HOWELL *v.* HENRY.

5-2695 356 S. W. 2d 747

Opinion delivered May 7, 1962.

Edwin E. Dunaway, for appellant.

Joe P. Melton and *Chas. A. Walls, Jr.,* for appellee.

CARLETON HARRIS, Chief Justice. The only question presented in this litigation is the proper interpretation of the language in the last will and testament, including the codicil thereto, of W. H. Eagle, Sr. The will was admitted to probate on March 21, 1906.

Appellant, Ruby Eagle Howell, instituted an action in ejectment against appellee seeking to recover possession of 80 acres of land in Lonoke County. The complaint alleged that under the will of W. H. Eagle, Sr., W. H. Eagle, Jr., was given a life estate in the lands in question, with the remainder in fee to his bodily heirs. Mrs. Howell was the only child of W. H. Eagle,

Jr., who died September 15, 1959. She alleged that, as the only remainderman, she became entitled to possession of the lands upon the death of her father. According to a stipulation entered into between the parties, W. H. Eagle, Jr., and his wife, Elaine, deeded the lands to J. M. Gates on February 23, 1917, and following some subsequent mortgages and conveyances, appellee purchased the lands from the St. Louis Union Trust Company. Both parties waived trial by jury, and the cause was submitted to the court. After the filing of stipulations, exhibits, and the taking of testimony, the court held that appellant had no interest in the lands; that appellee owned said lands in fee simple, and was entitled to continued possession thereof. From the judgment so entered, Mrs. Howell brings this appeal.

The will of W. H. Eagle, Sr., executed on July 5, 1904, contained, *inter alia,* the following provisions:

"Second: I desire and will that my twelve children, hereinafter named, share equally in my Estate, including what I have already advanced to them and the amounts I may hereafter advance to them including also the bequests of this Will. * * *

Sixth: I will and bequeath to my son, W. H. Eagle and unto his bodily heirs the following described lands to-wit: (here describing lands)

Seventh: I will and bequeath to my son, Bryan Eagle and unto his bodily heirs the following lands to-wit: * * *" (here describing lands)

Including the two just mentioned, Eagle devised lands to six of his children, using the term "and unto his[1] bodily heirs" in each instance. The other six were left bequests of money. On January 16, 1906, Eagle executed a codicil to the will, containing the following provisions pertinent to this litigation.

"1st. In my said last will I gave and devised to my son W. H. Eagle certain lands which it was my intention to will and devise to my son Bryan Eagle, and

[1] Or "her bodily heirs", as the case might be.

gave and devised to my son Bryan Eagle certain lands which it was my intention to give and devise to my son W. H. Eagle, and one of the purposes of this codicil is to correct the error above described. My sole purpose being that all of my children shall be equal in the enjoyment of my property and estate.

2nd. I now give and devise to my said son W. H. Eagle, the West half (W 1/2) of the Southeast Quarter (SE 1/4) of Section Five Township 1 North, Range 9 West, containing 80 acres which lands were in my said last will given to my son Bryan Eagle.

3rd. I give and devise to my said son Bryan Eagle the S 1/2 of the Northeast Quarter of Northwest Quarter of Section Five, Township 1 North Range 9 West, containing 20 acres, which lands were in my said Last Will given and devised to my said son, W. H. Eagle.

4th. In my said Last Will I estimated the value of the lands and other property given, bequeathed and devised, fixing the total value to be given to each child, and I wish it understood that it is not my intention, by this codicil to alter or change such valuation, but simply to correct an error or oversight for when the total valuations allotted to my said son W. H. Eagle and Bryan Eagle respectively were made, my calculations were based upon the theory that each was to have the lands assigned him in this codicil. I therefore will and direct that such total valuations stand, as fixed and provided in my said will."

Appellant stoutly contends that the court erred in holding that an estate in fee simple was devised to W. H. Eagle, Jr., rather than holding the will created a life estate only in Mr. Eagle with the remainder in fee to her. It is argued that Mr. Eagle, Sr. made clear his intention that all children should equally enjoy the property and estate, and that the codicil was only intended to substitute one piece of land for another, which had been erroneously described in the will itself; that to hold otherwise would do violence to the intent of the testator. Appellant cites *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, where it was stated:

"The first and great rule in the exposition of wills (to which all other rules must bend) is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

In *United States of America* v. *Moore,* 197 Ark. 664, 124 S. W. 2d 807, this court said:

"It is the well-settled general rule that a will and codicil are to be regarded as a single and entire instrument for the purpose of determining the testamentary intention and disposition of the testator, and both instruments together will be construed as if they had been executed at the time of the making of the codicil. They will not, however, be considered as a single instrument where a manifest intention requires otherwise. The construction of the provisions contained in a will and codicil may be different from that which would be given to the same provisions all embodied in a will. This is due to the fact that the mere making of a codicil gives rise to the inference of a change in intention, and such inference does not arise in the case of a will standing by itself. When a will and codicil are inconsistent in their provisions, the codicil, being the latest expression of the testator's desires, is to be given precedence."

It is certainly apparent that Mr. Eagle intended to make a change, else he would not have executed the codicil. It is further noted that in that instrument, in the first item, he states, "*One*[2] of the purposes of this codicil is to correct the error above described." It would appear therefore, that Mr. Eagle had more than one purpose in executing the codicil. Of course, we do not *know* the exact reason for the employment of language in the will itself, the legal effect of which created only a life estate, and the employment of language in the codicil, which devised an estate in fee simple. It could be that Mr. Eagle did not know the legal meaning of the words used in the will at the time it was prepared, and actually had intended to devise the land in fee; it could be that other property had been given to the other children during the approximate year and a half

[2] Emphasis supplied.

period between the execution of the two instruments, and Mr. Eagle was seeking to equalize the amount of property to each child. Item 2 of the will clearly implies that other advances would be made to the children in addition to property devised or bequeathed. In connection therewith, appellee states in his brief:

"The burden in any litigation of this nature is upon the moving party, in this instance, the burden was upon the appellant in the lower court to prove, that by giving in fee to W. H. Eagle, Jr., this tract of land, an inequality would be created among the children. If there was any allegation prior to the filing of the suit, the same was not expressed at any time by the Executors nor the heirs at the time of the distribution of this estate, according to the proof. In fact, there was no evidence introduced to bear this argument out or to support it, and there being no question as to the change in valuation as between a devise in fee and a devise of a life estate, it is clear that the codicil was for the purpose of equalizing rather than for the purpose alleged by the appellant."

It, of course, is possible that the language used in the codicil was a mistake on Mr. Eagle's part, but, to the contrary, it also could well be that he was thoroughly familiar with the legal effect of the words used, and intentionally made the change in the choice of language. At any rate, there being nothing in either instrument to indicate that Mr. Eagle did not understand the meaning of the words used, we must presume that he understood the full legal effect of the language employed. As stated in *Crittenden* v. *Lytle,* 221 Ark. 302, 253 S. W. 2d 361:

"Certainly there is nothing in the will which indicates Mrs. Wilson did not understand the meaning of the words she used, and we must therefore presume that she did. In the early case of *Moody* v. *Walker,* 3 Ark. 147, this Court said:

'When technical phrases or terms of art are used, it is fair to presume that the testator understood their

meaning, and that they expressed the intention of his will, according to their import and signification. When certain terms or words have by repeated adjudication received a precise, definite and legal construction, if the testator in making his will use such terms or similar expressions, they shall be construed according to their legal effect...' "

In *Park* v. *Holloman,* 210 Ark. 288, 195 S. W. 2d 546, we said:

"The function of a court in dealing with a will is purely judicial; and its sole duty and its only power in the premises is to construe and enforce the will, not to make for the testator another will which might appear to the court more equitable or more in accordance with what the court might believe to have been the testator's unexpressed intentions. 'The appellants are correct in the statement that the purpose of construction is to arrive at the intention of the testator; but that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will.' " There is no ambiguity in the language used in the codicil; there is no reason for supposing that Mr. Eagle did not mean just what he said. That being ture, it follows that W. H. Eagle, Sr., devised to his son, W. H. Eagle, Jr., the lands in question, in fee simple.

Affirmed.

WARD, J., dissents.

PAUL WARD, Associate Justice (Dissenting). It seems to me this is a case where the majority can't see the forest for the trees—the forest being the will and codicil as a whole and the trees being a few isolated words.

The cardinal rule for the construction of a will is to ascertain the intention of the testator, as announced in *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20. A hurried investigation reveals that we have approved and followed this rule in fifteen other cases.

In this case we should consider the will and the codicil as one instrument for the purpose of trying to arrive at the testator's intention. *United States of America* v. *Moore,* 197 Ark. 664, 124 S. W. 2d 807.

The application of the above rules to the essential facts in this case is a simple matter, and it leads me to but one conclusion.

The testator, by his original will, gave a distinct parcel of land (described by metes and bounds) to each of six children In each instance the testator placed a value on each parcel of land (ranging from $13,200 to $14,000). In each instance he made it clear that the land was being devised to the son (or daughter) "and his bodily heirs". (This meant, of course, the child could not sell the land.) Also, the testator, in the will, stated he wanted his children to share *equally* in his estate.

Later the testator discovered that he had mistakenly switched lands in the case of "W. H." and "Bryan". It is clear to me that the *purpose* of the "codicil" was to correct the above error, and not to change the quality of the devised estate. Among other things, my conclusion is explained briefly by the following:

(a). This view is the only view that maintains equality among the children.

(b). In the codicil the testator gave as *one* of his purposes "to correct error above described". (The words "above described" refer to the mixup in descriptions only.)

(c). The above was *one* of his purposes in executing the codicil. The question arises: What was another purpose? Was it to change the title from a fee tail to a fee simple? The answer is found in the 5th paragraph of the codicil where it is explained that due to the death of his brother since the will was signed, he was appointing another personal representative.

(d). The first paragraph in the codicil begins with these words: "In my said last will I *gave* and *devised*

to my son...'' No one doubts that by the above quoted words the testator was referring to his ''bequeath to my son... and unto his bodily heirs''. If that be true why attach an entirely different meaning to the same words (give and devise) when used later in the same paragraph? I can see no reason.

ALDRIDGE & STROUD, INC. *v.* AMERICAN-CANADIAN OIL & DRILLING CORP.

5-2529 357 S. W. 2d 8

Opinion delivered May 7, 1962.

[Rehearing denied June 4, 1962]

Mehaffy, Smith & Williams and *D. D. Panich; Keith, Clegg & Eckert* and *Wright, Lindsey, Jennings, Lester & Shults,* for appellant.

Francis B. Borden, Jr., J. Hugh Wharton, J. S. Thomas, Joe B. Hurley, and *Joel B. Dickinson,* Dallas, Tex., for appellee.

Ed. F. McFaddin, Associate Justice. This case was pending in the Second Division of the Union Chancery Court, in one form or another, from 1956 until 1960, and involved a number of parties and issues. Finally, the Chancellor was able to get all parties present for a hearing, and he disposed of the issues in a finding that listed the various controversies between the litigants. All of these controversies have become final except the four involved on this appeal. Yet it is necessary to give a rather lengthy recital of the background facts to present the four controversies now before us.

Mrs. Ruth Corder Roberts owned an undivided working interest in certain oil wells in the Smackover field in Union County. R. M. Crabtree and others also owned undivided working interests, along with Mrs. Ruth Corder Roberts; and in 1953 the owners of the working interests executed a lengthy contract, whereby R. M. Crabtree and others were designated as "operator" of all the working interests and clothed with certain powers and duties. Among other provisions in the contract was Section 22, designated "Preferential Purchase Rights," to be later discussed.

On April 16, 1956, R. M. Crabtree filed suit No. 12904 in the Second Division of the Union Chancery Court against the American-Canadian Oil & Drilling Corporation, Ruth Corder Roberts, and various other parties on the said 1953 contract. Crabtree sought judgment against the various defendants for various stated amounts, and prayed that their working interests be sold to satisfy the said respective judgments. Monsanto Chemical Company and MacMillan Petroleum Corporation were purchasing the oil runs from the property, and they were also made defendants so that the oil runs might be held subject to the orders of the Court.

The American-Canadian Oil & Drilling Corporation (hereinafter called "American-Canadian") had purchased the interest of Ruth Corder Roberts in the prop-

erty in 1955; and that is the reason why American-Canadian was made a defendant. Various pleadings were filed, and on July 11, 1957, Aldridge & Stroud, Inc. (hereinafter called "Aldridge & Stroud") intervened, claiming that Aldridge & Stroud held a note executed by American-Canadian for $75,000.00 and interest, and a mortgage on all of American-Canadian's oil runs from the Ruth Corder Roberts Smackover properties.

On October 28, 1957 Crabtree's original claim against the owners of the working interests was satisfied and dismissed by reason of what is called the "Anthony Deal," hereinafter to be discussed. But the case No. 12904 was still left pending because of the Aldridge & Stroud intervention. Then, on June 19, 1958, Crabtree intervened in the same suit, this time seeking relief against Ruth Corder Roberts and American-Canadian because of the "Anthony Deal." Kay Van and William T. Foran intervened, and various other parties intervened; and what was commenced as a suit by Crabtree for money he had advanced in the operation of the wells became almost a "free-for-all" receivership of the working interest that was originally owned by Ruth Corder Roberts, and which she had conveyed to American-Canadian.

As aforesaid, the Chancellor was finally able to get all the litigants and intervenors together to present the issues; and on December 22, 1960 there was entered the decree from which comes this appeal. There were a number of litigants and issues, but we have only four of those before us on this appeal; and we will now proceed to consider those four issues.

I. *R. M. Crabtree's Intervention.* On June 19, 1958, Crabtree intervened, claiming that he was entitled to purchase the Ruth Corder Roberts interest for some amount of money which counsel now estimate as $270,000.00. The Crabtree intervention alleged; that under

Section 22 of the operating instrument of 1953,[1] Crabtree was given the preferential right to purchase the Ruth Corder Roberts interest if she ever sold; that she gave him notice that she was selling to American-Canadian for $400,000.00 cash and 150,000 shares of American-Canadian stock; that said notice was false, in that she sold on different terms; and that Crabtree could still exercise his preferential purchase right for the actual value of the property.

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[1] Said Section 22 reads as follows:

"22. *PREFERENTIAL PURCHASE RIGHTS.* If any party hereto should desire to sell all or any part of his interest in the jointly owned leases and materials, the other parties shall have the preferential right to purchase the same as herein provided, except that such right shall not apply to a sale by any corporation which is a part hereto to a successor to all or substantially all of its business and assets or to a corporation which is a parent or subsidiary of the selling corporation, or affiliated with the selling corporation through common ownership of voting stock, or to a sale by any individual party hereto to a private closed corporation organized by such individual party and of which he is the principal stockholder, or to a sale by any individual party to any member of his immediate family or any trust created by such individual party for the benefit of any person in the immediate family of such individual. Subject to the foregoing exception, a party hereto shall not make any sale of all or any part of his interest in the jointly owned leases and materials otherwise than pursuant to a *bona fide* written offer from a purchaser who is ready, willing and able to purchase the same, accurately describing the interest to be purchased and providing for a purchase price payable in lawful money of the United States. If any party should receive and desire to accept any such offer, such party shall give written notice thereof to each of the other parties, together with a true copy of such offer, and the other parties shall have the option, exercisable only by written notice given to the selling party within ten (10) days after the giving of notice of desire to sell, to purchase the interest described in the offer for the purchase price therein stated. If each option should be so exercised by the other parties, or any of them, the buying party or parties shall be allowed a reasonable time, not exceeding thirty (30) days, for examination of the title to the interest being purchased, the obligation of the buying party or parties to purchase such interest being conditioned upon title thereto being found to be merchantable in the selling party. Promptly upon approval of title, the purchase price shall be paid by the buying party or parties, and the selling party shall execute and deliver to the buying party or parties a properly executed instrument of conveyance of the interest being sold, with full warranty of the title thereto; if the conveyance is made to two or more parties, the interest conveyed to each shall be in the proportion that his interest in the jointly owned leases bears to the combined interests of all the buying parties therein. If the option above provided for is not exercised by any party here to within the ten-day period allowed therefor, the party desiring to sell shall be free to accept the offer, copy of which was submitted to the other parties, and to sell the interest therein described in accordance with the terms of such offer, but not otherwise."

Should Crabtree prevail he would acquire all of the interest of American-Canadian in the Smackover property, so this is the first matter for determination. On the Crabtree claim the Chancellor, in his opinion, said:

"Although R. M. Crabtree was the moving party herein in the beginning of this action, and later as an Intervenor, and although he had the right to purchase the interest for which he has intervened herein, the Court finds, from the time of the letter to him advising that a sale was imminent, he made no effort to avail himself of this right, and that he cannot, at this late date, prevail in purchasing the property involved, and his cause of action, together with his Intervention, should be dismissed for want of Equity."

We agree with the Chancellor's findings on the Crabtree claim. The operating instrument of 1953 was never placed of record so could not be binding on any persons except those with actual notice. The dealings between Mrs. Ruth Corder Roberts and American-Canadian began in 1955, when she agreed to sell all of her working interest in the Smackover property to American-Canadian for $400,000.00 in cash and 150,000 shares of stock. American-Canadian experienced difficulty in acquiring the $400,000.00 in cash, and persuaded Mrs. Ruth Corder Roberts (whose husband had died in the meantime) to accept more stock and less cash. In the course of the negotiations, American-Canadian learned of the said Section 22 of the 1953 contract which gave Crabtree preferential rights to purchase Mrs. Ruth Corder Roberts' interest; and a letter was written by Mrs. Ruth Corder Roberts to Crabtree on September 19, 1955, wherein she advised Crabtree of her February agreement to sell the property to American-Canadian for $400,000.00 cash and 150,000 shares of stock.

Crabtree wrote Mrs. Ruth Corder Roberts on September 30, 1955, acknowledging receipt of the letter, waiving all formalities or irregularities in the notice, and said: ". . . I have elected to exercise the option

in that Agreement to purchase your interests in these properties." But after Crabtree notified Mrs. Ruth Corder Roberts of his election to purchase her interest, he had a geologist go over the property, and then concluded from the geologist's report that the interest of Mrs. Ruth Corder Roberts was not worth the amount for which she was selling it. So far as the record before us discloses, Crabtree never notified Mrs. Ruth Corder Roberts that he had changed his mind and would not take the properties. Instead, he remained silent. Under the terms of said Section 22 he was allowed only thirty days in which to complete the transaction after exercising his option. He did nothing further until he filed his intervention herein on June 19, 1958, which was over two years later.

As heretofore stated, American-Canadian was experiencing difficulties in acquiring the $400,000.00 cash to finance the purchase of the property from Mrs. Ruth Corder Roberts, and finally this transaction (herein called the "Anthony Deal") was accomplished: Mrs. Ruth Corder Roberts mortgaged her interest in the Smackover property to Anthony for $150,000.00 and received the cash; American-Canadian paid her $5,000.00, in cash and she received 395,000 shares of stock in American-Canadian of the par value of $1.00 per share. If the stock in American-Canadian was worth par, Mrs. Roberts received the equivalent of $400,000.00 in cash and $150,000.00 in stock; but the consummated transaction was different from the one originally planned. Crabtree says he did not learn of the variation in the transaction between Ruth Corder Roberts and American-Canadian[2] until shortly after June 1, 1956. But, even so, on October 28, 1957, in this case No. 12904, he dismissed his original claim on the 1953 operating contract against American-Canadian and Ruth Corder Roberts; and then delayed until June 19, 1958 before intervening and seeking to pursue his alleged preferential rights against American-Canadian and Ruth Corder Roberts. Without going into the issue of *res judicata,*

[2] This date appears in his "Petition" filed in the Chancery Court.

we affirm the Chancellor's decision against Crabtree because of the equitable maxim: "Equity aids the vigilant, and not those who sleep upon their rights." Courts of equity do not sit to restore lost opportunity, or to renew possibilities that have been permitted to pass by neglect.[3] After he learned the facts Crabtree delayed more than two years before intervening and asserting rights against American-Canadian. In the interim, the situation had changed. Values change rapidly in oil and gas matters (see *Sanders* v. *Flenniken,* 180 Ark. 303, 21 S. W. 2d 847); and Crabtree's unconscionable delay is sufficient, in itself, to justify a court of equity in refusing to allow him to now receive the properties after it has been shown that his geologist's report was wrong and that the properties have produced far more oil than was thought probable in 1956.

II. *The Aldridge & Stroud Intervention.* Aldridge & Stroud intervened in the proceedings on July 11, 1957, seeking judgment on a note for $75,000.00, executed by American-Canadian, dated April 4, 1956, and secured by a mortgage on the oil runs from the property.[4] The witnesses for Aldridge & Stroud testified that the Company had drilled a well for T. E. Robertson Company, Inc. in Hudspeth County, Texas, which well was necessary to be drilled in order to validate certain leases; that the leases were all transferred to American-Canadian; that the balance due for drilling the well was $75,000.00, which American-Canadian agreed to pay since it had acquired the leases; and that the mortgage or assignment was security for the $75,000.00 note. T. E. Robertson, President of American-Canadian when the note and mortgage were executed, testified that the note and assignment were legal and valid in every respect.

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[3] See 19 Am. Jur. p. 333 "Equity" § 333.

[4] As regards the Aldridge & Stroud claim, the Chancellor said: "The Court is of the opinion that there is no merit in the Intervention of Aldridge & Stroud, Inc. and that the alleged 'assignment' to it is without consideration and same should be cancelled so as not to be a cloud on the title to this leasehold."

There are a number of suspicious circumstances regarding this Aldridge & Stroud claim; but we have a note and assignment, fair on their face, and the President of American-Canadian testifying that he executed the note and mortgage for the Company and that the same were valid. Without reciting all of the testimony, we have reached the conclusion that the resisting evidence is insufficient to show that the note and assignment were fictitious, or that they have been satisfied. We, therefore, reverse that portion of the Chancery decree which disallowed the claim of Aldridge & Stroud, and direct that the same be allowed; but it must be allowed junior to the Foran claim and the Kay Van claim subsequently to be discussed. In other words, the Foran claim and the Kay Van claim must be paid in full before the Aldridge & Stroud claim is paid.

III. *The William T. Foran Claim.* Regarding this claim there seems to be very little controversy. Foran loaned $12,000.00 to American-Canadian; and as security he received an assignment of the oil runs; his assignment was duly placed of record; and due proof of his claim was made. We affirm the allowance of the claim. As regards the Foran claim, the Chancellor's opinion states:

"The Court finds that the claim of W. T. Foran is also a valid and bona-fide claim in the amount of $12,000.00 and that he should have Judgment for that amount, together with interest from date until paid at the rate of six per centum (6%) per annum. That said amount is a lien against the property involved herein, . . ."

IV. *Mrs. Kay Van's Claim.* As a part of her sale to American-Canadian, Mrs. Ruth Corder Roberts executed a mortgage on the property to Anthony for $150,000.00. This has heretofore been referred to as "the Anthony Deal." Default was made on this mortgage and Anthony filed foreclosure in the First Division of the Union Chancery Court. In order to prevent the foreclosure, American-Canadian persuaded Mrs. Kay

Van to loan American-Canadian $72,000.00, which, with impounded oil runs, would be sufficient to pay the Anthony mortgage. In the meantime, American-Canadian had been placed in receivership in the State of New York and Mrs. Kay Van issued and delivered her $72,000.00 check to Evans, the New York Receiver. The funds were used to satisfy the Anthony foreclosure, which was dismissed. It was represented to Mrs. Kay Van by the attorney for American-Canadian that if she paid this money, she would be subrogated to the Anthony mortgage and would receive her money with interest. The fact that she paid the money is conclusively established by the original check in the record. But it is insisted that the New York Receiver received some amount and should have paid Mrs. Kay Van out of such proceeds. A study of the record shows that Mrs. Kay Van did not look to the New York Receiver for the money: she was told that she would be subrogated to the Anthony mortgage and would receive her money from the oil runs. She followed the procedure suggested by the attorney for American-Canadian. She has received part of her money, and she now seeks the balance. As regards her claim, the Chancellor said:

"The Court finds that Mrs. Kay Van's claim for Judgment is a valid and bona-fide claim, and that there is due her the amount of $54,798.16, together with interest from this date at the rate of six (6%) per centum per annum until paid. The Court does not feel that this Judgment is a lien on the money held in the Registry of this Court, but should, rather, be a lien on the property involved herein as of and from this date."

Mrs. Kay Van has not cross-complained from this latter finding; so the decree of the Chancery Court is affirmed as regards the claim of Mrs. Kay Van.

V. *Conclusion.* The Chancery decree is affirmed in all respects except as to the Aldridge & Stroud claim. As to it, the decree is reversed and the cause remanded

with directions to allow the Aldridge & Stroud claim, but junior to the Foran claim and the Van claim, as hereinbefore stated. All costs are taxed against the oil properties.

WARD, J., not participating.

LYTLE, EX'R *v.* ZEBOLD, EX'R.

5-2681 357 S. W. 2d 20

Opinion delivered May 7, 1962

[Rehearing denied June 4, 1962]

Brockman & Brockman, for appellant.

Coleman, Gantt & Ramsay and *John Harris Jones,* for appellee.

GEORGE ROSE SMITH, J. W. W. West died testate in 1953. His will created a trust and directed that the trust income be paid to, or accumulated for, eight named life beneficiaries. Upon the death of the last surviving life beneficiary the trust property is to be distributed among the lineal descendants of those life beneficiaries who were kin to the testator by blood. Other details of the testamentary trust may be found in an earlier opinion involving this same will. *Lytle* v. *Zebold*, 227 Ark. 431, 299 S. W. 2d 74.

To discourage a will contest the testator directed that if any of the beneficiaries of the will should institute proceedings to nullify, change, or restrict any of its provisions, or should do any act for the purpose of impairing, setting aside, or invalidating any of its provisions, then those beneficiaries would be excluded from participation in the estate, the provisions in their favor would be void, and the trust property would ultimately go to the beneficiaries who had not violated this particular provision of the will.

The present proceeding is a petition for instructions filed by the appellee as the sole remaining executor and trustee under the will. The petition asserts that trust income is available for distribution among the life beneficiaries, but the trustee is unwilling to distribute the money until the probate court first determines whether five of the life beneficiaries forfeited their interest in the trust by filing the proceedings in *Lytle* v. *Zebold*, *supra*. After a hearing in the matter the court held that the first proceeding violated the no-contest paragraph in the will and effected a forfeiture of the rights of the five complaining beneficiaries. This is an appeal by the persons disqualified by the judgment.

The court's decision was correct. The validity of such a prohibition against attacks upon the will is generally recognized and was upheld by this court in *Ellsworth* v. *Ark. Nat. Bk.*, 194 Ark. 1032, 109 S. W. 2d 1258. Since the testator may leave his property to anyone he chooses he is at liberty to exclude from his

bounty those beneficiaries who unsuccessfully seek to thwart his testamentary wishes.

We cannot agree with the appellants' insistence that the earlier proceeding sought merely a construction of the will rather than its invalidation. There the dissatisfied beneficiaries contended that the testamentary trust was invalid and that the property should be distributed as if the testator had died intestate. Our opinion discussed and rejected three separate attacks upon the validity of the testamentary scheme. We cannot avoid the conclusion that the first petition was the very type of proceeding that the testator intended to forbid.

As a matter of fact, in the case at bar the appellants are making still another attack upon the validity of the trust. By this will the testator devised and bequeathed his residuary estate to his executors and trustees and then went on to outline the terms of the trust. In assailing this procedure the appellants rely upon the rule that an attempted limitation over after a fee simple devise is void for repugnancy. *Bernstein* v. *Bramble*, 81 Ark. 480, 99 S. W. 682, 8 LRANS 1028, 11 Ann. Cas. 343. This rule is inapplicable here, for the testator's description of his testamentary trust is not a limitation over that is repugnant to the vesting of title in the trustees. It would obviously be impossible for any settlor to create a trust if he could not state the terms and conditions upon which the title was being placed in the name of the trustees.

A third contention is that the executor, under the counterclaim statute, should have asserted a forfeiture of the appellants' interest in the first case and cannot do so now. Ark. Stats. 1947, § 27-1121. This contention is unsound. It was not until this court had announced its decision in the first proceeding that it became definitely known that the appellants had made an unsuccessful rather than a successful attack upon the will. Before the final judgment the issue was in doubt. Hence when the executor filed his answer he was not in a position to assert that the appellants had violated the prohibition against a will contest. By analogy, as the

appellee aptly points out, one who is wrongfully and maliciously made a defendant in a civil proceeding does not have to assert a claim for malicious prosecution in that very suit. It is not until the first case has been carried to its conclusion that the cause of action for malicious prosecution can be shown with certainty.

Attacks are also made upon the manner in which certain trust property was sold by the trustee. The appellants, having forfeited their interest in the estate, are not in a position to question the trustee's conduct. We may assume that the appellants' action did not affect the rights of the other trust beneficiaries, including these appellants' lineal descendants, but those beneficiaries have not questioned the manner in which the property was sold.

Affirmed.

HARRIS, C. J., not participating.

GENTRY *v.* JETT.

5-2706 356 S. W. 2d 736

Opinion delivered May 7, 1962

Sexton & Morgan, for appellant.

George E. Steel and *Shaver, Tackett & Jones,* for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case. Appellant (Gentry) and appellee (Jett) were both residents of Polk County, Arkansas. Appellee owned and operated a wholesale produce business. Although it has not yet been determined whether appellant's status is that of an employee or an independent contractor, for all purposes of this opinion, we will treat him as an employee of Jett. As such employee appellant drove appellee's truck to make deliveries of produce to points outside of Arkansas.

While on his way to Wichita, Kansas to deliver produce, appellant collided with a St. Louis-San Francisco Railway train in Oklahoma on June 22, 1958, receiving serious injuries. Soon thereafter appellant instigated a series of legal actions to secure redress of his injuries.

On October 3, 1958 appellant sued the railroad company in the Circuit Court of Sebastian County, Arkansas, in tort, and secured an agreed judgment in the amount of $4,500 which was promptly paid to him.

On October 4, 1958 appellant filed a claim before the Arkansas Workmen's Compensation Commission based on the same injuries. During the pendency of the claim appellant learned that appellee (although he had the required number of employees) had not secured workmen's compensation insurance. About this time appellant became a resident of Texas.

On February 11, 1959 (while his claim was still pending before the commission) appellant filed a common law tort action against appellee (for the same injuries) in the Federal District Court at Fort Smith. This suit was dismissed by final action of the Federal Court for the reasons that appellee's tort liability was controlled by the law of Oklahoma (where the tort occurred), and that under such law the recovery against the railroad company released appellee of all liability for the tort.

Following that, appellant prosecuted his claim before the Workmen's Compensation Commission with the result that the referee, the full commission and the circuit court all denied his claim, holding, in general, that the law of Oklahoma governed, that appellant had made an election, and that the Federal Court case was *res judicata.*

Appellant's arguments for a reversal are based on the following points. (1) The Workmen's Compensation law of Arkansas (and not of Oklahoma) applies; (2) The Federal Court action did not amount to an election of remedies; and, (3) The Federal Court action is not *res judicata* of his present claim.

One. Under the law of Oklahoma (as conceded by appellant) when appellant sued the third party (the railroad company) and recovered a judgment he was, thereby, barred from also receiving compensation under the law of Oklahoma. See Okla. Stats. Tit. 85

§ 44 (1951) and *Ridley* v. *United Sash & Door Co.*, 98 Okla. 80, 224 P. 351. This is not, however, the law in Arkansas (Ark. Stats. § 81-1340). It is conceded to be the law in Oklahoma that, in tort cases, recovery against one tortfeasor relieves all other co-tortfeasors from liability. It is also further conceded that, under the full faith and credit clause of the Federal constitution, Arkansas is bound by the Oklahoma law as it relates to torts and the effect of a recovery against one tortfeasor.

Notwithstanding the above concessions, it is appellant's contention that the constitutional clause relative to full faith and credit does not apply, under the facts in this case, to compensation claims. We have concluded that appellant's contention is meritorious and must be sustained.

In the first place there is a logical and vital difference between the nature of the liability arising from a tort and the nature of the liability arising out of Workmen's Compensation laws. The former is based on a wrongful act while the latter is based on a contractual relationship—in fact, it is also based on the public welfare. That being true, there is no sound reason why another state should be able to keep this state from discharging its contractual obligation to one of its citizens. As to when one state must give full faith and credit to laws of another state is, of course, a federal question, so we can look to such decisions for authoritative answers. The cases presently mentioned support the view already expressed.

The case of *Alaska Packers Association* v. *Industrial Accident Commission of California,* 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044, dealt with a problem much like the one now under consideration. Alaska Packers owned a business in California; it hired Palma (a resident of California) to work in Alaska, where he was injured. Both Alaska and California had compensation laws under either of which Palma might possibly have recovered. Section 58 of the California Workmen's Compensation Act imposed jurisdiction "over all contro-

versies arising out of injuries suffered without the territorial limits of this state..." When the California commission made an award to Palma, Alaska Packers insisted in the Supreme Court of California and in the U. S. Supreme Court—"that as the Alaska statute affords, in Alaska, an exclusive remedy for the injury which occurred there, the California courts denied full faith and credit to the Alaska statute by refusing to recognize it as a defense to the application for an award under the California statute". While the manner in which the question was presented to the Court may be lacking in clarity, the answers given by the Court are clear and decisive. Among others the Court made the following pronouncements:

1. "But where the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation and its sanctions are subject, in some measure, to the legislative control of the state. The fact that the contract is to be performed elsewhere does not of itself put these incidents beyond reach of the power which a state may constitutionally exercise." (Citing cases.)

2. "While similar power to control the legal consequences of a tortious act committed elsewhere has been denied... the liability under workmen's compensation acts is not for a tort. It is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer."

The Court also approved this statement:

" 'The contract creates a relationship under the sanction of the law and the same law attaches as an incident thereto an obligation to compensate for injuries sustained abroad amounting to a sort of compulsory insurance.' "

In the case of *Industrial Commission of Wisconsin et al.* v. *McCartin, et al.*, 330 U. S. 622, 67 S. Ct. 886, 91 L. Ed. 1140, both the employer and the employee were residents of Illinois where the contract of employment was entered

into. Appellee, who was injured while working in Wisconsin, first accepted a settlement from the Illinois Commission but reserved his right to apply for compensation in Wisconsin. Later appellee was refused an award by the Wisconsin courts. On appeal, by certiorari, to the U. S. Supreme Court, the issue was stated this way by the Court: "The troublesome problem that arises here is whether the compensation paid under the Illinois statute raises a full faith and credit bar to a subsequent award in Wisconsin for an additional amount." In an exhaustive opinion the Court held no such bar existed. The essence of the opinion is found in the following statement: "Illinois was the state where the parties entered into the employment contract and its legitimate concern with that employer-employee relationship permitted it to apply its own statute even though the injury occurred elsewhere." (Citing cases.)

We have carefully examined the cases relied on by appellee but find nothing in conflict with the foregoing. We do not consider the Oklahoma cases cited by appellee to be controlling. It is our consludion, therefore, that the Workmen's Compensation Commission and the trial court erred in refusing to consider appellant's claim on the ground that the accident happened in Oklahoma and that the law of that state is controlling as to the allowance of benefits.

Two. We have likewise concluded that appellant's suit in Federal Court did not amount to an election of remedies as contemplated under Ark. Stats. § 81-1304. Undoubtedly, under this section, if appellant had not sued the railway company, his suit against appellee in tort would have been an *election* and thereafter he could not have maintained a claim for compensation, assuming, of course, that appellant sued as an employee of Jett.

However, when appellant obtained a judgment against the railway company in tort, he thereby (under the Oklahoma law to which we must give full faith and credit, the action being in tort) released all other tortfeasors (including appellee) from liability. So, when

appellant filed his complaint against appellee in tort there was no such cause of action in existence. That being true appellant did not have two causes of action to elect between—he had only the right to claim compensation. This view, we think, is clearly announced in *Sharpp* v. *Stodghill,* 191 Ark. 500, 86 S. W. 2d 934, 87 S. W. 2d 577, where the Court approved the following statement:

" 'The general rule as to election of remedies is that where a party has a right to choose one of two or more appropriate but inconsistent remedies, and with full knowledge of all the facts of the case and of his rights, makes a deliberate choice of one, then he is bound by his election and is estopped from again electing or resorting to the other remedy, although the judgment obtained in the first action fails to afford relief to the party making the election.

" 'Election is to be distinguished from mistake in remedy. The pursuit of a remedy which one supposes he possesses, but which in fact has no existence, is not an election between remedies, but a mistake as to the available remedy, and will not prevent a subsequent recourse to whatever remedial right was originally available.' "

Also, to the same effect, see the rule as stated in 18 Am. Jur. *Election of Remedies* § 24. In Workmen's Compensation cases there appears to be an even less strict adherence to the election rule than in other cases. In II Larson, Workmen's Compensation Law § 67.22 there is the statement:

"The most troublesome question that emerges from the statute giving the employee an option to claim either common law damages or compensation from the uninsured employer is this: if the employee pursues one remedy to a fruitless conclusion, is he barred by his election from pursuing the other? The majority of cases have held that an unsuccessful damage suit does not bar a compensation claim... The theory, which has its beneficent counterpart in almost any other field of law where the harsh old Roman doctrine of election

rears its head, is that an election of a remedy which proves to be non-existent is no election at all. Election, according to this view, is a choice between two valid but inconsistent remedies; it is not the mistaken pursuit of a misconceived right when only one right in fact existed.''

We do not find anything in *Eastburn* v. *Gaylen,* 229 Ark. 70, 313 S. W. 2d 794, or in any other decision of this Court cited by appellee that conflicts with the view above expressed.

Three. Having reached the conclusion announced just previously, it follows that the action in the Federal Court was not *res judicata* of appellant's claim for compensation. The merits of appellant's claim for compensation were not considered or passed upon in that case.

Since the Commission failed to determine the question of fact regarding appellant's relationship to appellee—whether he was an employee or an independent contractor, the cause is remanded to the circuit court with directions to remand to the Workmen's Compensation Commission for further proceedings consistent with this opinion.

FARM BUREAU MUTUAL INS. CO. *v.* CUSICK.

5-2620 356 S. W. 2d 740

Opinion delivered May 7, 1962

Shaver, Tackett & Jones and *T. E. Webber,* for appellant.

William R. Mitchell and *M. C. Lewis, Jr.,* for appellee.

SAM ROBINSON, Associate Justice. Appellant issued its policy of fire insurance to appellee, insuring a dwelling house located near Hot Springs in the sum of $4,000.00 and insuring the personal property in the house for the sum of $2,000.00. Subsequently the house and contents were totally destroyed by fire. Appellee made her proof of loss, but the insurance company refused to pay the claim. Appellee then filed this action alleging the issuance of the policy, the fire and loss and the proof of loss. The appellant company answered admitting the issuance of the policy and the destruction of the property by fire; however, it denied the loss on the personal property amounted to $2,000.00 and it was alleged in the answer that the fire was not accidental.

After all the evidence was in and each side had closed their case, the trial court directed a verdict for the appellee in the sum of $6,000.00. To this amount was added the statutory penalty of 12 per cent and an attorneys fee of $1,500.00.

Appellant contends that the trial court erred in not permitting counsel to cross examine the appellee regarding her whereabouts on the night of the fire, The following occurred:

Counsel for appellant: "Q: Where were you the night of the fire?"

The Court: "Mr. Tackett, you keep going into that. She has testified she was in Hot Springs, both on direct examination and cross examination, and you have asked the same thing again. Now do you want to continue along this line? She has testified she was in Hot Springs and with Howell Neice all that time and she got home about 12 o'clock that night. Now, you have gone all over that."

Mr. Tackett: "I still don't know where she was."

The Court, "She testified she was in Hot Springs and that is sufficient."

Mr. Tackett: "Save my exceptions."

Appellee testified that she was in Hot Springs at the time of the fire. Appellant proffered no testimony to the contrary and there is no showing of materiality of the exact place where she was in Hot Springs.

Appellee testified that the value of the personal property destroyed was more than $2,000.00 and her father, Lee R. Frazier, gave testimony to the same effect. One of the items was a piano which had been given appellant by Mr. Frazier. He testified that it was worth $500.00 and placed a total valuation of more than $2,000.00 on the personal property. The testimony of both appellant and Mr. Frazier was admissible. "The testimony of an owner or former owner concerning the value of an object is competent evidence as to its worth." *Pettit* v. *Kilby,* 232 Ark. 993, 342 S. W. 2d 93.

The case of *Phillips* v. *Graves,* 219 Ark. 806, 245 S. W. 2d 394, involved the value of furniture destroyed by fire and there the Court quoted with approval from 32 CJS 315, as follows: "Rules of evidence are not so technical as to require expert witnesses to prove the reasonable or market value of chattels such as household furniture in common use, where it is apparent that the value of the articles is within the knowledge of persons of ordinary intelligence and experience."

In the first report appellee made to the insurance company she stated that she went to the picture show

with Howell Neice, a state policeman, the night of the fire, but later she wrote to the insurance company that she was mistaken about being at the show that night; that she was with the officer as she had first stated, but they did not go to the show; that it was the night before the fire that they went to the show. We fail to see how the representation about having been at the show on the night in question was in any way material.

After all the evidence was in, appellant offered to confess judgment for the sum of $6,000.00, but at that stage of the proceedings counsel for appellee insisted on the statutory penalty and attorneys fee and would not accept the $6,000.00 tendered. Appellant offered no evidence to contradict appellee's evidence of the loss.

The Court directed the jury to return a verdict in favor of plaintiff for $6,000.00 and then added 12 per cent penalty and $1,500.00 attorneys fee. We find no error in the Court's action in directing a verdict. There was no issue to submit to the jury. *Burcher* v. *Casey,* 190 Ark. 1055, 83 S. W. 2d 73. We find no error calling for a reversal; the judgment is therefore affirmed.

The appellee has filed in this Court a motion for an additional attorneys fee in connection with the appeal. The motion is granted. An additional fee of $500.00 is allowed, to be taxed as cost in this Court.

Affirmed.

LOFTIS *v.* EDWARDS.

5-2737 356 S. W. 2d 742

Opinion delivered May 7, 1962.

Fulk, Lofton, Wood, Lovett & Parham, by *Warren E. Wood,* for appellant.

James R. Howard, for appellee.

JIM JOHNSON, Associate Justice. This case involves the foreclosure of a laborer's and materialman's lien.

Between the dates of March 20 and April 21, 1959, appellants sold materials to and performed labor for the appellees in the amount of $1,032.54. The materials and labor were utilized in the construction of improvements on property described as Lot Twelve, Block One, Fairground Addition to the City of Little Rock. Appellants received a payment of $100.00 and gave appellees credit therefor, leaving a balance due of $932.54.

Appellants followed the statutory requirements in perfecting a Laborer's and Materialman's Lien. When the indebtedness was not paid, appellants filed suit against appellees in Chancery Court, Pulaski County, and service was obtained. The complaint prayed for judgment against appellees and that same be declared a first lien on the property and "if said judgment be not paid, that the property be sold to satisfy said lien for costs and all other just and proper relief."

Appellees did not elect to file a responsive pleading and on August 8, 1960, a default judgment was entered against appellees for the sum of $932.54, together with their cost. A lien was impressed upon the lot and building which were ordered to be sold if the judgment was

not paid within ten days. The judgment did not name a Commissioner to sell the property and fix the time, place and terms of the sale.

After the expiration of that term of court (Sec. 1 and 2, Act 342 of 1923), on May 22, 1961, appellants filed a motion in the Pulaski Chancery Court stating that the judgment indebtedness had not been paid and requested the Court to enter an order naming the Chancery Clerk as Commissioner to sell the property and to fix the time, place and terms of the sale.

Appellees filed a demurrer to the motion on June 27, 1961, and on August 16, 1961, the demurrer was sustained by the Court.

Appellants attempted an appeal from the order sustaining appellees' demurrer. The appeal was dismissed for the lack of a final and appealable judgment thereby leaving the cause pending in the trial court. *Loftis* v. *Edwards,* 234 Ark. 632, 353 S. W. 2d 535. A final order of dismissal was entered by the trial court on February 15, 1962, and from that order comes this appeal.

Appellees contended as grounds for their demurrer and contend here that the court had no authority to amend the decree after the lapse of the term. To the contrary appellants urge that the court had control of its own judgment and possessed inherent power to enforce it.

At first blush this most interesting problem appeared to be a technical exception to the sacred maxim that "Equity will not suffer a wrong to be without a remedy", however, upon further research we find that the matter presented for our consideration was settled by the Civil Code of 1869, §§ 405 and 406. These sections are brought forward as Ark. Stats. § 51-1105 and § 51-1108. Section 51-1105, Ark. Stats., is as follows:

"Interlocutory order unnecessary—Judgment in First Instance.—It shall not be necessary, in any action

upon a mortgage or lien, to enter an interlocutory judgment or give time for the payment of money, or for doing any other act; but final judgment may in such cases be given in the first instance."

This section of our statutes is permissive; certainly it is not prohibitive to the entry of an interlocutory order as was the nature of the order in the case at bar. Had the judgment been paid within the ten days allotted there would have been no necessity for a final decree. Section 51-1108, Ark. Stats., is as follows:

"Sale of property always ordered.—In the foreclosure of a mortgage, a sale of the mortgaged property shall in all cases be ordered."

This section of our statutes is mandatory. Therefore, since an interlocutory judgment in the foreclosure of a lien is permissible and the sale of the property in foreclosure proceedings shall in all cases be ordered, we are impelled to the conclusion that the trial court here failed to comply with the statutes by refusing to complete the decree even at a subsequent term. See 59 CJS, p. 1265, and also 19 Am. Jur. Equity, § 418. Accordingly, the trial court's order sustaining the demurrer and dismissing the action is reversed and the cause is remanded with directions to enter a final decree naming a Commissioner to sell the property upon which a lien was impressed and fix the time, place and terms of the sale.

Reversed and remanded with directions.

GARVER *v.* UTYESONICH.

5-2619 356 S. W. 2d 744

Opinion delivered May 7, 1962

Shaver, Tackett & Jones, for appellant.

M. C. Lewis, Jr., and *Earl J. Lane,* for appellee.

NEILL BOHLINGER, Associate Justice. On the night of April 2, 1960, the appellant, Elizabeth Garver, was in the City of Hot Springs. At that time she met socially the appellant, Harry A. Curtis, and at approximately 10 o'clock on the morning of April 3rd, she loaned to Harry A. Curtis her Buick automobile. It appears to have been the understanding at that time that appellant, Curtis, was to return Mrs. Garver's automobile later that afternoon at which time the appellants planned to have dinner. The matter of agency between appellants is not raised.

While driving Mrs. Garver's car, the appellant, Curtis, about six o'clock in the afternoon, at the intersection of Central Avenue and Olive Street, attempted to make a sharp left turn into Olive Street at which time the automobile he was driving collided with a motor scooter being operated by Joseph A. Utyesonich, the appellee herein, the accident causing both property damage and physical injury to the appellee.

As a result of this accident, the appellee filed a complaint in the Garland Circuit Court against the appellants herein and alleged that while he was exercising

due care and caution the appellant, Curtis, negligently and carelessly crossed the center line on Central Avenue into the lane in which appellee was driving and attempted to make a sharp left turn into Olive Street; that he failed to yield the right-of-way and that the damages suffered by appellee were serious, painful, and permanent; for all of which he prayed damages.

The appellants, Elizabeth Garver and Harry A. Curtis, filed their separate answers in that cause through the Honorable Boyd Tackett who appears as attorney for both the parties, appellants.

The cause proceeded to trial on June 26, 1961, at which time the attorney for the appellee, Joseph A. Utyesonich, filed a motion in which he requested the court to appoint a guardian *ad litem* for the defendant, Curtis, who, he stated, appeared to be mentally incompetent. To that motion was attached a letter from S. I. Feurst, M. D., on the stationery of Martin Memorial Clinic, Vicksburg, Mississippi, in which Dr. Feurst stated that appellant, Curtis, was mentally ill, the diagnosis being schizophrenic reaction, paranoid type. By this is meant that Mr. Curtis displayed autistic unrealistic thinking and obviously believed that there was some kind of plot against him; that he was very tense, highly suspicious and hostile and refused to take medication, which the doctor stated was a common reaction in certain stages in paranoid schizophrenia; that Mr. Curtis was incapable of giving testimony and that it was debatable as to whether he would know what he was saying. The length of the mental incompetency could not be determined and Dr. Feurst did not believe that without necessary treatment Mr. Curtis would improve at any time in the near future.

Responsive to that motion, the court, on June 26, 1961, entered its order and appointed the Honorable Boyd Tackett, the attorney for both parties, appellants, guardian *ad litem* for Harry A. Curtis.

Thereafter, Mr. Tackett filed an amended and substituted answer for Harry A. Curtis and entered his

appearance as guardian *ad litem.* Mr. Tackett further filed a separate amended and substituted answer for Elizabeth Garver. The appellants, Elizabeth Garver and Harry A. Curtis, by their attorney, Boyd Tackett, filed a motion for a continuance in order that the mental condition of appellant, Curtis, might be determined and the possibility of his attendance at the court ascertained. The appellant, Elizabeth Garver, set out in that motion that without the testimony of the appellant, Harry A. Curtis, she would be greatly prejudiced and that the appellees' cause of action would not be jeopardized by a reasonable continuance and that there was no other person, other than appellant Curtis, who could testify in defense of this action.

On February 10, 1961, Louise Childers, as mother, next friend, and guardian of Daniel Edward Sampson, filed a complaint against these appellants alleging injuries to Daniel Edward Sampson who had been a companion of the appellee, Joseph A. Utyesonich, at the time of the accident.

The two actions were joined for trial and the case proceeded to trial and the jury returned a verdict of $1,000.00 against both the appellants herein in favor of Louise Childers, mother, next friend and guardian of Daniel Edward Sampson, a minor, and also found against the appellants in the sum of $31,000.00 in favor of Joseph A. Utyesonich. Judgment was entered accordingly and to reverse that finding and judgment the appellants present this cause here.

The appellants present eight points relied on for reversal but we need look no further than the second point on which this case must be reversed. That point is as follows:

"The trial court erred in appointing the attorney for defendants guardian *ad litem* for the absent defendant, Harry A. Curtis."

Mr. Tackett, who was appointed guardian *ad litem,* was the attorney for both the appellants and therefore

was not eligible for appointment as guardian for the appellant, Curtis, who was alleged to be of unsound mind. The statute on this point is clear and unambiguous.

"* * * The appointment can not be made until after the service of the summons in the action. No party or attorney in an action can be appointed guardian to defend therein for an infant or person of unsound mind." §27-826 Ark. Stats.

The question of the mental condition of appellant, Harry A. Curtis, was timely and forcefully presented. A doctor testified that he was mentally ill, would not know what he was saying if he tried to testify, and that the chances of his recovery were somewhat remote.

It is true that the probate courts, by the constitution, are given original jurisdiction in matters of persons of unsound minds and their estates, but this does not exclude the jurisdiction of other courts to hear and determine suits by and for insane persons whether under guardianship or not and whether they have been judged insane by the probate court nor not.

In the case of *Peters* v. *Townsend,* 93 Ark. 103, 124 S. W. 255, we said:

" '*** It was regarded as error to proceed against him without such guardian. If the insanity of a defendant in a pending suit was suggested, but had not been judicially ascertained, the court gave opportunity for an inquisition to be held, or took the necessary steps to determine the question for itself; and, having ascertained that the defendant was mentally incapable of making his defense, it appointed a guardian *ad litem* for him, and thereafter imposed upon him the restraints of infancy.' "

We cannot say that the appointment of Mr. Tackett was improvident or that the cause of the allegedly insane appellant was in any way jeopardized, but the Legislature has said in no uncertain terms that no attorney in any action can be appointed guardian *ad litem* to

defend therein. The appointment of an attorney for the parties herein as guardian *ad litem* was error.

The record reflects that the appellees introduced the deputy clerk of the Hot Springs Municipal Court as a witness and such deputy clerk identified the docket sheet and testified therefrom that appellant, Harry A. Curtis, was on the docket sheet and as to his case number and the fact that he was represented by an attorney who entered a plea of guilty to a charge of failure to yield the right-of-way.

This witness did not testify that she was present in court and heard the plea entered and her testimony from the docket sheet on the various details of the case just as effectively introduced a record of conviction in the municipal court for a violation of the statute as if the docket sheet had been made an exhibit to her testimony.

This cannot be done. The statute provides [Ark. Stats. 75-1011]:

"Record of conviction inadmissible in a civil action. —No record of the conviction of any person for any violation of this act shall be admissible as evidence in any court in any civil action."

The act referred to applies to traffic violation and the language of the Legislature makes clear its intent that the record of the municipal court cannot be introduced in actions of this kind. As further evidence of Legislative intent, Act 216 of the Acts of 1961 provides that no record of the forfeiture of a bond or of any conviction of any person for any violation of this Act [traffic violation] shall be admissible in any court in any civil action. Under these enactments, the evidence of the traffic violation was not admissible.

While an admission against interest in the course of conversation might be admissible, those admissions

cannot be fortified and given weight by reason that a court of law has taken action on them. As far as the record of the municipal court in a traffic violation is concerned, it is a closed chapter in a trial of a civil suit in any other court.

For the reasons herein stated this cause is reversed and remanded for further proceedings not inconsistent with this opinion.

DRITT *v.* MORRIS.

5-2669 357 S. W. 2d 13

Opinion delivered May 14, 1962.

[redacted]

Dickson, Putman, Millwee & Davis, for appellant.

Rex W. Perkins and *Pearson & Pearson,* for appellee.

CARLETON HARRIS, Chief Justice. On June 14, 1958, Mrs. Jessie P. Dritt, age 70, appellant herein, entered a Fayetteville grocery store, known as Campbell's Super Market, operated by A. D. Morris and Alfred D. Morris,

appellees herein, for the purpose of purchasing groceries. As she left the store, and started down the concrete incline leading from the premises, Mrs. Dritt slipped and fell, breaking her hip and sustaining other injuries. Suit was instituted by appellant against appellees, alleging that she was a customer and invitee of appellees, and that appellees had placed or caused to be placed on the floor of the store and on the surface immediately outside and inside the entrance, a "slippery, greasy substance known as floor sweep"; that the floor and surface were thereby made dangerous and unsafe; that her fall was occasioned by slipping upon the floor sweep, and such injuries were due to the negligence of appellees in placing and allowing to remain upon the floor and surface such slippery and greasy substance. The Morrises answered, denying the allegations, and further asserting that if Mrs. Dritt was injured, it was due to her own negligence and without negligence on their part. On trial, the jury returned a verdict for appellees, and from the judgment entered accordingly, appellant brings this appeal. Four points are relied upon for reversal, which we proceed to discuss, though not in the order listed in appellant's brief.

I.

"The Lower Court Erred in Ruling as a Matter of Law That the Conduct of Appellees or Their Employees in Placing Floor Sweep on the Floor Inside Their Grocery Store Did Not Proximately Cause Appellant's Injuries. A Question of Fact Was Presented on This Issue, and It Should Have Been Submitted to the Jury for its Determination."

In its instruction No. 6, the court told the jury:

"You are further instructed that any allegation of negligence of floor sweep being on the defendants' floor inside of the building at the time and place of the fall complained of by the plaintiff as the proximate cause of the injury is not to be considered."

Appellant objected and saved exceptions to the giving of this instruction. After the giving of instructions (15 in number), the court asked: "Are there other instructions? I believe a juror had a question?" One of the jurors then stated:

"I didn't understand what you said about the floor sweep inside the building.

THE COURT: I will reread that.

MR. PUTMAN: We renew our objection to it if you reread it.

THE COURT: In other words, I will say this: There were two allegations of negligence; one in the complaint was that the floor sweep inside of the building was an act of negligence and the other allegation was that there was floor sweep outside of the building that she fell on which was an act of negligence. Now, I am telling you that it has been admitted in evidence that there was floor sweep inside of the building, but as far as an allegation of negligence on the part of the plaintiff, it is not to be considered. The allegation of negligence that floor sweep on the inside of the building at the time and place of the fall complained of was the proximate cause of the injury, that the evidence on proximate cause was not sufficient.

MR. PUTMAN: We object to the Court so instructing."

We are definitely of the opinion that the court erred in so instructing the jury. Mrs. Dritt testified that the floor on the north side of the establishment had floor sweep on it, distributed for sweeping; that she walked down this north side in making her shopping rounds, and had to walk through the floor sweep in order to find the items she desired to purchase. Mrs. Josephine Jennings, daughter of Mrs. Dritt, testified that when she took her mother's clothing home from the hospital, two days after the fall, floor sweep was still on Mrs. Dritt's shoes. Mr. Alfred Morris stated that customers did walk on and through the floor sweep in going about

the store. Morris identified a sample of "Certain Sweep" which was the brand used on the occasion of Mrs. Dritt's injury. Mr. Loren Heiple, head of the Civil Engineering Department, University of Arkansas, testified that a part of his training consisted of making analyses of compounds, and learning the effect of friction. He testified that he made an analysis of "Certain Sweep" (which had been purchased by appellant's attorneys from the same dealer supplying the appellees), and found it to consist of sand, oil, sawdust, and dye. The witness testified that he had performed tests with leather material and "Certain Sweep" on a concrete surface substantially the same as where appellant slipped and fell. Mr. Heiple stated that he walked through the floor sweep, on concrete, wearing leather soles and heels, and slipped. It was his opinion that the floor sweep on concrete made it at least twice as slippery. From his testimony:

"Two items would cause this slipperiness, one would be the roller-like effect of the sand particles, the other would be the oil base of the floor sweep compound which would tend to act as a lubricant. * * *

"The sand would serve as an intermediate surface apparently spherical in size, which would tend to act as a roller, that can act as a roller between two hard surfaces.

Q. Would that be lubricated by the oil?

A. It would be lubricated by the oil."

The witness also stated that he had used several different individuals in making tests.

Appellees insist that the court's ruling was correct, pointing out that the floor sweep used in conducting the experiments was not the same floor sweep, or out of the same container, as that on the floor at the time of Mrs. Dritt's fall. It is true that this was not a part of the same "batch" that had been used on June 14, 1958, but in answering interrogatories subsequent to the occurrence, appellee Alfred D. Morris stated that none of that particular sweep remained in his possession. Of course,

under those circumstances, it was impossible to conduct the experiments with sweep that had been on the floor on the occasion of the injury complained of. As herein stated, the same brand was used, and purchased from appellees' supplier—in fact, the above named appellee identified a sample of "Certain Sweep" which he had purchased from the supplier on the morning of the trial as "the same floor sweep" (referring to the brand), and stated, "It's the same thing we have always used."

Appellees also assert that Heiple's evidence was inadmissible because the experiments were not conducted under circumstances similar to those existing at the time of appellant's fall. It is not necessary that conditions be identical to those existing at the time of the occurrence in order to render experiments admissible; it is sufficient if there is a substantial similarity. Minor variations in the essential condition go to weight, rather than to the admissibility, of the evidence, and of course, much depends upon the purpose for which such evidence is introduced. See 20 Am. Jur., § 756, p. 628. It is there also stated: "Speaking generally, however, the measure of permissible variation of the conditions of the experiments from those of the occurrence is measured by whether such variation is liable to confuse or mislead the jury." We find nothing in the proffered evidence that could have tended to mislead or confuse the jury. We think the evidence was sufficient to present a question for jury determination on the issue raised by this point. It follows that the court's instruction was error, and such error calls for a reversal of the judgment. However, other alleged errors have been asserted, and in view of the fact that all questions presented may again arise upon a second trial, we briefly discuss each alleged error.

II.

"The Trial Court Erred in Refusing to Order Appellee Alfred D. Morris to Answer More Fully Certain Interrogatories Propounded to Him."

Subsequent to the filing of the complaint, appellant propounded twenty-two consecutively numbered interrogatories to Alfred D. Morris, to be answered by him pursuant to the requirements of Act 335 of 1953, known as the Discovery Act (Chapter 3, Depositions and Discovery, Title 28).[1] Interrogatory No. 14 and the answer to same, are as follows:

"State whether or not any of your employees reported to you or your attorneys that they saw or knew or heard that the plaintiff fell as aforesaid. If yes, state the name and present address of said employee and state what said employee reported to you or your attorneys.

(Answer) (14) No report made to me. Have no information as to reports, if any, made to my attorneys." Interrogatory No. 15 and the answer thereto are as follows:

"State whether or not any other person reported to you or your attorneys that they saw or knew or heard that the plaintiff fell as aforesaid. If yes, state the name and present address of said employee[2] and state what said person or persons reported to you or your attorneys.

(Answer) (15) Several days after June 14, 1958, Alton Dewey Morris, 411 South School Street, Fayetteville, Arkansas, advised me that the daughter and son-in-law of plaintiff reported to him three days after June 14, 1958, that plaintiff had fallen. Have no information as to reports, if any, made to my attorneys."

Appellant moved to require Morris to answer these interrogatories more fully. The court found that no further answer was required, and the order reflects the following:

"For the sake of the record, the Court states that it finds that the purpose of said interrogatories is to lead to the discovery of eye witnesses to the fall of plaintiff, and that the information sought is a part of the at-

[1] The discussion under this point relates to Sections 28-355 and 28-356, Ark. Stats.

[2] This was evidently a typographical error and should read "person".

torney's work product, and that the knowledge of the attorney of the defendant is not imputed to the defendant."

We are of the opinion that the first portion of these interrogatories should have been answered, *i.e.,* appellant was entitled to the names and addresses of any employees who might have witnessed the fall, and the names and addresses of any other persons who witnessed same. The answer, "Have no information as to reports, if any, made to my attorneys", is insufficient. Though perhaps not true in this instance, to permit such an answer might well enable a litigant to intentionally evade questions propounded to him. As was stated in *Hickman* v. *Taylor,* 329 U. S. 495, "A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney." This is not to say that we will unequivocally follow the reasoning of the *Hickman* case in every respect, as several questions were presented in that litigation which have not, as yet, reached this Court, but we thoroughly approve the quoted statement. Practically the same identical point was before the Supreme Court of Delaware in the case of *Bullock* v. *Maag,* 94 A. 2d 382. The opinion reflects that the following interrogatory was propounded:

"Give the names and addresses of persons who have been interviewed or from whom statements have been procured, by you or on your behalf, in regard to the facts alleged in the complaint."

It was answered as follows:

"I have not interviewed any persons nor have I procured statements from any persons in regard to the facts alleged in the complaint. I have no knowledge nor information as to the names and addresses of persons who may have been interviewed or from whom statements have been procured on my behalf by my attorneys."

Likewise, a similar interrogatory:

"Give the names and addresses of the persons who have knowledge of the facts alleged in the complaint." This was answered:

"The defendant, Harry Maag, Ann Marie Bullock, my former wife; and other persons whose names and addresses are known to my attorneys but not to me." The propounding party moved the court to require the answering party to answer more fully, and the latter contended that he should not be required to furnish any of the desired information which was in the possession of his attorneys. The court rejected the contention with the following language:

"If the (answering party's) contention were accepted, the cloak of privilege would be spread widely enough to smother Rule 33. These interrogatories are within the scope of Rule 33 and the subject matter is not privileged. If the (answering party) does not have the information requested in Interrogatories Nos. 1 and 2, he will be obliged to obtain the date from his attorneys and to furnish it to the (propounding party). Obviously, a party may not be permitted to avoid answering interrogatories, otherwise unobjectionable, merely because the information sought is in the possession of his attorney."

Of course, there was nothing to prevent Morris from obtaining names and addresses of witnesses (if any) from his attorneys, and we hold that this portion of the interrogatories should have been more fully answered.

However, we take a different view when we reach that part, "State what said employee reported to you or your attorneys", and "State what said person or persons reported to you or your attorneys." This request had the same effect as asking for statements made by witnesses, and cannot be granted without a showing of necessity. See *Hickman* v. *Taylor, supra.* Of course, a situation may well arise where a party can show necessity, *i. e.,* a witness cannot be found, or the expense of obtaining the statement or deposition of a witness, perhaps hundreds of miles away, is prohibitive. Numerous

other valid reasons might well be advanced. However, in the case before us, there is no showing at all of necessity.

We have never had occasion to discuss this subject before, and we take this opportunity to make some general observations, since the question will arise before trial courts many times in the future. We think it would be vastly unfair to require an attorney, who perhaps has worked diligently in interviewing witnesses and obtaining statements, to turn his file of statements, his "work product", over to his adversary, who is then able to obtain the same amount of information with but a minimum of effort. Such a requirement could well have the effect of rewarding slothfulness, and would certainly tend to discourage initiative and promptness in preparing one's case. Counsel for each side might (as) well procrastinate while the other obtained statements. After all, in the average case, once counsel has obtained the names and addresses of possible witnesses (information to which he is entitled), there is nothing to prevent him from interviewing and taking the statements himself.

III.

"The Trial Court Erred in Permitting Evidence of the Absence of Floor Sweep on Occasions Other Than the One in Issue."

Alfred Morris testified that he had seen floor sweep on the premises outside the store only once or twice, in 1952 or 1953, and that he had placed it there himself and swept it up. Harold Brannon, a former employee, testified he had never seen any floor sweep on the outside during the three or four months that he worked for appellees. This testimony was objected to by appellant. Appellees contend that the testimony was admissible as habit evidence, but the evidence in question went beyond merely showing the daily habit, routine, or method of cleaning. Appellees were entitled to present testimony as to the daily manner in which the floor was cleaned, and the compound disposed of, but the testimony that

no floor sweep had been observed on other occasions was immaterial to the question of whether there was sweep on the outside on this particular occasion. The fact that no floor sweep had been observed at prior times certainly did not establish that none was there on this occasion. Likewise, the evidence of these witnesses covered a long period of time, and we have held that evidence of conditions on remote occasions is not admissible to show conditions on the date in question. See *Little Rock & Ft. Smith Rwy. Co.* v. *Eubanks,* 48 Ark. 460, 3 S. W. 808. It follows that the court erred in admitting the testimony in question.

IV.

"The Trial Court Erred in Permitting Appellees' Witness to Testify that He had Never Slipped and Fallen on Floor Sweep at Campbell's Super Market."

Brannon testified that he worked for appellees for several months during the summer of 1958, and his duties included sweeping the premises of the super market. He testified that in sweeping, he used and distributed floor sweeping compound, and he was asked if he had ever slipped and fallen on floor sweep. Over appellant's objections, the witness was permitted to testify that he had never slipped, nor fallen. We think the factual situation in this case precludes this evidence. Mrs. Dritt's complaint was predicated upon two different theories (or a combination of both). One was that her fall was caused by a pile of floor sweep outside the exit to the building; the other, was that in walking in the store, floor sweep accumulated on the heels and soles of her shoes, and upon walking down the incline (just outside the exit), the accident occurred because of the contact between the soles of her shoes (covered with the compound) and the concrete, creating the slipperiness mentioned by the expert, Heiple. If Mrs. Dritt had fallen *Inside* the store, Brannon's evidence would have been admissible, but she fell *outside,* and Brannon did not testify that he had walked on to the concrete incline

after walking through the floor sweep.[3] This, under the evidence, would seem to make a vast difference in the factual situation, for appellees' proof was directed to the fact that the *combination* of *floor sweep and the concrete incline* caused the fall.

In accordance with the reasoning herein set out, the judgment is reversed, and the cause remanded.

[3] For that matter, the evidence does not reflect the kind of shoes worn by Brannon while walking through the floor sweep, *i.e.*, whether they had leather soles.

McGehee *v.* Mid South Gas Co.

5-2644 357 S. W. 2d 282

Opinion delivered May 14, 1962.

[Rehearing denied June 4, 1962]

Arnold & Hamilton by *William S. Arnold,* for appellant.

Mehaffy, Smith & Williams, by *William J. Smith* and *Frank Warden, Jr.,* for appellee.

ED. F. MCFADDIN, Associate Justice. This suit is an effort by appellant, a minority stockholder, to prevent Mid South Gas Company from transferring its assets to Arkansas Louisiana Gas Company. Appellees —defendants below—are the Mid South Gas Company and its officers and directors. On motion of appellees, the Chancery Court dismissed the appellant's complaint without affording him a trial on the merits; and this appeal resulted. The background facts need to be given in some detail for a full understanding of the matter.

Mid South Gas Company (hereinafter called "Mid South") and Arkansas Louisiana Gas Company (hereinafter called "Arkla") were public utility corporations engaged in transmitting and selling natural gas in this State. On May 19, 1961, Mid South and Arkla entered into an "Agreement and Plan of Reorganization", by the terms of which Arkla would issue 336,000 shares of its common stock to Mid South and would assume the debts and obligations of Mid South, all in exchange for the properties and assets of Mid South as a going concern; and with the further provision that Mid South would thereafter dissolve and distribute said stock *pro rata* to the holders of its common stock on the basis of one share of Arkla stock for two shares of Mid South stock. Since both Mid South and Arkla were public utility corporations, the entire Agreement and Plan of Reorganization was subject to the approval of the Arkansas Public Service Commission; and on June 8, 1961, Mid South and Arkla filed their joint application for approval of such plan and the Public Service Commission set the matter for a hearing date of June 26, 1961.

Appellant, Wiley A. McGehee, was a stockholder in Mid South; and on June 21, 1961, he filed the present case in the Pulaski Chancery Court against Mid South and its officers and directors. The complaint alleged that it was a class suit on behalf of the plaintiff and others similarly situated; that the plaintiff was a minority stockholder in Mid South; that on May 19, 1961, without notice to the stockholders, the officers and directors of Mid South entered into the aforementioned

agreement with Arkla; that no valid notice of a stockholders' meeting was given; that the stockholders' meeting of Mid South held on June 8, 1961 for the purpose of voting on the said Agreement and Plan of Reorganization with Arkla was illegal and void; that the proposed plan of stock distribution was illegal and inequitable; that Ark. Stats. §§ 64-701 *et seq.* (under which appellant says the merger agreement was proposed) are unconstitutional and void; that the entire agreement and plan of reorganization with Arkla is void; and that Ark. Stats. §§ 64-110 *et seq.* are violative of Art. 7, §§ 1 and 15 of the Arkansas Constitution. The prayer of the petition was that Mid South and its officers and directors be enjoined and restrained from further proceeding in the agreement with Arkla. There was thus pending: (a) the suit in the Chancery Court, which involves the present appeal; and (b) the petition of Mid South and Arkla before the Public Service Commission, which latter proceeding came to us in Case No. 2699 in this Court, subsequently to be mentioned.

On the same day that the appellant filed his suit in the Chancery Court (*i.e.*, June 21, 1961), he likewise filed before the Public Service Commission his motion for continuance, informing the Public Service Commission of the Chancery suit and praying that the Public Service Commission delay any action in regard to the contemplated Agreement and Plan of Reorganization between Mid South and Arkla until the Chancery case could be heard and decided. The appellant also filed before the Commission his response and objections to any proceedings, and presented the same questions that he had posed in the Chancery case. The Arkansas Public Service Commission proceeded to a hearing in the matter on July 5, 1961, overruled the motion for continuance, denied the objections and response of appellant, and approved in every respect the Agreement and Plan of Reorganization.[1] The final result of the Public Service Commission proceeding will subsequently be stated.

[1] We copy the order of the Public Service Commission in the said case since it appears as an exhibit in the transcript in the case now before us.

"ORDER

"On June 8, 1961, a joint application was filed by Arkansas Louisiana Gas Company "Ark La" and the MidSouth Gas Company "MidSouth" seeking approval of their Agreement and Plan of Reorganization entered into on May 19, 1961. Pursuant to an order issued by this Commission the matter was set for hearing on June 26, 1961.

"On June 21, 1961, Wiley A. McGehee of McGehee, a stockholder of MidSouth, filed a Motion for Continuance of the hearing pending final adjudication of a suit filed by him in the Chancery Court of Pulaski County, Arkansas, seeking an injunction against the consummation of said Agreement and Plan of Reorganization and also a Response and Objection to the application. One June 26, 1961, the date of the hearing previously set by this Commission, the Motion for Continuance was presented and argued by counsel. The Commission inquired whether the issues propounded to the Chancery Court were raised in the Response and Objection to the Application. Counsel for the minority stockholder affirmed that this situation obtained and the Commission made the following conclusions of law:

"1. That this Commission has primary jurisdiction over the acquisition by Ark La, a gas utility operating in the State of Arkansas, of the utility property and proposed service areas within the State of Arkansas of Mid South, as contemplated by said Agreement and Plan of Reorganization, and also has primary jurisdiction with regard to the sale of public utility assets within the State of Arkansas insofar as the public interest is concerned, as contemplated by said Agreement and Plan.

"2. That this Commission also has jurisdiction over utility reorganization within the State of Arkansas and specifically the reorganization of Ark La and Mid South, with respect to the rights of the holders of their stock, bonds, and other securities, secured and unsecured, as contemplated by said Agreement and Plan of Reorganization.

"3. That this Commission is the proper forum for hearing this application, together with the matters presented in opposition thereto.

"4. That the general corporation statutes of the State of Arkansas applicable to the Agreement and Plan of Reorganization submitted for approval are constitutional.

"5. That all rights of stockholders of both parties are adequately protected by right of appeal to the courts from any order issued by this Commission.

"6. That no legal reason was presented for the continuance sought herein.

"Based upon the above conclusions of law, the Commission denied the Motion for Continuance and proceeded with the hearing on the merits on June 26, 1961, in the hearing room of the Commission, Justice Building, Little Rock, Arkansas, as set by previous order.

"From oral testimony and documentary evidence submitted at the hearing and from briefs filed by opposing counsel, the Commission makes the following findings:

"1. That this Commission has jurisdiction of the matters presented in the application and the response and objection to the application.

"2. That Arkansas Louisiana Gas Company and Mid South Gas Company have entered into a certain Agreement and Plan of Reorganization dated May 19, 1961, a copy of which was attached to the application herein and submitted in evidence in the hearing of the application, and which has now been duly approved by Ark La and Mid South in the manner required by the statutes of the State of Delaware and the State of Arkansas, under the laws of which Ark La and Mid South are incorporated respectively. By the terms of such Agreement and Plan of Reorganization, Ark La will issue 336,000 shares of its Common Stock to Mid South and will assume the debts and obligations of Mid

On July 7, 1961, the appellees herein, being Mid South and its officers and directors, filed in the Chancery Court their motion to dismiss the complaint of McGehee, alleging: that McGehee had entered his appearance before the Public Service Commission in the Arkla-Mid South matter; that he had filed a response; that he had participated in the hearing; that the same questions raised in the Chancery case were likewise presented in the hearing before the Public Service Commission; that the Public Service Commission had ruled adversely to McGehee; that he could appeal that ruling; and that his remedy at law by appeal was adequate and complete.

South, all in exchange for the properties and assets of Mid South as a going concern; and that Mid South will thereafter dissolve and distribute said stock pro rata to the holders of the present Common Stock of Mid South with one (1) share of stock in Ark La being distributed for each two (2) shares of stock in Mid South. The details of the conditions and the mode of carrying into effect the provisions of the agreement are as set forth specifically in said Agreement.

"3. That the holders of the secured indebtedness and other creditors of Arkansas Louisiana Gas Company and the Mid South Gas Company will not be adversely affected.

"4. That the value of said Ark La stock, plus the debts and liabilities of Mid South to be assumed by Ark La, is equal to the fair value of the property of Mid South to be exchanged for said stock.

"5. From testimony offered at the hearing, the Commission finds that the rates and service to the customers now being served by both companies will not be adversely affected by the said Agreement and Plan of Reorganization, which is in the public interest and should have the consent and approval of the Commission.

"6. That Ark La's ability to make gas available for industrial development in the areas served by Mid South exceeds the ability of Mid South in this connection.

"IT IS, THEREFORE, ORDERED THAT:

"The application of Arkansas Louisiana Gas Company and Mid South Gas Company in the above entitled and numbered proceeding be, and the same is hereby, granted; and accordingly the Commission hereby grants its approval and consent to the consummation of the Agreement and Plan of Reorganization between Arkansas Louisiana Gas Company and Mid South Gas Company in the manner contemplated by the said Agreement and Plan of Reorganization between those two corporations dated May 19, 1961, and approved by proper corporate action of each company, and authorized Ark La and Mid South to consummate and carry out said Agreement and Plan of Reorganization, and in that connection, upon the consummation thereof for Mid South to dissolve and distribute 336,000 shares of Ark La Common Stock pro rata to the holders of the present Common Stock of Mid South, and as well to do any and all things necessary and proper to consummate said Agreement and Plan of Reorganization.

"This order shall be in full force and effect immediately upon its issuance.

"BY ORDER OF THE COMMISSION

"This 5th day of July, 1961."

The motion was supported by copies of the pleadings filed by McGehee before the Public Service Commission, the order of the Commission, and excerpts from the record of testimony before the Public Service Commission. To the motion to dismiss Appellant McGehee filed a response, claiming that the Public Service Commission was without jurisdiction to hear the matter; that his rights of appeal from the Public Service Commission were not adequate and complete; and that the Public Service Commission was merely an administrative tribunal and had no authority to adjudicate the questions raised in the Chancery case. On September 25, 1961, the Chancery Court sustained the motion to dismiss and McGehee duly prosecutes the appeal to this Court.

So much for the background facts. In sustaining the motion to dismiss the petition, the Chancery Court found "that the plaintiff has an adequate remedy at law by way of appeal from the Order of the Public Service Commission as provided by law . . ." We recognize that equity has jurisdiction in a case of this kind if there is no adequate remedy at law; and that the mere existence of a remedy at law does not deprive equity of jurisdiction unless such remedy is "clear, adequate and complete." *Ex Parte Conway,* 4 Ark. 302; *Chapman & Dewey* v. *Osceola District,* 127 Ark. 318, 191 S. W. 220; *Bassett* v. *Mutual Benefit Assn.,* 178 Ark. 906, 12 S. W. 2d 893; *Little Red River Dist.* v. *Thomas,* 154 Ark. 328, 242 S. W. 552; *Meriwether* v. *State,* 181 Ark. 216, 26 S. W. 2d 57; and *Consumers Co-op.* v. *Hill,* 233 Ark. 59, 342 S. W. 2d 657. See also 19 Am. Jur. 118, "Equity" § 114; and 30 C. J. S. 347, "Equity §§ 25 *et seq.* Therefore, in order to sustain the ruling of the Chancery Court, we must determine (a) that the Public Service Commission had jurisdiction; and (b) that McGehee's remedy, before the Public Service Commission and by appeal from its order, afforded him full, adequate, complete, and expeditious relief.

That the Public Service Commission had jurisdiction to inquire into the contract between Mid South and Arkla must be conceded, since each is a public utility and

since § 73-253 Ark. Stats. provides that only with the consent and approval of the Public Service Commission may two or more utilities consolidate or one utility acquire the stock of another utility. The same section prescribes the procedure under which public utilities may obtain such consent and approval of the Public Service Commission; so this statute establishes that the Public Service Commission had jurisdiction. The next and more serious question is whether the jurisdiction of the Public Service Commission afforded McGehee a full, adequate, complete, and expeditious remedy: *i.e.,* could every objection that he listed in the Chancery case be likewise presented and decided before the Public Service Commission or by appeal from its order to the Circuit Court and to this Court. In 30 C. J. S. 345, "Equity" § 23, cases are cited from many jurisdictions to sustain this statement:

"When jurisdiction has become concurrent through statutory enlargement of the legal remedy, a court of equity, although recognizing the existence of its jurisdiction, will generally decline to exercise it where the remedy at law is complete and adequate, and no special circumstances exist demanding the interference of equity."

As heretofore stated, McGehee alleged: that there was no valid meeting of the stockholders of Mid South; that the proposed plan between Mid South and Arkla was illegal and inequitable; that § 64-701 *et seq.* Ark. Stats. were unconstitutional and void; that the entire agreement between Mid South and Arkla was void; and that §§ 64-110 *et seq.* Ark. Stats. were violative of Art. 7, §§ 1 and 15 of the Arkansas Constitution. Did McGehee have a full, adequate, complete, and expeditious remedy to present each of these attacks before the Public Service Commission and, on appeal, to the Circuit Court and to this Court? We unhesitatingly answer this question in the affirmative. We have a series of cases which show the extent of issues that may be presented in a hearing before the Public Service Commission and on appeal therefrom. Some of these cases are: *Southwest-*

ern Gas & Elec. Co. v. *City of Hatfield,* 219 Ark. 515, 243 S. W. 2d 378; *City of Ft. Smith* v. *Southwestern Bell Telephone Co.,* 220 Ark. 70, 247 S. W. 2d 474; *Arkansas Power & Light Co.* v. *Arkansas Public Service Commission,* 226 Ark. 225, 289 S. W. 2d 668; and *Town of Emerson* v. *Arkansas Public Service Commission,* 227 Ark. 20, 295 S. W. 2d 778.

In *Southwestern Gas* v. *Hatfield, supra,* one of the questions presented was whether the Town Council of Hatfield had validly approved the sale of the electric distribution system from Southwestern to Rich Mountain Co-op.; and we held that the Commission had full power to determine whether the Town Council of Hatfield had validly approved the sale, saying:

"The Commission's determination of the question is subject to review by the courts. Orderly procedure and administrative efficiency demand that the regulatory body be vested with authority to make preliminary determination of legal questions which are incidental and necessary to the final legislative act. Otherwise endless confusion would result because different phases of the same case might be pending before the Commission and the courts at one time. *St. Clair Borough* v. *Tamaqua & Pottsville Elec. Ry. Co.,* 259 Pa. 462, 103 A. 287, 5 A. L. R. 20; *State ex rel Cirese, et al.* v. *Ridge, Presiding Judge,* 345 Mo. 1096, 138 S. W. 2d 1012. It is our conclusion that the Commission had jurisdiction to determine whether the town council of Hatfield approved the sale in question and that the trial court erred in holding otherwise."

In *City of Fort Smith* v. *Southwestern Bell Telephone Co., supra,* there was involved the question of telephone rates fixed by the Public Service Commission, and we said:

"As regards the review sought by Southwestern, we do examine, and have so examined, to see that the order of the Commission does not amount to a confiscation of the property of the Utility, and that no rights under the United States or State Constitutions have been invaded."

In *Arkansas Power & Light Co.* v. *Arkansas Public Service Commission, supra,* the correctness of rates fixed by the Public Service Commission was involved and we said:

"When an appeal is taken to the circuit court, that court, as well as this court on appeal from the circuit court, shall not extend the review of the Commission's findings and actions 'further than to determine whether the Department (Commission) has regularly pursued its authority, *including a determination of whether the order, or decision under review violated any right of the complainant under the Constitution of the United States or of the State of Arkansas.*' (Sec. 73-233 (d) Ark. Stats.)" (Italics our own.)

In *Town of Emerson* v. *Arkansas Public Service Commission, supra,* there was a contest before the Public Service Commission as to which of two utilities should provide telephone service in a given area and it was there recognized that, on review, the courts examine to see whether the Commission has regularly pursued its authority, "including a determination of whether the order under review violated any right of the complainant under the U. S. or State Constitutions."

In these four cases—and others could be cited to the same effect—we have held that the Commission in the first instance and the courts on appeal could consider such matters as each of the five points of attack made by McGehee in the case at bar. It thus follows that McGehee's remedy through the proceedings before the Commission and on appeal, was full, adequate and complete in that he could urge every point that he alleged in the Chancery Court. That his remedy through the Commission's proceedings was expeditious is shown by the fact that the Commission's Order was made on July 5, 1961, affirmed by the Circuit Court on September 25, 1961, and an appeal to this Court was dismissed on February 19, 1962, because McGehee had not pursued his appeal expeditiously and within the time prescribed by law. The fact that McGehee lost his appeal to this court—questioning the Public Service Commission's Order—by

failing to prosecute it in due time, does not reinstate equity jurisdiction, because where a legal remedy has been lost, through failure to seek it at the proper time, equity will not for that fault entertain jurisdiction. 30 C. J. S. 346, "Equity" § 24.

We therefore affirm the decree dismissing this Chancery case, since the remedy at law was full, adequate, complete, and expeditious.

WARD, J., dissents.

PAUL WARD, Associate Justice, (Dissenting). In brief, my reasons for dissenting are set out below.

If McGehee can substantiate the allegations of his complaint in chancery court, it means money in his pockets. I assume that no one questions his right to try to prove his case against Mid South in a court of competent jurisdiction. The majority opinion denies McGehee this right unless the Arkansas Public Service Commission is in fact such a court.

To my mind, to state the above issue is to answer it. I have never heard it contended or even intimated that the Arkansas Public Service Commission was a court, in law or equity, to resolve legal differences between individuals or corporations.

It cannot be disputed that the Public Service Commission has only such powers as are given it by the legislature. Ark. Stats. § 73-115 contains that grant of powers which is "all matters pertaining to the regulation and operation of—" (naming the several utilities). Nowhere is the commission invested with the general powers of a court. Yet, the effect of the majority opinion is to invest the commission with the *general* jurisdiction of a duly constituted court.

The majority attempt to justify the result reached on the ground that McGehee had the right of appeal to the circuit court. The fallacy of that position is clearly revealed by an examination of the law governing trials before the commission and appeals therefrom. First, however, it is pertinent to point out that if McGehee is

permitted to exercise his constitutional right of trial by a court, the introduction of all evidence would be in accordance with rules developed by thousands of decisions over a long period of time. Yet, in a trial before the commission a radically different situation would obtain. Ark. Stats. § 73-127 provides that the commission "shall not be bound by the strict technical rules of pleading and evidence . . ." but it may use its own discretion. Can the effect of such a trial before the commission be erased or cured by an appeal to the circuit court? Definitely and clearly it cannot. Section 73-133 (Ark. Stats.) governs appeals from the commission to the circuit court of Pulaski County. After providing that such appeals are automatically allowed and that the secretary of the commission shall make a transcript of all proceedings and all evidence, the section then states: "The said circuit court shall thereupon review said order *upon the record* presented . . ." (Emphasis added.)

In *Southwestern Gas and Electric Company* v. *City of Hatfield*, 219 Ark. 515, 243 S. W. 2d 378, and *Woodruff Electric Cooperative* v. *Arkansas Public Service Commission*, 234 Ark. 118, 351 S. W. 2d 136, we recognized that the commission can exercise quasi judicial functions in matters incidental to the administration of the act. Those holdings, however, have no application here because McGehee's grievance with Mid South was real and in no way incidental to the merger.

For the reasons above noted I respectfully dissent.

HANEY *v.* HANEY.

5-2710 357 S. W. 2d 19

Opinion delivered May 14, 1962.

John Harris Jones, for appellant.

Reinberger & Eilbott and *Don H. Smith,* for appellee.

George Rose Smith, J. This is an application by the appellee, Dorothea C. Haney, for an increase in the amount awarded her for the support of the parties' two minor sons. The children's father has appealed from an order increasing the allowance from $200 to $275 a month.

The appellee obtained a divorce on January 13, 1960, and was given the custody of the children. The decree recited that the parties had agreed to a settlement of their property rights, that the defendant should pay $200 a month for the support of the children, and that the defendant should pay alimony at the rate of $300 a month for twenty-four months, beginning as of July 15, 1959, and continuing through June 15, 1961. It is conceded that the appellant has made all the required payments.

This petition for an increase in the allowance for child support was filed within a month after the appellee received her last installment of alimony. It is quite apparent from her testimony that the present request was motivated in part by the fact that without the monthly alimony the appellee has experienced difficulty in maintaining her household upon her own earnings of about $160 a month and the original award of $200 a month for the children. Alimony, however, is not in issue, and any increase in the allowance for the support of the children must be based upon a showing that conditions

have changed since the entry of the decree. *Lively* v. *Lively*, 222 Ark. 501, 261 S. W. 2d 409.

The proof is insufficient to support an increase of $75 a month. One change in conditions is that the appellant's monthly net earnings are $26.50 more than they were when the divorce was granted. The appellee testified that the expenses of her older son are greater now that he is in the eleventh grade than they were when he was in the ninth grade, but she made no attempt to express the additional expense in dollars and cents. She indicated a desire to put the younger child in a private day school, but the added expense of $20 a month would apparently be largely offset by the fact that a maid may no longer be needed to look after the child while the appellee is at work.

It is with reluctance that we differ with the chancellor in a case of this kind, but we are unable to find in the record sufficient proof of changed conditions to support the increase that was granted. The figures that the appellee gave concerning her monthly expenses indicate that the original allowance was nearly enough to provide for the two boys. Her statement that she needs an increase of more than $50 a month evidently refers in part to the matter of replacing the lost alimony.

We have concluded that an increased allowance of $25 a month is the most liberal award that can be justified by the appellee's proof of changed conditions. The chancellor's order will accordingly be modified to fix the monthly allowance at $225, with the appellant to pay the costs.

WILLIAMS *v.* WILLIAMS.

5-2693 357 S. W. 2d 25

Opinion delivered May 14, 1962.

O. W. Pete Wiggins, for appellant.

Howell, Price & Worsham, for appellee.

PAUL WARD, Associate Justice. The parties to this action were divorced in 1952. The decree awarded the two minor children to the mother (appellant) and ordered appellee to pay $50 per month to the mother for support of the minors. The present litigation stems from the failure of appellee to make the monthly payments.

Since we have reached the conclusion that the cause must be remanded for further development of pertinent facts, we deem it unnecessary to discuss in detail all the testimony or all the numerous pleadings set forth in the record.

After the divorce decree in 1952 the record is silent until August 21, 1958 when the court cited appellee to show cause why he should not take care of the delinquent payments and increase the monthly payments. About one month later appellee was ordered to pay $3,300 and to quit poisoning the minds of the children against the mother. A little later the above order was set aside for lack of notice. On April 20, 1961 appellee (after being again cited to show cause) was ordered to pay $100 per month ($25 per week) for support, but no order was made about the delinquent payments. About four months later appellee was cited to show cause why he had not made the $100 payments, and why he should not pay the $3,000 past due.

Climaxing the above series of proceedings the trial court, on September 19, 1961, (a) refused to order appellee to discharge in full all delinquent payments; (b)

ordered appellee to pay $600 for support of the minors; and, (c) reduced the monthly payments from $100 to $50 per month.

A careful review of the record (as abstracted by both sides) sheds very little light on the phases of this case about which we are most concerned, viz: (a) the financial needs of the two minor children; (b) the financial ability of appellee to supply such needs; and, (c) the justification for relieving appellee from paying all the past due monthly installments. We feel that justice would be better served by remanding the cause for further development along the lines indicated.

Accordingly, the decree of the trial court is reversed and the cause is remanded.

McCLAIN *v.* ALEXANDER.

5-2678 357 S. W. 2d 1

Opinion delivered May 14, 1962.

[Rehearing denied June 4, 1962]

Thorp Thomas, for appellant.

J. B. Milham, for appellee.

SAM ROBINSON, Associate Justice. This is a suit by appellees, Robert M. Alexander and his wife, to cancel a contract for the sale of real estate to appellants, S. C. McClain and his wife. The trial court ordered the contract cancelled and possession of the property delivered to the Alexanders. The McClains have appealed.

In 1954 the Alexanders purchased the property involved from L. T. and Annie Miller for the sum of $2,500.00. In November, 1957, the Alexanders contracted to sell the property to the McClains. The consideration was the assumption by the McClains of the balance of $1,558.17 owed to the Millers, payable in monthly installments of $35.00, and payments to the Alexanders of the additional sum of $500.00, payable $25.00 monthly.

In February, 1961, apparently, the McClains had paid in full the $500.00 owed to the Alexanders, but owed not exceeding $381.00 on the indebtedness to the Millers. At that time the Alexanders contended that the McClains had breached the contract of purchase in several respects, and thereby declared as due the entire balance owed to the Millers. The Alexanders then proceeded to pay off the Miller indebtedness and on February 13, 1961, obtained a Warranty Deed to the property from Annie Miller (widow of L. T. Miller).

Under the terms of the contract with the McClains the Alexanders were obligated to furnish an abstract of title upon the payment of the purchase price. On February 16, 1961, Mr. Thorp Thomas, attorney for the McClains, wrote to Mr. Alexander as follows: "Please be advised that I am the attorney for Mrs. Ruby McClain and in such capacity she brought me a contract entered into by you and your wife and she and her husband, wherein you agreed to convey certain piece of property in Saline County, where Mr. and Mrs. McClain now live. She further tells me that you have demanded that she pay the full purchase price at this time. Therefore, pursuant to the contract, we ask that you deliver a warranty deed to Mr. and Mrs. McClain and an abstract to Mr. Ben McCray, and he will in turn examine the abstract and will pay you the balance due you under the contract." Instead of delivering the abstract and deed as requested, the Alexanders, two days later, filed this suit to cancel the contract.

True, the contract provides that time is of the essence, but when the seller elected to accelerate the payments, the buyer did not protest or refuse payment; he

merely asked that the deed and abstract be delivered to a lawyer's office where the abstract could be examined and payment would be made. This was a reasonable request and in no way violated any provision of the contract. The object and function of an abstract of title is to enable the purchaser to ascertain the condition of the title and to facilitate a further examination of the records if desired. 1 CJS 381

Here, the sellers agreed to deliver to the buyers a deed covenanting that they had not in any manner encumbered the property, and that they would warrant and defend the title against all claims whatever done by them. Certainly the buyer should have a reasonable time to examine the abstract to determine if he was getting the kind of title he was entitled to receive. *Drury* v. *Mickelberry*, (Mo.) 129 S. W. 237. In 52 A. L. R. 1482, it is said: "The general rule is that the abstract should be furnished for examination within a reasonable time before the date fixed for performance of the contract by the vendee, in order to give him an opportunity to examine it before performing the contract." See also 55 Am. Jur. 732.

As heretofore pointed out, when the seller accelerated the payments owed under the terms of the contract, the buyer merely requested that the abstract be delivered to a lawyer's office so that it could be examined to determine the condition of the title, and payment would be made. In these circumstances the trial court erred in ordering that the contract be cancelled.

Reversed with directions to enter a decree consistent herewith.

DUCKWORTH *v.* PEOPLES INDEMNITY INS. CO.

5-2663 357 S. W. 2d 26

Opinion delivered May 14, 1962.

Rhine & Rhine, for appellant.

Frierson, Walker & Snellgrove, for appellee.

JIM JOHNSON, Associate Justice. This case involves a coverage exception clause in a fire insurance policy.

The material facts as between the appellants, Mr. and Mrs. Duckworth, and the appellee, Peoples Indemnity Insurance Company, are undisputed. The appellee issued a policy of fire insurance covering a farm dwelling owned by the appellants, Mr. and Mrs. Duckworth, which was subject to a mortgage in favor of the Federal Land Bank of St. Louis. The insurance policy bore a mortgage clause which provided for payment of loss to the Federal Land Bank of St. Louis and further provided that the interest of the mortgagee should not be invalidated by the occupation of the premises for purposes more hazardous than are permitted by the policy but that, in the event the company should be re-

quired to pay to the mortgagee any sum for loss or damage under the policy as to which no liability existed in favor of the mortgagor, the company should be legally subrogated to all rights of the mortgagee under its security. The principal policy provided that the company should not be liable for any loss or damage occurring while the hazard is increased by any means within the control or knowledge of the insured or while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days without written endorsement attached to the policy.

On or about July 7, 1960, the insured dwelling was destroyed by fire. The appellee company refused to pay the claim to the mortgagors, the appellants, Mr. and Mrs. Duckworth, contending that the house was unoccupied but paid the Federal Land Bank of St. Louis and demanded subrogation. The right of subrogation was acknowledged by a subrogation agreement executed by the Federal Land Bank of St. Louis and it is admitted by appellants that the right exists provided the building was, in fact, unoccupied at the time of the fire within the meaning of the policy.

The trial court found for appellee and in so finding recited the general rules relative to "vacant or unoccupied" as follows:

"In 29A Am. Jur., Page 112, § 907, it states:

"Although sometimes used interchangeably, the terms 'vacant' and 'unoccupied' are not generally regarded as synonymous terms in the law of insurance. 'Vacant' means without inanimate objects; 'Unoccupied' means without animate occupants . . . and the terms . . . 'Vacant or unoccupied', imply a situation in which the insured building . . . are without an occupant of the kind, and during the time, contemplated by the intention of the parties, as indicated by the terms and descriptions of the policy. A dwelling is 'occupied' when it is in actual use by human beings, who are living in it as a place of habitation, and is 'unoccu-

pied' when it has ceased to be a customary place of habitation or abode, and no one is living or residing in it."

"In 29A Am. Jur., Page 115, § 910, it further states:

"If, however, a dwelling is left without an occupant for an unreasonable length of time, it should be deemed unoccupied irrespective of the intention of the occupant.

"On page 116, in § 911 of the same volume it states:

"Of course, if the policy expressly provided that it shall be void if the insured building, 'whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain' for a specific number of days, that provision controls . . ."

The sole issue presented for our consideration on this appeal is whether the property was, in fact, vacant or unoccupied at the time of the fire or whether the hazard was increased by a means within the knowledge or control of the insured appellants. It is undisputed that the last tenant of the property moved out about May 30, 1960, and that no one else occupied the property from that date until the fire on July 7, 1960, so that there is no question that as far as time is concerned it was unoccupied for at least the time prohibited by the policy.

Appellants each admitted that they were aware that their tenant, a Mr. Droke, moved out of the house about May 30, 1960, and were so advised by a letter received by them from Droke and that neither ever informed the company or its agents that the property was no longer occupied. Nobody was living in the house at the time of the fire.

The record is clear that appellants never actually resided in the house. They merely stored their furniture in two unused rooms while Droke was living in the house and left for a three months' visit in Arizona. They were last in the house about April 5 or 6, 1960. Appellants did, however, refer in their testimony to the fact that

the house was their home. We can from the record only conclude that they merely intended to make it their home upon their return. Appellants admitted that they never actually lived in the house themselves, never spent the night there and at the time of the fire nobody was eating or sleeping in the house or occupying it at all nor had there been any occupancy for approximately six weeks prior to the fire.

Applying these facts from the record to the correct general rules recited by the learned Chancellor as set forth above, we cannot say that the trial court's findings are against the weight of the evidence. Certainly the language of the policy is unambiguous; this being true the courts have no choice but to construe the insurance contract according to the plain import of its language. *Southern Surety Company* v. *Penzel,* 164 Ark. 365, 261 S. W. 920. It follows, therefore, that even the most liberal construction we could give in favor of the insured under the facts here presented justifies no conclusion except that the decree must be affirmed.

ROBINSON, J., dissents.

SAFFERSTONE *v.* TUCKER.

5-2655 357 S. W. 2d 3

Opinion delivered May 14, 1962.

U. A. Gentry, Julius C. Acchione and *Harold L. King*, for appellant.

Mehaffy, Smith & Williams, by *Herschel H. Friday, Jr.,* and *Robert V. Light,* for appellee.

NEILL BOHLINGER, Associate Justice. The school that is known as Rightsell School is located in the south central portion of Little Rock and is within the Little Rock School District.

The appellants in this case are property owners within the attendance area of the Rightsell School and the appellees are the officials of the Little Rock School Board. Serving the general attendance area of the Rightsell School, or adjacent thereto, are two other exclusively White elementary schools and two Negro elementary schools.

Prior to the institution of this suit, the appellees announced the intention of transferring the White pupils in the Rightsell School to adjacent White schools and moving 421 Negro pupils from two Negro schools to the Rightsell School. To prevent this transfer and change, the appellants brought an action in the Pulaski Chancery Court to restrain and enjoin the appellees from making that change. The principal allegation of the appellants is that the Board was guilty of an abuse of discretion in transferring the Rightsell pupils to other schools and converting what had always been an exclusively White school in an exclusively White residential district to a Negro school; that such action by the School

Board would be arbitrary, unreasonable, capricious, wrongful and discriminatory, and would result in great disadvantage to the White pupils being transferred and would result adversely on the property values within the area where the Board purposes to convert a White to a Negro school.

The cause was duly presented to the Pulaski Chancery Court which sustained the action of the Board and dismissed appellants' complaint and from that action comes this appeal.

The law involved appears to be well settled. In this State a broad discretion is vested in the board of directors of each school district in the matter of directing the operation of the schools and a chancery court has no power to interfere with such boards in the exercise of that discretion unless there is a clear abuse of it and the burden is upon those charging such an abuse to prove it by clear and convincing evidence. *White* v. *Jenkins,* 213 Ark. 119, 209 S. W. 2d 457; *Merritt* v. *Dermott Special School Dist.,* 188 Ark. 243, 65 S. W. 2d 33; *Connelly* v. *Earl Frazier Sp. School Dist.,* 167 Ark. 49, 266 S. W. 929; *Pugsley* v. *Sellmeyer,* 158 Ark. 247, 250 S. W. 538; *State* v. *School Dist. No. 16,* 154 Ark. 176, 242 S. W. 545.

This declaration is in line with Ark. Stat. 80-509.

"The board of school directors of each district in the State shall be charged with the following powers and perform the following duties:

* * *

(b) Purchase buildings or rent school houses and sites therefor, and sell, rent, or exchange such sites or school houses. * * *

* * *

(m) Do all things necessary and lawful for the conduct of an efficient free public school or schools in the district."

In a very recent case, *Evans* v. *McKinley,* 234 Ark. 465 [Law Rep. No. 11, Jan. 15, 1962] this court said:

"Under these [Ark. Stat. 80-509] and other powers, the School Directors could, in good faith, reach the decision they did about the Star School [closing it]; and the evidence herein does not show that the School Directors acted in bad faith. In *Pugsley* v. *Sellmeyer,* 158 Ark. 247, 250 S. W. 538, we said: 'Courts will not interfere in matters of detail and government of schools, unless the officers refuse to perform a clear, plain duty, or unless they unreasonably and arbitrarily exercise the discretionary authority conferred upon them.' "

47 Am. Jur., Schools, § 44, p. 325, states it in this manner:

"The courts will not interfere with the exercise of discretion by school directors in manners confided by law to their judgment, unless there is a clear abuse of the discretion, or a violation of law. Every presumption is in favor of the proper exercise of power when its object is reasonably germane to the purpose of the grant."

In *White* v. *Jenkins, supra,* this court said:

"It is well settled that courts may not intervene to control matters in the discretion of administrative bodies such as school boards, in the absence of a showing of an abuse of such discretion. Necessarily, some latitude in the exercise of this discretion must be given to these boards. They represent the people of the locality affected and naturally are closer to the problems to be solved than any court or other agency could be. 28 Am. Jur. 352, *Connelly* v. *Earl Frazier Special School District,* 167 Ark. 49, 266 S. W. 929; *Pugsley* v. *Sellmeyer,* 158 Ark. 247, 250 S. W. 538; 30 A. L. R. 1212; *State* v. *Montgomery County Sp. School Dist. No. 16,* 154 Ark. 176, 242 S. W. 545."

The law therefore being clear on the authority of the school boards, the matter addresses itself to the question as to whether or not the action taken in this case was arbitrary, unreasonable, capricious, wrongful, discriminatory or oppressive. The question which presented itself to the school board was this: Rightsell

School was constructed by the Little Rock School District as a White elementary school some 55 years before this controversy arose. At the time of the erection of the Rightsell School the area involved was an exclusively White area and the construction of the Rightsell School provided school facilities for 421 pupils and for many years the school cared for the educational primary requirements of all the White children within the area.

With the changing years we now find that there are registered in the Rightsell area 944 pupils, of which 300 are White and 644 are Colored. The adjacent schools of Parham and Centennial have approximately the same ratio of Negro to White residents. In the case of the Rightsell School, we have a plant designed for 420 pupils with but 300 White children eligible in the registered area. At the same time we have three adjacent Negro schools which were overcrowded at the time of the conversion. Therefore, we must assume that the Board weighed the problem that in one instance we have vacant classrooms in three White schools and 420 Negroes as an overflow from the Negro schools. Confronted with this problem, the appellees decided upon the conversion of Rightsell to an all Negro school.

Did that conversion place an undue hardship on the pupils attending Rightsell School? A careful perusal of the record in this case discloses that of the White children to be transferred, 50 will be closer to their newly assigned school, 240 will be about the same distance, and only 7 will be as far as 22 blocks from their new school. The plight of these 7 pupils is unfortunate but the added distance to their new school appears minimal when weighed in the scales of the congested condition of some Negro schools which retard not only the educational advantages for transferred Negroes but all the other Negro pupils in those schools.

The appellants state, however, that the matter could have been resolved with fewer dislocations had the School Board erected a new school for the Negroes. The proof shows that while the income of the Little Rock School District is impressive, there remains over as a

surplus at the end of the year somewhere between nine and eleven thousand dollars which we assume is reserved for emergencies. One of the prime duties of a school board is to conserve the resources of the district and if the school board had elected to build a new school, it would have been confronted with the proposition that in three White schools there were available vacant classrooms which it was their duty to utilize in the best possible manner. It is true, as appellants point out, that the Board might have considered the conversion of the other two White schools that are most nearly adjacent to Rightsell, but it appears that this problem was thoroughly explored by the Board and discarded for the reason that the transferees, both White and Colored, would have greater distances to travel than is the case in the conversion of the Rightsell School. This conclusion appears logical.

Appellants contend and present credible testimony that this conversion will adversely affect the property values in the affected area. Be this damage what it may, it falls under the maxim of *Damnum Absque Injuria.* The function and duty of the School Board is not to maintain property values but to provide educational facilities for the children within the area. Assuming that property values will be adversely affected, the entire history of the City of Little Rock has been a history of repeated changes and each change has disrupted existing conditions and economic situations. It is true, as appellants state, that the area about this school is now and has always been a high-grade White residential section and the homes and buildings within that area have, since the erection of that school, reflected affluence and culture. They still do.

But the gracious and imposing homes and substantial business structures that rimmed the settlement at the landing at Little Rock many years ago were not sufficient to confine the needs of the population to that area and the stately and imposing schools and churches were not sufficient to still the growing pains of an expanding community. People migrate and populations

shift in response to economic and other needs and when that migration starts, we bend our efforts not to stopping the inevitable but we bend our facilities to caring for the newly created condition.

Such is the case before us. A shift in population has presented the problem that an area exclusively White 55 years ago can now muster but 300 White children out of a registration of 944.

The attitude of the appellants toward Rightsell is understandable. People tend to take a possessive attitude toward schools under those conditions and they think of their tax money going to the support of that school alone. That is not the case. The tax contribution of the Rightsell area goes to the support of all 29 schools that comprise the Little Rock School District and the Board must and has seen fit to view the district as a whole. The educational advantages of the 421 Negro pupils transferred are a part of the obligation of the appellees just as much as is the claim of any pupil in any registered area within the district.

We are unable to say that the appellees have been motivated by any impulse except to make available the pupils within the Little Rock School area the best school facilities possible under the circumstances.

Able counsel on both sides have been most helpful, but viewing their efforts with the record in this case we find nothing that justifies this court in overturning the decision of the chancellor.

The decree is, accordingly, affirmed.

ROBINSON, J., not participating.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, (Dissenting). In the famous case of *Olmstead* v. *United States,* 277 U. S. 478, one of the dissenting opinions profoundly acknowledged the following truth:

". . . The makers of our Constitution undertook to secure conditions favorable to the pursuit of happi-

ness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

As I view the case at bar, appellants are only seeking to preserve their constitutional "right to be let alone." While maintaining this view, certainly I acknowledge as well settled law the school board's discretionary powers in matters relating to school affairs, including the purchase and sale of school buildings, the assignment and transfer of students, the establishment in certain cases of separate schools for the White and Negro races. However, these powers are not absolute and are subject to judicial review and determination of whether the exercise of discretion has or has not been abused. In 79 C. J. S. "Schools and School Districts", Section 420, pages 299-300, it is written:

"As in suits by tax payers to restrain the activities of school authorities, courts will not interfere with the discretionary powers of school authorities in the selection of a school site, or in the erection, or relocation or removal of a school building, unless they are guilty of fraud or an abuse of discretion."

Viewing the entire case before us as a whole, I am convinced that the admitted and undisputed facts show that the Board by its action in converting the Rightsell Elementary School from White to Negro has abused its discretion. See *Nicklaus* v. *Goodspeed, et al,* (Oregon) 108 Pac. 135; *Taylor* v. *Robertson,* 16 Utah 330, 52 Pac. 1; *Fisher et al,* v. *Birkey, et al,* 307 Ill. 625, 139 N. E. 126,

In 47 Am. Jur., "Schools" § 19, p. 311, it is written, referring to school board's discretion:

"Discretion being exercisable, certain limitations are, of course, imposed. Thus, the authority must act

in good faith for the best interest of the people of the districts affected, upon just and equitable terms which do not cause unnecessary hardship."

Who is it that can say that this is in the best interest of the people of the districts affected and upon just and equitable terms when the flagrant results of the board's action shakes the stability of a steadfast community, destroys the property values therein, and compels its patrons to migrate elsewhere.

In *Bledsoe* v. *McKeowen* (1930) 181 Ark. 584, 26 S. W. 2d 900, this Court stated:

"The proper interpretation of the language used in the act is that the board may consolidate the proposed territory into a new district if, in the judgment of the board, it would be to the best interest of all parties residing in the district as a whole, meaning, of course, a substantial majority of all the parties residing in the territory. The exercise of a sound discretion on the part of the board in the organization or formation of a new district upon proper petition does not mean that the board may greatly inconvenience, oppress or outrage any parties residing in any part of the territory. The true interpretation of the statute is that the wishes and convenience of a substantial majority in the whole territory should be respected, if, in doing so, it would not greatly harm the other parties affected."

It is undisputed that one of the members of the Board himself recognized that the Board's action was discriminatory and not in the best interest of the people in the Rightsell area. The Board Member, Mr. Tucker, admitted that, if he were a property owner in the Rightsell area, he would be "mad as hell" about the conversion. What is it about the action of the Board that would prompt one of its members to volunteer the statement that he would be "mad as hell"? Why would he be "mad" and why to that extent? Could there be any other reason than the fact that he recognized that the board's decision was obviously discriminating against these people? Could it be for any other reason than the

fact that the Board's action was prejudicial, oppressive and burdensome to the property owners and taxpayers of this community? How could he justify his decision to do something to other property owners and taxpayers that he would not want done to himself.

I submit that Mr. Tucker's strong language is a concession that the school board in its unanimous decision to take this hallowed institution away from the White taxpayers and give it to the Negroes acted arbitrarily.

For these reasons and the further reason that I am convinced that if the facts were reversed and this was a case of the White patrons taking a school away from Negroes, the Federal Courts as presently constituted would not for an instant hesitate to grant to them the relief which is here by the majority being denied appellants. I respectfully dissent.

SMITH *v.* VAN DUSEN, ADM'X.

5-2682 357 S. W. 2d 22

Opinion delivered May 14, 1962.

William C. Gilliam, for appellant.

Joe W. McCoy and *Cole & Scott,* for appellee.

NEILL BOHLINGER, Associate Justice. Parties to this lawsuit reside in Hot Spring County. Roy M. Van Dusen died intestate suddenly on December 2, 1959.

For some years prior to his death it appears that Roy M. Van Dusen had enjoyed a close relationship, almost that of a congenial family, with Hester H. Smith and her sisters, Lewis Cooper Smith, Lethe E. Smith, Sherwood D. Smith, and her brother, Joe C. Smith. It further appears that Roy M. Van Dusen, over the years, had taken most of his meals with the Smith family and kept some of his important papers at their house.

On January 12, 1959, Roy Van Dusen borrowed $2,300.00 from Hester Smith and executed his note for that amount due and payable in one year with interest. On April 24, 1959, Van Dusen, doing business as the Ouachita Company, borrowed $700.00 from Hester Smith for which he executed his note payable in six months with interest. On June 30, 1959, Van Dusen, d/b/a the Ouachita Company, borrowed $4,500.00 from Joe Smith and executed his note therefor payable in one year with interest.

Van Dusen was the owner of lands in Ouachita and Hot Spring Counties and on February 13, 1959, Van Dusen executed two warranty deeds to part of his lands, the deeds purporting to convey title to Hester H. Smith. On June 30, 1959, the date on which Van Dusen borrowed $4,500.00 from Joe Smith, he executed to Hester Smith and Joe Smith his warranty deed conveying the Ouachita County lands. Joe Smith died August 4, 1959, and his will was duly probated and under that will Hester Smith was named as executrix. The will left the entire estate of Joe C. Smith to his sisters named above.

Within days after the death of Roy M. Van Dusen on December 2, 1959, Hester Smith filed the two deeds to the Ouachita lands for record and on December 8, 1959, she filed in the office of the recorder of Hot Spring County the deed which conveyed Van Dusen's Hot Spring County land to Hester Smith.

On March 28, 1960, Hester Smith, as executrix of the estate of Joe Smith, filed her inventory of the lands of the Joe C. Smith estate, which inventory did not list any of the lands described in the deed to Joe Smith by Van Dusen and thereafter, on May 11, 1960, Hester Smith, individually and as executrix of the Joe C. Smith estate, filed claims against the Roy M. Van Dusen estate on the notes executed by Van Dusen as above described. These claims were allowed and paid.

Lillian M. Van Dusen, as administratrix of the estate of Roy M. Van Dusen, applied for and obtained permission of the Hot Spring Probate Court to employ counsel to recover the lands covered by the deeds executed by Van Dusen to Hester Smith and Joe Smith. Some reference is made to the fact that in two of the deeds from Van Dusen to Hester Smith the name of Hester Smith as grantee appears to have been typed in by a typewriter other than the one used in the preparation of the deeds. We do not find it necessary to pursue that matter further.

The main question on which this case turns is: Was there such delivery of the deeds as would vest title in Hester H. and Joe C. Smith? The fact that one of the deeds was executed on the very day that Van Dusen borrowed $4,500.00 from Joe C. Smith might lend credence to the theory that the deed was intended as an equitable mortgage. That fact, however, is without weight here because the proof shows that Hester Smith filed claims against the Van Dusen estate for all sums of money which Van Dusen had borrowed from the Smith family and those claims were paid in full.

Did the execution and delivery of the deeds from Van Dusen to Hester H. Smith and Joe C. Smith constitute a gift *inter vivos*? To constitute a valid gift *inter vivos* the donor must have been of sound mind, must have actually delivered the property to the donee and must have intended to pass the title immediately and the donee must have accepted the gift. *Neal* v. *Neal,* 194 Ark. 226, 106 S. W. 2d 595; *Elrod* v. *Broom,* 214 Ark. 548, 217 S. W. 2d 246; *Carter* v. *Walker,* 200

Ark. 465, 139 S. W. 2d 233; *Krickerberg* v. *Hoff,* 201 Ark. 63, 143 S. W. 2d 560; *Bennett* v. *Miles,* 212 Ark. 273, 205 S. W. 2d 451; *Tucker* v. *Peacock,* 216 Ark. 598, 227 S. W. 2d 929.

In *Hunter* v. *Hunter,* 216 Ark. 237, 224 S. W. 2d 804, it was said:

"This court has held that there is no delivery of a deed unless what is said and done by the grantor and grantee manifests their intention that the instrument shall at once become operative to pass the title to the land conveyed and that the grantor shall lose dominion over the deed. *Maxwell* v. *Maxwell,* 98 Ark. 466, 136 S. W. 172; *Van Huss* v. *Wooten,* 208 Ark. 332, 186 S. W. 2d 174."

In the case of *Cavett* v. *Pettigrew,* 182 Ark. 806, 32 S. W. 2d 808, this court quoted the case of *Battle* v. *Anders,* 100 Ark. 427, 140 S. W. 593, as follows:

"The important question in determining whether there has been a delivery is the intent of the grantor that the instrument should pass out of his control and operate as a conveyance. The intent of the grantor is to be inferred from all the facts and circumstances adduced in the evidence. His acts and conduct are to be regarded in ascertaining his intent."

In the case of *Bray* v. *Bray,* 132 Ark. 438, 201 S. W. 281, Chief Justice McCulloch, speaking for the court, succinctly stated the law as follows:

"* * * We have said that the question of delivery is generally one of intention as manifested by acts or words, and that there is *no delivery unless there is an intention on the part of both of the actors in the transaction to deliver the deed in order to pass the title immediately to the land conveyed,* and that the grantor shall lose dominion over the deed. *Cribbs* v. *Walker,* 74 Ark. 104; *Maxwell* v. *Maxwell,* 98 Ark. 466; *Battle* v. *Anders,* 100 Ark. 427." [Emphasis supplied]

The facts in this case do not reflect that it was the intention to pass title immediately. There was a manual

delivery of the deeds but thereafter Van Dusen continued to occupy the lands, build roads, sell timber therefrom and exercise all the other prerogatives of an unlimited ownership, including the payment of the taxes. Highlighting the intention of the parties to this transaction, there is the testimony of the appellant, Hester H. Smith, which is as follows:

"Q. Isn't it a fact Mrs. [sic] Smith that all the time or from the time you first came in possession of those deeds that you knew Roy Van Dusen had a right to go on that land and cut trees and build roads on it without your permission?

A. Yes, he did.

* * *

Q. He exercised all rights on that land until he died?

A. Yes.

Q. You never did take possession of it?

A. No.

Q. You mean he had possession of it for his life time?

A. Yes.

Q. You mean that deed was to take effect at his death?

A. Yes."

Viewing all of the facts in the light of the pronouncement in the *Bray* case cited *supra* we have here an instance in which "one of the actors of the transaction" states positively that there was no intention to pass title immediately to the land conveyed. The manual transfer of the deed itself is not sufficient. The intention to transfer title immediately must be present in both of the parties to the transaction, not just one of them but both of them, and here one of the parties who in testifying against interest stated that the intention to immediately vest title was not present.

It is noted that this action was commenced by Lillian Van Dusen as administratrix of the estate of Roy M. Van Dusen, deceased. In the recent case of *Calmese* v. *Weinstein,* opinion delivered November 27, 1961, Law Rep. 234, No. 6, [234 Ark. 237], we cited the case of *Dean* v. *Brown,* 216 Ark. 761, 227 S. W. 2d 623:

"Our statute provides that *immediately upon the intestate's death, the title to real estate descends to the heirs at law, subject to the widow's dower and the payment of debts.* See § 61-101 Ark. Stats. 1947. The two sections (§ 62-411 and § 62-911, Ark. Stats. 1947), concerning lands as assets in the hands of the administrator, have been uniformly construed to mean that the title to the lands passes direct to the heirs on the death of the intestate, subject to the rights of the administrator to have the Probate Court sell the lands if such be necessary to pay the debts of the deceased. [Footnote and citations omitted. Emphasis added.]"

This is in line with our uniform holdings on the relationship of the administratrix to the lands of the intestate. Our findings in that particular have no bearing here because the probate court had directed the administratrix to bring the action. We do know there were debts against the estate and it is possible that the probate court viewed the lands as being perhaps necessary for the payment of debts.

The chancellor found that there was no delivery that would vest title and in that he was correct. We agree with his conclusion and affirm this case.

WILLIAM D. WATKINS, *et al.*, *v.* A. W. JOHNSON, *et al.*

5-2624 356 S. W. 2d 655

Supplemental opinion on rehearing delivered May 14, 1962.

[Original opinion delivered April 2, 1962, 234 Ark. 929]

GEORGE ROSE SMITH, J., on rehearing. In a petition for rehearing the appellees earnestly contend that we erred in holding that the second count in the appellants' complaint is not subject to demurrer. It is insisted that our present conclusion is contrary to the decision in *Ulrich* v. *Coleman,* 218 Ark. 236, 235 S. W. 2d 868, where we held that a cotenant's purported conveyance of the entire title, followed by the grantee's entry into open and exclusive possession of the land, amounts to a disseisin that will ripen into title if continued for the statutory period.

Here the allegations of the complaint, construed liberally on demurrer, do not describe a situation falling within the doctrine of the *Ulrich* case. This complaint does allege that Johnson conveyed the land to his son in 1943 and that the grantee took possession, but there is no statement whatever that the occupancy was continuously adverse for seven years. All that the appellees are relying upon is a statement and prayer that the defendants should be required to account for rents and profits received since 1905. There is no assertion that the lands were continuously rented for seven years or for any other period of time. To sustain this argument we should have to hold that a plaintiff who demands an accounting of any rents and profits that may have been received thereby pleads himself out of court by having affirmatively conceded the existence of adverse possession for the entire period in issue. Such a holding would plainly be contrary to the rule that on demurrer doubts are to be resolved in favor of the pleader, not against him.

Rehearing denied.

5-2609 357 S. W. 2d 261

Opinion delivered May 21, 1962.

[redacted]

Kaneaster Hodges, for appellant.

Fred M. Pickens, Jr., for appellee.

CARLETON HARRIS, Chief Justice. This is a petition for a writ of prohibition wherein we are asked to direct the Chancellor of the 8th Chancery District to refrain from a trial of a cause now docketed in his court, and to retransfer the cause to the Jackson Circuit Court. On February 2, 1959, C. W. Reed filed an action in unlawful detainer against O. D. Mitts in the Jackson Circuit Court. A bond was filed by Reed for the purpose of obtaining immediate possession. Mitts filed a cross-bond, but his sureties subsequently withdrew, and possession of the premises passed to Reed. Mitts did not, and has not, to the date of this proceeding, filed a pleading of any nature. The Circuit Court docket sheet reflects that on February 26, 1959, Mitts was granted an extension of ten days; on May 8, 1959, the case was set for jury trial, and on May 29, 1959, the Jackson Circuit Court entered the following order:

"Now on this 29th day of May, 1959, being a pretrial day of Jackson County Circuit Court, this cause comes on to be heard on the regular call of the docket, with the plaintiff appearing by his attorney, and with the defendant appearing by his attorney, after hearing each side in this cause of action finds that this cause is in equity.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that this cause of action be transferred to the Jackson County Chancery Court."[1]

The chancery docket sheet reflects that the cause was set for trial in that court by agreement, for September 25, 1959; on that date, it was set for October 27, 1959; at that time it was reset for November 24, 1959. On this late date, it was reset for a day in January, and on January 26, 1960, a motion was made to transfer the case back to Circuit Court. On April 8th, the motion was denied. In the meantime, on November 4, 1959, the discovery deposition of Arthur Damouth was taken.

Petitioner seeks the writ of prohibition, contending that the only pleading in the case is the complaint, wherein the landlord seeks possession of his premises from the tenant, and that this is a legal action not cognizable in equity. We do not agree that prohibition will lie under the facts herein set out. The order, heretofore quoted, reflects that counsel for both parties appeared in the Jackson Circuit Court, and a hearing was conducted, after which the court transferred the cause to the Chancery Court. We, of course, do not know what facts were developed at this hearing, but the then counsel for petitioner was certainly aware of the nature of the defense and the basis for the court's action. The chancery docket reflects that the cause was set in that court for hearing *by agreement.* In fact, the record does not reflect any

[1] The lawyer appearing for Reed was not the same attorney who presently represents petitioner. Reed's first attorney withdrew from participation in the case, the second attorney died, and present counsel did not enter the case until all the court proceedings, mentioned in this opinion, had already taken place.

objection to either the order transferring the cause from circuit to chancery, or the Chancellor's order refusing to transfer the cause back to the circuit court. In *Green* v. *Garrett,* 225 Ark. 311, 280 S. W. 2d 905, this Court said:

"The plaintiffs' lack of possession does not involve a complete absence of judicial power over the subject matter, as would be true if a chancery court attempted to try a criminal case or to probate a will. Instead, the present objection goes merely to the adequacy of the remedy at law and is waived if not timely interposed."

In *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. 2d 402:

"It is next insisted that the defendant, Marshall B. Reynolds, had possession of the land, and that the chancery court had no jurisdiction of the case. The record shows that the case was first brought in the chancery court and then transferred to the circuit court. Subsequently, the case was retransferred without objection by the circuit court to the chancery court. Hence, under our settled rules of practice, the chancery court had jurisdiction to try the case, and any objections to the jurisdiction of the chancery court were waived by the failure to object at the time and to save exceptions to the action of the court."

In *Richards* v. *Maner, Judge,* 219 Ark. 112, 240 S. W. 2d 6, in quoting from an earlier case, we said:

" 'The writ is never issued to prohibit an inferior court from erroneously exercising its jurisdiction, but only where the inferior tribunal is wholly without jurisdiction, or is proposing or threatening to act in excess of its jurisdiction. To illustrate: The circuit judge certainly had jurisdiction to pass upon the motion to transfer to equity the case pending in its court. If it erroneously transferred the case to equity, prohibition is not the remedy. It can be corrected only on appeal.' We then want on to point out that the party objecting to the transfer should have saved his objection and preserved his point for consideration by this court on appeal from the trial court's final judgment."

The question of defendant's failure to file an answer is a matter that can properly be presented on appeal; in fact, we find nothing in the entire record that indicates petitioner's remedy by appeal to be inadequate.

Writ denied.

ARK. COMMERCE COMM. *v.* ARK. & OZARKS RWY. CO.

5-2709 357 S. W. 2d 295

Opinion delivered May 21, 1962.

