

Ford sedan setting in front of his house with a cracked windshield, and the right-hand side of the windshield was broken out. He stated that it was his car. Elvie Lau, a deputy sheriff, stated that he accompanied the state trooper to appellant's home where he saw the above described Ford parked in front of his house with half of the windshield broken out; that when they got the saw, appellant stated that he had bought it in West Plains and that he had borrowed $50 from the bank to pay for it. Bill Young stated that he had been in the chain saw business about three years. After examining the saw, which was supposed to have been stolen and which was an exhibit in the trial of the case, stated that the market value would be somewhere from $40 to $60.

We find no merit in appellant's contention that there was no evidence to prove the identity of the saw or its fair market value. It was, of course, necessary to show that the market value of the saw was more than $35, otherwise, a conviction under Ark. Stats. § 41-3907, could not be sustained. The testimony of the owner of the saw and the testimony of Young was, we think, substantial evidence from which the jury was justified in finding that the saw had a market value of at least $40. Likewise, the identification of the saw made by the owner supplied substantial evidence to sustain the jury's verdict. In the case of *Burrell* v. *State,* 203 Ark. 1124, 160 S. W. 2d 218, the court among other things said, ". . . it is also a well-settled rule that the evidence admitted at the trial will, on appeal, be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict of the jury it will be sustained."

Appellant's strongest contention is that the circumstantial evidence in this case is not sufficient to support the verdict of guilty. In support of this argument appellant relies on what this court said with reference to circumstantial evidence in the cases of *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604, *Turner* v. *Walnut Ridge,* 186 Ark. 899, 56 S. W. 2d 759. In the *Reed* case the court,

after reviewing the lengthy testimony, had this to say: "There may be in this testimony some evidence of suspicion against defendants, but at the most it is a circumstance of bare suspicion. But mere circumstances of suspicion are not sufficient upon which to base the conviction for a crime, which must be established by substantial evidence to the exclusion of a reasonable doubt." In the *Turner* case the court cited the *Reed* case with approval and reached the same result. In doing so the court made this statement: "The testimony recited raises a serious suspicion that appellant had intoxicating liquor at his home for the purpose of sale; but convictions cannot be sustained upon suspicion merely. There must be testimony which, when given its highest probative value, proves that the accused had committed the offense charged."

The court has, however, on many occasions sustained convictions on circumstantial evidence; see: *Lackey* v. *State,* 67 Ark. 416, 55 S. W. 213; *Bartlett* v. *State,* 140 Ark. 553, 216 S. W. 33; *Scott* v. *State,* 180 Ark. 408, 21 S. W. 2d 186, *Huffman* v. *State,* 222 Ark. 319, 259 S. W. 2d 509; *Miller* v. *City of Helena,* 224 Ark. 1016, 277 S. W. 2d 841.

In the *Lackey* case, *supra,* the court (in reviewing circumstantial evidence) said: "The doctrine of reasonable doubt applies to the general issue of guilty or not guilty, *but it does not apply to each item of testimony or to each circumstance tending to show the guilt of the defendant.*" (Emphasis supplied.) In the *Huffman* case, *supra,* the court approved this instruction: "You are instructed that although it is competent to convict on circumstantial evidence before you would be authorized to convict on such evidence, the facts and circumstances in evidence must point with reasonable certainty to the defendant's guilt and they must be consistent with each other and consistent with the defendant's guilt to the exclusion of every reasonable hypothesis of his innocence." In the *Scott* case, *supra,* we find this statement: "The defendant was convicted on cir-

cumstantial evidence, but there is no difference in the effect between circumstantial evidence and direct evidence. In either case it is a question for the jury to determine, and, if the jury believes from the circumstances introduced in evidence, beyond a reasonable doubt, that the defendant is guilty, it is the duty of the jury to find him guilty just as it would be if the evidence was direct." In the *Miller* case, *supra,* the court quoted with approval: "There is no greater degree of certainty in proof required where the evidence is circumstantial than where it is direct, for in either case the jury must be convinced of the guilt of the defendant beyond a reasonable doubt."

In the case under consideration the evidence against appellant amounts to more than a suspicion of guilt. It amounts, we think, to substantial evidence. One strong factor, not heretofore mentioned, is the fact that the missing saw was found in appellant's possession and no satisfactory explanation, consistent with innocence, was given by him. At least the jury evidently did not believe the explanation given, as it had a right to do.

In the case of *Duty* v. *State,* 212 Ark. 890, 208 S. W. 2d 162, where the appellant was charged with and convicted of grand larceny the court said:

"Without further recitation of the testimony it may be said that it was clearly shown that appellant was in possession of property recently stolen and the jury evidently did not accept appellant's explanation of his possession. *This testimony alone would suffice to sustain the larceny charge.* See *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398, and cases there cited." (Emphasis supplied.)

It is our conclusion that there was substantial evidence to support the jury's verdict of guilty, and the judgment of the trial court is therefore affirmed.

Affirmed.

4989 339 S. W. 2d 601

Opinion delivered November 7, 1960.

Nance & Nance, for appellant.

Bruce Bennett, Atty. General, by *Ancil M. Reed,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Appellants were convicted of the crime of robbery. The only witness that connects the appellants with the offense is Mary Salmon. In these circumstances if she was an accomplice, the conviction cannot stand. The State proved that on the night of February 12, 1958, R. J. Wilson was robbed of about $195 in a liquor store at West Memphis. There is no evidence whatever which tends to show that appellants committed the offense except the testimony of Mary Salmon. She testified that she had known the defendants since 1956; that Marvin Sanders was her lover; that on the night of February 12th she and the defendants drove to West Memphis; that she knew the defendants had no money when they went there; that Marvin Sanders took a pistol out of the glove compartment of the automobile and put it under his belt; that the two men then got out of the car but that she stayed in the car; that the men were gone a few minutes and returned; they had one-half pint of liquor and she saw one of them stuffing money in his pocket; she knew at that time that they robbed the liquor store; she asked them if they had hurt the man in the store. She testified that she was charged with the robbery involved here but later the case was nolle prossed. She stated that she still loves Sanders; that he is the father of her child; that her husband is in the penitentiary; that she lived with another man named Chuck Tutor as his wife, at a time when she was married to her present husband. She testified that after the robbery was committed she and the two men went to her apartment in Memphis and there the men divided the money; they counted it out on a table in her presence. She denied that she got any part of it but stated that Froman stayed in her apartment until about 2 or 3 o'clock in the morning and that Sanders stayed there until the next day. She stated that she told Sanders' stepmother about the crime having been committed, but told no one else about it for more than a year, when she told the Memphis police. The evidence shows conclusively that as a matter of law the prosecuting witness, Mary Salmon, is an accomplice.

Ark. Stats. § 41-120 provides: "An accessory after the fact, is a person who after a full knowledge that a crime has been committed, conceals it from the magistrate, or *harbors* and protects the person charged with or found guilty of the crime." [Emphasis ours.] According to the undisputed testimony, Mary Salmon knew at the time that the men committed the robbery. She testified:

"Q. You knew they robbed something and you knew they robbed that liquor store, didn't you?

A. Yes, sir.

Q. You came back to Memphis and you counted the money didn't you? How was this money, currency or silver?

A. It was in bills and silver."

Immediately following the robbery she harbored the men in her apartment. Undoubtedly she was an accessory after the fact. An accessory after the fact is an accomplice. In *Polk* v. *State,* 36 Ark. 117, the Court said: "An 'accomplice', in the full and generally accepted legal signification of the word, is one who, in any manner, participates in the criminality of an act, whether he is considered, in strict legal propriety, as a principal in the first or second degree, or merely as an accessory before or after the fact." In *Stevens* v. *State,* 111 Ark. 299, 163 S. W. 778, the Court quoted with approval from *State* v. *Jones,* 91 Ark. 5, 120 S. W. 154, as follows: " '. . . where a felony has been committed, the felon stands charged with the crime, and it is the duty of all persons, who know or have reason to believe that he is guilty of a felony to arrest him. One who, with a full knowledge that the crime has been committed, harbors and protects the felon, is guilty as accessory and may be punished as such, whether the principal offender be arrested or not. Any other view of the statute would permit a person to go unpunished who has been guilty of the most flagrant act of harboring and protecting a felon before a warrant of arrest could be procured, or an indictment could be returned.' " The Court also

said in the *Stevens* case: "There is a conflict of authority as to whether an accessory after the fact is an accomplice, but the decisions of this court are to the effect that he is." On rehearing in the *Jones* case, Judge McCulloch said: "Under the statute now under consideration, it is unimportant how the knowledge is received by the alleged accessory; it is sufficient to constitute the offense if he knows, at the time he harbors and protects the felon, that the latter has committed the felony named in the indictment."

In attempting to explain why she waited for more than a year after the alleged crime was committed before giving the information to the police, the witness, Mary Salmon, stated that she was scared, but she said she was not afraid of Sanders, and she does not indicate that she was afraid of Froman, and she stated that she was not afraid of the police. In fact, she gives no explanation of her asserted fear. In Wharton's Criminal Evidence, 12th Ed., Vol. 2, p. 238, it is said: "Nor is one an accomplice who through fear of immediate danger to life or member conceals the commission of the crime. But ordinarily, 'a person who aids and assists in the commission of a crime or in measures taken to conceal it and *protect the criminal,* is not relieved from criminality as an accomplice on account of fear excited by threats or menaces, unless the danger be to life or member, nor unless that danger be present and immediate as above announced. . . ." [Emphasis ours.]

In *Henderson* v. *State,* 174 Ark. 835, 297 S. W. 836, the Court said: "The general test to determine whether a witness is or is not an accomplice is, could he himself have been indicted for the offense, either as a principal or accessory?" The witness, Mary Salmon, was indicted, although later the indictment was nolle prossed. But certainly, according to her own testimony in this case, her participation in the offense was sufficient to sustain a conviction on such an indictment if a jury had returned a verdict of guilty.

In *Havens* v. *State*, 217 Ark. 153, 228 S. W. 2d 1003, the Court said: "We have approved the follow-

ing test generally applied to determine whether one is an accomplice: 'Could the person charged (as an accomplice) be convicted as a principal, or an accessory before the fact, or an aider and abetter upon the evidence? If a judgment of conviction could be sustained, then the person may be said to be an accomplice. . . .' "

In Underhill's Criminal Evidence, 5th Ed., Vol. 1, p. 335, it is said: "The burden is on the defendant to show that the witness for the state is an accomplice. This is usually determined by the court as a question of law. But if the evidence is conflicting as to the participation of the witness in the commission of the crime, the matter should be left to the jury under proper instructions as to intent and participation." Here there is no conflict in the evidence as to Mary Salmon's participation in the crime. She waited in the automobile near the scene of the crime while the robbery was perpetrated; she knew the crime was committed; she permitted the two men to go to her apartment and divide the money obtained in the robbery; she harbored one of the men until 2 or 3 o'clock in the morning and the other until the next day.

It being established that she is an accomplice, the question that follows is whether there is any evidence corroborating her testimony connecting the appellants with the crime. Ark. Stats. § 43-2116 provides: "A conviction can not be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. . . ."

It will be noticed that the corroborating evidence must tend to connect the defendant with the crime. Corroborating evidence that the crime was committed and the details thereof are not sufficient. The corroborating evidence must be independent of evidence given by the accomplice. In Underhill's Criminal Evidence, 5th Ed., Vol. 1, p. 401, it is stated: "The test of suf-

ficiency of corroboration has been stated to be whether, if the testimony of the accomplice is eliminated from the case, the testimony of the other witnesses be sufficient to establish the commission of the offense and the connection of the accused therewith."

True, Mrs. Salmon knew the details of the crime; it was shown that the robbers tore the phone from the wall. She testified that she heard the men say they tore the phone loose. Mr. Wilson, the victim of the robbery, testified as to the denomination of the money taken in the robbery, and Mrs. Salmon testified that the money the robbers divided in her apartment was of similar denomination. But when the evidence is analyzed it is perfectly clear that if Mary Salmon's testimony were eliminated, there would not remain a scintilla of evidence which tends to connect the defendants with the crime.

The jury returned separate verdicts finding each appellant guilty of robbery, but it is stated in each verdict that the jury are unable to agree on the punishment, leaving it to the court to fix the punishment, which the court did. Appellants contend that the statute authorizing the court to fix the punishment in certain cases is unconstitutional. Ark. Stats. § 43-2306 provides: "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."

Article 2, § 7 of the Constitution of Arkansas provides: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, . . ." Article 2, § 8 provides: ". . . but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had may, in its discretion, discharge the jury, and commit or bail the accused for trial at the same or the next term of said court; . . ." Article 2, § 10 provides: "In all

criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury. . . ." Article 2, § 21 provides: "No person shall be taken or imprisoned, or disseized of his estate, freehold, liberties or privileges; or outlawed, or in any manner destroyed or deprived of his life, liberty or property, except by the judgment of his peers or the law of the land; . . ."

The great weight of authority is that statutes similar to ours permitting the court to fix the punishment under certain circumstances are not unconstitutional. We agree with that view. *State* v. *Hamey,* 168 Mo. 167, 67 S. W. 620; *Woods* v. *State,* 130 Tenn. 100, 169 S. W. 558, L.R.A. 1915F, 531; *Ward* v. *Hurst,* 300 Ky. 464, 189 S. W. 2d 594; *Lee* v. *Buchanan,* Ky., 264 S. W. 2d 661. See also 31 Am. Jur. 575; 50 C. J. S. 784.

Since the accomplice's testimony connecting the defendants with the crime is not corroborated, the judgment must be reversed. It is so ordered.

McFaddin, J., dissents.

George Rose Smith and Ward, JJ., concur.

George Rose Smith, J., concurring. I cannot join in the majority's conclusion that Mary Salmon was shown to be an accomplice as a matter of law. This witness did not admit her complicity in the crime, as by turning state's evidence. On the witness stand she sought to maintain her innocence and to convince the jury that it was not until the money was being counted in her home that she was certain a crime had been committed. She explained her failure to report the offense by saying she was afraid to go to the police. Although her avowals of innocence were greatly weakened upon cross examination I cannot say that the jury were bound to disbelieve her. Hence I think we should follow the rule adhered to in *Jackson* v. *State,* 193 Ark. 776, 102 S. W. 2d 546: "In any view of the situation, appellant was entitled to have the question as to whether she was an accomplice submitted to the jury, as it was one of mixed law and fact, . . . unless the testimony or subsequent

events show conclusively she was an accomplice.'' In my opinion the court below properly submitted this issue to the jury.

I agree, however, that the case should be reversed and remanded for a new trial, as the court erred in giving its instruction No. 10. By that instruction the jury were permitted to convict the accused even though Mary Salmon was found to be an accomplice. This instruction should not have been given, for as the majority correctly point out there is no evidence whatever, apart from Mary Salmon's testimony, that connects these appellants with the crime. Hence the jury should not have been given an opportunity to base a conviction upon nonexistent proof.

WARD, J., joins in this opinion.

ED. F. MCFADDIN, Associate Justice, dissenting.

Since several questions are presented in this case, I think it may be worthwhile for future reference that I state the reasons for my dissent. I think the judgment should be affirmed for these reasons:

(1) Mary Salmon was not an accomplice as a matter of law. It was a question of fact for the jury to decide as to whether or not she was an accomplice. If the jury should find that Mary Salmon was not an accomplice, then her testimony would not have to be corroborated.

(2) If the jury should conclude that Mary Salmon was an accomplice, then her testimony would have to be corroborated; and I think there was ample evidence of corroboration to support the jury verdict:

(a) Mary Salmon testified that Marvin Sanders took a pistol from the glove compartment of his car as he started toward the liquor store. R. J. Wilson testified that the man who robbed him stuck a pistol in his back. Wilson described the pistol.

(b) Mary Salmon testified that when Froman returned to the car, she asked where Sanders was, and that Froman went back and was gone a short time and Sanders returned with him. Wilson testified that one of the rob-

bers stopped long enough after committing the robbery to select a bottle of whiskey and that the other robber came back for him.

(c) Mary Salmon testified that after Froman and Sanders had re-entered the car, Sanders stated that he had torn the telephone off the wall in order to prevent the Wilsons from calling the police. It was testified by Wilson and other witnesses that the telephone was torn from the wall.

(d) Mary Salmon testified that Froman and Sanders had something over $190 in currency, half dollars, and quarters, when they counted the money in her presence. Wilson testified that the robbers took $196 in currency, half dollars, and quarters.

The corroboration did not merely go to show that a crime was committed; it went to show that Froman and Sanders had committed the particular robbery here involved; and I think this evidence corroborates the testimony of Mary Salmon even if the jury had found that she was an accomplice.

In the concurring opinion in this case it is stated that there was error in Instruction No. 10 as given by the Court. I find no error.[1]

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[1] So that there can be no misunderstanding about the Instruction No. 10, I copy Instructions 9 and 10 as given by the Court; and I find no error in them:

COURT'S INSTRUCTION NO. 9.

"Therefore, if you find from the evidence in this case under the instructions herein given that Mary Salmon was an accomplice to the crime, then you will consider the following instruction:"

COURT'S INSTRUCTION NO. 10.

"You are instructed that one may not be convicted of a felony upon the uncorroborated evidence of an accomplice. You cannot, therefore, convict the defendants upon the testimony of said witness, Mary Salmon, unless you find her testimony is corroborated by other evidence in the case tending to connect the defendants with the commission of the crime; and the corroboration is not sufficient if it merely shows that the crime was committed and the circumstances thereof. But you are instructed that the amount of such corroborating evidence and its weight is a matter solely for the jury, and if you find that such witness has been corroborated by evidence, positive or circumstantial, other than her own, tending to show that the crime was committed and connecting the defendants with its commission, you will be justified in convicting the defendants, provided you believe them guilty from all the evidence in the case and beyond a reasonable doubt."

Therefore, I conclude that the judgment of conviction should be affirmed.

HIGHWAY LUMBER & SUPPLY CO. *v.* COMMISSIONERS OF WEST HELENA WATER COMPANY.

5-2212 339 S. W. 2d 609

Opinion delivered November 7, 1960.

Dinning & Dinning, for appellant.

Eugene L. Schieffler and *James P. Baker, Jr.,* for appellee.

JIM JOHNSON, Associate Justice. This case involves an action brought by appellant, Highway Lumber & Supply Company, seeking a mandatory injunction against appellee, Commissioners of West Helena Water Company, requiring it to install water meters and furnish water for two lots in Westwood Subdivision, a housing development of appellant, now situated within the city limits of West Helena.

In 1955 the appellant acquired twenty acres of land and platted the same into fifty-seven lots and dedicated it as Westwood Subdivision, the North line of which is adjacent to Highway No. 20, where appellee maintains a 6″ water main with an ample supply of water. The first development made by the appellant consisted of

commercial buildings along said North end of the property which appellee serviced from its water mains in the adjacent highway without question.

Appellant, desiring the development of the lots located behind the highway front commercial property for housing, and finding that water to said lots (which were at the time of the dedication of said subdivision located outside the city limits of West Helena) could not be provided directly from the water main in Highway 20, as was done for the front commercial property, sought to and did enter into a contract with appellee on November 18, 1955, whereby water was to be furnished these lots.

Under this contract appellant was required to deposit the sum of $500 for the construction of a 2″ line into the subdivision from the 6″ main in the highway. The contract provided that the appellant was permitted to build houses on a designated number of lots and upon completion of five houses he was to receive a refund of his original deposit. Appellant and appellee both complied with the terms of that contract and water was furnished to the original five houses. Five additional houses were built by the appellant in the subdivision. These houses were situated upon lots designated in the contract and were also furnished water.

Following the construction of these houses, appellant undertook to further develop the subdivision by building on two adjoining lots which were not included in the contract. These were lots No. 19 and No. 11.

On April 8, 1958, Rolla St. John, to whom the plaintiff had sold Lot No. 19, applied for a water meter for the home on said lot and this was refused. About the same time the plaintiff was completing the home on Lot No. 11 and a water meter for this residence was also denied. The denials of these two water meters brought on this lawsuit. The plaintiff says that the refusal to furnish water to these two lots constitutes an unlawful and unwarranted discrimination; that unless the defend-

ant is enjoined he will suffer an irreparable injury and is, therefore, entitled to an injunction.

The record reveals that on or about May 21, 1957, and after several years of study, and some 18 months after the execution of the above limited contract for water service, the water company adopted a Water Main Extension Policy. All of the subdivision developers in West Helena have abided by this policy or expressed a willingness to abide by it and the policy has been applied indiscriminately to all subdivision developers since the adoption of the policy.

Under this policy the Contract For Main Extension for a real estate development requires the subdivision developer to deposit with the water company a sum of money which represents the estimated cost of constructing and installing the proposed main extension. If, after the work is finished, the cost proves to be less than the deposit, the difference is immediately refunded to the developer. Paragraphs four and five are most important to the developer because they provide for the repayment to him of his deposit. Under paragraph four the water company would refund to him at the end of the first year of occupancy of each house three and one-half times the gross amount of water revenue received from each house. There is only one refund to each house in the subdivision. The minimum amount of actual gross revenue for each house shall not be less than Thirty Dollars and the maximum amount shall not exceed One Hundred Dollars. The City of West Helena pays the water company Fifty Dollars per year for each fire plug in town and the water company gives a developer credit for each fire hydrant in the subdivision by refunding to him three and one-half times the revenue from the one fire plug for one year only or $175.

Under paragraph six, their contract is only in effect for six years from the date the main extension is placed in service. Applying the water main extension policy and the contract to the balance of the Westwood Sub-

division not covered under the original limited water service contract, the following facts developed:

Mr. Gene Cowsert, Manager of the Water Company, testified that the average gross water revenue for each house in Westwood Subdivision amounted to $36 per year. Three and one-half times $36 x 34 houses to be built on additional lots to be serviced equals $4,284, and this sum plus $175 for the fire hydrant equals $4,459. The revised detailed estimate of cost amounted to $4,493. (The first estimate was $4,708.18 and later on was reduced to $4,493.68.)

Mr. Cowsert testified that the appellant would have been entitled to receive all of his money back when he had built 34 houses. Even appellant testified he would have received all of his deposit back in six years.

Mr. Waters, owner-appellant, refused to sign the above contract and in order to obtain water for his subdivision he deposited the sum of $3,370.11 (which was the amount of money required for the construction of the mains he wanted to build at that time) under protest. The water company then constructed the water mains in accordance with the requirements of the Arkansas State Board of Health which provided a six inch main in the western part of the subdivision rather than a two inch main as desired by appellant.

Appellee contends that they refused to provide water to lots No. 11 and No. 19 for several reasons of which the main ones are as follows:

1. Because a two-inch main extended throughout the subdivision would not provide sufficient water pressure for adequate service for the development of the entire subdivision.

2. Because of the Water Extension Main Policy adopted on or about May 21, 1957.

3. Because the Arkansas State Department of Health recommended a six-inch main leading from State

Highway No. 20 on the West side of the subdivision to a point . . . (designated in the subdivision). This was purely for the domestic use of water from the standpoint of the Board of Health.

4. Because the Arkansas Inspection and Rating Bureau approved a six-inch main in order to provide sufficient water pressure for adequate fire protection.

5. Because it was necessary to protect the financial stability of the West Helena Water Company.

In support of their refusal, appellee further contends in their argument which was based upon the record that: "Appellant states that for the purposes of this lawsuit it is interested only in these two lots, however, its attorney says 'that if we build right next to it we are entitled to it.' On the plat of Westwood Subdivision the distance from the south end of the original two inch main to the south part of the subdivision, around the bend or loop and thence north to the state highway on the West side of the subdivision is approximately twenty-five hundred fifty feet which lacks approximately one hundred eighty feet of being half a mile. The continuous extension of the two-inch line through the subdivision would be of great advantage to appellant in saving it money but it would be of great disadvantage to the people to whom it sold homes and would also create a huge burden on the water company when later on it would have to come back and duplicate the two-inch main with a six-inch main a distance of approximately six-hundred fifty feet. Without a fire plug in Westwood Subdivision all of the citizens in West Helena would have to pay higher fire insurance premiums. In short, if the position of the appellant were upheld then there would, in fact, be discrimination against the water company, other subdivision developers and the people of West Helena generally."

The learned Chancellor agreed that appellee's contentions were valid and refused to grant the mandatory injunction prayed for. On appeal, appellant relies prin-

cipally upon the following cases: *City of Malvern* v. *Young,* 205 Ark. 886, 171 S. W. 2d 470; *Pine Bluff Corporation* v. *Toney,* 96 Ark. 345, 131 S. W. 680; *Consumers Company* v. *Hatch,* 224 U. S. 148, 32 S. Ct. 465, 56 L. Ed. 703. After careful review on trial *de novo* we find that the cited cases do not here sustain the points urged by appellant for reversal. To the contrary, however, we do find in the *City of Malvern* v. *Young, supra,* quoted from Pond's Law of Public Utilities, 4th Ed. Vol. 1, § 275, the following:

"Where the location of the prospective customer is unusual and the conditions of furnishing him service are peculiar because of the distance he is removed from the center or thickly populated district of the municipality or because of the sparsely settled condition of his own neighborhood, it is only reasonable that the public service corporation providing him with its service be permitted to impose other and different conditions from those applicable to a customer centrally located in the thickly populated district of the municipality. . . . And while the public service corporation can not act arbitrarily or discriminate among its customers, present or prospective, where similarly situated, by way of favoring one customer of a class or one class over others a distinction may be made between different customers or classes of customers on account of location, amount of consumption, or such other material conditions which distinguish them from each other or from other classes."

According to Professor Pond the water company could have made a distinction between different customers or classes of customers on account of location (Westwood subdivision was located in the Western part of West Helena and at the time of the Dedication deed the lots involved in the first contract were not even in the city limits of West Helena), amount of consumption or such other material conditions which distinguishes one customer from another.

The water company denies that there was any discrimination whatsoever against the plaintiff or anyone else. Gene Cowsert, Manager of the Water Company, testified that all other subdivision developers in West Helena had either abided by the policy or expressed a willingness to abide by it and that the policy had been applied indiscriminately to all subdivision developers since the policy was adopted. There was no evidence to the contrary. In fact, the owner-appellant testified as follows:

"Q. Have you reviewed the policy?

"A. Yes, sir; I have read it.

"Q. Do you think it is a reasonable policy?

"A. I don't see too much wrong with it. . . ."

It is a well established rule that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that the Water Company acted arbitrarily or abused their discretion. This the appellant failed to do.

Affirmed.

ARK. REAL ESTATE CO., INC. *v.* FULLERTON.

5-2190 339 S. W. 2d 947

Opinion delivered November 14, 1960.

James R. Howard of *Moses, McClellan, Arnold, Owen & McDermott,* for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

CARLETON HARRIS, Chief Justice. Appellees Fullerton and Brooks purchased respectively 5,000 and 2,500 shares of stock, at one dollar per share, in Arkansas

Warehouse Corporation from John Yancey, agent for Arkansas Real Estate Company, Inc.[1] Subsequently, appellees instituted suit in the Pulaski County Circuit Court alleging that the stock had been sold to them under fraudulent representations by Yancey; further, that the stock was sold in violation of the Arkansas Securities Act, offered to surrender their stock certificates (which they had previously endeavored to do), and sought a refund of the money paid for such stock. On trial, the jury returned a verdict for appellees in the amounts sought on the basis of fraudulent misrepresentation, and the court entered its judgment accordingly, finding that the stock certificates sold to appellees had been filed with the clerk of the court, and directing that upon satisfaction of the judgments, such certificates be delivered to Arkansas Real Estate Company. From such judgment, appellants bring this appeal; appellees cross-appeal, contending that the court should have granted their motion for a directed verdict because the stock was sold in violation of the Arkansas Securities Act.

As shown by the evidence, the Arkansas Warehouse Corporation was formed for the purpose of building warehouses to be leased, and the corporation had acquired 320 acres of land south of Roosevelt Road and east of the right-of-way for the proposed freeway through Little Rock. According to Brooks, Yancey told him that the corporation had received title to the land by issuing 1,500,000 shares of stock to the Arkansas Real Estate Company. Fullerton stated that Yancey assured him that the land was "already paid for, and it was free and clear, or anyway, there wasn't anything against it; they owned the land." The stock was purchased by appellees in Warren, their home town, Brooks making his purchase on January 23, 1959, and Fullerton making his purchase on February 15th. In March or April, Brooks decided "it would be wise to check" on the title, and following a title examination, appellees endeavored to obtain a return of their money.

[1] Yancey was an officer of both Arkansas Real Estate Company, Inc., and Arkansas Warehouse Corporation.

Yancey admitted on the stand that the land was not clear of encumbrances. The record reflects that about twenty acres was subject to a lien of $40,000 under a first mortgage to Bankers Insurance Company, a tax lien against the lands amounted to $3,540, and there was an indebtedness to D. W. Jones of approximately $20,000; in fact, according to Yancey, there was a total indebtedness of about $90,000 at the time the stock was sold to appellees. The witness testified that the indebtedness had subsequently been reduced by about $40,000. Admittedly, the money obtained from Brooks and Fullerton was used for that purpose. Yancey also admitted that a part of the most valuable acreage (6 acres) was not owned by the corporation, but was leased from E. L. Faucett, and that this fact was not told to appellees, Yancey explaining, "We have a lease for 99 years. If that is not owning it, I'm not going to worry about it. I will not be here, and my kids will not be here." The rental on the lease amounted to $100 per month. The record reflects approximately thirty-four transactions involving the transfer of stock, of which sixteen or seventeen were admitted by Yancey to have been outright sales. The others were classified by him as loans, *i. e.*, stock was given as collateral on notes executed by the real estate corporation to such individuals.

Appellant sets out three grounds for reversal, contending that there is no evidence that appellees relied on the representations by Yancey in making their purchases; that the court erred in one of the instructions given; and that testimony should have been allowed wherein appellant sought to establish the value of the land in question. Under the view we take, a discussion of these alleged errors is unnecessary, though it might be stated that all contentions have been thoroughly examined, and found to be without merit. We are of the opinion that the point urged by appellees/cross-appellants in the cross-appeal is at once decisive and determinative of the litigation.

The pertinent portions of Act 397 of 1947, cited as the Arkansas Securities Act[2] (§ 67-1201, Ark. Stats., 1957 Replacement), provide as follows:

§ 67-1206—"No securities, except of a class exempt under Section 5 [§ 67-1205] hereof or unless sold in a transaction exempt under Section 4 [§ 67-1204], shall be sold within this State unless such securities shall have been registered by notification or by qualification as hereinafter defined. * * *"

§ 67-1214 — "It shall be unlawful for any issuer or dealer or representative thereof, either directly or indirectly, to sell or cause to be sold, offer for sale, take subscriptions for, or negotiate for the sale in any manner in this State, any contracts, stocks, bonds, or other securities (except as expressly exempt herein) unless and until said Commissioner has approved and issued his certificate therefor in accordance with the provisions of this Act. . . ."

The term "issuer" is defined by § 67-1202, subsection (e), as one

". . . who proposes to issue or who issues or has issued or shall hereafter issue any security. Any person who acts as a promoter for and on behalf of a corporation, trust or unincorporated association or partnership of any kind to be formed shall be deemed to be an issuer."

Subsection (g) provides:

"Any person, firm, copartnership, corporation or association, whether domestic or foreign, not the issuer, who shall in this State sell or offer for sale any of the stocks, bonds, or other securities of any issuer, or who shall, by advertisement or otherwise, profess or engage in the business of selling or offering for sale such securities, shall be deemed to be a 'dealer' within the meaning of this Act [§§ 67-1201 — 67-1234,] and no such dealer

[2] This Act was repealed by Act 254 of 1959, which is also known as the Arkansas Securities Act; the latter act became effective on July 1, 1959, but Act 397 controls this litigation, since the stock was sold to appellees prior to that date.

shall sell or offer for sale any securities, except securities qualified or exempt under the provisions of this Act or except in transactions exempted under the provisions of this Act, or profess the business of selling or offering for sale such securities unless and until he shall have qualified the same in the office of the commissioner as in this Act provided. The term 'dealer' shall not include an owner of such securities who shall acquire and sell same for his own account in the usual and ordinary course of business, and not for the direct or indirect promotion of any speculative enterprise; provided that such ownership is in good faith. Repeated or successive sales of any such securities shall be *prima facie* evidence that the claim of ownership is not bona fide."

Section 67-1228 provides:

"Every sale or contract for sale of any security made in violation of any of the provisions of this Act [§§ 67-1201—67-1234] shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director or officer of the issuer whose securities are being offered for sale who shall have participated in making such sale shall be jointly and severally liable to such purchaser for the refund of all moneys or property received in payment therefor with interest at the rate of six per centum (6%) from the date of payment until date of refund and all costs and reasonable attorney's fee incurred therein."

The question in determining whether the motion for directed verdict should have been granted is whether the record places in issue any question of fact relative to the violation of these statutes, or, to state it differently, do the exhibits and testimony reflect, as a matter of law, the violation of the Securities Act.

The only suggestion of any dealings with the Banking Department concerning stock is found in a single line of testimony by Yancey, when he stated, "I believe there was a stock option when we got permission to issue that from the State Banking Department. We could issue stock in lieu of cash and they also had the option

of taking the six per cent." However, scrutiny of the transcript reveals that this statement referred entirely to loans. Yancey had testified at length regarding loan transactions, and in fact, the quoted statement was in reply to a question, "Now on these loan transactions, was there any agreement that they could turn these notes into common stock of Arkansas Warehouse if they so desired?" There is no doubt of non-compliance with the registration section of the Securities Act, for the parties entered into the following stipulation:

"Neither Arkansas Warehouse Corporation or Arkansas Real Estate Company, Inc., filed a registration statement with the Bank Department of Arkansas for the stock of Arkansas Warehouse Corporation; the State Banking Department has not issued a certificate authorizing the sale of this stock pursuant to the Arkansas Securities Law. That is a stipulation, your Honor."

The first question is whether the sales made by appellants were a violation of the Securities Act. An owner of securities is permitted to make isolated sales (subsection (g), § 67-1204), or sales for his own account in the ordinary course of business. Section 67-1202, subsection (g), heretofore quoted, states in part, "the term 'dealer' shall not include an owner of such securities who shall acquire and sell same for his own account in the usual and ordinary course of business, and not for the direct or indirect promotion of any speculative enterprise; provided that such ownership is in good faith". Certainly, we do not consider that appellants can come under the category "owner", for the evidence clearly reflects that the stocks were sold as a means of directly promoting the enterprise of building warehouses. Sales were made in widely scattered localities over the state, such as Fordyce, Danville, Warren, Russellville, Pine Bluff, and Coy. Furthermore, the aforementioned section provides: "*Repeated or successive sales of any such securities shall be prima facie evidence that the claim of ownership is not bona fide.*[3] Webster's New International Dictionary defines the word "repeated"

[3] Emphasis supplied.

as "happening again and again". The record shows at least sixteen or seventeen direct sales, and these were admitted by Yancey. This number of sales cannot be considered "isolated"; in fact, it amounts to one-half of the total transactions prior to the trial.

It makes little difference whether appellants be classified as dealers, promoters, or representatives. The evident fact is that they were engaged in selling stock without first registering same, or obtaining a certificate of approval, and neither the stock nor the transactions were exempt. In other words, under the undisputed facts, appellants, as a matter of law, clearly violated the Securities Act.

At the conclusion of appellees' evidence, they moved the court for a directed verdict on the grounds that the stock was sold in violation of the Arkansas Securities Act. This was denied by the court. Appellants also moved for a directed verdict, which was granted as to Arkansas Warehouse Corporation, and Robert Traylor, officer of Arkansas Real Estate Company and one of the incorporators of Arkansas Warehouse Corporation, but the motion was denied as to appellants herein. At the conclusion of all the evidence, appellants again moved for a directed verdict, which was denied, and counsel for appellees again moved for a directed verdict for Brooks and Fullerton on the same ground as the first motion. The court ruled that it had concluded to let the matter go to the jury on the ground of misrepresentation only; thereafter, appellees requested the court to submit the issue relative to violation of the Securities Act to the jury specially, but the court stated: "I am overruling the plaintiffs' motion for an instructed verdict which would, in effect, rule out the question of the Securities Act". Both sides then offered instructions on the question of misrepresentation, and the case was submitted to the jury on that phase only. The fact that each side moved for a directed verdict is of no significance in this case; had a fact question been involved, and no instructions to the jury requested, this action could have had the effect of waiving a jury trial, and submitting the

issues to the court. However, as set out in this Opinion, there was no question of fact left for the court to decide. In 53 Corpus Juris Secundum, § 77, p. 792, we find:

"A transaction involving securities will ordinarily be presumed to comply with the applicable Blue Sky Laws, and the burden of proving a violation is on the party asserting it. Thus, in an action to recover the consideration paid as the purchase price of a security on the ground that the transaction was in violation of the Blue Sky Law, the burden is on plaintiff to prove such violation and the presence of all the elements necessary to warrant recovery under the act. Defendant, on the other hand, has the burden of proving defensive matters. Thus, if defendant relies on ratification as a defense, he has the burden of proving it. Also defendant has the burden of proving that stock sold in violation of the statute was within statutory exemptions."

The testimony of appellants did not establish a defense; nor is any defense to violation of the Securities Act argued in the briefs. As stated in *Plunkett* v. *Winchester,* 98 Ark. 160, 135 S. W. 860:

"The admitted facts showing plaintiffs entitled to relief sought, there was no question for the jury, and the verdict was properly directed."

Also in 5B, Corpus Juris Secundum, § 1929, p. 440:

"Where plaintiff has made out a prima facie case, the facts are practically undisputed and the amount of recovery certain, and defendant, although having full opportunity to do so, has established no defense sufficient to prevent or bar the right of recovery, the appellate court, on reversing a judgment in defendant's favor, will sometimes render the proper judgment for plaintiff, or direct the court below to do so."

Here, appellees, not once, but twice, requested the court to direct a verdict in their favor on the point herein discussed. While no exception was saved to the court's ruling in refusing to do so, this was unnecessary under the provisions of Act 555 of the General Assembly

of 1953 (§ 27-1762, Supplement, Ark. Stats. Anno.), which provides:

". . . but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take. * * *"[4]

Appellees made known the action which they desired the trial court to take, and their reason therefor, and the court erred in not granting the motion.

Accordingly, the judgment, insofar as it relates to these appellees, is reversed, and the cause remanded to the circuit court with directions to enter judgment for appellee Fullerton in the sum of $5,000, and appellee Brooks in the sum of $2,500, together with interest at the rate of 6% per annum, costs, and a reasonable attorney's fee.

[4] No question is raised about the sufficiency of the motion.

CAWOOD *v.* PIERCE.

5-2233 339 S. W. 2d 861

Opinion delivered November 14, 1960.

Eugene Coffelt, for appellant.

J. T. McGill and *Little & Enfield,* for appellee.

J. SEABORN HOLT, Associate Justice. This is a suit on an open account. The appellee, Earl Pierce d/b/a

Pierce Produce and Feed, filed a complaint alleging that a running account existed between it and the appellant, Lee Cawood, and that after all credits had been allowed, there remained a balance due of $2,763.14 which appellant had not paid although demand for payment had been made. An itemized and verified statement of the account was made an exhibit to and part of appellee's complaint. Appellant answered with a general denial only. He did not deny under oath the correctness of the account. In fact, he did not offer any testimony after appellee closed its case and rested, but he also rested his case. At this point, appellee asked for a directed verdict in its favor which the court granted. This appeal followed.

For reversal appellant contends: "The court was in error in directing a verdict against appellant." We do not agree.

The record reflects that the only witness at the trial was the appellee's bookkeeper, Mrs. Evelyn Kelley, who testified as to the correctness of a verified account which was attached to the complaint and which was introduced in evidence as an exhibit to her testimony. As indicated, appellant did not offer any testimony at the trial but rested his case after appellee had closed its case. Arkansas Statutes (1947), § 28-202 [Crawford & Moses' Digest, § 4200] provides: "Affidavit as to correctness of account —Sufficiency.—All accounts upon which suits may be brought in any of the courts of this state, the affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account, either in whole or in part; in which case, the plaintiff shall be held to prove such part of his account as is thus denied, by other evidence. [* * * C. & M. Dig., § 4200; Pope's Dig., § 5211.]"

Here the appellant did not deny the verified account and did not deny its correctness by affidavit or by verified answer. We hold that appellee's proof made a *prima facie* case of the correctness of the account. We

said in *Clarke* v. *John Wanamaker,* 184 Ark. 73, 40 S. W. 2d 784: "* * * The effect of § 4200 of Crawford & Moses' Digest is to make a verified account, when undenied, *prima facie* proof of its correctness. The defendant did not deny the correctness of the account by affidavit or by verified answer. She did not offer any testimony whatever, but contented herself with demurring to the complaint. By virtue of the statute above quoted, the account verified by the affidavit of the agent of the plaintiff was evidence of its correctness, and, not having been attempted to be contradicted by the defendant, warranted a judgment in favor of the plaintiff. *Chicago Crayon Co.* v. *Choate,* 102 Ark. 603, 145 S. W. 197." See also *Terry* v. *Esso Standard Oil Co.,* 220 Ark. 694, 249 S. W. 2d 577 and *Walden* v. *Metzler,* 227 Ark. 782, 301 S. W. 2d 439.

Accordingly, the judgment is affirmed.

HORN *v.* HORN.

5-2183 339 S. W. 2d 852

Opinion delivered November 14, 1960.

Richard W. Hobbs, for appellant.

J. Harrod Berry, for appellee.

Ed. F. McFaddin, Associate Justice. This appeal questions the decree of the Chancery Court made to obtain the dower previously awarded to the wife in a divorce decree. On July 25, 1958 the Pulaski Chancery Court rendered a decree awarding Mrs. Mary Horn (appellee here) a divorce from J. W. Horn (one of the appellants here), and the decree contained this language as to dower and retained jurisdiction:

"The Court further finds that Plaintiff is entitled to the sum of $11,666.66 as a statutory dower settlement of and from the monies of defendant, said sum being one-third of the monies of defendant, and which said sum is hereby decreed to said plaintiff against defendant as a property settlement. It is therefore considered, ordered and decreed by this Court that defendant J. W. Horn shall pay immediately to plaintiff the said sum of $11,666.66, for which execution, garnishment, and citation for contempt may issue as upon a judgment at law. . . . The Court doth retain control of this cause for such further orders and proceedings as may be necessary to enforce the rights of the parties herein. . . ."

It had been shown in the divorce case that Mr. Horn had recently received the sum of $35,000 cash in a settlement with the Rock Island Railroad Company; and the Court awarded Mrs. Horn $11,666.66 from said amount. Later, Mr. Horn sought to have the decree of July 25th modified, and claimed that he had no money at the time the decree was rendered; but such effort at modification was unsuccessful and the decree of July 25, 1958 has long since become final and is not an issue on this appeal.

Mr. Horn did not pay the dower awarded to Mrs. Horn, and in September, 1958 she filed in the Pulaski Chancery Court her petition and amended petitions alleging, *inter alia,* that Mr. Horn was attempting to conceal his assets by having his property placed in the name of W. C. Irwin and Mary Irwin, husband and wife;

and certain definitely described property in Garland County, Arkansas was listed in the petitions. The Arkansas Trust Company of Hot Springs was also named as a garnishee. The status of the Irwins when brought into the case and their objections to such procedure will be discussed in Topic I, *infra.* Trial in the Pulaski Chancery Court resulted in a voluminous record. On November 2, 1959 a decree was rendered in which the Pulaski Chancery Court found that Horn had concealed his assets by putting them in the name of the Irwins and that the Irwins were trustees of the Horn assets. The decree directed execution issue against specific property to satisfy the dower award of Mrs. Horn;[1] and it is from the said decree of November 2, 1959 that this appeal is prosecuted both by Mr. Horn and by the Irwins.

I. *Jurisdiction And Venue.* As aforesaid, Mrs. Horn filed her petition in the Pulaski Chancery Court in September, 1958 and for the first time named the Irwins. They filed a demurrer to the petition and amended petitions, stating that, ". . . the Court has no jurisdiction of the persons or subject of the action, and that the complaint did not state facts sufficient to constitute a cause of action." When the demurrer was overruled, the Irwins filed answer and proceeded to trial, which resulted in the decree of November 2, 1959, as aforesaid. On appeal the Irwins[2] now say: "(a) Appellee's petition was an action independent of the divorce; and (b) the venue of a subsequent suit would be in Garland County." To sustain their contentions, the Irwins cite: *Renn* v. *Renn,* 207 Ark. 147, 179 S. W. 2d 657; *Hardy* v. *Hardy,* 228 Ark. 991, 311 S. W. 2d 761; *Wilson* v. *Wilson,* 163 Ark. 294, 259 S. W. 742; *Fullerton* v. *Fullerton,* 230 Ark. 539, 323 S. W. 2d 926; *Harris* v. *Smith,* 133 Ark. 250, 202 S. W. 244; *Ark. Mineral Products Co.* v. *Creel,* 181 Ark. 722, 27 S. W.

[1] The specific property (both real and personal) was sold and purchased by Mrs. Horn for the amount of her dower claim.

[2] The record before us fails to disclose that Mr. Horn ever filed any pleading or objection to the venue of the Pulaski Chancery Court, so this topic involves only the Irwins.

2d 1003; and also the following sections of Arkansas Statutes: 34-1214, 29-506, 29-508, 27-601, and 27-613.

The gist of the Irwin argument is that: (1) when the Pulaski Chancery Court rendered judgment for Mrs. Horn for $11,666.66 such judgment made her a creditor of Mr. Horn; and (2) as a creditor she should have proceeded in Garland County to seek to set aside the alleged fraudulent conveyances involving the real estate in that County. We do not agree with the Irwins in these contentions. There are several possible answers, but we need give only one. In the divorce decree of July 25, 1958, the Court found that Mr. Horn had certain moneys and that $11,666.66 was one-third of the said moneys; and this amount was awarded Mrs. Horn as "statutory dower"; and the decree retained control of the cause "for such further orders and proceedings as may be necessary to enforce the rights of the parties herein." When Mr. Horn did not pay the money in accordance with the decree, Mrs. Horn had a right to ask the Chancery Court to aid her in obtaining her dower. She had learned that Mr. Horn was transferring his property and assets to the Irwins, and she caused them to be cited into the Pulaski Chancery Court.

Mrs. Horn's proceedings against the Irwins were in the nature of an equitable garnishment.[3] In *Riggin* v. *Hillard,* 56 Ark. 476, 20 S. W. 402, Chief Justice Cockrill said: "Every equitable proceeding wherein a remedy is devised to apply the debt of a third person to the extinguishment of the plaintiff's demand against his debtor is a suit for an equitable garnishment." In *So. Lbr. Co.* v. *Riley,* 224 Ark. 298, 273 S. W. 2d 848, we held that garnishment in equity was available as a remedy to reach property fraudulently conveyed. And in *Sneed* v. *Sneed,* 172 Ark. 1135, 291 S. W. 999, we held that equitable garnishment was the proper remedy allowed a divorced wife, to whom the husband owed money, to impound a fund due the husband. Mrs. Horn wanted to ascertain and subject to her dower claim

[3] We have a number of other cases on equitable garnishment. Some of them are cited in *C. A. Rees & Co.* v. *Pace,* 156 Ark. 473, 246 S. W. 491.

whatever funds or properties the Irwins had that belonged to Mr. Horn. Under § 31-513, Ark. Stats. the Pulaski Chancery Court had power to issue garnishment and/or execution on its decree of July 25, 1958. See *The McGehee Bank* v. *Greeson,* 223 Ark. 18, 263 S. W. 2d 901.

The Court found that the Irwins had in fact received money from Horn and held property for him, and execution was then issued by the Pulaski Chancery Court. Under § 30-202, Ark. Stats., an execution may be levied on property conveyed to defraud creditors. See *Baldwin* v. *Williams,* 74 Ark. 316, 86 S. W. 423. What the Pulaski Chancery Court did in the case at bar[4] is very much like what the Perry Chancery Court did in *Morgan Utilities* v. *Perry County,* 183 Ark. 542, 37 S. W. 2d 74. See also *Merchants & Farmers Bank* v. *Harris,* 113 Ark. 100, 167 S. W. 706. The cases cited by the appellants, as previously listed, have factual situations far different from those existing in the case at bar; and we find no merit to the Irwins' contentions as made under this point.

II. *The Facts.* The Irwins, as well as Mr. Horn, most vigorously contend that the evidence in the case at bar does not support the Chancellor's finding that the Irwins had any money or property belonging to Mr. Horn at any time after July 25, 1958; and this contention necessitates a brief recital of the salient facts. As previously indicated, Mr. Horn obtained a settlement of $35,000 cash for injuries which he received while working for the Rock Island Railroad Company. On March 24, 1958 Mr. Horn (listing his residence as 518 Ringo, Little Rock, Arkansas) opened up three accounts in the Arkansas Trust Company in Hot Springs, Arkansas. The first was for $5,000; the second was for $5,000; and the third was for $24,500. On March 25, 1958 (just five days later) Mr. Horn closed out all three of these accounts.

[4] An interesting case from a sister jurisdiction and involving the wife's effort to recover dower in property fraudulently conveyed is *Newton* v. *Falligant,* 166 Ga. 450, 143 S. E. 391.

The testimony is crystal clear—in fact, it is practically admitted—that on March 25, 1958 Mr. Horn delivered to W. C. Irwin a check for $24,500, and on the same day W. C. Irwin opened an account in the Arkansas Trust Company and deposited therein the $24,500 check that Mr. Horn gave him. The Irwin account was styled, "W. C. Irwin or W. C. Irwin, Jr., Agent." From that account Irwin bought the real estate and the personal property here involved. The photostats of the checks and the bank records establish all these facts without a doubt. But to overcome the effect of the above proof, both Mr. Irwin and Mr. Horn testified to a most bizarre statement of facts. Mr. Horn said he transferred the $24,500 to Irwin so Irwin could let him have money when he wanted it, even when the banks were closed; that from time to time he obtained cash from Irwin for large sums of money; and that he gambled away this money at the races, and various other places, so that by July 25, 1958 Horn had no money, and in fact owed money to Irwin.

Irwin testified to practically the same statement of facts: that he paid Horn in cash from money that Irwin had in his safe at the Martin Recreation Center in Hot Springs; that at one time he gave Horn three $500 bills; and by July 25, 1958 Irwin had paid Horn back all of Horn's $24,500. Irwin explained the record of checks from the Arkansas Trust Company by saying that he paid Horn in cash and then used the trustee account in lieu of opening up a personal account. This testimony was most bizarre and the Chancery Court did not believe the testimony. On appeal the attorneys for Irwin and Horn tell us that the testimony of their clients is uncontradicted by anyone and that the Chancery Court committed reversible error in failing to believe the stories of Irwin and Horn. That is the gist of this point.

We hold that the Chancery Court was not bound to give credence to the stories told by Irwin and Horn. All the testimony offered to prove a return of any part of the $24,500 by Irwin to Horn was the testimony of

these parties; and each was an interested party in this proceeding by Mrs. Horn to recover her dower. The testimony of a litigant interested in the result is never considered uncontradicted in weighing such testimony. In *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. 2d 462, we said: "Another rule established by this Court is that the testimony of a party to an action, who is interested in the result, will not be regarded as undisputed in determining the legal sufficiency of the evidence. *K. C. S. R. Co.* v. *Cockrell,* 169 Ark. 698, 277 S. W. 7; *Gish* v. *Scantland,* 151 Ark. 594, 237 S. W. 98." One strong bit of testimony is that a part of the $24,500 was used by Irwin to purchase a house in Hot Springs and pay for the furnishings in the house; that Horn was living in the house at the time of the trial; and that he sought to claim the house as his homestead and the furnishings as his personal exemptions against Mrs. Horn's dower claim. How, then, can Horn be heard to say that he is renting the house and furniture from his good friend Irwin! It would unduly prolong this opinion to detail other evidence.

The decree of the Pulaski Chancery Court is affirmed.

CARRICK *v.* GORMAN.

5-2240 340 S. W. 2d 377

Opinion delivered November 14, 1960.

[Rehearing denied December 19, 1960.]

Rolland A. Bradley, for appellant.

Clark, Clark & Clark, for appellee.

George Rose Smith, J. In the summer of 1959 the appellants, a retired school teacher and his wife, came to Arkansas with the thought of buying a farm or business with their savings. On July 25 they executed a contract by which they agreed to buy the Bachelor Hotel in Conway from the appellee Gorman for $85,000, with $8,500 being paid in cash and the remainder being payable one month later. The contract required Gorman to furnish good title to the premises.

After signing the contract the Carricks went back to Colorado to arrange for the sale of their home. They returned to Conway about the middle of August and assumed the possession and control of the hotel. The sale was not consummated on August 25, as expected, because the Car-

ricks were still trying to raise the rest of the purchase money. In the latter part of September, with the sale still awaiting completion, the Carricks made up their minds that they had been defrauded. They abandoned the hotel and went back to Colorado.

This suit was brought by Gorman, to enforce a demand note assertedly given by the Carricks for the unpaid purchase price. (The Carricks say the note was merely tentative, being dependent upon the due completion of the sale.) The defendants filed an answer and cross complaint seeking a rescission of the contract and a recovery of their down payment and of certain expenditures for the improvement of the hotel. Gorman's real estate agent, who had received the down payment, was brought in as a third party defendant.

At the trial Gorman introduced the demand note and rested his case. The Carricks assumed the burden of going forward with the evidence and introduced proof in support of their answer and cross complaint. When the Carricks reached the close of their case Gorman undertook to file a demurrer to their evidence. This demurrer was sustained by the chancellor, upon the theory that the Carricks had offered no substantial competent evidence to sustain their position. *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. This appeal is from a decree dismissing the cross complaint and foreclosing Gorman's lien.

The appellants are right in contending that Gorman was not entitled to file a demurrer to the evidence. In the absence of a statute our practice does not recognize that particular pleading. *Kelley* v. *Northern Ohio Co.,* 210 Ark. 355, 196 S. W. 2d 235. Our only statute upon the subject provides: "Upon the closing of plaintiff's or moving party's proof and an announcement by plaintiff or moving party to that effect, . . . the defendant, or defendants, may file a written motion challenging the sufficiency of the evidence . . ." Ark. Stats. 1947, § 27-1729.

The statute refers only to the situation at the close of the plaintiff's or moving party's proof. We need not speculate whether the defendant might be regarded as the

moving party if he filed a pleading confessing the plaintiff's whole cause of action and thereby assumed the true burden of proof rather than the mere burden of going forward with the evidence. Here the Carricks denied the validity of the note sued upon. The plaintiff Gorman was therefore compelled to offer proof of his cause of action, which he did by introducing the note. In response to that proof the defendants presented testimony to show that the note was given merely for accommodation, as well as evidence supporting their cross complaint for rescission. Neither the restricted language of the statute nor its basic intent can be regarded as allowing the plaintiff to test the defendant's proof when both parties have offered substantive evidence to support their contentions. We must conclude that Gorman's attempted demurrer to the evidence was not a permissible pleading. In the *Kelley* case, *supra,* we held that one who files an unauthorized demurrer to his adversary's evidence thereby waives the right to adduce additional proof. It follows that Gorman waived his right to offer further evidence, and the case comes to us for final trial *de novo* upon the record made below.

On the merits the merchantability of Gorman's title emerges as the decisive issue. A purchaser, until he accepts a deed to the land, is entitled to rescission upon a showing that the vendor's title is not marketable. *Sutton* v. *Ford,* 215 Ark. 269, 220 S. W. 2d 125. Here it appears that the Carricks neither accepted a deed nor approved the deposit of a deed in escrow. Indeed, Dr. Carrick testified without contradiction that he had not even reached the point of employing a lawyer to examine the title.

The undisputed evidence shows that Gorman's title is not merchantable. Two surveyors testified that the brick wall of the hotel building encroaches upon the adjoining land, some of which is owned by the United States. It goes almost without saying that in this situation the seller's title is not merchantable. Thompson on Real Property (Perm. Ed.), § 4586. In fact, Gorman does not in his brief deny that his title is defective. Instead, he advances two

reasons for a rejection of the appellants' request for rescission.

First, it is contended that the chancellor was right in excluding all testimony about the encroachment, as this defect was not specifically pleaded in the cross complaint. It appears, however, that the cross complaint did allege that "the title to said hotel real property . . . is not marketable." This assertion was a mere conclusion of law, but Gorman nevertheless filed a responsive pleading in which he expressly denied that his title was not merchantable. It was not until the surveyors' evidence was offered at the trial that Gorman interposed the objection now before us.

We hold that the objection came too late. A motion to make more definite and certain is the proper way to pinpoint an adversary's error in pleading a conclusion of law. When a litigant elects to join issue with such a defective allegation he waives the defect and cannot raise his point for the first time by an objection to the evidence. *Choctaw, O. & G. R. R. Co.* v. *Doughty,* 77 Ark. 1, 91 S. W. 768; *Jonesboro, L. C. & E. R. R. Co.* v. *Board of Directors,* 80 Ark. 316, 97 S. W. 281; *Wassell* v. *Sprick,* 208 Ark. 243, 185 S. W. 2d 939.

Secondly, the appellee insists that a vendee cannot avail himself of defects in the vendor's title without first giving the vendor notice and a reasonable opportunity to cure the flaw. This is true, and the rule would be applicable if the Carricks had taken the initiative in seeking to obtain a cancellation of the contract without affording Gorman a chance to remedy defects found in the title. *Mays* v. *Blair,* 120 Ark. 69, 179 S. W. 331. But when, as here, it is the seller who brings the matter to a head by filing suit to enforce the contract, and the purchaser pleads a defect in the title, it would be manifestly impractical to permit the seller to ask in the middle of the trial that the hearing be adjourned to afford him an opportunity to remedy the defect. Hence the rule is that a vendor must have good title when he sues for specific performance. Thompson, *supra,* § 4641; Powell on Real Property, § 928.

It follows from what we have said that the appellants are entitled to the entry of a decree canceling the note and

the contract of sale and restoring to them their down payment, with interest. They are not, however, entitled to recover the sum sought for their improvements, as their proof is deficient in failing to show the extent, if any, to which the asserted improvements enhanced the value of the hotel property. *Abraham* v. *Hatchett,* 128 Ark. 15, 193 S. W. 72, 6 A. L. R. 88.

Reversed.

GEORGE ROSE SMITH, J., on rehearing. In a petition for rehearing the appellee Gorman earnestly contends that we have abrogated the settled rule which requires a vendee-defendant to plead and prove the specific defect of title that he relies upon to defeat the vendor's suit for specific performance. To support his position Gorman cites *Bolton* v. *Branch,* 22 Ark. 435; *Walker* v. *Towns,* 23 Ark. 147; *Anderson* v. *Mills,* 28 Ark. 175; *Benjamin* v. *Hobbs,* 31 Ark. 151; *McGowan* v. *Smith,* 68 Ark. 215, 57 S. W. 256; and *Lone Rock Bank* v. *Pipkin,* 169 Ark. 491, 276 S. W. 588.

We adhere to the cited decisions, but we do not consider any of them to be in point. In two of the cases, *Bolton* v. *Branch* and *Anderson* v. *Mills,* the vendee-defendant attempted to cast upon the plaintiff the burden of showing his ability to convey good title. We held that the defendant had the burden of pleading and proving specific defects. In two more of the cases, *Benjamin* v. *Hobbs* and *McGowan* v. *Smith,* the vendee-defendant pleaded as a conclusion of law that the plaintiff had no title, and we affirmed the trial court's action in sustaining a demurrer to that plea. In the other two cases, *Walker* v. *Towns* and *Lone Rock Bank* v. *Pipkin,* the vendee-defendant failed to prove that the plaintiff's title was defective.