J. Frank Holt, Attorney General, by *Russell G. Morton,* Asst. Att. Gen'l.; *Harry E. McDermott, Jr.,* for appellant.

Warren & Bullion, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves the constitutionality of Act 62 of the Acts of 1961. The Arkansas & Ozarks Railway Corporation, in June, 1960, sought a certificate of public convenience and necessity from the Interstate Commerce Commission to abandon its railroad line, which operates from Seligman, Missouri, to Harrison, Arkansas. Service and operations on the railroad had been discontinued in May, 1960, as a result of flooding, which rendered impassable appellee's trackage and certain bridges in what is known as the Leatherwood Creek area. Following a lengthy hearing,

the hearing examiner for the Commission issued his intermediate report authorizing the abandonment of the road. In February, 1961, the General Assembly passed Act 62, levying a "removal" tax against "any railroad company seeking to abandon its entire line, or a major portion thereof, and seeking to sell its properties."

The constitutionality of the Act was attacked by complaint in the Pulaski Chancery Court (2nd Division), wherein it was alleged that said act was unconstitutional and void because:

"(1) It is confiscatory and amounts to a public taking of private property without just and adequate compensation contrary to Amendment 14 of the Constitution of the United States; (2) It is an unlawful, unwarranted and unconstitutional classification of taxpayers contrary to Amendment 14 of the Constitution of the United States and of Amendment 14 of the Constitution of the State of Arkansas; (3) It constitutes a burden upon interstate commerce conflicting with the commerce clause of the United States; (4) It denies the equality before the laws guaranteed by the Constitution of the State of Arkansas; (5) It is not equal and uniform, and is arbitrary and capricious contrary to the provisions of both the Constitution of the United States and of Arkansas; (6) It is a local and special law specifically forbidden by Amendment 14 of the Constitution of the State of Arkansas."

Defendants (appellants herein) were the Arkansas Commerce Commission, the Commissioners thereof, the State Treasurer, and the Attorney General. After the filing of demurrers, which were overruled, and an answer, the cause proceeded to trial, and after the taking of evidence, the court entered its decree finding that Act 62 was unconstitutional and void, and appellants were restrained and enjoined from enforcing or attempting to enforce said act. From the decree so entered, appellants bring this appeal.

A resume of the provisions of the act, and the circumstances attending its passage, is first in order. The act is composed of eight sections and an emergency clause. Section one authorizes the State Highway Department to construct and improve those portions of the highway system adversely affected by the cessation of operation of railroads previously available. Section two levies a removal tax against any railroad company seeking to abandon its line or a major portion thereof; the act purportedly levied the tax for the purpose of obtaining a portion of the necessary funds required for the maintenance of highways which will carry the extra burden of traffic. The removal tax is set at $20 per ton on scrap rail; $25 per ton on re-roll rail; $30 per ton on re-lay rail; $20 per ton on scrap frogs, switches, switch stands, guard rails, MT scrap fastenings, angle bars, bolts, spikes, scrap bridges, steel; 25% of the gross salvage value of equipment such as locomotives, turn tables, generators, cabooses, depots, round houses, and all other personal property. Section four provides that any railway company seeking to abandon rail service and remove such personal properties "shall, within seven (7) days from the passage of this Act, notify in writing the Arkansas Commerce Commission of its desire and intentions, and it shall furnish said Commerce Commission a complete inventory of its properties." This section sets forth that any expenses of the Commission for a survey and appraisal shall be borne by the railway company, and further provides that before any of the taxable assets are sold or removed, "such railroad shall pay over to the Treasurer of the State of Arkansas the full amount of removal taxes due as found by the Commerce Commission, and obtain written clearance from said Commission authorizing removal of said property." Section 5 provides certain exemptions to the act which will be hereinafter more fully discussed. Section six is the severance clause; section seven provides penalties for violation; section eight repeals laws in conflict, and section nine declares an emergency.

According to the evidence, the Arkansas & Ozark Railroad operated from Seligman, Missouri, to Harrison, Arkansas, a distance of approximately 70 miles, 62 miles of which were in this state. The evidence reflected that the revenue of the railroad had decreased almost from the time appellee commenced operations.[1] The United States government, under the authority of the Water Power Act, instituted proceedings in the United States District Court to condemn approximately 2.8 miles of the railroad near Beaver, Arkansas, and the area was subsequently flooded. According to appellee, this action, which severed the line, was the immediate cause of the petition for abandonment, and there was testimony that the cost of relocating the tracks was prohibitive. Further damage to the trackage and bridges was occasioned by the severe flood in May, 1961. This, then, is the background of the instant litigation.

Appellants question the jurisdiction of the Pulaski Chancery Court to determine the constitutionality of Act 62; contend that the proper parties were not before the court, and assert that no overt acts had been committed which would call for enforcement of the provisions of the statute, *i. e.,* appellee had not notified the Commerce Commission of any intention to remove the railroad, nor asked for any written permission to remove. Accordingly, it is contended that appellee had not exhausted its administrative remedy. We find no merit in this contention. Under the authority of the State Constitution, Article 16, Section 13, any citizen of a county, city, or town, may institute suit to prohibit the enforcement of illegal exactions. In *Commissioner of Revenue* v. *Dillard's, Inc.,* 224 Ark. 826, 276 S. W. 2d 424, we upheld the right of the appellee to seek an injunction against the collection of a tax alleged to be illegal. In *McCarroll, Commissioner of Revenue* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. 2d 254, the court said:

[1] In 1955 the loss was $14,694.00; in 1956 it was $32,361.00; in 1957 it was $41,703.00; in 1958 it was $59,626.00; and in 1959 it was $56,937.00. For the first six months of 1960 it was $30,226.00.

"We are of the opinion, therefore, that an individual has the right to go into a court of equity to enjoin the enforcement of any illegal tax or exaction and that this same right inures to the corporation, appellee, in the instant case, since a corporation is a person within the meaning of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States."

The Commerce Commission is charged with appraising the properties and issuing the clearance, and the removal tax must be paid to the State Treasurer. Since these are the only parties directly involved in the collection of the tax, it follows that the necessary parties are before the court.

The act is patently unconstitutional, probably on at least three different grounds, but we will discuss only one phase of the statute which shows it clearly to be both arbitrary, and special legislation. Section five reads as follows:

"SECTION 5. Exemptions. This Act shall apply to all railroad properties in Arkansas, except short feeder lines which have outlived the purpose for which they were built; and except railroads which operate more than one hundred miles of main lines in Arkansas and all subsidiary lines of any such railroad; and except railroads and railway companies whose main line tracks in the State of Arkansas are less than fifty (50) miles in length."

The evidence reflects, as previously stated, that Arkansas & Ozarks has 62 miles of track in this state, and this is the only railroad in this state which has more than fifty miles, and less than one hundred miles, of main line tracks. The practical effect of the statute is the same as though the legislature had provided that the Arkansas & Ozarks Railway alone would be subject to its provisions. In determining the classification arbitrary, and therefore a violation of the Fourteenth Amendment to the Constitution of the United States, we think it apparent that the

ground of difference upon which the discrimination is based, *viz.,* length of line, has no fair or substantial relationship to the stated object sought to be accomplished by the legislation. Ceratinly, if the abandonment of a railroad line will require the state to provide additional highways for public transportation purposes, it logically follows that the abandonment of a railroad operating more than one hundred miles of track will impose a greater burden on the state's highway facilities than the abandonment of a railroad which operates less than a hundred miles of track. As stated by appellee in its brief:

"In the present case there is no reasonable relation to the classification made and the objects of the legislation. A 62 mile railroad's abandonment will work no more hardship on the highways than the abandonment of a 162 mile railroad. Indeed the volume of traffic will be greater in the latter instance. Is it in any way reasonable to assume that the abandonment of the A & O operations will place more freight on the highways of the state than the abandonment of the Missouri-Pacific or the Rock Island? Such an assumption would be ridiculous."

In *Royster Guano Co.* v. *Commonwealth of Virgina,* 253 U. S. 412, a state law which taxed all the income of local corporations from business done outside the state and business done within it, while exempting entirely the income derived from business outside the state by local corporations which did no local business, was held arbitrary and violative of the equal protection clause of the Fourteenth Amendment. The Court said:

"It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial

relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy (citing cases). Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appears to be altogether illusory."

In *Quaker City Cab Company* v. *Commonwealth of Pennsylvania,* 277 U. S. 389, the constitutionality of a Pennsylvania statute was at issue. This particular statute levied a tax on the gross receipts derived by foreign or domestic corporations from the operation of taxi cabs in intrastate transportation of passengers, but did not tax like receipts of individuals and partnerships in the same kind of business. In holding that the statute was unconstitutional, the court said:

"The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' "

See also *Louisville Gas Company* v. *Coleman,* 277 U. S. 32. In *Rebsamen Motor Company* v. *Phillips,* 226 Ark. 146, 289 S. W. 2d 170, this Court said:

"In reading and considering this act in its entirety it is readily apparent that its purposes and effect, and under its terms, appellant, along with his salesmen and other franchised dealers and their salesmen, were regulated and required to pay a license fee for the privilege of engaging in the business of selling new and unused motor vehicles and on failure to pay the tax to be subject to prosecution on a misdemeanor charge, while their com-

petitors in the same community, who are not franchised, but who may deal in both new and used cars, along with their salesmen, were not regulated or required to pay the license fee and could operate without penalty, even through they were engaged in the same business. To hold that under its police power the legislature could enact such legislation, exempting from the tax automobile dealers engaged in new and used cars from paying the license fee, and at the same time requiring franchised dealers in the same community, who deal only in new and unused cars to pay the tax, is clearly, we think, an arbitrary classification and in conflict with Section 18 Article 2 of the Constitution of the State of Arkansas which provides that: 'The general Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.' It also contravenes the Fourteenth Amendment to the Constitution of the United States which prohibits a state from denying to 'any person within its jurisdiction the equal protection of the laws.' "

Likewise, the same section is violative of Article Fourteen to the Arkansas Constitution, which prohibits the General Assembly from passing any local or special act. In *Ark.-Ash Lumber Co.* v. *Pride & Fairley,* 162 Ark. 235, 258 S. W. 335, this Court said:

"The rule announced by nearly all of the authorities is that, in a judicial determination of the question as to the nature of a statute, whether general or special, the inquiry is not restricted to the form of the statute, but it reaches to a consideration of the necessary effect of the statute, regardless of its form."

As already stated, this legislation will only affect the one railroad, and we think it obvious that it was only intended to affect one railroad. This is even shown by the language of Section four, which provides:

"Any railway company heretofore abandoning rail service or seeking to abandon rail service and to sell and

remove from service such personal properties mentioned herein shall, within seven (7) days from the passage of this act notify in writing the Arkansas Commerce Commission of its desire and intentions and it shall furnish said Commerce Commission a complete inventory of its properties. * * *"

Of course, there was only the one railroad (appellee herein) which, at that time, was seeking to abandon rail service, and which, in fact, had already ceased operations. It alone was subject to the provision requiring a notice within seven days from the passage of the act. Appellant asserts:

". . . it should be noted that Section 6 of the Act provides that if any clause, sentence, section or provision or any part of this Act shall be adjudged to be unconstitutional or invalid for any reason by any court, the judgment shall not impair, affect or invalidate the remainder of the Act which shall remain in full force and full effect. In other words, if any part of the classification provided for in Section 5 of the Act is declared unconstitutional for any reason, then only that classification or exception should be deleted from the Act. This would not invalidate the Act as it applies to Arkansas & Ozark Railway since, under these circumstances, it would apply to all other railroads."

This reasoning is erroneous. As stated in 82 C. J. S., § 93, subsection (c), page 160:

"Where, by striking a void exception, proviso, or other restrictive clause, the remainder will be given a broader scope as to subject or territory than that intended by the legislature, the whole act is void; . . ." Of course, by striking section five of the act, the statute is considerably broadened and the result would be an act applying to all railroads, whatever the amount of trackage, rather than railroads with main line trackage between fifty and one hundred miles in length. This would amount to judicial legislation, which is no part of our

duty. Furthermore, it cannot be presumed that the legislature would have passed Act 62 without the provisions of section five, and such a presumption is essential to the validity of the remainder of the Act. *Replogle* v. *Little Rock,* 166 Ark. 617, 267 S. W. 353.

For the reasons heretofore enumerated, it appears that the act had a single object—to prevent solely the Arkansas & Ozarks Railway from removing its properties. It was not the purpose of the act to prevent *all railroads* from removing trackage. The invalidity of section five therefore invalidates the entire statute.

The decree of the Chancery Court is affirmed.

BOHLINGER, J., not participating.

ELLIOTT *v.* PAUL.

5-2691 357 S. W. 2d 292

Opinion delivered May 21, 1962.

Moses, McClellan, Arnold, Owen & McDermott, by *Wayne W. Owen,* for appellant.

Joe W. McCoy and *Cole & Scott,* for appellee.

ED. F. MCFADDIN, Associate Justice. There was a traffic mishap at a street intersection between vehicles driven by appellee (plaintiff) and appellant (defendant), and this litigation ensued. Trial to a jury resulted in a verdict and judgment for Appellee Paul for $10,000.00. The property damage was only claimed to be $218.00; and the personal injuries account for the remaining amount. On appeal, Elliott urges two points: one relating to the refusal of the Court to declare a mistrial after an insurance company had been mentioned by name on *voir dire;* and the other relating to the refusal of the Court to admit certain proffered evidence.

I. *Refusal To Declare A Mistrial After An Insurance Company Had Been Named.* On *voir dire,* the attorney for Mr. Paul, the plaintiff, asked the jurors, *inter alia*:

"MR. COLE: . . . Is there anyone on the prospective panel who owns any stock in the People's Indemnity Insurance Company?

"(At this time one member of the prospective panel, Mr. Tindel, answered in the affirmative.)

"MR. COLE: Would the fact that you own stock in that company, Mr. Tindle, affect your decision in any way in this case?

"Mr. Tindle: No, I don't think so."

After a number of other questions on *voir dire,* this occurred:

"MR. COLE: . . . Do any of you know Mr. Louis Logan with the People's Indemnity Insurance Company?

"MR. OWEN: Now, if it please the Court we object and ask the Court for a mis-trial at this time."

In chambers, the attorney for the plaintiff offered to show that the People's Indemnity Insurance Company had insured Mr. Elliott, and that Mr. Louis Logan was the Claims Officer for the People's Indemnity Insurance Company and had been in Malvern making his investigation, to all of which the Court remarked:

"Here's the weakness. If you had asked whether anybody knew the man without associating him with the People's Indemnity Insurance Company, but here's the second time you have injected People's Indemnity Insurance Company into it. The first time there was no objection, and I think it was error there, but there was no objection."

Notwithstanding the foregoing, the Court refused to declare a mistrial; and we conclude that a mistrial should have been declared.

The mere fact that the attorney for the plaintiff had previously mentioned the People's Indemnity Insurance Company and there had been no objection—such fact—did not give the plaintiff's attorney *carte blanche* to continue to refer to a named insurance company. This matter of permitting questions on *voir dire* relative to insurance companies has given us trouble for many years; but in *DeLong* v. *Green,* 229 Ark. 100, 313 S. W. 2d 370—which came from the same Circuit Court as the present appeal—we enunciated certain rules as to how far an attorney could go on *voir dire.* After discussing our previous cases, we stated:

"We could, of course, end our discussion at this point, leaving for future determination a host of minute and finely drawn distinctions that would undoubtedly be urged in later cases. The bench and bar, however, are entitled to an expression of our views, especially if that course may reduce an area of uncertainty and thereby avoid needless appellate litigation. We therefore think it best to announce our preference for the procedure that is

at once the simplest to follow and the fairest to both sides in the lawsuit: Questions about the veniremen's insurance connections should refer only to insurance companies in general; a particular company should not be named when the information wanted can just as well be obtained by the use of general questions."

In the case at bar, the plaintiff could have asked if anyone knew Mr. Louis Logan, without associating him with the People's Indemnity Insurance Company, but the question as asked is in direct violation of our statements in *DeLong* v. *Green, supra;* and we must therefore reverse the case because of the question asked and the refusal of the Court to declare a mistrial on request.

In cases since *Delong* v. *Green, supra,* we have adhered to the rule announced therein. For instance, in *Morgan* v. *Daniels,* 229 Ark. 811, 318 S. W. 2d 823, an insurance company had been named and we said:

". . . under our holding in *DeLong* v. *Green,* 229 Ark. 100, 313 S. W. 2d 370, such a statement by the court, if properly objected to by appellee, would have necessitated a reversal, had appellant obtained a judgment."

Again, in *Malone* v. *Riley,* 230 Ark. 238, 321 S. W. 2d 743, the Court had allowed the attorney for the appellant to ask the jurors on *voir dire* if any of them were working for or had relatives working for the Travelers Insurance Company. Of that we said:

"The naming of the Travelers Insurance Company in the *voir dire* examination was more than Malone's attorneys were entitled to. The situation in the case at bar is entirely similar to that in *Morgan* v. *Daniels, supra;* and that case is ruling here."

In short, there is no way to reconcile the questions asked on *voir dire* in the case at bar, about the People's Indemnity Insurance Company, with our holding in *DeLong* v. *Green, supra.* We cannot say that the refusal to declare a mistrial was harmless error. *St. L. I. M. & So. Ry.* v. *Steed,* 105 Ark. 205, 151 S. W. 257. The error was not waived by the failure of the appellant to object

the first time the insurance company was named. Absence of objection to the commission of one error does not justify a party to persist in committing the same error. We adhere to our statements in *DeLong* v. *Green* and reverse the judgment for failure to observe the rule of that case.

II. *Refusal To Admit Proffered Evidence.* Because of the likelihood of a new trial, it is proper that we discuss this point also. Mr. Paul, the plaintiff, testified as to the nature and extent of the injuries he claimed to have received in the traffic mishap with Mr. Elliott. On cross examination, Elliott's attorney sought to show that several years ago Mr. Paul had been involved in a traffic collision in Texas and had sued in the District Court of Shelby County, Texas and recovered damages. Mr. Elliott's attorney sought to introduce a duly certified copy of the complaint filed by Mr. Paul's attorney in the Texas case. The complaint was duly authenticated as required by the Federal statutes, U. S. C. A. Tit. 28 § 1738. However, the Hot Spring Circuit Court. in the present case, refused to allow the complaint in the Texas case to be admitted in evidence. In this ruling the Trial Court was correct under our holding in *Mo. Pac.* v. *Zolliecoffer,* 209 Ark. 559, 191 S. W. 2d 587. The Federal statute prescribing authentication of records and judicial proceedings is to make the copies as admissible as would have been the originals, and to assure the court in which the copies are offered in evidence that they are, in fact, authentic; but this does not mean that such copies must be admitted if they are inadmissible for reasons other than authenticity. The pleading here offered was not admissible because it was not signed by Mr. Paul or verified by him. It was a complaint signed by Mr. Paul's attorney; and Mr. Paul stated that he did not authorize the making of the statements therein concerning his injuries. Our holding in *Mo. Pac.* v. *Zolliecoffer, supra,* is ruling here. It is not a question of denying full faith and credit to the records of a court of a Sister State: the complaint was not admissible because it was not signed or agreed to by the witness here sought to be impeached.

We hold that the Trial Court was correct in its ruling on this pleading.

After the Court refused to admit the complaint in the Texas case, Mr. Elliott's attorney went a step further and offered in evidence a copy of the judgment rendered in favor of Mr. Paul, his wife, and children, in the District Court of Shelby County, Texas; and this judgment was likewise duly verified and authenticated in compliance with the Federal statute. The Trial Court ruled the judgment to be inadmissible; and in this ruling we find no error because the only purpose the judgment would have served would have been an attempt to impeach Mr. Paul on a collateral matter. Mr. Paul stated that he and his wife and children were involved in a traffic mishap in Shelby County, Texas about thirteen years prior to the accident here involved and that a consent judgment had been rendered in that case. Mr. Paul said that he had received $500.00, that each of the children had received $500.00, and that the balance of the amount recovered had been for injuries sustained by Mrs. Paul. We have carefully examined the certified copy of the judgment offered in evidence and it recites that a certain amount of money was to be paid to "Leonard D. Paul and Iona Paul, his wife"; and Mr. Paul stated that under the law of Texas he was a necessary party for the recovery by his wife for her injuries. To have allowed the judgment to have been introduced would merely have constituted an attempt to impeach Mr. Paul on a collateral matter. See 58 Am. Jur. 433, "Witnesses" § 785 *et seq.*

For the error in refusing to declare a mistrial because of the mention of a named insurance company, the judgment is reversed and the cause is remanded.

ROBINSON, J., dissents as to reversal.

HALL *v.* PITTMAN CONSTR. CO.

5-2704 357 S. W. 2d 263

Opinion delivered May 21, 1962.

[redacted]

Virgil Ramsey and *Paul Jameson,* for appellant.

Crouch, Blair & Cypert, for appellee.

GEORGE ROSE SMITH, J. This is a workmen's compensation claim filed by the appellant for total disability assertedly resulting from his having fallen from a tractor on October 27, 1959. The commission denied the claim on the ground that the claimant had not met the burden of proving that his disability, which manifested itself in January of 1961, was attributable to the accident that had occurred fifteen months earlier. The circuit court upheld the commission's decision.

According to the medical testimony the tractor accident aggravated an existing degenerative condition in the disc between two of the vertebrae in Hall's neck. The injury, however, was not disabling until about a month later, when Hall first consulted Dr. Patrick. This

physician placed his patient in a hospital on November 29, 1959, where he remained for five days under the care of Dr. Kaylor, an orthopedic specialist. Upon leaving the hospital Hall soon returned to his job as a tractor operator and continued in that work until sometime during the summer of 1960. In May of that year Hall was treated by Dr. Patrick for a back condition, but there is no indication in the medical record that the claimant was then complaining of any suffering in the region of his neck.

After leaving the appellee's employment in August of 1960 Hall appears to have engaged in light work of one kind or another until the condition of his neck became disabling in January of 1961. He was again treated by Dr. Patrick and Dr. Kaylor, both of whom gave evidence in the case. The referee, whose opinion was adopted by the commission, found the medical testimony to be inconclusive and rather pointedly rejected Hall's testimony on the ground that his credibility had been almost completely destroyed.

Under the substantial evidence rule that prevails in a case of this kind the appellant shoulders a heavy burden in seeking a reversal of the commission's decision upon an issue of fact. In order to succeed the appellant must show that the proof is so nearly undisputed that fair-mined men could not reach the conclusion arrived at by the commission. After studying the record we are unable to say that the appellant is entitled to a reversal; that is, that there is no substantial evidence to support the commission's findings.

Cases such as this one present problems that gradually and almost imperceptibly progress from issues of law to issues of fact. If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award. *Clark* v. *Ottenheimer Bros.*, 229 Ark. 383, 314 S. W. 2d 497. But if the disability

does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the commission's conclusion is controlling. *Kivett* v. *Redmond Co.*, 234 Ark. 855, 355 S. W. 2d 172.

The case at bar falls in the latter category. A period of fifteen months intervened between the tractor accident in October of 1959 and the onset of total disability in January of 1961. Dr. Patrick was unable to say with confidence that Hall's disability was related to the tractor accident; he recognized the possibility that the original condition could have been aggravated at any time by a subsequent incident. Dr. Kaylor, the claimant's other physician, had this to say: "There is some possibility of aggravation of his arthritic condition in his neck as the result of the accident in November or late October, 1959. I cannot, with any degree of certainty, establish any rating of disability by reason of this injury and aggravation." The law does not imperatively compel the members of the commission to be even more certain than the witnesses in the case.

Thus the medical testimony created an issue of fact. This uncertainty was not dispelled by the claimant's testimony, which was considered to be of little value. Hall originally asserted a claim for total disability during the first three months following the tractor accident, but eventually it was shown pretty clearly not only that Hall was actually working during that period but also that he was fraudulently obtaining unemployment compensation benefits at the same time. In view of all the circumstances we cannot say that the commission was bound to conclude that Hall's disability was caused by the tractor accident some fifteen months earlier.

Affirmed.

ROBINSON, J., dissents.

HINK *v.* BOARD OF DIRECTORS OF
BEAVER WATER DISTRICT.

5-2794 357 S. W. 2d 271

Opinion delivered May 21, 1962.

Jeff R. Rice and *Walter R. Niblock,* for appellant.

Little & Enfield, Leflar & Croxton, and *Mehaffy, Smith & Williams,* by *Herschel H. Friday, Jr.,* and *James E. Westbrook,* for appellee.

George Rose Smith, J. By this proceeding, which is apparently a test suit, the appellants as citizens and taxpayers seek to obtain a declaratory judgment and an injunction preventing the appellees from carrying out a proposed arrangement by which four cities in northwest Arkansas are undertaking to obtain a supplementary water supply. The chancellor found the proposal to be valid in all respects, sustained a demurrer to the complaint, and dismissed the suit.

For some years it has been the policy of the federal government to permit some part of the water impounded in federally owned lakes and reservoirs to be reserved for municipal and industrial use. The most recent statute, 43 U. S. C. A. § 390b, permits the Corps of Engineers to include a provision for such municipal or industrial use in its plans for a new reservoir if state or local interests agree to pay all additional construction costs that result from the inclusion of this provision in the plans.

In order to take advantage of this federal policy our legislature adopted Act 114 of 1957, which appears as Ark. Stats. 1947, §§ 21-1401 et seq. This statute provides for the creation of regional water distribution districts as nonprofit public corporations. Such a district is authorized to contract with the Corps of Engineers for the acquisition of water rights in federal impoundments

and to make contracts with consumers, including municipalities, for the sale of such water. In order to finance its operations the district is authorized to borrow money and to issue bonds to be secured by a pledge of its assets and revenues.

Pursuant to the above statute the Beaver Water District was organized by an order of the Benton circuit court on July 17, 1959. The district proposes to enter into a contract with the Corps of Engineers for the acquisition of water rights in the reservoir that is to be impounded by the construction of Beaver Dam. The district also proposes to enter into contracts for the sale of water to the cities of Bentonville, Fayetteville, Rogers and Springdale. To obtain money for its operations the district will issue bonds to be secured by a pledge of its assets and revenues.

In attacking this proposal the appellants rely upon seven grounds for questioning its validity.

I. It is first contended that the four cities do not have the authority to enter into an agreement such as the one now proposed. The principal case relied upon is *Yancey* v. *City of Searcy,* 213 Ark. 673, 212 S. W. 2d 546, where we held that the city of Searcy could not purchase an extensive intercity water distribution system and go into the public utility business by undertaking to serve three other municipalities.

That decision is not controlling in the case at bar. Here the four municipalities do not propose to sell water to one another or to enter into the business of acting as public utilities. All that each city seeks is a dependable source of water for its own municipal waterworks. In *McGehee* v. *Williams,* 191 Ark. 643, 87 S. W. 2d 46, we held that a city is authorized to purchase a water supply for distribution to its own inhabitants and that the purchase may be made from another municipality. Upon that reasoning there is no valid objection in the present case to the four cities' obtaining a water supply from the Beaver Water District.

II. It is next contended that Amendment 10 to the state constitution prevents the cities from executing two proposed contracts with the Beaver Water District. Amendment 10 requires the fiscal affairs of all cities to be conducted on a sound financial basis and prohibits any city from entering into any contract or incurring any obligation in excess of its revenues for the current fiscal year. By one of the contracts now in question, attached as Exhibit C to the complaint, the city would pledge only its net waterworks revenues to secure the performance of its contract with the Beaver Water District. This contract is valid, for it is well settled that Amendment 10 does not prohibit the creation of a debt exceeding current annual revenues if the debt is secured by and payable solely out of the income or assets of a special and separable activity such as a municipal waterworks. *Williams* v. *Harris,* 215 Ark. 928, 224 S. W. 2d 9.

On the other hand, the contract appearing as Exhibit B to the complaint does not contain any restriction upon the source from which the city's obligations must be paid. By the language of this contract the city would bind itself to purchase water from the Beaver Water District for a period of fifty years. The complaint alleges, and the demurrer admits, that the total purchases under this contract would exceed the current revenues of each city. Under many decisions of this court it must be held that the contract in question is contrary to the provisions of Amendment 10. *Luter* v. *Pulaski County Hospital Association,* 182 Ark. 1099, 34 S. W. 2d 770, and *Williams* v. *Harris, supra.* For this contract to be valid the city's obligation would have to be payable only from the revenues from its municipal waterworks. To this extent the trial court's declaratory judgment upholding the entire proposal must be modified.

III. At least one of the participating cities, Fayetteville, has an outstanding municipal waterworks bond issue. The ordinance creating this bond issue pledged the revenues from the municipal waterworks to the payment of the bonds and provided that surplus revenues

might be used only for prepayment of the bonds or "for making extensions, betterments and improvements to the system." It is now contenedd that the city's pledge of its surplus revenues to the Beaver Water District violates the restrictions contained in this ordinance.

This argument is without merit. What the city is attempting to do is to obtain an additional water supply for its municipal distribution system. It seems too plain for discussion that the proposal constitutes an extension, betterment, or improvement to the existing system. A waterworks cannot be operated without a source of water.

IV. It is insisted that the deed of trust to be executed by Beaver Water District to secure its outstanding bonds goes beyond the authority conferred on the district by Act 114 of 1957, under which the district was created. Specifically, it is contended that the act contemplates that the district will pledge only its net revenues, while in fact the proposed deed of trust contains a pledge of all the district's revenues. Ark. Stats., § 21-1412 (b).

When the deed of trust is read in its entirety we think it is plainly limited to a pledge of net revenues. Although there is some broad language in the granting clause that refers to the district's revenues in general, this language is limited by later provisions in the instrument. By § 305 of the deed of trust the district covenants to keep the mortgaged properties in good condition and to make all needed repairs, replacements, additions, betterments, and improvements. By § 403 it is directed that a sufficient part of the district's revenues be paid each month into an Operation and Maintenance Fund to provide for the expenses of operation and for the repair and maintenance of the district's property. It is then directed by § 404 that after the required monthly deposit has been made in the Operation and Maintenance Fund there shall be deposited sufficient revenues in a Bond Fund to pay the accruing principal and interest of the bonds. Thus when the deed of trust is construed as a

whole it clearly provides for the operation and maintenance of the district's property, so that there is no pledge of gross revenues.

V. We find no merit in the appellants' contention that Act 414 of 1955, Ark. Stats., §§ 19-4239 et seq., is the only authority for two or more municipalities to join together in the acquisition of a water supply. In the first place, § 3 of that act provides that it is cumulative and not a limitation upon other existing laws. Secondly, Act 114 of 1957, authorizing the creation of water distribution districts, is a later statute and is clearly not affected by the provisions of the prior act.

VI. In entering into the proposed arrangement the cities will execute a contract restricting to some extent their future power to borrow money for waterworks improvements and to issue bonds evidencing such loans. This, however, is unavoidable, for in every case when a municipality executes a contract which pledges a part of its revenues it necessarily reduces its ability to borrow additional money in the future. There is no showing in the case at bar that these cities have abused their discretion in entering into the proposed arrangement with the Beaver Water District. In the absence of any facts indicating an abuse of discretion it is not for us to say that the cities should not have entered into an arrangement that appears to be a desirable method of securing an ample water supply for the future. We know, of course, that an abundant source of water is often an essential factor in a municipality's effort to attract new industries.

VII. The final contention is that in making their contracts with the Beaver Water District the cities are not authorized to agree that the water rates to be charged to their consumers will be maintained at a level sufficient to meet the cities' obligations. It is insisted that a city cannot impair its right to fix its water rates in the future, this being a reserved power that cannot be bargained away. *Delony* v. *Rucker,* 227 Ark. 869, 302 S. W. 2d 287.

It is true that in the absence of statutory authority it has been held that a municipality cannot, in issuing bonds, validly agree that its water rates will not be reduced during the life of the bonds. *Batchelder* v. *Hartwig,* 63 Ore. 472, 128 P. 439. When, however, such an agreement is authorized by statute it may be made by the city and becomes a contract that is protected from impairment. *Karel* v. *City of Eldorado,* D. C. Ill., 32 F. 2d 795; *State ex rel. City of Vero Beach* v. *MacConnell,* 125 Fla. 130, 169 So. 628.

Our statute governing all municipal waterworks provides that the rates to be charged by the municipality must be adequate to pay the principal and interest on all revenue bonds and that rates fixed prior to (and in connection with) the issuance of revenue bonds may be reduced if authorized by the trust indenture or the ordinance pertaining to the bond issue; "provided however the rates shall not be reduced below the standards herein prescribed." Ark. Stats., § 19-4208. Thus it will be seen that the legislature permits the rates to be reduced during the life of the bond issue if the trust indenture or ordinance so provides. It follows that the contracting parties are impliedly authorized to enter into an arrangement which does not so provide, in which case the rates are not subject to reduction during the life of the bonds.

It is our conclusion that the trial court's decree is correct in all respects except for the modification contained in part II of this opinion.

With this modification the decree is affirmed.

HYDE *v.* TAYLOR.

5-2717 357 S. W. 2d 289

Opinion delivered May 21, 1962.

Cecil Grooms, for appellants.

Rhine & Rhine, for appellee.

PAUL WARD, Associate Justice. Appellee, H. P. Taylor, entered into a written contract with appellants to build them a house on their land for $12,000. After the house was completed appellants refused to pay appellee the contract price and this litigation followed.

Appellee filed a complaint in chancery alleging that between May 5, 1960 and October 18, 1960 he constructed a dwelling for appellants, furnishing labor and materials in the total sum of $12,000 as shown in an attached exhibit; that there is past due the sum of $6,496.88; and that on January 16, 1961 (being less than 90 days after the last item of materials and labor was furnished) he filed a material and laborman's lien as required by law. The prayer was for judgment in the amount stated and for a statutory lien on the dwelling and lands.

Appellants first filed a motion to dismiss the above complaint on the ground of *res judicata* which motion was denied. Then they filed an answer again raising the plea contained in the motion, and also stating that more than 90 days had elapsed after the last item of labor and materials was furnished before the lien was filed.

After a full hearing the chancery court found the issues in favor of appellee and entered a decree to that effect. Appellants here present their contentions for a reversal under four separate points. These points will

be discussed in the order presented. The pertinent evidence will be considered as we discuss each separate point.

One. Appellants seriously contend that appellee furnished no materials and did no work within 90 days prior to filing his lien in the circuit clerk's office on January 16, 1961. Appellee says he did the last work on the house on October 18, 1960, and appellants say the last work was done (or materials furnished) on October 5, 1960. The issue under this point is clear cut and, of course, the trial court must be sustained unless we find its decision is against the weight of the evidence. The trial court made the specific finding that appellee "did on the 16th day of January, 1961, before the expiration of ninety (90) days from the date of supplying the last item of materials and labor file a Material and Laborman's Lien. . . ." Appellee testified emphatically that the last item of work or materials furnished on the job was October 18, 1960. He stated he bought material in the amount of $3.45 on the above date and took it out to the house to fix the tile in the hall and further testified that Mr. Hyde (appellant) knew about it. This testimony was corroborated by a statement on the letterhead of Hickson, Inc. (building materials) signed by the secretary. It reads: "I hereby certify that the last material purchased by H. P. Taylor for use on the Aaron Hyde residence was invoice No. 25644 in the amount of $3.43, dated October 18, 1960". All the above was contradicted by Mr. Hyde who stated that the last work appellee did on the house was on October 5, 1960. He further stated that the cement appellee purchased on October 18 was not used on his house. On cross examination Mr. Hyde admitted he was not at the house every minute, but said he was there ten times more than appellee.

In view of the conflicting evidence we are unwilling to superimpose our judgment over that of the chancellor. The chancellor could have arrived at his decision on the basis that there was an honest mistake on the part of appellants, or he may have viewed the testimony as

irreconcilable. In either event he was in a better position to arrive at the true facts than are we.

Two. The defense of *res judicata* was based on the facts and circumstances set out below.

Appellee had apparently sublet part of his construction job to A. D. Johnson (dba Allen's Plumbing & Heating Co.) and to Hickson, Inc. (a supplier). Having unpaid bills, each of these suppliers sued appellants and appellee for their money and sought a lien on the property. Appellee filed no answer in those actions—in fact, he said he advised the suppliers to take the action they did. By decree dated May 2, 1961, the chancery court found in favor of the two suppliers. A sale of the property was ordered, but appellants paid the judgment before the sale was held. Appellants lay particular stress on certain language in the court's decree (of May 2) to the effect that appellee had not proceeded within the time and manner required by law to establish a contractor's lien against the owner. Appellants also strongly insist that appellee, being a party to the above mentioned suits, should have asserted therein any claim he had against them.

We are inclined to the view, however, that the above mentioned litigation is not *res judicata* of the issue here presented, i. e., appellee's right to collect his money and perfect his lien. The pertinent rule in this connection has been stated many times and in many ways. In *Teasley* v. *Thompson,* 204 Ark. 959, 165 S. W. 2d 940, it is stated:

"Before appellants may successfully sustain the defense, that the former injunctive proceedings between the parties here were *res judicata* of this action, it is essential that they show that the parties and the issues in both actions were the same."

In *Carrigan* v. *Carrigan,* 218 Ark. 398, 236 S. W. 2d 579, the Court in this connection said:

" '. . . it must appear either upon the face of the record, or be shown by extrinsic evidence, that the

precise question was raised and determined in the former suit.' ''

There remain two principal issues in this litigation: the balance appellants owe appellee under the contract and how much is secured by a lien on the property. Since appellants offer *res judicata* as an affirmative defense, the burden is on them to show (by the record) that the two issues above mentioned were also issues in the previous litigation. Appellants frankly admit they cannot discharge that burden. We therefore must sustain the decision of the trial court on this point.

Three. Appellants say the trial court erred in refusing to transfer the cause to the circuit court. It seems this assignment is based solely on an error in the record which has been cured since their brief was filed here. The original record (before correction) showed appellee to have admitted he had no lien and that only questions of law were presented. The corrected records show the above statement in the record to be the result of an error on the part of the reporter.

Four. The trial court found that appellants were indebted to appellee in the sum of $5,839.24 (with interest thereon from January 16, 1961) and gave judgment accordingly. It also held that said judgment was a first lien on appellants' property. Appellants challenge the above actions of the trial court in two respects: (a) as to the amount of the judgment and (b) the extent of the lien.

(a) We are unable to say the evidence does not support the finding that appellants owe appellee the full sum of $5,839.24 (plus interest) on the contract. It is true that some of the testimony is indefinite and hard to evaluate, but we cannot say the chancellor's finding was against the weight of the evidence. Appellants have not pointed out any definite figures or testimony to indicate error.

(b) We have concluded there is no clear testimony in the record to sustain the chancellor's finding that

appellee is entitled to a lien for the full amount of the judgment. Under our holding in the case of *Withrow* v. *Wright,* 215 Ark. 654, 222 S. W. 2d 809, appellee was not entitled to a lien for his profits (if any) as a result of performing the contract. After a careful review of the record we are unable to determine with any degree of satisfaction what part of the total judgment represents labor and materials paid for by appellee or if any of it represents profits. These questions can more easily and more accurately be determined, we believe, by the trial court.

For the reasons just mentioned the cause is remanded for further proceedings. In all other respects the decree of the trial court is affirmed.

ALEXANDER *v.* MCCRAY.

5-2696 357 S. W. 2d 301

Opinion delivered May 21, 1962.

J. B. Milham and *Gladys M. Cummins,* for appellant.

Fred E. Briner, for appellee.

SAM ROBINSON, Associate Justice. This is a suit for a real estate agent's fee, alleged to have been earned in the sale of a tract of seven and a fraction acres for the sum of $7,695.00. There was a judgment for the plaintiffs, Jack and J. E. McCray, real estate agents, in the sum of $745.00, and the defendant, Will Alexander, the property owner, has appealed.

Appellees are licensed real estate brokers in Benton. They entered into a contract with appellant, Will Alexander, whereby they undertook to have surveyed 16 acres, more or less, belonging to Alexander, streets marked off, the property divided into lots, and sell the same for a commission of 20 per cent of the sale price.

When the survey was made it was discovered that a small strip of land, thought to be a part of the 16 acres owned by appellant, really belonged to Wyatt Crawford. In an attempt to iron out this difficulty, Jack McCray talked with Mr. Crawford. In the course of the conversation Crawford made an offer of $1,000.00 an acre for seven and a fraction acres of Alexander's 16 acres. McCray conveyed this information to Alexander.

There is substantial evidence to the effect that Alexander inquired of Jack McCray if the real estate agent's fee would be 20 per cent as provided by the original contract, and that McCray replied that in the circumstances, the fee would be only the regular commission of ten per cent for selling country property. The evidence is substantial to the effect that Alexander authorized McCray to proceed with the sale on that basis; that McCray prepared the offer and acceptance, and that the sale was completed.

Of course, there can be no question but that the original contract for selling the 16 acres as lots was abandoned. McCray testified that Alexander agreed to sell the seven and a fraction acres to Crawford and his associate, J. B. Yarbrough, Jr., and it is clear from the record that Alexander did convey the property to them.

There is only one real question; did Alexander agree to pay McCray ten per cent of the sale price for making the sale to Crawford and Yarbrough? The jury's verdict answering that question in the affirmative is supported by substantial evidence.

Affirmed.

5-2713 357 S. W. 2d 265

Opinion delivered May 21, 1962.

[redacted]

Carlos B. Hill, for appellant.

W. Q. Hall, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from an order of the Washington County Probate Court allowing a claim for funeral expenses against the estate of Stonewall Jefferson Dutton, deceased.

For reversal appellant contends that the judgment was arbitrary and not supported by the evidence and that the claim should be disallowed because appellant was denied the right to take charge of the body and to arrange for the funeral and further that appellee contracted with volunteers who acted officiously and without interest.

The facts for the most part are undisputed. Stonewall Jefferson Dutton died intestate in Washington County on the 7th day of December 1960. At the time of his death Dutton had been separated from his wife for more than six months. They had discussed her contemplated suit for separate maintenance against him and his

contemplated suit for divorce against her with an attorney in Fayetteville. The deceased had informed his wife and her attorney that he could not meet their demands for separate maintenance due to his inability to work because of the condition of his health. Thereupon the deceased was advised to go to a doctor and get a certificate verifying his contentions. Apparently upon the receipt of the certificate the matter of contemplated action was dropped, at least she testified as follows:

"Q. So far as you know you never got a decree of separate maintenance against him?

"A. No."

There is no contention or showing in this record that the deceased, even under the handicap of ill health, failed to adequately support his wife and two 14-year-old daughters. It is shown, however, that some three weeks prior to his death (which was the last time his wife saw him alive) deceased came by their home, which he and his wife owned, in Fayetteville and "brought the girls a coat apiece from Penney's." At the time of his death, Dutton was making his home with his parents at Goshen, a small town located on the main highway between Fayetteville and Huntsville. He died suddenly and unexpectedly from heart failure and the parents caused the body to be removed to the Brashears Funeral Home in Huntsville. Mrs. Dutton testified that neither of the deceased's parents nor close relatives called her but that a neighbor called and notified her of the death. She waited awhile for some of the family to call and when they didn't she called Brashears about 10 minutes after 9:00 the next morning and told him she would be up there about noon that day. She arrived at the funeral home about 1:30 in the afternoon and found that the deceased's mother, father and brother had already made the funeral arrangements. She stayed at the funeral home approximately 20 minutes and testified that she did not ask "Mr. Brashears if she could have custody of the body." She did inquire about the financial arrangements and when questioned by the court testified as follows:

"Q. Now, do I understand you to say that you raised with Mr. Brashears the question of who was going to pay for the funeral?

"A. I asked him what kind of financial arrangements had been made.

"Q. And his answer was that he knew the Duttons, they were reliable people, and he was not going to worry about getting his money, is that the essence of it?

"A. (Witness nods head affirmatively.) He told me to go on home and not worry about it. That I was not liable for it."

Mr. Brashears testified on direct examination relative to the financial arrangements as follows:

"Q. Did she ask you if she would be financially responsible for the arrangements?

"A. She did.

"Q. What did you tell her?

"A. I told her that she wouldn't be held liable personally, and that seemed to satisfy her.

"Q. And she never made any demand for the body? She never made any demand to make any sort of arrangements herself?

"A. No."

When questioned by the court, Mr. Brashears further testified as follows:

"Q. Mr. Brashears, were there arrangements, and an understanding about who was going to pay for this funeral?

"A. There wasn't any definite arrangement made about it at that time between the mother, father and brother. I asked them, naturally, about financial arrangements and they said, 'Well, he has a lot of property and some cattle and some things.' And said, 'Just don't

worry about your money.' And that was, approximately, the best I recall, what was said.

"Q. There was no writing, no contract or anything signed?

"A. No.

"Q. You didn't ask for a contract to be signed?

"A. No, not with that family."

As to the arrangements, Mrs. Dutton on cross-examination testified as follows:

"Q. Did you like the casket that the body was in?

"A. I don't recall noticing it at first, I don't recall that I saw anything wrong with it.

"Q. Did you like the clothes that the body had on? Did you notice them?

"A. Not particularly.

"Q. It did have—the body was laid out and in the casket ready for burial?

"A. Yes.

"Q. What sort of objection did you make?

"A. The body was drawn.

"Q. The body was what?

"A. The body was drawn. The hands were too far down.

"Q. Did you make any other objections?

"A. I don't recall."

When further examined by the court about the arrangements, Mrs. Dutton testified as follows:

"Q. Now, Mrs. Dutton, you mentioned something about you did not like the way your husband's body was laid out, something about the hands, you said something about that?

"A. Aunt Mona and I were talking and she may have even been the one that mentioned it, we were both talking about it, he was standing close by, but he said there was nothing they could do about it.

"Q. Were the hands folded across the body in some fashion or alongside of the body?

"A. Just down too far.

"Q. I'm not quite sure what you mean by saying they were down too far. What was the position of the hands? Were they folded across his body?

"A. No.

"Q. Were they down along his sides?

"A. No, they were just down this way some way.

"Q. They were on top of his body but they were not folded, is that correct?

"A. Yes.

"Q. And to you it looked as if they were farther down than they naturally would be, is that correct?

"A. Yes.

"Q. Did you mention that to Mr. Brashears?

"A. Aunt Mona did; we were talking about it.

"Q. Did you hear her mention it to him?

"A. Yes.

"Q. What reply if any did he make?

"A. He said that the body had been so long—he had been dead so long there was nothing they could do about it. And as I recall he said they brought the body in about noon.

"Q. As I understand it, Mr. Brashears suggested that the body had been dead so long when he took charge of the body that he could not manipulate the limbs?

"A. Yes.

"Q. And if I follow you on that. you do not propose this as an objection about the way Mr. Brashears handled it?

"A. No.

"Q. But it was simply a thing you observed?

"A. Yes.

"Q. Now, leaving that aside, Mrs. Dutton, and the fact you thought it looked unnatural, the hands were too far down, was there anything about the funeral service itself, including the casket and the flowers and the manner of conducting the funeral, and the actual burial, was there anything about the entire funeral service that you objected to, or found distasteful or inappropriate or off base?

"A. Well, I am objecting to them ignoring me and the children."

Fourteen days after the death of her husband, Mrs. Thelma A. Dutton was appointed administratrix of his estate, and within the time provided by law appellee Brashears Funeral Home filed its claim against the estate for the collection of the funeral expenses. It was stipulated between appellant and appellee that the amount of the claim was reasonable. Appellant, as administratrix, denied the claim on the basis of her contentions set out above, and as heretofore stated the trial court after hearing all of the evidence allowed the claim. As stipulated by the parties "the only issue here involved is whether, under the facts, the claim for the funeral expenses should be paid by the administratrix." Even though the Probate Court is a court of law, appeals from such courts are tried *de novo* in this court. *Campbell, Administrator* v. *Hammond,* 203 Ark. 130, 156 S. W. 2d 75; *Suits* v. *Chumley, Administrator,* 218 Ark. 488, 236 S. W. 2d 1001. On trial *de novo,* as sympathetic to the widow as the facts will permit us to be we cannot escape the conclusion that here the appellant is confusing the liability of the widow for funeral expenses with the

liability of the estate of the deceased for such expenses. Under the circumstances disclosed in the record before us we could not say that the widow, as such, would have been liable for the expenses here claimed, but such is not the case. In the early case of *Yarborough* v. *Ward,* 34 Ark. 204, this Court acknowledged that funeral expenses were an exception to the rule that "no debts can be created against an estate after death." It is stipulated that the claim in the case at bar was filed within the time and in the manner required by law for the funeral expenses against the estate of the deceased. Ark. Stats. Ann. § 62-2606 provides that "reasonable expenses" shall be paid as a Class b claim and in *Security Bank & Trust Co.* v. *Costen,* 169 Ark. 173, 273 S. W. 705 this Court said: "It goes without question that the estate of the decedent is chargeable for the reasonable and necessary expenses of interment of the body. The duty rests upon some of the living to see that the right of decent burial is provided, and from this duty springs a legal obligation of decedent's estate to pay the expenses." Appellant stipulated that the appellee's claim for burial was reasonable, and it would go without question that interment of the dead body was a necessary expense and in fact was a necessary undertaking.

From the evidence, it is clear that the appellant did not demand that she be allowed to take charge of the body, nor did she make any objections to the arrangements for interment as had been made nor did she make any objection at the time to the place of interment of the body.

The widow was not entitled to take charge of the body since she and her husband were not living together at the time of his decease. In *Teasley et al* v. *Thompson,* 204 Ark. 959, 165 S. W. 2d 940, this Court stated the following rule: "Where the wife is not living with her husband at the time of his death or neglects or refuses to assume the trust incident to her right, a waiver of that right is implied and the right and duty immediately descends to the next of kin present and acting. In the case

of a dead body needing burial, the right of the spouse must be promptly asserted, or the right to possession of the body for the purposes of interment will be held to have been waived in favor of the next of kin." At page 963 of the same case it is said: "(4) That, in case of husband and wife, the right of possession is in the surviving spouse, provided the husband and wife are living together at the time of the demise; (5) that the absence of the spouse, or his or her failure or refusal to act, has the effect of transferring the right of custody and duty of trusteeship to the next of kin in succession." Following this rule certainly it cannot be said that the mother, father and brother of this deceased were volunteers who were acting officiously and without interest.

We find, therefore, that appellant here waived any right she may have had to take charge of the body, when she did not make a prompt demand of the appellee to take charge of the body and she ratified the acts of the parents of the deceased when she did not make a timely objection when she visited the place of business of the appellee and viewed the body.

Affirmed.

WARD, ROBINSON, and BOHLINGER, JJ., dissent.

NEILL BOHLINGER, Associate Justice (Dissenting). I respectfully dissent from the majority decision in this case.

It is elementary and no man can gainsay that the funeral expenses are but one of the first charges against the estate of a deceased, but before that charge can come into being there are certain things that must be done, the most important of which is entering into a contract with the undertaker.

As I see it in this case, the sole question is who had the right to make that contract.

The evidence reflects that the appellant, the widow of the deceased, was living in their home in Fayetteville with two minor children. The deceased, her husband,

had been staying with his parents out in the country where he was engaged in the cattle business and it appears that it had been about three weeks since he had visited the appellant in Fayetteville. This man died very suddenly at his parents' home and the parents did not notify his wife, the appellant, of his death but she learned it from a neighbor.

The following day she phoned the undertaker, the appellee here, at Huntsville that she would be over that day to make the funeral arrangements. At that time no arrangements had been made by anybody. She made the trip from Fayetteville to Huntsville to make the funeral arrangements and the appellee advised her that the arrangements had been made by her husband's parents and there was nothing she could do. She inquired as to the financial arrangements that had been made for the funeral and was advised by the appellee that she would not have to pay them, that "the Duttons [parents of the deceased] are honest, reliable people. I'm not worried about the bill. They always pay their debts."

In 15 Am. Jur. § 9, p. 834, it is said:

"Right of Surviving Spouse.—It is generally conceded that on the death of a husband or a wife, the primary and paramount right to possession of the body and to control the burial or other legal disposition thereof is in the surviving spouse, and not in the next of kin, at least in the absence of a different provision by the deceased. The surviving spouse is entitled to select the place of burial and the place of reinterment if the remains are removed after burial. However, in making the selection, consideration must be given to the last expressed wish of the deceased. The right of a surviving spouse to control the burial is dependent on the peculiar circumstances of each case, and may be waived by consent or otherwise. However, if the parties were living in the normal relations of marriage, a very strong case will be required to justify a court in interfering with the wish of the survivor, and a widow's waiver of the right to administer upon the estate of her deceased husband

will not include a waiver of her right to control the interment of his body unless it is made to do so expressly."

It therefore appears to me that the burial of a deceased mate involves something more than a legal duty. It involves a personal right and this right is closely linked in the hearts and minds of women as a final loving tribute at the close of a relationship.

It is a right, and I am unwilling to concede that that right is dependent on the fleetness of foot of the widow or the allacrity with which she reaches the door of the undertaker's shop. There is but one requirement and that is that she must move promptly. In this case the widow did and no arrangements had been made at the time she phoned the undertaker.

I am unwilling to concede that a relative, friend, or other person can inject himself in the transaction while the widow is trying to make her own arrangements and commit an estate [in this case a very meager one] to a funeral obligation which will be in accord with their sense of fitness. I must admit that the widow, the appellant here, might have used the entire $2,500.00 which is the appraised value of her husband's estate and have braved the world with her two small children penniless but there is nobody else who can force that condition upon her. And in this case it appears that almost a half of the appraised value of this estate was committed to this funeral by people who were not connected with nor dependent upon the estate in any way.

The case of *Security Bank and Trust Co.* v. *Costen,* 169 Ark. 173, 273 S. W. 705, was a case involving the incurring of expenses and advancement of money to pay funeral expenses. It is not applicable here. And the case of *Teasley* v. *Thompson,* 204 Ark. 959, 165 S. W. 2d 940, does apply and this phrase is used:

"It is generally conceded that on the death of a husband or wife, the primary and paramount right to possession of the body and to control the burial or other legal disposition thereof is in the surviving spouse, * * *".

In the *Teasley* case the court found that the widow had waived her rights. Such is not the case here.

What prompted the parents of the deceased to attempt to commit a disproportionate part of this meager estate to the burial of their son I do not know. But be that as it may, they were seeking to commit a fund which was not in their power to commit. It seems clear to me that even though the appellee knew that the widow was on her way to its place of business to make the funeral arrangements, nevertheless elected to contract with the parents of the deceased whose credit it regarded as good.

The parents of the deceased, in my opinion, were at best but officious volunteers who contracted a debt which they should now be made to assume.

I am strongly of the opinion that this case should be reversed and dismissed and for that reason I respectfully dissent from the majority view.

I am authorized to state that ROBINSON, J., joins in this dissent.

HENSHAW *v.* HENDERSON.

5-2467 359 S. W. 2d 436

Opinion delivered May 21, 1962.

[Rehearing denied September 10, 1962.]

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

Cole & Scott and *Wiley Smith,* for appellee.

NEILL BOHLINGER, Associate Justice. Early in the evening of April 25, 1960, the appellant, Joe Wilburn Henshaw, called at the apartment of Miss Sarah Overturf in the City of Hot Springs with the intention of having Miss Overturf accompany him for an automobile ride.

Sharing the apartment with Miss Overturf was Miss Peggy Henderson. Miss Henderson did not wish to be left alone in the apartment and it was decided that she would accompany the appellant and Miss Overturf. These three parties, in the appellant's new Chevrolet convertible, drove up Central Avenue in Hot Springs toward the race track. At Truman's Tavern the appellant got out and went in by himself and came out with a can of beer. He then drove out the Golf Links Road to a tourist court where it had been planned they would meet a married couple who were friends of both the appellant and Miss Overturf but it was found that the couple was not in.

Either at that time or shortly before, and the time is immaterial, it was suggested that they would drive to Malvern to get a young man of Miss Peggy Henderson's acquaintance who was to be her escort for the evening. Upon leaving the tourist court it appears that the car progressed a short distance when it struck a Plymouth automobile parked near the pavement. The impact in-

flicted minor damage to the left rear of the Plymouth automobile.

At that point the appellant, as driver of the car, seems to have lost control of the vehicle which partly skidded across the road in a left-hand direction and traveled about 190 feet where it struck a large oak tree. Either at the point of impact or shortly prior thereto the two young ladies were thrown from the car and the force of the impact was such that the Chevrolet convertible was wrecked and subsequently caught fire. Miss Henderson died as a result of the accident and D. C. Henderson, as special administrator of the estate of Peggy Henderson, brought this action in the Circuit Court of Hot Spring County to recover damages for the wrongful death of Miss Henderson.

The case was duly tried before a jury which returned a verdict of $1,750.00 for the estate of Peggy Henderson; the sum of $2,500.00 for Mrs. D. C. Henderson; and $2,500.00 for D. C. Henderson, the Hendersons being the next of kin of the deceased.

Judgment was duly entered and to reverse that judgment the appellant brings this appeal.

The record clearly establishes that both Miss Overturf and Miss Henderson were guests in the car driven by the appellant. Therefore the allegations of the appellee must be viewed in the light of our guest statute. Our guest statute, Ark. Stats. 75-913 also [75-915], is as follows:

"Action by guest prohibited except in case of wilful negligence.—No person transported as a guest in any automotive vehicle upon the public highways or in aircraft being flown in the air, or while upon the ground, shall have a cause of action against the owner or operator of such vehicle, or aircraft, for damage on account of any injury, death or loss occasioned by the operation of such automotive vehicle or aircraft unless such vehicle or aircraft was wilfully and wantonly operated in disregard of the rights of the others. [Acts 1935, No. 61, § 1,

p. 135; Pope's Dig., § 1302; Acts 1955, No. 175, § 1, p. 406.]"

In establishing the rule as to guests in the case of *Simms* v. *Tingle,* 232 Ark. 239, 335 S. W. 2d 449, we said:

"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."

The status being that of guests, it must be established that the appellant operated the automobile in a wilful and wanton manner in disregard of the rights of others.

In order to establish wilful and wanton negligence on the part of the appellant, appellee has presented some testimony in regard to beer drinking by the appellant and testimony as to the speed at which the appellant operated his automobile. These are matters for the jury's consideration on a retrial of this cause since we find error on which this present cause must be reversed and hence we do not find it necessary to go further into the points thus presented.

It appears from the record that the appellee presented as a witness Glen Minton, a trooper for the Arkansas State Police. Mr. Minton was presented as an expert with thirteen years service with the State Police.

Mr. Minton was permitted to testify, over the objection of the appellant, that he was called to the scene of the accident shortly after it occurred. He described in

detail the position of the Plymouth automobile and the Chevrolet convertible; the point where the two girls were found; and the position of the appellant who was unconscious on the front seat of his car and was further permitted to testify that on the morning of the trial he had taken his car, a 1960 Chevrolet, from a dead stop and accelerated as fast as possible for two-tenths of a mile [this being the distance between the motel and the location of the Plymouth that was struck] and that he attained a speed of 75 miles per hour; that it was one of the requirements of his position to estimate the speed of vehicles involved in a collision and that viewing the distance the Chevrolet convertible was out of control and the severity of the impact, he thought the Chevrolet convertible was traveling 80 miles per hour.

Appellant properly objected to this line of testimony. There is no need to resort to expert opinion in the absence of evidence to indicate that it was beyond the jury's ability to understand the facts and draw its own conclusion.

In the case of *Conway* v. *Hudspeth,* 229 Ark. 735, 318 S. W. 2d 137, we said:

"We do not agree with the appellants' contention that the proffered testimony was admissible as the opinion of an expert. It has been said that the courts look with disfavor upon attempts to reconstruct traffic accidents by means of expert testimony, owing to the impossibility of establishing with certainty the many factors that must be taken into consideration. *Moniz* v. *Bettencourt,* 24 Cal. App. 2nd 718, 76 P. 2d 535. In the case at hand the officer was not asked to describe every physical fact that he had seen and then to explain his deductions, in the manner that ballistic experts often explain their conclusion that a certain weapon fired a certain bullet. Here the officer was asked his opinion on the basis of the position of the vehicles, the damage to them, 'and other physical evidence found at the scene.' In the absence of anything to inicdate that it was beyond the jurors' ability to understand the facts and draw their

own conclusions, there was no need to resort to expert opinion. *Mo. Pac. R. Co.* v. *Barry,* 172 Ark. 729, 290 S. W. 942."

The witness' test was made with a car other than the one involved in the accident and there is no showing that his test was made under the same conditions that prevailed at the time and at the place of the accident. The testimony of a policeman as an expert carries great weight but when it is predicated on conditions different than those under scrutiny it is inadmissible.

The objection of the appellant was timely and should have been sustained. For error in overruling the objection this cause is reversed and remanded for further proceedings not inconsistent herewith.

HARRIS, C. J., SMITH & ROBINSON, JJ., dissent.

CARLETON HARRIS, Chief Justice (Dissenting). While I have every sympathy for the family of the unfortunate young lady who was killed in the accident, I am forced to dissent to the holding of the Majority, for I think this holding emasculates the law as set out in numerous prior holdings of this Court. The Majority say that a jury question was made because of the combination of evidence relative to speed and intoxication. Let us examine first the evidence as to intoxication.

(1) Henshaw himself testified that he had two cans of beer at noon; one can in the early part of the afternoon, and a portion of a can after he picked up his date that night.

(2) Sarah Overturf (now Ashley) testified that she could smell alcohol when he came to get her for the date. On leaving her premises to go to the car, she stated, "He kinda stumbled once." He drank part of a can of beer after she was with him.

(3) Mrs. Delbert Hughes, who arranged the date for Henshaw with Miss Overturf, went with him to her apartment about 5:30 or 6 p. m., testified that she noticed nothing unusual about the way he walked, nor any-

thing different about the way he handled the automobile while driving, and smelled nothing on his breath while with him.

(4) Glen Minton, trooper with the Arkansas State Police, who went to the scene of the accident, testified that he could smell alcohol on Henshaw's breath, but that it had a "sour" smell, indicating that the alcohol had been consumed sometime before, rather than recently.[1]

No one testified that Henshaw was intoxicated.

Let us next examine the evidence relative to speed.

(1) Dayton Thornton, a mechanic, who was the only eye witness, was traveling the highway in his car with his wife and family. Mr. Thornton observed the entire occurrence, and estimated the speed of Henshaw's automobile to be somewhat between 50 and 65 mph.; he would say the car was not exceeding 65 mph.

(2) Glen Minton, heretofore mentioned, who did not observe the accident, but was subsequently called to the scene, estimated appellant's speed at 80 mph. This estimate was based, as he stated, "on the distance that the car was out of control and the severity of the impact." (The Majority is holding this testimony inadmissible, with which holding, I thoroughly agree.)

(3) Miss Overturf never did estimate the speed, only saying the car was going very fast.

(4) Henshaw testified that he was not driving in excess of 55 mph.

This was all the testimony relative to speed.

I do not think that the aforementioned evidence establishes intoxication, and the strongest competent evidence of the speed was 65 miles per hour. Of course, in

[1] The officer explained that from his experience in arresting people who were intoxicated, he had learned there was a difference in the smell of the breath when a fresh drink had been taken, and when the drinks had been taken over a period of time. He stated a fresh drink smelled as though fresh out of the container, while in the latter instance, the breath becomes soured.

numerous cases, we have said that in order to sustain a recovery under the Guest Statute, the negligence must be of even greater degree than gross negligence; it must be willful or wanton. *Edwards* v. *Jffers,* 204 Ark. 401, 162 S. W. 2d 472. In that case, an award of damages to a guest was reversed by this Court, and the cause of action dismissed. Mrs. Jeffers, a passenger in the Edwards car, was injured when the car traveled too rapidly around a curve and overturned. There was evidence that the automobile was traveling at a speed of 70 to 80 miles per hour. There was even evidence that Mrs. Jeffers protested two or three times to Mrs. Edwards about the rate of speed at which the car was being driven. This Court said that no willful and wanton negligence was established. This case involved purely a matter of speed. In *Lewis* v. *Chitwood Motor Co.,* 196 Ark. 86, 115 S. W. 2d 1072, this Court said that if a driver is under the influence of liquor to such an extent as to make him an incompetent driver, and such intoxicated condition contributes to the injuries complained of by the guest, still, there can be no recovery if the passenger knew, or by the exercise of ordinary care should have known, that the driver was under the influence of liquor, but not withstanding such knowledge, rode with him. In one of our more recent cases, *Poole* v. *James,* 231 Ark. 810, 332 S. W. 2d 833, a guest in a car operated by James instituted suit for damages, and following a directed verdict for the defendant in the trial court, appealed. This Court, quoting from Blashfield's Cyclopedia of Automobile Law and Practice, said:

"Where the road becomes dangerous, or the speed of the machine in which a passenger or guest is riding becomes excessive or unlawful, or the driver is otherwise careless or reckless in his conduct, and this is or ought to be known to the passenger, he is under the duty, in the exercise of ordinary care, to protect himself from injury, to caution the driver of the danger, remonstrate against it, and, unless the dangerous character of the surrounding conditions or the dangerous manner of operation is altered in such a way as to lessen the grave potentiality

of harm, to quit the car if that may be safely done, or to request the driver to stop the vehicle, and, when it has stopped, to get out of the car."

Of course, the facts in these cases are not identical with the facts in the instant case, but the principle of law, just enunciated, is exactly the same. Let us review the evidence in the case before us to determine whether the guests in Henshaw's car remonstrated with him about his speed, or had the opportunity to quit the car. In the first place, if Henshaw was intoxicated when he went to the Overturf apartment, the girls could (and should) have refused to go with him. Miss Overturf testified that she smelled alcohol, and he "kinda stumbled once" (though she did not say this was because of intoxication, and people have been known to stumble when completely sober). In fact, she testified that she saw Henshaw walking, and talked with him in the apartment, and she was not afraid to go with him. She did go with him, and Miss Henderson insisted upon going also. Also, Miss Overturf testified she had been around Henshaw once since the accident, and had heard him talk, and she observed no difference in his speech on the latter occasion and that of the night of the accident. She testified that Henshaw started out in Hot Springs driving fast, and had to "squeal his brakes" to keep from hitting a car in front of them at a red light; thereafter, she closed her eyes because she was scared, until they reached Truman's Tavern, where Henshaw got out and went in and purchased the can of beer heretofore mentioned. The car was parked there for several minutes, and both girls had a clear opportunity to quit the car; instead, they remained, and drove to the tourist court where they were to meet a married couple. Again, Miss Overturf testified that she closed her eyes until they reached their destination. Here, also, the car was stopped for several minutes, and both girls had a second opportunity to quit the car. Instead of leaving it, they requested Henshaw to drive to Malvern to pick up Miss Henderson's boy friend, and this was the purpose of driving toward Malvern, where the accident occurred. During all of this time, from the

period of leaving the apartment until the accident occurred, *no one made a single protest to Henshaw* about his speed, or the can of beer that he had purchased; nor did either of the girls request to go home. Likewise, Miss Overturf testified there was no difference in his driving from the last stop made (the tourist court), to the scene of the accident, and his previous driving. "It was about the same." She testified that the only time anything was said about his driving was between Truman's Tavern and the tourist court, when she told him her scarf was blowing off (they were riding in a convertible), and he slowed down for her to put it back on. She stated that he did nothing to indicate he would not have slowed down had he been requested to do so. Under the principles of law heretofore set out, I am convinced that this judgment should be reversed, and the cause dismissed.

I therefore respectfully dissent.

George Rose Smith and Robinson, JJ., join in this dissent.

Davis *v.* Kukar, Adm'x.

5-2612 357 S. W. 2d 275

Opinion delivered May 21, 1962.

William H. Drew, for appellant.

John F. Gibson, for appellee.

NEILL BOHLINGER, Associate Justice. On December 16, 1959, at approximately 7:50 p. m., Gerald Kukar was driving a 1956 Mercury sedan on U. S. Highway 65 in Chicot County and at approximately 45 feet north of the point where State Highway 144 intersects U. S. Highway 65, which point is known as McMillan Corner, the car driven by Gerald Kukar struck the rear of a 1956 John Deere tractor which was the property of the appellant, Alice-Sidney Farms. The tractor was driven by Joe Nathan Davis, an appellant herein who was an employee of the appellant, Alice-Sidney Farms. The force of the impact was such that Gerald Kukar died several hours after the accident in a nearby hospital and to recover damages for the death of said Gerald Kukar, the appellee, Agnes Kukar, individually and as administratrix of the estate of Gerald Kukar, brought action in the Chicot Circuit Court against the appellants herein.

She alleged that the appellant, Joe Nathan Davis, was a regular employee and acting in the scope of his employment for the Alice-Sidney Farms at the time of the accident; that the proximate cause of the accident was negligence of the Alice-Sidney Farms in permitting

the appellant, Joe Nathan Davis, to operate the tractor on the highway when they knew or should have known that he was not a qualified driver or operator; that the appellants were both negligent in operating the tractor driven by appellant, Joe Nathan Davis, along and upon the highway at the time of the accident without any rear lights operating on said tractor; that any rear lights on said tractor was not of a type approved by the laws of the State of Arkansas; and that such acts of negligence were the proximate cause of the injury and resulting death of Gerald Kukar.

Taking the sequence of events from the record, it is shown that the appellant, Joe Nathan Davis, had been working for Alice-Sidney Farms about a year and a half and had been a tractor driver for about a year. About 5:30 on the afternoon of December 16, 1959, the bookkeeper for the Alice-Sidney Farms had gone to the home of the appellant, Joe Nathan Davis, and directed him to go to the Alice-Sidney tractor shed. He was directed by an employee of the Alice-Sidney Farms to take a certain tractor and proceed to a point on State Highway 144 where a car had been mired down or was in the ditch. State Highway 144 was undergoing some repairs and was muddy and rutted. Arriving at the point where the car was mired down, the appellant, Joe Nathan Davis, drove behind the car to pull it back and after he had hooked onto the car another employee of the Alice-Sidney Farms took the tractor and pulled the car to the front of the McMillan Store.

Appellant, Joe Nathan Davis, was told to take the tractor back to the farm. However, he waited in front of the McMillan Store until his boss had left the vicinity, then he turned the tractor and drove east across U. S. Highway 65 to Stene Dunn's farm where he stayed 15 to 20 minutes and took two of his friends from that point to Judge Locke's farm which was approximately two miles north of Dunn's. He there drove out in a pasture and left his friends at a house where he stayed two or three minutes and then started back south on U. S. Highway 65 and had reached the front of the Oasis Cafe,

about 45 feet north of the junction of State Highway 144 and U. S. Highway 65, when the accident occurred.

To account for his being on highway 65 and the lapse of time involved, Davis had told his employer and others that he had gone north on 65 to help start a car, which statement he subsequently retracted and said he had made it to keep from being fired because he had been doing something he had not been told to do.

The case as to Alice-Sidney Farms hinges upon the question: "Was the appellant, Joe Nathan Davis, engaged in the business of the appellant, Alice-Sidney Farms, at the time of the accident?" There is no showing that the Alice-Sidney Farms had any business which required Davis to go either upon highway 65 or to any point east thereof. That part of the excursion seems to have been purely a personal and social one initiated by and in the interest of the appellant, Joe Nathan Davis.

The law of *respondeat superior* is well settled.

"* * * the doctrine of *respondeat superior* * * * rests upon the proposition that, in doing the acts out of which the accident arose, the servant was representing the master at the time and engaged in his business. It is conceded that the doctrine cannot be invoked unless, at the time of the negligent act causing the injury, the servant was engaged in performing a service for the master or [an act] incidental thereto. It is generally stated by text writers and in judicial decisions that the test of the liability of the master for his servants [sic] acts is whether the latter was at the time acting within the scope of his employment. The phrase 'in the scope of his employment or authority,' when used relative to the acts of the servant, means while engaged in the service of his master or while about his master's business. It is not synonymous with 'during the period covered by his employment.'

* * * The very basis of the rule of *respondeat superior,* as applied to automobile accidents as well as to other cases, is that the driver of the car is acting for the owner and not for himself personally at the time of the

accident. When the servant steps outside of the master's business and enters upon the performance of some individual purpose of his own, he ceases to act as the servant of the owner, and the latter's responsibility for his act terminates." *Hunter* v. *First State Bank of Morrilton,* 181 Ark. 907, 28 S. W. 2d 712.

In *Page Lumber Company* v. *Carman,* 214 Ark. 784, 217 S. W. 2d 930, this court discussed the master's liability and said:

"In order to bind the master, * * * 'the act must be done not only while the servant is engaged in his master's service, but it must pertain to the particular duties of that employment.'

'In the more recent case of *Carter Truck Line* v. *Gibson,* 195 Ark. 994, 115 S. W. 2d 270, it is said: "The act of the servant for which the master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform or be for the benefit of his master. *Sweeden* v. *Atkinson Imp. Co.,* 93 Ark. 397, 125 S. W. 439, 27 L. R. A., N. S. 124. * * * And if the servant steps aside from the master's business to do an independent act of his own and not connected with his master's business, then the relation of master and servant is for such time, however short, suspended; and the servant while thus acting for a purpose exclusively his own, is a stranger to his master, for whose acts he is not liable. * * * If a servant completely turns aside from the master's business and pursues business entirely his own the master is not responsible.' *Lindley* v. *McKay,* 201 Ark. 675, 146 S. W. 2d 545."

The case of *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, is a leading case on the matter of deviation and abandonment. In the *Healey* case the master had ordered the servant to bring the car around to her door. This entailed the servant driving the car around three sides of a block and parking the car at the master's door. But instead of this, the servant drove the car several blocks away to purchase cigarettes for himself and on

the return trip was involved in an accident. In this case we said:

"We do not think that the facts of the present case bring it within the rule of slight deviation from the employer's service, or a mere incidental departure from the service to mingle it with purposes of the servant's own, but that it is a case of complete abandonment or departure from the employer's business and a stepping aside wholly for the servant's own purpose. The distance traveled by the servant in going upon his own errand was not very great, but it was considerably out of proportion with the distance necessary to travel in obeying the instructions of his employer. In other words, the relative distance was too great to be called a slight deviation, and the departure from the line of duty was so complete that the connection with the employer's service was completely broken. In order to perform the employer's service it was unnecessary for the servant to leave the immediate proximity of the employer's premises. He did not even have to cross any of the streets, but his journey from the back of the premises to the front was merely to follow the same side of the street half way around the block. Instead of following that course, the servant left the premises entirely and went off on an errand of his own to purchase an article for his private use, and in order to make the trip to the store, was not mingling his it was necessary for him to travel the distance of six and one-half blocks in getting back to the front of his employer's residence. The servant, in leaving the premises in order to make that trip in observance of the traffic rules, own business with that of his employer, but he was stepping aside entirely from the employer's business to go on an errand of his own, and this is true even though he intended to dispose of the car, on his return, in accordance with the employer's direction."

In *Neville* v. *Adorono,* 123 Conn. 395, 195 A. 613, there is a discussion of deviation from and return to the scope of employment.

"In deciding whether an unauthorized deviation from the employment is so slight and not unusual as not to relieve the employer from liability, or of such a character as to constitute a temporary abandonment of the employment, 'the trier must take into account, not alone the mere fact of deviation, but its extent and nature relatively [sic] to time and place and circumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it.' * * *

Only when the deviation is clearly of the one character or the other can its effect upon the employer's liability be determined as matter of law. In most cases it is a question of fact, depending upon the nature and extent of the deviation and all the attendant circumstances." [Citations omitted]

The testimony in this case is in no wise disputed that the employer, Alice-Sidney Farms, had no business that required its servant, Joe Nathan Davis, to go on highway 65 at all nor to go east of highway 65 and that Davis' action in so doing constituted a deviation and departure from his employment for which the employer is not responsible.

The accident occurred at a point north of where the employer had left Davis when Davis was instructed to take the tractor back to the farm. Hence, there could have been no resumption of his employment. We think that the time that elapsed between the departure from employment, when Davis, on his own, turned the tractor around and went east across highway 65, and the claimed resumption is a significant circumstance. We do not know how much time elapsed after Davis crossed highway 65 going east, but as a matter of common knowledge we know that time did elapse between Davis' departure from in front of the store to the point where he picked up his friends on the Stene Dunn farm. We know that time did elapse between the time he picked up his two friends at Dunn's and drove two miles north to the Locke farm where he stayed two or three minutes and

time certainly elapsed between the leaving of the Locke farm and the time when Davis arrived in front of the Oasis Cafe, the scene of the accident, and it was Davis' use of that time on his own business that placed him at the scene of the accident.

We think the finding of the Alabama Supreme Court in *Bell* v. *Martin,* 241 Ala. 182, 1 S. 2d 906, is especially pertinent.

"It is established in this jurisdiction that where there is an abandonment of the master's business for personal reasons of the servant or agent in question, the employment is suspended and the master is not liable for the negligence of such agent or servant during such suspended employment and during the time of his departure from the master's business. Each case must be ruled by its 'own peculiar' or particular facts, and when a servant has abandoned his employment by the master (*Moore-Handley Hardware Co.* v. *Williams,* 238 Ala. 189, 189 So. 757), *the mere fact that he is returning* thereto, does not of itself reinstate the servant, agent or agency in his master's employment and establish the engaging in the master's business so as to subject the master to liability and for damages resulting after the departure and before the return is accomplished as of fact."

That court also said:

"* * * where there has been an abandonment and the driver must return to the place of such abandonment before he can commence carrying out what he was hired to do, then to such extent the employment is suspended, *both on the outgoing and return trip.*"

The defendants requested instruction No. 15 as follows:

"You are instructed that under the proof in this case, as a matter of law, the defendant, Joe Nathan Davis, was not acting within the scope of his employment, and you are, therefore, instructed to find for the defendant, Alice-Sidney Farms, and against the plaintiff."

Under the proof in this case, the above instruction should have been given. Failure to give it was error and for that error this cause is reversed and dismissed as to Alice-Sidney Farms. The negligence of the appellant, Joe Nathan Davis, was properly submitted to the jury which found for the appellee against him. That verdict we do not disturb.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice (Dissenting). I dissent to the majority opinion for the reason that in my view the principal question presented here is one of fact for the jury. I am convinced that the trial court correctly submitted to the jury the question of re-entry upon the purposes of the master by the servant. The Court's Instruction No. 3 is as follows:

"You are instructed that even though you should find that the defendant, Joe Nathan Davis, was on an errand for his employer and had, prior to the accident, deviated from the scope of his employment, that this fact is immaterial if you find from a preponderance of the evidence that at the time of the accident the Defendant, Joe Nathan Davis, had resumed the performances of his duties for the defendant, Alice-Sidney Farms, and if you so find from a preponderance of the evidence, then you will find that Joe Nathan Davis was acting within the scope of his employment at the time of the collision."

There can be no question but that appellant's servant was on a frolic of his own and had departed from the scope of his employment. However, there is ample evidence to show that somewhere in point of time or space appellant's servant intended to re-enter upon the master's business. There is testimony to support a conclusion that at some point in the deviation appellant's servant intended to return the tractor to its accustomed place. (That was what he was instructed to do.) The facts here show that appellant's servant returned to within less than 45 feet of the point where he had departed from the scope of his employment. His own testi-

mony is undisputed that his intent was to return the tractor in accordance with the instructions of his superior. He testified that he slowed the speed of the tractor for the purpose of making a turn onto the road at which point he had departed on his own business. While in this process of altering the speed of the tractor for the purpose of negotiating the turn, the fatal injury occurred. What was in the servant's mind? The servant and the Lord only knows! Surely a trial judge would not be expected to rule, as a matter of law, that the servant was not intent upon returning the tractor to its rightful place. Intent is a matter of proof. The strength or weakness of the proof may or may not allow a trial judge to rule, as a matter of law, that the servant was or was not intent upon fulfilling his mission for his master, however tardy he may be in doing so. Clearly, reasonable men could differ in the case at bar. Since reasonable men could differ, it is most unreasonable to expect a trial judge or this Court on appeal to substitute his or our evaluation of the facts by denying a jury review of those facts.

The majority here has placed too much stress upon this Court's ruling in *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229. The *Cockrill* case is clearly distinguishable. There the distance, though not great, which was traveled by the servant in going upon his own errand was many times greater than the distance necessary to travel in obeying the instructions of his employer. Here the distance traveled by the servant in going upon his own errand was less than half the distance necessary to travel in obeying the instructions of his employer. The majority goes to great length to reiterate the well known rule that when a servant goes upon a frolic or detour of his own such departure from the course of the master's business terminates the relationship of master and servant and relieves the master of tort liability for acts and omissions of the servant during such frolic or detour. There can be no quarrel with this rule for it is sound and represents the great preponderance of case law in this country. But the question of re-entry by the servant

upon the purposes and business of his master has too long been ignored by this Court. And I take specific issue with the majority's reliance upon the minority holding that re-entry is not effectuated so as to reestablish tort liability upon the master until the servant has reached the exact point of departure. This rule is much too narrow and could open the door to collusive and even perjured testimony whereby judgment-proof servants might willingly lift the burden of liability from their more prosperous master and the master's sureties.

By the very nature of a master-servant relationship it is folly to expect a master to be in constant supervision of each act his servant is to do. When a master sends a servant to accomplish some purpose for the master he thereby incurs certain liabilities of a vicarious nature for the acts and omissions of the servant. If the servant departs from that purpose the master is relieved of liability. But the perplexing problem presented to the courts is to devise some means of determining the approximate point in time or space when the servant re-enters upon the purposes of the master and thereby reestablishes the vicarious liability of the master.

No two cases present the same set of facts. The facts in one case may be so clear as to allow the trial judge to rule, as a matter of law, that the servant had or had not re-entered upon the purpose of the master. Conversely, the facts in another case may be such that reasonable men could differ. There can be no doubt but the case at bar falls in the second category.

The Court attempted to define re-entry in *Cahill* v. *Bradford,* 172 Ark. 69, 287 S. W. 595, when it held that it was a question for the jury ". . . whether the servant was pursuing the general course necessary to accomplish the purposes involved in his master's business at the time the injury occurred."

The facts in the present case are undisputed that the servant was in fact in the process of re-entering the road at the exact spot from which he had departed when the collision occurred.

The question still remains: At what point in time or space does re-entry into the scope of employment occur?

In an effort to answer this difficult question, the American Law Institute's Restatement of the Law of Agency, 2d, § 237, set out this rule:

"A servant who has temporarily departed in space or time from the scope of employment does not re-enter it until he is again reasonably near the authorized space and time limits and is acting with the intention of serving his master's business."

Cases cited in the appendix point clearly to the better view that, as here, on close questions of fact, submission to the jury is proper. (See cases cited in Restatement of the Law, Agency 2d, Appendix, § 237.)

American Law Institute's Restatement position is clearly supported by other authoritative legal writers. Professors Harper and James in their learned three volume text "The Law of Torts", Vol. 2, § 26.8 p. 1386, say:

". . . The simplest case of detour is that of a driver who is employed to drive a truck to deliver his master's goods to a point 10 miles south of the store, but who drives the loaded truck a short block west of the prescribed direct route to get some cigarettes, intending to return forthwith to the performance of his duty. If he negligently injures plaintiff, during the deviation, the master is generally held liable.

"At the other extreme stands the case where the driver, having delivered the goods, proceeds to take a 50-mile drive further south to see his girl and on his way there injures plaintiff 25 miles south of where he delivered the goods. Here the master is not held.

"Between these extremes exist the greatest confusion and contrariety of opinion. Most courts and commentators agree that no clear line can be drawn although some of the earlier cases are marked by a striving for precise—and arbitrary—tests. *For the most part the tendency has been to recognize the importance of a num-*

ber of factors, attaching to each a weight that varies with the circumstances—a process that is usually committed to the jury . . ." (Emphasis supplied.)

Further, see Prosser on Torts, 2d Ed. § 63, p. 353, which states:

"Questions of fact of unusual difficulty arise in determining whether the servant's conduct is an entire departure from the master's business, or only a roundabout way of doing it—and likewise, the point at which the departure is terminated, and the servant may be said to have re-entered the employment. This is particularly true in the 'detour' cases, where the servant deviates from his route on a personal errand, and later returns to it. Various tests have been proposed. One makes the question turn primarily on the servant's motive in the deviation, saying that he is within his employment while he intends in part to serve his master, or as soon as he starts to return to his route. Another more generally accepted, looks to the foreseeability of such a deviation, and holds the employer liable only for torts occurring in a 'zone of risk' within which the servant might be expected to deviate. Under this view the servant does not re-enter the employment until he is reasonably near the authorized route. . . ."

35 Am. Jur. Master and Servant, § 558, p. 992.

". . . One of the controverted questions is whether an employee who has turned aside from his employer's business to accomplish some purpose of his own, and who, after accomplishing his purpose, returns to resume his duties, is, while so returning, engaged in the business of his employer and within the scope of his employment so as to render the employer liable for his tortious conduct. According to the rule of many courts, the employer may be held liable for the torts of his servant which are committed after the personal business of the latter has been concluded and while he is returning to the place where he departed from the designated course. Some courts hold that the mere fact that an employee using the car for his own business or pleasure

is returning to the master's garage or to his employment, when the injury occurs, does not alone constitute such a resumption of the master's business as will render the master liable for the injury. The truth is that no hard and fast rule on the subject either of space or time can be applied. It cannot be said of a servant in charge of his master's vehicle, who temporarily abandons his line of travel for a purpose of his own, that he again becomes a servant only when he reaches a point on his route which he necessarily would have passed had he obeyed his orders."

It is my view that this Court should follow the great weight of authority in deciding the question of re-entry by the servant upon the purposes and business of his master. The better view, in my opinion, is that on close questions of fact the jury is the proper forum to decide whether a servant has re-entered upon the purposes and business of his master. The case at bar is a clear illustration of the injustice of the narrow view taken by the majority of this court.

For the reasons stated above, I respectfully dissent.

Opinion delivered May 28, 1962.

Jeff Duty, for appellant.

J. Frank Holt, Attorney General, by *Milas H. Hale,* Asst. Attorney General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Lawrence John Higgins, was charged by Information with the crimes of burglary and grand larceny, the Information alleging that appellant burglarized the Western Auto Store in Bentonville, Arkansas. The Information also charged Higgins with being an habitual criminal,

alleging that he had previously been convicted of three separate felonies and had served a sentence in a penitentiary on each of said convictions. On trial, the jury returned the following verdict:

"We the Jury find the defendant, Lawrence John Higgins, guilty of Burglary and fix his punishment at 15 years consecutively in State Penitentiary.

We the Jury find Lawrence John Higgins guilty of Grand Larceny and fix his punishment at 15 years consecutively in State Penitentiary."

From the judgment entered in conformity with this verdict, appellant brings this appeal.

For reversal, it is first asserted that the court erred in permitting introduction of State's exhibit No. 8. This exhibit, which was admitted over the objections and exceptions of appellant, is a copy of the criminal record of Lawrence Higgins, and includes all of the arrests and convictions of appellant from the year 1935 to the present time. In admitting the exhibit, the court did not permit the jury to look at the record itself (apparently because it showed the number of arrests, as well as the number of convictions), but did permit the prosecuting attorney to read into evidence those portions relating to appellant's convictions. The admitted portion reads as follows:

"UNITED STATES (SEAL)[1] OF AMERICA
FEDERAL BUREAU OF INVESTIGATION

July 7, 1961

In accordance with Title 28, Section 1733, U. S. Code, I hereby certify that the annexed paper is a true copy of the original record and fingerprints in the Identification Division of this Bureau, of LAWRENCE HIGGINS (ALSO KNOWN AS LAWRENCE JOHN HIGGINS) FBI number 1 146 464.

[1] This seal reads: "Department of Justice" (at top)—"Federal Bureau of Investigation" (at bottom).

In Witness Whereof, I have hereunto set my hand and caused the seal of the Federal Bureau of Investigation to be affixed, on the day and year first above written.

/s/ A. K. Bowles

A. K. Bowles

Inspector

Identification Division

Contributor of fingerprints: State Reformatory, Monroe, Washington; Name and number, Lawrence John Higgins, No. 9810; Arrested or received, October 10, 1936; Charge, grand larceny; Disposition, not more than 15 years; 5 years board action. June 21, 1944, final discharge from parole.

Contributor of fingerprints, United States Marshal, Abilene, Texas; Name and number, Larry J. Higgins, No. 1497; Arrested or received, January 30, 1956; Charge, Dyer Act; Disposition, March 22, 1956, 2 years.

Contributor of fingerprints, United States Penitentiary, Leavenworth, Kansas; Name and number, Lawrence John Higgins, No. 75012; Arrested or received, November 12, 1957; Charge, Motor Vehicle Theft Act; Disposition, 3 years, December 30, 1959, mandatory release."

The authority for offering this evidence is contained in Section 43-2330 (1961 Supp.), and reads as follows:

"The duly certified copy of the record of a former conviction and judgment of any court of record for imprisonment in the penitentiary against the person indicated or the certificate of the warden or other chief officer of any penitentiary of this State or any other State in the United States, or the Federal Government or of any foreign country, or of the chief custodian of the records of the United States Department of Justice, containing the name and the fingerprints of the person imprisoned as they appear in the records of his office

shall be *prima facie* evidence on the trial of any person for a second and subsequent offense, of the conviction and judgment of imprisonment in the penitentiary and may be used in evidence against such person."

This section is a part of the "Habitual Criminal Act" (Act 228 of 1953, as amended in 1961), which provides a greater penalty for those defendants who have been previously convicted of felonies.[2] Appellant contends that the court erred in admitting this exhibit, since it is not signed by anyone claiming the title of "Chief Custodian of the Records of the United States Department of Justice", but rather, the signer is only identified as an "Inspector, Identification Division". We think there is merit in this contention.

Since the statute authorizing a more severe punishment for one who has been previously convicted, is highly penal, it must be strictly construed. *U. S. V. Lindquist, et al,* 285 F. 447; *State* v. *Bailey* (La.), 115 S. 613. There is here no showing that A. K. Bowles, Inspector, Identification Division, is the chief custodian of the records of the United States Department of Justice. In *Mullican* v. *United States,* 252 F. 2d 398 (U. S. Court of Appeals, 5th Circuit), it was urged by the appellant that certain exhibits offered by the Government consti-

[2] "§ 43-2328. Second or Subsequent Convictions—Sentence.—Any person convicted of any offense punishable by imprisonment in the Penitentiary, who has been discharged, either upon compliance with the sentence or upon pardon or parole, and shall subsequently be convicted of any offense committed after such discharge, pardon or parole, shall be punished as follows:

(1) If the second offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one (1) year more than the minimum sentence provided by law for a first conviction.

(2) If the third offense is such that, upon a first conviction the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for a determinate term not less than two (2) years more than the minimum sentence provided by law for a first conviction.

(3) If the fourth or subsequent offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term not less than his natural life, then the person shall be sentenced to imprisonment for the fourth or subsequent offense for a determinate term not less than three (3) years more than the minimum sentence provided by law for a first conviction."

tuted error requiring a reversal. The Court quoted from the Federal Rules as follows:

"An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. * * *"

Relative to one of the exhibits, the Court then said:

"Government Exhibit 4 consisted of photostatic copies of a Certificate of Parole issued to Mullican in December, 1954, at which time he was an inmate of Texarkana, an Order of Revocation of the Parole, a Warrant for his return to Texarkana, and a Marshal's return showing the delivery pursuant to the Warrant of Mullican to Texarkana on May 18, 1956. These were certified as being exact copies of official documents issued by the United States Board of Parole. The certificate was signed by the Chairman of the Board of Parole, and in this form:

'District of Columbia, Washington, D. C., ss.

I, Scovel Richardson, Chairman, United States Board of Parole, hereby certify that the three attached instruments are exact copies of official documents issued by the United States Board of Parole, in the case of Lloyd Ray Mullican—8786—TT.

The documents are as listed below:

Parole Certificate

Warrant

Order of Revocation

Witness my hand and seal this 1st day of March, 1957.

[Signed] Scovel Richardson

Chairman

[Seal]

I hereby certify that this document was signed in my presence this 1st day of March, 1957, and that I have custody of the seal of the United States Board of Parole, which is affixed hereto.

[Signed] James C. Neagles

Acting Parole Executive'

This certificate, in addition to having some of the infirmities inherent in Exhibit 3, is also defective in not containing any recital saying that the officer making the certificate has the custody of the records. We conclude that the court erred in admitting Government Exhibit 4.'' We might here point out that we do not think it was the intent of the Legislature in passing Act 228 of 1953 (§ 43-2330, 1961 Supp.), to permit the introduction of a certified copy of the records of the United States Department of Justice, even though properly certified by the Chief Custodian of the Records, in instances where the prisoner's sentence was served in a state prison. Rather, we are of the opinion that the language of that section requires the certificate of the warden or the chief officer of the state penitentiary wherein the accused had previously served time. The records of the United States Department of Justice, properly certified, could appropriately be offered where the accused had served time in a federal prison or reformatory. When a man is arrested and charged with crime in this state, under the usual procedure, he is fingerprinted, and a copy of the prints sent to the Department of Justice in Washington. That department then sends back to the arresting officers a copy of the defendant's record, if any, which shows both previous arrests and convictions. If the prosecuting officials of that county desire to charge the defendant with being an habitual criminal, and to invoke the penalties of the Habitual Criminal Act, it is only necessary that they write the warden or other chief officer of the institution where he served time, and request a certificate that the defendant served a sentence in that prison (giving dates and charge convicted of, along with copy of fingerprints). Of course, the record is hearsay evidence (made

admissible by the Legislative Act), but under this procedure, it is, at least, hearsay "at first hand", whereas, when a certified copy of a record is obtained from the Department of Justice, it is hearsay "once removed", since the department acquired its information from the state authorities.[2] We think, unquestionably, that the introduction of a prior record carries great weight with a jury, and the statute permitting this type of evidence should be strictly complied with.[3]

Appellant also complains that the exhibit is objectionable in that Higgins and the person named in the record were not identified by the State as one and the same person. Courts of various jurisdictions are not in agreement upon the sufficiency of proof to establish the identity of a defendant. As stated in 11 A. L. R. 2d, p. 884 and p. 887:

"It would seem that there are two distinct lines of authority in regard to the effect to be given to identity of name as evidence of identity of person in such case. One line of authorities holds that identity of name of the defendant and the person previously convicted is prima facie evidence of identity of person, and, in the absence

[2] Where a defendant admits in open court his prior convictions, the certificates are not necessary.

[3] Actually, because of the fact that this evidence does carry great weight with the jury, and may even subconsciously influence the minds of the jurors in determining the defendant's guilt or innocence of the crime with which he is immediately charged, a few states follow the procedure of first determining the guilt of a defendant on the present charge before admitting evidence of prior convictions. The procedure is set forth in the case of *State* v. *King* (Nash.), 140 P. 2d 283, as follows: "Where a defendant has been convicted of a crime, consequent upon which an habitual criminal proceeding is instituted against him, sentence upon the substantive offense upon which he has been convicted shall await the outcome of the habitual criminal proceeding, and if the latter be substantiated, then, and not until then, shall sentence be imposed upon the defendant for the commission of the substantive crime, with an increased penalty exacted because of the adjudication of defendant's habitual criminal status." This procedure is predicated upon a statute (since repealed), but the procedure is still maintained. See *State* v. *Huneke*, 249 P. 784; *State* v. *Kirkpatrick*, 43 P. 2d 44. Connecticut likewise follows a similar procedure, as set out in Section 340 of the Connecticut Practice Book. See *Armstrong* v. *Potter*, 125 A. 2d 389. While we approve this practice, we feel that such procedure should properly be required by the Legislature, rather than by this Court.

of rebutting testimony, supports a finding of such identity.

* * * *

. . . some courts hold that, to warrant the application of a statute authorizing additional punishment of one convicted of crime upon proof of former conviction, the identity of the accused and the one against whom the former judgments were entered must be established by affirmative evidence, mere proof of identity of names not being sufficient."

In fact, it would appear that the authorities are rather equally divided. We prefer the former view, feeling that the certified copy of record is proper *prima facie* evidence. Of course, there is nothing to prevent a defendant from tendering proof to the effect that he is not the preson referred to in the record. Actually, we have already upheld the admission of such evidence, without additional identification, in previous cases. See *Rowe* v. *State,* 224 Ark. 671, 275 S. W. 2d 887.

Appellant next questions the sufficiency of the evidence to sustain the conviction. While the evidence was not overly strong, we think, when viewed in the light most favorable to the State, which we must do on appeal, it was sufficient. For that matter, on a second trial, it may well be that the evidence will be more fully developed. The proof reflected that some guns were stolen from the Western Auto Store at Bentonville, Arkansas. Higgins, Bill Linehan, alias O'Banyan, and a man named Smith, were registered together at a Eureka Springs hotel. Sheriff Dwan Treat of Carroll County arrested appellant, because of circumstances that appeared suspicious to him, and took Higgins to his (the sheriff's) office. Earl Rife, criminal investigator for the Arkansas Police, testified that appellant told him that he had some guns in the trunk of his car. Appellant points out that neither Mr. Rife, nor the sheriff, who also testified, stated that Higgins admitted that the guns referred to were the same guns that had been stolen. The sheriff then arrested O'Banyan, who, at the trial, testified that he and Higgins

broke into the building and stole three shotguns, shotgun shells, and a radio. These items were recovered by the sheriff near Lake Eureka, after O'Banyan took him to the place where they were hidden. Clayton Morrow, a justice of the peace of Carroll County, stated that he heard Higgins and O'Banyan talking in the sheriff's office, and Higgins asked O'Banyan what he (O'Banyan) "did with the guns." The latter replied that he "hid them over in the woods." Mr. Morrow could not testify that the men were talking about the particular guns stolen from Western Auto, though O'Banyan testified that the guns were the same. We think it plausible, considering the two men had just been arrested for stealing the guns from the Western Auto Store, that the conversation related to those particular items.

The jury, in fixing the punishment, found that the sentences should be served consecutively. We take this occasion to point out that this finding can only be considered advisory, much in the same nature as when a jury recommends a suspended sentence, inasmuch as the question of whether sentences shall be served concurrently or consecutively lies solely within the province of the court. See § 43-2312, Ark. Stats. Anno.

Because of the error in admitting the exhibit as herein set out, the judgment is reversed, and the cause remanded.

DAVIDSON *v.* SANDERS.

5-2676 357 S. W. 2d 510

Opinion delivered May 28, 1962.

Dinning & Dinning and *Burke & Roscopf,* for appellant.

George K. Cracraft, Jr., for appellee.

CARLETON HARRIS, Chief Justice. This is an action by appellees, as children, grandchildren, and great grandchildren of Andrew Williams, deceased, who was the owner of certain lands in Phillips county (120 acres, more or less), against Otis Williams, grandson of Andrew Williams, alleging that they were the owners of such lands, through inheritance, as tenants in common; that though they had conveyed their interests in the lands to Otis Williams, and he thereby held legal title, appellant was actually holding the lands in trust for them. It was alleged that the title was placed in appellant for the sole purpose of obtaining a loan to pay off indebtedness against the property; that Otis Williams was to have the use of said lands "and as soon as the rents and profits were sufficient to pay said indebtedness that said lands would then be conveyed back to said heirs according to their original interests therein"; that demand had been made upon Williams to convey the property back, but that he had failed and refused to do so. Appellant

answered, asserting, *inter alia,* that he was the owner of said lands, denying that he had made any agreement, verbal or written, to reconvey to appellees any part or portion of the lands involved in the proceedings, and specifically pleading the statute of frauds, laches, estoppel, and the five year statute of limitations applying to the commencement of actions against purchasers at judicial sales. Appellant, Abe J. Davidson, asserted that he held a mortgage on the property to cover advances made for the benefit of appellant Otis Williams, and that he was due the sum of $22,373.71, which amount constituted a first lien upon the property, and was superior to any claim of appellees. Davidson further alleged that if there was an agreement between Otis Williams and appellees to reconvey the property, he (Davidson) had no notice of same, and had made his advances to appellant Williams in good faith, and without any notice of any possible defect in title. At the conclusion of the trial, which covered several days, the court entered its decree, finding that Otis Williams held legal title to the lands in question, but "that said legal title now held by Otis Williams is held in trust nevertheless for the following named persons, to-wit:

Carrie Sanders, an undivided 1/6th interest

Martha Smith, an undivided 1/6th interest

The heirs at law of Julia Sawyer, an undivided 1/6th interest

Otis Williams, an undivided 1/2 interest.

The court further finds that the heirs of Julia Sawyer are:

Nora Laws

Maurice Laws

Ira Laws

Katie Laws Sims

Catherine Laws

Walter Laws

Hazel Laws
Elnora Sawyer Griffin
Mary Sawyer Shaw
Jessie Sawyer
Gill Sawyer
Annie Rankins
Marie Vanderbilt

Each of whom is entitled to an undivided 1/78th interest of said trust as the heirs at law of Julia Sawyer, deceased.

"The court finds that the purpose of said trust was to consolidate the title in Otis Williams for the purpose of obtaining a loan with said lands as security to retire the lien against said lands for delinquent taxes.

"The court further finds that an implied trust was thereby created and brought into being by the actions of the parties and the execution and delivery of the deed by which the above undivided interests were conveyed to the defendant, Otis Williams, and that the said Otis Williams now holds legal title to said interest in said lands as trustee for the use and benefit of all of the above named parties.

"The court further finds that the purposes for which said trust was created had been accomplished and that the trust should be terminated and the respective interests of the tenants in common be determined and fixed by this decree. * * *

"The court further finds that the deed of trust executed by Otis Williams and wife to Abe J. Davidson . . . should be set aside in so far as same purports to affect the interest of any of the beneficiaries of the trust hereinabove declared, * * *." From the Chancellor's decree, appellants bring this appeal.

Evidence on the part of appellees reflected that in the year 1942, the heirs of Andrew Williams were on the verge of losing the lands. They were without money to

pay taxes of any nature, and suits having been instituted by Little Cypress Drainage District, it was necessary that a loan be obtained in order to save the property. Mr. A. M. Coates, attorney of Helena, testified that Julia Sawyer, Carrie Sanders, and Otis Williams, discussed the matter with him; that subsequently, other heirs participated in the discussion. Miss Berniece Riegel was secretary to Mr. Coates, and served in that capacity for approximately 25 years. Miss Riegel was possessed of financial means, and indicated that she might be willing to make the loan, with Mr. Coates representing her in making the arrangements. According to Mr. Coates, Miss Riegel[1] was unwilling to lend the money on account of so many undivided interests, and he suggested that the title be placed in one person, so that that person could act for all the heirs, secure the loan, and repay same through the rents and profits. According to Mr. Coates, it was understood that as soon as the indebtedness was paid, Otis Williams would reconvey the land to appellees, according to their respective interests. On April 4, 1942, a warranty deed was prepared, which was subsequently executed by Carrie Sanders, Martha Smith, Julia Sawyer, Maude Turner, Sylvester Williams and his wife, Celestine Williams, and Jelle Lee Holmes. Aline White[2] declined to join in the plan, and three of the heirs were minors. A partition suit was filed in the name of Otis Williams, the complaint asserting that Williams, by virtue of the conveyance from appellees, had become the owner of all of the lands, with the exception of the interests of Aline White and the three minors. On November 23, 1942, a decree was rendered, finding that Williams, by reason of inheritance, and the warranty deed executed by appellees, was the owner of said lands (with the exception of the interests just mentioned), and the lands were ordered sold. At the partition sale, Miss Riegel purchased the property, and then executed a quitclaim deed to Otis Williams. According to Mr. Coates,

[1] Miss Riegel was killed in an automobile accident on September 27, 1956, which Mr. Coates stated was the reason for his testifying in the case.

[2] This heir sold her interest in the lands to Otis Williams on December 4, 1942.

this was all a part of the plan, and agreed upon by all participants. Williams and his wife then executed their notes and a deed of trust in favor of Berniece Riegel, to secure a loan of $1,653.93, same to become due in November, 1949.

Mr. Coates stated that he first learned in 1951 that Otis Williams denied that he was holding the property in trust for appellees. At that time, Otis still owed $1,479.00. According to the witness, a house on the place burned and Miss Riegel was holding $1,000.00, which had been paid by the insurance company, and which Otis desired to be applied on his individual indebtedness.[3] Coates explained that this could not be done. "I told her that she could not do that because that $1,000.00 belonged to the Andrew Williams heirs, and in keeping with the original agreement, she could not apply it to the individual debt of Otis Williams." The witness stated that he explained this thoroughly to Williams, who came to his office on several occasions. About the same time, Miss Riegel assigned, for value received, her note, together with the deed of trust, to Mr. Davidson. Coates testified that he explained to Davidson why the money could not be applied on the personal indebtedness of Williams, and also informed Davidson about the trust arrangement.

Carrie Sanders, aunt of appellant Williams, testified that she and her sister, Julia Sawyer, together with Otis, went to the office of Attorney Coates to seek advice and help in paying the drainage taxes. She stated that the deed was signed purely as a matter of obtaining the loan, and it was understood her nephew would reconvey the property when the indebtedness was paid. Mrs. Sanders stated that she explained this agreement to Martha Smith, who joined in the deed. Mrs. Sanders stayed on the property until 1950 or 1951, when she voluntarily moved.

[3] Williams was indebted to appellant Davidson at that time for twelve or thirteen thousand dollars, due to loans and furnishings for a long number of years.

Jesse Sawyer, son of Julia Sawyer, testified that his mother lived on the land until a short time prior to her death in 1953; that she farmed a part of the land after 1942, and that he had farmed a portion of it since 1946; that neither he nor his father had ever paid any rent to Otis Williams.

Annie Rankin, a daughter of Julia Sawyer, testified that on one occasion, she accompanied her mother, Carrie Sanders, and Otis Williams, and heard the agreement discussed (that the property would be conveyed back by Otis after the indebtedness on the land was paid).

Earl Smith, a son of Martha Smith, and grandson of Andrew Williams, testified that Otis Williams tried, in 1950, to buy his mother's interest in the property for $250.

Lula Belle Coker, a daughter of Martha Smith, testified that she was present, along with Otis Williams, Marie Vanderbilt, and Carrie Sanders, when the deed was signed; that "Otis said that he was made the administrator over the place to get money to pay the drainage and he said, 'Just like it stands, I can't borrow no money and we have to make one the head of it and Aunt Julia and Aunt Carrie made me the head of it. * * * When all the notes have been paid, it will go back to us. * * *'"

Appellant Otis Williams (son of Frank Williams and grandson of Andrew Williams), testified that no trust agreement was mentioned, and it was never indicated that he was to reconvey the property to the other heirs at any future time. He stated that it was understood that Carrie Sanders and Julia Sawyer could continue living in the home for the rest of their lives; that he did not agree with any of the heirs to reconvey the property to them. He testified that at the time the house burned, he did not have enough money to pay off the indebtedness to Miss Riegel; that the insurance company delivered a $1,000.00 check to her, and he borrowed $479.00 from Davidson to add to the $1,000.00 in order

to settle his indebtedness with her,[4] but that Miss Riegel would not take the insurance check. She did agree to take a check for the entire amount from Mr. Davidson, and this was done. He stated that Miss Riegel would never turn the $1,000.00 check over to him. The witness admitted that while he was in the army, his Aunt Julia might have paid some taxes, and for the years 1954 and 1955, "Jesse slipped down here and paid them."

Mrs. Maude Darby, sister of Otis Williams and a resident of Chicago, testified that the deed was mailed to her and she signed it; she signed "because they was going to lose the property"; that Otis made no agreement with her to deed the property back at a later time.

Jelle Lee Holmes, a granddaughter of Andrew Williams, stated that she signed the deed in 1942, at which time Otis Williams told her that he would pay her some money later; that her brother, Sylvester, signed with the same understanding. She stated that Otis, in 1951, gave her the money that he promised.

Abe Davidson, a cotton buyer of Marvel, testified that he had been furnishing and lending tenants money for forty-two years; that he had furnished Otis Williams for a period of over fifteen years, and would take chattel and real estate mortgages as security. The witness testified that in November, 1951, Williams was indebted to him in the amount of twelve or thirteen thousand dollars. Davidson testified that Williams asked for an additional $479.00 to pay to Miss Riegel, but subsequently informed him that Miss Riegel wanted a check for the entire amount he (Williams) owed her, $1,479.00. Davidson gave the check in that amount, and received from Miss Riegel the notes and deed of trust signed by Williams. In January, 1952, Williams and his wife executed a real estate mortgage to Davidson, including the lands involved in this litigation, as security for the total indebtedness. Davidson testified that at the time of the execution of the mortgage, he had no knowledge that

[4] Actually, Williams, over a period of about eight years, executed several deeds of trust in favor of Miss Riegel, to secure sums advanced to him.

anyone, other than Otis Williams, was asserting any claim of ownership to the lands here involved. He stated that his brother checked the record, and found nothing to show that there were claims against the property. He denied that he had been advised that anyone was claiming any interest in the lands other than appellant Williams, and stated that he had no recollection of any conversation with Mr. Coates. His brother, Sol Davidson, testified that he had checked the records at the court house, and found nothing against the property except the Riegel mortgage; that he had never talked with Mr. Coates nor Miss Riegel either before or after the loan was made.

Appellants assert that appellees are guilty of laches, and are also estopped from attacking Williams' title. It is pointed out that the suit was instituted in the Phillips Chancery Court in June, 1956, more than fourteen years after the execution of the deed from appellees and the decree of the Chancery Court ordering sale of the lands and reciting Williams to be the owner (with the exception of the interests of Aline White and the three minors). We do not agree that the doctrine of laches has any application under the facts in this case. The fact that the deed was executed fourteen years before the institution of the litigation is of no consequence, for the indebtedness was not due to be paid until 1949, *i.e.,* appellees could not, under their agreement, have expected the deed back before that time. However, the indebtedness was not retired in 1949, Miss Riegel not being paid until 1951, and even then, the notes and deed of trust securing $1,479.00 of this indebtedness were assigned to Davidson. According to the testimony of that appellant, the indebtedness has not as yet been paid. As was stated in *Walker* v. *Biddle,* 225 Ark. 654, 284 S. W. 2d 840:

"Second, it is contended that since the Statute of Limitations, in the absence of concealment, runs in favor of the trustee of a constructive trust, *Mathews* v. *Simmons,* 49 Ark. 468, his suit is barred by the seven year statute. The answer is that the constructive trust did

not arise at the moment the deed was executed. It is the transferee's repudiation of his promise that brings the trust into being. The evidence indicates that Walker did not claim the land as his own until after his sister Mary's death in 1947; so that bar of the statute had not fallen when this suit was brought in 1952."

Appellants assert that appellees' rights, if any, are barred by the statute of limitations. This argument has reference to § 37-108, Ark. Stats., which provides that all actions against a purchaser at a judicial sale, his heirs or assigns, shall be brought within five years of the date of sale. Miss Riegel received a commissioner's deed in January, 1943, and she conveyed the lands to Otis Williams a few days later. The suit was not instituted until June, 1956. It is contended that appellees are estopped from attacking the decree in the partition suit. Appellants state that the court's decree, in the instant case, had the effect of (a) invalidating the finding of fact in the 1942 suit that Otis Williams was the owner of the property by reason of the execution of the deeds from appellees, (b) invalidating the sale and conveyance of 1942 by the commissioner appointed by the court, and (c) invalidating the deed executed by Miss Riegel to Otis Williams. We disagree with this contention. The present suit is not an attack upon the decree in partition. Appellees have not contended that the decree is void or of no judicial effect. It is simply asserted that the title which Otis Williams acquired in that proceeding was impressed with the trust which appellees here assert. Of course, Williams held legal title to the property, and if Williams had conveyed the property to an innocent purchaser, such purchaser would have acquired a fee simple title. The facts in this case do not conform to the facts in the case of *Hardy* v. *Hilton,* 211 Ark. 991, 204 S. W. 2d 163, which is cited by appellants. In other words the principle declared in that case has no application to facts that would establish a constructive trust. If the evidence was legally sufficient to establish the agreement between Williams and the appellees, *i.e.,* that Williams was only holding as trustee, then

the court action was only a part of the overall understanding between the parties in interest. According to appellees' evidence, the partition suit was agreed upon by all parties, in furtherance of the mutual objective, and this being true, when Williams purchased the property, such act was in the nature of a redemption for the benefit of all the heirs.

Appellants contend that the evidence does not meet the legal test of sufficiency to establish the trust. It is first contended that the "over-all plan" cannot be enforced under the laws of this state, since no written memorandum was prepared showing that the title was vested in Otis Williams as trustee. Appellants have reference to Section 38-106, Ark. Stats. (a part of the Statute of Frauds), which provides as follows:

"All declarations or creations of trusts or confidences of any lands or tenements shall be manifested and proven by some writing signed by the party who is or shall be by law enabled to declare such trusts, or by his last will in writing, or else they shall be void; and all grants and assignments of any trusts or confidences shall be in writing signed by the party granting or assigning same, or by his last will in writing, or else they shall be void."

The very next section, however, § 38-107, provides:

"Where any conveyance shall be made of any lands or tenements, by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by anything contained in this act."

For that matter, in *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88, we held that the provisions of Section 38-106 (then Section 4867, Crawford & Moses' Digest) did not apply to a constructive trust. The facts in that case were rather similar to the present litigation. From the opinion:

"Monroe Armstrong testified that there was no agreement such as claimed by the appellees, but that,

finding they would be unable to pay the $514 mortgage, they conveyed the land absolutely to him.

All the appellees, his brothers and sisters, testified in support of the allegations made by them, and their testimony was corroborated by that of disinterested witnesses, among whom was the justice of the peace who drew the deed from appellees to Monroe and took their acknowledgments. According to all this testimony, the deed was made to Monroe as the elder brother, so that he might secure money to pay the indebtedness then existing, and to manage the land and pay whatever indebtedness he might thus incur out of the rents and profits, and that, when this purpose was accomplished, he and his brothers and sisters would be the owners of the land, share and share alike. To our mind, this evidence is clear, satisfactory and convincing, and warranted the chancellor in the conclusion reached.

The contention of appellant, Monroe Armstrong, that this state of facts, if proved, would not entitle appellees to the relief prayed because of the statute of frauds cannot be sustained for the reason that the statute, § 4867, Crawford & Moses' Digest, refers to express trusts, and the facts established by the evidence in this case establish a constructive or a trust *ex maleficio,* to which the statute has no reference.

It is well settled that equity impresses a constructive trust in favor of those entitled to the beneficial interest against one who secures the legal title by means of an intentional false verbal promise, who held the same for a certain specified purpose, and having thus obtained title he retains and claims the property as absolutely his own."

See also *Walker* v. *Biddle, supra.* Appellant asserts there is no proof of fraud in this case, and accordingly, no grounds for declaring a constructive trust. Whether appellant Williams was guilty of fraud, is here of no consequence, and requires no discussion, for proof of fraud is not essential to the establishment of a con-

structive trust. In *Robertson* v. *Robertson,* 229 Ark. 649, 317 S. W. 2d 272, this Court said:

"A grantee's oral promise to hold the land for a third person is unenforceable under the statute of frauds, but a constructive trust will be imposed if it is shown by clear, convincing and satisfactory evidence that the grantors promise was intentionally fraudulent *or that the grantor and grantee were in a confidential relationship.*"[5]

Under appellees' theory, and proof, Williams stood in a confidential relationship with his aunts and other relatives, and the evidence offered on their behalf reflects that they reposed their trust and confidence in him, were depending upon him to protect their rights, and trusted him to reconvey to them their respective interests in the land. Black's Law Dictionary, 4th Edition, defines a constructive trust as: "A trust raised by construction of law, or arising by operation of law, as distinguished from an express trust. Wherever the circumstances of 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."

This brings us to a discussion of the most pertinent question in the litigation, *viz.,* was the evidence, from which the court found a constructive trust, clear, cogent, and convincing? The testimony of Attorney Coates is particularly impressive, not because he was the only witness testifying who was not a relative, or had no apparent interest in the case, but mainly because his testimony "ties in" with the circumstances that tend to throw light upon what actually transpired, and was agreed upon, between the parties. There certainly seems to be no reason why Mr. Coates would not have testified

[5] Emphasis supplied.

according to his best recollection; he evidently represented the entire family group, and the evidence reflects no purpose that he could have had in stating that the agreement was anything other than what he understood it to be. As to the circumstances referred to, we mention the following:

It is admitted by Otis Williams that Miss Riegel would not turn over to him the $1,000.00 check from the insurance company; Mr. Coates testified that she followed his advice in that regard, since he explained that this money, under the agreement between the parties, belonged to all of the heirs.

Several of the appellees continued to live on the land without paying any rent, though Williams testified that he permitted them to do this. There was even testimony that he paid rent to some of the heirs.

Miss Riegel purchased the property at the commissioner's sale, and then deeded it back to Otis Williams, taking a deed of trust as security for the money she advanced. This, of course, is in complete conformity with the testimony of Mr. Coates to the effect that the parties were endeavoring to place the title in one individual for the purpose of securing a loan. What other reason would Miss Riegel have for purchasing the property, except to further the agreement beween appellees and Otis Williams? Certainly, she was not trying to buy it in for herself, because, within a few days, she deeded it to Williams, and took the deed of trust. In other words, *it is obvious that the partition suit, the purchase by Miss Riegel, and the conveyance from the latter to Otis Williams, were all part of a preconceived plan.*

A very pertinent bit of evidence was the copy of a letter, offered as an exhibit, from Otis Williams to his commanding officer at Camp Robinson. This letter was written by Mr. Coates for Williams, the attorney, according to his testimony, dictating the latter to his secre-

tary, in the presence of appellant. The letter reads as follows:

"Sir:

I have recently been inducted into the United States Army and arrived here for duty Saturday, December 5th, 1942.

Before being drafted for service in the United States Army I farmed in Phillips County, Arkansas, on a tract of land of 120 acres that was owned by me and other heirs of Andrew Williams, deceased. This land is situated in a drainage district known as the Little Cypress Drainage District of Phillips County, Arkansas, and annual assessments had accumulated against the land to the extent of approximately $1,000.00. By reason of the fact that the title to the land was considerably involved with many heirs it was impossible for us to secure a loan on the land to pay the drainage district assessments and we were about to lose the land by reason of the nonpayment of these assessments.

The balance of the heirs placed the matter in my hands to look after and work out for them inasmuch as they were scattered over various parts of the country and in October of this year I employed an attorney, Mr. A. M. Coates, of Helena, Arkansas, to file a suit in the chancery court there to get the title to the land straightened out so that money could be borrowed on the land to pay the drainage district assessments.

The case was heard by the Chancery Court on the 23rd day of November, 1942, and a decree rendered and the land ordered sold and the same has been advertised for sale by the Commissioner appointed by the Court on the 18th of December, 1942. The next term of the Chancery Court in Phillips County, Arkansas, will be held on the 6th of January, 1943, at which time the sale will be confirmed by the Court and then I can proceed to close the matter by completing the loan on the land and paying the assessments to the drainage district and thereby save this land for myself and the other heirs.

Inasmuch as the matter was placed in my hands by the other heirs to handle for them it will be necessary that I execute all the loan papers in order to pay the drainage district assessments after the sale has been confirmed on January 6th, 1943.

Therefore, I wish to apply for a leave of absence from the Army, the time to be so arranged that I can be in Helena, Arkansas, on January 6th and 7th, 1943, as the papers above referred to cannot be completed until the sale is confirmed by the Chancery Court. * * *"

Williams testified that he never read the letter, nor was it read to him, and that he had no idea of the contents; that Coates gave it to him sealed in an envelope, and told him to give it to his commanding officer. He stated that he did not know whether he signed it. Williams did subsequently write Coates stating that, "The letter you give me was a prince, and I will be there on the said days." Aside from the fact that it is difficult to conceive of Williams getting the letter from Coates, delivering it to his commanding officer, and writing back as to its effectiveness—without ever knowing the contents thereof—this evidence is also a strong circumstance substantiating the testimony of Coates. Let it be remembered that Coates was the man consulted by both Williams and appellees Coates was the individual who prepared the deed—who instituted the 1942 complaint—who arranged the Riegel loan—and the Riegel purchase of the property. The letter, admittedly, was written approximately eight months after the conveyance from appellees, and only a few days after the Chancery Court decree of 1942, *i.e.*, it was written at a time when the details of the agreement should have been clear in the mind of this attorney who suggested it—in fact, before the complete plan had been fully consummated,[6] and at a time when no litigation was contemplated.

One of the strongest circumstances in the record, to substantiate the agreement as contended for by appellees,

[6] The letter was written on December 2, 1942, which was, of course, prior to the sale of the property, the purchase by Miss Riegel at the sale, and prior to the conveyance to Williams by Miss Riegel.

is the fact that Williams, in 1951, purchased the interests of Jelle Lee Holmes, and her brother, Sylvester Williams, and each of these grantors executed a deed to Williams at that time. Both Jelle Lee Holmes and Sylvester *had joined in the deed of April 4, 1942,* and Sylvester's wife had released her dower and homestead rights. If there was no trust agreement in 1942, and the deed from appellees at that time was an outright and absolute conveyance to Otis Williams, why did he deem it necessary to obtain a second deed from Jelle Lee Holmes and Sylvester Williams? We are of the opinion that the evidence was clear, cogent, and convincing, and the Chancellor was justified in declaring a constructive trust in favor of appellees.

This leaves only the question of whether Davidson was a *bona fide* purchaser for value. Here, we leave the "clear, cogent, and convincing" rule, and determine this question on whether the Chancellor's findings were against the preponderance of the evidence. Mr. Coates stated that he advised Davidson of appellees' interest in the property at about the time the insurance check was received by Miss Riegel, and her notes assigned to Davidson, fully explaining the state of the title and the reason the insurance check could not be applied to Otis Williams' debt.[7] This appellant testified that no such discussion took place. We are unable to say that the Chancellor's finding was against the preponderance of the evidence, but we do feel that the court erred in not granting Davidson relief in the amount of the notes assigned to him by Miss Riegel, and any further amount that Davidson may have advanced to Williams solely for the use and benefit of this land. After all, Miss Riegel herself would have been entitled to the $1,479.00 from Williams, and Davidson "stands in her shoes" to

[7] It is interesting to note that Miss Riegel filed a bill of interpleader in the Chancery Court in August, 1952, paying into the registry of the court the $1000.00 check, asserting the agreement between appellees and appellant Williams, as herein discussed, stating that Williams had subsequently purchased the 1/6th undivided interest of Aline White and the 1/12th undivided interest each of Sylvester Williams and Jelle Lee Holmes, and stating that several of the heirs were asserting a claim to the proceeds of the check, and she was unable to distribute same without risk of liability to herself.

that extent. This is to say that Davidson is not entitled to a lien on appellees' interests in the lands for any amount of debt which was already in existence at the time he was assigned the Riegel notes, or for amounts furnished Williams because of other transactions or securities. According to Davidson, Williams was already indebted to him in the amount of twelve or thirteen thousand dollars. It is impossible to determine from this record the exact amount this appellant would be due. The cause is therefore remanded to the Chancery Court with directions to ascertain and determine the proper amount due Davidson under our holding herein. In all other respects, the decree is affirmed.

EDENS *v.* STATE.

5026 359 S. W. 2d 432

Opinion delivered May 28, 1962.

[Rehearing denied September 10, 1962.]

Gus Camp, for appellant.

J. Frank Holt, Attorney General, for appellee.

ED. F. MCFADDIN, Associate Justice. Arnold Edens was convicted of the crime of obtaining property by false pretense (§ 41-1901 Ark. Stats.); and he prosecutes this appeal. The record is voluminous, and the motion for new trial contains sixty-five assignments, all of which are presented in the appellant's brief and have been studied. We group and discuss them.

I. *Preliminary Matters.* A number of assignments relate to such preliminary matters as the signature on the information, a bill of particulars, endorsing the names of the witnesses on the information, motion for continuance, amount of bail, etc., etc.; but we find no merit in any of these. The Prosecuting Attorney signed and filed an amended information which gave the defendant all the particulars that the law requires. Copies of certain exhibits were furnished the defendant, and the list of State witnesses was given to him. The defendant was not entitled to receive copies of the statements that the Prosecuting Attorney had obtained from the various witnesses for the State, as this was a part of the Prosecuting Attorney's work papers. Furthermore, we have held that the Discovery Statute (Act No. 335 of 1953) does not apply to criminal cases. *Bailey* v. *State,* 227 Ark. 889, 302 S. W. 2d 796. The Trial Court did not abuse its discretion in the rulings on any of these so-called preliminary matters.

II. *Jurors.* The appellant claims several errors as to method of calling jurors, making up the panel, etc., etc.; but we find no error. The only matter meriting

discussion is the claim that the Court erred in holding that Mr. Woolard was qualified; but we consider any error in this ruling to be harmless because of the condition of the record. Woolard had served as a juror within the previous two years and such service made him ineligible to serve at the time of this trial. (Act No. 205 of 1951, as now found in § 39-225 Ark. Stats. The Court held that such disqualification of Woolard could be waived by Woolard's failure to claim such privilege.[1] We think the two-year disqualification under Act No. 205 of 1951 is mandatory, and not something that the individual juror can waive. But the Court's ruling as to the juror, Woolard, constituted harmless error. The record shows that the appellant excused Mr. Woolard by exercising one of the defendant's eight peremptory challenges allowed by statute (§ 43-1922 Ark. Stats.); and we fail to find in the record that appellant was forced to be tried by any disqualified juror.

III. *Sufficiency Of The Evidence.* On appeal, we must view the evidence in the light most favorable to the jury verdict. (*Eddington* v. *State,* 225 Ark. 929, 286 S. W. 2d 473; and *Carnal* v. *State,* 234 Ark. 1050, 356 S. W. 2d 651.) So viewing it, the State proved the following facts now to be recited: John W. Recker and Raymond Recker owned certain lands in Lawrence County on which was located a rice dryer of the approximate value of $100,000.00. In accordance with a previous contract, the Recker brothers on September 3, 1958, joined with their wives and executed a warranty deed to the United Enterprises, a corporation organized and dominated by the appellant, Arnold Edens. This deed was executed and delivered in Edens' office in Paragould, upon his representation to the Reckers that he had for them investment certificates in the "Investor's Mutual, Inc.", a company which Edens said he represented. Edens exhibited to the Reckers two certificates for shares in "Investor's Mutual, Inc." One

[1] As regards jurors over 65 years of age being allowed to be excused from jury service, that is a personal privilege which the juror can waive (§ 39-104 Ark. Stats.); and, here, no juror over 65 years of age claimed his personal privilege to be excused.

was Certificate No. 22392055 to J. W. Recker and Exa Recker, his wife; and the other was certificate No. 22392054 to Raymond Recker and Myrtle Recker, his wife. But Edens told the Reckers that "Investor's Mutual, Inc." had issued the certificates for twice as many shares or interests as the Reckers were entitled to receive, and that he would return the certificates to "Investor's Mutual, Inc." for reissuance for the correct number of shares or interests, and the corrected certificates would be delivered. Edens signed and gave to the Reckers a receipt which read: "Sept. 3, 1958. Received from John W. Recker & Exa A. Recker, No Cash — Dollars — Cert. No. 22392055 5056:00 Investors Mutual. (Signed) Arnold E. Edens, Zone Mgr. 5311, Investors Diversified Services, Inc."

The Reckers never received any certificate of any kind for shares or interests in Investor's Mutual, Inc.; and it was testified by an auditor for Investor's Mutual, Inc. that the Company had never issued a certificate with numbers like those on Edens' receipt, and that the Company had never issued certificates like those which Edens exhibited to the Reckers. In short, the certificates exhibited by Edens to the Reckers were forgeries.

The evidence already detailed, if believed, would establish that Edens obtained the deed from the Reckers on September 3, 1958 by representing and exhibiting to them two papers which he said were valid certificates, but which were in fact forgeries, and void and of no value. It was further testified that Edens never returned the deed to the Reckers. Three of our more recent cases, involving this false pretense statute, are *Anderson* v. *State,* 226 Ark. 498, 290 S. W. 2d 846; *Karr* v. *State,* 227 Ark. 777, 301 S. W. 2d 442; and *Kerby* v. *State,* 233 Ark. 454, 342 S. W. 2d 412. In accordance with the rules of these and other cases, we conclude that the evi-

dence was sufficient to support a conviction under § 41-1901 Ark. Stats.,[2] which reads:

"*Obtaining personal property by false pretense. Penalty.* Every person who with intent to defraud or cheat another, shall designedly by color of any false token or writing, or by any other false pretense, obtain a signature of any person to any written instrument, or obtain from any person any money, personal property, right of action, or other valuable thing or effects whatever, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly."

Edens claimed that all of this September 1958 deed and certificate matter was done by him merely to favor the Reckers in their income tax problems with the United States Government; that the United Enterprises, Inc. held John W. Recker's note for $413,000.00; that in 1959 the corporation did in fact receive a deed conveying the rice dryer property; and that the United Enterprises then duly credited the Recker note with $100,000.00. John W. Recker denied that he had ever signed any such note for $413,000.00; and that became a disputed issue in the case. But such explanation by Edens was a matter for the jury to decide. The jury chose to believe the Reckers' version of the transaction; and we must conclude that the evidence is sufficient to sustain the verdict of conviction.

IV. *Rulings As To Evidence.* A large number of appellant's assignments relate to the Court's rulings as to admitting or excluding evidence, form of questions, etc., etc. We have carefully examined all of these assignments and find no reversible error. We mention only a few. Assignment No. 16 relates to the refusal of the Court to permit the appellant to question the prosecuting witness, John Recker, pertaining to his relationships with the United Enterprises. When the Court

[2] The statute was amended by Act No. 111 of 1959; but the date of the offense here charged was September 3, 1958; and we have a statute which provides that the subsequent repeal of a statutory offense does not affect the prosecution under the law as it existed at the time of the offense. (§ 1-104 Ark. Stats.)

originally refused this cross-examination, the appellant made an offer to prove what the witness would testify. Later, in the course of the trial, John Recker was recalled and was then cross-examined as to moneys received from United Enterprises, the use of a telephone credit card, the insurance on his airplane, and various other matters which were in the previous offer of proof. Therefore, the appellant finally obtained his claimed right of cross-examination, and the first ruling was overcome.

Assignments 49, 50, and 51 relate to questions that the Prosecuting Attorney asked the defendant when he was on the witness stand. The Prosecuting Attorney inquired: "I will ask you, going to your credibility, if you did not defraud Mrs. Kelly Winfred Recker, a woman 72 years of age, out of $7,000.00." Similar questions were asked concerning three other persons. In each instance the defendant answered that he did not defraud such named person; and that ended the inquiry. We find no error committed in the Court's rulings in these matters. When a defendant takes the witness stand in his own behalf in a criminal trial, he submits himself to correct questions that may be asked him on cross-examination to test his credibility. *Hunt* v. *State,* 114 Ark. 239, 169 S. W. 773; and *Castle* v. *State,* 229 Ark. 478, 316 S. W. 2d 701. The questions here propounded went to the credibility of the witness. But when the defendant answered in the negative the inquiry stopped, and there was no effort to impeach him on these answers. So no error was committed in these matters.

Assignment 53 in the motion for new trial relates to the ruling of the court in permitting the State to introduce character witnesses to support the reputation of the prosecuting witnesses. This occurred in the State's rebuttal. Assuming without deciding that the character and reputation of these witnesses had not been put in issue, nevertheless, a careful study of the record fails to disclose any objection or exception made by the defendant to the testimony of any of these character wit-

nesses. So there are no exceptions on which to base these assignments.

V. *Ruling On The Motion For New Trial.* In the motion for new trial, the defendant, *inter alia,* sought to bring in the testimony of Mr. Linton Godown, a handwriting expert of Memphis, Tennessee, to show that the witness John W. Recker had in fact signed the note for $413,000.00 to the United Enterprises. The Trial Court overruled the motion for new trial and the appellant claims that reversible error was thereby committed. We see no error in this regard because the testimony of Mr. Godown to support the motion for new trial was cumulative of the evidence that the defendant had offered on this same point in the trial in chief. Many pages in the record in the trial in chief are concerned with the testimony as to whether John W. Recker signed the $413,00.00 note. What was said in *Sellers* v. *Harvey,* 220 Ark. 541, 249 S. W. 2d 120, is entirely apropos here:

"This court has consistently applied the following rules in considering an application for a new trial on the ground of newly discovered evidence under the seventh sub-division of Ark. Stats., § 27-1901: First, the testimony must have been discovered since the trial; second, it must appear that the new testimony could not have been obtained with reasonable diligence on the former trial; third, it must be material to the issue; fourth, it must go to the merits of the case, and not to impeach the character of a former witness; fifth, it must not be cumulative. *John Robins* v. *Absalom Fowler,* 2 Ark. 133; *Mo. Pac. Transportation Co.* v. *Simon,* 200 Ark. 430, 140 S. W. 2d 129.

"Another settled rule is that the motion is addressed to the sound discretion of the court and this court will not reverse for failure to grant it unless an abuse of such discretion is shown. *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. 2d 20."

VI. *Other Assignments.* As heretofore stated, the motion for new trial contains 65 assignments. To dis-

cuss each of them would unduly prolong this opinion. It is sufficient to say that we have carefully studied all of them, and find none to possess merit.

Affirmed.

WARD, J., not participating.

FARR *v.* TRADERS & GENERAL INS. Co.

5-2697 357 S. W. 2d 544

Opinion delivered May 28, 1962.

Charles C. Wine and *LeRoy Autrey,* for appellant.

Shaver, Tackett & Jones, for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation results from an oil well "blow in." Appellant, A. T. Farr, Jr., was drilling for oil in Lafayette County; about 9:30 p.m. on June 10, 1960, while the drill pipe was being removed, the well "blew in", erupting like a volcano and sending oil, water, and mud hundreds of feet into the air; a large crater developed; the entire rig was lost; and the semi-liquids coming from the well began to flow over surrounding land. Immediately after the "blow in" Farr employed H. R. Wootton, whose crew, working with bulldozers, was able to erect levees to minimize the damage to adjacent lands and streams.

Two days later (Sunday, June 12th) the Haliburton Oil Well Cement Company succeeded in "killing the well" and stopping the eruption. Wootton's work of clearing the land by use of bulldozers continued for approximately three weeks; and the payment of Wootton's charges of $7,325.00 is the matter of contention in this litigation.

Wootton recovered judgment against Farr for the amount claimed. Farr (appellant) then brought this action against the appellee, Traders & General Insurance Company (hereinafter called "Insurance Company") claiming that under its policy issued to Farr the Insurance Company was obligated to pay the judgment Wootton had obtained against Farr. The Insurance Company denied liability; and trial to the Court, without a jury, resulted in a finding and judgment for the Insurance Company. This appeal ensued.

The policy which the Insurance Company issued to Farr was a liability policy, and not a property damage policy. So at the outset Farr concedes, with admirable candor, that the basis of his recovery is not the coverage in the policy but rather: (a) the actions of the insurance adjusters in authorizing the Wootton work; or (b) that Farr's prompt employment of Wootton resulted in minimizing the Insurance Company's liability for damages to adjacent land-owners, and the Insurance Company would be unjustly enriched if it did not pay the Wootton judgment against Farr. We examine these contentions.

I. *The Actions Of The Insurance Adjusters.* As aforesaid, the well "blew in" at 9:30 p.m. Friday night, June 10, 1960, and within two hours thereafter Farr had Wootton and his crew building levees, minimizing the damage that the erupting well might cause. The next day after the explosion, Farr's bookkeeper notified the insurance agents who had issued the policy to Farr. Pursuant to such notification, the Insurance Company sent two independent insurance adjusters (J. C. Floyd and Carl W. Pelley) to investigate and report. Floyd and

Pelley visited the well site on Tuesday, June 14th, and discussed the matter with Farr. What was said in the conversation is a matter of dispute. Farr testified that the adjusters told him to continue the work and satisfy the property owners; but the adjusters testified that they merely congratulated Mr. Farr on his promptness, investigated the full situation, and settled with the land owners for their property damage. The adjusters denied that they had any authority to bind the Insurance Company for Wootton's work. Thus, there is a direct conflict in the testimony.

Later, and before Wootton had completed his work, he and Farr met with the insurance adjusters in Texarkana and the conversations that transpired at that meeting are likewise in dispute. Farr and his witnesses testified that the insurance adjusters agreed that the Insurance Company would pay Wootton's claim within ten days after the work was completed and a final bill was submitted. On the other hand, Pelley and Floyd testified that they definitely informed Farr and Wootton that the adjusters had no authority to authorize payment of the bill and that the adjusters would send the bill to the Insurance Company for its decision. The Assistant Vice President of the Insurance Company testified that Pelley and Floyd were independent adjusters and had no authority to authorize the Wootton work or to assume liability for Wootton's bill. Thus, there was a sharply disputed question of fact. The policy contained a provision that ". . . the company shall . . . reimburse the insured for all reasonable expenses . . . *incurred at the company's request* . . ." (Emphasis our own.) But here the adjusters denied that they requested the work by Wootton; and the Insurance Company denied that the adjusters had any authority to make such request.

The Trial Court specifically found that the Insurance Company ". . . did not request Farr to build the levee: on the other hand, Farr voluntarily called Wootton and put him on the job." In a well-worded and

comprehensive opinion, the Trial Judge reviewed the applicable law and found, from the evidence, that Farr had failed to prove the authority of the adjusters, Pelley and Floyd, to assume for the Insurance Company the charges for the Wootton work. This finding of fact by the Circuit Judge has substantial evidence to support it, and has the force and effect of a jury verdict. *Pate* v. *Fears,* 223 Ark. 365, 265 S. W. 2d 954; *Coward* v. *Barnes,* 232 Ark. 177, 334 S. W. 2d 894. We affirm the Trial Court's finding that the Insurance Company did not request the Wootton work or ratify the expenses incurred by Farr.

II. *Farr's Prompt Action As Minimizing The Damages.* The second point, relied upon by the appellant for reversal is, that the Insurance Company should pay Wootton's judgment against Farr because Farr's prompt action in employing Wootton minimized the amount of damage claims that the Insurance Company might have been required to pay. the Circuit Judge used this language as regards Farr's efforts in minimizing the damages:

"The Court is not unmindful that the quick action of Farr undoubtedly worked to the benefit of Traders & General. The damming of the flow of debris prevented considerable property damage, which damage could have involved Farr's insurance carrier. But it must be remembered that Farr's expenditure was likewise beneficial to him. First, he maintained the good will of the landowners, and, secondly, if he had stood idly by and permitted damage to vast acreage plus pollution of Bodcaw Creek, he could conceivably subject himself to damage suits far in excess of his liability coverage."

Notwithstanding the foregoing, the Circuit Judge could find no substantial evidence on which to base any recovery by Farr against the Insurance Company; and we are unable to say that the Circuit Judge was in error. By the terms of the policy, the Insurance Company agreed to pay, on behalf of Farr, "all sums which

the insured shall become legally obligated to pay as damages . . . ." The evidence in the record before us leaves entirely to speculation just how much benefit the Insurance Company received from Farr's action in employing Wootton. Judgments cannot be based on speculation; and a study of the record fails to disclose any damage claims for which the Insurance Company might have been liable if Wootton's bulldozer work had not been performed. There is no evidence in this record that would support a court of law in deciding that the prompt action of Farr reduced the claims against him (for which the Insurance Company would have been liable) in the amount of $7,325.00, or any other amount. As aforesaid, verdicts and judgments cannot be based on speculation. "Conjecture and speculation, however plausible, cannot be permitted to satisfy the place of proof." *Missouri Pacific R. R. Co.* v. *Ross,* 194 Ark. 877, 109 S. W. 2d 1246; *Glidewell* v. *Arkhola Sand & Gravel Co.,* 112 Ark. 838, 208 S. W. 2d 4.

Affirmed.

WARD and ROBINSON, JJ., dissent.

HARGETT *v.* STATE.

5037 357 S. W. 2d 533

Opinion delivered May 28, 1962.

Claude F. Cooper, for appellant.

J. Frank Holt, Attorney General, by *Russell J. Wools,* Asst. Atty. General, for appellee.

George Rose Smith, J. The appellant was convicted of burglary and grand larceny and sentenced to imprisonment for nine years. In seeking a reversal of the judgment he questions the admissibility of his confession.

It is first suggested that the confession should have been excluded because there is no other evidence connecting the accused with the crimes. This is immaterial. An extra-judicial confession is sufficient to support a conviction if there is other proof that the offense was committed by someone. Ark. Stats. 1947, § 43-2115; *Haraway* v. *State,* 203 Ark. 912, 159 S. W. 2d 733. Here there was testimony that the drugstore in question had been broken into and that more than $300 in money and more than $70 in merchandise were taken.

The appellant's principal contention is that his confession was not voluntarily given. Hargett, a young man of twenty-two, was arrested in Steele, Missouri, after he had apparently injured his leg in kicking out a glass door or window in a grocery store there. He waived extradition, and Captain Ford, a Blytheville police officer, was sent to bring him back to Arkansas. The confession was made to Ford.

Ford testified that he warned Hargett that any statement that he made could be used against him. Ford said that no threats or promises of reward or immunity were made. On cross-examination he stated candidly that he told Hargett that "[I] would help him all I could. In fact, I helped the young man all I could. All I ever told him, I would help him all I could." He denied that this offer to help was conditioned on Hargett's admitting the burglary. Ford also said that the accused was not complaining about his injured leg during their in-

terview and that there was no promise to take him to the hospital if he would confess.

From the evidence as a whole the jury were justified in believing that in the course of questioning the prisoner Ford made the general statement, but not as a specific inducement for a confession, that he would help Hargett all he could. The issue is not free from difficulty, but we are unwilling to say as a matter of law that Ford's vague offer of assistance rendered the confession involuntary and inadmissible.

"Often the statement or conduct [of the interrogator] is not a clear and specific promise of immunity, reward or benefit. In such event the question of whether the statement or conduct was such as would and did induce hope of reward or benefit depends largely upon the circumstances of each case." Underhill's Criminal Evidence (5th Ed.), § 388. In *Cornelius* v. *Moore,* 208 Ala. 182, 94 So. 55, the sheriff told the accused that "any other way I can be a friend to you I will be glad to do it." The confession was held to be admissible.

Similarly, in *State* v. *Kwiatkowski,* 83 N. J. Law 650, 85 Atl. 209, the prisoner asked an interpreter about obtaining bail, and he was told that the interpreter would help him as much as he could. In holding the confession to be voluntary the court pointed out that the interpreter's offer was not held out to the prisoner as a consideration for his making a statement or confession.

Here the question of whether Hargett's statements to Ford were voluntary was submitted to the jury under instructions that are not challenged. We are not convinced that the officer's decidedly indefinite assurance of help was necessarily sufficient to induce Hargett to make an admission of guilt that he would not otherwise have made. The court properly left the question to the jury, whose verdict is conclusive.

Affirmed.

5-2725 357 S. W. 2d 497

Opinion delivered May 28, 1962.

[redacted]

Fanklin Wilder, for appellant.

Jeta Taylor and *Mark E. Woolsey,* for appellee.

GEORGE ROSE SMITH, J. This is a child custody case. R. J. and Wanda Vest were the parents of two infant children at the time of Mrs. Vest's death in January of 1961. The father had been away in military service, and for some time before her death Mrs. Vest had been living with the children in the home of her parents, the appellants. After their mother's death the children remained with the appellants, their maternal grandparents, for several months. Their father then picked them up and took them to the home of his sister, the appellee Pauline Horton, and her husband.

In August of 1961 the appellants filed the present petition, asking for custody of the children. The principal defendants are the children's father, R. J. Vest,

and his sister and brother-in-law, the Hortons. In the course of refusing to make any change of custody the chancellor conducted two separate hearings and entered two separate orders. The appellants have appealed from both the orders.

At the first hearing the grandparents sufficiently proved their own fitness to have the care of the children, but they rested their case without having shown that R. J. Vest was unfit to have the custody of his own children. The defendants accordingly demurred to the plaintiffs' evidence. Without ruling upon the demurrer the chancellor announced that he would treat the petition as one for visitation rights. The record is not absolutely clear about what then happened, but it is a fair inference that the opposing attorneys conferred and agreed that the appellants should have the children on the fourth weekend of each month and that the paternal grandparents should have them on the second weekend. An order to that effect was duly entered, and this order is the first one appealed from.

We cannot say that the chancellor was wrong in taking the action that he did. The appellants' failure to show that Vest was not fit to have the care of his own children was a fatal omission, for a third person cannot deprive a parent of the custody of his own children without first proving that the parent is not a suitable person to have them. *Verser* v. *Ford,* 37 Ark. 27; *Rayburn* v. *Rayburn,* 231 Ark. 745, 332 S. W. 2d 230. That proof was wanting at the conclusion of the first hearing. The chancellor did not actually rule upon the defendants' demurrer to the evidence, but in our opinion the demurrer might properly have been sustained, on account of the defect in the plaintiffs' proof. The appellants criticize the chancellor's order of visitation; but they were present at the hearing, and the record does not indicate that they expressed any dissatisfaction with their counsel's agreement to the order. There is, of course, a presumption that an attorney of record is authorized to act for his clients. His action within the

scope of his authority is binding upon his clients, even though they may later think it to have been unwise.

After the first hearing the appellants changed lawyers and engaged their present attorney. Some twenty-six days after the entry of the first order the appellants' present counsel filed a motion for reconsideration, attaching six affidavits purporting to show that Vest was unfit to have the custody of the two children. This motion was presented to the chancellor (after the lapse of the term) and was denied. The second notice of appeal relates to that order.

We find no error. The request for a reconsideration is comparable to a motion for a new trial in a court of law or to a bill of review in a court of equity. If a litigant fails to develop his case fully when it is first heard upon its merits the law does not afford him a second chance by permitting him to bring in additional proof that might just as well have been offered in the first instance. It is essential that he make a showing of diligence; that is, that for some valid reason he was unable to produce the missing evidence at the original hearing. *Richardson* v. *Sallee,* 207 Ark. 915, 183 S. W. 2d 508. That showing is absent here; to the contrary, it is indicated that the appellants' witnesses on the issue of the father's unfitness to have the children were present at the first hearing but were not called to the stand. Thus it cannot be said that the evidence was newly discovered or could not, with reasonable diligence, have been adduced at the original hearing.

Affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, (Dissenting). Upon the strong showing made by appellants as to the unfitness of the appellees to be entrusted with the care and custody of these little children, I am convinced that the motion for Reconsideration should have been granted.

This is a child custody case which is before us on trial *de novo*. It is so well settled as to require no citation of authority to support the proposition that one of the paramount questions which should concern us the most is the welfare of the children. The superior position enjoyed by natural parents in questions of custody as cited in the majority opinion has always been reserved for those parents who are deserving of that position. My research fails to reveal an application of this rule in a single case where the suggestion of unfitness of a natural parents is nearly as strong as that made in the affidavits filed in support of appellants' motion to reconsider. Therefore, it seems to me that since this is an Equity case and the trial court's order specifically retained jurisdiction of the cause for the making of such further orders as the court might find to be proper and necessary, the cause should be remanded for further development so as to permit the appellants to properly present their proof on the most vital and startling matters alleged in their affidavits. These matters certainly go to the heart of the question of the welfare of the children.

To the extent indicated, I respectfully dissent.

MINOR *v.* POINSETT LUMBER & MFG. CO.

5-2728 357 S. W. 2d 504

Opinion delivered May 28, 1962.

Ward & Lady, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case. Appellant received compensable injuries in April, July and October, 1960, while in the employment of appellee. He was allowed compensation through November 21, 1960. Since December 2, 1960 appellant has been unable to work, and the Commission and the circuit court held he was not entitled to further compensation. Hence, this appeal.

Generally stated, the pertinent factual circumstances are substantially as presently set forth. Appellant, who is married, began working for appellee late in 1959, after he had been given a physical examination. For several years prior to that time he was nervous and at times he was mentally disturbed. Because of this condition, and not primarily because of his physical condition, it was thought best not to have appellant testify. For that reason, no doubt, the record does not contain a detailed account of how the accidents occurred or the extent of the injuries. However, from statements made by appellant to the doctors and others, the following general picture emerges.

On April 20, 1960 appellant was injured when he fell from a tractor. His back was hurt, and he also complained of trouble with his eyes. He was examined by a doctor and after a four days' layoff, he returned to

work. This injury was accepted by appellee as compensable.

Again, on July 27, 1960, appellant suffered another compensable injury which the referee said may have aggravated the injury of April 20, 1960. At any rate, appellant was off from work until October 18, 1960.

On the day following his return to work, appellant, while going to lunch, was struck by a car, and received still another compensable injury which, apparently, was more severe than the other two. Allegedly he was thrown upon the front of the automobile with such force that his head broke (or cracked) the windshield. At any rate, it is admitted that appellant received a large severe bruise on his left leg, and it appears likely he received other injuries also.

Petition. Appellant filed a petition with the Commission in which, among other things, it was stated:

(a) Prior to the injuries he had no physical impairment except his mental condition.

(b) As a result of the injuries he has been totally incapacitated to do any work for which he is suited.

(c) He has incurred medical bills to the extent of $700 and will incur such bills in the future.

Commission's Findings. The following pertinent findings of fact were made: (a) Appellant suffered a compensable injury on April 20 and July 27, 1960 for which he has been paid (including medical bills) up to October 19, 1960; (b) Appellant suffered a compensable injury on October 19, 1960 when he was struck by a car, from which he was temporarily totally disabled until November 21, 1960 when he was released to return to work without permanent partial disability; (c) Appellant's absence from work since December 2, 1960 is not the result of his aforementioned injuries; (d) Appellant's coronary artery disease bears no causal relationship to said injuries—neither does his mental incompetency.

After a careful examination and consideration of the entire record, and being fully aware of the force and effect of the Commission's findings of fact, we have been forced to the conclusion that there is no substantial evidence to support finding (d) set out above. It is undisputed that appellant is (or was) unable to work. His inability to work must have been caused by something—either the injuries or his coronary and mental condition. So the Commission must have meant that appellant was unable to work because of his mental and coronary condition, or one of such conditions. The Commission then obviously denied compensation because it found there was no causal relationship between the (admitted) injuries and appellant's mental and coronary condition.

It is well established by our Court "that an injury which brings about an aggravation of a preexisting condition is compensable under our Workmen's Compensation Law". *Hamilton* v. *Kelley-Nelson Construction Co.*, 228 Ark. 612, 309 S. W. 2d 323.

In the first place, it does not appear clear to us that the Commission attempted to answer this vital question: Was appellant's mental and coronary condition aggravated by the injuries? If the Commission did mean to answer this question in the negative, then we think there is no substantial evidence to support such answer.

Dr. Robert T. Colbert, who apparently examined appellant more frequently than any other doctor, stated unequivocally several times that the accidents aggravated appellant's nervous condition and also his coronary disease. Dr. Joe Verser, who examined appellant on March 7, 1961, stated he was not able to work and that his mental condition was the principal reason why. He also stated that appellant's injuries could have aggravated his mental condition. The matter of aggravation was not mentioned one way or the other by Dr. Marcus J. Stewart, by Dr. R. C. Shanlever, or by Dr. Paul T. Drenning. Dr. Floyd A. Smith, Jr. may not have exactly agreed with the other doctors who said the injuries aggravated appellant's mental and coronary condition, but

we do not think his testimony amounts to a positive disagreement. Dr. Smith, who only examined appellant shortly after he was injured on October 19, 1960, in a letter dated March 8, 1961, made this statement:

"Assuming that this individual did have a myocardial infarction on Dec. 13, 1960, I can not possibly conceive how this could be precipitated from an injury of the left lower leg, and neither do I believe that this injury aggravated the pre-existing mental derangement."

It appears to us that Dr. Smith was not taking into consideration the same factors that were considered by the other doctors. To say that an injury to the left lower leg (on October 19, 1960) would not precipitate an infarction on December 13, 1960 is by no means the same thing as saying an injury to the back in April, another similar injury in July, and a severe injury in October would not aggravate a general nervous condition and a general coronary disease and hardening of the arteries.

Put another way, the real issue in this case is whether appellant would have been able to work longer if his injuries had not occurred. If he would have, then he is entitled to compensation under the principle announced in *Frank Lyon Company* v. *Scott,* 215 Ark. 274, 220 S. W. 2d 128; *Bell* v. *Batesville White Lime Company,* 217 Ark. 379, 230 S. W. 2d 643, and *French* v. *Jonesboro Public Schools,* 233 Ark. 879, 349 S. W. 2d 670. It is apparent the Commission did not consider appellant's claim from this standpoint.

In accord with the conclusions heretofore expressed, the judgment of the trial court is reversed, and the cause is remanded to the circuit court with directions to remand to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

5-2716 357 S. W. 2d 522

Opinion delivered May 28, 1962.

[redacted]

McKay, Anderson & Crumpler, for appellant.

William I. Prewett, for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether the lessee of an oil and gas lease waited an unreasonable length of time after abandonment of the lease to attempt to remove from the premises personal property (trade fixtures) used in operating the lease, and whether by reason of such length of time the lessee has lost title to the personal property.

In 1938 H. A. McWilliams, owner of the land, executed an oil and gas lease to J. E. Childers. In 1948 Childers assigned the lease to the Hassie Hunt Trust (hereinafter called Hunt). Hunt operated the lease, producing oil or gas until March or June, 1960. We do not think that in the circumstances it is material whether March or June was the last month of production. In any event, Hunt continued to have an employee look after the property and in February, 1961, for the consideration of $4,250.00, assigned the lease to Arthur Arnold. After making an investigation, Arnold reached the conclusion that the well on the property could not be operated at a profit and decided to abandon it.

On June 6, 1961, Arnold employed appellee, Marshall Craig, to pull the pipe and remove the "trade fixtures" from the premises. Craig moved the heavy equipment necessary for the job to the location of the well, but was prevented from carrying out his contract to remove the trade fixtures from the land by the action of appellant who obtained a temporary injunction prohibiting the removal of such property.

On the 24th day of May, 1961, H. A. McWilliams, the landowner, executed to appellant, Mardrey S. Delk, an oil and gas lease on the property. When the "casing pulling contractor", Craig, attempted to remove the trade fixtures from the property on June 6, 1961, appellant, Delk, filed this action and obtained a restraining order. Craig answered, denying that he was wrongfully removing the personal property and alleging that he had been damaged in the sum of $2,500.00 by the issuance of the restraining order.

After a trial on the merits, the Chancellor held in favor of Craig on the complaint, and awarded him $300.00 damages on the cross-complaint. Delk has appealed.

We cannot say the Chancellor's decree is contrary to a preponderance of the evidence. In 3 Summers Oil and Gas 453, it is said: "It is a well-settled rule that casing in wells, derricks, engines, and other machinery and appliances placed upon the land by the lessee for testing, developing and operating the land for oil and gas purposes are trade fixtures. They may, therefore, be removed at any time during the existence of the lease, or within a reasonable time after its termination. If they are not so removed, they become the property of the landowner."

The lease, executed in 1938, was for a term of ten years and as long thereafter as oil or gas was produced. According to the undisputed evidence, the well was operated as a producer until March or June, 1960. At that time a vital piece of machinery, necessary to the oper-

ation of the well, broke. It was then that the well was shut down, but Hunt's paid employee looked after the property every day.

In February, 1961, for the consideration of $4,250.00, Hunt assigned the lease to Arthur Arnold. It does not appear that Arnold paid such a substantial sum for the lease for the purpose of abandoning the well. On the contrary, there is evidence that he bought it with the idea of producing oil, but reached the conclusion that profitable oil production was not feasible. It was only then that he decided to abandon the well and made the contract with Craig to remove the trade fixtures. In *Ezzell* v. *Oil Associates,* 180 Ark. 802, 22 S. W. 2d 1015, the Court said: "The question of abandonment or not is a mixed question of law and fact, and each case must depend upon its own particular facts and circumstances. The intention of the lessee cannot be gathered from any statement of his alone. It must be determined from his intention as shown by his acts and conduct."

In *McLeon* v. *Wells;* 207 Ark. 303, 180 S. W. 2d 325, the Court pointed out that the lessee has a reasonable time to remove his equipment from the leased premises after abandonment, and what is a reasonable time depends on the facts and circumstances of each particular case. One of the things to be considered is whether the landowner has been damaged by the failure to remove the trade fixtures. Here, it is argued that McWilliams was damaged by being unable to raise pine trees at the site of the well because a small area was occupied by the personal property involved. We do not think there is any substantial evidence that McWilliams was damaged to any extent by reason of the trade fixtures not being removed sooner. In fact, McWilliams is not a party to this litigation, and there is no evidence that Delk was in any manner damaged.

The Chancellor awarded Craig $300.00 as damages, occasioned by the issuance of the temporary restraining order. The evidence fully sustains a finding that Craig was damaged to the extent indicated. Craig sub-

mitted an itemized statement showing damages of more than $1,000.00 caused by being prohibited from carrying out his job of pulling the casing and removing the trade fixtures from the land. The evidence would sustain an award of a good deal more than $300.00.

Affirmed.

McFaddin, J., not participating.

Burns *v.* Owen.

5-2656 357 S. W. 2d 520

Opinion delivered May 28, 1962.

Holt, Park & Holt, for appellant.

Bruce T. Bullion, for appellee.

Jim Johnson, Associate Justice. This is a suit by appellants, B. M. Burns and his wife against appellees Wayne Owen and his wife seeking to quiet title in appellants to a strip of land here in controversy and further seeking to compel appellees to remove their fence from the property.

From a decree of the Chancery Court of Pulaski County dismissing appellants' complaint for want of equity, comes this appeal.

Appellant and his first wife, Beatrice, purchased the North 20 feet of Lot 22 and the South 15 feet of Lot 23,

Block 6, Ebendale Addition to the City of Little Rock on August 27, 1934, and immediately moved on to the property. Soon after moving on the property appellant planted an irregular strip of hedge running approximately East and West some twenty odd feet North of his house. In the vicinity of the West end of this so called hedgerow, appellant put up a dog pen, the North fence of which ran approximately in line with the hedge. Appellant Burns testified that he obtained the wire for the fence from the City Dump for $3.00 and just put it up to hold his dogs. There was evidence to the effect that at the time appellant moved on to the property a portion of the lot on which his house is located was washing away because of a huge ditch which ran through the land here in question. There was some evidence indicating that the fence and hedge were placed as they were to obstruct the flow from this ditch, in order to prevent further erosion of the soil from appellants' lot. This so called hedgerow and fence are admittedly located on Lot 24, Block 6, of the Ebendale Addition and the strip of land here in question is the space between the hedge and fence and a line approximately 3 or 4 feet North of appellants' house. This land includes the North 10 feet of Lot 23 and a part of Lot 24. In January of 1961, appellee purchased the said North 10 feet of lot 23 and all of Lot 24, Block 6, Ebendale Addition. On February 17, 1961, appellee advised appellants by mail of his purchase of this property and of his claim of ownership to the strip in dispute. It is undenied that thereupon appellant Mattie Burns offered to purchase the property from appellee. On March 28, 1961, appellee caused to be erected a chain link fence along the South boundary of the property he had bought.

On April 3, 1961, appellant filed suit to quiet title to the disputed property.

One of the witnesses upon whom appellant relied to sustain his contentions was Hannah Lewis.

After testifying extensively about the conditions surrounding the disputed property, based on 20 years of

living in this community, and visiting appellant Mattie Burns, Hannah on cross-examination testified as follows:

"Q. Now you said you were very familiar with the property?

"A. Yes, I know the property, I know Mattie, I am familiar with that part where Mattie lives.

"Q. That makes you familiar with the general neighborhood?

"A. Yes, I guess it does.

"Q. Is there any other vacant lot in that neighborhood?

"A. I don't know.

"Q. How many houses are on the West side of Gaines between 31st and 32nd? (Same block as the land here in question.)

"A. I don't know.

"Q. Is there any hedge in front of the house on the south of the Burns House?

"A. I don't know.

"Q. In the block immediately north of Mattie's house, how many houses are there?

"A. I don't know.

"Q. Are there any vacant lots in there?

"A. I don't know.

"Q. And you don't know of any other vacant property in that area?

"A. I don't know nothing but that lot on the side of Mattie, that is the only place I know of."

Since there is no dispute to the fact that the chain of title to the property in dispute is complete in the appellee, the appellants have never at any time held even color of title to the disputed property. Therefore, if the

appellants have any claim to this property it must be by adverse possession.

In the case of *Clem* v. *Mo. Pac. R. R. Co.,* 223 Ark. 887 (1954) this Court said:

"What is necessary to constitute adverse possession was announced by this Court in *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002, as follows: 'It is well settled by the authorities that this possession must be actual, open, continuous, hostile, exclusive and be accompanied by an intent to hold adversely and in derogation of and not in conformity with the right of the true owner.' *McCulloch* v. *McCulloch,* 213 Ark. 1004, 214 S. W. 2d 209."

The burden was on the appellants to prove their claim of adverse possession by a preponderance of the evidence. *McConnell* v. *Day,* 61 Ark. 464, 33 S. W. 731, (1896); *Love* v. *Cowger,* 130 Ark. 445, 197 S. W. 853; *Gaither* v. *W. A. Gage and Co.,* 82 Ark. 51, 100 S. W. 80.

A large portion of the pertinent facts in this case are in hopeless conflict, suffice it to say. Appellants proved that they used certain portions of the land here in dispute from time to time but they have not proven to our satisfaction that such use was adverse. On the contrary, the weight of the evidence seems to support the fact that the land was held permissibly with knowledge on the part of the appellants, that the land was owned by another and that there was no intent to claim the disputed land as their own.

It follows, therefore, that the familiar rule, that the holding of the Chancellor will not be reversed unless it is against the preponderance of the evidence, applies here. *Harp* v. *Christian,* 215 Ark. 833, 223 S. W. 2d 778; *Howell* v. *Simpson,* 216 Ark. 873, 228 S. W. 2d 41; *Clem* v. *Mo. Pac. R. R. Co., supra.* Accordingly the decree is affirmed.

5-2674 357 S. W. 2d 524

Opinion delivered May 28, 1962.

Keith, Clegg & Eckert, for appellant.

William C. Gilliam, for appellee.

JIM JOHNSON, Associate Justice. This appeal involves a replevin action brought by appellant, Superior Iron Works and Supply Company, Inc., against appellee, F. H. McMillan, d/b/a McMillan Pipe and Supply Company, seeking to recover a quantity of drill pipe and damages.

The appellant is in the business of manufacturing and selling oil field equipment with offices located in several states, including a district office at Magnolia, Arkansas. Superior owned approximately 2,820 feet of used 3½ inch drill pipe which it had temporarily stored on a vacant lease, known as the "Hall Lease" near Stephens, Arkansas. In February of 1960, Superior sent two of its trucks from Shreveport to pick up the pipe

and it was discovered that the pipe had disappeared. Superior immediately reported the theft of the pipe to the Sheriff of Columbia County, who obtained the assistance of the Arkansas State Police and the Federal Bureau of Investigation.

The Sheriff obtained information that a man named A. L. Cook had pretended that he was the owner of the pipe and had sold it to Hugh Ray White; a warrant was issued for the arrest of Cook, but he has not been apprehended. A bill of sale was executed by Cook to White describing 2,820 feet of drill pipe and containing the following recital:

"This property being sold is located on the Hall Lease in the Stephens, Arkansas, field, and is located on racks, which are also hereby sold to H. R. White."

At the time of this transaction, White gave a personal check to Cook with the intention of selling the pipe and depositing the proceeds to cover the check. White attempted to sell the pipe to a number of people and F. H. McMillan, the appellee, being advised about the pipe called White indicating his interest in buying it.

McMillan negotiated with both Cook and White and bought the pipe by making payment of one check to Cook in the amount of $1,424.00 and a separate check to White for $409.00. In this trade, White agreed to deliver the pipe to McMillan's yard at Malvern and for this purpose, White hired R. A. Flower Trucking Company, a common carrier, which picked up the pipe at the Hall lease near Stephens, Arkansas, and delivered it to the yard of the appellee, F. H. McMillan, at Malvern.

The total consideration paid for the pipe by McMillan was $1,833.00. The pipe, according to the testimony of Superior Iron Works officials, is valued at $1.50 a foot, or $4,230.00.

Immediately after learning that the stolen pipe was in the hands of McMillan, Superior Iron Works sent a telegram to McMillan advising him of these facts as follows:

"This is to inform you that the 2,820 ft. of 3½ inch drill pipe which was delivered to you by Mr. Hugh Ray White was stolen from Superior Iron Works in Stephens, Arkansas."

Demands were made upon Mr. McMillan for return of the pipe, but he refused to release it to Superior Iron Works. Thereupon this replevin action was commenced against McMillan who in turn posted a cross-bond for the purpose of retaining the property.

The pipe racks referred to in the bill of sale were not purchased from White by McMillan and these racks were recovered by Superior Iron Works from White at his residence at Magnolia, Arkansas.

At the close of the case by both parties, appellant moved for a directed verdict, which was denied, and the case was submitted to the jury upon interrogatories, only the first of which was answered. This interrogatory is as follows:

"Do you find from a preponderance of the evidence that the pipe now in possession of the defendant, McMillan Supply Company, was stolen from the plaintiff, Superior Iron Works?"

The jury responded, "No".

Judgment was entered on the verdict. Appellant moved for judgment notwithstanding the verdict, and for a new trial. The trial court denied the motion, and this appeal followed.

For reversal appellant contends that "the evidence is not sufficient in law to sustain the verdict. The trial court erred in refusing to grant a directed verdict at the close of testimony and in refusing to grant a judgment to the plaintiff non obstante veredicto."

Ark. Stats. § 43-2901 provides:

"All property obtained by larceny, robbery or burglary, shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property."

Ark. Stats. § 42-2902 provides:

"Any person losing property or any valuable thing by larceny, robbery or burglary may maintain his action not only against such felon, but against any persons whatsoever, in whose hands or possession the same may be found."

From these statutes it is clear that in this jurisdiction title to stolen property remains in its rightful owner. *Eureka Springs Sales Company* v. *Ward,* 226 Ark. 424, 290 S. W. 2d 434.

The definition of larceny is stated succinctly in 52 C. J. S., page 779 as follows:

"Larceny was a crime at common law; and at common law it may be defined to be the taking and carrying away from any place, at any time, of the personal property of another, without his consent, by a person not entitled to the possession thereof, feloniously, with intent to deprive the owner of his property permanently, and to convert it to the use of the taker or of some person other than the owner."

The undisputed evidence in the case at bar showed that the pipe in question was owned by the appellant, was carried away by another without the consent of the appellant and with the intent (by the purported sale to the appellee) to deprive the owner of his property permanently.

The only witness for the appellee was the appellee himself, and he did not purport to testify in any respect as to how the pipe was lawfully acquired by anyone from the appellant.

On the other hand, all of the uncontradicted testimony showed beyond question that the pipe was stolen. This uncontradicted evidence was:

(a) The ownership of Superior was established conclusively by the testimony of appellant's vice president and the introduction of its title papers. There is no evidence whatever in the record to the contrary.

(b) The location of the pipe on the "Hall Lease" was established by the uncontradicted testimony of appellant's store manager at Magnolia, the testimony of White, who sold the pipe to appellee, and by the statement in the Bill of Sale, introduced by appellee, and under which he claims title, recites that the pipe described therein was "located on the Hall Lease". Appellee did not contradict this evidence in his testimony or otherwise.

(c) The fact that the pipe was taken from the Hall Lease without the knowledge and consent of Superior and sold by Cook to White and by White to appellee without right was also established by all the evidence. Neither did appellee in any way contradict any of this evidence.

Under this state of the record we have no choice but to conclude that there is no substantial evidence to sustain the jury's verdict. *Aetna Life Ins. Co.* v. *Lemay*, 218 Ark. 328, 236 S. W. 2d 85; *Mutual Life Ins. Co. of New York* v. *Springer,* 193 Ark. 990, 104 S. W. 2d 195.

It follows, therefore, that only the question of the value of the pipe and damages, if any, should have been submitted to the jury. *Kesterson* v. *Hays,* 137 Ark. 592, 209 S. W. 721. Accordingly, the judgment is reversed and the cause is remanded for a new trial on those issues only. *Union Central Life Ins. Co.* v. *Mendenhall,* 183 Ark. 25, 34 S. W. 2d 1078.

RODGER *v.* CRAIN.

5-2690 357 S. W. 2d 527

Opinion delivered May 28, 1962.

Jeff Duty, for appellant.

Little & Enfield, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a decree of the Benton County Chancery Court ordering reformation and specific performance of a contract for the sale of land and abatement of the purchase price.

For reversal appellant contends that the trial court erred in decreeing abatement.

Appellant John E. Rodger, is the owner of a rectangular tract of land located on Highway No. 68 near the city limits of Siloam Springs. Each corner of the tract is plainly marked by an 8'' x 8'' crosstie. The entire tract is fenced.

Sometime prior to March 6, 1961, appellee, George Crain, and appellant entered into a discussion concerning the purchase of this tract of land by appellee. The appellant went over the land with appellee and pointed out the corner post and the fence line. When questioned about this by the court appellee testified as follows: ''Q. Did I understand you correctly to say that some-

where down toward the south there is a fence running east and west? A. Right, and we went to that, it went down to that fence, supposed to be 400 feet and I knew there was plenty of room for what I wanted, in fact more so I didn't go down there to that fence." The fence line on the east was substantially on the 20 acre line. The appellant told appellee that he would sell him the entire tract for the flat sum of $4,000. The parties had a contract drawn setting out their agreement. When the contract was written, appellee testified that neither he nor Mr. Rodger knew the exact size of this tract of land. Mrs. Doris Elrod, the scrivener who prepared the instrument, with reference to the dictation of the land description testified that "Mr. Crain (appellee) as I recall, did all the talking." The description which appears in the contract is as follows:

A tract of land beginning at the NE corner of Lot 1 of Rodger's Sub-division No. 1 of the NW 1/4 of the SW 1/4 of Sec. 4, Twp. 17 N., Rge. 33 W., running thence east *approximately* 330 feet to the 20-acre line, thence south 400 feet, thence west *approximately* 330 feet to the southeast corner of said Lot 1, thence north 400 feet to place of beginning (*said tract to be more accurately described in the deed conveying said lands to the Buyer*). (Emphasis ours.)

Concerning this description Mrs. Elrod further testified "Q. I notice you say in the contract 'said tract will be more accurately described in the deed' . . . A. Well we put that in there because they didn't know the exact footage." After the contract was written it was suggested by the appellee that Mr. Rodger have the land surveyed to ascertain the exact size of the tract. This was done by Mr. Rodger and on the survey it was revealed that the dimensions were 270.9 and 274.4 by 400 feet deep running to the 20 acre line. Appellee said he thought there were 330 by 400 feet in the tract. Mr. Rodger thereupon offered to tear up the earnest money check and the contract. Mr. Crain refused, stating to Mr. Rodger that he wanted the land. It is undisputed

that appellee was acquainted with this property even before talking to Mr. Rodger about purchasing it and it is clear from the testimony that he was buying all the land under fence.

From these and other facts contained in the record we are called upon, on trial *de novo,* to determine whether, as previously stated, the trial court erred in decreeing an abatement of the purchase price. One of the best settled rules in the law of real property is that "where the descriptions of the boundaries of a tract are uncertain and conflicting, distances yield to courses and courses to monuments." *Paschal* v. *Swepston,* 120 Ark. 230, 179 S. W. 339. These monuments may be natural or artificial, *Hughes* v. *Yates,* 228 Ark. 860, 311 S. W. 2d 179. This being true, it is our view that the four 8" x8" crosstie corner posts here involved constitute such artificial monuments as to fall within this rule. Another rule applicable to the case at bar is set forth in the case of *Taliaferro* v. *Boyd,* 115 Ark. 297, 171 S. W. 105, wherein it is said that it is essential that the party addressed should trust the representations and be so thoroughly induced by it that judging from the ordinary experience of mankind in the absence of it he would not in all reasonable probability have entered into the contract or other transaction. Then in 37 C. J. S., p. 271, § 29, it is stated as the test: " . . . he must show that he would not have acted but for such representation." From the record before us we have been unable to find at any point where appellee has shown that he would not have acted had he known the exact footage of the land here in question. We did find that he testified: "If I had known it was 270 feet there *might* have been a different story." This testimony does not meet the test. It follows, therefore, that the portion of the Chancellor's decree which ordered the abatement of the purchase price is reversed and the cause is remanded for the entry of a decree awarding the full purchase price.

Reversed.

COLEY *v.* ENGLISH.

5-2702 357 S. W. 2d 529

Opinion delivered May 28, 1962.

George K. Cracraft, Jr., for appellant.

David Solomon, for appellee.

JIM JOHNSON, Associate Justice. This litigation arose out of a contract entered into on January 2, 1957, by Ann H. T. Coley to convey certain lands in Phillips County, Arkansas, to Leroy and Bessie King. The pertinent portion of the contract follows:

"It is further mutually agreed between the Parties, Seller and Purchasers, in the event the said Seller A. H. T. Coley, shall depart this life before the entire purchase price shall have been paid, as herein agreed, the contract shall continue in force provided all its conditions have been promptly met by the said Purchasers, and all subsequent payments, which would and should have been paid to A. H. T. Coley, Seller, had she lived, will be paid to her husband's nephew, Walter Lee Coley, who at the time of the making of this contract lives in Dayton, Ohio."

Some months later, on February 24, 1958, the contract was amended to extend the date and time of payments.

This contract was in full force and effect on June 14, 1960, when Ann H. T. Coley, the seller, died testate. Her last will and testament, dated July 21, 1956, was admitted to probate and was not contested; Walter L. Coley, the same person named in the contract between Ann H. T. Coley and the Kings, was appointed Executor.

The Kings, as purchasers, asked for and were granted specific performance of the contract. On March 27, 1961, the Probate Court directed Walter L. Coley, as Executor of the Estate of Ann H. T. Coley, to convey said lands to the Kings pursuant to the contract. A balance owing in the amount of $7,000 was paid into the registry of the Court for final disposition. On October 28, 1961, the court ordered this $7,000 balance paid to Walter L. Coley in his capacity as executor of the estate of Ann H. T. Coley, to be distributed to the residual legatees named under the Coley Will. From this order the same Walter L. Coley appeals in his capacity as an individual contending he is a third party beneficiary and claiming the $7,000 as a gift under the contract.

Attorneys for both sides present learned and well reasoned arguments on a complex question that is not made easier by the diversity of case law on the subject. Arkansas Law Review, Vol. 5, No. 1, p. 66.

For reversal, appellant contends that he is a third party beneficiary under the contract and argues forcefully that the benefit under the contract is not made testamentary by the fact that such benefit was postponed until the death of a party.

In Restatement, Contracts, § 133 (1932) we find third party beneficiary contracts divided into three classes: (1) He is a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance is to make a gift to, or confer a right of action upon, the beneficiary; (2) He is a creditor beneficiary if no purpose to make the beneficiary a donee appears

from the terms of the promise in view of all the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary; (3) He is an incidental beneficiary if the facts of neither (1) nor (2) exist.

In support of his contentions for reversal, appellant relies heavily upon the finding by this Court in *Freer* v. *J. G. Putnam Funeral Home, Inc.,* 195 Ark. 307, 111 S. W. 2d 463. We see a clear distinction between the *Freer* case and the case before us. In the case at bar, appellant is an incidental beneficiary to the contract. That is, the promisee, Ann H. T. Coley, owed no duty or legal obligation to appellant at the time the contract was made and no duty or legal obligation arose out of the contract upon the promisee's death; *Dickinson* v. *McCoppin,* 121 Ark. 414, 181 S. W. 151; nor does appellant show he has changed his position to his detriment in reliance upon the contract. In the *Freer* case, as Judge Baker pointed out, there was an absolute duty upon the promisor to pay a debt of the promisee. This legal obligation supplied the necessary privity between the contracting parties and a stranger to the contract. See *West* v. *Norcross,* 190 Ark. 667 80 S. W. 2d 67.

In the case before us now, the promisee retained full control over the contract and, had she lived, she would have been the sole beneficiary or recipient of the full consideration due on the contract. At no point does appellant show an actual or constructive intent on the part of the promisee to relinquish such control of the contract as would cause a presumption that appellant was entitled to anything until the promisee's death. The terms of the contract clearly state that appellant was to receive nothing until the death of Ann H. T. Coley, and then only such amount (if any) as might be remaining due upon the contract. This provision of the contract clearly shows an intent on the part of Ann H. T. Coley to make a testamentary disposition of property contrary to the solemn requirements of a will. From the

clear language of the contract there is no inference of an intent on the part of Ann H. T. Coley to convey a present interest in the contract to appellant as would constitute a valid gift *inter vivos*. See *Baugh* v. *Howze*, 211 Ark. 222, 199 S. W. 2d 940.

Affirmed.

HOOKER *v.* PARKIN.

5-2726 357 S. W. 2d 534

Opinion delivered May 28, 1962.

D. D. Panich, for appellant.

J. Frank Holt, Atty. General, by *Jack Holt, Jr.,* Chief Asst. Atty. General, and *Russell Morton,* Asst. Atty. General; *Dan Stephens,* General Counsel, Ark. Hwy. Dept., by *Don Gillaspie*; *Mehaffy, Smith & Williams,* by *W. J. Smith* and *James E. Westbrook,* for appellee.

JIM JOHNSON, Associate Justice. The appellant, J. J. Hooker, a citizen, resident and taxpayer of Little Rock, Pulaski County, Arkansas, filed a class action in the Chancery Court of Pulaski County, challenging the constitutionality under our State Constitution of five acts: Act 200 of 1961; Act 465 of 1961; Act 395 of 1961; Act 118 of 1953, as amended, which is the Revenue Stabilization Law; and, Act 412 of 1955, as amended, which is the General Accounting Procedures Law. The appellees are Governor Orval E. Faubus and other state officials charged with the execution and administration of the questioned acts. The learned Chancellor found the challenged acts to be constitutional in all respects and the appellant has brought the case to this Court by appeal.

The three appropriation acts involved (200, 465 and 395 of 1961) provide for the expenditure of more than 250 million dollars during the two fiscal years, begin-

ning on July 1, 1961, for the expenses of meeting the State's emergencies and carrying out the State's good roads and educational programs. The other two acts involved have been in effect for a number of years and in practical application constitute instrumentalities by which the Legislature controls the allocation of state funds and the accounting by the state officials and employees for such funds. The magnitude of this action and its impact on the welfare of the people of Arkansas cannot be put into words.

In his Memorandum Opinion the learned Chancellor stated that our State Constitution of 1874 is a document we should revere and we agree with him. While we consider the grave issues raised in this appeal, we must be mindful of the fact that our state Constitution is a restrictive document; whereas our Federal Constitution is a document of delegated powers. The Federal Government has no right to act in a given field unless authority to do so has been delegated to it by the States. To the contrary, the Legislature (which is made up of the people's elected representatives and spokesmen) has absolute power and authority to legislate in all fields unless prohibited or restricted from doing so by the State Constitutution or unless authority to so act has been delegated to the Federal Government and such authority has been exercised by the Federal Government.

Also, we are mindful of the rules urged by appellees to the effect that any doubt as to the constitutionality of an act must be resolved in favor of the validity of the act, *State* v. *Sloan,* 66 Ark. 575, 53 S. W. 47; *State* v. *Moore,* 76 Ark. 197, 88 S. W. 881; and, that contemporaneous construction given by the Legislature to the constitutional provisions involved are to be given great weight (though not conclusive), 6 R. C. L. 63 and *Pressman* v. *D'Alesandro,* 211 Md. 50, 125 A. 2d 35. However, we find no occasion for the applicability of these urged rules in the case at bar, since the constitutionality of the acts in question seems to be too clear to admit of any doubt.

The appellant contends that: "Act 200 of 1961 is unconstitutional in that (1) it directs unlawful delegations of power in violation of Article 4 of the Arkansas Constitution, and (2) the appropriation set out in Section 2 of said act is in violation of Sections 29 and 30 of Article 5 of the Arkansas Constitution in that said appropriation fails to itemize the amounts to be spent and appropriates funds for more than one subject."

One must concede that this act delegates broad powers to the Highway Commission, but we find nothing in these powers that contravenes Article 4 of the State Constitution, which reads as follows:

"Section 1. DEPARTMENT OF GOVERNMENT. The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another.

"Section 2. SEPARATION OF DEPARTMENTS. No person or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Act 200 appropriates funds for the operation of the Highway Department from July 1, 1961, to July 1, 1963. The act establishes the maximum salaries and wages for a maximum number of employees by grades and classes. The act does permit the Highway Commission to employ a lesser number of employees and to pay less than the maximum salaries and wages to employees in the various grades and classes. The need for employees and the salary or wage deserved by the individual employee are left for the Highway Commission's determination. The delegation of this power is necessary for the orderly and efficient operation of the Highway Department and is not repugnant to Article 4 of the State Constitution. The Legislature has the right to delegate the power to determine facts upon which the law makes

or intends to make its action depend. *McArthur* v. *Smallwood,* 225 Ark. 328, 281 S. W. 2d 428. In this case the facts we repeat are: first, the need for the employee, and second, the ability and efficiency of the employee.

Act 200 also appropriates a lump sum of $83,100,000 for each fiscal year of the biennium for the following:

"Maintenance, Construction, Reconstruction, Repair, Replacement, Relocation, Betterment, and Operation of roads, bridges, ferries, and toll facilities in the State Highway System; including the acquisition of necessary rights of way; the purchase, repair, and operation of equipment; the purchase of land and construction of buildings and facilities required for the operation of the highway department, including facilities necessary for truck-weighing operations; the purchase of materials and supplies, the payment of departmental current expense, and the payment of travel expenses."

How much money is to be expended for each of these items is left for determination by the Highway Commission. As we view the matter, the only alternative would be for the Legislature to decide and fix by law each road and bridge to be repaired or built, the kinds of equipment and materials to be used, et cetera. We cannot find any intention for such a restriction in Article 4 of the State Constitution. Neither do we find any intention that the Highway Department or any other Department or agency of the State should be required to employ a person not needed simply because such employment is authorized by an act.

Another provision of Act 200 authorizes the Highway Commission to carry forward from the first fiscal year of the biennium to the second fiscal year appropriation authorizations not used in the first year. However, the carry over is limited in purpose. An appropriation may be made for two years, and this is authorized by Article 5, Section 29 of the State Constitution which is the very provision the appellant contends this act violates. This provision is as follows:

"Section 29. APPROPRIATIONS. No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriations shall be for a longer period than two years."

Act 200 does not authorize the withdrawal of money from the treasury without an appropriation. To the contrary, it requires an appropriation and clearly states the purpose for the appropriation. The act specifies in dollars and cents the maximum amount which may be drawn from the treasury. The act makes no appropriation for a period longer than two years. Clearly the act meets each requirement of Article 5, Section 29, supra.

The appellant's last objection to Act 200 is that it contains more than one subject contrary to Article 5, Section 30 of the State Constitution. We find that this issue was settled in one of our earliest cases, *Fletcher* v. *Oliver, Sheriff,* 25 Ark. 289 (1868) in which the Court said:

"The title of the Act is for 'opening and regulating roads and highways.' Under this title may be included every act necessary to carry into effect or accomplish the design."

Then the Court posed this question:

"Is there a power conferred, or a duty enjoined, by any of the sections of the law of 1868 which, if left out, would not have retarded and delayed the construction of roads and highways?"

In our opinion, if any power conferred or duty enjoined upon the Highway Commission had been left out of Act 200, the construction of roads and highways in our State would have been retarded and delayed. We find Act 200 valid in every respect.

The appellant raises exactly the same objections to Act 465 of 1961 (appropriation act for the Department of Education for period from July 1, 1961 to July 1, 1963)

as he raises to Act 200, i.e. that the act offends Article 4 and Article 5, Sections 29 and 30 of the State Constitution.

Act 465 contains twenty sections and covers eleven pages in Volume 2 of the Acts of Arkansas for 1961. A detailed discussion of each clause or sentence or item would serve no useful purpose. We have carefully examined the act and find no delegation of unlawful powers.

The State Board of Education is empowered to determine the need for employees and to fix the number of employees and salaries, within maximum authorizations. In this connection what we have said about Act 200 suffices here. The Governor is authorized to reduce the amount to be expended for Transportation Aid in each fiscal year. We find that his action must depend upon facts to be determined and that this requirement meets the test set forth in *McArthur* v. *Smallwood, supra,* and as further set forth in *State* v. *Davis,* 178 Ark. 153, 10 S. W. 2d 513, as follows:

"The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

It would be poor policy, to say the least, for the Legislature to fix the number of employees for this or any other department and to require the employment and payment of such employees when not needed. The appellant has read such an intention into *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45, but we do not agree with his interpretation of that decision where we quoted Article 16, Section 4 of the state Constitution which reads as follows:

"The General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person, or at any rate other than par value; and the number and salaries of the clerks and employees of the different departments of the State shall be fixed by law."

Act 465 does not authorize the payment of a greater salary or fee to any employee than the amount fixed by law. We construe this provision to mean that the Legislature has the sole authority to establish the maximum remuneration to be received by any State employee and to establish the maximum number of such employees. We can find no requirement to the contrary.

Likewise we find it is within the power of the Legislature to fix a maximum amount to be used for any given purpose, with a proviso that the money will not be so used unless needed, such as was done in connection with the appropriation for Transportation Aid.

Act 465 specifies appropriations in dollars and cents, contains no appropriation that is not for a specific purpose, does not authorize the drawing of money from the treasury without an appropriation, and contains no appropriation for more than two years. This act meets every requirement of Article 5, Section 29, of the State Constitution.

The appellant's contention that Act 465 covers more than one subject has given us some concern, because of Article 14 of the State Constitution which pertains to education in the public schools. However, we can find no limitation in the State Constitution that would prohibit the Legislature from treating all educational functions as one subject. The legislature has the right, if it so desires, to provide for education of our citizens from the cradle to the grave. The State Constitution requires a free public education for our boys and girls between the ages of six and twenty-one years, Article 14, Section 1; but we reiterate, there is nothing in the State Constitution to prohibit the Legislature from ex-

tending aid to higher education nor from developing educational opportunities for our people in the fields of vocational and technical training. The scope of activities which may be assigned to the State Board of Education and its various divisions by the Legislature has no bounds so long as those activities pertain to education (except as limited by Amendment 33). Black's Law Dictionary defines "education" as follows:

"EDUCATION. Comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical. Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all. *Barbers' Commission of Mobile County* v. *Hardeman,* 21 So. 2d 118, 120, 31 Ala. App. 626. Acquisition of all knowledge tending to train and develop the individual. *Mitchell* v. *Reeves,* 123 Conn. 549, 196 A. 785, 788, 15 A. L. R. 1114."

Act 465 is limited to the subject of education and does not violate Article 5, Section 30, of the State Constitution.

The appellant contends that Act 395 of 1961, violates Article 4 and Article 5, Sections 29 and 30, of the State Constitution, supra.

The title and Section 1 of this Act are as follows:

"AN ACT to Appropriate Funds to Alleviate Conditions Arising in Public Emergencies, and for other Purposes."

"SECTION 1. In the event of riot or threatened riot, sabotage, public insurrection or threatened insurrection, storm, flood, famine, or other public calamity, or other unforeseen situations which upon determination of necessity by the Governor calls for immediate action, the Governor is hereby authorized to issue a proclamation declaring an emergency to exist, which said proclamation shall include: (a) The nature and location of the emergency; (b) the name of the department or agency of State which, in the Governor's opinion, is best

able to alleviate or obviate the conditions which have arisen or are about to arise because of such emergency; and (c) the amount of funds required therefor; such amount or so much thereof as shall have been set forth in each such proclamation, to be expended upon vouchers drawn by the disbursing agent of the department or agency of State named in the proclamation. The original of each such proclamation shall be filed with the Secretary of State and executed counterparts thereof shall be filed with the State Auditor, State Treasurer, and State Comptroller."

Section 2 appropriates $100,000 each year for the two-year period beginning July 1, 1961.

Section 3 is a repealing clause.

The reason we have quoted in toto the title and Section 1 of this act is to show clearly that the act treats with one subject, i.e. "Public Emergencies." What constitutes a public emergency is to be determined by the Governor within the requirements of Section 1. It is to be noted that these requirements are specific and strict. Of course, any emergency proclamation is subject to attack under the position that no emergency exists.

This act does not authorize the withdrawal of money from the treasury without an appropriation, the purpose is distinctly stated, the maximum amount to be drawn from the treasury is specified in dollars and cents, and no appropriation is made for more than two years.

The same authorities cited in connection with our discussion of Acts 200 and 465 are applicable here, and reference to the many additional cases which could be cited to support our views on these three appropriation acts would only serve to unduly lengthen this opinion.

The appellant contends that Act 118 of 1953, as amended, the Revenue Stabilization Law, violates Article 4, Article 5, Sections 29 and 30, and Article 16, Sections 11 and 12 of the State Constitution.

This act came in to being as Act 311 of 1945. It was amended by each subsequent session of the Legislature and was completely redrafted as Act 118 of 1953. Each regular session of the Legislature since then has resulted in amendments to the act.

It would literally require volumes to discuss every facet of this important and vital act; but regardless of the length of this opinion, we are compelled to consider and, in the case at bar, feel impelled to state our views on each objection raised by the appellant. However, first we think that any discussion of the act should be prefaced with a brief review of the conditions that apparently brought about its enactment.

Upon the adoption of the Constitution of 1874, the Legislature launched a program based on deficit financing which eventually brought the State to the brink of bankruptcy. As early as 1875 the Legislature passed an act making appropriations for the expense of the executive, legislative and judicial branches of the State government, which included numerous items to supply deficiencies in appropriations theretofore made for various expenses of government. Act March 6, 1875, Section 3. A few other examples are: Act 123, Ark. Acts of 1887; Act 81, Ark. Acts of 1889, and Act 135, Ark. Acts of 1899.

This record of deficit financing continued in varying degrees until 1933 when Governor Futrell's legislative program to save the financial integrity of the State became law. In that year the Legislature proposed Amendment No. 20 to the State Constitution which was adopted in the general election of 1934 by a majority of almost 4 to 1. This amendment is as follows:

"BONDS PROHIBITED EXCEPT WHEN APPROVED BY MAJORITY VOTE OF ELECTORS. Except for the purpose of refunding the existing outstanding indebtedness of the State and for assuming and refunding valid outstanding road improvement district bonds, the State of Arkansas shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the State or any of its revenues for any pur-

pose whatsoever, except by and with the consent of the majority of the qualified electors of the State voting on the question at a general election or at a special election called for that purpose.

"This Amendment to the Constitution of Arkansas shall be self-executing and require no enabling act, but shall take and have full force and effect immediately upon its adoption by the electors of the State."

Clearly, the people of Arkansas spoke out through this amendment against deficit financing in State affairs, and in effect established public policy of the State Government, against such spending. In our opinion, this amendment was a mandate to the Legislature to prohibit issuance of state warrants unless money was on hand (from whatever source derived) to cover such warrants. Herein lies the financial stability of the State Government.

The ground work done during Governor Futrell's tenure in office was the base upon which the Revenue Stabilization Law was established in 1945 as a part of Governor Laney's fiscal program. Although many amendments and a redraft of this act subsequently followed, the basic concepts of the 1945 act remain to this day.

The Revenue Stabilization Law is a complex accounting tool designed to insure that the recipients of State funds receive monies only so long as cash is on hand. The appropriation for each agency sets a top limit on the amount that may be paid to that agency, and the Revenue Stabilization Law insures that no more is spent than is taken in and is allocated by the Legislature.

Does this act delegate powers contrary to Article 4 of the State Constitution, supra? We think that it does not. Duties to be performed by the administrative department of the State are spelled out in detail and depend upon facts over which no one has control, such as the amount of taxes collected which depends upon economic conditions. Duties delegated are purely minis-

terial since the Legislature has established specific procedures to be followed.

Turning now to the appellant's contention that this act violates Article 5, Sections 29 and 30, of the State Constitution, supra, we need only to say that the act provides for the allocation of funds within the State Treasury and it does not provide for the withdrawal of any funds from the Treasury. The act is not an appropriation act within the meaning of these two provisions of the State Constitution. *Dickinson* v. *Johnson,* 117 Ark. 582, 176 S. W. 116; *Dickinson* v. *Clibourn,* 125 Ark. 101, 187 S. W. 909.

The appellant next contends that this act violates Article 16, Section 11, of the State Constitution. This provision is brief and reads as follows:

LEVY AND APPROPRIATION OF TAXES. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose."

The appellant is substantially correct in his contention that a tax levied for one purpose cannot be used for another. *Page* v. *Alexander,* 206 Ark. 479, 177 S. W. 2d 415. However, the appellant is in error in reasoning that a tax once levied for one purpose cannot thereafter be levied for a different purpose. In *Page* v. *Alexander, supra,* this Court held that when a tax is collected pursuant to being levied for a specific purpose, the money so collected cannot be diverted for a different purpose. At no time has this Court held that a tax act cannot be repealed or amended. Apparently this is what the appellant seeks. Such a meaning cannot be read into the above-quoted section of the State Constitution. We point to the wording of this provision and note that money does not arise from a tax until the tax has been collected.

In considering this point raised by the appellant, we have studied each provision of the Revenue Stabili-

zation Law which levies a tax and have found in each instance that no tax money collected has been diverted to a different purpose than that for which it was levied. True, we have found amendment after amendment to the basic act levying a tax for a different purpose after a given date in the future and we hold that such a procedure is not prohibited by the State Constitution. This procedure is well demonstrated in the Legislature's handling of the sales tax (Act 233 of 1935 as amended) prior to the enactment of the Revenue Stabilization Law.

Since this act is not an appropriation act as stated above, it follows, therefore, that the appellant is in error in his contention that the act violates Article 16, Section 12 of the State Constitution which reads as follows:

"DISBURSEMENT OF FUNDS-APPROPRIATION REQUIRED. No money shall be paid out of the treasury until the same shall have been appropriated by law, and then only in accordance with said appropriation."

Although the appellant objects to the allocation of a percentage of taxes collected to the Constitutional and Fiscal Agencies Fund, he fails to state the provision of the State Constitution upon which he relies for his position. This Court dealt with this subject in *Young* v. *Clayton*, 223 Ark. 1, 264 S. W. 2d 41, and we find nothing in the case at bar to require a contrary holding here.

Act 412 of 1955, as amended, the General Accounting Procedures Law, is the last act to come under attack by the appellant. He alleges that this act violates Article 4 and Article 5, Sections 29 and 30 of the State Constitution, supra.

This act does not authorize the withdrawal of any money from the State Treasury and it is not an appropriation act. Therefore, there is nothing in Article 5, Sections 29 and 30, which pertains in any manner to the General Accounting Procedures Law.

Now let us consider whether this act violates Article 4 of the State Constitution, *supra.*

The General Accounting Procedures Law may be summarized as conferring: powers upon certain State Constitutional officers and employees and upon the Legislative Council to prepare a budget for the Legislature's consideration when enacting specific appropriation acts; powers upon the administrative department of the State Government to require that certain records be kept and that state funds be accounted for according to an established accounting system; and powers upon the administrative department of the State Government to execute budget controls found necessary by the Legislature. These are in essence the powers which the appellant contends have been delegated in violation of Article 4, supra.

As we have stated, the Revenue Stabilization Law was first enacted in 1945. At that time certain accounting laws had been in existence for many years. These laws were amended from time to time and when appellee Faubus came into office in 1955, he proposed and the Legislature adopted the General Accounting Procedures Law which is comprehensive in detail. Through this act the Legislature has supplied the controls so necessary for the proper functioning of the Revenue Stabilization Law. These two acts go hand in hand and constitute as near as possible a guarantee against deficit spending by the State Government.

The Legislature has retained in this Law the right to enact the acts under which money can be withdrawn from the State Treasury. Since the Legislature is the department of the State Government that has this right and duty, it stands to reason that the Legislature also has the right to cloak such appropriations with such safeguards and restrictions as it may determine to be necessary for the preservation of the welfare of the people of this State.

In our opinion, the authorities cited above in this opinion relative to Article 4 of the State Constitution suffice and need not be repeated.

In reaching our conclusion on the whole case before us, we have borne in mind the following from *Fletcher* v. *Oliver, supra*:

"It is the bounden duty of courts not to defeat the will of the people, expressed through their representatives in the legislative halls, unless it is clearly manifest that some vested right or provision of the Constitution has been invaded. If the validity of every law is to depend upon the mere fact that the judiciary, if they had been legislating, would not have so arranged the law, we think that the Constitutional Convention reposed more confidence in the judicial department than sound discretion would warrant."

It follows, therefore, that the decree in all respects is affirmed.

McFaddin, J., concurs.

Gibson *v.* Lowry.

5-2733 357 S. W. 2d 531

Opinion delivered May 28, 1962.

O. E. Gates, DuVal L. Purkins and *D. A. Bradham,* for appellant.

J. F. Wallace, Jr., and *Gerland P. Patten,* for appellee.

JIM JOHNSON, Associate Justice. This appeal is prosecuted by the Heirs of Annie Cherry seeking to reverse an order of the Desha Circuit Court dismissing their suit in ejectment against a devisee in possession.

A jury was waived and the facts were stipulated.

The subject matter of this action is a farm in Desha County, acquired by Charles S. Thomas by a warranty deed dated February 17, 1947, upon which he resided with his wife, until she departed this life, leaving him alone. In the course of time his mother, Annie Cherry, and J. H. Cherry, her husband, and his step-father, moved into the home and the three lived as members of the family. During that time, on March 25, 1955, Charles S. Thomas made his Last Will and Testament, which is the basis of the title upon which both appellants and appellees rely for relief.

The paragraph of the Will pertinent to this controversy is as follows:

"Third: I devise, give and bequeath unto my mother, Mrs. Annie Cherry and to my step-father, J. H. Cherry, jointly, share and share alike, or to the survivor of them, the possession, rents, benefits and profits from my farm, being my home place situated about six miles South of McGehee, on Old U. S. Highway No. 65, in Desha County, Arkansas, during the natural lifetime of them, or the survivor of them, *and at the death of both*

of said beneficiaries, I direct the said farm be vested, absolutely in fee simple in my brother, George E. Thomas." (Emphasis ours.)

J. H. Cherry predeceased Charles S. Thomas and Charles and his mother continued to occupy the residence as a family until November 22, 1957, when Charles S. Thomas departed this life, leaving his mother, Annie Cherry, residing in the home . She continued to reside in the home until on June 22, 1959, when she departed this life. Following the death of Charles, but one month prior to the death of Annie Cherry, George S. Thomas, remainder-man in the Charles S. Thomas Will, departed this life on May 22, 1959.

George died testate, survived by his wife, Mabel C. Thomas, who was sole beneficiary under his Last Will and Testament, executed July 5, 1958, which specifically devised to his widow his "remainder interest in farm land". Upon the death of Annie Cherry, Mabel C. Thomas, surviving spouse of George E. Thomas, moved into possession of the land here in question, where she remained until her death testate April 1, 1960. Being without children, Mabel C. Thomas, by her Last Will and Testament, executed on the 10th day of July, 1959, devised all of her land to her nephew, appellee, Autus T. Lowry, who is now in possession of the property.

From these and other stipulated facts the trial court, sitting as a jury, found that upon the death of Charles S. Thomas on November 22, 1957, George E. Thomas acquired a vested interest in the land and had the right to dispose of his interest as he saw fit.

For reversal appellants forcefully contend "that Charles S. Thomas by his Will vested a life estate in his farm in his mother, Annie Cherry, subject to a remainder estate to George E. Thomas, his brother, contingent upon the condition precedent that he survive Annie Cherry, his mother, which he did not do, and, so, at the death of George E. Thomas, his contingent interest or estate ceased to exist and the fee title passed by operation of the laws of descent and distribution to Annie Cherry."

A remainder is vested when it is limited to an ascertained person or persons, with no further condition upon the taking effect in possession, than the termination of the prior estate. See 33 Am. Jr. 525, Varn Anno. Supplement to Jones Ark. Titles, § 222, P. 146. An indefeasibly vested remainder is not precluded from creation "by the fact that the remainder is, in specific words, limited to the properly identified person "on", "upon", "at" or "after" the death of a person having a prior interest for life, or "when" such a person dies. Language of this type indicates the postponement of enjoyment implicit in all indefeasibly vested remainders and injects no additional element of uncertainty." Restatement, Property—Future Interest § 157.

Here the interest given to George C. Thomas vested at the same instant and by the same grant as the life estate to Annie Cherry, and although his right to the enjoyment of the possession of this interest was postponed until the termination of the life estate, still this right, upon the termination of the prior particular estate, was presently fixed, and was in no wise dependent upon the happening of any event. *McCarroll* v. *Falls*, 129 Ark. 245, 195 S. W. 387. Therefore, since the remainderman interest, in this case, was ready to take effect immediately upon the death of the life tenant, and the designation of the remainderman being definite and certain, we cannot say that the trial court erred in finding that the Will of Charles S. Thomas created a vested remainder interest in his brother, George E. Thomas. *Hargett* v. *Hargett,* 226 Ark. 929, 295 S. W. 2d 307.

Affirmed.

Opinion delivered May 28, 1962.

[redacted]

Wright, Lindsey, Jennings, Lester & Shults, for appellant.

Hall, Purcell & Boswell, for appellee.

NEILL BOHLINGER, Associate Justice. The appellee, Lucille Cox Troutt, brought this action in the Saline Circuit Court as executrix of the estate of George L. Troutt to recover the sum of $10,000.00 which she alleged was due under a policy of life insurance which the appellant, Universal C. I. T. Credit Corporation was to have procured from the Old Republic Life Insurance Company on the life of her husband, George L. Troutt.

It appears from the record before us that George L. Troutt and I. E. McCray contemplated the installation of swimming pools which were to be purchased from the Arkansas Swimming Pool Corporation of which McCray and Troutt were the organizers. It was planned that the Arkansas Swimming Pool Corporation would take the notes of McCray and Troutt and transfer them to the appellant, Universal C. I. T.

McCray and Troutt conferred with the appellant which, after a credit investigation, agreed to purchase their notes from the Swimming Pool Corporation and McCray and Troutt filled out certain forms presented to them by the appellant and the appellant's manager testified that he advised both parties that since the transaction involved real estate their wives would be required to sign the notes with them. McCray's wife signed the McCray note but it does not appear that Mrs. Troutt signed the note which the appellant contends was necessary to complete the application for the loan and both Troutt and McCray were advised at that time that $10,000.00 in life insurance would be purchased as credit life insurance to secure the loan and that they were insured from that point on. George L. Troutt died a few days subsequent to the meeting between McCray, Troutt, and the representative of the appellant. Mrs. McCray, not wishing to complete the purchase of the swimming pool, cancelled the order.

Mrs. Troutt, executrix of George L. Troutt's estate, advised the Old Republic Life Insurance Company and the appellant of the death of Mr. Troutt and made claim for $10,000.00, the amount of insurance which she states the appellant was to purchase for the account of George L. Troutt. The appellant rejected the claim.

Thereafter Mrs. Troutt, as executrix, brought this action in the Saline Circuit Court and prayed judgment against the Old Republic Life Insurance Company and the appellant, both jointly and severally, for breach of contract and to recover on an insurance policy. Summons was issued and served on the Old Republic Life Insurance Company from the Saline Circuit Court which was the county wherein Mr. Troutt resided and died and summons was also served in Pulaski County on the appellant in that action, although it is stipulated that the appellant neither resides in nor maintains an office in Saline County.

Subsequently Mrs. Troutt filed an amended complaint, the prayer of which, as with the original com-

plaint, prayed judgment against the Old Republic Life Insurance Company and the appellant, jointly and severally, for breach of contract and for penalties and attorney's fees.

The appellant raised the question of jurisdiction of the Saline Circuit Court and the cause was thereupon transferred to the Pulaski Circuit Court in which county the appellant maintained an office. The Pulaski Circuit Court refused to accept jurisdiction and transferred the action to the Saline Circuit Court. Upon this return to the Saline Circuit Court a number of pleadings and motions of various kinds were filed but since the cause is to be decided entirely on the question of venue we do not go into the matter of the side issues raised by those pleadings.

On the trial of the case, at the conclusion of the evidence on behalf of the plaintiff, the defendant, the Old Republic Life Insurance Company, moved the court for a directed verdict on the grounds that no proof had been offered that the Universal C. I. T. Credit Corporation was the agent of the Old Republic Life Insurance Company or that the appellant agreed to place any insurance in any particular company. This motion the court granted and dismissed the cause as to the Old Republic Life Insurance Company.

Immediately after the granting of that motion the appellant moved the court to dismiss the cause as to it on the grounds that the action against its co-defendant, the Old Republic Life Insurance Company, had been dismissed and that consequently the venue was improper with respect to the Universal C. I. T. Credit Corporation because it was served with summons in Pulaski County and that it did not maintain any office or place of business in Saline County. This motion the court denied. This was error.

Up to the point where the court dismissed the Old Republic Life Insurance Company the Saline Circuit Court had jurisdiction. Mr. Troutt resided in Saline

County and Ark. Stats. § 66-3234 provides for an action on an insurance policy in the county where the insured died or in the county of the insured's residence at the time of death. It is inherent, except where there is a statute to the contrary, that each defendant is liable to suit only in the county wherein he resides or wherein it maintains an office and defendant cannot be dragged from the forum of his residence or place of business except in the case where a suit is against several defendants as set forth in the Arkansas Statutes, § 27-613, where it is provided that action "may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned." The Old Republic Life Insurance Company was properly summoned in Saline County but § 27-615 of the Statutes provides:

"Where any action embraced in section 96 [27-613], is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of summons in another county than that in which the action is brought, where no one of the defendants is summoned in that county, or resided therein at the commencement of the action, or where, if any of them resided, or were summoned in that county, the action is discontinued or dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him."

The statute is plain and beginning with the case of *Stiewel* v. *Borman,* 63 Ark. 30, 37 S. W. 404, this court has uniformly held that a judgment cannot be rendered against a defendant jointly sued with others who neither resided in the county in which suit was brought, nor was summoned therein, if he objected before judgment to the proceeding, or unless judgment is rendered against a codefendant who was summoned in that county or who resided therein at the commencement of the action.

In the case of *Wernimont* v. *State,* 101 Ark. 210, 142 S. W. 194, Justice Frauenthal, speaking for the court, said:

"* * * It is the policy and spirit of our law, enacted into statute by our Legislature, that every defendant shall be sued in the township or county of his residence. To this general principle there are statutory exceptions, chiefly in cases where there is a joint liability against two or more defendants residing in different counties. In such cases it is provided that suits may be brought in the county of the residence of any of the defendants, and service of summons can then be had upon the other defendants in any county, thereby giving jurisdiction over their persons to the court wherein the suit is thus instituted. Kirby's Digest, §§ 6072 and 4588 Ark. Stats. 27-613 and 26-304].

But, before this jurisdiction can be acquired by virtue of these statutes over the person of such defendants nonresident of the county wherein the suit is instituted, it is essential that the defendant resident of the county where the suit is brought shall be a *bona fide* defendant. By our statute, it is further provided that, before judgment can be had against such nonresident defendants, a judgment must be obtained against the resident defendant. Kirby's Digest, § 6074 [Ark. Stat. 27-615]."

In the case of *Seelbinder* v. *Witherspoon,* 124 Ark. 331, 187 S. W. 325, we said:

"* * * According to this statute [Ark. Stat. 27-615], appellee is not entitled to judgment in this action against [non-resident of county of forum], although he may be entitled to recover against him, *unless judgment is recovered against one of the defendants who resided in the county in which the action was brought at its commencement, or was summoned in such county, or he fails to object before judgment to its proceeding against him.*" [Emphasis added]

Barr v. *Cockrill,* 224 Ark. 570, 275 S. W. 2d 6; *Terry* v. *Plunkett-Jarrell Grocer Co.,* 220 Ark. 3, 246

S. W. 2d 415, 92 A. L. R. 2d 1264; *Coca-Cola Bottling Co.* v. *Swilling,* 186 Ark. 1149, 57 S. W. 2d 1029; and *Metzger* v. *Mann,* 183 Ark. 40, 34 S. W. 2d 1069, are also in point.

In *Coley* v. *Green,* 232 Ark. 289, 335 S. W. 2d 720, it was stated that when a defendant is summoned to appear in an action outside his own county and the action is dismissed against any co-defendant, resident of the county in which the action is pending, then, upon proper objection, no judgment can be rendered against the defendant nonresident of the county.

The venue in this case rested entirely upon the service on the insurance company. When the case as to the insurance company is dismissed, the appellant is left standing alone as if it singly had been sued. Upon the dismissal of the cause as to the defendant upon whom venue is predicated there remains but one thing to be done by the defendant who is a nonresident of the forum in which the cause is pending. That is, it must move for a dismissal of the cause against him. This was done and the cause should have been then and there dismissed as to this appellant.

Other points have been ably presented and splendid briefs filed by both parties hereto but since we find that the Saline Circuit Court was without jurisdiction to proceed against this appellant, we deem it unnecessary to pursue further the other points that are urged.

This case is reversed and dismissed here.

ARCHER *v.* BUCY.

5-2700 357 S. W. 2d 636

Opinion delivered June 4, 1962.

[Rehearing denied September 10, 1962.]

[redacted]

Camp & Brinkley, by *Gus Camp,* for appellant.

Kirsch, Cathey & Brown, for appellee.

CARLETON HARRIS, Chief Justice. Appellee instituted an action to recover the alleged balance due under a conditional sales contract dated August 31, 1959, covering one used tractor and one used cotton picker.[1] Appellants, Henry Archer and Herschel Murdock, answered, and for their defense alleged breach of express warranty,

[1] This litigation is determined under law existing prior to January 1, 1962, when the Uniform Commercial Code became effective.

sought damages and rescission, and pleaded failure of consideration. Subsequently, the answer was amended to allege an implied warranty rather than an express warranty. The case proceeded to trial, during the course of which, the court permitted appellants, over the objections of appellee, to amend the pleadings to include the affirmative defense of an express and oral warranty. At the conclusion of the evidence offered on behalf of appellants, the court directed a verdict in favor of appellee. Judgment was entered in the sum of $3,999.82, $3,074.00 representing the principal balance due under the contract, $562.11 representing interest, and $363.71 representing attorney's fee as provided in the contract. From the judgment so entered, appellants bring this appeal.

The proof reflects that Archer and Murdock purchased a used Allis-Chalmers cotton picking machine, and a used tractor from appellee on August 31, 1959, for the agreed sum of $4,074, the note bearing interest at 8% per annum from date to maturity, and 10% per annu after maturity. Under the terms of the contract, $2,074 was due on October 15, 1959, and $2,000 on October 15, 1960. A total of $1,000 was subsequently paid on the purchase price, $500 being paid in October of 1959, $300 in March, 1960, and $200 in May, 1960. According to the evidence offered by appellants, the cotton picker never did properly function. Murdock stated that directions as to operation of the machine were followed, but that it "tore up" before a bale was picked. Bucy, several times, sent an employee to work on the machine, but it did not remain in operating condition. Archer testified that they told Bucy within three weeks after entering into the contract, to get the picker and take it back; however, Bucy refused to do so, and appellants continued to use the machine. Testimony by appellants and their witnesses enumerated deficiencies of the picker, and its failure to operate. Under the view that we take, a detailed discussion of this testimony is deemed unnecessary, for the question of whether the machine properly functioned is not controlling in this litigation.

There is no written express warranty; in fact, the only written warranty refers to repairing or furnishing parts to replace parts which were defective at the time of the sale of the machine, and this warranty only applies to new machinery. The contract then provides that this is the sole warranty, "either express, implied, or statutory, upon which said machinery is sold", and "no representative of the company has authority to change this warranty or this contract in any manner whatsoever, and no attempt to repair or promise to repair or improve the machinery covered by this contract by any representative of the company shall waive any consideration of the contract or change or extend this warranty in any manner whatsoever." As to an implied warranty, Section 68-1415 can have no application, for the proof reflects that the contract involved herein is a conditional sales contract. Such a transaction is specifically exempted from the application of the Uniform Sales Act, Ark. Stats. 68-1479. Relative to the contention of an oral warranty, this court said in *Hembrick* v. *Peoples Mercantile & Implement Co.,* 228 Ark. 1021, 311 S. W. 2d 785:

"The defendants offered to show that the seller orally warranted the condition of the machine. The contract of sale, however, is in writing and recites that it constitutes the entire agreement between the parties. Parol evidence was therefore not admissible to prove the giving of an oral warranty."

In *Hignight* v. *Blevins Implement Company,* 220 Ark. 399, 247 S. W. 2d 996, we said:

"The written contract of sale provides that it is made without any express or implied warranties. In view of this provision it was incumbent upon the defendant to show that his assent to the contract was induced by fraud. Not only is there no evidence of fraud; even if there were such testimony the defendant has waived his right to complain. His proof is that the motor did not perform properly for even a single day, yet he kept the machine and continued to make pay-

ments on the purchase price for eight months after signing the contract. His only reason for this delay is that it was not until eight months after his purchase that he noticed water seeping from the engine and concluded that the block was broken. But Nathan Crawley, his employee whose duty it was to operate and repair the motor, testified that he noticed this seepage on the day the motor was delivered, or the next day. The defendant is charged with knowledge acquired by his employee in the course of his duties and in circumstances in which the knowledge should have been reported to the master." In the instant case, fraud is not alleged in the pleadings, nor does the proof reach that degree. However, as pointed out in Hignight, even if there were evidence of fraud, appellants have waived any right to complain. Admittedly, appellants retained the machine through the fall of 1960, and in both 1959 and 1960, picked cotton with it. It is true that they complained about its performance, but they continued, over this long period of time, to use it, and made payments upon the purchase price as late as May of the latter year. Under such circumstances, appellants were entitled to neither damages nor a rescission of the contract. In *Kern-Limerick, Inc.,* v. *Mikles,* 217 Ark. 492, 230 S. W. 2d 939, we said:

"Many questions are presented in the excellent briefs; but we find it unnecessary to consider any of them except Kern-Limerick's request for an instructed verdict, because an answer to that question is determinative of the case and requires a reversal and dismissal. * * *

The cross complaint of Mikles was on two counts: (a) failure to properly repair the WK tractor, and (b) fraudulent misrepresentations as to condition of the HD tractor. But Mikles waived any cause of action he might have had for damages on either of these counts: by his letter of February 18, he consented to the sale of the WK tractor and the crediting of the proceeds to his account; and by his letter of July 8, he agreed to pay for the HD tractor if given three days (which was granted).

The case at bar is ruled by our cases of *Schichtl* v. *Bowser,* 175 Ark. 1141, 1 S. W. 2d 816, and *Pate* v. *McWilliams,* 193 Ark. 620, 101 S. W. 2d 794.

In *Schichtl* v. *Bowser, supra,* the buyer claimed damages for breach of warranty of pumping equipment. The evidence showed that the buyer used the equipment for a year, discovered all of the claimed defects, and when pressed for payment, requested additional time and promised payment. In that case the trial court instructed a verdict for the seller for the balance due on the pumping equipment and we affirmed, saying:

'The court instructed a verdict for appellee, and properly so, because appellant waived his right, to rely upon the defects in the outfit under his guaranty, by writing the letter to appellee's attorney of date April 26, 1926, in which he made an absolute promise to pay the balance of the purchase money, irrespective of any defects he had complained of prior to that time.'

In *Pate* v. *McWilliams, supra,* the seller brought suit on a title retaining contract involving automobiles; and the buyers cross complained for damages, because of alleged fraudulent misrepresentations inducing the sale. The evidence showed that the buyers used the cars from May until December; and after having received full knowledge that the alleged representations were not true, the buyers continued to make payments on the automobiles. On such evidence the trial court instructed a verdict for the seller in his action for the balance of the contract price; and this Court affirmed, saying:

". . . appellants waived the right to defend on the ground of a fraudulent procurement of the contract, by making no complaint and by using the trucks and making monthly payments thereon long after they claimed to have discovered that the Dodge truck consumed more gas and oil than the Chevrolet trucks had consumed.' "

We have so held in numerous other cases. Here, too, there was a promise, as late as 1960, to pay the balance.

Also, Archer, on May 31, 1960, mortgaged his one-half interest in the cotton picker to the Corning bank. At the time of the trial, he was still indebted to the bank, and that institution still held the mortgage on the cotton picker.

Appellants' final contention relates to plaintiff's exhibit No. 2, executed about the same time as the note, and which reads as follows:

"WHEREAS, Bucy Implement Company has sold to me a W. D. Allis Chalmers Tractor & 1 Row Allis Chalmers Cotton Picker No. CP 1-1025, for which a balance of the purchase price still remains unpaid. Therefore, I hereby agree that as I custom-pick and market my Cotton Crop for 1959-1960, there shall be paid on account of said debt out of each bale of cotton sold, the sum of $1.50 per hundred, and the purchaser of same is authorized to withhold the same and pay the total amount direct to the BUCY IMPLEMENT COMPANY.

/s/ HERSCHEL MURDOCK

/s/ HENRY ARCHER"

It is asserted that an issue was presented as to the manner of payment for the picker, which should have gone to the jury. In support of this position, appellants rely upon *Stephens* v. *Smith,* Law Reporter, April 10, 1961. The facts in that case were vastly different from those now before us. In *Stephens,* a cotton picker was purchased for the price of $8,517, and the purchasers executed their note in that amount. The note bore a notation in the left-hand corner, "to be paid out of picking." All parties agreed that the appellees were to pay $25 out of each bale of cotton picked, and appellees contended that their liability was limited to the $25 per bale; we upheld the Circuit Court in its finding to that effect. The picker was repossessed by appellant company before a sufficient amount of cotton had been picked to pay for the machine.

We find no merit in appellants' contention for the language of the two instruments is entirely different. In the *Stephens* case, the notation on the note flatly stated that payments "were to be paid out of picking". Here, the memorandum signed by appellants contains no provision that the picker will be paid for entirely from the proceeds derived from cotton picked by the machine. Rather, this agreement seems to be in the nature of additional collateral to secure the purchase price, *i.e.,* it would serve to prevent appellants from picking their cotton with the machine, and disposing of the proceeds from the sale of the cotton without making their payments to Bucy. It is also, of course, noted that in *Stephens,* the notation appears on the note itself, while here, the picking contract is a separate instrument. The controlling fact, however, is the language used. No jury question was presented by the instrument, but appellants assert that they should have been permitted to offer oral testimony in support of their contention that the agreement, under plaintiff's exhibit No. 2, was that the picker should be paid for solely in accordance with the amount of cotton picked with the machine. This contention is contrary to the view of this Court as expressed in *Jones* v. *Cox,* 227 Ark. 750, 301 S. W. 2d 12. In that case, Cox sold Jones a concrete mixer. Jones contended that, following execution of the conditional sales contract, on the same day, he had an agreement with Cox that the equipment would be paid for solely and absolutely out of the net profits derived by Jones from the use of such equipment. From the opinion:

"After the matter was discussed it was reduced to writing and signed by Sam M. Cox and Wesley N. Jones, and was sworn to before a notary public, on June 23, 1954. This note or writing reads as follows: 'Any and all net monies acquired from the truck and mixer applies to the purchase price agreed upon, which is the amount of the unpaid balance of the contract with the Universal CIT Credit Corporation, Little Rock, Arkansas.' It will of course be noted that this writing contains no provision that the equipment would be paid for entirely and abso-

lutely out of the net profits and nothing else. It seems unlikely that Mr. Jones and Mr. Cox would have omitted from the writing anything as essential as that contended for by appellants if it had in fact been agreed upon. * * *

Moreover, since the parties put their agreement in writing, oral testimony would not be admissible to engraft other agreements or understandings made or had at the same time. The rule that permits testimony to show a subsequent oral agreement (citing case) is not applicable here, because, if there were any such oral agreement as appellant contends for, it was contemporaneous with and not subsequent to the written agreement which Jones and Cox signed."

No error appearing, the judgment is affirmed.

HICKS *v.* EARLY.

5-2734 357 S. W. 2d 647

Opinion delivered June 4, 1962.

Ward & Lady, for appellant.

Frierson, Walker & Snellgrove, for appellee.

CARLETON HARRIS, Chief Justice. This is a slander of title action. Appellant, A. A. Hicks, purchased roof-

ing materials from appellees, Southwestern Petroleum Company, Inc., a Texas corporation, and Lee Early, according to an allegation of the complaint, an agent and officer of the corporation,[1] to be delivered and used at 215 Clark Street, Nettleton, Arkansas. A dispute arose as to the amount Hicks owed appellees. On January 11, 1960, a materialman's lien was filed by appellees, claiming a lien in the amount of $47.02 upon "buildings and property of Mr. A. A. Hicks in Jonesboro, Arkansas, located at 705 Steele." According to the testimony of Mr. Hicks, in November or December of that year, he settled his indebtedness with appellees in the municipal court,[2] and requested the clerk of that court to tell appellees to satisfy the lien.

On January 17, 1961, appellant instituted his complaint in the Craighead County Chancery Court, alleging that the heretofore referred to lien had been filed by appellees, "with the corrupt and wrongful purpose and intention of discrediting the record title thereto in violation of Section 41-1935, Ark. Stats. 1947. The defendants knew they had no claim of any nature whatsoever that could possibly be a lien against the real property described. There has existed a bona fide disagreement between the parties hereto over payment for certain matrials purchased by plaintiff from defendants for use on real property located, at the time of purchase, in the city of Nettleton, Arkansas. That disagreement was settled in full to the satisfaction of all parties on November 5, 1960, at which time the plaintiff demanded that the lien wrongfully placed against his real property at 705 Steele, Jonesboro, Arkansas, be satisfied of record no later than November 15, 1960." Appellant then alleged that appellees had failed and refused to satisfy the lien, and that their wrongful acts had resulted in discrediting and clouding the title to his property at 705 Steele in

[1] The complaint alleges that the purchase was made from the Zone Company, a subsidiary of Southwestern Petroleum Company, Inc. This allegation was admitted to be true by appellees.

[2] The record does not reflect it, but apparently appellees obtained a judgment against appellant in that court.

Jonesboro; that he had suffered embarrassment, inconvenience, humiliation, and actual loss of money, and that the acts of the appellees had been wilful, wanton, and corrupt. Total damages were sought in the amount of $6,000.[3] The court was asked to cancel the lien, order the record satisfied, and grant judgment against appellees for the amount previously mentioned. Summons was served on the Secretary of State of Arkansas as agent for service for Early and Southwestern Petroleum Company.

Appellees appeared specially for the purpose of moving the court to quash the attempted service upon them, asserting they were not doing business or performing work in this state such as would subject them to this type of service. On hearing, the court overruled this motion, and after a motion to make the complaint more definite and certain, appellees filed their answer (reserving their objections to the jurisdiction of the court), admitting that Southwestern was the sole owner and operator of the Zone Company, but denying all other allegations. The cause was set for trial for July 18, 1961, and on the morning of that date, the lien was satisfied. After hearing the evidence, consisting of the testimony of Hicks, the chancery clerk, and the deposition of J. E. Hicks of Hillsboro, Illinois, a brother of appellant, the court subsequently entered its memorandum opinion, which included the following findings:

"The preponderance of the evidence shows that the lien was placed on the wrong property by mistake and not with any specific intent to injure the plaintiff or to disparage the title to his property. It was a mere collection procedure that was very loosely handled.

The Arkansas law is clear in that to sustain an action for slander of title the plaintiff must prove the defendant acted maliciously and in holding that the plaintiff in the instant case has failed to meet this burden

[3] By amendment to the complaint, this amount was increased to $8,275.00.

of proof it is unnecessary to rule on the question of damages and other issues raised by the plaintiff in his complaint. The defendant must prevail."

In accordance with the findings therein, a decree was entered dismissing appellant's complaint for want of equity. From such decree, appellant brings this appeal.

As stated by the trial court, it is necessary, before appellant can prevail, that he establish that appellees acted with malice. *Sinclair Refining Company* v. *Jones,* 188 Ark. 1075, 70 S. W. 2d 562. This holding is in accord with the general rule. As stated in 53 C. J. S., § 274, P. 394:

"Malice is a necessary ingredient in order to entitle plaintiff to recover for slander of title. Indeed it has been said that malice is the gist of the action. Such malice, however, may be express or implied. The action cannot be maintained if the claim was asserted by defendant in good faith, and if the act complained of was founded on probable cause or was prompted by a reasonable belief, although the statement may have been false."

Further, in § 278 [4 (f)]:

"Malice may not be inferred from a mistake of law honestly made. The fact that defendant did not have probable cause for believing in the validity of a claim asserted against plaintiff's property will not in itself establish his malice. The evidence of malice must support the reasonable inference that the representation not only was without legal justification or excuse, but was not innocently made."

Appellant cites a statement contained in the *Sinclair* case, "Where the assertions are known to be false by the one making them, malice may be inferred by the trier of fact", and contends that the proof reflects that appellees knew at the time they filed the lien, that they had no claim whatsoever on his property located at 705 Steele Street in Jonesboro. The claim for damages, according to his evidence, is predicated upon the loss of a sale of

the Jonesboro property. He testified that his brother was willing to purchase the property for $13,000, but would not do so until the materialman's lien was satisfied; that his brother gave him thirty days (which extended the time of the offer to February 1, 1961) to obtain the satisfaction of the lien, but he was unable to do so. Hicks testified that no one else offered $13,000, and that he considered the property worth $10,000.

The deposition of J. E. Hicks, the brother, a resident of Hillsboro, Illinois, was offered in evidence. Hicks stated that he offered to purchase the property around the last of December for $13,000, and was ready, willing, and able to carry out the offer; that he did not purchase the property because he discovered a lien against it; that he was not presently willing (May 12, 1961), to renew the offer, even if the lien were released.

The fact that the lien was claimed on the wrong property does not establish malice. In *Coffman* v. *Henderson,* 63 So. 808 (Ala.), one of the leading cases on the subject of slander of title, the court said:

"But although false, yet if the claim was asserted by the defendant in good faith, an action will not lie against him for damages; otherwise every failure to maintain a title or lien claimed to or upon property, or every error of judgment or mistake made in the assertion of such claim, or suit brought to enforce it, however honestly and sincerely done, would subject a party to suit and mulct him in damages. *Hill* v. *Ward, supra.* In this class of matters, the extent of the penalty which the law inflicts upon an unsuccessful, honest disputant is to award costs to the opposing party, and that only when the controversy between them has proceeded to the point of and resulted in litigation. While malice, of course, cannot exist in legal contemplation unless the statement or claim was in fact false or untrue, yet, in order to constitute malice, it is seen that something more must be alleged and shown than the mere falsity of the statement or claim. Even though false, if the defendant had probable cause for believing his statement, there can

in law be no malice; and, though the fact that there was a want of probable cause for believing the statement is evidence of malice, it is not conclusive of its existence, nor its legal equivalent.''

In the instant litigation, a purchase of materials had been made; appellant did own property in Jonesboro, and mail was sent to the Steele address; in fact, notice that the lien had been filed was sent to this address. Appellees, of course, were entitled to claim a lien on the Nettleton property, where the materials were used, but the claim was made against the Jonesboro property. Under the circumstances, considering the lien was filed by an out of state concern, that Hicks lived in Jonesboro, and mail was directed to that location, it certainly would appear that the filing of the lien on the wrong property could have well been through inadvertence, rather than a calculated, deliberate, or malicious act. At any rate, appellant did not establish it to be otherwise. As stated by the Chancellor, the matter was ''loosely handled'' by appellees—but this does not prove malice.

Appellant vigorously argues that malice is shown by the fact that, though appellees had notice that the lien was filed on the wrong property, they still refused to release same until July 18, 1961. According to the testimony, Hicks settled the indebtedness by giving his check to the city clerk in November, 1960. Appellant stated that he requested the clerk to ''Please clear my records on my property''. Of course, there was no duty, or authority, upon the part of the city clerk, to satisfy the lien that had been filed. Appellant's next move was to institute his suit, which was filed on January 17th. At this time, he stated his cause of action, and we are unable to understand how subsequent events have any bearing on the question of malice. Be that as it may, the contention is answered completely in the case of *Coffman* v. *Henderson, supra,* in the following language of the court:

''The contention of appellant's counsel in this matter is best stated in his own words, found in his brief, to-

wit: 'The court will notice that this is not an action for damages for any filing of the notice of lien, regardless of whether the filing was wrongful or not. The complaint clearly states that the said T. M. Henderson (defendant) failed or refused to cancel said notice or declaration, or to remove the same from record, after being notified to do so, and, as a proximate consequence, the damage is averred. It is not the filing of the notice we complain of, but of the failure, wrongful failure, to cancel the notice of record after being notified to do so, when the complaint shows it was the duty of the defendant to have done so. * * * The complaint shows a duty owed by defendant to plaintiff, viz., the duty to remove the notice or cancel the same of record, because, as averred in the complaint, there was no indebtedness existing between the parties at the time the claim was filed, nothing on which to base the supposed lien, and because defendant had been notified to remove or cancel the same. * * * The breach of that duty is shown by the averment that the defendant failed to perform such duty after being notified to remove or cancel the notice. * * * The damages are averred to have been sustained as a proximate consequence of defendant's failure to perform the duty. * * * Looking at the substance, and not the form, of the allegations in the complaint, the source of the damages claimed was the filing of the claim or declaration for record by which act the defendant claimed a lien on the property in disparagement of plaintiff's title, rendering it unmarketable. If the positive act of the defendant in filing and having recorded such false claim (if that it was) of a mechanic's lien on plaintiff's property is not actionable (and it is not, as the authorities without dissent declare, unless it was maliciously done), then certainly his negative act in failing to cancel of record such claim or declaration would not be actionable.''

While it is not controlling in this litigation, it is observed that appellant does not appear to have acted with diligence. He was notified in January, 1960, that the lien had been filed, but apparently took no steps to

obtain the satisfaction of same. The record does not reflect that he advised the company that they had erroneously filed the lien, or made any demand to appellees that same be released, or that he had any correspondence with them at all. In fact, his first notice to the company was the filing of the complaint. Since the lien was not satisfied until the suit was commenced, we do feel, as set forth in the *Coffman* case, that appellant is entitled to his court costs expended to the time of satisfaction. The cause is therefore remanded with directions to award appellant his *court costs.*[4] In all other respects the decree is affirmed.

[4] This, of course, does not include attorney's fee.

WOOD *v.* BROWN.

5-2634 361 S. W. 2d 67

Opinion delivered June 4, 1962.

[See supplemental opinion on Rehearing, p. 500, delivered Oct. 8, 1962]

March Fietz, Penix & Penix, Rhine & Rhine and *Marshall N. Carlisle,* for appellant.

Cecil Grooms, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an election contest[1] involving the Democratic nomination for the office of Mayor of the City of Paragould. In the second primary on August 8, 1961, appellant Wood and appellee Brown were the rival candidates. On the face of the returns the vote was: Brown, 1087; and Wood, 1077. The Democratic Central Committee refused Wood petition for a recount and purging of the returns; and in due time Wood instituted this election contest claiming, *inter alia*: (a) twenty-one named persons who voted for Brown were not qualified voters; and (b) other irregularities, one of which—subsequently to be discussed in detail—was the misconduct of an election judge of Box 2 in Ward 2. The prayer of the complaint was that the Court open the ballot boxes, recount the ballots in Box 2 of Ward 2, declare certain specified ballots to be illegal, and declare Wood to be the Democratic nominee. By answer and cross complaint, Brown denied the allegations of the complaint, challenged as irregular certain named ballots cast for Wood, and prayed that the contest be dismissed. Trial in the Circuit Court resulted in judgment for Brown; and the Court found the true result of the election to be: Brown, 1078; and Wood, 1060. On this appeal Wood urges eight points; but the first one is decisive of the appeal.

I. *The Court's Ruling As To Box 2 Of Ward 2.* As regards the said box, Wood had alleged in Paragraph 5 of his complaint:

"V. Contestant further alleges that one of the judges, Jones Horne, helping with the election in Ward 2, in charge of Box 2, made a substantial wager or bet on the outcome of the election and he made a statement that he had changed and thrown out several votes cast for this Contestant, thereby assuring the election of the Contestee, the candidate he was betting on would win the

[1] Some of our more recent election cases are: *Gunter* v. *Fletcher*, 217 Ark. 800, 233 S. W. 2d 242; *Logan* v. *Moody*, 219 Ark. 697, 244 S. W. 2d 499; *Phillips* v. *Melton*, 222 Ark. 162, 257 S. W. 2d 931; *Baker* v. *Hedrick*, 225 Ark. 778, 285 S. W. 2d 910; *Bradley* v. *Jones*, 227 Ark. 574, 300 S. W. 2d 1; *McClendon* v. *McKeown*, 230 Ark. 521, 323 S. W. 2d 542.

election. That such action by this judge was illegal, fraudulent, and a violation of the law, the rules of the Democratic Party of Arkansas, and the right of the legal voters of the City of Paragould, Arkansas, and if true would change the result of the election because of this fraudulent irregularity. That this fraud cannot be corrected unless a complete recount of Box 2 Ward 2 be ordered by this Court and the ballots examined to determine which ballots were changed or not counted."

After hearing all the evidence the plaintiff Wood desired to offer to support the allegations of the above quoted Paragraph 5, the Court sustained the defendant's demurrer to the evidence[2] which the plaintiff had offered to sustain this Paragraph 5; and the Court then proceeded to hear the evidence offered by both sides on all the other issues in the case. The ruling of the Court on the said Paragraph 5 is challenged by appellant. The Trial Court held that the plaintiff's evidence as regards Paragraph 5 was insufficient to sustain the allegations in the said Paragraph 5. In testing the Court's ruling we must give the plaintiff's evidence its strongest probative force, just as the Trial Court was required to do in passing on the motion. *Guenther* v. *Guenther,* 222 Ark. 278, 258 S. W. 2d 562; *Barrentine* v. *Henry Wrape Co.,* 120 Ark. 206, 179 S. W. 328.

The gravamen of the charge in said Paragraph 5 is that Jones Horne, one of the judges in said Ward 2, Box 2, placed a bet that Brown would win the election; and that Jones Horne, as such judge, had stated that he had changed enough votes in favor of Brown to thereby defeat Wood. There are thus two matters charged: (a) that Jones Horne, an election judge, placed a bet that Brown would win the election; and (b) that Jones Horne stated that he had in fact changed enough votes from

[2] The name of the pleading is unimportant. While the defendant's (appellee's) pleading is called a "demurrer to the evidence" (see § 27-1729 Ark. Stats.) it was in fact in a case tried at law "a motion for an instructed verdict," as it would have been styled in a jury trial. In the absence of a jury, as here, it was a "motion for a declaration of law or a finding of fact." See § 27-1744 *et seq.* Ark. Stats.

Wood to Brown to thereby defeat Wood. We consider these two matters.

(a) *An Election Official Betting On The Result Of An Election.* Section 3-1516 Ark. Stats. reads:

"*Betting on elections—Penalty.*—Every person who shall make any bet or wager upon the result of any general, special or primary election in this State, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars ($50.00)."

Section 3-704 Ark. Stats. reads:

"*Betting on election as disqualifying judge or clerk.* —No person hereafter shall be competent to act as judge or clerk of any election authorized to be holden by the laws and Constitution of this State who shall have any moneys, goods, wares or merchandise bet on the result of any such election as aforesaid."

That Jones Horne was an election judge of Box 2, Ward 2, was admitted. There is also evidence to show that he placed a wager on the result of the election. Such conduct constituted a violation of law and disqualified Jones Horne from acting as an election judge. But, because an election judge is a law violater does not, *ipso facto* and alone, destroy the integrity of the entire ballot box. Something more needs to be shown. We have a number of cases which hold that a voter is not to be disfranchised because of the failure of the election officials to obey all election laws. *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257; *Ellis* v. *Hall,* 219 Ark. 869, 245 S. W. 2d 223; *Orr* v. *Carpenter,* 222 Ark. 716, 262 S. W. 2d 280; *Baker* v. *Hedrick,* 225 Ark. 778, 285 S. W. 2d 910. We pass then to the other charge.

(b) *Changing Votes From Wood To Brown.* This allegation, if sustained by the evidence, would make a *prima facie* case to destroy the integrity of the returns from said Ward 2, Box 2, and would require a recount. But the evidence that Wood offered on this allegation is entirely insufficient to make a case for the trier of the

facts to decide. A careful study of the record fails to disclose any substantial evidence to sustain this most serious charge: (1) O. D. Hyde testified that Jones Horne talked about votes in the Harris-Dexter aldermanic race (the contest in that election was tried at the same time as the present contest); but did not make any statement relative to the mayorality race. (2) Jimmy Haggett's testimony was the same as that of Mrs. Hilton Carey. (3) Mrs. Hilton Carey heard Jones Horne say that there was one vote in the mayorality election that was discarded for the uncertainty of the judges as to how the vote was cast. (4) Hilton Carey's testimony was the same as that of his wife. (5) A. D. Dickson's testimony was not as definite on the point at issue as was that of Mrs. Hilton Carey. The foregoing witnesses are all that gave pertinent testimony on the point at issue. No election official at said Box 2, Ward 2 was called to testify; no voter at said Box 2 was called to testify. In short, there was no testimony to sustain the allegations of the complaint as to the specific point here under consideration.

In *Baker* v. *Hedrick,* 225 Ark. 778, 285 S. W. 2d 910, we quoted Judge Eakin's language in the case of *Patton* v. *Coates,* 41 Ark. 111, as to the *quantum* of evidence required to destroy the integrity of an entire box:

" 'The wrong should appear to have been clear and flagrant; and in its nature, diffusive in its influences; calculated to effect more than can be traced; and sufficiently potent to render the result really uncertain. If it be such, it defeats a free election, . . . If it be not so general and serious, the court cannot safely proceed beyond the exclusion of particular illegal votes, or the supply of particular legal votes rejected.' "

It is readily apparent that the plaintiff's testimony in the case at bar completely failed to measure up to the test stated by Judge Eakin. Giving the plaintiff's testimony its strongest force, it was shown that one judge—Jones Horne—had placed a bet on the election, and that he had said that one vote in the mayor's race was dis-

carded because the judges were unable to tell for whom it was cast. Such evidence is wholly insufficient to destroy the integrity of an entire box. We strongly condemn any election official who places a bet on the election; but the statute only subjects such offending official to prosecution and does not say that the entire box is to be recounted because of the conduct of such offending official. So far as the record here shows, the other judges, clerks, and the Sheriff of Box 2 complied with the law in every respect. So the Trial Court was correct in ruling as it did in regard to Paragraph 5 of the complaint.

II. *The Court's Rulings On The Other Issues.* It is unnecessary for us to consider the Court's rulings on the other issues in this case either on the direct appeal or the cross appeal. The trial in the Circuit Court resulted in a finding that Brown received 1078 votes and Wood 1060; thus there was a difference of eighteen votes in favor of Brown. On this appeal Wood has challenged the Court's ruling on seven specific ballots; and by cross appeal Brown has challenged the Court's ruling on four specific ballots. There is no need for us to prolong this opinion to recite the evidence and rulings as to each of these, because the result would not be changed even if the appellant should be correct in his claim on all seven of the votes; and certainly we need not consider the appellee's cross appeal if he wins the case on direct appeal. In *Phillips* v. *Melton,* 222 Ark. 162, 257 S. W. 2d 931, we held that it was unnecessary to consider votes, the decision of which would not change the result in the case. In *Black* v. *Jones,* 208 Ark. 1011, 188 S. W. 2d 626, we quoted from the early case of *Swepston* v. *Barton,* 39 Ark. 549:

" 'The remaining grounds of contest, if they are true in fact, are insufficient to change the result. It is no valid objection to an election that illegal votes were received, or legal votes rejected, if they were not numerous enough to overcome the majority. (Citing cases.)' To the same effect, see *Webb* v. *Bowden,* 124 Ark. 244, 187

S. W. 461, where we said: 'But if the returns had been purged of all the illegal votes shown to have been cast in those precincts, it could not have affected the general result. "It is no valid objection to the election that illegal votes were received or that legal votes were rejected if they were not numerous enough to overcome the majority." ' "

CONCLUSION

The Court's ruling was correct as regards the insufficiency of appellant's evidence to sustain Paragraph 5 of the complaint; and we affirm the judgment of the Circuit Court.

GEORGE ROSE SMITH, ROBINSON & JOHNSON, JJ., dissent.

JIM JOHNSON, Associate Justice, (Dissenting). This is an election contest involving the Democratic Primary held August 8, 1961 in Paragould. Upon the count certified by the Greene County Central Committee appellee received 1087 votes and appellant 1077 votes in the race for Mayor. A petition by appellant to the Central Committee requesting a recount was denied and this action was thereafter filed. The complaint alleged 21 illegal votes were cast for appellee and in Paragraph V (upon which the result here hinges) it was alleged that Jones Horn, an election judge in Ward 2, Box 2, had made a bet on the outcome of the election and stated he had changed and thrown out certain votes in this box. Appellant prayed specifically for a recount of Ward 2, Box 2.

At the conclusion of appellant's testimony on the allegations contained in Paragraph V of the complaint, the trial court sustained appellee's demurrer to the evidence which in effect was a motion for an instructed verdict. The court then proceeded to determine the validity of certain votes challenged by both parties and upon conclusion of the trial rendered its findings showing the count to be 1078 for appellee and 1060 for appellant. The determination by the court of the validity

of these votes is of no consequence unless appellant is entitled to a recount of Ward 2, Box 2, since our ruling thereon would admittedly not change the result of the election.

It is reasonable, to say the least, that a candidate in an election wherein the difference is only 10 votes is entitled, in the public interest, to be given every consideration in a request for a recount. Judges and clerks being human, it is not without the realm of possibility that 5 honest errors in the tally could be made from over 2,000 votes cast, and this in itself would change the result. I am compelled, therefore, to examine even more closely the matters involved here, for certainly the voters of the City of Paragould are entitled to a true and accurate count of the votes cast.

It is impossible for me to see how the majority can conclude that no question of the accuracy of the count in this box is raised by the activities of Jones Horne. It is practically admitted that Horne made a substantial bet on the Mayor's race. It is further obvious from the record that on the night of the election Horne made certain statements which would throw into grave doubt the accuracy of the count of the box on which he served as judge. Certainly, under our statutes, as the majority points out, Horne was disqualified to serve as judge. This alone should require that the box be looked into. It must be pointed out that the appellant here did not ask that the box be invalidated but only asked that it be recounted to determine if the judges and clerks reported the true and accurate results.

The majority correctly states that the evidence of appellant must be given its strongest probative force. But then it goes on and used as its authority for affirmance the language from *Patton* v. *Coates,* 41 Ark. 111, which, when read in the light of appellant's evidence, leaves no doubt as to what the proper result should be. If the actions set forth in the record before us are not "clear and flagrant" and "sufficiently potent to render the result really uncertain" then no candidate

will ever be entitled to a recount. The evidence on its face clearly "defeats a free election".

The opinion of the majority which in effect puts its stamp of approval on Horne's questionable acts, in my view, makes a fundamental error in its approach to this question. Without one bit of discussion on the point, it presupposes that in order to obtain a recount of the box in question appellant must show here and now that the result of the election would be changed. This, as I see the matter, is a basically erroneous hypothesis, for if appellant were able to show by proper proof that the result of the election would be changed, a recount would be superfluous and unnecessary and appellant would be entitled to a reversal and declared the winner of the election forthwith. This, of course, is the reason that the majority of courts have adopted the rule as stated in 29 C. J. S. "Elections", Section 290:

"It is held by some authorities that a mere charge or allegation of error, mistake, fraud, misconduct, or corruption in counting the ballots or declaring the results of an election warrants a recount of the ballots on the request of the complaining parties, and under some statutes a recount may be had merely on application therefor and without stating any particular grounds. However, it is more generally held that a resort to the ballots cannot be had unless the contestant shows at least a probability that a recount would decide the election in his favor, that there were frauds, irregularities, or mistakes committed in the acceptance of the ballots and return of their count, * * * *Ordinarily when the state of the evidence is such as to throw uncertainty on the accuracy of the count by the inspectors and judges a judicial count is properly ordered.*" (Emphasis mine) Our own legislature has in effect adopted this rule in contests of elections. Ark. Stats. § 3-1012 requires that the petition to the County Election Commissioners asking for a recount merely show "reasonable grounds for believing that the return, as made by the judges of election, does not give a correct statement of the vote as

actually cast.'' Although this statute applies to elections as opposed to primaries, since there is no pronouncement on the point as to primaries we can certainly look to this enactment to determine the legislature's feeling on the matter.

The voters of Paragould and every other ward and precinct in our nation are entitled, nay, guaranteed that our elections be conducted in such a manner that their votes will be accurately reported. If the evidence presented here does not warrant the recount of the box in question, I do not know what would be necessary to place the accuracy of the count in doubt.

For the reasons stated I respectfully dissent.

UNITED STATES *v.* PIONEER AMERICAN INS. CO.

5-2732 357 S. W. 2d 653

Opinion delivered June 4, 1962.

[redacted]

Louis F. Oberdorfer, Asst. Attorney General, *Lee A. Jackson, Joseph Kovner,* and *David I. Granter,* Dept. of Justice, Washington, and *Charles M. Conway,* U. S. Atty., for appellant.

Bethell & Pearce and *Donald P. Callaway,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal challenges a decree which held that an attorney's fee in the mortgage foreclosure suit was superior to the federal tax lien. Events and dates are as follows:

1. On May 24, 1956, The Development Company, Inc., for value received, executed a note for $20,000.00 secured by a mortgage on real estate in Sebastian County, Arkansas. The mortgage was duly filed and recorded on June 7, 1956; and, before maturity, the said indebtedness, together with the mortgage, was transferred to the appellee, Pioneer American Insurance Company of Dallas, Texas (hereinafter called "Pioneer"). The note bound the maker, ". . . in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." The mortgage securing the note provided that if the grantor should fail to pay any interest or installment of principal when due, then, at the option of the holder, all of the indebtedness secured by the said mortgage should become due for all purposes and there could be foreclosure in a court of competent jurisdiction.

2. By deed recorded March 18, 1958, The Development Company, Inc. sold the mortgaged real estate to Ocie A. Rogers and Florence W. Rogers, his wife, who assumed the mortgage and indebtedness held by Pioneer.

3. The Rogers failed to make the monthly payment in October, 1960, and all subsequent payments; and on March 24, 1961, Pioneer filed foreclosure for the balance due on the debt and interest, and also for a reason-

able attorney's fee. The United States of America was made a defendant in the foreclosure suit because of the federal tax liens that had been filed against Ocie A. Rogers and Florence W. Rogers, the said liens having been filed on the dates and in amounts as follows:

November 29, 1960	$1,776.65
January 30, 1961	1,567.14
April 14, 1961	1,288.96
July 17, 1961	1,606.87
October 3, 1961	1,148.69

4. The United States Government, by answer admitted its lien to be subordinate to the mortgage and interest, but claimed its tax lien to be superior to the attorney fee.

On November 11, 1961, the Chancery Court entered a decree of foreclosure which determined priority as between Pioneer and the United States Government, as follows:

"The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, for all amounts it secures, including principal of the note and interest thereon; . . . and attorney's fees fixed by the court; . . ."

The decree in the Chancery Court also contains these statements which are submitted by appellant on this appeal:

"The United States of America has in open court conceded that its lien is subordinate to the lien of plaintiff, Pioneer American Insurance Company, insofar as principal and interest of said plaintiff's note are concerned, . . . The United States of America claims, however, that its lien is prior to the lien of plaintiff, Pioneer American Insurance Company, so far as same secures . . . attorney's fee . . ."

So much for dates and background information. The United States Government (hereinafter sometimes called

"Appellant") has appealed from so much of the Chancery decree as adjudged the attorney's fee allowed Pioneer in the sum of $1,250.00 to be superior to the United States' tax lien claims[1]; and the appellant relies on U. S. Code Annotated, Title 26, § 6321 *et seq.*; and also, *inter alia*[2], the following cases: *U. S.* v. *New Britain,* 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367; *U. S.* v. *Security Trust & Savings Bank,* 340 U. S. 47, 95 L. Ed. 53, 71 S. Ct. 111; *U. S.* v. *Bond* (4th Cir.), 279 F. 2d 837 (*certiorari* denied by U. S. Supreme Court, 364 U. S. 895, 5 L. Ed. 2d 189, 81 S. Ct. 220); *U. S.* v. *Christensen* (9th Cir.), 269 F. 2d 624; and *In Re New Haven Clock & Watch Co.,* (2d Cir.), 253 F. 2d 577.

We recognize the power of the United States Government to legislate as to the rights to be accorded its tax liens; and we recognize the power of the United States Supreme Court to be the final arbiter in such cases as this. Nevertheless, we do not consider any of the cases relied on by the appellant as completely decisive of the case at bar because of the matters that we now mention:

(A) Section 68-102 Ark. Stats., which is a part of the Negotiable Instruments Law,[3] states: "The sum payable is a sum certain . . . although it is to be paid: . . . (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity."

(B) The Arkansas Statute on attorneys' fees is Act No. 350 of 1951 (now found in § 68-910 Ark. Stats.),

[1] There were other parties in the foreclosure suit and other lien claims involved; but there is no occasion to give details as to these matters because the only issue on this appeal by the United States Government is, as stated in its brief: "Federal tax liens take priority over a mortgagee's lien for an attorney's fee incurred in a foreclosure proceeding, where the federal liens were recorded prior to the time the lien for an attorney's fee became choate."

[2] Both sides have favored us with briefs containing scores of cases, all of which have been studied by us; but we list here those which are most strongly relied on by the appellant, and which have factual situations most similar to the case at bar.

[3] By Act No. 185 of 1961 Arkansas adopted the Uniform Commercial Code, effective January 1, 1962; and § 85-3-106 Ark. Stats. contains the provision of the Uniform Commercial Code similar to § 68-102 Ark. Stats. above quoted.

and reads: "A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a *contract of indemnity.*" (Emphasis supplied.)