The case at bar differs sharply from all six of the foregoing decisions in that here the vendee-defendants actually proved that the plaintiff's title is not merchantable. Thus they discharged their burden of proof. The only remaining question is the effect of their pleading a conclusion of law instead of the specific defect relied

upon. It is true that the defect should have been pleaded, and under the cases now cited the plaintiff might have challenged the faulty pleading by filing a demurrer or a motion to make more definite. In that event the defendants would presumably have pleaded the defect which they ultimately proved. But Gorman elected to join issue with the defendants' imperfect cross complaint, by filing a responsive pleading in which Gorman denied that his title was not merchantable. We are still of the opinion that Gorman's action amounted to a waiver of the flaw in his adversary's pleading.

Rehearing denied.

UNITED INSURANCE CO. OF AMERICA *v.* WOODARD.

5-2242 339 S. W. 2d 862

Opinion delivered November 14, 1960.

Charles E. Plunkett and *J. Bruce Streett,* for appellant.

Paul K. Roberts, for appellee.

PAUL WARD, Associate Justice. This appeal involves the interpretation of the provisions of an insurance policy executed by appellant in favor of appellee on November 20, 1956. The provisions of the policy in dispute provide for

payment of $200 per month for loss of time due to an accident. Appellee sued appellant for the sum of $400, being the amount claimed for time lost from August 28, 1958 to October 28, 1958. The trial court, sitting as a jury, found in favor of appellee and appellant now prosecutes this appeal for a reversal.

Most of the essential facts were stipulated or are undisputed. Appellee, who was engaged as a contractor to supply pulp wood, suffered an injury to his back while so engaged on January 11, 1958, he was disabled and unable to work from that date until March 7, 1958, and he was paid by appellant the sum of $376.66 for the loss of time. On the latter date appellee tried to resume his regular duties and worked intermittently until August 28, 1958, when, as he says, he had to quit work entirely because of the aforementioned injury to his back, and he was unable to work or at least did not work any more until October 28, 1958. It is for the loss of this two months time that he seeks to recover $400 under the insurance policy.

In seeking a reversal appellant relies on three designated points, viz: The court erred in refusing to dismiss appellee's complaint; the court erred in refusing to direct a verdict in its favor at the conclusion of appellee's testimony, and; the court erred in finding in favor of appellee. On all of these points, all discussed together by appellant, and from this discussion it appears that it relies on two principal contentions: *ONE;* Two "Riders" attached to the policy on June 1, 1958, preclude recovery. *TWO:* In the alternative, the disability (causing the loss of time) was not continuous as required by the policy.

ONE: It was stipulated by the parties that the insurance policy was in force, subject to all provisions, up to September 1, 1958. On June 1, 1958, an "Impairment Rider" was attached to the policy which provides, in effect, that "the policy shall not cover disability or loss resulting from or caused by any injury to or disease of the spine." Also, on June 1, 1958, another "Rider" was likewise attached to the policy which reduced payments for the loss of an eye, arm or limb and certain combinations

thereof. Both of these "Riders" were signed by appellant and appellee.

We are unable to agree with appellant's contention that these "Riders" precluded appellee from recovering for loss of time resulting from the original injury. The trial court, sitting as a jury, had the right to construe the provisions of these "Riders" strictly against appellant. See *Washington Fire & Marine Insurance Company* v. *Hodge,* 230 Ark. 42, 320 S. W. 2d 926, and *Metropolitan Life Insurance Company* v. *Hawley,* 210 Ark. 855, 198 S. W. 2d 171. Applying this rule of construction to the language in the "Riders" it is fairly deducible that they are effective prospectively and not retroactively. Appellant of course was aware that appellee had suffered a back injury on January 11, 1958 at a time when the policy was in full force and effect; that it had paid appellee for his loss of time following that injury, and; it was aware that appellee had not fully recovered from said injury since he had not been working regularly up to the time that the "Riders" were attached. If appellant had wanted to make it clear to appellee that it would not be obligated to pay him for any more loss of time resulting from the original injury it could have easily so stated. This it did not do.

TWO: Part I of the policy provides for payments of stated amounts for the loss of an eye, arm or limb and certain combinations thereof caused by an *accident* referred to throughout the policy as "such injury." Part IV of the policy reads as follows:

> "If 'such injury' does not result in any of the specific losses named in Part One but causes *continuous total disability and total loss of time* within twenty days from the date of the accident and *requires regular and personal attendance by a licensed physician,* surgeon, osteopath or chiropractor, other than the Insured, the Company will pay at the rate of the Monthly Benefit stated in the Policy Schedule for one day or more from the first medical treatment *so long as the Insured lives and is so disabled.*" (Emphasis Supplied)

The Policy Schedule provides for a monthly benefit of $200.

It was under Part IV of the policy that appellant paid appellee for his loss of time from January 11th to March 7th, 1958. It is not seriously contended by appellant that appellee's loss of time from August 28th to October 28th, 1958 was not due to the original injury. Nor is it contended that appellee was not totally disabled and suffered a complete loss of time during that period. The record shows that appellee received medical treatment at a doctor's office on July 28th and 30th; on August 2nd, September 23rd and 25th; and October 10th, 20th and 23rd. Thus it appears that there was a compliance with all the provisions of the policy.

It appears to be appellant's contention, with which we can not agree, that appellee's disability was not *continuous* because he was able to work intermittently for a period of time previous to August 28, 1958. Such an interpretation is clearly not in accord with the rule of this court as previously pointed out. The answer to appellant's contention is found in the fact that appellee is not seeking to be paid for the time that he was partially disabled and is only asking for that period of time during which he was totally disabled, unable to work and was regularly attended by a physician. In view of the above, we think the trial court clearly interpreted the policy in favor of appellee. The findings of the court, sitting as a jury, has the same force and effect as the findings of a jury. *Casteel* v. *K. Lee Williams Theatres, Inc.,* 221 Ark. 935, 256 S. W. 2d 732 and *Stewart* v. *Hedrick,* 205 Ark. 1063, 172 S. W. 2d 416.

Affirmed.

4995 339 S. W. 2d 859

Opinion delivered November 14, 1960.

Harold L. Hall, for appellant.

Joseph C. Kemp and *Perry V. Whitmore,* for appellee.

SAM ROBINSON, Associate Justice. Appellant was convicted in the Pulaski Circuit Court on the charges of driving while under the influence of intoxicating liquor and leaving the scene of an accident. On appeal he argues two points: First, he says that the evidence is not sufficient to sustain the conviction. There is no merit at all in this contention. A car involved in the collision was driven away from the scene of the accident. By various means, including a trail of water caused by a damaged radiator, the car was traced to where it was parked in the street. Officers located appellant in a house nearby. He admitted he was driving the car involved in the collision and that he drove away from the scene of the accident. He was under the influence of liquor, but at the time of his arrest he said it had been two hours since he had taken a drink. This was about 45 minutes after the accident occurred. All of the evidence considered together constitutes substantial evidence of the appellant's guilt on both charges.

Appellant next contends that the charges against him should be dismissed because he was arrested without a

warrant on alleged misdemeanors and that such alleged offenses were not committed in the presence of the arresting officers. True, the charges against appellant were only misdemeanors and the officers had no authority to make the arrest in the circumstances. Ark. Stats. § 43-403. The officers acted at their peril in making the arrest. *Edgin* v. *Talley,* 169 Ark. 662, 276 S. W. 591, 42 A.L.R. 1194; *Watkins* v. *State,* 179 Ark. 776, 18 S. W. 2d 343. But the fact that the officers had no warrant does not call for a dismissal of the charges. Certainly, one guilty of murder would not have to be released and turned scot-free because the arrest happened to be illegal in the first instance. If as a result of the arrest the officers had obtained incriminating evidence, perhaps such evidence could be suppressed. *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816. But no evidence of that kind was discovered by virtue of the arrest. True, appellant made voluntary statements to the officers that were used against him, but appellant was in no way coerced into making such statements. A voluntary statement made by the accused at the time of an unlawful arrest is not considered as evidence obtained in an unlawful manner. *Quan* v. *State,* 185 Miss. 513, 188 So. 566.

Affirmed.

ED. F. MCFADDIN, Associate Justice, concurring.

I concur in this case for the purpose of preserving my views as stated in my concurring opinion in *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816.

VERNON *v.* MCENTIRE.

5-2211 339 S. W. 2d 855

Opinion delivered November 14, 1960.

[Rehearing denied December 12, 1960.]

Wiley A. Branton, for appellant.

Jay W. Dickey, for appellee.

JIM JOHNSON, Associate Justice. This suit arises out of a contract for the sale of land. The appellants, Luchers Vernon and Annie Vernon, a Negro couple, on December 19, 1948, entered into a contract to purchase 80 acres of farm land in Jefferson County from Mr. Ed Bost. The agreed purchase price was $6,000. Appellants paid $1,500 as a down payment and agreed to pay the balance off at $400 per year with interest at six per cent. Appellants went into possession of the lands on February 4, 1949, and have remained in possession ever since and have raised a crop each year. The appellants were threatened with a foreclosure by Ed Bost in 1950 and they employed appellee, Hendrix Rowell, as their lawyer to represent them in preventing a forfeiture of their purchase contract.

In February 1955 appellee Rowell, with the approval of appellants, paid off the balance due Ed Bost from the appellants in the amount of $2,500 and took over the contract himself. In addition to the purchase money paid Ed Bost by appellee Rowell, appellants owed Rowell money previously advanced them for crop furnish, etc. This money added to the amount paid Bost totalled $3,570.71. After the purchase by appellee Rowell of the property here in question, the following letter was written by him to appellants on February 25, 1955:

"Dear Luchers and Annie:

"This is to advise that with your consent I took over Ed Bost's account this date and that you owe me a total of Thirty-five Hundred and Seventy and 71/100 ($3,570.71) Dollars with interest at 6% per annum from this date until paid.

"When you have paid this obligation plus all taxes and the taxes that I have to pay will carry interest at the same rate as the note. I will deed the . . . (described property) . . . in Jefferson County, Arkansas, to you and your wife, but I want it distinctly understood that the relationship between us is simply that of landlord and tenant and if you do not pay me or if you pay me one year and do not pay the next and I am forced to dispossess you, that whatever you pay will only be considered as rent.

"While the note you are giving me is a demand note and I can call it at any time, I will be reasonable with you and work with you, but I want you to thoroughly understand that you are occupying the premises at my sufferance.

"If this meets with your approval, I want you and your wife to so indicate by signing hereon below.

Yours very truly,
/s/Hendrix Rowell

HR:JN

"Approved: /s/ Luchers Vernon
/s/ Annie Vernon"

The above letter from appellee Rowell to appellants, which was approved by appellants, is the only written sales

contract appearing in the record. There is nothing contained in this contract regarding time as being of essence. Appellee Rowell, true to his word, was reasonable with appellants and did work with them in every lenient way. In fact, he was so reasonable with them that as late as December 31, 1957, appellants had only reduced the indebtedness down to $3,100. On that date appellee Rowell wrote appellants the following letter:

"Dear Luchers:

"As requested, I hand you herewith statement of your account, showing interest figured at 6% up to January 1, 1958, at which time you will owe me a total of $3,100 with interest at 6% from January 1, 1958, until paid.

"This is to further notify you that if this debt has not been paid on or before December 31, 1959, I will have to have possession of the property.

Very truly yours,
/s/ Hendrix Rowell"

Six days later appellee Rowell wrote appellants the following letter:

"Dear Luchers:

"A friend of mine and I want to talk with you about your debt and what can be done in order to get you out of debt to the Government and to me.

"Accordingly, I would like to see you in my office at 11:30 A. M. Wednesday, January 8, 1958.

"Before you come to my office, go by the FHA and get the exact amount of money you owe them, so we will know what we are talking about.

Very truly yours,
/s/ Hendrix Rowell"

Appellant went by appellee Rowell's office as requested. Appellee Rowell testified relative to the discussion which occurred at the meeting as follows:

"... in looking through my file I saw that letter telling him (appellant) he had two years to pay my debt, and I immediately wrote him to come in. Luchers came in ... and I told him I wrote the letter (December 31, 1957) in error, and although 'I want my money, you cannot be disturbed in possession until 1959, regardless of what I do, you will have two years' free rent, two years to pay the Government, and two years to get another home.' He said 'I have been trying.' I told him 'I'm not as big as the Simmons National Bank or as big as the Government and I just can't carry you any longer.' I said 'If I can get you $6,-500.00 you won't get but $900.00. I have even answered blind ads but nobody wants your land. You have $35 or $40 acre stuff, and you have no improvements on the place, and it is cut up by two canals, and having a crop about once every five years.' I told him that Mr. McEntire or Judge Robinson could take him over two years free of rent, and 'I hope during that time you will pay the Government off and get enough to move.' I told him the non-disturbance agreement was outstanding, and 'if I can get somebody to pay me what I have in it, I am going to sell it.' He owes me $3,100.00, Uncle Sam $2,100.00, the Cousart taxes and State and County taxes. I was trying to explain if I could get $6,500.00, he would possibly have $900.00 and I said 'I am not out for you to beat the Government, they don't have a lien on the land, it is my land,' but I told him I would have to 'unload him'—I used that expression 'and if you can't pay Uncle Sam, you can walk off.' I said 'I would rather you have it than give it to India in Foreign Aid'."

"Q. When he left your office before you sold to Mr. McEntire, did you state to him you were going to sell the land?

"A. I said, 'You are riding me.' I told him without any question ... I gave him an hour telling him what sufferance meant. I told him 'I am not going to have any foreclosure, I have the deed, and you are not going to get it unless you pay me; I have got to have my money'."

Following this meeting in Rowell's office, appellee Rowell conveyed the 80 acres to appellee McEntire on Jan-

uary 24, 1958, for the consideration of $3,350. On the same date, appellee Rowell wrote the appellants and informed them of his conveyance to Mr. McEntire and stated that "the result of which is that you have forfeited all of your right of redemption, unless you can prevail upon Mr. McEntire to permit you to do so . . ." Appellants contacted the appellees about redeeming the lands to no avail and, through another lawyer, appellants tendered the balance due on the purchase price, plus interest, to the McEntires and the latter refused to accept the money or execute a deed to appellants.

The appellants filed suit on January 30, 1959, for specific performance, or damages in the alternative, against J. L. McEntire and wife and also Hendrix Rowell. The cause was heard on November 10, 1959, and the appellants' complaint was dismissed with prejudice. This appeal followed:

For reversal, appellants contend that "The right of Forfeiture had been waived and specific performance should have been ordered."

As has been stated above, the contract here in question contained nothing regarding time as being of essence. The rule relative to the inclusion of such express language in a contract is set out in *White* v. *Page,* 216 Ark. 632, 226 S. W. 2d 973, as follows: "The contract in the case at bar did not state in express words 'time is of the essence'; but our cases hold that evidence may establish such fact in the absence of a specific statement in the contract." Even so, we think there are facts and circumstances in the present case which clearly show that time was not of the essence. One of the facts to which we refer is that on December 31, 1957, appellee Rowell wrote Luchers Vernon that he had until December 31, 1959, to pay the outstanding indebtedness. This letter was followed by a conference between Vernon and Rowell and according to Rowell's own version of what occurred in that conference, he did not by inference or otherwise indicate that he meant to declare a forfeiture immediately. According to our view, the rule applicable to the facts in the case at bar was stated by Mr. Justice Frau-

enthal, speaking for the Court in *Friar* v. *Baldridge,* 91 Ark. 133, 120 S. W. 989, as follows:

"Parties may enter into a valid contract relative to the sale of land whereby they may provide that time of payment shall be of the essence of the contract, so that the failure to promptly pay will work a forfeiture. *Ish* v. *Morgan,* 48 Ark. 413; *Quertermous* v. *Hatfield,* 54 Ark. 16; *Block* v. *Smith,* 61 Ark. 266. But the final effect of such an agreement will depend on the actual intention of the parties, as evidenced by their acts and conduct; and such a breach of the contract as would work a forfeiture may be waived or acquiesced in. The law will strictly enforce the agreement of the parties as they have made it; but, in order to find out the scope and true effect of such agreement, it will not only look into the written contract which is evidence of their agreement, but it will also look into their acts and conduct in the carrying out of the agreement, in order to fully determine their true intent. It is a well settled principle that equity abhors a forfeiture, and that it will relieve against a forfeiture when the same has either expressly or by conduct been waived. The following equitable principle formulated by Mr. Pomeroy has been repeatedly approved by this court: 'If there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving against it, if necessary.' 1 Pomeroy Eq. Jur. 452; *Little Rock Granite Co.* v. *Shall,* 59 Ark. 405; *Morris* v. *Green,* 75 Ark. 410; *Banks* v. *Bowman,* 83 Ark. 524; *Braddock* v. *England,* 87 Ark. 393."

Applying these principles to the case at bar, we find nothing in the record which would cause us to doubt in the least the veracity of appellee Rowell. In fact, appellant candidly concedes that there was no wrong doing. As stated by appellant: "Appellants wish to make it clear that there is no allegation being made of any 'fraud or intentional imposition' in the transaction." However, to the contrary we find the record relative to the indebtedness owed by appellant to be replete with acts and unmistakable

indications of leniency and benevolence. Even so, based on our prior decisions, we have no choice but to find that herein lies appellee's as well as the trial court's error. As is true in many cases of waiver, appellee Rowell's own goodness to appellants was his own undoing under the law since such acts and indications constituted waiver.

Having thus concluded, it necessarily follows that the decree is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

HARRIS, C. J., and MCFADDIN, J., dissent.

ED F. MCFADDIN, Associate Justice, dissenting.

The majority is reversing the finding of the Chancery Court on a fact question; and it is my view that the Chancellor, seeing the witnesses, had a better opportunity to evaluate the evidence than does this Court. So I would affirm the Chancellor.

I view the letter of February 25, 1955, that Honorable Hendrix Rowell wrote the appellants, and which they approved, as being a mere executory contract affecting real estate; and I believe he had a perfect right to declare a forfeiture, as he did. The letter and all the surrounding circumstances show that time was of the essence. The Chancery Court so found; and I cannot say that the preponderance of the evidence is against the Chancery finding. Therefore, I would affirm the Chancery decree.

The Chief Justice joins in this dissent.

5004 339 S. W. 2d 947

Opinion delivered November 14, 1960.

[redacted]

PER CURIAM

The appellant, E. W. Edwards, was convicted of a felony in the Garland Circuit Court and on October 11, 1960, was sentenced to one year in the penitentiary. On October 12, 1960, a partial record was filed in the Supreme Court and an appeal granted, and *certiorari* was issued to bring up the entire record.

The appellant has filed in this Court a motion that he be allowed to proceed *in forma pauperis*. The motion is duly verified and appellant's counsel certify that they are serving without compensation. The appellant has complied with the requirements of the law so as to be allowed to proceed *in forma pauperis*. See *Thornsberry* v. *State,* 192 Ark. 435, 92 S. W. 2d 203; and *McCulloch* v. *Ballentine,* 199 Ark. 654, 135 S. W. 2d 673; and see also Sec. 22-357 Ark. Stats., and Act No. 148 of 1953.

The Clerk of this Court is hereby ordered to forthwith direct a writ to the Clerk of the Garland Circuit Court and to the Court Reporter of the Garland Circuit Court who took down the testimony. The Reporter is directed to without delay transcribe and file the testimony with the Clerk of the Garland Circuit Court; and the Clerk of the Garland Circuit Court to complete without delay the entire transcript under the writ of *certiorari* issued to him in this case. The transcribing and filing of the testimony by the Court Reporter and the preparation of the transcript by the Clerk of the Court are to be furnished without expense; but this Court retains the right to hear resistance that may be made by any persons or governmental units desiring to resist the pauper affidavit of the appellant.

5-2152 340 S. W. 2d 266

Opinion delivered November 21, 1960.

Dickson, Putman & Millwee, for appellant.

Rex W. Perkins and *Charles Bass Trumbo,* for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to an award made by the Workmen's Compensation Commission for the benefit of Mrs. Doris Dorman, widow of Oscar L. Dorman, and four minor children. Following the award, appellants appealed to the Washington County Circuit Court. The court confirmed the award, and from such order of the court, appellants bring this appeal. Appellants rely upon only one point for reversal, *viz,* "It is medically unsound to permit the finding of a causal relationship between effort and myocardial infarction

unless the attack follows an episode of severe and unusual exertion."

Dorman, age 35, a carpenter by trade, suffered a heart attack that was described as a myocardial infarction on September 9, 1958, while engaged in carpentry work for his employer, Box Construction Company, during the construction of a residence at Fayetteville. The evidence reflected that Dorman first suffered a heart attack in the middle of July, 1957, and was hospitalized in the Veterans Administration Hospital from that time until August 13th, at which time he was released. During October and November of the same year, he worked as a night watchman during the construction of a factory in Fayetteville, and had no other employment until May 7, 1958, when he returned to work for Box Construction Company at his usual occupation of carpentry. During the period between May 7th and September 9th, Dorman suffered intermittent chest pains, which were relieved by rest or the taking of nitroglycerin tablets. According to Mrs. Dorman, her husband complained of pain anytime he exerted himself, and, after returning to work for the construction company, would make complaints of chest pains following his engaging in lifting or heavy work. She stated that the pains were worse the last day or two before the attack on September 9th. Following this last attack, which occurred about 3:30 in the afternoon, Dorman went to Dr. Joe Hall, of Fayetteville, and obtained an examination; he then went home, ate very little supper, and retired. Around midnight, the pains became more severe, and Mrs. Dorman took him in their car to the Veterans Hospital. According to her testimony, he lost consciousness before they arrived, and vomited after entering the hospital; death occurred less than 48 hours later.

Lloyd Box, employer of Dorman, testified that Dorman worked a forty hour week from May 7, 1958, until September 9th, and was doing general carpentry work. Since he (Box) had knowledge of the previous heart attacks, an effort was made to see that Dorman obtained lighter duties, and he heard no complaints from Dorman concerning chest pains during this four months

of employment. Box was working with Dorman on the morning of the 9th, being engaged in constructing the ceiling on the porch. The witness stated that this first required sawing, and that construction of the ceiling required Dorman to stand with his arms overhead. About 10:30 in the morning, Dorman complained that he was having a dizzy spell, "had pain up kinda high in his chest", but they continued to work on the ceiling since but little complaint was made. Thirty minutes was taken off for lunch, and at 12:30 the two men resumed work. Some complaint was made during the early part of the afternoon, but about 3:30, while Dorman was nailing the ceiling, the pain became more severe, and Box advised Dorman to go to the doctor. The witness stated that he did not consider the work on that day as particularly strenuous, though he stated that nailing a ceiling is as hard work as a carpenter is required to perform, with the possible exception of lifting or building a scaffold.

Three carpenters, Orville Foster, Arthur Ledford, and Carl Lewis, testified on behalf of claimant. Foster testified that reaching up over one's head and nailing is "most strenuous", and is the most strenuous part of carpentry work. Ledford, a carpenter of fifteeen years, testified that because construction of the ceiling requires overhead work, and requires the body to be out of its normal position, it places a strain on the worker, and "hurts me worse" than other phases of carpentry. Lewis likewise testified that overhead nailing or plastering of ceilings was the most difficult type of work to him, and produced the most strain upon his body.

Dr. Joe B. Hall of Fayetteville, specializing in internal medicine, testified that he saw Dorman on September 9th around 5:30 in the afternoon; that this was past the regular office hours, but the nurses recognized that Dorman was ill, and asked the doctor to see him. The witness stated that he obtained a history from Dorman, in which the facts heretofore set out were related, and that Dorman was having pain in the chest at the time of the interview. Dr. Hall testified that after making an examination and taking a cardiogram, he was of the opinion that

Dorman was having a myocardial infarction.[1] The doctor then stated, that based on the history, and his examination of the patient, "I think that the work he was doing was an aggravating factor which precipitated the heart attack." On cross-examination, the witness reiterated that the effort in which Dorman was engaged contributed to his death. Dr. Hall had no opinion as to the immediate mechanism which brought about the formation of the thrombus, and stated that some mechanisms that precipitate thrombi have no relation to effort. He also testified, on cross-examination, that the effort could have contributed to Dorman's condition, even though there was no thrombus.

"The effort might have produced a subendomal hemorrhage. It might have produced a loosening of an arteriosclerotic plaque. It might have produced a narrowing of a coronary vessel which resulted in a myocardial infarction, without a thrombosis."

The doctor admitted that an occlusion of the artery could occur simply by degeneration of the artery in the arteriosclerotic process, and in such event, effort would have nothing to do with the attack. Dr. Hall stated that in many instances, acute myocardial infarction occurs without relation to effort, but in this instance, he considered the work Dorman was doing to be an aggravating factor which precipitated the heart attack.

Dr. W. J. Butt, upon being interrogated with a hypothetical question embracing the facts of the case, stated, that in his opinion, there was a direct causal relationship between the work in which Dorman was engaged and his heart attack. Dr. Butt stated there was no way of determining the cause of occlusion of the artery without an autopsy being performed (which had not been done), and

[1] Dr. Hall explained a myocardial infarction as follows: "Well, that implies that there has been a coronary thrombosis in the vast majority of cases; that there is disease of the coronary arteries in the form of arteriosclerosis which produces a narrowing of these arteries, and that this, combined with spasm or the rupture from the surface of one of these vessels or one of the sclerotic plaques precipitates a blood clot which shuts off the blood supply to a portion of the heart muscle, resulting in the death of this muscle and the death of this muscle is called a myocardial infarction."

he accordingly could not give the specific reason for the attack.

The doctor stated that it was normally his policy to order heart patients to bed for absolute rest, and that he had never recommended that a heart patient exercise when first suffering a coronary thrombosis.

Dr. Frank Riggall, in response to a hypothetical question, expressed the opinion that effort plays no part in the end result of the decay and degeneration of the coronary supply resulting in myocardial infarction, and was therefore of the opinion that there was no causal relationship between Dorman's actions as a carpenter, nailing on the ceiling, and his death. Dr. Riggall explained that there are five mechanisms that occasion the blocking or closing of the arteries. One of the five, according to the doctor, is coronary thrombosis, which Dr. Riggall stated is the most common, and he explained,

"* * * due to a further lack of nourishment there is further decay and further degeneration and the surface of the plaque becomes roughened. It is dying but not dead. That allows the cells in the traveling blood to be arrested on that roughened surface — to pile up — slowly in some cases, moderately fast in another, rapid in another, so that a thrombus is formed at the site of the roughened plaque. We call that coronary thrombosis. It may pile up sufficiently there to block the artery or it may not block the artery but a piece of it breaks off, again as an embolus, and blocks the artery lower down so as to deprive the heart muscle of its nourishment and produce infarction." Upon being asked whether effort plays any significant part in the two processes mentioned, he replied, "They are perfectly normal, natural processes of decay and degeneration in the particular plaque." The witness stated that he had made a survey of the cardiovascular cases in Elizabeth Hospital over the last twenty years. According to the doctor:

"Three of our cases were between 30 and 40. Two of them died in the acute attack, one of them died in a second attack. One of them was riding in a car in Fort

Smith which was being driven by his wife down Garrison Avenue in the middle of a block when he had his attack. Another occurred while he was shopping in Fayetteville and the third one occurred while he was shaving in his own bathroom. On the other cases of 230 it works out roughly that one-half of them were at rest, one-fourth of them, roughly, were at their usual vocation, and one-fourth of them appeared to be doing something unusual for them at that particular time. In three-quarters of them we could find no relation to activity; one-quarter doubtful."

He also testified relative to other surveys which had been made in various parts of the country,[2] and stated that these surveys had,

"* * * changed all of our ideas, really, on treatment, although we are in a somewhat difficult position. I was taught, as I said, the classical view. I still with some fear and trembling hesitate to tell a man to resume activity * * *. Where we used to keep our heart patients in bed recumbent, flat, we get them up quicker, and we have them sit up because we know more about the effects of the circulation. When a man is sitting up in bed or is standing up, the heart only has to pump the blood to the arch of the aorta. From there on it falls by gravity. When he is lying in bed the heart has to pump it along the level. Those are some of the things that these newer ideas have given us in handling these cases."

Dr. Riggall testified that surveys in Utah, Washington, and California, indicated no relationship between effort and myocardial infarction; however, he admitted that there is a wide divergence of views on the subject.

Dr. Spencer Brown, in response to a hypothetical question embracing the facts of this case, was of the

[2] According to Dr. Riggall, a survey conducted by medical authorities in New York revealed that of 398 internists and cardiologists, 93.9% agreed that work did not produce heart disease; 93.4% agreed that atherosclerosis of the coronary arteries must exist before there can be an infarction of heart tissue; 88.5% were of the view that ordinary or moderately heavy work does not produce coronary effects, and 88.9% thought that later heart attacks were due to the natural progression of coronary arteriosclerosis, and not related to previous attacks.

opinion that Dorman's exertion had nothing to do with the heart attack. The doctor stated that exertion will not precipitate an acute coronary insufficiency in a person whose arteries are already diseased, because the insufficiency is already present, and the exertion only makes it manifest. He stated that any unusual exertion beyond the person's limit could produce pain, but would not produce infarction. However, the doctor admitted that exertion would increase the demand of the heart for blood. Also, both Dr. Riggall and Dr. Brown agreed that the doctor who examines the patient is in a better position to render an opinion than a doctor who had no personal contact, but renders an opinion simply on the basis of a hypothetical question.

Dr. Charles T. Chamberlain, a physician of Fort Smith, stated that the mechanism that occluded a coronary artery could not be determined in the absence of a post-mortem or autopsy; and though agreeing that work involving the use of the hands above the head is more strenuous than work at heart or chest level, he was of the opinion that no specific act can be held responsible for the production of a myocardial infarction through the mechanism of a thrombosis or occlusion, except in very rare instances.

As indicated by appellants' sole point for reversal, this appeal is primarily an attempt to persuade this Court to re-examine and modify prior holdings in "heart attack" cases. In *Bryant Stave and Heading Company* v. *White,* 227 Ark. 147, 296 S. W. 2d 436, this Court held that it is unnecessary to make a showing of unusual strain or exertion in order to sustain an award under the compensation law. That rule has been applied to all workmen's compensation cases, including those based on death or disability resulting from heart attacks. In their brief, counsel state:

"Appellants have no quarrel with the Bryant case, for it is clear that an individual's ordinary work load may over a period of time by a process of attrition, produce injuries which are in every respect as disabling as those brought about by sudden or fortuitous events. But

it is appellants' purpose here to try to demonstrate to the Court that a rule established in a case concerned with a ruptured intervertebral disc is, in the light of recent medical developments, scientifically unsound when applied to a case involving the altogether distinct condition of myocardial infarction resulting from coronary occlusion.

* * * * * *

The area of controversy among medical men centers around the question of whether effort or exercise can ever, under any circumstances, trigger an arterial spasm, a subintimal hemorrhage, or a coronary blood clot, so as to produce a coronary occlusion and consequent myocardial infarction. On this point, medical opinion is divided into three groups. Those who believe that effort sometimes can and does activate these mechanisms, those who believe that effort never is causally related to a coronary occlusion and those who believe that violent or extreme effort may, in rare instances, cause the rupture of an atheromatous plaque and the consequent formation of a subintimal hemorrhage or hematoma. The vast majority of leading internists and cardiologists in the United States believe either that effort never plays any part in this kind of heart attack or that it contributes to the attack rarely and only then when the episode of effort is violent or extreme."

During examination of the medical witnesses, counsel for appellants brought out that certain eminent physicians hold the opinion that effort is not a significant factor leading to coronary thrombosis,[3] and appellants rely to large extent upon the testimony of Dr. Riggall relative to the medical surveys heretofore set out. Of course, these particular surveys favor appellants' contention, though some items appear irrelevant to this appeal; for instance, there is no contention here that work was the cause of Dorman's heart disease, and it is admitted that he had suffered previous heart attacks. Appellants' own medical

[3] Among others, Dr. Samuel A. Levine, Dr. Herman L. Blumgart, and Dr. Meyer Texon. In the textbook of medicine, "Cecil and Loeb", in which the section on cardiovascular disease is written by Dr. Blumgart, he states: "In most instances, acute myocardial infarction occurs without relation to effort or other discernible clinical event."

witnesses agreed that there is, over the country, a wide divergence of views concerning the part that effort plays in a myocardial infarction, and Dr. Riggall stated, "I still with some fear and trembling hesitate to tell a man to resume activity * * *" At any rate, we are unpersuaded that there is such unanimity of opinion among medical authorities that it can now be said, as a matter of law, that effort never, or at most, only when violent or extreme, plays any part in producing a coronary occlusion and consequent myocardial infarction. We are still of the opinion that this is a question of fact, to be decided on the basis of evidence developed at each particular hearing, and we take occasion to re-affirm our holdings in *Safeway Stores* v. *Harrison,* 231 Ark. 10, 328 S. W. 2d 131, *Reynolds Metals Company* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489, and *E. P. Bettendorf & Co., et al* v. *Kelly,* 229 Ark. 672, 317 S. W. 2d 708.

Appellants also contend, that even though we disagree with this primary contention and hold that exertion can contribute to a coronary occlusion, the evidence in the present case is insufficient since appellees' medical witnesses were unable to pinpoint the specific mechanism precipitating Dorman's attack. We find no merit in this contention. Appellants state, "There is no way to determine which of the several mechanisms have occluded a coronary artery in the absence of a post mortem." Were we to agree with this contention, it would simply mean that recovery could never be made in a heart attack case unless an autopsy had been performed. Though helpful as pertinent evidence, we do not agree that such a requirement is absolute. Doctors frequently reach their conclusions on the basis of physical examinations, together with case histories. It might be mentioned that one can, of course, suffer a heart attack without dying, and can draw disability payments if the attack was occasioned or contributed to by work on the job; it goes without saying that proof establishing such disability could not include an autopsy. The same contention was made in the case of *American Life Insurance Company* v. *Moore,* 216 Ark. 44, 223 S. W. 2d 1019. While this was not a compensation

case, the same logic applies. In that case, the doctor who testified for appellee stated that after examining the body and learning the history of the case, he attributed death to a pulmonary embolism resulting from a fracture. Quoting:

"On cross-examination Dr. Monroe admitted that there are cases known to the medical profession in which pulmonary embolism has been caused other than by accidental injury or surgery. In this case an autopsy would have been required to determine the cause of death with certainty. Nevertheless, Dr. Monroe reiterated his opinion that Looney's death resulted from pulmonary embolism caused by the accidental injury. On the other hand, appellant's medical witness—who stated that he was as familiar with the subject as the average physician—testified that an embolism never occurs more than three weeks after the injury. In his opinion, based on his own experience and the textbooks he had examined a few days before the trial, it was not possible for an injury sustained on May 31 to produce pulmonary embolism on July 12—an interval of forty-two days.

* * * * * * * *

"Appellant insists that Dr. Monroe's testimony is speculative, since he admitted the possibility that death was due to some other cause. But medicine, like the law, is not an exact science. If mathematical certainty were required, a surgeon would act at his peril in advising his patient to undergo an operation. The law does not compel adherence to a standard so precise. The effect of Dr. Monroe's testimony is that in his opinion the most probable cause of death was a pulmonary embolism attributable to the fractured leg."

In *Herron Lumber Company* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252, we held that circumstantial evidence is sufficient to support an award of the Workmen's Compensation Commission, and it may be based upon the reasonable inference arising from the reasonable probabilities flowing from the evidence, and absolute certainty is not required.

Witnesses classed as experts are permitted to give their opinion for the very reason they are considered experts, and their opinions are frequently based, and expressed, purely in answer to a hypothetical question — without ever seeing the patient — as is the case with appellants' expert witnesses in this litigation. Dr. Hall was designated as an outstanding heart doctor by appellants' medical witnesses, and in addition, he, as already stated, was the only one of the doctors to actually personally examine deceased.

In *Bettendorf* v. *Kelly, supra,* Kelly was engaged in driving nails into boards when he suffered his heart attack. Repeating our language in the *Bryant Stave and Heading Company* v. *White, supra,* we held:

"* * * an accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or a contributing cause of the injury. In short, an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary."

Dorman was engaged in driving nails into the ceiling (which incidentally, though not the controlling or determinative factor in this case, is considered rather strenuous carpentry work), and we hold, under the authority of the cases cited herein, that there was substantial evidence to justify the Commission's finding "that the exertion put forth by the deceased on September 9, 1958, was either the sole or contributing cause of the injury."

Affirmed.

WYATT *v.* WYCOUGH.

5-2245 341 S. W. 2d 18

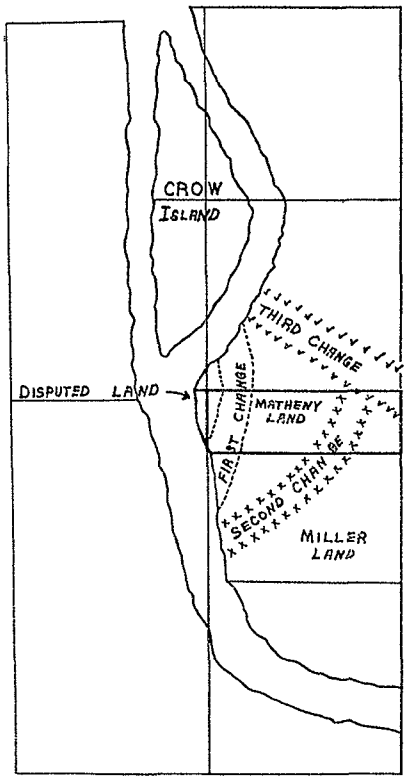
Opinion delivered November 21, 1960.

[Rehearing denied January 9, 1961.]

Chas. F. Cole, for appellant.

Murphy & Arnold, for appellee.

J. Seaborn Holt, Associate Justice. This is a suit in ejectment for possession of land. Paul Wycough and his wife filed a complaint in the Circuit Court of Independence County sounding in ejectment, stating that they were the owners of a certain parcel of land described as the Northeast Fraction Northwest Quarter of Section 26, Township 12 North, Range 5 West, and that they were rightfully entitled to possession of the land, but that the defendant, D. A. Wyatt, had refused to allow them to take possession, and prayed they be awarded immediate possession. At the trial of the cause, the Wycoughs produced deeds tracing their chain of title back to the original government patent to the lands. Exhibits, photos, plats, maps, and testimony relating thereto, were introduced to show the location, character, and change in the lands through the course of the years. The testimony and



exhibits show that the land in question was, during early official government surveys date 1826 and 1854, located on the east side of White River. Immediately north of the land at the time was an island known locally as Crow Island. Sometime around 1900 (the witnesses could not pinpoint the exact year), the river changed its course, cutting around the Wycough lands. Subsequently, the river has since changed its course twice. As a result of these changes, the land of the Wycoughs is now on the west side of White River and lies adjacent to Crow Island. D. A. Wyatt, who owns part of Crow Island, claims that the Wycough land is an accretion to his property, and further, that he had acquired title by adverse possession. The preceding drawing shows the present location of the land here involved after river changes.

The trial court entered judgment for the plaintiffs and Wyatt has appealed. For reversal the appellant first contends that the lower court erred in declaring in its judgment that the appellees were the owners of the lands. Although it is true that ejectment is in its nature a possessory action, it is equally well settled in this state that title to real property may be settled as between the parties in an action of ejectment. *Brasher* v. *Taylor,* 109 Ark. 281, 159 S. W. 1120. And we have many times held that a plaintiff must recover on the strength of his own title and not on the weakness of the defendant's. *Chavis* v. *Henry,* 205 Ark. 163, 168 S. W. 2d 610; *Jackson* v. *Gregory,* 208 Ark. 768, 187 S. W. 2d 547. Some contention is also made as to whether the judgment can bind R. K. Wyatt, who secured title to some of the lands from D. A. Wyatt, after filing of the suit but before judgment was rendered. In *Ritchie* v. *Johnson,* 50 Ark. 551, 8 S. W. 942, under a somewhat similar factual situation, this Court held that a presumption exists that one who secures title in such a situation holds in privity with the defendant in the ejectment suit, and that if such a person holds by an independent title, it is incumbent upon him to then show it. Here there was no showing that R. K. Wyatt secured title independent of D. A. Wyatt. In

Hobbs v. *Lenon,* 191 Ark. 509, 87 S. W. 2d 6, we laid out the general rule in the following language:

> "It follows from the general rule that a person who acquires the property *pendente lite* takes subject to the court's adjudication of the rights in the property which is the subject-matter of litigation; such persons will be bound whether a party to the litigation or not. Parties, their privies, and purchasers *pendente lite* are all grouped together as bound by the court's decision, 17 R. C. L., § 28, p. 1031. Also to the same effect, 2 Pomeroy's Equity Jurisprudence, 3d ed., pp. 632-635. The rule as above stated has been recognized and followed by this court from its early days to the present time . . ."

Since it is not shown in the present case that R. K. Wyatt holds a title independent of D. A. Wyatt, it follows that the fact that R. K. Wyatt is not a party to this case is not a ground for its dismissal.

The appellant also argues that the deeds under which the appellee claimed title were void because the description was vague and indefinite, and there is a discrepancy in the amount of acreage shown in the parcel. Without an extended discussion, suffice it to say that three surveys were run on the property, and they all agreed within approximately four feet of each other. No contention was made at the trial that the surveys were inaccurate. In order to locate the parcel, it is only necessary to locate the NW corner of the NE ¼ of Section 26, and from there, by surveying west and south on the proper variation. The old river bed locates the other boundaries and all witnesses stated this bed is clearly visible. As to the excess acreage, we have held the fact that the acreage is stated incorrectly does not lessen the certainty of the description. *Rucker* v. *Arkansas Land & Timber Company,* 128 Ark. 180, 194 S. W. 21. See also *Doe* v. *Porter,* 3 Ark. 18; Jones, *Arkansas Titles,* Sec. 233. Further, the discrepancy in acreage seems adequately explained by the United States Survey of 1826, a certified copy of

which is attached and made a part of the appellees' brief, and which we will take judicial notice of, *Pope* v. *Shannon Bros., Inc.,* 195 Ark. 770, 114 S. W. 2d 1, shows that the surveyor listed the parcel as containing 8.80 acres, but later surveys indicate that it contained only 6.87. The draftsman of the title instruments apparently copied the acreage listed in the early survey.

Two additional grounds urged upon us for reversal are that the trial court erred in failing to find that the land was an accretion to Crow Island, and that the appellant had acquired title by adverse possession of the land. Both of these questions present issues of fact, which we will not disturb here if supported by substantial evidence. *Lewis* v. *Houchins,* 220 Ark. 610, 249 S. W. 2d 1. In *St. Louis, I.M. & S. R. Co.* v. *Ramsey,* 53 Ark. 314, 13 S. W. 931, 8 L.R.A. 559, we defined accretion as:

> "Accretion is the increase of real estate, by the addition of portions of soil by gradual deposition, through the operation of natural causes, to that already in the possession of the owner. The term 'alluvion' is applied to the deposit itself, while accretion rather denotes the act."

When land is formed by such gradual deposits, it belongs to the owner of contiguous land to which the addition is made. *Nix* v. *Pfeifer,* 73 Ark. 199, 83 S. W. 951. Avulsion is a sudden and perceptible gain or loss of riparian land and may arise from the sudden abandonment by a stream of its old channel and the creation of a new one, or the sudden washing from one of its banks a considerable body of land and the depositing of it on the opposite bank. Thompson, *Real Property* § 2561. When a stream shifts suddenly by avulsion the boundaries of the riparian owners do not change with the course of the stream. *Wallace* v. *Driver,* 61 Ark. 429, 33 S. W. 641, 31 L.R.A. 317. In the present case three eye-witnesses testified that the river changed its course not gradually, as contended by appellant, but by a sudden and perceptible change, in fact, cutting a new channel. We think the evidence is sub-

stantial and sufficient to show that an avulsion occurred and title to the land did not change.

As to adverse possession, the record reflects that the first acts which could have even amounted to acts of adverse possession were the cutting of timber and the clearing of a small parcel of land in 1949. However, at that time the title to the land was in the State of Arkansas and adverse possession cannot run against the state. *Bengel, Executor* v. *City of Cotton Plant,* 219 Ark. 510, 243 S. W. 2d 370. The first time that adverse possession could have begun to run was in 1954 when title was acquired by the appellees from the State. Simple arithmetic shows that seven years from 1954 would be 1961, a date still in the future, hence the appellant could not have acquired title by adverse possession from the appellee.

Finding no error, the judgment is affirmed.

GILLIAM *v.* GILLIAM.

5-2234 340 S. W. 2d 272

Opinion delivered November 21, 1960.

Willis V. Lewis, for appellant.

Holt, Park & Holt, for appellee.

ED. F. MCFADDIN, Associate Justice. From a decree granting her petition for separate maintenance and awarding Mrs. Gilliam $250 per month, Mr. Gilliam prosecutes this appeal and presents only two points:

> "(I) The evidence of the plaintiff was insufficient to sustain a decree of separate maintenance upon her complaint.
>
> "(II) The evidence on behalf of the defendant and cross-complainant was sufficient and should sustain a decree of divorce for him upon his cross-complaint."

I. *Is The Evidence Sufficient To Sustain The Decree Awarding Mrs. Gilliam Separate Maintenance?* Mr. and Mrs. Gilliam were married in December 1948 and lived together as husband and wife until they separated on September 6, 1959. This suit for separate maintenance was filed shortly thereafter; and no property rights are here involved. We have a long line of cases which recognize that under what is now § 34-1202, Ark. Stats. the Chancery Court has the power to decree separate maintenance to the wife. Some of these cases[1] are: *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459; *Shirey* v. *Hill,* 81 Ark. 137, 98 S. W. 731; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86; *Savage* v. *Savage,* 143 Ark. 388, 220 S. W. 459; and *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096.

Mrs. Gilliam testified that just prior to the separation Mr. Gilliam jerked her out of bed and inflicted physical injuries on her, such as a bruised bronchial tube and a broken tooth; and that Mr. Gilliam's violence continued up to the separation. Mr. Gilliam admitted hitting his wife.[2] In addition to the evidence as to physical in-

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[1] There is a dissenting opinion in *McClain* v. *McClain,* 222 Ark. 729, 263 S. W. 2d 911, wherein these separate maintenance cases are listed. A later case is: *Hill* v. *Rowles,* 223 Ark. 115, 264 S. W. 2d 638.

[2] We quote portions of his testimony:

"Q. Major, it has also been testified here that you have been very abusive, that you have beaten your wife, at one time she had a tooth knocked out or had a tooth broken. Is that true?

A. Anything I did to her was in self defense.

THE COURT: Answer the question, did you do it or not?

A. I don't know about breaking her tooth but I did hit her.

juries inflicted by Mr. Gilliam, there was also evidence designed to show marital infidelity on the part of Mr. Gilliam; but we see no occasion to recite any of this evidence because the testimony as to physical injuries is amply sufficient to support a decree for separate maintenance. A wife is not required to live with her husband when, without provocation, he inflicts physical injuries on her. *Shirey* v. *Shirey,* 87 Ark. 175, 112 S. W. 369; and *Crabtree* v. *Crabtree,* 154 Ark. 401, 242 S. W. 804, 24 A.L.R. 912. Mr. Gilliam's defense was, that his wife was a jealous nagging woman and goaded him into violent conduct at times when he was drinking intoxicants. But, even so, such explanation is no defense for the physical injuries that he admitted having inflicted on his wife.

Mrs. Gilliam was corroborated to a limited extent as to her physical injuries: her mother, Mrs. DePriest, testified that she observed a bruised place on Mrs. Gilliam's face. But we have recognized that in suits for separate maintenance there is no requirement for corroboration as in cases for absolute divorce. *Welch* v. *Welch,* 225 Ark. 372, 282 S. W. 2d 600, and cases there cited. There is certainly no evidence of collusion in this case. The Chancellor accepted Mrs. Gilliam's testimony and awarded her separate maintenance. We cannot say that the decision of the Chancellor is against the preponderance of the evidence on this point.

II. *Did Mr. Gilliam Introduce Sufficient Evidence On His Cross Complaint To Require That The Court Grant Him An Absolute Divorce?* In his cross complaint Mr. Gilliam sought an absolute divorce from Mrs. Gilliam. His allegations were:

Q. When did you hit her.
A. I can remember on one occasion. She was biting me on the arm and I slapped her to get her teeth loose out of my arm.
Q. When was that?
A. That was on the night she testified to where she went and stayed at the Albert Pike. I don't remember the date of the incident. . . . I was trying to hold her and she kept biting me and I thought I would calm her down a little bit and slapped her on the face a couple of times.
Q. Did you slap her with your fist or open hand?
A. Open hand.
Q. Did you break a tooth or bruise her up in any manner?
A. I did not notice any bruises or a broken tooth . . ."

> "That the plaintiff and cross-defendant has pursued a systematical and habitual course of personal indignities toward him which rendered his condition in life intolerable and unbearable. That such indignities consisted of fussing, nagging, quarreling and unmerited reproach. That all these acts on her part have made it impossible for him to longer live with her."

Mr. Gilliam testified most strongly in support of his cross complaint; but the Chancery Court was not required to give full credence to such testimony in the face of equally strong denials by Mrs. Gilliam. Furthermore, we find no corroboration of Mr. Gilliam's testimony on the material and substantial matters; and corroboration is required in a case for *absolute divorce,* as Mr. Gilliam was seeking. *Fania* v. *Fania,* 199 Ark. 368, 133 S. W. 2d 654; *Allen* v. *Allen,* 211 Ark. 335, 200 S. W. 2d 324; *Stimmel* v. *Stimmel,* 218 Ark. 293, 235 S. W. 2d 959. From a study of the evidence, we conclude that the Chancery Court was correct in refusing to grant Mr. Gilliam an absolute divorce.

Affirmed.

JOHNSON, J. dissents.

ROY *v.* MCCOMB.

5-2194 **340 S. W. 2d 381**

Opinion delivered November 21, 1960.

[Rehearing denied December 19, 1960.]

James M. Roy and *Elsijane T. Roy,* for appellant.

Fred McDonald, for appellee.

GEORGE ROSE SMITH, J. The question here is whether the will of Sallie Bryan McComb created a tenancy in common in the property left to her two children or created instead a joint tenancy in that property, with a right of survivorship. (As to the latter estate see *Ferrell* v. *Holland,* 205 Ark. 523, 169 S. W. 2d 643.) The trial court took the first view, which opens the door to a claim of dower by the appellee, who is the surviving widow of the testatrix's son. The appellants contend that the second view of the testatrix's will is the right one.

Mrs. McComb, the testatrix, died in 1922, survived by two children, Joel V. McComb and Pearl Moore Roy. The estate, apparently by common consent, was kept together and managed by the appellant Pearl Moore Roy, as administratrix, until after her brother's death in 1957. Mrs. Roy then filed her present petition in the probate court, asserting that the entire estate had vested in her

as the surviving child of the testatrix and asking for authority to convey all the property to herself. This petition was resisted by the appellee, Joel V. McComb's widow, who seeks to assert her right to dower in her husband's share of his mother's estate.

These are the pertinent provisions in the will of Sallie Bryan McComb:

"That all the property I own and money in banks and stocks be equally divided in half to my two children . . .

"If my son Joel V. McComb should die bearing no children of his own the said inherited property must come back to his sister, 'Pearle [sic] Moore Roy.'

"If Pearle Moore Roy should die the said property goes to her children equally divided and in case she leaves no children property goes back to her brother, Joel V. McComb."

In our opinion the present issue was conclusively determined in a prior case involving this same will, *Ollar* v. *Roy,* 212 Ark. 682, 207 S. W. 2d 313. In that case the testatrix's two children had contracted to sell lands constituting part of their mother's estate. Pearl Moore Roy then had one child, the appellant James Roy, while her brother Joel was childless, as he continued to be until his death. In the earlier case Ollar, the purchaser, questioned the sellers' title, contending that they had received under their mother's will some estate less than the fee simple and were therefore not able to convey a merchantable title. In the vendors' suit for specific performance we rejected the purchaser's construction of the will and announced two conclusions concerning the will of Sallie Bryan McComb:

First, we held that the first quoted paragraph in the will vested an estate in fee in the two children. "While the language used by the testatrix in the instant case is that of a layman, we hold that it was her intent to create an estate in fee to the appellees . . ."

Secondly, we held that the other two quoted paragraphs were to have been effective only if either child had predeceased the testatrix. "Applying this rule of construction to the will in the instant case, we hold the testatrix meant by the second paragraph above quoted that had Joel V. McComb died without children prior to his mother's death, his share of the estate would have gone to his sister, Pearl Moore Roy. The same construction is applicable to the third paragraph. Since the appellees survived their mother they became vested with title to the lands in fee simple under the will and can convey such title to the appellant."

From the foregoing language in the *Ollar* case it is plain that the second and third paragraphs of Mrs. McComb's will never became effective, because both the testatrix's children survived her. We therefore concluded in that case that the son and daughter of the testatrix took the fee simple under the first paragraph of the will.

In the prior case Pearl Moore Roy and her brother successfully contended that they, having survived their mother, were vested with the fee simple, to the exclusion of any possible estate in their own children. Mrs. Roy does not ask us to overrule that decision; it is clear that she could not in good conscience make such a request. Instead she argues, with much ingenuity, that the effect of the previous opinion was merely to hold that she and her brother *together* could convey the fee simple. This holding, it is urged, does not necessarily defeat her present insistence that there was a right of survivorship upon her brother's death in 1957.

This contention, when carefully analyzed, will be seen to attribute two alternative meanings to the second (and third) paragraph in the will. To uphold the appellants' argument we should have to construe the second paragraph as if it read in substance as follows: "If my son Joel V. McComb should pre-decease me bearing no children of his own, the said inherited property must come back to his sister Pearle Moore Roy; but if both my children survive me they will hold the property as joint

tenants, with a right of survivorship, *regardless of whether they die with or without issue.''* The italicized clause, although not even remotely resembling any language actually appearing in the will, is nevertheless essential to the appellants' present argument; for if there was any possibility of a vested or contingent remainder in Joel's surviving children, if any, we could not properly have held in the earlier case that the brother and sister were in a position to convey a merchantable title to Ollar in 1948. Without further discussing this contention of the appellants we think it sufficient to say that we do not see how the suggested interpretation can possibly be drawn from the language of this will.

Finally, the appellants offered parol evidence to show that when Mrs. McComb executed her will in 1922 she was suffering from an incurable disease which caused her death within three weeks and that therefore she must have known that both of her children would survive her. This proof is neither competent nor relevant. Extrinsic evidence is not admissible to show what the testatrix meant, as distinguished from what the words of the will express; such evidence is admitted only for the purpose of showing the meaning of the words selected by the testatrix. *Piles* v. *Cline,* 197 Ark. 857, 125 S. W. 2d 129. The appellants' evidence has no tendency to assist the court in determining the particular sense in which Mrs. McComb employed the simple words in her will.

Affirmed.

CONTINENTAL CASUALTY CO. *v.* VARDAMAN.

5-2254 340 S. W. 2d 277

Opinion delivered November 21, 1960.

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

McMath, Leatherman, Woods & Youngdahl, for appellee.

PAUL WARD, Associate Justice. Howard J. Vardaman (appellee), the holder of a policy issued by the Continental Casualty Company (appellant), filed a suit against the Company to collect accrued monthly payments due under the terms of the policy for alleged total disability. After the complaint had been twice amended, appellant confessed judgment for the amount then

prayed. Thereupon the trial court rendered judgment in favor of appellee for the amount confessed. The trial court also, after hearing testimony, rendered judgment for the statutory penalty and attorney's fee.

Appellant here urges a reversal on the ground that the court erred in allowing the penalty and attorney's fee, and also on the ground, in the alternative, that the attorney's fee is excessive.

The peculiar facts of this case call for a careful study of Arkansas Statutes, Section 66-514, together with the many interpretations of said statute by this court. The situation presents a close and interesting question as to whether the trial court was justified in awarding the penalty and attorney's fee. The facts giving rise to the question are not in dispute, but it is necessary to a clear understanding of the issues to set them out in detail.

The insurance policy, which had been in effect for 18 years, provided for an indemnity of $100 per month as per its terms. If by reason of an accident, appellee was continuously disabled and prevented from performing all duties pertaining to his occupation (a locomotive engineer) appellant agreed to pay the monthly indemnity for a period not to exceed 12 consecutive months. In addition, the policy provided that after the first 12 months of total disability the Company would continue the payment of the monthly indemnity so long as Vardaman should live and be wholly and continuously disabled and prevented from engaging in each and every occupation or employment for wage or profit. The policy further provided that no indemnity would be paid for any period of disability during which Vardaman was not under the regular care and attendance of a qualified physician or surgeon.

Vardaman was seriously injured in an automobile wreck on March 8, 1958, following which the Company paid him the monthly indemnity at the rate of $100 per month through May 8, 1959. On June 28, 1959, the Company informed Vardaman by letter that in its opinion

he had ceased to be totally disabled and that it was therefor terminating the payments and asked that the policy be returned. In this letter the Company enclosed a check for $116.66 which was in payment for one month and 5 days.

At all times since the accident Vardaman had been in the Missouri Pacific Hospital or under the continuous care of physicians who had determined that he could not return to his occupation as an engineer and that he could not engage in any occupation where manual labor was involved.

After appellee had received information from the Company that no further payments would be made he secured counsel and suit was filed on July 2, 1959 for accrued monthly payments of $116.66, and also sued for the present value of the policy based upon his life expectancy—determined to be 27 years. The policy was attached to *and made a part* of the complaint. The issue here presented (allowing of penalty and attorney's fee) was brought to focus by the manner in which the litigation developed from this point.

On July 24, 1959 appellant filed an Answer in which it admitted issuing the policy, but denied that since May 8, 1959, appellee had been disabled to such extent as to entitle him to the payment of benefits. On December 20, 1959, at a pre-trial conference, appellee amended his complaint to eliminate that part relating to anticipated damages. This left only the prayer for monthly payments of $116.66 from May 8, 1959 to date of judgment. The trial was then set for March 3, 1960. On February 26, 1960, appellee again amended his complaint to ask for monthly payments of $100 (instead of $116.66). In each instance appellee asked for the penalty and attorney's fee. On the last mentioned date appellant amended its Answer stating that it had paid appellee $100 per month from March 8, 1958 to May 8, 1959; that it concluded appellee was no longer disabled so as to be entitled to further payments; it offered to confess judgment for $100 per month from May 8, 1959 to date of judgment, exclusive of penalty and

attorney's fee. A few days later appellant offered, in addition to the above, to confess judgment for accrued interest on the said monthly payments.

A hearing was had before the trial judge at which the following transpired. It was stipulated that, assuming appellee lived out his expectancy and was entitled to receive monthly indemnity, then the present value of the policy would be $21,155.16. It was further stipulated that a report by Doctor W. I. Porter and a copy of the insurance policy be introduced in the record, and that appellant's attorney on or about February 16, 1960, informed appellee's attorney that if they could not agree on a lump sum settlement the case would not be tried. Also in this hearing appellee's attorney made a statement to the court and introduced further medical statements, indicating to the court the time and effort spent in legal and medical research and in exploring voluminous hospital records. It is indicated by several medical statements that appellee was permanently unable to engage in any occupation. Also testimony by several witnesses indicated that an attorney's fee in the amount of approximately $4,000 would be reasonable.

The trial court made extensive Findings and Conclusions among which were: All testimony supported the conclusion that appellee was totally disabled when appellant wrote the aforementioned letter on June 23, 1959 discontinuing monthly payments; appellant's conduct forced appellee to employ counsel; the prayer in the first complaint asking for monthly payments of $116.66 resulted from a mistake on the part of appellee's attorney, but that this mistake in no way misled appellant who knew the terms of the policy and knew that the monthly payments were $100. Based on these findings, the court rendered judgment against appellant for $922.50, for $111.06 penalty, and $1,250 for attorney's fee.