(C) The United States Government conceded, in open court below, and conceded in its brief filed in this Court, that its tax lien is subordinate to the mortgage and interest in full to date of payment. In accordance with the foreclosure decree, the mortgaged property was sold, and with the consent of the United States Government, Pioneer received the balance of its principal and all interest due to the date of such payment; and a further sum is now held in the Court to await the result of this litigation.

(D) The default in the payment of the note and mortgage held by Pioneer occurred in *October 1960*; and it was not until *November 1960* that the first tax lien of the United States Government was filed in this case.

We regard Paragraphs (A) to (D) above as, together, being sufficient to distinguish the case at bar from those relied on by the United States Government, as heretofore listed. In the New Britain case,[4] the United States Supreme Court spoke of the requirement that the lien must be "choate". The recording of the mortgage in 1956 put the world on notice that if there should be a default in payment of the note an attorney's fee would be added. There was such a default in October 1960 and the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and all of this was prior to any lien filed by the United

[4] *U.S.* v. *New Britain,* 347 U.S. 81, 98 L. Ed. 520, 74 S. Ct. 367.

[5] Attorneys for Pioneer have quoted to us the language of the U. S. Supreme Court in the case of *Security Mtg. Co.* v. *Powers,* 278 U.S. 149, 49 S. Ct. 84, 73 L. Ed. 236, as regards when a lien becomes choate: "The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given . . . When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable, though this occurs after the adjudication."

States Government. So we are definitely of the opinion that the right for attorney's fee became choate before the United States Government filed its lien claim.

We have carefully studied the case of *U. S.* v. *Bond,*[6] and also the Virginia statutes and cases[7] regarding attorneys' fees in foreclosure of mortgages since the case arose in Virginia; and we fail to find any statute in Virginia that is comparable to our Act. No. 350 of 1951 which says that the contract to pay attorneys' fee is a *contract of indemnity.* Such a statute in this State makes a difference between the Bond case and the case at bar.

In the case at bar the United States has conceded all the time that Pioneer is entitled to its *full debt and interest to date of payment.* Unless Pioneer gets its attorney's fee, it will not receive its full debt and interest, because the attorney's fee will have to be paid by Pioneer out of its debt and interest. So when the United States Government concedes—as it must under the adjudicated cases—that the prior mortgage is entitled to payment in full, it cannot expect the mortgagee to leave its attorney unpaid in the face of a statute which says that the attorney's fee is a contract of indemnity. In 27 Am. Jur. 471, "Indemnity" § 22, in discussing a contract of indemnity against liability, the text quotes the holdings: "In all actions on bonds of indemnity it must appear that the condition of the bond was broken, but, such fact appearing, the obligee is not obliged to wait until he is compelled to discharge the debt; *he may bring an action for a full recovery the moment the first breach happens in failing to perform the condition of the bond.* (Emphasis supplied.)

There is another point that favors Pioneer's claim for attorney fees and which was not discussed in any of the cases cited and relied on by the United States Government in the case at bar; and that is the matter of unjust enrichment. We find no holding directly in point,

[6] *U. S.* v. *Bond* (4th Cir.), 279 F. 2d 837.

[7] Among others, there are: *Colley* v. *Summers,* 119 Va. 439, 89 S. E. 906; and *Cox* v. *Hagan,* 125 Va. 656, 100 S. E. 666.

but we do find the general rules discussed in American Law Institute's Restatement of the Law, "Restitution" § 103 et seq. on the topic on "Protection of Property". Pioneer employed attorneys, foreclosed the mortgage, caused a sale of the property and its conversion into money. The United States Government seeks to receive the money before the payment of the fee due the attorneys, whose efforts brought the money into Court. To allow such would violate the rules against unjust enrichment. While attorneys love their work, they do not work entirely for love. Someone must pay the fee: Pioneer employed attorneys after a default which had occurred before the United States ever filed a tax lien; and Pioneer proceeded to reduce the mortgaged property to cash. Under such facts the United States Government should not be allowed to assert a claim superior to the payment of the fee that Pioneer has paid to cause the mortgaged property to be reduced to cash and the proceeds readied for distribution, as they now are.

We are firmly of the opinion that in a court of equity Pioneer was entitled to prevail for its attorney's fee; and we therefore affirm the decree of the Sebastian Chancery Court.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice (Dissenting). I cannot agree with the Majority opinion, for I am unable to distinguish the facts in the case at bar from those in *U. S.* v. *Bond,* 279 F. 2d 837 (C. A. 4th), and *In re New Haven Clock & Watch Co.,* 253 F. 2d 577 (C. A. 2nd). I do not consider that discussion of those cases is necessary, for brief quotations from the opinions will suffice to explain my views. In *Bond,* the court said:

"For the same reasons, we must subordinate to priority of the federal tax liens the claim for an attorney fee paid by Perpetual in protection of the lien of its mortgage. The fee was incurred long after the atatachment of the federal tax lien; and at the time of the execution of the mortgage and the creation of the debt

secured thereby, the future existence or amount of such attorney fee, was, at best, speculative and uncertain."

In *New Haven,* that court said:

"The Bank sought an order in the District Court including an award of reasonable attorney's fees because the Clock Company, in the assignment contract, agreed 'to reimburse the Bank for any and all legal and other expenses incurred in and about the checking, handling and collection of the accounts hereby assigned to the Bank and the preparation and enforcement of any agreement relating thereto.' The Government, in its oral argument before this Court and in its brief, opposed this claim on the ground that the United States, acting pursuant to Sections 3670 and 3671 of the Internal Revenue Code of 1939, and Sections 6321 and 6322 of the Internal Revenue Code of 1954, 26 U. S. C. §§ 6321, 6322, had a tax lien on the proceeds of the assigned accounts which was prior to the 'inchoate' lien of the Bank. Since the amount of the Bank's lien for attorney's fees was unknown at the time of the Clock Company's petition for reorganization, this lien was 'inchoate' in the sense used to determine its priority as against a United States tax lien. *United States* v. *City of New Britain,* 347 U. S. 81, 84, 74 S. Ct. 367, 98 L. Ed. 520. Thus, the Government's lien is superior to the claim for attorney's fees if the United States has complied with the aforementioned provisions of the Internal Revenue Codes and in addition has filed the notice of the lien as required * * *." Here, there is no dispute that the lien was properly filed and recorded.

The Majority apparently depend in large measure upon the fact that our statute provides that a reasonable attorney's fee is enforceable as a contract of indemnity. In my view, this provision lends no weight to the position taken by the Majority. The sole question here is *when* the insurance company's lien for attorneys' fees came into existence, *i.e.,* did the attorneys' fee become choate before the Government filed its lien claim? There

was a default on the note in October, 1960,[1] and the Majority state:

". . . the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and all of this was prior to any lien filed by the United States Government. So we are definitely of the opinion that the right for attorney's fee became choate before the United States Government filed its lien claim."

The question, in my view, is not when the company became entitled to enforce the provision for an attorney's fee, but rather, when it actually did enforce it. I emphatically disagree with the statement of the Majority, for I cannot see that the company was due to add the attorney's fee *immediately upon default.* Debtors frequently are a few days late in making payments, but no one would contend that this permits a note holder to add an attorney's fee. The default in payments on this note occurred in October, but I daresay that if Rogers had subsequently made the October payment, and the other payments, no foreclosure suit would have been filed. Certainly, if delinquent payments had been made and accepted by the company, it would not be contended that Pioneer should be permitted to add an attorney's fee. In such event, there would have been no occasion to enforce any contract for indemnity, for there would have been no loss.

While the default occurred in October, 1960, *the foreclosure suit was not filed until March, 24, 1961.* The claim for attorney's fee can only be enforced by court action, and though I am primarily of the opinion that an attorney's fee would not have priority over the Government's tax liens until it had been definitely fixed by the court, (prior to the recording of the liens) still, if that be error, then certainly I can see no possible priority for the attorney's fee until a suit is filed asking for the fee. Both the filing of the complaint, and the order fixing

[1] The first two federal tax liens were recorded in November, 1960, and January of 1961.

the fee, occurred after the recording of the federal tax liens. The note provides:

"The undersigned also agree(s) that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee."

Our statute, quoted by the Majority, also provides that the attorney's fee is enforceable "for services actually rendered." Therefore, under the language of both the note and the statute, *a default in payment is not sufficient to enable the note holder to add an attorney's fee;* services actually rendered by an attorney (generally the filing of a suit) are necessary. But, if it be said that an attorney could render service in trying to collect payments on the note before actually instituting any suit, I point out that this record is silent as to *when* this matter was placed in the hands of the attorneys for Pioneer. *There is no evidence that appellee's attorneys rendered any service relative to collection of the note prior to the filing of the foreclosure complaint.*

The Majority state that to allow the Government to recover the amount sought would "violate the rules against unjust enrichment." I personally find no merit in this contention. The Government has its attorneys, and I am quite sure, wolud have been only too glad to have brought its own proceeding for sale of the property to satisfy the tax liens if such action would have given it priority over appellee.

While I have commented to some extent relative to statements in the Majority opinion, this dissent is primarily based on the holdings in the *Bond* and *New Haven* cases, a reading of which persuades me that the lien for attorneys' fee did not become choate until a definite, fixed amount was allowed by the court. As previously stated, this, of course, was long after the recording of the federal tax liens.

I accordingly feel that the Government should prevail in its contention, and respectfully dissent.

ARK. STATE HWY. COMM. *v.* ARK. P. & L. CO.

5-2763 359 S. W. 2d 441

Opinion delivered June 4, 1962.

[Rehearing denied September 10, 1962.]

Dowell Anders and *H. Clay Robinson,* for appellant.

House, Holmes, Butler & Jewell, for appellee.

GEORGE ROSE SMITH, J. Pursuant to a franchise granted by the city of North Little Rock in 1944 the appellee Power Company has been paying the city $6,000 a year for the privilege of maintaining its poles, wires, and other equipment in and along the city streets. The State Highway Commission is now engaged in the construction of a superhighway, to be known as a Freeway, that will be about a city block in width and will cross a section of the city's business district.

Portions of East Second Street and East Third Street will be crossed by the Freeway right of way. A segment of Second Street about a block in length will be obliterated by the new highway, and a similar segment of Third Street will be converted into an underpass.

The Highway Commission requested the Power Company to remove its poles, at its own expense, from those parts of Second and Third Streets that lie in the path of the Freeway. It is contemplated that the company's wires will cross the new right of way at an elevation of about sixty feet and will be supported on each side of the Freeway by tall poles placed in portions of Second and Third Streets not being taken by the new construction. When the company insisted that the expense of relocating the poles and lines should be borne by the Highway Commission the present action for a declaratory judgment in the matter was filed by the commission. This is an appeal from a judgment holding that the cost of relocation should be paid by the commission.

With respect to the commission's principal argument the case is indistinguishable from, and is governed by, our decision in a case having the same style as this one, *Ark. State Highway Comm.* v. *Ark. Power & Light Co.*, 231 Ark. 307, 330 S. W. 2d 77. There the commission was building a controlled access highway near El Dorado and demanded that the Power Company remove its poles from streets and county roads to be crossed and obliterated by the new facility. We held that under its franchise the company had a property right in the maintenance of its equipment in the city streets, so that it was entitled to be compensated for its expense in removing its poles from the new highway right of way.

In seeking to distinguish the earlier case the commission stresses this language in that opinion: "Hence if the city or county should change the right of way of a public street or road, or widen it, or relocate it, the Company could be required to change its poles and wires without compensation so as not to 'unnecessarily and unreasonably impair or obstruct' the street. But

here it is not a question of requiring the Power Company to relocate its poles so as not to unnecessarily or unreasonably impair or obstruct the traffic. The Commission has demanded that the Company remove its facilities entirely from the right of way."

The appellant seizes upon the last quoted sentence and insists that here the Power Company is not being required to "remove its facilities entirely from the right of way," since the new tall poles will be erected upon portions of Second and Third Streets that abut the Freeway. Hence, the agrument goes, there is merely a relocation within the city streets rather than a complete exclusion of the utility company from the public easement.

The fallacy in this contention lies in its assumption that our reference to "the right of way" was intended to mean the existing easement for the city streets (and county roads). It is plain from a study of the opinion as a whole that we were in fact referring to the new right of way for the controlled access highway. The Power Company was being ousted from its occupancy of that right of way, and its right to compensation stemmed from its property right in the streets and roads which were being destroyed by the new facility. In like manner the Company is being excluded in the case at bar from its right to occupy those portions of Second and Third Streets that stand in the path of the Freeway. We cannot sustain the commission's present contention without overruling the earlier case, which we decline to do.

It is also argued that Ark. Stats. 1947, § 35-301, requires the appellee to remove the poles at its own expense. This statute permits an electric utility company to place its poles and wires (*a*) along the public highways, (*b*), along city streets if the permission of the municipal authorities be obtained, and (*c*) upon private property if the just damages be paid, with a general proviso that none of these installations be made if the ordinary use of the highways, streets, or other facilities

would be obstructed. The appellant insists that this statute is broad enough to permit the State to require the appellee to bear the expense that is involved in this litigation.

This argument might have merit if the Power Company had erected its poles upon a State highway under clause (*a*) of the statute and was merely being requested to relocate them in connection with a widening or other renovation of the highway. See *Ark. State Highway Comm.* v. *Ark. Power & Light Co., supra.* That, however, is not the situation. Here the company placed its poles along the city streets under clause (*b*) and paid a substantial annual fee for the privilege. Under the case cited the company acquired a property right which could not be taken by the State Highway Commission without compensation, any more than would have been the case if the lines had been situated upon private property rather than upon the city streets. We must therefore conclude that the trial court was right in imposing the expenses in question upon the appellant.

Affirmed.

BOHLINGER, J., not participating.

WARD, J., dissents.

HELMERICH *v.* LOWRANCE.

5-2593 359 S. W. 2d 447

Opinion delivered June 4, 1962.

[Rehearing denied September 10, 1962.]

William R. Horkey, Tulsa, Okla., and *Jeff Duty,* for appellant.

Little & Enfield, for appellee.

PAUL WARD, Associate Justice. On June 7, 1960 appellees, Dan Simpson and Ed M. Lowrance, filed a suit in chancery court against appellant, Mrs. Cadijah C. Helmerich, to require her to execute to them a deed conveying 940 acres of land in Benton County known as the "River Bend Ranch". On June 29, 1961, after a lengthy hearing, a decree was entered in favor of appellees wherein the trial court ordered appellant to deliver a deed to appellees upon their paying the required amount within 20 days. (For more details see *Helmerich* v. *Butt, Chancellor,* decided September 11, 1961, 233 Ark. 795, 348 S. W. 2d 878.) In appealing from the above decree appellant relies on only one point for a reversal, viz: "The trial court erred in decreeing the right of appellees to redeem . . ."

In order to better understand the reasons which prompted the chancellor's decision and also the basis of appellant's contentions of error, it should be helpful to summarize the several transactions and agreements between the parties which culminated in the present litigation, the non-essential facts being omitted.

On January 13, 1954 appellant contracted to sell and appellees agreed to buy the said land for the price of $62,442.40. Appellees paid $6,942.40 in cash and were to pay the balance in yearly installments of $5,000 each, beginning in one year, with interest at 5%. Appellees were placed in possession, and the deed and abstracts

were to be held in escrow. Apparently appellees failed or were unable to make the 1955 payment on time and appellant promptly filed suit to foreclose appellees' equity in the contract.

Only a few days after the above mentioned suit was filed it appears that the parties entered into an agreement, or at least expressed a desire, that they could proceed under the original contract, and appellees agreed, within 6 months, to construct on the land a dairy barn at a cost of about $4,000, to pay back taxes, insurance premiums, and to continue regular payments. However, notwithstanding this agreement, there was a commissioner's sale and appellant bought the property for $30,100. It is appellee's testimony that they talked with appellant a few days before the commissioner's sale; that they asked her to hold up or postpone the sale; that she refused to do so, but that she agreed to let them pay off the balance due on the land over an extended period provided they (appellees) would pay $5,000 down and give her a mortgage on certain cattle.

Following the above, on May 1, 1956, appellant and appellees entered into a lengthy written agreement relative to appellees' rights to pay the balance due on the land. This written agreement was supplemented by other written agreements and memorandums later. We think it would serve no useful purpose to set out the details of these agreements because we are convinced they all amount to an agreement on the part of appellant to convey the lands in question to appellees provided they paid the balance due under the original agreement of January 13, 1954 together with accrued costs, taxes, insurance, and accumulated interest. The fact is that appellant does not here challenge the above, or that appellees did offer to make full payment of the balance of the purchase price. It is, however, as previously stated, appellant's sole contention that appellees had no right of redemption, but that their right of redemption was extinguished by the foreclosure suit brought by appellant in 1955 and later by the commissioner's sale. We think appellant's contention is untenable and must be rejected.

A contention similar to the one here made by appellant was rejected in the case of *Baugh* v. *Taylor,* 184 Ark. 545, 42 S. W. 2d 992, where the issue arose out of facts similar to the facts in this case. In that case there had also been a foreclosure by the mortgagee (Taylor) and a commissioner's deed to him. There, also, appellant and appellee entered into an agreement whereby appellant could repurchase the land. The trial court denied appellant the right to redeem under the terms of the agreement. In reversing the trial court, this Court, among other things, said:

"... we are convinced that the option contract was in effect a new mortgage. It had practically all the characteristics of a mortgage. It carried the same indebtedness and bore the same rate of interest as the old indebtedness and costs of the foreclosure and appellee's attorney's fees. * * * The relationship of mortgagor and mortgagee between appellant and appellee Taylor concerning the property in question was created by the option contract, which necessarily let in the equity of redemption after default in payment."

In the case under consideration the several agreements clearly show the relationship of mortgagor and mortgagee existed between appellant and appellees.

Much the same issue presented here was considered in the case of *Jackson* v. *First National Bank of El Dorado,* 195 Ark. 648, 113 S. W. 2d 714, where the mortgagee had foreclosed and then agreed to let the mortgagor repurchase. In upholding the mortgagor's right to redeem under the agreement this Court quoted with approval from Jones on Mortgages the following:

" 'Redemption may be had after foreclosure if the mortgagee or other holder of the title recognizes the mortgage as a continuing obligation. . . . Where the mortgagee either directly or indirectly receives a part of the mortgage debt after the time for redemption has expired, the mortgagor may redeem upon payment of the balance due.' "

Following the above, the Court in the *Jackson* case made a statement which seems to indicate the basic reason for the conclusion reached, and we think it is partially applicable to the case under consideration. It said:

"In the instant case appellants might have resisted the foreclosure or might have objected to the confirmation, or might have secured other persons to bid."

In this case it is certainly reasonable to assume, if appellees had not relied upon the several agreements heretofore mentioned, that they would have tried to procure someone besides appellant to bid at the commissioner's sale, that they would not have erected a dairy barn on the land, and that they would not have sold their cattle in an effort to pay the balance of the purchase price.

It is therefore our conclusion that the trial court's decree accords with both the law and equity and it is hereby affirmed.

Affirmed.

EDENS *v.* STATE.

5025 357 S. W. 2d 641

Opinion delivered June 4, 1962.

[redacted]

Gus Camp, for appellant.

Frank Holt, Atty. General, by *Sam H. Boyce* and *Dennis W. Horton,* Asst. Attys. General, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Edens, was charged with the crime of "overdrafting" by executing and delivering to Raymond Recker a check in the sum of $11,000.00 with the felonious intent to defraud the said Recker, Edens not having sufficient money in the bank to pay the check. He was convicted of the charge, sentenced to six years in the penitentiary, and has appealed. It is important to keep in mind that appellant was not charged with obtaining money by false pretense in violation of Ark. Stats. 41-1901.

Recker is a successful businessman and has dealt in transactions amounting to hundreds of thousands of dollars. He claims that he cannot read or write, but that he can sign his name. His signature shows extraordinarily good penmanship. It is hard to understand how a person could write such a good hand and not be able to read or write anything except his name.

Recker has had many business transactions with Edens. They have been having business dealings with each other over a period of several years. In 1958 Recker borrowed $3,000.00 from Edens and has not repaid it. On January 15, 1960, Recker gave Edens two checks totaling $11,000.00; one for $4,000.00 and the other for $7,000.00. The money was to be used by Edens to purchase a piece of land for Recker. When the $7,000.00 check was presented to the bank by Edens, payment was refused because Recker did not have sufficient funds in the bank to cover the check. It is significant that Recker was not charged with overdrafting. Later, the check was returned to the bank and honored. Edens failed to purchase the real estate.

On May 20, 1960, four months later, Recker called on Edens for payment of the $11,000.00 debt that Edens

owed him. Edens issued and delivered his check to Recker for the $11,000.00, but because of insufficient funds, the check was not honored by the bank. As a result of giving that check, on October 31, 1960, Edens was charged with overdrafting.

Subsequent to the giving of the first $11,000.00 check, Edens issued to Recker other $11,000.00 checks for the same purpose, but none of those checks were good. However, on June 24, 1960, Edens gave Recker a check in the sum of $4,500.00 as part payment on the debt, and that check was honored and paid.

On October 25, 1960, Edens' father gave Recker a check for $400.00 as payment of the interest on the debt owed by appellant. The check was not honored, but later the father paid the $400.00 in cash. Just six days after Edens' father paid the $400.00 interest on the debt, the felony information was filed charging Edens with overdrafting.

Ark. Stats. 67-720 makes it unlawful to give a bad check in payment of a debt with the intent to defraud. Ark. Stats, 67-722 provides that if the check is dishonored by the bank or drawee, such fact shall be prima facie evidence of the intent to defraud.

The effect of the statute providing that refusal of payment by the drawee of a check or draft is prima facie evidence of the intent to defraud is to cast upon the defendant the burden of going forward with the case. In the case at bar, the refusal of payment by the bank was prima facie evidence of the intent to defraud, but such evidence was not sufficient to take the case to the jury in the face of other evidence in the case. All of the evidence shows that Edens defrauded Recker of nothing by the issuance of the $11,000.00 check. There was no possibility of Edens defrauding Recker of anything by giving the check, and Edens could have had no intention of committing a fraud by giving the check. Prima facie evidence alone is not sufficient to support a verdict where it is contradicted by other evidence explaining the transaction.

In 20 Am. Jur. 1102, it is said: "While a presumption may relieve a party of the duty of presenting evidence, a prima facie case made in favor of the plaintiff, by a presumption of law, does not need to be overcome by a preponderance of the evidence, or evidence of greater weight, but needs only to be balanced to defeat the plaintiff's case and require him again to go forward with the proof. . . . After testimony is adduced tending to overcome a presumption, it ceases to have probative force."

Perhaps in some circumstances one could be guilty of perpetrating a fraud by giving a bad check in payment of a debt, but here the evidence shows conclusively that Recker was not defrauded by Edens giving him a check for $11,000.00. Recker did not part with one dime at the time of receiving the check or at any time thereafter as a result of having received the check. There is not a scintilla of evidence that Edens intended to defraud Recker by giving him the check. Edens had become indebted to Recker in the sum of $11,000.00 several months before the check was issued. There was no possibility that the check could cause Recker to lose anything except the time it might take to present the worthless check to the bank for payment. Certainly such a small inconvenience is not sufficient to base a six year sentence to the penitentiary.

Surely a verdict of guilty would not be sustained in every instance of a check being dishonored because of insufficient funds. In the case at bar, for instance, would a verdict of guilty be sustained against Recker because his $7,000.00 check, which he later made good, was dishonored because of insufficient funds when it was first presented to the bank, or would a conviction of appellant's father be sustained because the $400.00 check he gave Recker for interest was no good, and later the $400.00 was paid in cash? Of course a verdict of guilty would not be sustained in a case of that kind.

If there was substantial evidence of the intent to defraud other than the mere giving of a bad check, such

evidence could be sufficient to sustain a conviction, but here there is absolutely no evidence of the intent to defraud except the giving of the bad check and the presumption raised by such act is completely rebutted by the proven facts.

In *St. Louis-San Francisco Railway Co.* v. *Spencer,* 231 Ark. 221, 328 S. W. 2d 858, this Court said: "In the case of *Kansas City Southern Railway Co.* v. *Shane,* 225 Ark. 80, 279 S. W. 2d 284, 287, this statement was made: 'In construing § 73-1002 above our rule appears to be well settled where an injury is caused by the operation of a railway train a prima facie case of negligence is made against the company operating such train and the burden rests on the company to show that it was not guilty of negligence'. In that case it was stated that the statute in question creates a presumption or inference of negligence on the part of the railroad company. In the same case, however, the court approved what now appears to be the settled rule of this court to the effect that 'The only legal effect of this inference is to cast upon the railway company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of negligence is one for the jury upon all the evidence.' "

In the *Spencer* case a judgment against the railroad company was reversed and the cause dismissed because there was no evidence of negligence except the statutory presumption. The Court held that the presumption was not sufficient to take the case to the jury in the face of other evidence showing there was no negligence. The same rule applies in the case at bar.

The judgment is reversed, and since the cause appears to have been fully developed, it is dismissed.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice, (Dissenting). I agree that the judgment in this case should be reversed; but I dissent as to the dismissal of the case.

The judgment should be reversed because of Assignment No. 18 in the motion for new trial, which relates to statements made by the Prosecuting Attorney in the final argument to the jury; and some cases holding such statements to require reversal are: *Paul* v. *State,* 99 Ark. 558, 139 S. W. 287; *Thomas* v. *State,* 107 Ark. 469, 155 S. W. 1165.

However, I am firmly of the opinion that there was a case made for the jury, and the cause should be remanded for a new trial. Even if the Majority considers the evidence offered by the State to be weak (which I do not), nevertheless there was some evidence of guilt offered, and it may be strengthened on a new trial; so the case should be remanded according to such cases as: *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604; *Johnson* v. *State,* 210 Ark. 881, 197 S. W. 2d 936; *Grigson* v. *State,* 221 Ark. 14, 251 S. W. 2d 1021; *Anderson* v. *State,* 226 Ark. 498, 290 S. W. 2d 846; and *Poole* v. *State,* 234 Ark. (adv. opn.) 593, 353 S. W. 2d 359. Each of these cases involved violation of the criminal laws, and is ruling here. With due deference to my associates on the Court, I must nevertheless state that the Majority Opinion seems to me to indicate that this Court is acting as an appellate jury in this case and bringing in a verdict of "Not Guilty"; whereas I contend this Court should remand the case for a new trial, as was done in each of the five cases just cited above.

Now, I desire to go further and discuss (I) the statute under which the appellant was prosecuted; and (II) some of the evidence presented by the State.

I. *The Law Under Which Appellant Was Prosecuted.* Appellant was tried and convicted of violating the "Arkansas Hot Check Law," which is Act No. 241 of 1959. Even though the law may have been changed, the appellant is tried under the law[1] applicable at the time of the offense, the date of which is stated to be

[1] The Act No. 241 of 1959 may now be found in §§ 67-719 *et seq.* Ark. Stats.

May 20, 1960. The germane portion of Section 2 of the Act 241 reads:

"It shall be unlawful for any person . . . to make payment of any pre-existing debt or other obligation of whatsoever form or nature, or for any other purpose, to make or draw or utter or deliver, with intent to defraud, any check, draft or order, for the payment of money, upon any bank, . . . knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or on deposit with, such bank . . . for the payment of such check . . . and all other checks . . . upon such funds then outstanding."

The germane portion of Section 4 of the Act No. 241 of 1959 reads:

"As against the maker, or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud . . ." Thus, the giving of a "hot" check to pay *a previous indebtedness* is an offense; and when the bank refuses payment on the check, such fact is *"prima facie evidence of intent to defraud."* That is what the statute says; and the Majority Opinion does not even intimate that such statute is unconstitutional.

II. *The Evidence Against Appellant.* With the law stated as above, I turn now to the evidence: Arnold Edens was an officer in a corporation called "United Enterprises, Inc." in Paragould, Arkansas; and Raymond Recker was an individual who lived in Walnut Ridge, in Lawrence County, Arkansas. Edens was the "moving spirit," or general manager of the United Enterprises, Inc.; and Edens and Recker had been acquainted for several years. In January 1960 Recker approached Edens to see if United Enterprises could purchase for Recker a particular 160 acres of land; and Edens required Recker to deposit with United Enterprises the sum of $11,000.00 as the proposed purchase

price of said lands which United would seek to purchase for Recker. A receipt of $11,000.00 was issued to Raymond C. Recker, which stated: "For deposit in full, 160 A Bovine Land, subject to approval of R. C. Recker." This receipt on the United Enterprises' form, was signed by Arnold Edens, dated January 15, 1960, and was introduced in evidence.

United Enterprises did not acquire the land for Recker and he demanded the return of his money; but the United Enterprises had used Recker's money for some other purpose not disclosed; and, finally, on May 20, 1960, Arnold Edens, appellant here, issued his *personal* check to Raymond Recker for $11,000.00, drawn on The Security Bank & Trust Company of Paragould, Arkansas. It was clearly established that Edens never had over $1,000.00 in his account in The Security Bank & Trust Company of Paragould at any time. When the bank refused to pay the $11,000.00 check, Edens attempted to give Recker other checks and to delay matters as long as possible.

Did Edens intend to defraud Recker? Edens and his company received $11,000.00 of Recker's money on January 15, 1960; then Edens toyed along with Recker for months by giving him a check on May 20, 1960 for $11,000.00 and by issuing other checks to further delay matters. Surely the evidence outlined above is sufficient to take the case to the jury and fair-minded men should have an opportunity to decide whether Edens was guilty of an attempt to defraud Recker. Regardless of all that the Majority Opinion said about overcoming presumptions—which I will subsequently mention—I still contend that a case was made for the jury under the proof here offered.

The Majority says, however, that this statutory provision in Section 4—about the failure of the bank to pay the check being *prima facie* evidence of intent to defraud—was entirely dissipated by other testimony. Whose testimony? It was the testimony of Edens. He was the witness who tried to explain away the entire

transaction and say that he was only doing Recker a favor to give him the check. The law is well established that the testimony of an interested person is never undisputed as a matter of law. *Stovall* v. *Stovall,* 228 Ark. 1077, 312 S. W. 2d 337; *Lewis* v. *Lewis,* 222 Ark. 743, 262 S. W. 2d 456; *Phelps* v. *Partee,* 208 Ark. 212, 185 S. W. 2d 705; and *Business Men* v. *Sanderson,* 144 Ark. 271, 222 S. W. 51. So Edens' testimony stands disputed by the law and the presumption of intent to defraud takes the case to the jury.

Section 4 of the Act No. 241 uses the words, "*prima facie* evidence." In 23 C. J. S. 534 "Criminal Law" § 900, the text reads:

"'*Prima facie evidence*' is evidence, direct or circumstantial, which indicates to a reasonable person such strong probability of guilt that accused's denial or explanation is called for, and which standing alone is sufficient to convict him of the offense with which he is charged; but such evidence is not necessarily conclusive and may be rebutted not only by contradictory evidence, but also by evidence so explaining the conditions and circumstances under which the alleged offense was committed *as to convince the jury that the person charged is not guilty.*" (Emphasis supplied.)

The above quotation says that the *prima facie* evidence takes the case to the jury; and that is exactly what I believe. The Majority Opinion cites some railroad cases construing a statute on burden of proof. These cases are not in point. There are "disappearing presumptions", and there are "continuing presumptions";[2]

[2] On this matter of "Presumptions" here are some annotations in American Law Reports, for the benefit of any who desire to read them: "Constitutionality of statutes or ordinances making one fact presumptive or *prima facie* evidence of another," 51 A.L.R. 1139, 86 A.L.R. 179, and 162 A.L.R. 495; "*Res ipsa loquitur*—Burden of proof or evidence," 59 A.L.R. 486, and 92 A.L.R. 653; "Presumption as Evidence," 95 A.L.R. 878; "Presumption of innocence as evidence," 94 A.L.R. 1042, and 34 A.L.R. 938; "Presumption against suicide as evidence," 103 A.L.R. 185, and 114 A.L.R. 1226; "Directing verdict where based on testimony of party," 72 A.L.R. 27. See also McCormick on Evidence § 310 *et seq.*

and I maintain that in the case at bar the Legislature has made the dishonoring of a check *prima facie* evidence, sufficient to take the case to the jury. But, even if it should be a "disappearing presumption," still it would require uncontradicted evidence to dissipate the presumption; and the evidence offered by Edens was his own testimony, which certainly is contradicted as a matter of law.

In short, I see no escape from the conclusion that this case should be reversed and remanded for a new trial. Certainly it should not be dismissed.

WADDELL *v.* STATE.

5-2666 357 S. W. 2d 651

Opinion delivered June 4, 1962.

Paul K. Lewis, Jr., for appellant.

Frank Holt, Atty. General by *Dennis W. Horton,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. This action was filed in the County Court of Randolph County alleging that Eula Ray Meeks was pregnant by appellant, Cleo Waddell, Jr. The case was tried, the child having been born in the meantime, and it was the judgment of the Court that appellant is the father. Appellant appealed to the Circuit Court, and there filed a motion that the cause be tried before a jury. The motion was overruled, the case was tried before the Court without a jury, and

there was a finding that appellant is the father of the child. A judgment was entered accordingly, and Waddell has appealed.

There is only one issue raised on appeal, and that is whether the Circuit Court erred in denying the appellant a trial by jury. Prior to the year 1955, the Statutes of Arkansas provided for jury trials in bastardy proceedings in the County Court, when requested. Ark. Stats. 34-705. But, by Act 374 of 1955 (Ark. Stats. 34-705, as amended) the right of a jury trial in the County Court was abolished. We now have no statute specifically providing for jury trials in bastardy proceedings in any court.

At common law there was no provision to affiliate a bastard child, but the common law in that respect has been changed by statute. Ark. Stats. 34-702. In 31 Am. Jur. 19, it is said: "Generally, no one has a constitutional right to a trial by jury of any action not so triable when the Constitution was adopted. . . . However, the right exists not only in cases in which it existed at common law and at the time of the adoption of the constitutional provisions preserving it, but it exists in cases substantially similar thereto, in which it would have existed had they been known to the common law."

The weight of authority is that a party is entitled to a jury trial in a bastardy proceeding when the request for such a trial is made. 7 C. J. 997. *Trawick* v. *Davis,* 4 Ala. 328; *Stone* v. *State, ex rel, Milhorn,* 33 Ind. 538; *Anderson* v. *State,* 42 Okla. 151.

Whether the one charged is the father of the illegitimate child is a question of fact. Ark. Stats. 27-1704 provides: "Issues of law must be tried by the Court. Issues of fact, arising in action by proceedings at law for the recovery of money, or of specific real or personal property, shall be tried by a jury unless a jury trial is waived." Bastardy is a subject of civil proceedings. *State* v. *Blackburn,* 61 Ark. 407, 33 S. W. 529.

This is essentially an action at law for the recovery of money. The appellant is entitled to a jury trial on the issues of fact.

Reversed and remanded for new trial.

KAISER *v.* PRICE-FEWELL, INC.

5-2671 359 S. W. 2d 449

Opinion delivered June 4, 1962.

[Rehearing denied September 10, 1962.]

Warren & Bullion, for appellant.

Mehaffy, Smith & Williams, by *William H. Sutton* and *B. S. Clark,* for appellee.

JIM JOHNSON, Associate Justice. This appeal questions the validity of an injunction against picketing in a labor dispute in North Little Rock. Appellants urge that members of the International Brotherhood of Electrical Workers, Local 295, have been denied their right of peaceful picketing pursuant to a strike directed against appellee. The Chancellor granted the injunction on the ground that the union was picketing for unlawful objectives, first, to obtain a contract with appellee which contains a hiring hall arrangement, and second, for a closed shop. Both of these objectives were found to violate Amendment 34 to the Arkansas Constitution and Act 101 of the Acts of 1947, which is the enabling act for enforcement of Amendment 34.

Suit for injunction was brought by appellee, Price-Fewell, Inc., against Paul Kaiser, individually and as Representative of International Brotherhood of Electrical Workers, Local 295, and R. L. Webb who is the International Representative of the Electrical Workers.

In September 1961, representatives of the union served notice on appellee that they represented a majority of its employees and requested that appellee negotiate a collective bargaining agreement with the union. Appellee refused and thereafter 14 of its employees went out on strike. The parties then commenced negotiations and several conferences were held. At one of the conferences the union presented appellee with a proposed basic contract, part of which was a contract termed "Inside Agreement". This agreement was executed by this union and members of the Ark. Chapter, National Electrical Contractors Association. Article V thereof sets forth a job referral procedure as follows:

"In the interest of maintaining an efficient system of production in the industry providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree

to the following system of referral of applicants for employment.

"1. The Union shall be the sole and exclusive source of referrals of applicants for employment.

"2. The Employer shall have the right to reject any applicant for employment.

"3. The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspects of obligation of union membership policies or requirements. All such selections and referral shall be in accordance with the following procedure.

"4. The Union shall maintain a register of applicants for employment established on the basis of the groups listed below. Each applicant for employment shall be registered in the highest priority group for which he qualifies.

"*GROUP I*: All applicants for employment who have four (4) or more years experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a journeyman's examination given by a duly constituted Local Union of the I. B. E. W. and who have been employed for a period of at least one (1) year in the last four (4) years under a collective bargaining agreement between the parties to this Agreement.

"*GROUP II*: All applicants for employment who have four (4) or more years' experience in the trade and who have passed a journeyman's examination given by a duly constituted Local Union of the I. B. E. W.

"*GROUP III*: All applicants for employment who have two (2) or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market and who have been

employed for at least six (6) months in the last three (3) years in the trade under a collective bargaining agreement between the parties to this Agreement.

"*GROUP IV*: All applicants for employment who have worked at the trade for more than one (1) year.

"If the registration list is exhausted and the Union is unable to refer applicants for employment to the Employer within forty-eight (48) hours from the time of receiving the Employer's request, Saturdays, Sundays and Holidays excepted, the Employer shall be free to secure applicants without using the referral procedure, but such applicants if hired, shall have the status of 'temporary employees'. The Employer shall notify the Business Manager promptly of the names and Social Security numbers of such 'temporary employees', and shall replace such 'temporary employees' as soon as registered applicants for employment are available under the referral procedure."

Appellants contend there was no insistence on the part of union negotiators that the referral procedure be incorporated in the basic contract offered appellee. Also, that in any event appellee did not refuse to sign the proposed contract because of the referral procedure, but rather because appellee performed work for non-union general contractors and union organization would prevent appellee from doing business with such contractors. Although the evidence is conflicting on these issues, Mr. R. L. Webb, International Representative of the union, did testify that the referral procedure was a part of the basic contract presented to appellee. As previously pointed out, this same contract has been executed by the Arkansas Chapter of National Electrical Contractors Association and Article III, Section 7-b thereof prevents this union from granting other contractors more favorable terms than those granted to Association members. Section 7-b reads as follows:

"The union agrees that if, during the life of this Agreement, it grants to any Employer in the Electrical Contracting Industry any better terms or conditions than

those set forth in this Agreement, such better terms or conditions shall be made available to the Employers under this agreement and the Union shall notify in writing, the Employer of any such concessions * * *."

Section 81-203 Ark. Stats. of 1947, Annotated (Section 3 of Act 101 of 1947) the enabling act for enforcement of Amendment 34 provides as follows:

"81-203. Certain Contracts prohibited.—No person, group of persons, firm, corporation, association, or labor organization shall enter into any contract to exclude from employment (1) persons who are members of, or affiliated with, a labor union; (2) persons who are not members of, or who fail or refuse to join or affiliate with, a labor union; and (3) persons who, having joined a labor union, have resigned their membership therein or have been discharged, expelled, or excluded therefrom."

If an objective of the picketing was to force appellee to execute a contract which has the effect of excluding employees from employment or excluding applicants for such employment because of their refusal to join or affiliate with a labor union, then such picketing violates Amendment 34. On the other hand, if the picket line was established in furtherance of a lawful strike, certainly no objections could be raised because employees in the exercise of free speech had the right to advise the public of their dispute with appellee. Traditionally, one of the objectives of union organization is to obtain higher wages and better working conditions. However, it is the duty of the Court to construe the contract in the light of the evidence adduced and since the voters of Arkansas have seen fit to adopt Amendment 34 and the Legislature enacted Act 101 of 1947 allegedly to prevent discrimination because of failure to join or affiliate with a labor organization, the Court has no alternative but to apply these measures in accordance with the intention thereof.

The Chancellor interpreted the statute as applying not only to persons who are not members of a labor union but also persons who fail or refuse to affiliate with a labor union. We cannot disagree with this interpretation. The statute reads in part: "* * * or who fail or refuse to *Join,* or *affiliate with* a labor union, * * *." The word "affiliate" apparently is not used here in the same sense as the word "join". This is made even more plain by the wording in the statute immediately prior to the above language, which is: "(1) persons who are *members of,* or *affiliated with* a "labor union." In the absence of a showing that a union apprentice or the like is any less a union member than a union journeyman, it clearly appears that the General Assembly did not intend that the word affiliate should have the same meaning as join or to become a member of, otherwise the two words would not have been used in the same sentence. It is a well known principle of statutory construction that words must be construed according to their usually accepted meaning in common language, "for this is the sense in which they must be supposed to have been used by the Legislature." *Hancock* v. *State,* 97 Ark. 38. Consequently, if the referral procedure has the effect of excluding persons from employment who fail or refuse to affiliate with a labor union, then Amendment 34 and Act 101 are violated.

Applying this reasoning to Article V of the proposed agreement, we find that Paragraph 1 makes the union the sole and exclusive source of referrals and Paragraph 4 requires that a register of applicants be maintained at the union hall. This means that before a person can be employed by appellee, such person would have to go to the union hall and place his name upon the register. In doing so he is to this extent affiliating himself with the union because the union is the only source to look to for employment. This affiliation goes even further because such persons must also meet the conditions set forth in the various groupings before they can be considered for referral. One condition is that before a person can get into Group II he must have passed a

journeyman's examination given by a duly constituted local union of the International Union. Certainly he would have to further affiliate with the union in order to take this examination.

It is common knowledge that in the construction industry a contractor's work is intermittent. He moves from job to job and between jobs must lay off experienced personnel, many of whom may have worked for him for years as faithful and efficient employees. When a new job is started, this hiring hall arrangement would prevent the contractor from calling these employees directly and requesting them to come back to work. He would be required to call the union hall instead and these faithful employees would be forced to take their place on this referral list along with all the other applicants. They may or may not be referred back to the job with their old employer. In this manner the referral procedure would destroy the very thing that employees traditionally have sought and this is job security. Job security, seniority with an employer, tenure of employment, or by whatever other terminology described or defined, it must be conceded that Amendment No. 34 and Act 101 of 1947, guarantee to the individual worker the opportunity to firmly establish himself in a job without submitting to any form of control outside the normal relationship of employee and employer. This an employee could not do under the proposed contract here questioned. This right of an employee is, or at least should be, just as sacred to a union member as it is to a non-member. Under the proposed contract, union members' lawful rights (as here outlined) would suffer the same disruption and destruction as would be inflicted upon the non-members. The arrangement here in question therefore appears to be nothing more than an intricate web set up whereby the union can control employment. This control would be exclusive except for the employer's privilege of rejection. The employer would be subjected to work stoppage based upon breach of contract if he should permanently hire his brother without first referring him through the union hiring hall.

No longer could public or private employment agencies or, for that matter, competing unions refer persons directly to an employer for employment. Surely, as argued by appellants, hiring halls maintained by building and construction trade unions could and, no doubt do, serve a beneficial purpose not only for their trades but for the entire industry, and, certainly, they have a perfect right to offer this service, however, to demand by the use of the most powerful weapon at their command (i.e. strike and picket), the right, in effect, to control employment to the exclusion of all others, including the employer, is a service some employees and employers might not be inclined to cherish.

It is well settled in this jurisdiction that picketing to obtain an unlawful objective is grounds for an injunction. In *International Association of Machinists, A. F. L. Local 924* v. *Goff-McNair Motor Co.,* 223 Ark. 30, this Court said:

"On the other hand this court has held that the demand by a union that a collective bargaining agreement contain a provision in violation of Amendment 34 to the Constitution and Act 101 of 1947, coupled with picketing in an attempt to enforce such demand, is grounds for the issuance of an injunction prohibiting such picketing. *Self* v. *Taylor,* 217 Ark. 953, 235 S. W. 2d 45; *Local No. 802* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154; *Lion Oil Co.* v. *Marsh,* 220 Ark. 678, 249 S. W. 2d 569. See also *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 69 S. Ct. 694, 93 L. Ed. 834."

In *Self* v. *Taylor,* 217 Ark. 953, this Court had occasion to deal with an agreement that was found to violate Amendment 34 due to the Union's announced intention to cancel the contract under a sixty-day notice clause if the employer hired non-union men. The Court then said:

"It was the object of the defendants, in submitting this contract, to compel the plaintiff to operate a closed shop business. He could not afford to sign such a con-

tract, under the laws of the State of Arkansas, because if he permitted union men to work for him he would have to violate the law and dismiss employees because they were not members of the union. It is an ingenious scheme, but it did not work."

The same principle is applicable here. If appellee had signed the contract, any person thereafter seeking employment with the appellee would either have to join the union or become affiliated with it. The proposed agreement clearly would allow appellants to do by indirection exactly that which they are prohibited by law from doing directly.

It follows, therefore, that under Amendment 34 to the Constitution which was adopted by the electors of Arkansas in 1944, under the enabling statute for this amendment (Act 101 of 1947, Sec. 81-201, et seq., Ark. Stats. 1947) and the decisions of this Court construing these measures, we have no choice but to affirm the Chancellor's finding that the hiring hall arrangement sought by the union is prohibited by the Constitution and laws of this State. To hold otherwise would substitute our will, by Court decree, for the expressed will of the legislature and the people and render nugatory a portion of our Constitution without authority. Having so determined, we find it unnecessary to reach the issues pertaining to a closed shop.

Accordingly, the injunction granted by the Chancellor herein is affirmed insofar as it prohibits the appellants and those cooperating with them from picketing for the purpose of obtaining a contract containing the matters found objectionable in this opinion. See *Youngdahl* v. *Rainfair*, 355 U. S. 131, 2 L. Ed. 2d 151, 78 S. Ct. 206.

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

GEORGE ROSE SMITH, J., dissenting. In the construction industry a contractor must utilize the skills of many specialized craftsmen, such as bricklayers, concrete fin-

ishers, plumbers, electricians, painters, roofers, etc., but most of them work upon a particular job for only a few days or even a few hours. It is plain enough that a small contractor cannot maintain upon his payroll, as full-time employees, all these specialists. Hence it is desirable that some central labor pool be maintained, so that each contractor can call for the various skilled workmen as he needs them. Such an arrangement is not only advantageous to the contractors; it also affords the workmen access to whatever jobs are available in their field. Hence the hiring hall fills a definite need in the building industry. According to this record, the electrical workers' union maintains the only existing hiring hall in this craft in Pulaski county. No other agency, public or private, has undertaken to perform this necessary function in the construction business.

The union sought to include in its labor contract a provision for the recognition and continued existence of this hiring hall. The contract was fair on its face, in that it permitted the employer to reject any applicant for employment. Certainly the proposed contract met the standards suggested for such agreements in *National Labor Rel. Board* v. *Mountain Pac. Chap. of Assoc. Gen. Contractors,* 9th Cir., 270 F. 2d 425.

It is obviously possible that the hiring hall might be conducted with discrimination, so that non-union electricians would not be given equal opportunities for employment. But this record contains not a sentence, not a word, not a syllable, of testimony to show that this hiring hall is to be used as an instrument of discrimination. I am very much afraid that the effect of the majority opinion is to outlaw the hiring hall, a useful device, in all instances, even though the terms of the proposed contract appear to be wholly fair and non-discriminatory. For these reasons I would reverse the decree.

5-2688 357 S. W. 2d 646

Opinion delivered June 4, 1962.

Bernard Whetstone, for appellant.

Spencer & Spencer, for appellee.

JIM JOHNSON, Associate Justice. This is an application by the appellee, Stanley G. Mitchell, for a decrease in the amount of alimony which was awarded his former wife in a divorce decree rendered July 21, 1950. From an order suspending future alimony payments conditioned as follows: "Until further orders of this court; said payments being by this Decree suspended indefinitely and until conditions change to the extent that payments can be resumed," appellant, Mary Myrtle Mitchell, prosecutes this appeal, arguing only that the court erred in modifying the decree.

In the original divorce decree appellant was awarded alimony in the sum of $50.00 per month, together with $5,500.00 in cash as a settlement of her rights in the property of appellee.

Appellee filed this action to modify the provisions of the decree relating to alimony on April 19, 1961, and contends that there has been such change in conditions

since the time of the original decree as to justify the granting of the relief sought.

The original decree recited the grounds for divorce to be three years' separation and the cause of the separation to be the wrongful conduct of the appellee.

The parties were in their fifties and the parents of two grown children at the time of the divorce. Appellant was unemployed and had no income of any kind from any source; appellee was living in a building which housed a box and crate manufacturing company which he owned; he was single and had minimum living expenses. His income was $3,200.00 per year.

Since the divorce appellant has never remarried and lives alone. She took a business course and after about two years was able to obtain a job. At first she made $150.00 per month, she has had raises since then and for the past two years she has earned a gross of $235.00 per month, with take-home pay of $185.00 to $188.00 per month. Her $5,500.00 settlement has dwindled to $3,022.00. She lives in a rented house and owns no automobile. She is 63 years of age and suffers from arthritis in her hands, which are vital to her employment. Even though there was some evidence to the contrary, appellant testified that her income was insufficient to pay all her living expenses.

Within about a year following the divorce appellee remarried. His living expenses at the time of the hearing on the petition to modify were around $250.00 per month. He admitted to reporting for the year 1960 (last year preceding modification) taxable income in the amount of $3,276.76. He owned, among other things, a $30,000.00 apartment house; a partnership in some stripper oil wells and a vending machine which produced $725.00 per year.

To minimize this rather substantial financial picture, appellee introduced some evidence indicating that his prospects for future income were less favorable than they had been in the past and that he was at the time of

the trial suffering financial difficulties. Because of the nature and extent of these difficulties we agree with the Chancellor that appellee is entitled to some relief. However, in weighing the equities of the whole case before us on trial *de novo,* we find that the proof of changed conditions is insufficient to warrant a suspension of the full alimony payments. In our view, a $25.00 per month reduction in the alimony payments is the most than can be justified by appellee's proof of changed conditions. The Chancellor's order will accordingly be modified to fix appellant's monthly alimony at $25.00, with appellee to pay the cost. See *Haney* v. *Haney,* 235 Ark. 60, 357 S. W. 2d 19.

BUCKNER *v.* PRAIRIE COUNTY BANK.

5-2715 359 S. W. 2d 443

Opinion delivered June 4, 1962.

[Rehearing denied September 10, 1962.]

Chas. A. Walls, Jr., for appellant.

John D. Thweatt and *Moses, McClellan, Arnold, Owen & McDermott,* by *Wayne W. Owen,* for appellee.

JIM JOHNSON, Associate Justice. This appeal involves two cases. Actions were brought by the Prairie County Bank upon two separate notes in the Circuit Court of Prairie County. Both actions were transferred to Chancery Court where they were tried as one.

In the first case, appellee, Prairie County Bank, filed suit on the 15th day of September, 1959, against Conley E. House to recover upon a note. The note, dated December 28, 1957, was in the sum of $4,000.00. House, in his answer, alleged by cross-complaint that he was not the real party in interest and that the note was a means used by BucTon Construction Company, a partnership composed of Charles Buckner and Jerry J. Screeton, to pay obligations of the partnership. That he was not the real party and that Jerry J. Screeton and Charles Buckner, the partnership, was the real party to the note and that the note should be reformed to show them as the makers. Jerry J. Screeton, in answering the cross-complaint, denied that it was a partnership debt and alleged that it was a debt incurred by Buckner and that the loan was to Charles Buckner and not to the partnership. Charles Buckner, in his pleading, admitted that the money was borrowed by House for the use and benefit of the partnership, BucTon Construction Company, and alleged that Jerry J. Screeton assumed this liability along with all other obligations of BucTon Construction Company when he purchased Buckner's interest in the partnership.

In the second case, appellee, Prairie County Bank, filed suit against Charles S. Buckner and Margaret Ann Buckner on the 24th day of March, 1960, upon a note alleged to be due in the amount of $20,000.00. This note was dated the 16th day of December, 1958. The Buckners answered admitting signing the note but denied signing the note as individuals, contending in effect and *inter alia* that the $20,000.00 loan was an accommodation loan for the sole benefit of the true obligor, BucTon Construction Company.

The Buckners filed a cross-complaint with their answer, in which they set out that this was an obligation which had been assumed by Jerry J. Screeton when the partnership was dissolved.

The issues involved in the *Prairie County Bank* v. *House* part of the litigation were whether the note signed by House constituted a debt of House or a debt of BucTon Construction Company, with the further issue being if the debt were a partnership debt, then had Jerry J. Screeton assumed this obligation upon the dissolution of the partnership. Another issue raised was one involving a deed given by Buckner to House to hold as security in the event that BucTon Construction Company became insolvent.

The issue in the Prairie County Bank v. Buckner part of the litigation was whether the obligation was one of the partnership or was an obligation for a capital investment in the patnerrship.

After hearing the evidence, the Court found that House was obligated to pay the note to the Prairie County Bank but that the $4,000.00 borrowed was loaned to BucTon Construction Company, a partnership at that time composed of Charles S. Buckner and Jerry J. Screeton. The Court further found that Charles S. Buckner and his wife gave to Conley E. House their deed to secure the payment of this obligation and found further that Jerry J. Screeton was primarily liable to the Bank, but that the lands conveyed by the Buckners to House were to be conveyed by House to Screeton and further found that Charles S. Buckner and Margaret Ann Buckner were liable to the Bank on their promissory note in the sum of $20,000.00, and dismissed the cross-complaint of Charles S. Buckner and Margaret Ann Buckner against Jerry J. Screeton, from which judgment Charles S. Buckner and Margaret Ann Buckner have appealed.

The partnership dissolution agreement was pre-prepared by Jerry J. Screeton and is as follows:

"KNOW ALL MEN BY THESE PRESENTS:

That we, Charles S. Buckner and Margaret Ann Buckner, his wife for and in consideration of the agreement of Jerry J. Screeton to hold us and each of us harmless from all indebtedness of BucTon Construction Company, and East Arkansas Materials Company, and for the further consideration of the sum of One Dollar, cash in hand paid to us by Jerry J. Screeton, receipt of which is hereby acknowledged, do hereby assign, sell, transfer and convey unto the said Jerry J. Screeton all of the right, title, claim and interest we have, or either of us has, in BucTon Construction Company and East Arkansas Materials Company and in all of the assets of said BucTon Construction Company and East Arkansas Materials Company, and I, Charles S. Buckner retire from said BucTon Construction Company and East Arkansas Materials Company.

WITNESS OUR HANDS AND SEALS This *26th* day of *March,* 1959."

The facts in regard to the House loan as developed at the trial are basically not in dispute. House, a Lion Oil Distributor in Hazen, was servicing an account with BucTon Construction Company. BucTon owed Lion Oil Company about $4,000.00 and Lion Oil was threatening to cancel their credit. This was a large account and Mr. House did not desire to have it cancelled. He went to Mr. Buckner, who was then a partner in BucTon Construction Company, and explained the situation to him. Mr. Buckner then made arrangements with Prairie County Bank for a loan for Mr. House, who was in turn advised to go to the bank and sign a note for $4,000.00. The understanding being that BucTon would make the interest payments and would pay the principal sum when it was due. Mr. Hartlieb, Vice-President of the bank, prepared the note and Mr. House signed it. The money was deposited in House Oil Distributor account and then

Mr. House made a check to BucTon Construction Company for $4,000.00 and marked the check loan. Upon receipt of this loan from Mr. House, BucTon Construction Company immediately used the money to pay its debt to Lion Oil Company.

It is clear from the record that Mr. Buckner in arranging this transaction was acting for the partnership under the authority of Section 65-109, Ark. Stats. 1947.

Some 21 months following this transaction Mr. House, in the course of his business as distributor for Lion Oil Company, was called upon by his company to furnish them a financial statement. Mr. House advised Mr. Buckner of his fears that this $4,000.00 indebtedness would adversely affect his financial statement and requested that the note to the bank be paid. It appears that BucTon Construction Company was still suffering financial difficulties and rather than have the partnership at that time attempt to pay the debt, Charles Buckner and his wife, On October 31, 1958, executed to Conley House their deed to a 200 foot lot which they individually owned. The lot is located in Hurt's Addition to the Town of Hazen. The deed was given for the purpose of offsetting the note on House's financial statement and for him to hold in the event that BucTon Construction Company became insolvent. The deed was not to be recorded and had not at the time of trial been recorded.

On the 26th day of March, 1959, the agreement set forth above was entered into between the Buckners and Screeton in which, as stated therein, the Buckners transferred to Screeton all their interest in BucTon Construction Company for the consideration of Screeton holding them harmless from all indebtedness of the partnership.

The original note was executed on January 21, 1957. BucTon paid the interest on this note on June 3, 1957, and September 13, 1957. Then on December 28, 1957, at the request of Mr. Hartlieb, Mr. House executed the note that is in question to this litigation. The purpose of this note was to renew the old note of January 21, 1957.

The interest was paid on this note by BucTon on July 30, 1958, December 1, 1958, and on April 1, 1959. The last payment being made after Mr. Screeton had purchased all of Buckner's interest in the partnership.

From these and other facts disclosed in the record, the trial court properly found the $4,000.00 to be a partnership indebtedness. *Jacks* v. *Greenhaw,* 105 Ark. 615, 152 S. W. 160. This being true, the learned chancellor further properly found that the indebtedness was assumed by Screeton under the terms of the partnership dissolution agreement. However, on trial *de novo* we cannot, from the record, agree that the equitable title to the land deeded by the Buckners to House was ever in BucTon, nor that this land should be deeded to Screeton (the now sole owner of BucTon) upon his payment of the $4,000.00 partnership indebtedness. As we view the matter, the land belonged to Buckner personally. Buckner paid the taxes and had possession of the land. Nowhere in the record is there any evidence that this land was not Buckner's individually and there is a complete absence of any evidence that BucTon ever had any interest in the land. In fact, Mr. Screeton acknowledged that this land was Mr. Buckner's individually when he testified that he had tried to buy the land from Mr. Buckner prior to the dissolution of the partnership.

The state of the record being thus, we are, on this phase of the case, impelled to the conclusion that the proof was clear, decisive and convincing that the deed from Buckner to House was, in fact, an equitable mortgage with the equitable title remaining in Buckner. *Watkins* v. *Demby,* 192 Ark. 1178, 91 S. W. 2d 251. When Screeton pays the Prairie County Bank the judgment on the $4,000.00 note, as he is obligated to do, then House will convey the lot to the Buckners, as owners.

The facts as developed at the trial relative to the Buckner loan were not nearly so involved as those pertaining to the House loan.

The $20,000.00 note executed by Charles S. Buckner and Margaret Ann Buckner to the Prairie County Bank

on December 16, 1958, was, according to the undisputed testimony of all persons, used by the makers to raise $20,000.00 which was placed into the assets of the BucTon Construction Company.

It appears that on December 16, 1958, the BucTon Construction Company was in need of funds in its account in the Prairie County Bank to the extent of approximately $30,000.00 to cover checks which were then in the bank and which could not be paid for lack of funds. Consequently, on that date the sum of $40,000.00 was deposited in the BucTon account.

It is undisputed that appellee Jerry J. Screeton went to the Prairie County Bank and executed a note on this date signing the note in his own personal capacity in the sum of $20,000.00 and deposited this $20,000.00 to the BucTon Construction Company account. Likewise, on the same date, the appellants Buckner went to the Prairie County Bank and executed a note in the sum of $20,000.00 which they deposited in the account of the BucTon Construction Company. It is clear from the evidence that the two notes were made each by the individual in his individual capacity and contemporaneously with the deposit in the BucTon Construction Company account in the Prairie County Bank, each of the partners was given credit in his capital investment account to the extent of $20,000.00 on the partnership books. Buckner claims that the $20,000.00 was a loan to the partnership, rather than an advancement toward capital assets. From these and other facts set forth in the record, the trial court found that the $20,000.00 loan was contributed to BucTon Construction Company as a capital asset and was not to be paid by appellee Screeton in furtherance of his partnership dissolution.

It is not only the general rule, but it is well settled in this jurisdiction, that money borrowed on the personal note of one of the partners for a contribution to, or advancement toward, his share of the capital assets of a partnership is not an obligation of the partnership. See *Garner* v. *Hallum,* 169 Ark. 295, 273 S. W. 1025; *Dixie*

Cotton Oil Company v. *Morris,* 79 Ark. 113, 94 S. W. 933; Vol. 40, *Am. Jur.,* § 160 p. 243.

Applying this rule to facts appearing in the record, we cannot, on trial *de novo,* say that the chancellor's findings, on this phase of the case, are against the weight of the evidence.

It follows, therefore, on the whole case before us, the decree is reversed only to the extent indicated and the cause is remanded for further proceedings consistent with this opinion.

ARK.-BEST FREIGHT SYSTEM *v.* SHINN.

5-2703 357 S. W. 2d 661

Opinion delivered June 4, 1962.

Harper, Harper, Young & Durden, for appellant.

Tom Gentry, for appellee.

NEILL BOHLINGER, Associate Justice. This is an appeal from a judgment of the Washington Circuit Court affirming an award by the Workmen's Compensation Commission to William Boyd Shinn, the appellee herein, in connection with a disabling heart attack which the appellee suffered on July 1, 1960, at Fayetteville.

The appellee was an employee of the Arkansas-Best Freight System, Inc., appellant herein, by whom he had been employed for some time as a road driver. The record before us discloses that two days preceding the heart attack of which the appellee complains he had left Fort Smith for Dallas, Texas by way of Muskogee, Oklahoma. He left Fort Smith about 10 o'clock P. M. on June 28th stopped briefly in Muskogee, went to Dallas and left Dallas at 8 P. M. the following day for Little Rock where he rested and slept and then left Little Rock at 7:45 on June 30th for Fayetteville where he arrived about 1 o'clock A. M. The appellee testified that he did not feel well when he arrived at Fayetteville but he started preparing to leave Fayetteville. It was necessary for him to change trailers and to do so necessitated his disconnecting the fifth wheel and letting down dollies on the trailer.

It appears that the dollies were let down with a hand crank which, on occasion, was hard to crank down, requiring strenuous effort with both hands. After letting down the dollies, he parked the tractor and walked to the terminal because of a pain in his chest. He told a fellow employee of his trouble and sat down for a while and when he began to feel some better he got up and walked to a drinking fountain whereupon he felt a severe pain in his chest. His distress was apparent to his co-workers who called a doctor and summoned an ambulance and he was taken to the hospital in Fayetteville where he was

treated by Dr. LeMon Clark for a week and was then moved to Fort Smith by ambulance where he was treated and is still being treated by a Doctor George Allen.

It further appears that the appellant had suffered a heart attack previously in September, 1959, at which time he was treated by Dr. Allen but he had recovered from that attack and had returned to work in December, 1959, and had no recurrence of the trouble until the attack on July 1, 1960.

Dr. Clark diagnosed Shinn's condition as myocardial infarction brought about by a coronary occlusion. The appellee filed his claim with the Workmen's Compensation Commission where it was allowed and the appellant herein appealed that finding to the Washington Circuit Court which affirmed the finding of the Commission and entered judgment in conformity with the finding of the Workmen's Compensation Commission. On this appeal the appellant contends that there was not sufficient competent evidence in the record to warrant making the award and that the award is contrary to the only substantial medical evidence in the record.

We have long held in an unbroken line of cases that the finding of the Workmen's Compensation Commission have the same binding force and effect as the verdict of a jury or a court sitting as a jury and when supported by substantial evidence such findings will not be disturbed.

This is well set out in the case of *Pearson* v. *Faulkner Radio Service Company,* 220 Ark. 368, 247 S. W. 2d 964:

"We have consistently held in a long line of cases that 'The rule has been clearly established that the binding of the Commission shall have the same binding force and effect as the verdict of a jury, or of a circuit court sitting as a jury, and when supported by substantial evidence, such findings will not be disturbed by the circuit court on appeal to that court or on appeal to this court.' * * * The Commission had the right, just as a jury would have had, to believe or disbelieve the testimony of any witness. See, also, *Harris Motor Company* v.

Pitts, 212 Ark. 145, 205 S. W. 2d 21, and *Mechanics Lumber Co.* v. *Roark,* 216 Ark. 242, 224 S. W. 2d 806."

The medical testimony which must form a large part of the evidence on which the Commission predicated its finding is not long. There were three doctors who testified. Dr. LeMon Clark, who treated the appellee at the hospital in Fayetteville, testified:

"It is my opinion that the effort involved in cranking the dollie undoubtedly contributed to the onset of Mr. Shinn's heart attack."

Dr. George Allen, a specialist in internal medicine who had previously treated the appellee, gave the following answers to questions at the hearing.

"Q. My question is, Doctor, is it your opinion that there is a definite relationship between the degree of stress and strain and the occurrence of his condition?

A. Yes.

Q. And is there a definite relationship between his occupation and the occurrence of his condition?

A. As related to this particular incident, yes.

Q. And is it your opinion that there is a causal relationship between Mr. Shinn's occupation and his present condition

A. Yes."

Dr. C. T. Chamberlain, called by appellant, testified as follows:

"Since it is well established that such a complication of arteriosclerotic heart disease, namely, acute coronary occlusion or coronary thrombosis, can as readily occur and does occur with the patient at complete rest or even when asleep, I feel that no one specific act of physical exertion can in itself be responsible for the production of a thrombus in a coronary artery except in rare and exceptional instances."

While Dr. Chamberlain testified that no one specific act of physical exertion can alone be responsible for a thrombosis in a coronary artery, except in rare or exceptional cases, the other two doctors state positively that there was a causative relationship between Mr. Shinn's occupation and work and his heart attack.

It is now well settled in Arkansas that when an injury or disability is caused by exertion arising from the employment, whether that exertion is normal or extraordinary, the injury is compensable, or in the words of the court in *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436:

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

Thus the Commission did not have to decide if the exertion of Shinn was unusual or extraordinary, nor did it have to decide if the prior heart attack of Shinn's was a contributing cause of the injury. The sole question for the Commission was whether Shinn's actions in undertaking to fulfill his employment duties on July 1, 1960, were the cause or contributing cause of the disabling heart attack. There is ample proof in the testimony of the doctors for the Commission to answer this question in favor of the appellee.

Appellant, in its brief, has made reference to the fact that Doctor Allen, in filling out an insurance form concerning Mr. Shinn, had answered "no" to the following question:

"Was the disability due to any injury or sickness arising out of and during the course of your patient's occupation or employment?"

This answer is at variance with his sworn testimony and at most it goes to the credibility of Doctor Allen. The Commission might well have elected to give more credence to the testimony of the witness on a witness stand under oath than to an answer that appears upon a questionnaire.

There is ample testimony in the record to support the finding of the Commission and this cause and the judgment thereon in the Washington Circuit Court we do not disturb. We affirm the case.

ARK. STATE BOARD OF PHARMACY *v.* FEY.

5-2730 357 S. W. 2d 658

Opinion delivered June 4, 1962.

Warren & Bullion, for appellant.

Rose, Meek, House, Barron, Nash & Williamson, for appellee.

NEILL BOHLINGER, Associate Justice. The appellant is a State Board created by statute and charged with the administration of the laws pertaining to the practice of pharmacy in this State. On July 13, 1961, the appellant brought an action in the Garland Chancery Court to enjoin the appellee, David L. Fey, from practicing pharmacy.

The appellee answered and the cause was presented to the Garland Chancery Court where the chancellor denied the plea for a restraining order against the appellee and from that action comes this appeal.

The appellant in this case denies that it issued a license to the appellee authorizing him to practice as a pharmacist and that the appellee has no legal right to practice without a valid license issued by the appellant Board; on the other hand, the appellee contends that the Board of Pharmacy did issue him a license to practice and presents a document which reads as follows:

"TO WHOM THIS MAY CONCERN:

THIS IS TO CERTIFY THAT THE ARKANSAS STATE BOARD OF PHARMACY IN SPECIAL SESSION DID ON MAY 17, 1961 APPROVE THE APPLICATION FOR LICENSURE AS A REGISTERED PHARMACIST UNDER THE PROVISIONS OF ACT 59 OF THE 1955 LEGISLATURE OF

DAVID LEONARD FEY

AND THAT CERTIFICATE OF LICENSURE WILL BE ISSUED TO THE SAID

D. L. FEY

WHEN ENGRAVED.

SIGNED

/s/

THOMAS E. MATTAX

SECRETARY"

The minutes of the appellant Board on which the certificate is predicated are as follows:

"May 17, 1961. D. L. Fey, who had been denied reciprocity to Arkansas from Tennessee, presented a reciprocity application and asked that it be considered for approval under Act 59 of 1955. With Mr. Fey's application was an opinion from the Attorney General's Office that if all the statements on the reciprocity application were proven true, Mr. Fey did qualify for registration under Act 59 of 1955, with the approval of the Board. A motion was made by Mr. Waddle, seconded by Mr. Peters, and passed unanimously that Mr. Fey be granted registration, subject to the review of his experience and residency qualification, and with the notation on the face of the Certificate that the registration was made under Act 59 of 1955. The Board went on record at this meeting to recommend to the next General Assembly of the Arkansas Legislature the repeal of Act 59 of 1955."

At the hearing before the chancellor the appellant contended that the document exhibited by the appellee was intended only as a temporary license which would automatically expire at the next meeting of the Board.

No such limitation appears upon the certificate issued by the Board nor do we find any limitation in the action of the Board as reflected by its minutes. The motion which was passed unanimously at the Board Meeting was that the appellee be granted registration subject to review of his experience and residency qualification and that the registration was made under Act 59 of the Acts of 1955. We do not view the words "that if all the statements on the reciprocity application were proven true" as being a limitation. That general statement would apply to any application that came before the Board and viewing the wording in any light, there was a certificate issued to the appellee which is not conditioned in any way, and, under the statute, so long as he is thus licensed he has the right to practice as a pharma-

cist and until that certificate is revoked, there is no limitation placed upon him.

If, as the appellant contends, there are disqualifying conditions that would have made the appellee ineligible for a certificate, his certificate nevertheless can be cancelled only in the manner provided by the statute. Being a creature of the Legislature, the Board has only those powers and rights which are specifically granted by the Legislature. Ark. Stat. § 72-1025 provides for the revocation of certificates obtained by false representation and reads as follows:

"If any person shall procure registration as a registered pharmacist under this act, by making, or causing to be made, false representations, the registration and certificate thus fraudulently obtained may, in the discretion of the board be revoked, and the name of the person so registered stricken from the register. Provided, That the person charged with the fraud be first allowed a hearing by the board. Act Mar. 13, 1891, No. 50, § 10, p. 80; C. & M. Dig., § 3676; Pope's Dig., § 4612."

And Ark. Stat. § 72-1028 pinpoints the procedure which the Board must follow in the revocation of a license:

"Procedure for revocation by the board.—Before revoking the certificate of registration of any registered pharmacist, the Board of Pharmacy shall give such person ten [10] days notice in writing to appear before such board, at such time and place as the Board may direct, to show cause, if any he has, why his or her certificate should not be revoked. said notice shall be signed by the Secretary of the State Board of Pharmacy and shall set forth in clear and concise language the nature of the charge against such person. Mailing a copy of such notice by registered mail, addressed to such person at his address appearing upon the records of the State Board of Pharmacy concerning the issuance of his certificate or the last renewal thereof shall be sufficient service of such notice. At such hearing, the Board shall

have power to subpoena witnesses and the President or Chairman of said Board shall have power to administer oaths and such Board shall hear evidence. If the Board finds after such hearing that the certificate of registration or license of such person should be revoked, the same shall be done forthwith. [Acts 1939, No. 120, § 2, p. 278."]

This statute is not only a grant of power to the Board, but it is also the grant of a right to the license holder. It is his guarantee of his day in court, it is the grant of a right by the Legislature and cannot be taken from him by the Board. He has a right to insist on the ten days notice of the Board Meeting at which the matter of the revocation of his certificate will be considered. He may be present and the testimony of witnesses will be taken and it is further provided in Ark. Stat. § 72-1029 that an appeal will lie from the action of the Board to the *Circuit Court* of the county in which the alleged offense was committed.

"Appeals from decisions of the board—Procedure.—Any person whose certificate of registration or license has been revoked by the State Board of Pharmacy as herein provided may appeal from the action of said Board to the Circuit Court of the County in which the offense was committed by filing with the Clerk of said Court within thirty [30] days from the order of the revocation, his affidavit to the effect that said appeal is not taken for the purpose of delay but that justice may be done him and by causing summons to be issued from said Court and served upon the Secretary of the State Board of Pharmacy. Such person appealing shall, at the time of filing his affidavit, give bond with security to be approved by said Clerk to cover the costs of said appeal and shall likewise cause to be prepared and filed with the Clerk of said Court a transcript of the proceedings, including stenographic record of all evidence, at said hearing. When an appeal has been taken as aforesaid, the same shall stand for trial de novo upon the record thus presented at the next day of said Court more than

twenty [20] days after service of summons upon the Secretary of the State Board of Pharmacy as herein provided. Appeals from the judgment of the Circuit Court on such trial shall be taken and had in accordance with the rules of appellate procedure now or hereafter provided by the laws of this State with respect to appeals in civil causes. [Acts 1939, No. 120, § 3, p. 278."]

The appellee has the right to practice pharmacy as long as he is the holder of the Board's certificate and that certificate can be cancelled only by following the provisions of the statute just quoted. None of these statutes were followed and of that there is ample proof. This case involves the determination by the chancellor of a question of fact and we have so many times stated:

"On the fact question: we try the case *de novo* here; unless the preponderance of the evidence appears to be against the chancellor's findings we must affirm. See *Lupton* v. *Lupton,* 210 Ark. 140, 194 S. W. 2d 686. Our rule also is 'that the judgment of the chancellor on the question of the preponderance of the evidence will be considered as persuasive when the evidence is conflicting, and evenly poised, or nearly so.' *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750. Also see *Brown* v. *Ozark Black Marble Co. et al., Ozark Black Marble Co.* v. *Stephenson, et ux,* 222 Ark. 280, 258 S. W. 2d 882." *Turnage* v. *Matkin,* 227 Ark. 528, 299 S. W. 2d 831.

The chancellor's decision is supported by a preponderance of the evidence and that decision we do not disturb.

The cause is, accordingly, affirmed.

George Rose Smith, J., not participating.

5-2741 359 S. W. 2d 801

Opinion delivered September 10, 1962.

R. D. Rouse, for appellant.

No brief filed for Appellee.

CARLETON HARRIS, Chief Justice. This is a divorce action. Appellant, Mildred Lucille Relaford, instituted suit against appellee, James William Relaford, alleging general indignities. The husband answered, denying the allegations, and filed a cross-complaint alleging that "plaintiff became interested sexually in divers men * * * That plaintiff persists in her association with divers men." The parties are the parents of six minor children, and each sought custody of said children. On trial, the court held that neither party was entitled to a divorce, in that both "have been guilty of such indignities to the person of the other as to render either of them unable to come into court asking for relief with clean hands." Custody of the six children was granted to appellant, and appellee was directed to contribute the sum of $10 per week toward the maintenance of the children. From the decree so entered, appellant brings this appeal.

Actually, the only question posed is whether appellant was entitled to a divorce. The parties were married in May, 1946, and lived in Nevada County before moving to Little Rock in October, 1959. They separated in June, 1960. According to appellant, appellee offered indignities

almost from the commencement of the marriage. "Well, he was all the time talking about me to other men. I would go to town after things and he was all the time saying he didn't know how much money I had when I left—I didn't have any money when I left, but he didn't know how much I'd come back with and on occasions he would tell them I would drink anything I could get my hands on, and then in one instance he told me I was tired of him and said 'You ought to try Fred, he may be the "coon-dog" you are looking for.' " This was a reference to Fred Virden, supposedly a friend to both parties. Mrs. Relaford testified that on occasions when some man would be in the house to spend the night, her husband would invite the visitor to sleep with her, and she mentioned a very vulgar statement made when the Relafords and Virden, on one occasion, were visiting the zoo. Appellant stated that her husband "made out like he was joking," but she did not consider it very humorous. Mrs. Relaford testified that her husband did quite a bit of drinking. She stated that on an occasion, she visited the doctor for an examination. The doctor sent a bill for $11. According to her evidence: "He said I had a baby done away with—said no Doctor would charge $11.00 for an examination," and he "harped" on the subject constantly. This accusation was the "final straw" that caused Mrs. Relaford to leave her husband, and return to Nevada County. She further testified that on an occasion when she, Virden, and her husband were at home, that appellee told Virden "she had your baby done away with." This statement, along with several other accusations, was verified by Virden.

Mr. Relaford denied most of the testimony of his wife. As to the last mentioned accusation, after learning about the $11 doctor bill, Relaford stated that he did not say she had done away with a baby. "No, sir, I didn't accuse her of it, I just said it was a good sign." Obviously, this was, in effect, an admission of making the charge.

Twelve witnesses testified on behalf of appellant, and seven witnesses appeared for appellee. Without detailing the testimony, which would serve no useful purpose, suffice it to say that not a single witness testified to any

illicit relationship between Mrs. Relaford and any man, nor to circumstances that would establish that such a relationship existed. The strongest testimony was that Virden, divorced from his wife, had often visited in the Relaford home, and that Mrs. Relaford at times laundered her clothes in the Virden home. As to the first, Virden frequently visited when Relaford was present, and according to appellee's own evidence, was a close friend. Relaford likewise testified that Virden had endeavored to help him obtain a job, and had assisted in other ways. As to the laundry, Mrs. Relaford stated that her own washing machine was out of order, and that all children were present on each occasion when she went to the Virden home to use the washing machine; that at times, she did her ironing there at night in order for the children to watch television. In fact, the only evidence that suggests in any manner an improper relationship between Mrs. Relaford and any man was contained in the depositions of Paul M. Adams and C. D. Tomlin, both former employers of Relaford. That evidence consisted of answers to the following interrogatories:

(To Adams) "State whether or not James William Relaford, the defendant, exhibited to you several letters bearing the purportedly written name of Fred Virden of Prescott, Nevada County, Arkansas, as writer, to plaintiff, Mildred Lucille Relaford?

A. I saw the letters.

Q. If any such letters were presented to you, state whether or not the name of Fred Virden was affixed to the envelopes and/or as signature to said letters?

A. They were affixed to the envelopes as return addresses and he signed the letters by his first name.

Q. State whether or not you read all or any part of said letters?

A. I read all of them.

Q. State whether or not the contents of said letter or letters reflected any amorous statement or assertions by Fred Virden to Mildred Lucille Relaford?

A. Yes."

(To Tomlin) "State whether or not James William Relaford, the defendant, exhibited to you several letters bearing the purportedly written name of Fred Virden of Prescott, Nevada County, Arkansas, as writer to plaintiff, Mildred Lucille Relaford?

A. One is all I read.

Q. If any such letters were presented to you, state whether or not the name of Fred Virden was affixed to the envelopes and/or as signature to said letters?

A. They was.

Q. State whether or not you read all or any part of said letters?

A. I read all of one.

Q. State whether or not the contents of said letter or letters reflected any amorous statement or assertions by Fred Virden to Mildred Lucille Relaford?

A. They did."

The letters were not exhibited (Relaford testified that he gave them back to his wife); no questions were propounded as to contents of the letters; the witnesses could not state, of their own knowledge, that the letters came from Virden, or bore his signature, nor was there any further effort to explain what was meant by "amorous statement". In any event, whatever was written, of course, *was not written by Mrs. Relaford,* and without further illumination of the contents of the letters, appellant cannot be held responsible for assertions or sentiments expressed by the writer.

The testimony reveals that Mrs. Relaford was employed during the time the parties were living together, enabling a better living for the family, and that she worked hard after the separation to take care of the six children. During the marriage, she labored in the hay fields with other farm employees for Mr. Owen Garrett, and hauled hay to Little Rock and Shreveport with Mr.

Garrett. This was done, according to appellant's testimony, at the request of her husband, and he admitted that he did not object to her doing this work.

This case was tried on August 7th, 1961, and Mr. Relaford stated that he had only given his wife $13 since January 1, 1961, for child support.[1] In fact, according to the sheriff of Nevada County, Relaford had been tried and convicted in the Justice of the Peace court for non-support of the children. The evidence reflected that friends, including Virden, and members of the Christian and Methodist churches, helped in supporting the children. Mrs. Relaford was employed at the Prescott Manufacturing Company, earning $38.80 net per week.

Even though it should appear that Mrs. Relaford had engaged in improper conduct with some man, the evidence would indicate that these alleged offenses were condoned, since Mr. Relaford continued to live with his wife during, and after, the period of appellant's alleged immoral behavior.

Be that as it may, the record falls far short of establishing adultery, or that his wife had become "interested sexually in divers men". The charge of sexual promiscuity or infidelity is probably the most offensive charge one spouse can make against the other, and it has been frequently held that to make such a charge without basis is an indignity entitling the person charged to a divorce. As stated by the Court of Appeals of Kentucky in the case of *Wiggins* v. *Wiggins*, 104 S. W. 2d 1097:

"It has been repeatedly held by us that the husband's making of an unfounded charge of lascivious conduct against an innocent wife is in itself evidence of and constitutes cruel and inhuman treatment within the meaning of the statute, entitling the wife to divorce, except where the charge is made, not maliciously but in good faith, upon reasonable grounds for believing it, even though held untrue. (citing cases) Also, we have held that accusations in pleading of spouse as to improper conduct of the

[1] According to her testimony, he had only given the $13 since June, 1960.

other spouse, where not supported by such evidence as to imply good faith, constitutes cruel and inhuman treatment where false and malicious. * * *

"Clearly, the testimony of the husband and his witnesses as to instances of alleged misconduct on the part of his wife, upon which he here based his charge that she was loose and lascivious in her behavior, was found to be altogether without substance or of the quality to induce conviction, and therefore, his baseless charge having only such support (which amounted to no support), it must needs have been made by him not in good faith but maliciously, and as such constituted, as set out *supra,* cruel and inhuman treatment within the meaning of the statute and entitled her, we conclude, to an absolute divorce and reversal of the judgment as erroneous, in so far as it failed to grant her such."

Also, in *Land* v. *Land* (Kentucky), 132 S. W. 2d 742.

"Clearly the venomous character of defendant's accusations and charges made against the chastity of his wife, when unsupported by any substantial and probative evidence, in itself constitutes cruel and inhuman treatment of her."

Appellant's charges, at the most, could have been based on no more than suspicion, and suspicion is not sufficient to justify one in maligning the character of his spouse, either by spoken charge, or by written pleading. Since the charge was unsupported by any substantial evidence, we consider it an indignity entitling appellant to an absolute divorce, and so hold. The awarding of the custody of the children to appellant, being indicative of the fact that the trial court found no substantial evidence of immorality on the part of the mother, is upheld.

While the custody of the children is not at issue in this appeal, it is interesting to note that Mrs. Relaford demonstrated her interest in both the physical and spiritual welfare of the children. The pastor of the First Christian Church in Prescott, along with his wife, the Mayor of Prescott, and a member of the City Council, all

testified that the mother and children attended church and Sunday school, and that the children were well behaved, polite, well supervised, and appeared to be happy.

The decree is reversed, insofar as it fails to grant appellant a divorce, and the cause is remanded with directions to enter a decree not inconsistent with this opinion.

BLAND, ADM'R *v.* BELLE POINT LODGE No. 20.

5-2731 359 S. W. 2d 804

Opinion delivered September 10, 1962.

Luke Arnett, for appellant.

Gean, Gean & Gean, for appellee.

ED. F. MCFADDIN, Associate Justice. The question posed is whether the appellee is liable for contributions under the Arkansas Employment Security Act. The appellant is J. L. Bland, Administrator of the Employment Security Division of the Department of Labor of the State of Arkansas; and the appellee is Belle Point Lodge No. 20, which, on November 15, 1848, received a charter as a subordinate lodge of the Most Worshipful Grand Lodge of Masons, which Grand Lodge was incorporated by act of

the Arkansas Legislature on November 25, 1848 (see page 136 of the 1846 Acts). The Belle Point Lodge is an unincorporated association and its proper officers are also appellees.

On February 3, 1961 the appellant Bland, acting in his official capacity and proceeding under § 81-1117 Ark. Stats., filed in the Office of the Circuit Clerk of Sebastian County a certificate of assessment against said Belle Point Lodge for delinquent contributions levied by the Arkansas Employment Security Act.[1] On February 9, 1961, and pursuant to § 81-1117(e) Ark. Stats., the Belle Point Lodge applied to the Sebastian Chancery Court to review the said assessment. At the trial from which comes this appeal it was shown that Belle Point Lodge is a regular subordinate lodge and annually elects a secretary, to whom is paid a salary. For the past fourteen years this secretary has been, and still is, Cicero Lewis; and he is the only person in said lodge who receives any compensation. The reason for the assessment against the lodge was because of appellant's contention that Cicero Lewis, as secretary of the Lodge, was an employee of the Lodge and, therefore, the

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[1] The said Certificate of Assessment reads as follows:

"CERTIFICATE OF ASSESSMENT
of
CONTRIBUTIONS LEVIED BY THE ARKANSAS EMPLOYMENT SECURITY ACT

"TO THE CLERK OF THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS: I, J. L. Bland, Administrator of the Employment Security Division of the Department of Labor of the State of Arkansas, hereby certify:

"That on the 23rd day of January, 1961, I certified to the Commissioner of Labor of the State of Arkansas an assessment of delinquent contributions levied by the Arkansas Employment Security Act, past due and unpaid by: Belle Point Lodge No. 20 of Fort Smith, of the County of Sebastian, State of Arkansas; and on said date delivered a copy of said assessment to said Belle Point Lodge No. 20.

"I further certify that ten days has expired since said certification to said Commissioner and delivery to said delinquent taxpayer, and I now hereby certify to you, as Clerk of the said Circuit Court, that the amount of said delinquent contributions due by the said Belle Point Lodge No. 20 is $342.26. Cost of filing this assessment, $1.00—Total $343.26.

"NOTICE OF LIEN: Notice is hereby given that Section 18(c) of Act 162 of the Acts of Arkansas 1953, creates a lien upon all real and personal property owned by the above named defendant to secure the payment of the amount above shown.

"WITNESS MY HAND as such Administrator on the 2nd day of February, 1961. (Signed) J. L. Bland, Administrator, Employment Security Division, Department of Labor of State of Arkansas."

Lodge was liable for unemployment compensation payments.

The Chancery Court held[2] that the Belle Point Lodge was not liable for the tax; and from that holding, the appellant prosecutes a direct appeal,[3] and appellee prosecutes a cross-appeal.[4] A careful study convinces us that the Chancery Decree should be reversed since under our statute the appellee is liable for the tax unless exempted, and the appellee is not within the provisions of any exemp-

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[2] We copy the Chancellor's opinion *in extenso*: "This petition for review is filed pursuant to Title 81, Section 1117 (e) of the Employment Security Act. It is an undisputed fact that Belle Point Lodge No. 20 has only one employee. From the evidence it is clear that this Lodge of Free and Accepted Masons is not operated 'exclusively for religious, charitable, scientific, literary or educational purposes.' If it were so operated it would be exempt under the provisions of the first paragraph of Title 81, Section 1103 (i) (6) (0). The second paragraph of the above section provides: 'Also any service or employment now exempt under terms of Federal Unemployment Compensation laws so long as the same is exempt under Federal Law.'

"Federal Unemployment Compensation Act, Chapter 23, I.R.C. Section 3306 (a) and Regulation Section 31, 3306 (a)-1 exempts all persons or organizations employing less than four (4) persons. Research by the write of this opinion has not disclosed any interpretation of this section by the Supreme Court of this State.

"The Legislature, in the enactment of the Employment Security Act, provided for a review by a Court of Equity and in so doing, in my opinion, had in mind an equitable construction of these provisions to protect some organizations who might not be exempt by reason of exclusive operation for charitable purposes, but exempt under Federal Law.

"Considering the provisions of Sub-section (0) along with the provisions of Sub-section (1) which exempts services performed in the employ of Chambers of Commerce, baseball clubs, and civic organizations, and labor unions, *excepting those liable for tax under the Federal Unemployment Tax Act*, it leads this Court to the conclusions that the Legislature did not intend that organizations such as Belle Point Lodge No. 20 should be liable under the Act.

"It is, therefore, the opinion of the Court that Petitioners, Belle Point Lodge No. 20 is exempt for liability under the Employment Security Act, by reason of the provision of the second paragraph of Title 81, Sec. 1103 (i) (6) (0)."

[3] Appellant urges on direct appeal two points:

(a) The Court erred in holding that appellee was exempt from the payment of the tax assessed under the provisions of Ark. Stats. § 81-1103 (i) (6) (0), and the Federal Unemployment Tax Act, U.S.C.A. Tit. 26, § 3306.

(b) The Court erred in finding that the Petition for Review should be sustained and in quashing the assessment.

[4] On cross-appeal, the appellee urges that the Belle Point Lodge is exempt under Ark. Stats. § 81-1103 (i) (6) (0) as a "foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earning of which inures to the benefit of any private shareholder or individual."

tion. The applicable law, in Ark. Stats. § 81-1103, defines "employing unit" and "employer" as follows:

"81-1103 . . . (g) *Employing unit.* 'Employing unit' means any individual or type or organization . . . which has . . . *one or more* individuals performing services for it within this State." (Italics our own.)

"81-1103 . . . (h) *Employer.* 'Employer' means: . . . for the calendar year 1942 and thereafter, any individual or employing unit which, for some portion of ten (10) or more days, . . . has . . . in employment one or more individuals . . ."

Therefore, it is clear that Belle Point Lodge—in employing Mr. Lewis as secretary—was an "employing unit" and an "employer" within our statute. The Federal statute, as contained in United States Code Annotated, Title 26, § 3306, defines an employer as one who has *four or more individuals* in the employment; but the State of Arkansas had the right and power to make its Act apply to the employer of only one individual.

Therefore, Belle Point Lodge was and is an employing unit and an employer within the applicable Arkansas statute and is liable for the tax unless it comes within one of the exemption provisions of the Arkansas statute. The burden of showing matters of exemption was upon Belle Point Lodge. See *McKinley* v. *R. L. Payne & Son Lbr. Co.,* 200 Ark. 1114, 143 S. W. 2d 38. In *Wiseman* v. *Madison Cadillac Co.,* 191 Ark. 1021, 88 S. W. 2d 1007, in speaking of exemptions from taxation, we quoted with approval from *Cooley on Taxation,* 4th ed., Vol. 2, p. 1403, § 672, as follows:

" 'An intention on the part of the Legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter, or act of incorporation, it is to be construed strictly against the

property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed, and cannot be made out by inference or implication, but must be beyond reasonable doubt. In other words, since taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing is upon him who claims it.' "

Ark. Stats. § 81-1103 (i) (6) lists the various exempted employments in alphabetical subdivisions "(A)" to "(P)" inclusive. The only language claimed to have any application, on either the direct appeal or cross-appeal in this case, is the paragraph lettered "(O)" which reads as follows:

"Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

"Also any service or employment now exempt under terms of Federal Unemployment Compensation laws so long as the same is exempt under Federal law."

The concluding sentence of the above quotation refers to the exemption terms of the Federal statute, and we find these exemption terms in U.S.C.A. Tit. 26 § 3306 (c), in which are listed seventeen numbered paragraphs concerning exemptions, but the only one of these paragraphs which is claimed to be applicable is "(8)" which reads:

"Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,

or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;"

It will be observed that this Federal provision, for all purposes here involved, uses the same words as § 81-1103 (i) (6) (0) of the Arkansas statute; so we consider them together. The Arkansas statute urged by appellee on cross-appeal provides for the following exemption: "Service performed in the employ of a corporation . . . or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . ." In the case at bar, Belle Point Lodge entirely failed to prove that it was organized and operated *exclusively* for religious, charitable, scientific, literary, or educational purposes. Mr. Lewis was the witness for Belle Point Lodge, and he testified:

"Our organization is religious in that it requires a religious belief for membership. It is of a religious nature in its work. It is educational in that we have branches who study the history of the Order, even politics, for that matter. And it is charitable, primarily, inasmuch as we are organized for the purpose of assisting the brethren in the case of need. . . . We do not consider ourselves a religion inasmuch as it refutes another religion, but we do require a religious belief for membership, and we practice religion in the Lodge in the prayers and invocations."

A careful search of the transcript fails to show that Mr. Lewis ever used the word "exclusively". Belle Point Lodge may be organized for religious and charitable purposes, but it may also be organized for *fraternal* purposes. The point is that Belle Point Lodge failed to show that it was organized and operated *"exclusively"* for the purposes mentioned within the statute. In the case of *Grand Lodge, F. & A. M.* v. *Taylor,* 146 Ark. 316, 226 S. W. 129, emphasis was placed on the word "exclusively"; and so in the case at bar the proof fails to show that Belle Point Lodge is a corporation organized and operated *exclusively*

for the purposes mentioned in the Arkansas statute allowing exemptions.

It therefore follows that the decree of the Chancery Court is reversed and the cause is remanded for the entry of a decree in keeping with this opinion.

GIRARD *v.* KUKLINSKI.

5-2758 360 S. W. 2d 115

Opinion delivered September 10, 1962.

[Rehearing denied October 8, 1962.]

Wootton, Land & Matthews, for appellant.

Richard W. Hobbs, for appellee.

GEORGE ROSE SMITH, J. This is an action by Kuklinski and his wife to recover damages for personal injuries and loss of consortium sustained when the husband's car, while stopped at an intersection, was struck from behind by a vehicle driven by the appellant. There was a $12,000 verdict for Kuklinski. We find it necessary to consider only

the appellant's contention that the court permitted the plaintiffs to introduce incompetent and prejudicial evidence.

Two police officers who investigated the accident gave their opinion that the defendant Girard was drunk at the time. Over an objection one of these witnesses also testified that he placed a charge against Girard for driving while under the influence of intoxicants.

The latter testimony was inadmissible. It is generally held that evidence of an arrest or of the filing of a charge, without proof that a conviction resulted, is incompetent. Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 6196. The minority view was taken in *Segerstrom* v. *Lawrence,* 64 Wash. 245, 116 P. 876, but that case was overruled in *Billington* v. *Schaal,* 42 Wash. 2d 878, 259 P. 2d 634.

The exclusionary rule is sound. The fact of arrest was not in itself a significant *act* for the jury to consider. It merely indicated the officer's belief at that time and thus corroborated his testimony that he thought Girard to have been drunk. It is, however, ordinarily improper for a witness's testimony to be reinforced by proof that he made the same statement upon some earlier occasion. *Rogers* v. *State,* 88 Ark. 451, 115 S. W. 156, 41 LRANS 857. There we held the admission of such bolstering testimony to be prejudicial.

Here the proof was especially objectionable, for our Uniform Act Regulating Traffic on Highways, Act 300 of 1937, provides that no record of a conviction under the act shall be admissible as evidence in a civil case. Ark. Stats. 1947, § 75-1012; *Garver* v. *Utyesonich,* 235 Ark. 33, 356 S. W. 2d 744. The appellees argue that the charge of drunken driving did not involve a violation of the Uniform Act, since the charge was lodged under a later statute, Act 208 of 1953. Ark. Stats., § 75-1027. The latter act, however, was in substance an amendment and restatement of § 49 of the Uniform Act, and consequently the later statute should properly be treated as falling within the purview of the general provisions of the Uniform Act. Since the

record of a conviction under the act is inadmissible there is still less reason for admitting proof of a mere charge.

We cannot say with confidence that the inadmissible evidence was not prejudicial. The jurors may well have supposed that the placing of the charge was an indication of its truth, in the absence of an affirmative showing by Girard that he was not convicted. If he really was convicted, as appears to have been the case, then he was powerless to rebut the jury's inference, and proof of the mere charge was just as damaging as proof of the conviction would have been.

We do not agree with the trial court's conclusion that the inadmissible testimony was invited by Girard's attorney, who conceded in his opening statement to the jury that his client had consumed three or four bottles of beer before the accident. Inasmuch as proof that Girard had been drinking was undoubtedly admissible, we fail to see why counsel's reference to that proof should be considered as an invitation for the use of incompetent and prejudicial evidence.

Reversed.

BACHMAN *v.* STATE.

5036 359 S. W. 2d 815

Opinion delivered September 10, 1962.

[redacted]

W. G. Wiley, for appellant.

Frank Holt, Atty. General, by *Dennis W. Horton* and *Sam H. Boyce,* Asst. Attys. General, for appellee.

PAUL WARD, Associate Justice. Appellant, Richard D. Bachman, was convicted in the Municipal Court of Batesville and fined $25 for maintaining an "automobile graveyard" within 500 feet of State Highway 69, which is paved. On appeal to circuit court his conviction was affirmed, and this appeal follows.

Appellant was charged with violating Act 212 of 1955. Section 1 defines an automobile graveyard as "any place where five (5) or more junk, wrecked or non-operative automobiles or other vehicles are deposited, parked, placed, or otherwise located". Section 2 says it shall be unlawful for any person to maintain or operate an automobile graveyard within *one-half mile* of any paved highway of this State. Section 3 allows four months after the act becomes effective to remove the junked cars. This section also provides "that the provisions of this act shall not apply to any automobile wrecking yard or graveyard which is *now* being actively operated as a going business." (Emphasis added.) (Ark. Stats. §§ 76-129—76-133)

Because of the disposition we are making of the case it is unnecessary to discuss at length or pass upon all the points appellant relies on for a reversal. It is our conclusion that said Act 212 is unconstitutional, and that the judgment of the trial court must be reversed.

There can be no dispute about the fact that any right the legislature has to prevent the location of an automobile graveyard along a public highway stems from its police power. This is true because every citizen has a common right to own and possess property so long as it does not interfere with the general health and welfare of the public. In the case of *Beaty* v. *Humphrey, State Auditor,* 195 Ark. 1008, 115 S. W. 2d 559, this Court, in construing Act 313

of 1937 (Ark. Stats. §§ 71-501—71-522) which regulated barbers, quoted with approval the following:

" 'If it has any such right, it comes within what is termed the police power. There have been many definitions of the term 'police power' and many cases before the courts of the country assailing statutes as not being within that power.' "

It is just as well settled by many decisions of this and other courts that when a state exercises its police power to regulate a lawful business such regulation must bear a direct relation to the general welfare. In the *Beaty* case, *supra,* the Court found such a relationship existed, and consequently upheld said Act 313. Four years later the legislature passed Act 432 of 1941 which complemented said Act 313 by giving a Board the right to fix minimum wages which a barber could charge. This act was tested in the case of *Noble* v. *Davis,* 204 Ark. 156, 161 S. W. 2d 189, where we held it was an invalid exercise of the police power. The Court reached this conclusion even though Section 1 of Act 432 specifically provided that "The purpose of this Act is the protection of the public safety, health, welfare and general prosperity. . . ." After referring to the above language the Court said:

"The fact that the Legislature so declared the purpose of the act does not make it so, if, in fact, the declared purpose has no substantial connection with the real purpose of the act."

The Court then went on to point out that no such connection did exist in fact.

In the case under consideration a very sound argument could be made to show that an automobile graveyard, although located near a public highway, in no way affects the public safety, health, welfare, and general prosperity of the people. If that argument be accepted it must be concluded that only the esthetic senses of the traveling public would be offended or affected. There is respected authority that the police power of the state is not broad enough to include only esthetic considerations. This line

of reasoning would necessarily result in declaring said Act 212 unconstitutional. We do not choose, however, to base our decision in this case upon the above line of reasoning, because it appears to us that the general trend of modern judicial thinking is to broadening the scope of the police power to include esthetic considerations, especially when connected with other considerations. Both the narrow and the broad views are well and sufficiently expressed in a quotation from the case of *W. C. Farley, etc.* v. *Patrick C. Graney, State Road Commissioner, etc.*, W. Va., 119 S. E. 2d 833, which dealt with a state of facts similar to those of this case. The Court there said:

"It would serve no useful purpose to engage in an extended discussion of the place of esthetic considerations in the enactment of legislation under the police power. It can not be gainsaid that at this time the great weight of authority is to the effect that esthetic considerations *alone* will not justify the exercise of legislative authority under the police power. But on the other hand, it is perhaps just as well established that esthetic considerations may be given due weight in connection with other factors which support legislative exercise of the police power. It is clear also that there is in this day a marked tendency to accord greater importance to esthetic considerations."

In this modern age when our highway system is being expanded and improved, and when more attention is being given to their beautification for the attraction of tourists, we deem it wise not to close the door on the aforementioned tendency to broaden the scope of the state's police power.

2. We have concluded, however, that the judgment of the trial court must be reversed because said Act 212 is arbitrary and unreasonable in attempting to effect its intended purpose, which could only be to protect the traveling public from unsightly views. The courts have many times held that the operation of a junk yard or an automobile graveyard is a lawful business. The Act itself recognizes this fact by allowing the continuance of those already actively in business. See also: *Town of Vestal* v.

Bennett, 199 Misc. 41, 104 N. Y. S. 2d 830; *City of New Orleans* v. *Southern Auto Wreckers,* 193 La. 895, 192 So. 523; and *State* v. *Brown,* 250 N. C. 54, 108 S. E. 2d 74.

The state cannot of course destroy or injure a person's private property without just compensation and without due process of law. It may regulate its use under certain circumstances but only if the imposed regulations are reasonable and not arbitrary. The state cannot by statute, under the guise of the police power, impose arbitrary or unreasonable restrictions upon private property or its use. *Quesenberry* v. *Estep,* 142 W. Va. 426, 95 S. E. 2d 832; *Carter* v. *City of Bluefield,* 132 W. Va. 881, 54 S. E. 2d 747; *Lawton* v. *Steele,* 152 U. S. 133, 14 Sup. Ct. 499, 38 Law Ed. 385; *Anderson* v. *Jester,* 206 Iowa 452, 221 N. W. 354; *Merrill* v. *City of Wheaton,* 356 Ill. 457, 190 N. E. 918. To the same effect, the United States Supreme Court in the case of *Williams* v. *Arkansas,* 217 U. S. 79, 30 Sup. Ct. 493, 54 Law Ed. 673, at page 88 of the U. S. Reports, quoted with approval the following:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and the personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary interfered with or destroyed. . . ."

The Act under consideration here, in effect, imposes a penalty of $100 a day for each day a person keeps or maintains 5 "non-operative" automobiles within one-half mile of any paved highway, regardless of whether they can be seen or not. By no stretch of the imagination could it be maintained that 5 such cars located one-half mile away from the highway, hidden behind a hill, a forest, a high fence, or in a building, could offend the esthetic senses of a traveler along said highway, and certainly

not his peace, health or happiness. To that extent, then, it must be concluded that the Act is arbitrary and unreasonable, and bears no relation to the purpose intended to be achieved, which could only be to keep travelers from having to look at an unsightly junk yard.

Nor are we convinced by the argument that the Act is valid as it applies to appellant's situation who maintains more than 5 non-usable cars in open view within 500 feet of the highway. The only alternative left to appellant under the terms of the Act is to abandon his business or subject himself to a fine of $100 a day. The Act is arbitrary and unreasonable because it affords him no opportunity at all to save his business by obstructing it from the view of those persons who travel the highway. This could be done by erecting a high wall or fence or by inclosing the cars in a building. If he did not of these things he would still be subject to the penalty provided in the Act. Putting it another way, we hold Act 212 to be arbitrary and unreasonable because it could injure or destroy a lawful business while it affords the owner no opportunity to preserve the same by making changes or alterations without offending the intended purpose and purview of the Act.

Consequently the judgment of the trial court must be, and the same is hereby, reversed.

McFaddin, J., concurs.

Ed. F. McFaddin, Associate Justice (Concurring). I agree that the Act here under consideration is unconstitutional. See *State* v. *Brown*, 250 N. C. 54, 108 S. E. 2d 74.

The purpose of this concurrence is to indicate my view that the State can accomplish what it is seeking to do—*i. e.*, police junk yards on or near highways—by declaring the operation of such yard to be a privilege, and by designating some agency or authority to grant permits, upon reasonable rules and regulations as to conditions, sanitation, maintenance, etc. For the benefit of those interested, I cite the following: *State* v. *Kievman*, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; and see also annotations

entitled, "Regulation of Junk Dealers," in 88 A.L.R. 970, and 45 A.L.R. 2d 1391; and annotation entitled, "Automobile Wrecking Yard or Place of Business as Nuisance," in 84 A.L.R. 2d 653. See also generally *Vt. Salvage Corp.* v. *Village of St. Johnsbury* (Vt.)., 34 A. 2d 188.

CUNNINGHAM *v.* STOCKTON, COUNTY JUDGE.

5-2723 359 S. W. 2d 808

Opinion delivered September 10, 1962.

Garner, Shaw & Kimbrough, for appellant.

James H. Pilkinton and *Nabors Shaw*, for appellee.

SAM ROBINSON, Associate Justice. Appellants, Bill Cunningham and Harold Berg, filed this action in the Chancery Court to enjoin Roy Stockton, County Judge of Polk County, from "using, loaning, letting, hiring, or otherwise using" county road machinery in making improvements for private citizens. It appeared that the County Court had approved the action of the County Judge in the use of the equipment and the Chancellor ruled that the Chancery Court did not have jurisdiction to grant the relief sought; that such jurisdiction was in the Circuit Court.

The issue on appeal is whether the Chancery Court has jurisdiction to enjoin the County Judge from using the county equipment for unauthorized purposes.

During March and April, 1961, the County Judge used heavy earth moving equipment belonging to the county to do work for certain individuals. Only one of those individuals paid for such work.

On August 15, the County Judge entered into a purported contract with his secretary, Grace Bell Smith, whereby all the county road equipment of Polk County was leased to Miss Smith for the consideration of one dollar per year, and other consideration.

Later, the County Judge used the road equipment for doing work for other individuals. At the trial in Chancery Court, the County Judge testified that unless prohibited by a court order, he would continue to do such work for individuals.

On October 16, 1961, this Court decided the case of *Needham* v. *Garner, County Judge,* Law Reporter, Vol. 108, No. 10. There the Court said: "One, there is no contention here by appellee that he was acting in the capacity of the County Court. The record show that the parties stipulated 'there have been no orders of the County Court made, entered or placed of record confirming or affirming any of the dirt moving project contracts'. Two, because of the above stipulation, we need not and do not affirm or deny the powers of the *county court* to enter into contracts such as here questioned. Three, there is no contention that the County Court ratified the contracts made by the County Judge."

The next day, October 17, the County Court entered what was designated as a *nunc pro tunc* order approving and ratifying the work done by the County Judge for private individuals, and on the 7th or 8th of November, the County Court entered another such order.

Now as to the jurisdiction of the Chancery Court to enjoin and restrain the County Judge or County Court from using the county equipment for unauthorized purposes, Art. 16, Sec. 13 of the Constitution of Arkansas provides: "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."

In the *Needham* case, in referring to Art. 16, Sec. 13, we said: "The above quoted section of the constitution has been interpreted in more than forty decisions of this Court. A casual reading of just a few of these decisions clearly indicates a liberal interpretation of said section not only for the protection of citizens against specific 'illegal exactions' but for protection against unlawful official acts which could logically result in illegal exactions. We think there can be no doubt that if a county judge is given the right, limited only by his own discretion, to use county road machinery for private purposes, it could result in the need for more tax money to repair and replace the road machinery."

In *McLellan* v. *Pledger, County Treasurer,* 209 Ark. 159, 189 S. W. 2d 789, there was a contention that the Chancellor did not have jurisdiction; that there was a remedy at law. This Court said: "Appellees insist that the Chancery Court was without jurisdiction, as the plaintiffs had a remedy at law—*i.e.,* appeal from the County Court order allowing a claim or salary warrant under either of the acts. Appellees cite *Bowman* v. *Frith,* 73 Ark. 523, 84 S. W. 709; and *Sadler* v. *Craven,* 93 Ark. 11, 123 S. W. 365, to sustain their contention. But in *Bowman* v. *Frith* it was pointed out that a taxpayer could not proceed in equity to prevent a county from entering into a contract claimed to be improvident, but could proceed in equity to restrain the county from entering into a void contract. *Fones Hardware Co.* v. *Erb,* 54 Ark. 645, 17 S. W. 7, 13 L.R.A. 353, was there cited as authority for such equitable proceeding in the case of a void contract. In the case at bar it was alleged that the legislative acts were *void*; so the Fones case applies, rather than the Bowman case. *Sadler* v. *Craven, supra,* involved an attack on an allegedly improvident contract, and not one claimed to be void. In short, the cases cited on this point by appellees are without application."

Likewise, in the case at bar, it is alleged in the complaint that the use of the county equipment, as above

mentioned, is illegal, unlawful and unauthorized by law. Furthermore, the order of the County Court approving and ratifying the action of the County Judge in the use of the machinery was not made or entered until months after the work was done. In a situation of this kind, a citizen would have no remedy unless it was by injunction.

The Chancery Court has jurisdiction to grant the relief sought by plaintiffs and should do so.

Reversed.

DONALDSON *v.* JOHNSON.

5-2727 359 S. W. 2d 810

Opinion delivered September 10, 1962.

NEILL BOHLINGER, Associate Justice. Clare M. Donaldson was the mother of the appellant, J. Earl Donaldson and Willie Johnson, an appellee herein, and the grandmother of Helen M. Johnson who is also an appellee.

Clara M. Donaldson was the owner of a home in Springdale, Arkansas and on January 17, 1958 she executed a deed conveying the homeplace to her granddaughter, Helen M. Johnson, subject to her life estate therein. The consideration recited was $1.00 and other valuable considerations.

At the time of the execution of this deed, Mrs. Donaldson was 81 years of age and was suffering from diabetes, arteriosclerosis, leukemia, secondary uremia and other diseases of old age. Nine days after execution of the deed in question Mrs. Donaldson died. Mrs. Donaldson had resided in her home in Springdale for many years and subsequent to her husband's death had been cared for by her son, Earl Donaldson, appellant, who lived in her home with her. Earl had also cared for her and her husband and had lived with them from time to time.

On January 16, 1958, Mrs. Donaldson's daughter, Willie Johnson, came to the Donaldson home and took Mrs. Donaldson to the Johnson home. The deed in question was executed by Mrs. Donaldson on January 17th in the office of a lawyer in Fayetteville.

After the death of his mother, appellant brought this suit to cancel the deed from Mrs. Donaldson to her granddaughter, Helen M. Johnson, and alleged that the appellees, Willie and Helen Johnson, exercised undue influence on Mrs. Donaldson to secure the deed and also that Mrs. Donaldson was incompetent to execute the deed.

Much testimony was offered both by doctors and laymen as to Mrs. Donaldson's mental capacity, the doctors and laymen all testifying that in their opinions, because of her diseases and old age, Mrs. Donaldson

did not have the competence to know the extent of her property and to realize the disposition she was making of it although they all testified that Mrs. Donaldson did have lucid intervals during which she was normal.

At the close of appellant's case in chief the chancellor sustained a demurrer as to the undue influence allegation. There was no testimony offered concerning undue influence and the fact that Mrs. Donaldson's daughter, Willie Johnson, took her mother to her home the day before the deed was executed might offer an opportunity for the exertion of influence but there is none shown to have taken place. The daughter, Mrs. Johnson, seems to have been an infrequent visitor to her mother's home and there is no testimony to support appellant's allegation of a confidential relationship between Mrs. Donaldson and her daughter or granddaughter which would give rise to a presumption of undue influence, duress or fraud which the appellee would be required to rebut. We conclude the chancellor was correct in sustaining the demurrer to the allegation of undue influence. The issue of confidential relationship and presumption of undue influence is covered well in an Iowa case, *Arndt* v. *Lapel,* 214 Iowa 594, 243 N. W. 605:

"What constitutes a confidential relationship has been recently passed upon by this court in *Utterback* v. *Hollingsworth,* 208 Iowa, 300, 225 N.W. 419. We quote the following, loc. cit. 302 of 208 Iowa, 225 N.W. 419, 421: 'Plaintiffs take their main position on the proposition that defendants sustained to decedent a confidential relationship such as to shift to them the burden of proof. It is not claimed, of course, that the relationship was fiduciary as a matter of law, but that it existed in fact within the doctrine of *Curtis* v. *Armagast,* 158 Iowa, 507, 138 N.W. 873; *Pruitt* v. *Gause,* 193 Iowa, 1354, 188 N.W. 798; 2 Pon. Eq. (4th Ed.) § 956. This doctrine for the purpose of the matter now under discussion may be stated to be that one who in fact stands in a confidential relationship to another may not retain advantage of a transaction with the *cestui que* trust which may reason-

ably be the result of the confidence reposed, unless he shows that the *cestui* acted with freedom, intelligence, and with full knowledge of all the facts. The purpose of the doctrine is to defeat and correct betrayals of trust and abuses of confidence. It is a prerequisite to the application of the doctrine that faith and confidence be reposed; that the repository shall be thereby in a position of superiority or dominance, while the *cestui* is in a corresponding position of inferiority or subservience. * * * Before the doctrine can be applied, however, the existence of the confidential relationship or of the facts giving rise to it must be proved. The relationship must be such as to enable the one charged with having abused it, to have exercised it to his advantage. It must appear expressly or by implication that trust or confidence was reposed. The supposed trustee must be shown to have been in a position of advantage or superiority such as to imply a dominating influence over the *cestui.*' (citations omitted)

* * * * *

As was said in *McNeer* v. *Beck,* 205 Iowa, 196, loc. cit. 198, 217 N.W. 825, 826: 'Mere blood relationship does not of itself create the legal trust or confidential relationship and change the requirement in the above regard. *Kromar* v. *Kromar,* 202 Iowa, 1166, 211 N.W. 699; *Shaffer* v. *Zubrod,* 202 Iowa, 1062, 208 N.W. 294.' "

The mere proof of kinship alone does not give rise to a confidential relationship. *Cunningham* v. *Lockett,* 216 Miss. 879, 63 So. 2d 401; *Arndt* v. *Lapel,* 214 Iowa 594, 243 N.W. 605; 26 C.J.S. § 64a, p. 774.

There is no set formula by which the existence of a confidential relationship may be determined, for each case is factually different and involves different individuals. As was said in *Gillespie* v. *Holland,* 40 Ark. 28, 48 Am. Rep. 1:

* * * * *

"* * * (confidential relationships) are supposed to arise wherever there is a relation of dependence or confidence; especially that most unquestioning of all con-

fidences which springs from affection on one side, and a trust in a reciprocal affection on the other. *The cases for the application of the doctrine can not be scheduled. They pervade all social and domestic life.*" [Emphasis added]

The second allegation on which a reversal is prayed is that the preponderance of the evidence showed Mrs. Donaldson was incompetent at the time the deed was executed. The appellant offered the testimony of several of Mrs. Donaldson's neighbors and Mrs. Donaldson's doctors that she was mentally incompetent to execute the deed. The doctors, one of whom had been treating Mrs. Donaldson for about two years, testified that in their opinion, because of her diseases and advanced age, she did not have the competency to know the extent of her property and the disposition that she was making of it. They all testified, however, that Mrs. Donaldson did have lucid intervals.

The test of mental competency to execute a deed is found in *Petree* v. *Petree,* 211 Ark. 654, 201 S.W. 2d 1009, where we quoted *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S.W. 510, as the applicable rule in cases of this kind.

"If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting *his own interest in dealing with another* is all the law requires. If a person has such mental capacity, then, in the absence of fraud, duress, or undue influence, mental weakness, whether produced by old age or through physical infirmities, will not invalidate an instrument executed by him. *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590; *Seawel* v. *Dirst,* 70 Ark. 166, 66 S. W. 1058; *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *McEvoy* v. *Tucker,* 115 Ark. 430, 171 S. W. 888." [Emphasis added]

The *Pledger* case was also quoted approvingly in *Hunt* v. *Jones,* 228 Ark. 544, 309 S.W. 2d 22.

Even the doctors who testified that Mrs. Donaldson was mentally incompetent agreed that she could have lucid intervals. Since it is shown that Mrs. Donaldson had periods in which she was normal, it becomes a question as to her mental condition at the time the deed was executed. It is not a question as to mental condition before or on the afternoon of the day on which she executed the deed, but in the morning at the time the deed was signed did she have the capacity that is demanded by the authority quoted above.

There were but two witnesses that testified as to Mrs. Donaldson's mental capacity the day she executed the deed. Taking the testimony of these witnesses in the order in which they were presented to the trial court and not the sequence of events, there was the testimony of Mrs. George Been, a next door neighbor to Mrs. Donaldson who had observed Mrs. Donaldson for many years and had noted a mental decline ever since the death of Mrs. Donaldson's husband and who talked to Mrs. Donaldson on the evening of January 17th after the deed in question had been executed the morning of that day. Mrs. Been stated that Mrs. Donaldson's mental and physical conditions were poor; that she wasn't able to understand and could not carry on a conversation; that she had known Mrs. Donaldson for more than fifty years and that she and Mrs. Donaldson had many mutual friends and she enjoyed her conversations with her but there were times when Mrs. Donaldson's mind did wander but there were times when she would be perfectly all right.

The only other witness in connection with Mrs. Donaldson's mental condition at the time she executed the deed was the attorney who prepared the deed. He testified that Mrs. Donaldson had sought to make an appointment with him some weeks prior to the time the deed was executed and he was unable to see her on that oc-

casion but did arrange to see her on the 17th of January, 1958, and that on the second occasion when she called him she stated that she wished to draw a deed. He saw her in the morning of January 17, 1958, at his office and there was no one in his private consultation room except he and Mrs. Donaldson. He did not know how she reached his office.

While part of this witnesses' testimony is open to objection, his testimony is competent and relevant as to his observations on her mental condition. It appears from this testimony that Mrs. Donaldson was 81 years of age and the attorney said she was in his office for more than an hour and he enjoyed the conversation he had with her.

After the attorney's secretary had gone to prepare the deed in question he and Mrs. Donaldson talked about the infirmities of age and she told him that she had her good days and some bad days but on this particular day she felt good. They discussed how things had progressed, about old relationships, and she told him about the store she and her husband once had. The attorney found that she was coherent, well oriented and knew exactly what she wanted and was quite lively to talk with. Mrs. Donaldson stated to the attorney that the grantee in the deed was her only grandchild and that she and her husband had wanted to give her something and she wanted to do it in a way that would be impervious to attack after her death.

Based on his experiences with Mrs. Donaldson and his conversation with her, the attorney was in a position to give an opinion as to her mental capacity on that day at the time the deed was executed. From her ability without prompting to remember the nature and extent of her property; to know what she was doing with it and who was the natural recipient of her bounty, the attorney formed an opinion that she was totally and completely competent and the deed was executed in his presence. There is no testimony that Mrs. Donaldson was incompetent at the time the deed was executed.

These matters might well have presented themselves to the consideration of the learned chancellor. One of the tests set forth in *Petree* v. *Petree,* 211 Ark. 654, cited *supra,* was the grantor's ability to protect his own interest in dealing with another. In this case we find that Mrs. Donaldson provided for herself—fully protected her interest—by reserving a life estate in the property.

There is before us a photostatic reproduction of the deed in question showing the signature of Clara M. Donaldson which the chancellor had the opportunity to observe. The signature of Clara M. Donaldson on the deed is in a firm, clear hand. It has none of the waverings in the letters or lines that we might expect to be present in a person mentally and physically distressed at the time of the signing but is a clear, bold signature that bespeaks neither uncertainty or fear and is a mute witness but eloquent testimony which tends to sustain the testimony of the attorney that she was fully competent.

The proof before the chancellor fails to show undue influence or lack of mental capacity at the time the deed was executed. The chancellor so found and the decree in this cause is accordingly affirmed.

JOHNSON, J., dissents.

LOUISIANA-NEVADA TRANSIT CO. *v.* OZAN LUMBER CO.

5-2736 360 S. W. 2d 120

Opinion delivered September 17, 1962.

Weisenberger & Wilson, by *John L. Wilson, Moses, McClellan, Arnold, Owen & McDermott,* by *James R. Howard,* for appellant.

Tompkins, McKenzie & McRae, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Ozan Lumber Company, instituted an action for damages against appellant, Louisiana-Nevada Transit Company, and F. S. McGee. The action was filed as the result of a fire alleged to have been caused by the negligence of appellant and McGee, the fire resulting in damage to timber land owned by Ozan. The Circuit Court, sitting as a jury, awarded judgment against Louisiana-Nevada and McGee in the amount of $2,388,[1] and apportioned the negligence as 80% to appellant and 20% to McGee. From the judgment so entered, Louisiana-Nevada brings this appeal.[2] For reversal, appellant asserts first, that the acts of its employees were not the proximate cause of the damages suffered by appellee, and second, that there is no substantial evidence supporting the findings that the transit company was responsible for 80% of Ozan's damages.

[1] The amount of judgment is not questioned in this appeal.

[2] McGee has not appealed, and the judgment, as to him, has already become final.

Appellant owns and operates a pipe line which traverses lands owned by Ozan. The line is buried from 18 to 24 inches below the surface of the ground, and pressure on the line varies from 250 to 400 pounds per square inch. Louisiana-Nevada entered into an oral contract with McGee for the cleaning of the right-of-way, which was overgrown with brush, weeds, and grass, and the company agreed with McGee that its employees would precede his operations, and mark all connections and protrusions upon the line, in order that McGee's bulldozer operator would avoid striking them.

McGee commenced work under the contract, starting at Cotton Valley, Louisiana, and working northward. A large diesel powered bulldozer, equipped with a nine-foot steel blade, was used, and the right-of-way was cleared to a width of eighteen feet.[3] Connections on the line were located both above and below the ground, and on each day prior to September 12, 1960, an employee of the transit company preceded McGee's employees, marking all connections and danger areas on the line, both above and below the ground. The markings were accomplished by placing a red flag on a stick, or by a transit company employee standing on the connection and waving off the bulldozer operator. The latter, when coming to a marked connection, would go around it. Appellant company possessed a map of the line, prepared by its engineers, which supposedly pointed out all connections on the line, both above, and below, the ground.

B. Bullock, foreman for McGee, testified that Hale Bowden, district superintendent of Louisiana-Nevada Transit Company, told him there were no connections in the area worked on September 12th; that this was the only day that appellant company did not have an employee present, and engaged in marking. On that date, the bulldozer struck a connection and broke it off. The broken valve then released gas, and fire immediately broke out. McGee's employees were unable to extinguish the fire until Bowden came out and cut off the gas. After arriving, it

[3] Accomplished by making two trips.

took Bowden at least an hour to accomplish this task, and fire burned over and damaged approximately five acres of timber land belonging to appellee. An employee of the transit company "beat out" the fire, and poured some water on the burning stumps. No fire lane was plowed around the burned area by either appellant's employees or those of McGee. In fact, no further steps of any nature were taken to ascertain that the fire had completely ceased burning, or to insure against its recommencement. The whole area was left unattended, following repair of the line, completed about one o'clock in the morning. The next day, aided by a strong wind, the fire broke out again, and burned over additional large portions of Ozan's land. It was extinguished around six o'clock of the evening of the second day, by forest rangers.

Appellant contends that it is not liable, because its failure to mark the location of the valve was not the proximate cause of the fire, but rather that the proximate cause was the breaking of the connection, and this last was due to the manner in which McGee's employee operated the bulldozer. Appellant company asserts that it was only obligated under the contract to mark connections on the surface of the ground;[4] that McGee's dozer was only supposed to scrape along the surface, or not more than an inch or two beneath; that actually, the dozer dug down ten or twelve inches, thereby hitting the valve, which was about eight inches beneath the ground. The superintendent admitted that he told McGee's employees that they would encounter no trouble on September 12th (when no company man was present marking the connections), but he testified that this statement was based on the fact that the bulldozer was only due to scrape the surface, rather than to cut down into the earth. Bullock, McGee's employee, testified that when Bowden told him there was "clear sailing", he took it to mean there was no danger ahead, either above the ground, or below it. McGee and his em-

[4] Mr. Bowden testified that it was not his duty to point out any connections under the ground unless it was a dangerous area, for instance, where the ground was boggy, or contained big rocks which, in being moved, could break a valve. The area where the valve was broken was not of that type.

ployees denied that the blade dug into the ground, but the court found that this did happen.

However, the fact that McGee's driver operated the bulldozer in an incompetent or negligent manner, does not relieve appellant company of liability. Though Mr. Bowden stated that he was only required, under the contract, to mark all connections on the surface of the ground, his actions, and other portions of his testimony, somewhat indicate to the contrary. He testified that the company had prepared a map of its line, supposedly showing all connections, both above and below the ground. He stated that the map did not show this particular valve, and he did not know that this valve was underground at the location. Mr. Bowden testified that the engineer who prepared the map simply missed that particular valve. The witness admitted that, in preceding McGee's working crew, he marked every connection of which he had knowledge, whether on the surface, or under the ground. From the testimony:

"Q. Mr. Bowden, as I understand it, what you were actually doing, you were marking all connections that you knew of?