Based on the above factual situation we have, after careful consideration, concluded that the trial court was correct in awarding the penalty and the attorney's fee. Appellant, in its exhaustive and well prepared brief, cites

and quotes from several decisions of this court to sustain the general rule that when the insured files suit for the amount due under the policy (for convenience called the "correct amount") and the insurer confesses judgment for that amount, then the penalty and attorney's fee are not allowable. That, says appellant, is the situation here because as soon as appellee reduced his claim to $100 per month it confessed judgment. The cases relied on by appellant are: *Pacific Mutual Life Insurance Company* v. *Carter,* 92 Ark. 378, 123 S. W. 764; *Mississippi Life Insurance Company* v. *Meadows,* 161 Ark. 71, 255 S. W. 293; *Illinois Bankers' Life Association* v. *Mann,* 158 Ark. 425, 250 S. W. 887; *Interstate Business Men's Accident Association* v. *Sanderson,* 148 Ark. 195, 229 S. W. 714; *National Fire Insurance Company* v. *Kight,* 185 Ark. 386, 47 S. W. 2d 576; *Colorado Life Company* v. *Polk,* 191 Ark. 151, 83 S. W. 2d 534; *Broadway* v. *Home Insurance Company,* 203 Ark. 126, 155 S. W. 2d 889; *Life & Casualty Company* v. *Sanders,* 173 Ark. 362, 292 S. W. 657.

It must be conceded that the above cases support the general rule. There is, however, at least one factor (present here, we think) which makes the rule inapplicable. That is, if the insurer has previously refused to pay the "correct amount" claimed, making it necessary for the insured to employ counsel and file suit (for the "correct amount") then the penalty and fees are allowable even though the insurer confesses judgment for that amount. We have reviewed the cases cited by appellant and find that none of them are contrary to what we have just stated, but there are other decisions in support. In the case of *Globe & Rutgers Fire Insurance Company* v. *Batton,* 178 Ark. 378, 10 S. W. 2d 859, the Company denied all liability. Thereupon the insured brought suit and the Company admitted liability in the full amount of the policy. This court affirmed the judgment for the penalty and attorney's fee on the ground that the Company had compelled the insured to incur the expense of employing an attorney. To the same effect is *Commercial Union Assurance Company* v. *Leftwich,* 191 Ark. 656, 87 S. W. 2d 55. See, also, *Equitable Life Assurance Society of the*

U. S. v. *Gordy,* 228 Ark. 643, 309 S. W. 2d 330, where the facts are somewhat similar to the facts under consideration. In sustaining the penalty and attorney's fee the court, among other things, said: "But the insurance company refused to accept the offer to settle for the five year period, and therefore the policyholder was compelled to file suit." In the cited case, the insurer confessed judgment for the same amount finally demanded in the pleadings by the insurer.

It is true that in the case under consideration there was no specific demand, prior to filing suit, made by appellee and no corresponding specific denial thereof by appellant, but what did happen amounted to such demand and refusal. The court found, and it is not here denied, that appellee was, on and after May 8, 1959, entitled to the monthly payments, but shortly thereafter appellant by letter informed him in no uncertain terms that they would not make any more payments, and denied all liability. It was at this point, just as if there had been a specific demand and refusal, that appellee was forced to employ an attorney and commence litigation. This, we think, constituted a situation which falls within the spirit if not the letter of the previously mentioned Section 66-514. In material parts said Section reads:

> "In all cases where loss occurs (on) and the . . . insurance company . . . liability therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such person, firm, corporation and/or association shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve (12) per cent damages . . . together with all reasonable attorneys' fee for the prosecution and collection of said loss; . . ."

We have also concluded that the trial court was correct in allowing an attorney's fee in the amount of $1,250. It is true that this amount appears to be out of proportion to the actual amount of recovery but the court was entitled to consider the fact that the services of appellee's

attorneys tended to establish appellant's liability for future payments. See *New York Insurance Company* v. *Dandridge,* 204 Ark. 1078, 166 S. W. 2d 1030, and the *Gordy* case *supra.*

By stipulation it was established that appellant's potential liability under the policy has a present value to appellee of more than $20,000. In addition to this three reputable attorneys estimated a fair attorney's fee in this case to be approximately $5,000.

Appellee has requested the court to make an allowance for an additional attorney's fee for the prosecution of this appeal, and we have decided that the same should be allowed in the amount of $250.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

ARCO AUTO CARRIERS, INC. *v.* STATE.

5-2253 341 S. W. 2d 15

Opinion delivered November 21, 1960.

[Rehearing denied January 9, 1961.]

George S. Dixon and *Louis Tarlowski,* for appellant.

Bruce T. Bullion, Special Assistant to the Attorney General. *Bruce Bennett,* Attorney General, of counsel, for appellee.

SAM ROBINSON, Associate Justice. This action was brought by the State of Arkansas to enforce the collection of certain *ad valorem* taxes on trucks and equipment used by appellants in hauling for hire into and through the State of Arkansas in interstate commerce, automobiles and other merchandise. The issue is the validity of the tax. The chancellor held that the tax is valid, and the transportation companies have appealed. On motion of appellant Greyvan Lines, Inc., its appeal has been dismissed.

The tax is authorized by Ark. Stats. § 84-601. The property used in interstate commerce and in issue here is divided into two categories: The vehicles used in hauling merchandise into this State, and vehicles used in hauling merchandise through the State. Insofar as this case is concerned, there is no distinction. The vehicles used in both categories are engaged in interstate commerce. No provision of our Constitution is pointed out as prohibiting the act in question. But appellants vigorously argue that the statutes authorizing the tax, and also the action of the taxing officials of Arkansas in attempting to collect the tax, violate Article 1, § 8, the commerce clause of the United States Constitution, and the 14th Amendment.

Conceding that the owners of the equipment involved in this case could not be compelled to pay an excise or privilege tax (*State* v. *American Refrigerator Transit Co.,* 151 Ark. 581, 237 S. W. 78), the fact remains that only an *ad valorem* tax is involved here, and the tax is on property that may be found in this State. It is immaterial that such property may not be moved on any regular route or schedule. Conceivably millions of dollars' worth of transportation equipment belonging to appellants could be in the State at all times, with the owners

thereof being afforded the benefits and protection of a duly constituted, organized and functioning state government. And, moreover, the fact that no particular piece or pieces of such equipment would be here for any designated time should not relieve the owners thereof from bearing their fair share of maintaining and operating a state government, with all its ramifications, that serves all the people, including the owners of the transportation equipment found in the State, regardless of where such owners may be domiciled.

Of course, in the circumstances of the property not being in the State 100% of the time and subject to an *ad valorem* tax in other states, this State can only levy a tax based on a formula "which fairly apportions the tax to the commerce carried on within the state." *Standard Oil Co.* v. *Peck,* 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427. In the case at bar it appears that such a formula was used, but if the formula is not fair, appellants have an administrative remedy. Ark. Stats. § 84-609—84-612, § 84-115. Here, however, they did not pursue the administrative remedy to a final conclusion.

This case is controlled by three cases heretofore decided by the United States Supreme Court. First is the case of *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613. There the Court said: "For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. . . . It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. [Citing cases]"

Next is *Ott* v. *Mississippi Barge Line,* 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585. In that case it was held that the doctrine of the Pullman case is applicable to barges and

towboats, moving freight in interstate commerce up and down the Mississippi River. *Ad valorem* taxes levied on such transportation equipment by Louisiana and the City of New Orleans were upheld.

The third case is *Braniff Airways* v. *Nebraska Board,* 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967. The issue was the authority of Nebraska to levy an *ad valorem* tax on aircraft, the owners of which were domiciled in other states, such aircraft being found in Nebraska but used in interstate commerce. The Supreme Court upheld the right of the State to collect a tax properly apportioned on the basis of the use of the aircraft in Nebraska compared to the over-all use of such equipment.

As shown by the above mentioned cases, the United States Supreme Court has upheld an *ad valorem* tax when fairly apportioned on railway, barge line and aircraft equipment used in interstate commerce. There is no sound reason why such a tax is not equally valid when applied to vehicles used on the the roads of the State. The State of Arkansas did not levy the tax on the full value of the equipment; a mileage formula was used. This formula determines the percentage of the total time the property may be found within this State and the percentage of time the assets of the appellants are employed here for purposes of *ad valorem* taxes. Appellants also attack here the formula used, but they did not exhaust their administrative remedy on such question.

Appellants contend also that Article 2, Sec. 23, of the Constitution of Arkansas prohibits *quasi* judicial commissions from making assessments for *ad valorem* tax purposes. In *McDaniel* v. *Texarkana C. & M. Co.,* 94 Ark. 235, 126 S. W. 727, the Court said: "The Legislature has the power to make all property in this State subject to taxation, except property exempted by the Constitution. It has the power to provide where and in what manner said taxes shall be levied and collected; and it may classify corporations and corporate interests for the purpose of taxation, and specify the mode of the assessment, levy and collection of taxes on corporate

properties and interests." But appellants contend that Amendment No. 47 to the Constitution of this State prohibits the levy of an *ad valorem* tax by the State. Here the State has levied no *ad valorem* tax. An agency of the State has merely ascertained the value of the property. True, under the provisions of Act 168 of 1953 (Ark. Stats. 84-614) the Commissioner of Revenues collects the tax, but the same act provides that the State Treasurer shall pay the amounts so collected to the County Aid Fund and in turn shall distribute same to the various counties on a proportionate basis as set out therein (Ark. Stats. 84-615). It can readily be seen that this is a county tax merely administered by a State agency for the purpose of efficiency, and therefore is not in violation of Amendment 47.

Affirmed.

REYNOLDS *v.* HOLMES.

5-2157 340 S. W. 2d 383

Opinion delivered November 28, 1960.

Ras Priest, for appellant.

Fred M. Pickens, Jr. and *Wayne Boyce,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant instituted suit against appellee for libel, slander, and malicious prosecution, resulting from a charge brought by appellee against appellant of petit larceny. The jury found for appellee, and judgment was entered dismissing the complaint. From such judgment, comes this appeal.

The evidence reflects that on the morning of Saturday, October 13, 1956, appellant, with her two daughters, Nadie, age 12, and Glenda, age 6, entered the Ben Franklin Store, a self-service store, located at Newport, owned and operated by appellee, and made some purchases. Four purchases were made, including a green coat sweater for the older girl, taken to the cashier's stand, and paid for. As appellant and her daughters were leaving the store, appellee, Douglas Holmes, requested that they come to the back, where he interrogated them about a red sweater being worn by the younger daughter. Mrs. Reynolds claimed she purchased the red sweater at the store on the preceding Monday, October 8th. Employees of the store were summoned, and two, Mrs. Nettie Davidson and Jerry Lynn Bradley, stated that they had seen appellant, while standing at the sweater counter, button the red sweater on the little girl. Both witnesses

stated that neither of the children was wearing, or carrying, wraps of any kind when they first observed them in the store. Martha Spears, an employee, stated that she was the cashier, and remembered a sale of a sweater to Mrs. Reynolds on Monday, but did not remember the color of the sweater. Appellant then left the store, returning with her husband, Lawrence Reynolds, and after some conversation with Holmes, the Reynolds went to the office of the sheriff for the purpose of instituting prosecution. The sheriff's office was also occupied by the police department of the City of Newport. J. R. Taylor, chief of police, heard their story, and placed a telephone call to Holmes, who came to the office. After discussing the matter, an affidavit for a warrant of arrest, charging appellant with petit larceny was prepared, and was signed by appellee. Taylor kept the written charge until Monday or Tuesday, at which time he delivered it to the municipal clerk of the City of Newport. Following the signing of the affidavit, Taylor, together with a deputy sheriff, drove appellant and her family to their home. The officer testified that appellant told him she had the tag that came off the red sweater which had been purchased on Monday, but when the tag was not produced, he returned to town. Appellant was instructed to appear in municipal court in the City of Newport on Tuesday, October 16th, but the case was not tried until December 7, 1956, at which time Mrs. Reynolds was acquitted of the charge. Three weeks later, complaint was filed against appellee seeking $10,000 actual damages for libel and slander, $10,000 actual damages for malicious prosecution, and punitive damages in the sum of $5,000, or a total amount of $25,000. The case was tried on December 4, 1957, and resulted in a hung jury. The second trial was held on July 11, 1959, and resulted in a verdict for appellee. Numerous alleged errors are urged by appellant, and we proceed to a discussion of these points.

Appellant first asserts that the verdict of the jury amounted to a finding that appellant stole the sweater in question, and there is no substantial evidence to support such a finding. Under the court's instructions, it would

appear that the jury may have taken such a view. Of course, we have no way of knowing the factual basis upon which the jury reached its conclusions. The fact that she had been acquitted of the charge in criminal court, did not necessarily preclude the civil jury from reaching an opposite conclusion. It must likewise be remembered that a criminal conviction requires proof of guilt beyond a reasonable doubt, while an action for damages only requires a preponderance of the evidence; here, on appeal, we are only concerned with whether there was substantial evidence to support the verdict. Proof offered by appellee included the testimony of the two ladies, heretofore mentioned, that they had observed Mrs. Reynolds buttoning the red sweater on the little girl; that she was in the store for an hour and a half to two hours; that the little girls were neither wearing sweaters, nor carrying sweaters, when first observed in the store, and a price tag was found by one of the employees on the floor near the sweater counter. Admittedly, the red sweater was not paid for on October 13th. Holmes also testified that he watched the mother and two daughters in the store for approximately thirty minutes, and neither of the children had any kind of wrap. Appellant denied taking the sweater, and testified that the red sweater had been purchased on the previous Monday; however, another employee of the store (Mrs. Warren) testified that the sweater purchased at that time was blue. The price tag found was for a size 8 sweater, and the record reflects that, following the filing of the charge of petit larceny against Mrs. Reynolds, a friend of appellant, Sarah Miller, purchased a size 8 sweater from the Ben Franklin Store, for the purpose of showing that that size sweater was too large for the child to wear. Mrs. Miller testified that the size 8 sweater purchased "* * * come way down on her". The witness also testified that she had observed Glenda wearing a red sweater on Tuesday before the alleged theft on Saturday. Lawrence Reynolds, husband of appellant, Billy Reynolds, son of appellant, and Nadie Reynolds, daughter, also testified that the red sweater was purchased on the Monday prior to the accusation, and had

been worn for several days during the week. Appellant points out that certain evidence offered by appellee was contradictory—but the jury heard each witness, and was in a position to evaluate the testimony; also, appellant urges that no asportation was proved, *i.e.*, no one actually saw Mrs. Reynolds take the sweater from the counter. No citation of authority is required to the effect that circumstantial evidence is entirely competent and affords a valid basis upon which to render a verdict. As this Court has many times stated, it is within the province of the jury to believe or disbelieve witnesses, and weigh the facts and circumstances. Though appellant's evidence, if accepted by the jury, would likely have supported a verdict, we are likewise of the opinion that appellee offered evidence of a substantial nature upon which the jury could properly base its verdict.

Error is claimed because of the refusal of the court to permit appellant to testify on direct examination about a question asked Holmes at the criminal trial by the presiding judge, Vernon Ridley, and to relate the answer given by appellee. Appellant states that this evidence was competent to show Holmes was guilty of express malice in the prosecution, and that he attempted to obtain a conviction by giving false testimony. Upon refusal of the court to permit the evidence, counsel for appellant stated:

"Note our exceptions, and the witness, if permitted to answer would have stated that at the conclusion of the argument Judge Ridley hesitated, then said, 'I know this is unusual, but I want to ask Mr. Holmes a question and I am going to ask it; Mr. Holmes, did you see Mrs. Reynolds and the two little girls enter the store?' His answer was, 'No, sir, I did not know about it until it was reported to me.' "[1]

[1] Lawrence Reynolds, husband of appellant, testified that this question was asked by the Judge, and the answer given by Holmes. The parties stipulated that Judge Vernon Ridley, if present, would testify that he did not recall the details of the testimony.

In the first place, we do not see how the refusal to admit this evidence was prejudicial to the cause of appellant. Mrs. Reynolds had just testified that Mr. Holmes stated in the criminal trial that he saw her and the children when they first came in, and they were not wearing wraps. According to appellant's brief, in the previous civil trial, Mr. Holmes had stated, in effect, that he did not see the family when they first came in, and this evidence was evidently desired by appellant in contemplation that appellee would testify in a like manner. In fact, when Holmes subsequently took the stand, he did state that he did not recall when he first saw the family. Appellant contends that the desired evidence "* * * went to the very heart of the principal issue: Who was lying? Who started off lying? Can there be absence of express malice when the prosecution attempts to obtain conviction by false testimony?" As stated, the jury heard Mrs. Reynolds relate the version given by Holmes at the criminal trial. Subsequently, in the case now before us, Holmes testified that he did not know when he first observed appellant and her daughters. Accordingly, before submission, the jury was well aware of the fact that Holmes had, according to appellant, made contradictory statements. Therefore, if the testimony was relevant, Mrs. Reynolds was not prejudiced, for the damaging part of Holmes' alleged evidence before the municipal court was admitted, and the alleged conflict in his testimony was brought to the attention of the jury. It would seem that the only fact that could have been shown by this evidence was that Holmes gave two versions in the criminal trial, which was entirely collateral to the matter at hand. At any rate, we do not consider the evidence relating to whether Holmes observed appellant coming into the store as being material. Coming into the store did not directly relate to the stealing, nor did it tend to show lack of probable cause, since the charge against her was based, not upon her coming into the store, but upon observation of her actions after she arrived; malice is not shown by proving inconsistent statements regarding immaterial matters. We find no merit in this contention.

It is next contended that the court erred in permitting witnesses to testify, over objections of appellant, that they had suspected appellant of shoplifting. There are divergent views as to whether testimony, wherein witnesses state inferences or opinions, formed as a result of their observations, is admissible.[2] Here, there is no necessity for discussion of this question, for this point can be disposed of without such a determination. Jerry Lynn Bradley testified that appellant was in the store for close to two hours, and that she watched her. When interrogated as to why she watched her, she replied:

"A. Because we had suspicioned her before. She was looking around, and when you ask a customer, and they are looking, and that was such a period of time, that gives you, as a sales clerk, room for suspicion.

Q. How long did you watch her, Jerry Lynn?"

At this point, counsel for appellant objected, stating that "suspicion is a conclusion drawn by the witnesses and not based upon any facts that are in evidence. We think it is prejudicial, immaterial, and it is inadmissible." The court overruled the objection. Subsequently, Mrs. Dorothy Warren was asked why she noticed appellant, and the witness likewise replied, "Because we had suspected her of shoplifting, and we had been watching her." The witness further testified with reference to two dresses, which had been tried on by the daughters of Mrs. Reynolds on a previous date when appellant was present, and which, according to her testimony, subsequently "disappeared". This testimony was objected to, and the objection at first overruled. Within a few minutes, however, the court ordered all the testimony about the dresses stricken from the record, told the jury that such evidence was being withdrawn from its consideration, and instructed the jury specifically to not consider the testi-

[2] For instance, in Corpus Juris Secundum, Vol. 32, § 459, p. 101, we find: "The modern tendency is to regard it as more important to get to the truth of the matter than to quibble over distinctions which are in many cases impracticable, and a witness is permitted to state a fact known to or observed by him, even though his statement involves a certain element of inference."

mony in any manner. "You must treat it as though this testimony had never been introduced during this trial." Shortly thereafter, after proceedings in chambers, and at the request of appellant, the court instructed the jury to disregard the answer of the witness, "* * * because we suspected her of shoplifting, and we had been watching her." The court further stated: "You are instructed you are to disregard that testimony and give it no consideration; that you are to treat it as though you never heard it because it, too, is being stricken from the record and you are specifically and cautiously instructed to use care and caution and to wipe it completely out of your mind." It does not appear from the record that the court specifically told the jury to disregard the similar statement made by the first witness, Jerry Lynn Bradley, though there is an inference during the examination of Holmes that all of this testimony had been excluded. Holmes, the last witness on behalf of appellee, was asked:

"Q. What was the first thing that called her to your attention?

A. Well, it has been brought out in testimony we had suspected her before.

BY MR. ERWIN:

If Your Honor please, it is not brought out in testimony; *it was excluded from the consideration of the jury.*[3]

BY THE COURT:

Sustained."

At any rate, it was apparent that the court had changed its mind since first admitting this evidence, and if appellant desired that the specific statement of Miss Bradley be stricken, she should have made such a request to the court. However, appellant's principal argument on this point is not directed to the fact that the Bradley testimony was not specifically excluded, but rather to the fact that the court's admonition to disregard the

[3] Emphasis supplied.

testimony "* * * did not remove and could not remove prejudice created in the minds of the jury." This contention relates principally to the testimony of Mrs. Warren. In *Horton, Guardian* v. *Smith,* 219 Ark. 918, 245 S. W. 2d 386, a witness was asked whether one Charles Sherman "* * * is a careful or reckless driver? A. I know that he is a reckless driver." On appeal, this Court said:

"The first assignment in the motion for new trial is that the court erred in permitting appellee to answer the question, in refusing to exclude the answer, and in failing to instruct the jury not to consider it. The record reflects an objection by appellant after the question was answered. In sustaining appellant's objection, the trial court said: 'Yes, gentlemen, that is incompetent, and you will not consider the last answer of the witness. It is taken from you.' There was no further objection nor was a mistrial requested. In these circumstances, any prejudice arising from the excluded testimony was removed by the action of the trial court."

Here, the court went even further, and made a rather lengthy statement admonishing the jury that the evidence should not be considered. If it were felt that the court's statement to the jury would not remove any possible prejudice, a motion for mistrial should have been made in the first instance. This was not done.

Holmes testified, from his own knowledge, that his annual average loss from shoplifting was $2,000. This evidence was based upon records in appellee's possession. Appellant states that this evidence was immaterial and irrelevant, but highly prejudicial. We think the evidence was competent to show appellee's state of mind, and probable cause for instituting the criminal action, as well as tending to show a lack of malice. Of course, one who had suffered losses from theft would be much more concerned than one who had not. As stated in *Richter* v. *Neilson,* 11 Cal. App. 2d 503, 54 Pac. 2d 54:

"As the authorities point out, malice being the main indispensable element of an action of this kind, not only

is a plaintiff given a very wide range in proving facts and circumstances tending to establish such element, but likewise the defendant is given the same full opportunity to disprove it. 16 Cal. Jur. 748. As said in *Griswold* v. *Griswold, supra,* and again in *Burke* v. *Watts,* 188 Cal. 118, 204 P. 578, whatever tends to prove good faith tends to disprove malice and must be admitted."

Nor are we able to see where this testimony was prejudicial, since there was no evidence submitted to the jury to connect appellant with the $2,000 loss.

Appellant complains that the size 8 pin tag found on the floor near the sweater counter was never offered in evidence, and she calls attention to the fact that though Martha Spears and Gene Warren testified about the finding of the tag, neither Jerry Lynn Bradley nor Holmes were asked any questions with reference to it. Of course, there was nothing to prevent appellant from interrogating Miss Bradley, Holmes, or any other witness at length with reference to the tag, or why it was not introduced. In addition, no objection was made to the evidence of witnesses Spears and Warren concerning the tag.

Appellant alleges error in the refusal of the court to permit the clerk to read to the jury the pre-trial order made by the court following a pre-trial conference on November 29, 1957. This request was based on the fact that the original answer of appellee stated that the prosecution was instituted in good faith upon the advice of the deputy prosecuting attorney of Jackson County; at the pre-trial conference appellee obtained leave to amend his answer so as to allege that he consulted Taylor, the chief of police, and had acted upon the advice of Taylor in commencing the prosecution. Appellant desired to introduce the order as indicating "ever-shifting" defenses of Holmes. The statute relating to pre-trial conferences (Ark. Stats., § 27-2402, 1959 Supp.) provides:

"Actions taken at the conference, amendments allowed to the pleadings, rulings of the court, stipulations to be considered in evidence, and, agreements made by

the parties on any of the matters considered, will be made a part of the record in the case."

Though the pre-trial order is a part of the record, we think this point is immaterial. The original answer was read to the jury. While the testimony of Holmes reflected that some discussion was held with the chief of police, no mention was ever made by appellee that he consulted the deputy prosecuting attorney. Appellee also admitted on cross-examination that at the previous trial, he had testified the charge had been filed at the suggestion of Taylor. Accordingly, this conflict was called to the attention of the jury, and no prejudice could have resulted from the court's ruling.

Appellant complains about the giving of the court's instruction No. 6 and the failure to give appellant's requested instruction No. 20. As to the first, there was no objection to the instruction; as to the second, the contents of the requested instruction were covered by other instructions given.

Finally, it is urged that the court erred in not excusing venireman David Paul Burton for cause. Burton stated on *voir dire* that he had heard about the occurrence at the Ben Franklin Store through relatives of appellee, and had formed an opinion; the relatives were not witnesses. However, he said that he had no bias, and in response to interrogation by the court, stated that he could go into the jury box, lay aside any opinion, and base his decision solely on the evidence introduced during the trial, and the law as given by the court. We have several times held that the facts relied upon by appellant are not sufficient grounds for challenge. See *St. Louis I. M. & S. Ry. Co.* v. *Stamps,* 84 Ark. 241, 104 S. W. 1114, *Rowe* v. *State,* 224 Ark. 671, 275 S. W. 2d 887.

Finding no reversible error, the judgment is affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting. This is an appeal from a judgment in favor of appellee, Douglas

P. Holmes, based upon a verdict of a jury, in an action brought by appellant, Inez Reynolds, for libel, slander, and malicious prosecution.

On the morning of Saturday, October 13, 1956, appellant, Inez Reynolds, with her two daughters, Nadie, age 12, and Glenda, age 6, entered the Ben Franklin Store, a self-service store, at Newport, which was owned and operated by appellee, Douglas P. Holmes, to make some purchases. She and the children selected four purchases, including a green coat sweater for the older child, carried them in a basket to the cashier's stand, paid for them, and were leaving the store when she was stopped by appellee, conducted to a room at the rear of the store, and accused by him of having stolen a red sweater then worn by her youngest daughter, Glenda. She protested that she had bought the red sweater in question at the store the preceding Monday, October 8. Appellee summoned three employees, Henry Burge, Mrs. Nettie Davidson, and Jerry Lynn Bradley, who told him in appellant's presence that they had seen her put the red sweater on the smaller girl. She repeated that she had bought the sweater on the preceding Monday and requested that he summon the cashier as a witness. The cashier, Martha Spears, was summoned by the appellee, and questioned. Appellant was then dismissed. She left the store and returned with her husband, Lawrence Reynolds, in 15 or 20 minutes. Mr. Reynolds confronted appellee and demanded to know whether the red sweater worn by the little girl was the sweater his wife was accused of stealing. Appellee responded in the affirmative.

Appellant and her husband went immediately to the office of the sheriff for the purpose of attempting to prosecute appellee. The sheriff's office was then occupied by the police department of the City of Newport. A radio operator and a deputy sheriff, John Mitchell, were present and appellant and her husband were directed to wait for the return of the Chief of Police. When Chief of Police, J. R. Taylor came in, he heard their story, took the paper bag containing their purchases, took them into the sheriff's private office and placed a telephone call

to Mr. Holmes who came to the office. After a discussion of the matter, Mr. Holmes and Chief Taylor went out into the main office, filled out a blank form affidavit for a warrant of arrest charging appellant with petit larceny. This charge was signed by appellee at the time and delivered to the Chief of Police. Chief Taylor kept the written charge until Monday or Tuesday following at which time he delivered it to Vaughan Jackson, the Clerk of the Municipal Court of the City of Newport. On Tuesday morning, October 16, 1956, the clerk presented the signed form to appellee at his office for verification.

After appellee signed the form in the sheriff's office, Chief Taylor and John Mitchell, the deputy sheriff, drove appellant and her family home to Jacksonport. By invitation the two officers inspected the clothing of the children in their home.

After having inspected the clothing of appellant's children on the Saturday afternoon in question, Chief Taylor instructed appellant to appear in the Municipal Court in the City of Newport at 1:30 p.m., on Tuesday, October 16, 1956. Appellant appeared as instructed with her witnesses and her attorney for trial. She was not tried until December 7, 1956, at which time she was acquitted of the charge against her.

On December 28, 1956, twenty-one days after her acquittal, appellant filed her complaint against appellee for slander, for libel, and for malicious prosecution. The case was tried December 4, 1957, and resulted in a hung jury. The case was retried on July 11, 1959, and the jury returned a verdict for the defendant. Judgment was rendered accordingly; notice of appeal was given in apt time; and the case is now before this Court.

For reversal, appellant relies upon a number of points. No useful purpose would be served by discussing any except the following on which my dissent is based.

Appellant contends that the court erred in refusing to permit appellant, Inez Reynolds, to testify that at her trial in Municipal Court, Judge Ridley, after hearing the

evidence and the argument of counsel for the prosecution (her attorney made no argument), asked appellee Holmes a question, what the question was, and what his answer was.

The following appears in the record relative to appellant's testimony in her case in chief:

"Douglas testified against me. He said he saw me when we first came in and we didn't have no wraps on, and I had a shopping bag. I said none of us did. I had on a blue short coat. My youngest daughter had on the red sweater. Nady didn't have on a sweater because she didn't have no sweater.

"He testified that when he called Martha Spears back there, she admitted selling me a sweater, but said it was a blue one.

"Jerry Lynn Bradley testified that Martha said she sold me a sweater, but it was a blue one. She said she saw us when we came in and my girls didn't have on anything; no wraps. Mrs. Davidson testified. She said she saw us come in and we didn't have on any wraps. She also said that Martha said she sold me a sweater but she said it was a blue one."

"Q. Did the court ask Douglas Holmes a question after the argument?

"A. Yes, sir.

"Q. What was the question?

"By Mr. Pickens: Object for the reason that whatever the Court might have said to Douglas Holmes at the time is not proper in this lawsuit. We are getting three different litigations mixed up as a result of Mr. Priest's question and it is irrelevant.

"By the Court: What was the question?

"By Mr. Priest: I asked her what question Judge Ridley asked Douglas Holmes and what his answer was.

"By the Court: Objection sustained, go ahead.

"By Mr. Priest: Note our exceptions; and the witness, if permitted to answer would have stated that at the conclusion of the argument Judge Ridley hesitated, then said, 'I know this is unusual but I want to ask Mr. Holmes a question and I am going to ask it; Mr. Holmes, did you see Mrs. Reynolds and the two little girls enter the store?" His answer was: 'No, sir, I did not know about it until it was reported to me'."

In the case at bar appellee testified concerning the subject matter contained in appellant's testimony, as set out above, as follows:

"Q. Why did you send after Miss Jerry Bradley?

"A. *I wanted to confirm what I had seen myself.*

"Q. When you first saw them, did either of the children have any kind of wrap on?

"A. Neither one.

"Q. I believe you testified it was approximately 30 minutes you watched them?

"A. That's right.

"Q. When Jerry Lynn came back, what took place?

"A. I asked her if the little girl had a sweater on when they came in and she said, 'No, neither one had anything on'."

Appellant argues that the excluded testimony was offered for two purposes:

"A. To show that Douglas Holmes acted with express malice in instituting the criminal prosecution against appellant on a charge of petit larceny by showing that he tried to bring about her conviction by giving against her, and by causing his employees to give against her, testimony which he admitted to be false.

"B. To show that the testimony which she knew, from having heard it at a previous trial, would be given by appellee and his employees, Jerry Lynn Bradley and Mrs. Nettie Davidson, was fabricated and false, and was

merely a substitute for their original testimony in the Municipal Court, which Mr. Holmes had admitted to Judge Ridley was false."

The question here presented is whether appellant should have been permitted to testify in her malicious prosecution action as to what was said by appellee in the criminal case before the Municipal Court. The issue involved in the exclusion of the testimony referred to is whether or not Mr. Holmes' prosecution in the criminal case was in good or bad faith, *i.e.,* whether or not he had probable cause to commence the action. In discussing this identical question, this Court in *Kansas & Texas Coal Company* v. *Galloway,* 71 Ark. 351, 74 S. W. 521, after discussing the general rule of admissibility, had this to say:

". . . malicious prosecutions forms an exception to the rule. . . .

". . . Probable cause is such a state of facts in the minds of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty. The facts testified to on the examination may have been very influential in raising such suspicion or belief, and are therefore competent evidence to show the ground he had of cause to believe, whether they were true or not. They are therefore facts material to the issue, to be proved by any witnesses who can testify to them, as well as by those who testified at the examination. These witnesses may be dead, absent or insane; they may have forgotten them, or refuse to testify to them, or even deny them; it is not the less true that they did so testify, and if the testimony was of a character to evidence a belief or strong suspicion, in the mind of a reasonable man, of the guilt of the accused of the crime charged, they had a direct bearing on the issue of probable cause or not, in the action for malicious prosecution. . . ." From what has been said above, I cannot escape the conclusion that the trial court erred in excluding the ques-

tioned testimony. See *Hall* v. *Adams,* 128 Ark. 116, 193 S. W. 520.

I now reach the question, was such error in this case reversible? Appellee argues that: "Appellant has no grounds for complaint. For in fact, the jury was permitted to hear this testimony in the testimony of Lawrence Reynolds. Reynolds testified in almost exactly the words of the offer of proof made at the time that the testimony was excluded when Inez Reynolds was on the stand. The appellee feels that it is at least highly questionable that the question of an examining magistrate was admissible the first time, but certainly by no stretch of the imagination can the appellant contend that she was prejudiced because she was not permitted to put the same testimony into the record twice. To have permitted both Inez Reynolds and Lawrence Reynolds to have testified to the same identical question and answer would simply be repetitive and cumulative and would serve no useful purpose."

The general rule is that prejudice is presumed from the exclusion of competent and material evidence; 3 Am. Jur. § 940, p. 504. In the same volume on the same subject, at page 589, § 1032, we find:

"The general principle has been laid down that where the facts of the case are such that the appellate court cannot say that if the evidence erroneously excluded had been admitted, the jury would have returned the same verdict, the exclusion of such evidence will be held to be reversible error. If the erroneous exclusion injuriously affects a substantial right, then there is reversible error. It is generally held to affect a substantial right if it relates to a material point."

To the contention of appellee that the error was cured by the testimony of Lawrence Reynolds, to the same effect we find in the case of *McDonough* v. *Williams,* 86 Ark. 600, 112 S. W. 164, the following:

"While there was evidence to the same effect admitted, the jury did not accept it. We cannot say that

this evidence was cumulative. The witnesses were not sufficiently numerous for that, and, if the jury had been given the opportunity to consider the testimony of Spradlin, they might have given it more weight than the other testimony that was adduced to the same effect."

The testimony which was excluded was an admission against interest because when Holmes admitted in Municipal Court that he didn't see them enter the store, after having previously testified that he did see them enter the store, it was more than impeachment because in showing that he swore falsely in Municipal Court indicates that he maliciously instituted the prosecution in that court. Whether he saw them enter the store was material because that was one factor in determining his good faith in starting a prosecution on something someone else told him rather than on personal knowledge. See: *Thiel* v. *Dove,* 229 Ark. 601, 317 S. W. 2d 121; *Hall* v. *Adams, supra;* and *Kansas, Texas Coal Co.* v. *Galloway, supra.*

Following the rule set out above, it is my conclusion that the error as indicated is reversible and for this reason I respectfully dissent to the majority opinion.

FAIR *v.* FAIR.

5-2191 341 S. W. 2d 22

Opinion delivered November 28, 1960.

[Rehearing denied January 9, 1961.]

Edward J. Rubens and *Davis & Davis,* Memphis, Tenn.; for appellant.

Arthur L. Smith, Jr. and *Samuel J. Weintraub,* Memphis, Tenn.; for appellee.

J. Seaborn Holt, Associate Justice. This is an action in which appellee, Nancy Fair, seeks to set aside a divorce decree on the ground of fraud in the procurement of said divorce. The record reflects that Mark L. Fair (deceased) and Nancy Fair (appellee) were married in 1938 and separated in March 1944. The last time that Mr. and Mrs. Fair communicated directly with each other was sometime around Easter 1946. During August, 1950, Mr. Fair filed suit in Crittenden County, Arkansas, for divorce alleging that he and his wife had lived apart three years without cohabitation and prayed that he be granted a divorce. On October 16, 1950 he was granted a decree of divorce from Mrs. Nancy Fair. On June 19, 1958 Mr. Fair died and Mrs. Fair, appellee, was notified of his death on June 21, 1958. Shortly thereafter, while checking on a burial policy of Mr. Fair's and in talking to the manager of the Thompson Brothers Funeral Home, it appears that Mrs. Fair was first apprised of the fact that her husband had procured a divorce. This was confirmed on August 8, 1958 when a certified copy of the

divorce decree was procured from the court records of Crittenden County, Arkansas. Mrs. Fair filed the present suit to set aside the above decree of divorce primarily on the ground that fraud was used in the procurement of it and that she was never notified of the filing or pending of said divorce suit. On a trial the lower court, after hearing all the testimony, set aside the divorce decree and the administrator of Mr. Fair's estate, Norman Brooks Fair, has appealed relying on the following points for reversal: (1) Fraud was not proved, (2) Mrs. Fair is guilty of laches, and (3) the trial court was without jurisdiction to hear the case. We have reached the conclusion that the decree should be affirmed on the ground that appellee's proof shows that the decree of divorce in favor of Mr. Fair was fraudulently procured during his lifetime.

I

The appellee, in charging Fair with fraud in the procurement of the divorce, asserts that he supplied his attorney and the attorney *ad litem* with an improper address as the place of Mrs. Fair's residence, with the result that she received no notice whatever of the pendency of the divorce proceeding. This charge, if supported by the weight of the evidence, constitutes such a fraud as to justify the court in setting aside the decree. *Murphy* v. *Murphy,* 200 Ark. 458, 140 S. W. 2d 416; *Lewis* v. *Lewis,* 214 Ark. 454, 217 S. W. 2d 346. In the *Murphy* case, upon essentially similar facts, we said: "Another fraud more subtle and, therefore, more egregious was his action in giving an improper address as the place of his wife's residence. This prevented her from knowing that she had been sued until after she had been divorced. Such frauds will not be tolerated."

Fair, in filing suit for divorce in Crittenden County, gave two possible addresses for his wife, both of which were insufficient and resulted in the letters of the attorney *ad litem* being returned to him by the postal authorities. The first address given was 171 Merton Street, Memphis, Tennessee. The proof shows that Mrs. Fair

had never lived at this address. Mr. Fair, however, was familiar with the property, as he had formerly owned it. At the time of the divorce case a Mr. and Mrs. Richter were living at 171 Merton Street. Mrs. Richter was a sister of Fair's daughter-in-law, and Mr. Richter was one of the two corroborating witnesses who testified for Fair in the divorce case. In the present proceeding Richter testified that in 1950 he knew that Fair was getting a divorce and that when the letter for Mrs. Fair arrived he turned it back and "just put on there she didn't live there." Thus there are strong reasons for concluding that Fair well knew that a letter sent to 171 Merton Street would never reach his wife.

The second address given was General Delivery, Vicksburg, Mississippi. Mrs. Fair had lived in Vicksburg as a girl and in 1950 still had a post-office box there, in her maiden name, which was used by her mother and other members of her family. Fair had often visited in the family home and undoubtedly knew the address of his mother-in-law there. That the address given was insufficient is of course established by the fact that the letter was returned. Just as in the *Lewis* case, *supra,* the fact that Fair made no effort to reach his wife through her mother strongly indicates a lack of good faith on his part. There is also the additional fact that Mrs. Fair was working in a bowling alley in Memphis, just across the river from Crittenden County, that Fair had visited her at the bowling alley on two or more occasions, and that he could easily have used that address to notify her of the divorce case. Hence the weight of the evidence shows clearly, indeed almost conclusively, that Fair practiced a fraud in obtaining the divorce decree.

II

We cannot agree with the contention that the appellee was guilty of laches in not filing the present complaint until April, 1959. Fair's fraudulent conduct prevented her from knowing about the divorce case when she was sued, and she did not learn of the decree until after Fair's

death in June, 1958. There was no lack of diligence on her part, nor was the appellant adversely affected by the delay of a few months between the appellee's discovery of the divorce decree and the institution of this proceeding to set it aside.

The appellant also argues that the complaint to set aside the decree is defective in failing to allege a meritorious defense to the original action. Ark. Stats., Anno. (1947) § 29-508; *Wims* v. *Wims,* 214 Ark. 811, 218 S. W. 2d 85. This contention we hold to be without merit. Fair obtained the divorce on the ground of three years separation, and it was impossible for the appellee to assert a meritorious defense to the cause of action for divorce, as she admits the fact of three years separation. Hence, under the statute, Fair had a right to a divorce. Ark. Stats., Anno. (1947) § 34-1202. But the statute says that the question of who is the injured party shall be considered in the settlement of property rights and alimony. Upon that point the appellee's complaint does assert a meritorious defense, by alleging that the parties lived together until December 6, 1945, "when the said Mark Lee Fair deserted her (the appellee)." The complaint therefore asserts the only defense that could be asserted—that the appellee was the injured party.

III

The appellant's third contention, that the court was without jurisdiction, is based upon the argument that nothing would be accomplished by setting aside the divorce decree now that Fair is dead, since his death freed the appellee from the bonds of marriage. But, as stated in the headnote to *Jackson* v. *Bowman,* 226 Ark. 753, 294 S. W. 2d 344: "Chancery courts have the power to set aside a default decree of divorce, even after the death of one of the parties, if property interests of the survivor are affected." In this case it appears that Fair left a substantial estate, situated in Florida, and the vacation of the Arkansas divorce decree is evidently a necessary

step to enable the appellee to assert her rights as Fair's widow.

Finding no error, the decree is affirmed.

McFaddin, Ward, and Johnson, JJ., dissent.

Ed. F. McFaddin, Associate Justice, dissenting.

The majority opinion in this case is most unfortunate because it sets aside a divorce decree granted by a Court of competent jurisdiction and which has been of record for ten years; and all this in spite of the fact that the movant has made no showing of a meritorious defense to the divorce action.

Mr. Fair obtained a divorce decree in Crittenden County on October 16, 1950. Mrs. Fair filed the present proceeding on April 9, 1959 to set aside the 1950 divorce decree. She made two claims: (a) Mr. Fair was not a *bona fide* resident of Crittenden County when he obtained the divorce decree; and (b) Mr. Fair fraudulently concealed from her the pendency of the divorce proceedings by failing to give her best known address to the Court's attorney ad litem.[1]

Now let us take up these two attacks made by Mrs. Fair on the 1950 divorce decree.

A. *Mr. Fair's Residence.* The Trial Court in the present case found that the 1950 Chancery Court was without jurisdiction because Mr. Fair was not a *bona fide* resident of Crittenden County in 1950. In my opinion, the Trial Court in the present case was in error in so holding; and the majority of this Court does not rest the affirmance on that finding. The depositions in the 1950 divorce case are in the record before us; and these depositions disclose the following questions were asked Mr. Fair when his deposition was taken on the 13th of October, 1950:

"Q. Please state your name, age, and place of residence.

[1] There is not the slightest indication that either Mr. Fair's attorney in the divorce action or the attorney ad litem was guilty of any impropriety of any kind or guilty of any conduct unbecoming a lawyer.

A. Mark A. Fair, lawful age, West Memphis, Ark.

Q. How long have you lived in West Memphis?

A. Since June 19, 1950. . .

Q. At the time you commenced your residence in West Memphis, was it your intention to reside here permanently or indefinitely?

A. It was.

Q. Is that now your intention?

A. It is. . . ."

Mrs. Ben Melson was one of the witnesses whose deposition was also taken on October 13, 1950; and she testified as to Mr. Fair's residence as follows:

"Q. Do you know the Plaintiff in this case, Mark L. Fair?

A. Yes, I have known Mr. Fair since June 19, 1950, when he rented a room at my hotel here in West Memphis.

Q. Where does he now reside?

A. In West Memphis."

Thus, the question of Mr. Fair's residence was before the Court in 1950; and in the decree the Chancellor, Hon. Francis Cherry, made this specific finding:

"That the Plaintiff is now and has been for more than three months a resident of Crittenden County, Arkansas; . . ."

In *Jamieson* v. *Jamieson,* 223 Ark. 845, 268 S. W. 2d 881, a contention was made that the person obtaining the divorce was not a *bona fide* resident[2] at the time the decree was granted; and in denying the claim in that case we said:

[2] At the time the Fair divorce decree was granted in 1950, the case of *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, was the law; and *bona fide* residence (*i.e.*, domicile) was the requirement. Later, the Legislature by Act 36 of 1957 eliminated the *bona fide* residence (domicile) requirement; and the Legislative enactment was sustained in *Wheat* v. *Wheat,* 229 Ark. 842, 318 S. W. 2d 793. But Mr. Fair's testimony in the 1950 divorce case met the requirements of the Cassen case.

" 'The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed.' "[3]

The same rule applies here, and even stronger, because in the case at bar Mrs. Fair, in testifying before the Court in the present case in 1960, said of Mr. Fair's residence in 1950:

"Q. You allege in your complaint that Mr. Fair was a non-resident of the State of Arkansas at the time this divorce decree was granted to him?

A. Yes, sir.

Q. Now how do you know that or do you know it?

A. Well, I don't know.

Q. You don't know?

A. No."

With all this evidence before this Court, the majority, by failing to mention the matter of Mr. Fair's residence in 1950, correctly refused to rest its present holding on any claim that Mr. Fair was a non-resident of Crittenden County, Arkansas when he obtained his divorce in 1950; and that issue, therefore, passes out of this case and we come to the next attack on the 1950 divorce decree.

B. *Fraud on Mrs. Fair.* The majority is basing the affirmance of the Chancery decree on the theory that Mr. Fair fraudulently concealed from the Court and the attorney ad litem the address of Mrs. Fair. There is no showing that Mr. Fair knew any address for Mrs. Fair other than the one that he gave. The report of the attorney ad litem in the 1950 divorce case is in the record now before us, and the attorney ad litem says in part:

"That on August 19, 1950, he addressed two letters to the Defendant, Mrs. Nancy Fair, 171 Merton Street,

[3] To the same effect see also *Williams* v. *Williams*, 224 Ark. 949, 277 S. W. 2d 77.

Memphis, Tennessee, and Mrs. Nancy Fair, c/o General Delivery, Vicksburg, Mississippi; that both of said letters were returned marked "unclaimed."

The affidavit for warning order was duly made in the 1950 case, and the decree finds that the warning order was duly published. In the 1960 case Mrs. Fair claimed that she had a post office box in her maiden name in Vicksburg, Mississippi. The letter was sent by the attorney ad litem to the general delivery in Vicksburg, Mississippi. If Mr. Fair had wanted to conceal the divorce from Mrs. Fair, it seems that he would have given her address as some city other than Vicksburg, Mississippi, because the 1950 United States census shows that Vicksburg at that time was a city of only 27,948 population; and in 1940 the population was 24,460. Furthermore, Mr. Fair gave Mrs. Fair's Memphis address as 171 Merton Street, which was a place they had formerly owned and which was only two doors from where they had lived at one time. If he was trying to conceal the divorce suit from her, he went dangerously close to letting her know about it by giving such addresses. Mrs. Fair said that she did not know Mr. Fair's address. How could she expect him to know her address?

In *Alsupp* v. *Alsupp,* 199 Ark. 130, 132 S. W. 2d 813, the husband in obtaining a divorce had given the wife's address as Nashville, Tennessee, c/o the Sheriff's Office of Davidson County. After the divorce decree was granted, the wife brought suit to set the divorce aside on the claim that the husband had fraudulently concealed from the Court her address, and had thereby kept her from knowing of the suit. This Court held that under the facts and circumstances in that case the address given for Mrs. Alsupp was a good address. The evidence in the case at bar is just as strong to support the address given by Mr. Fair as was the address given in the Alsupp case; and so I conclude that the Court was in error in holding that Mrs. Fair established that Mr. Fair fraudulently concealed her address.

There is another reason for my dissent, and that is the failure of Mrs. Fair in her present suit to allege a

meritorious defense to the divorce case or to claim that she was the injured party. In *Alsupp* v. *Alsupp, supra,* we said it was essential that a person seeking to set aside a divorce allege facts sufficient to show a meritorious defense. That has been our rule in Arkansas. In the present case, the majority says that Mrs. Fair could not allege a meritorious defense because they had been separated for more than three years without cohabitation, which is the seventh ground for divorce under § 34-1202, Ark. Stats. I earnestly submit that the burden was on Mrs. Fair to show that she was the injured party in this suit in which she is seeking to set aside the divorce so that she can get some property rights. She is not interested in the divorce now for the purpose of settling her marital status, because Mr. Fair is dead. She is interested in setting aside the divorce only in order to get property rights. In failing to claim that she was the injured party, she has lost her chance to claim property rights. Secton 34-1202, Ark. Stats. in the seventh ground for divorce, says, "... and the question of who is the injured party shall be considered only in cases wherein by the pleadings the wife seeks either alimony under Section 34-1211, Arkansas Statutes 1947, or a division of property under Section 34-1214, Arkansas Statutes 1947, as hereby amended, or both."

In her present complaint to set aside the divorce decree, Mrs. Fair has this as her prayer:

"WHEREFORE, the Plaintiff prays that the Decree of Divorce granted to the said Mark Lee Fair by this Court be set aside, vacated, and declared null and void ab initio inasmuch as the Court proceeded without jurisdiction in granting said Decree because of fraud practiced by the said Mark Lee Fair upon the Plaintiff and upon the Court and that the Court grant to the Plaintiff the recovery of her costs in this action and all other proper legal and equitable relief."

She failed to pray for property rights and I think that such failure is fatal to her case.

There is also the matter of laches, which I think is a bar to Mrs. Fair. Mrs. Fair testified that she went to

Vicksburg to stay with her mother in 1942 or 1943 and that she and Mr. Fair never lived together thereafter. She saw him when he came to the bowling alley, but she made no effort to keep in touch with him. From 1943 to 1959 Mrs. Fair went her way and left Mr. Fair to go his way. I think a wife who goes off and leaves her husband for fifteen years is in poor grace to claim that she can pick him up when she gets ready. Husbands are not like chattels that can be thrown down and left until the owner is ready to resume possession. When a wife goes off and leaves her husband for fifteen years I think she is guilty of laches and cannot come in after his death and seek to set aside a divorce.

PAUL WARD, Associate Justice, dissenting.

The apparent equities in favor of Mrs. Fair make me reluctant to disagree with the majority opinion, but the latent dangers inherent therein compel me to do so.

The essence of the majority opinion, as I understand it, is the finding that Mark Fair defrauded the court in procuring the original divorce decree in that "he supplied his attorney and the attorney *ad litem* with an improper address as to the place of Mrs. Fair's residence." This being true the majority of course must be first convinced that Mr. Fair knew her correct address.

The decisive question therefore is: Does the evidence show (conclusively) that Mr. Fair deliberately supplied an improper address?

As I see it, the defect in the majority opinion is that it fails to point out that Mr. Fair knew Mrs. Fair's address. I am aware of nothing in the record to show that he had such knowledge. If this is true any other conclusions reached by the majority must necessarily rest on conjecture and inferences. Such being the situation the *Murphy* case and the *Lewis* case, relied on so heavily by the majority, lose all convincing application. From the *Murphy* case we quote: "Thereafter the parties lived separate and apart in the City of St. Louis, but each knew the other's address." Again in that same case the court

stated: "It is admitted that plaintiff furnished this address, and it is admitted also that he knew this was not the address of his wife." From the *Lewis* case we quote: "When we consider that appellee was familiar with Missoula and knew the address of his wife's parents, with whom she was actually living. . ." In the case under consideration we have nothing approaching that degree of certainty or knowledge on the part of Mr. Fair. Concededly it appears unlikely that Mr. Fair did not know his wife's whereabouts since they both lived at times in the same state and city, but appellee's own testimony proved conclusively that it could happen. Certainly Mr. Fair, who apparently was a substantial business man, was better known and easier to be found than was his wife, yet she admits that she could not locate Mr. Fair even though she made a determined effort to do so. Why then should this court assume that Mr. Fair was acting in bad faith and fraudulently when he supplied the two addresses mentioned by the majority. Why should we not assume that he supplied the best address available to him.

A solemn judgment of a court of record is the foundation upon which rest important property rights and intimate personal relationships, and courts should act cautiously before sweeping it away, particularly after a lapse of 10 years. The trial judge who rendered the original divorce decree in 1950 had much better opportunity to inquire into the matter of service than this court has at this late date. In that court decree the judge stated that he had given "careful consideration to plaintiff's complaint in equity, proof of publication of warning order and the report of the attorney *ad litem.*" It is not questioned that Mr. Fair complied with all the provisions of the statute in securing proper service by warning order.

In the beginning I mentioned the "latent dangers inherent" in the majority opinion, and I believe they are real. Theoretically and actually it jeopardizes the happiness of thousands of homes and the ownership of untold millions of dollars in personal and real property where they have been established on this kind of service. The stability of such values should not rest upon what some

court determines to be the state of mind of a litigant 10 years previously—that is, did he act honestly or fraudulently. As was said by this court many years ago in a similar situation in the case of *Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 566, 88 S. W. 1011, 91 S. W. 20; "Any other view of the law would permit the retrial of the question whenever either party sees fit to tender the issue anew, and the final adjudications of the courts of competent jurisdiction would rest upon a slender thread."

WOOD *v.* WOOD.

5-2237 340 S. W. 2d 393

Opinion delivered November 28, 1960.

Martin, Dodds & Kidd, for appellant.

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

ED. F. MCFADDIN, Associate Justice. The Chancery Court granted Dr. Wood an absolute divorce; and Mrs. Wood in prosecuting this appeal lists two points:

I. Trial Court Erred by Denying Appellant the Right to Participate in the Trial.

II. There Was No Corroborative Testimony or Evidence Submitted to Sustain the Decree.

The correctness of appellant's position on the second point is so clearly determinative of the appeal that we discuss the second point at the outset.

A. *Lack of Corroboration.* Dr. Wood sought an absolute divorce on the claim that he and his wife had lived separate and apart for three consecutive years (the seventh ground stated in § 34-1202, Ark. Stats.). In a divorce action no complaint can be taken as confessed (§ 34-1207, Ark. Stats.). We have many cases which hold that in suits for absolute divorce there must be corroboration of the plaintiff's testimony. See *Sisk* v. *Sisk,* 99 Ark. 94, 136 S. W. 987; *Shelton* v. *Shelton,* 102 Ark. 54, 143 S. W. 110; *Arnold* v. *Arnold,* 115 Ark. 32, 170 S. W. 486; *Johnson* v. *Johnson,* 122 Ark. 276, 182 S. W. 897; *Fania* v. *Fania,* 199 Ark. 368, 133 S. W. 2d 654; *Gabler* v. *Gabler,* 209 Ark. 459, 190 S. W. 2d 975; and *Saugey* v. *Saugey,* 228 Ark. 110, 305 S. W. 2d 856.

In the light of the foregoing, we examine the evidence offered in the case at bar. Only two witnesses testified: one was the Clerk of the Chancery Court, who testified entirely as to pleadings, continuances, and such procedural matters. The testimony of this witness could not be claimed to have corroborated Dr. Wood in any way as to his ground for divorce. The only other witness was Dr. Wood. He testified most strongly in support of his case. But, the only corroboration offered was the *ex parte* affidavit of William Harris;[1] and this affidavit was offered as an exhibit to Dr. Wood's testimony. We have frequently held that affidavits cannot be used as in-

[1] This affidavit was on the stationery of the Veterans Administration Hospital, Perry Point, Maryland, dated March 2, 1960, and reads in full as follows: "TO WHOM IT MAY CONCERN: "This is to certify that Benjamin S. Wood, M.D. was appointed as a resident in Psychiatry in the Perry Point Veterans Administration training program on March 11, 1957 and that he served continuously in the Perry Point Program until September 4, 1959 at which time he was placed on detail to Little Rock, Arkansas.

To the best of my knowledge during Dr. Wood's stay at Perry Point he was never accompanied nor did he live with his wife, Barbara R. Wood.

Very truly yours,
/s/ W. M. Harris, M.D.
Assistant Director, Professional
Services for Education.

(Seal of Margaret M. Bell,
Notary Public, Cecil County, M.D.)
/s/Margaret M. Bell
My commission expires 5/1/61."

dependent evidence. *Western Union* v. *Gillis,* 89 Ark. 483, 117 S. W. 749; *Evans* v. *Farris,* 188 Ark. 83, 64 S. W. 2d 325. In *Johnson* v. *Johnson,* 122 Ark. 276, 182 S. W. 897, and again in *Gardner* v. *Gardner,* 142 Ark. 292, 218 S. W. 663, we specifically held that affidavits could not be received as independent testimony and as corroboration in a divorce case. In the last cited case we said:

"The ground urged here for reversal is that the decree was rendered on *ex parte* affidavits. The record sustains appellant in this contention, for it recites that the cause was heard on the affidavits of appellee and two other witnesses . . . Accepting the recitals of the record as true, which we should do on appeal, it is apparent that the decree was based solely on *ex parte* affidavits introduced in evidence, and it has been decided by this court that it is error to accept such character of evidence, and that it cannot be made the basis of a decree for divorce. *Johnson* v. *Johnson,* 122 Ark. 276."

There was no evidence to corroborate the testimony of the plaintiff; and the Chancery Court was in error in awarding Dr. Wood a decree for divorce. The Chancery decree is reversed, and the divorce is annulled.

B. *Disposition of The Case.* In order to do full justice to both parties and to give appellant an opportunity to defend any divorce case against her—a right she claims was denied her in this case—we have concluded that the Chancery Court should, and it is hereby directed to, dismiss the present case without prejudice. Then either party is free to institute a new case if so desired. All costs in the present case are taxed against the appellee, Dr. Wood.

George Rose Smith, J., not participating.

B. & M. LAND CO. *v.* STATE.

5-2255 340 S. W. 2d 395

Opinion delivered November 28, 1960.

J. H. Spears and *Burch, Porter, Johnson & Brown,* Memphis, Tenn., for appellant.

Bruce Bennett, Atty. General, by *John T. Haskins,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. This is a civil action brought by the prosecuting attorney to close the appellants' place of business, known as Danny's Club. Ark. Stats. 1947, §§ 34-111 *et seq.* This appeal is from a final judgment perpetually enjoining the appellants from operating a dance hall or road house upon the property but permitting it to be used for any other lawful business. The appellants contend that they should be permitted to operate a public dance hall, with proper safeguards to prevent its becoming a nuisance.

The prosecuting attorney's complaint charged that Danny's Club was being conducted in violation of the law, that intoxicants had been unlawfully consumed upon the premises by minors and others, and that affrays and

general breaches of the peace had been frequent. Upon the filing of the complaint the court issued a temporary order closing the place until a hearing on the merits. The appellants then filed a petition asking that the temporary injunction be modified to permit them to open and maintain a public dance hall in a lawful manner, with no intoxicating liquors being sold, consumed, or brought upon the premises.

At the final hearing the State introduced no testimony, as the defendants admitted that the State could, if necessary, produce witnesses to prove the allegations we have summarized. The principal appellants, Robert and Dan Trabish, described the manner in which they plan to operate their business if permitted to reopen. They intend to remove the tables from what has been a road house and to conduct the place solely as a public dance hall, featuring nationally known bands. Neither minors nor intoxicants would be permitted upon the premises, and the proprietors would co-operate with law enforcement officers in every way. The Trabishes testified without contradiction that their investment in the property is about $79,000 and that the building is not suitable for any use except that for which it was designed.