A. That's right.

Q. Whether they were above ground or below ground?

A. That's right.

Q. In doing that on below-ground connections, you had a map of the pipeline, is that correct?

A. Yes, sir.

Q. And that map supposedly showed—

A. That's right.

Q. —all of your connections on the line?

A. That's right.

Q. But your map didn't show this particular connection?

A. That's right.

Q. So for that reason you did not mark it?

A. That's right.

Q. I think you answered this question indirectly, but let me ask you directly. Had you known the existence of this connection, would you have in the ordinary course of your duties out there notified Mr. McGee's employees?

A. I sure would."

Further:

"Q. That, of course, was a highly dangerous pipeline, if broken?

A. Yes, sir.

Q. Every connection on that pipeline was a potential danger spot, was it not?

A. Any place—any connection that is welded on is a danger spot, for machinery.

Q. It is a danger spot?

A. Yes, sir.

Q. That is the reason you mark them on the map, is it not?

A. Yes, sir.

Q. And the purpose for which you keep that map is to mark those danger areas?

A. That's right.

Q. And whoever had charge of the map at the time this particular connection was installed apparently simply missed putting it on there, is that right?

A. Yes, sir."

The testimony is in dispute between McGee and Bowden as to whether all connections were to be marked, or only those above the surface of the ground, but it would appear from the custom that had been followed on the days preceding September 12th, that McGee's employees were justified in thinking that all valves were to be marked. At any rate, it definitely appears, even from Bowden's own

testimony, that the cleaning operation, involving the possibility of machinery coming into contact with a welded connection, was dangerous, and it is obvious that the company considered even the underground connections a dangerous area, because it marked them on the map. Appellant cites authorities which deal with intervening causes (contending that the negligent operation of the dozer was the sole and actual cause of the fire). We do not agree that these cases are applicable. Rather, the fire, and the resulting damage occurred from the concurring acts of each. There is substantial evidence that both appellant and McGee were negligent, and that such negligence on the part of each was a proximate cause of the fire and resulting damage to Ozan's property. Appellant failed to mark a dangerous area—McGee operated the dozer carelessly and negligently. Of course, if McGee had not struck the connection, there would have been no fire, but, on the other hand, if McGee had been warned of the valve in that particular area, the driver would have gone around, and thus avoided striking it. See *Temple Cotton Oil Co.* v. *Brown,* 192 Ark. 877, 96 S. W. 2d 401. In addition, both were obviously negligent in permitting the fire to break out a second time, having taken no precautions to prevent this occurrence. This second fire caused even more extensive damage. We find no merit in appellant's contention.

Appellant company complains, in the alternative, that the court committed error in apportioning the negligence between it and McGee. The company stoutly asserts that there is nothing in the record to indicate that it was more at fault in causing the fire than McGee. Of course, it is immaterial whether this Court actually agrees with the apportionment arrived at by the Circuit Court. Just as we are not permitted to substitute our judgment for that of a jury, we likewise are not permitted to substitute our own opinion for that of the trial court sitting as a jury. We are only concerned with whether there was substantial evidence to support the judgment rendered. There is no question of law involved; rather, the question of the degree of liability assessed to each defendant is, in this instance,

purely a question of fact. We think there was substantial evidence, as heretofore set out, to support the findings of the trial court. While that court did not give its reasons for the manner of apportioning the overall degree of negligence, it is true, as pointed out by appellee, that had the transit company taken only one precaution, *viz.*, marking the connection in question, the fire would not have occurred.

Finding no error, the judgment is affirmed.

MR. JUSTICE MCFADDIN not participating.

CITY OF LITTLE ROCK *v.* GARNER.

5-2738 360 S. W. 2d 116

Opinion delivered September 17, 1962.

Joseph C. Kemp, City Attorney, by *William M. Stocks,* Asst. City Atty., for appellant.

Barber, Henry, Thurman & McCaskill, by *Guy Amsler, Jr., Holt, Park & Holt,* by *Jack Holt, Sr.* and *Conley Byrd,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a zoning case. Appellee Garner owns, either directly or through options to purchase, a tract of approximately six acres abutting Cantrell Road (State Highway No. 10) in the western part of the City of Little Rock. The tract has a frontage of approximately 530 feet on the highway, and an average depth of approximately 650 feet; and Mr. Garner desires to develop the tract into a modern shopping center. Three of the Garner lots fronting on Cantrell Road have already been zoned as "F" Commercial; but the remainder of the tract is zoned as "A" One-Family District.[1] After several hearings, as hereinafter to be mentioned, the City Board of Directors of Little Rock denied the application for rezoning. Garner then filed complaint in the Chancery Court and, after a thorough hearing, the Court granted Garner his prayed relief—*i.e.,* the City was enjoined from denying Garner's right to use the tract for "F" Commercial purposes. The City prosecutes this appeal, presenting, *inter alia,* the matters herein discussed.

I. *The Court's Right To Reverse The City's Decision.* Appellant, in urging that this Court should reverse the Chancery Decree and reinstate the action of the City Board of Directors, claims that reasonable minds might differ as to the rezoning; and since there might be difference of opinion, no court should overrule the decision of the City Board of Directors and substitute its opinion for that of the administrative body. This argument necessitates a brief review of the applicable zoning procedure. A landowner applies to the City for rezoning; the application goes to the Little Rock Planning Commission, which studies the application and makes a decision or a recommendation to the City Board of Directors; and the City Board of Directors acts on the application by either grant-

[1] The Zoning Ordinance of the City of Little Rock lists thirteen "Districts", as follows: "A" One-Family District; "B" Residence District; "C" Two-Family District; "D" Apartment District; "E" Apartment District; "E-1" Quiet Business and Institutional District; "F" Commercial District; "G" Commercial District; "G-1" Commercial District; "H" Business District; "I" Light Industrial District; "J" Light Industrial District; and "K" Heavy Industrial District. The name of each lettered district tells the use to be made of property in such district.

ing or refusing it, returning it to the Planning Commission, or by other appropriate action. If—as here—the City Board of Directors finally refuses the application for rezoning, then the property owner, having exhausted his administrative remedies, files—as here—a petition in the Chancery Court, alleging that the refusal of the City to rezone is arbitrary and amounts to depriving the landowner of the use of his property for its best purposes.[2]

The Chancery Court hears the case and decides whether the action of the City was arbitrary. In that trial, the burden, of course, is on the landowner to prove his allegations by the preponderance of the evidence; and if the evidence makes a mere question of whether the chancery court thinks it would be fairer to rezone the property, then, of course, the Chancery Court does not substitute its opinion for that of the City.[3] But when—as here—the Chancery Court finds from the preponderance of the evidence that the City acted arbitrarily in refusing the application for rezoning, then, on appeal to this Court, it is a question of whether the Chancery Court finding is contrary to the preponderance of the evidence. That is the question next to be considered, and we have gone into this point in some detail because appellant has urged that there is confusion in the language of some of our cases. Isolated sentences lifted out of context might indicate confusion; but we think a careful study of the cases will show the statements herein to be the governing rules. We

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[2] Some cases in which such allegations were made and sustained are:
City of Little Rock v. *Henson*, 220 Ark. 663, 249 S. W. 2d 118; and *City of Blytheville* v. *Lewis*, 218 Ark. 83, 234 S. W. 2d 374.

[3] This was all discussed in *Herring* v. *Stannus*, 169 Ark. 244, 275 S. W. 321, wherein we said:

"This was a question about which reasonable minds might differ, and did differ sharply as reflected by the testimony in the case, and the ordinance constituted the council as the tribunal to pass upon this question. . . . 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. *North Little Rock* v. *Rose*, 136 Ark. 298; *Pierce Oil Corp.* v. *Hope*, 127 Ark. 38.

"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. This we are unable to say."

reiterate what we said in *Little Rock* v. *Henson,* 220 Ark. 663, 249 S. W. 2d 118:

"In the recent case of *City of Little Rock* v. *Hocott, ante,* p. 421, 247 S. W. 2d 1012, it is said: 'We have uniformly upheld the finding of the Chancellor on the question as to whether the classification of property by zoning authorities is unreasonable and arbitrary where such finding is supported by the preponderance of the evidence.' Citing *City of Little Rock* v. *Sun Building & Development Co.,* 199 Ark. 333, 134 S. W. 2d 582; *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446."

II. *Arbitrary Action Of The City.* The Chancery Court found that the City had acted arbitrarily in refusing Garner's application for rezoning, and our problem is to decide whether such finding is against the preponderance of the evidence. A review of the record before us shows the following:

(a) Garner applied to the City on November 15, 1960 for rezoning from "A" One-Family District to "F" Commercial District all of the tract in question that was not already "F" Commercial. The City Planning Commission, after several delays,[4] voted in March, 1961, that the petition for rezoning be denied.

(b) Mr. Garner carried the matter to the City Board of Directors; and on April 3, 1961 it was voted to return the Garner application to the Planning Commission for further study.[5]

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[4] In December 1960 the Planning Commission deferred action for a "staff study"; in February 1961 the study was filed but no action taken; and in March 1961 the Planning Commission voted to recommend denial of Mr. Garner's application.

[5] The minutes of the City Board of Directors contain the following regarding the Garner application:

"Upon question by members of the Board of Directors, Mr. Julius Breckling, Planner, stated that the Petition had been denied after it was determined from the Zoning Study and Report made by the Staff of the Little Rock Planning Commission of the area in general, that there was sufficient property zoned as Commercial property in this area which was not being utilized for this purpose. Mr. Joseph Kemp, City Attorney, advised members of the Board of Directors that in an earlier court suit in Supreme Court, it had been determined that under Zoning Laws in the State, if a particular piece of property is requested for rezoning to Commercial District, and said property is abutting or adjoin-

(c) On May 11, 1961 the Planning Commission again voted to deny Mr. Garner's application, giving nine reasons for such denial.[6]

(d) The application for rezoning again went to the City Board of Directors, where, after a series of hearings, the matter was, on July 5, 1961, returned to the Planning Commission. The minutes of the City Board of Directors on this point are as follows:

"Director Winburn stated that the members of the Planning Commission had not reviewed this Development Plan showing Parking Plans and Traffic Patterns which had been submitted by Mr. Garner, and made the follow-

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ing property used as business property, it can be extended and not be denied if proposed use of property is not obnoxious and conforms to other regulations. Upon question by Director Morse, as to what amount of a proposed business building on the property was leased, Mr. Garner indicated that he had signed leases for approximately seventy-five percent of the total square footage of the building. After lengthy discussion on the matter, Director Winburn moved, that the Petition of Mr. Garner for rezoning of this property to 'F' Commercial District be referred to the Planning Commission for prompt reconsideration and study, so as not to delay applicant unnecessarily. This motion was seconded by Director Morse, and adopted. . . ."

[6] There nine reasons are quite interesting.

"1. This property is not adjacent to an established business district, nor has business been established on the lots zoned 'F' Commercial adjacent to this property.

"2. The only satisfactory access presently available is from Highway No. 10, and the establishment of commercial uses on this property would create traffic hazards, during the busy time of the day in this vicinity. If future streets were extended to the South from this subdivision, heavy traffic would be extended into a most desirable residential district.

"3. The land is suitable for other uses and has a most desirable view.

"4. To rezone this property would result in an extension of strip zoning along Highway No. 10.

"5. The land slopes sharply to the rear and would not provide a one level commercial development, the commercial development would be encroaching, however, on a future desirable residential area.

"6. There is ample undeveloped 'F' Commercial property along Highway No. 10 that is located in a much more logical place for the development of districts. This was reflected in the Highway No. 10 Zoning Commercial Study prepared by the staff and Metroplan earlier this year.

"7. This would be the establishment of a new business district with a total area much larger than the total business development in its vicinity.

"8. The applicant for this rezoning request made little effort to justify the rezoning of this property, nor was a market analyses submitted.

"9. The City Attorney's office has advised the Commission that the denial of this rezoning petition, if appealed to the court would be defensible."

ing motion: 'I hereby move that the Petition of D. H. Garner to the Board of Directors asking that certain property along the south side of Highway No. 10 in the City of Little Rock be rezoned from Residential to "F" Commercial be returned to the Little Rock Planning Commission with the request that said Commission review the site plan and all covenants to furnish improvements in connection with the proposed use of said property should it be rezoned. Further, that said Planning Commission furnish the Board of Directors its recommendations on said Petition after study of all matters in relation thereto.' This motion was seconded by Director Blankenship. A roll call was then had on the motion, the result being as follows: Ayes—Directors Winburn, Brown, Blankenship, Morse, and Mayor Knoop—total 5; Noes—Directors Hewitt and Steinkamp—total 2; Absent—none."

(e) The application thus went back to the Planning Commission from the City Board of Directors, the minutes of which, as above copied, reflected that the members of the Planning Commission had not reviewed this development plan, as submitted by Mr. Garner; and yet, on July 6, 1961 (the next day after the Board of Directors' action), the Planning Commission again denied the Garner application, with assigned reasons similar to the nine heretofore copied.

(f) On July 17, 1961, the City Board of Directors finally voted to deny the Garner application for rezoning; and this suit was filed on July 21, 1961.

We have sketched the proceedings in considerable detail in order to show how the Planning Commission assigned first one, and then another alleged reason for refusing Garner's application; and in the trial in the Chancery Court, the City pursued the same tactics. For instance, it was practically conceded by some of the City's witnesses that the Garner property could not be used for "A" One-Family purposes; and the City sought to show that the best possible use of this property was "E-1" Quiet Business District, or "D" Apartment District. "E-1" Quiet Business, includes doctors' offices, clinics,

insurance offices, or any office buildings; and "D" Apartment means a multiple apartment house.

When it was shown by competent witnesses that these uses for the property had been explored and found unfeasible and financially impossible, the City then claimed that the proposed shopping center would create a traffic hazard on Cantrell Road; and this testimony was in the face of testimony that property abutting on Cantrell Road for a distance of a quarter mile west (away from Little Rock) was already zoned as "F" Commercial, and that the property east of and adjacent to the Garner tract was likewise zoned as "F" Commercial; and the Garner tract was almost an island of residential property with "F" Commercial property lying to the east and west of it. It was furthermore shown that the Garner tract could not be used to advantage for residential property, and that the refusal to allow it to be rezoned as "F" Commercial for a shopping center would amount to depriving the landowner of the use of his property, which already bore a commercial valuation assessment on the tax books.

Without detailing all of the evidence, it is sufficient to say that it clearly preponderates in favor of the Chancery Decree, which finds:

"That the aforesaid property lies on and is adjacent to Highway No. 10, and that most of the property in the vicinity along said highway, both to the east and to the west of plaintiff's property, is either zoned or used 'F' Commercial, or both; that said property is undesirable for residential purposes but that it has a high value for commercial purposes, and that its intended use for a community shopping center will not adversely affect the use or value of residential property in the vicinity.

"That the City of Little Rock . . . in refusing to classify the (Garner) property for zoning purposes as 'F' Commercial, is arbitrarily depriving the plaintiff of the use of his property."

The decree of the Chancery Court was correct and is in all things affirmed.

HENSLEE *v.* BOYD.

5-2645 360 S. W. 2d 505

Opinion delivered September 17, 1962.

[Rehearing denied October 22, 1962.]

Jay W. Dickey and *Gerland P. Patten,* for appellant.

Gregory & Claycomb, for appellee.

GEORGE ROSE SMITH, J. This suit is the outcome of an unsuccessful venture in which the appellant F. Brooks Henslee and the appellee H. Eugene Boyd attempted to engage as partners in the wholesale and retail lumber business. The enterprise was heavily indebted from the outset and lasted for only about three months. Thereafter Boyd brought this suit for a rescission of the partnership contract, asserting fraud in its inducement and a subsequent failure of consideration. The chancellor set aside the contract on the second ground and in effect

directed Henslee to repay everything that Boyd had invested in the venture. The basic question is whether the decree is supported by a preponderance of the evidence.

The partnership was formed on June 2, 1960. Before that time Henslee had been engaged in the same business by himself, near Pine Bluff. His assets included a sawmill, a planing mill, a dry kiln, rolling stock, and miscellaneous equipment. The outstanding indebtedness consisted of a $25,000 mortgage on the sawmill and other property, payable to the Benton State Bank, a $17,000 mortgage on the dry kiln and rolling stock, and about $10,000 owed on various open accounts.

Some years earlier Eugene Boyd, the appellee, had been connected with the sawmill business in Alabama, but in May of 1960 he and his wife had a gift shop in New Mexico. In the latter part of that month Eugene and his brother Barney were in Arkansas seeking to buy timber for a sawmill that Barney owned in Alabama. They heard the Henslee mill in operation near the highway and stopped to ask about the availability of standing timber in the vicinity.

Henslee told them that he had both timber and a mill for sale, as he was not a sawmill man and would like to sell out. It was at first thought that the Boyds would buy the entire business, and a gross value of $70,000 was eventually agreed upon. Barney, however, decided not to enter the transaction when Henslee was unwilling for him to have a weekly drawing account of more than $75 while the purchase price was being paid. After further discussion it was agreed that Henslee would sell a half interest to Eugene Boyd and go into partnership with him. The Boyds returned to Alabama so that Eugene could raise the money for his down payment.

On June 2 Henslee and Eugene Boyd met at the office of a Pine Bluff attorney, where a contract of sale and a contract of partnership were prepared and signed. The two instruments were executed together, in the course of the same transaction, and should be considered as a single contract not only in the matter of interpretation, *Gowen* v.

Sullins, 212 Ark. 824, 208 S. W. 2d 450, but also, we think, in the determination of whether rescission is proper.

By the first contract Henslee sold Boyd a half interest in the assets of the business. The agreement recited the valuation of $70,000 and provided that the partnership would assume the $17,000 mortgage and $5,000 of the open accounts, leaving a net worth of $48,000. For his half interest Boyd was to pay a total of $12,000 in cash within sixty days and execute six notes, due semiannually, for the other $12,000. Boyd duly made the cash payments and executed the notes.

The partnership agreement declared that the parties would engage in the lumber business as equal partners, devoting such time and attention to it as should be necessary. Paragraph 7, after referring to an inventory of 80,000 board feet of finished lumber that was owned by Henslee individually, provided that the partnership might sell this lumber to raise operating capital, but the lumber so sold would be replaced within two years.

Paragraph 8 recited that the $25,000 mortgage debt to the Benton State Bank was to be Henslee's personal obligation and would be paid by him "within such reasonable time as is practicable." It was further stated that Henslee would use all the purchase price in excess of the first $5,000, and also any available profits, toward the satisfaction of the bank mortgage. The proof shows that Henslee did not in fact apply Boyd's cash payments immediately to the mortgage debt. Henslee treated the money as his own and at once used $2,500 of it to buy a tract of timber for the partnership. The rest he applied partly to debts and expenses of the partnership and partly to his own personal debts. On September 16, 1960—eleven days after the partnership ceased to be active—Henslee made a payment of $19,000 upon the bank mortgage, reducing its balance to $6,000. This suit was filed a month later, on October 19.

Boyd and his brother testified that in the course of the oral negotiations Henslee said that he would use the cash payments made by Boyd to reduce the bank mort-

gage and that he would also discount Boyd's purchase-money notes and use the proceeds for the same purpose. The Boyds state that Henslee represented that in this way the bank would be paid in full and the sawmill could be mortgaged by the partners to raise operating capital. Boyd attributes the failure of the undertaking to a shortage of operating capital with which to purchase saw logs for the mill.

The chancellor held the Boyd brothers' testimony to be admissible, despite the parol evidence rule. In granting a rescission of both contracts the trial court relied solely upon the fact that Henslee did not promptly apply the purchase money (in excess of the first $5,000) to the payment of the bank mortgage. The chancellor thought this breach of contract to be so material as to amount to a failure of consideration, entitling Boyd to complete restitution.

We lay aside the admissibility of the Boyds' testimony, for we have concluded that even if this proof is considered to be admissible no failure of consideration has been shown. Failure of consideration does not mean, of course, that the agreement was invalid in its inception for lack of consideration. Instead, the phrase means that after the formation of the contract one party so materially defaults in the performance of his promise that the other party is excused from the duty to perform and may, in a proper case, obtain rescission. Corbin on Contracts (1950 Ed.), § 133. Failure of consideration may result not only from complete default but also from a protracted delay in performance. Rest., Contracts, §§ 273 (2) and 276. In chancery the amount of delay that will be condoned varies with the equities of the case. Williston on Contracts (Rev. Ed.), § 852.

We are not convinced that Henslee's delay in making his $19,000 payment to the bank was a material factor leading to the collapse of the venture. By the letter of the contract Henslee was required to apply $7,000 of the cash payments toward satisfaction of a $25,000 mortgage. There is no suggestion that such a small payment would

have brought about a release of the lien. And if Henslee had carried out his alleged oral promise to discount the notes as well, he could not have raised as much as an additional $12,000, leaving a substantial balance still owing to the bank. Henslee actually made from his own funds a payment of $19,000 in September. The record does not support the conclusion that the firm's insolvency would have been avoided if this payment had been made earlier—even at the inception of the partnership.

With many circumstances to be considered we cannot say with assurance that one partner rather than the other was primarily responsible for this business failure. Neither man professed to be a skilled sawmill operator when the partnership was formed. From the beginning the concern was heavily indebted and suffered continually from a lack of sufficient funds to meet its day-to-day expenses. Boyd neglected the business to some extent, being gone for about 37 days in the course of making two extended trips to New Mexico upon personal missions and about five trips to Alabama in search of some one to buy Henslee's remaining half interest. The last straw was apparently a decline in the local demand for lumber, which left the struggling young firm without a dependable market for its production. All in all, the weight of the evidence does not persuade us that Henslee was so exclusively at fault that he should bear the entire loss.

The chancellor made no finding upon the charge of fraud, but Boyd relies upon this issue as an alternative basis for rescission of the contracts. This contention is without merit.

The partnership agreement recited that Henslee would sell to the partnership, as needed, timber growing upon lands owned by him and his wife, at prevailing market prices. The Boyds testified that Henslee orally represented to them that he owned from three to five million feet of standing timber, when in fact a subsequent cruise disclosed his ownership to be only about half a million feet. It is insisted that the venture would not have failed if Henslee had owned all the timber he claimed and had been willing to sell it to the partnership.

The record does not support the assertion that Henslee violated his obligation to sell timber to the firm. It is true that he declined to sell, but the reason was that the concern was unable to pay for the timber. There was no duty on Henslee's part to make a credit sale, and, as we have already indicated, we do not consider Henslee to have been culpably responsible for the partnership's lack of ready cash. Since the firm was never in a position to buy even a substantial part of the timber that Henslee did own, the fact that he did not own a great deal more is immaterial. As a matter of fact, the shortage of saw logs was not nearly so acute as the appellees would now have us believe; for Eugene Boyd in substance admitted on cross examination that the tracts of timber purchased by Henslee for the partnership pretty well kept the sawmill busy from June 2 until the latter part of August. There are other minor charges of fraud, but we do not find them to be well founded.

The appellees' complaint for rescission contains an alternative prayer asking the court to dissolve the partnership and wind up the business. A similar request is made in the appellants' answer. In our view this is the proper action to be taken, and the cause will be remanded for that purpose.

Reversed.

CAMPBELL *v.* WAGGONER, JUDGE.

5-2712 360 S. W. 2d 124

Opinion delivered September 17, 1962.

House, Holmes, Butler & Jewell, for appellant.

J. B. Reed, for appellee.

PAUL WARD, Associate Justice. The essential facts in this case are brief and undisputed.

Ed Campbell, d/b/a Campbell Rides, is an employer who has complied with all the provisions of the Arkansas Workmen's Compensation law. One of his employees, Larry Benafield (a minor), was injured while in the petitioner's employment because of the negligence of a fellow employee. Suit was filed in circuit court by Charles Benafield in his own right and for his son, Larry, against petitioner to recover damages for said injuries in the amount of $2,600.

The complaint alleged that said fellow employee was a third person within the meaning of Workmen's Compensation law. All the above facts were contained in the pleading or admitted before the trial court.

Petitioner presented to the trial court a motion for summary judgment and a dismissal of the complaint, based on the contentions that, as a matter of law, the Compensation Commission had exclusive jurisdiction of any claim arising out of the injury, and that the circuit court had no jurisdiction to try the alleged cause of action.

The trial court denied the motion and refused to dismiss the complaint, and Campbell has petitioned for a writ prohibiting the respondent from trying the case.

1. Under the admitted facts in this case the circuit court had no jurisdiction to try Benafield's claim against petitioner for injuries caused while working as his employee. The exclusive jurisdiction to entertain such claim rests in the Workmen's Compensation Commission. Section 81-1304 of Ark. Stats. reads as follows: "The rights and remedies herein granted to the employee . . . on account of injury . . . shall be exclusive of all other rights and remedies of such employee. . . ." The above

statute has been consistently construed by this Court to mean just what it says. See: *Young, Administrator* v. *G. L. Tarlton, Contractor, Inc.,* 204 Ark. 283, 162 S. W. 2d 477; *Odom* v. *Arkansas Pipe and Scrap Material Co.,* 208 Ark. 678, 187 S. W. 2d 320; *Hagger, Administratrix* v. *Wortz Biscuit Co.,* 210 Ark. 318, 196 S. W. 2d 1; *Barth* v. *Liberty Mut. Ins. Co.,* 212 Ark. 942, 208 S. W. 2d 455. In none of these decisions or in any other has this Court made an exception where the injury was caused by the negligence of a fellow employee. In the *Odom* case, at page 681 of the Ark. Reports, the following statement is found:

"By adoption of Amendment Number 26 to the constitution the people of this state authorized the Legislature to enact the Workmen's Compensation Law. *Young* v. *G. L. Tarlton,* 204 Ark. 283, 162 S. W. 2d 477. The law is plain and unambiguous. Its purpose and effect was to substitute, as to employment embraced within its terms, the liability created by it for any and all liability of the master arising from the death or injury of his servant. 'The remedies provided by Act No. 319 of 1939 (Workmen's Compensation Law) are, unless the employer fails to secure the payment of compensation as required by the Act, exclusive.' "

It necessarily follows that the circuit court had no jurisdiction to try the cause of action alleged in the complaint and it should have been dismissed.

2. The respondent does not question the remedy pursued here by the petitioner, and rightly so. In the *Young* case, *supra,* we said the complaint in circuit court should have been dismissed, and so ordered. Where the trial court has no jurisdiction to try a cause of action and attempts to do so, prohibition is the proper remedy. See: *Norton* v. *Hutchins, Chancellor,* 196 Ark. 856, 120 S. W. 2d 358; *Pacific Mutual Life Insurance Company* v. *Toler, (Judge)* 187 Ark. 1073, 63 S. W. 2d 839. Since there were no questions of fact to be passed on by the trial judge (the respondent here) and no matters calling for the exercise of his discretion, he should have granted petitioner's motion and should have dismissed the complaint.

Nothing we have said herein is to be construed to prevent Benafield from maintaining an action in circuit court against a negligent fellow employee. See: *King* v. *Cardin,* 229 Ark. 929, 319 S. W. 2d 214.

The petition is granted.

DUNCAN *v.* MANES.

5-2739 360 S. W. 2d 128

Opinion delivered September 17, 1962.

George D. Hester, for appellant.

Marion S. Gill, for appellee.

SAM ROBINSON, Associate Justice. The issue is whether the traveling public has acquired by prescription, an easement over a strip of land about one fourth mile long used by the public as a road. The one fourth mile road in question runs over land belonging to appellants, Rosie Duncan and Oscar Edwards.

Appellees, Kizzie Manes and Mack Grover Robinson, filed this action alleging that the public had used the strip of ground in question as a road for over 60 years; that plaintiffs "have used said road openly, continuously, adversely, notoriously, and under a claim of right for more than seven years". It is further alleged that defendants plowed up the ground, and plaintiffs asked that an injunction be issued enjoining defendants from obstructing the road.

Upon a trial on the merits, the Court granted the injunction and the owners of the fee have appealed.

The preponderance of the evidence sustains the Chancellor's finding that the public had established an easement over the strip of ground by prescription. It is shown that the road has been used by the public for 50 years. At one time there were fences on each side of the road, but they were removed many years ago and the adjoining land has been in cultivation for about 30 years. The first time any owner of the fee objected to anyone using the road was in October, 1961.

It is necessary for appellees to use the road to get to their property. At certain times of the year they can reach their land by no other road. It was shown that appellee Robinson, and other members of the travelling public, have worked and maintained the road for many years. They built culverts, filled holes, opened ditches, and placed some gravel on the road. In fact, it appears that they did some work on the road along with Edwards, one of the appellants.

In *Bullioun* v. *Constantine,* 186 Ark. 625, 54 S. W. 2d 986, it was pointed out that an easement may be established by prescription, but where it is across uninclosed property it will be deemed to be by permission of the owner and not adverse to his title. The Court also pointed out that "those using a private way over uninclosed lands may, by their conduct, openly and notoriously pursued, apprise the owner that they are claiming the way as of right, and thus make their possession adverse."

The evidence shows that the appellees did use the road in such manner as to give notice to the owners that they were claiming the way as a matter of right. As heretofore mentioned, in addition to the public use of the road for about 50 years, the appellees worked the road, hauled dirt and gravel, provided drainage, filled holes, and installed culverts for a period of more than seven years.

The nature of the use of the road was sufficient to give appellants notice of the asserted right and to establish the easement by adverse possession. *Ayres* v. *Stuckey,* 212 Ark. 847, 208 S. W. 2d 166.

Affirmed.

PORTER *v.* HESSELBEIN.

5-2724 360 S. W. 2d 499

Opinion delivered September 17, 1962.

[Rehearing denied October 22, 1962.]

Phillip H. Loh and *U. A. Gentry,* for appellant.

Felver A. Rowell, Jr. and *Gordon & Gordon,* for appellee.

Dissenting opinion attached.

JIM JOHNSON, Associate Justice. This case involves an election contest. Appellant Porter, Appellee Hesselbein and Homer Gray were candidates for the nomination of alderman of the Third Ward in the City of Morrilton in the Democratic preferential primary on July 25, 1961.

There were 605 votes cast. Hesselbein received 327 votes, Porter received 178 and Gray 100 votes. Hesselbein was thereafter certified by the county central committee as the Democratic nominee.

Porter filed suit against Hesselbein contesting the certification of vote and certification of nomination, relying upon the following portion of Initiated Measure of 1916, No. 1, § 12 [Ark. Stats. § 3-245]:

"A right of action is hereby conferred on any candidate to contest the certification of nomination or the certification of vote as made by the county central committee. . . . The complaint shall be verified by the affidavit of the contestant to the effect that he believes the statement thereof to be true, and shall be filed within 20 days of the certification complained of."

The complaint was filed within 20 days of the certification and verified, as provided in the statute, *supra*. The allegations of the complaint contest both the certification of the vote and the certification of nomination. (The complaint was filed within the 20 days, but on the day following the date for the general primary, which by statute is to be held 14 days after the preferential primary.)

On November 21, 1961, the contestee filed a motion to dismiss the complaint on the ground that the contestee had been elected alderman of the Third Ward in the general election and, by reason thereof, the court had lost any and all jurisdiction to award plaintiff any of the relief sought in his complaint. The motion was granted, from which comes this appeal.

For reversal, appellant contends that: (1) The court erred in holding that a candidate in a preferential primary (who does not allege that he received a sufficient number of votes to entitle him to a certificate of nomination) cannot contest the election, and in dismissing the complaint; and (2) The court erred in holding that the cause had become moot after the general election and in dismissing the complaint.

First we will consider the second point urged for reversal. Appellee cites two Arkansas cases in support of his contention that the cause is now moot. They are *Kays* v. *Boyd,* 145 Ark. 303 at 305, 224 S. W. 617, and *Cecil* v. *Cline,* opinion delivered March 5, 1962. The Kays case is a suit to reinstate a student suspended from the State Agricultural School for conduct unbecoming a gentleman. The trial court granted the prayer of the petitioner and ordered the Board of Trustees to restore the student to full scholarship, which was done. The Board of Trustees appealed to this court, and the school term lapsed while the appeal was pending. The court therefore found that a decision of the case could have no practical application to the controversy between the litigants, and dismissed the appeal of the Board of Trustees.

Cecil v. *Cline, supra,* is an election contest case. The appeal was dismissed as moot because the record clearly showed that the term of office over which the controversy arose had expired.

From the record in the case at bar, the term of office in controversy commenced January 1, 1962, and will not expire until December 31, 1963. With the state of the record being thus, *i.e.,* the term of office having not yet expired, we find that the cited cases have no bearing on the question here presented for our consideration. However we do find two sections of the Arkansas Statutes which have a great deal of bearing on the question. They are as follows:

"No person shall be declared the nominee of any political party for . . . municipal office unless such person shall have complied with every requirement of all laws applicable to primary and other elections *and has received a majority of all votes cast* at such primary election for all candidates for such office." Acts 1943, Ark. Stat. 3-201. (Emphasis ours).

"Should a proceeding (contest) . . . be not determined finally until after the election, and the defendant in such proceeding is elected to the office as the nominee of the party, and it is determined that he was not entitled

to the nomination, . . . then such judgment shall operate as an ouster from office, and the vacancy in it shall be filled as provided by law for filling vacancies in such office in case of death or resignation.'' Init. Measure of 1916, Ark. Stat. 3-253. (Insert ours).

From these sections of our statutes, we find that the people by an Initiated Measure have provided that a nominee for a municipal office must have received a majority of all votes cast at the primary election and further provided that in the event it is judicially determined even after success in the general election that such person was not entitled to nomination, such judgment shall operate as an ouster from office. This being true, we have no choice but to conclude that the cause is not moot.

See generally, *Higgins* v. *Barnhill,* 218 Ark. 466, 236 S. W. 2d 1011.

The remaining point urged for reversal presents a case of first impression in this jurisdiction. As stated above, appellant contends that the trial court erred in holding that a candidate in a preferential primary (who does not allege that he received sufficient votes to entitle him to a certificate of nomination) cannot contest the election. It is true that the case of *Hill* v. *Williams,* 165 Ark. 421, 264 S. W. 964, and *Story* v. *Looney,* 165 Ark. 455, 265 S. W. 51, and the line of cases following them are authority for the rule that Initiated Measure of 1916, No. 1, § 12 [Ark. Stat. 3-245] *supra* ''. . . confines the right of contest to a candidate at the primary election, . . . who claims to be the rightful nominee.'' If for no other reason than to avoid a multitude of suits and lend some stability to our election laws, we agree that this is a salutary interpretation of the 1916 Initiated Measure and should under proper circumstances be followed. If the question presented for our consideration merely involved an application of this established rule, our task would be simple indeed. Unfortunately this is not the case. In 1943 the Legislature amended our election laws and provided as follows:

"Whenever any political party in this State shall, by primary election, select party nominees as candidates at any general (regular or special) election, for any . . . municipal office, said party shall hold a preferential primary election on the day two (2) weeks prior to said general primary election, which preferential primary shall be conducted according to the law prescribed for conducting the general primary election in this State." Acts 1943, Ark. Stat. 3-210.

With the enactment of this law providing for a preferential primary it is engrafted upon our existing election laws, such as they are, and becomes a part thereof. Now for the first time since the adoption of the 1943 Act, this court is presented with the question of whether a duly qualified candidate for a municipal office can properly contest an election while, under the facts, he cannot honestly allege that he received a sufficient number of votes to entitle him to a certificate of nomination, but instead does allege *inter alia* that when the election returns are purged of the enumerated illegal votes it would be shown that such candidate should be certified as a candidate in the run-off or general primary election. Certainly the right of a candidate to be in a run-off or general primary for nomination to public office is a valuable right. While such right may not be as valuable as the right to be certified as the nominee, it is nonetheless a valuable right and in our view should not be denied. If the allegations of appellant's complaint are judicially found to be true, appellee is presently holding office without having received a majority of the votes cast in the primary election, contrary to the prohibitions of the statute providing that no person shall be declared to be the nominee unless such person has received a majority of all votes cast. Ark. Stat. 3-201, *supra.* It would necessarily follow, in such an event, that the provisions of Ark. Stat. 3-253, *supra,* would operate as an ouster from office. As in all election contest cases in which the contestant prevails subsequent to the general election and after the contestee has been sworn into the office in question, success in the contest may not personally benefit the contestant, but to deny

a contestant, because of this, the right, in a proper case, to contest an election would be a denial of a right which in most cases is precious to the contestant and of inestimable value to the general public in the maintenance of the democratic processes. Therefore it is our view that the Legislature by the enactment of Act 238 of 1943, *supra,* providing for a preferential primary election has given a candidate in such preferential primary, as a matter of public policy, the right to contest such election upon the proper allegations of entitlement to be certified as a candidate in the run-off or general primary election. To hold otherwise would effectively prohibit election contests in preferential primaries regardless of the skulduggery which might be employed in the conduct of an election. Accordingly, the order of dismissal is reversed and the cause is remanded for further proceedings consistent with this opinion.

HARRIS, C. J., and MCFADDIN and ROBINSON, JJ., dissent.

ED F. MCFADDIN, Associate Justice (Dissenting). I respectfully dissent from the reversal. The learned Trial Judge delivered a written opinion which is in the transcript, and to which I subscribe. I therefore use as my dissent the applicable portion of the written opinion of the Honorable Paul X. Williams, who was the Trial Judge in the case. It is as follows:

"C. L. Hesselbein, Fred Porter, and Homer Gray were candidates for the Democratic nomination for the office of Alderman of the Third Ward of Morrilton, Arkansas, in the preferential primary election held by the Democratic party on July 25, 1961. Each of the individuals was and is a member of the Democratic Party, was a qualified candidate for the nomination sought and voluntarily sought the nomination of the Party.

"Since there were more than two candidates for the nomination it was necessary that they submit themselves to the preferential primary.

"As a result of the said preferential primary held on July 25th Hesselbein was certified to have been the recip-

ient of 327 votes, Porter 178 votes, and Gray 100 votes, and since 327 was more than a majority of all votes, the Democratic Party Officials, by virtue of the provisions of Act 238 of 1943 (The Preferential Primary Law) certified Hesselbein to be the Democratic nominee.

"Neither of the losing candidates applied for a recount or for an order to place either of their names on the Democratic ballot in the general primary election which was held on August 8th.

"On August 14, 1961, Porter filed in the Conway Circuit Court an instrument designated 'complaint' in which he named himself as plaintiff and C. L. Hesselbein as defendant. The prayer of that instrument is as follows:

" 'Wherefore, plaintiff prays that he be adjudged and declared one of the duly elected nominees of the Democratic Party for the run-off or elimination primary for Alderman of the 3d ward of the city of Morrilton, Arkansas and that the court enter an order herein directing the county Democratic Central Committee to certify him as such nominee; for his costs herein, and for all other proper and legal relief to which he may be entitled.'

"At the time the complaint was filed the Primary election had already been held on August 8th and there was no other primary election to which Porter could have been certified as a candidate.

"Subsequently, the General Election has been held and Hesselbein, the Democratic nominee, was elected to the position and office of Alderman. Hesselbein is now holding that office. Any delay in presenting plaintiff's complaint has not been the fault of Hesselbein and there has been no fraud . . . Hesselbein now files a Motion to Dismiss, which is the matter under consideration.

"The Preferential Primary Law under which the July 25th preferential primary election was held is Act 238 of 1943. In the discussion concerning this 'motion to dismiss' it will be borne in mind that when Arkansas adopted the Primary Election Law in 1916 it did not com-

pletely divest the political parties of all supervision and control of the manner in which the party would select its nominees for elective positions; and that prior to the 1916 law, the party procedure both for elections and election contests were matters in which the party itself was all powerful. *Walls* v. *Brundidge,* 109 Ark. 250. The contest provisions of the statute were construed by the Arkansas Supreme Court not to extend to contests for delegates and committeemen. *Tuck* v. *Cotten,* 175 Ark. 409. The law has been amended to include those specific offices, but that holding of the court is here referred to in order to emphasize that the primary election law did not usurp the functions of the political party unless the function was specifically dealt with. In *Williamson* v. *Montgomery,* 185 Ark. 1129, the Court said:

" 'Where a political party makes a rule governing its procedure and in good faith interprets that rule, the court has no authority to substitute its interpretation for that of the officers of the party.'

It goes without argument that the nomination of a candidate is actually a Political Party Function.

"In the case at bar, the plaintiff, Mr. Porter, does not claim to be the nominee of the party. He does not claim the right to the office itself. His prayer is that he be declared 'one of the nominees of the Democratic Party for the Run-Off Primary.' The true situation can be better stated when it is said that Mr. Porter, at a time when it is impossible to do so, asks this court to declare him eligible to participate in a primary election that can never be held. Not only has the time for the general primary passed, but the general election has been held and the office itself has been filled. . . . Mr. Porter has not been a candidate in such a primary and he does not allege or claim that he is honestly the democratic nominee. He merely alleges that he should have been permitted to appear on the ballot in the general primary election. He did not formally make this contention until the filing of the complaint in this cause and that was after the general primary had been held. Furthermore, he took no steps to have the Democratic Party officials put his name on the

ballot. The usual election procedure had been followed and the party, in its usual way, had awarded the nomination to the one who had the majority of the votes.

"In the case of *Higgins* v. *Barnhill* (1951), 218 Ark. 466, where a candidate thought his name should go on the general primary ballot after having lost in the preferential primary, an application was made to the chancery court for a writ of mandamus. The application was refused and an appeal followed. The Arkansas Court, at page 467, said:

" '. . . As to the jurisdiction of the chancery court, Ark. Stats. 33-101 provides: "The Circuit and Chancery Courts shall have power to hear and determine petitions for the writ of mandamus and prohibition and to issue such writs to all inferior courts, tribunals and officers in their respective jurisdictions."

" 'If appellant was entitled to have his name placed on the ballot, and the chairman and Secretary of the county democratic central committee refused to have his name printed thereon, then the chairman and secretary would be refusing to perform a ministerial duty and could be compelled by mandamus from the chancery court to carry out such duty . . . The question presented here is not moot because, if we fail to pass on the issue for the reason that at this late date the decisions of this court could avail the appellant nothing, it is possible that, by reason of the time element involved between the two primary elections and the time necessary to perfect an appeal to this court, the point involved could never be decided before becoming moot . . .'

"The Court finds that the laws of Arkansas regarding 'Contest' of a primary election are the only statutory enactments depriving the political party of the right to administer its own selection of nominees that can possibly be available to Mr. Porter as a basis to maintain the suit he has filed. And that brings us squarely to the question: 'Is this action a contest for a party nomination?' The evident answer is that it is not. At most, this is a belated attempt to assert that Porter should have been

permitted to be a candidate in the general primary election which has already been held. Mr. Porter does not attempt to say that he honestly won the democratic nomination. In the case of *Bohlinger* v. *Christian* (1934), 189 Ark. 839, the court used the following language:

" 'At the threshold of the case, however, appellant is met with the proposition that, before he can contest appellee's nomination, he must allege and show that he, himself, was entitled to that nomination . . .'

and at page 841 of the same case:

" '. . . In *Storey* v. *Looney,* 165 Ark. 455, this court said: "The question necessarily presents itself in the beginning whether or not appellant is in an attitude to contest the certificate of nomination awarded to appellee . . . In order to make a contest for nomination, appellant must show that he is entitled to the nomination, himself, which he fails to do . . ." '

"The object of the election laws is to permit a political party to nominate its candidate in an orderly way so that the party nominee may hold the office if he is elected in the general election. The enactment of the primary law did not completely usurp all the functions of the political party. The candidates in democratic primary elections are voluntarily seeking the party endorsement and nomination. They submit themselves to the machinery of the party in every way that has not been taken over by a specific statutory enactment. It is reasonable to suppose that the Legislature considered the party and the existing court procedure sufficient to take care of the problems that arise in the preferential primary. At least, we can safely say that the Legislature, with full knowledge of the possibility of just such a situation as the case at bar, saw fit to NOT provide statutory direction to insure that a disgruntled losing candidate could contest a preferential primary election when he does not claim to have honestly won the primary nomination.

"The object of the preferential primary election is not to select 'Nominees' to be candidates in the general primary election. Its object is to insure that the candidate

getting the nomination has received a majority of the votes cast rather than a plurality. Where there are three candidates, as in the case at bar, the political party is interested in selecting from the three the one who gets the majority of the votes. The preferential law was and is designed to get away from the old system by which a nomination could be won by a mere plurality.

"CONCLUSION. Since Mr. Porter does not allege that he was and is entitled to the political party nomination; since there is no allegation of the loss of a property right; since there is no practical remedy at this date; and since this is not a contest of a Democratic Party Nomination, the Complaint of the plaintiff should be and is dismissed at cost of the plaintiff.

"Paul X. Williams."

BEATY *v.* GRIFFIN.

5-2750 360 S. W. 2d 126

Opinion delivered September 17, 1962.

Eddy & Eddy, for appellant.

Johnston & Rowell, for appellee.

NEILL BOHLINGER, Associate Justice. This case arises from the proposed sale of a house in Morrilton which was owned by the appellant, Clib Beaty. After negotiations covering some time, the appellee, Barney Griffin, agreed to pay the appellant the sum of $12,000.00 in cash for the house.

In order to carry through this trade, the appellee contends that it was agreed between the parties that the appellee would transfer title to a car which he owned to the appellant as a credit of $1,895.00 on the down payment, pay the difference between the $1,895.00 and $3,500.00 in cash and obtain a loan from the Morrilton Building and Loan Association for the balance of $8,500.00.

In bringing that matter to a conclusion, as they thought, the parties hereto met at the appellee's house in Morrilton. Appellee gave to the appellant the title papers and possession of the car, which appellee and his wife state was given to the appellant upon the appellant's assurance that he would take the car and have it washed and polished, and if the trade failed to go through he would return the car. This testimony is denied by the appellant. The appellee contends, and the chancellor found, that there were assurances by the appellant that the appellee could borrow whatever amount was needed to pay the balance due on the house from the Building and Loan Association, which amount, after the credit of $3,-500.00, would have been $8,500.00.

Some time after appellant left with the car, the appellee called the manager of the Building and Loan Association who told him that the maximum amount which he could borrow on the house was $8,000.00. The appellee phoned the appellant immediately and told him that contrary to what had been reported to him, he could not borrow a sufficient amount of money to enable him to close the trade and demanded the return of his car. Appellant advised appellee that it was too late for him to call the manager of the Building and Loan Association that night but if he saw him the next day he would talk to him and that there was something wrong because the Building and Loan man had told appellant that he would lend him more than $8,000.00.

In conversation with the Building and Loan man the next day the appellant was advised that $8,000.00 was the most the Building and Loan Association would loan on the house and although the deal failed to go through for that

reason appellant did not account to the appellee for the car.

The chancellor found that there was a mutual mistake of a material fact and we think that finding is supported by a preponderance of the evidence. Griffin's resources consisted of a car valued at $1,895.00 and $1,605.00 in cash which would enable him to make a $3,500.00 down payment and an $8,500.00 loan from the Building and Loan Association would make the $12,000.00. We are convinced, as was the chancellor, that Griffin was led to believe that no difficulty existed in securing a loan of $8,500.00 on the place. In fact, the appellant testified that the house had been approved by FHA for a loan value of $9,800.00 but the appellant fails to bring in any testimony from the Building and Loan Association or FHA that either agency would lend $8,500.00 to Griffin to enable him to complete the trade. Had the loan from the Building and Loan not been a factor in negotiations, we incline toward the belief that when Griffin phoned the appellant the night he found that $8,000.00 was the maximum loan value the appellant would have then and there advised the appellee that the loan from the association was none of his concern. But instead he said he didn't understand it and would see the manager of the Building and Loan Association.

If the appellant knew that Griffin was dependent on a $8,500.00 loan and knew that $8,000.00 was the most he could borrow and failed to advise appellant of that fact, then the appellant would be guilty of a fraud by his silence. But we do not think the testimony supports that theory for the appellant testifies that the FHA had a loan value of $9,800.00 on the house.

We conclude that the chancellor was correct in saying that the appellee was entitled to rescind the trade and recover his car or its value by reason of a mutual mistake of a material fact. The case falls squarely within our finding in the case of *Blythe* v. *Coney,* 228 Ark. 824, 310 S. W. 2d 485, wherein there was a mutual mistake by the contracting parties as to the availability of a water supply

to a house. That case cites and affirms *First National Bank of Wynne* v. *Coffin,* 184 Ark. 396, 42 S. W. 2d 402:

"A contract can be cancelled or rescinded for a mutual mistake of a material fact."

We think in this case that both parties knew of the materiality of the appellee's loan and that when the car was delivered to the appellant each party fairly believed that a loan of $8,500.00 could be secured. It was at best a mutual mistake of a material fact. The chancellor so found and we affirm the decree.

Opinion delivered September 24, 1962.

[Rehearing denied November 12, 1962.]

Hardin, Hardin & Barton, for appellant.

Sexton & Morgan, by *Sam Sexton, Jr.,* for appellee.

CARLETON HARRIS, Chief Justice. Texana D. Masters, beneficiary of H. J. Alexander, instituted suit to collect certain benefits under a program provided by the United Furniture Workers Insurance Fund for members of the

United Furniture Workers Union. United Furniture Workers of America, AFL-CIO, is an unincorporated labor organization, and local union No. 270 is located at Fort Smith. H. J. Alexander was a member of this union, and was entitled to benefits under a program provided and administered by the United Furniture Workers Insurance Fund. A death benefit in the amount of $1500 was provided, and an additional $1500 benefit was payable if the covered member sustained loss of life by external, accidental, and violent means. However, this last benefit was subject to the following condition:

> "The foregoing benefits shall, however, not be paid where loss of life, limb and/or sight is directly or indirectly, wholly or partly connected with or related to the commission of a crime or an offense by the covered member or by any other person."

Alexander died as a result of injuries sustained in an automobile collision on October 31, 1959. The $1500 death benefit was paid, but payment of the additional $1500 accidental death benefit was refused, because it was contended that Alexander was operating his vehicle under the influence of intoxicating liquor, and was in the process of violating several traffic laws at the time of the collision. Suit was instituted by appellee against appellants, Elmer Bost, president, Margaret Howard, secretary of local union No. 270, Louis Campbell, Trustee, United Furniture Workers of America, and the United Furniture Workers Insurance Fund, and summons issued. The sheriff's return reads as follows:

> "I have this 30 day of November, A.D., 1960, duly served the within by delivering a copy of the same to each of the within named: Elmer Bost in person. Louis Campbell in person. Margaret Howard by serving a true copy to Louis Campbell, Trustee, United Workers of America, AFL-CIO."

Appellants appeared specially, filing a motion to quash and dismiss, asserting:

"That the plaintiff has attempted to procure service of process upon the United Furniture Workers Insurance Fund, a Trust, organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 700 Broadway, in New York City, N.Y., by serving a purported process upon these named defendants; That the United Furniture Workers Insurance Fund has not and does not at any time herein material, maintain an office or place of business in Fort Smith, or the State of Arkansas; that it has not filed with the Secretary of State or the Insurance Commissioner of the State of Arkansas, application for authority to do business in this State; that the United Furniture Workers Insurance Fund, as a Trustee, has no corporate rights and that the purported service of process herein constitutes no service upon said United Furniture Workers Insurance Fund; that these defendants, as officers of Local Union No. 270 of United Furniture Workers of America, AFL-CIO, have no control whatever over the United Furniture Workers Insurance Fund and have no authority to administer or regulate the Fund and, as such, are not officers or trustees of the United Furniture Workers Insurance Fund, and have not been and are not authorized to accept service of process."

The motion was overruled by the court, and appellants, without waiving their special appearance and specifically reserving their rights thereto, filed an answer, and subsequently, two amendments thereto, setting up that the Fund was not liable because Alexander met his death as a result of violating the law. In each amendment, appellants reserved their rights under the original motion to quash service. On trial, the jury found that Alexander's death was not directly or indirectly, wholly or partly, connected with or related to the commission of a crime or an offense. The court held that the defendants constituted an insurance company under the laws of this state, and accordingly entered judgment for $1500 plus the statutory penalty of 12%, and an attorney's fee of

$750, together with interest from date until paid. From the judgment so entered, appellants bring this appeal. Several points are urged by appellants in seeking a reversal. Point No. 1 is: "The court erred in overruling defendants' motion to quash the service of summons." Since we find, as hereinafter set out, that this point is well taken, other alleged grounds for reversal, relating to the evidence and rulings during the trial, will not be discussed; *i. e.,* since we are of the opinion that the court did not, under the service obtained, acquire jurisdiction over the United Furniture Workers Benefit Fund, there is no occasion, nor would it be proper, to discuss the actual proceedings, and evidence, at the trial.

It is apparent from the Sheriff's return that the United Furniture Workers Insurance Fund was never served. It is equally apparent that Margaret Howard was not properly served. However, this last is immaterial. This action was brought as a class or representative action, but we agree with appellants that the service was ineffective, for the reason that the union members, as a class, are in no way responsible to appellee. The individual appellants who were served with summons, and the local union, did not insure anyone, and did not agree to provide death benefits for Alexander. It appears from the exhibits introduced, that in May, 1944, the "United Furniture Workers Insurance Fund" was created. The Agreement and Declaration of Trust creating such fund reflects that the fund is operated by a Board of Trustees, composed of eleven members, with its office at 700 Broadway, New York City. The trust was created and accepted in the state of New York, and the trustees, in their collective capacity, are known as United Furniture Workers Insurance Fund, and are authorized to conduct all business of the trust and execute all instruments in that name. The manner of obtaining the monies to make up the fund is explained in the opening resolution of the Declaration of Trust, as follows:

> "WHEREAS, the United Furniture Workers of America (herein called the 'Union') has executed through its affiliated locals or will through its affil-

iated locals from time to time hereafter execute collective bargaining agreements or supplements to collective bargaining agreements with manufacturers of furniture, bedding and kindred products as described in Article III, titled 'Jurisdiction' of the Union's Constitution (said manufacturers herein called the 'Employers') which, among other things, provide for the payment by such Employers to the United Furniture Workers Insurance Fund (herein called the 'Fund') periodically a sum of money equal to a stated percentage of the wages paid during the preceding month to those of its employees who are covered and entitled to the benefits of the collective bargaining agreement between the Employer and the Union; and

WHEREAS, the sums payable to the Fund as aforesaid (herein called the 'employer contributions') are for the purpose of providing social insurance to the members of the Union employed in the furniture industry:

NOW, THEREFORE, in consideration of the premises, the Trustees declare that they will receive and hold the employer contributions and other money or property which may come into their hands as Trustees hereunder (all such employer contributions, money and property being herein called the 'Trust Estate') with the following powers and duties and for the following uses, purposes and trusts and none other, to-wit:"

The subsequent paragraphs set out the various duties of the trustees, which include, *inter alia,* depositing the money, investing and reinvesting same, employing administrative, legal, accounting, clerical, and other assistance, purchasing or leasing real estate, establishing and accumulating reserve funds, etc. It does not appear that the local union, or any of its officers, have anything to do with the collection of funds, or any part in handling such funds. Upon becoming eligible for benefits, a worker receives a hospital identification card from the New York office. In this particular instance, the Fund

did not have complete information on Alexander, and a form was sent out from New York City, signed by Abraham Zide (Director of the Fund), for the additional information. When a claim for benefits is made, the completed claim forms are sent to the fund office in New York.

For that matter, it does not appear that mere membership in a furniture workers' union entitles a member to benefits. A booklet distributed by the New York office states:

> "Eligible members shall be covered for benefits only so long as contributions are received from employers under the terms of their collective bargaining agreements.
>
> ELIGIBILITY
>
> Benefits provided by the Program are for members in this area employed by contributing employers. New fulltime employees become eligible for the Program's benefits after completion of 30 working days for which their employers have contributed to the United Furniture Workers Insurance Fund. Employees working for a non-contributing employer become eligible for benefits under the Program on the effective date that such an employer becomes a contributing employer under the terms of the collective bargaining agreement with a Local Union."

No payments are made by the individual members of the union, the trust fund, as herein pointed out, being derived solely from the contributions of employers. Since the union, and its individual members, are not responsible to appellee, it follows that the service obtained was totally inadequate and ineffective, and the court acquired no jurisdiction over the United Furniture Workers Insurance Fund by virtue of the service obtained on the officers of local union No. 270.

The trial court held that "the defendants do constitute 'an insurance company' within the meaning of the laws and statutes within the State of Arkansas applicable

to this cause." It is apparent, from the reasoning heretofore set out, that we disagree with the holding that the union, or its officers, constitute an insurance company; however, we do agree that the United Furniture Workers Insurance Fund comes within the definition of an insurance company. Act 148 of the General Assembly of 1959 (Sections 66-2001 through 66-4920, Ark. Supp., 1961) is known as the Arkansas Insurance Code. Section 2 of said Act (§ 66-2002) defines "insurance" as follows: "Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount or provide a designated benefit upon determinable contingencies." This definition certainly applies in the instant case. United Furniture Workers Insurance Fund undertook to pay a specified amount to Alexander's beneficiary upon events which were determinable. Of course, in some respects, the Fund differs from the ordinary conception of an insurance company, in that it does not sell to the general public, nor does the member pay any part of the premium. However, the contributions from the employers, in effect, serve the same purpose as premiums from the individual members, and the program of benefits is essentially the same as that provided in many general insurance contracts.[1] At any rate, we are of the opinion and hold, that service against the United Furniture Workers Insurance Fund can properly be obtained under

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[1] The program provides as follows:

"DEATH BENEFITS FOR MEMBERS—$1,500 paid in the event of death from any cause. See page 7.

ACCIDENTAL DEATH AND DISMEMBERMENT BENEFITS FOR MEMBERS—Up to $1,500 paid in the event of accidental death or loss of hands, feet or eyesight through accidental means. See page 8.

WEEKLY ACCIDENT AND SICKNESS BENEFITS FOR MEMBERS—Up to $25 a week paid for a maximum of 26 weeks in any one benefit year for an off-the-job accident or illness. See page 9.

WEEKLY MATERNITY BENEFITS FOR WOMEN MEMBERS—Up to $25 a week paid for a maximum of six weeks for any one pregnancy. See page 10.

MEDICAL BENEFITS FOR MEMBERS—Up to $2 paid for office visits and up to $3 for home and hospital calls for a maximum of $150 during any one continuous period of disability. See page 11.

SURGICAL BENEFITS FOR MEMBERS AND DEPENDENTS—Up to $160 paid for operations performed on members and up to $160 for operations performed on dependents. See page 12.

HOSPITALIZATION BENEFITS FOR MEMBERS AND DEPENDENTS—Up to $8 per day for 31 days plus $80 for miscellaneous charges. See page 21."

the "Unauthorized Insurers Process Act", found in Sections 66-2903 through 66-2907, Supp., 1961 (§ 183 through 187 of Act 148 of 1959). Section 66-2904 provides that:

> "Delivery, effectuation, or solicitation of any insurance contract, by mail or otherwise, within this State by an *authorized*[2] insurer, or the performance within this State of any other service or transaction connected with such insurance by or on behalf of such insurer, shall be deemed to constitute an appointment by such insurer of the Commissioner and his successors in office as its attorney, upon whom may be served all lawful process issued within this State in any action or proceeding against such insurer arising out of any such contract of transaction; and shall be deemed to signify the insurer's agreement that any such service of process shall have the same legal effect and validity as personal service of process upon it in this State."

Section 66-2905 sets forth the manner of obtaining service.

Because, as heretofore set out, service was not properly obtained, the judgment of the Circuit Court is reversed and set aside. It is so ordered.

Opinion delivered November 12, 1962.

Supplemental Opinion on Rehearing.

CARLETON HARRIS, Chief Justice. In her petition for rehearing, appellee points out that this court overlooked the fact that Louis Campbell of Fort Smith is a trustee of the United Furniture Workers' Insurance Fund, and, since service was had upon Campbell, the Fund was properly served under the provisions of Sub-section (2) of Section 66-2905, 1961 Supp. Exhibit 1, which appears

[2] The word "authorized" appearing in the Supplement is a printer's error. In the printed Acts of the General Assembly of 1959, the word appears as "unauthorized," and the bill, signed into law by the Governor, shows the word to be "unauthorized." The title itself is indicative of the fact that the word properly is "unauthorized."

in the transcript, reflects that one "Louie Campbell" is a trustee of the fund, and apparently, from appellee's petition, Louis and Louie is one and the same.

Appellee's petition is without merit for three reasons. In the first place, appellee did not argue in her original brief that service was obtained upon a trustee of the insurance fund, though appellants devoted considerable space in their brief to the argument that service on the fund was not obtained. Appellee's sole argument, relating to service, was to the effect that this action was brought as a class action. The heading of appellee's Point II in the original brief reads,

> "The appropriate procedure for bringing an action against an unincorporated association is by a class or representative action and the trial court correctly overruled appellants' motion to quash service of summons."

In her discussion under this point, appellee stated,

> "This Court has held many times that the appropriate manner for obtaining service upon an unincorporated association in this state is by a class or representative action. Indeed, this is the only manner in which service can be had."

In other words, appellee never made the contention, now advanced, in her original brief. We have said on numerous occasions that we do not consider matters, in civil actions, which are not argued in the brief, and any point not argued is deemed waived. *Connell* v. *Robinson,* 217 Ark. 1, 228 S. W. 2d 475, *Johnson* v. *Gammill,* 231 Ark. 1, 328 S. W. 2d 127.

In the next place, as admitted in appellee's petition for rehearing, Exhibit 1, along with another exhibit which appellee contends to be pertinent, were not abstracted by either appellant or appellee in the original briefs. Appellee called attention to the fact that appellants had not properly abstracted these exhibits, but made no effort to supply the deficiency herself. In appellants' reply brief, Exhibit 1 was partially abstracted, but the portion showing Louie Campbell to be a trustee of United Furni-

ture Workers' Insurance Fund, was omitted. Rule 9, Sub-section (e) of the procedural rules of this court provides,

"If the appellee considers the appellant's abstract to be defective he may, at his option, submit with his brief a supplemental abstract. When the case is considered on its merits the court may impose or withhold costs to compensate either party for the other party's noncompliance with this rule."

In *Anderson* v. *Stallings,* 234 Ark. 680, 354 S. W. 2d 21, we said,

> "We have repeatedly pointed out that it is not practical for the seven members of this Court to examine the one record filed here, and that under Rule 9 the burden is on the appellant to furnish such an abstract as will give the various members of the Court an understanding of all questions presented. *Farmers Union Mutual Insurance Co.* v. *Watt, et ux,* 229 Ark. 622, 317 S. W. 2d 285. *Porter* v. *Time Stores, Inc.,* 227 Ark. 286, 298 S. W. 2d 51: * * * We have often said that we will not explore the record; * * *"

Further, Rule 20, Sub-section (h), which relates to "Petitions for Rehearing," provides,

> "In no case will such petition be granted when based on any fact thought to have been overlooked by the Court, unless reference has been clearly made to same in the abstract of record prescribed by Rules 9 and 11."

Finally, even though the matter had been argued in appellee's original brief, and the exhibits properly abstracted, it would still appear that the petition is without merit, for the reason that the provisions of Sub-section (c) of Sub-section (2), § 66-2905, have not been complied with.

The petition for rehearing is denied.

5-2757 360 S. W. 2d 192

Opinion delivered September 24, 1962.

[redacted]

Featherston & Featherston, for appellant.

Lindell Hile, for appellee.

ED. F. MCFADDIN, Associate Justice. On this appeal a decree of the Chancery Court is consolidated with a judgment of the Probate Court, since the question common to both cases is whether, under the facts here presented, limitations and/or laches released the father from paying anything for the support of his minor children.

In 1945 the Pike Chancery Court awarded Mrs. Irene Garner (now Irene Wilder, one of the appellants) a divorce from Carnell Garner, the appellee; and the decree also awarded the mother the care and custody of the two minor children, a boy named Jesse, then three years of age, and a girl named Nellie, then fifteen months of age. At the time of the divorce, Carnell Garner was incar-

cerated in the Federal Penitentiary at Leavenworth, Kansas, for conviction of a felony, and the divorce decree contained no provision requiring the father to support the minor children. After completing the penitentiary sentence, Carnell Garner returned to Pike County, and in 1953 was adjudicated insane and committed to the State Hospital, where he still remains. Mrs. Garner, now Mrs. Irene Wilder, has all the time, since the divorce decree of 1945, had the care and custody of the two children, who are still minors.

In 1961 some Garner ancestral lands were sold in a partition proceeding in Pike County, and the sum of $1,357.70 was the portion due to Carnell Garner. To partially repay herself for the support of the minor children, Mrs. Irene Wilder undertook to obtain this money: (a) by filing in the original divorce proceeding a petition asking the Chancery Court to award her money for support of the children; (b) by intervening in the partition proceeding and impounding the Carnell Garner money; and (c) by having the Pike Probate Court appoint a guardian for Carnell Garner and then filing in that proceeding petition for future support money for the two minor children. The Chancery and Probate cases were tried at the same time, and both Courts held that all the claims against Carnell Garner were barred by limitation and laches.[1]

We conclude that the Chancery Decree should be reversed. We have a number of cases which bear on some of the facets of the points here under consideration. A few of these cases are: *Holt* v. *Holt,* 42 Ark. 495; *Daily* v. *Daily,* 175 Ark. 161, 298 S. W. 1012; *McCall* v. *McCall,* 205 Ark. 1123, 172 S. W. 2d 677; *Worthington* v. *Worthington,* 207 Ark. 185, 179 S. W. 2d 648; *Dalrymple* v.

[1] The learned Chancellor wrote a memorandum opinion which is in the transcript; and we copy the germane portions of it:
"In the case of *Brun* v. *Rembert,* 227 Ark. 241, it was held that past due child support payments are not a judgment on a decree but a right to a judgment, but in the case at bar no judgment was prayed, only custody of children was awarded plaintiff. This divorce decree was in 1945 and under above ruling this case is barred by statute of limitations, Sec. 37-213 of the Ark. Stats.
"In *Payton* v. *Payton,* 230 Ark. 348, it was held the mother was not entitled to reimbursement where she took no action to collect judg-

Dalrymple, 221 Ark. 260, 252 S. W. 2d 823; *Payton* v. *Payton,* 230 Ark. 348, 322 S. W. 2d 588; and *Wilson* v. *Wilson,* 231 Ark. 416, 329 S. W. 2d 557. Ever since *Holt* v. *Holt, supra,* decided in 1883, the general rule in Arkansas has been that, if a divorce decree grants the custody of a minor child to the mother but makes no provision for the child's support, and the mother thereafter supports the child or supplies it with necessaries, the father, if financially able, should repay the mother for the reasonable value of the support or necessaries thus furnished.[2] In *Holt* v. *Holt, supra,* as here, the original divorce decree was silent as to support, and the mother, who had supported the children, was allowed to file in the original divorce proceeding a petition for amounts expended for child support, and also to obtain an order for future support payments.

In the case at bar, the appellee pleaded laches; but we find nothing to support such a plea. The mother proceeded when the father had financial ability to support the children. The case of *McCall* v. *McCall, supra,* points to such a course. The appellee also pleaded limitations; but as long as the children are minors the obligation is a continuing one on the father to support the children, and during such period of minority limitations could not bar all amounts. The present case is different from the case of *Brun* v. *Rembert,* 227 Ark. 241, 297 S. W. 2d 940, and also different from the case of *Payton* v. *Payton,*

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ment for eleven years (in this case a judgment for child support was rendered). In the case at bar she not only did not have a judgment but she has made no attempt to collect child support for fifteen years. Under the ruling in this case she is barred by laches and limitations. Also, proof shows that Carnell Garner is an incompetent and is now an inmate of the Arkansas State Hospital for Nervous Diseases as an insane since 1953.

"In the recent case of *Wilson* v. *Wilson,* 231 Ark. 416, the Supreme Court held that a similar claim was barred by the statute of limitations and reaffirmed the case of *Payton* v. *Payton,* 230 Ark. 348.

"Under the testimony in this case and the rulings of the Supreme Court it is my opinion that the plaintiff is not entitled to recover for the reasons given and her complaint should be dismissed for want of equity . . ."

[2] There is an annotation in 69 A.L.R. 2d 203 entitled, "Father's liability for support of child furnished after entry of decree of absolute divorce not providing for support"; and cases from many jurisdictions are cited as agreeing with the Arkansas holding. To the same effect see C.J.S. Vol. 27B, p. 597 and p. 622; and see also Am. Jur. Vol. 17A, p. 47 and p. 55.

230 Ark. 348, 322 S. W. 2d 588, in each of which the effort to recover for support was made long after the child became of age. Here, both of the children are still minors.

The question that gives us most serious concern is the period of time for which the mother may recover for the reasonable and definite amounts she has expended for the support of the children. As heretofore stated, she filed this proceeding on March 10, 1961; and the question is whether she can recover for the three years preceding such filing, or for the five years preceding such filing. In cases where the parties had a written contract for support, and in cases wherein the original divorce decree contained language requiring support, we have held that the mother may recover the reasonable and necessary amounts expended by her for child support within the 5-year period. Such holdings were because the contract sued on was a written instrument (§ 37-209 Ark. Stats.), or because the decree was an "action not otherwise provided for." (See § 37-213 Ark. Stats.) But in the present case there was no provision in the original divorce decree for support, and the obligation on the father is one "express or implied not in writing" (§ 37-206 Ark. Stats.); and would, therefore, come within the 3-year statute. See *Davis, Admr.* v. *Herrington,* 53 Ark. 5, 13 S. W. 215.

There is one other possible limitation on the period of time for which Mrs. Wilder may recover from the impounded fund. A chancery court will order a father to contribute to the support of his children when he is financially able to do so. Before Mr. Garner became vested with an interest in the ancestral lands he was not able to contribute to the support of his children. But from the date he became vested with an interest in the ancestral lands, he became able to contribute to such support; and a court of equity would at that time have ordered him to make such contribution if such jurisdiction had been invoked. If such time of vesting be more recent than the three-year period prior to March 10, 1961, then the date of such vesting will be the beginning from which Mrs. Wilder may recover. If the date of such vesting be prior to the said three-year period, then the three-year period is the beginning date from which Mrs. Wilder

may recover. The date of such vesting is not shown in the present record, but may be shown on remand.

Mrs. Wilder is entitled to recover from the $1,357.70 impounded whatever reasonable and definite amounts she may establish that she has expended for the care and support of the minor children within the said time limitations herein mentioned. Furthermore, if any part of the said $1,357.70 should remain after payment of the above items, then the Court will make a proper order for the reasonable support payments during the minority of each child, and such payments will have priority over any other claims because these funds have been impounded.

The Chancery Decree and Probate Judgment here appealed are both reversed, and each case is remanded to the appropriate Court for further proceedings not inconsistent with this opinion; and all costs of all Courts are to be paid from the impounded funds.

FARRELLY LAKE CO. *v.* REDDEN.

5-2718 360 S. W. 2d 187

Opinion delivered September 24, 1962.

Wright, Lindsey, Jennings, Lester & Shults, for appellant.

Botts & Botts, 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 George Redden. The decedent strained the muscles of his left side on August 15, 1956, while helping fellow employees lift a heavy timber. He died less than two months later, on October 10, from cancer of the left lung and other organs. The commission denied the claim, finding that there was no connection between the accidental injury and the cause of death. The circuit court reversed the decision, holding that it was not supported by substantial evidence.

On the day of his accident Redden consulted Dr. Whitehead, who treated him for muscular strain by taping his side and giving sedatives. On that day, or the next day, Redden coughed up blood from his lungs for the first time in his life. He returned to work on August 21 and was able to perform light tasks until August 28, which was his last day at work. He was in the care of physicians at Stuttgart until September 21, when he was sent to the Veterans Hospital at Little Rock. No positive diagnosis seems to have been made by any doctor during Redden's lifetime. An autopsy disclosed a primary cancer of the left lung, which had metastasized to the lymph nodes, spleen, liver, kidney, adrenalin gland, and bone marrow.

There is no contention that the cancer was caused by the decedent's work. The medical witnesses were pretty well in agreement that the disease had already spread over Redden's body when he strained his side on August 15 and that he was then so afflicted as to have no chance for recovery. The only fact question was whether the accidental injury aggravated his condition and thereby hastened his death.

On this issue the testimony is in direct conflict. For the claimant several physicians testified that in their opinion the injury did hasten Redden's death or at least might have done so. For the respondents Dr. Hipp and Dr. Graham, specialists in the field of cancer, testified positively and unequivocally, after having reviewed the entire record, that the injury had no connection whatever

with the decedent's death and did not cause it to occur any sooner than would otherwise have been the case. Dr. Hipp explained that even if the accident caused the bleeding within the lung that would not have affected the spreading of the disease, because metastasis is due to the entry of cancer cells into the blood stream rather than into the bronchus.

The testimony adduced by the respondents is unquestionably of a substantial nature; so it is our duty to uphold the commission's decision. *H. G. Price Construction Co.* v. *Southern,* 216 Ark. 113, 224 S. W. 2d 358. Nor does the record support the appellee's contention that the commission considered only the medical evidence, to the exclusion of the other proof. All the facts were reviewed in the referee's opinion, which was referred to with apparent approval by the full commission. There is no indication that the commissioners thought themselves bound to reach a decision upon the medical evidence alone.

The appellee's motion to affirm the judgment for noncompliance with Rule 9 must be denied. While the appellants' abstract might well have contained more numerous references to the pages of the record, it is by no means fatally defective.

Reversed.

AERIAL CROP CARE, INC. *v.* LANDRY.

5-2759 360 S. W. 2d 185

Opinion delivered September 24, 1962.

Cecil C. Matthews, for appellant.

Wm. M. Moorhead and *Riddick Riffel,* for appellee.

PAUL WARD, Associate Justice. We are asked on this appeal to determine who is (or may be) an employee under the provisions of Ark. Stats. § 81-1302 which is a section of the Workmen's Compensation Law. Subsection (c) (1) of the above section, in effect, places under the terms of the law every employer who has five or more employees regularly employed. We are also asked to determine the meaning of the words "regularly employed".

The employer in this instance is a corporation owned and controlled by three people: Crandall Hagan, the President; Ernest Boone, the Vice-president; and George Tiefenback, the Secretary-Treasurer. The corporation, under the name of Aerial Crop Care, Inc., has been engaged for several years in agricultural flying in fertilizing and dusting crops. All three of the incorporators are active pilots and all are paid equally except that each may receive additional remuneration depending on the number of flights made. The Corporation (appellant) did not have workmen's compensation insurance, believing, perhaps, it did not have five regular employees.

In the early part of November 1958 the corporation, having at that time only two other employees who did

manual labor, began the construction of a hangar near Stuttgart. On or about November 20, 1958, the corporation hired appellee, Jack J. Landry, to assist the other laborers in the construction work. While in the course of his employment appellee was injured. Appellee filed a claim for compensation under the Workmen's Compensation Act. The claim was allowed by the Referee, the full Commission, and the Circuit Court.

Appellant prosecutes this appeal contending, first, that the Commission had no jurisdiction because (a) Appellant did not have five or more employees and (b) Appellee was not "regularly employed". It was also contended by appellant that there is no substantial evidence to support the findings of the Commission.

One. (a) *Were the Officers of Appellant Employees?* It is conceded that appellant did not have five employees at the time of the injury unless, as held by the Commission and the trial court, the three incorporators are considered to be employees. Said Section 81-1302, for the purpose of this opinion, defines an "employee" as any person in the service of an employer under any contract of hire, expressed or implied. This Court, in the case of *Brooks* v. *Claywell,* 215 Ark. 913, 224 S. W. 2d 37, held that an officer of a corporation was, under the facts of that case, an employee under the provisions of the Workmen's Compensation Law. This case, on this point, has not been overruled, and we do not see fit to overrule it at this time, although appellant vigorously urges us to do so. In so doing appellant relies on the reasoning in the dissenting opinion in the *Brooks* case and also says that decision has been greatly undermined by the decision in the case of *Brinkley Heavy Hauling Co.* v. *Youngman,* 223 Ark. 74, 264 S. W. 2d 409. We do not agree with appellant as to the effect of this decision. There, this Court held that Youngman could not be considered as an employee of the Brinkley Heavy Hauling Company which was a *partnership* of which Youngman was the only active, working member. The essence of the reason for this opinion appears to be that a person could not be an employee of himself because he would have control over

himself. Speaking of this, the Court said: "In this situation his status was the antithesis of that of an employee, as far as Brinkley [the partnership] is concerned." The decision did not hold that a partner could not under any circumstances be an employee of a partnership of which he was a member. It may be noted that there was a vigorous dissent by three judges pointing out that Youngman should be considered an employee. It may also be noted that the judge who wrote the dissent in the *Brooks* case also wrote the majority opinion in the *Brinkley* case, and that in both instances great stress was laid on the matter of control over the employee. In the *Brinkley* case we said: ". . . we have repeatedly emphasized the matter of control as the most vital factor in the determination of the employer-employee relationship". It is readily apparent that a corporation (being a separate legal entity) could more logically control the activities of one of its officers than a partnership, which is not a separate legal entity, could control one of its members.

The only remaining question to be considered in this connection is whether each of the three officers actually performed work for the corporation in this case. The Commission found that they did, and in our opinion the record supports such a finding. It reveals that each of them flew a plane which happens to be the principal work of the corporation. It is significant also that each officer's pay depended to some extent on the amount of flying done. It further appears that the officers took an active part in the construction of the hangar.

(b) It is argued by appellant that "Claimant was a *casual* employee not engaged in the regular business of Respondent". We see no merit in this argument in view of the facts in this case. Not only had claimant worked for appellant previously helping load seed or fertilizer in season, but it is undisputed that, at the time of his injury, he was helping erect the hangar which was to be used in the corporation's regular business. Although claimant had been working on this particular job for only about five days when injured, we find (as did the Commission) nothing in the record to show claimant was

hired on a temporary basis. This Court, in the case of *Wallace* v. *Wells,* 221 Ark. 750, 255 S. W. 2d 970, construed the meaning of the words "regularly employed" as used in § 81-1302 (c) (1), quoting, with approval, the following:

"The word 'regularly' is not synonymous with 'constancy'. There are businesses of importance which employ numbers of men *regularly,* who employ none of them *continuously.* And a number of businesses, as this, will require a large number of employees, nearly all or a large number of whom are employed only *periodically,* for the reason that the needs of the business require their services only at intervals or periods, whenever the business is in active operation."

In that same case we approved this statement: " '. . . an employer cannot be allowed to oscillate between coverage and exemption as his labor force exceeds or falls below the minimum from day to day.' " This Court likewise in the case of *Buxton* v. *Dean,* 218 Ark. 645, 238 S. W. 2d 487, considered the meaning of the word "casual" as used in § 81-1302 (b), stating: " It is noted that before an employment is excepted from the operation of the act, it must be *both casual and not in the usual course of the employer's trade or business.*" (Emphasis added).

In our opinion the record fully justified the Commission in finding Claimant was "regularly employed" and was not a "casual" employee.

Two. Considering what we have heretofore said it would serve no useful purpose to discuss at length appellant's final contention that there was no sufficient competent evidence to support the Commission's findings. We have said it so often that it is unnecessary to cite decisions to establish the fact that the findings of the Commission have the same force and effect as the findings of a jury, and that substantial evidence is sufficient to support the findings in either case. The judgment of the trial court is therefore affirmed.

Affirmed.

5-2743 360 S. W. 2d 189

Opinion delivered September 24, 1962.

Riddick Riffel, for appellant.

Cooper Jacoway, for appellee.

SAM ROBINSON, Associate Justice. This is a workmen's compensation case; the issue is whether the death of the employee, Charles A. Reep, arose out of and in the course of his employment as secretary, manager, and salesman for the Fine Nest Trailer Colony, Inc. He was burned to death in a house trailer. The Workmen's Compensation Commission denied compensation, holding that Reep's death did not grow out of and in the course of his employment. The claimant appealed to the Pulaski Circuit Court, Second Division, and there the order of the Commission denying compensation was reversed. The employer has appealed to this Court.

At about 3 o'clock p.m. on the first day of March, 1958, George W. Tucker went to the Fine Nest place of business in North Little Rock with the intention of buying a house trailer if he could find one that suited him. He had known Reep for a long time and had bought a house trailer from him on another occasion.

Reep showed Tucker the trailers Fine Nest had on its lot in North Little Rock, but was unable to sell him one of those. At about 4:30 p.m. they got into a company

truck and went to Reep's home where Reep talked to his wife for a few minutes. Reep and Tucker then returned to the Fine Nest place of business where Tucker got his car. Reep continued to drive the company truck and they went to Jack and Jill's trailer place on the old Benton Highway. Reep knew of a trailer for sale there that might suit Tucker, but after looking over the trailer at Jack and Jill's, Tucker decided it was not what he wanted.

Reep owned a tract of land west of Little Rock where he had a few head of cattle. At this location he had a trailer belonging to the Fine Nest that he and his wife had been using two or three times a week for about eleven months. He had the trailer with the knowledge and consent of his employer and had shown it to prospective buyers on other occasions. Reep asked Tucker to go out and look at the trailer at the Reep place. Tucker did not want to go. He did not want to put Reep to the trouble of going out there, but finally consented when told by Reep that he was going out there to feed his cattle regardless of whether Tucker went along.

On the way out to the place where the trailer was located, Reep stopped at a store and bought a steak.

The first thing they did when they got to the Reep place was to enter the house trailer and light a fire in a kerosene heating stove. Reep put kerosene into the stove from a five-gallon can he kept under the house trailer. They then went to look at Reep's minnow ponds, walked across the road to look at a small piece of land that Reep was thinking about buying, fed the cattle, and returned to the house trailer. The weather was cold, but it was then warm in the trailer.

Tucker had been familiar with house trailers for 25 years; he took his time and looked the trailer over carefully. Reep agreed to put in a new commode and paint the trailer on the outside. Tucker offered $2,200.00 for it, Reep accepted the offer, and the sale was made on that basis. Tucker was to pay part in cash and the balance in monthly installments. They were to meet the next day at 11 a.m. at the Fine Nest place of business and attend

to the details of the sale. The sale was made about 8:20 or 8:30 and Reep wanted Tucker to stay and eat, but Tucker declined and returned to the city.

A little over an hour later, some of Reep's neighbors noticed that the house trailer was on fire. The trailer was destroyed and Reep burned to death. The remains of his body were found near the center of the trailer, about where the butane cook stove was located.

This is not a case of one side introducing evidence to prove one set of facts and the other side bringing evidence to prove the opposite. The only point at issue is the inference to be drawn from the undisputed evidence. If a reasonable inference is deducible from the evidence that Reep's death did not grow out of and in the course of his employment, the decision of the Commission denying compensation must be affirmed. On the other hand, if the only reasonable inference to be drawn from the evidence is that the death grew out of and in the course of the employment, then the judgment of the Circuit Court must be affirmed.

In *Frank Lyon Co.* v. *Oats,* 225 Ark. 682, 284 S. W. 2d 637, this Court quoted with approval, as follows, from Snyder on Workmen's Compensation, Permanent Edition, Vol. 7, P. 1665: "Where the trip or attendance is one which the employer ordered or directed, or is for the sole benefit of the employer, *or is to the mutual advantage of both the employer and his employee,* compensation may be recovered." (Our italics.)

To sustain the contention that Reep was not acting in due course of his employment at the time of his death, the appellant employer cites *Marks Dependents* v. *Gray,* 251 N. Y. 90, 167 N. E. 181. We think, however, that this case really sustains the position of the appellee in the case at bar. There, Mr. Justice Cardozo said: "To establish liability, the inference must be permissible that the trip would have been made though the private errand had been cancelled . . . The test in brief is this: If the work of the employee creates a necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own."

Reep had been working with Tucker since three o'clock in the afternoon in an effort to sell him a trailer. Not only had he shown Tucker all the trailers on the Fine Nest lot, but had taken him to the Jack and Jill place to show him a trailer. Tucker did not want to go to the country to look at the trailer out there, but Reep prevailed on him to do so. There is no reason whatever to believe that Reep would not have done the same thing even if there had been no cattle there to be fed. The work of the employee created a necessity for the travel. He could not show Tucker the trailer without going out there.

The least that can be said is that the trip was for the mutual benefit of the employer and employee. There is no evidence in the record going to show that Reep did not intend to return to the city that night. Mr. and Mrs. Reep had intended to go to the house trailer that day, but the weather was bad and Mrs. Reep had a cold. Without objection, Mrs. Reep testified: "He (Mr. Reep) came by the house with Mr. Tucker to take him out, and I said I couldn't go, and he said he would come on back."

There is only one reasonable inference to be drawn from the evidence, and that is that after making the sale of the trailer, Reep stayed at the trailer to cook and eat the steak he had bought. It will be recalled that he invited Tucker to stay and eat with him, but Tucker declined. Moreover, it will be recalled that Reep and Tucker were to meet at the Fine Nest place of business the next day at 11 a.m. and attend to the necessary details of the sale. Of course the trailer would have to be brought in to the place of business in order that the repairs agreed upon could be made. Reep was driving a company truck equipped to tow house trailers. This truck was not furnished him for his personal business. Mr. Baney, a long time employee of Fine Nest, testified that he had never known of Reep driving the truck home at night.

Certainly if, at the time of the mishap, Reep was disconnecting the gas and butane stoves and making the trailer ready so he could tow it to the city, he was acting within the course of his employment; and if he was cooking his steak he was still within the course of his employ-

ment. The undisputed evidence is that the salesmen were expected by Fine Nest to stay with a customer and not let a mealtime interfere. In order to carry out this policy, the company had cooking facilities at the place of business where the salesmen could prepare their meals when they were not with a customer. On the day in question, as late as 8:30 p.m., Reep had not eaten his evening meal.

Reep's duties as a salesman required him to travel over the State of Arkansas, and even into other states. One of his purposes in travelling to the house trailer was to sell it, and he did sell it. The case of *Johnson Auto Co.* v. *Kelley,* 228 Ark. 364, 307 S. W. 2d 867, involved the death of an automobile salesman. The issue was whether the death grew out of and in the course of his employment. There the Court said: "Kelley's course of employment for the purpose of workmen's compensation, like that of the ordinary travelling salesman, covered both the time and place of travelling, as well as the selling of the goods." We think the same principle applies in the case at bar.

Affirmed.

STANDARD ACCIDENT INS. CO. *v.* CHRISTY.

5-2745 360 S. W. 2d 195

Opinion delivered September 24, 1962.

Lester E. Dole, Jr., for appellant.

Walter H. Laney, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a jury verdict in favor of a policyholder, Ernest Christy, appellee, against his insurer, Standard Accident Ins. Co., appellant. The suit involves the fire insurance provisions of an automobile insurance policy and exceptions and exclusions against coverage contained therein.

In July 1960, appellee was driving his 1959 DeSoto automobile from Sparkman to Camden, when he noticed smoke coming up from behind his car. He slowed down and as soon as he could find a wide place in the road, he stopped. By the time he stopped, the radiator hose and air conditioner hose had burned off and the water from the radiator had extinguished the fire. He had the automobile towed to Camden and notified the appellant, his insurance carrier, of the fire.

Appellant instructed the garage to repair the automobile. The vehicle did not leave the shop of the repairman until repairs were finally completed at a cost of $763.62. When the automobile was repaired, appellant offered to pay $160.47 for repair of the wiring, rubber hose connections and other obvious fire-damage repairs, but refused to pay for damage to pistons and cylinder walls, contending that this was mechanical failure, not fire damage, and was therefore excluded from the policy coverage.

Appellee filed suit under the policy provisions for $569.13 and amended the suit to the sum of $763.62. Appellant offered to pay the sum of $160.47 which appellant considered as actual fire damages to appellee's automobile under the policy provisions. The jury after hearing the evidence found for appellee in the sum of $763.62, the amount sued for. Statutory penalty and attorney's fee were assessed, making the judgment for appellee the sum of $1,005.25, from which comes this appeal.

Appellant conceded that appellee owned an automobile which was insured against fire loss under the terms of appellant's policy No. AF870166. It is undisputed that this automobile caught on fire while being driven from Sparkman to Camden. Appellee's burden of proving the

insurance policy and the loss having been met, the burden was then on appellant to show that the case fell within an exclusion to the contract by which appellant had indemnified appellee against such an injury. *Life and Casualty Ins. Co. of Tenn.* v. *Barefield,* 187 Ark. 676, at 679, 61 S. W. 2d 698. The policy exclusion is as follows:

"Exclusions. This policy does not apply under Part III: . . . (e) to damage which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage results from a theft covered by this policy."

The material points relied on by appellant question whether there was any substantial evidence to support the jury verdict.

After the repairs to the automobile had been made, appellant adopted the position that a portion of the damages to the automobile was occasioned by a mechanical failure. In this connection, appellant introduced the testimony of an expert witness, Mr. John L. Peterson. His testimony included a discussion of how the fire probably originated and how various items of damage were occasioned. According to this witness, he found damage to the cylinders and cylinder walls. This damage, he testified, could only be caused in one of two ways:

"One is operating the engine at a fairly moderate to high rate of speed without sufficient water in the cooling system, which would cause an extreme overheating condition . . ."

Appellee testified that "the car was running perfectly" and that he was traveling at approximately sixty miles per hour when he noticed that the automobile was on fire. Thereafter, he proceeded until he found a wide place in the highway and then he stopped. At this point he found the radiator hose and the air conditioner hose had been burned off and that the escaping water had extinguished the fire. This is precisely the factual situation described by Mr. Peterson as one of the possible explanations for interior damages to the pistons and cyl-

inder walls. The jury could certainly fairly conclude from Peterson's testimony that a fire originated on top of the automobile engine—either from a leaky fuel pump, leaky carburetor, broken gas line, or some other cause; that this fire proceeded to burn off the rubber hose connections to the radiator and air conditioner allowing the water to escape from the cooling system; that wiring, battery, etc., were burned; that certain damage resulted to the interior of the motor as a result of the escaping water from the cooling system; and that, in short, the fire was the direct, proximate and sole cause of all the damage to this automobile.

After carefully reviewing the record, we cannot escape the conclusion that there was substantial evidence to support the jury verdict. This being true, the judgment must be affirmed. *Lloyd* v. *James,* 198 Ark. 255, 128 S. W. 2d 1019.

CALDARERA *v.* GILES.

5-2729 360 S. W. 2d 767

Opinion delivered September 24, 1962.

[Rehearing denied October 29, 1962.]

Keith, Clegg & Eckert, Wright, Lindsey, Jennings, Lester & Shults, for appellant.

Harry Crumpler and *Brown & Compton,* for appellee.

NEILL BOHLINGER, Associate Justice. This case arose out of a collision of two trucks, one belonging to the appellants and the other owned by one of the appellees. The suit for damages growing out of the collision of the two trucks was tried before the Columbia Circuit Court,

the appellees seeking damages on account of negligence alleged against the defendants, appellees here, and the appellants counterclaiming for damages which it was alleged had been suffered because of the negligence of the appellee and his driver, Johnny Hight.

The trial resulted in a verdict for the appellees and the appellants prosecute their appeal here alleging as points for reversal (1) the lower court erred in granting appellees' request for a drawn jury after *voir dire* and the exercise of peremptory challenge by the appellants, (2) the misconduct of a jury which it is alleged affected the appellants' right to receive a fair trial and, (3) the amounts of the verdict were excessive.

These facts were developed in the trial: At the beginning of this trial there were 18 veniremen in the jury box and counsel for both plaintiff and defendant were furnished a list of the names of the jurors; after examination on *voir dire,* the appellants struck the names of three of the prospective jurors and returned the list to the clerk. It does not appear that appellants' challenges were revealed to any person and without exercising their peremptory challenge, the appellees moved for a drawn jury which motion was granted over the objection of the appellants. The applicable statute is as follows:

"Ark. Stat. 39-229. Peremptory challenges—Panel drawn upon request—Right to strike names.—Each party shall have three (3) peremptory challenges, which may be made orally—but if either party shall desire a panel, the court shall cause the names of twenty-four (24) competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of eighteen (18) shall be drawn and entered on a list in the order in which they were drawn, and numbered. Each party shall be furnished with a copy of said list, from which each may strike the names of three (3) jurors and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve names remaining on said original list shall constitute the jury."

We see no error in allowing a drawn jury at this time as any exercise of challenges on original veniremen was not known. This was a matter which presented itself to the discretion of the trial judge and we do not find that he abused that discretion.

The appellants filed a timely motion for a new trial and in support of that motion presented testimony tending to show that one of the jurors, Otis Franks, Jr., had an interest in the result of the verdict.

It appears, from the record, that the juror, Otis Franks, Jr., was an employee of the First National Bank of Magnolia where he was employed as note teller and worked on relief; that in 1959 he, together with his wife, and Dixon Barnett, and his wife, organized a corporation known as the Bruce Cartright Livestock Auction, Inc.; that some time prior to June 25, 1959, the appellee, Giles, was indebted to the juror's corporation and to discharge that debt the appellee procured a loan from the bank at which Mr. Franks was employed, the loan being in the sum of $3,060.00, and to secure that loan the juror had signed a writing guaranteeing its payment; that the note was a demand note and had not been paid at the time of the trial. As additional security for payment of the demand note, the appellee had executed to the bank an assignment of the proceeds of any recovery which he might secure in this action against the Caldareras.

The name of Mr. Franks does not appear to have been among the eighteen (18) prospective jurors first presented, although his name was on the list that the clerk distributed for the drawn jury.

On examination of the propective jurors the veniremen were asked as to business relationships with the appellee, Mr. Giles; juror Franks answered that Giles had worked for him at the auction barn a couple of years before and since then he had had other business relations with him but that there was nothing in their relations that would affect his verdict.

On behalf of the appellee it is urged that a member of one of the law firms representing the appellants had

drawn the incorporation papers for the juror Franks' corporation and was at the time representing the corporation in a law suit; that this attorney also was a director of the bank that was carrying the loan of Mr. Giles and was a member of the Discount Board and there was introduced a transcript of the meeting of the Discount Committee on June 25, 1959 which discloses that loans and discounts No. 71582 through 71602 to 71612 were before that Board and that a notation appears on that transcript, "J. F. Giles (letter of guaranty) $3,060.00"; that this particular attorney had participated in the trial, which statement was qualified by the statement of the attorney and other counsel that this particular counsel came in after the trial had started and sat in the back of the courtroom until he was motioned to the counsel table and that when the attorney who was examining the veniremen asked as to Franks, this attorney had said, "He's a good man."

The juror, Franks, stated when testifying in the motion for a new trial that his corporation had been the beneficiary of the Giles loan from the bank and that he had signed the agreement guaranteeing the loan and had as his protection a mortgage on the Giles' home; that he knew at the time that he was present on the jury that the original loan had not been paid and that if the appellee, Giles, got a judgment that the $3,060.00 would be thus paid; and on the morning of the trial he had talked to the presiding judge and had told him that appellee Giles had a guaranteed loan at the bank where he worked and the judge had told him to talk to the attorneys and he did talk to the appellees' attorneys but it does not appear that he advised anyone of his guaranty agreement or any assignment of the verdict in this case.

On the *voir dire* examination of the prospective jurors there appears to be no official transcript, but it is established that the court had directed a question to the prospective jurors as to any business dealings with the appellees; that the juror Franks at that time stated that Giles, the appellee, had worked for him two or three years before.

It is the contention of the appellants that the juror Franks had such an interest in the verdict that he was disqualified from serving as a juror; that this disqualification was known to Franks and not to them.

On the other hand, the appellees contend that if Franks had an interest in the proceeds from the verdict that fact was known or could have been known to the attorneys for the appellants and that they failed to avail themselves of the information which was theirs and that it is too late to bring that matter to the attention of the court in a motion for a new trial.

There is a duty upon every prospective juror on *voir dire* examination to make a full and frank disclosure of any connection he may have with the litigants or anything that would or could in any way affect his verdict as a juror. In this case Mr. Franks was asked if he had had any business connection with appellee Giles. His answer was that Giles had worked for him several years before and he had had other dealings with him. In his testimony on the motion for a *rehearing* he used the expression, in connection with his other dealings, "I did not see any point in saying that I bought two shabby calves from him since 1959." There seems to have been more of an effort at evasion than of disclosure. At no point in the empaneling of the jury do we find that Franks told the judge or any of the attorneys with whom he talked, and certainly he did not on *voir dire* state that he was a guarantor of the repayment of a loan which appellee Giles had at the bank where juror Franks was employed and that appellee's judgment in this case was assigned to protect juror's guaranty. Had he done so it must be readily assumed that he would have been disqualified at that time.

We do not know why, when the juror stated he had had other dealings with the appellee, the matter was not pursued further. The revelation as to his dealings at that point had been minor and of no consequence and as to whether or not counsel might have gone further in his examination, we do not say, but certain it is that the juror,

Franks, knew of his own interest in the verdict and that knowledge was shared by the appellee, Giles.

It is true that the record before us reflects that an attorney connected with one of the firms representing appellees was a director of the bank where juror Franks was employed; he was also on the Discount Committee; that on June 25, 1959 the attorney had signed a form which reflected that a number of loans, listed by number and not by name, had been before the Discount Committee and the form contains the statement, "J. F. Giles (letter of guaranty) $3,060.00," but no witness brings home to the attorney involved a knowledge that Mr. Franks was the guarantor on the Giles note and that knowledge must be traced to the attorney before this point has weight. The testimony of the attorney is to the effect that his firm was one of the attorneys for the bank and he was a director and on the Loan and Discount Committee; that the Discount Committee went through certain formalities, made a report that certain members of the committee would sign; that he had no recollection of the loan made by the bank to Mr. Giles, the appellee. That transaction seems to have been dated over a year before the trial.

The loan was a routine one and when asked about it, the president and another officer of the bank did not recall it. Therefore, it is logical to believe the testimony that the matter was not in the mind of the attorney on the morning of the trial. This particular attorney was not trying the case and came into the courtroom after the trial had started. If this attorney had prepared the corporation papers for the juror Franks' company, and was representing that corporation in a law suit, there is nothing that traces to this attorney or any member of his firm any knowledge that juror Franks was a guarantor of the debt of Giles.

Let it be understood that nothing in this opinion is designed to reflect upon counsel. Counsel for both appellants and appellees are able, skillful attorneys and have the confidence of the courts.

It is urged that counsel for appellants should have pursued his interrogation of Franks to uncover "other business dealings," but it does not take a searching cross-examination by counsel nor solemn charge from the bench to advise any man that he cannot sit upon a jury when he has a direct interest in the verdict which he is called upon to formulate.

In the case of *Hot Springs Street Railway Co.* v. *Adams,* 216 Ark. 506, 226 S. W. 2d 354, we had a case in which, as a grounds for reversal, it was alleged that one of the jurors were represented by one of the attorneys for the plaintiff. There the juror said he had not mentioned it because he thought the case had been settled and upon the question being asked of the panel he had held up his hand but that defendant's lawyer did not ask him any questions. In reversing that case we said:

"We believe that the trial court's failure to declare a mistrial was an abuse of discretion constituting reversible error. Even if we accept Calloway's statement that he held up his hand, it is perfectly clear that he knew his gesture had not attracted the attention of appellant's counsel. Both his action in raising his hand and his assertion that he thought his case had been settled show beyond any doubt that he understood the inquiry that was being put. The appellant was entitled to the information sought, as a basis for a peremptory challenge if not as a ground for challenging for cause. In these circumstances the juror's duty of candor extends well beyond a ready acquiescence in the supposition that counsel has decided not to pursue his inquiry. *The very theory of an impartial jury trial demands that the juror take positive action to bring his possible disqualification out into the open when the question is raised.* 'Nothing can destroy the integrity of juries more effectively than to allow prejudiced jurors to sit in a case.' *Anderson* v. *State,* 200 Ark. 516, 139 S. W. 2d 396. For us to approve the denial of a mistrial in this case would, we think, be a disservice to our system of jury trials." [Emphasis added]

The case of *Gershner* v. *Scott-Mayer Comm. Co.*, 93 Ark. 301, 124 S. W. 772, was a case in which the disqualification of a juror by reason of his interest in the result of the trial was before the court. In that case we said:

"Another ground set forth in the motion for new trial is that C. K. Lincoln, one of the trial jurors, was interested in the result of the trial, in that he was an officer and stockholder in a corporation which was a creditor of Gershner & Rosenthal at the time. Plaintiff filed a response, setting forth that it had no information until the motion for new trial was filed that the corporation named was a creditor of Gershner & Rosenthal; and also filed the affidavit of juror Lincoln stating that when he was selected as a juror, and during his service as such, he did not recall to mind the fact that his corporation was a creditor. No questions were asked the juror as to his interest in the outcome of the trial, and no diligence is shown to have been exercised by defendant in ascertaining whether or not the juror was interested. His son and son-in-law, Nathan Gershner and I. E. Rosenthal the two confessed members of the firm, were present at the trial, and knew, not only that the corporation named was a creditor of the firm, but also that juror Lincoln was interested in the corporation.

Though a juror asserts that his direct interest in the result of the trial will not influence his judgment, the law presumes him to be under a disqualifying bias, and public policy forbids that he sit as a juror, notwithstanding his avowal."

In the above case the court refused to set aside the verdict but the facts in the *Gershner* case, *supra,* are far different from those in the case at bar. In the *Gershner* case the most that can be said is that the Gershner partnership was indebted to juror Lincoln's company and had the verdict been for Gershner, we will assume that the Gershner assets would have been increased by $400.00 which might have been a factor in the payment of the Lincoln Company account. But in the *Gershner* case, the jury, of which Lincoln was a member, found against Gershner. The finding was directly against the interest

of juror Lincoln, if any interest he had. Juror Lincoln stated he did not know of the account between his firm and the Gershner partnership and the finding of the jury, being against the juror's interest, precluded any possibility of any intended fraud or wrongdoing or collusion. Hence the trial court properly refused to set the verdict aside.

In the instant case, it is certain that a wrong was done and while the juror stated that his direct interest in the result of the trial would not influence his judgment, not only does the law presume him to be under a disqualifying bias, but public policy forbids that he sit as a juror, notwithstanding his avowal.

One of the greatest rights of citizenship is jury service. Like any other right, it carries responsibilities. One of those responsibilities is to make known anything that affects the right to serve. The opportunity is given to do that in every trial. It was given in this trial and the juror knew what it was for when the question was asked as to dealings with the appellees and he reported some inconsequential contacts several years before and "other dealings." Elaborating on "other dealings" in his testimony on the motion for a retrial, he stated that he had bought a couple of shabby calves from Giles. Nowhere did the juror state what he knew to be a fact, that his interest in this verdict was that $3,060.00 of the verdict was assigned to relieve him of his guarantee for the appellee's loan.

The juror should have known that his interest in the proceeds from the verdict in this case would prevent him from serving and failed to make that disqualification known. Being disqualified there is nothing that counsel or trial judge can say or do, or fail to say or do, that can replace that disqualification with the right to serve.

Since there was nothing on which appellants could predicate a supposition that juror Franks was a guarantor for appellee Giles, it readily becomes apparent that counsel would indeed have to have gone far into the realm of speculation to assume that relationship and interro-

gated about it. There was nothing in the case up to that time to indicate it.

In timely and proper manner appellants presented this matter to the court and moved for a new trial. This motion should have been granted and failure to do so was error for which this cause is now reversed and remanded.

HARRIS, C.J. concurs.

McFADDIN, J. dissents.

CARLETON HARRIS, Chief Justice (Concurring). The Opinion of the Court has pointed out that Mr. Franks seemed to have made more of an effort at evasion than disclosure in answering the questions relative to his business connections with appellee Giles. I agree that his statement on the motion for a new trial, "I did not see any point in saying that I bought two shabby calves from him since 1959", indicates that he had not intended to mention, on *voir dire* examination, that he was a guarantor of the loan which Giles had at the bank. It also appears that nothing was said to Court or counsel by the juror to the effect that he had guaranteed appellee's note, which, after all, was the principal, and most pertinent, fact that should have been disclosed. However, my vote to reverse this case is not necessarily based upon any feeling of wilful misconduct on the part of Franks, or any belief that there was collusion between Franks and Giles. I am willing to accept the Circuit Court's statement that Mr. Franks stands well in the county and is a "good" man. Nonetheless, as a matter of public policy, I do not feel that one should sit as a juror where a pecuniary interest appears, irrespective of whether such interest will affect the juror's judgment. We have had several cases involving disqualification of jurors but I have found no instance of this Court approving the service of a juror in any case where an apparent pecuniary interest was present. To permit one to serve on a jury, where it appears from the record that he *could* be financially interested in the outcome of the case, would, in my opinion, stagger the confidence of the public in our juries and, in fact, strike at the very heart of the jury system.

ED. F. MCFADDIN, Associate Justice (Dissenting). The Majority is reversing the judgment on the ground that the juror, Otis Franks, Jr., was guilty of misconduct; and I dissent. As I see it, neither the facts nor the law support the conclusion reached by the Majority.

THE FACTS

The record shows that Otis Franks, Jr. is a young business man in Magnolia; that his parents have lived in Columbia County for over sixty years; that he works in the First National Bank of Magnolia; that some time before the trial he had become a guarantor on the note of James Floyd Giles to the First National Bank of Magnolia; that Mr. Eckert, one of the attorneys for the appellant in this case, was on the Discount Committee of the Bank; that Mr. Eckert had been the attorney of Mr. Otis Franks, Jr.; and that Mr. Eckert had drawn an instrument whereby Giles assigned to the Bank any recovery in this case. When Mr. Franks went to the court house, summoned as a juror in the case, he went to Judge Jones, the presiding Judge, and told him that Floyd Giles had a guaranteed loan at the Bank, and that he (Franks) worked at the Bank. Judge Jones told Franks to tell the lawyers about it. Mr. Franks went to one of the lawyers, who told him: "You answer whatever questions that are put to you by the Court and the attorneys". When Franks was questioned on *voir dire,* he told the Court and the attorneys that Giles had worked for him in the auction barn for a couple of years, and since then they had other business dealings. Here is his undisputed testimony as to what occurred on *voir dire*:

"Q. The question has arisen about a certain question asked by either the court or the attorneys about any business dealings you had with one of the plaintiffs, Floyd Giles,—will you tell the court what your answer was to the question as to your business relations with Mr. Giles?

"A. When they asked the question I answered that he had worked for me in the auction barn for a couple of years and since then we have had other business deals.

"Q. Were you asked any further questions about that by the attorneys or the court?

"A. No, sir."

Mr. Franks also testified that he was asked on *voir dire* if his business dealings with Giles would influence his verdict, and that he answered that they would not; and that such answer was true.

Mr. Eckert entered the court room while the jury was being interrogated, and the trial attorney for the appellant went to Mr. Eckert and asked him what about Franks as a juror, and Mr. Eckert replied, "He is a fine boy". The Circuit Judge, in refusing to set aside the verdict on account of the alleged misconduct of Otis Franks, Jr., said:

". . . I don't agree with the complaining persons in this case. But in this case I am sorry about it on account of the gentleman that to some extent has been made a goat out of: Mr. Franks. I know him and know his father, and they are good people, and I feel that both attorneys for the plaintiffs and the Defendants feel the same as I do about that . . .

"Mr. Franks' testimony here today as to what was asked him was almost word for word what I remember was asked. He said the Plaintiff, Mr. Giles, had worked for him and that they had had other business deals. It was dropped at that point, no question was asked what that business was or what it consisted of, and everybody seemed to be perfectly satisfied, and I think under the circumstances that the attorneys for the Defendants were put on notice sufficiently by his statement that if they had cared to they could have pursued it further. I do say that it is my personal opinion from the whole set-up, everything that happened in this case, knowing Mr. Franks and knowing how he stands in this county, had everything been known that is known here now he would still have served on this jury. So I don't know that the Defendant is in too much of a position to complain for that reason.

"But there is another matter—it is an undisputed fact in this case that the attorneys for the defendants were in a very close relationship with the juror. This had

existed over a long period of time. I don't mean regular employment but matters had arisen between them, and the juror had gone to one of the attorneys for advice. It is undisputed in this case that one of the attorneys was on the Discount Committee at the bank, that he knew Mr. Franks was with the bank and he knew Mr. Giles was indebted to the bank. It is a matter of common knowledge, that usually there is some kind of endorsement or guaranty drawn to secure money to the bank for money owed them. So I say if the Defendants' lawyers did not know that in this case, that everything else concerning that loan they did know, and I say that their knowledge was sufficinet in this case that they are not now in a position to complain of it.

"The motion for new trial will be over-ruled . . ."

The Trial Court was in a far better position than is this Court to determine, under the facts, whether Otis Franks, Jr. was guilty of misconduct. The Court found that he was not: rather, the Court found that the attorneys for the appellants did not pursue the matter with diligence[1] and, therefore, could not be heard to complain after they had lost the case. They thought that Otis Franks "was a good boy"; they chanced having him on the jury; and after they lost the case they wanted to call back the play and make Otis Franks the "goat". I think the appellant has "sinned away his day of grace" on this question of the misconduct of the juror, Otis Franks, under the facts in this case.

THE LAW

We held in *Hot Springs Street Ry. Co.* v. *Adams*, 216 Ark. 506, 226 S. W. 2d 354, that the juror Calloway had failed to make a complete disclosure; but that is not the situation here. Otis Franks went to the Court, and he told

[1] In 39 Am. Jur. 86, "New Trial" § 71, the holdings are summarized:
"It is a well-settled general rule that where alleged misconduct of the jury was known to the party claiming to have been prejudiced thereby, or to his counsel, during the trial and before a verdict was rendered, and no objection was made thereto and the matter was not in any manner brought to the attention of the court, such party cannot, after an adverse verdict, assert the misconduct as a ground for a new trial."

the attorneys, so the Hot Springs Street Railway case is not applicable. The other case cited by the Majority is that of *Gershner* v. *Scott-Mayer Comm. Co.*, 93 Ark. 301, 124 S. W. 772. In that case the juror, C. K. Lincoln, was an officer and a stockholder in a corporation that was a creditor of Gershner. Lincoln did not recall that fact to his mind when he was selected as a juror. "No questions were asked the juror as to his interest in the outcome of the trial, and no diligence is shown to have been exercised by defendant in ascertaining whether or not the juror was interested." Under that situation this Court held that the person seeking to set the verdict aside had not been diligent, and we said:

"But when objection is made to a juror after the verdict for the first time, due diligence to discover the disqualification must be shown by the objecting party. At that stage of the case it becomes to some extent a matter of discretion with the trial court as to whether or not the verdict shall be set aside; and when there is no fraud intended or wrong done or collusion on the part of the successful party, it is not reversible error for the trial court to refuse to set aside the verdict. *Fain* v. *Goodwin*, 35 Ark. 109, *Shinn* v. *Tucker*, 37 Ark. 580."

In the case at bar there was no fraud intended, and certainly there was no collusion on the part of the successful party with the juror Franks; and, therfore, the Gershner case affords the Majority no support for its conclusion. Rather, the Gershner case indicates that when there is an absence of fraud or an absence of proof of collusion on the part of the successful party, then the Trial Court's discretion in refusing to set aside the verdict will not be overthrown by us.

In *Lauderdale* v. *State*, 233 Ark. 96, 343 S. W. 2d 422, the appellant urged on appeal that the Trial Court committed error in failing to excuse Juror Illing. We held that the appellant had failed to show due diligence; and what we said in that case certainly applies here:

"Another reason for our conclusion to sustain the ruling of the Trial Court in regard to Juror Illing is be-

cause of the opportunity the appellant had on *voir dire* examination to interrogate Juror Illing. The *voir dire* examination of Illing consumed eight pages of the typewritten transcript (T. 408-415, inclusive). The juror was interrogated by the defendant at length, and that was the time and place for the defendant to ask him about any possible relationship to anyone in any wise the object of any bombing. Due diligence required investigation by the defendant on *voir dire* as to veniremen; and defendant could not wait until near the conclusion of the trial, then ask the Court for a mistrial, and complain that the Court abused its discretion."

In 39 Am. Jur. 87, "New Trial" § 73, in discussing the discretion of the trial court, the holdings are summarized:

"The refusal or denial of a motion for a new trial for alleged misconduct on the part of the jury is, as a general rule, a matter within the discretion of the judge presiding at the trial; and unless it appears that this discretion has been abused, that there has been palpable error, or that the judge has refused to review and consider the evidence by which the consideration of the motion should have been guided or controlled, his refusal to grant a new trial will not be disturbed. In considering the motion, 'each application must be determined mainly upon its own peculiar facts and circumstances and should be granted or refused with a view not so much to the attainment of exact justice in a particular case as to the ultimate effect of the decision upon the administration of justice in general.'

"Many authorities may be cited to support the rule that where a motion for a new trial is based on the alleged misconduct of a juror or jurors, and the trial judge hears evidence, either orally or by affidavits, touching such misconduct, his conclusions of fact on conflicting statements will not be disturbed on appeal."

For the reasons herein stated, I respectfully dissent.

BROWN *v.* PATTERSON CONSTRUCTION CO.

5-2765 361 S. W. 2d 14

Opinion delivered October 1, 1962.

[Rehearing denied November 5, 1962.]

J. R. Wilson, for appellant.

Riddick Riffel, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Administratrix of the estate of her son, Randal Gene Brown, instituted an action in the Bradley County Circuit Court on behalf of herself, Jesse Brown, father of Randal Gene, and several brothers and sisters of the decedent. The suit was brought against W. H. Patterson and Inodean Patterson, a partnership, d/b/a W. H. Patterson Construction Company, and against Malcolm Browning and William Henry Browning, employees of the company, alleging that Randal Gene, while employed by the construction company, was killed in an accidental injury arising out of his employment. Appellant asserted that Randal Gene Brown's death was caused by the negligence of the servants [Malcolm and William Henry Browning] of Patterson Construction Company and damages were sought in the total sum of $100,000. Patterson Construction Company filed a motion to dismiss, setting up that the Bradley Circuit Court was without jurisdiction for the reason that "jurisdiction lies exclusively with the Arkansas Workmen's Compensation Commission." The two Brownings filed a demurrer to the complaint, assert-

ing that the court was without jurisdiction over the person of those defendants, and that the allegations in the complaint were insufficient to state a cause of action against them. No order by the court relative to the demurrer appears in the record, but the court did grant Patterson's motion to dismiss. From the order entered dismissing the complaint as to the Pattersons, appellants bring this appeal.

Admittedly, Randal Gene Brown was an employee of Patterson Construction Company, and was fatally injured in an accident arising during, and out of, his employment. Patterson Construction Company did carry Workmen's Compensation Insurance, and under the provisions of Section 81-1304, Ark. Stats., the rights and remedies of appellant were exclusively under the Workmen's Compensation Law.[1] That section provides in part as follows:

"The rights and remedies herein granted to an employee subject to the provisions of this act, on account of injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representatives, dependents, or next kin, or any otherwise entitled to recover damages from such employer on account of such injury or death, except that if an employer fails to secure the payment of compensation, as required by the act, an injured employee, or his legal representatives, in case death results from the injury, may at his option, elect to claim compensation under this act or to maintain a legal action in court for damages on account of such injury or death."

In conformity with this section we have held on numerous occasions that the rights and remedies granted to an employee subject to the provisions of the Compensation Act, on account of personal injury or death, are exclusive of all other rights and remedies of such employee, his legal representative, dependents, or next of kin. See *Haggar, Administratrix* v. *Wortz Biscuit Company,* 210 Ark. 318, 196 S. W. 2d 1, *Kimpel, Guardian* v. *Garland Anthony Lumber Co.*, 216 Ark. 788, 227 S. W. 2d 932.

[1]In fact, an award has already been made by the Commission, the amount of which is questioned in another case before this Court.

Accordingly, the trial court's order dismissing the complaint was entirely proper.

As previously mentioned, no order appears in the record relating to the demurrer filed on behalf of the Brownings.[2] Accordingly, we do not pass on the question of whether appellants' tort action against the Brownings, under our holding in *King* v. *Cardin,* 229 Ark. 929, 319 S. W. 2d 214, can be maintained.

The Court's judgment dismissing the complaint against the Pattersons, and W. H. Patterson Construction Company, is affirmed.

[2]The complaint alleges that Malcolm Browning was the foreman on the job during the period when Randal Gene Brown was fatally injured, and that Browning had placed his son, William Henry Browning, in charge of the operation of a certain machine, the son being totally unskilled and incapable of operating such machine. "William Henry Browning set in motion the wrong piece of machinery which negligently and carelessly injured Randal Gene Brown" * * *.

DIETER *v.* BYRD, ADMR.

5-2714 360 S. W. 2d 495

Opinion delivered October 1, 1962.

H. B. Stubblefield, for appellant.

Dickson, Putman, Millwee & Davis, for appellee.

ED. F. MCFADDIN, Associate Justice. This case stems from a traffic mishap, when a car owned and driven by Mr. W. J. Bardo was wrecked, and Mr. Bardo was killed. Melvin Dieter, a minor, one of the occupants of the Bardo car, was injured, and brought this action by his father and next friend, for damages for personal injuries. Appellee Byrd is Special Administrator of the Estate of W. J. Bardo. At the close of the evidence for the plaintiff, the Court directed a verdict for the defendant; and the plaintiff brings this appeal, urging the points herein discussed.

I. *The Passenger Issue.* The complaint alleged that the plaintiff, Melvin Dieter, was "riding as a passenger in the front seat" of the Bardo car, and that Bardo in driving his car was guilty of willful and wanton negligence in enumerated particulars. The allegation that Melvin Dieter was riding as a passenger was the only allegation in the complaint as to Melvin Dieter's status. In the trial of the case, the Court refused to allow the plaintiff to offer evidence as to passenger relationship. This ruling was on the theory that the complaint had alleged that Bardo was guilty of willful and wanton negligence, and that such *quantum* of negligence would be necessary to be shown only if the relationship of Dieter to Bardo was that of a guest. In other words, the Court held that the allegation as to willful and wanton negligence eliminated the allegation as to passenger relationship.

It is our holding that the allegation of willful and wanton negligence did not control the other allegations in the complaint. Under an allegation that the driver of the car had been guilty of willful and wanton negligence, the plaintiff may show any degree of negligence he can. Willful and wanton negligence is the worst form of negligence, and the allegation as to it would admit evidence of the lesser degree of negligence. The situation is somewhat analogous to an indictment of first degree murder; under such an indictment the defendant may be tried and convicted of a lesser degree of homicide if proved, even if not guilty of first degree murder. *Smalley* v. *State,* 167 Ark. 678, 269 S. W. 49; *King* v. *State,* 117 Ark. 82, 173 S. W. 852; and *Brown* v. *State,* 203 Ark. 109, 155 S. W. 2d 722.

In 38 Am. Jur. 958, "Negligence" § 269, the text states that there is a diversity in holdings as to whether degrees of negligence have to be alleged in different counts, and then the text says:

"Other courts have adopted the view that allegations of willful or wanton negligence are mere surplusage and may be disregarded so that recovery may be had on proof of mere negligence or carelessness. Still other courts in permitting recovery for proof of ordinary negligence under an allegation of gross or wanton negligence have done so on the theory that an averment of the greater degree includes the lesser. Many of the courts which adopt the view that recovery may be had for ordinary negligence under an averment of gross, willful, or wanton acts hold that an averment that the act of the defendant was negligently done is sufficient, and under a general averment of negligence, proof of any and every degree of negligence is admissible. The better view would seem to be in favor of permitting a recovery regardless of the refinements attributed by some courts to the terms employed by the pleader."[1]

The complaint alleged that Melvin Dieter was a "passenger" in the car; and under that allegation the plaintiff had a right to offer evidence as to his status. In *Cousins* v. *Cooper,* 232 Ark. 605, 339 S. W. 2d 316, the word "passenger" was used to differentiate such status from that of a guest: ". . . as to whether Cooper was a guest or a passenger, we have no undisputed evidence on that issue." There are cases from other jurisdictions which differentiate between "passenger" and "guest": *Humphreys* v. *San Francisco Area etc.* (Cal. Sup.), 139 Pac. 2d 941; *Riggs* v. *Roberts* (Idaho), 264 Pac. 2d 698; *Bentley* v. *Oldetyme* (N.D.), 298 N. W. 417; *Richards* v. *Parks* (Tenn. App.), 93 S. W. 2d 639; *Woelkl* v. *Latin*

[1]Arkansas is liberal on pleadings. Our statute (§ 27-1113 Ark. Stats.), as to the requirements of the complaint, says:
"Third. A statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action.
"Fourth. A demand of the relief to which plaintiff considers himself entitled."

An interesting case is *Long* v. *Archer* (Ind.), 46 N. E. 2d 818, in which the complaint alleged that the plaintiff was a "passenger".

(Ohio App.), 16 N. E. 2d 519; *Gale* v. *Wilber* (Va.), 175 S. E. 739; *Long* v. *Archer* (Ind.), 46 N. E. 2d 818; *Cafaro* v. *Cafaro* (N. J.), 184 A. 779; and *Peery* v. *Mershon* (Fla.), 5 So. 2d 694. In "Restatement of the Law on Torts" § 490, the distinction between "passenger" and "guest" is stated:

"The phrase 'passenger in a vehicle' is used to denote the fact that the plaintiff is one who is being carried by another for hire. The word 'guest' is used to denote one whom the owner or possessor of a motor car or other vehicle invites or permits to ride with him as a gratuity, that is, without any financial return except such slight benefits as it is customary to extend as part of the ordinary courtesies of the road."

The status of the occupant of a car, when suing the driver, is ordinarily a matter to be shown by evidence, and is a question of fact for the jury if the status is disputed. We so held in *Brand* v. *Rorke,* 225 Ark. 309, 280 S. W. 2d 906. In *Simms* v. *Tingle,* 232 Ark. 239, 335 S. W. 2d 449, we said:

"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."

In the case at bar, the allegation was that Melvin Dieter was a "passenger", and under that allegation the plaintiff was entitled to offer competent evidence as to his status; and such evidence should have been received so that the issue of status could have been submitted to the jury if the evidence was in conflict and if the other essentials for a recovery were shown. The Trial Court erred in its ruling in this regard.

II. *Competency Of The Proffered Evidence As To The Status Of Melvin Dieter.* As heretofore stated, the Trial Court refused to allow any evidence as to Melvin Dieter's status, but did allow the appellant to make his record as to what a witness would testify on the point. The witness offered was Harrell Dieter, father of Melvin Dieter, and the purport of his testimony was dictated into the record. While this was being done, the attorney for the appellee said: "Your Honor, please, you have already ruled on this; but for the sake of the record I would like to state that we would object to this on the further ground that any testimony regarding a contractual transaction between the deceased, Mr. Bardo, and any party to this lawsuit would be a violation of the 'Dead Man's Statute'." In view of our rule that we sustain the Trial Court if the ruling be correct, regardless of reason assigned (*Williams* v. *Lauderdale,* 209 Ark. 418, 191 S. W. 2d 455), we find it proper to consider the so-called "Dead Man's Statute". This is found in "Schedule" § 2 to the Arkansas Constitution, and the germane portion reads:

". . . 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."[2]

It must be remembered that Melvin Dieter was a minor at the time of the trial and that the style of the action was "Melvin Dieter, by his father and next friend, Harrell Dieter, v. Conley Byrd, Special Administrator of the Estate of W. J. Bardo, Deceased." The question then, in whether Harrell Dieter, being the father and next friend of Melvin Dieter, was prohibited by the "Dead Man's Statute" from testifying as to conversations and agreements with W. J. Bardo in this case against the administrator of Bardo's estate. We reach the conclusion that Harrell Dieter was not a disqualified witness under the

[2]In Ark. Law Bulletin Vol. 9 at p. 63 (under date of May 15, 1941), there is an article entitled, "The Dead Man's Statute in Arkansas," by Edgar E. Bethell. Also, in 4 Ark. Law Review on p. 383 *et seq.* there is a discussion of our holdings on the "Dead Man's Statute".

"Dead Man's Statute", because Harrell Dieter was not a real party to the suit. He was a person liable for costs, if the infant lost the action (§ 27-824 Ark. Stats.), and little more than a surety on a bond for costs. Our statute (§ 27-823 Ark. Stats.) says: "Any person may bring the action of an infant as his next friend." In *Buckley* v. *Collins,* 119 Ark. 231, 177 S. W. 920, we said:

". . . for it is the infant, and not the party who represents him in the litigation, that is the real party to the suit. As is said in *Morgan* v. *Potter,* 157 U. S. 195-8: 'It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian *ad litem,* by whom a suit is brought or defended in behalf of another. The suit must be brought in the name of the infant, and not in that of the next friend.' Under our statute 'the action of an infant must be brought by his guardian or next friend.' Kirby's Digest, § 6021. But whether the suit be brought by the guardian or the next friend, it is at least the suit of the infant and must be brought in the name of the infant by the guardian or the next friend. The infant can not act for himself in bringing a suit, but it is nevertheless his suit, no matter by whom brought."

The general rule is stated in 58 Am. Jur. 187, "Witnesses" § 305, in discussing whether a next friend is disqualified from testifying:

"Although technically a party to the suit, one who sues or defends as a guardian or next friend is competent to testify as a witness in behalf of the person whom he represents regarding a transaction with a person who has died; such a plaintiff or defendant is not a party within the dead man statute."[3]

[3]The reasoning in the Kentucky case of *Doty* v. *Doty,* 118 Ky. 204, 80 S. W. 803, 2 L.R.A.N.S. 713, 4 Ann. Cas. 1064, is sound and in accordance with our holding here. In addition to the Kentucky case, see also *Begovich* v. *Kruljac,* 38 Wyo. 365, 267 P. 426, 60 A.L.R. 1046; see also case note in 4 Ann. Cas. 1067; and see also annotation in 149 A.L.R. 1130, entitled, "Statute excluding testimony of one person because of death of another as applicable to testimony of surviving party who entered into contract with decedent for the benefit of a third person."

We therefore conclude that the proffered testimony of Harrell Dieter was competent on the status of Melvin Dieter[4] in the Bardo vehicle at the time of the collision, and the Court erred in refusing to allow said testimony to go to the jury.

III. *Other Points Presented.* (a) At the close of the plaintiff's case the Trial Court instructed a verdict for the defendant on the theory that the plaintiff was a guest in the car and had failed to prove willful and wanton negligence. Of course, if Melvin Dieter was a passenger, as distinguished from a guest, then the plaintiff only had to show ordinary negligence, as distinguished from willful and wanton negligence; and we have held that the plaintiff was entitled to show his status. So, at all events, the judgment must be reversed and the cause remanded for a a new trial. On a new trial the evidence as to the degree of Bardo's negligence, if any, will have to be presented to a new jury. We, therefore, forego any discussion as to whether the evidence in the present record was sufficient to take the case to the jury on the issue of willful and wanton negligence.

(b) The Court refused to allow the deposition of Melvin Dieter to be read in evidence, and also refused to allow the deposition of Dr. Coy C. Kaylor to be read in evidence. We are asked to rule on these matters because of another trial. We find it unnecessary to rule on these matters, because if the persons are present or available in court, their testimony is better than their depositions if called by the party who took the depositions; and if the parties are absent, a different issue will be presented.

For the errors herein discussed, the judgment is reversed and the cause remanded.

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[4]Of course, under the "Dead Man's Statute" Melvin Dieter could not testify as to any transactions he had with the deceased, but he could testify as to the facts of the collision because those facts did not involve a "transaction". See *Rankin* v. *Morgan*, 193 Ark. 751, 102 S. W. 2d 552.

REESE *v.* HAYWOOD.

5-2760 360 S. W. 2d 488

Opinion delivered October 1, 1962.

[redacted]

John C. Watkins and *Ward & Lady,* for appellant.

Kirsch, Cathey & Brown and *Barrett, Wheatley, Smith & Deacon,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellant for libel. At the close of the plaintiff's case the court directed a verdict for the defendants. We have concluded that the peremptory charge was correct, for the reason that the words complained of were not actionable *per se* and there is no substantial proof of special damages.

In 1955 the plaintiff, a farmer, bought about $15,000 worth of farm equipment from the defendant Haywood, doing business as Clay County Implement Company. Reese later returned part of the equipment and contended that there was then a balance of $64 due to him from the seller. This claim was disputed by Haywood, who insisted

that Reese owed his company a balance of $213.87. The parties were still in disagreement about the matter at the time of the trial.

In 1959 Haywood referred the account to the other defendants, Frost & Frost, who were engaged in the business of disseminating credit information and collecting delinquent accounts. The Frosts published a monthly periodical, called Credit Information Bulletin, in which they listed thousands of overdue accounts, giving the name and address of each debtor, the name and address of his creditor, and the amount supposedly due. The implement company's claim for $213.87 was so listed in several issues of the Bulletin. These statements appeared in the preface to each issue: "This information is compiled from reports submitted by our subscribers and is believed to be accurate. To the best of our knowledge it does not include disputed accounts. Nothing in this report is to be construed as an accusation that any debtor listed is unwilling to pay his or her just debt."

In an early case we discussed the distinction between words that are actionable in themselves and those that are not: "Where the natural consequence of the words is a damage, as if they import a charge of having been guilty of a crime, or of having a contagious distemper, or if they are prejudicial to a person in office, or to a person of a profession or trade, they are in themselves actionable; in other cases, the party who brings an action for words, must show the damage which was received from them." *Studdard* v. *Trucks,* 31 Ark. 726.

Damage is not necessarily a natural consequence of the publication of the bare statement that a farmer owes a past-due account to an implement company, with no suggestion of a dishonest or fraudulent refusal to pay. While such a publication might be defamatory in itself in the case of a trader or one in whose business credit is an important asset, the contrary rule prevails where the plaintiff is not a trader. Harper & James, The Law of Torts, § 5.2. In the same vein we have said that an imputation of insolvency is not actionable *per se.*

Rachels v. *Deener,* 182 Ark. 931, 33 S. W. 2d 39; see also *Honea* v. *King,* 154 Ark. 462, 243 S. W. 74.

As the words were not actionable in themselves the appellant had the burden of proving actual damages. At the trial he made no claim that his credit had been impaired by the publication. He did testify that he had been humiliated and embarrassed, but he did not attempt to say who, if any one, had witnessed his humiliation and embarrassment, nor did he give any details whatever of his asserted discomfiture. The jury would have been required to resort to speculation and conjecture in order to make an assessment of actual damages on the basis of the plaintiff's bald conclusion of law.

Reese was asked if the published information had come to the attention of his friends and associates, but the court sustained an objection to this line of inquiry, as offending the hearsay rule. The court's ruling was correct, for Reese's knowledge must have come from his friends and associates, none of whom were called to testify. If by any chance Reese had first hand admissible information in the matter it should have been brought to the trial court's attention by an offer of proof, after the defendants' objection had been sustained. No such offer of proof was made.

While it is true that the jury might have made an award of nominal damages upon a mere finding that the published statement was untrue, it is well settled that a failure to award nominal damages is not a sufficient basis for a reversal. *Wells* v. *Adams,* 232 Ark. 873, 340 S. W. 2d 572.

Affirmed.

AGRICULTURAL INS. CO. *v.* ARK. POWER & LIGHT CO.

5-2740 361 S. W. 2d 6

Opinion delivered October 1, 1962.

[Rehearing denied November 5, 1962.]

McMillen, Teague & Coates; Thompson, Coe, Cousins & Irons, Dallas, Texas, for appellant.

Wright, Lindsey, Jennings, Lester & Shults; House, Holmes, Butler & Jewell, for appellee.

PAUL WARD, Associate Justice. The subject of this litigation is Boiler Unit No. 2 of the Harvey Couch Steam Electric Station, property of the Arkansas Power and Light Company, located near Stamps, Arkansas. On the night of October 11, 1957 an explosion occurred within this Unit. The Arkansas Power and Light Company (hereafter referred to as "Arkansas") carried insurance (including explosion insurance) covering, among other properties, this Unit. This insurance was written by 102 separate companies, 100 of which are the appellants herein and the other two are appellees. The insurance policies are identical in form, including the explosion clauses, and each policy contained a "joint loss" clause. The amount of damages caused by the explosion was stipulated and is not an issue here.

The pertinent clause in each of the policies is set out below.

" 'INHERENT EXPLOSION CLAUSE:

" '1. In the interest of the Insured, the condition of this policy excluding loss from explosion is hereby modified, and in consideration of the rate at which this policy is written, this Company shall be liable for any direct loss to the property covered hereunder caused by explosion and by any artificial electrical disturbance immediately preceding and causing such explosion occurring in any part of the plant of which the property insured hereunder is a portion, or occurring in any structure containing property insured hereunder; provided such loss exceeds the sum of $200 (inclusive of loss, if any, by ensuing fire) but only for this Company's *pro rata* part of the amount of such excess. Provided, further, that in each and every instance the explosion results from the hazards inherent in the business as conducted therein and not otherwise and except as hereinafter provided.

" '2. Loss by explosion shall include direct loss from explosion originating within unfired pressure vessels and from the explosion of accumulated gases or unconsumed fuel within the firebox (or the combustion chamber) of any fired vessel or within the flues of passages which conduct the gases of combustion therefrom, *but this company shall not be liable for any loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines,* internal combustion engines, rotating parts of machines or machinery, unless fire ensues and then shall be liable for loss by fire only.

" 'Electrical arcing, water hammer, and the bursting of water pipes are not explosions within the intent or meaning of this Inherent Explosion Clause.' " (Emphasis added.)

The total of appellants' policies on all of Arkansas' properties is $95,990,000, and the total of all the policies is $97,300,000.

As before stated, Arkansas and two of the group of insurance companies are appellees. Another appellee is the American Motorist Insurance Company. Its policy also contains an explosion clause, but it claims that (under the wording of said clause) it is not liable if Arkansas had other explosive coverage. All of the policies included other coverages besides explosions.

On May 19, 1959 appellants filed a complaint in the circuit court against Arkansas and the American Motorist Insurance Company, hereafter called American, (asking to have the other two insurance companies made defendants, as necessary parties) in the nature of a declaratory proceeding, asking the court to make certain declarations of law, and stating that American had denied all liability under the terms of its policy. In the complaint appellants alleged that "the cause of the explosion was not a peril covered by the fire and lightning policies to the appellee utility in any sum or amount". Appellants further alleged that "there is no liability under their policies and that the entire liability for the damage is covered by the policy of the American Motorist Insurance Company." Alternatively it was pleaded that, if they were held liable, American was also liable, and that, under the joint loss clause (in all the policies), the loss should be prorated. In addition it was alleged in effect that the same result should be reached because of certain "Agreement of Guiding Principles" to which all insurance companies adhere. The essence of appellants' prayer was: (1) that the court declare the appellants not liable; (2) that American be declared liable for the entire amount of the loss; (3) that, alternatively, the loss be apportioned among all the insurance companies (including American) pursuant to the "joint loss" clauses and the "Agreement of Guiding Principles". Exhibits were attached to confirm and sustain related allegations in the complaint.

After certain procedural matters were disposed of the two appellee insurance companies filed answers in which they neither admitted nor denied liability to Ar-

kansas, and appellants then filed an amendment to their complaint. Therein appellants alleged that ". . . the explosion and resulting damage originated in a steam pipe in the steam boiler"; that it " . . . accidentally cracked, ruptured, and exploded, setting in motion an uninterrupted, continuous, connected series of events, directly and proximately terminating in an explosion of gas in the boiler", and that they have no liability to Arkansas.

On October 12, 1959, American filed a separate answer in which, after admitting and denying certain allegations contained in the complaint and the amendment thereto, it was alleged its policy did not cover the explosion in question "in the event such an explosion is covered by any other valid and collectible insurance", and that appellants' policies provided such coverage. On October 16, 1959 Arkansas filed its separate answer in which, among other things it was alleged: It had no knowledge of any "Agreement of Guiding Principles" entered into between various insurance companies; it agreed the court should decide whether appellants' policies covered the explosion; and, that a justiciable issue was presented and that the rights, obligations and liabilities of all parties should be determined. In Arkansas' cross-complaint it asked the court to impanel a jury to determine the damages to which it is entitled under the several policies. Later Arkansas filed an answer to the amended complaint denying the allegation that the explosion occurred in a steam pipe as alleged by appellants.

Then on October 23, 1959 appellants filed a reply to Arkansas' pleas above mentioned. Therein appellants set out in full the clause in their policies designated "Inherent Explosion Clause" (copied above); they deny the explosion occurred as stated by Arkansas; they admit a justiciable issue exists; and, they state they are entitled to a "jury trial upon any controverted issue of fact".

There followed a lengthy trial on the above issues wherein voluminous testimony and exhibits were introduced in evidence, and, after numerous instructions by the court, the matter was submitted to the jury along with the following separate forms of verdicts:

(1) "We, the jury find for the Arkansas Power & Light Company against the plaintiff insurance companies.

_____

Foreman

(2) "We, the jury find for the defendant, American Motorists Insurance Company.

_____

Foreman

(3) "We, the jury, find for the Arkansas Power & Light Company against the American Motorist Insurance Company.

_____

Foreman

(4) "We, the jury find for the plaintiff insurance companies.

_____

Foreman

(5) "We, the jury, find that the direct loss from an explosion of accumulated gases or unconsumed fuel within the firebox or combustion chamber of a fired vessel or within the flues of passages which conduct the gases of combustion therefrom was:

$_____

_____

Foreman

"We the jury find that the loss to property of Arkansas Power & Light Company directly damaged by an explosion of a steam pipe was:

$_____

_____

Foreman"

At the bottom of the last form of verdicts the following occurs:

NOTE: "This form of verdict will be used by you only if you find that there were two explosions, and the sum of the two amounts should be $1,658,634.89."

After the deliberation the jury returned into open court with the following verdicts:

"We, the jury, find for the Arkansas Power & Light Company against the plaintiff insurance companies.

/s/ Sam Wortman,

Foreman"

"We, the jury, find for the defendant, American Motorists Insurance Company.

/s/ Sam Wortman,

Foreman"

As previously stated, there was a lengthy trial at which a mass of testimony and exhibits were introduced, including voluminous technical testimony relative to the construction and operation of Unit No. 2. However, we feel, in view of the jury verdicts and our disposition of the case hereafter set forth, it would serve no useful purpose to attempt to abstract the record in detail, but that it will suffice to set forth only a summary of the pertinent facts involved.

What is designated as Boiler Unit No. 2 is a square metal structure approximately 130 feet high and 30 feet in width and (apparently) about the same in depth. The Unit is lined inside with steam water pipes which are heated by the combustion of a mixture of air and gas forced or blown into the large combustion chamber through 18 apertures on the east side of the Unit. Also, the Unit on the west side but within the overall structure, is what is called a "bird cage" which is about 11 feet wide and extends from near the top of the structure down about one half the way to the bottom. Inside the bird cage (near the bottom) there is an assembly of water

pipes (known as the "economizer section") where the water is preheated, and above them is a similar assembly called the "superheater section" where the gases not fully burned in the main fire box (which is 20 feet wide and about 80 feet high) are utilized to super heat the water and steam in the metal pipes. Perpendicular steam pipes line the bird cage and form a "U" at the bottom. After the explosion it was found that one of the steam pipes (about 3 inches in diameter, with walls about three eighths inch in thickness) at the bottom of the "U" was broken, apparently by some great force. No one questioned the evident fact that there was a terrific explosion in the large fire box or combustion chamber which resulted in more than $1,000,000 damages to the Unit.

Generally speaking, appellants take the position (a) that the steam pipe broke first and the big explosion followed as a result, and (b) that their policies did not cover that situation.

We agree with the trial court that the principal questions to be decided were (a) whether the steam pipe broke first and caused the big explosion in the large combustion chamber or (b) whether the explosion in the combustion chamber caused the steam pipe to explode or rupture.

Much testimony was introduced by appellants to sustain their theory that the steam pipe exploded first. The theory and contention of Arkansas and American was that the explosion in the combustion chamber caused the steam pipe to break or give way, and they introduced much technical testimony to sustain that theory.

Although, as previously stated, this litigation was begun as a declaratory judgment proceeding to determine the respective rights and liabilities of the several parties, both sides agreed that a jury should be impaneled to try disputed questions of fact, and this was the procedure followed without objections. Appellees contend here that their theory was adopted and sustained

by the jury's verdict. Appellants contend, however, that their theory was not properly submitted to the jury. American contends it was not liable for the damage because, under the terms of its policy, it was not to be liable if there was other insurance to take care of the loss. It is conceded that the liability of the two appellee insurance companies is the same as that of appellants. In addition to the principal issue mentioned above, there are other contentions advanced by appellants which will be examined hereafter. Appellants group their contentions for a reversal under 4 separate points which we will now discuss in the order set out by them:

(1) "The Trial Court erred in refusing to submit to the Jury as requested by Appellants the issue of whether the explosion in Unit 2 of the Harvey Couch Steam Electric Station on October 11, 1957 originated within a steam pipe, because this involved a question of fact for the jury."

Our understanding of the factual situation in this connection, after carefully studying the lengthy discussions ably presented by all parties, may be briefly stated as presently set forth. (a) It is beyond doubt that there was a terrific explosion of "accumulated gases or unconsumed fuel within the fire box" of Unit No. 2 which was the immediate cause of the extensive damage; (b) There can be no doubt, if not in fact conceded, that this damage was covered by the "Inherent Explosion Clause" (paragraph 2) contained in appellants' policies (unless excluded by the emphasized portion); (c) Appellants (relying on said exclusion language) offered voluminous testimony to prove the terrific explosion previously mentioned was set off by an explosion or rupture in a steam pipe in the bird cage; (d) This theory of appellants can be maintained only by showing two explosions were involved; and, (e) this situation presented a fact question for the jury's determination. The jury found that there was only one explosion, and this finding must, of course, be sustained if there was substantial evidence to support it.

There is no doubt in our minds that appellees did present such substantial evidence. This fact is so clearly shown by the record that it would be supererogation to attempt to set out the voluminous testimony. In fact, we do not understand that appellants seriously challenge this point. They do, however, ably contend that this fact was not presented (or properly presented) to the jury. Although we do not agree with this contention, we now proceed to discuss it.

The instructions requested by each party and those given by the Court were voluminous and it would be impractical and useless to do more than refer to the pertinent portions. The trial court, after refusing numerous instructions requested by each of the parties, gave instructions to the jury covering ten pages in the record. (It is noted here that appellants challenge no specific instruction in the points set out in their brief.)

A careful study of the trial court's instructions and the several forms of verdicts submitted to the jury convinces us that the issue (mentioned above and insisted on by appellants) was properly presented to the jury. Touching the issue in question the court gave the following instructions:

(a) (In essence) the court told the jury the burden was on Arkansas to show its loss was covered by the general terms of appellants' policies, and, this having been done, the burden shifted to appellants to prove the loss came within the exception or exclusion clauses, and that the burden was on appellants to prove the steam pipe exploded or ruptured before the explosion in the combustion chamber.

(b) ". . . the only issue for you to determine is the nature of the explosion or explosions which caused the damages . . ."

(c) (In essence) if the loss suffered "from an explosion of accumulated gas or unconsumed fuel within the fire box . . ." you find for Arkansas. If, on the other hand you find the loss resulted from an explosion

or rupture in a steam pipe your verdict will be against American.

(d) (In essence) if you find there were two explosions and one of them occurred in a steam pipe, then American would be liable.

(e) "The word Explosion as used in connection with the tube also means ruptured."

Based on the above instructions, the jury was handed five forms of verdict which have been previously set out in full. Reference to form 5 (with the court's explanatory note attached at the bottom) leads us to only one conclusion, i.e., the jury found there were not two explosions. As pointed out before, appellants admit there was an explosion in the fire box, so the jury must have found there was no explosion (or eruption) in the steam pipe.

(2) Appellants' next point is phrased as follows:

"The Trial Court erred in refusing to submit to the Jury issues raised by the pleading and evidence as to ambiguities in the insurance policy of Appellee American Motorists Insurance Company which if found by the Jury in Appellants' favor would have resulted in a lesser judgment against Appellants under the joint loss clause in their policies."

We see no merit to appellants' contentions under this point, and we believe they can be adequately disposed of in the following summary manner.

Arkansas had a policy written by American which also covered (in a limited way) damage by explosion such as the one in this case. An endorsement on the policy reads as follows:

"It is agreed that coverage is provided hereunder as respects an explosion of gas within the furnace of a boiler or gas passages therefrom to the atmosphere, *except that this policy does not provide this coverage in the event such an explosion is covered by any other valid and collectible insurance.*" (Emphasis added.)

Without going into the merits of appellees' contention that appellants, not being a party to the contract of insurance between American and Arkansas, have no right to challenge the meaning of the policy placed on it by the two participating parties, we think the meaning of the emphasized words in the above clause is clear and unambiguous. In plain language it says American was not to be liable if there was other coverage. In view of the conclusion we have reached under point (1) above, it is now established that the explosion was covered by other insurance, i.e. by appellants' policies. This interpretation is sustained by the record which discloses that Arkansas paid American only $11.71 for this limited coverage when they would have had to pay $1,241.24 for unlimited coverage.

Much the same reasoning disposes of appellants' contention that American should have to pay its proportional part of the damages because American's policy contained a "joint loss" clause just like all of appellants' policies. It seems to us that appellants' contention loses all its force since we have already concluded (as did the jury) that American is not liable for any of the damages caused by the explosion—hence there could be no "joint loss" as to American.

(3) Appellants here contend that "it was a question of fact for the jury that furnace explosion coverage was specified in the insurance policy" of American. We feel that what we have previously said refutes and disposes of this contention. The trial court took the position, and we agree, that there was no ambiguity in the language contained in American's policy. It was the province of the court and not the jury to determine this fact. See: *Steele* v. *McCargo,* 260 F. 2d 753 (8 Cir. 1958). Insurance policies are to be interpreted like other contracts. See: *The National Life and Accident Insurance Company* v. *Baker,* 234 Ark. 670, 354 S. W. 2d 1. Also, if the contract is not ambiguous, it is the province of the court and not the jury to interpret it, as held in *Lindner* v. *Mid-Continent Petroleum Corporation,* 221 Ark. 241, 252 S. W. 2d 631.

(4) Appellants' final contention for a reversal is couched in this language:

"The Trial Court erred in ruling as a matter of the law that the Agreement of Guiding Principles of May 1, 1950, has no application to the liability of the Appellee American Motorists, because this involved a question of fact for the Jury."

Appellants, in this connection, preface their argument with this statement:

"The Agreement of Guiding Principles is a written guide designed to prevent disputes in the apportionment of losses involving overlapping coverage between boiler and machinery policies and fire, extended coverage and explosion policies, which disputes are declared to be against the interest of the insuring companies and the general public."

The instrument referred to above, consisting of 7 pages, contains this clause:

"Therefore Be It Resolved, that the National Bureau of Casualty Underwriters and the National Board of Fire Underwriters recommend to their respective members and subscribers their concurrence in adopting the following Agreement of Guiding Principles, effective on and after May 1, 1950, at Noon Standard Time, at location of property involved."

Near the middle of the instrument appears the following in bold capital letters:

"The guiding principles apply only when overlapping coverage exists."

Speaking of this instrument the trial court, in its judgment stated:

"The Court finds that the policies of insurance involved here and the Agreement of Guiding Principles are unambiguous, that there is no overlapping coverage, and the Court finds as a matter of law that the Agreement of Guiding Principles has no application under the

facts and circumstances of the case and creates no liability on the part of American Motorists Insurance Company, nor any defense as to the claim of Arkansas Power & Light Company; the Court further finds, as a matter of law, that the joint loss clauses of the policies of insurance have no application under the facts and circumstances in this case."

In our judgment the court's statement was correct, and we would not presume to rephrase it. It is also our own opinion that the language in the "Agreement of Guiding Principles" document is clear and unambiguous, and, as we have already pointed out, the trial court had the right to construe it. The interpretation of the trial court becomes even more conclusive since we have already decided American is not liable for the loss but that appellants are, so there could not possibly be any "overlapping coverage" as between American's policy and the policies of appellants.

Finding no error, the judgment of the trial court is affirmed.

Affirmed.

GOODWIN *v.* STATE.

5-2742 360 S. W. 2d 490

Opinion delivered October 1, 1962.

C. Floyd Huff, Lookadoo, Gooch & Lookadoo, Daily & Woods, Shaver, Tackett & Jones, for appellant.

David B. Whittington, Wood, Chesnutt & Smith, for appellee.

PAUL WARD, Associate Justice. This litigation was initiated to invalidate certain transactions negotiated by H. C. Warren as County Judge of Garland County during the year 1959. In these transactions Warren, acting in the capacity of County Judge, bought numerous expensive pieces of used road building equipment from Paul G. Goodwin on divers occasions, each time delivering to him used county equipment as a down payment. On these occasions Warren executed a purchase contract together with a written note or agreement, bearing interest, for the balance due. These notes or agreements were to be paid in equal installments—some due in 1959 and the others due the following year. These installment notes were then transferred or sold by Goodwin to different banks. Some of the installment payments had been made to the banks by the county.

This suit was filed in the chancery court by the prosecuting attorney and five members of the grand jury (all citizens and taxpayers of Garland County) against Goodwin and the said banks. The plaintiffs, gen-

erally speaking, sought to have the contracts (sales, purchases, notes) rescinded and declared null and void; to have Goodwin and the banks repay the county any money they had received; to have returned to the county any equipment (or the value thereof) turned over to Goodwin; to be reimbursed for all damages and depreciation to equipment sold to Goodwin; to enjoin the present county judge (Warren having gone out of office in February of 1960) from approving any claims based on the installment payments due or to become due; and, to impound for the benefit of the county the equipment purchased from Goodwin. The complaint sets out in detail the above mentioned transactions, identifying by code or name each piece of equipment bought or transferred by Warren (as county judge), but a brief summary, set out below, will suffice for all purposes of this opinion.

(a) On January 12, 1959 contract to buy equipment for $29,500; $6,000 paid by county; balance (including $2,115 interest) $25,615, payable in four equal installments of $6,403.75, due July 1, 1959—November 15, 1959—July 15, 1960—November 15, 1960. This contract was endorsed by Goodwin and transferred to the Bank of Amity on a date and for a consideration unknown to plaintiffs. It is alleged that Goodwin bought the equipment for $17,000 and then sold it to the county for $29,500. The county has already paid the bank the first two installments or a total of $12,807.50 and the same amount is payable in 1960. The $6,000 down payment represented a trade-in of equipment belonging to the county.

(b) On April 15, 1959 Warren purchased equipment from Goodwin for $21,000; down payment $3,500 (represented by county equipment delivered to Goodwin); balance due by county (including $1,575 interest), $19,075; payable $2,500 May 15, 1959, and three payments of $5,525 each due April 15, 1960, October 15, 1960, and December 15, 1960. Prior to May 15, 1959 Goodwin endorsed the contract to the First National Bank of Fort Smith—consideration unknown. The county has made the first payment to the bank.

(c) On February 15, 1959 there was a similar transaction between Warren and Goodwin. Equipment was purchased for $31,000 with a down payment of $1,500 (representing county equipment trade-in); the balance (including $2,920.25 interest), $32,420.52 payable in four equal installments, two due in 1959 and two in 1960. The contract was transferred by Goodwin to Elk Horn Bank & Trust Co. of Arkadelphia. The first installment has been paid to the bank by the county. On March 4, 1960 the bank filed a claim for the second payment but it has not been approved by the county judge. Plaintiffs allege that Goodwin purchased the equipment for $19,500 and sold it to the county for $31,000.

(d) Similarly, on January 1, 1959 Warren purchased from Goodwin equipment for $7,600 payable (with $376.20 interest) in three equal installments due in March, August and November of 1959. This contract was assigned to the Bank of Amity. The county made the first payment of $2,658.73 to Goodwin. The other two payments were made to the bank.

(e) On December 11, 1959 Warren executed a contract with Goodwin for the purchase of equipment, consideration being $9,800 with a down payment of $3,000 (representing county equipment trade-in). The balance (including $367.21 interest) of $7,167.21 payable $1,389.07 on June 15, 1960, and $2,389.07 in September and November, 1960. This contract was assigned to the Bank of Amity, and no claim for payment has been filed with the county.

After the issues were fully developed and presented by able counsel on both sides the chancellor made numerous findings in favor of appellees. These findings will be discussed separately under the five points urged by appellants for a reversal.

1. It is first contended by appellants that the plaintiffs, being the prosecuting attorney for Garland County and members of the grand jury of that county, were not proper parties, and, therefore, had no standing in court to maintain this action. In support of their contention,

appellants point out that the grand jury was in session when this suit was filed, and that all the plaintiffs (except the prosecuting attorney whose duty it was to advise the grand jury) were members of the grand jury, although they were qualified electors and taxpayers. Attention is also called to Sections 43-927 to 43-931, Ark. Stats. which, among other things, require members of the grand jury not to make public what they say or how they vote, and not to disclose evidence given them as jurors. In *Collins* v. *State,* 200 Ark. 1027, 143 S. W. 2d 1, the Court said these mandates are for the protection of the jurors. In *State* v. *Fox,* 122 Ark. 197, 182 S. W. 906, it was said the proceedings of a grand jury should be kept secret and cannot be reviewed by a trial court on a motion to quash an indictment. Appellants argue that members of the Grand Jury investigated the facts upon which this complaint was based and that they had no legal right to use this information as they are here attempting to do.

We find no merit in appellants' contention on this point. It is conceded that all five plaintiffs are qualified as electors and taxpayers to maintain this action. The information, or at least most of it, is a matter of public record, and appellants do not point out what, if any, information was obtained otherwise. Even if some of the plaintiff-jurors did obtain some of their information as jurors, we know of no law or rule that would prevent them from using it in an action of this kind to protect the public interest. In 24 Am. Jur. *Grand Jury,* § 50, page 867, there is a discussion, under the heading "Application of Rule Permitting Disclosure of Evidence," which contains this statement:

"These illustrations of the extent of the rule requiring secrecy of the grand jury's proceedings amply sustain the statement, often made, that any person may disclose in evidence what transpired before the grand jury wherever such disclosure becomes necessary for the protection of public or private rights. Indeed, there is authority that a grand juror may, after the grand jury has been discharged and the accused has been taken into cus-

tody, disclose to the accused's counsel the evidence on which the indictment against him was based, in order to enable him to make defense. Statutes sometimes permit an accused person to procure a stenographic record of the testimony taken before the grand jury."

In addition to the above there is another sufficient reason for the chancellor's refusal to dismiss the complaint in this case. Even if it be conceded (as we do not) that the jurors were not proper plaintiffs, still the prosecuting attorney could maintain this action. We do not find that appellants seriously challenge his status as a proper party plaintiff. Ark. Stats. § 17-711 makes it the "express duty" of the prosecuting attorney to enforce the terms and conditions of Amendment No. 10 to the Constitution of 1874 dealing with the prohibition against a county judge authorizing any contract in excess of the revenues, which is one of the principal issues in this case. The following section, § 17-712, subjects the prosecuting attorney to impeachment if he fails to perform his duty.

2. It is next argued by appellants that the transactions heretofore described were not void and that the chancellor erred in so holding. The onus of the contention is directed toward showing the contracts do not violate Amendment No. 10 to the Constitution. The pertinent part of this Amendment reads:

". . . no county court . . . or agent of any county shall make or authorize any contract . . . for any purpose in excess of the revenue from all sources for the fiscal year in which said contract . . . is made."

Using the audit for 1959, made by the State of the finances of Garland County, appellants appear to contend that the contracts (together with other expenditures) did not exceed the available revenues for 1959. The audit showed the county's total revenue available for expenditures for 1959 to be $550,781.33 and the total actual expenditures for that year to be $551,820.90.

It is our opinion that the numerous contracts mentioned above violate the spirit and the plain provisions of Amendment No. 10 of the Constitution set out above.

While the words "County Judge" do not appear in the foregoing quotation it is inconceivable that we should interpret the amendment so as to give the county judge more power to make contracts for the county than is given to the county court. It is admitted here that Judge Warren executed the contracts without prior authorization by the county court. Appellants, it seems to us, in arguing that the expenditures did not exceed the revenue, overlook the payments to be made in 1960. Amendment No. 10 has been construed many times by this Court and always contrary to appellants' contentions in this case. See: *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 390; *Carter* v. *Cain,* 179 Ark. 79, 14 S. W. 2d 250; *Nelson* v. *Walker,* 170 Ark. 170, 279 S. W. 11; *Luter* v. *Pulaski Hospital Association,* 182 Ark. 1099, 34 S. W. 2d 770; *Stanfield* v. *Friddle,* 185 Ark. 873, 50 S. W. 2d 237; *Warren* v. *State,* 232 Ark. 823, 340 S. W. 2d 400, and there are others too numerous to mention. In the last two citations mentioned we held such contracts to be "wholly void". In the case of *City of Little Rock* v. *White Company,* 193 Ark. 837, 103 S. W. 2d 58, this Court, after citing other cases, said:

"To make a contract in one year to be paid out of the revenue of a succeeding year is a violation of Constitutional Amendment No. 10."

In addition to what we have already said we point out also that the contracts, which provided for interest on the unpaid balances, violate Amendment No. 13 of the Constitution. The pertinent part of this Amendment reads:

"Neither the State nor any . . . county . . . shall ever lend its credit for any purpose whatever; nor shall any county . . . ever issue any interest-bearing evidences of indebtedness, except . . ."

The exception indicated in the last word quoted above has no relevancy to the facts and issues in the case before us.

3. We cannot agree with the contention that the banks were *bona fide* purchasers and holders in due

course. They rely on Ark. Stats. § 68-101 and § 68-152 (sections of the Uniform Negotiable Instrument Act) to sustain their contention. The latter section provides that a "holder in due course" is one who has taken an instrument under the following conditions: (1) It is complete and regular upon its face; (2) it is taken in good faith and for value; (3) the taker had no notice of an infirmity. We are unwilling to hold that the banks, in good faith, had no notice the contracts were not "regular" and had no "infirmities". The contracts clearly showed that they bore interest in violation of Amendment No. 13 and that some of the installments became due in 1960 in violation of Amendment No. 10 as interpreted by our decisions. To hold otherwise would virtually destroy the effect of the two amendments, opening the way for an unscrupulous or careless county judge to wreck the financial stability of his county.

4. We find no merit in appellants' contention that the contracts were ratified by virtue of the county having made payments thereon. Having held the contracts were "void" they could not be ratified. See: *Forrest City* v. *Orgill,* 87 Ark. 389, 112 S. W. 891 and *Lamar Bath House Company* v. *City of Hot Springs,* 229 Ark. 214, 315 S. W. 2d 884. What we have said applies likewise to the defense of estoppel. We have examined other contentions made by appellants under this point but find nothing to justify a reversal.

5. Under this point appellants state: "The trial court erred in granting plaintiffs excessive relief and priority to which they are not entitled". Instances of alleged excessive relief complained of by appellants are discussed below.

(a) The record shows that a patrol, owned by the county, was sold to Goodwin by Warren who later bought it back after Goodwin had allegedly spent some $4,000 on repairs. As before set out the chancellor impressed a lien on all the property purchased from Goodwin to secure payment of the judgment. The chancellor, however, excluded this particular piece of equipment from such lien. In this we think the chancellor was correct.

He could have found this sale to Goodwin was a part of an overall scheme to defraud the county and that Goodwin was a party to such a scheme. Such being the case Goodwin could not come into a court of equity and seek to profit by his own scheming. Moreover, Judge Warren had no right to sell county property without complying with Ark. Stats. § 17-305. It does not appear that this was done.

(b) The chancellor held that the First National Bank (as in the case of other banks) must repay to the county the sum of $2,500. This was the amount which the bank received as payment from the county on the first installment due on May 16, 1959, being a part of the transaction designated (b) heretofore. For reasons already stated this transaction violated Amendments No. 10 and No. 13 and was therefore void, and the chancellor correctly ordered the bank to make repayment.

Finding no error, the decree of the trial court is affirmed.

Affirmed.

BROWN *v.* PATTERSON CONSTRUCTION CO.

5-2764 361 S. W. 2d 13

Opinion delivered October 1, 1962.

[Rehearing denied November 5, 1962.]

J. R. Wilson, for appellant.

Riddick Riffel, for appellee.

SAM ROBINSON, Associate Justice. Randall Gene Brown, an employee of W. H. Patterson Construction Company, was killed while working at his job of helping to unload a truck. There is no question about his death growing out of and in the course of his employment. He had worked for Patterson about four weeks. His wages were $1.00 per hour and he earned an average of $33.75 per week. The employer, Patterson, and his insurance carrier promptly admitted liability under the workmen's compensation law.

The decedent was only 18 years of age with no wife or children, but left surviving a father and mother and several brothers and sisters. The employer was in doubt as to how the compensation benefits should be distributed under the provisions of Ark. Stats. 81-1315, and therefore notified the Workmen's Compensation Commission of the death of the employee, and stipulated that the death grew out of and in the course of the employment.

The amount of monthly contribution by the decedent to the support of his partially dependent family was established by the testimony of the father and mother. Although there is a little discrepancy in the evidence as to the exact amount contributed to the family by the decedent, it appears that the Commission gave the family the benefit of any doubt and made an award of 40%, amounting to about $14.00 per week. There is substantial testimony to support this ward made by the Commission. In addition, $250.00 was awarded as burial expense as provided by Ark. Stats. 81-1315, and an award of $100.00 was made to the attorney for the claimants as provided by Ark. Stats. 81-1332 for claims that are not contested. We find no error.

Affirmed.

CLARK *v.* HAMBLETON.

5-2751 360 S. W. 2d 486

Opinion delivered October 1, 1962.

Fletcher Long, for appellant.

Mann & McCulloch By: *John Mann,* for appellee.

JIM JOHNSON, Associate Justice. This case involves the issuance of a writ of mandamus against a county clerk. In March, 1961, appellees as taxpayers filed a petition in Circuit Court for a writ of mandamus against appellants, the County Judge and County Clerk of St. Francis County, seeking to require these officials to publish all claims allowed against the county, under the provisions of Ark. Stat. § 15-204. Appellants answered, admitting that they had not published a list of warrants, contending that the Quorum Court of St. Francis County had refused to appropriate funds for the purpose of paying for the publication provided in the statute, and had, in effect, forbidden any expenditure for such services. It was stipulated that the Forrest City Daily Times-Herald offered to publish a list of allowed claims as prescribed by statute.

The trial court granted a writ of mandamus against the County Clerk and found that the petition as against the County Judge should be dismissed. Specifically, the writ of mandamus orders the County Clerk to cause to be published a list of claims allowed at the close of each regular or special term of the County Court held after January 1, 1962. From this order comes this appeal. The County Judge joined the County Clerk in the appeal.

For reversal appellants urge that: (1) the trial court abused its discretion in the granting of a writ of mandamus against the County Clerk; and (2) the Trevathan case sets forth in detail the proper approach for any remedy the appellees may have.

The Trevathan case referred to by appellants is *Jeffery, County Judge* v. *Trevathan,* 215 Ark. 311, 220 S. W. 2d 412. That case determined that mandamus will lie to require a quorum court to appropriate necessary funds for the payment of claims for printing the list of allowed claims. It discussed in detail the case of *Nevada County* v. *News Publishing Co.,* 139 Ark. 502, 206 S. W. 899, and reaffirmed its holding that a claim could not be allowed by a county court until an appropriation had been made by the quorum court. Under the facts in the case at bar, the question of whether the County Judge, the County Court, or the County Clerk and the Quorum Court can be, or should be ordered to pay for the cost of publishing the list of warrants (i.e., allowed claims) is not before us. The sole question presented by this appeal is whether the County Clerk, under the facts in this case, should be ordered to publish the list of claims allowed by the County Court.

Article XIX, § 12 of the Arkansas Constitution provides:

"An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom and on what account, shall, from time to time, be published as may be prescribed by law."

The enabling legislation implementing this section of the Constitution was enacted by the people and is known as the Publicity Act of 1914 [Initiated Measure of Oct. 13, 1914, No. 2; Ark. Stats. §§ 15-201—15-212]. The act provided for publication of laws, reports and miscellaneous matters, including claims allowed against counties. Section 5 of that act reads as follows:

"15-204. Claims allowed against county—List to be published. Immediately after the close of each regular

and special term of the County Court, the clerk thereof shall cause to be published one [1] time, in one [1] paper published in such county; a list of all claims allowed against the county, and the road districts thereof, to whom allowed, and for what purpose, and the amount."

Section 13 of the Publicity Act, the penal provision, is as follows:

"15-212. Penalty for failure to comply. Every person who shall fail to comply with the provisions of this act [§§ 15-201—15-212] shall be fined in any sum not exceeding one thousand dollars [$1,000.00]."

It is the contention of the appellees that the above statutes mean just what they purport to state and that these statutes impose a mandatory statutory official duty upon the County Clerk to publish immediately after the close of each regular and special term of the County Court a list of all claims allowed against the county. It is not reasonable to think that the Legislature intended to make publication of claims discretionary with the County Clerk when the statute clearly states that "the clerk *shall* . . ." and provides a heavy penalty for failure to perform this duty. Therefore, it is our view that the law requires the County Clerk to perform a plain and specific public duty, calling for the use of no discretion, nor the exercise of official judgment. This being true, we are bound by the settled rule as stated in the early case of *Willeford* v. *State,* 43 Ark. 62, as follows:

"Mandamus is an appropriate remedy where a public officer is called to perform a plain and specific public duty, positively required by law, calling for the use of no discretion, nor the exercise of official judgment."

Affirmed.

Ward, J., concurs.

Paul Ward, Associate Justice, (Concurring). My only reason for concurring in this opinion is to attempt to dispel some of the confusion which apparently exists in the minds of many county clerks over the state as to

what their obligation is to publish a list of the claims which have been allowed against the county. The Legislature, as well as the majority opinion and other opinions of this Court, makes it mandatory upon the clerk "to publish in a newspaper a list of all claims . . ." In instances where no appropriation has been made to pay for this publication the county clerk must make up his mind what to do. He has no newspaper himself, so how is he to follow the mandate to publish the list? It is my thought that it would be helpful for the county clerks to know that it is not their duty personally to publish the list, but they do have the power to make a contract for the publication of the list, and it is up to the publisher to collect his money.

In the *Nevada County* case (cited in the majority opinion) on page 505 of the Arkansas Reports the Court said:

"The Legislature made it mandatory upon the county clerk to publish in a newspaper a list of all claims allowed against the county, etc. This necessarily gave the county clerk the power to make a contract for such publication."

The clerk has the power to make such contract even though no appropriation has been made for that purpose, and it is therefore his duty to conscientiously attempt to do so. When he has done this, he has, in my opinion, discharged the duty imposed on him by statute and our decisions.

CHARLES *v.* LINCOLN CONSTRUCTION CO.

5-2754 361 S. W. 2d 1

Opinion delivered October 1, 1962.

[Rehearing denied November 5, 1962.]

George Howard, Jr., for appellant.

Eugene S. Harris and *Bridges, Young & Matthews,* for appellee.

NEILL BOHLINGER, Associate Justice. The appellant in this case was a laborer who was injured while working on the construction of a school building at Star City, Arkansas. He filed a claim for workmen's compensation against the appellee, Lincoln Construction Company, alleging that he was an employee of the Lincoln Construction Company and had a compensable injury.

At a hearing before the Workmen's Compensation Commission that Commission disallowed his claim and an appeal was taken to the Lincoln Circuit Court which affirmed the finding of the Workmen's Compensation Commission and denied the claim against the Lincoln Construction Company from which action this appeal is prosecuted.

It appears from the record before us that the appellant had been employed from time to time by the appellee, Lincoln Construction Company, and that he worked under their foreman, Phillip McFall; that some time before the accident complained of the Star City School District decided to build two school buildings and deemed it more economical to do the work by its own employees rather than let a contract. The School District agreed with the appellees upon the use of appellee's foreman, Mr. McFall, as general superintendent in the operation of building the two schools. There is nothing in the record that indicates that the appellee had any contract with the School District

or interest in the erection of the two school buildings. Mr. McFall recruited his own laborers and the School District paid Mr. McFall and the laborers.

Mr. Dayton Fish was one of the partners in the Lincoln Construction Company and was a member of the School Board and in addition thereto he maintained a business known as the Builders Supply Company where for a number of years it was customary for most of the contractors in that vicinity to go to recruit their labor supply. The appellant had, from time to time, gone to the Builders Supply store and had been directed by Mr. McFall where to go or would be transported by McFall to the site of such work as would be required of him. It further appears that at times the appellant would work part of a day on the school job and the balance of the day at a Lincoln Construction job. Appellant's time on the various jobs was kept separately and he was paid according to the hours he worked on each job. All of his checks were received through McFall but wages earned at the school site were paid by a check on the School District and wages earned at a Lincoln Construction job were paid by a Lincoln Construction check.

In *South Arkansas Feed Mills* v. *Roberts,* 234 Ark. 1035, 356 S. W. 2d 645, opinion delivered April 16, 1962, we quoted from Larson's Workmen's Compensation Law, 710, under the heading "Lent Employees and Dual Employment":

"§ 48.00 When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if

(a) *The employee has made a contract for hire, express or implied,* with the special employer; [Emphasis added]

(b) The work being done is essentially that of the special employer; and

(c) The special employer has the right to control the details of the work."

In this case we also quoted from *Stuyvesant Corporation* v. *Waterhouse,* (Fla.) 74 So. 2d 554, as follows:

"Basically and fundamentally, after all the chaff is cast aside, the solution of almost every such case finally depends upon the answer to the basic, fundamental and bedrock question of whether as to the special employer the relationship of employer and employee existed at the time of the injury. If the facts show such relationship, the existence of a general employer should not change or be allowed to confuse the solution of the problem."

Likewise we quoted from the *Nepstad* v. *Lambert case,* 235 Minn. 1, 50 N. W. 2d 614:

"Since both employers may each have some control, there is nothing logically inconsistent, when using this test, in finding that a given worker is the servant of one employer for certain acts and the servant of another for other acts . . . The crucial question is which employer had the right to control the particular act giving rise to the injury. In this connection, Restatement Agency, § 227, *comment* a (2) states:

'* * * Since the question of liability is always raised because of some specific act done, the important question is not whether or not he remains the servant of the general employer as to matters generally but whether or not, *as to the act in question,* he is acting in the business of and under the direction of one or the other.' (Italics supplied.)"

It appears clear from the record and the Commission and trial court so found, that appellant Charles was working for two different employers at different times and that the work was separable. This presents the question as to whether or not the appellant knew and consented to work for the School District. The case of *Ledbetter* v. *Adams,* 217 Ark. 329, 230 S. W. 2d 21, covers this situation:

"* * * the authorities hold (1) *that the original employer remains liable under the Workmen's Compensation Act, until there has been a reasonable time, or course of events, for knowledge of change of employer*

to be brought home to the employee; and (2) that the relationship of employer and employee is presumed to continue for a reasonable time after a sale of the business made without the knowledge of the employee. See *Palmer* v. *Main,* 209 Ky. 226, 272 S. W. 736; *Buchanan Min. Co.* v. *Henson,* 228 Ky. 367, 15 S. W. 2d 291; Schneider's Workmen's Compensation Test, Perm. Ed., § 788; Horowitz on 'Workmen's Compensation,' p. 228, *et seq.;* and also 71 C. J. 397 * * *." [Emphasis added]

The contention is made that Charles, the appellant, was the employee of the appellee but the appellee had no control of nor financial interest in the work on which appellant was injured and we think that more than three months time is a reasonable time and the courses of events are such as to bring home to appellant the status of his employment. Testifying in his own behalf appellant was asked as to the kind of checks he received:

"A. I'd get a green one from over to the school and I'd get a pink one from Lincoln Construction.

* * *

Q. And so you knew then that when you were working over at the schools you would get paid by a green check signed by the Superintendent, didn't you?

A. That's right.

Q. And you knew that when you went to what you call a Lincoln Construction job you got paid for that by a pink check?

A. That's right.

* * *

Q. I'm talking about when you got hurt that day. You knew by that time that you were being paid by the school district, didn't you?

A. Oh, yes, sir, I knowed it then.

Q. Didn't Mr. McFall keep a record of the time you spent out there on the School District and isn't that the time you got paid for by the school?

A. That's right."

A fellow workman, Sherman Rochelle, whose employment was in all respects similar to that of appellant, testified as follows:

"Q. Now, Sherman, when you are working out there for the school, who do you understand you are working for?

A. Mr. Phillip McFall. At least I know what they said, I was working for the school but I was assigned on to him.

Q. You work where Mr. McFall tells you but when you are out there working on the school ground site or you know where they are building the school, don't you understand you are working for the School District at that time?

A. Yes, sir.

Q. Isn't that who pays you? I mean isn't that the kind of check you get at the end of the week?

A. I get a school check."

Further on in the testimony he was asked:

"Q. Don't you know the school is going to pay you for the work you do on their building?

A. Yes, sir."

It therefore appears clear that the appellee had no interest in the school construction job and in no wise controlled it and that the evidence sustains, and the Commission and the Court so found, that the appellant, by reason of the time and course of events, was bound to have become aware of the status of his employment.

The judgment of the Circuit Court is affirmed.

HARRIS, C. J., not participating.

ROBINSON and JOHNSON, JJ., dissent.

SAM ROBINSON, Associate Justice, (Dissenting). There is no substantial dispute about the facts in this case. The appellant claimant, Joe Louis Charles, a negro, 24 years of age, had been working in the construction business as a

common laborer for three years. At the time he was sent by his employer, the Lincoln Construction Company, to work on the school job, he had worked continuously for Lincoln without any interruption at all for two years; he had worked every working day.

During the time he worked on the school building, he reported to work every morning at the Lincoln Company's place of business; the same place he had reported for work every day for two years. Never at any time did his regular employer, Mr. Fish, the owner of the Lincoln Company, Mr. McFall, the superintendent for the Lincoln Company, or anyone else, tell him that he was not working for the Lincoln Company.

With the possible exception of the fact that apparently, on three occasions, he received weekly checks of a different color than those ordinarily used by the Lincoln Company, there is not a scintilla of evidence in the record to the effect that the claimant had any knowledge whatever that he was not working for the Lincoln Company at the time he was injured. Certainly a different colored check would not be of any significance to the employee when all the checks were signed by his regular employer, Dayton Fish. According to the record, Mr. Fish signed the checks issued by the Lincoln Company, and as Secretary of the School Board, he signed checks issued by the school. Can it be said this was sufficient to give a common laborer notice that he had been fired by his regular employer without his knowledge or consent and employed by someone else without his knowledge or consent?

In addition to the positive testimony of the appellant that he thought he was still working for the Lincoln Company, all the circumstantial evidence points to the fact that he had no reason to believe that he was working for someone else. He reported to the Lincoln Company place of business every morning for work; he did not work at one particular job; even on the same days that he was working on the school job, he was sent by the Lincoln Company to various other jobs; Mr. McFall, foreman for the Lincoln Company, was still his foreman; the Lincoln

Company's tools and equipment, including a tractor and a digger, were used on the school job the same as the other jobs; Mr. Fish, the same man who signed his checks for the Lincoln Company, signed the checks it is now claimed that he got from the school board; the checks were delivered to him by Mr. Fish, his regular employer, or Mr. McFall, his regular foreman. It is admitted that during the time it is claimed that McFall was in the employ of the school board he was the general foreman for the Lincoln Company. He kept the alleged school time and the Lincoln Company time all in the same book. Mr. McFall testified:

"Q. Glance back through there if you will for the preceding two or three weeks and see if you find his name as having worked for the Lincoln Construction Company?

A. He worked seven hours on December the 6th.

Q. Who was he working for at that time?

A. Wait just a minute. I am back on the school job here. I got the wrong one.

Q. Is that the last time prior to the January 3rd or whenever it was?

A. January 10th.

Q. When was that that he worked for the construction company?

A. He worked three days, four days. He worked four days in December. Let's see, this would be the 12th, 11th, 10th. He worked on the 10th, the 14th, the 15th, and the 17th.

Q. Of December?

A. Of December. I am all messed up here. I am on the School District again."

According to Mr. Fish's testimony, he simply loaned Charles to the School Board. Mr. Fish testified:

"Q. And if I understand your testimony it is then that at this particular time your work was slack so that you were able to spare both McFall and certain workers?

A. That's correct.

Q. To lend them, to allow them to work for the School District. Is that correct?

A. That is correct."

As heretofore pointed out, no one contends that the claimant, Charles, was ever told by anyone that he was not working for the Lincoln Company, just as he had worked for them continuously every day for two years, and it is not claimed by anyone that Lincoln ever surrendered control of its employee, Charles. In fact, it is entirely clear and beyond dispute that the Lincoln Company moved Charles around from job to job at its will. In *Anderson* v. *Northwestern Hospital,* 40 N. W. 2d 442, it was held that in determining who was the actual employer, payment of compensation was important, but where the original employer maintained control over the employee and assigned her to different institutions, there was no change in employer. In ***Rhinelander Paper Co.*** **v.** ***Industrial Commission,*** 239 N. W. 412, the Court said: "Where the employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer, and in doing what the new master directs him to do, he is performing his duty to the employer who gave the order. . . . It is clear that the claimant was performing services in obedience to the direction of the master and there was no consent on his part, express or implied, sufficient to make him the employee of the American Engineering Company."

In his work on Workmen's Compensation Law, Vol. I, at page 710, Professor Larson states: "Although the lent-service doctrine is a familiar one at common law, and has produced some of the most venerated and most

intricate cases in the law of master and servant, it is necessary to stress once more that the workmen's compensation lent-employee problem is different in one significant respect: there can be no compensation liability in the absence of a contract of hire between the employee and the borrowing employer. For vicarious liability purposes, the spotlight was entirely on the two employers—what they agreed, how they divided control, how they shared payment, and whose work, as between themselves, was being done. No one paid much attention to the employee or cared whether he had consented to the transfer of his allegiance, since, after all, his rights were not usually as a practical matter involved in the suit. In compensation law, the spotlight must now be turned upon the employee, for the first question of all is: did he make a contract of hire with the special employer? If this question cannot be answered 'yes', the investigation is closed, and there is no need to go into tests of relative control and the like."

To support the view expressed, the majority cites two Arkansas cases. In my opinion, neither case is authority to sustain the majority's position.

The first case cited by the majority is *South Arkansas Feed Mills* v. *Roberts,* 234 Ark. 1035. The issue was whether Roberts was to be considered an employee of South Arkansas. In the case at bar the majority failed to point out that in the Feed Mill case, Roberts specifically agreed to the employment by the feed mill. There, this Court said: "The relationship of employer and employee existed between South-Ark. and claimant when he was injured and had so existed for about eleven months theretofore. . . . The most reasonable interpretation of the evidence is that claimant was a special employee of South-Ark. at the time of his injury; 2. Shortly after claimant began work for South-Ark. he agreed to such employment." Furthermore, South Arkansas paid insurance premiums on Roberts.

The other case cited by the majority is *Ledbetter* v. *Adams*, 217 Ark. 329, 230 S. W. 2d 21. There, the Court held that the employee, Ledbetter, was, for compensation

purposes, still the employee of his original employer, Adams, although without Ledbetter's knowledge, Adams had sold the taxicab driven by Ledbetter to one Pike, who was the actual employer at the time Ledbetter was injured. The Ledbetter case and the authorities cited therein support the employee, Charles', position in the case at bar.

Mr. Jerry Thomasson, Referee for the Workmen's Compensation Commission, who had this claim before him in the first place, felt that compensation should be allowed. Mr. Thomasson stated: "In this case I feel the claimant was merely following directions of his employer when he went to work for the school district and therefore, no contract of hire was entered into between the school district and the claimant."

In my opinion, Mr. Thomasson was correct in his conclusion. I also think Charles is entitled to compensation for the loss of his finger, and I therefore respectfully dissent from the opinion of the majority.

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

HALEY *v.* GREENHAW.

5-2711 360 S. W. 2d 753

Opinion delivered October 8, 1962.

W. B. Howard, for appellant.

Gerald E. Pearson, for appellee.

CARLETON HARRIS, Chief Justice. The sole question on this appeal is whether a certain transaction was usurious. The facts leading to the litigation are as follows:

Mrs. Mildred Haley, appellant herein, was granted a divorce from Dr. R. J. Haley on May 23, 1959. Prior thereto, the parties had entered into a property settlement which included, *inter alia,* the provision that the doctor would pay Mrs. Haley $500 in cash and execute a promissory note in her favor in the principal sum of $4,200, payable in

monthly installments of $150 per month. The payments were to commence on June 1, 1959, and continue until the entire balance was paid. The property settlement further provided that Dr. Haley would pay a real estate mortgage in the amount of $7,500, which existed on the home belonging to his wife; further, that he would transfer title to a certain automobile to Mrs. Haley, and would pay any balance due which might constitute a lien on the car. According to appellant, Dr. Haley did not pay the mortgage, did not satisfy the lien on the Cadillac, made only the first two payments on the note, and thereafter left the state of Arkansas, being in Cotton Valley, Louisiana, at the time of the institution of this suit.

Sometime subsequent to the divorce, Dr. Haley married one Christine Knox, and on April 13, 1960, Haley and wife conveyed to Ben R. Scott, approximately 480 acres of land in Greene County, Arkansas, for the consideration of $87,500. Scott and wife, on April 19, 1960, executed to Haley a mortgage on the lands for the amount of $17,500, subject to a lien of the Metropolitan Life Insurance Company for $105,000. The Scotts executed six notes to Haley for the $17,500, payable over a period from December, 1962, to December, 1967, with interest at rate of six per cent per annum. These notes were subsequently assigned by Haley to appellee, George N. Greenhaw, for the sum of $13,500. The notes provided that the makers and endorsers waived presentment for payment, notice of non-payment and protest, and they were endorsed in blank and without qualification. Mildred Haley instituted suit against Haley, Greenhaw and Scott (as garnishees), asking that Greenhaw be declared a trustee of Haley for the notes.

Appellant asserted that "R. J. Haley is liable to the said Greenhaw under his endorsements on said notes and that this transaction amounted to a loan from Greenhaw to Haley of $13,500.00 for which the said Greenhaw was to receive $17,500.00 plus 6 percent interest. Plaintiff says that said transaction was usurious in that it amounted to a taking or an attempting to take interest in excess of 10 percent per annum by Greenhaw from Haley. Plaintiff says that under the constitution and statutes of Arkansas

the attempted transfer of said notes from Haley to Greenhaw is null and void because of usury. By reason of the fact that said transaction is void on the count of usury, the plaintiff has and the court should declare that plaintiff has an equitable garnishment lien upon said notes for the payment of the amount due plaintiff as set out in the original complaint."

Her prayer for relief was as follows:

"That the court enter an order temporarily restraining and enjoining the said Greenhaw from selling, assigning, hypothecating, collecting the proceeds of, or otherwise disposing of the six notes totaling $17,500.00 wherein Ben R. Scott and Maude Scott are makers, R. J. Haley is payee and R. J. Haley is endorser until the further order of this court and that upon final hearing, the court order the said Greenhaw to deposit said notes in the registry of this court in order that they may be subjected to the claim of plaintiff for collection of the amount due her from the defendant Robert J. Haley. Plaintiff further prays that the court decree that plaintiff has an equitable garnishment lien on the notes in question for the amount due her from the defendant Robert J. Haley. Plaintiff further prays that the court find that the purported transfer of said notes from R. J. Haley to George N. Greenhaw was usurious and void and that R. J. Haley be decreed to be the owner of said notes subject to the claims of plaintiff herein. * * *"

The case proceeded to trial, and after the taking of testimony, the court found:

"That the six notes totaling $17,500 dated April 19, 1960, made by Ben R. Scott and Maude Scott, his wife, to R. J. Haley, which said notes were sold, assigned and delivered to defendant, George N. Greenhaw by the said R. J. Haley for the sum of $13,500.00 paid by defendant George N. Greenhaw, to defendant Robert J. Haley, should be found and declared to be the property of defendant George N. Greenhaw, and that the plaintiff, Mildred Haley, has no right, title, interest or claim or equitable garnishment lien upon or against said notes or the proceeds thereof or the security therefor; that said sale, assignment and deliv-

ery of said notes by R. J. Haley to George N. Greenhaw was a real and *bona fide* sale and purchase and was not made as the occasion, subterfuge or pretext for a loan from George N. Greenhaw to R. J. Haley; and that said transaction was not usurious. * * *"

The complaint was accordingly dismissed, and from the decree embracing such findings, appellant brings this appeal.[1]

For reversal, appellant relies upon three points, but we consider point No. 2 decisive in determining the litigation, and accordingly, there is no occasion to discuss the other points. Appellant's point No. 2 asserts that the transfer of the notes from Haley to Greenhaw constitutes usury, and the transaction is consequently void. Appellee contends, as found by the Court, that the transaction was a *bona fide* sale and purchase, and accordingly, was not usurious.

One thing is certain; there can be no usury unless there is a loan, either directly or indirectly. As stated in 55 American Jurisprudence, Usury, § 18, p. 336:

"It is essential to constitute usury that there must be a loan of money or a forbearance of an existing indebtedness; unless it appears that the transaction in question was in substance a loan or the forbearance of a debt, there is nothing upon which to predicate a charge of usury."

In *Mitchell* v. *Duncan,* 190 Ark. 598, 79 S. W. 2d 997, we said:

". . . to constitute usury, there must be an agreement requiring the borrower to pay and entitling the lender to receive a higher rate of interest than that allowed by statute for the loan or forbearance of money."

Appellant's contention of usury is based on the fact that the notes assigned to Greenhaw by Haley were endorsed in blank, and without qualification. The notes contain the following language on their face: "The makers and endorsers of this note hereby severally waive present-

[1] Scott is also technically an appellee, but has no actual interest, his only concern relating to whom the money should be paid to.

ment for payment, notice of non-payment, and protest, and consent to extension of time of payment without notice." Since, under this endorsement, Haley became equally liable with the maker of the note, Scott, appellant contends that the transaction between Haley and Greenhaw became usurious.

The contention is summarized in her brief as follows:

"We now see that when Dr. R. J. Haley endorsed the notes in question to appellee, he undertook to pay the appellee the total sum of $17,500.00 plus 6% interest in return for the advance of $13,500.00. In other words, Haley agreed to pay Greenhaw $17,500 principal plus $5,405.42 (the total of six percent interest computed on the face amount of each note until their respective maturity dates), plus the additional sum of $4,000.00 (the difference between $17,500.00 and $13,500.00). Haley promised to pay $9,405.42 for the use of the money in question, whereas, 10% interest for the period necessary to retire a principal amount of $13,500.00, in accordance with the schedule of due dates on the notes in question would amount to only $6,071.25. Hence, by endorsing the notes, he agreed to pay Greenhaw 10%, plus $3,334.17 in usury."

We have held that waiver of notice and protest accompanied by an unqualified endorsement renders the endorser equally liable to the holder of the note. See *Gibson* v. *Talley,* 206 Ark. 1, 174 S. W. 2d 551. This holding is in conformity with Section 68-811, Ark. Stats. Anno. That section provides as follows:

"All indorsers or assignors of any instrument in writing assignable by law, for the payment of money alone, on receiving due notice of the non-payment or protest of any such indorsed or assigned instrument in writing, shall be equally liable with the original maker, obligor or payee of such instrument, and may be sued for the same at the same time with the maker, obligee or payee thereof, or may be sued separately."

Here, of course, the notice of non-payment and protest have been waived. Appellant points out that by the en-

dorsement, Haley has made himself *primarily*[2] *and unconditionally* liable for the repayment of the money; that his liability is not secondary, and conditioned upon the failure of Scott to pay.

There is a divergence of authority on the question of whether the discount of a note with general endorsement for a sum in excess of interest allowed by law, constitutes usury. Both appellant and appellee cite authority in conformity with their respective contentions. However, we are of the opinion that the transaction must be viewed from "its four corners" in determining whether this transaction was usurious. Under the facts in this case, we are not willing to say that, *as a matter of law,* the transaction between Haley and Greenhaw amounted to usury.

To so hold, would have the same effect as saying that a note bearing ten per cent interest can never be sold at a discount unless the seller sells without recourse. Such a holding would, of course, seriously curtail commerce, and would impair the negotiation and sale of commercial paper. Certainly, negotiable notes and mortgages are subjects of *bona fide* sales in the usual course of business, and very frequently these sales are at a discount. Probably, most often the sales are with recourse, for many business concerns would not purchase the paper otherwise. We see no reason why an actual and *bona fide* sale and purchase of paper at a discount should be hampered by the ruling that appellant seeks.

The penalty for a usurious transaction is indeed heavy, and should therefore be established by clear and convincing evidence. A matter of some similarity existed in *Webster* v. *Sterling Finance Company* (Mo.), 195 S. W. 2d 509, in that it involved the assignment of notes from one company to another, and posed the question of whether the transaction constituted a sale or a loan. From the opinion of the Missouri Supreme Court:

[2] While primarily liable in the sense that, in case of default by Scott, Greenhaw could immediately institute suit against Haley alone for collection of the note, it must be remembered that Haley, in such event, could institute suit against Scott for the amount paid, and so, as we generally use the term, Haley, in reality, is not primarily liable. The primary maker of a note, of course, has no recourse against anyone.

"Were the transactions as to the alleged sold installments *sales* as defendant contends, or was each sale agreement a mere camouflage to disguise a usurious loan, as plaintiff contends? It is true that 'a loan may be cloaked in the outward form and appearance of a purchase, in which case that will not change the substance of the transaction nor hide the usury. But if there is a real and *bona fide* purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price.' * * *

"The law will not tolerate any camouflage disguising a usurious transaction to make it seem innocent. 'The law looks at the nature and substance of the transaction, and not to the color or form which the parties in their ingenuity have given it. No imaginable act or contrivance to cover up and conceal the usury will avail the parties. They will not be permitted successfully to evade the provisions of the statute by any conceivable scheme or expedient. The courts will follow them through all their shifts and devices, and ascertain the true character and design of the transaction. And if upon such investigation, it appears that there was in substance a loan at an illegal rate of interest, no matter what form or shape the contract has been made to assume, it will be declared to be usurious, and the proper remedy applied.' * * *

"We do not find any substantial evidence in the record tending to show that the transaction stated in the sale agreements were loans and not sales."

In the case before us, there is not one single shred of evidence that would indicate that the Haley-Greenhaw transaction was actually a loan, rather than a sale. For that matter, it does not appear that there was any attempt to conceal any part of the transaction. Appellant is apparently of the view that Haley's sole purpose was to denude himself of his property in order to avoid paying the amount of money due her, but the record reflects that the notes (as well as the assignment of the second mortgage on the lands) were not transferred to Greenhaw until approximately eleven months after appellant and Dr. Haley were divorced. At any rate, we repeat that there is abso-

lutely no evidence to indicate that the transaction was actually a loan, rather than a sale, or that Greenhaw had any intention to do other than purchase the notes at a discount. The language of the written assignment, delivered with the notes, provides that Haley and wife "grant, bargain, sell, assign, transfer, set over, deliver, and convey unto George N. Greenhaw . . . all of their right, title and interest in and to one certain mortgage * * * together with the notes, debts, and claims secured by said mortgage. * * *" Of course, this language does not conclusively mark the transaction as a sale, but as previously stated, the burden is upon appellant to establish usury. As was said in *Hare* v. *General Contract Purchasing Corporation,* 220 Ark. 601, 249 S. W. 2d 973, "Therefore, when the intention is not apparent, it is a question for the jury to determine whether it was a *bona fide* credit sale, or a device to cover usury." Likewise, we are of the opinion that whether the transaction between Haley and Greenhaw constituted a sale or a loan was a question of fact for the trial court to determine. That court found same to be a *bona fide* sale, and we think, and hold, that this finding was in accord with the preponderance of the evidence.

Affirmed.

BAER *v.* COLEMAN.

5-2762 360 S. W. 2d 761

Opinion delivered October 8, 1962.

O. W. "Pete" Wiggins, for appellant.

Martin, Dodds & Kidd, for appellee.

ED F. MCFADDIN, Associate Justice. The only question to be decided is whether the Trial Court should be sustained in its holding that the plaintiff (appellee) had established a lost deed by the required *quantum* of evidence.

Mr. J. B. Coleman, Sr. was married three times, and died in 1934. Appellee, Joseph B. Coleman, is the youngest child of Coleman, Sr. The appellants are the children or descendants of Coleman, Sr. by prior marriages. The mother of appellee was Emma Powell Coleman, now deceased; and appellee is her only heir. Coleman, Sr. owned eight lots in McIntosh's Second Addition to Little Rock. In March 1930, Mr. Coleman deeded two of the lots to his oldest daughter, Mrs. Elsie C. Baer; and it was and is appellee's contention that on or about the same time, Mr. Coleman, Sr. deeded the remaining six lots (here in litigation) to Mrs. Emma Powell Coleman; and that appellee owns the six lots by inheritance from his mother.

It was and is the contention of the appellants that due proof of the execution of said deed from Coleman, Sr. to Mrs. Emma Powell Coleman has not been made and, therefore, the appellants and appellee are co-tenants of said six lots. The Chancery Court held that appellee had established the lost deed from Coleman, Sr. to Emma Powell Coleman; and appellants challenge that holding.

At the outset, we recognize the established rule for proof of a lost deed to be as stated by Justice Millwee in *Schwartz* v. *Hardwicke,* 229 Ark. 134, 313 S. W. 2d 832:

"It is well settled by our own cases, and the authorities generally, that the evidence required to prove and establish a lost deed must be clear, satisfactory and con-

vincing, though it need not be undisputed. *McCulloch* v. *McCulloch,* 213 Ark. 1004, 214 S. W. 2d 209. In *Dillard* v. *Harden,* 197 Ark. 586, 124 S. W. 2d 10, we said it is sufficient if the testimony which the court credits and accepts as true shows clearly, concisely and satisfactorily that the deed sought to be restored had in fact been executed and delivered. We have also said that the burden is upon one who claims under an alleged lost instrument to establish its execution, contents and loss by the same *quantum* of proof. *Slaughter* v. *Cornie Stave Company,* 172 Ark. 952, 291 S. W. 69."

With the applicable law thus stated and understood, we proceed to examine the evidence to see whether it fulfills the requirements. Mrs. Katie Camp testified: that she was unrelated to the parties, but was well acquainted with Joseph B. Coleman, Sr. and his wife, Mrs. Emma Powell Coleman, having known them since 1930 when they were living near her in Levy; that one Sunday afternoon the Colemans were visiting at the home of Mrs. Camp, and Mr. Coleman made the statement that he had deeded two lots to his oldest daughter (Mrs. Baer), and "I made the others to Emma... I made a deed for them . . ."; that after Mr. Coleman's death the witness saw the warranty deed from Coleman, Sr. to Emma Powell Coleman, conveying the lots here involved; that Mrs. Coleman kept the deed in a little green box; that Mrs. Emma Powell Coleman claimed the lots as her own, and witness went with Mrs. Coleman to see the lots in 1937 or 1938, which was the last time the witness saw the deed; and that the deed had Mr. Coleman's signature, but witness could not be positive about an acknowledgment.

Mrs. Helen Harris Oates, a sister of Emma Powell Coleman and an aunt of the appellee, testified that she lived near Mr. Coleman, Sr. and Emma Powell Coleman when they were married in 1928; that this was Emma Powell Coleman's first marriage; that Emma Powell Coleman owned a house in Levy and the Colemans lived there for some time; and that Mr. Coleman died there on April 24, 1934. Mrs. Oates testified positively and unequivocally that she saw the deed from J. B. Coleman, Sr.

to Emma Powell Coleman; that witness saw the signature of the grantor on the deed and the lot numbers of the property; that the deed was duly notarized; that Mrs. Coleman kept the deed in a little green box; that Mrs. Coleman paid the taxes on the lots as long as she lived; and that witness paid the taxes for appellee each year thereafter.

The deposition of Mrs. Elsie Baer (deceased at the time of the trial) was introduced; and in the deposition Mrs. Baer stated that Mrs. Emma Powell Coleman told Mrs. Baer after the death of Mr. Coleman that he had deeded the lots in question to Mrs. Coleman; and Mrs. Baer accepted it as a fact and so believed for many, many years, until it was learned that no recorded deed could be found.

Mrs. Dillon, a daughter of Coleman, Sr. by a previous marriage, testified that she never heard of any deed from her father to Emma Powell Coleman; but she was confronted by her deposition in which she had conceded that for a period of twenty years she had been under the impression that the lots in question had been deeded to Emma Powell Coleman. In the deposition Mrs. Dillon also conceded that it was only when no deed was found of record that the appellants assumed the position of denying the deed. The appellants furthermore contend that the appellee had first claimed title by adverse possession, and only by subsequent amendment claimed the title by a lost deed.

Without detailing all the evidence, a careful study convinces us that the Chancery Decree should be sustained. For more than twenty years the taxes on the property had been paid for appellee and acts of ownership exercised without any question, and the appellants seemed to believe that Emma Powell Coleman had received a deed for the property. When no deed was discovered of record, some of the appellants undertook to deny the execution of any deed.

Affirmed.

HARBOR *v.* CAMPBELL.

5-2755 360 S. W. 2d 758

Opinion delivered October 8, 1962.

Terral & Rawlings and *Gail O. Matthews,* for appellant.

Denman & Denman, for appellee.

ED F. MCFADDIN, Associate Justice. This appeal stems from a traffic mishap which occurred when the appellee Campbell's car struck the rear of a car occupied by appellants and caused injuries and damages for which appellants sought recovery. The jury verdict and judgment was for Campbell; and appellants seek a reversal because of matters which occurred in the course of the trial.

I. *Conviction For Traffic Violation.* Appellants sought to introduce in evidence a certified copy of the record of the Municipal Court in which appellee had paid a fine for "failure to yield the right-of-way," which charge arose because of the traffic mishap here involved. The Trial Court was correct in refusing to allow the

Municipal Court record to be introduced in evidence. Section 75-1011 Ark. Stats. says:

"No record of the conviction of any person for any violation of this act shall be admissible as evidence in any court in any civil action." Our recent cases of *Garver* v. *Utyesonich,* 235 Ark. 33, 356 S. W. 2d 744; and *Girard* v. *Kuklinski,* 235 Ark. 337, 360 S. W. 2d 115, are in point.

II. *Plea of Guilty For Traffic Violation.* When Appellee Campbell was testifying, appellants sought to interrogate him to show that for this identical traffic mishap Campbell had entered a plea of guilty in Municipal Court to the charge of failure to yield the right-of-way. The Trial Court refused this evidence of a plea of guilty; and such ruling was error. A plea of guilty for traffic violation for the identical traffic mishap is certainly a declaration against interest; and such plea of guilty is as admissible as any other declaration against interest in any other case. In *Covington* v. *Little Fay Oil Co.*, 178 Ark. 1046, 13 S. W. 2d 306, we said: "It is well settled that any statements made by a party, to a suit against his interest, bearing on material facts, are competent as original testimony." Appellants sued appellee for damages, alleging appellee had been guilty of six acts of negligence. One of these was "failing to have his car under proper control," and another was "failing to exercise ordinary care under the existing circumstances." Appellee's plea of guilty to "failure to yield the right-of-way," had clear evidentiary value on the alleged acts of negligence. In *Miller* v. *Blanton,* 213 Ark. 246, 210 S. W. 2d 293, we said: "Appellant Miller testified that a charge of reckless driving was filed against him as a result of this collision, and that he pleaded guilty to this charge . . . This testimony as to appellant's plea of guilty was competent as showing a deliberate declaration against interest by said appellant. 20 Am. Jur. 545" [1]

III. *Comments Of The Trial Judge.* One of the grounds of negligence levelled against the appellee was the

[1] In 18 A.L.R. 2d 1307, there are cases cited from many jurisdictions to sustain the rule that proof of a plea of guilty is admissible as a declaration against interest.

claim that he was driving while intoxicated. Robert Harbor testified that immediately after the traffic mishap he smelled alcohol on Campbell's breath. Other witnesses testified that immediately after the mishap they saw Campbell throw some beer cans out of his car into the bushes; and a State Trooper testified that he found four unopened cans of cold beer and one empty can in the bushes pointed out to him by some of the witnesses. When Campbell was on the witness stand, the following occurred on cross-examination:

"By Mr. Rawlings:

"Q. You don't know what time you left home?

"A. I don't remember exactly what time it was. * * *

"Q. You can't tell the jury what time you left home?

"A. I can not.

"Q. The truth of the matter, you were so drunk that you don't know?

"A. I don't think so, I - - (interrupted)

"Mr. Denman, Sr.: I object to that.

"The Court: The objection is sustained.

* * * *

Mr. Rawlings: Well, he testified he wasn't drunk, so don't I have a right to ask him if the truth of the matter is that, wasn't he so drunk that he don't know what time he left home.

* * * *

"The Court: Well, I don't think it is proper to come out and ask a man, that kind of a question, when there is no proof about his being drunk, so far.

"Mr. Rawlings: If the court please, I want to ask for a mistrial at this time, because there is evidence in this record that this man threw beer out of his car, that he had an odor of alcohol on his breath; and the statement of the court that - - (interrupted) * * *

"The Court: That's far different from being drunk; having the odor of alcohol on his breath is far different from a statement that he was drunk.

"Mr. Rawlings: We wish to object to the statement the court is making in the presence of the jury."

We have copied the pertinent cross-examination so there may be seen the full effect of the Court's remarks. At one place the Court said: " . . when there is no proof about his being drunk, so far"; and at another place the Court said: "That's far different from being drunk; having the odor of alcohol on his breath is far different from a statement that he was drunk." The appellants claim that these remarks of the Trial Judge constituted comments on the weight of the evidence; and we agree with appellants. When the Court made these remarks, there was already in the record evidence that: (a) the appellee stated he could not remember what time he left home; (b) appellee had driven his car into the rear of a preceding car on the public highway; (c) the appellee had then thrown one empty and four unopened beer cans into the bushes; and (d) a witness had testified that he had smelled the odor of alcohol on the appellee's breath immediately after the collision.

We are of the opinion that said evidence already offered was sufficient to take the case to the jury on the issue of whether the defendant was guilty of negligence, in that he was driving his car while intoxicated. Such being true, the remark of the Trial Judge was a comment on the weight of the evidence as to intoxication.[2] In *Fuller* v. *State,* 217 Ark. 679, 232 S. W. 2d 988, we quoted from our earlier cases, and summarized:

"The requirement of Art. 7, § 23, of our Constitution, that 'judges shall not charge juries with regard to matters of fact,' applies as well to the credibility of witnesses and the weight to be given their testimony as to the outright

[2] There are a series of annotations on the subject, "Driving While Intoxicated," as contained in 42 A.L.R. 1498; 49 A.L.R. 1392; and 68 A.L.R. 1356. In these annotations there is discussed the sufficiency of the proof of the condition of intoxication in criminal cases, and the admissibility of various bits of evidence. The holdings cited in the annotations fully support the conclusion that we have here reached.

truth or falsity of what they say. *St. L. S. W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215. And it applies not only to what judges tell juries in the course of formal instructions but also to what they say in colloquys with lawyers in the jury's hearing.''

IV. *Appellate Procedure.* The appellee urges one point to overcome appellants' entire appeal; and it relates to a procedural matter which we have considered, and which we find does not possess merit. The appellants duly filed notice of appeal and duly obtained extensions for the filing of the record. But the appellants delayed several months before formally filing with the Court the designation of the record and the points relied on for appeal. Appellee says that this delay — in filing the designation of the record and the points on appeal—is violative of Sections 8 and 11 of Act No. 555 of 1953, as now found in § 27-2127.2 and § 27-2127.5 Ark. Stats. We believe that this present contention by the appellee is an afterthought. The appellee apparently considered the time element immaterial, because, when the appellants filed their designation and points, the appellee designated additional matters for the record without making any claim that the original designation of the record and points had come too late. In short, appellee has failed to show any prejudice to him. Furthermore, the appellee filed no motion to dismiss the appeal because of such delay, but only urged it in the brief; so we cannot say that this case falls within our holding in *Jones* v. *Adcock,* 233 Ark. 247, 343 S. W. 2d 779.

Because of the errors of the Trial Court, as heretofore discussed, the judgment is reversed and the cause is remanded.

5-2633 361 S. W. 2d 75

Opinion delivered October 8, 1962.

Marcus Fietz, Penix & Penix, Rhine & Rhine and *Marshall N. Carlisle,* for appellant.

Kirsch, Cathey & Brown and *John Burris,* for appellee.

GEORGE ROSE SMITH, J. This is an election contest involving the Democratic nomination for the office of alderman in the city of Paragould. In the court below it was tried together with its companion case, *Wood* v. *Brown,* also decided today. In the alderman's race Textor was the apparent winner by a single vote, 1070 to 1069. The circuit court's judgment increased his margin to three votes, 1058 to 1055.

At the outset we lay aside the appellant's contentions with reference to the votes of R. L. Wrape, Sr., L. J. Dowdy, Jerry Jones (and Al Weisberger), Eugene Penney, and Dwight Pranger and his wife. Those issues were considered in the companion case, upon identical evidence, and our decision upon the other appeal is controlling in this case.

I. This appellant also sought a recount of the ballots in Box 2 of Ward 2. We think the trial court erred in sustaining the defendant's demurrer to this plaintiff's evidence. While it was not shown that Jones Horne bet on this election, as he did on the mayor's race, there was other proof entitling Harris to a recount. Several witnesses testified that after the election Jones Horne stated that one vote for Harris had been erroneously counted for Textor and that if there should be a recount Harris would be the winner. This proof, which must be taken to be true on demurrer to the evidence, meets even the most stringent rule in recount cases, for it indicates that a re-examination of the ballots would change the result of the election. Hence a *prima facie* case was made.

II. Textor contends that the court erred in rejecting the vote of Elaine King, who was charged by the plaintiff with not having paid her poll tax. The trial court seems to have considered Elaine King's vote along with that of Lewis Crye, for the two involved the same issue. Since Elaine King voted for the appellant and Lewis Crye voted for the appellee it is evident that one canceled the other, no matter whether they were both held to be valid or both cast out. Hence no prejudicial error occurred.

III. Boyd Martin had paid his poll tax in another county, but he did not file the receipt, or a certified copy of it, with the election officials as required by statute. Ark. Stats., § 3-227. His vote was therefore correctly rejected, for the reason stated with respect to Eugene Penney in Part V of the opinion in *Wood* v. *Brown,* the companion case.

IV. Textor also insists that the court erred in not rejecting the votes of Mr. and Mrs. N. P. Cartright. This

couple lived in Paragould for many years. About five years before this election Cartright's job with a railroad company was abolished, and he moved to Pulaski county to continue his work there. His wife joined him two years later and obtained employment in Little Rock at the state hospital. The couple bought a home in Pulaski county and assessed their personal taxes there. At the time of the election they were living in Pulaski county, but they still owned their house in Paragould, paid their poll taxes there, and intended to return to Greene county when Cartright attained retirement age some four or five years in the future.

Upon these facts the Cartrights were not qualified to vote in Greene county. The constitution provides that an eligible voter must have resided within the county for six months next preceding the election. Ark. Const., Art. 3, § 1. This requirement is mandatory; neither the convenience of the elector nor any practice that he may have been permitted to indulge in can abrogate the plain language of the constitution. *Wilson* v. *Luck,* 203 Ark. 377, 156 S. W. 2d 795.

Mr. and Mrs. Cartright were unquestionably residents of Pulaski county, having lived there for five and three years respectively and having established their home there. Leflar, Conflict of Laws (1959 Ed.), §§ 10 and 16. Their situation was not an exceptional one, like that of a public office holder who lives where the duties of his office require him to be. *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161. The constitution, by its mandatory language, excludes the notion that a person may be qualified to vote in two or more counties at the same time. Since the Cartrights were clearly entitled to vote in Pulaski county it follows that they were no longer eligible to cast their ballots in Greene county.

Reversed and remanded for further proceedings with respect to Box 2 in Ward 2.

Robinson, J., thinks that the Cartrights were qualified to vote in Greene county.

McFaddin, J., dissents.

ED F. MCFADDIN, Associate Justice (Dissenting). This is a companion case to *Wood* v. *Brown,* No. 2634; and I dissent from that part of the Majority holding in the present case which allows a recount of the votes in Box 2 of Ward 2. The basis of my dissent in this case is stated in my dissent from the Majority Opinion of this day in *Wood* v. *Brown,* No. 2634, and also in the Opinion which I delivered in *Wood* v. *Brown* on June 4, 1962, which may be found in 235 Ark. 258.

WOOD *v.* BROWN.

5-2634 361 S. W. 2d 67

Supplemental opinion on rehearing delivered October 8, 1962.

(Original opinion delivered June 4, 1962, p. 258.)

Marcus Fietz, Penix & Penix, Rhine & Rhine, and *Marshall N. Carlisle,* for appellant.

Cecil Grooms, for appellee.

George Rose Smith, J., on rehearing. This election contest involves the Democratic nomination for the office of mayor of Paragould. According to the original returns the appellee Brown was the winner by a vote of 1087 to 1077. The circuit court, after rejecting a number of votes that were found to have been illegally cast, determined that Brown was the winner by a vote of 1078 to 1060. In seeking a reversal the appellant questions a number of the trial court's rulings.

I. In his complaint Wood specifically asked for a recount of the ballots in Box 2 of Ward 2, asserting misconduct on the part of an election judge. On this issue the trial court, at the close of the plaintiff's proof, sustained the defendant's demurrer to the evidence.

In a case tried without a jury, as this one was, the defendant's demurrer to the evidence is really a motion for judgment and is the equivalent of a motion for a directed verdict in a jury trial. In passing upon such a demurrer the trial judge must give the evidence its strongest probative force in favor of the plaintiff. *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. (That was a chancery case, but we pointed out that the same rule governs cases at law tried without a jury.)

Wood's proof, viewed in its most favorable light, shows that Jones Horne, one of the election judges at Box 2 in Ward 2 had bet $200 that Brown would win the nomination for mayor. There is also testimony that after the election Horne, a one-armed man, said that he could steal more votes with one arm than the other boys could with two and that the election officials at the box in question "didn't count the votes, they just estimated them."

In determining whether this testimony was sufficient to make a *prima facie* case we have no controlling precedent in this state. The decisions elsewhere range from one extreme to the other. Some jurisdictions hold that a recount should be granted almost as a matter of course, others that one should be granted if the applicant shows a reasonable basis for doubting the accuracy of the original returns, and still others that no recount is to be allowed unless the losing candidate proves that the result of the election will be changed in his favor.

The third view seems to us to be logically untenable, for the apparent loser does not need a recount if he has already shown himself to have really been the winner. It may be observed in passing that some courts, in putting obstacles in the way of a recount, stress the importance of preserving the secrecy of the ballot. *Free* v. *Wood,* 137 Kan. 939, 22 P. 2d 978; *Markowsky* v. *Newman,* (Tex. Civ. App.) 138 S. W. 2d 896. This consideration is entitled to little weight in Arkansas, for our system of having separate ballot-stubs allows the original ballots to be reexamined without a disclosure of how each person voted. See Ark. Stats. 1947, Title 3, Ch. 8.

It seems evident that not all applications for a recount stand upon the same footing. Whatever may be the rule in some situations, we are of the opinion that an exceptionally strong case is made when the losing candidate proves that an election judge bet on the outcome, in violation of Ark. Stats., §§ 3-704 and 3-1516. That a judge should have a financial interest in the matter to be determined is contrary to the simplest conception of justice. It is no answer to say that there were other election officers at the polling place, who are not shown to

have violated the law. By analogy, nine jurors may return a verdict in a civil case, but we would not for that reason uphold even a unanimous verdict if it were shown that one juror had a pecuniary interest in the outcome of the case.

The point is this: If a partisan election official has in fact succeeded in miscounting the votes to the advantage of his favorite, the other candidate is ordinarily helpless to expose the wrong except by means of a recount. A case in point is *Meriwether* v. *Stanfield,* (Tex. Civ. App.) 196 S. W. 2d 704, where an election judge had bet on the winning candidate. In answering the argument that the contestant should have been required to show what specific ballots had been falsely tabulated the court reasoned: "[W]e hold that it was impossible for the contestant to allege what individual voters' ballots had been miscalled in time to have made a definite pleading thereof in his petition. Such matters are obviously beyond the knowledge of anyone except the election judge himself. We believe that for the courts to require the contestant in an election contest, before being heard on his petition, to allege specifically the ballots which had been miscalled to his disadvantage would amount to denying to a contestant and to the voters themselves protection from dishonest election judges."

There is no merit in the suggestion that the granting of a recount would violate the rule that the voters are not to be disfranchised by the misconduct of an election official. *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257. To the contrary, if errors are disclosed by the recount it actually gives effect to the will of the electorate by correcting the returns to speak the truth.

II. The complaint alleged that R. L. Wrape, Sr., had voted twice, for Brown, and that both his votes should be cast out. No proof upon this issue was offered by either side until the plaintiff's rebuttal, when he seems to have attempted to change his position and prove that there were two R. L. Wrapes and that both votes were valid. The court rejected this offer of proof, as not being proper rebuttal. Both the votes were cast out, which was the

relief that the complaint had sought. We do not find in the appellant's abstract any statement that the Wrape votes were actually cast for Wood, nor any indication that this information is to be found in the record. We are thus not in a position to say that the appellant was adversely affected by the trial court's ruling.

III. By cross-complaint Brown challenged the vote of L. J. Dowdy, who had voted in the wrong precinct. At the trial it was impossible to identify Dowdy's ballot, as his ballot-stub could not be found. In the circumstances the court properly permitted Dowdy to waive the secrecy of his ballot and state which candidate he voted for (it was the appellant). When the ballots are not available the electors may be called to testify for whom they voted. *Dixon* v. *Orr,* 49 Ark. 238, 4 S. W. 774, 4 A. S. R. 42.

IV. The complaint attacked the vote of Jerry Jones on the ground that he had not paid his poll tax. This objection was met by proof that Jones was a maiden voter, entitled to vote without a poll tax receipt. It is now argued that Jones improperly cast an absentee ballot, as it turned out that he was not unavoidably absent from his precinct on election day. This issue is presented too late, being raised for the first time on appeal and long after the time for filing a complaint in an election contest. *Angelletti* v. *Angelletti,* 209 Ark. 991, 193 S. W. 2d 330; *Wilson* v. *Ellis,* 230 Ark. 775, 324 S. W. 2d 513. The same reasoning applies to the appellant's belated challenge to W. R. Sanders' vote.

V. The trial court erred in counting, for Brown, the maiden vote of Eugene Penney, since his affidavit of age, required by statute, could not be found. Ark. Stats., § 3-227; *Logan* v. *Moody,* 219 Ark. 697, 244 S. W. 2d 499.

VI. The appellee questioned the votes of Dwight Pranger and his wife and at the trial proved that the couple had been living in St. Louis, Missouri, for nine years before the election. The appellant now complains of the court's refusal to allow him to show that Pranger had a subjective intent to maintain his residence in Greene county, Arkansas. For the reasons stated in Part IV of the

opinion in *Harris* v. *Textor,* also decided today, the proffered proof would not have established the Prangers' right to vote in Greene county.

(This opinion, on rehearing, supersedes the original opinion delivered on June 4, 1962, 235 Ark. 258.)

Reversed and remanded for further proceedings with respect to Box 2 in Ward 2.

McFaddin, J., dissents.

ED. F. MCFADDIN, Associate Justice, (Dissenting). On June 4, 1962, this Court, by a four to three vote, affirmed the judgment of the Trial Court in this case. The Majority and Dissenting Opinions of June 4, 1962 may be found in 235 Ark. 258, *et seq.;* and the basis of such Majority Opinion was that the proof offered by the contestant as to Box 2 of Ward 2 was not sufficient to support the allegations contained in the contestant's complaint, or to obtain a recount of the votes in said box.

A petition for rehearing was duly filed, but this Court was in summer vacation from June 4th to September 3rd. Now, the petition for rehearing has been heard and granted; the Majority Opinion of June 4th has been overruled; the Circuit Court judgment has been reversed; and a new trial has been ordered in regard to Box 2 of Ward 2. In short, three of the Justices who voted for the Opinion of June 4th have changed their minds, as they have a perfect right to do. But before I prepared what was the Majority Opinion of June 4th, I read every word of the transcript and studied all of the applicable law. I still maintain that what was the Majority Opinion of June 4th was and is the correct rule of law on the facts.

So I dissent from the present Majority Opinion, which allows a recount of the votes in Box 2 of Ward 2; and I point to my then Majority Opinion of June 4th as containing all the reasons which support my present dissent.

5-2694 360 S. W. 2d 763

Opinion delivered October 8, 1962.

[redacted]

Hardin, Barton & Hardin, for appellant.

No brief filed for appellee.

GEORGE ROSE SMITH, J. The appellant applied to the Arkansas Commerce Commission for permission to eliminate its station agent and to inactivate its depot at Taylor, Arkansas, asserting that this facility is being maintained at a loss. The commission denied the application, finding that the closing of the station would result in undue inconvenience to the public in western Columbia county and would be contrary to the public interest. The circuit court affirmed the decision. The main question is whether the commission's conclusion is against the weight of the evidence.

Taylor, a city of about 700 people, is on the appellant's line between Springhill, Louisiana, about seven miles to the south, and Stamps, Arkansas, about nineteen miles to the north. The train service at Taylor has consisted of one freight each way daily and one passenger train each way daily. In 1957 the station agent and depot were maintained at an expense of $4,770.09, while the revenue assignable to the station was only $1,847.72. In 1958 the expense was $5,483.50 and the revenue $3,433.36. These are the only two years for which the appellant introduced evidence pertaining to its operations at Taylor.

Some 3,000 people within a six-mile radius of the community are served by the business houses at Taylor. These establishments include several grocery stores, a hardware and furniture store, a cleaning and pressing shop, cafes, barber and beauty shops, insurance agencies, a drugstore, a recreation hall, and municipal buildings. The merchants are dependent upon the appellant for common carrier service, for the town is not served by any truck line.

If the present application should be granted the city would still be served by rail, but the depot would not be an active facility. Incoming carload shipments could be unloaded by the consignees, as has been the practice in the past. Less than carload lots would have to be picked up by the consignees at Springhill. For outgoing freight the shipper would have to arrange, by a collect telephone call to Springhill, for cars to be spotted at Taylor and for the necessary shipping documents to be dropped off by the conductor upon one of the daily trains. The shipper would not only have to load the car, as in the past, but also have to seal it. There would be no station agent to sell passenger tickets, issue bills of lading, supply information, and perform many other duties. It is quite evident that the proposed do-it-yourself freight service would be decidedly inconvenient to the railroad company's patrons at Taylor.

In a case of this kind, where substantial losses are resulting from the operation, the question is whether that economic waste outweighs any public benefit or conven-

ience. *Chicago & N.W. Ry. Co.* v. *Mich. P.S.C.*, 329 Mich. 520, 45 N.W. 2d 520. As the court pointed out in that case the factors to be considered include the character and population of the territory being served, the public patronage or lack of it, the facilities remaining, and the operations of the carrier as a whole.

"Another statement of the principle is that although the operation of the entire system yields a net profit, the loss resulting from the maintenance of a certain service on a particular branch must be of sufficient importance to outweigh the inconvenience which the public will suffer as a result thereof." *Alabama P.S.C.* v. *Atlantic Coast Line R. Co.*, Ala., 45 So. 2d 449.

In the case at bar we cannot say that the findings of the commission, a specialized and informed tribunal are against the weight of the evidence. It cannot be doubted that the public would be greatly inconvenienced by the withdrawal of depot service at Taylor. In addition to mere inconvenience there is proof that the cessation of the existing service will adversely affect the economic growth of the community. Taylor has been a growing city; its future is bright. If, however, it no longer has access to good railway service its ability to attract new industry and to continue its progress will, according to the testimony, be substantially impaired.

The applicant's proof is not as comprehensive as it might be. There is no evidence about the financial situation of the company as a whole; so we cannot say whether it is seriously affected by the comparatively small annual loss at Taylor. Moreover, the proof relates to two years only. The net loss in 1958 was much smaller than that in 1957; the prospects for future improvement may be excellent. On the whole case we do not feel justified in declaring that the commission was required by the preponderance of the evidence to grant the application for a reduction in service.

Inasmuch as the proof establishes the reasonableness of the commission's order, there is no merit in the appel-

lant's contention that its property is being arbitrarily taken without due process of law, in violation of the Fourteenth Amendment.

Affirmed.

LUSBY *v.* HERNDON.

5-2708 361 S. W. 2d 21

Opinion delivered October 8, 1962.

Robert W. Henry and *Yingling, Henry & Boyett,* for appellant.

Lightle & Tedder, for appellee.

PAUL WARD, Associate Justice. This litigation is between adjoining landowners over a road which the parties (and their predecessors in title) and the public had (at various times) used over a period of some fifty years. Appellants closed the road (by erecting gates and fences) and appellees brought suit in chancery to prohibit appellants from doing so. In appellants' answer they admitted erecting fences across the road, but denied the said road was a public road. They stated also that appellees were

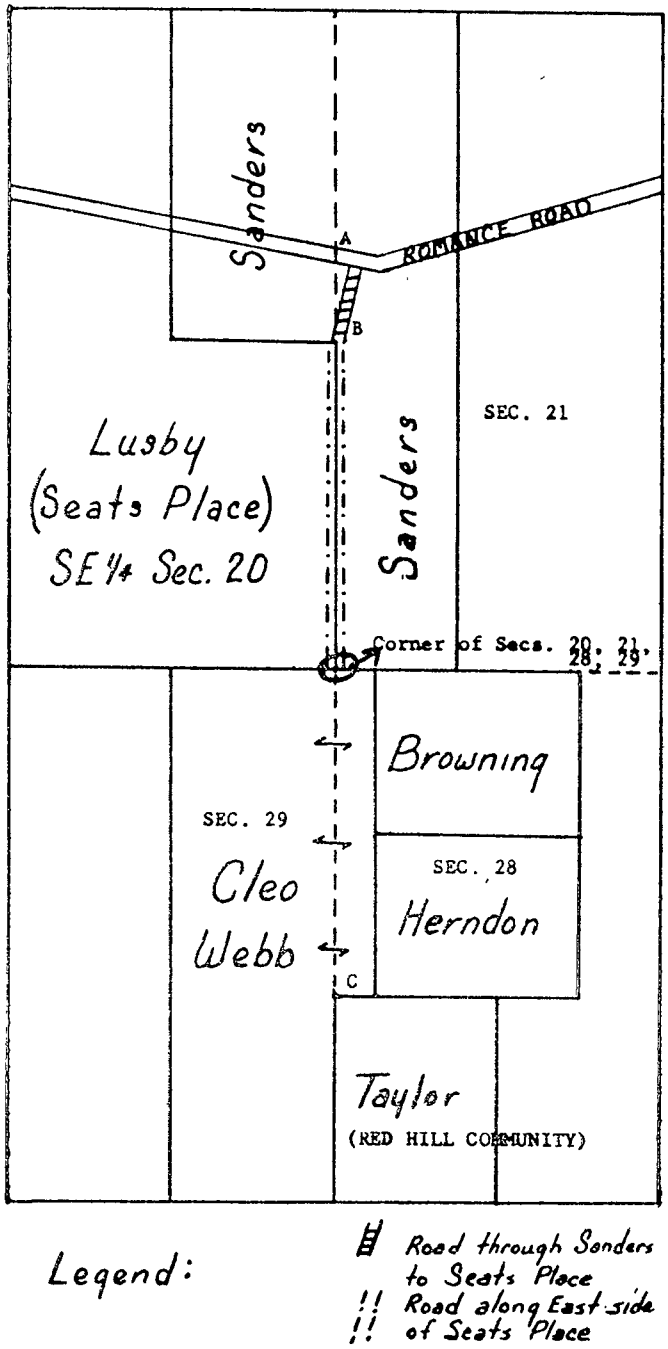
estopped from claiming a right to use the road since they had deeded the land (where the road was located) to appellants.

The chancellor held that the road had been abandoned as to the public but ordered appellants to maintain two gates so that appellees, Browning and Herndon, could use the road, and he gave appellants judgment for damages in the sum of $200 against those two appellees. Title to the roadway was quieted in appellant, Lusby. Appellants have appealed and appellees have cross-appealed.

In order to understand the issues hereafter discussed it is necessary to give a general summary of the factual background.

Appellant, Lusby, owns the southeast quarter of Section 20, Township 7 north, Range 10 west, having bought the land in 1955 from appellant, Nolen Troxell, who now holds a mortgage for a portion of the purchase price. Appellee, Sanders, owns the southwest quarter of Section 21, lying on the east side of Lusby's land, and also owns lands on the north side. There is a public road (Romance Road) running east and west a short distance north of the center of Sections 20 and 21. There was an old community road which ran from the public road south along the section line between the two landowners, thence south to the Red Hill Community. Appellees claim this road is still open to them and the public. Appellee, Browning, owns fifty acres just south of (and adjoining) Sanders' land, but the west line of Browning's land is five chains east of the section line, *i.e.* east of the old road in controversy. Herndon's land joins Browning's land on the south, and the west line is likewise five chains east of the road. Appellant, Troxell, is a party merely because he holds the mortgage on Lusby's land.

One. We hold the chancellor was correct in finding the old community road had been abandoned as a public highway. It clearly appears that for many years, until about 1945 or 1950, the public did travel the road (A to C on map) which appears to have been rough and unimproved. On the other hand, the weight of the testimony shows that Lusby and his predecessors had maintained


Sanders
ROMANCE ROAD
A
B
SEC. 21
Lusby
(Seats Place)
SE¼ Sec. 20
Sanders
Corner of Secs. 20, 21, 28, 29
Browning
SEC. 29
Cleo
Webb
SEC. 28
Herndon
C
Taylor
(RED HILL COMMUNITY)
Legend:
Road through Sanders to Seats Place
Road along East side of Seats Place

fences or gates across the road for more than seven years before this suit was filed. That being true it must be legally presumed that when any member of the public traveled the road during that period he did so by permission. See: *Porter* v. *Huff,* 162 Ark. 52, 257 S. W. 393.

Two. The chancellor erred in quieting title in Lusby to that portion of the road (A to B on map) which is situated on Sanders' land. Lusby claims this portion of the road by virtue of a warranty deed executed in 1945 by Sanders to one Seats who was then the owner of the Lusby land. This deed purported to convey a strip of land one rod wide "for road purposes only." This being true, the use of this strip of land for a roadway by Seats, Troxell, and Lusby was permissive and would remain so for seven years after Sanders had notice to the contrary. No such notice appears in the record. See: *Dial* v. *Armstrong,* 195 Ark. 621, 113 S. W. 2d 503; *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830.

Three. It follows from what we have previously said that Sanders has a right to use the road (A to B on map) and the chancellor, for that reason, was justified in requiring Lusby to maintain gates for that purpose. By the same token it was error to require Lusby to maintain gates for the sole benefit of appellees, Browning and Herndon. Their land was at least a half-mile away from the land conveyed to Seats by Sanders, and they show no privity of interest with Sanders. If these appellees have no way of ingress and egress to and from their lands their remedy is to apply to the county court in accordance with the applicable statutes.

Four. The chancellor ordered Browning and Herndon to pay Lusby $200 as damages for destroying Lusby's fences and gates across the road. That the fences and gates were destroyed is not denied, but appellants say the amount awarded is inadequate. On this point we think the record sustains appellants.

Lusby testified one gate was broken down and the chain and lock were broken; the fences were cut to pieces, torn to pieces, and the posts pulled up; the guy wires on

the fences were cut; some terraces were damaged; and the total cost of repairs will be $400. None of this testimony is denied by Browning and Herndon. Their main defense is based on the alleged right to the use of the road, and not to the amount of damage done. Both sides recognize that the testimony of Lusby, an interested party, is not regarded as uncontradicted. However this testimony was positive and undenied, and we know of no contradicting fact or circumstance in the record. Consequently we are bound to say the weight of the evidence sustains a finding that Lusby has been damaged in the sum of $400, and we so find.

The decree of the trial court is affirmed in part and reversed in part to the extent heretofore indicated, and the cause is remanded for entry of a decree in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.

PENDLETON *v.* STUTTGART AND KING'S BAYOU DRAINAGE AND IRRIGATION DIST. NO. 1.

5-2684 360 S. W. 2d 750

Opinion delivered October 8, 1962.

Paul B. Pendleton and *William C. Daviss,* for appellant.

Cecil C. Matthews and *George E. Pike,* for appellee.

SAM ROBINSON, Associate Justice. During 1911 there were created in Arkansas County two drainage districts —King's Bayou Drainage District and Wulff Drainage District; Wulff Bayou drains into King's Bayou. The districts are contiguous and extend from the City of Stuttgart to some 12 miles south. The districts accomplished the intended purposes and for a long time have been inactive and dormant; no drainage taxes having been levied for many years. No work has been done in either district since 1935; however, neither district has been formally dissolved.

In 1959 a new district, to be known as the "Stuttgart and King's Bayou Drainage and Irrigation District," was proposed. In this connection a petition was filed in the Arkansas Chancery Court asking that the Court establish a drainage and irrigation district embracing certain described lands, including most of the land in the old King's Bayou District and some of the land embraced in the Wulff District. The petition was granted and the remonstrants have appealed.

First, appellants contend that the plan of the proposed district does not meet the requirements of the statute under which such district is being formed; that the order authorizing the formation of the district is not supported by a preponderance of the evidence, and that there is no substantial evidence to sustain the order.

The new district was organized by authority of Act 329 of 1949, as amended by Act 171 of 1957. Section V of this Act (Ark. Stats. 21-905) sets out the necessary requisites for the formation of a district under the Act. It appears that the Act was fully complied with.

Appellants strongly argue that there is no showing that the project is feasible. Those petitioning for the formation of the district secured an order of the Court appointing an engineer. The engineer provided the required bond; made a survey and ascertained the limits of the region that would be profited by the proposed improvement; made his report giving a general idea of the character and expense, and made suggestions as to the proposed improvements and their location. Mr. Fricke, an engineer employed by appellants, testified that the preliminary data is sufficient to let a contract and complies with all requirements.

Appellants contend that the estimated cost of the improvements does not take into consideration the cost of the right-of-way, and that such cost will be $19,000.00. Even if the right-of-way costs that amount it would not render the project unfeasible. Twenty-six thousand acres of rich land are in the new district and the total cost of the improvements is estimated to be $71,032.80. Ark. Stats. 21-905 provides that the petition for the formation of a district shall contain "the estimated cost of the project as then estimated by those filing such petition from such information as they may have at that time, with reasonable detail and definiteness in order that the court may understand therefrom the purpose, utility, feasibility, and need or necessity therefor." Although the improvements may cost $19,000.00 above the estimate, it would not be such a great difference as to be unreasonable and not in conformity with the estimate.

It is argued that the trial court erred in not removing from the petition the names of Billy J. Burkett and H. H. McCauley. Without their land the petition would not represent the majority necessary for the formation of the district. Appellants rely on *Mahan* v. *Wilson,* 169 Ark.

117, 273 S. W. 383, but in that action, a drainage district case, the Court held that the signers of a petition for the formation of a district could not withdraw their names, except for cause, after the filing of the petition. In *Echols* v. *Trice,* 130 Ark. 97, 196 S. W. 801, the Court held that the only valid reason for removing a name from a petition is some good reason that will justify the change in the attitude on the part of the petitioner, such as fraud, deceit, misrepresentation, duress, etc. In their motion asking that their names be removed from the petition, Burkett and McCauley state: "That, at the time Movants signed said petition, they did so under a misapprehension and misunderstanding of the project, insofar as the type of work; the amount thereof, the complete and total cost thereof, the lands to be included in said proposed district, the complete and total cost per acre as it affected Movants' land, and the mode of payment therefor, and Movants here and now state to the Court that, if they had a complete understanding of the above details of said proposal, they would not have signed the same, and are now most unwilling to have their names included on said petition." No fraud, duress, deception, or anything of that kind is alleged.

The petition for the formation of the district was filed December 17, 1959. Subsequent to that time a great deal of work was done and expense incurred in connection with the project. A lengthy trial was had in which all of the issues were fully developed. The trial ended on March 7, 1960; the case was closed on May 12, 1960; and it was not until May 27, 1960 that Burkett and McCauley asked the Court to remove their names from the petition. In view of all the circumstances, the Court committed no error in denying the motion.

It is next argued by appellants that the trial court erred in ordering lands and improvements already in Wulff Drainage District included in the new district. The inclusion in a new district of lands already in an existing district has been approved several times. *Keystone Drainage District* v. *Drainage District No. 16,* 121 Ark. 13, 180

S. W. 215; *Lee Wilson & Co.* v. *Compton Bond & Mortgage Co.*, 103 Ark. 452, 463 S. W. 110. In the last case the Court said: "It is also urged that one tract of land included in this drainage district was located in another drainage district, and was therefore not subject to an assessment in this district, which, it is claimed, would be making a double assessment upon this land for drainage purposes. But this question involves solely the amount of the benefit which such land receives from the drainage system within this district, and with which it should alone be charged. It does not involve the power to include this land within the drainage district. The land may be benefited by both drainage districts."

Appellants cite *Sembler* v. *Water & Light Imp. Dist.*, 109 Ark. 90, 158 S. W. 972, but there the question was whether or not a new district could take over property belonging to an old district. This involved the transfer of title to property—a water and light plant, etc., and the Court held that the statutes did not provide for the acquisition of property of the old district by the new district; but the Court said: "The fact that part of the territory embraced in the new district is already covered, and the property therein assessed for the construction of the old water and light plants, affords no reason why it cannot be embraced in a new district covering a broader territory if additional benefits accrue to the property in the old district."

But appellants maintain that since the adoption of Act 180 of 1927, lands in an existing drainage district cannot be taken into a new district. Act 180 of 1927 is entitled "An Act to Provide for Adding to Drainage Districts Lands which have been actually Drained into the Ditches of such Districts Where Lands so Added Are Not in any other Drainage District."

The preamble to this Act provides: "WHEREAS, into the ditches of some drainage districts of the State, after the ditches were completed, other lands have been drained by digging private ditches, thereby draining

sloughs, marshes and lakes that could not otherwise be drained, and WHEREAS, in certain instances, sanitary sewer lines have made use of such drainage ditches to procure an emptying outlet, thereby saving the sanitary sewer district large sums of money, and WHEREAS, it is right and just that such lands as make use of and are benefited by such drainage ditches of any such drainage districts should stand their just portion of the costs of the construction and maintenance of such drainage ditches in proportion to the benefits received."

Section I provides: "Where any slough, marsh or lake has been drained into the drainage ditches of any drainage district which has completed its work of construction, lands benefited by the drainage of such slough, marsh or lake may be added to such drainage district in the manner provided by Section 3 of this Act; but in no case shall lands paying taxes in another drainage district be added to any drainage district under the provisions of this act, and in no case shall lands, lots or blocks already in a drainage district be in any way affected by the provisions of this act."

Appellants contend that Section I of Act 180 of 1927 prohibits the inclusion in the new district of lands already in King's Bayou and Wulff Districts. Section I of Act 180 has no application whatever to the situation existing between the King's Bayou District, the Wulff District, and the new district. It is perfectly clear from Act 180 that the purpose of Section I is to prevent owners of sewer lines, sloughs, marshes and lakes, from making use of the drainage district's improvements without just compensation. Moreover, Section I of the Act applies only to lands added to an existing district under the provisions of the Act. The new district is not formed under the provisions of Act 180 of 1927; it is created under the provisions of Act 329 of 1949, as amended by Act 171 of 1957.

Appellant's fourth proposition is that the court erred in including the lands of Georgia Pendleton, Hugh Partridge and Harold Partridge in the new district. It is

claimed that the lands of these parties will receive no benefits from the proposed improvements. True, the trial court found that the lands in question would receive no direct benefits, but the court also found that the lands would receive indirect benefits. In *Memphis Land & Timber Co.* v. *St. Francis Levee District,* 64 Ark. 258, 42 S. W. 763, the Court said: "And the lands above overflow would be increased in value by reason of changes made in their surroundings." In *Carson* v. *St. Francis Levee District,* 59 Ark. 513, 27 S. W. 590, the Court said: "A tract within the District may be above overflow without the levee and yet in various ways be greatly benefited by the levee." To the same effect is *Oats* v. *Cypress Creek Drainage District,* 135 Ark. 149, 205 S. W. 293.

Of course the entire situation will be taken into consideration in the assessment of benefits. In an excellent opinion, the trial court said: "The evidence reflects that all of the protesting Petitioners are in close proximity to the King's Bayou Ditch and that they will receive indirect benefits as a natural result of the proposed improvements to this district. Certainly, to paraphrase from the Lessenberry case (*Lessenberry* v. *Little Rock-Pulaski Drainage District,* 211 Ark. 1046, 204 S. W. 2d 554) the proposed improvement is one in which all the landowners within the territory of the proposed District have, to a certain extent, a common interest, and the improvement cannot be accomplished effectively without the help of all within the area."

Affirmed.

SIMMONS *v.* MURPHY.

5-2744 360 S. W. 2d 765

Opinion delivered October 8, 1962.

Bruce Bennett and *Mahony & Yocum,* for appellant.

J. S. Brooks and *Spencer & Spencer,* for appellee.

JIM JOHNSON, Associate Justice. This is an action by appellant, J. A. Simmons, against appellee, Marie Murphy, seeking to set aside and cancel a warranty deed which was executed and delivered by appellant to appellee on August 18, 1958, and recorded on February 2, 1959, purporting to convey certain lands in Union County. The complaint admitted that appellant executed the deed here in question, but alleged *inter alia* that appellant was ill and afraid he was going to die, and made the deed intending only to convey title to appellee in event of his death. Appellee answered, pleading *inter alia* that the deed was made and delivered with no reservations or conditions, either express or implied. The trial court held that appellant failed to sustain the burden of proof and dismissed the cause for want of equity and quieted and confirmed title to the land in the appellee as against all claims of appellant. This appeal followed.

For reversal, appellant contends the trial court's finding that the deed was delivered within the meaning of the law is not sustained by the evidence.

Appellee is the niece of appellant's first wife. Following the death of appellee's mother, when appellee was about one year old, she and her three sisters were taken into appellant's home and raised as his own children. The record is replete with testimony of appellant's goodness to appellee and her sisters over a long period of time. His kindness is not in issue. The question in issue is whether appellant proved there was no delivery of the deed.

From appellant's own testimony, he had drawn many deeds over a period of 45 years for himself and his employers. He had purchased some 40,000 to 50,000 acres of land, 250 million feet of timber, 2,000 acres of mineral rights, 15,000 acres of oil and gas leases, and he had also prepared leases and deeds for friends and neighbors "numbers and numbers of times." He testified that he had drawn "numbers" of deeds containing conditions, exceptions and reservations, and that the deed to appellee contained none. From a reading of the testimony, appellant obviously has a thorough understanding of deeds and property transactions.

There is evidence that shortly after the death of appellant's first wife, he told appellee and her sisters that he wanted to deed the "home property" to them or to some of them. The deed was prepared at appellant's direction. He executed it, had it acknowledged, and manually delivered the deed to appellee, without any words or acts indicating any reservations or restrictions. Some months after the conveyance appellee had the deed recorded.

There is evidence that appellant was a sick man about the time he made this deed, but there is also evidence of mineral deeds negotiated, prepared and recorded at this same time, in the furtherance of appellant's usual business.

Subsequent to the execution and recordation, appellant leased the property from appellee at a time when apparently he was no longer sick nor afraid he was going to die but in fact was preparing to remarry. He drafted

and signed a rental contract in which appellee is named as owner of the property, and actually paid rent for seven months. Both appellant's and appellee's acts are consistent with a completed delivery—appellee paid taxes and insurance on the property, and lived there until appellant's remarriage. Now, some two years after the conveyance, appellant claims there was no delivery.

In the Chancellor's detailed and cogent opinion, he stated:

"In the case at bar, plaintiff (appellant) alleged and so testified that he was in 'very bad health' and was afraid he was going to die when he made and delivered the deed to her, 'intending for title to pass to her in the event that death ensued such illness.'

"It must be noted, however, that plaintiff (appellant), did not allege nor did he testify that defendant (appellee) was aware of any mental reservations, nor did he testify that he told her of such intention or that there was any reservation on his part."

As stated in 26 C. J. S. at page 681:

"A mental reservation contrary to the grantor's expressed intention to convey title, or a subsequent change of intention, does not destroy the effect of a completed delivery."

This court has consistently held that in a proceeding to cancel a solemn deed, on the theory of nondelivery or otherwise, the quantum of proof required must rise above a preponderance of the testimony: it must be clear, cogent and convincing. *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 253.

While there was testimony elicited from appellee on cross-examination tending to show that she was somewhat confused as to when she thought legal title passed, and that she had knowledge of appellant's intention to remarry prior to the recordation of the deed, and further evidence that in the course of appellant's vast real estate transactions title to various properties was, from time to time, placed in her name as a "straw" title-holder for

the convenience of appellant, we cannot, from the record before us on trial *de novo,* in the instant case, say that the learned Chancellor was wrong in concluding that appellant failed to produce the quantum of proof required to set aside the deed.

Affirmed.

HARGETT *v.* MILLER.

5-2746 361 S. W. 2d 83

Opinion delivered October 8, 1962.

[Rehearing denied November 12, 1962.]

Melvin E. Mayfield and *W. A. Speer,* for appellant.

Mahony & Yocum, for appellee.

NEILL BOHLINGER, Associate Justice. This case involves an accounting between two partners, E. W. Hargett, the appellant here, and Dr. J. W. Miller, who is the appellee. The partnership was formed for the purpose of erecting and operating a motel at Lake Village, Arkansas.

Sometime prior to June, 1955, the appellant had procured a verbal option on a piece of property upon which he desired to erect a motel. He cleaned off the property and poured the footings for the building but being unable to exercise his option or erect the buildings, he formed a partnership with his brother-in-law, the appellee, for the accomplishment of these purposes.

Thereafter the parties decided to finance the venture by borrowing $30,000.00 from a bank in El Dorado and to this end the appellee made a note for $21,000.00 secured by a mortgage on property owned by him, and the appellant, Mr. Hargett, made a note for $9,000.00 secured by property owned by him and each partner signed the other's note.

There seems to have been no written agreement between the parties but it was agreed that Mr. Hargett would build the motel and operate it when finished. The appellee, Dr. Miller, was to continue to practice medicine and pay a monthly installment of $825.00 on the indebtedness at the bank each month until the motel was in operation and funds were thereby in hand to make the monthly payments and Dr. Miller would be reimbursed, as the conditions at the motel permitted, for the monthly payments he had made. In due time the motel was constructed and opened for business with 12 units and later 8 additional units were built.

In June, 1957, the motel was sold for $120,000.00 and with that money in hand the partners paid off the balance of the loan at the bank in El Dorado in the sum of $11,920.80, reimbursed Dr. Miller, the appellee, the monthly loan payments made by him and discharged an obligation of the partnership to Mr. W. C. Lovett in the sum of $53,417.75. The parties to the partnership were unable to agree as to the division between them of the remaining money. The appellant contended that he was (a) entitled to reimbursement for his expenditures, prior to the partnership, in preparing the property which the partnership took over, (b) and further that he was entitled to be paid for the expense of operating his personal truck

while using it in the construction and operation of the partnership's business, (c) that he was entitled to compensation for the work and labor performed by him after the formation of the partnership in the construction of the 20 units which comprised the motel, (d) and that the appellee, Dr. J. W. Miller, was not entitled to interest on the monthly payments made by him to the First National Bank of El Dorado where the original loan for the partnership was procured.

The solution of the problems presented here has been hampered at every stage by an absence of records, or inadequately kept records, but through many days of trial, which dealt in large part with minutia, the learned chancellor has ably stated an account between the parties hereto.

The appellant contends, however, that the court erred in holding that he was not entitled to reimbursement for his expenditures prior to the formation of the partnership. On that point we agree with appellant. There is testimony that the appellant spent $2,398.96 preparing the lots for the motel and starting the foundations. This was work which was necessary for the purposes of the partnership and had it not been done then, it would have to have been done subsequently and the partnership would have borne that cost in any event. Since it was cash expended for the partnership, the appellant is entitled to one-half of the $2,398.96, or $1,199.48. Ark. Stats. (1947) Anno., § 65-118: "(a) Each partner shall be repaid for his contributions, * * *."

On his second point the appellant contends that he was entitled to payment for the expenses of operating his personal truck while used in the construction and operation of the partnership business and for the depreciation of same while so used. On this point we do not agree. On appellant's point three which is that the trial court erred in holding that the appellant is not entitled to compensation for the work and labor performed by him after the formation of the partnership in the construction of the original twelve units and the additional eight units, we do agree.

The use of appellant's truck and the time for his labor are well covered by § 65-118, Ark. Stats. cited *supra,* sub-paragraph (f): "No partner is entitled to remuneration for acting in the partnership business, . . ." Hargett was acting in the partnership business and, in the absence of an agreement to the contrary, is not entitled to payment either for the use of his truck or for his personal time.

Appellant further urges that the trial court erred in holding that the appellee, Dr. J. W. Miller, was entitled to interest on the payment of the monthly installments by him to the First National Bank on the obligation of the partnership. In this he is correct. Under the Uniform Partnership Act, § 65-118, cited *supra,* sub-paragraph (d) provides: "A partner shall receive interest on the capital contributed by him only from the date when repayment should be made."

The original agreement was that Miller would be repaid when the business of the motel would produce enough money for that purpose. That time does not appear to have arrived, but the motel was sold and that was the time for Miller to be, and he was, paid. Hence no interest on his monthly payments to the bank should have been allowed.

Taking the excellent compilation of the learned chancellor, we have amended it in conformity with the conclusion cited *supra* and it now appears in this form.

Sale price of Motel	$120,000.00	
Cash in cash drawer (admitted by Hargett)	300.00	
Cash in cash drawer (additional amount found by chancellor from testimony)	2,035.39	
A—TOTAL ASSETS OF PARTNERSHIP		$122,335.39
Payments from Assets:		
(1) To Lovett in discharge of loan	53,417.75	

(2) To Bank in discharge of loan	11,920.80	
(3) To Hargett in additional salary	2,219.91	
(4) To Miller, reimbursement for loan payments and other advances	20,875.00	
(5) To Miller, interest on advances beyond capital	92.23	
(6) Cash paid for property improvement by Hargett (capital contribution)	2,398.96	
B—TOTAL OBLIGATIONS		90,924.65
C—BALANCE TO DIVIDE		31,410.74
D—AMOUNT DUE EACH PARTNER FROM BALANCE		$ 15,705.37

Amount due Miller from above calculation:

(4) Reimbursement for loan payments and other advances	$20,875.00	
(5) Interest on advances beyond capital	92.23	
(D) Amount due Miller from balance	15,705.37	
E—TOTAL DUE MILLER		$ 36,672.60
Amount in Miller's possession	36,912.25	
F—OVERPAYMENT TO MILLER		$ 239.65

Amount due Hargett from above calculation:

(3) Additional salary	$ 2,219.91

(6) Cash paid (capital contribution)	2,398.96	
(D) Amount due Hargett from balance	15,705.37	
G—TOTAL DUE HARGETT		$ 20,324.24
Amount in Hargett's possession	20,084.59	
H—BALANCE DUE HARGETT		$ 239.65

It thus appearing that appellant, Hargett, is entitled to recover the sum of $239.65 from appellee, Miller, judgment here is rendered in that amount. The appellant will also recover his costs.

THOMASON *v.* HESTER MOBILE HOME MFG., INC.

5-2773 361 S. W. 2d 94

Opinion delivered October 15, 1962.

[Rehearing denied November 12, 1962.]

Claude B. Brinton and *Bon McCourtney,* for appellant.

Frierson, Walker & Snellgrove, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Hester Mobile Home Manufacturer, Inc., was, during the period of this litigation, a manufacturer of trailers in Blytheville, Arkansas, and appellant, Howard Thomason, was a retail dealer in such vehicles at Jonesboro. In March and April, 1961, negotiations were entered into for the purchase of six vehicles by appellant, and these were sold

to him for the total sum of $19,247.30. Of this amount, $8,558.00 has been admittedly paid, and the present litigation refers to the difference in the sale price, $10,-689.30, which appellee contends remains unpaid; appellant contends that this amount of money was paid to Charles Russell Hester, the President of appellee corporation.[1]

On May 31, 1961, the corporation instituted suit against Thomason alleging that appellee and appellant had entered into an agreement whereby the former would sell to the latter certain trailers; that Thomason would procure the financing of such trailers, held in stock by him, under a floor plan arrangement with commercial finance companies, and would remit to appellee the portion of the purchase price of each trailer financed under such an arrangement, the balance to be paid as each trailer was sold. Six trailers were sold under this arrangement.

The complaint further alleged that Thomason had consummated a floor plan agreement with a finance company, but had failed and refused to remit the proceeds to Hester. It was further alleged that Thomason had been entrusted with the certificates of title to the vehicles in reliance upon his agreement to procure floor plan financing, but that appellant had encumbered the vehicles under his floor plan financing arrangements, and had thereby defrauded appellee of the title certificates; an equitable lien was claimed upon the vehicles, inferior to any *bona fide* liens which had been placed thereon. Further, "Upon information and belief, plaintiff alleges that the defendant has appropriated the proceeds of the floor plan financing arrangements on the said vehicles into other assets of his business carried on as College Trailer Sales, and has sold certain vehicles and has notes or accounts receivable therefor. Plaintiff alleges that the defendant has no known assets out of which he can collect except the assets of the College Trailer Sales and that the defendant has already removed one of the trailers from the State of Arkansas and may remove others or sell

[1] The proof throughout refers to Hester as the actual appellee.

them to *bona fide* purchasers, leaving the plaintiff without any means of collecting the indebtedness due him. Plaintiff alleges that the defendant is insolvent and is concealing his assets and is about to remove the said trailers or sell them into the hands of persons who would be in the position of *bona fide* purchasers, from whom plaintiff would be unable to collect the purchase money due upon the said trailers.'' The prayer of the complaint sought judgment against Thomason for the sum of $10,-689.30, together with interest, and further sought the appointment of a receiver ''to take charge of all of the trailers sold to the defendant by the plaintiff and the proceeds of sale of any such trailers already sold, including notes, accounts receivable, or any other form of proceeds, and to take charge of all of the other assets of College Trailer Sales and to hold the same pending further orders of this Court, and that the said assets be sold in satisfaction of the judgment in favor of the plaintiff, and for all proper relief.''