The case is not free from difficulty, but we have concluded that the order should be modified to permit the appellants to operate a public dance hall, with the safeguards described in their petition and testimony. In a proceeding of this kind we review the evidence as in a chancery case. *Alston* v. *State,* 216 Ark. 604, 226 S. W. 2d 988. In some cases we have approved orders perpetually enjoining the operation of a dance hall upon the property involved. *Foley* v. *State,* 200 Ark. 521, 139 S. W. 2d 673; *State* v. *Williams,* 222 Ark. 966, 264 S. W. 2d 417. On the other hand, in *Portman* v. *State,* 204 Ark. 349, 162 S. W. 2d 67, we sustained an order that prohibited gambling and the sale of intoxicants but permitted public dancing to continue. Each case must be determined upon its particular facts. We do not know, nor did the trial court know, how objectionable the operation of Danny's Club

has been in the past, as the State was not required to offer any proof. In view of all the circumstances we think the appellants should be given an opportunity to conduct their business in a lawful manner. If this attempt on their part should fail the State has a prompt and effective remedy through the institution of contempt proceedings. Ark. Stats., § 34-118; *Lawson* v. *State,* 226 Ark. 170, 288 S. W. 2d 585.

Modified and remanded for the entry of an order consistent with this opinion.

FEE *v.* LEATHERWOOD.

5-2198 340 S. W. 2d 397

Opinion delivered Nov. 28, 1960.

[redacted]

McMillen, Teague & Coates, by *Eugene F. Mooney, Jr.*, for appellant.

Robert B. Gibson, for appellee.

PAUL WARD, Associate Justice. In February, 1958, W. C. Leatherwood and B. C. Castleberry (appellees) filed a suit against appellants to quiet title to 342 acres of timber land located in Section 16, Township 13 South, Range 3 West, in Desha County. It was alleged that Leatherwood had acquired title to said lands by adverse possession for more than 7 years. Appellants lay claim to the land by inheritance from one Mamie Kone Fee, who was the fee owner of said land at the time of her death in 1931. Two of the appellants are the grandchildren of said Mamie Kone Fee and the other appellant is their mother, who was also the wife of the son of the said Mrs. Fee.

For clarity and convenient reference we divide the subject lands into three separate groups as set out below:

GROUP I. The South One-half of the Northeast Quarter, 80 acres; all of the Southeast Quarter of the Northwest Quarter east of the railway track and highway No. 65, approximately 30 acres.

GROUP II. The Southwest Quarter of the Northwest Quarter, 40 acres; all of the Northeast Quarter of the Northwest Quarter lying west of the said railway and road, 22 acres; all of the Southeast Quarter of the Northwest Quarter lying west of said railway and road, approximately 10 acres.

GROUP III. The North half of the Southeast Quarter, 80 acres; Southwest Quarter of the Southeast Quarter, 40 acres; Northeast Quarter of the Southwest Quarter, 40 acres.

At the conclusion of the trial the court confirmed the title in appellees to all of the land in Group III. Ap-

pellants have not appealed from this portion of the decree, and so these lands are no longer in litigation.

The title to the lands in Group II was quieted, subject to certain restrictions to be noted later, in Jane Day Fee (one of the appellants) to an undivided one-half interest, and in appellees to an undivided one-half interest. Appellants appealed from that portion of the decree giving only a one-half interest to Jane Day Fee, but appellees have not appealed from that portion of the decree giving a one-half interest to Jane Day Fee. We will later discuss appellants' appeal in this connection.

The trial court quieted title in appellees to all of the lands in Group I. The principal arguments of appellants are directed to a reversal of this portion of the chancellor's decree. To better understand the issues involved in this connection, it is necessary to set forth a summary of the factual background and portions of the testimony.

As heretofore stated the title to this 342 acres of timber land was held in fee by one Mamie Kone Fee, who died in 1931. Beginning about the time of her death and for several years thereafter all of the lands forfeited for taxes and were never redeemed. The forfeiture of the lands in Group III was by a valid description, but the remainder of the lands were described by an invalid description, being described only as a part of the North One-half of the Section. Mrs. Mamie Kone Fee, who died intestate, left surviving her one son, Edward S. Fee, Sr., who died intestate in 1942. Edward S. Fee, Sr., left surviving him his widow and a son and daughter, named Edward Fee, Jr., and Jane Day Fee, respectively. It is important to note that Jane Day Fee was born in 1937.

In 1931 Alex White moved onto the land and built a small house on the lands in Group I. It appears from the evidence that this house was perhaps surrounded by three or four acres of cleared land. In addition to this, White cleared and cultivated approximately thirty acres of land, but no definite description of this thirty acres is

contained in the record. In addition to the above, it appears that White also cleared and pastured an additional parcel of land consisting of approximately eleven acres, to which no definite description is in the record. Alex White was joined in this occupancy by a woman named Ella Williams. They occupied the lands together until 1945 or 1946 when White died. In the meantime a third party had bought the tax title to the forfeited lands and this party, by means of certain negotiations with Ella Williams, succeeded to her rights in the occupancy of the lands. Appellee, Leatherwood, derives his title through this third party. (It is noted here that Castleberry became a party to the suit and is now one of the appellees by virtue of the fact that he has a contract to buy the lands from Leatherwood.)

It is because of this adverse occupancy by Alex White and his privies for a period of 7 years (beginning in 1931) that Leatherwood now claims title to the lands in question. In addition to the occupancy of the lands by Alex White and Ella Williams, appellees and their privies entered upon the lands more than seven years before filing suit and have continuously occupied and improved all of it up until this time. This fact is not seriously controverted by appellants.

The above factual situation poses the following problems: (a) If the nature of the occupancy by Alex White and Ella Williams for the period from 1931 to 1938 or '39 was sufficient to vest title in them to all the lands in Group I then the Chancellor was correct in so holding. This would be true because Jane Day Fee would have no right which she could assert, since her father would have lost the land. (b) If, however, the adverse occupancy by White and Williams was not sufficient to extend to all of the lands but only to the lands to which they actually occupied (the home, the thirty acres and the eleven acres) then appellees would have to rely on "the latter period of adverse occupancy." In this event, however, Jane Day Fee would still have an existing interest in the lands because she had not reached the age of twenty-one when this

suit was filed, and the statute had not run against her. See: *Jackson* v. *Cole,* 146 Ark. 565, 226 S. W. 513.

(a) It is our conclusion that the Chancellor erred in holding that the adverse occupancy of White and Williams extended to all of the lands in Group I. It is conceded by appellees that White and Williams were not occupying the land under color of title and the record reflects that the lands in Group I were not enclosed by a fence. Except for the three parcels of land mentioned above, there is no showing of actual or pedal possession of the lands in Group I, by White and Williams. It was shown that White cut some timber and hauled if off in a wagon or cart, but it was not shown to have been continuous for seven years or that it was co-extensive with the land. Under these circumstances, there being no color of title, the occupancy of the said parcels of land did not extend to the rest of the lands in Groups I and II. The law in this respect is well settled.

In the case of *Bradbury* v. *Dumond,* 80 Ark. 82, 96 S. W. 390, 11 L. R. A. (N. S.) 772 the court said: "Color of title is not necessary to give title by adverse possession, *but it is necessary to extend the title acquired beyond the limits of the actual possession.*" (Emphasis supplied.) In the case of *Dickson* v. *Sentell,* 83 Ark. 385, 104 S. W. 148, the court was dealing with adverse possession based on an indefinite description, and the court said: "This description is so vague that it does not constitute color of title, so that possession of part will be considered possession of the whole." Likewise in the case of *Bailey, Trustee* v. *Martin,* 218 Ark. 513, 237 S. W. 2d 16, the court reaffirmed the rule in the *Bradbury* case *supra.* In *Cooper* v. *Cook,* 220 Ark. 344, 247 S. W. 2d 957, the court announced the rule in these words: "It is well settled by our decisions that while color of title is not necessary to give title by adverse possession, it is required to extend an actual possession of a part of a tract of land constructively over the rest of it. Thus the adverse possession of appellees in the case at bar is limited to the land they actually occupied."

(b) Appellants do not appear to seriously contend that the adverse occupancy of appellees and their predecessors for a period of seven years immediately before this suit was filed was not sufficient to give them title to all of the lands in Groups I and II including the three parcels actually occupied by White and Williams but, if so, we find from the record that such occupancy was sufficient. Nor can appellees successfully contend that such occupancy barred the rights of Jane Day Fee, who was not of age when the suit was filed. See: *Jackson* v. *Cole, supra.* It is contended however by appellants that since Jane Day Fee could successfully defend, her right to do so extends to her brother and mother. We cannot agree with this contention on the part of appellants since the lands in question were not a homestead, and since they were co-tenants. See: *Jackson* v. *Cole, supra* and 43 C.J.S. § 32 page 100. Furthermore this is not a suit to redeem.

From what we have said above we have reached the conclusions hereinafter set out. (1) Appellees' title should be quieted to the three parcels of land actually occupied by White and Williams. It will be appropriate however for the trial court, on remand, to see that these parcels are located and definitely described. (2) As to the remaining lands in Group I, Jane Day Fee should have her title confirmed to an undivided one-half interest, and likewise an undivided one-half interest in the same lands should be quieted in appellees. (3) For the reasons heretofore set out the trial court was correct in the disposition it made of the lands in Group II, and in refusing to make any award to the mother and brother of Jane Day Fee.

We mentioned heretofore that the trial court gave Jane Day Fee an undivided one-half interest in the lands in Group II with certain reservations. These reservations by the court were that Jane Day Fee took title "subject to the betterment and tax payments of the plaintiff." The court itself reserved this issue for future consideration. Also, in view of the charge which we have made in that portion of the decree dealing with the lands in Group I, the trial court should further consider the question of

"betterment and tax payments" pertaining to the lands in that group.

The decree of the trial court is therefore affirmed in the respects above indicated, and it is reversed in other respects as heretofore set out, and the cause is remanded for further proceedings relative to the matters heretofore mentioned.

GEORGE ROSE SMITH, J., not participating.

WARREN *v.* STATE.

4998 340 S. W. 2d 400

Opinion delivered November 28, 1960.

Richard W. Hobbs, for appellant.

Bruce Bennett, Atty. General, by *John T. Haskins,* Asst. Atty. General, for appellee.

JIM JOHNSON, Associate Justice. This is a criminal case. The action originated with the filing of an information against the appellant H. C. (Dusty) Warren in Garland County charging him with the crime of violating Amendment No. 10 of the Constitution of Arkansas. The information alleged that the appellant in his capacity as county judge did in and during the fiscal year of 1959, in violation of Amendment No. 10, make or authorize contracts and/or make allowances of claims in excess of the revenue from all sources for the said fiscal year in which the said contracts and/or allowances were made and that he did sign or issue script, warrants and/or make allowances in excess of the revenue from all sources for the fiscal year of 1959. A warrant was duly issued, the appellant was arrested, and allowed to make bond. The case was set for trial on June 20, 1960, and the appellant at that time entered a plea of not guilty to the charge. Trial was had before a jury which returned a verdict of guilty and assessed punishment at a fine of $500 with a recommendation that the fine be suspended.

Formal judgment and sentencing took place on June 24, 1960, and the trial court followed the recommendation of the jury and assessed a fine of $500 and suspended the fine but did formally remove the appellant from his office as county judge in accordance with the provisions of Amendment 10.

A motion in arrest of judgment was filed on June 24, 1960, and the same was overruled on that date. A motion for new trial was then filed; the court overruled that motion and granted an appeal to this Court.

Since this case arises out of an alleged violation of Arkansas Constitution, Article 12, Section 4, which was amended to its present form by Amendment 10, passed in 1924, we here set out the pertinent part of this Amendment as follows:

". . . The fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis, and no county court or levying board or agent of any county shall make or authorize any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made; nor shall any county judge, county clerk or other county officer, sign or issue any script, warrant or make any allowance in excess of the revenue from all sources for the current fiscal year; . . .

"Provided, however, to secure funds to pay indebtedness outstanding at the time of the adoption of this amendment, counties, cities, and incorporated towns may issue interest-bearing certificates of indebtedness or bonds with interest coupons for the payment of which a county or city tax in addition to that now authorized, not exceeding three mills, may be levied for the time as provided by law until such indebtedness is paid.

"Where the annual report of any city or county in the State of Arkansas shows that script, warrants or other certificates of indebtedness had been issued in excess of the total revenue for that year, the officer or officers of the county or city or incorporated town who authorized, signed or issued such script, warrants or other certificates of indebtedness shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in any sum not less than five hundred dollars nor more than ten thousand dollars, and shall be removed from office."

The evidence reveals that soon after appellant took office as County Judge of Garland County in January 1959, he purchased $80,000 worth of road machinery from Paul Goodwin and entered into a sales contract for the payments to be made over a two-year period. Regarding this purchase, appellant testified as follows:

"When I assumed office as county judge the road department had been closed down since the first of December until January 1. This was a cold spell and lots of

ice and snow. When I took office, it cost the county better than $4,000.00 to get the machinery started and took us about a month. In my opinion the county needed additional equipment because the county had progressed, there being new subdivisions and new roads and the demands of the people and to give the people service, I thought that they needed, I felt we needed more and better machinery.

"The county didn't have enough money then to purchase new equipment and the only way we could do it was to buy it on installments. New graders cost $23,000.00 each; we had seven graders and some of those we couldn't ever use so the only way I could work it out was on installments to be paid out of the state turnback. I entered into a contract for the purchase of some used equipment and some new equipment and the agreement was that the county couldn't pay cash and the payment would have to be made out of the state turnback and I authorized payments out of the county road fund and the warrants that were paid were paid out of the county road fund."

Because of the payments on the contract thus entered into by appellant, auditors with the County Audit Division of the State Comptroller's Office, while checking the Garland County records, found that claims for the payments on this contract were allowed and warrants of the county were written in 1960 which were for expenses incurred in 1959 (purchase of machinery). The amount of these warrants was charged back to the year 1959 thereby causing a deficit or overdraft for that year in the amount of $1,039.57. Odell Moudy, one of the auditors assigned by the Comptroller's Office to audit the books of Garland County, testified relative to their audit as follows:

"I kicked back certain claims which were allowed in 1960 to the year 1959 and these came under the heading of disbursements. The total amount of these claims I kicked back was approximately $20,000.00. I put them back in 1959 based upon what I thought the law was . . .

even though they were allowed in 1960. That is the rule followed in every county in Arkansas by my department. If you took the actual expenditures and disbursements of 1959, approved and allowed during that year, and forgot about 1960 there would be no deficits but $21,000.00 to the good . . ."

Applying the facts in this case to the prohibitions contained in Amendment No. 10, we must proceed on the premise that a portion of this amendment is a penal law and that part constituting a penal law is to be strictly construed. Key 241(1) Statutes, West's Digest.

In speaking of contracts such as appellant here entered into, this Court said in *Cook* v. *Shackleford,* 192 Ark. 44, 90 S. W. 2d 216:

". . . The only question for us to decide is whether contracts made, or indebtedness created in excess of the revenues from all sources for the years in which the contracts are made, are void.

"Amendment No. 10 has been construed by this Court many times and in the case of *Standfield* v. *Friddle,* 185 Ark. 873, 50 S. W. 2d 237, we said: 'The law may therefore be regarded as definitely settled that any contract entered into or allowance made in excess of the revenues of the year in which the contract was entered into, or the allowance made, is wholly void, and the issuance of any county warrants based thereon, adds nothing to their validity, as the warrants are also void.' "

Following the rule set out above, the contract for the purchase of machinery entered into by appellant in the case at bar was "wholly void" as were the warrants issued for payment on the same.

The provision of Amendment No. 10 relative to contracts made for the payments of amounts in excess of revenues from all sources for the year in which the contracts are made is separate and apart from the penal provisions under which the appellants was prosecuted.

The penal provision under which appellant was convicted refers only to the issuance of script, warrants or

other certificates of indebtedness in excess of the total revenues for the year. The Amendment refers to certificates of indebtedness as being in the nature of interest-bearing bonds. The contract in itself cannot be considered as a certificate of indebtedness. Here it is not shown that appellant issued script, warrants or other certificates of indebtedness in excess of the total revenues for the year 1959, as charged, and it is not shown that the paper be issued in 1960 exceeded the revenues for that year, nor is he charged with issuing excessive paper for 1960. Therefore, following the rule of strict construction and adhering to the prohibition against extending penal provisions to include that which is not by its plain language clearly included [Key 241(1), Statutes, West's Digest, *supra*] we reach the conclusion that the undisputed evidence shows appellant did not violate that part of Amendment No. 10 making it a misdemeanor to issue script, warrants or other certificates of indebtedness in excess of the total revenues for the year in which such paper is issued.

Reversed and dismissed.

HARRIS, C. J., concurs. MCFADDIN, J., dissents.

WELBORNE *v.* PREFERRED RISK INSURANCE CO.

5-2262 340 S. W. 2d 586

Opinion delivered December 5, 1960.

Little & Enfield, J. R. Crocker and *J. F. Robinson,* for appellant.

Dickson, Putnam & Millwee, Wright, Lindsey, Jennings, Lester & Shults, for appellee.

CARLETON HARRIS, Chief Justice. This appeal results from a decree entered by the Chancery Court wherein the complaint of appellant seeking specific performance of an alleged agreement, was dismissed for want of equity.

Suit was instituted by appellant on May 28, 1958, seeking to enforce alleged rights under a pre-incorporation subscription offer executed by him in favor of appellee on March 31, 1954. Prior to this time, Welborne was a stockholder and member of the Board of Directors of Preferred Risk Mutual Insurance Company. On the aforesaid date, the mutual insurance company was converted to its present status as a stock company, and known as Preferred Risk Insurance Company. Appellant was a stockholder, and served as an officer and director in the company until May 26, 1956, when he resigned from the Board of Directors. He remained an employee of appellee until February, 1957, and, as of February 27th of that year, sold all shares that he owned in the company. The subscription agreement entered into on March 31, 1954, is as follows:

"WHEREAS, it is the desire of the undersigned to purchase 1,000 shares of common stock, par value Ten Dollars ($10.00), in an insurance corporation to be known as the Preferred Risk Insurance Company.

NOW, THEREFORE, BE IT AGREED AS FOLLOWS: That for and in consideration of the agreement of the undersigned to purchase the aforesaid shares of stock, and for and in consideration of the mutual promises of other subscribers to additional shares of common stock in said corporation to be formed, that the undersigned agrees to purchase from said corporation the above stock, on demand of said corporation."

The stock structure of the appellee is reflected by the minutes of the meetings of the Board of Directors. On June 30, 1954, a motion was unanimously passed by the Board providing that stock subscribed to at $20 a share prior to the organization of the company, be delivered before July 20, 1954, to those paying said purchase price,[1] and that no further stock be sold at this price without further authorization of the Board of Directors. Appellant was present at this Board meeting. In subsequent meetings, par value of stock was reduced from $10 to $1 per share, and the Board unanimously passed a motion that stockholders of record as of May 1, 1956, be offered one share of stock for each three shares held, the $1 par value stock to be offered for $2.50 per share. The record reflects that appellant bought 1,200 shares of this stock, apparently at the offered price of $2.50 per share. The Board, on May 23, 1956, with appellant present, unanimously voted to offer a public issue of stock at $15 per share (par value $1) and a motion was also passed unanimously providing "that all holders of rights or options to purchase stock be notified that any such right to purchase stock below the Public Issue price shall be void and of no effect after June 30, 1956." Sometime during this year, the subscription instrument was returned to Welborne, according to W. M. Ritter, president of the company, at appellant's request. In

[1] Originally, the par value of the stock was $10 per share, but the initial subscribers agreed to pay $20 per share.

June, 1957, a stock dividend on the basis of two shares for each outstanding share was declared. On March 25, 1958, Ritter directed a letter to Welborne, stating that the Board of Directors had voted to make demand upon each subscriber for the amount of stock subscribed, at $7.50[2] per share for the $1 par value stock. The letter states:

"Your subscription was for 10,000 shares, therefore the amount necessary to carry it out would be 10,000 x $7.50. The other alternative provided by the Resolution is that you release the subscription by signing the attached release.

We presume that you will not want to complete the subscription and therefore ask that you sign and return three copies of the attached release by return mail."

Welborne replied as follows:

"Pursuant to your demand of March 25, 1958, I hereby tender you $10,000.00 in cash and request that your company in return issue to me 30,000 shares of $1.00 par value common stock of the Preferred Risk Insurance Company as per my subscription agreement signed by me on the 31st day of March, 1954."

Appellee declined to accept this proposition, and suit followed.

Appellant contends that the subscription was a contract which he is entitled to enforce by specific performance, and appellee asserts five different defenses. We deem a discussion of the various contentions advanced by the parties to be unnecessary, in view of the fact that we consider this litigation to be controlled by the doctrine of laches. This defense is closely associated with estoppel, upon which doctrine the Chancellor's decision was predicated, and we might here say that this is likewise a valid defense in this case.

Laches is defined by Bouvier's Law Dictionary (Third Revision) as "unreasonable delay; neglect to do

[2] Apparently the price for the public issue had been reduced from $15 to $7.50.

a thing or to seek to enforce a right at a proper time." Also, "The neglect to do what in law should have been done, for an unreasonable and unexplained length of time, and under circumstances permitting diligence." Appellant's right to purchase common stock came into being in March, 1954. The record does not reflect the reason for appellant's failure to exercise this right at that time, or in the subsequent months and years, though appellant, as a stockholder, officer, and director, in the company, was familiar with, and had participated in, the various board meetings heretofore enumerated; no effort was ever made to enforce any purported rights under the subscription until the letter was received from President Ritter. This letter cannot be relied upon by appellant, for it was written without authority; *i. e.*, the record reflects no authorization from the board for the proposition contained in the letter. For that matter, this proposal was entirely different from the terms of the original subscription, and, as earlier mentioned, according to the record, the subscription instrument had already been reclaimed by Welborne sometime in 1956.

It is at once apparent that enforcement of Welborne's claim would be most inequitable, for it would permit appellant to stand by for an unreasonable and unexplained length of time (four years), and as far as this record reflects, under circumstances permitting diligence—yet, glean high profits through such conduct.[3] We consider the language in *Austin* v. *Hallmark Oil Co.*, 21 Cal. 2d 718, 134 P. 2d 777, to be entirely apropos:

[3] Appellee, in its brief, states: "It would be a monstrous result if the law were such that a person could remain mute for more than four years and obtain 30,000 shares of $1.00 par value stock having a public sale price of $225,000.00 (*i.e.*, $7.50 per share) upon payment of the mere sum of $10,000.00." In his reply, appellant states: "The stock of Preferred Risk Insurance Company is not listed for sale on any exchange. Its value depends on finding a buyer and dealing with him on whatever price he is willing to pay. There was no showing in the record of the number of shares which have been sold by appellee at $7.50 per share or at any other price. Appellee's contention that the stock in litigation here is worth $225,000.00 is a mere fantasy * * *." Irrespective of the accuracy of appellee's statement, it is obvious that the stock has increased considerably in value.

"It is not appropriate to grant specific performance of a subscription contract when the complainant, instead of paying for the stock subscribed to at the time the corporation is in great need of funds, does not offer to pay until the success of the venture undertaken by the corporation is assured."

As stated in 49 American Jurisprudence, under the heading "Specific Performance", § 73, p. 89:

"The well-established equitable principle that equity aids the vigilant and refuses to help those who sleep on their rights to the prejudice of the party against whom relief is asked is fully applicable to parties seeking specific performance of contracts. It is universally recognized that inexcusable laches or default on the part of the party seeking such relief will be a sufficient ground for the denial of the relief. * * * Laches is less excusable in regard to certain classes of property than others. For example, promptness in seeking specific performance is especially required in reference to contracts involving property likely to fluctuate suddenly in market value."

Also, from § 76, page 93:

"A common consequence of delay is a change in value of the property which is the subject of the contract, and where this has taken place the courts will usually decline to enforce specific performance. This rule is especially applicable where the complainant has laid by apparently for the purpose of taking advantage of the change in value. Equity will not relieve one guilty of gross delay who has lain by until events enabled him to make his election as to completing the contract with certainty of advantage to himself. Equity will not enable a party to speculate upon the advantage of a contract by permitting him to hold back from the assertion of his rights until it is clear that the contract is to his advantage, and then allow him to have specific performance, and thus encourage delays and favor speculation in possible changes in value. * * * Promptness on the part of the complainant in seeking enforce-

ment or in performing his part of the contract seems to be especially necessary in the case of property which is particularly subject to fluctuation, such as corporate stock."

In *Lacey* v. *Bennett,* 210 Ark. 277, 195 S. W. 2d 341 (1946), appellant entered into a contract on January 5, 1942, for the purchase of real property, but did nothing to assert his rights until September 9, 1945, when he sought specific performance in a cross-complaint, after Bennett had instituted suit to quiet title. In upholding the trial court's decree refusing specific performance, this Court quoted from 65 A. L. R., page 53, as follows:

"To secure the aid of equity in enforcing the performance of a contract, it must be made to appear that the plaintiff or complainant has been prompt, ready, able, and eager to perform and abide by the same. If he has failed or refused to claim or act under the contract for such a length of time as to give the impression that he has waived or abandoned the sale or purchase, especially if circumstances justify the belief that his intention was to perform the contract only in case it suited his interests, he will be denied this equitable relief. The rule that, to be entitled to the specific performance of a contract, the party seeking such relief must show that he has been at all times ready, able, and willing to perform on his part, is quite universally recognized in holding that inexcusable laches or default on the part of the party seeking such relief will be a sufficient ground for the denial of the relief."

Affirmed.

Opinion delivered December 5, 1960.

C. E. Yingling, Jr. and *Lloyd Henry,* for appellant.

Odell Pollard and *W. R. Hastings, Jr.,* for appellee.

J. Seaborn Holt, Associate Justice. This is a zoning ordinance case. The appellant, Economy Wholesale Company, Inc., filed for a building permit under Zoning Ordinance 353 of the City of Searcy to build a business building in block 24 which was classified as R-1, residential. The building was to be of modern architectural design and constructed of concrete blocks and brick. The premises were to be landscaped and no parking allowed in front of the building. The appellees, Dr. Porter Rodgers and others, filed a protest declaring that the issuance of such a permit would decrease the value of the property in the immediate vicinity for residential, church, and school purposes. Pursuant to the terms of the ordinance, a public hearing was held and at the conclusion of the hearing the city council voted to grant the permit to the appellant. The appellees filed suit in the chancery court praying for a temporary injunction and cancellation of the building permit. This was granted by the lower court. At the final hearing of the matter which extended over a three month's period during which time many exhibits and voluminous testimony were offered, the lower court issued its order, cancelling the permit and permanently enjoining the appellant from proceeding further with the construction of any building upon the property. This appeal followed.

Although numerous points are relied upon for reversal, they may be summarized in two. First, did the city council have the authority to issue the permit and, second, if it did, was there an abuse of discretion in issuance of the permit.

As to the first point, we think the city council did have the authority to issue the permit. Under Zoning

Ordinance 353 the city council is vested with the authority to issue or not to issue such building permits as it deems advisable after a public hearing. Section 4 of the Ordinance states:

"That any such petition (opposing issuance of permit) so filed shall be referred by the City Recorder to the City Council of said City and said City Council shall, at the next regular meeting following said ten day period, conduct a hearing upon the application for a permit and the petition against such permit, at which hearing the applicant and petitioners may be present. At the conclusion of such hearing the City Council may issue or refuse to issue such permit."

Under the above provision of the ordinance the city council, after a public hearing, may, as it did in this case, issue a permit for the construction of a commercial building upon property previously zoned for residential purposes. This is the same procedure as that contained in the ordinance which we approved in *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321. We cannot agree with the appellees' insistence that Section 4 of the ordinance, above quoted, is deficient in failing to set forth standards by which the city council is to be guided in issuing permits for non-conforming uses. Since the council itself issues the permit it would obviously be free to amend or repeal any standards previously adopted for its own guidance. The protesting property-owners are amply protected against arbitrary action on the part of the city council by that provision of the statute giving a right of appeal to the chancery court. Ark. Stats., § 19-2806.

The appellees also argue that Section 4 of the ordinance, above quoted, has been repealed either by Ordinance 367, establishing a city planning commission, or by Ordinances 399 and 400, approving certain plans submitted by the planning commission. We find no merit in either contention.

By its original zoning ordinance the city council elected to reserve to itself the power to issue permits

for non-conforming uses, rather than to delegate that power to a subordinate commission as it had the option of doing under the statute. Ark. Stats., § 19-2806. Later on, in 1956, the city council passed Ordinance 367, pursuant to Act 108 of 1929, and by that ordinance the council created a city planning commission. The appellees now argue that Ordinance 367 by implication repealed Section 4 of the original zoning ordinance and therefore vested in the planning commission the authority to grant permits for nonconforming uses. We think it plain, however, that there was no inconsistency between the two ordinances and therefore no repeal by implication. Ordinance 367 created a planning commission pursuant to the provisions of Act 108 of 1929, so that the commission might discharge the duties imposed upon it by that statute. Ark. Stats., §§ 19-2811 *et seq.* The discharge of those duties by the planning commission is not repugnant to the city council's reserved power to issue building permits, and consequently there is lacking the irreconcilable conflict between the two ordinances that would be essential to a finding of an implied repeal. "The courts have always leaned against repeals by implication, and subsequent laws do not abrogate prior ones unless they are irreconcilably in conflict." *Kendall* v. *Ramsey,* 179 Ark. 984, 19 S. W. 2d 1020.

Neither can we say that Section 4 of Ordinance 353 was repealed by Ordinances 399 and 400. These ordinances merely approved a land-use plan and related plans submitted to the city council by the city planning commission, pursuant to Act 186 of 1957. Ark. Stats., §§ 19-2825 *et seq.* The land-use plan, which was introduced in evidence, is plainly not a zoning ordinance. It is merely a broad declaration of policy, specifying in a general way the uses to which the land in and near the city is now being put and to which it may be put in the future. The plan does not contain exact descriptions so that a property owner may ascertain what restrictions are being placed upon his land. Indeed, the land-use plan contains none of the details that are essential to a zoning ordinance. The statute itself contemplates that

the land-use plan will be put into effect through the adoption of a subsequent zoning ordinance. Section 5 of Act 186 is entitled "Implementation of Plans," and provides in part: "Following adoption and filing of the land use plan, the planning commission may prepare for submission to the legislative body [city council] a recommended zoning ordinance for the entire area of the municipality." Ark. Stats., § 19-2829. It is undisputed that the city council of Searcy has not yet approved a zoning ordinance submitted by its city planning commission. It follows that the original zoning ordinance, under which the council acted in the case at bar, is still in full force and effect.

The only remaining question then is, has the city council acted unreasonably and arbitrarily. We hold that it did not. Photographs, plans, and traffic flow patterns introduced as exhibits, as well as the testimony, all show that the area, during recent years due to growth of the city and increased traffic, has become more and more desirable for use as commercial property and less and less as residential although the area in question contains a number of very fine and valuable homes. The property here involved fronts on East Race Street which the evidence discloses has the heaviest traffic count in the city. In fact, numerous businesses had been built in the area in question before any zoning was enacted. It should also be noted that the property in question is only a block from property zoned commercial. Several witnesses testified that the city was growing in the direction of East Race Street and the mayor testified that it was felt by the city council that the council should not impede the growth of the city and voted to issue the permit. We have held that we would not set aside the findings of a city council unless we find that the facts clearly show that the council acted unreasonably and arbitrarily. To do so would "be substituting our judgment for that of the zoning authorities who are primarily charged with the duty and responsibility of determining the question." *McKinney* v. *City of Little Rock,*

201 Ark. 618, 146 S. W. 2d 167. In the case of *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321, we said:

"As we have said it is to be presumed that the council in exercising the power conferred on it acted in a fair, just and reasonable manner and its action in the instant case indicates that the power to grant or to withhold permission to erect a forbidden structure in the restricted area was vested in the council. . . .

". . . (A)nd its action is final unless we can say that the council abused its discretion. But this discretion in so far as a discretion abides is vested in the council charged by law with the duty of passing on the question, and does not rest in the courts which review the council's action.

"The question is not what a member of the court might decide if the question were submitted to him as a matter of discretion, but rather is whether it can be said that the council abused its discretion and we may not say that was the case unless the fact clearly appears."

The language of this court in *Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 823, is applicable here:

"There is substantial evidence tending to show that the value of some of the adjacent residence property will be depreciated on account of the lessening of usable value of the property for residence purposes, but we do not think that this affords justification for interfering with the gradual expansion of the business district, which has already been established. As the size of the business district grows, it ceases to be a residence district to that extent within the purview of the zoning ordinance. . . ."

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

SOUTHERN FARM BUREAU CASUALTY INS. CO. *v.* PARKER.

5-2230 341 S. W. 2d 36

Opinion delivered December 5, 1960.

[Rehearing denied January 9, 1961.]

Hardin, Barton & Hardin, Charles R. Garner, for appellant.

Jeff Duty, for appellee.

ED. F. MCFADDIN, Associate Justice. In this case, the insured sued his insurance carrier to recover damages for failure of the insurance carrier to settle a lawsuit against the insured which could have been settled within the limits of the insurance coverage. The insured recovered judgment in the Trial Court, and the insurance carrier brings this appeal.

C. H. Parker, appellee, carried motor vehicle liability insurance with the appellant, Southern Farm Bureau Casualty Insurance Company (hereinafter called "Insurance Company"); and the limit of the coverage was $5,000.00 for injury to one person. In October, 1955, Parker, while driving his insured vehicle, was involved in a traffic mishap with a vehicle owned and driven by D. E. Rush; and Rush's 19-year-old son, Roy D. Rush, was injured in the mishap. Very little damage was done to either of the vehicles; but Roy D. Rush sued Parker for $25,000.00 for personal injuries. The Insurance Company defended—as it was required to do—the case of *Rush* v. *Parker*; and trial resulted in a verdict and judgment against Parker for $12,500.00. Parker then retained personal counsel, who settled the Rush judgment for $6,500.00, with Parker paying $1,500.00 and the insurance company paying $5,000.00 as the limit of its coverage. Parker then brought the present damage action against the Insurance Company to recover the $1,500.00 he had paid to settle the Rush judgment. The complaint in the present case contained the following allegations:

"That the said Roy D. Rush, through his attorneys, made an offer of compromise to the defendant company prior to the trial of said cause. That said offer was in the amount of $4,000.00. That this plaintiff begged and insisted that said compromise settlement be made and entered into. That the defendant company ignored said offer and refused to make such settlement. . . .

"Plaintiff states and alleges that good faith demanded that the defendant company settle said case for the offered amount of $4,000.00. . . .

"Plaintiff alleges that the acts of the defendant company in this case amounted to bad faith and negligence and that this plaintiff was forced to, and did, pay the sum of $1,500.00 on account of said negligence and bad faith of the defendant company."

As aforesaid, trial in the present case resulted in a verdict and judgment in favor of Parker for $1,500.00; and on this appeal the Insurance Company urges two points:

"1. The verdict and judgment are not supported by the evidence and are contrary to appellee's theory of the lawsuit.

"II. The Court erred in refusing to give defendant's requested instructions."

I. *The Evidence.* The testimony is in sharp dispute on several issues, particularly as to what Parker insisted the Insurance Company should do in regard to settling the Rush lawsuit in advance of trial. "On appeal from a judgment based on a jury's verdict, the evidence must be given the strongest probative force in favor of the successful party that it will reasonably bear." *Albert* v. *Morris,* 208 Ark. 808, 187 S. W. 2d 909. This means that we state the evidence favorable to the contentions of Appellee Parker bearing on the matter of failure of the insurance company to settle. The facts showed: (a) that Parker lived in Benton County and Roy D. Rush and his father lived in Washington County; (b) that Roy D. Rush filed the damage suit against Parker in the Circuit Court of Washington County; (c) that Parker immediately contacted the Insurance Company and gave full cooperation to the Insurance Company; (d) that Parker at all times stated that he gave no manual or directional light signal before undertaking a left turn; (e) that while Parker was making, or had undertaken to make, a left turn, the Rush vehicle had the collision with the Parker vehicle; (f) that Roy D. Rush was a polio victim and it was realized that his appearance would arouse jury sympathy for him;

(g) that the Insurance Company knew that one physician stated that Roy D. Rush sustained permanent injuries in the traffic mishap; (h) that the local attorney[1] for the Insurance Company in Benton County, after investigation and on his own authority, offered Roy D. Rush $3,000.00 to settle the lawsuit; (i) that Rush's attorney refused the $3,000.00 offer but agreed that the case could be settled for $4,000.00;[2] (j) that Parker ". . . begged and insisted . . ." that the Insurance Company settle the case in advance of a trial; (k) that Parker was advised by the Insurance Company that Parker had no control of the litigation; (l) that the local attorney for the Insurance Company duly notified the State Office of the $4,000.00 offer; (m) that the Insurance Company did not reply to the local attorney; and (n) that even after the $4,000.00 offer was communicated, the State Claims Manager[3]

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[1] The local attorney for the Insurance Company in Benton County is a reputable high-class attorney, and nothing herein reflects on his ability or integrity.

[2] The $4,000.00 offer was contained in a letter from Rush's attorney to the local attorney for the Insurance Company, dated April 18, 1956, and the letter reads as follows:

"The above case has been set for trial in Circuit Court here on Monday, May 21, 1956. We understand that the Clerk will notify you to this effect but we thought that we should inform you so that there will be no misunderstanding as to the date it has been set for trial. We are anxious to try this case as soon as possible.

"If your client is still interested in settling this case, I believe that our client would be willing to accept $4,000.00 in settlement thereof, if settlement is effected before we go to further expense and trouble in preparation of the case for trial. The offer you made of $3,000.00 was not enough. While I do not think that the amount herein suggested would be adequate compensation for the injuries sustained by this young man, in order to get the matter settled soon without the necessity of a trial, I believe it could be settled for $4,000.00. Otherwise, it is our plan to be ready to try this case on May 21, 1956."

[3] Here is the testimony of the State Claims Manager of the Insurance Company:

"Q. Did you put as your top valuation in the case the sum of three thousand dollars for the purpose of settling?

A. It would certainly be complete tops as far as I was concerned . . .

Q. Yes, sir. Now, I believe you've also testified that under no circumstances would you have agreed or did agree to anything over three thousand?

A. I believe what I said, I felt in my opinion that was the top settlement.

Q. That was the top settlement you would permit Mr. Little or any-

of the Insurance Company considered $3,000.00 as the greatest offer to make, even though he had all the reports heretofore mentioned. As aforesaid, the facts were not undisputed, but we have detailed enough to make applicable the hereinafter stated rules of law.

II. *The Law.* Among other instructions, the Court gave the jury the following:

I.

"Before the plaintiff can recover, it is necessary that the plaintiff show by a preponderance of the evidence each of the following four elements:

"1. That the claim of Roy D. Rush against the plaintiff growing out of the automobile collision on October 8, 1955 could have been settled within the $5,000.00 limit of the policy.

"2. That the plaintiff made due demand upon the defendant to settle said claim within the limits of the policy prior to the trial of the case on May 29, 1956 and the defendant refused or failed to settle.

"3. That the plaintiff, as a result of the trial on May 29, 1956, was forced to pay to Roy D. Rush the sum of $1,500.00 over and above the $5,000.00 limit of the policy which was paid by the defendant.

"4. That the action on the part of the defendant in refusing to settle the claim of Roy D. Rush within the limits of the policy when requested to do so by the plaintiff was negligence."

II.

"You are instructed that due care, or negligence, as used in these instructions, means the doing of something in conduct of one's business affairs that an ordinary prudent person would not do under the same or similar circumstances, or the failure to do something

body else to agree to settle on; is that right?
A. That's correct."

in the conduct of one's business affairs that a person of ordinary prudence would do under the same or similar circumstances."

Specifically, the appellant insists that the Court instructed on the wrong rule—*i. e.,* negligence—instead of the "bad faith" rule. This contention makes it necessary that we consider holdings in other jurisdictions, because we have no case in Arkansas that commits us exclusively to either the "negligence" rule or the "bad faith" rule. In *American Mut. Liability Ins. Co.* v. *Cooper,* 61 F. 2d 446, Judge Bryan of the Fifth Circuit, made this clear statement:

"It is well settled in cases of limited liability insurance that the insurer may so conduct itself as to be liable for the entire judgment recovered against the insured, although that judgment exceeds the amount of liability named in the policy. But the courts that have considered the question are not in agreement as to the nature and kind of proof which it is incumbent upon the insured to make in an action against the insurer for the excess which the insured has been compelled to pay over the amount named in the policy. Some of these cases hold that the insured is entitled to recover upon proof that the insurer in refusing to settle a claim for damages covered by the policy was guilty of *negligence.* (Cases cited.) Other decisions impose a heavier burden upon the insured, and deny recovery unless he can show that the insurer in refusing to make settlement acted in *bad faith.* (Cases cited.)" (Emphasis supplied.)

Some courts allow recovery on the rule of *"bad faith"*, while other courts allow recovery on the less stringent rule of *negligence.* We see no occasion to align Arkansas exclusively with either of these, because we take the same view as did the Supreme Court of Alabama in *Waters* v. *American Cas. Co.,* 261 Ala. 252, 73 So. 2d 524:

"This question, presented here, has not been previously decided by this Court. We are aware that in cases of this nature courts generally hold that there may be liability on the part of the insurer for the excess of the judgment above the policy limits, but there is a division among them as to whether the liability of the insurer is based on (1) the rule of bad faith or (2) the rule of negligence. 131 A. L. R. 1500; 71 A. L. R. 1485; 43 A. L. R. 329; 37 A. L. R. 1484; 34 A. L. R. 750; 45 C. J. S., Insurance, § 936, p. 1069; 8 Appleman Insurance Law and Practice, Sections 4712 and 4713. We hold that there may be liability under both rules and properly drawn counts based either on negligence or bad faith should be held good, and separate counts, one charging negligence and one charging bad faith may be joined in the same complaint."[4]

In the case at bar the complaint, as previously copied, contained allegations both as to bad faith and as to negligence; but when the plaintiff asked his instructions he limited them to the rule of negligence. We see no error in so doing.[5] The Insurance Company owed Parker, as its insured, the duty to act in good

[4] The Supreme Court of Alabama has reaffirmed this holding of liability of the insurance carrier on either negligence or bad faith. See *Ala. Farm Bureau Ins. Co.* v. *Dalrymple*, 270 Ala. 119, 166 So. 2d 924.

[5] In 40 A.L.R. 2d 168 there is a splendid annotation entitled: "Duty of liability insurer to settle or compromise." Cases from many jurisdictions are cited. We have examined them all; but we list the following as those worthy of study, in addition to the cases cited in this opinion: *Noshey* v. *American Auto. Ins. Co.* (6th Cir.), 68 F. 2d 808; *Maryland Cas. Co.* v. *Cook-O'Brien Const. Co.* (8th Cir.) 69 F. 2d 462; *Ballard* v. *Citizens Cas. Co.* (7th Cir.), 196 F. 2d 96; *Auto Mutual Indemnity Co.* v. *Shaw* (Fla.), 184 So. 852; *Stowers Furn. Co.* v. *American Indemnity Co.* (Tex.), 15 S. W. 2d 544; *Wilson* v. *Aetna Cas. & Surety Co.* (Maine), 76 A. 2d 111; *Dumas* v. *Hartford Accident & Indemnity Co.* (N.H.), 56 A. 2d 57; *Henke* v. *Iowa Mut. Cas. Ins. Co.* (Iowa), 97 N. W. 2d 168; *Abrams* v. *Factory Mutual Liability Ins. Co.* (Mass.), 10 N. E. 2d 82; *Best Bldg. Co.* v. *Employers Liability Assurance Corp.* (N.Y.), 160 N.E. 911; *Hoyt* v. *Factory Mut. Lia. Ins. Co.* (Conn.), 179 A. 842; *National Mut. Cas. Co.* v. *Britt* (Okla.), 200 P. 2d 407; *Burnham* v. *Commercial Cas. Ins. Co.* (Wash.), 117 P. 2d 644; and *Johnson* v. *Hardware Mut. Cas. Co.* (Vt.), 187 A. 788. There are also notes involving matters allied with the question here at issue and found in 7 Ark. Law Review, p. 142; 10 Ark. Law Review, p. 138; and 11 Ark. Law Rev. p. 26. See also Am. Jur. 29A, p. 556, § 1444 *et seq.*; 45 C.J.S. 1069, "Insurance" § 936; and Appleman on Insurance, Vol. 8, § 4712 *et seq.*

faith, *and also* the duty to act without negligence. Appellant complains bitterly of the failure of the Court to give its instructions on the "bad faith" theory; and says that in *Home Indemnity Ins. Co.* v. *Snowden,* 223 Ark. 64, 264 S. W. 2d 642, we approved instructions that contained the idea of bad faith. We are here considering a factual situation entirely different from that in *Insurance Co.* v. *Snowden.* There, the insurance company refused to admit any unconditional liability; and the insured settled with the injured parties in advance of any trial and sued the insurance company for the amount of the settlement. Here, the Insurance Company all the time admitted to its insured full liability to the extent of the coverage, but failed to effect settlement within such limits. Even though we approved instructions on the bad faith rule in the Snowden case, it still does not preclude us from allowing a recovery on either theory, just as did the Supreme Court of Alabama. It may be negligence to refuse to settle, even though the negligent person may be acting in good faith. One may in good faith make an honest mistake which hurts another, and still be liable for negligence in making the mistake even though no harm was intended.

In *American Fidelity & Cas. Co.* v. *Nichols,* 173 F. 2d 830, Judge Orie Phillips of the Tenth Circuit, used this language:

"When a liability insurance company by the terms of its policy obtains from the insured a power, irrevocable during the continuance of its liability under the policy, to determine whether an offer of compromise of a claim shall be accepted or rejected, it creates a fiduciary relationship between it and the insured with the resulting duties that grow out of such a relationship. Under policies like those here involved, the insurer and the insured owe to each other the duty to exercise the utmost good faith. While the insurance company, in determining whether to accept or reject an offer of compromise, may properly give consideration to its own

interests, it must, in good faith, give at least equal consideration to the interests of the insured and if it fails so to do it acts in bad faith."

See also *Johnson* v. *Hardware Mutual Cas. Co.,* 108 Vt. 269, 187 A. 788.

In the case at bar the policy which the Insurance Company issued to Parker provided that the Insurance Company would defend any suit—". . . but the company shall have the right to make such investigation, negotiation, and settlement of any claim or suit as may be deemed expedient by the company. . . ." By this language the Insurance Company became a fiduciary to act, not only for its own interest, but also for the best interest of Parker. The Supreme Court of South Carolina, in *Tyger River Pine Co.* v. *Maryland Casualty Co.,* 170 S. C. 286, 170 S. E. 346, used this language:

"The charge that it was the duty of appellant to compromise the claim if that was the reasonable thing to do is supported by authority.

"In the annotation of the case of *U. S. Casualty Co.* v. *Johnston Drilling Co.,* (161 Ark. 158, 255 S. W. 890), 34 A. L. R. 727, it was said: 'It has been held that an insurer against liability for accidents which assumes the duty of defending a claim owes the assured the duty of settling the claim if that is the reasonable thing to do.' Citing: *Cavanaugh Bros.* v. *General Accident F. & L. Assur. Corp.,* 79 N. H. 186, 106 A. 604."

After a thorough review of the record we reach the conclusion that no error occurred in the trial prejudicial to the appellant.

Affirmed.

HALBROOK *v.* HALBROOK.

5-2223 341 S. W. 2d 29

Opinion delivered December 5, 1960.

[Rehearing denied January 9, 1961.]

[redacted]

Lovell & Evans, for appellant.

No brief filed for appellee.

GEORGE ROSE SMITH, J. This is an appeal from an order by which the circuit court refused to grant the appellant a new trial upon the ground of newly discovered evidence. Since the appellant concedes that

his motion was addressed to the trial court's sound discretion the only question is whether there was an abuse of that discretion.

The dispute grew out of an oral transaction by which the appellee, Ellery Halbrook, sold and delivered thirty-five head of cattle to his brother Archie, the appellant, for an agreed price of $3,500.00. Ellery's suit to recover the purchase price was defended by Archie on the ground that the money had been paid. At the trial Archie testified that he paid his brother in cash, without taking a receipt, while Ellery testified that he had received nothing. The decisive issue of fact was submitted to a jury, which returned a verdict for Ellery, the plaintiff.

The appellant, in his motion for a new trial, asserted that after the entry of the judgment he discovered that his brother Ellery had engaged in a conversation in a barber shop several months before the trial and had then said in the presence of three named witnesses that he had sold his cattle too cheaply but there was nothing he could do about it, as Archie had paid him for the cattle. The motion was supported by affidavits of the three witnesses.

At a hearing upon the motion two of the affiants were called as witnesses. One of them testified in conformity with his affidavit, but the other, upon being questioned by the court, was not sure whether Ellery had mentioned payment in the conversation or had merely said that he had sold the cattle too cheaply. In denying the motion the circuit judge indicated that he considered the newly discovered evidence to be cumulative and doubted if this proof alone would change the result of the first trial.

We are not willing to say that the circuit court abused its broad discretion in the matter. Our pertinent cases are cited and discussed in a comment appearing at 4 Ark. L. Rev. 60. There the authors point out that a motion of this kind is not favored by the courts, owing to the manifest disadvantages in allowing the

losing litigant a second trial after he has been afforded a fair opportunity to present his proof at the original hearing. Before granting such a motion the trial court should be convinced, among other things, that an injustice has been done, that the newly found evidence is not merely cumulative to that produced at the first trial, that the proof was not discoverable through the exercise of due diligence, and that the additional testimony will probably change the result.

There are two reasons for our reluctance to disagree with the circuit judge in this case. First, he had the advantage not only of having heard the testimony at the original trial but also of hearing two of the new witnesses at the hearing upon the motion. In the latter respect the case differs from *Medlock* v. *Jones,* 152 Ark. 57, 237 S. W. 438, where there was apparently no hearing upon the motion, so that its allegations stood undisputed. Here the trial judge, after observing the demeanor of the newly found witnesses, did not feel that their testimony would change the outcome of the case.

Secondly, the new testimony was to some extent of a cumulative nature. "Cumulative evidence is such as tends to support the fact or issue which was before attempted to be proved upon the trial." *Olmstead* v. *Hill,* 2 Ark. 346, 353. At the original trial the defendant attempted to prove the same fact that is involved in his present motion—that Ellery had stated to a third person that he had been paid for the cattle. The witness Hilton was called by the defendant for the purpose of so testifying, but he proved to be a disappointment in that he failed to testify as counsel had expected. In this situation, where a party's attempt to prove a particular fact has unexpectedly failed, he is not entitled to seek out additional witnesses to the same fact and upon that basis, with no affirmative showing of prior diligence, demand a retrial upon the ground of newly discovered evidence.

Affirmed.

5-2241 340 S. W. 2d 580

Opinion delivered December 5, 1960.

Sam Sexton, Jr., for appellant.

Heilbron, Shaw & Beasley, for appellee.

PAUL WARD, Associate Justice. This appeal by George J. Goodin challenges the action of the Chancery Court in awarding to his wife and their two minor children exclusive occupancy of the dwelling owned jointly by them and at the same time denying the wife's petition for a divorce.

The parties were married on May 24, 1947, and lived together until August 15, 1959, at which time appellee and the two children (ages about 6 and 12) left the home in which they had all been living in the City of Fort Smith. On the following day appellee filed suit for divorce on the general ground of neglect and mistreatment. She prayed not only for divorce but for custody of the children and for alimony and child support.

Before the final order from which comes this appeal there were several preliminary hearings and orders. The first hearing was held on November 24, 1959, at which an allowance of $25 a week was made for the support of appellee and the children and the cause was

finally set for March 8, 1960. On this date, after hearing testimony, the Chancellor denied appellee's prayer for a divorce, but decreed that she should have permanent care and custody of the two children with the understanding that she would not remove them from the jurisdiction of the court without permission; that appellant should have reasonable rights of visitation; and that appellant should pay $25 a week for the support of appellee and said children. Following that order, appellee and the children moved into the house owned by the parties, by the entirety, located on Chaffee Drive in Fort Smith. Almost immediately thereafter appellee filed a Motion in which she asked that appellant be enjoined and restrained from entering the premises and that the court fix a specific time and place for appellant to visit the children. A Response to this Motion was filed by appellant and on March 15, 1960, the court made the following findings: That subsequent to the court's decree of March 8, 1960, and without the knowledge or consent of the appellee, the appellant moved into the home in which the appellee had been living with their children; that such act on the part of appellant, along with other conduct on his part, was detrimental to the health and welfare of the children; that the decree of March 8, 1960, should be withdrawn and the case continued under the previous Order made on November 24, 1959; that final adjudication on the divorce petition be taken under advisement; that the Order made on November 24, 1959, should be amended to give appellee possession of the home and furnishings located on Chaffee Drive. The Order of the court was in compliance with the above findings.

After another hearing a final decree was entered on May 6, 1960, in which it was ordered: That the petition for divorce be denied at this time; appellee shall have custody of the children subject to appellant's right of visitation at all reasonable and proper times; appellee shall have exclusive possession of the family home and furniture, as well as possession of the newest car, so that the children may be properly reared, can

attend church and take care of medical treatments; the appellant shall continue to pay $25 per week for the support of the two minor children; appellee shall pay the house payments due out of the child support so long as she continues to occupy the house with the children; and this Order shall remain in effect as to the occupancy and payments on the family home so long as appellee continues to reside therein.

The only ground urged for a reversal, as stated by appellant, is that "the Chancellor erred in excluding the appellant from the jointly owned property of the parties."

In support of the above contention appellant relies almost exclusively on the decision in the case of *Walls* v. *Walls,* 227 Ark. 191, 297 S. W. 2d 648. The particular language contained in that opinion upon which appellant relies is found at page 194 and 195 of the Arkansas Reports.

In the cited case, the Chancellor gave exclusive possession of the home to the wife and children but this holding was reversed by this court. The essence of the court's holding appears to be that the wife had established no meritorious cause for leaving her husband and three older children and refusing to live with him. In the case under consideration, the situation is different in that respect. The effect of the Chancellor's holding was that appellee was justified in leaving appellant. We have reviewed the record in this connection and are unable to say that the Chancellor's finding is not supported by the weight of the testimony. This being the situation the court had authority to give the exclusive possession and occupancy of the property to appellee and the children. In the case of *Cassell* v. *Cassell,* 211 Ark. 489, 200 S. W. 2d 965, we held that the trial court had jurisdiction to give the wife the right of exclusive possession of the dwelling property even though her petition for a divorce was denied. The decision rested on the ground that such an order did not amount to a permanent disposition of property rights. Likewise, the order of the court in the case under consideration is not

a permanent disposition of property rights. The latter portion of the decree states: "this order shall remain in effect as to the occupancy and payments on the family home so long as the plaintiff continues to reside on said premises." It was also stated in the Order "that the petition for a divorce by the plaintiff be denied *at this time.*" (Emphasis supplied.)

This is one of those unfortunate situations where a home with children has been, at least temporarily, broken up, and the court is faced with the task of finding the best possible solution. We are reluctant to say we could find a better solution than the one reached by the Chancellor. As in many other such cases we are reminded that the Chancellor saw and heard the witnesses, an advantage denied to us. Possibly the Chancellor entertained the hope of a reconciliation in the future. This of course would be the happy solution. In the meantime it appears more reasonable to us that the wife and children, rather than the husband, should be provided a place to live.

Appellee has cross-appealed from the portion of the decree refusing her a divorce. It would serve no useful purpose to set forth the evidence in this connection. We have carefully reviewed it and find that it fully supports the Chancellor's decision.

From the above it follows that the decree of the trial court is affirmed both on direct appeal and cross-appeal.

Affirmed.

5-2192 340 S. W. 2d 590

Opinion delivered December 5, 1960.

Edward J. Rubens and *Jake Brick,* for appellant.

J. H. Spears, for appellee.

SAM ROBINSON, Associate Justice. This is a contest between appellant, Jane Tibbels, and appellee, Aurelia J. Tibbels, as to which one of the two is entitled to the proceeds of a policy of life insurance issued by the Metropolitan Life Insurance Company on the life of John W. Tibbels. There is no indication or inference that more than one policy was issued to Tibbels by the insurance company. Jane Tibbels and John W. Tibbels were formerly husband and wife but were divorced on May 26, 1958. The policy in question was issued on the 17th day of June, 1958. Jane Tibbels was named beneficiary in the policy. About a year later, on April 4, 1959, John was killed in an automobile accident. The policy, which was a group policy, provides:

"Section 13. CHANGE OF BENEFICIARY.—Any Employee insured hereunder may, from time to time, change the Beneficiary designated in his certificate by filing written notice thereof with the Insurance Company

accompanied by the certificate of such Employee. Such change shall take effect upon endorsement thereof by the Insurance Company on such certificate and unless the certificate is so endorsed, the change shall not take effect. After such endorsement, the change shall relate back and take effect as of the date the Employee signed said written notice of change, whether or not the Employee be living at the time of such endorsement, but without prejudice to the Insurance Company on account of any payment made before receipt of such written notice."

Sometime prior to 11:00 a.m. on April 4, 1959, a letter written by John W. Tibbels, the insured, dated March 31, 1959, addressed to the Metropolitan Life Insurance Company, was mailed. John was killed about 1:30 p.m. April 4th, the same day the letter was mailed. The letter to the insurance company is as follows:

"3/31/59

"Dear Sir

"As my wife and I are divorced I would like to have my beneficiary changed to my mother Mrs. Chas. D. Tibbels 508 Gibson West Memphis Ark-

"Thanks

"John W. Tibbels"

On April 8, 1959, following receipt of the above letter, the insurance company wrote to John W. Tibbels as follows: "We are unable to act upon your recent letter because of our inability to determine the correct number of the policy to which you refer. Please furnish the following information and return this letter in the envelope provided." Following the letter was a form to be completed, requiring the insured to furnish considerable information.

Mrs. Aurelia Tibbels, mother of the insured, who had possession of the policy at the time, furnished the insurance company the number and serial letter of the policy and the exact name of the insured, and informed

the insurance company of the insured's death. Jane Tibbels, the original beneficiary named in the policy, furnished the insurance company proof of the death of the insured and demanded payment under the terms of the policy. The insurance company filed this cause of action—an interpleader—in a court of equity, naming Aurelia J. Tibbels and Jane Tibbels as defendants, and deposited in court the principal sum named in the policy for accidental death of the insured. From a decree in favor of Mrs. Aurelia Tibbels, Jane Tibbels has appealed.

There is only one real issue in the case, and that is: Was John W. Tibbels' letter to the insurance company above quoted sufficient in all the circumstances to change the beneficiary from Jane Tibbels to Aurelia Tibbels?

The provision of the insurance policy regarding change of beneficiary was not complied with. On this point there are two lines of authority, the minority holding that there must be strict compliance with the provisions of the policy pertaining to change of beneficiary, but the great weight of authority is that a substantial compliance is sufficient. 19 A. L. R. 2d 30 and cases cited therein. This State is among the majority. *Robinson* v. *Robinson,* 121 Ark. 276, 181 S. W. 300. It will be recalled that the insured was killed about two and one-half hours after the postmark time appearing on his letter to the insurance company asking that the beneficiary be changed. Of course, the insured could do nothing further about the matter, and could not respond to the insurance company's request for additional information. In these circumstances we think there was a sufficient compliance. The weight of authority is that if the insured has done everything reasonably possible to effect a change in beneficiary, a court of equity will decree that to be done which ought to be done. True, the insured could have sent his policy to the insurance company along with his letter requesting a change in beneficiary, but there is no showing that Tibbels was an

expert on insurance matters or realized the necessity of sending in the policy.

In the case of *Bell* v. *Criviansky,* 98 Mont. 109, 37 P. 2d 673, the insured wrote to the insurance company indicating his desire to change the beneficiary in a policy of insurance, but before he was able to complete the forms sent to him by the insurance company to effect the change he became ill and died. The court said: "Admittedly, the insured did not comply with the policy provisions with reference to change of beneficiaries in the following respect: (a) He made no written request, upon the company's form, for change of beneficiary; (b) he did not return the policy to the company; (c) he did not deliver the written request on the prescribed form in his lifetime to the company." And the court went on to say: "By the letter he indicated that he desired to change the beneficiary and that it was his purpose to change the beneficiary from his then wife to his four children, although he did not name them. At the time he received this blank, and continuing on to the time of his death, his physical condition according to the record was such as to render him unable to complete and execute the furnished blank form." The court further said: "We think the true rule is that, if the insured has pursued the course pointed out by the laws of the association and has done all in his power, under the facts and circumstances of the case, to change the beneficiary, but before the new certificate is actually issued or the change of beneficiary is indorsed on the old, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued or the indorsement made." The court held that in the circumstances the insured had changed the beneficiary.

A situation similar to the case at bar existed in the case of *United Benefit Life Ins. Co.* v. *Elliott,* 11 Alaska 466. There the court said: "While the question is not free from doubt, the weight of authority would seem to support the view that the failure to transmit or deliver the policy to the insurer with a written request for a change of beneficiary does not preclude the application

of the rule of substantial compliance, even though the policy was available or could have been obtained upon demand, where it appears that the insured did everything that it was reasonably possible for him to do before death.

"It must be conceded, of course, that it may be argued with plausibility and much force that where the insured has failed to transmit the policy to the insurer with the request for a change of beneficiary he has not done every thing possible to effect the change. But where the insured does not know where the policy is *or dies before the receipt of the insurer's blank and instructions for its execution and return with the policy,* no reason is perceived why a court of equity should order the proceeds of the policy disposed of in a manner directly contrary to the clearly expressed wishes of the insured." [Emphasis ours]

Appellant argues that even though the insurance company could waive the provision of the policy requiring that certain things be done in order to effect a change of beneficiary, such waiver could not affect the interest of the original beneficiary; that such interest vested immediately upon the death of the insured. The answer to this proposition is that the rights of the new beneficiary, Mrs. Aurelia J. Tibbels, are not based on a waiver of a policy provision by the insurance company. There was a sufficient compliance by the insured with the policy to effect the change. Hence the new beneficiary is entitled to the proceeds of the policy regardless of whether there was a waiver by the insurance company.

Affirmed.

THORNBROUGH, COMMISSIONER OF LABOR *v.* BARNHART.

5-2217 340 S. W. 2d 569

Opinion delivered December 5, 1960.

Lowell D. Gibbons and *Luke Arnett,* for appellant.

Bass Trumbo and *E. J. Ball,* for appellee.

JIM JOHNSON, Associate Justice. On October 23, 1953, the Commissioner of Labor filed a Certificate of Assessment in the amount of $109.35 for unpaid unemployment contributions against Ralph C. Barnhart in the office of the Circuit Clerk of Washington County. Appellee Barnhart filed a petition for review in the Chancery Court of Washington County and prayed that the Chancellor quash the assessment and expunge it from

the record because the assessment had been made without appellee's having been afforded a hearing regarding appellee's liability for contributions as an employer under the terms of the Arkansas Employment Security Law. The Chancellor held that the Commissioner of Labor had not followed the procedure prescribed by the Act affording appellee an opportunity to be heard before filing such assessment and ordered the assessment expunged from the record without prejudice to the Commissioner.

Thereafter the Commissioner instituted proceedings in accordance with the procedure the trial court found to be requisite for filing assessments and a hearing was held before the Commissioner and appellee was found to be indebted for taxes in the amount of $109.35, together with interest thereon from October 22, 1953, until paid. This finding by the Commissioner was appealed to the Board of Review by appellee on the ground that the matter was *res judicata* because of the decree entered by the Chancellor in the prior proceedings.

On May 24, 1956, the Board of Review held that the decree of the Chancery Court which was based upon technical defects in the procedure followed by the Commissioner in filing the assessment was *res judicata* regarding the matter of whether appellee was indebted for taxes; and further, that because this question was *res judicata* there was no liability for taxes on the part of appellee. The Commissioner appealed this determination of the Board of Review to the Pulaski Circuit Court; the Pulaski Circuit Court sustained the determination of the Board of Review by a final judgment; and this appeal is from that final judgment.

For reversal, appellant relies upon the following points: (1) The Court erred in holding the issues made before the court *res judicata* under the Washington Chancery Court decree for the reason that the issues now involved were not before the court in the proceedings in

which the decree was entered. (2) The Court erred in holding that the Chancellor's decree entered "without prejudice to J. R. Cash, Commissioner of Labor" was a final judgment rendering the issues in this matter *res judicata.* (3) The Court erred for the reason that "to expunge from the record" does not embrace a judicial or equitable determination of an issue, but denotes a physical act of obliteration, leaving the record, for all purposes, as if that "expunged" had never occurred.

The basic issue before this Court is whether the proceeding in the Washington Chancery Court, wherein the sole question determined was that of technical procedure required by the Commissioner of Labor in filing a valid certificate of assessment, renders the merits of the claim for employment security contributions *res judicata* thereby defeating the right of the Commissioner to collect the contributions claimed.

There have been two proceedings in the instant case. In the first proceeding the record before this Court does not reflect that the question concerning the merits of the claim for contributions was tried but that a technical defense, *i. e.,* that the procedure followed by the Commissioner of Labor in filing the Certificate of Assessment did not fulfill the requirements of the Arkansas Employment Security Law. Appellee's technical defense was successful in that proceeding and the Chancellor issued his decree expunging the assessment from the record without prejudice to the Commissioner of Labor. Appellee now seeks to prevent the claim for contributions being processed and collected by raising the defense of *res judicata,* although the merits of the claim were not in issue when the first defense of improper procedure was used.

Appellee did not raise any issue concerning the merits of the claim for taxes. To the contrary, appellee's petition for review filed in the Washington Chancery Court was based solely on the ground that the certificate of assessment was not founded on a finding of fact which

could be reviewed by the Chancery Court. Therefore, we conclude that the merits of the claim of the Commissioner of Labor for contributions from appellee was not in issue but only the question whether appellee was entitled to a hearing on the merits before an assessment was filed; and if he was entitled to such a hearing whether the failure to afford him the opportunity for a hearing was a fatal defect in the procedure for filing a certificate of assessment by the Commissioner of Labor. The trial court was correct in holding that the failure to afford appellee such a hearing was a fatal procedural defect and in issuing the order to "expunge the assessment from the record without prejudice to the Commissioner of Labor."

Having thus concluded, we reach the question whether such order is *res judicata* in the present case. The general rule applicable to this question is well stated in 30 Am. Jur. under the title of Judgments, p. 925, Sec. 180:

"The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. The established rule is that the judgment in the first action operates as an estoppel only as to the points or questions actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined therein. Accordingly, before the doctrine of res judicata is applied in such cases, it should appear that the precise question involved in the subsequent action was determined in the former action. These rules prevail whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive per se."

Appellee very forcefully argues that the rule set out in *Crump* v. *Loggains,* 212 Ark. 394, 205 S. W. 2d 846, should apply to the case at bar. There the Court said:

"The test in determining a plea of *res judicata* is not alone whether the matters presented in a subsequent suit were litigated in a former suit by the same parties

but whether such matters were necessarily within the issues and might have been litigated in the former suit."

There is nothing in the record to show that the matter of appellee's liability for taxes was in issue nor that such liability was necessarily in issue. See Harvard Law Review, Vol. 65, p. 818, *et seq.*

Based upon the facts in the present case. as we view it, the rule applicable here is stated in *Chiotte* v. *Chiotte,* 225 Ark. 101, 279 S. W. 2d 296, as follows:

"In the application of the doctrine of *res judicata,* if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both . . . if, however, the two actions rest upon different sets of facts . . . a judgment in one is no bar to the maintenance of the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has been designated as infallible."

The Chancellor in his decree recited that the act of expunging the assessment from the record was done *without prejudice* to the Commissioner. There can be no merit in the contention made by appellee that such action was a final judgment on the merits since the rule in Arkansas as restated by this Court in the case of *Baughman* v. *Overton,* 183 Ark. 561, 37 S. W. 2d 81, is as follows:

"A judgment dismissing a suit *without prejudice* is not *res judicata* in a subsequent suit involving the same parties and issues." [Emphasis ours.]

See also: *Jordan* v. *McCabe,* 209 Ark. 788, 192 S. W. 2d 538. We believe that the Chancellor recognized that it would be inequitable and would defeat the ends of justice to bar a valid claim by the Commissioner of Labor on technical procedural grounds and entered his decree "without prejudice" which phrase is universally under-

stood to preserve to the parties the right to proceed anew in order that the case may be tried on its merits.

The term "expunge" is defined in Black's Law Dictionary, 4th Ed. p. 693 as: "To destroy or obliterate; *it implies not a legal act but a physical annihilation.* To blot out; efface designedly; to strike out wholly." [Emphasis ours.] It is our holding that the certificate of assessment then of record had no legal force and effect as a judgment against appellee Barnhart but we cannot read into this physical act of striking the assessment from the record [because of procedural defects] a bar to further proceedings on the merits of the case since no determination was ever made as to appellee's liability as an employer under the terms of the Employment Security Act. Since the issues now involved were not before the trial court when the decree was entered, we cannot say that the prior decree was *res judicata.*

Reversed and remanded to the Circuit Court with directions to remand to the Board of Review for further proceedings consistent with this opinion without prejudice to either party to introduce additional evidence upon the merits.

McFaddin, J., concurs.

5-2260 341 S. W. 2d 41

Opinion delivered December 12, 1960.

[redacted]

Langston & Walker by *Wayne Foster,* for appellant.

Joe E. Purcell, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Iva D. Green, married appellee, Hubert B. Green, in February, 1931. Sometime in 1946, the parties hereto adopted a male child, nine days old, whose name is Hubert William Green. In October, 1958, appellee instituted suit against appellant for divorce. Appellant entered her appearance, but did not contest the action. Appellee's complaint, *inter alia,* alleged:

"The parties are the parents of an adopted child, Hubert William Green, now twelve (12) years of age and in the custody of defendant, who desires his custody and plaintiff feels that defendant is the proper person for his care and custody, and further feels that he should be required by order of this Court to pay into the registry of this Court for the maintenance and support of said minor child the sum of $25.00 per month, and should also pay into a trust fund account in some bank to be selected by the defendant the sum of $25.00 per month to provide an educational fund for said minor child."

The divorce was granted, and the decree included the provision:

"* * * that plaintiff should contribute into the registry of this court the sum of $25.00 per month for the maintenance and support of said child, and an additional sum of $25.00 per month into some bank, to be selected by the defendant, as an educational fund for said child."

In November, 1959, Mr. Green filed a petition alleging that Mrs. Green had taken the minor child from the State of Arkansas, thus depriving him of reasonable visitation rights; that he had remarried since the decree of divorce, and was now required to support a wife and step-daughter, as well as his mother; that he was unable financially to pay the $25 each month into the educational fund as provided in the original divorce decree, and prayed the court to modify the decree by eliminating the provision requiring the payment of said sum into an educational fund. Appellant responded, denying that she had deprived appellee of visitation rights with the boy, and alleging that Mr. Green was in arrears in the amount of $75 in his payments to the educational fund, and seeking judgment for that amount. She further asserted that the $25 for maintenance was insufficient, and prayed the court to increase the allowance. On hearing, the court discontinued the requirement for the payment of the $25 to the educational fund, and denied the motion for an increase in support and maintenance payments.

From such order of the court, appellant brings this appeal.

Of course, it is necessary that appellee show a change in circumstances before being entitled to a reduction; for instance, his income is reduced, or increased obligations leave him less able to comply with the requirements of the original decree. We do not think such a change was shown. Mr. Green did not testify relative to the amount of money he was making at the time of the divorce, but Mrs. Green stated that, due to an injury he had received, he was drawing $100 per month workmen's compensation. At the time of the hearing, Mr. Green had been an employee of the State Hospital for the past two years, and lived at the hospital. His testimony reflects that he earned $284 per month from this job, and obtained free rent and utilities; in addition, he received a veteran's disability check of $52 each month. His present wife had an income of $170 per month, and his mother received $41 per month. Though the record does not reflect Mr. Green's job income at the time of the divorce, it would appear from this record that he is perhaps even better off financially, since he was only drawing $100 a month at the time of the decree, and, by his own admission, was not at that time receiving free rent and utilities. Appellee mainly relies upon the fact of his remarriage to justify a modification of the decree. In *Bostic* v. *Bostic,* 229 Ark. 127, 313 S. W. 2d 553, this Court, in quoting from 27 C. J. S., Divorce, § 322, p. 1245, said:

"The fact that a divorced husband has remarried or was contemplating remarriage is not alone ground for reducing the amount of the allowance, although it is a circumstance that may be considered in weighing the equities of the situation; and the same rule applies to the remarriage of the wife, at least in the absence of an assumption by the second husband of any obligation to support the children of the first marriage; nor is the remarriage of both husband and wife to third persons, in itself, regarded as such a change of circumstances as requires a modification of the allowance."

Certainly, the remarriage is not a ground for modification in this case; the record reflects that Mr. Green married his present wife shortly after obtaining the divorce,[1] and was well aware, at the time he asked the court, through his complaint, to enter the educational fund provision, that he was fixing to assume additional obligations, *viz.*, a second wife and a step-daughter. In *Wilson* v. *Wilson,* 186 Ark. 415, 53 S. W. 2d 990, a divorced husband sought reduction of an award for support of the ex-wife and two minor children. The facts in that case were far stronger for reduction than the present one, in that it was established that the appellant's salary had been reduced, and that one of the minor children, a daughter, had married. The Chancellor refused to grant a reduction, and on appeal, we affirmed the decree.

Appellee also argues that appellant's financial condition has improved considerably since the divorce, since she was unemployed at that time, and attending school, while presently, she is employed in Oklahoma City, having net earnings of $170 per month. Of course, this fact does not relieve Mr. Green of his obligation to the boy, particularly when it appears that he is financially able to comply with the decree. Appellee also makes reference to an alleged agreement at the time of the adoption of the child, which he asserts should relieve him of the payment to the educational fund. We find no merit in this contention. Appellee's obligation to this boy is the same as though it were his own natural child.

Likewise, the child should not be deprived of the opportunity to obtain an education because appellant removed him to Oklahoma. This was done, according to Mrs. Green, because she could obtain higher wages in Oklahoma City. Mr. Green complains that though he

[1] From the testimony of Mr. Green during cross-examination:
"Q. How soon did you remarry? A. Just as soon as the law allows. Q. And this woman had a daughter when you married her? A. Yes, sir. Q. You had already made an obligation to pay $50.00 a month to the defendant at that time? A. Yes, sir. Q. And you were represented by Counsel at the time the divorce was granted? A. That is right. Q. Whose idea was it about this educational fund? A. It was mine when she insisted."

has extended invitations to the boy to visit him here in Arkansas, such visits have not been made, and implies that appellant has alienated the affection of the child for appellee. Appellant testified that Hubert William was very fond of Mr. Green, but the child did not want to go to appellee's home. She insisted that she had not kept the boy away, but had, to the contrary, told him that he might visit Mr. Green whenever he wanted to. The evidence leaves some doubt as to appellee's actual desire to visit with the child, since the testimony reflects that the boy visited in Little Rock for three weeks in the summer of 1959, and Mr. Green only visited with him one time. Certainly, appellee is entitled to have the child visit him at a time when the boy is not in school, and, if he (Green) desires such visits, and will furnish costs of transportation, the Chancery Court can be petitioned for this purpose. Except for the fact that the youngster is away from the state, we would give consideration to increasing the allowance for maintenance.

The decree is reversed, insofar as it relates to relieving appellee of the payment to the educational fund, and the cause is remanded with directions to reinstate the $25 monthly allowance for the educational fund for Hubert William Green, together with judgment for any unpaid amounts that may have accrued; in all other respects, the decree is affirmed.

Appellant's attorneys seek an additional fee for services rendered on this appeal, and because of the findings herein contained, and the further fact that the attorneys have only received a $50 fee, we are of the opinion that an additional attorneys' fee of $50 should be allowed.

It is so ordered.

WELLS *v.* ADAMS.

5-2256 340 S. W. 2d 572

Opinion delivered December 12, 1960.

Tom Gentry and *William H. Donham,* for appellant.

Mann & McCulloch and *E. J. Butler,* for appellee.

J. SEABORN HOLT, Associate Justice. This is an action for damages for alleged false arrest and false imprisonment. A trial resulted in a judgment for the defendants [appellees here] and this appeal followed. The evidence reveals that the appellant, Mrs. Ruby A. Wells, and her late husband, L. L. Wells, were doing business as the "Arkansas Tastee Freez Company," and

as such entered into a franchise agreement with the Harlee Manufacturing Company of Chicago, Illinois. Under the terms of this agreement, Mr. and Mrs. Wells were granted the exclusive privilege for the sale and distribution of Harlee Ice Cream Freezers in a designated territory in Arkansas which included St. Francis County. In addition, the Wells were entitled to lease one Harlee automatic ice cream feeder, a dispensing device, for each ice cream freezer sold in the territory. The Wells, in turn, sold ice cream freezers and leased automatic ice cream feeders in their designated area to individual proprietors of dairy stands who catered to the public by selling ice cream. One of the conditions upon which the feeders were leased by the Wells was that only an ice cream mix known by the trade name of "Tastee Freeze" would be used in the feeders and that violation of the terms of the condition would entitle the Wells, without notice or legal action of any kind, to take possession of the feeders free and clear of any claim of the lessee. In 1953, Mr. Charles Adams procured equipment from Mr. Wells to set up a dairy stand in the town of Hughes. Included in the equipment was an automatic ice cream feeder. At the trial it was contended by Mrs. Wells that the feeder was leased; Adams, on the other hand, maintained that he purchased the feeder from Mr. Wells. Another provision under which the feeders were leased, was that they would be serviced by appellant, Wells. On June 13, 1958, Mrs. Wells testified that she was in the town of Hughes to service the feeder, having received a complaint from Adams that the feeder was not working properly. During the course of inspecting the machine and repairing it, Mrs. Wells discovered that an ice cream mix other than "Tastee Freez" was being used in the feeder contrary to the express provisions of her alleged agreement. Upon discovery of this fact, Mrs. Wells informed the attendant at the stand that she would have to take the feeder with her and loaded it in her car. Shortly thereafter, Adams was notified of what had happened by one of his employees and upon receiving this information, he radioed the city police from his car and an officer, Wil-

liam L. Harris, was dispatched to aid Adams in the search for Mrs. Wells. Mrs. Wells was located, and though the record is in dispute, it appears that she either voluntarily or involuntarily went to the City Hall and either voluntarily or involuntarily remained there for some two and one-half to three hours while attempting to call her attorney. Mrs. Wells testified that she was released when she removed the keys to her car from her bosom where she had secreted them. The keys were taken, a search made of her car, and the feeder recovered. As indicated, Mrs. Wells filed the present suit alleging in her complaint that she was falsely arrested and falsely imprisoned and prayed that she be awarded damages.

Appellees answered with a general denial. Trial was had before a jury and a verdict returned in favor of the defendants [appellees]. This appeal followed.

The sufficiency of the evidence to support the verdict is not an issue on this appeal since appellant, Mrs. Wells, admitted that the evidence was sufficient to support the jury's finding that she was not falsely imprisoned but for reversal she relies on the following points: "I. The court erred in giving defendants' Instruction No. 1 and refusing to give plaintiff's requested Instruction No. 5. II. The court erred in giving plaintiff's requested Instruction No. 3, as modified by the court. III. The court erred in allowing the introduction of defendants' exhibits No. 7 and No. 8."

-I-

We have reached the conclusion that appellant is correct in her first contention above that the trial court erred in giving Instruction No. 1 over her objections. This instruction contained this provision: "You are instructed that false imprisonment is a trespass committed against the person of another by unlawfully arresting and detaining him without any legal authority, or by instigating such unlawful arrest. It must be proved that the arrest was without legal authority before an action can be founded upon a false imprisonment." We

hold that the vice in the above instruction lies in the language of the last sentence which clearly imposed the burden on the plaintiff [Mrs. Wells] of not only proving imprisonment but also the burden of proving that the imprisonment was unlawful. We think that this instruction is in conflict with our holding in *Missouri Pacific Railroad Company* v. *Yancey,* 180 Ark. 684, 22 S. W. 2d 408, where we said: "* * * The action was one for false imprisonment, and, the arrest having been proved by the undisputed evidence, the burden was upon the defendant to show that it was by authority of law. Every imprisonment of a man is a trespass; and in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant. [appellees here] Citing cases." Also in support of this statement, the Supreme Court of Michigan in the case of *Elmer Burlingame Donovan* v. *James S. Guy and Edwin James Ward,* 347 Mich. 457, 80 N. W. 2d 190, said: "As general proposition, it must be admitted that it is only necessary for the plaintiff, in action for false imprisonment, to show that he has been imprisoned or restrained of his liberty; the presumption then arises that he was unlawfully imprisoned, and it is for the person who has committed the trespass to show that it was legally justified."

- II -

Appellant's next contention is that Instruction No. 3 of the plaintiffs [appellees] as modified by the court in which the court instructed the jury that if it found that the plaintiff [Mrs. Wells] had been imprisoned and had suffered damages thereby, they would be justified in awarding such damages. The appellant says that false imprisonment is a trespass and every trespass carries with it at least nominal damages to which she was entitled. While this seems to be a correct statement of the law, this court has many times held that we would not reverse for failure to award nominal damages. *Yampert* v. *Johnson,* 54 Ark. 165, 15 S. W. 363, *Laflin* v. *Interstate Construction Company,* 181 Ark. 1110, 29 S. W. 2d 280, *Brown* v. *Bradford,* 175 Ark. 823, 1 S. W. 2d 14.

- III -

The third point urged for reversal is that the trial court erred in admitting in evidence a search warrant supplied by appellee, Adams, to show lack of malice and good faith on the part of appellees. Appellant insists that good faith and lack of malice must be specially plead and cannot be in issue on general denial. We do not agree. The plaintiff [appellant] put the issue of punitive damages in the case by her pleadings. Since exemplary or punitive damages are not allowed in this state without a showing of malice, wantonness, or lack of good faith, *Kroger Grocery & Baking Company* v. *Waller,* 208 Ark. 1063, 189 S. W. 2d 361, the appellees had the right to deny that part of appellant's complaint asking for punitive damages and by so doing, show that they acted in good faith and without malice. The search warrant and the affidavit for it, as going to show good faith, were properly admitted. In *Elrod* v. *Moss,* et al, 4 Cir., 278 F. 123, an invalid search warrant was held to be properly admitted to refute the charge of malice and show good faith on the part of the officers in a false imprisonment suit. The court there said: "The so-called John Doe search warrant in the possession of the defendant Gosnell as a federal officer, although properly held invalid by the court, was clearly admissible to refute the charge of malice and wantonness. The search warrant under which Moss acted, even if its period of validity had expired, was admissible for the same purpose." See also the case of *Richardson* v. *Huston,* 10 S. D. 484, 74 N. W. 234, where it was held the defendants were entitled to show under a general denial, all the facts and circumstances connected with an arrest in order to disprove the malice and thereby prevent a judgment for exemplary damages, and accordingly it was held error to exclude such evidence even though it might have some tendency to raise the defense of justification which had not been pleaded. To the same effect is *Adair* v. *Williams,* 24 Ariz. 422, 210 P. 853.

Accordingly, for error indicated the judgment is reversed and the cause remanded.

CAMPBELL *v.* CITY OF HOT SPRINGS.

5-2200 341 S. W. 2d 225

Opinion delivered December 12, 1960.

[Rehearing denied January 16, 1961.]

Sam L. Anderson, for appellant.

David B. Whittington, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal challenges the judgment of the Garland Circuit Court, which ordered appellant, Joe Campbell, dismissed from the police force of the City of Hot Springs. The governing statute on civil service trials is § 19-1605.1, Ark. Stats., as amended by Act No. 326 of 1949; and one of the recent cases involving this statute is *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750.

Because of several complaints from citizens the Civil Service Commission of the City of Hot Springs notified Joe Campbell (appellant) that he was reduced from the rank of lieutenant to the grade of patrolman.

In accordance with the previously cited statute, Mr. Campbell requested and obtained a trial before the Civil Service Commission, where the City was represented by the City Attorney and Mr. Campbell was represented by his own attorney. Evidence was introduced as to a number of incidents involving Mr. Campbell, one of which will be hereinafter detailed in Topic II. At the conclusion of the hearing, the Civil Service Commission reinstated Mr. Campbell to the rank of lieutenant. The City Attorney of Hot Springs appealed to the Circuit Court to reverse the order of reinstatement made by the Commission. After Mr. Campbell's motion to dismiss the appeal (subsequently to be discussed in Topic I, *infra*) had been overruled, the Circuit Court tried the case *de novo* on the transcript of evidence heard before the Civil Service Commission, together with additional evidence *ore tenus* (§ 19-1605.1, Ark. Stats.); and entered a judgment discharging Mr. Campbell from the police force of the City of Hot Springs. To reverse that judgment, Mr. Campbell prosecutes this appeal to this Court and urges the points herein treated.

I. *The Appeal From The Civil Service Commission To The Circuit Court.* In the Circuit Court Mr. Campbell filed an unverified motion to dismiss the appeal from the Civil Service Commission order, and claimed that the City Attorney did not have the right and power to prosecute such an appeal. Mr. Campbell admitted that Mr. Whittington was the City Attorney and had given due and timely notice of appeal, and that the said Act No. 326 of 1949 specifically provided for a right of appeal by the City; but Mr. Campbell insisted[1] that it was necessary for the City Council of Hot Springs to specifically authorize the City Attorney to appeal the case to the Circuit Court, and that no such specific action of the Council had been presented by Mr. Whittington.

[1] Campbell's motion in the Circuit Court reads in part: "The appeal which has been filed in this case is not a proper appeal, because the power of appeals in cases of this nature is not given to City Attorneys but to the City itself. In this particular case the City Attorney was not directed to appeal this case by the City Council nor by the Civil Service Commission."

The Circuit Court ruled that the case was properly appealed from the Commission to the Circuit Court; and in the state of the record before us, the Circuit Court was correct. It is true that § 19-1015 Ark. Stats. provides for the election of a City Attorney but does not prescribe his duties[2] in detail: rather, leaving it to the City Council to fix such duties. No ordinance of the City of Hot Springs was introduced in evidence in this case fixing such duties of the City Attorney; and we do not take judicial notice of municipal ordinances. *Lowe* v. *Ivy,* 204 Ark. 623, 164 S. W. 2d 429; and *City of Little Rock* v. *Griffin,* 213 Ark. 465, 210 S. W. 2d 915, and cases there cited. So we have no *evidence* that the City Attorney of Hot Springs did, or did not, have the right and power under the municipal ordinances to appeal this case from the Commission to the Circuit Court.

Mr. Whittington, however, as the admitted[3] City Attorney of Hot Springs, represented to the Circuit Court that he had the power to appeal the case; and his representation was not denied by affidavit. The leading case on the authority of an attorney to represent a client is that of *Tally* v. *Reynolds,* 1 Ark. 99, 31 Am. Dec. 737, wherein this Court said:

". . . it is incumbent on the party undertaking to question the authority of the attorney representing his adversary, to show to the court by affidavit, facts sufficient to raise a reasonable presumption that the attorney is acting in the case without authority from the party he assumes to represent, then, and not until then, the attorney may be required to show his authority." The above quoted language from *Tally* v. *Reynolds* is found practically verbatim in 5 Am. Jur. 308, "Attor-

[2] We have not overlooked § 19-912 Ark. Stats. relating to the duties of a City Attorney; but that section is from Act No. 153 of 1923, which relates only to city attorneys of cities of the second class; and we know judicially that Hot Springs is a city of the first class. *City of Malvern* v. *Young,* 205 Ark. 886, 171 S. W. 2d 470.

[3] Mr. Campbell's answer to the Circuit Court contained this language: ". . . admits that David Whittington is the City Attorney for the City of Hot Springs, Arkansas . . . admits that the City Attorney filed with the Chairman of the Hot Springs Civil Service Commission a notice of this appeal."

neys at Law", § 81. When Mr. Whittington appeared in the Circuit Court to prosecute the appeal of the City, his standing as an attorney at law, and an officer of the court, carried with it his presumed right to represent his client; and Mr. Campbell did not challenge that representation by affidavit. Therefore, Mr. Whittington's authority was not sufficiently challenged; and the Circuit Court was correct in its ruling on this point.

II. *The Correctness Of The Circuit Court Judgment.* Mr. Campbell vigorously insists that the Circuit Court judgment was erroneous in ordering complete dismissal from the police force; but we find such insistence to be without merit. In the case at bar, the Circuit Court proceeded in strict adherence to our case of *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750, wherein we said:

"We conclude that the Legislature in enacting Act 326, *supra,* intended to provide for a *de novo* hearing by the circuit court on the record before the Commission and any additional competent testimony that either party might desire to introduce; and that this court should hear the matter *de novo* on the entire record before the circuit court, as in chancery cases."

In the hearing before the Commission there was the matter of ownership of an automobile by Mr. Campbell, which automobile—it was claimed—had been used by persons committing a robbery. Mr. Campbell's title certificate showed some replacement of names; but Mr. Campbell claimed that he purchased the car in the regular course of business and paid for it with money he had earned while working in off-hours at the Citizens' Club. Here is a portion of his testimony before the Commission:

"Q. How much did you pay for that automobile?

A. $250.00.

Q. How did you pay the $250.00?

A. In cash.

Q. Did you cash a check to get that money?

A. I certainly didn't. I don't have a checking account.

Q. Then where did you get $250.00 all of a sudden?

A. I made about $500.00 at the Citizens' Club two or three months before, and that's the last I had from that, and I made several more dollars in tips from taking some of them home, and someone up there one night handed me a fifty dollar bill just for being nice to him, and I certainly didn't ask him for it. I made, I guess, between 6 and $700.00 up there, and it's turned in on my Federal income too."

The question of what kind of work Mr. Campbell was doing at the Citizens' Club was not pursued before the Commission; but when the case reached the Circuit Court, the matter was pursued; and the following occurred in the examination of one witness:

"Q. Do you know of a place called the Citizens?

A. Yes, sir.

Q. Can you state whether or not Lieutenant Campbell worked there at any time?

A. Yes, sir.

Q. When did he work there?

A. Last year.

Q. Can you recall the time of year?

A. It was during the races.

Q. What type of establishment is the Citizens?

A. It is a gambling house."

Mr. Campbell's attorney then said:

"That is right, your Honor. We will stipulate it is a gambling house in Garland County. If you will recall, the testimony was about where he got some $500 with which he bought an automobile."

We thus have a police lieutenant who was regularly working on the City police force of Hot Springs, but who, in his off time, was working in a gambling house in that City. The City police force of Hot Springs cannot condone its policemen in such violations of the law. In *Rowland* v. *State,* 213 Ark. 780, 213 S. W. 2d 370, we held that when the City Attorney failed to enforce the municipal ordinances against gambling, he was guilty of law violation. The same rule applies to a policeman who violates the gaming statutes of Arkansas found in § 41-2001 *et seq.* Ark. Stats. A policeman in a municipality cannot represent the City as a policeman part of the twenty-four hours, and then assist in the operation of a gambling place of business the rest of the time. We cannot sanction such a "Dr. Jekyll-Mr. Hyde" arrangement. It is beyond the power of the Chief of Police or the Police Department of Hot Springs to condone such action.

In this case, Mr. Campbell openly admitted law violation; and under the holding of *Rowland* v. *State, supra,* he should have been dismissed from the police force. That the Circuit Judge in the case at bar based his holding on this point is shown by the language of the judgment and the other order in the record:

". . . that the additional oral evidence adduced before this Court on this date is so convincing and of such a nature as to justify not only a demotion, but a complete discharge of Appellee from the Hot Springs Police Department. . . .

"IT IS THE ORDER OF THIS COURT that Leonard R. Ellis, Sheriff of Garland County, and the Honorable Walter J. Hebert, Prosecuting Attorney for the 18th Judicial Circuit of Arkansas be ordered and directed to make an investigation and ascertain if gambling of any nature is being carried on at the said Citizens Club; that they and each of them take the necessary actions to abate said gambling house if same is existing, and report their findings to this Court."

The judgment of the Circuit Court ordering Mr. Campbell dismissed from the police force of the City of Hot Springs is affirmed.

GINGRICH *v.* BRADLEY.

5-2222 341 S. W. 2d 33

Opinion delivered December 12, 1960.

J. Wesley Sampier and *Duty & Duty,* for appellants.

Eugene Coffelt, for appellee.

George Rose Smith, J. This is a will contest in which the appellants seek to set aside the will of Mattie Syme, who died October 18, 1959, at the age of 78. The appellants challenge the will on the ground of undue influence and testamentary incapacity. The proponent of the will is its principal beneficiary, the appellee Bob Bradley, a minister who was 31 years old when Mrs. Syme executed the will on November 7, 1958. The probate court upheld the will.

A narrative of the facts may conveniently begin in November of 1955, when young Bradley left Joplin, Missouri, to assume the pastorate of Christ's Church, a nondenominational church at Rogers, Arkansas. In the following year the young people in the congregation advertised a lawn-mowing service as a means of raising money for the church. Mrs. Syme, who belonged to a different church, met the young minister in the course of making arrangements to have her grass cut.

A widow of moderate means, Mrs. Syme was then living in a home which she owned in Rogers. Three of her four children, all by her first husband, were still living, but none of them resided with their mother at Rogers. One daughter, the appellant Mary Gingrich, lived within the county, at Bentonville. The second daughter, Ruth Earp, who has since died, was then living in Ohio. The appellant Glenn Daniels, a son, lived in Texas, and Mrs. Syme's grandson, the appellant William V. Daniels, lived in Ohio. There is an abundance of testimony, given by witnesses on both sides of the case, to show that the testatrix considered her children and her grandson to be culpably inattentive to her in her old age. She often complained about the infrequency of their visits; it cannot be doubted that she was lonely.

In 1957 Bradley and Mrs. Syme again met one another as in the preceding year. Bradley says that upon this or a later occasion he inquired about Mrs. Syme's church affiliation. She expressed a desire to attend church if transportation could be arranged, and Bradley offered to come for her whenever she wished.

Mrs. Syme eventually accepted this offer, and by the spring of 1958 she was attending Bradley's church with some regularity, usually riding with Bradley or with his wife.

In about March of 1958 Mrs. Syme's doctor suggested that she give up living by herself. She accordingly sold her house at Rogers and moved into the home of her daughter, Mrs. Gingrich, at Bentonville. At that time Mrs. Syme gave her daughter a check for $6,000, dated April 2, 1958. Why this money was paid is a disputed issue of fact, but the evidence preponderates in favor of the view that in return for the money Mrs. Gingrich was to take care of Mrs. Syme for the rest of her life.

At about this time Mrs. Syme executed what proved to be the next to the last of several wills made by her. This will, dated March 28, 1958, was prepared by her regular attorney, Wesley Sampier; its validity is not questioned. By this will the testatrix left Mrs. Gingrich five dollars, thereby disinheriting this daughter without explanation. After a bequest of $500 to the testatrix's grandson the rest of the estate was left equally to her son Glenn and her other daughter, Ruth.

After staying with Mrs. Gingrich for less than three months Mrs. Syme became dissatisfied and moved into a hotel at Bentonville, where she remained until the last few weeks of her life. During the months between Mrs. Syme's departure from Rogers in March and the execution of the contested will in November Bradley continued to visit her and to take her to church on Sunday at least part of the time. In August Mrs. Syme joined Bradley's church.

The only description of the events immediately preceding the execution of the disputed will comes from Bradley himself. He says that in October or November Mrs. Syme brought up the subject and expressed her intention of leaving all her property to him, saying, among other things, that he had made it possible for her to go to church and to other places after she had

been pretty well confined. Bradley discouraged the suggestion, telling Mrs. Syme that it would not be right for her to leave everything to him. In a few days, however, Mrs. Syme renewed her suggestion and seemed determined to carry it out. Bradley jotted down notes about her wishes and later took them to an attorney, Eugene Coffelt. Bradley says, and we find it natural to believe, that Coffelt thought it necessary to consult Mrs. Syme before actually preparing the will.

The will was executed under Coffelt's supervision in the office of Coffelt's uncle, which was on the ground floor of the hotel where the testatrix lived. One of the attesting witnesses thought, without being sure, that Bradley was present; but we think the weight of the evidence supports the trial judge's belief that Bradley was not present at the execution of the will.

The will is rather long, but its provisions may be summarized as follows: (*a*) There is a bequest of $100 to the testatrix's grandson. (*b*) The testatrix declares that she has advanced or loaned at least $7,300.00 to Mary Gingrich. She gives $3,325.00 of this money to Mrs. Gingrich and directs that her administrator collect the remaining $3,975.00 and divide it equally among Ruth Earp, Glenn Daniels, and Bob Bradley. (*c*) The three beneficiaries just named are to receive the proceeds from the sale of the real estate in Bentonville, after the payment of medical and funeral expenses and the costs of administration. (*d*) All the rest of the estate is given to Bob Bradley, who is named as executor. (*e*) There is a forfeiture clause by which anyone who contests the will is precluded from receiving any benefits under it.

About a month after the execution of the will Mrs. Syme apparently learned (and, if so, the information was correct) that her daughter Ruth was afflicted with cancer. A codicil, prepared by Coffelt and duly executed on December 5, provided that Bob Bradley should receive Ruth's share if Ruth predeceased her mother, the testatrix.

During the remaining eleven months of Mrs. Syme's life Bradley and his wife continued their kindnesses toward the elderly woman. On two occasions Bradley drove Mrs. Syme to Ohio for overnight visits with her daughter Ruth, who died in April of 1959. The present contest was instituted by the appellants after the death of Mrs. Syme on October 18, 1959.

We have no hesitancy in saying that the contestants' proof falls short of establishing the charge of testamentary incapacity. Although Mrs. Syme suffered from arteriosclerosis it is not contended that she was mentally incompetent in the latter part of March, 1958, when she executed the will drafted by Mr. Sampier, entered into a contract for the sale of her house, and a few days later gave her daughter a check for $6,000. There is proof that the testatrix's condition became progressively worse, but the weight of the evidence supports the trial court's finding that she did not lack testamentary capacity on November 7, 1958.

The issue of undue influence presents a more difficult question. There is no direct proof of improper conduct on the part of the appellee, but the appellants insist that two circumstances strongly indicate the existence of undue influence: First, the testamentary scheme is unnatural in that the testatrix's own descendants do not receive a fair share of the estate. Secondly, the appellee, as the testatrix's spiritual adviser, occupied a confidential relationship toward her, had both the motive and the opportunity to exert a sinister influence, and in fact acted at least as the intermediary in communicating her wishes to the attorney who prepared the will. These arguments are forcefully presented, but they do not persuade us that the probate judge was wrong in his decision.

As to the first point, the testatrix had the privilege of dividing her estate any way she chose, and it is shown by the will executed in March that she had no hesitancy about completely disinheriting at least one of her children. There is, as we have indicated, ample evidence to

support the view that Mrs. Syme resented what she regarded as a want of affection on the part of her children.

Furthermore, we are not convinced that the testamentary scheme, if viewed through Mrs. Syme's eyes, is quite as unnatural as the appellants consider it to be. The estate consists of three principal assets: (*a*) The Bentonville real estate, inventoried at a value of $6,500; (*b*) the balance due on the contract for the sale of the Rogers house, inventoried at a value of $8,916.77; and (*c*) the indebtedness of $7,300.00 that is mentioned in the will as being owed to the testatrix by Mary Gingrich. (The appellants insist that this debt was not really owed, but we are firmly of the view that the probate judge was right in rejecting Mrs. Gingrich's testimony on this disputed point.)

When the will was executed Mrs. Syme was living in a hotel at a monthly expense of $100, plus her other living costs. Presumably she expected to pay those expenses from the income accruing from the sale of the house in Rogers, as it does not appear that she had any other liquid asset. If the testatrix believed, as nearly every human being does, that she would continue to live for the indefinite future, she might well have concluded that by the time of her death the balance payable upon the sale of the Rogers house would have been entirely consumed. In that event her division of the estate is not especially unnatural. If the sale of the Bentonville real estate should produce $6,000 after the payment of the expenses charged against it by the will (and the inventory indicates that this figure is not unreasonable), then it will be found that the testatrix's method of dividing this money and the sum owed by Mrs. Gingrich will result in exactly equal payments of $3,325.00, to the penny, to each of the four principal beneficiaries of the will. We do not know, of course, if this distribution is what Mrs. Syme had in mind, but there is no other ready explanation for her method of dividing the amount assertedly owed to her by her daughter.

Upon the second point urged by the appellants we recognize the fact that the circumstances surrounding the execution of this will call for the closest scrutiny and may even give rise to a rebuttable presumption that undue influence was exercised. *McDaniel* v. *Crosby,* 19 Ark. 533; *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590; *Orr* v. *Love,* 225 Ark. 505, 283 S. W. 2d 667. But, after considering the record as a whole, we do not find that the weight of the evidence requires the will to be set aside.

There is no proof whatever tending to reflect upon the character of Bradley or his wife. There is no real reason to read a mercenary or sordid motive into conduct that is certainly not unusual or extraordinary in the circumstances of this case. Indeed, the testimony indicates clearly enough that the Bradleys' thoughtfulness was not confined to this testatrix; similar kindnesses were extended to other members of the congregation. The actions that might be considered really unusual, such as Bradley's two trips to Ohio, took place after the will had already been signed. Evidence of such conduct is admissible for its bearing upon the proponent's actions as a whole, but influence exercised after the execution of the will does not affect the validity of the instrument. Page on Wills (1960 Ed.), § 15.10; Thompson on Wills (3d Ed.), § 146. We are inclined to conclude our opinion with the same thought that we expressed in *Shipley* v. *Campbell,* 226 Ark. 786, 294 S. W. 2d 59: "There is proof that Mrs. Mann, [the testatrix] preferred living with the Thomases to living with her cousin. There is proof that she was happy while in their care. Theirs was perhaps the only real kindness that Mrs. Mann received from anyone after the death of her husband. The fact that her recognition of that kindness may seem to have been unduly liberal is not a sufficient reason for declaring her will to be invalid."

Affirmed.

MASON *v.* LAUCK.

5-2263 340 S. W. 2d 575

Opinion delivered December 12, 1960.

[redacted]

Langston & Walker and *L. A. Hardin,* for appellant.

Wright, Lindsey, Jennings, Lester and *Shults,* for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case. Romie L. Mason was killed in a car accident on Tuesday, January 20, 1959, at about 10:30 p.m. A claim for benefits for his widow, Dorothy V. Mason, and their infant daughter was disallowed by the referee and the full Commission. An appeal was taken to the Circuit Court. After said appeal had been taken claimants filed a Motion before the Commission asking it to reopen the case for the purpose of introducing newly discovered evidence. This Motion was denied by the Commission on the ground that it had lost jurisdiction. Then the claimants filed a petition for Certiorari in the Circuit Court to have the proceedings on the Motion (before the Commission) brought up. This was granted by the Circuit Court. Also, claimants filed a Motion in the Circuit Court asking it to remand the case to the Commission for the purpose of considering the newly discovered evidence. This Motion was denied by the Circuit Court on the ground that it had no authority to remand the case to the Commission for said purpose.

Under the above state of the record the trial court then proceeded to review the findings of the Commission (disregarding the proceedings relative to the newly discovered evidence) and affirmed the same. Claimants now prosecute this appeal.

For the purpose of clarity we will hereafter treat the proceedings as if two appeals were involved. The first appeal refers to the original proceedings before the Commission, its original finding, the appeal to the Circuit Court, and its finding thereon. The second appeal refers to all proceedings relative to the newly discovered evidence.

FIRST APPEAL. Romie L. Mason was an employee of the Lauck Provision Company, located at 717 East Washington Street in North Little Rock. James L. Lauck is the owner and manager of said Company. The Company is engaged in the business of selling and servicing freezers to patrons in the State of Arkansas. It was the duty of Romie L. Mason to service these freezers when occasion arose. Some 75 such freezers were located in the Conway territory, which extended along Highway 65 leading from North Little Rock to Conway. The Company furnished Mason a panel truck which he used in connection with his duties. Mason was paid by the week and was subject to call at any time his services were needed whether day or night. Mason kept the truck at his residence when he was not using it.

On the morning of the day Mason was killed he left his home at the usual time and reported for duty at the office of the Company. Shortly thereafter Mr. Lauck asked him to go to his home and service his personal freezer. After completing this task Mason left Lauck's home at approximately 1:30 p.m. He next appeared at about 3 p.m. at the Levy Cafe, which is located a mile or so west of North Little Rock on Highway 65. This cafe at that time was owned by "Dick" Page and his wife Mildred Page (after that and previous to the hearings Mrs. Page married a Mr. Humphreys.) While at the Levy Cafe Mason drank some beer and played shuffleboard with Mr. Page. Later at about 4:30 p.m. Mr. Page left for the purpose of going to "Dick's Place", which is a cafe owned by him and located approximately 5 miles further west on said Highway 65. Approximately 30 minutes after Dick Page left the Levy Cafe Mason also left, and he arrived at Dick's Place at approximately 5:30 o'clock. Mason drank two or three beers with friends at Dick's Place and remained there (with one exception noted later) until about 9:45 or 10 o'clock. It appears from the evidence that while at Dick's Place Mason left somewhere around 7 o'clock and stayed for about 30 minutes then came back. After leaving Dick's Place Mason apparently started to return

home on Highway 65 when he had a collision with another car and was killed at about 10:30 p.m.

It appears from the record that the Company keeps a call-book in which are placed the names of people who call in for repair service on their freezers. This book contained a call from two people in the Conway territory. It was not shown however that Mason was cognizant of these two calls. The record further discloses that these two persons were not contacted by Mason on the afternoon or night of the day he was killed, although they were at home during that time. It further appears that Mason had told a friend earlier in the afternoon that he was to make a service call in the Conway territory that day.

The pivotal question presented to the Commission was whether Mason's death arose "out of and in the course of his employment". It is appellants' strong contention that the facts and circumstances of this case bring it squarely within a well recognized exception to the going and coming rule often referred to in decisions by this court and particularly in the case of *Blankenship Logging Company* v. *Brown,* 212 Ark. 871, 208 S. W. 2d 778. In that case the court recognized "the general rule to the effect that injuries sustained by employees going to and returning from the regular place of employment are not deemed to arise out of and in the course of employment." In that case the court further stated: "The authorities generally recognize several exceptions to the general rule. One of these exceptions, which is as well established as the rule itself, is stated by the Washington Court in the case of *Venho* v. *Ostrander Railway and Timber Company,* 185 Wash. 138, 52 P. 2d 1267, 1268, as follows: 'When a workman is so injured, while being transported in a vehicle furnished by his employer as an incident of the employment, he is within the course of his employment, as contemplated by the act.' " In the case under consideration it is not denied that the Company furnished Mason the truck which he used in servicing the freezers in the Conway territory.

In support of the above contention appellants also rely upon the decisions of this court in *American Casualty Company* v. *Jones,* 224 Ark. 731, 276 S. W. 2d 41; *Frank Lyon Company* v. *Oats,* 225 Ark. 682, 284 S. W. 2d 637, and; *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579.

It would appear therefore that Mason's death arose out of and in the course of his employment *if,* on the afternoon or night of January 20, 1959, he was engaged in business for his employer. On the other hand, *if* Mason was engaged in activities for his own personal pleasure or profit appellants' claim is not compensable. See: *Fox Brothers Hardware Company* v. *Ryland,* 206 Ark. 680, 177 S. W. 2d 44, and *Cagle* v. *Gladden-Driggers Company,* 222 Ark. 517, 261 S. W. 2d 536. In the latter case this court in affirming the lower court stated: "The commission, however, chose to base its findings upon the purely personal nature of Cagle's activities when the misfortune occurred."

Thus in this kind of cases, as in the case under consideration, a question of fact is presented for the Commission's determination. In testing the Commission's finding on this question of fact, we must give it the force and effect of a jury verdict. See: *Johnson Auto Co.* v. *Kelly,* 228 Ark. 364, 307 S. W. 2d 867, and *Hobbs-Western Co.* v. *Craig,* 209 Ark. 630, 192 S. W. 2d 116. Therefore the finding of the Commission in this instance must be sustained by us if we find it is supported by substantial evidence. If the "first appeal" were all that was involved on this appeal we would be compelled to uphold the findings of the Commission and the Circuit Court because we are convinced they are supported by substantial evidence. However, because of the conclusions reached hereafter on what we have chosen to call the "second appeal," we make no final disposition of the cause at this time.

SECOND APPEAL. When appellants presented the Motion to the Commission to reopen the case for the introduction of newly discovered evidence, they attached

to the Motion an affidavit of one Loyce W. Talley, wherein it was indicated he would testify to certain facts. We do not set out the contents of the affidavit because we do not try a case of this kind *de novo.*

It is appellants' belief and contention however that this purported new evidence would result in the Commission reversing its original finding.

We hold that the Commission was correct in refusing to reopen the case on the ground that it lost jurisdiction when the case was appealed to the Circuit Court. We have concluded however that the Circuit Court erred in holding that it had no jurisdiction or authority to grant appellants' Motion to remand the case to the Commission. We have reached this conclusion against the strong protest of appellees.

It is appellees' contention that if the Circuit Court had any authority to remand to the Commission it must be found in Arkansas Statutes, Section 81-1325, and that no such authority is found in this section. The statute referred to, in all pertinent parts, reads 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."

In support of appellees' contention they cite the decisions in *Continental Casualty Co., et al* v. *Caldwell, et al,* 55 Ga. App. 17, 189 S. E. 408, *Gonzales* v. *Johnston Foil Manufacturing Co.,* Mo. Court of Appeals, 305 S. W. 2d 45. We find that the former citation is not entirely in

point and therefore not controlling and we are unwilling to follow the decision in the latter case.

In the *Caldwell* case the Motion to remand for the introduction of newly discovered evidence was first made in the appeals court, and no question of due diligence was involved. Also in that case it is not shown that the statutes involved were the same as our own statutes. Neither do we agree with that court in its overall understanding of the Workmen's Compensation Act as revealed by this statement: "The design of the Workmen's Compensation Act is to furnish a speedy, inexpensive, and final settlement of the claim of injured employees. The act abhors and shuns protracted and complicated litigation over the facts of any case. * * * For this reason the act makes the finding of the Industrial Commission upon the facts final and conclusive." Our own conception of the Workmen's Compensation Act is that it does not consider speed more important than justice.

The Missouri Court of Appeals in *Gonzales* case did construe a Workmen's Compensation Statute exactly like our own statute above quoted, and the opinion does clearly hold that the Circuit Court had no authority under the statute to grant a Motion to remand to the Commission to consider newly discovered evidence. We are unable however to agree with the reasoning upon which the court reached its conclusion. What appears to be the essence of the court's reasoning is stated as follows:

"There is nothing before us to indicate arbitrary action or abuse of discretion on the part of the Commission unless it can be said employee's so called Motion for Reconsideration and the exhibits attached thereto constitute a part of the record in the case. There is no provision in the Workmen's Compensation Act Authorizing the Commission to entertain such motion after final award. There is but one course to pursue after final award by the full Commission and that is to appeal to the Circuit Court. The Motion for Reconsider-

ation and the exhibits attached thereto were filed seven days after the Commission made its final award. Consequently it is our conclusion that such motion and exhibits were not properly a part of the record in the case and should not be so considered. The transcript as certified by the Commission to the Circuit Court did not include these documents, obviously, on the theory, and rightly so, that they constituted no part of the record. The Circuit Court should be confined to the transcript of the proceedings and the evidence as certified by the Commission when reviewing an award, absent the charge raised for the first time 'that the award was procured by fraud.' * * * And the court's action in permitting the introduction of employee's Motion for Reconsideration and the exhibits attached thereto as evidence on appeal was irregular and unwarranted." (*Lewis* v. *Kansas Explorations,* 238 Mo. App. 697, 187 S. W. 2d 524, loc. cit., 527)

"To permit the employee, or, for that matter, the employer and insurer, to bring in new evidence after a final award has been made by the Commission, would seriously interfere with the finality of the Workmen's Compensation proceedings. If such a course was permitted, claimant could await the Commission's decision and if it was adverse, then search for new evidence in an effort to set aside the Commission's Award."

It seems to us that the same process of reasoning would apply with equal force to a Motion in the Circuit Court in an ordinary civil or criminal action, yet nothing is more generally and uniformly recognized in our jurisprudence than the power and duty of a trial court to grant a new trial on newly discovered evidence (under proper conditions) in order to prevent a miscarriage of justice. The "proper conditions" referred to are, for example, that the movant has exercised due diligence, that the evidence is not cumulative, and that the new evidence would justify a different result. These "conditions" are, we think, sufficient safeguards against undue delays and connivance on the part of the claimant, the possibility of which apparently disturbed the Mis-

souri Court of Appeals. It is difficult to see why every reason which justifies new trial procedure in a Circuit Court does not apply with equal force and relevancy to the Workmen's Compensation Commission. It is noted from that portion of the *Gonzales* opinion copied above that even the Commission has no authority to reopen a case once it has reached a final decision. We can see no just and valid reason for us to reach such a conclusion, especially since our statute (Ark. Stats., § 81-1327) specifically provides that the Commission "shall not be bound by technical . . . rules of procedure."

There is another fundamental respect in which we disagree with the Missouri opinion mentioned above. It holds, and appellees here contend, that the Circuit Court has no authority to remand (in this kind of a situation) to the Commission because none of the 4 grounds set forth in the statutes are applicable—that is, there is no contention here that (1) the Commission acted in excess of its power, (2) any fraud was involved, (3) the facts do not support the order of the Commission, and (4) there is no lack of evidence to support the Commission's order. On the face of the statute that analysis appears to be sound but we think the significance of the key word in the statute has been overlooked. That word, "review", is found in the first line of the above quoted statute. If this was a situation where the Circuit Court was called upon to "review" the *record of the proceedings* of the Commission, then the 4 grounds mentioned above would be applicable. However, that is not the situation presented in this case. The Circuit Court was not called upon to "review" any *proceedings* of the Commission. It was called upon only to consider a Motion which constitutes no part of the proceedings before the Commission. It is our opinion therefore that in this situation the Circuit Court had the same authority to consider and act upon appellants' Motion that it always has to pass upon a like Motion in the usual civil or criminal case originating therein. Not only so, but in both instances the trial court's sound discretion should be based upon the same considerations, to-wit: Is the

newly discovered evidence relevant, is it cumulative, would it change the results, and was the movant diligent?

In view of the conclusions heretofore set forth, it follows that the entire cause should be, and it is hereby, remanded to the Circuit Court and the Circuit Court is reinvested with authority to consider appellants' Motion to remand to the Commission for the purpose of introducing newly discovered evidence. In considering the said Motion upon remand the Circuit Court will, of course, use its sound discretion in accordance with our pertinent statements in the previous paragraph.

Reversed and remanded with directions.

RINKE *v.* WEEDMAN.

5-2231 341 S. W. 2d 44

Opinion delivered December 12, 1960.

Lasley & Lovett, Gentry, Gentry & Mott, Rose, Meek, House, Barron & Nash, for appellant.

Owens, McHaney & McHaney, Frank J. Wills, for appellee.

SAM ROBINSON, Associate Justice. The issue in this case is the ownership of a tract of wild and unimproved land west of Little Rock in Pulaski County, consisting of 37.13 acres. Appellants own the land or a substantial part thereof if appellee has not acquired it by adverse possession. So there may be a clear understanding of the issues, it is necessary to mention several transactions in connection with the land which have occurred over a period of about fifty years. Prior to 1914 the land was owned by Alexander Robertson and had been platted into lots and blocks as Arkansas Heights Addition. The plat was duly recorded. Robertson let the property forfeit for general taxes for the years 1914, 1916 and 1917. Later R. M. Birnbach obtained a deed from the State to the lands and in 1921 deeded the property to R. A. Rinke and F. A. Rinke. In 1923 the land was again allowed to forfeit for taxes. F. A. Rinke was adjudged insane in 1935. R. A. Rinke died in 1939 and his widow died in 1941. In 1939 the State Land Commissioner deeded the land to appellee, Mark Weedman, and Weedman had paid taxes on it for more than seven consecutive years at the time appellants commenced this action.

Alexander Robertson died testate in 1921. His entire net estate was placed in trust, with the income therefrom to his widow, Abigail Robertson, for life, upon her death the income to be used for educational purposes known as Abigail Robertson Scholarship Trust. No children were born to Alexander and Abigail Robertson. The lands were a new acquisition and Abigail Robertson

renounced the will of Alexander Robertson, thereby acquiring a one-half interest in the Alexander Robertson estate. The Abigail Robertson Scholarship Trust is still active, and it conveyed its interest in the property to appellant, Fred Rinke, on November 21, 1958.

The parties have agreed that all the tax sales are void. Therefore, title to one-half interest in the land would be in Fred Rinke under the 1958 deed from the Abigail Robertson Scholarship Trust and title to one-half interest would be owned by the beneficiaries under the will of Abigail Robertson if Weedman has not acquired the property by adverse possession.

There are two points that need to be discussed:

First, does the deed from the State give appellee Weedman the color of title which he must have in order to successfully claim ownership by adverse possession under the provisions of Ark. Stats. § 37-102?

Ordinarily a tax deed from the State, void because a tax sale is void, nevertheless constitutes color of title. *Cayce* v. *Nordin, Trustee,* 221 Ark. 383, 253 S. W. 2d 338, and cases cited therein. A redemption of tax forfeited land, however, does not in itself constitute color of title. *Galloway* v. *Battaglia,* 133 Ark. 441, 202 S. W. 836; *Rouse* v. *Teeter,* 214 Ark. 488, 216 S. W. 2d 869. Appellants contend that Weedman is estopped to deny that he was the owner of the property at the time of obtaining the deed from the State and therefore his acquisition of the property must be considered a redemption and not a purchase.

Before Weedman obtained a deed from the State he knew the land had been platted in lots and blocks and forfeited as such because of the nonpayment of general taxes. In connection with acquiring the land from the State he engaged the services of an attorney. The attorney advised getting a deed from Mrs. Fred A. Rinke, whose husband had been declared insane in 1935. It will be recalled that in 1921 Rinke obtained title based on a tax sale and in turn had allowed the property to again

forfeit for taxes in 1923. (It will also be recalled that the parties agree that all the tax sales are void.)

Weedman did get a deed to the property from Mrs. Rinke, and acting on the theory that this deed gave him title to the property, he petitioned the county court to convert the platted property to acreage under the provisions of Act 91 of 1929 [Ark. Stats. § 19-407 *et seq.*], which would thereby enable him to redeem the property from the State for $1.00 per acre under the provisions of Act 284 of 1937 [Ark. Stats. § 10-903]. Acting on Weedman's petition, the county court did convert the platted property back to acreage and Weedman obtained a deed from the State to the property for the consideration of $1.00 per acre and other fees that are mentioned in the deed.

We need not go into the question of whether the deed from Mrs. Rinke gave Weedman color of title, because we have reached the conclusion that the deed from the State did give him color of title; hence it is immaterial whether Mrs. Rinke's deed gave him color of title. Appellants base their contention that the State's deed did not give Weedman color of title because, they say, Weedman is estopped to deny he was the owner of the property by reason of his assertion of ownership made in getting the property reduced to acreage and purchasing from the State on the theory of ownership.

The doctrine of equitable estoppel has no application because nothing that Weedman did caused appellants to act in any manner to their detriment. It is agreed that all the tax sales, including the one under which Rinke originally claimed ownership through his purchase from Birnbach, are void. And Rinke does not claim by adverse possession. It follows, therefore, that Rinke acquired no interest whatever in the property until he obtained a deed from the Abigail Robertson Scholarship Trust in 1958, and of course he obtained no interest at that time if the Trust had none to convey. And Weedman's representation that he was the owner of the property under the deed from Mrs. Rinke in no way

caused the Scholarship Trust to act to its detriment. Although the Trust has been in existence for more than 35 years, it paid no taxes on the property and did not carry it as an asset and showed no interest in the property until it gave the deed to Rinke in 1958. At one time Weedman inquired of the trust officer of the bank acting as trustee, regarding the property, and was told that the Trust owned no interest in the property.