The Court appointed the Circuit Clerk of Craighead County as temporary receiver, and directed that he serve in such capacity ''under his own bond''. Appellant filed a motion to discharge the receiver, asserting that he was not indebted to appellee, that he was solvent, and that appellee had an adequate remedy at law. Upon hearing on the motion, the Court discharged the receiver,[2] but impounded four trailers until the cause was heard on the merits. On June 14, Thomason filed his answer, denying the allegations in the complaint, and stating that he had paid the alleged indebtedness to appellee in full. A cross complaint was filed wherein it was asserted that the appointment of the receiver had caused appellant to suffer embarrassment with his creditors, a loss of sales, and injury to his reputation, and damages were sought in the sum of $10,000. These allegations were denied by appellee, and on June 19, appellant moved to transfer the case to the Circuit Court of Craighead County. This motion was denied, and after the filing of several other motions, the cause proceeded to trail. At the conclusion

[2] Apparently the mortgage liens against the trailers had been discharged subsequent to the filing of the suit.

thereof, the court entered its decree rendering judgment in favor of Hester Mobile Home Manufacturer, Inc., against Thomason in the amount of $10,698.30, together with interest from April 7, 1961, to November 20, 1961, or a total judgment of $11,083.62, with interest at 6%, and directed that if the judgment be not paid within 10 days, the commissioner of the court sell the trailers previously impounded, at public auction to the highest bidder for cash. The Court further held that there had been probable cause for the appointment of a receiver, and that appellant sustained no damages by the appointment of the receiver. From the decree so entered, appellant brings this appeal. Appellee cross appeals from the order of the court which denied the assessment of a reasonable attorney's fee and the assessment of an expert witness fee for Linton Godown, questioned documents expert, who testified for appellee. Though appellant urges several points for reversal, only three are actually pertinent to the question at this time, *viz*:

"The Court erred in granting an order of receivership."

"The Court erred in overruling Defendant's Motion to transfer to Law Court and in retaining jurisdiction of the cause after the hearing upon receivership."

"The Judgment is against the preponderance of the Evidence."

The allegations in the complaint were sufficient to justify the Court in appointing a receiver. In 75 C.J.S., § 26, p. 690, we find, "A receiver may be appointed on the ground of fraud in obtaining property or where there is fraud coupled with other facts or circumstances, such as the insolvency of defendant, or insolvency and other matters."[3]

Appellant argues at length that the court erred in overruling his motion to transfer the case to the Circuit Court, after the receivership had been dissolved and the receiver discharged, contending that there was no equit-

[3] Appellant also devotes some portion of his brief to arguing that the Court erred in not requiring a bond for the receiver, but a discussion of this point is immaterial in determining this cause.

able issue to be determined. Appellant asserts that this was simply a suit for a debt upon six trailers. We do not agree for several reasons. In the preceding paragraph, it has been pointed out that the appointment of the receiver was justified, and the appointment of the receiver was, of course, a matter properly within the province of the Chancery Court. We have held that when equity assumes jurisdiction for one purpose, it assumes jurisdiction for all purposes, *Goodman* v. *Powell,* 210 Ark. 963, 198 S. W. 2d 199. Furthermore, the allegations of the complaint were grounds for equity jurisdiction.[4] Appellant says that these allegations were not sufficient for the reason that the assertion that Thomason had promised to finance the trailers, but did not subsequently pay the money over to appellee, related to an event to happen in the future, and consequently did not support the allegation of fraud or deceit. This argument is erroneous. The case of *Wilson* v. *Southwest Casualty Ins. Co.,* 228 Ark. 59, 305 S. W. 2d 677 involved the question of a claim adjustor obtaining a release from a Mrs. Pelton on the fraudulent representation that he would settle with the Peltons' insurance carrier. This court said, "A promissory representation may be the basis of fraud in procuring a release if the promissor never intended to fulfill the promise and made it for the purpose of obtaining the release". We have likewise held in several other cases. No merit is found in this contention.

This brings us to the principal, and controlling, question in this litigation. That question, stated simply, is, "Has Thomason paid the total indebtedness due Hester?" Summarized, appellant's contention is that he paid Hester $10,537.80 in cash on Wednesday, April 5, in the latter's office. He stated that he borrowed $4,400 of this money from an uncle and aunt in Missouri, and that he already had the balance of the money in cash. Thomason testified that Hester gave him a receipt for the money but that the receipt didn't show what it was for and that he accordingly "took a couple of invoices lay-

[4] Actually, appellant filed an answer and cross complaint in the Chancery Court several days before moving to transfer the case to the Circuit Court.

ing on his desk and wrote out the receipt and he signed it and put his seal on it". By deposition, Bill Parker, a former employee of Hester, testified that he was standing out side the office on the 5th, and could see Hester and Thomason inside. He stated that appellant purchased a chair and some tires on that occasion, and that he saw Thomason and Hester "changing bills", *i.e.,* Thomason handed Hester some money and Hester, in turn, handed some money back to appellant, "Thomason had quite a roll but I don't know how many he give Hester". When asked if he observed anything unusual about the transaction, he replied, "Just the cash that is all." Parker testified that all of the invoices [or bills of sale][5] were given to Thomason on the following Saturday. Appellant stated that he received all of the bills of sale on Saturday, April 8; that he received the white, yellow, and pink copies, and that Hester kept the blue copies. However, Thomason stated that he did not receive the yellow copy of Invoice No. 146.

Hester testified that Thomason was in his office on Wednesday, April 5, but, they were "straightening" papers on two trailers that had previously been purchased. Appellee stated that the negotiations for the sale in question were entered into on Friday, April 7; that he gave all the bills of sale to Thomason at that time, and the latter was supposed to floor plan the trailers the following Monday, and then pay him. According to his evidence, several requests were made to Thomason for payment, all without success until April 17, at which time appellant gave appellee two checks in the total amount of $8,558.00; that these checks were the only payments he had received on the trailers. Hester denied emphatically that any money was paid to him on April 5, or that he gave a receipt for any such payment. Though there is much testimony by each party as to the details of the transaction, including payments on particular trailers,

[5] The documents are headed "Bill of Sale and Invoice" and the parties use the terms interchangeably throughout. We, therefore, do likewise, and, in this instance, the document did constitute a bill of sale, as well as invoice. We have not overlooked our holding in *Morrison* v. *Bland,* 226 Ark. 514, 291 S. W. 2d 243, to the effect that an invoice, standing alone, is not regarded as a contract, or evidence of title.

the real issue, determinative in this litigation, as previously stated, is whether the cash payment of $10,537.80 was made to Hester in his office on Wednesday, April 5. Appellee contends that the "receipt" is the lower part of the yellow copy of Invoice 146, and that the language of the receipt was placed on it by Thomason subsequent to receiving it. Indeed, it is a strange looking receipt! Quite obviously, the paper is the bottom portion of a bill of sale. The language at the top, admittedly written (actually hand printed) by Thomason, reads as follows: "Received of Howard Thomason, $10,537.80 by cash, which represents payment in full for the following trailers:—Serial No. 2181033, 5110-1030 and 5110-1029. A balance of $8,558 on the *following* trailers—(Serial No. 5110-1018, 51101032 and 5110-1029) will be due and payable on or before April 25, 1961. The sum of $19,095.80 represents payment in full of all debts past and present owed to Hester Mobile Homes Inc." Beneath this language is the printed form appearing on all the bills of sale to-wit: "State of Arkansas, County of Mississippi, Personally appeared before me, the undersigned authority, ... to me personally known, who stated he is ....., of the HESTER MOBILE HOME MANUFACTURERS, that he is duly authorized to execute the foregoing instrument for and in the name and behalf of said corporation. Subscribed and sworn to, before me, this.....day of .....19..... My commission expires.....19..... Notary Public....." In the first blank appears the written name of Hester, admittedly his signature; in the second blank appears the word "President", which is typed, and is a carbon copy; the date is given as 5 April 61. A faint outline of a corporate seal appears near the bottom right hand corner. Linton Godown, of Memphis, Tennessee, expert on the subject of questioned documents,[6] who conducts his examinations by special

[6] Mr. Godown is a graduate of Ohio State University, is a member of the American Society of Questioned Document Examiners, a Fellow in the Questioned Documents Section of the American Academy of Forensic Sciences, and a member of the Chicago Chapter of Photographic Scientists and Engineers. He has lectured at Indiana University and has testified in various courts of record in Arkansas and other states.

cameras, lens, various types of microscopic and lighting devices, and special transparent test plates, testified that he had, by various experiments, made an examination of the blue copy of Invoice 146, the "receipt", and all of the blue forms retained by Hester in the transaction with Thomason, together with a number of blank invoice forms or bills of sale. It was his opinion that the yellow receipt was the lower portion of one of the yellow forms used as bills of sale and invoices by Hester Mobile Home Manufacturers, and that it was taken from the yellow copy of Invoice No. 146.

Godown's findings, along with pertinent observations of the trial court, are summarized in an oral opinion rendered at the close of the case. The Chancellor stated, "In looking at the receipt that the defendant produced before the court, on which he relies and states it is the true reflection of the transaction that took place in this case, the Court notices that the receipt, which is Exhibit 3, that the defendant claims, that trailer 5110-1029 was included in the $10,537.80 cash that he claims to have paid to the plaintiff. Also in his receipt he says that a balance of $8,558.00 is due on the following trailers, which would be payable on or before April 25, 1961, and in this purported receipt, the same trailer appears, No. 5110-1029. So in his purported receipt here he claims credit for this particular trailer in the $10,000 payment, and yet he claims it is still due in the balance of $8,558.00, which is represented by these checks. So certainly, Gentlemen, the receipt, in that respect, contradicts itself. Also, there was produced before the court here, a handwriting expert and the court was careful to observe, in regard to his interpretation as to whether or not the Exhibit 3, the alleged receipt, was the yellow copy of Invoice No. 146. If the Court recalls the testimony correctly, there appeared a seal which was affixed to Invoice No. 146 and there also appeared to be a seal on alleged receipt, Exhibit 3. The Court was careful to note that in this testimony, the identification was not made by where the seal appears in relation to the writing, but the identification was made in regard to the measure-

ments from the right and left side of the paper and the bottom part of the paper. According to the proof produced by this expert, he overlapped the two seals in relation to the measurements of the paper, and they appeared to be identical.[7]

"Gentlemen, another observation the court has made in regard to this receipt here, it is written on the bottom of an invoice. There is no doubt that the plaintiff's signature appears in the affidavit, 'State of Arkansas, County of Mississippi, etc.' and recites the plaintiff's name and states in it that he is President of Hester Mobile Homes Manufacturers, and the date is filled in, 'Subscribed and sworn to before me on this 5th day of April, 1961.' There is a place for a Notary Public to sign. The Court does not believe that anyone would make out a receipt in this fashion. I believe the defendant testified Mr. Hester did write out a receipt that was not satisfactory to him and he sat down and wrote this out himself. The receipt here appears not to have been written in any great amount of haste. The left hand margin is exactly even. The space between the printed and written words is very neat, and even on the face of this receipt. The defendant himself says he filled in this information and that Mr. Hester signed it.

"Gentlemen, in view of the evidence before the court, the court is going to find that this receipt is the bottom half of Invoice 146."

There are other facts which support the conclusion of the trial court. For instance, on April 17, the two checks totaling $8,558.00 were given to Hester. According to Thomason's contention, this settled his indebtedness completely in the transaction (since he stated he had already paid the $10,537.80 in cash); yet there is no notation on either check to the effect that those payments represented payment in full. One of the strongest circumstances supporting the finding that the language on the "receipt" was superimposed subsequent to the

[7] Godown also testified that the word "President" appearing in carbon on the yellow receipt was in precisely the same location as the word "President" on the blue invoice of No. 146.

time of the transaction, relates to a letter written by Hester to appellant on May 1. In this letter, Hester states, "* * * I want a check today for the amount of $10,537.80". Thomason replied to this communication by writing a message on the bottom part of the letter. This message complained that one of the trailers needed repair work, was not as represented, and was not satisfactory. *Not one line is written to the effect that Thomason had already paid Hester in full!* We think it inconceivable that an individual can receive a statement from another for $10,500, which sum has already been paid, and yet in answering, never mention that fact; rather, we are of the opinion that any person so billed, would immediately get in touch with the sender of the statement, and demand a reason for receiving a bill for an amount that had already been fully settled.

Another circumstance is pointed out by appellee which has some significance. In writing the letter, Hester actually made a mistake in the sum demanded, as the proper amount was $10,689.30. In his testimony, Thomason admitted that the amount shown in his receipt was "a few dollars off".[8] There is no testimony that the $10,537.80 figure was ever mentioned between the parties, and appellee contends that this circumstance reflects that appellant obtained the figure from Hester's letter of May 1, and then used it in writing the receipt.

Be that as it may, we are definitely of the view that the Chancellor's findings are supported by a preponderance of the evidence.

It follows that the decree on direct appeal is affirmed.

We think the court should have allowed the expenses incurred by appellee in obtaining the services of Linton Godown. Subsection (c) of Section 28-359, Ark. Stats., 1962 Replacement, provides as follows: "If a party, after being served with a request under Section 11 [§ 28-358] to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial

[8] The difference is actually $151.50.

thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matters of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made." This is an exact copy of Rule 37(c) of the Federal Rules of Civil Procedure. In the case of *Akins* v. *McKnight* 13 F.R.D. 9, the District Court for the Northern District of Ohio, Eastern Division, stated, "There is presented a sworn denial of the requests, therefore, and not a failure to respond to requests. Under such circumstances, Rule 37(c) is mandatory that an order for expenses shall be made unless the court finds that 'there were good reasons for the denial or that the admissions sought were of no substantial importance'." In his answers to Requests for Admissions, Thomason, under oath, denied that Exhibit No. 3 (the receipt) was the bottom portion of the bill of sale and Invoice No. 146. As previously pointed out, we think unquestionably, that the evidence at the trial established that the so-called receipt was the bottom portion of the yellow copy of Invoice 146. Certainly this fact was of substantial importance, and, for that matter, could have been admitted without completely jeopardizing appellant's defense, *i.e.,* appellant could still have claimed that the receipt was written on his copy of the invoice when such invoice was given to him. At any rate, the failure to admit the fact in question forced appellee to obtain the services of the questioned documents expert. Godown testified that he made a charge of $100.00 for the examination and report which had been submitted, and was charging a fee of $250.00 for attending the trial and preparing the photographs. This charge appears to us, under the circumstances, to be fair and proper, and there is no showing by appellant that it is not reasonable. In fact, appellant does not question the amount. We are also of the view that counsel is entitled to a reasonable fee for his efforts and time expended,

and that a reasonable allowance would be $150.00. Accordingly, the cause is remanded to the Chancery Court of Craighead County with directions to enter an order allowing the sum of $500.00 for expenses incurred in making proof of the matter denied in "Requests for Admission No. 2".

It is so ordered.

HOME INDEMNITY CO. *v.* RAY.

5-2768 361 S. W. 2d 24

Opinion delivered October 15, 1962.

Shaver, Tackett & Jones, for appellant.

Joe D. Woodward and *Harry Crumpler,* (*Robert C. Compton,* on the brief), for appellee.

ED. F. MCFADDIN, Associate Justice. Trial in the Circuit Court resulted in a judgment whereby the appellees recovered from the appellant on the omnibus coverage clause in the insurance policy issued by appellant; and this appeal challenges such judgment.

On November 26, 1959, Grady Junior Talley (hereinafter called "Talley") was driving a motor vehicle on U.S. Highway No. 82 in Columbia County. There was a

collision between that motor vehicle and one driven by Arthur Ray, resulting in the death of Arthur Ray, and property damages and personal injuries to Miss Helen Bain, the owner and occupant of the car Ray was driving. Action was filed in the Columbia Circuit Court against Talley by Miss Bain and by Jewell Ray, administrator of the estate of Arthur Ray, deceased. (They are the appellees in the present appeal.) Judgments were obtained against Talley for $26,500.00 in favor of Miss Bain, and for $35,000.00 in favor of Ray, as administrator. Executions on said judgments were returned *nulla bona,* and then Miss Bain and Ray, Administrator, proceeding under § 66-4002 Ark. Stats., filed the present action against appellant, The Home Indemnity Company, alleging the foregoing matters and also: that D. C. Littrell was the owner of the motor vehicle driven by Talley in the traffic collision; that Littrell had granted permission to Talley to drive said vehicle; that Littrell had a liability insurance policy with appellant, The Home Indemnity Company, covering said vehicle, with limits of $5,000 for property damage and $10,000 for each collision; that said policy had an omnibus coverage clause which made Talley an insured under said policy; and that The Home Indemnity Company, after due notice, had refused to defend appellees' action against Talley. The prayer of the complaint was for judgment for $5,000.00 personal injuries and $1,550.00 property damage in favor of Miss Bain; and $5,000.00 damages for Ray, Administrator (being the limits of the policy coverage), ". . . with 12% penalty and reasonable attorney's fee, as prescribed by law."

By answer, the appellant Insurance Company stated, *inter alia*:

"Defendant admits and alleges that a liability insurance policy had been executed by this defendant prior to the date of the collision in favor of D. C. Littrell, covering the involved vehicle which was involved in the collision while being driven by Grady Junior Talley, indemnifying D. C. Littrell, *and any driver operating the*

vehicle with his permission,[1] against loss by reason of liability arising from accidents in which the involved vehicle might subsequently be involved, with policy limits of $5,000 for personal injuries suffered by each person in each accident, limiting personal injury recovery to $10,000 for each accident, and limiting property damage liability to $5,000 for each accident. Defendant denies that the insurance policy enured to the benefit of Grady Junior Talley, and defendant denies that Grady Junior Talley was operating the motor vehicle with the permission of the owner, D. C. Littrell. Defendant admits that it refused to defend the Complaint by and on behalf of plaintiffs against Grady Junior Talley, and that the defendant has refused to pay any portion of the judgment obtained against Grady Junior Talley. Defendant denies that plaintiffs are entitled to any benefits afforded by the liability insurance policy in favor of D. C. Littrell."[2]

Trial to a jury resulted in verdicts and judgment for Miss Bain and Ray, Administrator, as prayed; and The Home Indemnity Company brings this appeal, urging the points herein discussed.

I. *Defendant's Request For An Instructed Verdict.* At the close of all the evidence, the Court denied the defendant's request for an instructed verdict; and in testing the correctness of such ruling, we recite the evidence in the light most favorable to the verdict, as is our rule. See *Life & Cas. Co.* v. *Kinney,* 206 Ark. 804, 177 S. W. 2d 768, and cases there cited.

The evidence showed that D. C. Littrell owned and operated a potato farm near Canton, Texas; that Talley, a Negro man, lived near Waldo, Arkansas, as did two other Negro men, named Witcher and Robinson; that in September, 1959, Littrell and another farmer employed Talley, Witcher, and Robinson to work in the harvesting of the potato crop on the Texas lands; that on one or

[1] Italics our own.

[2] The attorney for the Insurance Company stated to the Trial Court: "The whole litigation is whether or not the Negro (Talley) was driving with permission. The plaintiffs have alleged that he was driving with permission, and we have denied that he was driving with the permission of the owner."

two occasions either Littrell or the other farmer had transported Talley, Witcher, and Robinson from Canton, Texas to Waldo, Arkansas, in order that the said employees could visit their respective homes; that while at work Talley kept Littrell's Chevrolet pickup truck at the place where Talley stayed near Canton, Texas; that Talley, with Littrell's consent, used the truck to go to the picture show and to get groceries; and that it was this same pickup truck that was involved in the traffic collision.

The evidence further showed that on the afternoon before Thanksgiving of 1959, Littrell agreed that if Talley, Witcher, and Robinson would help Littrell move some cattle, he would allow Talley the pickup truck to transport Talley, Witchell, and Robinson to Waldo for Thanksgiving. Littrell immediately called his insurance agent and obtained an insurance policy for the trip; and it is the policy sued on by the appellees. When the cattle moving was completed, Talley, Witcher, and Robinson left Canton, Texas, about 9:00 P.M. Wednesday night in the Chevrolet pickup truck, and arrived in Waldo, Arkansas about 1:00 A.M. Thanksgiving morning.

Talley and Littrell both testified that Littrell instructed Talley that when he reached Waldo he was to leave the truck with Mrs. Fannie Mitchell, who lived near Waldo, and that the truck was to so remain until Talley was ready to return to Texas after Thanksgiving. Talley testified that he took the truck to Mrs. Mitchell's house about 9:00 A.M. Thanksgiving morning, but that no one was at home; and that he later made another trip to Mrs. Mitchell's home, and no one was there. It developed that Mrs. Mitchell had only recently married and moved a short distance from her former home and was Mrs. White. Until after the collision this was unknown to Littrell, as well as Talley. Littrell gave Talley no specific instructions as to where to leave the truck if Mrs. Mitchell was not at home; but Talley and Littrell both testified that Talley had been instructed that he was not to drive the truck on private ventures while he was on the trip. That

negative restriction on the permission to use the truck is the main defense of the Insurance Company.

Talley testified that when he found no one at home at Mrs. Mitchell's house, he did not leave the truck:

"Q. On that morning why did you take that truck on with you?

"A. Because that is what I was supposed to do.

"Q. Why didn't you leave it there?

"A. Because she wasn't there.

"Q. Why did you take it back with you?

"A. Because I was in charge of it.

"Q. You felt responsible for it?

"A. Yes, sir."

After a second unsuccessful effort to find anyone at home at Mrs. Mitchell's, Talley and another boy started to drive to Buckner, Arkansas, and enroute had the traffic collision that caused the injuries to Miss Bain and the death of Arthur Ray. The Insurance Company claims that, under the testimony of both Littrell and Talley, it is clear that the permission under which Talley received the truck contained a specific negative restriction against such driving as was being done at the time of the traffic collision and, therefore, that permission was absent and there was no insurance coverage.

The Insurance Company called Littrell as a witness, so the plaintiffs are not bound by his testimony. Furthermore, even though the plaintiffs called Talley as a witness, the plaintiffs were and are free to contradict the details of his testimony by other witnesses. Talley was not a party to the case, but only a witness. *Sharpensteen* v. *Pearce,* 219 Ark. 916, 245 S. W. 2d 385; *Arnold* v. *State,* 233 Ark. 3, 342 S. W. 2d 291, and cases there cited. The plaintiffs showed by other witnesses, including the Sheriff of Columbia County and the Prosecuting Attorney of the District, that Littrell had repeatedly ad-

mitted that he let Talley have the truck, and that in none of these conversations had Littrell, when the collision was under investigation, made any claim that he had placed any negative restrictions on Talley's driving the truck while in Waldo. The plaintiffs also showed by Witcher and Robinson on cross-examination that when Littrell let Talley have the truck, nothing whatsoever was said by Littrell as to what Talley was to do with the truck if Mrs. Mitchell was not at home.

In view of all the evidence, we reach the conclusion that a jury question was made as to whether there was in fact a negative restriction placed on the permission that Littrell gave Talley as to the truck; and, with a jury question made, certainly the motion for an instructed verdict was correctly denied.

Counsel for both sides have been diligent in their search for cases on the omnibus coverage in insurance cases. We are cited to an array of cases and authorities on the question. Some of these are: *Allstate Ins. Co.* v. *Mathis,* 232 Ark. 484, 339 S. W. 2d 132; *Traders & General Ins. Co.* v. *Powell* (8th Cir.), 177 F. 2d 660; *Standard Accident Ins. Co.* v. *Rivet* (5th Cir.), 89 F. 2d 74; *Columbia Gas. Co.* v. *Lyle* (5th Cir.), 81 F. 2d 281; *Martin* v. *Burgess* (5th Cir.), 82 F. 321; *Nyman* v. *Monteleone,* 211 La. 375, 30 So. 2d 123; *Olgin* v. *Employers Mutual* (Tex. App.), 228 S. W. 2d 552; Blashfield Cyclopedia of Automobile Law & Practice, Vol. 6, Pt. 1 § 3946; Am. Jur. Vol. 5A, p. 99 *et seq.,* "Automobile Insurance" § 98 *et seq.;* and a splendid annotation in 5 A.L.R. 2d 600, entitled, "Automobile Liability Insurance: Permission or consent to employee's use of car within meaning of omnibus coverage clause." We find it unnecessary to decide (a) whether the law of Texas covers; (b) what the law of Texas is; or (c) whether Arkansas should adopt the conservative, liberal, or middle of the road view on omnibus coverage. If there was no negative restriction attached to the permission when Littrell let Talley have the truck, then Talley occupied the status of an insured under the policy; and, as aforesaid, there is evidence to take the case to the jury on the question

as to whether there was a negative restriction in the permission.

II. *Instructions.* The Insurance Company offered instructions which stated that before the plaintiffs could recover the jury must find that Talley was "on the involved occasion driving the pickup truck with specific permission and authority," etc. After the quoted words the Court added, "express or implied." The Court defined "express or implied," and then in other instructions the Court added the words, "express or implied," in regard to the permission that Talley had to use the truck. The Insurance Company objected in each instance to the addition of the words, "express or implied," and insists that Littrell had given a specific negative restriction on Talley's permission to drive the truck, and that such restriction made any "express or implied" permission impossible.

We find no error in the ruling of the Trial Court in regard to the point here under consideration. It was testified by several witnesses that Littrell did not tell Talley what to do with the truck in the event that Mrs. Mitchell was not at home. It was shown that when Talley was at work for Littrell in Texas, Talley kept the truck at the place where he stayed, and with Littrell's knowledge used the truck as he desired to go for groceries and to go to the picture show; and it was shown, as heretofore detailed, that Littrell let Talley have the truck to make the trip to Waldo, Arkansas. With such evidence in the record, the matter of express or implied permission was properly included in the instructions to the jury.

Affirmed.

5-2776 361 S. W. 2d 65

Opinion delivered October 15, 1962.

Bailey & Trimble, for appellant.

William C. Gilliam, for appellee.

GEORGE ROSE SMITH, J. This is a tort action by the appellee, as administrator, for the wrongful death of Harold Curtis, Sr. The jury returned a verdict in favor of the plaintiff for $25,000, specifying that the award was to compensate the decedent's widow for the loss of contributions from her husband. The appellant contends that the evidence does not establish any liability on his part, and, alternatively, that the court erred in its instructions to the jury.

On the afternoon of March 29, 1960, the appellant, Grady Miller, drove his station wagon from his home

in Little Rock to Hot Springs. The engine developed a knock on the trip, and Miller stopped to have it checked at the Wade Goin Ford Company's garage in Hot Springs. For the inspection the car was parked on the concrete floor of the garage, near the rear wall.

The decedent, a mechanic employed by Goin, tested the engine and determined that Miller could drive the vehicle to his summer cottage on Lake Hamilton and bring it back the next day for repairs. While the station wagon was being inspected a large truck backed into the garage and stopped in the wide entranceway, partly blocking Miller's exist.

At the decedent's direction Miller started his car and began to back slowly toward the entranceway, intending to go around the truck. Suddenly Miller's engine began to race at full speed, and the vehicle spun its wheels on the concrete and leaped backward toward the truck. Curtis was crushed between the two vehicles and suffered extensive and painful injuries to his face and chest, from which he died four days later.

The court was right in submitting the question of liability to the jury. The proof is that Miller's accelerator was out of order and would stick when depressed all the way to the floorboard. It would not stick in any other position, however, and it is shown to be mechanically impossible for the accelerator to go down to the floorboard without being pushed. Hence the jury would have been justified in finding that the tragedy was the result of Miller's having in some way depressed the accelerator all the way down to the floor, where it stuck. Even though Miller may not have known that the accelerator was not functioning properly it was still a question of fact whether Miller's conduct was negligent. The defendant's motion for a directed verdict was correctly denied.

The plaintiff's Instruction No. 5 was as follows: "You are instructed that it is the duty of the driver of any motor vehicle to keep his vehicle under such control as to be able to check the speed or stop it absolutely if

necessary to avoid injury and damage to others, where danger could reasonably be expected, or is apparent, and in this respect you are instructed that if you find from a preponderance of the evidence in this case that the defendant, Grady Miller, failed to keep his car under such control, and if his failure to do so was the proximate cause of the death of Harold E. Curtis, Sr., and if you find plaintiff's decedent, Harold E. Curtis, Sr., was not negligent, then you are instructed to find for the plaintiff."

This instruction is similar to those approved in *Lockhart* v. *Ross,* 191 Ark. 743, 87 S. W. 2d 73, and *Livingston* v. *Baker,* 202 Ark. 1097, 155 S. W. 2d 340, but there is an important difference. In the case at bar the concluding language of the instruction told the jury that if Miller failed to keep his car under control and if that failure was the proximate cause of Curtis's death, then the plaintiff was entitled to recover. The instruction should have gone farther and required the jury to find, as a condition to the defendant's liability, that his failure to keep his car under control amounted to negligence. See *Floyd* v. *Johnson,* 193 Ark. 518, 100 S. W. 2d 975. In fact, the instruction as given was in effect a peremptory charge for the plaintiff, since the undisputed evidence shows that Miller did fail to keep his car under control and that this failure was the cause of Curtis's death.

The court also erred in giving the plaintiff's Instruction No. 7: "You are instructed that if you find from the evidence that at the time and place of the occurrences in question plaintiff's decedent was a mechanic engaged in working in the building in which the accident occurred, then I instruct you no duty was imposed upon him to be constantly on the lookout for motor vehicles. It is not negligence as a matter of law for a workman to keep his mind on his work. A workman under such circumstances may properly assume that the motorist will not be guilty of running him down without warning." This instruction, in stating that various specific acts did not constitute negligence, invaded the province of the jury,

since the issue of negligence on the part of Curtis was a question of fact to be determined by the jury. *Bean* v. *Coffee,* 169 Ark. 1052, 277 S. W. 522.

The judgment must be reversed, and, since the verdict of the jury is an entity that we cannot fairly subdivide in this case, the cause will be remanded for a new trial upon all issues. *Oklahoma Gas & Elec. Co.* v. *Hofrichter,* 196 Ark. 1, 116 S. W. 2d 599; *Manzo* v. *Boulet,* 220 Ark. 106, 246 S. W. 2d 126.

Reversed.

DOSTER *v.* BELL.

5-2769 361 S. W. 2d 28

Opinion delivered October 15, 1962.

Parker Parker, for appellant.

Williams & Gardner, for appellee.

PAUL WARD, Associate Justice. This is an action brought by Mr. and Mrs. Doster in probate court to remove a guardian previously appointed for Mr. Doster's four children. From an adverse order appellants prosecute this appeal for a reversal.

Mr. Doster's first wife died April 8, 1956 leaving four children whose ages at that time were three, six, eight and nine. The probate court of Yell County, on a waiver signed by Doster, appointed Wesley Bell (grandfather of the children) as guardian of the persons and estates of the children. The order of appointment was made May 8, 1956 under docket number 271.

Later Mr. Doster moved to Little Rock and remarried. He and his present wife are the appellants herein. On June 2, 1959 appellants filed a petition in the Yell County probate court (docket No. 271) asking to have the guardian (appellee herein) discharged, and to have custody of the children given to them. Later they petitioned the same court to grant them rights of visitation. The record contains an "Exchange Agreement" (between two chancellors) wherein reference is made to a "petition of adoption" under case number 272, but this proceeding seems to have been abandoned. Then on February 13, 1960 Mr. Doster made a motion (later granted) to transfer cases 271 and 272 to the Pulaski County probate court. Pursuant thereto the probate court of Pulaski County ordered the causes docketed as cause No. 3747.

After testimony was presented by both sides on September 25, 1961, the court made the following findings: Appellee is the paternal grandfather of Charlette, Darlette, Sandra Kay, and Chester T. Doster, Jr.; said children have lived with appellee and his wife since May 1956, and they give the children a good home with proper care and training; that Mr. Bell is a proper person to act as their guardian; that from observation of and an interview with the children he finds them happy and satisfied with their present home and surroundings and they desire to remain with their grandparents; and that appellants have failed to prove any statutory grounds required for the removal of the guardian, and that it is not to the best interest of the said minors at this time to terminate the guardianship. The court further found that the children should be given an opportunity to become better acquainted with their natural father. The court then denied appellants' petition for removal of

Bell as guardian, and granted the children permission to visit in the home of their father four days at the end of the year and also during one-half of the vacation period between school terms.

For a reversal appellants present their argument under five separate headings, but we find it necessary to discuss fully only one general question which substantially includes all questions raised.

It is ably and forcefully contended by appellants that the natural father is entitled to the custody of his children, and that he is a fit and proper person to have such custody. In support, appellants rely on expression of this Court in *Lipsay* v. *Battle,* 80 Ark. 287 97 S. W. 49; *Kirk* v. *Jones,* 178 Ark. 583, 12 S. W. 2d 879; *Hancock* v. *Hancock,* 197 Ark. 853, 125 S. W. 2d 104; and, *Brown* v. *Brown,* 218 Ark. 624, 238 S. W. 2d 482. We are aware that in these and other decisions of this Court we have recognized the rights of parents over and above that of relatives or strangers in cases of this kind. However, in these cases we have also consistently looked to the best interest of the children as the guiding factor. The record reveals that the trial court considered both sides of this question in making his decision, and we are unwilling to say he ruled against the weight of the evidence. On the one hand the father has remarried and has established a home, but on the other hand the record reflects certain facts and circumstances indicating it was to the best interest of the children, at least for the present, to remain with their grandfather and grandmother. Unfortunately, for appellants, it appears from the record that the father was at one time considered incompetent and that he has a record of several convictions for minor law violations. The trial court, as before noted, talked with the children and obtained their wishes and desires. The court then very wisely, we think, gave the children opportunity to get better acquainted with their father and the surroundings in his new home. Some of the children are now, and others soon will be, of such age as to be able to choose where they would like to live. Considering all these things we cannot say the trial court failed to act in the

best interest of these children. We find no valid reasons for discharging Bell as guardian, and find the trial court was justified in refusing to do so.

We find no merit in appellants' contention that the trial court should have granted their petition to discharge Bell because he filed no answer in accordance with Ark. Stats. § 27-1135. In the first place, it is not shown that Bell was served with a summons as the statute requires. Moreover appellants participated in all subsequent proceedings without objection on their part.

Neither do we agree with appellants' statement here that "the order appointing Bell is void" because his bond was not approved by the court. The bond for $500 appears in the record, showing a filing date of May 4, 1956. Also shown in the record is the "Order Appointing Guardian". It is dated May 8, 1956 and contains these words: "It is further ordered, adjudged, and decreed that the bond of such guardian filed herein in the sum of $500 is hereby in all things approved and confirmed."

Finding no error, the decree of the trial court is hereby affirmed.

Affirmed.

CITY OF WALDRON *v.* HUSTON.

5-2799 361 S. W. 2d 556

Opinion delivered October 15, 1962.

[As amended on denial of rehearing November 26, 1962.]

Donald Poe, for appellant.

R. S. Dunn, for appellee.

SAM ROBINSON, Associate Justice. In 1948 the appellees, Robert Huston and his wife, Barbara Huston, bought the Northwest Quarter of the Northwest Quarter of Section 27, Township 3 North, Range 29 West, in Scott County, Arkansas. In 1951 the city limits of the City of Waldron were extended to include all of Section 28, township and range as above set out. Sections 27 and 28 are bordered on the north by State Highway No. 80.

In September, 1961, the City of Waldron contracted with Glenn Plummer to do some grading on an old road beginning at Highway 80 and the northeast corner of Section 28 and running south about one-fourth mile. It was thought that the road was located in Section 28 at the section line dividing Sections 27 and 28, and in the city limits. After Plummer had pushed down five or six trees and had done some grading for a distance of about 150 feet on the old road, Mrs. Huston caused him to be stopped, it being her contention that the road Plummer was working was in Section 27.

A temporary restraining order was issued by the Chancery Court enjoining the City of Waldron and Plummer from doing any further work on the road. On final hearing the restraining order was made permanent, the Chancellor finding that if the road in question is in Section 27, the land on which it is located belongs to the Hustons, as they had purchased the Northwest Quarter of the Northwest Quarter of Section 27; and if the road

is in Section 28, the Hustons own the land on which the road is located by adverse possession. The Court further held that the Hustons had been damaged in the sum of $400.00 by reason of the grading of the road and destruction of the trees, and had been damaged in the additional amount of $250.00 caused by the piling of the trees on the Huston property. The city has appealed.

The principal controversy between the parties is the correct location of the section line between Sections 27 and 28. The City of Waldron claims that the section line begins at one point and the Hustons contend it is 17 feet west of that point.

The Hustons bought their land from the Waldron Hardware Company in 1948 and paid for it in installments. The last installment was paid in 1953 and the deed and abstract were delivered. The grantor employed Mr. Edgar Smallwood, the county surveyor, to establish the location of the corners of the property sold to the Hustons. Mr. Smallwood established the Northwest corner of Section 27 and the Northeast corner of Section 28 as being the point the city now claims is the north end of the section line between the two sections. At that time Mrs. Huston did not agree with Mr. Smallwood that the corner, as located by him, was correct. She thought the section line between the two sections was farther west, but she accepted the deed and did nothing further about establishing the line until the city began to grade the road in 1961.

Of course, if the road in question is in Section 27, the city has no authority to work it, and would not want to work it, as it would be outside the city limits. On the other hand, if the road is in Section 28, it is within the city limits; the Hustons have no record title to any part of that section and could own no part of the land on which the road is located unless they have acquired such ownership by adverse possession.

A decided preponderance of the evidence proves that the 150 feet of the road worked by Plummer for the City of Waldron is in Section 28; that the trees knocked down

and the grading done by him, for which the trial court awarded the Hustons damages in the sum of $400.00, is in Section 28; and that the Huston land in Section 27 was not damaged by removing the trees or working the road. The trees, however, were pushed over onto the Huston property in Section 27, and on that account the trial court awarded damages in the sum of $250.00.

Now as to the evidence of the location of the section line between Sections 27 and 28. Mr. Edgar Smallwood, who lives in Waldron and is the County Surveyor of Scott County, along with Mr. Melvin Bell, a graduate engineer, made a survey to locate the Northeast corner of Section 28 and the Northwest corner of Section 27. They began their measurements at a corner established by a U.S. Government survey. The corner was unmistakably marked by a wagon thimble buried in the ground with the big end up. This was the corner between Sections 20, 21, 28, and 29. Mr. Smallwood first found this corner in 1934 by digging in the ground and finding the wagon thimble described in the field notes of the U.S. survey. That corner is now in the center of a paved street in Waldron, but it was again located with field notes.

Mr. Luther C. Phillips, County Surveyor of Garland County, produced as a witness by appellees, also measured from the corner of Sections 20, 21, 28, and 29 and reached the same point that Mr. Smallwood and Mr. Bell had said was the correct line between Sections 27 and 28; but Mr. Phillips ran two other lines and reached the conclusion that the correct line was 17 feet west of that point. First he began at a point three-fourths mile north of Sections 27 and 28 and ran a line south. He missed by 18 feet the point he later testified was the correct corner. He then went to a point one-fourth mile south and three-fourths mile west of the corner in question and began at an alleged corner that was not identified by field notes or monuments. He only had information he obtained from one of the property owners of the Love and Henry Addition to the City of Waldron. Mr. Phillips was asked:

"Q. You say there is no marker there but an iron stob?

A. Yes.

Q. And the only way you know about it was what one of the property owners pointed out to you as the corner of one of his lots?

A. Yes, sir."

He had no field notes.

The kind of evidence used by Phillips in locating a known starting point does not carry much weight in establishing corners for an accurate survey. The evidence is completely convincing that the section line between Sections 27 and 28 is where Mr. Smallwood and Mr. Bell testified that it is located. The preponderance of the evidence shows that the work done by Plummer was west of the Smallwood line. This being true, the 150 feet of road worked by Plummer is, accordingly, in Section 28.

The next question is whether the Hustons have acquired any part of Section 28 by adverse possession. There is no evidence that they have exercised any acts of ownership over any part of Section 28. True, they thought the west line of Section 27 was farther west than it proved to be, but they did not fly their flag over that part of Section 28 they thought was in Section 27; they did nothing whatever that would be calculated to let anyone know they were claiming ownership of any part of Section 28. One cannot acquire land by adverse possession merely by thinking that the land belongs to him; he must do more. Adverse possession may not ripen into ownership unless possession for seven years has been actual, open, notorious, continuous, hostile, exclusive, and accompanied with the intent to hold against the true owner. *Terral* v. *Brooks,* 194 Ark. 311, 108 S. W. 2d 489, and the many cases cited under Adverse Possession, Arkansas Digest.

Moreover, the evidence is overwhelming to the effect that the road running along the section line of Sections

27 and 28 from Highway 80 to the Wagoner house about one-fourth mile south, has long since been acquired as a public road by prescription. According to the undisputed testimony, the strip of land in question has been used by the public as a road for 50 years or more. For many years there has been a fence on each side of the road. Until this litigation arose, the right of the public to use the road has not been questioned. The county has worked the road for many years; graded it and put rock and gravel on it. At one time someone put a wire gate across the end of the road to keep stock from getting out onto the highway, but this was not done by appellees.

From what has been said, it can be seen that the Hustons are not entitled to a judgment for damages alleged to have been sustained by reason of the work done by Plummer on the 150 feet of road, all of which is in Section 28; but the trees pushed down were piled on appellees' land in Section 27, and for that reason they are entitled to damages of $250.00 as awarded by the court.

On cross appeal, the Hustons maintain that they are entitled to a judgment against Plummer as well as one against the city, by reason of Plummer piling the trees on the Houston land. The city employed Plummer to do the work, and the city cannot damage private property without paying just compensation. Our Constitution, Art. 2, Sec. 22, provides: "Private property shall not be taken, appropriated, or damaged for public use without just compensation." *Dickerson* v. *Oklolona,* 98 Ark. 206, 135 S. W. 863; *Fayetteville* v. *Stone,* 104 Ark. 136, 148 S. W. 524; *Clark County* v. *Mitchell,* 223 Ark. 404, 266 S. W. 2d 831. Of course, if Plummer negligently placed the trees on appellees' property, he would be liable for such negligence and appellees would be entitled to a judgment against him as a joint tort-feasor; but the city was given ten days to remove the trees from appellees' property in lieu of paying the $250.00 damages. The record does not show whether the trees have been removed.

In substance, our conclusion is that the line established by Smallwood is the section line between Sections

27 and 28; that the work done by Plummer was in Section 28; that the Hustons have acquired none of the land by adverse possession; that the road from Highway 80 to the Wagoner house has been acquired by the public by prescription; that the city is not liable to the Hustons for the $400.00 damages awarded by the trial court, but is liable for $250.00 for piling the trees on the Huston property; that Plummer is liable as a joint tort-feasor for the $250.00 if he negligently piled the trees on appellees' property and the trees have not been removed.

Reversed on appeal and on cross appeal with instructions to allow the Smallwood survey to be laid out on the ground and then for the Court to determine from competent evidence whether any damages have accrued to the appellees in addition to the $250 above mentioned, and if so, to render judgment accordingly.

WATERS *v.* COLEMAN.

5-2770 361 S. W. 2d 268

Opinion delivered October 15, 1962.

[Rehearing denied November 19, 1962.]

M. V. Moody, for appellant.

Wright, Lindsey, Jennings, Lester & Shults, for appellee.

JIM JOHNSON, Associate Justice. This case arises out of an automobile collision. Appellant, Mathew Waters, sued appellee, George Coleman, for personal injuries and damages to his automobile sustained by appellant when appellee's car hit the rear of appellant's car

on Highway 67, south of Jacksonville, October 19, 1960. Appellant was turning or about to turn left; appellee overtook him and tried to pass on the left, when the collision occurred. Appellant and his witnesses testified that appellee was traveling at a high rate of speed, which was contradicted by testimony of appellee and his witnesses, including an Arkansas State Police officer introduced as an expert on accident investigations. This officer was allowed to testify, *inter alia,* as to his opinion of appellee's speed and point of impact. Appellant objected to all of this witness' testimony and also objected to certain of appellee's instructions to the jury. The jury returned a verdict for appellee, and from the judgment comes this appeal.

The jury instructions give us a great deal of concern. To say the least, they could have been better worded, and appellant's position improved by more specific objections. However, since it is not necessary for a determination of this case, we do not pass on the instructions in this opinion.

For reversal appellant specifically urged that the trial court erred in permitting a state police officer to testify as an expert witness over appellant's general and specific objections, because there were four eye-witnesses in close proximity to the collision who testified seeing the collision and the impact, and that this evidence invades the province of the jury.

The officer's testimony abstracted from the record is as follows:

"I have been with the Arkansas State Police fifteen years. I am a graduate of the FBI Training School, Arkansas State Training School and Northwestern Traffic Institute. I have been an instructor in accident investigation in the Arkansas State Police since 1951. For the last ten years my job has been the investigation and analysis of all accidents investigated by our office.

"I am qualified by experience and training to examine points of impact or physical evidence at the scene of an accident and express an opinion of the speed and location of the vehicles. In determining the speed of a ve-

hicle there are a number of factors that are involved. The three major factors are the surface over which the car has traveled, the initial speed the car was traveling and whether the surface was upgrade or downgrade, and of course, wet or dry, in which the type of surface is taken into consideration. In a minimum speed estimate, I do not take into consideration the vehicle. In a probable speed estimate, in order to determine as near as possible the exact speed, that is taken into consideration.

"I went to the scene of the accident. I looked at the automobile driven by Mathew Waters.

"Of the Waters vehicle, I think the testimony I have heard in court here this morning is pretty well established his vehicle was traveling not more than 15 miles per hour and certainly that is a high speed to make a turn such as he was making. His speed would be estimated at a maximum of 10 miles per hour and the Coleman vehicle, of course, is a different matter. The surface over which he was sliding out there was dry, level asphalt and a test skid from that surface shows that it had a drag factor of holding factor of .75, which makes it three-fourths perfect over which to drive an automobile. In the formula we use, if you have two facts, then you can find the third factor. After the test skid was made we had the drag factor and 105 feet of skid marks involved in the initial accident and using the formula we do use, his speed would be 47.7 miles per hour when he applied his brakes. In other words, he would have to be traveling at that speed in order to slide his car to a stop in 105 feet without striking anything.

"The damage, of course, done to both vehicles, gives a pretty good estimate of the speed of the cars.

"As has been testified to, the speed of the Waters vehicle has been pretty well established, and the very small amount of damage done to both vehicles on impact between the cars leads to the opinion that the Coleman car was virtually stopped at the point of impact. The fact that the Coleman car traveled behind the Waters car after the impact and brought to a stop under control and driven off the highway indicates that Coleman's car

was under control at all times and traveling at a very low rate of speed at the point of impact. There has been testimony that the Waters car was knocked into the cafe. But it must be remembered that the Waters car was in motion and had been turned toward the cafe before point of impact. Had Coleman's car been traveling at 89 or 90 miles per hour—.

"The point of impact on these two vehicles, it had been testified on the Waters car was the left rear and on the Coleman car the testimony shows it was the right front. Now if the Coleman car had been traveling at a relatively high rate of speed then the Waters car would never have continued in that direction. Let me put it this way. It would be more understandable probably in the place of two automobiles we take two cue balls, we all know what cue balls are and in this case the Waters automobile had traveled at the specified speed of 10 miles per hour. It has been testified here by several witnesses that the Coleman car was traveling from 80 to 90 miles per hour. If the Coleman vehicle had struck the Waters vehicle, neither of them would have been in this courtroom.

"The course of the two vehicles as shown on the diagram of the police report, had the Coleman vehicle struck the Waters vehicle at the point of impact as shown, the Waters vehicle would have been shoved straight south down the highway and they both would have been completely demolished."

On cross-examination, the witness testified that he did not see the accident, and that at the time of the accident he was probably at State Police Headquarters about twenty miles from the scene of the accident.

Appellee argues in effect that the officer's testimony simply explained to the jury the foundation upon which he reached his conclusions as to the single issue of the speed of the vehicles. *Ergo,* the evidence was admissible under the rule laid down in *St. Louis & S. F. R.* v. *Fithian,* 106 Ark. 491, 155 S. W. 88.

In our view, the witness' testimony went much further than contended by appellee. In fact it was tantamount to a reconstruction of the collision and a comment on the weight of the evidence. In this case there were five eye-witnesses who testified on behalf of appellant (including appellant) and two who testified on behalf of appellee (including appellee) in addition to the expert. While the testimony was in such hopeless conflict as to amount to a swearing match, the facts to be determined were not complicated. This was a relatively simple collision. Certainly there was no evidence to indicate that it was beyond the jury's ability to understand the facts and draw its own conclusions. The state of the record being thus, we find that the trial court erred in allowing appellee to resort to expert opinion. *Mo. Pac. R. Co.* v. *Barry,* 172 Ark. 729, 290 S. W. 942, *Henshaw* v. *Henderson,* 235 Ark. 130, 359 S. W. 2d 436.

Reversed.

CRAIG *v.* STATE.

5055 **361 S. W. 2d 16**

Opinion delivered October 15, 1962.

Sexton & Morgan, by *Thomas A. Pedron,* for appellant.

Frank Holt, Attorney General, by *Milas H. Hale,* Asst. Attorney Gen., for appellee.

NEILL BOHLINGER, Associate Justice. On April 4, 1962, the appellant was convicted in the Justice of the Peace Court, Carter Township, Greenwood District, Sebastian County, on a charge of disturbing the peace and sentenced to thirty days confinement in jail and was also fined at the same time for assault and battery.

At the time of sentencing, the appellant made an oral motion for an appeal to the Sebastian Circuit Court and executed a bond for his appearance in that court.

No further action seems to have been taken in the matter and on May 5, 1962, the Justice of the Peace ordered a commitment for the incarceration of the appellant. On May 7, 1962, the appellant filed in the Sebastian Circuit Court a petition for a *writ of habeas corpus* and a petition for a *writ of certiorari.* The circuit court denied both petitions and the appellant appeals here under the contention that by the terms of Act 151 of the Acts of 1905 he was allowed sixty days after conviction to perfect his appeal, which time had not elapsed on the date of the issuance of the order of commitment. On May 21, 1962, a bail bond in the sum of $500.00 was fixed by a justice of this court under which appellant was released from custody pending further orders of this court.

It is the contention of the State, however, that an appeal from an inferior court to the circuit court must be perfected within thirty days from date of judgment, which time had elapsed at the time the commitment was issued.

Act 151 of 1905 is captioned as an act to amend the laws regulating appeals to the circuit court in criminal cases and provides, in Section 1:

"Any person convicted before any justice court, or police, or city court of any crime, misdemeanor, breach of the penal laws of this State, or of violation of any city or town ordinance, may appeal therefrom to the circuit court of the county in which such conviction occurred at any time within sixty days thereafter."

Since the passage of Act 151 of 1905, the Legislature has twice acted on the matter of appeals from inferior courts to the circuit court.

Act 323 of the Acts of 1939 is entitled "An Act Regulating Appeals From Inferior Courts to the Circuit Court," and Section 1 thereof is as follows:

"*A party who appeals* from a justice of the peace judgment or a common pleas judgment or a municipal court judgment *must file the transcript of the judgment* in the office of the circuit court clerk within 30 days after the rendition of the judgment. If the transcript of the judgment is not filed within 30 days after the rendition of the judgment, execution can be issued against the signers of the appeal bond." [Emphasis added]

In 1953 the Legislature passed Act 203 entitled "An Act to Amend Act 323 of the Acts of the General Assembly of the State of Arkansas for the Year 1939, It Being an Act to Regulate Appeals from Inferior Courts to the Circuit Court." Section 1 of Act 203 is as follows:

"Section 1 of Act 323 of 1939, being Section 26-1307 of the Statutes of the State of Arkansas, be and the same is hereby amended to read as follows:

'If a party appeals from a justice of the peace judgment or a common pleas judgment or a municipal court judgment the clerk of the court or the justice of the peace of the court from which the appeal is taken must file the transcript of the judgment in the office of the Circuit Court Clerk within thirty (30) days after the rendition of the judgment.' "

It will be noted that Act 203 of 1953 amended Act 323 of 1939 by placing the responsibility of filing the transcript within a thirty day period upon the clerk

of the court, or upon the justice of the peace rather than upon the appealing party and omitted the last sentence of Act 323 which is immaterial here.

In order for us to sustain the contention of the appellant it would be necessary for us to engraft upon the clear wording of the statute an intent upon the part of the Legislature to make the Acts of 1939 and 1953 apply only to civil cases. In this connection we can do no better than to quote from the opinion of the learned trial judge in that particular.

"* * * It is of course obvious that this Act contains no language whatsoever limiting its application to civil cases. In view of this state of affairs the Court feels that there is nothing for it to construe or interpret. There is no ambiguity about this Act and for the judicial branch of the Government to engraft words of limitation on it would be an affront to the legislative branch of our Government. Surely where the Legislature has expressed itself in clear and unequivocal language the courts have no business in picking it apart, and certainly in this instance there can be no quarrel with the lucidity of expression employed by the Legislature in expressing its will. To the contrary it must be pointed out that this Act serves a laudable purpose of making uniform the time in which to perfect appeals from inferior courts to the Circuit Court without regard to whether or not the case is criminal or civil in nature, or whether it emanates from a Municipal or Justice of the Peace Court."

It is clear that the Legislature intended no difference of allowance of time for the appeals of civil and criminal cases.

In *Whiteley* v. *Pickens,* 225 Ark. 845, 286 S. W. 2d 4, there was before the court the matter of the time allowed for a defendant to perfect an appeal to the circuit court from a lower court and in holding that the transcript of the judgment from the lower court must be filed in the office of the circuit court within thirty days after rendition of the judgment, we said:

"* * * The transcript must be filed with the clerk of the circuit court within 30 days to confer jurisdiction upon the court."

This is in line with the holding in *Nowlin* v. *Merchants National Bank,* 192 Ark. 529, 92 S. W. 2d 390, and *Bridgman* v. *Johnson,* 200 Ark. 990, 142 S. W. 2d 217.

In the *Whitely,* case, *supra,* we further said:

"We hold that the burden was on appellant to see that the transcript was lodged within the 30 day period and that Act 203 of 1953, which was an amendment to Act 323 of 1939, does not change the law in this respect."

In *Ex parte Hornsby,* 228 Ark. 975, 311 S. W. 2d 529, there was before us a case in which *Hornsby,* being in durance vile, petitioned the Crittenden Circuit Court for a writ of *habeas corpus* to inquire into the jurisdiction of the court which had committed him. There was no record of an appeal having been taken and in that case we said:

"At the outset we are confronted with the proposition that an application for *habeas corpus* cannot be made to perform the function of an appeal, or writ of error, in correcting errors or irregularities at the trial. We have repeatedly held that if a petitioner for *habeas corpus* is in custody under process regular on its face, nothing will be inquired into save the jurisdiction of the court whence the process came." Citing cases.

Hence there was no jurisdiction in the circuit court in this case and the petition for *habeas corpus* was properly refused.

We further hold that the appellant's petition for writ of *certiorari* was at best a substitute for failure to file his appeal on time. As we said in *Ex parte Phillips,* 80 Ark. 200, 96 S. W. 742:

"*Certiorari* can not be used as a substitute for appeal except in instances where the right of appeal has been unavoidably lost through no fault of the petitioner."

There is no proof here that the right of appeal was unavoidably lost.

The finding of the circuit court refusing the writ of *habeas corpus* and writ of *certiorari* is affirmed.

ANDREWS *v.* VICTOR METAL PRODUCTS CORP.

5-2785 361 S. W. 2d 19

Opinion delivered October 15, 1962.

Ward & Lady, for appellant.

Pickens, Pickens & Boyce, for appellee.

NEILL BOHLINGER, Associate Justice. The appellant, Clara V. Andrews, brought this action in the Jackson County Circuit Court to recover the sum of $5,700.00 which she alleged was due her by the appellee as damages for her discharge by the appellee. She alleged that she was a member in good standing of a union and that she was discharged without written notice in violation of the contract with the union and the appellee.

Against this contention the appellee has pleaded *res judicata* as a defense alleging that the judgment in Case No. 2040 in the Jackson County Circuit Court under the style of *Clara V. Andrews* v. *Commissioner of Labor, State of Arkansas, Employment Security Division and Victor Metal PRODUCTS* is conclusive as to the issues involved in this case.

The transcript in this case embodies the following judgment upon which appellee relies:

"IN THE CIRCUIT COURT OF JACKSON COUNTY

ARKANSAS

CLARA V. ANDREWS APPELLANT

VS. NO. 2040

COMMISSIONER OF LABOR OF THE
STATE OF ARKANSAS, EMPLOYMENT
SECURITY DIVISION, AND
VICTOR METAL PRODUCTS CORPORATION
RESPONDENTS

JUDGMENT

The matter of the claim for benefits of Clara V. Andrews, S.S. No. 432-40-4042, appealed from the Board of Review, is presented to the Court for judicial review upon the petition of the said petitioner, Clara V. Andrews, the response of the respondents, Commissioner of Labor, State of Arkansas and Victor Metal Products Corporation, the transcript of the proceedings before the Board of Review and the oral argument of counsel for the respective parties; from all of which the Court finds that the record before the Board of Review of the State of Arkansas contains substantial evidence supporting the decision of said Board in disqualifying the claimant for benefits and the decision should be affirmed by this Court.

It is therefore, by the Court, considered, ordered and adjudged that the decision of the Board of Review entered herein on July 7, 1959 disqualifying the petitioner, Clara V. Andrews, for benefits is affirmed and that the respondents recover from the said petitioner costs herein expended for which execution may issue."

From this judgment we are asked to find that in Case No. 2040 the issues that are presented here were before the Jackson Circuit Court in that cause. The pertinent part of that judgment is:

"* * * the Court finds that the record before the Board of Review of the State of Arkansas contains

substantial evidence supporting the decision of said Board in disqualifying the claimant for benefits and the decision should be affirmed by this Court."

It has been stated so often as to become axiomatic that:

"* * * To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear *from the record, or from extrinsic evidence* that the particular matter sought to be concluded was raised and determined in the prior suit; or that it might have been litigated in that case. *Livingston* v. *Pugsley,* 124 Ark. 432, and *Morton* v. *Linton & Plant,* 138 Ark. 297," *Gordon* v. *Clark,* 149 Ark. 173, 232 S. W. 19. [Emphasis added]

There is no extrinsic evidence and the record before us shows nothing except that in Case No. 2040, referred to *supra,* there was found substantial evidence supporting a decision of the Board of Review in disallowing certain benefits to claimant and we are left in the field of conjecture as to what was before the Board of Review. Was it something entirely foreign to the case now before us? Was it the particular wages or loss claimed in this action?

In their excellent brief the attorneys for the appellee have ably stated their plea of *res judicata* but as we said in the *Gordon* v. *Clark* case, *supra,* it must appear *from the record.* The statements of counsel we will accept without reservation, but that does not make them part of the record and our conclusion must be based upon the record.

For the reasons stated herein, this cause is reversed and remanded.

5-2917 361 S. W. 2d 77

Opinion delivered October 22, 1962.

[redacted]

Fred Pickens, Jr., for appellant.

Kaneaster Hodges, for appellee.

CARLETON HARRIS, Chief Justice. Seventy-six electors of Glaize Township, Jackson County, Arkansas, on July 23, 1962, filed a petition with Joe G. Armstrong, County Clerk of Jackson County, and one of the appellants herein, asking that the question of "For the Manufacture or Sale of Intoxicating Liquors" and "Against the Manufacture or Sale of Intoxicating Liquors" be placed upon the ballot for the general election to be held on November

6, 1962. No action was taken by the clerk, and about September 18th, that official advised appellees that the petitions had not been filed within the time prescribed by law, and he would not canvass its sufficiency or certify it to the County Board of Election Commissioners for inclusion on the November 6th ballot. On September 26, 1962, appellees filed their complaint in the Chancery Court of Jackson County, Arkansas, seeking Writs of Mandamus against the County Clerk and the County Board of Election Commissioners to compel the certification of the petitions as sufficient, and the submission of the question (heretofore stated), at the general election. Appellants, the County Clerk and the Board of Election Commissioners of Jackson County, filed their demurrer to the complaint on the ground that such complaint showed on its face that the petitions had not been filed within the time prescribed by law. The demurrer was overruled by the court. Appellants elected to stand on the demurrer and declined to plead further. Admittedly, the petition, insofar as containing a sufficient number of qualified electors, is valid. The court directed the issuance of writs as prayed, and this appeal followed.

Only one question is presented in this lawsuit, *viz,* "Were the petitions filed within the time prescribed by law?", and our holding is confined solely to that issue.

Appellants' contention that the petitions were not valid is based on the provisions of Amendment No. 7 (Initiative and Referendum) to the Constitution of the State of Arkansas. The pertinent portion of the amendment, relied upon by appellants, is found under the heading "Municipalities and Counties" and reads as follows:

"In municipalities and counties the time for filing an initiative petition shall not be fixed at less than sixty days nor more than ninety days before the election at which it is to be voted upon; * * *"

Initiated Act No. 1 of 1942 [§ 48-801 Ark. Stats. Anno.] provides for the manner of holding "Local Option" elections, and this section was amended by Act 15 of the

General Assembly of 1955. Section 2 of that act [§ 48-825 1961 Supp.] provides:

"Every petition for a local option election shall be prepared in accordance with Initiated Act No. 1 of 1942 [§ 48-801], and it shall be filed, and the subsequent proceedings thereupon shall be had and conducted, in the manner provided for county initiative measures by Initiative and Referendum Amendment No. 7 to the Constitution of Arkansas and enabling acts pertaining thereto."

The sum and substance of appellants' argument is, therefore, as follows:

The petitions of appellees were filed with the clerk on July 23, 1962. This was more than 90 days prior to the general election to be held on November 6, 1962, and, thus, (it is contended) in conflict with the requirements of Amendment No. 7. Accordingly, in appellants' view, the petitions were not timely filed, and the court erred in holding them valid, and directing its writs of mandamus to appellants.

In rendering its decision, the court stated:

"This matter is presented to the Court on the complaint of the plaintiffs to which the defendants have demurred, thereby, admitting the truth of the allegations in the complaint. And, in an attempt to sustain their demurrer, they contend that the time limits under the I & R Amendment govern the time of filing and as the petitions were filed more than ninety days before the election that they were, so far as the Clerk is concerned, never filed and, although they admit that the Clerk has refused to act on the petitions, that he was not required to act because of this early filing.

"It has been argued here that the time of filing for these petitions is governed by the I & R Amendment. I fail to see that. We have here the Section 48-801 which controls the local option elections. As to the preparation and the filing of the petitions and the percentage required, it is admitted the petitions represented a proper percentage of the qualified electors in Glaise Town-

ship in Jackson County; so that question need not be passed on.

"Section 48-801 as amended by Act 15 of 1955, which is in the Digest as 48-824 and 25, governs this case before us, but Act 15 of 1955 or Section 48-825 of the Digest says:

> Every petition for a local option election shall be prepared in accordance with Initiated Act No. 1 of 1942, — (which is 48-801 of the Digest) — and it shall be filed,—

"It shall be prepared and filed in accordance with 48-801; and right here is where I have to differ with the contentions of the counsel for the defendants. They have put a different construction on this section than I am forced to put on it. Then, after it is filed:

> —and the subsequent proceedings thereupon shall be had and conducted in the manner provided for county initiative measures by Initiative and Referendum Amendment No. 7 to the Constitution of Arkansas and enabling acts pertaining thereto.

"Now their argument is based on the theory that the I & R Amendment takes effect before the filing. As I construe this section, when the petitions are filed, then, the I & R Amendment and its provisions begin to take effect; and the procedure from there is in accordance with the I & R Amendment provisions."

We agree with the logic of the trial court, and, as that court subsequently stated, Section 48-801, as amended, does not set a time limit on the filing of petitions.

In January, 1944, in the case of *Yarbrough* v. *Beardon* and *Phillips* v. *Foreman,* 206 Ark. 553, 177 S. W. 2d 38, it was clearly held that Amendment No. 7 to the Constitution has nothing whatever to do with local option elections on liquor questions. In that case we held that the word "measure" used in Amendment No. 7 did not include "a submission to the legal voters of the

county on the question of the sale of liquor". In 1955, Act 15 was passed. Thereafter, on October 29, 1956, this court handed down its decision in *Brown* v. *Davis,* 226 Ark. 843, 294 S. W. 2d 481, which we deem controlling in the present litigation. In that case we held that *after* a local option petition has been prepared under the provisions of Initiated Act No. 1 of 1942 and filed with the County Clerk, *subsequent* procedure must be governed by Initiative and Referendum Amendment No. 7 to the Constitution. From the opinion:

"The legislative purpose or intent in this Act 15 is clear. Its primary purpose is to change the date of holding local option elections to the regular biennial November election days; in other words, special local option elections are prohibited. In Section 2 it expressly provides that petitions for local option elections must be prepared in accordance with the provisions of Initiated Act No. 1 of 1942, and all subsequent proceedings thereupon shall be had and conducted in the manner provided for county initiative measures by I. & R. Amendment No. 7 to the Constitution of Arkansas. This could only mean, we think, that petitions should be prepared and that procedure followed in accordance with our construction of Act 1 of 1942. Had the legislature intended to repeal any part of Act 1 of 1942 or to change local option elections into initiative acts, it would have been very easy for it to have so declared. The legislature is presumed to take knowledge of the decisions of this court when enacting legislation.

"The decree of the trial court contains these further recitals, which we hold the record supports and to which we agree. 'Under the clear wording and intent of Act 15, *supra*, the provisions of the I. & R. Amendment, and its enabling act, did not come into play (or affect this petition) until said petition was filed with the County Clerk. Up to that time, the petition was and is governed by Initiative Act No. 1 unaffected by the provisions of Sections 2 and 3 of Act 15, *supra.* However, after such petition was filed with the County Clerk, "subsequent proceedings thereon shall be had and conducted, in the

manner provided for county initiative measures by Initiative and Referendum Amendment No. 7 to the Constitution and enabling acts pertaining thereto." This means simply that while the local option petition under Act 1, *supra,* as amended, is not an initiative measure within the meaning of the I. & R. Amendment, still after such local option petition is prepared in accordance with Initiative Act No. 1 of 1942, and filed with the County Clerk, thereafter in order to get the question on the ballot at the regular biennial November general election in an orderly way such petition shall be handled in the same manner, and the same procedure followed, as if it were in fact a county initiative measure. Though different in nature, the same procedure insofar as getting the question on the ballot is concerned, must be followed after said petition is filed with the Clerk. That is what Section 2 provides. * * *'"

It might also be pointed out that we are committed to a liberal construction of this amendment, bearing in mind the purpose of its adoption, and the object it sought to accomplish, *Leigh and Thomas* v. *Hall, Secretary of State,* 232 Ark. 558, 339 S. W. 2d 104. Our holding in *Southern Cities Distributing Company* v. *Carter,* 184 Ark. 4, 41 S. W. 2d 1085, bears some similarity to the issue at hand. There, a referendum petition was filed to refer a municipal ordinance, and was filed less than 30 days after the enactment of the ordinance.[1] This court held that the latter fact did not invalidate the petition, under the provisions of Amendment No. 7 to the Constitution, stating:

"The amendment provides the time for filing a referendum petition at 'not less than thirty (30) days nor more than ninety (90) days after the passage of such measure by a municipal council'. This does not mean, of course, that the petition for a referendum cannot be filed less than 30 days after the passage of the measure

[1] Amendment No. 7, following the provision for the filing of initiative petitions in municipalities and counties, (heretofore quoted in the body of this opinion) provides that the time for filing a referendum petition shall be fixed "at not less than 30 days nor more than 90 days after the passage of such measure by a municipal council; * * *"

sought to be referred, but only that the city must allow at least 30 days after the passage of the measure for the filing of a referendum petition thereon, and cannot allow more than 90 days. * * * It is true the referendum petitions were filed * * * less than 30 days after the adoption of such measure but they remained on file and were on file after 30 days after the passage of the gas rate resolution, and were passed upon and certified by the city clerk on the 31st day after the passage of the resolution, as containing sufficient signatures of qualified electors to authorize the referendum petitioned for. The referendum petitions, although they could not have been required to be filed in less than 30 days after the passage of the measure sought to be referred, were in no wise invalidated by having been sooner filed."

We think the same reasoning applies to the filing of an initiative petition under Amendment No. 7, and the language "In municipalities and counties the time for filing an initiative petition shall not be fixed at less than sixty days nor more than ninety days before the election at which it is to be voted upon" simply means that the legislature may not *require* that the petitions be filed earlier. It will be noted that the amendment itself *does not* definitely fix the time, but appears rather as a directive to the legislative body, circumscribing and limiting its authority in the matter.

Of course, viewing the matter from a practical standpoint, appellants, or the general public, have not in any manner been misinformed or misled because the petitions were filed on July 23rd rather than August 8th. As stated in *Southern Cities Distributing Company* v. *Carter, supra*, the petitions "remained on file with the proper officer". In fact, though not controlling, if anyone was misled, it was the appellees. The petitions were accepted by the clerk, who placed his filing mark thereon. Petitioners were not advised that, in the clerk's view, the petitions were being filed too early, and it was not until September 18th (when it was too late to file such petitions), that appellees were advised by the clerk that he would not certify the petitions as sufficient. Be that

as it may, we hold that the petitions were filed within the proper time, and the writ was properly issued to the clerk directing that he certify the sufficiency of the petitions to the Board of Election Commissioners, and give the required statutory notice by newspaper advertisement; further, the writ was proper in directing the Board of Election Commissioners for Jackson County to submit the proposal to the electorate at the general election to be held on Tuesday, November 6, 1962.

Affirmed.

BARKSDALE *v.* CARR.

5-2767 361 S. W. 2d 550

Opinion delivered October 22, 1962.

[Rehearing denied November 26, 1962.]

Davis & Ragsdale, for appellant.

Brown & Compton, for appellee.

ED. F. MCFADDIN, Associate Justice. The Chancery Court held that the appellees had established, by the required *quantum* of evidence, a contract of September 26, 1945, between R. A. Carr and his wife, Sarah Ellen Carr, that they would make irrevocable reciprocal wills, and appellants challenge that finding and decree insofar as concerns the matter of irrevocability.

In 1925 R. A. Carr, a widower with three children, married Mrs. Sarah Ellen Barksdale, a widow with three children. There were no children born to the 1925 marriage, but it was a happy and successful one, and each parent treated the six children with equal love and affection. Mr. and Mrs. Carr acquired a taxicab business as partners; they owned their home by entirety; and among other assets, there was a joint bank account. On September 26, 1945, Mr. and Mrs. Carr went to the office of their attorney, Hon. Surrey E. Gilliam in El Dorado, and executed their separate reciprocal wills,[1] whereby

[1] Mr. Carr's will reads: "STATE OF ARKANSAS, COUNTY OF UNION. LAST WILL AND TESTAMENT OF R. A. CARR.

"KNOW ALL MEN BY THESE PRESENTS, That I, R. A. Carr, of the City of El Dorado, County of Union and State of Arkansas, being in good health, of sound and disposing mind and memory, and being above the age of twenty-one years, do make and publish this my last will and testament, hereby revoking all wills by me at any time heretofore made.

"FIRST: I direct that all my just debts shall be paid, and that the legacies hereinafter given shall, after the payment of my debts, be paid out of my estate.

"SECOND: I give to each of my children, Leon Carr, Belton Carr and William Carr, and to each of the children of my beloved wife, Ellen Carr, by a former marriage, that is, Coy Barksdale, Collie Barksdale and Ola Barksdale Wallace, the Sum of One Dollar each, to be paid to them as soon after my decease as conveniently may be done.

each spouse named the other as beneficiary, and then treated all six children equally. Mrs. Carr's will was identical in wording with Mr. Carr's will, except that she left everything to Mr. Carr and named him in each place in her will where he had named her. Each will was witnessed by Mr. Gilliam and his secretary, Miss Jewell Carroll, and the original wills, both in the same envelope, were left with Mr. Gilliam, who also had unsigned copies in his files; and the unsigned copies are brought into the present record by stipulation.

"THIRD: I give, devise, and bequeath to my beloved wife, Ellen Carr, all the rest and residue of my estate, real, personal and mixed, wherever the same may be situated or located, for and during her natural life, with the right, power and privilege, however, during her natural life, to use, expend, sell and hypothecate any and all of the same, and to execute valid and proper deeds, mortgages, conveyances or leases therefor, to the same full purpose and effect as though she owned the full fee or absolute interest in said property, without any interference from any of my said children during her natural life, and with full power and authority during her natural life to handle and carry on the business in which I am now engaged, as though said property belong to her absolutely.

"FOURTH: I give, devise and bequeath, in equal shares and portions, after the death of my said beloved wife, Ellen Carr, or in the event the said Ellen Carr shall not survive me, absolutely and in fee simple all my property, real, personal and mixed, and of any nature and kind, wherever the same may be situated, and located, which shall not have been used, expended, sold or otherwise disposed of, by my said beloved wife, Ellen Carr, in her lifetime to the following in equal shares and portions, to-wit: Leon Carr, Belton Carr, William Carr, Coy Barksdale, Collie Barksdale, and Ola Barksdale Wallace.

"And in the event of the death without issue of any of said devisees prior to the death of the said Ellen Carr, his or her share shall go to the remaining devisees above named in equal shares; and in the event that any of the above named devisees shall not survive the said Ellen Carr, but shall at her death leave direct descendant or descendants, the said direct descendant or descendants shall receive, in equal shares among themselves, the share and portion of his, her, or their said respective father or mother, as the case may be.

"FIFTH: I do hereby appoint and constitute Ellen Carr as sole executrix of this my last will and testament, to serve as such without bond.

"IN WITNESS WHEREOF, I have hereunto set my hand this the 26 day of September, 1945, in the presence of Surrey E. Gilliam and Jewell Carroll who attest the same at my request.

"R. A. Carr, Testator.

"The above instrument was now here subscribed by R. A. Carr, the testator, in our presence; and we, at his request and in his presence, and in the presence of each other, sign our names hereto as attesting witnesses, and at the time of our signing said testator declared said instrument to be his last will and testament.

"S. E. Gilliam
"Jewell Carroll"

Mr. Carr died in El Dorado on April 23, 1959. When Mr. Gilliam died on May 1, 1959, his files were delivered to Mr. Crumpler; and on or about May 22, 1959, Mrs. Carr sent her son, Mr. Collie Barksdale, to Mr. Crumpler for the original wills, both of which were delivered to Mr. Barksdale in the same envelope, just as they had been in Mr. Gilliam's possession through all the years. Mrs. Carr probated Mr. Carr's will, became the executrix, and took under said will.

On November 1, 1959, Mrs. Carr revoked her will by burning it; on December 18, 1959 she conveyed the home place to her son, Collie Barksdale; in December she conveyed the farm lands to the three Barksdale children; and she had her bank account made to herself and/or Collie Barksdale. On January 13, 1960, Mrs. Carr conveyed her automobile to her daughter, Ola Barksdale Wallace; and on January 14, 1960 Mrs. Carr departed this life intestate. The consideration for the said conveyances executed by Mrs. Carr to the Barksdale children was testified to be $10.00 in each instance, or a total of $30.00, which is certainly nominal for property worth in excess of $15,000 or $20,000. Dr. Wharton testified that she was mentally competent at all times.

In due time after Mrs. Carr's demise, the three Carr children filed this suit in Chancery Court against the three Barksdale children, claiming that when Mr. and Mrs. Carr made their wills in 1945 they made a contract for irrevocable reciprocal wills; that Mrs. Carr, having taken under one will could not destroy her own will thereafter; that Mrs. Carr breached the contract by destroying her will; and that her conveyances to the Barksdale children were not *bona fide*. The complaint prayed that the Barksdale children be ordered to convey to the Carr children one-half of all the properties that Mrs. Carr owned prior to making the conveyances beginning in December, 1959.

The Barksdale children moved that Robert B. Wallace, administrator of the estate of Mrs. Sarah Ellen Carr, be made a defendant along with them, since said

administrator had title to assets of the estate of Mrs. Carr. This motion was granted, and Wallace, Administrator became a party defendant. For answer, the defendants denied, *inter alia,* that R. A. Carr and Sarah Ellen Carr made any contract against revocation of their wills. The Chancery Court, after hearing the evidence, held that when Mr. and Mrs. Carr made their wills[2] in September, 1945, they made a contract that neither will could be revoked. The Court awarded the Carr children (plaintiffs) the prayed relief; and the Barksdale children* and Mrs. Carr's administrator (defendants) have appealed.

I. *The Dead Man's Statute.* In the trial of the case the defendants objected to any evidence by any of the Carr children (plaintiffs) as to anything Mrs. Carr may have said to them about the alleged contract. This objection was because of the "Dead Man's Statute," which is found in "Schedule" § 2 to the Arkansas Constitution; and the germane portion reads:

"In actions by or against . . . administrators . . . 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 . . . intestate . . . unless called to testify thereto by the opposite party."

The Trial Court correctly ruled that the "Dead Man's Statute" was applicable to the proffered evidence by the Carr children. See *Alphin* v. *Alphin,* 225 Ark. 122, 279 S. W. 2d 822; *Morris* v. *Arrington,* 215 Ark. 564, 221 S. W. 2d 406; and *Umberger* v. *Westmoreland,* 218 Ark. 632, 238 S. W. 2d 495.

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[2] We have several comparatively recent cases that are worthy of study in connection with some of the problems presented in this case. We mention these: *George* v. *Smith,* 216 Ark. 896, 227 S. W. 2d 952; *Janes* v. *Rogers,* 224 Ark. 116, 271 S. W. 2d 930; *Allen* v. *First National Bank,* 230 Ark. 201, 321 S. W. 2d 720; and *Robinson* v. *Williams,* 231 Ark. 166, 328 S. W. 2d 494.

* While the case was pending in this Court, Mrs. Ola Barksdale Wallace died intestate, and proper orders have been made reviving the cause as to her husband and heirs, all of whom are of full age.

II. *Declarations of Mr. Carr.* Likewise, in every instance in which the Carr children sought to prove that their father had made any statements to anyone—in the absence of Mrs. Carr—concerning any alleged contract against revocation of the wills, there was a prompt objection to such testimony as incompetent. Such objection was well made, because one party to an alleged contract cannot bind the other party by declarations made in the absence of the other party. *Central Coal Co.* v. *John Henry Shoe Co.,* 69 Ark. 302, 63 S. W. 49; *Beasley Lbr. Co.* v. *Sparks,* 169 Ark. 640, 276 S. W. 582; and *Rouw* v. *Arts,* 174 Ark. 79, 294 S. W. 993.

III. *The Burden On The Plaintiffs.* With the excluded evidence thus mentioned, the next vital point is the burden that rested on the plaintiffs to prove the contract prohibiting the revocation of Mrs. Carr's will. No language in either will stated or indicated that there was a contract against revocation. The mere proof of the making of identical or reciprocal wills[3] does not, *ipso facto,* establish a contract against subsequent revocation by either one of the makers. If the Carr children are to win, they must prove a contract against the revocation of Mrs. Carr's will just as they would have to prove a contract to make a will; and our cases hold that such a contract must be proved by evidence that is clear, cogent, and convincing. *Crews* v. *Crews,* 212 Ark. 734, 207 S. W. 2d 606. In *Janes* v. *Rogers,* 224 Ark. 116, 271 S. W. 2d 930, we had a set of facts very similar to those presented in the case at bar; and the question there posed was whether a contract to make irrevocable reciprocal wills had been established. There, as here, the written instrument contained no specific provision recognizing the contract; and Mr. Justice MILLWEE, speaking for this Court, said:

[3] Some cases have not made any definite distinction between "joint", "mutual", or "reciprocal" wills. There is an annotation in 169 A.L.R., page 9, entitled "Joint, mutual, and reciprocal wills," and on pages 11 to 14 of the volume there is a discussion of definitions and distinctions. The mere fact that two parties executed separate wills reciprocal in terms—as here—does not *ipso facto* prove a contract that the wills were to be irrevocable. See Page 23 of said annotation.

"The principal contention for reversal is that the proof is insufficient to establish a valid contract to make reciprocal wills. In considering this contention we deem it appropriate to notice certain general principles applicable to a proper solution of the issues. We have repeatedly held that a valid oral contract to devise or convey real estate may be made, which is enforceable in equity. *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82; *Speck* v. *Dodson,* 178 Ark. 549, 11 S. W. 2d 456. We have also held that the proof to establish such contract must be clear and convincing. *Crews* v. *Crews,* 212 Ark. 734, 207 S. W. 2d 606. The same degree of proof is required to establish a contract for the execution of wills containing reciprocal bequests of a life estate to the surviving testator with remainder to third persons designated by the contract. 57 Am. Jur., Wills, Sec. 728.

"It is also well settled that a will is generally ambulatory until the death of the testator, and that mutual or reciprocal wills, may be revoked at pleasure unless founded on, or embodying, a binding contract. 69 C. J. Wills, Sec. 2719. . . .

"The fact that the parties have concurrently executed separate wills, reciprocal in terms, is not sufficient, of itself, to show that the parties had entered into a contract to make such wills; but the terms of such wills afford some evidence of the contractual relation and, when read in connection with other evidence which tends to show the execution of the contract, may establish that fact. Page on Wills, Sec. 1710; Annotation on Joint, Mutual and Reciprocal Wills, 169 A.L.R. 9."

So we conclude that the burden resting on the Carr children in the case at bar was to establish by evidence that is clear, cogent, and convincing, a contract between Mr. and Mrs. Carr to make irrevocable wills.

IV. *The Competent Evidence In The Case.* In order to recover their full claimed interest in the property in controversy, the Carr children had to prove that Mrs. Carr could not legally revoke her 1945 will. The only competent evidence that we have discovered in the record

before us, even remotely bearing on the matter of the irrevocability of Mrs. Carr's will, is now listed:

(a) Theo Sawyer testified that he knew Mr. and Mrs. Carr; that he was at one time employed by the Yellow Cab Company which they owned; that some time between 1946 and 1950 he had a conversation with Mr. and Mrs. Carr, as it affected their children, and here is what the witness stated Mrs. Carr said:

"At the time, William Carr was living in one of their houses over on East First and for some months he had not paid the rent on it and she made the statement that in their will, each child, or if any owed any money, it would be divided equal and what each one owed would be deducted."

(b) The other witness was Carlos Cole. He testified that he had worked for the Yellow Cab Company; and he testified as to what Mr. Carr said in about 1957, when we infer Mrs. Carr was present:

"Q. State to the Court whether or not you had a conversation with Mr. R. A. Carr or was present when he made a statement with reference to his will and Mrs. Carr's will, both of them?

"A. Yes, sir, he did not say it to me exactly, but to the bunch that was sitting around.

"Q. All right, what was the occasion of that statement being made?

"A. Well, I don't know exactly what started it. At first, about some fellow that died and hadn't left a will or something, he figured there might be a big lawsuit and he just made the remark, he said, well, he said— . . . He just made the remark, said there wouldn't be nothing like that happen when he and his wife, that they had everything fixed like they wanted it, one of their heirs wouldn't get any more than the other one, and he just turned around and walked off."

The testimony of the witness Sawyer, at most, shows that some time between 1945 and 1950 Mr. and Mrs. Carr

intended that all the children be treated equally; but such intention does not establish a contract that would prevent the will of Mrs. Carr from being revoked by her. Likewise, the testimony of the witness Cole, as to what Mr. Carr said—even assuming Mrs. Carr to have been present at the time—merely showed that several years before Mr. Carr's death he had said that the six children would take equally. There is nothing to show that such intentions were beyond revocation.

In short, the testimony of Sawyer and Cole—and there is no other in the record on this point—along with the wills themselves, fail to be that "clear, cogent, and convincing evidence"[4] which is required in a case such as this; and we, therefore, conclude that the Carr children failed to offer the *quantum* of evidence required to establish their case and that the decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

V. *Other Matters.* In the briefs there is considerable argument as to whether the deeds from Mrs. Carr to her children were *bona fide* and with valuable consideration. That question passes out of the case, because, since Mrs. Carr had a right to revoke her will, she had a right to give to whomsoever she desired the property she had received by entirety as well as any property she acquired other than by Mr. Carr's will. Of course, any property she received solely through Mr. Carr's will, and not disposed of by her, would be governed by the terms of Mr. Carr's will. We remand the case so that as to such property, the Chancery Court may make appropriate orders.

[4] As to what is "clear and convincing evidence," we like the language used by the Supreme Court of Utah in *Kirchgestner* v. *Denver*, 233 P. 2d 699, wherein the Court quoted from its own case of *Greener* v. *Greener*, 212 P. 2d 194: "'. . . . for a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. A mind which was of the opinion that it was convinced and yet which entertained, not a slight, but a reasonable doubt as to the correctness of its conclusion, would seem to be in a state of confusion. . . . That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind.'"

COLLINS *v.* FINCHER.

5-2761 361 S. W. 2d 86

Opinion delivered October 22, 1962.

Bon McCourtney & Associates, Bon McCourtney, Claude B. Brinton, for appellant.

H. G. Partlow, Jr. and *Marcus Evrard,* for appellee.

GEORGE ROSE SMITH, J. This case involves the applicability of a well-settled doctrine of election, which comes into play when a testator purports to devise A's property to B and by the same will also leaves other property to A. In that situation A cannot claim both his own property and the testamentary gift; he must elect to take one and relinquish the other. *McDonald* v. *Shaw,* 92 Ark. 15, 121 S. W. 935, 28 L.R.A.N.S. 657. The question here is whether Lillie Belle Vastbinder was put to such an election with respect to the two forty-acre tracts in controversy. The chancellor held that no election had been necessary and upon that premise quieted the title in Mrs. Vastbinder's heirs, the appellees.

W. D. Vastbinder and Lillie Belle Fincher were married in 1920. By a prior marriage W. D. then had seven children, the appellants. Lillie Belle had four children by her first husband and later had four more children by Vastbinder; those eight are the appellees.

In 1946 W. D. and Lillie Belle acquired the eighty acres in dispute, as tenants by the entirety. W. D. died testate in 1958, owning 140 acres in addition to his interest in the two forties involved in this case. By his will Vastbinder left "all my real estate that I own at the time of my death to my wife, Lillie Belle Vastbinder, for the period of her life only," with remainder to W. D.'s eleven children as set out in the will.

Lillie Belle served as executrix of the will. The appellants attach some importance to the fact that she listed the eighty acres in question in her inventory, as an asset of the estate. It appears, however, that this listing was an error on the part of the person preparing the inventory, that Lillie Belle signed the inventory by mark without knowing that this property was included, and that no one has changed his position in reliance on the mistake. We therefore consider the error to be immaterial. Lillie Belle's act of signing the inventory could not have constituted an election, for she was not aware that the two forties were included. Nor were the circumstances sufficient to create an estoppel against her.

Lillie Belle died testate in 1960, leaving her property to her own eight children, the appellees. They brought this suit to quiet their title to the eighty acres and to set aside an assertedly erroneous partition decree that was rendered in a suit to which the Fincher children were not parties and at a time when none of the various heirs realized that the two forties had been owned as a tenancy by the entirety. The chancellor granted the relief sought.

The appellants contend that when W. D. Vastbinder left his children a remainder interest in "all my real estate," it was an attempt by him to devise an interest in the eighty acres that passed to Lillie Belle as the surviving tenant by the entirety. Hence, it is argued, W. D. pur-

ported to give his children property that belonged to Lillie Belle, and therefore the widow, by accepting the gift of a life estate in W. D.'s other land, elected to take under the will and forfeited her fee simple ownership of the eighty acres.

This contention is not sound. An election is required only when the testator purports to give the beneficiary's property to someone else. Here the two forties were not specifically mentioned in Vastbinder's will. The general reference to "all my real estate that I own at the time of my death" did not even purport to describe lands that would pass to Lillie Belle by operation of law at the instant of W. D.'s death. As Atkinson points out in his discussion of this doctrine of election: "Thus, where the testator and the beneficiary are both interested in the property disposed of, the presumption is that the testator intended only to give what was his. By the use of such expressions as 'all my lands' or 'all my estate,' the testator is deemed to intend to pass only his interest in the property." Atkinson on Wills (1937 Ed.), § 255.

Affirmed.

JERRY *v.* JERRY.

5-2777 361 S. W. 2d 92

Opinion delivered October 22, 1962.

Spencer & Spencer, for appellant.

Brown & Compton, for appellee.

PAUL WARD, Associate Justice. The question presented relates to the amount the divorced father should pay for the "maintenance and education" of his children under the peculiar facts and circumstances of this case. The factual background giving rise to this litigation is presently summarized.

Appellant, Gordon Jerry, and appellee, Mertice Jerry, were married October 6, 1937. They were divorced September 11, 1953 upon a complaint filed by appellee. They had three children—Bobby Jean (female) aged 10, Randall Lynn (male) aged 8, and Angela Lynett (female) 8 months old—whose care and custody was awarded to appellee. Incorporated in the divorce decree and approved by the court was an instrument executed by both parties entitled "Property Settlement, Agreement and Contract". In this instrument appellant agreed to "pay to the plaintiff the sum of $200 per month as child support for the maintenance and education of the three children born of this marriage". The decree indicates there was a property settlement and the record indicates certain real and personal property was given to appellee. The decree also provided that appellant would be in contempt of court if he failed to make any payment.

On March 8, 1961 appellee filed a petition stating: that on March 1, 1961 appellant paid only $133.33, and that he was in arrears in the sum of $66.67; that since the decree conditions have changed in that appellant's income is greater, the children's expenses have increased: Bobby Jean (then 18 years old) had finished high school and desires to enter college, and Randall Lynn is in junior high

school; that the cost of living had increased; that some of the rental property given to her produced little if any income; and, that $200 per month was insufficient. She prayed judgment for $66.67, for $300 per month for the children's maintenance, for suit money and for attorney's fee.

To the above petition appellant answered: Bobby Jean became 18 years of age February 7, 1961 and he was no longer liable to pay her one-third of the support money; and he was heavily in debt. He asked to have appellee's petition dismissed and his monthly payments reduced by $66.66. It is admitted that appellant, without authority from the court, made a payment of only $133.33 on March 1, 1961.

On September 21, 1961 the court, after a full hearing, in substance, made the following findings: (a) Although appellee's annual income is more than appellant's, the latter has, since the divorce, paid $9,000 on investments and now owns real estate, a liquor store and other business interests on which he owes considerable money; (b) appellant has no legal obligation to support his daughter, Bobby Jean, after she became of age in February, 1961; (c) since there is additional expense and cost in maintaining the two younger children in school the payments should remain at $200 per month; and, (d) appellant should pay the amount "he is in arrears by his voluntary reduction of those payments beginning last March". On the same date the chancellor entered a decree in accordance with the above findings.

For a reversal, appellant presents his argument under three separate points, but we feel that all issues raised can be resolved by a consideration of two questions: *One.* Was appellant legally and automatically relieved of any duty to make further payments for support of Bobby Jean when she reached the age of 18? *Two.* Does the weight of the evidence support the finding that the monthly payments should remain at $200? For the reasons hereafter set out, we have concluded the first question must be answered in the negative and the latter question must be answered in the affirmative.

One. Ark. Stats. § 57-103 makes it plain that "females of the age of eighteen (18) years shall be considered of full age for all purposes. . . ." In *Missouri Pacific Railroad Company et al.* v. *Foreman,* 196 Ark. 636, 119 S. W. 2d 747 (at page 651 of the Arkansas Reports) we said: "Ordinarily, there is no legal obligation on the part of a parent to contribute to the maintenance and support of his children after they become of age." A significant word in the above quotation is the word "ordinarily", showing that the Court realized there might be circumstances which could impose on a parent the duty to support a child after such child became of age. This fact was expressly recognized in *Upchurch* v. *Upchurch,* 196 Ark. 324, 117 S. W. 2d 339 (page 327 of the Arkansas Reports) where it was stated: "It is, of course, the duty of the father to contribute to the support of his children even after they are of age if the circumstances are such as to make it necessary." This court has uniformly held, based on Ark. Stats. § 34-1213, that the amount allowed for child support is subject to modification when required by changed conditions. See: *Watnick* v. *Bockman,* 209 Ark. 696, 192 S. W. 2d 131.

From the above there appears two sufficient reasons why appellant here could not, of his own volition, reduce the $200 monthly payment due on March 1, 1961. One is that the court (and the court alone) had the right to change the amount of the award for the support for the two minor children—which the court in fact did later do. The other reason is that the court, had the facts and circumstances justified, could have continued the original award for not only the two minors but also for Bobby Jean who had become of age. The fact that the trial court later found appellant was under no obligation, under the circumstances, to support Bobby Jean gave appellant no right to voluntarily stop part payment. A third reason might also be added—the award of $200 was for the maintenance of three children and appellant had no right to conclude that $66.67 was for Bobby Jean.

Two. Having the power to do so, we think the trial court was justified, under facts and circumstances, to con-

tinue the award of $200 per month for the support of the two minor children. At least we are unwilling to say such finding and holding was against the weight of evidence. Some of the facts on which the court based its decision have heretofore been set out in the findings, but there are others disclosed by the record. It appears undisputed that appellee is in poor health and that her earnings may be substantially diminished. The cost of living has gone up since the date of the original decree and the expense of maintenance of the two minors has increased. Appellee detailed the several items of expense such as groceries and clothing. The record also shows that appellant owns a grocery store, in which he and his wife both work, and from which they take groceries without keeping any account of the cost.

Appellee has asked for an attorney's fee and we think it should be, and it is hereby, allowed. In our opinion a fee of $200 is fair and reasonable under the circumstances. We do not find that any fee was allowed by the trial court. This procedure is in accordance with our previous decisions in similar cases and also with Ark. Stats. § 34-1210.

Affirmed.

HAYES BROS. LUMBER CO. *v.* BRADLEY.

5-2772 361 S. W. 2d 81

Opinion delivered October 22, 1962.

Thomas B. Tinnon, for appellant.

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

SAM ROBINSON, Associate Justice. Appellee, Roy Bradley, filed this action in the Searcy County Circuit Court alleging that he had been employed by appellant, Hayes Brothers Lumber Company, to buy timber; that he was to be paid $1.00 per thousand feet for the estimated amount of timber in a tract at the time of purchase, and an additional $1.00 per thousand at the time the timber was cut. Bradley alleged that he bought an estimated three million feet of timber, of which two million feet was later cut, making a total of $5,000.00 earned; that he had been paid $2,000.00, leaving a balance of $3,000.00 owed to him on the timber buying contract. He further alleged that he was indebted to Hayes on another account in the sum of $401.00, leaving a balance of $2,599.00 owed to him by Hayes. There was a verdict and judgment for that amount in favor of Bradley and Hayes has appealed.

Appellant contends that there is no substantial evidence to sustain the verdict for any amount, and particularly no evidence to sustain a verdict of $2,599.00. The evidence is convincing that the appellant company, acting through its authorized agent, Noah Burleson, entered into a contract with appellee, whereby Bradley undertook to buy timber for appellant. He was to receive $1.00 per thousand for the estimated footage of timber on a tract at the time of purchase, and was to receive an additional $1.00 per thousand at the time the timber was cut.

There is some discrepancy in the testimony as to both the amount of timber estimated to have been on the various tracts of timber at the time of purchase, and also as to the amount of timber actually cut. Under many decisions of this Court, such discrepancy must be resolved in favor of the jury verdict. *Service Fire Insurance Co.* v. *Payne,* 218 Ark. 499, 236 S. W. 2d 1020; *Wilson* v. *Morse Mill Co.,* 225 Ark. 405, 282 S. W. 2d 803; *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 222.

Mr. Gene Terry, Secretary and Treasurer of the Hayes Company, produced as a witness by Bradley, testified from company records, and gave testimony to the effect that the Bradley estimates totaled 2,465,000 feet, and that of this amount 1,335,602 feet were actually cut. In addition, 67,018 feet were cut from the Baker tract, and 22,863 feet were cut from the Sharp tract. No estimate was given on these two tracts, but by giving appellee the benefit of an estimate equaling the amount cut, this would make a total estimate of 2,554,881 feet. It can also be determined from Mr. Terry's testimony, which was the most favorable evidence for appellee, that a total of 1,425,483 feet were cut. This would make a total of 3,980,364 feet for the estimate and the amount cut. At $1.00 per thousand, Bradley earned $3,980.36.

According to the Complaint, Bradley had been paid $2,000.00; however, the evidence showed he was paid only $1,685.00. This sum, deducted from the amount earned, would leave $2,295.36 owed to him, but he owes the Hayes Company $401.00 on another account. This amount, deducted from the $2,295.36, leaves $1,894.36. When the evidence is viewed in the light most favorable to appellee, this is the total amount he can recover.

The judgment is, accordingly, set aside and a judgment will be entered here for the appellee in the sum of $1,894.36.

Reversed.

BARROW *v.* BOLTON.

5-2784 361 S. W. 2d 90

Opinion delivered October 22, 1962.

Ward & Lady, for appellant.

W. B. Howard, for appellee.

JIM JOHNSON, Associate Justice. This is a case of first impression wherein appellants seek a new trial on an assignment of error that the trial court abused its discretion in refusing to allow counsel for appellants to argue that sympathy is a proper ground for recovery in a tort action.

Appellants brought suit in Craighead County Circuit Court seeking to recover damages resulting from an injury suffered by Robert C. Barrow, age 13 years, when he received a blow on the head from a baseball pitching machine located on appellees' amusement park which was closed. In the course of final argument to the jury counsel for appellants attempted to read to the jury a definition of sympathy from Webster's Unabridged Dictionary. An objection was sustained to which counsel for appellants excepted. From judgment for appellees comes this novel appeal.

The abbreviated record before us shows the following colloquy took place in chambers:

"MR. WARD: In beginning the closing argument to the jury counsel for the plaintiffs referred to the fact that on *voir dire* examination and again in his closing argument counsel for the defendant had demanded that the jury remove all consideration and reference to sympathy from their deliberations. Counsel for the plaintiff then read, verbatim, an excerpt from the definition of sympathy as given in Webster's Unabridged Dictionary, and then stated to the jury that sympathy on the

part of mankind for each other was the basis for the existence of our judicial system. At that point counsel for the plaintiff was interrupted by counsel for the defendant with an objection. Pursuant to this objection on the part of defense counsel, the court admonished the jury in general terms that sympathy is not a basis upon which recovery may be predicated. Whereupon, counsel for plaintiffs expressly requested the court to rule on whether counsel for plaintiffs could discuss the proper definition of sympathy and its proper relationship to other matters and circumstances which the jury was entitled to consider. The court ruled that counsel could not pursue that type of argument, and it is to that ruling on the part of the court to which plaintiff now objects and asks that his exceptions be noted of record, for the reason that plaintiffs contend that by way of argument they had every right to discuss the meaning and application of sympathy in the deliberations of the jury.

"THE COURT: Specifically, the court, in its last ruling to the jury, stated that they could not undertake to consider sympathy for either of the parties in arriving at a verdict, that the discussion regarding sympathy would therefore be irrelevant, hence improper, and they should not consider it in arriving at their verdict in considering the law and evidence.

"MR. WARD: Just so there will be no misunderstanding as to what the record itself is. Counsel for the plaintiffs wishes to object to the ruling as dictated by the court and object to it for the reasons heretofore stated and save their exceptions.

"MR. HOWARD: Let the record show, the objection is being made after retirement of the jury and made in such manner at the express request of counsel for the plaintiffs. Let the record further show, it is the contention of the defendants that counsel for the plaintiffs was arguing to the jury, in effect, they had a right to consider sympathy in arriving at a verdict and that they should not disregard sympathetic consideration.

"THE COURT: May I state for the record, at the time the court sustained the objection made by defendants counsel, counsel for the plaintiff asked for permission to make a record of his objections to the court's ruling and the court said he would permit him to do so."

Appellants, in their brief, argue that the trial court abused its discretion in refusing to allow counsel to read to the jury a dictionary definition of the word sympathy. We do not agree. It is familiar law that definition of terms and statements of law are to be given by the court by way of instruction to the jury rather than by argument of counsel. *Heard* v. *Farmers Bank of Hardy,* 174 Ark. 194, 295 S. W. 38. It goes without saying that the word sympathy is a common, ordinary, workaday word which is within the immediate understanding and comprehension of veniremen.

Turning to the immediate issue, it is well that this court lay to rest the proposal that sympathy as a proper ground for recovery is without merit. The very nature of the word and its import upon an issue at trial is often inseparable from the facts in any given circumstance. But there it should remain, to go no further. For that reason we adopt the clear language as set out in 53 Am. Jur. Trial, § 496, p. 401, which is as follows:

"While sympathy for suffering and indignation at wrong are worthy sentiments, they are not safe visitors to the courtroom. They may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel. It is, therefore, improper for counsel to appeal to the sympathy of the jury, either directly or indirectly . . ."

Affirmed.

5-2775 361 S. W. 2d 87

Opinion delivered October 22, 1962.

Dinning & Dinning, for appellant.

A. M. Coates, for appellee.

NEILL BOHLINGER, Associate Justice. In the year 1900 M. E. West and his wife, Mary G. West, subdivided a plot of ground owned by them in Helena, Arkansas and filed their plat and dedication deed. This subdivision was known as the West's Addition in the City of Helena. M. E. West and his wife reserved Lot 9 and a strip of land being 10 feet North and South by 118.4 feet East and West out of the Northwest corner of Lot 10 as their homestead and occupied same up to the time of Mr. West's death, after which Mrs. West continued to occupy the place until about 1957.

Alice W. Foster was the owner of all of Lot 11 and Lot 10 of West's Addition with the exception of a strip of land 10 feet North and South by 118.4 feet East and West out of the Northwest corner of Lot 10, which strip had been retained by the Wests as part of their homestead.

The appellees acquired their property from Alice W. Foster in 1940 under a deed giving metes and bounds description and the appellees at the same time acquired from

Mrs. Foster a quitclaim deed to two narrow strips of land [here in controversy] lying immediately North of the well defined hedgerows and fence line. There appears to have been no monument or marker set that would indicate the line.

The appellees brought this suit for the purpose of establishing the North line of their property which would be, according to the plats, approximately 10 feet North of the hedgerow on the front and 12 feet North of the hedgerow and fence line on the back of the property and the appellees sought to enjoin the appellants from trespassing on these two pieces of their property. The appellants contested the suit on the ground that the appellees had for more than twenty years silently accepted a well defined boundary line which they contend constitutes the true boundary line between the two property owners.

The appellees' record title dates from the 16th day of January, 1940. The holding of the appellants dates from December 1959 when they acquired the property which is now their homestead. It is clear from the record before us that no doubt or confusion existed in the minds of the appellants' predecessors in title. The testimony of Will Smith on this point is pertinent. He testified that during the time Mrs. West was living on the adjoining property he was employed by Mr. Curtis, the appellee, to cut down a pecan tree that was located on the property which is now in dispute. That when he was cutting the tree, Mrs. West asked him why he was cutting it and he told her that Mr. Curtis had ordered it cut down and Mrs. West said: "Well, if it was on my property I wouldn't have it cut," but there was nothing she could do about it so to go ahead and cut it down. He had cut another tree on the property now in dispute and had piled some brush on the land and couldn't move it at that time and Mrs. West remarked on that occasion that it wouldn't make any difference to her because it was on Mr. Curtis' land and to move it when you get ready.

C. L. Moore also testified that Mr. and Mrs. West had sold to Mr. Foster a 10 foot strip and a 12 foot strip

because Mr. Foster found that his house was on the line and he didn't have room for a garage and that's when they sold him the extra 10 feet so he could put his garage on it. Thereafter the Wests made no claim to it.

From the record it appears that this controversy might well be pinpointed on the testimony of one of the appellants, Mrs. Webb:

"A. Now, I looked at the property, but to tell you the truth, I never noticed the gravel driveway. It came beyond the hedgerow. It didn't start right at the Curtis house. It comes over so little you would almost have to get out and look at the lines to notice it.

Q. What do you mean by looking at the line, Mrs. Webb?

A. *We naturally thought the hedgerow was the line.* In fact, anybody looking at that property I believe would call the hedgerow the line, if you are unfamiliar with the property." [Emphasis added]

Since the appellants' predecessors in title made no claim of acquiescence in a boundary or any claim of adverse possession, the case rests upon appellants' claim by adverse possession or acquiescence acquired since 1957. In the case of *Brown Paper Mill Co., Inc.* v. *Warnix,* 222 Ark. 417, 259 S.W. 2d 495, we said:

"* * * Of course 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." [See also *Cossey* v. *House,* 227 Ark. 100, 296 S. W. 2d 199.]

It may be true that Webb assumed that the southern boundary to his property was the hedgerow but a mere subjective belief cannot transfer the title to land.

In *Ball* v. *Messmore,* 226 Ark. 256, 289 S. W. 2d 183, we made the following statement:

"In claiming more land than the chancellor awarded them the appellants rely upon the testimony of several

witnesses who say that the branch has long been understood to be the line. This testimony may be true, but it falls short of establishing a record title, or adverse possession, or an agreed boundary line, or any other fact of substantive importance. It shows at most the existence of a general belief about the line, but of course such a belief could not have the effect of vesting or divesting the title to real property."

The instant case presents an even stronger case for application of the above pronouncement for here the record title is in the party against whom adverse possession, acquiescence, or general belief is claimed.

At the very start of appellants' claim of acquiescence or general belief they are met with the proposition that they knew, or should have known, the true boundary for the deed which they received to the property, in describing the boundaries, states:

"* * * thence South 10 feet along the West line of that part of said tract conveyed to Alice W. Foster[1] by deed recorded in book 189, page 422, * * *."

That deed described approximately one-half of the strip here in controversy; the other one-half had been previously conveyed to Foster. Therefore, by looking in the record noted in his own deed, Webb could have ascertained that he did not own any part of the disputed strip.

The use of part of the property as a dog run by former owners was at most a permissive use. No use was made of the front part of the strip except by appellees as part of their driveway and when appellants attempted to occupy or use said strip this action resulted.

The chancellor's finding that Webb had not obtained title to the property by adverse possession or by acquiescence is sustained by an overwhelming preponderance of the evidence. The chancellor quieted the title to the disputed strip in the appellees and enjoined the appellants from trespassing. That decree is now affirmed.

[1] Curtis' predecessor in title.

5-2881 361 S. W. 2d 262

Opinion delivered October 29, 1962.

Osro Cobb, for appellant.

Homer T. Rogers, for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to the validity of the appointment of Homer T. Rogers, appellee herein, as temporary guardian of Marvin Umsted, incompetent. On July 6, 1962, Audrey Umsted Cobb and Aubrey Umsted Becker filed their petition with the Ouachita County Probate Court, asking that Howard East, a resident of Camden, be appointed permanent guardian of the Marvin Umsted estate. Petitioners are nieces of Mr. Umsted, and the petition recites that the latter is 81 years of age, resides in the Ouachita County Hospital at Camden, and is incapacitated due to permanent circulatory disorders and advanced age. On July 12th, petitioners filed an "affidavit of facts" in support of the petition, reciting the history of their connection with Mr. Umsted, and detailing the facts of his illness. This affidavit, of course, is not evidence, but actually a supplemental petition, and is so treated. Reasons are set forth for the appointment of Mr. East, and petitioners

request "If, for any reason, Mr. Howard East should become unavailable for the appointment as permanent guardian, then these petitioners respectfully request that they be appointed jointly as such guardian".

On July 17, Mr. Rogers, appellee, filed a petition setting up that he had "been appointed by this court each ninety-day period for the past twevle months as temporary guardian of the said Marvin Umstead", and he sought to again be appointed temporary guardian for another ninety days. The petition recites that the condition of Mr. Umsted, physically and mentally, has improved from the date of the last appointment; that at times Umsted is confused, and at other times "his mind is clear and he acts normal". Said petition was supported by a letter from Dr. P. J. Dalton, a physician of Camden, who stated that he was of the opinion that Mr. Umsted was incompetent to take care of his affairs. Further, "His mental status has improved over what it was six months ago. As a rule, he is relaxed, quiet and co-operative"; however, "his mental status will remain confused at times for the remainder of his life".[1] On July 19th, appellants filed a motion seeking an order to require Mr. Rogers, as temporary guardian, to file a full and final report.

On July 20th, the Probate Court of Ouachita County entered its order reciting,

"* * * there is presented to the Court the Petition of Mrs. Aubrey Becker and Mrs. Audrey Cobb, asking that Mr. Howard East be appointed permanent Guardian of the person and estate of Marvin Umsted, an alleged incompetent person, or in the alternative, if Mr. Howard East refuses to serve, that they be appointed as such guardians; also a Petition of Homer T. Rogers, who has been appointed temporary guardian of the person and estate of the said Marvin Umsted for four consecutive periods of ninety days each; and the same are submitted to the Court

[1]Dr. Dalton's statement is not in conformity with the provisions of the statute [§ 57-615, 1961 Supp.] which requires that the written statement given by a doctor shall be verified; there is also a requirement that the doctor's qualifications be set forth in the statement.

upon said Petitions, testimony of witnesses, and statement of the attending physician, from all of which the Court finds:

"That Marvin Umsted is a resident of Camden, Arkansas, and is at the present a patient at Ouachita County Hospital. He is some eighty-two years of age[2] and is, at times, incapable of managing his property or caring for himself due to a mental incapacity brought on by advancing years and circulatory disturbances. That at intervals he is of sound mind and it would be greatly disturbing to him to change his guardian at this time. That he has become accustomed to Homer T. Rogers being his guardian, and Homer T. Rogers has requested this Court to appoint him a temporary guardian for a period of ninety days. That it would greatly upset said Marvin Umsted to appoint either Mr. Howard East or Mrs. Becker and Mrs. Cobb as his Guardian. * * *"

In accordance with the findings, Rogers was reappointed temporary guardian of the person and estate of Umsted for a period of ninety days, and a bond, in the sum of $15,000, was approved.

On July 23rd, appellants filed a motion to vacate and cancel the order appointing Rogers temporary guardian, alleging that the purported accounting filed by Rogers, covering his services as temporary guardian through July 9, 1962, was not a full and complete report; that there was no emergency which required the July 20th appointment of a temporary guardian; that Rogers is prohibited by statute from continuing as temporary guardian, and that appellants were not advised of any hearing on July 20th, though they had requested of the clerk, formal notice of any hearings in the case.[3] The preceding paragraphs set forth all pleadings, orders, and proceedings, appearing in the transcript, and the record is completely silent as to any further developments follow-

[2]Mr. Umsted apparently had a birthday following the filing of the original petition.

[3]The record does not reflect that a written request for notice was filed, or that other requirements of Section 57-613 ["Request for special notice of hearings"] were complied with.

ing this last motion. From the order of July 20th, reappointing Homer T. Rogers as temporary guardian, appellants bring this appeal.

At the outset, let it be mentioned that the briefs contain, and make reference to, many matters that do not appear in the record. Appellee's brief, in large measure, is devoted to extraneous material, and appellants, in their reply brief, to some extent, follow the same practice. The fact that we do not consider statements beyond the record is so axiomatic as to require no citation of authority.

While, in one sense of the word, this appeal is moot because of the fact that the appointment expired some 10 days ago, there are matters which could possibly be hereafter presented to the trial court, which we think necessitate this court's passing upon the legality of Rogers' appointment, *viz.*, the question of guardian's fee, expenses, and the validity of actions taken by the guardian during the ninety-day period. In addition, since the appointment is only for a ninety-day period, it would be virtually impossible for a transcript to be prepared, briefs submitted, and the case disposed of by opinion before such period expired. In effect, in many instances, this would result in the loss of the right of appeal, though such right is clearly granted by the statute.

As herein mentioned, appellee's appointment as temporary guardian on July 20th, was his fifth appointment in that capacity. We are not here concerned with the first four appointments, since they are not at issue on this appeal. We are of the view that the appointment of July 20th was invalid for two reasons. Section 57-620, 1961 Supp., provides as follows:

"If the court finds that the welfare of an incompetent requires the immediate appointment of a guardian of his person or of his estate, or of both, it may, with or without notice, appoint a temporary guardian for the incompetent for a specified period *which period including all extensions thereof, shall not exceed ninety* [*90*] *days,*[4] and remove or discharge him or terminate his guardianship.

[4]Emphasis supplied.

If made without notice, the temporary guardian shall forthwith give to the incompetent person notice of the appointment. The appointment may be to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment. The temporary guardian shall make such reports as the court shall direct, and shall account to the court upon termination of his authority. In other respects the provisions of this Code concerning guardians shall apply to temporary guardians and an appeal may be taken from the order of appointment of a temporary guardian. The letters issued to a temporary guardian shall state the date of expiration of the authority of the temporary guardian."

The Arkansas Probate Code was enacted by the General Assembly as Act 140 of 1949. Section 207 [57-620] of the act related to the appointment of temporary guardians. Under that act, a temporary guardian was appointed for ninety days, but there was nothing to prevent the reappointment of such guardian for an additional ninety days. This section was amended in 1951 by inserting the italicized language. Judge E. B. Meriwether, Professor, University of Arkansas School of Law, in an article appearing in Ark. Law Review, Volume 5, Page 377, discusses amendments to the Probate Code. At Page 380 he calls attention to the amendment herein discussed, as follows:

"Section 12 clarifies Code Section 207, which limited a court-ordered temporary guardianship to ninety days. Nothing in the Code, however, prevented the court from appointing successive temporary guardians or reappointing a temporary guardian. Section 12 therefore provides that the temporary guardian shall be appointed for a specified period, 'which period including all extensions thereof, shall not exceed ninety days'."

It is, therefore, at once apparent that the July 20th appointment of Rogers as temporary guardian was contrary to the provisions of the statute. While not argued, or relied upon, by appellee, it might be well to point out that the interim of eleven days between Rogers' fourth and fifth appointments, does not result in making the

court's order valid. It was clearly the intent of the legislature in amending this section to prohibit the appointment of a temporary guardian, or the retention of an individual as temporary guardian, for more than ninety days. To hold otherwise, would, obviously, emasculate the statute as amended. The period of time that should elapse, following the expiration of a temporary guardianship, before the same individual could again be appointed temporary guardian, is purely academic, and, therefore, requires no discussion. It is certainly conceivable that a case could arise, which would require the appointment of a temporary guardian, with no need for a permanent guardian at the expiration of the ninety-day period; perhaps a year or so later an exigency would arise, which could, again, require the appointment of a temporary guardian. We render no holding as to whether the same individual, who had been appointed the year before, could then properly serve. In the case before us, from a practical standpoint, Rogers had continuously served for 360 days before the appointment in question.

There is yet another reason why the order should not have been entered. In *Walthour-Flake Co., Inc.* v. *Brown,* 228 Ark. 307, 307 S. W. 2d 215, this court pointed out that the provision for appointing a temporary guardian was designed to take care of emergencies. Under the Probate Code, notice must be given before a regular guardian can be appointed, and as stated in the cited case, "* * * instances may well arise where such a delay would cause irreparable damage to the estate of an incompetent. Here, no such emergency seems to have existed." In the instant case, it would likewise appear that no emergency existed which would necessitate this appointment. The letter from Dr. Dalton stated that Umsted's mental status had improved, and that he was "relaxed, quiet and cooperative". The principal purpose of a temporary appointment is to take care of urgent and emergent matters that have arisen, and where prompt action is essential before the legal requirements for the appointment of a permanent guardian can be met.

In accord with the reasoning herein set out, we find, and hold, that the appointment of Homer T. Rogers as temporary guardian of Marvin Umsted, incompetent, by order entered on July 20, 1962, was invalid, and the order is reversed.

While the appeal relates only to the appointment of Rogers as temporary guardian, appellants suggest that this court should also name appellants, or Mr. East, or all three, as permanent guardians. Of course, in the first place, there is no appeal from the failure of the court to appoint any of those mentioned. Secondly, without benefit of a record containing evidence relating to the qualifications of those seeking the appointment of permanent guardian, we are in no position to know who can best serve the interests of the incompetent. Finally, it would not appear from the record that appellants have performed the requisite and necessary acts for a hearing on the appointment of a permanent guardian; *i.e.*, no notice appears in the transcript as provided in Section 57-611, 1961 Supp.[5] There is, of course, nothing to prevent appellants, after serving proper notices, from requesting and obtaining a hearing on their petition for a permanent guardian.

Reversed.

[5]The burden is upon appellants to see that proper notices are served.

KAROLEY *v.* A. R. & T. ELECTRONICS.

5-2774 363 S. W. 2d 120

Opinion delivered October 29, 1962.

[Petition for Rehearing withdrawn January 14, 1963.]

B. W. Thomas and *Richard W. Hobbs,* for appellant.

Lucien Wulsin, Jr., Rose, Meek, House, Barron, Nash & Williamson, for appellee.

ED. F. MCFADDIN, Associate Justice. The question presented is the validity of an order setting aside a judgment rendered against a defaulting garnishee. Dates become significant in presenting the issue to be decided:

A. In 1959 Mary E. Karoley (appellant here) obtained judgment in the Pulaski Chancery Court against John D. Reid for $12,000.00; and the judgment remained unpaid.[1]

B. On May 23, 1961 Karoley filed interrogatories[2] and obtained a writ of garnishment from the Pulaski

[1] For those interested in the ramifications of the litigation between Karoley and Reid, we give these citations; *Karoley* v. *Reid,* 223 Ark. 737, 269 S. W. 2d, 332; *Karoley* v. *Reid,* 226 Ark. 959, 295 S. W. 2d 767; *Reid* v. *Karoley,* 229 Ark. 90, 313 S. W. 2d 381; *Reid* v. *Karoley,* 232 Ark. 261, 337 S. W. 2d 648; and *Karoley* v. *Reid,* 233 Ark. 538, 345 S. W. 2d 626.

[2] The said interrogatories were:

"1. Please state if at the time of the service of this garnishment you have any goods, chattels, moneys, credits or effects in your hands or possession belonging to the defendant, John D. Reid, and if so, the value thereof.

"2. Please state if John D. Reid is an employee of your corporation and if so, please state if he is working under any contract of employment, verbal or written, and if so, the terms of the contract with respect to any salaries or remuneration or bonuses or other moneys to be paid to the defendant, John D. Reid.

"3. Please state if John D. Reid, during the past five years, has been an employee of your corporation and if so, please state whether he is paid for his services on a weekly, bi-weekly, monthly, bi-monthly or annual basis and please give the exact day of the week or month during the past five years that Mr. John D. Reid has been given any pay checks or any moneys from your corporation.

"4. Please state if John D. Reid is indebted to the corporation for any advancements as to salaries or otherwise and if so, when such advancements were made to him and the total amount thereof before the date of the service of this garnishment.

Chancery Court against A. R. & T. Electronics, Inc. (appellee here), seeking to recover from the garnishee any amounts due by it to the said Reid, who was executive vice-president of that Company.

C. The writ of garnishment was served on May 25, 1961, and the last day fixed by law for filing answers to the interrogatories was June 14, 1961. No answer or other pleading of any kind was filed within said time; but on June 15, 1961 (one day after time) there was filed a "Motion of Garnishee", which said in part:

"3. The Allegations and Interrogatories served on the Garnishee on May 25, 1961 contain matter which is beyond the scope of the Order of this Court dated January 16, 1961 and is irrelevant and beyond the scope of interrogatories permitted under the laws of the State of Arkansas.

"4. Garnishee requests the Court to issue an Order, striking Interrogatories No. 2, No. 3, No. 4, No. 5, No. 6 and No. 7 contained in Allegations and Interrogatories served on the Garnishee, May 25, 1961."

D. On June 22, 1961, the Garnishee filed an answer to Interrogatory No. 1, stating that the Garnishee was not on date of service, or at any other time thereafter, indebted to John D. Reid in any way whatsoever. This answer was several days after the time allowed by law

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"5. If your answer to the foregoing interrogatory is in the affirmative, please state what you have in your possession to show as evidence of any indebtedness of John D. Reid to A. R. & T. Electronics, Inc. and state whether or not John D. Reid has executed any promissory note or made any assignments of future salaries in regard to said indebtedness and if so, the dates of the giving of such notes or other evidence of indebtedness or assignment.

"6. If you state that John D. Reid is indebted to the said corporation, please state when the said debt is due and how it is to be paid and whether or not any demand has ever been made on John D. Reid for the payment of the said debt or any part thereof and whether or not any part of the said debt, if any, has been paid by John D. Reid during the past five years or since the inception of the debt and whether or not any deductions have been made during the past five years from any pay checks given to John D. Reid, and if any deductions have been made, whether or not they have been applied toward the payment of the debt or any part thereof.

"7. Please state the exact amount of each pay check that has been given to John D. Reid during the past year after deductions for withholding taxes, social security and F.I.C.A. taxes."

for filing same, and, as aforesaid, no defensive pleading of any kind was filed within proper time.

E. Because of the failure of the Garnishee to answer or plead on or before June 14, 1961, Karoley, on June 29, 1961, moved for judgment against the Garnishee for the amount of the judgment and interest against Reid, as provided by § 31-512 Ark. Stats.; and the Chancery Court rendered such judgment against the Garnishee on June 29, 1961, and directed that execution should issue "at any time from and after the date of this decree".

F. Execution was issued, and on July 7, 1961, the Garnishee, A. R. & T. Electronics, Inc., filed its motion to have the Court vacate and set aside the judgment rendered against the Garnishee on June 29, 1961. Without proper service of said motion (§ 27-1210 Ark. Stats.), an order was made by the Chancery Court on July 7, 1961, which, in its entirety, reads:

"On this day is presented to the Court the Motion of Garnishee, A. R. & T. Electronics, Inc., in which it asks that the default judgment entered herein on June 29, 1961, be temporarily vacated, and after a hearing on the merits that the vacation of said judgment be made permanent, and that the writ of execution issued on June 29, 1961, be recalled.

"The Court being fully advised doth order that said judgment entered herein on June 29, 1961, be, and the same is hereby, temporarily vacated and the Motion of Garnishee filed herein on this date, after due notice to counsel for plaintiff, shall be heard on the merits."

G. On August 15, 1961, Karoley responded to the Garnishee's motion of July 7, 1961, to set aside the judgment. The Pulaski Chancery Court made no further orders in the case until November 15, 1961, when the Court made permanent its order of July 7, 1961. The order of November 15, 1961, recited:

"It is ordered that the order entered herein on July 7, 1961 be, and the same is hereby, made unconditional and permanent . . ."

From the said order of November 15, 1961, Karoley has appealed.[3] Able counsel have argued many nice questions in the briefs; but the decisive point is that the default judgment against the Garnishee, as rendered on June 29, 1961, was not completely and finally set aside at the term in which it was rendered; and the motion (of July 7, 1961) to set the judgment aside did not comply with the statute applicable to setting aside a judgment after the lapse of the term (§ 29-506 *et seq.* Ark. Stats.).

I. *The Court Was Correct In Rendering The Judgment Against The Garnishee on June 29, 1961.* The Garnishee was served[4] on May 25, 1961; and was required by law to file some pleading on or before June 14, 1961. Nothing was filed within the said time; and the case of *Harmon* v. *Bell,* 204 Ark. 290, 161 S. W. 2d 744, is directly in point. In that case the garnishee filed no responsive pleading within the time fixed by statute and judgment was rendered against the garnishee, as provided by statute (§ 31-512 Ark. Stats.).[5] When the garnishee appealed to this Court, we said: "This amounted to a failure to answer and judgment by default was properly taken against him. In *Wilson* v. *Phillips,* 5 Ark. 183, this Court held: 'Where a garnishee fails to answer, no proof is necessary to charge him. The default admits his liability to the full extent of the plaintiff's demand.' " So the judgment rendered against the Garnishee on June 29, 1961, was correct and proper.

II. *The Order Of July 7th Did Not Finally And Completely Set Aside The Judgment Of June 29th.* The terms of the Pulaski Chancery Court are the first Monday in April and October of each year (see § 22-406 Ark. Stats.). The judgment against the Garnishee was rendered on June 29, 1961, which was a day of the April Term.

[3]The order of November 15, 1961, was a final and appealable order, since it purported to vacate and set aside a judgment which had been rendered at a previous term of Court. *Raymond* v. *Young,* 211 Ark. 577, 201 S. W. 2d 583.

[4]The validity of the service on the garnishee can hardly be questioned, in view of the statement previously copied in the motion of the garnishee, in which it is stated that the allegations and interrogatories were "served on the garnishee May 25, 1961."

[5]The cited statute says ten days, but this has been enlarged to twenty days in a case like this one.