But appellants argue that the doctrine of judicial estoppel is applicable; that once Weedman claimed in a judicial proceeding that he was the owner, he is estopped to later assert in another proceeding, where the parties are not the same, that he was not the owner at the time of his purchase from the State in 1939.

True, in petitioning the county court to reduce the lots and blocks to acreage and purchasing from the State, Weedman represented himself as owner, but we do not think these representations estop him from now showing just what the facts were in his acquisition of the property. To support their contention of judicial estoppel, appellants cite the cases of *Womack* v. *Womack,* 73 Ark. 281, 83 S. W. 937, *mod.* 83 S. W. 1136; *Robinson* v. *Cross,* 98 Ark. 110, 134 S. W. 954; *Hudson* v. *Union & Mercantile Trust Co.,* 155 Ark. 605, 245 S. W. 9. *Womack* v. *Womack* was a divorce case. Property was purchased in the wife's name, paid for by both the husband and wife. The husband asked that the deed be set aside. The Court said: "Conceding that Womack purchased the land and paid for it, and had the title taken in name of his wife, it was absolutely her property. 'If a husband purchases property, and has it conveyed to his wife, or expends money in improving her property, the advances will be presumed to be gifts. The law will not imply a promise on her part to repay him.' *Ward* v. *Ward,* 36 Ark. 586. But the facts do not justify this conclusion, for the evidence shows her work contributed at least equally to the acquisition of this property, and he has in bankruptcy proceeding treated it as hers, not his, and he cannot now be heard to say it was his. Rodgers, Domestic Rel. § 259. There can be no ques-

tion that she owned this property free of any legal, equitable, or moral obligation to convey to him." Thus it will be seen that the Court held in favor of the wife because she was the absolute owner of the property and not because Womack was estopped to claim ownership after asserting in a bankruptcy proceeding that the property belonged to his wife.

In the *Robinson* case the doctrine of judicial estoppel is not involved at all. In the *Hudson* case a widow alleged that certain money belonged to her husband's estate and prayed that she be allowed an interest therein. The court allowed her one-third, which she accepted. The administrator in good faith paid the balance on decedent's debts. In the circumstances it was held that the widow was estopped to claim all the money as her own property. This is clearly a case of equitable estoppel. The Court said: "Appellant's contention is that, under the agreed statement of facts, appellee's testatrix was estopped from claiming the fund on deposit as her individual estate, and that the court erred in not dismissing the bill. We think they are correct in this contention. The doctrine of equitable estoppel has been defined by this Court as follows: . . ." Thus it will be seen that this case went off on the proposition of equitable estoppel and not judicial estoppel. None of the above cases is authority for appellants' contention that judicial estoppel is applicable.

Appellants also cite 31 C.J.S., § 121, p. 390, to the effect that a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary of the assertion sought to be made. All of the cases cited in C. J. S. sustaining this note are from the State of Tennessee, except one case from Wyoming, *Hatten Realty Co.* v. *Baylies*, 42 Wyo. 69, 350 P. 561, 72 A. L. R. 587. There the court criticizes the holding in the Tennessee cases and cites the general rule that a position taken by a party in one suit cannot be claimed as working an estoppel in another suit in favor of a party who was a stranger to the first, but that whatever statements or admissions were made in the first can be

used as evidence only. Citing 18 Ann. Cas. 78; Ann. Cas. 1915C, 735; 28 L. R. A., N. S., 327; L. R. A. 1915A, 200; 5 A. L. R. 1505; and Wigmore on Evidence, 2d Ed., § 1064.

It is also said in 31 C. J. S., § 117, p. 373: "The doctrine of estoppel to assume inconsistent positions in judicial proceedings has been said to be one of vague application, and in many cases has been held inoperative, or has not been applied, under the particular facts and circumstances involved." Dozens of cases from numerous states are cited to support the text, and it is further stated, at page 381: "For this doctrine [doctrine of judicial estoppel] to be applied, it is commonly required that the parties be the same, and that the same questions be involved."

In the case at bar appellants were not parties to Weedman's petition to reduce the lots and blocks to acreage, nor parties in his purchase from the State. No theory of equitable estoppel is involved, and the doctrine of judicial estoppel is not applicable.

The next point for consideration is appellants' contention that Weedman did not pay the taxes on a description that would constitute notice to the owners. The land was described in the deed from the State to Weedman as follows: "All that part of the Southeast Quarter of the Northwest Quarter containing Twenty-three and 31/100 (23.31) acres, and All that part of the North Half of the Northeast Quarter of the Southwest Quarter, containing thirteen and 82/100 (13.82) acres, and containing, in the aggregate, Thirty-seven and 13/100 (37.13) acres, all in Section Three (3), in Township One (1) North, of the Base Line, in Range Thirteen (13) West of the Fifth Principal Meridian in Arkansas, which were forfeited and sold to the State of Arkansas, at a County Tax Collector's Sale for non-payment of the taxes due thereon for the year or years set forth below, as lots and blocks in Arkansas Heights Addition to the City of Little Rock, Arkansas, . . ." Then follow the lot and block numbers in Arkansas Heights Addition, and the dates of forfeiture.

Weedman filed his deed for record, and the property was extended on the records of the County and Weedman paid taxes under the following descriptions:

From 1939 through 1954 the property was described as:

"That pt. SENW cont. 23.31 A and pt. n 1/2 NESW cont. 13.82 A formerly platted as pt. Ark. Heights, Sec. 3-1N-13W"

and from 1955 to the present time it was described as:

"Pt. SENW Cont. 23.31 ac. & Pt. N 1/2 NESW cont. 13.82 ac. formerly platted as Pt. Ark. Hgts. 3-1N-13W".

It is conceded that the deed from the State to Weedman, which he recorded, contains a valid description of the lands involved in this litigation. The question is whether the taxes were paid on a description which would constitute notice to those who owned the property at the time of the forfeiture that someone was paying taxes on the property. Of course, such former owners knew that they had paid no taxes on the property for more than 35 years. If appellants had been interested in the land in the least bit and had made any investigation to determine what was the tax situation, they would have seen at once that Mark Weedman was paying taxes on 37.13 acres located in the SE 1/4 of the NW 1/4 and Pt. of the N 1/2 of the NE 1/4 of the SW 1/4, in Section 3, Township 1 N., Range 13 W., formerly platted as part of Arkansas Heights Addition; and the recorded deed from the State to Weedman would have given them the lot and block numbers of the lots described on the plat which the State conveyed to Weedman.

In *Junction City Special School District No.* 75 v. *Whiddon,* 220 Ark. 530, 249 S. W. 2d 990, the State had deeded tax forfeited land to McWilliams and Whiddon, such land being described in the deed as Frl. NW 1/4 of the NW 1/4, Sec. 28, T. 19 S., R. 16 W., containing 35 acres more or less. Previously five acres in the quarter section had been conveyed to the school district under

a definite and proper description. The Court said: "While the description under which appellees claimed was faulty, it was evident that they were claiming all that remained of the NW 1/4 of the NW 1/4 of section 28, township 19, range 16 west, 35 acres, after appellant's 5-acre tract had been carved out of that 40 acres under a definite correct metes and bounds description, which located the 5 acres in the NW corner of the NW 1/4 of section 28, township 19, range 16 west, etc. We think this was sufficient to identify this 35 acres claimed by appellees and entitled them to the benefits of § 37-103."

In the *Whiddon* case, one would have to examine the recorded deed to the five acres to determine the exact 35 acres on which McWilliams and Whiddon were paying taxes. Such determination could not be made from the deed from the State to McWilliams and Whiddon, but in the case at bar one would have to look no further than Weedman's recorded deed from the State to determine the exact location of the land on which he was paying taxes. In the *Whiddon* case this Court quotes from 132 A. L. R. 227, as follows: " 'If the taxes as to the particular land claimed adversely are in fact paid, the fact that such land has not been accurately described in the assessment or the tax receipts will not affect the efficacy of the payment as a compliance with the statute,' " and further quoted from 2 C. J. 209, as follows: " 'One who, under color of title acquired in good faith, has paid the taxes actually assessed against land is entitled to the benefit of the statute, notwithstanding the land may have been misdescribed in the tax receipts, and provided he is able to remove the uncertainty by extrinsic evidence.' " And the Court quoted from 2 C. J. S. 749: " '. . . if claimant pays the taxes on the land actually claimed, the fact that the land was misdescribed in the assessment or in the tax receipts is immaterial.' "

In support of the contention that the description on which Weedman paid taxes for so many years is insufficient to base a claim of seven years adverse possession under color of title, appellants cite *Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 566, 88 S. W. 1011, 91

S. W. 20; *Phillips* v. *Michel,* 217 Ark. 865, 233 S. W. 2d 551; and *Darr* v. *Lambert,* 228 Ark. 16, 305 S. W. 2d 333; but in all of these cases the description under which the taxes were paid furnishes no clue leading to a correct description that might be determined from the records.

Finding no error, the decree is affirmed.

GEORGE ROSE SMITH, J., concurring. Inasmuch as my joinder in the court's opinion appears to be at variance with my practice of not participating in cases wherein my former law partners appear as counsel, it is appropriate for me to explain that the attorneys on both sides requested that I take part in this case. In such circumstances I of course have no hesitancy in participating in the court's consideration of the case.

RAND *v.* STATE.

4977 341 S. W. 2d 9

Opinion delivered December 12, 1960.

Claude Duty & Jeff Duty, for appellant.

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

JIM JOHNSON, Associate Justice. The appellant, Virginia Rand, was charged with the crime of second degree murder for the killing of Harry V. (Buddy) Clark. Following trial in the Benton Circuit Court, the jury found appellant guilty and fixed her punishment at 8 years in the state penitentiary. From such verdict comes this appeal.

It appears from the record that on the evening of August 8, 1959, the deceased, Clark, and his wife entertained Mr. and Mrs. Sam Davis in their home. At about 1:15 a.m. on August 9, Mr. and Mrs. Davis left the Clark home and at the same time Clark left in his car to check the receipts at the Horseshoe Grill, a cafe which he owned located some 8 blocks from the Clark home in Rogers. Although the evidence is somewhat uncertain, it is clear that Clark finished his work at the cafe and at 1:30 a.m. the night police radio operator received a

call from a woman identifying herself as appellant who said: "Send someone out here, I have had some trouble." After the radio operator sent a patrolman to the Rand home, the appellant called again and said: "I have shot a man. I shot Buddy Clark." Upon arrival at the Rand home, the patrolman was told by appellant that she shot Clark in her bedroom. The patrolman immediately went to the hospital where he found Clark on the floor in the hall. Nurses at the hospital testified that Clark came in the front door and fell to the floor. The records show he was admitted at 1:45 a.m. He expired at 4:17 a.m. that same morning.

The patrolman testified he found tracks in the heavy dew going in and out of the Rand house and found a gun about 4 to 6 feet from these tracks. There were two bullet holes in the bedroom walls and 5 empty cartridges were found in the bedroom. The deceased was shot 4 times—3 times in the chest and one time in the right arm. No trace of blood was found in or around the Rand house but there was blood on the steering wheel and door of Clark's automobile.

The motion for a new trial contained 66 assignments of error which we have examined in detail. The evidence related above, standing uncontradicted and unexplained, was sufficient to justify a conviction. Ark. Stats. § 41-2246. The killing was admitted by defendant, and the use of a deadly weapon, capable of producing death was admitted. We have repeatedly held that malice, and intent to kill, may be implied from the use of weapons capable of producing death. Specific intent to take a life is not an essential element of the crime of murder in the second degree. See: *Wooten* v. *State,* 220 Ark. 750, 249 S. W. 2d 964, and cases cited therein.

A great deal of testimony was introduced by the State tending to show that there had existed for several years an extramarital relationship between appellant and deceased. The admissibility of this testimony is drawn in question. Without detailing the testimony of each particular witness, let it suffice to say that the evidence

wherein witnesses testified about seeing appellant and Clark together, including testimony of one following the other in automobiles, and the testimony establishing that Mrs. Rand called or contacted Clark, was entirely admissible.

On the other hand, the testimony of anonymous telephone calls was entirely inadmissible, as was certain evidence that strongly implied, though entirely speculative, that the two were having rendezvous. For instance, Eldon Maxey, a resident of Springdale, testified that he did not know Mrs. Rand or Clark, but that he had seen a man driving an old car and a woman driving an Oldsmobile, park in the parking lot in Springdale. Maxey stated that he rather thought the old car was a Ford, though he was unacquainted with the model. From his testimony:

"Q. It just come down like Fords do?

A. Yes. . . .

Q. Do you know whether or not that's the type, the model from 1941 to '48?

A. Yeah, it was a later car than a '48, a '38.

Q. I said a '48?

A. You said a '48?

Q. Was it between a '41 and a '48, or do you know?

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

* * *

"Q. A black car? How many such occasions did you observe that?

A. Just one time I reported."

The witness testified that he saw this couple get in the old car and drive west to the Legion Hut. "They was putting something up over the glasses so I reported to the police, to Herman McCullough." Herman McCullough testified that he was acquainted with Mrs. Rand, and following Maxey's report, investigated, and saw Mrs.

Rand in the Ford with *some man.* Neither of the witnesses identified Clark as being present at any time.

The court admitted into evidence two unsigned letters directed to Mrs. Clark, and three unsigned cards directed to acquaintances of Mrs. Clark. No proof was offered that these communications were sent by the defendant, though the contents of each clearly implied that they had been written by one having an affair with Mr. Clark. Mrs. Clark testified that after receiving these letters she almost had a nervous breakdown and went to Barnes Hospital to "find out what was wrong with me." This evidence relating to the letters was entirely inadmissible but further discussion of the contents is not required because the court subsequently withdrew these letters and cards from the consideration of the jury. One of the letters was very critical of personal items in the house, including the bedroom, and advised Mrs. Clark that ". . . I left a lipstick for you under the west end of the settee cushion." Mrs. Clark subsequently testified that she found a lipstick in that location, and this lipstick was offered in evidence at the trial. Velda Hudspeth, a close friend of Mrs. Clark, testified that the latter showed her the lipstick, and that on an occasion when appellant had visited in the witness' home, she observed Mrs. Rand's lipstick, and there was some similarity. From the evidence:

"Q. What was the similarity?

A. The lipstick was worn in the center.

Q. The one that she had?"

* * *

"Q. Now, you're testifying to this jury that Mrs. Rand had a lipstick and it was worn somewhat like that; is that correct?

A. Yes.

Q. Did you ever see any other lipsticks worn like that?

A. I never noticed another woman wearing it like that.

Q. You never noticed another woman wearing it like that? And that's what you go on in your testimony here; what you base your testimony on here is that you saw lipstick similarly worn like that?

A. Yes."

* * *

"Q. Do women have a particular manner in which they apply lipstick which leaves a particular impression on—wears it a certain way on the stick?

A. I think so.

Q. How many lipsticks have you examined, Mrs. Hudspeth?

A. At the time, since I was interested, I watched other people's lipsticks to see if they were worn differently.

Q. I'm asking you at that time how many lipsticks had you examined?

A. I didn't examine any.

Q. You hadn't examined any at that time, had you?

A. I'd looked at them. I looked at them when I saw other women take them out. I was interested."

This is a remarkable bit of evidence. With the thousands of women in this state who use lipsticks, it would certainly appear that more than one would have a lipstick "worn in the center." Be that as it may, the witness was not testifying about an examination of a lipstick in the possession of Mrs. Rand; rather she was testifying about a lipstick which Mrs. Clark said she found in a location suggested to her by an anonymous letter (which, in itself, was inadmissible). All of this evidence relating to the lipstick was incompetent for the reasons herein mentioned.

In addition to this testimony, a large volume of evidence was introduced by the State tending to show animosity between appellant and the wife of deceased. Mrs. Clark testified that she kept her golf equipment in a locker at the Twin City Golf Club house, and that, about a year before, she had found two pairs of golf shoes, golf bag, and a golf club slit, apparently by a razor blade or knife. She stated that she left her key to the locker hanging on a board where anyone could have picked it up. Paul Watkins stated that he saw Mrs. Rand in the club house on the occasion when the equipment was damaged, though he could not say what time of day the incident occurred, nor could he say that no one was there except Mrs. Rand. This evidence was inadmissible since it did not relate to animosity or ill feeling toward the deceased, nor was the defendant connected with the act of damaging the property. In this respect, such evidence is distinguished from that deemed admissible under the ruling set forth in *Avey* v. *State,* 149 Ark. 642, 233 S. W. 765; and *Stokes* v. *State,* 71 Ark. 112, 71 S. W. 248, relied on by appellee.

Probably the most damaging inadmissible testimony which was permitted to go to the jury related to evidence concerning the kicking of Mrs. Clark by Mrs. Rand when the former was seven months pregnant. Mrs. Pete Elders testified that she attended a party in 1959 which was also attended by Mrs. Clark and the defendant. She stated that she was talking with the former, who was standing in front of her, and Mrs. Rand was seated on a high stool just to the right of the witness. From her testimony:

"Well, I was talking to Mrs. Clark when I felt something hit me on my right side, and I glanced down, because it was a blow and I seen this foot hit Mrs. Clark.

"Q. Do you know . . .?

Mr. Duty: Object to the testimony and ask it be stricken. Irrelevant, incompetent and immaterial.

"The Court: It will be overruled.

"Mr. Duty: Save our exceptions to the ruling.

"Mr. Coxey:

Q. Do you know whether that blow struck Mrs. Clark?

A. She had on a smock.

"Q. I say, do you know whether or not it struck her?

A. Well, I couldn't feel for her, but the foot disappeared under the smock.

"Q. Under her smock?

A. Yes."

Further:

"Now, you didn't see Mrs. Rand kick Mrs. Clark, did you?

A. I saw her foot.

"Q. I say, you didn't see Mrs. Rand actually in the act of kicking Mrs. Clark, did you?

A. Well, she had to be on the other end of the foot." The kicking was also testified to by Laney Clark. We can think of nothing that would tend to more inflame the mind of a juror than to hear evidence that a woman that far along in pregnancy was kicked in the stomach. Such an act by the defendant would be considered inexcusable, and we deem this testimony not only inadmissible, but also highly prejudicial; so much so that a reversal would be required though the other testimony herein cited was not included in the record. This evidence all tended to show that Mrs. Rand was a woman of "bad character", and Mrs. Rand's character had not been placed in issue. As stated in Wharton Criminal Evidence, Vol. 1, 11th Edition, p. 487, § 345:

"Evidence of other crimes, when offered in chief, violates both the rule of policy which forbids the state to initially attack the character of the accused and the rule of policy that bad character may not be proved by particular acts."

There can be no doubt that all this evidence was prejudicial to appellant. By its very nature, it creates in the eyes of the jury a damaging image. As we said in *Lentz* v. *State,* 169 Ark. 31, 272 S. W. 847.

"It is the well settled doctrine of this Court that the prosecution cannot resort to the accused's bad character as a circumstance from which to infer guilt, the reason being that 'if such testimony be admitted the defendant might be overwhelmed by prejudice, instead of being tried upon evidence affirmatively showing his guilt of the specific offense with which he is charged.' "

Reversed.

McFADDIN, J., concurs.

ED. F. McFADDIN, Associate Justice, concurring. It is with great reluctance that I agree to a reversal of this conviction; but a careful study of the record convinces me that I cannot place the stamp of judicial approval on the admission of some of the testimony that was used by the State over the objections of the defense. In *Byler* v. *State,* 210 Ark. 790, 197 S. W. 2d 748, we reversed a case because of error; and Judge FRANK SMITH in making the reversal quoted: " 'Twill be recorded for a precedent and many an error by the same example will rush into the state. It cannot be."[1] That is the way I feel in this case. While the testimony may not have influenced the jury in view of other evidence, still I cannot, by affirming this conviction, place the stamp of approval on such evidence so as to be used in another case.

I do not agree with the majority opinion. The testimony showing Mrs. Rand's conduct toward Mrs. Clark could have been admissible—if properly limited—to show Mrs. Rand's dislike of Mrs. Clark because Mrs. Rand was jealous of Mr. Clark. This would support the State's theory of motive. It was part of the State's claim that

[1] The quotation is from Shakespeare's "Merchant of Venice," Act IV, Scene 1, Line 220. It is in answer to the equally famous quotation: "To do a great right, do a little wrong."

Mrs. Rand killed Mr. Clark when he tried to end their relationship: "Hell hath no fury like a woman scorned."[2] The burden was on the defense to ask that the Court limit the purpose of the testimony to the one purpose for which it was admissible. See *Amos* v. *State,* 209 Ark. 55, 189 S. W. 2d 611. No such request was made, so I see no error duly preserved in regard to such evidence.

But, even so, there was other evidence admitted into this trial which was clearly inadmissible, as I will now detail:

A.

On Transcript Page 406, when the witness Wanda Sly, a waitress in Buddy Clark's cafe, was testifying, the following occurred:

"Q. Now, you answered the phone, you say, on occasions. Did you ever answer the phone after it had rung and no one would answer and you'd hear them hang up?

Mr. Duty: That's objected to.

A. Yes.

Mr. Duty: That is objected to.

The Court: Overruled.

Mr. Duty: Note our exceptions."

The witness had been testifying as to telephone calls that Mrs. Rand made to Mr. Clark and in the quoted portion above, the Court allowed the witness to testify as to the phone ringing and somebody hanging up without answering. The quoted testimony was not admissible in evidence against Mrs. Rand and should not have been allowed because it was not shown that she had made such anonymous calls.

B.

Mrs. Laney Clark, the widow of Buddy Clark, was called as a witness and she testified as to telephone calls

[2] The full quotation from William Congreve's play, "The Mourning Bride," Act III, Scene 8, is: "Heaven hath no rage like love to hatred turned, nor hell a fury like a woman scorned."

that she received from Mrs. Rand; and then on Transcript Page 670 the following occurred while Mrs. Clark was being examined:

"Q. Now, I ask you at this time, since you've had time to reflect, if you on any of those occasions when the phone rang and you heard noises, that you think of one now that you couldn't recall when I examined you previously?

A. Deep breathing.

Mr. Duty: Just a moment. Object to those. Those were the anonymous telephone calls without anyone identifying themselves. Object to the testimony of those telephone calls and ask the jury not to consider them.

The Court: It will be overruled.

Mr. Duty: Save our exceptions.

Mr. Coxsey: Q. All right, do you remember any more?

A. Deep breathing. Just sit there and hold the phone and just breathe real hard in the telephone.

Q. When did that occur?

A. Over a period of several months within the last year."

There was nothing to show that this "deep breathing" was done by Mrs. Rand. So far as the record shows in this case these calls could have been the prank of a child; and yet such evidence was permitted to go to the jury against Mrs. Rand.

C.

Again, Mrs. Laney Clark, widow of Buddy Clark, was recalled to the witness stand and permitted to testify that she had a locker at the Twin City Golf Clubhouse in which she kept her golf equipment; and on Transcript Page 695 *et seq.* this occurred:

"Q. I will ask you to tell the jury whether or not you sustained some damage to any of that equipment? If so, when?

Mr. Duty: Just a minute, Mrs. Clark. Object to that testimony, if the Court please. I could dream a thousand years and never dream up any connection between an injury to Mrs. Clark's golf bag and this case we're trying before this jury. This girl is not being tried for anything but this indictment here. There has been no connection shown between Mrs. Clark and Mrs. Rand and injury to a golf bag some time ago on a golf course at Rogers.

Mr. Coxsey: That's what we're endeavoring to do.

Mr. Duty: It has no connection with this case we're trying; only for prejudice. I object to that line of testimony.

The Court: Overruled.

Mr. Duty: Save our exceptions.

The Court: Order in the court room.

Mr. Coxsey: Q. What damage did you sustain to what articles?

A. Two pair of golf shoes, and my golf bag, and a golf club were slit with what looked like to be a razor blade or knife, and the golf cart was broken.

Q. And that was when?

A. Last year, last fall, a year ago this fall.

Mr. Coxsey: That's all.

Mr. Duty: If the Court please, I renew my objection to that testimony."

There was not the slightest bit of evidence to connect Mrs. Rand with the damage that had been done to Mrs. Clark's golf equipment; and on cross-examination Mrs. Clark admitted that the key to her locker was, ". . . available to any Tom, Dick, and Harry that wanted to walk in there. . . . Anybody could get that key and unlock it. . . ." Nevertheless, the jury was left to surmise that Mrs. Rand *might have been the person* who

had damaged Mrs. Clark's golf equipment. Such unconnected evidence should never have been admitted.

D.

Again, there was the evidence about the lipstick. The witness, Velma Hudspeth, was permitted to testify that Mrs. Laney Clark had shown her some lipstick and that the witness had seen some lipstick carried by Mrs. Rand which "seemed similar." There was never any identity of the lipstick. Such testimony was highly prejudicial.

I have listed these instances of incompetent evidence permitted over objection, so that when the case is tried again—as it will be, since it is reversed and remanded—the same mistakes will not reoccur. Of course, a whole group of unsigned and anonymous letters were originally admitted without any proof as to the handwriting to connect Mrs. Rand with the letters; and then later the Court excluded those letters. I cannot say that prejudicial error resulted since each member of the jury stated that he would disregard all such letters. Of course, on a retrial the letters will not be admitted without proper foundation proof.

As aforesaid, it is with great reluctance that I vote to reverse the conviction; but I am convinced that material and prejudicial error occurred in the admission of evidence.

MULLIGAN *v.* PAYNE.

5-2246 341 S. W. 2d 53

Opinion delivered December 19, 1960.

[redacted]

Johnston & Rowell, for appellant.

Brazil & Brazil, for appellee.

CARLETON HARRIS, Chief Justice. This appeal results from a decree of the Conway Chancery Court wherein the complaint of appellants was dismissed for want of equity, and title to certain lands was confirmed in appellee, Darby Payne. Mr. and Mrs. T. B. Robbins of Center Ridge were the owners of approximately 195 1/2 acres of land in Conway County for a number of years prior to November 17, 1954. An additional 80 acres was also

owned by Mrs. Robbins, but this latter acreage is not involved in this appeal. On November 17, Mr. and Mrs. Robbins conveyed, by warranty deed, the 195 1/2 acres to their daughter, Darby Payne, who was living with her parents at the time they moved to the property in 1930. Mrs. Payne married in October, 1931, and she and her husband continued to live on the premises. In 1938, Mrs. Payne married a second time, moved away for a short while, but subsequently returned, and lived with her parents until their deaths. The deed from the parents to the daughter recites:

"This land is being conveyed to the said Darby Payne, our daughter, for and in consideration of her living with us and taking care of us the rest of our lives since we both are above the age of 84 years of age and need someone to care for our physical needs. The said Darby Payne is not able to care for us financially but can care for us otherwise. It is further agreed and understood that we can live on the said land the remainder of our lives."

In 1956, Mr. Robbins, 92 years of age, died, and in 1957, Mrs. Robbins died at 87 years of age. Appellants, Mrs. L. A. Mulligan, Mrs. W. E. (Della) Maxey, Sr., Hervey Robbins, and Berneice Richey, are also children of Mr. and Mrs. Robbins. Suit was instituted by these children against their sister, Darby Payne, in which they alleged that in 1954, their father and mother desired to become welfare recipients, and to receive monthly checks from the Welfare Department as grants to aged people, but that their parents owned too much land and cattle to qualify as needy persons under the regulations of the State Welfare Department; that persons owning more than 80 acres of land at that time were ineligible for welfare payments. It is then alleged that Mr. and Mrs. Robbins "conceived a sham deed to divest themselves of the ownership of all lands in excess of 80 acres * * *," and that solely for the purpose of coming within the eligibility requirements for welfare payments, the parents conveyed the 195 1/2 acres to appellee; that it was necessary that title be divested without the Robbinses

receiving any substantial consideration (since that would likewise make them ineligible for benefits), and the clause in the deed, heretofore set out, was inserted for that purpose. The complaint alleges that all the parties knew the purpose of the deed, and that it was understood by all that the property was to be divided equally among the children upon the death of the parents. It is further alleged that, still for the purpose of meeting welfare requirements, the Robbinses conveyed to their daughter, Berneice Richey, all of their cattle; but that Mrs. Richey did not actually own the cattle, and though checks for the milk were directed to her, the money was actually turned over to the parents. The complaint further asserted that Mrs. Payne "now contends that she is the sole and exclusive owner of the 195 1/2 acres" but "in truth and fact, the said Darby Payne holds naked legal title to the said 195 1/2 acres as the trustee for all the plaintiffs herein", and the prayer was that the court "impress an implied or constructive trust" upon the lands, and "find that the said Darby Payne holds said legal title as trustee for the use and benefit of all the children and heirs at law of the said T. B. Robbins and Ida Ann Robbins * * *." From the court's decree dismissing the complaint and quieting title in appellee, appellants bring this appeal.

The issue in this case is purely one of fact; there is no dispute as to the legal principle involved. It is simply a matter of whether appellants met the quantum of proof necessary and essential to the establishment of their contention. Nine witnesses, including three of the parties, were called to the stand on behalf of appellants; two others were grandchildren, one a husband of the granddaughter, and one a niece of the deceased Robbinses. The testimony of another, Arlie Bryant, strongly favored appellee. Seven witnesses, including the appellee, and Juanita Bailey, a daughter of appellant Berneice Richey, testified in her behalf.

Appellants, through their testimony, endeavored to show that the deceased parents desired to obtain welfare payments, and executed the conveyance to appellee sim-

ply as a means of getting the title out of themselves. Mrs. Jewell Gordon, daughter of Mrs. Mulligan, her husband, Olen Gordon, and Ruth Morrow, the niece, all testified that Mr. Robbins told them that the land had been deeded to Darby in order that they (the parents) could qualify for welfare benefits, and that appellee was to divide the land among all the children following the death of Mr. and Mrs. Robbins. Mrs. Mulligan testified that Darby told her, following the death of her father, and in the presence of her mother, that she would "turn the deed back—set the deed aside, and give each child his part." Hervey Robbins, a son, testified that "my Mother said she made most of the land over to Darby, and she knew Darby would divide the land up after their death", though he said Darby had never made any such promise to him. Mrs. Maxey, a daughter, testified that appellee stated the deed was "just for a sham to get relief for them."

Arlie Bryant, though called by appellants, testified that he took the Robbinses to Edwin Bird, a Notary Public, for the purpose of executing a deed to Darby, and that this service was rendered at the request of the grantors. He stated that Mr. and Mrs. Robbins told him that they wanted Darby to have the land, and that Mrs. Robbins made this statement in the presence of his wife and Berneice Richey.[1] According to the witness, at the time Mr. and Mrs. Robbins signed the deed, the father stated, in response to a query from the Notary Public as to whether the old people knew what they were doing:

"Yes, sir, that's why we come up here for is to deed it to her, that we feel that she ought to have it, and she is entitled to it by being there and never has been away from home, and stayed with us, and I don't know what we would have done if it hadn't been for her staying there."

Bryant also assisted the Robbinses in getting on the welfare rolls. Counsel endeavored to show that Bryant

[1] Mrs. Richey did not testify in the case.

had made prior statements inconsistent with his testimony. According to Joe Brinkley, a grandson, he had heard Bryant state that the welfare turned the Robbinses down because they owned too much land, and he (Bryant) had gone back to the old people, and talked to them about deeding all the property to Darby except 80 acres. Juis Carr, a merchant of Center Ridge, testified that Bryant had talked with him about getting Mr. and Mrs. Robbins on welfare, and that they owned too much land.

Several apparently disinterested witnesses testified on behalf of appellee. Audrey Atkinson and Mrs. Bryant both testified that Mr. and Mrs. Robbins stated that they wanted Darby to have the land. Atkinson testified that Mrs. Robbins had related to him in 1946 that she and her husband had been able to pay off an indebtedness to the Federal Land Bank with the help of Darby. Mrs. Audrey Atkinson testified that Mrs. Robbins had told her that the place was going to be deeded to Darby, so the latter would have a home. Edwin Bird, who prepared the deed and acknowledged same, stated that he asked Robbins if he knew what he was doing, and the latter stated that he did, and was deeding the property to Darby because she had been good to her parents, and stayed with and taken care of them. Ollie Moses testified that Mrs. Robbins had stated to the witness that she had the "place fixed just like she wanted it. Said Darby had a home now and wouldn't be rooted out." In addition, Juanita Bailey, daughter of Mrs. Richey, testified that her grandfather and grandmother had told her that they felt Darby should have the place. Appellee testified that her father had advised her, at the time a mortgage was given to the Federal Land Bank, that if she would work on the place and help her parents pay off the indebtedness, a deed or will would be executed, giving her the property. Some time later, she stated that her father said, "You know, I'm ninety-one years old, and nature teaches me that your Mother and I can't be here much longer. We've got to do something about this property"; that

they went to the house for dinner, and the mother agreed with the father that the property should be deeded to Darby. She testified that her mother or father never mentioned anything about appellee making a deed to the brother and sisters; she denied making any statements to anyone to the effect that the deed was executed only as a matter of getting the parents on welfare, and likewise denied that she had indicated to any of the heirs that the property would be divided among the children after the death of the parents.

We think it apparent that the proof on the part of appellants falls far short of meeting the burden required in this type of case. As stated in *Nelson* v. *Wood,* 199 Ark. 1019, 137 S. W. 2d 929:

"The general rule, as well as the established rule in this state, seems to be well settled that in order for one to establish by parole either a resulting trust or constructive trust, the evidence must be 'full, clear and convincing', 'full, clear and conclusive', 'of so positive a character as to leave no doubt of the fact', and 'of such clearness and certainty of purpose as to leave no well founded doubt upon the subject.' These requirements run through a long line of cases from this Court."

Appellants insist that circumstances, such as the fact that the Robbinses began to draw welfare payments soon after executing the deed, establish the truth of their assertion. But, of course, there are also other circumstances in the case; for instance, the fact that appellee lived and worked with her parents for many years, while the other children were away, and only returned for occasional visits. For that matter, it could well be that the desire for welfare payments contributed to the Robbinses' decision to make the conveyance at that particular time, rather than by later deed or by will. At any rate, irrespective of other considerations or contributing factors, the testimony is rather potent that the father and mother desired that Darby have the property. Appellants complain that the Chancellor paid too much attention to the testimony of the Notary Public; there is nothing in the record which indicates that

he paid particular attention to this evidence *because Bird was a Notary Public,* but it may well be that the testimony of the disinterested witnesses (of which Bird was one) carried considerable weight with the Court in reaching its decision. While, of course, parties are perfectly competent witnesses, and decisions may well be based upon the evidence of those interested in the litigation, still, the testimony of those without pecuniary interest, or apparent bias toward any party, would normally be noted and considered in the deliberations of a Chancellor.

Be that as it may, we are of the opinion, and hold, that appellants have not shown by clear and convincing evidence, that there was an intention on the part of the parents, in deeding the property to appellee, to create a trust for the benefit of all the children, *i. e.,* no resulting trust was established; nor is it shown by the required quantum of proof that the circumstances surrounding the execution of the deed, gave rise to a constructive trust.[2]

Decree affirmed.

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[2] Black's Law Dictionary, 4th Edition, defines Resulting trust as follows: "One that arises by implication of law, or by the operation and construction of equity, and which is established as consonant to the presumed intention of the parties as gathered from the nature of the transaction. It arises where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title." Constructive trust is defined as: "A trust raised by construction of law, or arising by operation of law, as distinguished from an express trust. Wherever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment."

SOUTHWESTERN BELL TELEPHONE CO.
v. THORNBROUGH, COMMR.

5-2214 341 S. W. 2d 1

Opinion delivered December 19, 1960.

J. Gayle Windsor, Jr. and *Edgar Mayfield,* for appellant.

Lowell D. Gibbons and *Luke Arnett,* for appellee.

J. SEABORN HOLT, Associate Justice. This is an unemployment compensation case. The appellant, Southwestern Bell Telephone Company, employed Mrs. Ouida

R. Mills during August of 1953 as a telephone operator in West Memphis exchange of the company. In 1956 Mrs. Mills requested a pregnancy leave which was made effective on July 29, 1956 and under standard company policy, its termination date was fixed at July 28, 1957, one year later. At the time Mrs. Mills applied for a pregnancy leave, she expressed her desire to return to work about two months after the anticipated date of birth of her child; however, she was advised in writing on her leave application that there probably would not be a place for her, due to dial conversion.

The evidence in the record disclosed that the terms and conditions of the type of pregnancy leave granted by the appellant are a matter of company policy, and not union contract. Under this policy, pregnancy leaves are always for a period of one year. There is no assurance of re-employment at the end of the leave. However, if the employee, after the birth of her child, is able and willing to work before the expiration of the one-year term of leave, and if a suitable vacancy exists, Southwestern Bell does, on some occasions, reinstate employees before the expiration of the full year's period.

Mrs. Mills' child was born on September 26, 1956. On or about October 31, 1956, Mrs. Mills contacted the chief operator at the West Memphis exchange about the possibility of resuming work, but was informed that no vacancy existed at that time. She contacted the chief operator again within two weeks and was told there would be no work for three or four more months.

On December 5, 1956, Mrs. Mills applied for unemployment benefits at the West Memphis office of the Employment Security Division, stating that she had been on a leave of absence from Southwestern Bell and that she had not been rehired. Upon being notified about the filing of the claim, the company challenged Mrs. Mills' eligibility on the grounds that she was on a pregnancy leave of absence which was not to terminate until July 28, 1957, and taking the position that

she was therefore covered by the provisions of Ark. Stats., § 81-1106 (e) (2) [hereinafter set out].

The local office of the Employment Security Division, at West Memphis, made a determination in favor of the claimant stating:

"While it may be company policy to grant a year's leave of absence in such cases, it is believed that this is a maximum duration rather than a blanket rule for all cases. It does not seem that the claimant should be penalized by being without work, or unemployment benefits for a full year period, merely because the company set duration of her leave at one year. . . . the Arkansas law provides that a female, separated for pregnancy shall not be disqualified, if she re-applies for work at the end of her leave of absence. It is our interpretation that this is to mean that a female who is separated because of pregnancy, after securing a leave of absence, shall not be disqualified if she re-applies for work as soon as she is again physically able to work, and her leave has not already expired. In this case, her leave has not expired, and we believe she meets eligibility requirements."

The decision of the local employment office was appealed by the employer and hearings were held in West Memphis and in Little Rock by a Referee of the Appeals Tribunal. The Referee reached the same conclusion as the local employment office, holding that Mrs. Mills had separated from her employment under "non-disqualifying circumstances," and concluding that her unemployment subsequent to December 5, 1956 was the result of a lack of work in the West Memphis exchange, and that such lack of work was created primarily by the conversion of the exchange to a dial system.

The decision of the Appeals Tribunal was then appealed by Southwestern Bell to the Arkansas Board of Review. No new evidence of any material consequence was taken by the Board although it was brought out that the claimant ultimately was reinstated by

Southwestern Bell in her old job when a vacancy occurred in April of 1957. The Board of Review, after reviewing the record made before the Appeals Tribunal, affirmed the decision of the Appeals Referee and adopted it as its own, both as to findings of fact and conclusions of law. Southwestern Bell then filed for a Petition for Review by the Pulaski Circuit Court, as provided by law. After oral argument from counsel, and briefs, the Circuit Court affirmed the Board of Review and from that judgment comes this appeal. In issue are the unemployment benefits of the claimant from December 5, 1956, when she applied for them, till her reinstatement on April 21, 1957.

For reversal, Southwestern Bell, appellant, relies on the following points: (1) There was no leave of absence within the meaning of the statute and (2) if there were a leave of absence it had not terminated as of December 5, 1956, when Mrs. Mills was declared eligible for unemployment benefits.

As to the first point we have reached the conclusion that there was a leave of absence. Our Employment Security Act contains no definition of "leave of absence" so we are left to the language of the contract between the parties, prior conduct and dealing by the company with employees, and any other relevant facts at hand to determine if a leave of absence existed.

There are several factors which go to show that a leave of absence existed. One is the contract of employment which provides:

"*Leave of Absence.* Insofar as the requirements of the service will permit, leaves of absence for good cause, and of reasonable length, will be granted upon request. The intention of the employee with respect to return to work shall be established in writing between the employee and the company at the time the leave is granted, and a copy shall be furnished the employee at the time the leave is granted."

A second document is exhibited in the record entitled "Southwestern Bell Telephone Company Leave of Absence." This document states that Mrs. Mills was granted a leave of absence because of pregnancy and that the employee, Mrs. Mills, understands that due to dial conversion there probably will not be a place for her at the time this leave of absence expires. A further note on the document states that leaves of absence do not carry any guarantee of employment. However, the record reflects that employees on leave of absence for pregnancy were nearly always hired back and often before the termination of the company set policy of one year. An additional factor is that the testimony shows that valuable seniority benefits of the employee were not lost if she was granted a leave of absence rather than quitting because of pregnancy. Under the peculiar facts of this case we feel compelled to find that there was a leave of absence granted the employee. It is argued by the appellant that a leave of absence connotes a continuity of the employment status, *Bowers* v. *American Bridge Company,* 43 N. J. Super. 48, 127 A. 2d 580 and cases there cited, and since the alleged leave of absence agreement contained no guarantee of re-employment, it was not in fact a leave of absence. We agree that in ordinary cases a leave of absence connotes a continuity of the employment status. We think the facts and surrounding circumstances in the present case indicate that Southwestern Bell and Mrs. Mills planned to continue the employment status at the time of her separation despite a printed provision of the contract that there was no guarantee of re-employment. Otherwise we can conceive of no other reasonable explanation of the acts of the company in writing a provision on leave of absence in the contract of employment, in giving a formal document entitled "Leave of Absence" when it was requested, in preserving the seniority rights of the employee, and in frequently reinstating the employees before the termination of the leave of absence, and in the present case, of reinstating Mrs. Mills three months before her leave of absence was to expire.

As to the second point, we agree with the appellant that the leave of absence had not terminated as of December 5, 1956 when Mrs. Mills was declared eligible for unemployment benefits. Upon this point some legislative history is helpful. The availability of women for work after pregnancy has been particularly troublesome in the administration of Employment Security Acts. As a result, states began to devise and enact special statutory tests applicable to women who leave their jobs due to pregnancy. At least 33 states have such provisions in their unemployment compensation laws. U. S. Dept. of Labor, Comparison of State Unemployment Insurance Laws, January 1, 1958, page 103: There are two general types of tests. (1) The woman is disqualified for an arbitrary number of weeks before and after the birth; or (2) she is presumed to be unavailable and hence ineligible for unemployment benefits after the birth until she has secured new work and has earned either a stipulated amount of wages, or has worked for a specified minimum period of days or weeks. Arkansas has this latter type. See Ark. Stats., § 81-1106 (e)(2) requiring thirty days of new work. In 1955, the Arkansas General Assembly amended § 81-1106 (e)(2) by providing that the thirty days new work test should not apply to an individual who had obtained a leave of absence from her employer for pregnancy and applies for reinstatement with her employer at the termination of such leave but is not reinstated by such employer. Or stated another way, a person who has a leave of absence for pregnancy does not have to secure thirty days of new work if she is not rehired, in order to receive benefits.

With this in mind, we need only look at the terms of the statute to come to a decision on the second point. Ark. Stats., § 81-1106 (e)(2) provides:

"If a female claimant is separated from her customary occupation because of pregnancy: Such disqualification shall continue until she has not less than 30 days of paid work subsequent to date of confinement.

Provided this provision shall not apply to an individual who has obtained a leave of absence from her employer for the above reason and applies for reinstatement with her employer at the termination of such leave but is not reinstated by such employer."

The statute says *termination of such leave.* In the present case, Mrs. Mills secured a leave of absence on July 29, 1956, at which time she was approximately seven months pregnant. The termination date of her leave was set at July 28, 1957, one year later. Mrs. Mills' child was born on September 26, 1956. About October 31, 1956, she applied for reinstatement which was denied and on December 5, 1956, she was declared eligible for unemployment compensation. At the time she was declared eligible, her leave of absence still had over seven months to run. Since her leave of absence had not terminated, it was error for the Commissioner to declare her eligible for benefits. The Commissioner argues that the year's leave of absence is an unreasonable length of time. Under the present circumstances, we do not think so. The present policy of the company of one year leave of absence for pregnancy was set up long before enactment of the Employment Security Act as a practical solution to a recurring employee problem and not as a guise to avoid unemployment payments. We cannot say that a year's time is unreasonable when all the attendant circumstances of giving birth to a child and caring for it the first few months after birth are taken into consideration.

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

HARRIS, C. J., and ROBINSON, J., dissent.

CARLETON HARRIS, Chief Justice, dissenting. The Employment Security Act covers Chapter 11 of the 1960 Replacement, Arkansas Statutes, Annotated, Volume 7-A. The Declaration of State public policy is found in the opening section, 81-1101, and reads as follows:

"Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which may fall with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this great hazard of our economic life. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment, the public good, and the general welfare of the citizens of this State require the enactment of this measure, under the police power of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

Appellee, Ouida R. Mills, was granted leave of absence, due to pregnancy, on July 29, 1956. On October 31, 1956, about five weeks after the birth of her child, Mrs. Mills endeavored to resume work with the company, but was refused employment *because no vacancy existed at that time.* I emphasize the statement, for this was the reason for employment not being granted, rather than the fact that a year's leave had not terminated. This is very clear from the record. Mr. J. W. Harrington, secretary, Employees Benefit Committee, Southwestern Bell Telephone Company, representing the employer, testified:

"The contract does not specify the length of time, and the following is from a part of the company's established practice: 'When it has been decided that an employee shall cease work because of pregnancy, she determines whether to resign or request a leave of absence.

If she requests a pregnancy leave of absence, it is granted for a period of one year.' It is always one year.

That doesn't mean, however, that the employee will not be returned before one year. That depends upon the employee's physical condition, her willingness to return and the availability of work in the office where she was formerly employed."

This last statement pretty well states my interpretation of the leave granted, for in my view, the year's leave of absence only relates to the period of time in which the employee may preserve her job rights. Here, there is no contention that Mrs. Mills was not physically able to return to work; certainly she was willing to return to work, and employment was only refused because there were no positions open. This is plainly shown by Mr. Harrington's testimony.

"There has been a change in the employment conditions at West Memphis, which came about during her absence. The West Memphis office was converted to dial operation; there are not as many operators needed at present as were needed prior to the conversion. . . .

To the best of my knowledge, we have no quarrel at all with Mrs. Mills. As far as I know, also, she would be re-employed if a vacancy were present."

In fact, on a previous occasion in 1954, after being granted a year's leave due to pregnancy, Mrs. Mills returned to work for the telephone company after four months.

Mrs. Mills was involuntarily unemployed, and under my view, in conformity with the intent of the Employment Security Act, she was entitled to unemployment compensation when she became able and willing to return to work. The company's answer to this contention is that Mrs. Mills agreed to take the year's leave; however, I fail to see that appellee really had any choice, *i.e.*, she either had to take the leave, or she had to resign. Adopting the latter course would simply mean that she would

lose seniority rights, and other benefits as an employee of the telephone company. If the company had a right to demand that she take a year's leave, or else resign, then I see no reason why it would not have equal right to demand that she take a two years' leave, or any other period of time which it might consider desirable. For that matter, § 81-1118 provides that "any agreement by an individual to waive, release, or commute his rights to benefits, or any other rights under this Act, shall be void." If then, leave granted by reason of physical disability terminates when that person is able and willing to return to work, any agreement to the contrary would be void. In effect, the Majority have held that appellee, in accepting the leave of absence, has waived her rights to any benefits for a whole year, notwithstanding that she was able and willing to return to work before that time.

Because, on the whole, I consider the holding of the Majority to be contrary to the intent of the Legislature in passing the Employment Security Act, I respectfully dissent.

Mr. Justice ROBINSON joins in this dissent.

SALEM SCHOOL DISTRICT NO. 30 *v.* UNIT STRUCTURES, INC.

5-2248 341 S. W. 2d 50

Opinion delivered December 19, 1960.

Oscar E. Ellis, for appellant.

McKay, Simpson & Crumpler, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellee sought to recover judgment against the appellant for $224.97 and interest; the defense was accord and satisfaction. The cause was submitted to the Court without a jury (§ 27-1743, Ark. Stats.) on an agreed statement of facts. The judgment was for the appellee; and this appeal resulted.

On August 8, 1957, appellee sold and shipped to appellant certain materials. The invoice (# 8-578-4) was for $7,499.00 and the invoice recited that there could be 2% discount for cash after freight was deducted. The invoice also stated: "Applicable sale, use, local, state and Federal taxes not included and to be paid by buyer." On August 19, 1957, the appellant sent its check to the appellee for $7,183.18. There was deducted:

The freight of	$158.20	
The 2% discount and exchange	157.62	315.82
TOTAL		$7,499.00

Thus, appellant did not pay the sales tax. On August 20th the appellee sent a bill to the appellant: "To bill you 3% State Sales Tax on invoice No. 8-578-4 dated Aug. 8, 1957, not included in Sight Draft. $224.97." Appellant refused to pay the $224.97, and claimed that the payment of the original invoice discharged the sales tax by accord and satisfaction.

We conclude that the judgment must be affirmed. The appellant, having pleaded accord and satisfaction, had the burden of sustaining such plea. *Shinn* v. *Kitchens,* 208 Ark. 321, 186 S. W. 2d 168. All the appellant established was the payment of $7,499.00; and we have held that part payment, standing alone, does not, as a matter of law, establish accord and satisfaction of the entire account. *Sharp* v. *Sonenblick,* 213 Ark. 649, 212 S. W. 2d 18. There still remained an issue for the trier of the facts; and we have repeatedly held that when a case is tried by the Circuit Court without a jury, the Court's findings have the force and effect of a jury verdict. *Woodruff* v. *McDonald,* 33 Ark. 97; and *Norvell* v. *James,* 217 Ark. 932, 234 S. W. 2d 378, and cases there cited.

Affirmed.

NETHERTON *v.* BALDOR ELECTRIC CO.

5-2257 341 S. W. 2d 57

Opinion delivered December 19, 1960.

Sam Sexton, Jr., and *Edwin E. Dunaway,* for appellant.

Bethell & Pearce, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal must be dismissed because the case is now moot.

On July 25, 1960 the employees of Baldor Electric Company (represented by Local Union No. 700 IBEW) went on strike; and the Baldor plant was picketed. When Baldor rented office space in the First National Bank Building in Fort Smith and undertook an employment campaign, the bank building was picketed. On August 11, 1960 the First National Bank of Fort Smith applied to the Sebastian Chancery Court and obtained an injunction against the picketing of the bank building. On the same day Baldor Electric Company applied to the Sebastian Chancery Court and obtained an injunction which, under certain circumstances, enjoined picketing at the Baldor plant. The defendants in the two chancery cases were the officers and representatives of the Local Union whose members were on strike; and they are the appellants in this Court. From the order of the Sebastian Chancery Court granting a temporary injunction in each of the cases, there were immediate appeals to this Court; and on August 12, 1960, while the Court was in recess, one of the Justices made an order which stayed in whole or in part the Chancery Court injunctions until the cases could be heard by the entire Court. On September 12, 1960, this Court, being reconvened, entered an order continuing the temporary stay until the causes were reached on the merits; and that time has now arrived.

But since the appeal to this Court on August 12, 1960 events have transpired which render this appeal moot. On September 5, 1960, by stipulation of all parties, the appeal of the First National Bank was dismissed; and now, upon submission of the Baldor Electric case, it is conceded that the strike has been settled. The appellant's brief contains the following paragraph:

"While this case was pending on appeal the labor dispute existing between Baldor Electric Company and the members of Local Union No. 700 terminated and the pickets have been voluntarily withdrawn from the employer's premises."

The quoted statement is not denied; so our holding in *Local Union No.* 656 v. *Mo. Pac. R. R. Co.,* 221 Ark. 509, 254 S. W. 2d 62, is ruling here. In that case there was an injunction against picketing in a labor dispute and while the appeal was pending in this Court the strike was settled. In dismissing the appeal as moot, we said:

"It is alleged, and the appellants concede, that the strike against Dixie Cup has now been settled. Thus there is no longer any occasion for picketing or any controversy between the parties to this appeal. In these circumstances neither an affirmance nor a reversal of the decree would have any practical effect except as it might affect the matter of court costs, which is not alone a sufficient issue to call for a decision in an otherwise moot case. *Quellmalz Lbr. & Mfg. Co.* v. *Day,* 132 Ark. 469, 201 S. W. 125. We think the case at bar falls within the rule announced in *Kays* v. *Boyd,* 145 Ark. 303, 224 S. W. 617: 'It is the duty of this court to decide actual controversies by a judgment which can be carried into effect and not to give opinions upon abstract propositions or to declare principles of law which cannot affect the matter in issue in the case at bar.' "

It, therefore, follows that this case has become moot and the orders heretofore made are set aside, and the appeal is dismissed at the cost of the appellants.

NEWTON *v.* CALHOUN COUNTY SCHOOL DISTRICT.

5-2270 341 S. W. 2d 30

Opinion delivered December 19, 1960.

R. H. Peace and *James E. Stein,* for appellant.

W. C. Medley, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellant, a school teacher, to recover her salary of $1,811.70 for the 1955-1956 school year. Mrs. Newton had been employed by the appellee district during the preceding year, and her contract contained the statutory provision that it would be renewed for the succeeding year "unless within ten days after the date of the termination of said school term, the teacher shall be notified by the school board in writing delivered in person or mailed to him or her at last and usual known address by registered mail that such contract will not be

renewed." Ark. Stats. 1947, § 80-1304 (b). It is conceded that Mrs. Newton was not given the required written notice, but the circuit court, sitting without a jury, found that she was given oral notice and that the school board was justified in assuming that she had waived the requirement of written notice. The issue on appeal is the sufficiency of the evidence to support the court's finding.

The principal witnesses were the plaintiff and Walter Rowland, the principal at the school in question. Mrs. Newton testified that during her last term as a teacher she was not given even an oral notice that her contract would not be renewed. She says that she did not learn of her discharge until she reported for work on the opening day of the fall term. She was then told that another teacher had been employed in her place and that she would not be needed. Mrs. Newton was unable to find other employment and lost a year's work.

Rowland, the principal, was not aware of the requirement that written notice be given. He testified that soon after the school election in March he was instructed by W. J. Jones, the secretary of the school board, to tell Mrs. Newton that she had not been retained. "I went to Mrs. Newton's room and talked to her and told her I wanted to tell her that she had had trouble in the election of the board and that since I had nothing to do with the hiring or discharging of teachers if she wanted to discuss it with anybody it would be necessary for her to talk to the board." Later on the following appears:

"The Court: And will you state again for the Court's benefit the notice that you gave her?

"The Witness: I didn't say in so many words—I wanted to make it as easy as possible—I told Mrs. Newton that she had had trouble in the school election and advised her to talk to Mr. Jones about it if she wanted to clear it up and that any discussion would be better to be had with him."

Rowland also testified that on the last day of the term in May he was making up a schedule of teachers for the fall. This schedule contained two blanks, one for Mrs. Newton's name and the other for Mrs. Stanton, who was resigning. Mrs. Stanton remarked, according to Rowland, "that it made her feel bad to see the schedule without her name on it, and Mrs. Newton said, 'Well, what do you think about me?' " The schedule was not put up for the teachers to see.

During the summer Rowland talked to Mrs. Newton by telephone. In that conversation "she stated that she wasn't going to be treated that way . . . and I told her that I could not tell her anything that had any bearing on the matter and that she would have to talk to the Board about it." Rowland denied that Mrs. Newton appeared for work on the first day of the fall term, but we think this to be immaterial, as he stated that she would not have been employed even if she had been present.

We are unable to find in the record substantial evidence to support the finding that Mrs. Newton waived the required written notice. In the absence of a waiver she is entitled to recover. *Wabbaseka Sch. Dist. No. 7* v. *Johnson,* 225 Ark. 982, 286 S. W. 2d 841. A waiver was found to have occurred in *Sirmon* v. *Roberts,* 209 Ark. 586, 191 S. W. 2d 824, but in that case the teacher admitted that she had told a school board member that if "the board didn't want me, I didn't want the place."

The statutory requirement of written notice is an important safeguard to the teacher's standing and security. As we said in the *Sirmon* case: "One obvious purpose of the statute requiring written notice was elimination of uncertainty and possible controversy regarding the future status of a teacher and a school." In the case at bar if the school board was misled into thinking that Mrs. Newton had been discharged it was doubtless because the board assumed that Rowland had carried out Jones' instruction to inform Mrs. Newton that she had not been retained. But Rowland in substance admits

that he did not so inform this teacher; he merely told her that she had had trouble in the school election and should see Jones if she wanted to clear the matter up. There is no indication that Mrs. Newton discussed the issue with Jones, who appears to have died before the trial. The proof indicates at most that Mrs. Newton was conscious of some uncertainty about her status in the coming year, but she was under no affirmative duty of bringing the matter to an issue. To the contrary, the statutory and contractual obligation of giving notice rested upon the school board. There is no evidence to show either that Mrs. Newton voluntarily relinquished her position or that she did or said anything to beguile the board into thinking that she regarded her contract as having been terminated.

If the district desired to mitigate the plaintiff's damages it had the burden of proving that she could have obtained other employment. *School Dist. No.* 65 *of Randolph County* v. *Wright,* 184 Ark. 405, 42 S. W. 2d 555. As no such proof was offered the plaintiff was entitled to judgment for the full amount of her salary, and the cause will be remanded for the entry of such a judgment.

Reversed.

HARRIS, C. J., dissents.

5-2279 341 S. W. 2d 6

Opinion delivered December 19, 1960.

N. J. Henley, for appellant.

Virgil D. Willis, for appellee.

PAUL WARD, Associate Justice. The trial court held that appellees had acquired title to the south one-half of an abandoned railroad right-of-way by adverse possession. Appellants, who claimed ownership of said land by record title, now prosecute this appeal for a reversal on the grounds that (a) appellees had no color of title because the deed relied on contained an indefinite description and (b) there is no substantial evidence of adverse possession.

The railroad right-of-way involved in this litigation runs in a northeasterly direction across the northwest corner of the Southeast Quarter of the Southeast Quarter of Section 26, Township 15 North, Range 16 West, in Searcy County. That part of the right-of-way here involved is 100 feet wide and approximately 800 feet long. The centerline intersects the north line of the above described forty acres near the middle and it intersects the west line of said forty acres 240 feet south of the northwest corner of said forty acres, leaving about 7 acres north of the right-of-way and abutting thereon.

The entire forty acres was owned by one N. J. McBride in 1903, when he conveyed the right-of-way to the St. Louis and North Arkansas Railroad. McBride later sold the land to Lonzo Tilley, and in 1916 Tilley sold to James A. Sutterfield 13 acres lying south of the right-of-way and abutting thereon. The heirs of Sutterfield, on March 28, 1959, deeded to Mr. and Mrs. Branscum (appellants herein) a portion of this land lying south of the right-of-way and abutting thereon.

In 1928 Highway No. 65 was built along the south line of the right-of-way. The right-of-way was abandoned by the railroad company in 1946.

Appellees acquired title to the aforementioned 7 acres of land north of the right-of-way either in 1951 or sometime prior thereto, and on October 16, 1951, they procured a Quit Claim Deed from the Trustees of the railroad company purporting to convey the said railroad right-of-way. The description in this deed reads as follows:

"That part of the right-of-way of the old Missouri and Arkansas Railway commencing at the west line of the Southeast quarter of the Southeast Quarter of Section 26, Township 15 North, Range 16 West, and extending in an easterly direction approximately 806 feet, or from Engineering Station 9039/75 to Station 9047/81 at private road crossing, as more fully indicated by Railroad Map V2A-Ark. No. 26 on file with the Railway Company at Harrison, Arkansas, same being a strip 100 feet in width of the length of 806 feet as indicated above, containing 1.8 acres, more or less."

This is the deed that appellants attack as containing an indefinite description.

In June, 1959, appellants filed a suit in ejectment against appellees in the Circuit Court, claiming to be the owners of the south one-half of said right-of-way; setting forth their chain of title; alleging that appellees had, without authority, entered upon the land and erected a fence thereon; and asking the court to declare them

to be the true owners. Appellees claim that they were entitled to the land by reason of 7 years adverse possession under color of title.

After hearing the testimony the court, sitting as a jury by agreement, found that appellees had acquired title to said strip of land by reason of adverse possession, and rendered judgment accordingly.

It is our conclusion that the judgment of the Circuit Court must be sustained on the ground that appellees had adverse possession of the portion of the land in question for more than 7 years under color of title.

(a) *DESCRIPTION IN THE DEED.* While the description in the deed from the Trustees to appellees does not definitely describe, by metes and bounds, the strip of land in question, we think it furnishes a sufficient "key" to make the description definite. Being a conveyance of a right-of-way in a definite forty acres of land it could not possibly refer to any other lands. The acreage is accurately described—being 1.8 acres. The width and length of the parcel of land is definitely stated. In addition to all of these, the deed itself makes reference to a map and tells where the map can be found. We think all these facts constitute a sufficient key to make the description definite under the decisions of this court. See: *Tolle* v. *Curley,* 159 Ark. 175, 251 S. W. 377; *Turrentine* v. *Thompson,* 193 Ark. 253, 99 S. W. 2d 585; *Ketchum* v. *Cook,* 220 Ark. 320, 247 S. W. 2d 1002, and *Benny Rinke, gdn., et al* v. *Mark Weedman,* 232 Ark. 900, 341 S. W. 2d 44.

(b) *ADVERSE POSSESSION.* Having concluded that appellees' deed from the Trustees constitutes color of title, it is necessary only that appellees show they had possession of a portion of the said strip for 7 years in order to acquire title to all of it. This court has uniformly and frequently held that adverse possession of a part of a parcel of land extends to all of the land claimed under color of title. See: *Benjamin M. Ledbetter* v. *Jesse Fitzgerald,* 1 Ark. 448; *Bradbury* v. *Dumond,* 80 Ark. 82, 96 S. W. 390; *Flannigan* v. *Beavers,*

172 Ark. 28, 287 S. W. 755 and *Lollar* v. *Appleby,* 213 Ark. 424, 210 S. W. 2d 900.

The record reflects that appellees cleared the strip of land in question more than once; that in 1951 they built a road from Highway No. 65 across the parcel of land to their home near by, and; that they had sawdust placed on the disputed parcel of land. It is not disputed that appellees built the road across the parcel of land in 1951 or that it has been in use ever since. Also, although the record is not clear on the point, there is evidence indicating appellees had built and maintained a fence on the land. In the *Lollar* case, *supra,* there appears this statement: ". . ., it has been well said that if the claimant 'raises his flag and keeps it up' continuously for the statutory period of time, knowledge of his hostile claim of title may be inferred as a matter of fact."

It is our conclusion therefore that there is sufficient evidence to support the judgment of the trial judge, whose findings have the same force and effect as the findings of a jury in this case.

Affirmed.

EDWARDS *v.* MARTIN.

5-2275 341 S. W. 2d 51

Opinion delivered December 9, 1960.

Paul K. Roberts, for appellant.

L. B. Smead, for appellee.

JIM JOHNSON, Associate Justice. This is a child custody case. It is a contest between the mother, Mrs. Graydon Edwards, appellant, and the grandmother, Mrs. Larkin Martin, appellee, over the custody of a minor child, Richard James Foord. This is the second appearance of this matter before this Court. The first appeal came to this Court from an order of the Ouachita County Probate Court granting custody of the child to the grandmother, appellee herein. On appeal, this Court in *Edwards* v. *Martin,* 231 Ark. 528, 331 S. W. 2d 97, held that probate courts are without power or authority to determine a contest over the care and custody of a minor and ordered the cause remanded with directions to transfer the case to the Chancery Court for further proceedings. The mandate of this Court was followed and a different judge in the same district presided. Rather than retry the entire case before the Chancery Court, the parties chose to stipulate that the record and evidence adduced at the trial of the case before the Probate Court be submitted to the Chancery Court as a base for its decision and opinion. The custody of the child was again awarded to the grandmother, Mrs. Larkin Martin. From such order comes this appeal.

For reversal, appellant relies only upon the contention that: "The Court erred in failing to grant custody of Richard James Foord to appellant."

The record reveals that appellant and her child were severely injured in an automobile accident October 22, 1952, in which her husband was killed. After considerable hospitalization appellant and her child went to the home of her parents, appellees here. Appellant bought a home in 1953 for her parents, using a large part of the insurance proceeds from her husband's death. Appellee retained physical custody of the child and this was the situation when appellant remarried. The child's aunt, Ruby Mae Foord, was appointed his guardian in March of 1956, but this appointment was set aside because of failure to comply with the necessary statutory requisites of notice. On October 23, 1958, Mrs. Larkin Martin petitioned for

custody of the child. Appellant resisted this petition, hence the controversy here.

The evidence is undisputed that appellee from the time the child was eight months old in 1952, until the date of trial, November 28, 1958, cared for, loved, protected, and reared the child in a good Christian home; that she carried him to church and Sunday School; that he is being reared in a proper environment and is happy and healthy and knows no other home than that of appellees. On the other hand, the record reflects that appellant, from the time of her accident until some fifteen or sixteen months before the filing of the present action, lived a life which, to say the least, was not conducive to that of a worthy mother. It would serve no useful purpose to here review the testimony against appellant other than to say it was established that appellant suffered from a disease, drunkenness, and spells of depression. She attempted suicide a number of times and left home with a truck driver and was away over a year before she married him.

To appellant's credit, however, it is uncontradicted that since her marriage to Graydon Edwards in 1957 and for more than a year prior to this trial, appellant has conducted herself in an exemplary manner, both as a wife and as a stepmother to her present husband's children. The testimony as to appellant's present conduct shows a remarkable change for the good.

From these facts we must agree with the following excerpts from the learned Chancellor's opinion, who also had only the cold written record before him:

"This is a case which presents a great responsibility on the Court. It arises out of a multitude of most unfortunate circumstances. It involves, the future welfare of a small boy whom fate has deprived of the care, love and protection of his own father, who was killed in an automobile accident when the child was about eight (8) months of age."

As we review the Chancellor's findings and the record before us, certainly the child's welfare is paramount

in our minds. It is obvious that the Chancellor chose the course that it is better to be safe than sorry. He must have concluded that the mother's exemplary conduct immediately preceding the trial was not of *sufficient duration* to show any *permanent improvement* in her character since, as the testimony reflected, there was much to overcome. It is well settled, of course, that in a child custody case the present conditions are those on which the decree will rest. *Willis* v. *Bell,* 86 Ark. 473, 111 S. W. 808. Therefore, if other circumstances remain the same, we conclude that a continued course of conduct of the sort here established to have existed within one year preceding this trial would show such a *permanent change* in appellant's character as would obviously merit favorable consideration of a reinstituted custody petition by the mother.

Affirmed.

DAVIS *v.* JACKSON.

5-2186 341 S. W. 2d 762

Opinion delivered January 9, 1961.

Carl L. Hunter, Kirsch, Cathey & Brown, for appellant.

Gus R. Camp, for appellee.

CARLETON HARRIS, Chief Justice. Don L. Davis, a widower, on February 7, 1957, deposited $10,000 with the Piggott Federal Savings and Loan Association, receiving a Savings Share Account certificate. This certificate was issued in the name "Don L. Davis or Patricia Jackson (a granddaughter)." In October, 1957, Davis married Lucy Copeland Davis, appellant herein. On January 3, 1958, Davis presented his savings book to the Association, stated that he had married, and would like to change the account to show his wife's name, Lucy Copeland Davis, rather than the name of the granddaughter. In compliance therewith, the certificate was changed by striking the words "Patricia Jackson (a granddaughter)", and inserting in lieu thereof, the words, "Lucy Copeland Davis." Davis died in June, 1958, leaving a will, in which appellant was named executrix. No withdrawals were ever made from the account after it was originally opened in 1957. Davis retained possession of the deposit book at all times. Subsequent to his death, appellee instituted suit against the widow (both individually and in her capacity as executrix), and against the Association, seeking to have the account declared her sole and absolute property. On hearing, the court held that a joint tenancy had been created in the first instance, and that same "cannot be revoked at the pleasure of either of the depositors * * *"; that it was the intention of Davis at the time of making the deposit, to create a joint tenancy with right of survivorship, and further, "That the testimony is insufficient to show that there was not a com-

pleted gift." In accordance with these findings, the court declared and held appellee to be entitled to the entire deposit, directed the Piggott Federal Savings and Loan Association to pay the deposit, together with all accruals thereto, to Patricia Jackson, and ordered appellant to deliver the pass book to appellee. From such decree, comes this appeal. For reversal, appellant asserts four points, but we think point three is controlling. Accordingly, we will only discuss that point, together with the two contentions relied upon by appellee to sustain the Chancellor's holding.

The pertinent provisions of Section 67-820, subsection (b), Ark. Stats. Anno. (1957 Replacement), are as follows:

"Any Building and Loan Association or Federal Savings and Loan Association may issue shares, share accounts, or accounts in the joint names of two (2) or more persons or their survivor, in which event any of such persons who shall first act shall have power to act in all matters related to such shares, share accounts, or accounts whether the other person or persons named in such shares, share accounts, or accounts be living or not. Such a joint account shall create a single membership in any such association. No shares, share accounts, or accounts shall be issued to tenants in common. The repurchase or redemption value of shares, share accounts, or accounts issued in joint names, and dividends thereon, or other rights relating thereto, may be paid or delivered, in whole or in part, to any of such persons who shall first act, whether the other person or persons be living or not. The payment or delivery to any such person, or a receipt or acquittance signed by any such person, to whom any such payment or any such delivery of rights is made, shall be a valid and sufficient release and discharge of any such association for the payment or delivery so made."

Appellee asserts that this section is applicable to accounts of the nature here involved, and that the case of *Ferrell, Administratrix* v. *Holland,* 205

Ark. 523, 169 S. W. 2d 643, wherein this Court held a joint tenancy to have been created, is controlling in the present litigation. We agree that the section applies, but we do not agree that the *Ferrell* case has any application. The holding in that case was predicated upon the aforementioned statute, and the provisions of the certificate issued,[1] together with the intent, as shown by the evidence, to create a joint tenancy. As this Court stated:

"The above statute applies here; and from the evidence in this case we hold that Mr. S. I. Ferrell and Dr. D. T. Holland intended to, and did, create a joint tenancy with right of survivorship when they applied for and received the certificate here involved."

Further, from the Opinion:

"We hold that there was created a joint tenancy with right of survivorship when Mr. S. I. Ferrell and Dr. D. T. Holland signed the application card to the loan association and received the certificate, and, *the certificate never having been changed,*[2] it goes to Dr. Holland as the survivor."

A substantial difference in that case, and the present one, is at once apparent, for here, *the certificate was changed.* Appellee takes the view that once Mrs. Jackson's name was placed on the certificate, she had a vested interest in the property. This position cannot be maintained, for the statute itself precludes such a result. Very clearly, such statute provides:

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[1] The applications for the share account in both the *Ferrell* case, and the present case, were the same, but the certificates issued were vastly different. In the former case, the certificate reads as follows: "This is to certify that S. I. Ferrell, Desha, Ark., and Dr. D. T. Holland, Newbern, Tenn., as joint tenants with right of survivorship, and not as tenants in common, is a member of the Batesville Federal Savings & Loan Association and holds a five thousand dollars investment share account of said association, subject to its charter and by-laws and to the laws of the United States of America." In the present case, the original certificate reads: "This certifies that Don L. Davis or Patricia Jackson (a granddaughter) is a member of Piggott Federal Savings and Loan Association and holds a Savings Share Account of said Association, subject to its charter and by-laws and to the Laws of the United States of America."

[2] Emphasis supplied.

"* * * any of such persons *who shall first act*[3] shall have power to act in all matters related to such shares, share accounts, or accounts whether the other person or persons named in such shares, share accounts, or accounts be living or not."

Mr. Davis did act, and he had every legal right to do so.

It is also contended, to make any sort of a change, it would have been necessary for Davis to draw the money out and re-open another account, rather than merely have the name changed on the certificate. This, we think, would have been superfluous. Equity regards substance rather than form. The circumstances clearly reflect the end result that Davis desired. It might also be added that the evidence clearly establishes that Davis had no intention of creating a joint tenancy when opening his account. According to Mrs. Wilma Underwood and John Ed Lingle, employees of the Federal Savings and Loan Association who were present when the account was originally opened, the following facts were shown: Davis desired to open an account in his own name, but was advised by one of the corporation directors that it was customary to have two names on the account. According to Lingle, Davis mentioned the name of one of his neighbors, a Mr. Montgomery, but it was suggested that would be asking a neighbor to assume a considerable amount of responsibility. The director inquired about relatives, and Davis mentioned his granddaughter. According to Mrs. Underwood, Davis was assured it would not be possible for the person whose name appeared on the account with him to draw on it except after his death, and only if she had possession of the pass book. After some discussion, he decided to place his granddaughter's name on the account, and was assured that if he desired to make any change, it would only be necessary that he return with the book, and give the Association the necessary information. We are not here concerned with the correctness of the advice given to Davis, but mention this evidence only for its pertinency to the question of intent.

[3] Emphasis supplied.

Appellee asserts, "In any event, there was certainly a completed gift to the granddaughter." We feel there is but little need to add to what has already been said. A gift is a voluntary transfer of property, without valuable consideration, to another. In the very nature of a gift, the donor ceases to exercise control over it. The testimony, heretofore referred to, establishes that Davis had no intention of giving the money, represented by the share, to anyone, and he likewise retained possession of the pass book. Appellee calls attention to a letter sent to Mrs. Jackson, by Davis, and enclosing an application card for her signature, following the original opening of the account with the Savings and Loan Association. The letter directs that appellee sign the card, "so then when you come down here they would know you"; however, the opening line of the letter is, "I wish you would sign this card to identify you just in case anything happens to me." We think it clear that the first statement referred to Mrs. Jackson's "coming down" after his death. The evidence falls far short of establishing a gift.

For the purposes of this appeal, it is not necessary that we determine whether the fund, evidenced by the certificate, belongs to appellant individually or in her capacity as executrix. The decree is reversed, and the cause remanded with directions to enter a decree not inconsistent with this opinion.

Reversed and remanded.

PERRY AND COGGINS *v.* STATE.

4980 and 4986 342 S. W. 2d 95

Opinion delivered January 9, 1961.

Robinson, Sullivan & Rosteck, for appellant.

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

J. Seaborn Holt, Associate Justice. The appellants, Jesse Raymond Perry and John Taylor Coggins, were charged with the crime of unlawfully and feloniously injuring property with dynamite in violation of Arkansas Statutes (1947) § 41-4237. Separate trials were held for each of the named defendants and a jury returned a verdict of guilty against each. Punishment for Perry was assessed at three years in the State Penitentiary. Punishment for Coggins was assessed at three years in the State Penitentiary and a $500.00 fine levied. A synopsis of the material facts shows that the appellants were part of the "confidential squad" of an organization known as the Ku Klux Klan who planned and carried out acts of violence directed against the Little Rock Public School Board and certain city officials of the City of Little Rock. The violence was designed to harass the School Board and city officials for their role in the integration of Negro pupils into the Little Rock school system. On the afternoon of September 6, 1959, Perry and Coggins, in the company of another person, drove to the places that had been selected as targets for bombing in order to acquaint themselves with the

nature and location of the targets. On the night of September 7, 1959, the appellants proceeded to carry out the plan of dynamiting the school board offices at Eighth and Louisiana Streets, Mayor Werner Knoop's office on Gaines Street, and the bombing of Little Rock Fire Chief Gann Nalley's station wagon. Perry and Coggins were arrested on September 10, 1959, and charged the following day with willfully and feloniously destroying property with dynamite.

Although the appellants assigned numerous alleged errors in the trial court proceedings, they argue but three on this appeal. (I) That the trial court erred in refusing to grant a change of venue, (II) that the trial court erred in refusing to quash the jury panel, and (III) that the trial court erred in permitting statements of other offenses with which the defendant, Jesse Raymond Perry, was charged to be admitted in evidence.

I

It is first contended that the trial court erred in refusing to grant a change of venue to the defendants because widespread coverage of the crime by local newspapers and other news media created a situation where public sentiment was so aroused and inflamed that it would be impossible for the defendants to obtain a fair and impartial trial in Pulaski County. A petition for change of venue was filed under Arkansas Statutes (1947) § 43-1501 and supporting affidavits were signed by thirteen persons, nine of whom testified at the hearing. The State filed counter-affidavits from twenty-seven persons and twenty-one of these testified. Unless the trial court abused its discretion in denying appellant's motion for a change of venue, then we must affirm the court's order. See *Bailey* v. *State,* 204 Ark. 376, 163 S. W. 2d 141, *Meyer* v. *State,* 218 Ark. 440, 236 S. W. 2d 996. In the present case, our review of the facts does not show an abuse of discretion. Numerous witnesses testified for both the defendants and the State. Their testimony was contradictory. However, in *Leggett* v. *State,* 227 Ark.

393, 299 S. W. 2d 59, this court held no abuse of discretion existed where there was presented a situation where hundreds of veniremen were searchingly examined under oath over a three-day period. Here, as in the *Leggett* case, *supra,* there is evidence that many veniremen may have reached positive conclusions as to the guilt or innocence of the defendants, but the lower court reached the conclusion after hearing all the testimony firsthand that the defendants could receive a fair trial and we cannot say under the facts of this case there was an abuse of discretion. We said in the *Leggett* case:

"It cannot be said that the court abused its discretion in refusing to order a change of venue. What the statute requires is a showing that the minds of the inhabitants of the county are so prejudiced against the accused that a fair trial cannot be had. Arkansas Statutes (1947) § 43-1501. Formerly the court was restricted to determining the credibility of the affiants supporting the motion, but the 1936 revision of the statute permits the court to ascertain whether the allegations of prejudice are well founded. *Robertson* v. *State,* 212 Ark. 301, 206 S. W. 2d 748. Here the trial judge had listened for more than three days while hundreds of veniremen were searchingly examined under oath. In deciding whether the appellant's two witnesses had correctly estimated the local sentiment the court was entitled to consider the views of scores of citizens already heard. Although many veniremen had reached positive conclusions from what they had read or heard, there is no indication that the news reports were biased or represented a studied effort to inflame the public. *Meyer* v. *State,* 218 Ark. 440, 236 S. W. 2d 996. Despite the defendant's theory that it was impossible to obtain a fairminded jury within the county, the court was convinced by testimony heard at firsthand that this goal had almost been reached. In these circumstances the conclusion that the asserted prejudice did not exist lay well within the limits of the court's discretionary authority."

II

It is next contended that the trial court erred in refusing to quash the jury panel. The court appointed three jury commissioners for the September 1959 term of court. The jury commissioners selected the jury panel for the September term of court and the respective jurors were summoned to appear on the first day of the new term, September 28, 1959. On this same date the court felt that one of the Commissioners, Marion Ward, was disqualified to serve as a jury commissioner and removed him. The jury was dismissed and each was paid for one day's jury service. A new jury commissioner, Jack Pickens, was selected by the court to replace Mr. Ward. The new commissioners selected a panel of jurors by which Perry and Coggins were ultimately tried and convicted. The appellants rely upon Arkansas Statutes (1947) § 39-222 which provides if the panel of jurors selected is set aside that the court shall order the sheriff to summon a petit jury who shall attend and perform the duties of jurymen as if they had been regularly selected. It is argued that in the present case, since the regular panel of jurors was set aside, that the sheriff should have summoned a panel of jurymen to try the defendants. We do not agree. Act 205 of Acts of 1951, compiled as Ark. Stats. 39-220.1 and 39-221.1, provides:

"Deficiencies in the regular panel of the petit jury shall be filled by selecting jurors from the special panel provided for in section 3 [§ 39-220] of this act and when in the trial of any case the regular panel is exhausted the court shall direct the summoning of a sufficient number of jurors from the special panel to complete a jury for the trial of said cause. In no event, except by consent of the parties, shall bystanders be summoned.

"In the event it becomes evident to the court that the special panel should be supplemented with additional names of petit jurors the court may recall the jury commissioners which selected such panel for the purpose of supplementing said special panel with such number of

petit jurors as the court deems necessary. In the event of disqualification or unavailability of one or more of such jury commissioners the court may appoint one or more jury commissioners in lieu thereof."

In the present case both the regular and the special panels of petit jurors were quashed, therefore it was necessary for the court to recall the jury commissioners to supplement the panels selected. It will be noted that this section of the statute, § 39-221.1, provides that the court may appoint other jury commissioners if one or more of the jury commissioners is disqualified. This was done in the present case. We think that the court followed the proper procedure in the present case and no error was committed as urged by the appellants.

The appellants also argue that the jury panel should have been quashed because two of the jury commissioners, Jack Pickens and Milton Anderson, were members of business firms which had subscribed to a reward fund sponsored by the Little Rock Chamber of Commerce to be paid for information leading to the arrest and conviction of individuals responsible for the aforementioned crimes. We think this is without merit.

In *Arnold* v. *State,* 148 Tex. Cr. R. 310, 186 S. W. 2d 995, 158 A.L.R. 1356, the defendants were indicted by a grand jury for cattle thefts and convicted by a petit jury. Both the grand jury and the petit jury contained persons who were members of an association whose purpose was to help investigate and prosecute cattle thefts. The Court of Criminal Appeals of Texas held that such members were not disqualified. And in *Corley* v. *State,* 162 Ark. 178, 257 S. W. 750, the citizens of Newport had contributed money to promote a law and order league, and several of the veniremen had contributed money to this association. These veniremen testified that their contributions had been made for the purpose of suppressing lawlessness generally, and no juror held competent was shown to have made a contribution for the purpose of prosecuting the appellant personally. The court in commenting upon this noted:

"The veniremen were not disqualified by this bias. The rule is that a juror is not disqualified from trying a person accused of a particular crime because he has a prejudice against the crime charged, if such prejudice against a particular crime would not prevent the juror from impartially considering the question of the guilt of the accused."

While the above cases deal with either grand or petit jurymen we can see no reason to apply a different rule of disqualification for jury commissioners who are even further removed from the case than a petit juror. The bias, if any, of jury commissioners, Pickens and Anderson, was not toward the particular defendants in this case, but toward the crime committed. It was their desire to see the offenders punished, whoever they might be. It is certainly no disqualification that a jury commissioner or juror be prejudiced against lawlessness. ". . . (G)ood citizenship implies a respect for and obedience to all laws, so long as they are laws, and a willingness and desire to see them effectively administered." *Remer* v. *State,* 3 Okla. Crim. 706, 109 P. 247.

III

Finally the appellant, Perry, contends that the court erred in allowing the prosecution to offer proof of an offense in addition to the one for which he was being tried. The record shows that Perry and the other members of the confidential squad met on several occasions to plan the dynamiting of three different places. All three bombings were part of a single scheme and were carried out in rapid succession on the same night. In the case at bar Perry was being tried on the charge of dynamiting the School Board office. The court allowed the prosecution to introduce proof of the entire plan and its execution, and this evidence showed that Perry was also implicated in the bombing of Nalley's car. The jury was instructed that the proof concerning the other offense was not to be considered with reference to the defendant's guilt of the charge on trial.

The court's ruling was correct. "If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme." Underhill's Criminal Evidence (5th Ed.), § 207.

The principle has often been recognized by this court. In the early case of *Baker* v. *State,* 4 Ark. 56, we stated the rule as follows: "Generally speaking, it is not competent for a prosecutor to prove a man guilty of one felony, by proving him guilty of another; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to prove the character of the other. . . . All the authorities concur, that the intention and design of the party are best explained by a complete view of every part of his conduct at the time, and not merely from the proof of a single and isolated act or declaration; and it may so happen, that, from the nature of the offense charged, it is impossible to confine the evidence to proof of a single transaction." Again, in *Banks* v. *State,* 187 Ark. 962, 63 S. W. 2d 518, we said: "Moreover, the testimony of Mrs. May was competent for another reason, that is to say, if several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense, which is itself a detail of the whole criminal scheme. Thus, where two or more persons are assaulted at or about the same time and place, it will be permitted to prove all the assaults on the trial of one indictment for any one of them. For the reason that all the assaults are merely parts of one transaction and to prove one

necessitates proof of all of them." Other cases to the same effect include *Johnson* v. *State,* 152 Ark. 218, 238 S. W. 23, and *Mayfield* v. *State,* 160 Ark. 474, 254 S. W. 841.

We have examined the other numerous assignments of error but find no error as alleged.

The judgment is affirmed in both cases.

ROBINSON, J., not participating.

JOHNSON, J., concurring.

JIM JOHNSON, Associate Justice, concurring.

I concur in the result reached by the majority but for entirely different reasons than those advanced in the majority opinion as to the appellants' contentions on (1) Petition for Change of Venue, and (2) The alleged reception of statements as to other offenses charged against the appellant Perry. I am in full accord with the majority as to its reasoning on appellants' contentions as to the refusal of the trial court to quash the jury panel.

My basic difference with the majority is that I feel that the case should be affirmed, not because no error was committed on denial of the Petition for Change of Venue, but because the error was harmless in the cases of these two appellants. The same thing may be said with reference to the statements made by the Prosecuting Attorney and one witness with reference to the fact that there were other charges pending against the appellant Perry. On this latter point, I cannot agree with the approach of the majority because, as I view it, the point raised by appellant is not that any improper evidence was received but rather that even though the trial court cautioned the jury to disregard such statements, it was impossible to erase the prejudice which their utterance in the presence of the jury had created.

As to appellants' Petition for Change of Venue, I firmly believe that the trial court erred in denying the petition. The majority cites *Leggett* v. *State,* 227 Ark. 393, 299 S. W. 2d 59, to sustain the trial court's action. It

should be remembered that in the Leggett case the trial court had heard the testimony of "hundreds of veniremen" and jurors had actually been selected at the time of the presentation of the petition. Further, the court found that in the Leggett case there was no indication: "*... that the news reports were biased or represented a studied effort to inflame the public. . .*" [emphasis added]. In the case now before us, no jurors had been examined before the Court passed upon the Petition for Change of Venue. Without detailing the testimony of the witnesses called by the State or the appellants on this petition, I am of the opinion that when all of such testimony is considered, the overwhelming preponderance of the evidence showed that a fair and impartial jury could not be selected in Pulaski County to try these cases. The second point of distinction between the cases now before us and the Leggett case is that in the present cases the record clearly shows that the news articles, editorials and cartoons were "biased" and did represent "a studied effort to inflame the public."

Space will not permit a detailed recitation of the text, prominence, size of headlines, number of stories and slanted emphasis of the news articles. It is sufficient to say that no fair minded person could read the same without coming to the conclusion that the news editors were magnifying the crimes and deliberately attempting to create hostility toward the defendants. Surely, no reasonable person would say that the editorials appearing in the Arkansas Gazette, wherein it was stated that the editors trusted that the Federal Bureau of Investigation had investigated whether or not the defendants were communists, were not a "studied effort to inflame the public." This example could be multiplied but this is a fair sample of the editorial treatment of the defendants. It is possible that fair minded men might differ as to the deliberate intent of the editors in news treatment of the matter if this were all that appeared in the record, but, when the editorials are considered it is clear, beyond the shadow of a doubt, that these editors not only attempted to prejudice the public against the defendants before trial but also that these efforts were undoubtedly successful. It is shameful

that any responsible newspaper editor would attempt to pervert justice by preventing a defendant from being tried by fair and impartial jurors. It matters not how guilty the defendants may have been and undoubtedly were; this did not give license to deprive them of their constitutional right to trial by an unbiased jury. If we ever come to the point that we reason that "the end justifies the means" we will have destroyed our government of law and will have substituted a "government by men" which will surely lead to the doom and destruction of our great nation.

Having stated my reasons for disagreeing with the treatment of the issue by the majority, I advert to my reason for concurring in the result, i.e., that the error was harmless. In *Sullins* v. *State,* 79 Ark. 127, 95 S. W. 159, in discussing an error of the trial court in refusing to sustain a challenge for cause against one of the trial jurors, we said:

"For instance, if the undisputed evidence, not only on the part of the state, but also *the testimony of the defendant himself,* clearly shows the facts which make out the crime, then we think this Court would not be justified in sitting the conviction aside for such an error, for under such a state of facts *the verdict would have been the same had the case been tried by any other unbiased and impartial jury.* Now that is the case here, so far as the guilt of the defendant is concerned; for his own testimony shows that the killing of Radcliff was neither necessary nor excusable on his part." [Emphasis added.]

In *Anderson* v. *State,* 197 Ark. 600, 124 S. W. 2d 216, we upheld a first degree murder conviction where confessions of conspirators had been improperly admitted against him saying:

"*They could not have been prejudicial in this case because the appellant, Joe Anderson, testified and admitted the conspiracy, the robbery and the killing of Cooley.* It is true he said that Cooley was shot when he was a few feet away and that he had nothing to do with the shooting, but it was done in furtherance of the conspiracy and all the

conspirators were guilty the same as the one that actually did the shooting." [Emphasis added.]

In *Malone* v. *State,* 202 Ark. 796, 152 S. W. 2d 1019, in discussing an alleged improper argument of the prosecuting attorney, we said:

"Moreover, no prejudice could have resulted by that statement of the prosecuting attorney, and *even where error is shown, if it is manifest from the record that no prejudice resulted, this Court will not reverse.*" [Emphasis added.]

Turning now to the record in the cases here, I find that the appellant Coggins testified in open court and admitted his guilt, seeking only to minimize his turpitude by statements that he thought the bomb would only cause slight damage and did not realize the havoc which it would wreak.

The appellant Perry testified in Chambers that the second of two confessions he made to the Prosecuting Attorney was true and he did not make the confession because of coercion, threats, duress or promises of reward. This confession was read in evidence against him and constitutes an unqualified admission of guilt as an accessory before the fact. This justified and demanded his conviction as a principal and based on the record before us, no fair minded jury could have come to any other conclusion, the distinction between accessory before the fact and principal having been abolished. Ark. Stats., § 41-118.

By virtue of both appellants own testimony, they would have been convicted by any fair minded jury and the convictions should stand because the error in denying the Petition for Change of Venue was harmless.

The contention of appellant Perry as to error in refusing to grant a mistrial because of statements of the prosecutor and a witness to the effect that other charges were pending against him is without merit because the error, if any, was harmless in view of his testimony — which, in effect, confessed guilt.

On this last point, the opinion of the majority goes to a point which I don't understand from the briefs to be raised by appellant and which, as I see it, could not properly be raised since the record shows that the Court did not admit evidence of similar offenses on the part of the defendant but instead charged the jury to disregard the improper statements. The appellant only contends that the admonitions of the Court were insufficient to remove the alleged prejudice created by these utterances. This contention is untenable for two reasons: (1) The appellant's admittedly true confession related his participation in and guilt of another crime, as well as guilt of the crime for which he was being tried. In this state of the record, it cannot be said that any prejudice resulted to the appellant because of the excluded statements of the Prosecuting Attorney and a witness. No objection was made to the reading of appellant's confession on the ground that it showed his guilt in another crime, and, indeed, none could have been properly made. (2) The admonition was ample to remove any possible prejudice. *Smith* v. *State,* 222 Ark. 650, 262 S. W. 2d 272.

EBBERT *v.* HUBBELL METALS, INC.

5-2208 341 S. W. 2d 768

Opinion delivered January 9, 1961.

Howard & McDaniel, for appellant.

Marcus Fietz and *James B. Roleson,* for appellee.

Ed. F. McFaddin, Associate Justice. The judgment in this action on account must be reversed because of an erroneous ruling in regard to the admission of evidence.

Appellee, Hubbell Metals, Inc., filed action against Appellant Bill Ebbert for $458.82 and interest alleged to be due on an open account for merchandise. The defense, *inter alia,* was that appellant neither ordered nor received the merchandise for his own use. Trial to a jury resulted in a judgment for appellee for the full amount; and appellant brings this appeal, urging two points, the first of which is:

"The Court erred in the admission in evidence of plaintiff's Exhibit No. 1 because said exhibit was a photostatic copy and it was not admissible under the best evidence rule and the governing statute."

We find it unnecessary to consider the second point urged by the appellant because the first point requires a reversal of the judgment rendered. Hubbell Metals shipped the merchandise to Arkansas Aluminum Awning Company via Superior Forwarding Company, a motor carrier. Ebbert's defense was, that even though he was the owner of Arkansas Aluminum Awning Company, nevertheless he had previously informed the salesman of Hubbell Metals that W. A. Kernodle was operating the Arkansas Aluminum Awning Company and that Ebbert would not be liable for any merchandise sold to the Company while Kernodle was operating the business. In the course of the trial, and to show delivery of the merchandise to appellant, appellee offered what pur-

ported to be a photostatic copy of a bill of lading issued by Superior Forwarding Company and claimed to contain the signature of appellant as having received the shipment. The Court permitted the photostat* to be introduced in evidence, and that ruling is the point at issue.

Ebbert insisted that the photostat was a mere copy and not the best evidence, and that no foundation was laid for the admission of the copy. The best evidence rule, as applied to the situation here, is stated in 20 Am. Jur. 379, "Evidence", § 426:

"The original of a writing, document, or record, is the primary evidence of the matter contained in such writing, document, or record. Copies are mere secondary evidence, and, under the general rule requiring the production of the best evidence which the nature of the case admits, are not admissible in evidence over the objection of the adverse party unless a basis is laid for their reception by showing that the original cannot be produced."

In *Union Central Life Ins. Co.* v. *Mendenhall,* 183 Ark. 25, 34 S. W. 2d 1078, there was an effort made to introduce a photostatic copy of a premium card and, in holding the copy to be inadmissible, this Court said:

"The original premium card was the best evidence, and there was no proper foundation laid for the introduction of a copy. . . . The court correctly held the photostatic copy inadmissible. That it was a photograph and less liable to imperfectly depict the original than a copy transcribed ordinarily would, does not alter the general rule."

In the case at bar there was no testimony to show that the original bill of lading was not available to the

* In some current dictionaries the word "photostat" is listed only as "A trademark applied to a device. . ."; but Funk & Wagnall's New Standard Dictionary of the English Language, published in 1956, says that "photostat", as a noun, is "A positive obtained by a camera designed to reproduce documents, as deeds for record, checks, policies, drawings, etc., on bromide paper; also, the instrument itself; a protected trade name." The same dictionary says that "photostat" is also a transitive verb as well as an intransitive verb; and "photostatic" is an adjective.

plaintiff instead of a mere photographic copy;[1] and so the copy offends against the best evidence rule. But the appellee insisted in the Lower Court, and claims here, that the copy was admissible because of Act No. 64 of 1953, which makes admissible in some instances the photographic copies of business records, and it was on this theory that the Lower Court admitted the photostat in evidence. The germane portion of this Act No. 64 (§ 28-932, Ark. Stats.) reads:

"If any business . . . in the regular course of business or activity has kept or recorded any memorandum . . . of any act . . . and in the regular course of business has caused any or all of the same to be recorded . . . by any . . . photostatic . . . or other process which accurately reproduces or forms a durable medium for so reproducing the original, . . . Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial . . . proceeding."

Even though this Act No. 64 of 1953 is Section 1 of the Uniform Act entitled: "Photographic Copies of Business and Public Records as Evidence Act" (see Uniform Laws Anno. Vol. 9-A, p. 338, printing of 1957), still there is a paucity of authorities regarding the Act.[2] But it is clear that the photostat copy is admissible only "when satisfactorily identified." There is no evidence in this case that the photostat offered in evidence was from a record kept in the regular course of business, or that the photostat was made in the regular course

[1] Although not involved here, we call attention to the statute on business records, which is Act No. 293 of 1949 (§ 28-928 Ark. Stats.), and which permits the introduction of any writing, ". . . made as a memorandum or record of any . . . transaction . . . if made in the regular course of business, and if it was the regular course of such business to make such memorandum . . . at the time of such Act . . ." For a study of this Act see article in Vol. 3 Ark. Law Review p. 359, and see also *U. S.* v. *Bartholomew*, 137 Fed. Supp. 700.

[2] The appellant has cited us to the case of *Toho Bussan Kaisha* v. *American President Lines*, 265 F. 2d 418; and we have found no better case than the one cited. There is a note on the Act in Ark. Law Review, Vol. 7, page 332. Those interested may also consult the following: *People* v. *Wells*, 380 Ill. 347, 44 N. E. 2d 32; 142 A.L.R. 1262; 48 Michigan Law Review p. 489 *et seq.;* and 57 Commercial Law Journal p. 83 *et seq.* (April 1952).

of business. The only witness who testified about the matter was the District Manager of appellee; and he said that the proffered exhibit was a copy of a bill of lading issued by Superior Forwarding Company:

"Q. Do you know how many copies of a bill of lading were made by Superior Forwarding when this was shipped out?

A. No, I do not know what number.

Q. Do you know where the original of this is?

A. The original, I imagine, would be at Superior Forwarding Company.

Q. Does your company have a copy?

A. Yes, sir.

Q. Where is it?

A. It would be in St. Louis, sir.

Q. Where did you obtain this?

A. Sir, I do not have a copy of that in my file. This was obtained from St. Louis."

The foregoing is the only testimony that was offered as to why the photostat should be introduced, rather than the original produced; and so we hold that there was no proper foundation made for the admission of a copy; and that under the best evidence rule or under the statute, the copy cannot be introduced until a proper foundation is made.

For the error indicated, the judgment is reversed and the cause is remanded.

MANHATTAN CREDIT CO., INC. *v.* BREWER.

5-2278 341 S. W. 2d 765

Opinion delivered January 9, 1961.

[redacted]

James R. Howard of *Moses, McClellan, Arnold, Owen & McDermott,* for appellant.

W. M. Herndon, for appellee.

PAUL WARD, Associate Justice. Appellant, Manhattan Credit Co., Inc., repossessed a Ford automobile belonging to appellee, Mrs. Pat Brewer, under the provision of a chattel mortgage because of delinquent payments. Appellee sued for conversion, and the trial court, sitting as a jury, gave her judgment in the sum of $200. Appellant here seeks a reversal on the ground that there is no substantial evidence to show a wrongful taking of the automobile.

The chattel mortgage executed by appellee, dated April 22, 1959, shows that appellee was to pay $919.65 in fifteen equal monthly installments of $61.31. Pertinent language in the chattel mortgage reads as follows:

"In case default be made in the payment of said debt . . . or any of the payments above scheduled . . . said Mortgagee at his option, without notice, is hereby authorized to enter upon the premises of the Mortgagor or other places where said property might be, and take possession of and remove said property, . . . and without legal procedure, sell the same and all equity of redemption of the Mortgagor therein . . . and out of the proceeds of said sale pay all costs . . .; and apply the residue thereof toward the payment of said indebtedness . . . rendering the surplus, if any, unto said Mortgagor. . . ."

It is not denied that appellee was delinquent in her payments at the time of the taking, and she does not challenge the right of appellant to repossess the automobile under the above provisions of the chattel mortgage provided the repossession had been made in a proper manner. She does insist however that the retaking in this instance was not proper but that it was wrongful, and that the evidence so shows. Appellant takes the opposite view, and that constitutes the prime issue presented on this appeal.

Before reaching the prime issue it is necessary to dispose of two other questions that have arisen.

FIRST. It is stated by appellant that a mortgagee (in a chattel mortgage such as this) has the same right under our decisions to repossess without legal process that the seller has under a conditional sales contract, citing *White River Production Credit Association* v. *Fears,* 213 Ark. 75, 209 S. W. 2d 294, and *Starling* v. *Hamner,* 185 Ark. 930, 50 S. W. 2d 612. We find that most of our decisions in this connection have dealt with conditional sales contracts, and we do not find that the above cited cases are sufficiently clear and in point to fully sustain appellant's contention. However, we deem

it unnecessary to decide this particular issue one way or the other in view of the conclusions hereafter reached. Rather than to do so, without the benefit of proper briefing, we choose to give appellant the benefit of any doubt and treat the chattel mortgage as if it were a conditional sales contract.

SECOND. Appellee first takes the position that this court should not re-examine the sufficiency of the evidence to sustain the judgment of the trial court because appellant did not make a motion for a directed verdict at the close of all of the testimony. To sustain this point appellee cites *Hot Springs Street Railway Company* v. *Hill,* 198 Ark. 319, 128 S. W. 2d 369 and *Dinet* v. *Rapid City,* 222 F. 497. Again we by-pass a full discussion and definite determination of this rule as it applies to our procedure for the reason that we think it would have no application in this particular case where the trial court acted both as judge and jury. In arguing the case before the trial court it would have been a useless gesture for appellant to have filed a motion asking the judge to direct himself to direct a verdict in its favor. The question of the sufficiency of the evidence was squarely before the trial judge and he could have in no way been misled.

The *prime issue* is whether there is substantial evidence to support the trial court's finding to the effect that appellant's acts in repossessing the automobile amounted to conversion. The applicable rule (briefly stated) as set forth in many of our decisions, appears to be that there is a conversion if force or threats of force are used to secure possession of the automobile.

In this case the act of taking the automobile is conceded. The circumstances of the taking are not materially in dispute, and in setting them out we view them in the light most favorable to sustain the judgment. Appellant's agent went to appellee's home and found the automobile in the driveway at a time when appellee was in the bathtub. While the agent was attempting to attach a towbar to the car appellee called her attor-

ney who told her the agent had no right to take the car without legal process. She so informed her husband and he in turn told the agent that they objected to him taking the car. The agent disregarded these objections and, without consulting appellee, towed the automobile to a service station to pick up a spare tire (belonging to the car) left for repair. While the agent was in the process of obtaining the spare tire appellee and her husband drove up to the filling station and demanded the agent to unhook the automobile. This the agent refused to do. Then appellee went to the right side of the agent's car and told him he couldn't take it, but this warning was ignored. At about this time appellee's husband went to the other side of the car and, while the agent was getting into the car, turned off the ignition. Thereupon the agent turned the ignition back on starting the motor, and started backing out of the filling station, causing Mr. Brewer to have to get out of the way. Thereupon the agent drove away with the automobile.

The case of *Kensinger Acceptance Corp.* v. *Davis,* 223 Ark. 942, 269 S. W. 2d 792, presented a factual situation somewhat similar to the situation in this case. Davis had left his Ford truck with the finance company barring some kind of a settlement, and the company refused to let him remove the truck. The question appeared to be whether or not the company had threatened force to prevent Davis from removing his truck. As set out in the opinion the branch manager, Mr. Enochs, testified: "Q. Did you at any time touch Mr. Davis or threaten any bodily harm to him? A. No, sir. Q. You told him he couldn't drive it off? A. I told him he wasn't going to leave in the truck." Following this the court said: "This was at a time when Davis was sitting in the truck with the key in his hand. It was not shown just how Enochs was going to prevent Davis from leaving in the truck except through violence. The evidence justifies a finding that Enochs' *statement was a threat of violence,* was so intended by him and so understood by Davis." (Emphasis supplied.) It appears to us that

the court, in the above cited case, was saying that Davis could not have driven the truck away without using force himself. Likewise in the case under consideration, it appears equally clear that Mrs. Brewer could not have prevented appellant's agent from driving her automobile away without her having to exercise force to prevent it.

The purpose of the rule against the use of threats of violence in these kind of cases appears to be that the conditional vendors may retake possession without legal procedure where and when they can do so peaceably and without incurring the risk of invoking violence. In the case of *Ellis* v. *Smithers,* 206 Ark. 247, 174 S. W. 2d 568, the court approved the following statement: "The conditional seller's right to possession of the goods sold on default of the buyer may be exercised without recourse to the courts by retaking possession provided this can be done peaceably; and this is especially true where the contract expressly so provides." In support of its right to take the automobile in this instance without legal process appellant relies upon our holdings in *Barham* v. *Standridge,* 201 Ark. 1143, 148 S. W. 2d 648; *Ellis* v. *Smithers, supra,* and *Rutledge* v. *Universal C. I. T. Credit Corporation,* 218 Ark. 510, 237 S. W. 2d 469. We find however that these cases are not in conflict with what we have heretofore said. In the *Barham* case the opinion states that there was evidence "that after the collision Mrs. Standridge brought the car to the motor company's garage and surrendered it, stating at the time that she was unable to pay for it." This testimony was contradicted by Mrs. Standridge, thus presenting a factual question for the jury. In the *Ellis* case the opinion states that: "Possession was obtained by appellees peaceably and without fraud." In the *Rutledge* case the opinion contained this statement: "Appellant did not give his permission, but he did not object. Massey then drove the car to appellant's house where Mrs. Rutledge removed some personal effects from the car."

From what we have heretofore said, it follows therefore that the judgment of the trial court must be, and it is hereby, affirmed.

Affirmed.

McFaddin, J., concurs.

Taylor *v.* The Aetna Casualty & Surety Co.

5-2264 341 S. W. 2d 770

Opinion delivered January 9, 1961.

Amis Guthridge, Moses, McClellan, Arnold, Owen & McDermott and *E. M. Arnold,* for appellant.

Owens, McHaney & McHaney, for appellee.

Sam Robinson, Associate Justice. Appellant, Merrill B. Taylor, was the owner of a house in Little Rock on which he purchased from appellee, The Aetna Casualty and Surety Company, a fire insurance policy in the face amount of $8,000. While the policy was in force, on March 28, 1959, a fire occurred which appellant contends resulted in a total loss. Appellee, however,

tendered as settlement an amount less than the face amount of the policy.

Appellant filed suit, alleging that under the provisions of the policy he had suffered a total loss and further alleging that the City of Little Rock had made a determination under the provisions of Ordinance 10907 that the house should be razed and had given appellant, by proper notice, sixty days within which to do so. Trial resulted in a jury verdict for appellant in the amount of $5,000.

During the course of the trial appellant offered in evidence the notice from the City directing him to raze the building and a certified copy of a resolution passed by the City Board of Directors finding that the building was so heavily damaged by fire that it was uninhabitable and should be razed for the health and safety of the citizens of Little Rock. Appellant also offered to testify that he had complied with the resolution, but the court refused to allow him to do so, and further refused to admit in evidence the notice and the copy of the resolution. The sole question involved in this appeal is whether the court's refusal to admit this evidence and to give its instruction based thereon was proper.

Although we find no case where this Court has been called on to so state, the general rule governing cases involving the question of total or partial loss wherein condemnation is concerned is set out in 45 C. J. S., § 913, 1008, as follows: "The rule . . . is that if, by reason of public regulations rebuilding is prohibited, the loss is total, although some portion of the building remains which might otherwise have been available in rebuilding; also, if the insured building is so injured by the fire as to be unsafe and is condemned by the municipal authorities the loss is total. It has been held that such an order of condemnation is not conclusive on either insurer or insured, and that, if the condemnation was caused by conditions having no connection with the fire, insurer is liable only for the part destroyed by the fire, although it has also been held that a fire, which,

combined with antecedent defects, renders a building incapable of repair under building ordinances creates a total loss."

Both appellant and appellee presented other evidence to support their respective contentions of total and partial loss. We see no reason why the evidence drawn in question should not also be considered by the jury in deciding if the loss was total. We have examined a number of cases where the facts are almost identical with those here and in each case similar evidence was admitted and allowed to be considered by the jury. *Feinbloom* v. *Camden Fire Insurance Assn.,* 54 N. J. Super. 541, 149 A. 2d 616; *Firemen's Ins. Co.* v. *Houle,* 96 N. H. 30, 69 A. 2d 696, 13 A.L.R. 2d 612; *Fidelity & Guaranty Ins. Corp* v. *Mondzelewski,* 49 Del. 306, 115 A. 2d 697; *A. H. Jacobson Co.* v. *Commercial Union Assur. Co.,* 83 F. Supp. 674; *Scanlan* v. *Home Ins. Co.,* Tex. Civ. App., 79 S. W. 2d 186; *Security Ins. Co.* v. *Rosenberg,* 227 Ky. 314, 12 S. W. 2d 688.

Reversed and remanded.

LEWIS *v.* BROWN.

5-2252 341 S. W. 2d 772

Opinion delivered January 9, 1961.

William H. Drew, for appellant.

No brief filed for appellee.

JIM JOHNSON, Associate Justice. This is a second review by this Court of matters arising out of the same litigation between appellant Elza Lewis and appellees W. G. Brown, et ux.

Elza Lewis commenced action against W. G. Brown and wife to be declared equitable owner of certain lands in Chicot County. Summons was served on November 17, 1958, and demurrer was filed by W. G. Brown and wife on December 6, 1958. On January 12, 1959, the regular Chancellor disqualified himself and a Special Chancellor was duly elected. On April 3, 1959, the demurrer was overruled and the defendants were given ten days to answer. On April 23, the defendants having not answered, the Special Chancellor vacated his order of April 3, 1959, and granted defendants until April 25, 1959, to answer and ordered the cause tried on May 18, 1959. On May 18, 1959, the defendants failed to appear and after a trial a default decree was entered in favor of plaintiff.

On July 18, 1959, W. G. Brown and wife filed complaint to vacate decree of May 18, 1959, and on July 18, 1959, filed petition for injunction restraining execution on decree of May 18, 1959. On August 8, 1959, after trial, the Chancellor denied the petition for injunction. On August 27, 1959, after trial, the complaint to vacate decree of May 18, 1959, was denied. Appeal was then taken to this Court on denial of complaint to vacate, *Brown* v. *Lewis,* 231 Ark. 976, 334 S. W. 2d 225, wherein the action of the Chancellor in denying the Complaint to Vacate Decree of May 18, 1959, was affirmed,

and rehearing denied on May 9, 1960, on which date the mandate of this Court was issued.

On June 1, 1960, W. G. Brown filed a Petition for Bill of Review. On the same date, Elza Lewis filed a demurrer to this petition which was treated as a Motion to make more Definite and Certain by the Chancellor, and plaintiff was "granted 20 days in which to comply with said Motion, in default the action be dismissed."

On June 22, 1960, two days beyond the granted time to comply with the motion, the appellant filed a petition to dismiss with prejudice the Petition for Bill of Review.

On June 29, 1960, appellant's petition to dismiss reached regular call on the docket. The Chancellor, upon inspecting his docket, found a notation thereon dated June 28, 1960, written by Solicitor for appellee. The notation is as follows: "The Chicot Chancery Court being in vacation, the Petitioners, by their attorney hereby take a non-suit in this action (case No. 9194) and the cost having been fully paid, Petitioners petition in this case is hereby dismissed without prejudice to Petitioners." The Chancellor thereupon dismissed appellant's petition for dismissal with prejudice thereby sustaining appellees' action in taking a non-suit. From such order comes this appeal.

For reversal appellant urges two points. The first point contended that: "The Chancellor erred in treating appellant's demurrer as a motion to make more definite and certain." This order of the Chancellor, treating the demurrer as a motion, was not final and appealable; it was a matter clearly within the Chancellor's discretion and here, contrary to appellant's eloquent argument, we cannot say that the trial court abused this discretion.

Appellant's second point contended that "The Court erred in dismissing appellant's petition for dismissal with prejudice."

Ark. Stats., § 27-1406 is as follows:

"The plaintiff or his attorney may dismiss any suit pending in any of the courts of this State, except actions of replevin, in vacation, in the office of the clerk, on the payment of all costs that may have accrued therein."

This statute has been construed by this Court many times and upon compliance with its terms the Court has never departed from the rule that "The plaintiff has an absolute right to dismiss his case at any time before submission to the Court." *St. Louis, I. M. & S. R. Co.* v. *Ingram,* 118 Ark. 377, 176 S. W. 692. While it is true, as appellant argues, the dismissal notation was made by the solicitor for appellee on the court's docket some seven days in default of a prior order of the court, yet it isn't contended that the court was not in vacation at the time, nor is it contended that all costs had not been paid, and since we do not find that the motion to dismiss with prejudice filed by appellant constituted a cross-complaint [See Ark. Stats., § 27-1407] we have no choice but to affirm the order of the Chancellor thereby concluding that there was no appealable order before this Court.

Affirmed.

5-2277 342 S. W. 2d 79

Opinion delivered January 16, 1961.

C. Van Hayes and *J. B. Milham,* for appellant.

Ben M. McCray, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a decree of the Saline County Chancery Court, wherein the court found that appellant, Benjamin Carroll, by reason of threats, intimidation, and duress, caused appellee, Peeda Carroll, to procure a divorce decree on June 19, 1950, against her wishes, and without her consent, the court cancelling, setting aside, and holding for naught, the June 19th decree.

The parties were married in South Carolina on July 3, 1942, and at the time of the decree in June, 1950, were residents of the state of New York. On June 21, 1948, after appellee had consulted an attorney friend of New York City, Martha Duff, the parties entered into an agreement in the nature of a property settlement, in which, *inter alia,* appellee acknowledged receipt of $5,000. The agreement further provided:

"6. That, while both parties hereto shall remain alive, and so long as the Second Party remains unmar-

ried, in the event that the parties hereto are divorced by a valid decree of divorce, the First Party shall pay to the Second Party the sum of Nine Thousand Three Hundred ($9,300.00) Dollars, in monthly equal installments on the first day of each and every month beginning with August 1st, 1948, said installments to be in the sum of Eighty-five ($85.00) Dollars, however, in the event of the Second Party's remarriage, this sum shall be no less than One Thousand ($1,000.00) Dollars."

Two years later (June 3, 1950), the complaint for divorce was instituted in the name of appellee in the Saline County Chancery Court, appellant waiving service of summons, and entering his appearance. The decree was granted on June 19th[1] on the deposition of appellee and Larry Drews, a witness on her behalf. From the evidence of these two persons, the court found that appellant willfully, and without cause, deserted appellee on August 1, 1948, and "had absented himself from her since that time." On June 5, 1952, the decree was amended to incorporate the provisions of the property settlement entered into by the parties in 1948.[2] On October 9, 1958, appellee filed the petition to vacate the decree of divorce, alleging that appellant, through threats and duress, had induced her to consent to being made the plaintiff in the divorce action. Following a hearing, in which both parties testified orally before the court, the decree was entered from which this appeal is taken.

Appellant, in seeking to uphold the divorce decree, asserts several alleged errors by the Chancellor, but, under the view that we take, a discussion of these alleged errors is unnecessary.

According to appellee, the parties, off and on, continued to live together in the same apartment. Mrs. Carroll stated that he would leave for a few weeks, and

[1] The Arkansas attorney who filed this complaint and obtained this decree apparently subsequently left the state.

[2] On April 17, 1954, Mrs. Carroll wrote her New York attorney asking that this agreement be incorporated in the decree. Since the decree had already been so amended, it is not clear why the letter was written, unless it be that the parties did not know that the attorney had already taken such action.

go to a hotel or to the home of his mother, but would come back after a period of time. Likewise, she would be gone for a few weeks, but would return to the apartment. She stated that this relationship continued until sometime in 1956, and they did not live in the apartment together after that time. Dr. Carroll testified that, following the divorce, since his wife would not move out of the apartment, he moved, and remained away for the balance of the year 1950, and "for many years thereafter." He did state that he used the apartment as an office when his wife was not present.

It is apparent to this Court that the parties colluded together, practiced fraud upon the Saline Chancery Court, and through such collusion and fraud obtained the divorce decree of June, 1950. We proceed to a discussion of the evidence that reflects the attitude, actions, and intent of each of the parties.

Mrs. Carroll contends that she acted under duress in consenting to the divorce action. Though she stated that Dr. Carroll did not mistreat her physically, appellee testified that he would criticize and ridicule her; would say "nice" things one day, and then ignore her and treat her as a stranger for three or four days. The witness stated that her husband told her to "get out" in 1948, which occasioned the property settlement. However, both parties admitted living together until after the divorce decree was obtained some two years later. Mrs. Carroll testified that she went to attorney Duff in 1948 of her own accord, and subsequently, Dr. Carroll went to the attorney's office with her. Appellee stated that Mrs. Duff was acting for both parties. She also testified that it was understood at the time of the agreement that the monthly payments were not to be made unless the divorce was granted. Appellee stated, that pursuant to this agreement, the divorce was granted in Arkansas in 1950. Mrs. Carroll testified that she did not come to Arkansas, denied that she signed the deposition (stating that it was a forgery), and denied knowing anyone by the name of Larry Drews (the witness in her behalf). *Admittedly,* however, Mrs. Duff mailed to

the parties two copies of the divorce decree, in which there is a definite finding that Dr. Carroll had deserted Mrs. Carroll on August 1, 1948, and had been away from her since that time. *Admittedly,* appellee directed a letter to her New York attorney, several years subsequent to the decree, in which she asked the attorney to "complete the matter of the court decree regarding the financial arrangement." *Admittedly,* Mrs. Carroll accepted benefits under the provisions of the decree, not only during the period in which, according to her testimony, the parties were still living together, but also for about eight months after the parties were living separate and apart. In fact, from her evidence, Mrs. Carroll did not institute her action to set aside the divorce decree until over two years after she had last lived with Dr. Carroll, and approximately eighteen months after he had ceased making the payments. The record reflects that he paid to her something over $1,300 after they ceased living together.[3]

We are accordingly unimpressed with the assertion by appellee that she acted "under duress". For that matter, irrespective of whether she voluntarily instituted the original divorce action (or instituted it at all), Mrs. Carroll was cognizant of the fact that fraud had been practiced upon the court, for she had the divorce decree in her possession, and was certainly aware that it had been rendered on false grounds and false testimony (even if she was not familiar with the residence requirements in Arkansas). We have concluded that the Chancellor's finding that Mrs. Carroll acted under duress was against the weight of the evidence. No citation, of course, is required to the effect that we try Chancery cases *de novo,* since this has been established by a long line of decisions.

Dr. Carroll testified that he took no part in obtaining the divorce, other than signing the waiver and entry of appearance; that he did not know whether his wife

[3] Dr. Carroll testified that he had paid Mrs. Carroll somewhere between $15,000 and $20,000 since the divorce. Mrs. Carroll testified that he had paid about $6,000 during that period. Neither party married again.

came to Arkansas; he denied any collusion, and the rendering of any aid in practicing fraud upon the court. The record disputes this testimony. In the first place, the entry of appearance, admittedly signed by appellant, states: "My name is Benjamin Carroll, and I am the husband of Peeda Carroll; I have read a copy of the complaint filed herein and fully understand the contents thereof." The complaint charged that Dr. Carroll had deserted his wife on August 1, 1948, and had "absented himself from her since that time." Dr. Carroll admitted that he was living with his wife until the divorce decree in 1950. The record also reveals a letter in which Dr. Carroll stated that he had made an initial payment to Mrs. Duff on the divorce proceedings. Of course, he, like his wife, had a copy of the fraudulent decree throughout the years.

We think the evidence reflects that these parties conspired and colluded to obtain a divorce decree in Arkansas in a court that had no jurisdiction, and we are of the opinion that this case is controlled by *Oberstein* v. *Oberstein,* 217 Ark. 80, 228 S. W. 2d 615. The circumstances there were quite similar to the circumstances in the present litigation. Mrs. Oberstein received payments under the decree from November, 1947, until May, 1948, and did not file a motion to vacate the decree until December 20th of the latter year. This Court said:

"In the case at bar Mrs. Oberstein's receipt of the weekly payments from November 6, 1947, to May, 1948, and her further delay until December 20, 1948, before filing the motion to vacate the Arkansas divorce decree—these facts together with others in the record—convince us that her Arkansas divorce proceedings were not caused by any duress exerted on her; but that she willingly traded her husband an Arkansas divorce decree for a property settlement."

The quoted reasoning is equally applicable here. In the present case, of course, Mrs. Carroll received payments for a much longer period, and delayed the institution of her action to set aside the decree for a considerably longer time.

In the *Oberstein* case, this Court likewise found that the husband had conspired and colluded to obtain the Arkansas divorce. From the Opinion:

"From the facts previously detailed, it is clear that both of the parties are culpable in this case. We do not want any Court of any sister State, or of the Federal system, to afford full faith and credit to the void divorce decree rendered in the Oberstein case by the Garland Chancery Court. Neither do we want either of these parties to profit to the slightest extent by reason of their trifling with the Arkansas Courts. Such is the problem confronting this Court. * * *

Thus, if we affirm the Chancery Court, we would be allowing Mrs. Oberstein relief to which she is not entitled because of her fraud; and if we reverse the Chancellor's decree, we would be allowing Mr. Oberstein to have relief to which he is not entitled because of his fraud. Each of them is estopped, because of collusion and fraud, from obtaining the sought relief."

This reasoning expresses completely our views in the instant cause, and in accordance therewith, we render the same holding that was rendered in the *Oberstein* case; in fact, we use the identical language, except for the substitution of names and the proper court.

"(1)—We hold that the divorce decree rendered in this cause by the Saline Chancery Court on June 19, 1950, was and is void; and this adjudication of invalidity prevents the divorce decree from being entitled to full faith and credit in this, or any other State.

(2)—We hold that each of the parties—Dr. and Mrs. Carroll—is precluded from any relief of any kind involving the said decree: she from having it vacated, and he from having it recognized.

(3)—We refuse to adjudge costs in favor of either party, since both are culpable; and, without reversing or affirming, we direct that a mandate issue remanding this cause to the Saline Chancery Court so that the holding here will be entered as the decree of that Court."

It is so ordered.

ROBINSON, J., dissents.

ROBINSON, J., dissenting. Of course, the parties in this case knew nothing about the law regarding residence requirements and jurisdiction of courts. It is perfectly obvious that if a fraud was perpetrated on the court it was the act of the lawyers and not of the litigants. For this reason I would not leave these people in the predicament in which the decision of the majority puts them. Undoubtedly Mrs. Peeda Carroll is estopped from questioning the validity of the decree because of the large benefits she has accepted under the decree, and I would dispose of the case in that manner. Therefore I dissent.

PETTIT *v.* KILBY.

5-2286 342 S. W. 2d 93

Opinion delivered January 16, 1961.

James R. Hale and *Rex W. Perkins,* for appellant.

Eli Leflar, for appellee.

J. Seaborn Holt, Associate Justice. This is a suit in replevin for a diamond ring, a diamond stud pin, certain other diamonds, a wrist watch, and a number of items of household furniture and other personal property. The relevant facts on this appeal show that L. N. Pettit was an elderly traveling salesman whose principal line of goods was selling caskets and as a sideline he dealt in diamonds. During February of 1957, Mr. Pettit employed Flossie Thurman to care for his invalid and mentally incompetent wife, Marie I. Pettit. In November of 1957, his wife was removed from the home to a hospital in Bentonville; however, Flossie Thurman continued to reside in the home of L. N. Pettit. On January 16, 1958, L. N. Pettit, under the name of Lewis Pettit, giving his address as Springfield, Missouri, and the appellant, Flossie Thurman, giving her address as Fayetteville, Arkansas, were married at Enid, Oklahoma. Shortly thereafter, while on a trip to Tulsa, Oklahoma, Mr. Pettit was stricken with a heart attack and taken to a Tulsa hospital where he died on November 23, 1958.

In certain litigation in the Probate Court of Benton County, Arkansas, it was adjudged that Marie I. Pettit was the lawful wife and widow of L. N. Pettit, deceased. An adopted daughter of that union, Roberta Pettit Kilby, was appointed administratrix of the estate. The admin-

istratrix filed the present suit to replevin certain diamonds and other named articles which were in her father's possession at the time of death and which are now in the possession of Flossie Thurman Pettit and which she refused to deliver [upon demand] to the administratrix. A trial was had in the cause and a judgment returned by the jury for the administratrix, Roberta Pettit Kilby. Flossie Thurman Pettit has appealed.

The first three points urged for reversal by the appellant deal with whether there was evidence to sustain the value of certain property. This argument overlooks the fact that the administratrix desires the return of the property itself and not its value. The recovery of possession is the primary object of a suit in replevin and the owner cannot be required to accept its dollar value. Ark. Stats. (1947) § 34-2116; *Schwantz* v. *Pillow,* 50 Ark. 300, 7 S. W. 167. We point out also that there was competent evidence as to the value of the jewelry. The administratrix of the estate, and as sole heir of her father, is the present owner. The testimony of an owner or former owner concerning the value of an object is competent evidence as to its worth. *Phillips* v. *Graves,* 219 Ark. 806, 245 S. W. 2d 394. The appellant does not question the competency of the witness' testimony, but merely complains of the quality of it. A verdict will not be overturned if there is any substantial evidence to support it. *Elkins* v. *Nelson,* 196 Ark. 209, 118 S. W. 2d 287. Here the jury had before it two witnesses as to the value; one a local jeweler and the other the administratrix. Weighing the testimony of these two witnesses was for the jury.

The appellant also complains of certain remarks of the trial judge during the trial of the cause about the introduction and identification of certain exhibits. We have examined these remarks and fail to find they went beyond the bounds of the trial court's discretion, nor do we think they sustain appellant's charge that the trial judge was helping the appellee try her suit.

The appellant also contends that the court erred in refusing to consider and allow a counterclaim of $2,012.63 against the appellee, administratrix, for funeral expenses which the appellant had assertedly paid. In the course of the trial it was stated without contradiction, if indeed it was not actually stipulated, that the appellant's claim for these funeral expenses had been filed in the probate court. The appellant insists, however, that she was also required to assert the claim in the circuit court, since the statute requires that the defendant "must" set out in his answer any grounds of counterclaim or set-off that he may have. Ark. Stats. (1947) § 27-1121.

The court's ruling was correct. The probate court is ordinarily the proper forum for the assertion of a claim for reasonable funeral expenses paid on behalf of the estate. Ark. Stats., § 62-2606. The probate court therefore had jurisdiction to act upon the claim filed therein by the appellant. In these circumstances it was not mandatory that the appellant also assert the claim as a set-off in the circuit court case, and the circuit court properly avoided a conflict of jurisdiction with the probate court. *Askew* v. *Murdock Acceptance Corp.*, 225 Ark. 68, 279 S. W. 2d 557. It is quite apparent, of course, that the circuit court's refusal to consider the claim is without prejudice to the appellant's right to proceed in the probate court.

Finally, it is urged that the court erred in refusing to allow the appellant to inquire about certain conversations with the decedent. Again we do not agree. The attorney for the appellee did not waive the dead man's statute, Schedule to the Constitution of Arkansas § 2, which provides: "In civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party. * * *" At no time

did appellee's attorney inquire about conversations and transactions with the deceased. However, the witness did volunteer conversations and the lower court sustained objections to them as not being responsive to the questions asked. In the words of the lower court, "There is a difference in injecting them when a question is asked, and being responsive to the question."

Finding no error, the judgment is affirmed.

ARK. FARMERS ASSN., INC. *v.* TOWNS.

5-2220 342 S. W. 2d 83

Opinion delivered January 16, 1961.

Thompson & Thompson, for appellant.

Carroll C. Cannon, for appellee.

ED. F. MCFADDIN, Associate Justice. On December 19, 1960 we sustained appellee's motion to dismiss the appeal; and appellant has filed a petition for rehearing. Because there seems to be some confusion about the point here involved, we believe it is proper to deliver a written opinion for future guidance.

The judgment of the Trial Court was entered on February 25, 1960. Notice of appeal was filed by appel-

lant the same day; and contemporaneously the Trial Court granted the maximum of seven months for filing the appeal and record in this Court. Such time expired in September, 1960. Entirely disregarding such matters as (a) appellee's right to file "amended designation" for partial record after first designating the entire record, (b) appellant's failure to designate the points as regards the partial record and (c) appellee's power to waive the statutory requirements as to the time for filing the designation, we come to the vital point of the case.

The appellant filed designation for only a part of the record. The appellee within ten days thereafter (Section 8 of Act 555 of 1953, Ark. Stats., § 27-2127.2) filed his designation for additional record, specifying: "All of the pleadings, the testimony and exhibits of all of the witnesses, and the instructions given and refused by the Lower Court, the verdict of the jury on the complaint and the judgment on the complaint." On September 21, 1960 appellant filed in this Court a record consisting of nineteen pages of pleadings and court orders, and a transcript of twenty pages of testimony and exhibits, certified by the official stenographer as, ". . . the evidence taken of *all of the witnesses testifying on behalf of the plaintiff* in the case of *Arkansas Farmers Association, Inc.* v. *Homer Towns,* all exhibits introduced in evidence and offered in evidence and refused and all objections made by counsel for both sides, *said evidence being in plaintiff's* case in chief." (Emphasis our own.)

No additional record was ever filed; and on December 1, 1960 appellee filed motion to dismiss the appeal because the appellant had failed to file the *complete designated record.* We granted the motion to dismiss in a *per curiam*; but appellant vigorously seeks a rehearing, claiming that it filed a pleading praying the Court, ". . . that any additional testimony and record designated by appellee be paid for by appellee until the determination of this case, since no additional record is necessary or desirable in determining the questions to be presented by appellant on appeal." The appellant, by making such quoted claim, cannot avoid its obliga-

tion to file in this Court the record as designated by both appellant and appellee. Section 9 of Act 555 of 1953 (§ 27-2127.3, Ark. Stats.) says:

"If there be designated for inclusion any evidence or proceeding at the trial or hearing which was stenographically reported, the appellant shall file . . . a copy of the reporter's transcript of the evidence or proceedings. . . . If the designation includes only part of the reporter's transcript, the appellant shall file a copy of such additional parts thereof as the appellee may need. . . ."

The appellant, as the party seeking a reversal of the judgment of the Trial Court, had the duty to file in this Court, within the prescribed time, the record as designated by the appellee, just the same as to file the record designated by appellant. When the appellant attempts to appeal he may designate the portion of the record he desires, but if the appellee insists on additional portions then the appellant must also furnish what the appellee designates; and when the case is decided by us the appellant may ask that the cost of the unnecessary record be taxed against the appellee. *Spikes* v. *Hibbard,* 226 Ark. 93, 288 S. W. 2d 38. In *Manila School Dist.* v. *Sanders,* 226 Ark. 270, 289 S. W. 2d 529, we said: "If appellee, Sanders, had desired any additional portion of the record to be brought up, he had only to follow the provisions of Act 555." See also *Drewry* v. *Sykes,* 226 Ark. 539, 291 S. W. 2d 258. In short, we hold that, in the absence of a court order to the contrary, the appellant must file in this Court the record designated by both parties or suffer the appeal to be dismissed for failure to file the designated record and appellant cannot, on his own determination, cast on appellee the burden of paying for the additional record designated. This has been our consistent holding under Act 555. Heretofore we have merely made *per curiam* orders showing the result. In order to avoid misunderstanding, we now render this opinion; and the appellant's petition for rehearing is denied.

MALVERN BRICK & TILE CO. *v.* HILL.

5-2268 342 S. W. 2d 305

Opinion delivered January 16, 1961.

Joe W. McCoy, Wootton, Land & Matthews, for appellant.

James C. Cole and *Gerald W. Scott,* for appellee.

ED. F. MCFADDIN, Associate Justice. Appellee, A. J. Hill, filed this action for damages for malicious prose-

cution, naming as defendants Every Mendenhall, F. P. Garvan, and Malvern Brick & Tile Company. There was a jury verdict and judgment for the plaintiff against all of the defendants for $750.00 actual damages and $250.00 punitive damages; and this appeal challenges the said judgment.

Malvern Brick & Tile Company (hereinafter sometimes called "Malvern")—as its name implies—is a company engaged in the manufacture of brick and tile in Malvern, Arkansas; F. P. Garvan at all times herein involved was the executive vice-president of the said Company; and Every Mendenhall was an employee of the said Company. In September 1959 there arose a labor dispute between Malvern and its employees. Some of the workers went out on strike and formed a picket line, but Mendenhall continued to work notwithstanding the strike. Some time during the night of October 10, 1959 several shots were fired into the home of Mendenhall, and he saw some persons running away from his house, entering an automobile, and driving away. Mendenhall drove in his car from his home to a store nearby for the purpose of calling law enforcement officers to make an investigation. After he reached the store and as he was enroute from his car to the telephone, Mendenhall was assaulted and beaten by a group of persons. He claimed to have recognized his assailants. Mendenhall's wife and father-in-law had followed him in another car, and they arrived on the scene in time to stop the fight before serious injuries were suffered by anyone.

The foregoing occurred on Saturday night, October 10, 1959. On Monday morning, October 12th, Mendenhall went to the office of Malvern and reported the occurrence to Mr. Garvan and named the persons whom he said had assaulted him. After a short time, Garvan and another employee took Mendenhall and another worker to the office of the Prosecuting Attorney in Malvern; and Mendenhall related what he said the facts were, and signed an affidavit for a warrant of arrest against seven persons, being: J. L. Watkins, Charlie James Carroll, Ralph T. Junior, J. W. Blackmon, Willie

Carroll Williams, M. T. Dedmon, and A. J. Hill. The persons named in the affidavit[1] were charged with assault and battery. The prosecution was not on information filed by the Prosecuting Attorney, but on an affidavit for warrant of arrest made by Mendenhall; and Malvern posted approximately $100.00 as advance court costs to insure the prosecution of the seven named persons. Each was arrested and tried in the Municipal Court of Malvern; and all of those named were found guilty of assault and battery with the exception of A. J. Hill: he was acquitted because he testified that he was not present at the time and place when Mendenhall was assaulted.

Then, on January 21, 1960, A. J. Hill filed the present action for malicious prosecution against Mendenhall, Garvan, and Malvern. As aforesaid, the verdict and judgment in the malicious prosecution case was in favor of Hill and against each of the defendants for $750.00 actual damages and $250.00 punitive damages; each of the defendants has appealed; and each urges in this Court that the evidence was insufficient to support the verdict. Before discussing the situation as to each appellant, it is well that we state the applicable law. In an action for malicious prosecution the burden is on the plaintiff to establish that the defendant acted maliciously *and* without probable cause, in prosecuting the plaintiff. In short, malice *and* want of probable cause are essential elements in an action for malicious prosecution. *Foster* v. *Pitts,* 63 Ark. 387, 38 S. W. 1114; *Kable* v. *Carey,* 135 Ark. 137, 204 S. W. 748, 12 A.L.R. 1227; *Keebey* v. *Stifft,* 145 Ark. 8, 224 S. W. 396; *Wm. R. Moore D. G. Co.* v. *Mann,* 171 Ark. 350, 284 S. W. 42; *Gazzola* v. *New,* 191 Ark. 724, 87 S. W. 2d 68. At the close of the testimony, each defendant moved for an instructed verdict; and the question presented is, whether the evidence was sufficient to take the case to the jury, either (1) as against Mendenhall, or (2) as against Garvan and Malvern. We discuss these points separately.

[1] It is conceded that the first affidavit for warrant of arrest was defective in failing to have the completed jurat; and that an affidavit containing the same names was subsequently completed.

I. *Was The Evidence Sufficient To Support The Verdict Against Mendenhall?* We have previously sketched some of the background facts, but there were other facts shown which have a direct bearing on the question here posed. Mendenhall caused Hill's arrest for assault and battery alleged to have been committed on Mendenhall on Saturday night, October 10th. Hill was acquitted of the charge of assault and battery; and then instituted the present malicious prosecution proceedings, claiming that Mendenhall, in prosecuting Hill for assault and battery, was guilty of malice and had acted without probable cause. Watkins, Junior, Blackmon, Carroll, Williams, and Dedmon were the other six persons named by Mendenhall in his affidavit for the warrant of arrest. Each of those persons was convicted; and yet in the present case each one of those persons testified that A. J. Hill was *not* present when Mendenhall was assaulted. Hill and his wife testified that they were either at home or visiting with friends a short distance from their home on the night of October 10th and were all the time a considerable distance from the place where Mendenhall was assaulted. Thus, there was evidence from which the jury could have found—as it apparently did—that Hill was not a party to the attack on Mendenhall.

Did Mendenhall have probable cause for naming Hill as one of his attackers? If Mendenhall had testified that he was so excited by the attack that he mistook some other person for Hill, then the jury might have thought that Mendenhall had acted with probable cause. But at this malicious prosecution trial, Mendenhall stoutly insisted that Hill was one of his attackers,[2] and Mendenhall called his wife and his father-in-law to substantiate his testimony as to Hill's participation in the attack. Thus, when the jury in the case at bar found that Hill was not one of Mendenhall's assailants, the jury could have also found that Mendenhall had acted

[2] In 43 A.L.R. 2d p. 1048, there is an annotation entitled: "Liability in malicious prosecution for instigation or continuation of prosecution of plaintiff mistakenly identified as person who committed an offense."

without probable cause in naming Hill, and also the jury might well have inferred that Mendenhall had named Hill as one of the assailants and obtained the supporting testimony, all out of a spirit of malice, if there was no probable cause shown for naming Hill. We have several cases which say that malice may be inferred when there is lack of probable cause, even though there was no express showing of malice. *Hall* v. *Adams,* 128 Ark. 116, 193 S. W. 520; *Williams* v. *Orblitt,* 131 Ark. 408, 199 S. W. 91; and *La. O. Ref. Corp.* v. *Yelton,* 188 Ark. 280, 65 S. W. 2d 537.

To summarize: in the malicious prosecution case Mendenhall attempted to prove Hill's guilt in the assault case as a complete defense to the malicious prosecution action (*Whipple* v. *Gorsuch,* 82 Ark. 252, 101 S. W. 735, 10 L.R.A., N.S. 1133); and when Mendenhall failed to prove such guilt, the failure showed want of probable cause, and also boomeranged into an inference of malice. We have detailed sufficient evidence to support the verdict against Mendenhall on the point urged by him.

II. *Was The Evidence Sufficient To Support The Verdict Against Garvan And Malvern?* As heretofore stated, before Hill could recover from these defendants he had to establish (1) that they acted without probable cause *and* (2) that they acted with malice, in aiding Mendenhall as they did: *i. e.,* taking him to the Prosecuting Attorney, advancing the court costs, and being present—if they were—at the criminal trial. See *Gordon* v. *McLearn,* 123 Ark. 496, 185 S. W. 803. What is the evidence against Garvan and Malvern? Mendenhall told them that Hill was one of his assailants. Not only did Mendenhall tell them that Hill was one of the assailants, but Mendenhall made an affidavit to that effect. Garvan and Malvern acted only as a good employer would have acted under such circumstances. In malicious prosecution cases we have defined the words, "probable cause," as, "such a state of facts known to the prosecutor, or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe, and did

induce the prosecutor to believe, that the accused was guilty of the crime alleged, and thereby caused the prosecution." *Hitson* v. *Sims,* 69 Ark. 439, 64 S. W. 219; *Whipple* v. *Gorsuch,* 82 Ark. 252, 101 S. W. 735, 10 L.R.A., N.S. 1133. When Mendenhall told Garvan and Malvern that he had been assaulted, he also told them that bullets had been fired into his house. Garvan went to the house and found where the bullets had been fired into it. It was not Garvan's duty to consult with each of the named assailants before taking Hill's word for the statements. *Kans. & Tex. Coal Co.* v. *Galloway,* 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79. In the annotation in 43 A. L. R. 2d p. 1048, cases from several jurisdictions are cited to sustain this statement: "Where the defendant in good faith has relied on an apparently sound identification by some other person, the Courts have held that there is no liability in malicious prosecution."

Furthermore, the evidence established without contradiction that when Mendenhall went to the office of Malvern on Monday morning, October 12th, and told Garvan of the assault, then before doing anything, Garvan consulted immediately with the regular retained attorneys of Malvern.[3] Garvan and Malvern relied on the advice of competent and qualified counsel. We have a long list of cases in Arkansas—and the general rule

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[3] Here is Garvan's testimony, which stands uncontradicted:

". . . he showed me a bullet that had been removed from a wall outside. I called Mr. Glover, the Prosecuting Attorney; but, before doing that, I called Wootton, Land and Matthews over in Hot Springs.

Q. For what purpose?

A. To ask them as to what procedure we should take, as they are counsel for the firm, for the Malvern Brick & Tile Company.

Q. Mr. Garvan, you, I believe, are an attorney yourself, are you not?

A. I am.

Q. At the time that you were involved in this incident were you making these legal decisions and judgments for yourself, or were you relying upon the attorneys' advice?

A. No. I relied upon the attorneys' advice, sir. I do not act as attorney for the company; I act as an executive for the company and we have outside attorneys for the company.

Q. Were you directed by your attorneys as to what should be done?

A. Yes.

Q. Did you follow their advice and directions that were given to you?

A. I did."

over the country is to the same effect—that when one recites the full facts to a competent attorney and acts on the advice of such attorney, such is a complete defense against the charge of acting without probable cause. *Kans. & Tex. Coal Co.* v. *Galloway,* 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79; *L. B. Price Merc. Co.* v. *Cuilla,* 100 Ark. 316, 141 S. W. 194; *Redmon* v. *Hudson,* 124 Ark. 26, 186 S. W. 312; *Jennings Motors* v. *Burchfield,* 182 Ark. 1047, 34 S. W. 2d 455. In view of these cases, it is clear that Garvan and Malvern, by acting on the advice of competent counsel, entirely dispelled any claim that they acted without probable cause; and until Hill could establish that Garvan and Malvern acted without probable cause, he could not hold them liable in this malicious prosecution action. Therefore, as to Garvan and Malvern, the judgment is reversed and dismissed.

The net result of the entire case is, that the judgment against Mendenhall is affirmed at the cost of Mendenhall; and that the judgment against Garvan and the Malvern Brick & Tile Company is reversed and dismissed at the cost of Hill.

HOLT, WARD & ROBINSON, JJ., dissent as to the affirmance.

WARD J., dissenting.

I respectfully dissent to that part of the majority opinion which affirms the judgment against Mendenhall. In my opinion there is no substantial evidence in the record to sustain the judgment.

To properly understand the exact issue in this case, a true picture of the facts is necessary. Briefly, but essentially, it is as the following:

Some people in an automobile fired shots into Mendenhall's home on a Saturday night. He, his wife, and his father-in-law then went up town in an effort to apprehend the raiders. There several people jumped on him and gave him a severe beating. He had Hill and five other men arrested. All were found guilty except Hill. Then Hill sued Mendenhall for malicious prosecution.

Before Hill was entitled to recover he had the burden of proving Mendenhall did not have reasonable grounds to *believe* Hill was present and took part in the fight. See: *St. Louis, I. M. & S. Ry. Co.* v. *Tyus,* 96 Ark. 325 (at page 331), 131 S. W. 682, where the applicable rule was stated by this court in these plain and concise words: "While slight and groundless suspicion would not be sufficient, a belief or suspicion, well founded or based upon reasonable and probable ground, would be."

What did Hill prove in this case to show Mendenhall did not have a good reason to think he was present? Merely and *solely* that five of Hill's co-defendants didn't see him there. Some of them said it was too dark to see everyone; some said they only meant that Hill was not in the car with them. At best, this was negative testimony.

In my opinion the above was not sufficient to sustain a judgment against Mendenhall. In the case of *McNeal* v. *Millar,* 143 Ark. 253, 220 S. W. 62 and also in 34 Am. Jur. at page 783, it is made clear that it is of no significance that, on the trial of Hill, he came clear. This is true because it has nothing to do with Mendenhall's good faith. Likewise and for the same reason no significance should be attached to the fact that the jury, in this case, found Hill was not guilty or was not present. Hill's own witness testified that Mendenhall had no reason to be mad at Hill.

What positive evidence was there to show Mendenhall acted in good faith in having Hill arrested? One, his wife said Hill was present. Two, his father-in-law said Hill was present. Three, he said Hill was present and that Hill was the one who kicked him most when he was on the ground.

Could Hill have been present? The uncontradicted evidence shows that he left his house that night at a time consistent with his presence at the fight.

The majority opinion in effect says that if Mendenhall had just told the jury he was honestly mistaken the result might have been different. This is an admission that it was not sufficient for the jury to find Hill was not

there. Yet the burden was on Hill and still all he tried to prove was his absence and nothing more. In my opinion all of the positive proof in this record tends to show Mendenhall acted in good faith.

The reason why I lay such stress on this matter is that I think the implications of the majority opinion tend to discourage good citizens from cooperating in law enforcement, and they could lead to great injustices. A simple example will illustrate. Three hoodlums, A, B, and C rob and beat D (who is wealthy) in the presence of his wife and son. D has the hoodlums arrested and A sues D for malicious prosecution. B and C swear A was not present, and D and his wife and son swear they saw A. Then what? I shudder to think of this court sanctioning a rule that would allow A to win. Yet, in some way, I think this is what the majority opinion has done.

McGuire *v.* Benton State Bank.

5-2284 342 S. W. 2d 77

Opinion delivered January 16, 1961.

J. B. Milham, for appellant.

Fred E. Briner, for appellee.

George Rose Smith, J. In 1959 the appellant and his wife were living apart from each other and had the sum of $6,075 on deposit in a joint savings account in the appellee bank. Mrs. McGuire obtained possession of the passbook, and for that reason the bank refused to permit the appellant to draw money from the account. The appellant brought this suit against the bank, asking either that the account be changed to his name only or that he have judgment for the sum on deposit. The bank filed an answer bringing Mrs. McGuire into the

case and offering to pay out the money in accordance with its regulations, which require a presentation of the passbook. In the course of the first trial the bank offered to pay the money into court, but the appellant's attorney refused this offer. At the close of the plaintiff's proof the chancellor sustained a demurrer to the evidence, but on appeal we directed that the ownership of the funds be determined on the merits. *McGuire* v. *Benton State Bank,* 231 Ark. 608, 331 S. W. 2d 258.

At the time of the final hearing the proof showed that there was then only $1,900 left in the account, the rest of the money having been withdrawn by Mrs. McGuire. Her withdrawals were of two sorts: First, on the day after the chancellor sustained the demurrer to the evidence Mrs. McGuire drew out half the money in the account. Secondly, in a pending suit for separate maintenance Mrs. McGuire had been awarded temporary alimony and attorney's fees. *McGuire* v. *McGuire,* 231 Ark. 613, 331 S. W. 2d 257. It appears that in the interval between the two trials that were had in the case at bar Mrs. McGuire collected the sums due her by cashing checks drawn against that half of the account remaining in the bank.

At the conclusion of the final hearing the chancellor delivered an oral opinion holding that the original account of $6,075 belonged equally to the husband and wife and, further, that the $1,900 still on hand should be held in the registry of the court until McGuire's exact indebtedness to his wife could be determined in the separate maintenance suit. The final decree, entered several months after the trial, confirmed the equal division of the account, directed that the remaining $1,900 be paid to McGuire, and absolved the bank from any liability to McGuire. This appeal is from that decree.

In substance the appellant urges two points for reversal. First, it is contended that the chancellor was in error in holding that the amount originally in the account should be divided equally. McGuire proved that all the money on deposit came from his earnings through

the years as a railroad employee. On the basis of this proof he insists that the money was entirely his and that his wife should receive none of it, or at most not more than the one third allowed by statute in divorce cases. Ark. Stats. 1947, § 34-1214.

We think the chancellor's decision was correct. A joint bank account such as this one has been held to constitute an estate by the entirety in the sense that upon the death of either spouse the title passes to the survivor. *Dickson* v. *Jonesboro Trust Co.,* 154 Ark. 155, 242 S. W. 57; *Black* v. *Black,* 199 Ark. 609, 135 S. W. 2d 837. But while both spouses are alive the estate is not a true common-law tenancy by the entirety, for, as we observed in the cases cited, either of the owners may extinguish the joint estate as to any part of the money that is withdrawn from the account and reduced to separate possession. Hence in a case like this one the intention of the parties and all other pertinent circumstances must be considered in determining the question of ownership.

We do not agree with McGuire's contention that the issue of title is to be decided solely as between him and the bank, without regard to the fact that Mrs. McGuire is a party to the suit and the additional fact that a separate maintenance case is shown to be pending. On the first appeal we recognized the existence of a dispute between the McGuires, saying: "It is self-evident that there is a controversy between Mr. and Mrs. McGuire as to the ownership of the money. . . . 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 judgment in this case will be *res judicata* in any other proceedings between the husband and the wife. Hence the issue should not be confined to the dispute between the appellant and the bank.

Upon the proof as a whole we cannot say that the chancellor was wrong in finding that the funds belonged equally to Mr. and Mrs. McGuire. At the time of their separation the couple had been married for twenty-two

years. Although Mrs. McGuire did not contribute directly to the bank account it is quite evident that the family's ability to save was due in a substantial measure to her assistance in supporting the household. The McGuires lived for years upon a homestead that Mrs. McGuire had received from her first husband. Mrs. McGuire had no children of her own, but she brought up Mr. McGuire's two children by an earlier marriage. The money she earned by taking in washing and ironing and by baby sitting was used to meet household expenses. The couple had kept their savings in a joint account since 1947. We are of the opinion that Mrs. McGuire was legally and equitably an equal co-owner of the account.

The appellant's second contention is that the bank, by honoring Mrs. McGuire's checks during the pendency of this suit, rendered itself liable to him for the full amount of her withdrawals. In making this argument the appellant relies upon two statutes. First, Ark. Stats., § 67-521, permits a bank to make payments from a joint account to either depositor "prior to the receipt by said bank of notice in writing signed by one of such joint tenants not to pay such deposit in accordance with the terms thereof." It is suggested that the appellant's complaint constituted the requisite written notice. Secondly, Ark. Stats., § 67-523, provides that notice to a bank of an adverse claim to a deposit standing to the credit of any person shall be effectual if the claimant procures a process against the bank in a cause wherein the person to whose credit the deposit stands is made a party. It is contended that the summons served upon the bank constituted a process within the meaning of the statute.

We think it to be immaterial whether the bank violated either or both of the statutes in question, for even if it be assumed that a violation occurred it does not necessarily follow that the bank has incurred any liability to the appellant. The purpose of the statutes is to require the bank to keep the deposit intact until its ownership can be determined. If that course had been

followed it does not appear to us that the appellant's position would be any better than it is now. That is, the court should still have awarded half the account to Mrs. McGuire and, by consolidating the two pending cases, could still have charged McGuire's half of the account with his delinquent indebtedness for alimony and attorney's fees. Thus the appellant has not sustained the burden of proving that he has been prejudiced by the bank's action in honoring Mrs. McGuire's checks. We do not find in the two statutes any legislative intention that a merely technical violation, resulting in no actual loss to the complainant, should entail either a penalty against the bank or a windfall to the depositor. Hence the chancellor was right in dismissing the complaint against the bank.

Affirmed.

AUTO SALVAGE CO. *v.* ROGERS.

5-2269 342 S. W. 2d 85

Opinion delivered January 16, 1961.

Barber, Henry, Thurman & McCaskill, for appellant.

Murphy & Arnold, for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case, and the sole question is whether there is substantial evidence to support the finding of the Commission which ruled the claim to be noncompensable. This finding of the Commission was reversed by the Circuit Court, and this appeal is prosecuted by the employer. The facts are not materially in dispute except for the expert medical testimony and the conclusions to be drawn therefrom.

W. E. Rogers, claimant and appellee herein, began working for the Auto Salvage Company sometime in 1956. His duties as a manual laborer included the use at times of an electric torch in cutting up scrap iron such as automobiles. In the early spring of 1958 a piece of metal lodged in claimant's ear, causing considerable injury and requiring extensive medication and treatment. The result of this injury was that claimant underwent an operation and has suffered pain somewhat continually up until the beginning of this litigation, although he resumed his regular work a few weeks after the injury. He has been paid in full for this injury, loss of time and medical treatment.

On Wednesday, October 29, 1958, while claimant was working at his regular job he noticed symptoms indicating a heart condition, when at about 4 p.m. he suffered pains in his chest. After resting a few minutes he resumed work until quitting time. On Thursday and Friday the chest pains continued, and on Friday the pains were constant until about 9 p.m. On Saturday claimant reported for work at the usual time, still feeling pains, and shortly thereafter he informed his employer

that he was going to a doctor. He reported to Dr. Charles Taylor of Batesville at about 8 o'clock that morning. After a somewhat thorough examination Dr. Taylor diagnosed claimant's condition as a coronary thrombosis and had him hospitalized for about two weeks, after which claimant returned to his home for rest.

It is conceded that claimant suffered a heart ailment, correctly diagnosed as coronary thrombosis, that this condition still exists, and that he has not been able to work at his regular job since November 1, 1958.

The Referee found that the injury was not compensable and later the Commission, after reviewing the evidence taken before the Referee and additional evidence presented to it, found that claimant had not proved that his heart attack occurred by reason of and in the course of his employment.

There is some testimony in the record to the effect that claimant first felt the chest pains on Wednesday (previous to the attack on Saturday) while he was engaged in trying to move a 450 pound scrap of metal. The Commission found that this fact was not substantiated by all of the evidence, and we think correctly so. Therefore, we consider this case as if there was no showing of unusual exertion on the part of the claimant. However, in accordance with our previous announcements, it is conceded that this is no bar to compensation. In other words, it is recognized that if claimant's normal working activities caused or contributed to his heart attack compensation may be established.

To sustain the judgment of the Circuit Court (which reversed the Commission) appellee's most serious contention is that his heart condition was caused or aggravated by the work in which he was regularly engaged, by the stress on his nervous system resulting from the injury to his ear, and by the anesthetic administered in connection with the ear operation. Specifically, then, appellee contends that there is no substantial testimony in the record to support the finding of the Commission.

Appellant contends, of course, just to the contrary. The decisive question then is: Was claimant's heart attack caused or contributed to by all or any of the incidents previously mentioned, and the answer to this question depends largely upon the medical testimony.

Dr. Taylor stated that, basically, coronary thrombosis is a disease of the arteries that supply the heart muscle with nourishment and oxygen, and it is the result of a pre-existing coronary disease called arteriosclerosis. In his opinion the claimant had a pre-existing arterial disease, and it was his opinion that claimant's work was a contributing factor to the coronary thrombosis; it was also his opinion that the stress caused by the ear injury was a contributing factor.

"Q. . . . I'll ask you if it is your opinion that but for this additional stress placed upon his heart by this infection and, also, by the emotion and worry and pain that the heart attack would not have occurred at the time it did in your opinion?"

"A. In my opinion, I think that the heart attack would have been postponed into the future had it not been for additional factors mentioned here of stress and additional work load placed on his circulation mechanism."

Dr. Taylor was asked if it was possible, with any degree of medical certainty, to tell what causes a coronary thrombosis, and his answer was:

"You asked me if there was any certainty of what precipitation cause could cause thrombosis. My answer to that is no, not exactly."

The doctor was also of the opinion that the anesthetic incident to the ear operation was a contributing cause but on cross-examination he stated that an anesthetic affects the heart only a few days or possibly a week after its administration.

Dr. Drew Agar of Little Rock, a specialist in internal medicine and diagnosis, testified as an expert but

made no examination of the claimant. At the end of a long hypothetical question propounded to him relative to claimant's condition, was asked:

"Q. . . . Doctor, could you express an opinion as to whether or not the work which this man was doing, a normal work that he was doing, was the cause or a precipitating factor of a coronary thrombosis?"

"A. Well, it would be my opinion that the work in no way contributed to the coronary occlusion."

Dr. David T. Hyatt, a recognized authority in heart diseases with extended experience, who examined claimant on March 23, 1959, at his office in Little Rock, stated that the electrocardiogram showed evidence of an old cardiac damage found in coronary thrombosis of long standing. After testifying at length he was asked and answered the following questions on cross-examination:

"Q. You certainly wouldn't say to this Commission that you know with a reasonable amount of certainty that if these factors had not been present in Mr. Rogers that he would have had the attack anyway."

"A. No; nobody but the Lord himself could say what's going to happen to anybody. All you can go by on that type of thing is the fact that many hundreds and thousands of other people go through the same type of things and don't have one."

"Q. Then you can't say that his work, his infection and his worry did not cause the heart attack, can you?"

"A. I can't say it didn't; but I can say I don't believe it did."

"Q. If you add, Dr. Hyatt, to the fact that Mr. Rogers was doing his normal work, if you add to that strain which the heart was already under the infection, the pain, worry, concern, is there any way of saying, in your opinion that those factors were not related to his heart attack?"

"A. Well, I don't know whether they're related to his heart trouble or not. We simply know that many

hundreds of patients his age develop coronary thrombosis. Some of them are sitting at a desk in a bank and doing nothing much except mental work; some of them are doing hard physical work; some of them have this and that, and I don't know. I don't know if he'd had an attack, if he had not had this or that."

The applicable rules by which we are governed in considering, on appeal, this kind of a case are well established and need only to be stated without discussion.

The burden is on the claimant to show a causal connection between his heart attack and his employment. See: *Pearson* v. *Faulkner Radio Service Company,* 220 Ark. 368, 247 S. W. 2d 964. We must give the testimony its strongest probative force in favor of the action and findings of the full Commission. See: The *Pearson* case *supra; Springdale Monument Company* v. *Allen,* 216 Ark. 426, 226 S. W. 2d 42; and, *Ark. Power & Light Co.* v. *Scroggins,* 230 Ark. 936, 328 S. W. 2d 97. The findings of the Commission have the same force and effect on review as the findings of a jury, and must be sustained if supported by substantial evidence. See: *Mosley* v. *Temple,* 231 Ark. 502, 330 S. W. 2d 719.

After carefully reviewing all of the testimony in the record, including that set out above and, also, the testimony of the claimant himself, we are forced to conclude that there is substantial evidence in the record to sustain the full Commission in finding "that claimant did not prove by a preponderance of the evidence that his heart attack was an accident that occurred by reason of and in the course of his employment."

To sustain the judgment of the Circuit Court (reversing the Commission) appellee has well presented some strong arguments to the effect that we should re-examine our decisions on what constitutes substantial evidence; that we should give more weight to the testimony of a doctor who had repeatedly seen and examined the claimant than to one who had not, and; that we should entirely discount and disbelieve the testimony of a certain doctor who testified. We find nothing in these contentions that

justifies us in changing the conclusion above indicated. We have many times discussed what constitutes substantial evidence and we think no useful purpose would be served in re-examining those decisions at this time. It is true that in some circumstances there would be good reasons for giving additional weight to the testimony of a doctor who examined the patient on numerous occasions and we have recognized this fact. Certainly this would be the case if such doctor had knowledge of facts not known to other doctors. However, in this case, it appears to us that all doctors were equally in possession of all the significant facts bearing on the causes of claimant's heart condition. Also, we have no way of knowing just what factors the Commission considered. It is not the province of this court to say which witness to believe or disbelieve. In the *Pearson* case, *supra,* we said: "The Commission had a right, just as a jury, would have had, to believe or disbelieve the testimony of any witness."

From a careful study of appellee's entire argument it seems he would have us hold that any time an employee, in the course of his regular employment, suffered a heart attack his claim should be compensable. Perhaps, due to the conflict and uncertainties in medical theories relative to the cause of heart attacks, this contention of appellee merits some consideration. However, any implementation of that contention is a matter for the legislature and not the judiciary. As the law now stands the burden is on the claimant to show a causal connection between his work and his heart attack. As we have frequently said in effect, the Workmen's Compensation Act is not an insurance policy.

Since we have concluded that the Commission's determination should be affirmed, it follows that the judgment of the Circuit Court must be and it is hereby reversed.

Reversed.

JOHNSON, J., dissents.

THE TRAVELERS INDEMNITY CO. *v.* HYDE.

5-2225 342 S. W. 2d 295

Opinion delivered January 16, 1961.

[Rehearing denied February 13, 1961]

Wright, Harrison, Lindsey & Upton, for appellant.

Gutensohn & Gutensohn, for appellee.

SAM ROBINSON, Associate Justice. This suit was filed by Imogene Hyde, administratrix of the estate of

M. D. Hyde, against appellant, The Travelers Indemnity Company, on a policy of insurance issued and delivered to Mr. Hyde. Among other things the policy provides to indemnify Hyde in a sum not exceeding $2,000 for medical expenses incurred due to injuries received while occupying an automobile. Hyde was injured while driving a motor vehicle on the 17th day of July, 1959, and died a few days later as the result of such injuries. The insurance company admits the issuance of the policy and that an accident occurred which resulted in the death of Hyde. The insurance company further admits the expenditure of a sum in excess of $2,000 for medical, surgical, X-rays, ambulance, professional nursing, hospital, funeral and burial expenses. But the company denies liability on the ground that at the time of the accident Hyde was occupying an automobile furnished for his regular use.

The case was tried before the court sitting as a jury, and from a judgment in favor of the administratrix the insurance company has appealed.

The parties stipulated as follows: "It is stipulated and agreed that at the time of the accident which resulted in the death of M. D. Hyde, he was driving a motor vehicle furnished and owned by his employer, Fort Smith Couch and Bedding Company. Said vehicle was assigned to M. D. Hyde for his exclusive use and was the only vehicle driven by him in the course of his employment by Fort Smith Couch and Bedding Company. This vehicle was a tractor and trailer used for hauling furniture for said Company to various parts of the United States in the course of business for the Company, and was never used at any time for the personal use of M. D. Hyde."

The controversial provisions of the policy provide: "The Travelers Indemnity Company . . . agrees with the insured . . . To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance,

hospital, nursing and funeral services: . . . To or for the named insured and each relative who sustained bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident, while occupying or through being struck by an automobile."

Under the heading "Exclusions" the policy also provides: "This policy does not apply under Part II [Medical Payments] to bodily injury: . . . sustained by the named insured or a relative . . . while occupying an automobile . . . furnished for the regular use of either the named insured or any relative, other than an automobile defined herein as an 'owned automobile.' "

Appellant contends that the truck Hyde was driving at the time he was injured was furnished for his regular use within the meaning of the exclusion provision and that the insurance company is therefore not liable. The sole point raised on appeal is whether the automobile was furnished to Hyde for his regular use within the meaning of the exclusion provision of the policy.

The provisions of the policy are ambiguous. First, the policy provides that the insured will be indemnified for medical expenses if he is injured while occupying an automobile. Here he was injured while occupying an automobile, but the policy further provides that the provision for medical payments does not apply if he is injured while occupying an automobile furnished for his regular use. These provisions of the policy render it ambiguous. Just what is meant by "for the regular use of either the named insured or any relative?" If "for his regular use" means personal use, it is one thing; if partly for his personal use and partly for the use of the employer, it could mean something else. If the insured was to use it in a certain area for one purpose, and he was injured while on a trip outside that area, for another purpose, then there could be a different meaning. Standing alone the terms of the policy are not sufficient to clear up the ambiguity, and the stipulation

is not sufficient to enable the court to say as a matter of law what the ambiguous provisions really mean. True, the stipulation states the truck was furnished for the insured's exclusive use. Perhaps it can be inferred that exclusive use means regular use. On the other hand, it could be exclusive without being regular. A jury could find that the wording in the policy "for the regular use of the insured" means personal use. This language certainly has that connotation. And the jury could reach the conclusion that the term means "for the benefit of the insured." If this construction were put on the language by a jury, then under the facts as set out in the stipulation the insured would be entitled to recover.

Some cases, such as *Davy* v. *Merchants Mut. Cas. Co.,* 97 N. H. 236, 85 A. 2d 388; *Home Ins. Co.* v. *Kennedy,* Del. Super., 152 A. 2d 115; *Voelker* v. *Travelers Ind. Co.,* 260 F. 2d 275; and *Farm Bureau Mutual Automobile Ins. Co.* v. *Marr,* 128 F. Supp. 67, have been decided on the theory that "for his regular use" means practically any use by the insured. In the *Farm Bureau* case the insured had never before driven the car in which he was injured, and there was nothing to show there was any probability that he would ever have driven it again, yet the court held the car was furnished for his regular use. We think the better view is expressed in *Pacific Automobile Ins. Co.* v. *Lewis,* 56 Cal. App. 2d 597, 132 P. 2d 846. There the court said: "Whether an automobile is furnished by another to an insured for his regular use may reasonably depend upon the time, place and purpose for which it is to be used. One furnished for all purposes and at all times and places would clearly be for his regular use. One furnished at all times but strictly for business purposes alone could hardly be said to have been furnished for his regular use at a time and place when it was being used for personal purposes. It may be assumed that when a car is furnished all of the time for business purposes, with permission to use the same for incidental personal purposes, all within a certain area, the car might be said to be furnished for regular use within that area. But when a car thus furnished for such a use is driven to a distant point on one

occasion, with the special permission of the one furnishing the car, that particular use would hardly seem to be a 'regular use' of the car. It cannot be said, as a matter of law, that such a use on a particular occasion, which is a departure from the customary use for which the car is furnished, is a regular use within the meaning of these clauses of the policies. A question of fact is presented which calls for an interpretation of the language of the policies relating to the facts involved."

And in *Farm Bureau Mutual Automobile Ins. Co.* v. *Marr,* 128 F. Supp. 67, in holding that a similar provision in a policy presented a question of fact to be determined by the facts of the particular case before the court, the court pointed out certain signposts to be looked for, as follows:

"1. Was the use of the car in question made available most of the time to the insured?

"2. Did the insured make more than mere occasional use of the car?

"3. Did the insured need to obtain permission to use the car or had that been granted by blanket authority?

"4. Was there a purpose for the use of the car in the permission granted or by the blanket authority and was it being used for such purpose?

"5. Was it being used in the area where such car would be expected to be used?"

There are two principles of law firmly established in this State that apply here: (1) Provisions of a policy of insurance "must be construed most strongly against the insurance company that prepared it, and if a reasonable construction could be placed on the contract that would justify recovery, it would be the duty of the court to so construe it." *Metropolitan Life Ins. Co.* v. *Guinn,* 199 Ark. 994, 136 S. W. 2d 681; *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. (2) Where a written contract is ambiguous, its

meaning is a question of fact for the jury and should be submitted to a jury. *Fort Smith Appliance & Service Co.* v. *Smith,* 218 Ark. 411, 236 S. W. 2d 583.

In the case at bar, undoubtedly the language "while occupying an automobile . . . furnished for the regular use of either the named insured or any relative" is ambiguous, and hence the true meaning of the language was a jury question. Here the cause was submitted to the trial court sitting as a jury, and the findings of the court have the same force and effect as a jury verdict. *Occidental Life Ins. Co. of Calif.* v. *Sammons,* 224 Ark. 31, 271 S. W. 2d 922; *Gray* v. *Ford, Bacon & Davis, Inc.,* 210 Ark. 995, 198 S. W. 2d 508.

Affirmed.

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

WARD, J., dissenting. First I wish to point out two respects in which I cannot agree with the majority opinion. I now refer to these as briefly as possible consistent with clarity and without setting forth the controversial clauses.

(a) At pp. 1021-1022 in the majority opinion, there is language which appears to assume the existence of ambiguity in the policy. This assumption is based on the fact that one part of the policy says the Company is liable if the insured is "injured while occupying an automobile," while another part says the Company is not liable if the insured is injured in an automobile provided for his regular use. Undoubtedly it cannot be said that an insurance policy is ambiguous merely because it contains a limitation clause. If this were true, then every insurance policy would be ambiguous. Therefore, we must start out with the proposition that if there is any ambiguity in the policy it is only in the limitation clause itself.

(b) The majority opinion misconstrues the effect of the holdings in every case cited in relation to the limitation clause here under consideration. I cannot help but feel certain that the majority, in considering the con-

troversial words "for the regular use of" are confusing the *purpose* of the use of the automobile with the *extent* of the use. All of these cases referred to above and cited by the majority deal only with the *extent* and not the *purpose* of the use of the automobile. In the *Davy* case nothing was said about the purpose but only the extent of the use of the taxicab. The holding in this case is directly opposite the holding in the majority opinion to the extent that there the taxicab was used not for his personal use but for the use of his employer. The same thing is true in the *Home Insurance Company* case where all of the discussion was relative to the *extent* of the use. And again, the holding in that case is contrary to the majority opinion. It is there said:

"Defendant agrees that he would be excluded from coverage if the pick-up truck had been furnished for his regular use. However, he argues, that 'furnished for regular use', under exclusion clause (d) (1) of Insuring Agreement V, means he was entitled to an indiscriminate and unrestricted, full and complete use of the truck, and since his use of the truck was restricted by his employer to a 'business use', it was therefore not furnished to him for his 'regular use'. Defendant then argues that 'for regular use' must mean indiscriminate and unrestricted use, . . ."

In rejecting the above contentions the court there said:

"If defendant is right, then he would be getting insurance on the Dodge and the pick-up truck for the price of the insurance on the Dodge alone. Every day, two vehicles could be on the road at one time, the Dodge driven by his wife, and the pick-up truck driven by him in his occupation, covered by one policy. This would be a bargain, and not one that was intended by the policy."

In the *Voelker* case the court considered only the *extent* and not the *purpose* of the use of the automobile. The gist of the reasoning given by the court is couched in the 3rd headnote which reads: "It is common knowledge that a greatly increased hazard against which the insured was protected under a liability policy would greatly increase

the premium for such coverage." It is too obvious for argument that the hazard would be the same regardless of the *purpose* for which an automobile is used. The holding in the *Farm Bureau* case is the same as in the other cases just mentioned. Again a good reason is given by the court where it said: "The purpose of the clause is to cover casual or occasional use of other cars. Any other interpretation would subject the insurance company to greatly added risk without the payment of additional premiums." In no way was the court concerned with the *purpose* of the use of the automobile but only with the *extent*. Likewise in the *Pacific Automobile Insurance Company* case, a careful study of the opinion reveals that the court was concerned only with the *extent* and not the *purpose* of the use of the automobile.

A careful and extensive research reveals that there is no court decision which sustains the position taken by the majority opinion. On the other hand there are several decisions, and two recent ones in particular, which are in point as to the terms of the policy and very similar to this case on the facts. *Home Insurance Co.* v. *Robert E. Kennedy, Jr.,* Del. Super., May 19, 1959, 152 A. 2d 115, cited above, and *George Moore* v. *State Farm Mutual Insurance Co.,* Miss., June 13, 1960, 121 So. 2d 125.

In the *Moore* case the decision also appears to be in point here and is contrary to appellee's contentions. The facts involved in the cited case were similar to the facts in this case and the pertinent parts of the policies are exactly the same. Appellant had a policy on his own automobile—a Family Policy—the same as here, and the same "Medical Payments" were involved. Also, there was the same "exclusion" involved there as here. Contained in the opinion is the following state of facts:

"For some two years prior to the accident later mentioned, insured was employed by Wade Tung Oil Company which owned some ten trucks. Insured drove trucks for his employer and had other duties, including operating a bulldozer, mechanical, tractor, and some carpenter work. He drove trucks for his employer two or three

times a week; sometimes he would haul machinery, and sometimes he would make trips to haul tung nuts. He was not assigned any particular truck the two or three trips a week he would make driving trucks. When he was not driving trucks, he would at times work on a truck as a helper.

The court, in holding there was no liability on the part of the insurer said:

"As stated, the obvious purpose of the exclusionary clause is to limit the extension of medical payments coverage to casual or infrequent use or occupancy of automobiles other than the one defined in the policy, in this case the insured's Chevrolet. It is regular use of other automobiles that brings the exclusionary clause into operation, . . ."

Following the above the court also stated: "there is no ambiguity in the policy."

There are, of course, many words in the English language which are susceptible to more than one interpretation. This does not mean that every sentence in which such a word is used is ambiguous. The normal and sensible thing to do is to look to the context to gather the intended meaning. The word "use" is such a word. Webster's small dictionary gives 10 different uses of the word. The thing that makes clear the intended use of the word in the policy is the fact that the liability of the Company would be the same regardless of the *purpose* of the use. Therefore it makes no difference in the case under consideration whether the insured was using the automobile to haul furniture for his employer or take his family to church.

CURTIS CIRCULATION CO. *v.* HENDERSON.

5-2276 342 S. W. 2d 89

Opinion delivered January 16, 1961.

Wootton, Land & Matthews, for appellant.

Walter J. Hebert and *Curtis L. Ridgway, Jr.,* for appellee.

JIM JOHNSON, Associate Justice. This case arises out of a judgment for damages resulting from an automobile collision. The damages were rendered against the appellant because of the negligent acts of an individual who was driving appellant's motor vehicle and who was at the time of the collision appellant's employee. There are two principal issues on appeal: (1) Was appellant's employee acting within the scope of his employment when the collision in question occurred? and (2) Was the jury properly instructed?

I.

It was undisputed that at the time of the collision an employee of appellant, driving a vehicle owned by appellant, collided with the vehicle owned and occupied by plaintiffs. Upon this showing, an inference or presumption of fact arose that at the time of the collision the employee was acting within the scope of his employment and in the furtherance of his master's business, which presumption might be overcome by evidence to the contrary. See: *Ford & Son Sanitary Co.* v. *Ranson,* 213 Ark. 390, 210 S. W. 2d 508, and cases there cited. The point in issue on this appeal is whether this presumption was overcome as a matter of law or whether it was an issue of fact for the jury. The distinction between presumptions of law and fact is clearly drawn in *Mullins* v. *Ritchie Grocer Co.,* 183 Ark. 218, 35 S. W. 2d 1010, where we said:

"We adhere to our ruling that the defendant's ownership of the car, coupled with proof that the driver at the time of the accident was in the regular employment of the defendant as salesman and had general charge of the car, raises a presumption that he was acting within the scope of his authority. In this connection it may be stated that there is a distinction between presumptions of law and presumptions of fact which is clearly and fully stated in Wigmore on Evidence, vol. 5, (2d Ed.) § 2491. To illustrate, we have a statute making railroads responsible for all damages to persons and property done or caused by the running of trains, and proof of the injury under the statute makes a prima facie case for the plaintiff. It is a presumption of law based upon public policy as declared by the Legislature. The presumption thus raised by law does not of itself possess probative weight. Hence, when evidence is introduced rebutting the presumption, it may be overcome, and, where the evidence of the basic facts is undisputed, the legal presumption will disappear and no longer exist.

"The presumption with which we are dealing in the present case is not a legal presumption, but is an inference or presumption of fact. Its existence is called into being by proof introduced on the subject and not by any statute dealing with the question. This being so, the opposing evidence must be weighed by the jury, for the reason that under Article 7, § 23, of our Constitution, the jury is the judge of the facts proved. . ."

In arguing that this presumption of fact in the case at bar was rebutted as a matter of law and that there was no question for the jury on this issue, the appellant relies, primarily, on the testimony of Marion B. Burkhalter, who was a party defendant, and the testimony of Martha Elmore, who was a passenger in appellant's car at the time of the collision. Burkhalter's testimony may not be taken as uncontradicted. He was a party and his testimony was contradicted as a matter of law. *Cousins* v. *Cooper*, 232 Ark. 605, 339 S. W. 2d 316. Mrs. Elmore was extremely vague about many things that occurred in a

three day period when she was with the employee constantly and during which the collision occurred. In fact, she stated "That I don't remember too much about," when asked to detail what happened on the trip from Hot Springs to Malvern during which the collision occurred. She further stated that after the collision they went to Jones Mill but that she did not know where they went thereafter. The record shows that the employee was a married man with a family who was on a drunken spree with Mrs. Elmore as his companion. This relationship was obviously illicit and immoral. The fact that she could not remember much about occurrences on the night in question gives rise to the inference that she was also drinking. Therefore, even though she said that the employee transacted no business on behalf of the employer on the trip which resulted in the collision, such testimony did not require a finding that, as a matter of law, the employee was not acting within the scope of his employment. We have repeatedly held that a jury does not have to blindly accept everything that a witness may say. As we said in *Reserve Loan Life Ins. Co.* v. *Compton,* 190 Ark. 1039, 83 S. W. 2d 537:

". . . It has long been the established rule in this state that the weight of the evidence and the credibility of the witnesses is solely within the province of the triers of fact. They may believe such part of the testimony or the testimony of any witness which they believe to be true and they may disregard such part of the testimony or such part of any witnesses' testimony which they believe to be false, or they may disregard any part of the testimony of any witness about which the witness might be mistaken. See *Gibson Oil Co.* v. *Bush,* 175 Ark. 944, 1 S. W. 2d 88, and *Warren & Saline River Railroad Co.* v. *Wilson,* 185 Ark. 1063, 50 S. W. 2d 976."

II.

For reversal, appellant contends that the following instruction was error:

"The test of a master's liability for wrongful acts of a servant is whether the act was done while on a

mission or carrying out the purpose and object of the mater's business and if you find in this case, from a preponderance of the evidence, that William C. Brown was so acting at the time of the collision in question, then you may return a verdict in favor of the plaintiffs in such sum or sums as you may determine to be due them under the other instructions given you herein."

Appellant complains that this instruction was a "binding instruction" and was erroneous because it required a finding for plaintiff without a finding that the employee was negligent, which issue was omitted from the instruction. We cannot agree that this is a binding instruction. It should be noted that the instruction says that the jury "may" return a verdict for the plaintiffs. It does not say that the jury "shall", "must", or "will", return such a verdict. Appellant cites *Des Arc Oil Mill* v. *McLeod,* 137 Ark. 615, 206 S. W. 655, as holding that a similar instruction was erroneous. Upon reexamination of the cited case we find that the case does not hold that the instruction is "binding". The case does show that the trial court did not give a proper instruction on the defense of assumed risk and therefore the omission of this defense in the instruction quoted in the case did amount to error. However, the case does not hold that the error could not have been cured by a separate instruction properly stating the defense of assumed risk and the consequences of a finding that the risk was assumed. In the case now before us, we find that the defendant's requested Instruction No. 4, which was given, and defendant's requested Instruction No. 8, as amended and given, adequately advises the jury as to negligence and necessity of first finding that the employee was negligent before finding for the plaintiffs. In *Roland* v. *Terryland,* 221 Ark. 837, 256 S. W. 2d 315, we quoted 53 Am. Jur. Sec. 547, as follows:

"The . . . 'instructions given to the jury should be complete, and should cover all material issues supported by the evidence adopted . . . However, it is not necessary that the law applicable to all questions in a case be

stated in each instruction in a series, it being sufficient if all, when considered as a whole, state the law correctly'."

While we do not believe that the giving of plaintiff's requested Instruction No. 2, as set out herein, necessitates a reversal, we do not wish to be understood as approving its form. Upon a retrial it should be revised to include the missing elements.

III.

Appellant complains of the giving of plaintiff's requested Instruction No. 1, which reads:

"You are told that if the servant, at the time of inflicting the injury, was acting within the scope of employment, or apparent scope thereof, and such injury was proximately the result of some wrongful or negligent act, the improper conduct is attributable to the master. This is true, although the servant acted in wilful disobedience of orders or prescribed rules of conduct; but, if on the other hand, in disregard of the duties of his employment, he leaves his employer's business, though momentarily, and engages in enterprises that are wholly his own, and while so engaged in accomplishing such individual desires or objectives, he wrongs another, he alone is responsible."

The complaint is that the part of the instruction which reads: "or apparent scope thereof" was abstract. In this, we agree. There was no evidence showing anything from which any inference as to "apparent scope of authority" could be drawn. Further, the doctrine of "apparent scope of authority" has no application in tort cases unless there has been a reliance upon apparent authority which caused the injury complained of. See: Restatement of Agency 2d, Sec. 265, Subsection 2, p. 575, and comment on same at page 576. For the error indicated, the case is reversed and remanded for a new trial.

Justice Robinson is of the opinion that the instruction discussed under point 2 herein is binding and the case should also be reversed for that reason.

Robinson, J., concurs.

[redacted]