At any time during that term, the Chancery Court had the power to set aside the judgment on its own motion and without any notice whatever to either party. *Stinson* v. *Stinson,* 203 Ark. 883, 159 S. W. 2d 446; *Wright* v. *Ford,* 216 Ark. 55, 224 S. W. 2d 50; *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797; *Eakin* v. *Cities Service Co.,* 228 Ark. 979, 311 S. W. 2d 530; and West's Digest, "Judgment" § 341.

But the order of July 7th, previously copied, did not purport to completely and finally set aside the judgment of June 29th: rather, the order of July 7th (a) recalled the execution, (b) "temporarily" vacated the judgment, and (c) stated that the motion of the Garnishee to set aside the judgment of June 29th would be heard on its merits "after due notice to counsel for plaintiff".

If the order of July 7th had been intended to finally and completely vacate the judgment of June 29th, then the order certainly would not have used the word "temporarily", and would not have stated that the motion to vacate would be heard on its merits "after due notice to counsel for plaintiff".

The word "temporarily" is the vital word in the order of July 7th, and discloses that the Court recognized that something more had to be done before the judgment of June 29th would be finally and completely set aside. Webster's Dictionary defines "temporarily" as meaning "for a brief period", or "during a limited time". In the early case of *Knox* v. *Bierne,* 4 Ark. 460, this Court had occasion to consider the word "temporarily", and said that it meant something other than "permanent or lasting". A reading of that opinion is convincing that "temporarily" means for a very limited time—really only slightly more than the immediate present. The power of the Court to permanently set aside that judgment of June 29th was complete during the April 1961 term; but at the expiration of that term, the Court had no further power to set aside the said judgment against the Garnishee except by following the statute (§ 29-506 *et seq.* Ark. Stats.). The Garnishee failed to ask the Court to further act on the matter at the April 1961 term.

III. *The Court Had No Power After The Term To Set Aside The Judgment Of June 29th.* As previously stated, the terms of the Pulaski Chancery Court are the first Monday in April and October of each year (§ 22-406 Ark. Stats.), and the judgment of June 29th was rendered in the April 1961 term. After the lapse of the April term, the Chancery Court did not have the power to set aside the judgment of June 29th, unless the Garnishee complied with § 29-506 *et seq.* Ark. Stats., or filed bill of review.[6] *Terry* v. *Logue,* 97 Ark. 314, 133 S. W. 1135; *Raymond* v. *Young,* 211 Ark. 577, 201 S. W. 2d 583; *Wright* v. *Ford,* 216 Ark. 55, 224 S. W. 2d 50; *Jamieson* v. *Jamieson,* 223 Ark. 845, 268 S. W. 2d 881. This is not a proceeding by bill of review; and in the oral argument before this Court, counsel for the Garnishee, with admirable frankness, conceded that the motion (to set aside the judgment) filed on July 7, 1961, did not comply with the statutory requirements for setting aside a judgment after the lapse of the term. We find such concession to be true.

The judgment of November 15, 1961, attempting to permanently set aside the judgment of June 29, 1961, was rendered at the October 1961 term of the Chancery Court, and was not supported by the jurisdictional essentials prescribed by § 29-506 *et seq.* Ark. Stats. In criminal cases, a motion for new trial must receive final court action at the same term of the court at which judgment was rendered against the accused (see § 43-2202 Ark. Stats. and *Town of Corning* v. *Thompson,* 113 Ark. 237, 168 S. W. 128); so the cases involving motions for new trial in criminal cases are analogous to the cases on setting aside a judgment after the term in civil matters. In *Siloam Springs* v. *McPhitridge,* 53 Ark. 21, 13 S. W. 137, defendant McPhitridge was tried in the Circuit Court and judgment of conviction rendered against him on September 27, 1887. We copy from the opinion of this court in that case:

[6]Of course, the statute regarding setting aside final judgments after the term, has no application to temporary injunctions. *Hardy* v. *Hardy,* 217 Ark. 296, 230 S. W. 2d 6; *Carter* v. *Olsin,* 228 Ark. 629, 309 S. W. 2d 328.

". . . at the same term of the court, he filed his motion for a new trial and in arrest of judgment, and the record says, 'which motion is by the court taken under advisement, and hearing of said motion is continued. And it is ordered by the court that the execution of the judgment rendered in this cause be suspended until decision by the court upon said motion.' "At the next term of the court, on April 20, 1888, the court sustained said motion in arrest of judgment, set aside the judgment entered at the preceding term, and gave judgment against appellant for the whole cost of the prosecution. "This was beyond the power of the court. Its judgment upon the verdict convicting McPhitridge became final at the end of the fall term, and the pendency of the motion for new trial and in arrest and the order suspending execution of the judgment did not prevent the result. Had the court desired to reserve the matter of the motion for consideration, it should have set aside the judgment at the fall term. The judgment of September 27, 1887, is still in full force, and the order setting it aside is quashed as upon *certiorari.*" [7]

In *Mayor of Little Rock* v. *Bullock,* 6 Ark. 283, judgment by default was taken against Field and Jeffries at the March 1840 term of the Circuit Court. At the March 1841 term, Bullock and Field appeared and moved to have the judgment set aside and showed that the City of Little Rock had consented. The judgment was set aside, but, on appeal, this Court said:

"After the term at which the judgment by default, and writ of inquiry, and final judgment were rendered thereon, the cause was no longer under the jurisdiction and control of the court, or the parties. The court not having the power to re-open the cause, it could not be done by the consent of the parties, for consent cannot confer jurisdiction. All the proceedings had in this cause subsequent to the final judgment at the March term, 1840, must be considered as *coram non judice,* and therefore void.

[7]See also *Feild* v. *Waters,* 148 Ark. 325, 229 S. W. 735, involving motion for new trial in a civil case, decided before Act No. 555 of 1953.

"The appeal not having been taken at the term at which that judgment was rendered, the same must be dismissed."

CONCLUSION

Since the judgment of June 29th was not finally and completely vacated at the term at which it was rendered, and since, on the motion before it, the Chancery Court had no power at the October 1961 term to set aside the judgment rendered on June 29, 1961, it therefore follows that the judgment of June 29, 1961 is in full force and effect, and the order setting it aside is a nullity. The cause is remanded with directions to the Chancery Court to set aside its order of November 15, 1961, and permit Karoley to have execution on her judgment of June 29, 1961.

GEORGE ROSE SMITH, J., not participating.

SUMMERHILL *v.* SHANNON.

5-2808 361 S. W. 2d 271

Opinion delivered October 29, 1962.

Dinning & Dinning, by *W. G. Dinning, Sr.,* for appellant.

Eugene L. Schieffler, for appellee.

GEORGE ROSE SMITH, J. On April 24, 1961, the appellee's car was struck from behind by a car owned by the appellant and being driven by his sixteen-year-old son,

Gary. The appellee brought this action to recover his property damage of $182.52, seeking to hold the elder Summerhill liable under the provisions of Act 495 of 1961. Ark. Stats. 1947, § 75-315. The jury returned a verdict for the plaintiff in the full amount sued for.

Act 495, as it applies to this case, imposes liability upon the appellant for his minor son's negligence if he permitted the boy to drive a motor vehicle "upon any highway". This collision occurred upon a paved road on the schoolgrounds of the West Helena high school. The road leads from a parking area to the city street and is open for use by students and others having occasion to enter the schoolyard. The appellant insists that the road is not a highway within the meaning of the statute.

We cannot sustain this contention. A highway is commonly defined as a passage, road, or street which every citizen has a right to use. Bouvier's Law Dictionary (Rawle's 3d Rev.); Webster's Second New International Dictionary. A highway includes every public thoroughfare, "whether it be a carriage way, a horse way, a foot way, or a navigable river". *Canard* v. *State,* 174 Ark. 918, 298 S. W. 24. There we held that a roadway within the local fair grounds was a public highway. Upon the same reasoning we are convinced that the paved road in this case was a highway within the intent of the 1961 act. There is no good reason why the protection afforded by the statute should not be available to high school students and others having occasion to use the road.

Summerhill's other arguments have to do with the matter of insurance. It appears that the plaintiff Shannon had an insurance policy upon which he had collected all but the first fifty dollars of his loss. At the trial Summerhill insisted that Shannon was not the real party in interest and that the jury should be informed of Shannon's insurance coverage. Both contentions were rejected by the trial judge.

The rulings were correct. We considered the first contention in *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566, and held that even though Mizell

had been reimbursed by his insurer for all but $25 of his $789.50 loss he was still the real party in interest and was entitled to maintain suit in his own name. That case was followed in *Dowell, Inc.* v. *Patton,* 221 Ark. 947, 257 S. W. 2d 364, where it was decided that the plaintiff's collection of most of his damage under a $50 deductible policy could not be proved in a jury case either to show the plaintiff's interest in the suit or to reflect upon his credibility as a witness. In principle those decisions control this case and require that the trial court's action be upheld.

Affirmed.

BECK *v.* RHOADS.

5-2789 361 S. W. 2d 545

Opinion delivered October 29, 1962.

[Rehearing denied November 26, 1962.]

McMath, Leatherman, Woods & Youngdahl and *G. Thomas Eisele,* for appellant.

Joe W. McCoy and *W. H. McClellan,* for appellee.

PAUL WARD, Associate Justice. Appellants, Buford F. and Dean K. Beck, filed suit to regain possession of two parcels of land in Malvern, and incidentally to cancel a deed conveying said lands to appellees, W. E. and Cecilia H. Rhoads, who were in possession at that time. The circuit judge (a jury having been waived) found the issues against appellants who have appealed for a reversal.

The facts presently set out are not in dispute. Subject to the claim of appellees hereafter mentioned, appellants have held a good record title to said lands since about 1945. The land was included in the Waterworks Improvement District No. 16 of the City of Malvern (hereafter referred to as District) which was organized somewhere around the year 1900. The assessments of benefits against the land were not paid for the years 1950-1951, and foreclosure followed. The foreclosure decree is dated February 14, 1952, and the District was the purchaser at the sale which followed. The land, not having been redeemed, was deeded to the District on February 13, 1960. Three days later the District executed a quitclaim deed conveying the land to appellee W. E. Rhoads who went into possession. The following month Mr. and Mrs. Rhoads obtained a $10,000 title policy from the American Title and Insurance Company, and in May (1960) they executed a mortgage on the land to the Bank of Malvern to secure a loan of $3,500. The bank also obtained a title policy. Appellants' suit was filed February 13, 1961.

Appellants make two basic contentions for a reversal. *One.* The trial court erred in refusing to give them a default judgment against the Rhoads. *Two.* The District's failure to give appellants notice (as required by statute) of the foreclosure proceedings rendered the decree (of foreclosure) void, which in turn voided the deed to the District and likewise the deed from the District to appellees.

The Bank of Malvern was made a party to the suit because of its mortgage on the land. Hereafter we will refer to it as the bank and to Mr. and Mrs. Rhoads as appellees.

One. Although the issue of a default judgment has been argued at length by both sides we deem it unnecessary to discuss that question since we have reached the conclusion that the decree appealed from must be reversed on the merits of the case presented under the second contention mentioned above.

Two. Several questions are raised and must be discussed under this point.

(a) Basically it was appellees' contention in the trial below, and it is their contention here, that appellants, having waited more than five years after the foreclosure decree, are barred from maintaining this suit under the provisions of Ark. Stats. § 37-108. The pertinent part of this section reads:

"All actions against the purchaser, his heirs or assigns, for the recovery of (lands sold by any collector of the revenue for the non-payment of taxes, and for) lands sold at judicial sales shall be brought within five [5] years after the date of such sale, and not thereafter. . . ."

In support of this contention appellees cite, among others, the case of *Cutsinger* v. *Strang,* 203 Ark. 699, 158 S. W. 2d 669. There the Court, in construing § 8924 of Pope's Digest (same as Ark. Stats. § 37-108), held appellant was barred from maintaining his suit after five years had elapsed in a situation comparable to that of this case, except for the fact that in the cited case there was no question of notice involved. Moreover, we think the *Cutsinger* opinion must be reappraised in the light of Act 195 of 1949 which appears in Ark. Stats. as Sections 20-412 *et seq.*, relied on by appellants. The provisions of Section 17 of Act 195 (Ark. Stats. § 20-418.13) may be summarized as follows: (a) The Board of Commissioners (of any Municipal Improvement District), before filing suit to collect delinquent taxes, shall obtain a list of the names of the owners and a description of their property; (b) a copy of the list shall be attached to the complaint; (c) twenty days before filing complaint, a registered letter (with return receipt requested) shall be sent

to each name on the list; (d) an affidavit of the person mailing the letter must be attached to the complaint.

Section 21 of Act 195 (Ark. Stats. § 20-446.1) also provides: "The owner of any land sold for delinquent installments due municipal districts shall have the right to redeem at any time within five (5) years from the date of sale. . . ." We interpret this section to mean the owner would have five years to redeem under any circumstances—even if he had been given the statutory notice. Act 195 of 1949 has never been before this Court for interpretation but, after a careful study of its many provisions and particularly Section 17 summarized above, we do not construe Section 21 to mean the owner could not redeem after five years where he was not given notice of the foreclosure suit. Any other interpretation would seem to nullify the express purpose for which the act was passed, which was "to provide more protection for the owners of property located within municipal improvement districts. . . ."

(b) The decisive question therefore is whether proper notice of the foreclosure suit was given to appellants. In this connection it is (and was) appellees contention that the decree of foreclosure is regular on its face and that, therefore, no evidence could be offered to the contrary. Supporting this contention they quote from the decree the following: "That notice of the pendency of this suit was given for the time and in the manner required by law. . . ." From this appellees conclude that Section 17 of Act 195 (summarized above) was complied with. This conclusion, however, is negatived by the emphasized portion of the decree copied below:

"That notice of the pendency of this suit was given for the time and in the manner required by law, *as evidenced by proof of publication filed herein, showing that due notice of this suit was given by publication of a notice in a newspaper having a bona fide circulation in Hot Spring County, for two weeks consecutively, the first insertion being more than four weeks prior thereto.*" (Emphasis ours.)

If it be true that appellants were not given notice, as they contend, then the foreclosure decree together with the deeds based thereon must be held to be void under the provisions of Ark. Stats. § 29-107 quoted below:

"All judgments, orders, sentences, and decrees, made, rendered, or pronounced, by any of the courts of the State, against any one without notice, actual or constructive, and all proceedings had under such judgments, orders, sentences, or decrees, shall be absolutely null and void."

In the case of *Woolfolk* v. *Davis,* 225 Ark. 722, 285 S. W. 2d 321 there appears this statement:

"The record here shows that there is a total lack of service upon any of the appellees; no pleadings either by complaint or cross-complaint to authorize the judgment. A judgment rendered without notice to the parties affected is void under our statute, Ark. Stats. 1947, § 29-107."

The uncontradicted testimony is to the effect that appellants had no notice of any kind (either actual or by registered mail) that the foreclosure suit would be, or was in fact, filed in this case. If the foreclosure decree was void it is, of course, subject to collateral attack under our decisions.

(c) Notwithstanding what we have heretofore said, appellees vigorously contend appellants' pleadings failed to raise the decisive question of the lack of notice heretofore discussed. This contention appears to be based specifically on the ground that the "record" in the foreclosure proceeding consists not only of the decree but also of the complaint and other pleadings, that the "record" was not challenged by appellants' pleadings. We are unable to find any merit in this contention. It is true that appellants' complaint deals extensively with matters foreign to the issues here raised (based on a forfeiture of the land to the state) but it does state that appellees claim an interest in the land based on a quitclaim deed from the District; then it states that the record entries are void for, among others, the following reasons: "There was no notice of sale of said lands given, as required by law."

Also, on March 1, 1961 (18 days after appellants' complaint was filed) the District filed its separate answer, stating the complaint did not state facts sufficient to constitute a cause of action and requested the court to dismiss the complaint. The court took no action on this request. Thereafter appellees (not having filed their answer within 20 days), on June 1, 1961, filed a motion asking time to file an answer. In this motion appellees stated (among other things) they purchased the land from the District February 29, 1960, and their defense was the same as that of the bank, but no request was made to have appellants' complaint dismissed. A few days later the bank filed a substituted answer in which (among other things) it admitted the validity of appellants' claim of title, but stated appellants were divested of their title by reason of the following things: (then follows four pages describing in detail how appellees secured their title by virtue of the foreclosure, the decree, and the deed from the District. Many exhibits were attached.) At no place in the answer was the sufficiency of the allegation of the complaint challenged. In addition to all this the trial court admitted appellants' testimony relative to the question of lack of statutory notice. Moreover, at one time appellants requested the court to treat the complaint as amended to conform to the testimony, and the record does not show this request was denied.

In view of all the above we are unwilling to hold the issue of lack of notice was not raised by the pleadings, or to hold that appellees were in any way misled. We find in the record no request by appellees to have the pleadings made more definite and certain.

(d) Appellees contend that appellants' complaint should be dismissed for failure to properly abstract the record. We have carefully examined this contention but find no merit in it.

(e) Appellees finally contend that it was incumbent upon appellants to plead a valid defense to the foreclosure action. It was so held in *Davis* v. *Bank of Atkins,* 205 Ark. 144, 167 S. W. 2d 876. We are unwilling to sustain this

contention for two reasons. *One.* The opinion in the cited case stated "The judgment against appellant here was not void but voidable". We have already cited the statute which says a judgment or decree without notice is void. This Court can not by its decision change the plain wording of a Statute. *Two.* In our opinion this is not the kind of situation, as it was in the cited case, where it is incumbent upon the appellants to plead a meritorious defense—at any rate to do more than tender the amount of taxes, penalty, and costs as appellants have done. Act 195 mentioned heretofore in no way says or intimates that a land owner can redeem only where he has paid his taxes. It does, however, give him a right to redeem where his taxes or assessments have not been paid. Therefore, it was not necessary here for appellants to allege they paid the assessments on their land.

We conclude, therefore that the judgment must be, and it is hereby, reversed, and the cause is remanded for entry of a judgment in accordance with this opinion.

Reversed and Remanded.

McFaddin, J., concurs.

Ed. F. McFaddin, Associate Justice (Concurring). The appellants, Buford F. Beck and wife, filed this suit in the Circuit Court against W. E. Rhoads and wife, the Bank of Malvern, Waterworks Improvement District No. 16 of the City of Malvern, and other defendants. This is a collateral attack on a foreclosure decree rendered in the Chancery Court; and that is the point that gave me most trouble; but I have concluded that the foreclosure decree shows on its face that proper service was not obtained on Mr. and Mrs. Beck.

The Becks owned certain real estate (hereinafter called "property") in Waterworks Improvement District No. 16 (hereinafter called "District") of the City of Malvern. The assessment of benefits was duly made by the District against the property and annual payments were made by the property holders for several years. However, in 1950 the Becks defaulted in making the payments; the

District filed foreclosure proceedings in the Chancery Court of Hot Spring County and obtained a decree of foreclosure on February 14, 1952 (which decree will be subsequently mentioned); a Commissioner was appointed to sell the property; the sale was made; the District purchased the property at the Commissioner's sale; the sale was duly reported to the Court; and the report was approved on June 2, 1952. After a lapse of time, supposed to be the time for the redemption, the Court ordered the Commissioner to execute the deed conveying the property to the District; the deed was made on February 13, 1960; and approved by the Chancery Court the same day. Several days later the District sold the property here involved to W. E. Rhoads, and he executed a mortgage on the property to the Bank of Malvern. Then on February 14, 1961, Buford F. Beck and wife filed the present suit in the Hot Spring Circuit Court, seeking to recover possession of the property. Mrs. Beck had continued in possession of the property until some time in 1958, when she voluntarily moved away.

In the present case the Circuit Court held that the decree of foreclosure in the Chancery Court showed on its face that valid service had been had on the Becks, and refused to award them any relief. The reason I concur in the reversal of this case is because I believe the Chancery foreclosure decree shows on its face that there was no proper service on the Becks in the foreclosure suit brought by the said District; and the decree of a court of general jurisdiction (chancery court) can be attacked collaterally when the decree shows on its face an absence of proper service on the defendants. *Winn* v. *Campbell,* 94 Ark. 338, 126 S. W. 1059; West Ark. Digest, "Judgment" § 490.

Prior to the passage of Act No. 195 of 1949 the only service required in a foreclosure by a municipal improvement district was a notice published in a newspaper; and many property owners, living on their property, failed to see the notice in the newspaper and lost their property with no personal service of summons ever being obtained on them. To overcome this defect the 1949 Legislature passed Act No. 195, captioned, "An Act To Provide More Protec-

tion for the Owners of Property Located Within Municipal Improvement Districts." Section 17 of that Act (now found in § 20-418.13 Ark. Stats.) requires *(inter alia)*: that, before filing a suit to collect delinquent installments, the Board of Commissioners of the District shall submit the list of the delinquent property to a competent abstracter "who shall compile a list of the names and last known addresses of the owners of record of all tracts . . ." about to be foreclosed; that twenty days before the filing of the complaint, a registered letter, with return receipt requested, shall be sent to each such record owner of the property, containing a description of the property and the amount necessary to be paid; that as an exhibit to the complaint there shall be attached an affidavit of the person or persons who mailed said notices and a report as to whether the notices were returned; and that the amounts expended by the Board of Commissioners for obtaining the list and in sending the registered letters shall be certified by the Board to the Clerk and shall be charged on a per tract basis to the delinquent lands and, if not paid, shall be taxed as costs in the suit. The said Act No. 195 of 1949 should be liberally construed to effectuate its purposes.[1]

In the present case, the original complaint in the foreclosure suit brought by the District in 1952 is in the record, and there is no exhibit attached to the complaint; nor is there any reference in the complaint to any attempted compliance with the said Act No. 195. On the contrary, the decree of foreclosure shows on its face that service had been attempted under the law as it existed prior to 1949, because the decree recites, as contained in the Majority Opinion:

"The Court finds that notice of the pendency of this suit was given for the time and in the manner required by law, as evidenced by proof of publication filed herein, showing that due notice of this suit was given by publication of a notice in a newspaper having a *bona fide* circu-

[1] In 8 Ark. Law Review, p. 386, there is the address of J. L. (Bex) Shaver, as President of the Arkansas Bar Association, entitled, "A Commentary on State and Improvement District Tax Sales"; and the address contains a discussion of Act 195 of 1949.

lation in Hot Spring County for two weeks consecutively, the first insertion being more than four weeks prior thereto; . . ."

The foregoing is all that is recited in the decree as to service. The recitation as to the method of service by publication completely negatives any presumption that might be indulged to support the decree. If the decree had merely said, "the court finds that notice of the pendency of the suit was given for the time and in the manner required by law," we could indulge the presumption of sufficient service. But when the decree goes on, as it does, and tells what kind of service it was, then we are bound by the statement of the Court as to what the service was. The situation here is very much like that in *Boland* v. *Kelly,* 205 Ark. 539, 169 S. W. 2d 865, where the oral testimony was not brought forward and we were asked to indulge the presumption that the testimony supported the findings of the Court; but the record recited a publication that was wholly insufficient to sustain the sale, so we set the sale aside. That is the situation here: a full study of the record discloses that there was no proper service in the municipal foreclosure suit. Furthermore, the decree, after stating the amount of delinquent taxes and penalties on each tract, recites that there is assessed against each tract an attorney's fee, court costs, and publication fee; and there is no reference to abstracter's cost or cost of the registered letters. This shows that said Act 195 was not followed.

Without proper service, the decree is void, as the Majority is holding. I am glad that the Majority cited the case of *Davis* v. *Bank of Atkins,* 205 Ark. 144, 167 S. W. 2d 876. My views are stated in a Dissenting Opinion in that case, in which I said that a default judgment, unless supported by a service of summons, was a void judgment. It cannot be said in the case at bar that the Becks have lost all their rights by lapse of time, because Mrs. Beck testified that she continued to live on the property at all times until 1958, when she moved to Hot Springs; and this present action was filed on February 14, 1961; so there was no lapse of time sufficient to bar the Becks.

Of course, the Becks owe and must pay the District the correct amount of the delinquent assessments, penalty, interest, and costs. When that is paid, they are entitled to recover. It would have been better if this entire proceeding had been conducted in the Chancery Court, but the litigants selected their forum and justice has been accomplished. For the reasons herein stated, I concur with the result reached by the Majority.

McCrosky *v.* State.

5-2790 361 S. W. 2d 266

Opinion delivered October 29, 1962.

Skillman & Webb, for appellant.

Frank Holt, Attorney General, by *Russell Morton,* Asst. Attorney Gen., for appellee.

Sam Robinson, Associate Justice. On the 6th day of January, 1961, appellant, Mary Lou Henson, was charged by information filed by the prosecuting attorney, with the crime of murder in the first degree. On the 16th day of April, 1961, the defendant, Henson, was indicted by the Craighead County Grand Jury for murder in the second degree for the same alleged killing. The defendant was released on $5,000.00 bail-bond made by the United Bonding Insurance Company and executed by D. F. McCrosky, attorney in fact.

The Craighead Circuit Court convened on November 13, 1961, the Henson case being set for trial on November 14. The defendant was not present on the 13th, nor was she present on the 14th when the case was called, a jury panel being present. On the 15th, the defendant having not appeared, the prosecuting attorney moved for a forfeiture of the bond. The Court granted the motion and issued a summons directed to the defendant, Henson, and her bondsman, ordering them to appear within twenty days and show cause why judgment in the sum of $5,000.00 should not be rendered against them. Appellants filed an answer and the matter was set for trial. After hearing all the evidence, the Court set aside half of the $5,000.00 forfeiture and rendered judgment against defendant and her bondsman in the sum of $2,500.00. Appellants have appealed from the $2,500.00 judgment, contending that there was an abuse of discretion by the trial court in failing to set aside a larger portion of the forfeiture.

Ark. Stats. 43-724 provides: "If, before the final adjournment of the Court, the defendant appears and satisfactorily excuses the failure, [to appear in court], the court may discharge the forfeiture." Ark. Stats. 43-729 provides: "If, before judgment is entered against the bail, the defendant is surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail-bond."

There does not appear to be any substantial controversy about the facts. McCrosky, attorney in fact for the bonding company, executed the bond. Mrs. Henson, the defendant, was living in Jackson County, near Newport; McCrosky kept in touch with her attorney and thought he knew where she was and that she would appear in court at the proper time. He had no reason whatever to believe otherwise.

On Saturday, November 11, 1961, Mrs. Henson's attorney went to Jackson County to see his client and learned from her mother that she had left a few hours earlier for Chicago; but the attorney still thought she would be in court Monday. When she was not there Mon-

day, and was not there on Tuesday, the attorney notified her bondsman and gave him the information about the defendant having gone to Chicago.

Mr. McCrosky immediately engaged a private detective in Memphis and sent him to Chicago in an attempt to locate the defendant and have her brought to court. On the 17th, the detective found the place where the defendant had stopped in Chicago, but learned that she had left early that morning to return to Arkansas. The detective gave this information to McCrosky by long distance telephone. McCrosky then engaged the services of Mr. Jake Winningham, ex-sheriff of Jackson County, to locate the defendant just as soon as she returned to Jackson County. Mr. Winningham got in touch with Mr. Leonard Woodman, the present sheriff, and in a short time they took Mrs. Henson into custody and put her in the Jackson County Jail. Later that same day, the 17th, McCrosky and Mrs. Henson's attorney went to Newport and the sheriff released her to her attorney. The lawyer and McCrosky then took her to Jonesboro where she was placed in the Craighead County Jail. This was on the 17th, just two days after the case was to have been tried, and the court was still in session. It might be added parenthetically, that the following April the defendant was tried and acquitted.

It appears that Mrs. Henson's husband was working in Chicago and that she went there in an effort to get money to pay the balance of her attorneys fee. Her husband received his paycheck Thursday evening and they left early Friday morning, arriving in Newport, Arkansas the same day. The evidence is convincing that she did not fail to appear in court because she intended to "jump bond".

Just as soon as the bondsman learned that the defendant was not in court when she should have been, he did everything in his power to produce her before the court, and did cause her to be brought before the court just three days after court convened and only two days after the case was set for trial. It is undisputed that the bondsman spent $912.20 in producing the defendant in

court, and this sum does not include the fee for the detective sent from Memphis to Chicago. It is shown that the total expense to the county caused by the defendant's failure to appear at the proper time, was not more than $780.00, which includes $1.50 per day for the 170 days she was in jail until she was tried. This amount, coupled with the $912.20 and the detective fee, will total $2,000.00 or more that it will cost appellants by reason of the defendant failing to appear in court when her case was called.

In the circumstances, we do not believe the defendant and her bondsman should be further penalized by causing them to pay a greater sum than it takes to reimburse the county for the loss sustained by reason of the defendant's absence. In *Central Casualty Co.* v. *State,* 233 Ark. 602, 346 S. W. 2d 193, a similar case, this Court said: "The court's discretion is not arbitrary; it should be fairly exercised upon the facts in the particular case."

Accordingly, the judgment is modified by reducing it to $780.00, and as modified it is affirmed. Costs to be assessed against appellants. It is so ordered.

ED F. MCFADDIN, Associate Justice (Dissenting). In the case of *Central Casualty Co.* v. *State,* 233 Ark. 602, 346 S. W. 2d 193 (decided May 15, 1961) this Court modified a Circuit Court judgment involving a bond forfeiture. I dissented in that case and stated my views in a dissenting opinion. I dissent in the present case, and my views in this case are exactly as stated in my dissent in the Central Casualty Company case, *supra.*

COMER LBR. & SUPPLY CO. *v.* WOODWARD.

5-2788 361 S. W. 2d 259

Opinion delivered October 29, 1962.

Bernard Whetstone, for appellant.

Keith, Clegg & Eckert, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from an order sustaining a demurrer to appellant's complaint and dismissing the complaint as failing to state a cause of action. Appellant, Comer Lumber and Supply Company, a supplier of oil well drilling materials, sued appellees, W. A. G. Woodward and others, joint owners of the working interest in an oil and gas lease, for supplies furnished to drill a well on the leased property.

Appellees demurred to appellant's complaint, and the trial court sustained the demurrer and offered appellant additional time to amend its complaint. Appellant elected to stand on its original complaint, and the complaint was therefore dismissed. From the order of dismissal comes this appeal.

For reversal appellant urges simply that the trial court erred in sustaining the demurrer and in dismissing the complaint.

Omitting the formal parts, the complaint reads as follows:

"1. Plaintiff is a domestic corporation with its principal place of business in the City of El Dorado, where it is, and was at all times herein mentioned, engaged in the lumber and building supply business, including material and supplies for the drilling of oil and gas wells, and allied endeavors.

"2. Defendants are individual citizens and residents of Columbia County.

"3. At all times herein mentioned defendants were the joint owners of the working interest in an oil and gas lease covering the SE¼ of the SE¼ of Section 5, Township 20 South, Range 26 West, in Lafayette County . . .

"4. Under the terms of said leases (of which these defendants were assignees), and as owners of the working interest in said leases, defendants were obligated to drill a certain well on the above described property.

"5. Pursuant to this obligation, and in compliance with it, the defendants engaged one Beverly Johnson, who at the time was operating under the trade name of The Magnolia Company, as its agent to drill said well.

"6. Thereafter, said Beverly Johnson engaged one A. A. Morgan as a subagent to handle the actual drilling. This was shortly before February 6, 1960.

"7. The engaging of said Beverly Johnson and his, in turn, engaging A. A. Morgan, as aforesaid, was well known and with the active consent of all the defendants.

"8. Pursuant to this arrangement, said A. A. Morgan ordered certain supplies for the drilling of said well over a period beginning February 8, 1960, to March 31, 1960, which supplies were delivered by plaintiff and used by said A. A. Morgan in the drilling of the well identified as State-Moore No. 1, 330 feet south and 380 feet west of the northeast corner of the SE¼ of the SE¼ of Section 5, Township 20 South, Range 26 West in Lafayette County. Itemized statement of said supplies in the form of duplicate invoices and ledger statement, showing a balance due in the amount of $4,774.58, duly verified by H. H. Causey, president and general manager of the Comer Lumber and Supply Company, is attached hereto marked Exhibit A, and made a part of this complaint.

"9. Said balance is still due and owing this plaintiff in spite of due and repeated demands therefor.

"Wherefore, premises considered, plaintiff . . . prays judgment against the defendants, . . ., jointly and severally, in the amount of $4,774.58, with interest . . . plus costs, and for all other proper relief."

To sustain his contention, appellant relies heavily upon *Superior Oil Company* v. *Etheridge,* 219 Ark. 289, 242 S. W. 2d 718. In that case the court held that "the lease of Superior was properly subjected to the lien of Etheridge". The Superior Oil Co. case has no bearing on the instant case. The case at bar is not a lien case—it must stand or fall on the theory of agency.

The appellees contend earnestly that the allegations in the complaint, to withstand demurrer, should allege that Beverly Johnson had been appointed as agent; that Beverly Johnson had been given authority to appoint a subagent; that A. A. Morgan had been appointed a subagent and that said authority given to Beverly Johnson, and, in turn, delegated to A. A. Morgan, permitted Morgan to incur debts in behalf of the appellees; that any language of such tenor might be sufficient, but that, instead, the complaint only contains, vague, innocuous and legally meaningless language.

We think the allegations are reasonably understandable. The complaint alleges that appellees engaged an agent, who in turn engaged a subagent, with appellees' knowledge and consent. [See paragraphs 5, 6, and 7, of the complaint, *supra.*] It will also be observed that in paragraph 8 of the complaint, appellant alleges that the supplies were used in drilling a well on the same property that it earlier alleged was leased to appellees [paragraph 3, complaint, *supra*].

The allegations of agency might well have contained a statement that the agency was authorized, but the lack of such a statement does not render the complaint completely vulnerable. Appellees filed no motion to make the complaint more definite and certain. The long-standing rule of this court is that in testing the sufficiency of a complaint on general demurrer, the court indulges every reasonable intendment in its favor, and the demurrer should be overruled if the facts stated, together with every reasonable inference arising therefrom, constitute a cause of action. *Neal* v. *Parker,* 200 Ark. 10, 139 S. W. 2d 41. It is generally held that where agency is averred, it may be

done without describing the authority of the agent, in the absence of a motion to make more definite and certain. 2 C.J. 905, § 611; 3 C.J.S., Agency, § 305, p. 238; *Kjerschow* v. *Daggs,* 24 Ariz. 207, 207 P. 1089; *Pacific Mut. Life Ins. Co.* v. *Barton,* 5th Cir., 50 F. 2d 362; *Rule* v. *Mitchell,* 173 Kan. 803, 252 P. 2d 924. The question of authority of an agent is one of evidence, not of pleading. This rule is well stated in the holding in *Rogers* v. *Beiderwell,* 175 Kan. 223, 262 P. 2d 814, 45 A.L.R. 2d 578, as follows:

"Where a petition alleges that another acted as agent of the defendant, such general allegation is ordinarily sufficient without averring that the agent had authority to act in the premises, in the absence of a motion to make more definite and certain, the question of the agent's authority being one of evidence, not of pleading."

Applying this rule to the facts in the case at bar, we find that the demurrer was improperly sustained and the order of dismissal is therefore reversed.

LOETSCHER *v.* BASELINE SEWER IMP. DIST. NO. 201

5-2898 361 S. W. 2d 257

Opinion delivered October 29, 1962.

James L. Sloan, for appellant.

William M. Dabbs, Jr. and *Rose, Meek, House, Barron, Nash & Williamson,* for appellee.

NEILL BOHLINGER, Associate Justice. The appellant is the owner of real property within the boundary of the Baseline Sewer Improvement District No. 201, Pulaski County, Arkansas which is a suburban improvement district organized under Ark. Stats. 20-701 *et seq.*

The appellees filed in the office of the County Clerk in Pulaski County a petition for the formation of such district which petition is in proper form and was properly filed and, acting under the statute, the County Clerk of Pulaski County published in a daily newspaper on January 5, 1961, a notice of the public hearing on said petition to be held in Pulaski County Court on January 19, 1961. This notice was published the second time on January 13, 1961, or eight (8) days after the first publication and six (6) days before the date of the public hearing.

The appellant has brought this action in the Pulaski Chancery Court alleging that the notice of the hearing was not "published once a week for two weeks"—within the meaning of the statute. The publication of the notice is for the purpose of advising the people having property within the district of the date of hearing on the petition for the formation of the district in order that such property owners may attend and protect their rights. We have many times held that the publication of the notice is jurisdictional. *American State Bank of Charleston* v. *Street Improvement Dist. No. 3 of Charleston,* 197 Ark. 986, 125 S.W. 2d 796. The same holding has been applied to the matter of tax sales and the sole issue that confronts us here is whether the publication of the notice of petition and hearing complies with the requirements of the statute which is Ark. Stats. 20-702:

"Said notice shall be published *once a week for two* [*2*] *weeks* in some newspaper published and having a *bona fide* circulation in the county where the lands affected are situated. This notice may be in the following form: * * *" [Emphasis added]

Approaching that statute from a common sense angle it is first apparent that the property owner is assured

of two (2) weeks notice. While it is true, as appellees point out, that one theory of a week might be based on the biblical or calendar week under which the term "*week*" would commence on Sunday and end on Saturday, the statutory week has been the theory under which our conclusions on the matter of notice have been universally bottomed. In *Raum* v. *Leach,* 53 Minn. 84, 54 N.W. 1038, it was held that a notice to be published for "two (2) weeks" requires an interval of fourteen (14) days between the first publication and the events stated in such notice. We therefore first ascertain if fourteen (14) days did elapse between the first notice and the date of the hearing.

It is conceded that the first notice was published on January 5, 1961. January 5, 1961, was on Thursday and counting seven (7) days from and including the fifth would close the first week with the eleventh. The second hebdomad includes the twelfth through the eighteenth. Since the notice was in publication on the fifth advising the property owners of the proposed hearing, the fifth cannot be eliminated from consideration. Therefore an elementary calculation of the days that intervened between the date of the first publication and the date of the hearing reflects that fourteen (14) days elapsed. See also Ark. Stats. 27-130.

Many excellent citations with which counsel have favored us deal for the most part with tax sales where it was shown that the notice had not run for the full statutory time. Since we find that in this case the notice did run for the full statutory period, we do not lengthen this opinion with the citations which have been given us in that respect.

The second contention of appellant is that the second publication should have been published seven (7) calendar days apart from the preceding publication to be at least seven (7) days prior to said hearing. In the case of *Byrne* v. *Less,* 92 Ark. 211, 122 S.W. 635, we had a case in which a second notice under the statute was published on the fifteenth day rather than on one of the days be-

tween the 8th and 14th days inclusive, and it was there held that the once a week, or weekly for two weeks, requirement had not been complied with.

Not so in the instant case. The first notice, as has been stated, was published on the fifth. The publication of that notice sufficed for a publication in the week from and including the fifth through the eleventh. The second weekly period in which a notice must be published ran from and included the 12th through the 18th. The notice was published on the 13th which is one of the days within the second week. The statute says the notice shall be published once a week for two weeks. The use of the word *"for"* in this connection means *"during"*. It would not have sufficed under this statute if the second notice had been published, for example, on the tenth and not thereafter for the tenth would be one of the days within the first week.

There is nothing in the statute that connotes an intention by the Legislature that any specific time is to be observed within that second week. Neither the designation of the lapse of a specific time between the last publication and the date of hearing, nor the phrase "shall be published ..... days before the day fixed for the hearing" are strangers to the Legislature, which body employed this expression in the formation of municipal improvement districts:

"* * * it shall be the duty of the City or Town Clerk or Recorder to give notice that such petition will be heard at a meeting of the City or Town Council named in the notice, which will be held more than fifteen [15] days after the filing of such petition. Such notice shall be published once a week for two [2] weeks, the last insertion to be not less than seven [7] days before the date fixed for the hearing." [Ark. Stats. 20-104]

Therefore, it appears clear that had the Legislature intended a lapse of time between the second notice and the hearing it would have so stated. That was its perogative. It is not ours. A clear interpretation in this connection

is found in *Koch* v. *Mack International Motor Truck Corp.,* 201 Md. 562, 95 A. 2d 105, quoting Merrill on Notice, § 668.

"Questions arise concerning specifications that publication shall be 'for' a certain number of weeks before an event. A week in this sense means seven days and the prescription can be satisfied only by publication starting the specified multiple of seven days prior to the effective date. [*Fisher* v. *Booher,* 269 Ky. 501, 107 S.W. 2d 307] However, if the several publications are to be once a week for a specified number of weeks, the spacing need—not be exactly seven days apart, provided there is one appearance in each period of seven days and the proper number of hebdomads intervenes—between the initial publication and the effective date."

We therefore find that the statutory notice was published for the full time required by the statute and that the publication on the 13th of January, 1961, of the second notice falls within the statute. The chancellor so found and the decree in this case is accordingly affirmed.

George Rose Smith, J., not participating.

5-2786 361 S. W. 2d 525

Opinion delivered November 5, 1962.

Hardin, Barton & Hardin, for appellant.

Gordon & Gordon, Howell, Price & Worsham, for appellee.

CARLETON HARRIS, Chief Justice. This litigation stems from the killing of D. L. Russell by Lee Mode, ap-

pellant herein.[1] Suit was instituted by Clida Russell Barnett, Administratrix in Succession of the estate of D. L. Russell, and as Guardian and next friend of Jerry Russell, Don Russell, Ferrell Russell and Darrell Russell, minor sons of the deceased. Count I of the complaint alleged that Russell and his wife, Mildred Sellars Russell, lived happily together as man and wife for more than 15 years until the fall of 1957, at which time appellant, Lee Mode, commenced making clandestine visits to Mrs. Russell, showering his affections and attentions upon her in an effort to entice her favor; that Mode did willfully and wickedly steal and alienate her affections, and about the 18th day of April, 1958, lured her away from her children and her husband, causing her to desert and abandon the children and to separate from their father; that since said date, Mode and Mrs. Russell had been living together, and that the children had been injured and damaged by being deprived of the comfort, companionship, love, affection and society of their mother. Actual damages were sought on this count in the sum of $100,000, together with punitive damages in the sum of $50,000.

Under Count II, it was alleged that Mode, after learning that D. L. Russell was attempting to effect a reconciliation with his wife, and after deliberation and premeditation, killed Russell on October 13, 1958, by shooting the latter on the streets of Conway; that the children had been deprived of their father's support, contributions, and future earnings, and as a result of his wrongful death, had suffered extensive grief, mental pain and anguish; that they had been deprived of the companionship, love and affection of their father and had been damaged in the sum of $100,000. $100,000 in damages was sought as actual damages to the estate, together with $50,000 punitive damages. The court sustained a motion to quash the original service, and after

[1] For a discussion of circumstances leading to, and surrounding the killing, see *Mode* v. *State*, 231 Ark. 477, 330 S. W. 2d 88, and *Mode* v. *State*, 234 Ark. 46, 350 S. W. 2d 675. Mode was convicted of 2nd degree murder in each case, and sentenced to 21 years in the penitentiary. The first case was reversed because of an erroneous instruction; this court affirmed the 2nd conviction.

numerous attempts, valid service was finally obtained on Mode on October 14, 1960. On the following November 1, Mode filed an answer himself, stating: "I deny every statement (sic) and every thing the plaintiff says and deny that they are entitled to anything from me and ask that the court dismiss their suit and deny them anything." The case was set for trial for January 3, 1962, and the clerk of the court notified appellant of this date by sending him a registered letter with return receipt requested. The return receipt was signed by Mode on December 16, 1961. On the date set for trial, appellant did not appear. Counsel for appellee requested that the court try the case without a jury. The request was granted and the court, sitting as a jury, proceeded to hear the testimony. After the conclusion of the evidence, judgment was entered against appellant in the total amount of $90,102.75, broken down as follows:

For disruption of the family ties, depriving the children of the parental care, affection, and instruction of their mother:

1. Jerry Russell	$2,000.00
2. Don Russell	3,000.00
3. Ferrell Russell	3,000.00
4. Darrell Russell	3,000.00

For loss of their father's contribution and support:

1. Jerry Russell	$2,181.40
2. Don Russell	3,116.28
3. Ferrell Russell	4,051.16
4. Darrell Russell	4,051.16

For the use and benefit of the children by reason of the loss of decedent's parental care, instruction, love and affection:

1. Jerry Russell	$2,500.00
2. Don Russell	5,000.00
3. Ferrell Russell	5,000.00
4. Darrell Russell	5,000.00

For the use and benefit of the children as damages for their grief and mental anguish:

1. Jerry Russell	None
2. Don Russell	$7,500.00
3. Ferrell Russell	7,500.00
4. Darrell Russell	7,500.00

Under Count II of the complaint, the court granted punitive damages in the sum of $25,000 for the use and benefit of the four children.[2] From the judgment so entered, appellant brings this appeal. For reversal, four points are relied upon, as follows:

I.

Section 2 of Act 460 of 1949 (Ark. Stats. Ann. 27-1743.2) is unconstitutional in that it denies a defendant his right to a jury trial and the trial court therefore erred in failing to empanel a jury to hear the evidence and fix the damages, if any, in this case.

II.

The trial court erred in granting appellee judgment on Point One of the complaint for the alleged "disruption of family ties" because minor children cannot recover for such alleged wrongs.

III.

The court erred in allowing the plaintiff's request for admissions to be introduced in evidence.

IV.

The damages awarded by the trial court are excessive.

We proceed to a discussion of each point in the order listed.

I.

Ark. Stats. Ann. 27-1743.2 provides as follows:

"Hereafter, in all tort cases where the defendant answers in the time and manner provided by law, but

[2] The balance was an award of $702.75 for doctor, hospital, and funeral expenses incurred.

fails to appear and defend said cause in the time and manner provided by law, said failure to appear and defend in the time and manner provided by law shall constitute a waiver of the right of a trial by jury on the issue of damages."

Appellant vigorously asserts that this statute is unconstitutional because (he contends) it denies a defendant his right to a jury trial, granted by Amendment No. 16 to the Constitution of Arkansas. Amendment No. 16, Article 2, § 7 Amended, reads as follows:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law; * * *"

We do not agree with this contention. Obviously, those who drafted the constitutional amendment had the purpose and intention to invest in the Legislature the authority to determine what actions on the part of a litigant constituted a waiver of the right of trial by jury; we say "obviously" because there could have been no other purpose in the provision, "but a jury trial may be waived by the parties in all cases in the manner prescribed by law." This provision, of course, includes prospective laws. The General Assembly is the lawmaking power, and it proceeded, in passing Act 460 of 1949 [of which 27-1743.2 is a part], to prescribe and enumerate various acts by which a defendant waives a trial by jury. While it is no part of our duty to pass upon the wisdom of legislation, we might comment that the statute appears entirely reasonable. A defendant is certainly aware that he has been sued, else he would not file an answer. In the instant litigation, Mode filed an answer himself, so it is readily apparent that he knew of the allegations in the complaint and the relief sought. Appellant states in his brief:

"It can be appreciated that there are circumstances in which a defendant finds himself unable to appear at a trial after having formally denied the plaintiff's alle-

gations. This could be due to ill health, lack of funds with which to secure the services of counsel[3] or any other of a multitude of reasons."

Let it be pointed out, however, that there is no showing that any of the possible reasons cited, prevented the appearance of Mode at the trial. Section 29-506 Ark. Stats., 1962 Replacement, grants the trial court power to set aside a judgment "for unavoidable casualty or misfortune preventing the party from appearing or defending." No motion was filed by appellant suggesting that relief should be granted under this section. Be that as it may, we find, and hold, § 27-1743.2 constitutional, and the court was accordingly within its rights in trying the case without a jury after appellee so requested.

II.

The question of whether children can recover from one who disrupts family ties by enticing a parent away from the home, has been before courts of various states within the last several years. In *Whitcomb* v. *Huffington* (Kansas) 304 P. 2d 465, an opinion handed down on December 8, 1956, it is pointed out that three states (Illinois, Michigan and Minnesota) uphold the right to maintain such an action, and twelve jurisdictions (Arkansas, California, Colorado, Connecticut, District of Columbia, Massachusetts, New Jersey, New York, North Carolina, Ohio, Texas and Wisconsin) deny the right to maintain the action. Arkansas was undoubtedly included because of our holding in *Lucas* v. *Bishop,* 224 Ark. 353, 273 S. W. 2d 397. It is true, as pointed out by appellee, that the fact situation in *Lucas* was different from the case at bar. In the earlier case, Kenneth and Wilma Lucas were divorced at a time when their child, Nick Alvin, was three years of age. The divorce was awarded to Mr. Lucas, the decree finding that his wife had been guilty of abuse, contempt and studied neglect. Custody of the child was, by consent, awarded to the mother. Mrs. Lucas, in approximately two months, married Charles Bishop. Lucas subsequently, as next friend of his son,

[3] The record, relative to Mode's financial status, would hardly support the second possible reason listed by appellant.

instituted suit against Bishop for $50,000, alleging that the child had enjoyed a comfortable, happy home, but that Bishop had enticed the child's mother to such an extent that her domestic affections were alienated, and that Nick Alvin had been deprived of the parental care of his mother and father in their home, and the financial security he was afforded before the alienation of his mother's affections. Bishop demurred and the court sustained the demurrer, dismissing Lucas' complaint. On appeal, we affirmed. Of course, in that case, the child continued to live with its mother, whereas in the instant case, the mother left the children. We agree with appellee that the factual basis for recovery is much stronger in the case at bar than in *Lucas;* still we discern no legal difference. In *Lucas,* this court said:

"Unfortunately the wrong here emphasized is one that has not been legislatively translated into dollar compensation in this state; nor does the common law supply a plaintiff's answer. * * * Appellant calls attention to Art. 2, § 13, of the Arkansas constitution: 'Every person is entitled to a certain remedy in the law for all injuries and wrongs he may receive in his person, property, or character . . .' The argument is that unless relief is granted by this court it is apparent that appellant will be without a remedy and that he will be deprived of just rights without due process of law.

"But the difficulty is that in this state there is no statutory law to which recourse may be had, and the common law is not helpful, hence 'denial of due process' is rhetorical rather than substantive."

As heretofore pointed out, the weight of authority holds that minor children cannot recover for disruption of family ties, and some of the reasons (in addition to lack of statutory authority) are pointed out in cases from other jurisdictions. In *Henson* v. *Thomas,* 231 N. C. 173, 56 S. E. 2d 432, the Supreme Court of North Carolina said:

"To hold otherwise would mean that every time a person persuades a mother to engage in other activities

to such an extent as to cause her to neglect her children, he commits a tort for which he may be compelled to respond in damages. The only difference lies in the gravity of the wrong and the extent of the damage.

"The problem here, in its last analysis, is sociological rather than legal. No one would question the fact that a child has an interest in all the benefits of the family circle. Nor may it be denied that the legislative branch of the government may give this interest such legal sanction as would make the invasion or destruction thereof a legal wrong. So far, it has not deemed it wise to do so."

In *Whitcomb* v. *Huffington, supra,* the Supreme Court of Kansas stated:

"No one will deny the fact that under such circumstances a child is the innocent victim and, in most instances, suffers damage—emotional, financial, and otherwise. But, that is not the question. The question is whether, under such circumstances, the child is to be permitted to bring the action.

"If we were to answer the question in the affirmative the ramifications and far-reaching results of our decision would readily be apparent to anyone giving much thought to the matter. In practical effect we would be opening up a new field of litigation, heretofore entirely unknown, between minor children and their grandparents, for instance, or between minor children and business or social companions or acquaintances of their parents, when, perchance, some incident or line of conduct on the part of those persons occurs which might be said to have contributed to the eventual breakup of the family home and circle. We recognize fully that merely because the asserted cause of action was unknown to the common law and has no statutory sanction in this state, such fact does not present a conclusive reason for the denial of the existence of such right. Nevertheless, we are of the firm conviction that from the standpoint of sound public policy the creation of new rights of action in the field of alienation of affections is a question for

the consideration and determination of the legislature, and is a function which this court should not usurp."

Contrary to some of the reasons advanced by those courts for not permitting such a cause of action, we, of course, recognize that from a moral standpoint, there is potent argument that a right of recovery should lie against one, who is so calloused in mind and heart, that he will take away the mother of four young boys. One would be hard pressed to find sympathy for the individual who commits such a deed, but, as was stated in *Lucas* v. *Bishop, supra,*

"The creation of a right of action for a child's benefit to compensate for loss of the intangible elements set out in the complaint here is a subject that addresses itself to the state's policy-forming department. Until the legislature has seen fit to designate the redress which, under Art. 2, § 13, of the constitution it has a right to do, the judiciary should not transgress the coordinate boundary established by Art. 4, § 1, of the constitution."

We take occasion to reiterate this language. It follows that the court erred in rendering judgment against appellant under Count One of the complaint for $11,000, and that item is disallowed, set aside, and stricken from the judgment.

III.

The Request for Admissions (which was not answered) was pertinent only to Point II, and since we have held there could be no recovery under that count, a discussion of Point III is unnecessary.

IV.

It is contended that some of the awards were excessive. It is first asserted that the sum of $13,400 awarded for contributions and support is not justified by the evidence. Russell's income, at the time of his death, was $45.00 per week, which would amount to $2,340 per year. Jerry Russell was 14 years of age; Don Russell

was 11 years of age; the twins, Ferrell and Darrell, were 8 years of age. It is true that the record does not disclose just what amount the father contributed for the support of these children, but it is certain that he took care of them, *i.e.*, fed them, clothed them, and apparently provided them with whatever sums of money they used for recreation. Considering that the two youngest boys were 13 years away from attaining their majority, and Don and Jerry were respectively 10 and 7 years away from that period, we cannot agree that the total amount is excessive.

It is likewise asserted that the awards for decedent's parental care, instruction,[4] and love and affection, in the total amount of $17,500, are excessive. No contention is made in appellant's brief that this last was not a proper element of damage, but it might be mentioned that we find no wrongful death case from this state that uses the term "love and affection"; in fact, in *Railway Co.* v. *Maddry*, 57 Ark. 306, 21 S. W. 472, this court held that the happiness found by the child in the love and companionship of the decedent father should never be considered. Subsequently, however, in several cases, we used language which indicated this to be a proper award. For instance, in *St. Louis & N. A. Rd. Co.* v. *Mathis*, 76 Ark. 184, 91 S. W. 763, it was said:

"So, in a case of this kind no amount of money can fully compensate children for the distress of mind suffered by them in the violent and painful death of the father, and in *the loss of his affectionate care*[5] and attention, but the court must ascertain some just amount to allow a fair compensation for the injury."

In *Kansas City So. Ry. Co.* v. *Henrie*, 87 Ark. 443, 112 S. W. 967, this court, referring to a decedent father, and discussing elements of damage, stated:

[4] We have held that "the loss to minor children of the instruction, physical, moral and intellectual training by a parent is a proper element to be considered in estimating the damage to the children by reason of such parent's wrongful death." *St. Louis, I.M. & S. Ry. Co.* v. *Prince*, 101 Ark. 315, 142 S. W. 499, and cases cited therein.

[5] Emphasis supplied.

"He was * * * kind and affectionate toward his wife and children and greatly interested in the proper education and training of his children. * * *"

Other cases use language in a similar vein. It would, therefore, appear that the terms used in the cases cited, and others of similar import, are, to a degree, synonymous with the term "love and affection." Appellant states there is no evidence in the record that Russell did other than take his sons fishing and swimming; also, occasional visits to the old homeplace in order for the boys to see their friends. It is also contended that the award for "grief and mental anguish," in the amount of $22,500, is not sustained by the evidence.[6]

We are not familiar with any rule by which the explicit pecuniary value of parental care, instruction, and affection, can be determined, but the children were definitely entitled to such an award. It would certainly appear from the record that these benefits to the children were mainly furnished by the decedent, for the mother voluntarily left her home—and these children. According to the record, the children had seen their mother but few times after she left the home; in fact, two of the boys testified that they had not seen her at all subsequent to their father's funeral.

In *Peugh* v. *Oliger*, Law Reporter of March 20, 1961, 345 S. W. 2d 610, we pointed out that the term "Mental anguish" means more than normal grief, quoting from an earlier opinion of this court as follows:

"It will thus be seen that the mental anguish for which a recovery can be had must not consist simply of annoyance or disappointment or a suffering of the mind growing out of some imaginary situation, but it must be some actual distress of mind flowing 'from the real ills, sorrows, and briefs of life'."

In *Strahan* v. *Webb*, 231 Ark. 426, 330 S. W. 2d 291, in discussing mental anguish, we said:

[6] No award for mental anguish was made for the oldest boy, Jerry, who did not testify in the case.

"Who can say how much mental anguish is worth * * * Unquestionably, the anguish and total loss of companionship will be felt far more in some cases than in others. There are individuals who really never completely reconcile themselves to the loss of a loved one, while, on the other hand, there are those who adjust themselves within a reasonable period of time, and are pretty well able to continue along in the usual pattern." In the instant case, we have three small boys who had been in close association with their father, probably a closer relationship than in the average family, due to the fact that there was no mother present to share in the companionship. Suddenly the one remaining parent was taken away from them—and in a violent manner. According to the evidence of Cecil Barnett, husband of Mrs. Clida Barnett, the boys' grandmother, the younger boys cried many nights, and on several occasions awakened the Barnetts in the middle of the night, "There's been a many of nights that me and my wife would go to bed, pick them up and take them in and love them and talk to them." The witness stated that Ferrell, one of the twins, had been under a doctor's care due to extreme nervousness. The boys testified that their father was good to them, and would take them fishing, swimming, and to the picture show. Mrs. Barnett stated, "He took the boys everywhere he went when he wasn't working, and they were not in school. If he went anywhere, they were with him, because he didn't leave them behind. And he worshiped those boys." She also testified that their father's death affected their school work: "They were able to continue in school but they had to stay in that same grade that year. They had to stay in that grade two years."

As stated, there is no way to measure mental anguish. Who can determine the grief of a small boy over the sudden death of his father—a father with whom he had been closely associated—and who had been the lone source of parental advice and encouragement? The adult child who loses a parent is generally better able to withstand the blow than a minor child whose close and con-

stant association with the parent in the home creates considerably more of a binding tie. It need not be added that the manner of the death of a loved one contributes to mental anguish, and the facts of Russell's death were well known by the children.

The $25,000 award for punitive damages is not specifically attacked, but, even so, the record supports the award made.[7]

We are unable to say that any of the awards were excessive.

In accordance with the views heretofore expressed, the judgment is modified by reversing the award in the total amount of $11,000 made under Count I (for disruption of the family ties and depriving the children of the parental care, instruction and affection of their mother). So modified, the judgment, in a total amount of $79,102.75, is affirmed.

[7] For instance, Wendell Bryant, Circuit Clerk and Recorder of Faulkner County, testified to several transactions reflected in his records, wherein Mode was paid sums of money totaling $125,000.

CRESWELL *v.* KEITH.

5-2782 361 S. W. 2d 542

Opinion delivered November 5, 1962.

Mitchell & Mitchell and *Roger L. Murrel,* for appellant.

Spencer & Spencer, for appellee.

ED. F. MCFADDIN, Associate Justice. This is the second appearance of this case in this Court. Our first opinion was on April 3, 1961 (see *Creswell* v. *Keith,* No. 2339, 233 Ark. 407, 344 S. W. 2d 854).

On August 28, 1958, Creswell filed suit against Keith *et al.,* claiming, *inter alia,* that Creswell was entitled to judgment for $61,500.00 because Keith had defrauded him of that amount, and that a receiver should be appointed for the Creswell-Keith Mining Trust, and for other relief. By answer, the defendants alleged that on May 28, 1957, Keith had executed a complete release of all matters involved in the litigation. When the release was exhibited, the Chancery Court refused to hear any testimony and dismissed Creswell's suit. On appeal to this Court, we held that evidence should be heard to determine whether the release was valid. That was our holding in the opinion of April 3, 1961 previously mentioned. On remand, the Chancery Court heard all the evidence offered and after weighing the same, dismissed the plaintiff's complaint for want of equity, finding:

"That the original release executed by the plaintiff, Arch N. Creswell, was a valid release executed for valid considerations and that the plaintiff has failed to establish any defense to said release or any grounds on which said release[1] could be set aside."

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[1] The release which Creswell admitted signing is as follows:

"RELEASE

"KNOW ALL MEN BY THESE PRESENTS:

"I, Arch N. Creswell, of the City of Hot Springs, County of Garland, State of Arkansas, for and in consideration of the sum of $910.00 Dollars in U. S. Currency to me in hand paid by R. Neville Keith, of the City of Hot Springs, County of Garland, State of Arkansas, paid for and in behalf of himself personally and as Trustee and on behalf of Creswell-Keith, Inc. and the Creswell-Keith Mining Trust both of Hot Springs, Arkansas, do release remise and discharge R. Neville Keith personally, R. Neville Keith as Trustee, Creswell-Keith, Inc. and the

From that decree, Creswell brings the present appeal. To overcome the admitted release, Creswell stated that he received no consideration at the time he signed it. But he finally admitted that he received $910.00 and a certificate for 100,000 shares in the Creswell-Keith Mining Trust, and also a mine in Mexico and certain property at the mine which Creswell had operated for one of the companies in which he and Keith were interested. The chattel property at the Mexico mine had a book value of several thousand dollars. Creswell was the man who knew most about it. He had returned from Mexico and had been in Hot Springs three months before he executed the release in 1957. Certainly there was consideration to support the release; and there is no evidence of duress. As to misrepresentation and fraud causing Creswell to execute the release, the evidence established that Keith had written Creswell about various business matters from time to time while Creswell was in Mexico managing the mine, and of which management Keith was very bitterly complaining. In short, there is no evidence of fraud or misrepresentation.

Finally, Creswell claims that he and Keith commenced their dealings as partners, that on account of such relationship Creswell trusted Keith, and that Keith, in obtaining the release from Creswell, did not observe the standards that law and equity require in dealings between partners. In *Alexander* v. *Sims,* 220 Ark. 643, 249 S. W. 2d 832, and in *Boswell* v. *Gillett,* 226 Ark. 935, 295 S. W. 2d 758, we had occasion to consider and emphasize the trust relationship that exists between partners; and we adhere to all the rules therein stated. Certainly Keith owed to Creswell a full and complete disclosure of assets and liabilities before purchasing his

Creswell-Keith Mining Trust of and from all, and all manner of actions, judgments, executions, debts, dues, claims, and demands of every kind and nature whatsoever which against R. Neville Keith personally, R. Neville Keith as Trustee, Creswell-Keith, Inc. and the Creswell-Keith Mining Trust ever had or now have, or which I or my heirs, executors or administrators have nor or may hereafter have by any reason whatsoever.

"In witness whereof, I have hereunto set my hand this 28th day of May, 1957. (Signed) Arch N. Creswell."

interest. In 40 Am. Jur. 218, "Partnership" § 129, the holdings are summarized:

"The general rule that the utmost good faith is required of partners in their relationship with each other, and that, since each is the confidential agent of the other, each has a right to know all that the others know and each is required to make full disclosure of all material facts within his knowledge in any way relating to partnership affairs, is held almost universally to apply in the case of a sale by one partner to another of his interest in the partnership."

With these guiding principles in mind, we find nothing in the record to show that Keith failed to make a full disclosure of all material facts relating to the enterprises in which he and Creswell were interested. Creswell complains that after Keith acquired his interest, oil wells were commercialized on holdings in Arkansas. But the record shows that on November 26, 1956, Keith wrote Creswell a letter[2] while the latter was in Mexico, and told him of the oil possibilities. When Creswell returned from Mexico, he had the right of access to all the books and files of the various enterprises in which he and Keith were interested. So far as the record before

[2] here are portions of the said letter:

"I am working on a deal that will really be something and will explain it fully in my next letter.

"I have a few papers for you to sign and will enclose those also. As I explained to you we are selling enough interests in an oil well to pay the costs of drilling in advance of the drilling and have nearly enough to drill our first well on our own. I sold $4,000 or 2/16ths yesterday.

"How are you coming along with the sale of the equipment? I wrote those people from Pocahontas but haven't received a letter in reply. We will wait a little longer and if nothing materializes I feel we should go ahead and sell the equipment. Our oil business here is much too big.

"Do you want me to sell some of your stock for a dollar that you bought for 25 cents? It won't be long before we will be selling it. If you do perhaps you better finish paying for yours so we can issue the Certificate. How is the weather there? It has been a little chilly here lately. I have appointed a Board of Directors for our Corporation and they have been helping me in the sale of stock and other Departments.

"Well I better close and get to work. It seems there is just not enough hours in a day to do every thing that has to be done. Some of the Stockholders have paid up and we now have over $30,000 in cash in the bank in Little Rock."

us shows, the 100,000 shares which Creswell obtained in the Creswell-Keith Mining Trust might have been considered by him as ample for executing the release.

Creswell has not shown that the finding of the Chancery Court is against the preponderance of the evidence.

Affirmed.

JEFFERY *v.* CITY OF MT. VIEW.

5-2791 361 S. W. 2d 540

Opinion delivered November 5, 1962.

Caldwell T. Bennett, for appellant.

John B. Driver, for appellee.

ED. F. MCFADDIN, Associate Justice. This action was instituted by appellant to recover money which he claimed due him as marshal of Mountain View, Arkansas, a city of the second class. (*Luther* v. *Gower*, 233 Ark. 496, 345 S. W. 2d 608.) The appellees are the City of Mountain View and its mayor and councilmen.

Appellant's complaint alleged: that at the election in 1958 Jeffery was duly elected for a two-year term as marshal of the city; that he took office on January 1, 1959, and performed the duties of the office; that the previous marshal of the city had been paid $225.00 per month, but that the city refused to pay Jeffery more

than $125.00 per month, which he accepted under protest for the ten months from January through October, 1959, totalling $1,250.00; that since November 1, 1959, the city had refused to pay Jeffery anything. He prayed for the full salary of $225.00 per month for the entire term of two years, less the $1,250.00 paid him.

The city and other defendants filed general denial, and also specifically denied: that Jeffery was ever legally elected marshal or that the salary of the city marshal had ever been established by law. Affirmatively, the defendants alleged that on March 25, 1959, the city had adopted an ordinance,[1] by the terms of which the mayor and city council had the right to choose a marshal for the term and on conditions and at the salary as fixed by the city council; and that by resolution of October 13, 1959, the city had dispensed with Jeffery's services because of inefficiency and neglect of duty. The city denied owing Jeffery anything. The case was tried before the Circuit Judge, without a jury, on the pleadings and some stipulated facts. The Circuit Court rendered judgment, dismissing the complaint, and from that judgment there is this appeal.

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[1] The said ordinance reads:

"AN ORDINANCE TO PROVIDE FOR THE APPOINTMENT OF A CITY MARSHAL FOR THE CITY OF MOUNTAIN VIEW, ARKANSAS. BE IT ENACTED BY THE CITY COUNCIL OF MOUNTAIN VIEW, ARKANSAS:

"Section 1. That the Marshal of the City of Mountain View, Arkansas, from and after April 1, 1959 shall be appointed by the mayor of the City of Mountain View, Arkansas, with the approval of the City Council.

"Section 2. That the Marshal so appointed, shall draw as compensation for such services as set forth by City Council payable monthly. That the person appointed Marshal as set out herein, shall have in addition to his duties that are set out by law, the responsibility for the enforcement of livestock laws of the City of Mountain View, Arkansas. He shall be the livestock poundmaster.

"Section 3. That hereafter, the person so appointed as Marshal shall serve in such capacity during the will and pleasure of the Mayor, and may be discharged at any time, with or without cause by the Mayor, with the approval of the City Council.

"Section 4. That from and after the effective date of this ordinance, no election shall be held in the City of Mountain View, Arkansas for the purpose of filling the office of Marshal.

"Section 5. That he shall perform other duties as set forth by the City Council.

"Section 6. All ordinances and parts of ordinances in conflict herewith are hereby repealed."

In *Horton* v. *City of Marshall,* 227 Ark. 141, 296 S. W. 2d 418, we listed some of the recent cases that have been before this Court involving the matter of salary for a city marshal in a city of the second class. In those cases may be found the applicable law. In the case at bar, there is no showing whatsoever that the City of Mountain View had ever adopted an ordinance fixing the salary of the marshal. The City paid the marshals whatever amount the City saw fit to pay from time to time. This being true, the case of *Horton* v. *City of Marshall (supra),* is authority for the statement that Jeffery cannot recover any fixed salary for his services as marshal merely because his predecessor was paid a certain amount. All Jeffery could legally demand for services as marshal were the fees due a constable for like service. If the city had ever fixed a salary for the marshal, then it could not have been changed during Jeffery's tenure (§ 19-907 Ark. Stats.); but, with no salary fixed, then the city had the right to refuse to pay Jeffery any salary in addition to the fees due a constable.

Furthermore, in March 1959, the city—acting under the provisions of Act No. 172 of 1953 (§ 19-1103.2 Ark. Stats.)—adopted an ordinance providing that on and after April 1, 1959, the marshal should be appointed by the mayor of the city, with the approval of the city council, and should draw such compensation as set forth by the city council, and should serve in such capacity as marshal during the will and pleasure of the mayor and might be discharged at any time, with or without cause. (We have heretofore copied this ordinance as a footnote to this opinion.) Jeffery continued to serve as marshal under this ordinance, and to draw the salary from April 1959 until October 1959, at which time the council passed a resolution finding and declaring that Jeffery's services were unsatisfactory, and removing him from office. When Jeffery continued to serve as marshal after April 1, 1959, and draw the salary under said ordinance, he thereby recognized the power of the city to remove him at any time. If he had wanted to remain as marshal on the basis of fees due the constable and claim § 19-907

Ark. Stats. as a right to same, then he should have made the claim in March 1959. Rather, he continued to accept pay from the city under the March ordinance and thereby has precluded himself from a recovery. He says he took the money "under protest"; but he cannot "have his cake and eat it." When he took the monthly payment under the March 1959 ordinance (whether for poundmaster or marshal), Jeffery precluded himself from challenging the validity of the ordinance.

Affirmed.

FOSTER *v.* PONDER, JUDGE.

5-2804 361 S. W. 2d 538

Opinion delivered November 5, 1962.

Andrew G. Ponder, Judge; writ granted.

Ivan Williamson, for petitioner.

No brief filed for respondent.

GEORGE ROSE SMITH, J. This is an application by the petitioner, Bill Foster, for a writ of prohibition to restrain the respondent from proceeding further in a case involving an asserted usurpation of the office of Democratic county committeeman in Stone county. We have con-

cluded that the trial court is without jurisdiction and that the writ should therefore be granted.

T. L. Ballentine filed the action against Foster in the court below. Ballentine alleged that in the Democratic primary held in August, 1960, he was an unopposed candidate for the office of county committeeman and was duly elected. He was accepted and seated by the county central committee and served until March 30, 1962. On that date other members of the committee wrongfully found Ballentine to be ineligible to hold his office, declared the position to be vacant, and selected Foster as his successor. The prayer was that Foster be ousted from the office and that Ballentine be reinstated. After the circuit court had overruled Foster's motion to dismiss the complaint for want of jurisdiction the present petition for a writ of prohibition was filed.

In *Tuck* v. *Cotton,* 175 Ark. 409, 299 S. W. 613, we held that in the absence of a statute conferring jurisdiction the courts have no authority either to interfere in any way with political organizations or to entertain a contest for a party office. That case was followed in *Park* v. *Kincannon, Judge,* 214 Ark. 398, 216 S. W. 2d 376, where a writ of prohibition was issued to keep the circuit court from taking jurisdiction of an election contest involving the office of Democratic county committeeman.

As far as this case is concerned the statutes have not been changed since those decisions were handed down. It is true that Act 21 of 1949 permits a candidate for the office of county committeeman to contest the election by filing a complaint in the circuit court within twenty days after the committee's certification of the nomination or of the vote. Ark. Stats. 1947, § 3-245. That statute, however, deals with the contest of a primary election at which candidates are elected by popular vote. It does not purport to confer upon the courts the power to entertain a usurpation proceeding in which the plaintiff is not contesting a popular election but is contending instead that he has been wrongfully ousted from office, long after the primary, by the action of the county committee. Inasmuch as jurisdiction has not been vested in

the courts the aggrieved plaintiff must, as we observed in *Brown* v. *Taylor,* 214 Ark. 403, 216 S. W. 2d 378, carry his protest to whatever body there is within the party that exercises supervision and control over the county committee.

Writ granted.

HOLLMAN *v.* STATE.

5051 361 S. W. 2d 633

Opinion delivered November 5, 1962.

[Rehearing denied December 3, 1962.]

Holt, Park & Holt, for appellant.

Frank Holt, Atty. General, by *Russell J. Wools, Asst. Atty. Gen.,* for appellee.

GEORGE ROSE SMITH, J. Upon trial without a jury the appellant, John Hollman, was found guilty of having knowingly received stolen property (ten chain saws) and was sentenced to imprisonment for ten years. For reversal he contends that his confession of the crime was involuntary and that its introduction in evidence by the State

violated his rights under the due process clause of the Fourteenth Amendment.

The ten saws in question were stolen from Timberland Saw Company on October 27, 1958. Hollman was picked up by the police on the same day, without a warrant for his arrest, and was questioned about the theft. He denied any knowledge of the matter. After an hour or two of questioning he was released.

A day or two later Jerome Wells was taken into custody and confessed that he had stolen the saws and had disposed of them through Hollman. On October 30 Hollman was arrested a second time, without a warrant. The testimony of the investigating officers does not specify the date on which Hollman was questioned, but apparently it was immediately after his arrest on October 30. The trial court was certainly justified in so finding.

According to the two officers Hollman was questioned in the presence of Jerome Wells, who again confessed his own guilt and implicated Hollman. The officers say that Hollman voluntarily admitted that he received the saws from Wells, knowing them to be stolen property, and sold them for $300. Hollman testified that during the questioning Wells was "all swolled up" and appeared to have been whipped. Hollman states that the officers exhibited blackjacks, forced him to make a false confession by threatening him with the same treatment that Wells had received, and refused to allow him to telephone an attorney. Both officers deny that any force or threats were used and deny that Hollman asked to be allowed to call a lawyer.

With the testimony in direct conflict the trial court was at liberty to accept the officers' version of the matter and to find that the confession was voluntarily given. The fact that Hollman was "uncounseled and illegally detained" does not render his confession inadmissible. *Stein* v. *New York,* 346 U.S. 156.

Many of the appellant's complaints relate to matters that occurred after the confession to the officers on

October 30. During the next six days Hollman was kept in confinement while the police investigated other thefts that apparently were disclosed either by Wells or by Hollman. A total of some thirty stolen chain saws were recovered in the course of the investigation. On or about November 5 Hollman was interviewed by the prosecuting attorney and again confessed his guilt. This confession seems to have been reduced to writing, but it was not introduced at the trial. The information was filed by the prosecuting attorney on November 5, and thereafter the accused was released on bond.

We are not convinced that Hollman's confession, if voluntarily made, was rendered inadmissible by later events. It is established by the proof that he was confined until November 5 without a formal charge having been lodged against him. It is also true that the arresting officers did not take him before a magistrate as the statute requires, Ark. Stats. 1947, § 43-601, but this omission did not invalidate the confession. *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77. Whether Hollman was denied an opportunity to call a lawyer was a disputed issue of fact which the trial court could resolve against the accused. Nor was the court compelled to accept Hollman's testimony, uncorroborated and apparently based on hearsay, that members of his family were not allowed to visit him.

It is clear enough that subsequent illegal conduct on the part of the police is relevant when it casts light upon their attitude at the time of the original questioning of the accused. *Haley* v. *Ohio,* 332 U.S. 596. Here, however, we do not perceive that the later events have any tendency to support Hollman's testimony that the officers displayed their blackjacks and threatened him with physical abuse. The case is not dissimilar in principle to *United States* v. *Mitchell,* 322 U.S. 65, where the accused was illegally detained for eight days while the police investigated other thefts that had been disclosed by his initial voluntary confession. Even though that case was tried in a federal district court, where the governing rules are more strict than those that are applica-

ble to state procedure under the Fourteenth Amendment, the court held that the admissibility of the confession was not affected by the later occurrences. In the course of the opinion it was noted that "the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures." We are of the same view in the case at bar.

Affirmed.

GOSSETT *v.* MERCHANTS & PLANTERS BANK.

5-2810 361 S. W. 2d 537

Opinion delivered November 5, 1962.

Richard W. Hobbs, for appellant.

Rieves & Smith, for appellee.

PAUL WARD, Associate Justice. Appellant and appellee are both asserting a prior claim to money deposited, as a savings account, with appellee by one Mary K. Pace. Hereafter we will refer to appellant as Gossett, to appellee as the bank, and to the depositor as Pace.

On June 10, 1959 Gossett recovered a judgment against Pace in the amount of $265.90. Gossett, being unable to collect from Pace and learning of the Pace deposit, caused a Writ of Garnishment to be issued against the bank on October 29, 1959. The writ was served on October 31, 1959.

The bank answered on November 5, 1959 as follows: (a) The bank was not indebted to Pace but did have a deposit in the name of Pace in the amount of $1,292.55, and Pace was indebted to it as evidenced by three notes, viz:

Date of note	Date due	Amount
6-16-59	12-16-59	$1,250.00
8-31-59	12- 5-59	198.00
10-14-59	11-13-59	150.00

Each note was due "on demand, and if no demand be made, on the date . . ." (date inserted). (b) The savings account was pledged to secure the payment of the said notes.

The trial court, after a hearing, held against Gossett, and the bank was discharged with its costs. In prosecuting this appeal Gossett states that the legal question presented is whether Pace can, after a judgment is entered against her, borrow money from the bank and effectively assign the $1,292.55 savings account as security, particularly where her three notes were not due and payable when the garnishment was served.

For the reasons hereafter set forth we conclude the trial court must be affirmed.

The only testimony given at the trial was by W. L. Barbour, Jr., Executive Vice President of the bank. The pertinent part of his testimony (as abstracted) was: The three notes were paid by Pace after the garnishment was served; The notes were payable on demand (as before set out). Pace's savings account was assigned to the bank as security for the notes by two written assignments dated August 15, 1957 and February 20, 1957 as shown by attached exhibits: Assignments were attached to the savings ledger page and we held her passbook; Pace could not draw on her account without the passbook; once a loan was made to Pace her account was flagged which prevented her from drawing the money.

Based on the undisputed facts heretofore set out, the decree of the trial court must be affirmed under the de-

cision in *Geyer & Adams Company* v. *Bank of Central Arkansas,* 170 Ark. 1016, 282 S. W. 358. In that case O. E. Hicks borrowed money from appellee and placed it on deposit with the understanding he would check it out only to pay the expenses of raising a crop. The account was designated as a "special account or deposit". Appellant, a creditor of Hicks, had a Writ of Garnishment issued against the bank. This Court said the "real issue involved was the priority of liens". In affirming a decree in favor of the bank, we said:

"There would be much in this contention if the deposit was general, growing out of the relationship of debtor and creditor between O. E. Hicks and the appellee bank. This unconditional relationship did not exist, for, under the agreement, O. E. Hicks could not draw checks upon the fund for any purposes except to pay debts incurred in growing the 1923 rice crop. It is immaterial that the witnesses referred to the fund as a general deposit, for under the agreement, it was deposited to the credit of O. E. Hicks by appellee for a special purpose. . . . A restricted deposit is not subject to diversion by garnishment or other process, but must be used for the purpose made. In short, the fund was not subject to garnishment by the general creditors of O. E. Hicks. No lien was acquired upon it by the service of the writ, hence the court correctly dismissed the garnishment proceedings."

In the case under consideration, under the undisputed facts, there can be no doubt Pace's deposit was "restricted" and, therefore, not subject to diversion by garnishment. Any possible lien in favor of appellant dated only from the time the Writ of Garnishment was served. See: *Green* v. *Robertson,* 80 Ark. 1, 96 S. W. 138; *Hockaday* v. *Warmack,* 121 Ark. 518, 192 S. W. 263; *Harris* v. *Harris,* 201 Ark. 684, 146 S. W. 2d 539. Long before that time Pace's deposit had been restricted. It is immaterial whether the three notes held by the bank were payable on demand or at some date in the future.

Affirmed.

INDEPENDENT THEATRE OWNERS OF ARK. *v.*
ARK. PUBLIC SERVICE COMM.

5-2783 361 S. W. 2d 642

Opinion delivered November 5, 1962.

[Rehearing denied December 3, 1962.]

Leon B. Catlett and *Howard Cockrill,* for appellant.

Moses, McClellan, Arnold, Owen & McDermott; Edgar Mayfield and *Mark Woolsey,* for appellee.

SAM ROBINSON, Associate Justice. Appellee, Midwest Video Corporation, hereinafter called Midwest, is authorized to engage in the business of furnishing television to subscribers for an agreed consideration. It does not, however, have the facilities to transmit from its studio in Little Rock to customers' receiving sets in homes or other places, the electrical impulses necessary to produce pictures and sound.

Appellee, Southwestern Bell Telephone Company, hereinafter called Southwestern, can furnish the required service, but refused the application of Midwest for such service until the Arkansas Public Service Commission (hereinafter called Commission) found that the service would be in the public interest, and approved a tariff for the service to be furnished. Midwest, therefore, filed a petition with the Commission asking that Southwestern be required to furnish the service. Southwestern filed an answer and agreed to furnish the service if approved by the Commission and a tariff was established.

Appellants, Independent Theatre Owners of Arkansas, Inc., United Theatres Corporation, and Rowley United Theatres, Inc., intervened asking that the Midwest petition be denied. After a hearing, the Commission granted the Midwest petition and approved a tariff for the services to be furnished by Southwestern.

This is an appeal by the theatre owners from a judgment of the Pulaski Circuit Court affirming the action of the Commission.

There are three issues on appeal. (1) Appellants contend that the service to be furnished by Southwestern is not in the public interest; (2) that the Public Service Commission does not have jurisdiction of the subject matter; and, (3) that the Federal Communications Commission has exclusive jurisdiction.

The sum and substance of appellants' argument that the proposed service is not in the public interest is that the appellant theater owners cannot successfully compete with the entertainment that will be furnished by Midwest in the form of television.

Midwest is not a public utility; it is a private concern engaged in furnishing television to members of the public who want to buy it, but it cannot distribute its product without the facilities of Southwestern. Midwest, therefore, asked that Southwestern, which is a public utility engaged in transmitting electrical impulses by wire, be required to furnish that service. Midwest is in

a position similar to that of the theater owners, who could not show pictures in their theaters unless they had the use of electricity furnished by the power company, and, no doubt, the power company could be compelled to furnish such service.

The only authority appellants cite to sustain their contention that the proposed service is not in the public interest is *Arkansas Electric Cooperative Corp.* v. *Arkansas Missouri Power Co.*, 221 Ark. 638, 255 S. W. 2d 674. We do not think that case sustains appellants' view, and we have found no other case sustaining that view. In that case the issues were whether, under the Arkansas statutes, Arkansas Electric could legally sell power to SPA, and whether, under federal legislation, SPA could legally bind itself to the performance of its contracts with Arkansas Electric.

In its finding in the case at bar, the Commission said: "All the Intervenors' arguments add up to one contention, that pay television will disrupt other segments of the entertainment business. Any new invention is likely to lead to economic change. This Commission cannot deny the people of Arkansas the benefits of a new entertainment media merely because other segments of the industry may be inconvenienced thereby." We think what the Commission said is a complete answer to appellants' contention on this point.

The next issue is whether the Commission had jurisdiction of the subject matter; that is, did the Commission have the authority to issue any orders at all in connection with pay television, or was it a non-utility service. If it is non-utility, the Commission does not have jurisdiction. *Associated Mechanical Contractors of Arkansas, etc.* v. *Arkansas Louisiana Gas Co.*, 225 Ark. 424, 283 S. W. 2d 123. But the Commission has the power and jurisdiction to regulate defined utilities operating as such. Ark. Stats. 73-202.

The term "public utilities" includes a person or corporation conveying or transmitting messages or com-

munications by telephone or telegraph. Ark. Stats. 73-201. If the sending of an electrical impulse over a coaxial cable owned and serviced by Southwestern, which produces a picture or sound, is conveying a message or communication by telephone or telegraph, then such service is a public utility subject to regulation by the Commission. Appellants contend that the operation of coaxial cables, although legal, does not come within the meaning of "conveying or transmitting messages or communications by telephone or telegraph" as authorized by Ark. Stats. 73-201.

In some localities, television reception by ordinary means is not good, and in some such locations, Community Antenna TV Companies, known as CATV, have been formed for the purpose of building a special antenna capable of receiving, without distortion, wireless electrical impulses, amplifying them, and distributing them by coaxial cable to those subscribing for the service. Appellants cite *Television Transmission, Inc.* v. *Public Utility Commission,* (Cal. 1956), 301 P. 2d 862, as holding that companies rendering such service do not come within the jurisdiction of a Public Service Commission. There is, however, a clear distinction between that case and the case at bar.

The above mentioned case turns squarely on the proposition that the transmission company was not a telephone corporation because it did not operate a telephone line, and therefore, did not come within the provisions of the California Code regulating telephone companies. In the case at bar, of course, Southwestern is a telephone company and the wires carrying the electrical impulses producing the sound and pictures will be carried on the telephone company's poles. In the cited California case, the Court said: "It does not follow, however, that because telephone corporations are not prevented by law from using their lines . . . for the transmission of television broadcasts, any corporation that uses the poles, wires, *et cetera,* to transmit such broadcasts is a telephone corporation."

Another case pointing out the distinction between an antenna company and a telephone company is *In Re New York Telephone Company,* 34 PUR 3rd 115. There, the New York Public Service Commission said: "The telephone company does not propose, under its tariff T1, to become an antenna company. It is not going to sell any service to the owners of television sets or erect any master antennas. [The same is true in the case at bar.] The service offering is limited to conveying (transporting or transmitting) for an antenna company, television signals from one point to another. Services of a like character are presently provided by the telephone company pursuant to field tariffs; for example, the telephone company provides channels for teletypewriter, teleprinter, telephotography, telautograph, Morse, and facsimile communication. In addition, channels are provided for the transmission from point to point of programs material such as music or other sound and for video program material. Similarly, the telephone company by offering channels to an antenna company is offering to provide a communication service—a variety of telephony or telegraphy—and nothing else.

"The mere fact that at this stage of development of this form of picture and sound transmission special coaxial cable and other special equipment must be installed in order to provide this particular service does not militate against the conclusion that the telephone company is providing telephone or telegraph service. A conclusion about the commisson's jurisdiction over the service proposed to be provided under Tariff T1 cannot be made to depend upon the type of system used, i.e., coaxial cable or ordinary telephone wires, but must be based on a determination whether thereby a telephonic or telegraphic communication service is being provided. We think one is.

"It is clear that the telephone company is undertaking to transmit intelligence from one point to another for the benefit of a subscriber, using principles of telephony (or telegraphy). It proposes to provide this serv-

ice upon similar terms to one and all seeking it. The company's filing of a tariff covering the service was proper."

In *Ohio Telephone and Telegraph Co.* v. *Steen,* 85 N. E. 2d 579, it is said: "The Court is also of the opinion . . . that the transmission of television is merely an advance or improvement in the art of telegraphy and telephony and therefore the right of eminent domain for telegraph and telephone purposes . . . is applicable to television."

In *Ball* v. *American Telephone and Telegraph Co.,* 86 So. 2d 42, the Mississippi Court said: "Television is but one of many scientific achivements of the past few decades made possible by developments of the carrier art. Some of the others are radio, teletype, and the phototelegraph, each of which employs electrical impulses in transmission. All these devices to some extent make use of cables and wires in the transmission process. Transmission techniques developed by or as an adjunct of the telephone business has made possible the services performed by these devices. We should not construe the eminent domain statutes so as to require the telephone and telegraph companies to secure new easements for every new device that employs the use of electrical impulses even when the new device performs a function other than the transmission of sound or articulate voice. To do so would lead to absurd and unreasonable results. We conclude that television transmission is an integral part of the telephone and telegraph business as it has developed and now exists."

Next, appellants contend that the Arkansas Public Service Commission does not have jurisdiction because the service to be furnished by Midwest is interstate in character, and that Congress has pre-empted that field, giving the Federal Communications Commission exclusive jurisdiction. Appellants cite *In Re Bennett,* 89 PUR, N. S. 149. There, the Wisconsin Court held that it lacked jurisdiction to determine whether a community

television antenna is a public utility because the Court was of the opinion that Congress had completely occupied the television field. But the Wyoming Commission held that an antenna company was a public utility because of the wording of the Wyoming statute. *Re Cokeville Radio & Electric Co.,* 6 PUR 3d 129.

The tariff approved by the Arkansas Commission covers "intrastate closed circuit television channels furnished by the Telephone Company over facilities located wholly within the State of Arkansas". Telephone and telegraph communications taking place within a single state are intrastate. *Western Union Telegraph Co.* v. *Alabama Board of Assessment,* 132 U. S. 472, 33 L. Ed. 409, 10 Sup. Ct. 161.

The Communications Act of 1934, 47 USCA, Sec. 151, *et seq.*, recognizes the jurisdiction of the state over intrastate communications. Section 152 provides: "The provisions of this chapter shall apply to all interstate and foreign communication by wire . . . Nothing in this chapter shall be construed to apply or to give the Commission [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication services by wire or radio of any carrier."

Congress has pre-empted the field of interstate communications, but has not pre-empted the field of intrastate communications. The service to be rendered by Southwestern, as described in the tariff approved by the Commission, is strictly intrastate in character. The Arkansas Commission, therefore, has jurisdiction to regulate such service.

Affirmed.

BOHLINGER, J., not participating.

5-2813 361 S. W. 2d 532

Opinion delivered November 5, 1962.

R. D. Rouse, for appellant.

James H. Pilkinton, for appellee.

Sam Robinson, Associate Justice. On the 4th day of November, 1959, appellant, Mrs. Louise E. McBride, went to work for appellee, Ark-La Industries, at its furniture factory at Emmett, Arkansas. On the 27th day of January, 1960, while helping to stack a crated dresser weighing about 90 pounds, Mrs. McBride fell, and according to the evidence and to the finding of the Workmen's Compensation Commission, she injured her back at that time. She continued to work, however, for the rest of that day, but the next morning went to see the doctor. She then returned to work and finished out that day. The next two days she was unable to return to work, but on the third day she went back to her job and worked until February 26, when she again went to the doctor. At that time she was placed in the hospital, where she stayed for about 12 days, but on her release from the hospital she did not return to work.

Later, she applied for workmen's compensation and was allowed disability benefits for a total of only 54 days. She has appealed from the order of the Commission.

The uncontradicted evidence is that Mrs. McBride did fall while helping to handle the heavy dresser on January 27, and that the dresser partly fell on her. Dr. Glenn G. Hairston testified that she was able to return to work on April 17, 1960, but Mrs. McBride testified that she was not able to return to work at that time; that the pain in her back and in her leg was so great that she could not stand to work.

It cannot be said that Dr. Hairston's testimony is substantial to the effect that Mrs. McBride was able to return to work on April 17, because on the 16th of May, he certified as follows: "This is to certify that Mrs. McBride has recovered from her recent hospitalization, and is able to return to work as of April 17, 1960. She should not do work that requires stooping, bending, or heavy lifting." As a matter of fact, this certificate amounted to a certification that Mrs. McBride was not able to work at her job, because the job she had in the shipping department of appellant's factory required her to stoop and bend, even if it did not require heavy lifting. There is no other evidence in the record that Mrs. McBride was able to return to work on April 17, and Dr. Hairston's testimony is not substantial to that effect.

On February 27, 1961, Mrs. McBride was admitted to the University of Arkansas Hospital in Little Rock because of the condition of her back, and was released on March 4, five days later. Dr. James A. Brown of the University Hospital, testified that the final diagnosis was: "Normal patient. No objective evidence of disease found."

The testimony of Dr. Hairston and Dr. Brown is the only evidence in the record that Mrs. McBride is not suffering from disability with her back. We have called attention to the inconsistency of Dr. Hairston's testimony in that respect, and we think that Dr. Brown's testimony is even more inconsistent. When he examined Mrs. McBride in February, 1961, he gave a diagnosis of a normal patient with no objective evidence of disease, but he testified that the patient developed numbness over the postero-lateral aspect of the right leg one year

ago (which would be about one month after the alleged injury occurred); that the patient walks stooped over because she has such pain; that there is anesthesia to pinprick over the lateral aspect of the right leg and the posterior aspect of the right buttock up to the level of L-5; that there was found to be present decreased bilateral knee jerks; that posterotibial reflex was absent bilaterally; that proprioception appeared to be absent in the right foot but not in the left; that the admitting impression was herniated nuclea pulposus at L-3, -4 level; and that there was a slight narrowing of the lumboscral joint. He further testified that upon being discharged from the hospital, the patient was told to continue to use heat to her back and analgesics as necessary. It is hard to understand why, if nothing was wrong with the woman, it was necessary to continue the use of heat to her back and analgesics.

Dr. Charles Avery testified that he first treated Mrs. McBride for her back January 28, 1960, and that he has treated her for her back off and on since that time; that she has been to see him 17 times because of her back; that the patient had been advised to avoid lifting completely, bending or stooping, and to sleep on a hard mattress. Dr. Avery further testified that he sent Mrs. McBride to Dr. John M. Hundley, an orthopedic surgeon in Little Rock, and that she had not been able to work since the date of her injury.

Dr. Hundley testified that his examination of Mrs. McBride reveals tenderness over the L4 region (4th lumbar vertebra); that flexion of the trunk is 25 per cent of normal; extension is 75 per cent of normal, accompanied by pain in the lumbosacral area; that there is hypalgesia over the lateral aspect of the right thigh and leg; that x-rays showed an abnormal condition of the spine around the 4th and 5th lumbar vertebra; that there was a degeneration of the nucleus pulposis, with probable herniation; and that he felt that she had a pre-existing degeneration of the spine which could have been aggravated by heavy lifting.

After reviewing the Medical Center reports, Dr. Hundley made an additional report and stated: "The conclusions of the doctor at the Medical Center are not in keeping with the objective clinical and x-ray findings —as there are reported abnormalities on examination and x-ray and yet it was deduced the patient was normal without disease. This quite obviously is not in agreement with their findings, nor in my findings and opinion."

"Since there is organic evidence of injury and/or aggravation of a pre-existing condition, I must conclude that as a result of the incident of January 1960 that this patient does have 10 per cent permanent partial disability of the body as a whole due to the injury."

Of course, this Court has held many times that a decision of the Workmen's Compensation Commission will be affirmed if there is any substantial evidence to support it. Here, the Commission made a finding that Mrs. McBride received an injury during the course of her employment. There is substantial evidence that she had not recovered from such injury on April 17, 1960, which was the end of the compensation period as found by the Commission.

When the testimony of Dr. Hairston and Dr. Brown is viewed in its entirety, as heretofore pointed out, we do not think it is substantial evidence that Mrs. McBride was able to return to work on April 17, 1960, and there is no other evidence in the record of any kind that she was able to return to work at that time.

Accordingly, the judgment is reversed and the cause remanded for further consideration by the Commission.

McFaddin, J., not participating.

SMYTH WORLDWIDE MOVERS *v.* LITTLE ROCK PACKING CO.

5-2805 361 S. W. 2d 534

Opinion delivered November 5, 1962.

W. J. Walker and *Conley Byrd,* for appellant.

E. L. McHaney, Chowning, McHaney, Mitchell, Hamilton & Burrow, for appellee.

NEILL BOHLINGER, Associate Justice. The appellant brought this action in the Pulaski Circuit Court to recover a sum of money which it alleged was due it by the appellee, Little Rock Packing Company, for transporting the household goods of B. Wayne Nelson to Puerto Rico.

It appears from the record that Wayne Nelson was an employee of the Puerto Rico Meat Packing Company; that Joe P. Finkbeiner was treasurer of the Puerto Rico Meat Packing Company and president of the Little Rock Packing Company; that Mr. Nelson had requested the appellant to move his household goods to Puerto Rico and the appellant requested a purchase order to cover the moving services. This request was made by wire to the Little Rock Packing Company.

Responsive to that request, the following purchase order was given to the appellant:

"PURCHASE ORDER No. 61

PUERTO RICO MEAT PACKING CO.
CAGUAS, PUERTO RICO

DATE 9-26, 1962

TO A B Co Van Lines, Inc. ATT: W. H. Dobbs

ADDRESS 527 No. 33rd Louisville, Ky.

Please furnish the following and charge to our account:

Quantity	Article No.	Description
		Moving B. Wayne Nelson's Household Goods From Louisville to Puerto Rico.
		Re: Your telegram— Estimated Cost: 6,000 Lb. @ 44.60 per CWT—$2,667.00
		Invoice: L. R. Packing Co. Box 1109 L.R., Ark.

/s/ by Carolyn Presson

Yours very truly,

PUERTO RICO MEAT PACKING CO.

By /s/ Joe P. Finkbeiner

Charge to.....Department

NOTICE

Invoice for goods
covered by this order
must bear the above
purchase order number,
before it will be
passed for payment.

PUERTO RICO MEAT PACKING CO."

Mr. Nelson's household goods appear to have been moved by the appellant and delivered to him in Puerto

Rico on November 4, 1960. The following March the appellant sent a bill to the Little Rock Packing Company for the amount of its charges covering the above service. The Little Rock Packing Company then advised the appellant that this item was an expense of the Puerto Rico Meat Packing Company and the invoice was being forwarded to the Puerto Rico Company at Caguas, Puerto Rico. The Puerto Rico Meat Packing Company went into bankruptcy in September 1961 before payment of appellant's invoice and appellant was advised that it had been listed as one of the creditors of the Puerto Rico Meat Packing Company. Thereafter the appellant brought this suit to recover the amount of its invoice from the Little Rock Packing Company.

The trial court found the issues for the appellee and appellant has appealed relying on the point that the trial court erroneously interpreted the written provisions on the printed/written order form.

The record before us reflects that Mr. Joe P. Finkbeiner, who was the president of the Little Rock Packing Company, was also treasurer of the Puerto Rico Meat Packing Company and that Joe P. Finkbeiner and Chris Finkbeiner were stockholders in both corporations. The Little Rock Office of the Puerto Rico Meat Packing Company was in the same building with the office of the Little Rock Packing Company and Carolyn Presson was secretary to both Mr. Joe P. Finkbeiner and Mr. Chris Finkbeiner but was not an officer in either corporation.

A purchase order is an authorization by the issuing party for the recipient thereof to provide materials or services for which the issuing party agrees to pay. The purchase order is an offer to buy. We are not here concerned with when the purchase order becomes binding on both parties for certain it is that it is binding when those things ordered have been provided as here.

We find no ambiguity in the purchase order. It is indeed a document of the Puerto Rico Meat Packing Company and that name appears in bold type in three

places on the purchase order. On the purchase order, the party addressed is requested to "please furnish the following and charge to our account: * * * Puerto Rico Meat Packing Co. By Joe P. Finkbeiner." In addition to that, the person furnishing the services under the purchase order is cautioned that: "Invoice for goods covered by this order must bear the above purchase order number before it will be passed for payment. Puerto Rico Meat Packing Co."

The contention of the appellant is predicated on the following words that appear on the face of the purchase order: "Invoice: L. R. Packing Co. Box 1109 L.R., Ark. by Carolyn Presson." We are left in no doubt that the insertion of these words was done by Carolyn Presson who was not an officer of either corporation and we are loath to believe that a mere employee can nullify or vary the explicit commitment of an officer of a corporation. It was clearly made the debt of the Puerto Rico Meat Packing Company by the action of its treasurer and we think it significant that the appellant did not bill the Little Rock Packing Company until the latter part of March 1961, at which time the Little Rock Company advised the appellant that the item was the obligation of the Puerto Rico Meat Packing Company and they were forwarding the invoice to it. If the appellant took any steps at that time to assert its claim against the Little Rock Packing Company we fail to find it and that was the time that the appellant should have made its contention known.

Where no ambiguity appears, the construction of the agreement is for the court. *West* v. *Todd,* 207 Ark. 341, 180 S. W. 2d 522; *Bailey* v. *Sutton,* 208 Ark. 184, 185 S. W. 2d 276; *Lindner* v. *Mid-Continent Petroleum Corp.,* 221 Ark. 241, 252 S. W. 2d 631.

There is no evidence introduced that tended to show or did show that the Little Rock Packing Company, acting through authorized personnel, agreed to obligate itself. There is no evidence that appellee attempted to mislead anyone and there is certainly no testimony

that Carolyn Presson had authority or apparent authority to obligate the company over and above the obligation of the officers of the company.

The trial court properly interpreted the purchase order and its judgment is affirmed.

BARNES *v.* ARK. PUBLIC SERVICE COMM.

5-2817 362 S. W. 2d 1

Opinion delivered November 5, 1962.

[Rehearing denied December 10, 1962.]

Fulk, Lofton, Wood, Lovett & Parham, by *T. S. Lovett, Jr.,* for appellant.

Mark E. Woolsey, for appellee.

NEILL BOHLINGER, Associate Justice. This case involves the furnishing of telephone service to an area involving about fifteen (15) square miles in the northeast corner of Conway County which community is known as the Austin Community. The two applicants for authority to provide service were the Southwestern Bell Telephone Company which will herein be referred to as Bell, and the Arkansas Telephone Company which will be referred to as Arkansas.

On July 21, 1960, the Arkansas Public Service Commission, in a proceeding initiated by Bell, allocated this area to Bell. Bell's proposal for supplying telephone service to the Austin Community is from an exchange or central office to be located in the community of Center Ridge, approximately five (5) miles from the community of Austin, plus what is known in the industry as Extended Area Service (EAS) to the whole of Conway County. Extended Area Service is the type of service which would furnish toll-free telephone service between closely situated telephone exchanges in the area having a common community of interest. Extended Area Service, being toll-free, has a higher base rate than does local exchange service.

Acting under the allocation of the area to Bell, the Bell Company made surveys and proceeded to project its plans to install exchanges in the towns of Center Ridge and Cleveland in Conway County and to extend area service from these exchanges to the town of Morrilton, the County Seat of Conway County. A majority of the citizens of the Austin area filed their petition, in which they were joined by the Arkansas Telephone Company, asking the Arkansas Public Service Commission to set aside its allocation of the territory to Bell and award the same to Arkansas.

In an effort to evaluate the interests of the public with the contention of the utilities, there was a public meeting in the community of Austin where representatives of Arkansas and Bell were present to explain the types of service each proposed to render. Questionnaires were distributed by the Commission staff to the residents in attendance at that meeting and it appears that of thirty-seven (37) questionnaires returned, twenty-two (22) of the residents preferred the Arkansas and fifteen (15) preferred Bell. The Arkansas Public Service Commission thereafter conducted a formal hearing and on July 20, 1961, issued its order denying the petition of Arkansas and residents of the Austin Community, and refused to set aside the order allocating this territory to

Bell. An appeal to the Pulaski Circuit Court followed and that court affirmed the Commission and the cause is presented here as an appeal from that judgment.

It would appear at first blush that the equity in this case would favor Bell which, proceeding under an order of the Commission, had expended time and effort in order to survey and project its service to the territory involved, during which time [a full year] Arkansas made no move in opposition to the Commission's order or the activities of Bell. However, the matter of equity between competing utilities does not address itself to the Public Service Commission, but that body is concerned with an effort to determine the best interest of the people in the whole area involved.

The findings of the Commission clearly indicate the efforts of the Commission and the discharge of its responsibilities.

"5. The Commission has previously allocated the area involved herein to the Southwestern Bell Telephone Company, which company has made surveys and is presently in process of perfecting plans to install exchanges in the towns of Center Ridge and Cleveland in Conway County, and to extend area service of these exchanges into the town of Morrilton, which is the County Seat of Conway County. The Company contemplates and is presently drawing plans to include the area involved herein in the Center Ridge exchange area.

6. The Commission's staff continued investigations which culminated in a public meeting in the community of Austin, at which meeting representatives of the Southwestern Bell Telephone Company and the Arkansas Telephone Company were present and explained the types of service each would render to the community, after which questionnaires were passed out by the Commission's staff to each of the residents in attendance and the results thereof were contained in the report of the Staff, which is Staff Exhibit No. 1, in this proceeding, indicating that sentiment and desires were fairly divided as to which company was preferred.

The Commission believes and so finds that if the area which has been previously allocated to Southwestern Bell Telephone Company should be reallocated to Arkansas Telephone Company for service, such action might jeopardize the interests of the residents throughout the remainder of Conway County insofar as receiving county wide Extended Area Service—therefore, the petition should be denied."

It is clear from the record in this case that under Bell's proposal the base rate per month would be approximately $1.00 higher than would be service under Arkansas. However, under the Bell plan there would be toll-free service throughout Conway County, whereas under the Arkansas plan there would be a toll charge for any call in Conway County other than the Austin Community. Under the Arkansas plan there would be toll-free service through the Clinton exchange and eventually the Shirley exchange, both of these exchanges being situated in an adjoining county.

We think the facts in this case bring it squarely within our pronouncement in the case of *Incorporated Town of Emerson* v. *Arkansas Public Service Commission,* 227 Ark. 20, 295 S. W. 2d 778:

"It is well settled by our decisions that the Commission is clothed with broad legislative and administrative powers and that a review of its findings and order by either the circuit court or this court, on appeal, is considerably limited in its extent. Ark. Stats., Sec. 73-233 (d) provides that such review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order under review violated any right of the complainant under the U. S. or State Constitutions. However this does not mean that the courts cannot inquire beyond mere formality when other provisions of the statute are considered along with Sec. 73-233, *supra.* In this connection we have repeatedly held that if the Commission's order is supported by substantial evidence, free from fraud, and not arbitrary, it is the duty of

courts to permit it to stand, even though the courts might disagree with the wisdom of the order. *Department of Public Utilities* v. *Ark.-La. Gas Co.*, 200 Ark. 983, 142 S. W. 2d 213; *City of Fort Smith* v. *Southwestern Bell Telephone Co.*, 220 Ark. 70, 247 S. W. 2d 474; *Arkansas Power & Light Co.*, v. *Arkansas Public Service Commission,* 226 Ark. 225, 289 S. W. 2d 668."

In upholding the Commission's order under the facts in the above case, this court also said:

"* * * It is understandable why the inhabitants of Emerson proper now prefer the services of Union and if their interests alone were at stake we might readily agree that the Commission acted both unwisely and arbitrarily. It is also easy to understand why Union can offer more attractive rates by declining to serve a substantial portion of the less populous rural territory, adjacent to Emerson. *The problem of the Commission was to determine the best interests of the people of the whole area in question.* Viewed from that standpoint its findings and conclusions are supported by the substantial evidence." [Emphasis added]

There is testimony in the record which indicates that if the Austin Community is excluded from Bell's plan, some of the residents of the adjacent rural area would also be excluded. Therefore, viewing all the facts, we are unable to state that the Commission acted arbitrarily in considering the interests of the people of the whole area involved and that the Commission's order and finding are not supported by substantial evidence.

The finding of the Commission and the judgment of the Circuit Court are accordingly affirmed.

5045 362 S. W. 2d 713

Opinion delivered November 12, 1962.

[Rehearing denied December 17, 1962.]

[redacted]

Lightle & Tedder and *Jack M. Lewis,* for appellant.

Frank Holt, Atty. General, by *Milas H. Hale,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Clinton Kurck, was charged by information with the crime of rape, it being alleged that on November 6, 1961, he assaulted and raped one Phyllis Carlton. Appellant filed a

motion to dismiss the information, asserting that the court had no jurisdiction over the area wherein the alleged crime was committed, due to the fact that such lands were acquired by the United States on August 18, 1959, and jurisdiction over the territory had been ceded to the United States by the State of Arkansas, pursuant to Section 10-1103, Ark. Stats. Anno. The motion was overruled by the court, and on trial, the jury found appellant guilty of the crime of Assault with Intent to Rape, and fixed his punishment at four years confinement in the Arkansas State Penitentiary. From the court's judgment so entered, appellant brings this appeal. For reversal, appellant relies upon five points, as follows:

I

The court has no jurisdiction for the reason that the scene where the alleged crime was committed had been condemned and taken by the United States Government on August 18, 1959, and under Arkansas Statute 10-1103, which was then in effect, all jurisdiction of the State had been ceded to the United States Government.

II

The defendant was entitled to examine the jury panel on *voir dire* as to their conscientious belief as to the death penalty.

III

The court erroneously refused defendant's instruction No. 1 and instructed the jury as to the crime of assault to commit rape—the intercourse being admitted.

IV

The court erred in permitting leading questions by the State.

V

The court erred in refusing defendant's requested instruction No. 2 relative to prosecutrix's duty to make an outcry.

We proceed to discuss each alleged error in the order listed by the appellant.

I

In 1939, the Legislature enacted Act 327 which appears in Volume 2, Ark. Stats. Anno. (1947) as Section 10-1103. That section reads as follows:

"The consent of the State of Arkansas is given to the acquisition by the United States by purchase or condemnation with just compensation or by grant or otherwise, of such lands in the State of Arkansas as in the opinion of the Federal government may be needed for the construction of dams, reservoirs, floodways, locks, canals, hydro-electric power plants, channel improvements, channel diversions, and for such other works as may be necessary for the control of floods, the development of hydro-electric power, the irrigation of lands, the conservation of the soil, recreation, and other beneficial water uses, and the jurisdiction of this state within and over all grounds thus acquired by the United States within the limits of the State of Arkansas is hereby ceded to the United States. Provided, that this grant of jurisdiction shall not prevent execution of any processes of this State, civil or criminal, on any person who may be on said premises."

Title 40 U.S.C.A., Section 255, deals with the acquisition by the United States of jurisdiction over lands to which it has acquired title for various purposes.[1] Pertinent portions read as follows:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not thereto-

[1] This is also codified as 33 U.S.C.A., § 733, and 50 U.S.C.A., § 175.

fore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

In 1959, the Arkansas General Assembly passed Act 256[1a] [§ 10-1127 through 10-1129, 1961 Supp.], which had the effect of repealing Section 10-1103, since the provisions of 10-1103 and 10-1127 and 10-1128 are in conflict.[2] This, of course, is known as "repeal by implication". The act, *inter alia,* provides that the United States, through a duly authorized department, agency, or officer, shall file a notice of intention to acquire legislative jurisdiction, with the Governor. "The notice shall contain a description adequate to permit accurate identification of the boundaries of the land or other area for which the change in jurisdictional status is sought and a precise statement of the measure of legislative jurisdiction sought to be transferred."

The Governor then makes his recommendations, together with those of the Attorney General, to the next session of the General Assembly "which shall be constitutionally competent to consider the same". Further, the Chief Executive shall cause duly authenticated copies of the notice and act to be recorded in the office of the Recorder of the county where the land or other area affected by the transfer of jurisdiction is situated.

Appellant calls attention to the fact that in our first act [10-1103], there was no provision for specific or additional action on the part of the state, or the United States, before jurisdiction passed to the federal government. Appellant says, "The statute unequivocally and without

[1a] Under the provisions of the act, it was to become effective on January 1, 1960.

[2] The act has no repealing clause.

any attempt at providing a method whereby the United States might acquire jurisdiction for criminal purposes automatically ceded all jurisdiction over the lands." Appellant then points out that the United States filed its Declaration of Taking in the United States District Court on August 18, 1959,[3] and, under his view, at that time, jurisdiction over these particular lands passed to the United States Government. Appellant emphasizes that this taking occurred before the effective date of Act 256 of 1959 [10-1127 through 10-1129, 1961 Supp.], and, accordingly, argues that jurisdiction over the premises where this alleged offense took place, was in the United States Government on November 6, 1961, the time of the occurrence complained of. It is not really necessary to discuss which state statute was in effect at the time of the alleged offense, for appellant's argument is fallacious from another standpoint. The portion of Title 40, Section 255, heretofore quoted, provides that the head or other authorized officer of the government agency may accept jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor or such other manner as prescribed by the laws of the state; further, "unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed[4] that no such jurisdiction has been accepted." It is, thus, apparent that, even though Section 10-1103 was the effective state act at the time of the taking, still under Title 40, the United States Government had not accepted jurisdiction over these lands, *i.e.*, the record does not reflect that notice of acceptance has been filed with the Governor of Arkansas, or jurisdiction accepted in any other manner. Certainly, the state cannot force jurisdiction upon the federal government, and until such time as an acceptance is filed by the United States, jurisdiction remains in this state. The burden was upon appellant to establish a lack of jurisdic-

[3] This date appears in the motion to dismiss for lack of jurisdiction, though the date used in the Declaration of Taking is April 7, 1959. It is immaterial in this case as to which date is correct.

[4] Bouvier's Law Dictionary, Volume 1, Page 579, defines "Conclusive Presumption" as follows: "A rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise."

tion, and this has not been done. We thus find no merit in this contention.

II

Appellant contends that he was entitled to question each member of the jury panel relative to such juror's views concerning the death penalty. Upon objection by the Prosecuting Attorney, who had previously stated that he was not seeking the death penalty, the court refused to permit the respective jurors to answer. Even if this ruling by the court constituted error, we are unable to see how appellant was prejudiced. Of course, if the jury had brought in a verdict fixing punishment at death in the electric chair, a far different matter would be presented. Here, however, the sentence was rather light, and we have held that where an error by the court inures to the advantage of a defendant, he cannot be heard to complain. *Bruce* v. *State,* 68 Ark. 310, 57 S. W. 1103, *Glenn* v. *State,* 71 Ark. 86, 71 S. W. 254.

In addition, it does not appear from the transcript that appellant exhausted his peremptory challenges. This, in itself, would preclude the finding of merit on this point. See *Green* v. *State,* 223 Ark. 761, 270 S. W. 2d 895, and *Nail* v. *State,* 231 Ark. 70, 328 S. W. 2d 836.

III

Appellant stoutly maintains that the court erred in not giving his requested instruction No. 1, and by instructing the jury on the crime of assault with intent to commit rape, inasmuch as he admitted the act of intercourse with the prosecuting witness, but contended that such act was committed with her consent. Appellant's requested instruction No. 1 defined the crime of rape, and further stated,

"If these allegations are proved beyond a reasonable doubt, there is but one form of verdict that would be responsive, that is, guilty as charged, the punishment of which is death in the electric chair or life imprisonment at hard labor. Under the evidence in this case, you would have to find the defendant either guilty of rape or not

guilty of any offense; there is no evidence here that would authorize this court in submitting any other offense whatever than that laid in the Information, which is rape."

This instruction was refused. The court, over the objections of appellant, gave the following instruction:

"Under this information it is competent for you if you think the evidence justifies it, to convict the defendant of rape, of assault with intent to commit or to acquit the defendant outright."

The court then defined the charge of assault with intent to commit rape. Appellant, which admitting that the cases of *Harrison* v. *State,* 222 Ark. 773, 262 S. W. 2d 907 and *Bradshaw* v. *State,* 211 Ark. 189, 199 S. W. 2d 747, hold that the charge of assault with intent to rape may be included within the charge of rape, under circumstances similar to the case before us, then asserts there is a conflict in our decisions, and cites the cases of *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937, and *Bailey* v. *State,* 227 Ark. 889, 302 S. W. 2d 796. In those two cases, we held that the trial court did not err in refusing a request from the defendant for an instruction on assault with intent to rape. Appellant feels that the latter cases express the proper view, and should govern this appeal. It is not here necessary to reconcile the holdings in these cases, for the facts in the instant appeal fall squarely within the holding in *Harrison* v. *State, supra.* There, the evidence on the part of the prosecutrix was to the effect that she was forcibly raped by Harrison, while Harrison admitted intercourse, but insisted that it was with her consent. The jury was instructed that it could find the appellant guilty of the lesser offense of assault with intent to rape, and appellant contended (as is here contended) that he was either guilty of rape, or no crime at all. This court, quoting from *Bradshaw* v. *State, supra,* stated.

" 'An assault with intent to commit rape is included in the charge of rape, and a conviction may be had of the former offense under an indictment for the latter. * * * If it be conceded that the testimony would logically demand a verdict of guilty of rape or nothing, it does not

follow that a conviction of an attempt to rape should be avoided here. The jury had the power to return the verdict and the offense is less than the crime charged.

"It was therefore clearly permissible for the jury to convict appellant of the lesser crime of assault with intent to rape, when charged with rape.' "

In *Lindsey* v. *State,* 213 Ark. 136, 209 S. W. 2d 462, appellant contended that, because the state's evidence went only to the charge of rape, the jury should not have been instructed on the crime of assault with intent to rape. We said,

"Appellant is mistaken in thinking that *attempt* is not included in a charge of rape. He relies upon *Whitaker* v. *State,* 171 Ark. 762, 286 S. W. 937, where Mr. Justice Wood said the trial court correctly instructed that, under the testimony there, the appellant, if not guilty of rape, was entitled to an acquittal. *He did not say, however, that it would have been error to instruct that attempted rape was included in the greater charge.*"[5]

It follows that this point is without merit.

IV

Appellant complains that the court erred in permitting certain leading questions by the state. All were objected to and exceptions saved. Those questions were as follows:

"Did you resist his efforts to rape you?"

"Now, at this point, may I ask you this, were you wearing what we ordinarily refer to as panties?"

"Young lady, tell the jury whether or not this intercourse was of a painful character."

"Was that painful to you?"[6]

"Did you say in response to a question propounded to you by Mr. Lightle that you screamed or didn't scream at the time he inserted his private in your body?"

[5] Emphasis supplied.

[6] This question had reference to appellant's insertion of his finger into the prosecutrix.

In the first place, it does not appear that some of the questions come within the category of leading questions, and certainly, we cannot see how any prejudice resulted to accused. Appellant says that these questions "inflamed" the minds of the jurors, and also states that the first question assumes a fact not supported by testimony, *i.e.,* intercourse without the prosecutrix's consent. As to the last, Miss Carlton certainly testified that the act of intercourse was without her consent, and that she struggled to prevent it. As to the former, there are several facts in evidence, which would likely have been much more persuasive in "inflaming the minds of the jury" — if the jury had been inclined, or subject, to being "inflamed". For instance, it was definitely established by the testimony of Dr. Nathan Poff, who examined Miss Carlton, that she was a virgin prior to the act complained of. From his testimony:

"I examined this white female, and the physical examination revealed a well developed, well nourished white female apparently as stated 18 years old in near hysterical state, quite nervous, tense — after some discussion I was able to calm her down and at this time was able to from examination find a torn blouse a bruised right thumb, a scratch on her right arm, a linear bruise of her right shoulder, scratched inner thigh, approximately the upper third of the thigh. The woman was having some bleeding from the vaginal vault or vaginal bleeding. * * *

"Q. Did you examine the hymen?

A. Yes sir.

Q. Was it intact?

A. No, it was not intact.

Q. Could you determine how recently it had been broken?

A. In my estimation it had recently been broken due to the fact that there was active bleeding at that time.

Q. In your opinion was this young lady a virgin prior to this breaking?

A. In my honest opinion I believe she was." * * *

Q. . . . you say in your honest opinion she was a virgin recently, is it possible she might not have been?

A. Medically speaking or miraculously speaking?

Q. Medically speaking?

A. No.

Q. In your opinion there was no way in which she could not have been a virgin?

A. That's right."

Other facts might also be mentioned; *viz,* that appellant, who was in this state on a visit from the state of Washington, did not tell Miss Carlton that he was married when he made the date with her, and also gave a fictitious name (for the purpose, as he stated, so his wife "wouldn't find out anything"). Of course, it is quite obvious from the verdict entered, that the jury was in no wise prejudiced by any question, or testimony. The penalty of only four years imprisonment under evidence that would have supported a conviction for rape, is ample answer to appellant's contention.

V

Finally, appellant asserts the trial court erred in refusing to instruct the jury that it was the duty of Miss Carlton "to give alarm, and make an outcry, when she first learned of defendant's desire to have sexual intercourse with her". The trial court properly refused this instruction, for it is not the law. The identical contention was raised in the case of *Jackson* v. *State,* 92 Ark. 71, 122 S. W. 101, and this court held that such an instruction was properly refused, commenting, however, that the failure to make an outcry might be considered in connection with other facts and circumstances as tending to show want of resistance. In the instant case the Cleburne Circuit Court told the jury.

"You are instructed that if you find from the evidence in this case that the prosecutrix failed to make an outcry or complaint at the time of and during the alleged rape,

or immediately thereafter, you should take such fact into consideration with all the other facts and circumstances in the case in passing upon whether or not the alleged sexual intercourse, if any, was with or without the consent of the prosecutrix.''

This was a correct statement of the law, and was the proper instruction to be given to the jury.

While not argued, some other alleged errors are set out in the motion for new trial. These, too, have been examined, and found to be without merit.

Finding no reversible error, the judgment is affirmed.

WILSON HARGETT CONST. CO. *v.* HOLMES.

5-2780 361 S. W. 2d 634

Opinion delivered November 12, 1962.

Mahony & Yocum, for appellant.

William H. Donham, for appellee.

ED F. MCFADDIN, Associate Justice. This is a Workmen's Compensation case arising from a heart attack

which the employee, Lawson R. Holmes, sustained because of his work for appellant employer (Wilson Hargett Construction Company) on June 22, 1960. Both the Referee, and the Full Commission on appeal, found for the claimant; the Circuit Court affirmed the Commission; and the employer and its insurance carrier prosecute this appeal.

At the hearing before the Referee it was shown that the claimant Holmes had suffered a previous heart attack while doing heavy work, either for himself or another, in 1957; that he had remained in bed about six weeks under a doctor's care; that he had then been allowed to return to work but cautioned against any heavy work or lifting; that from 1958 to 1960 he had worked regularly; that on June 22, 1960 he was working for the appellant at $160.00 per week (forty hours at $4.00 per hour) as a pipe fitter; that on June 22, 1960 he was called to do heavy lifting, which he undertook and which brought on his heart attack here involved. The doctors testified that the work of June 22, 1960 caused Holmes' present heart condition; but they disagreed among themselves as to what percentage of his present disability was due to the 1957 heart attack and what percentage to the 1960 heart attack. After hearing all the evidence offered, the Referee made an award on April 13, 1961 in favor of Holmes for all hospital and medical bills, for an attorney's fee, and for temporary total disability from June 26, 1960 to December 26, 1960, and for permanent partial disability of 75% for 337½ weeks from December 27, 1960.

The employer and its insurance carrier appealed to the Full Commission and offered additional testimony and there claimed (*inter alia*) that the present disability, if any, resulted from prior heart attack in 1957; and that if additional disability resulted from the 1960 heart attack, then the total disability should be apportioned between the two attacks. When the employer offered evidence on the apportioning of the disability, the attorney for the claimant objected: " . . . on the grounds, that the apportionment, according to the case of

McDaniel v. *Hilyard Drilling Company,* of February 13, 1961, of the Supreme Court, does not apply in a case where no previous compensation has been paid, and where the man has gone back to full time work earning full wages.'' The Workmen's Compensation Commission's opinion is, in part, as follows:

''Respondents on appeal raise these issues: (1) whether the claimant sustained a compensable injury in the course of his employment; and (2) the amount of permanent partial disability suffered by the claimant by reason of the alleged injury. The question of whether claimant sustained a compensable injury has been covered by the medical and lay testimony in the claim. There is no dispute between the four doctors who have seen and examined claimant as to the causal connection between claimant's work and his heart attack. The opinions of the medical witnesses can be summarized by saying that the work did contribute to the full infarction syndrome, even though claimant had predisposing coronary artery disease.

''Another question is involved when consideration is given the amount of permanent partial disability suffered by the claimant by reason of the injury of June 22, 1960. Involved in this question is the fact that the claimant had suffered a previous heart attack in 1957. It should be noted that this first attack was not claimed as an industrial injury and the claimant had returned to full employment between the first and second heart attacks. . . .

''The question of apportionment in Arkansas was decided by our Supreme Court in the case of *McDaniel* v. *Hilyard Drilling Co.,* opinion delivered February 13, 1961, Volume 107, Law Reporter 16, Page 573,[1] and this Commission feels that the disability in the present claim should not be apportioned. The Commission is of the opinion that, taking all of the evidence into consideration, it shows that the claimant is still totally disabled from any type of work at the present time. Under the definition of 'Disability' (Section 2 (e) of the Act), 'Disability

[1] This case is reported in 233 Ark. 142, 343 S. W. 2d 416.

means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury.' A study of the medical evidence, as well as giving weight to age, education and experience (*Glass* v. *Edens*, decided June 5, 1961, Volume 108, Law Reporter No. 4, Page 160)[2] shows, in the opinion of the Commission, that the claimant is totally disabled at the present time and will be for a period of time yet to be determined.

"Respondents raise one issue that it is felt should be commented upon, same being the contention that claimant was negligent in continuing to work when from his past experience he should have known he was suffering a heart attack. We give no weight to this contention, as negligence is not a bar to recovery under the Act."

The Commission's award was as follows:

"In addition to all reasonable medical expenses arising from this injury, the respondents are directed to pay temporary total disability compensation to the claimant at the rate of $35.00 per week from and including June 26, 1960, and continue the payment of same to a date to be determined in the future and the further directions of this Commission. 'The respondents are further directed to pay to Mr. William H. Donham, attorney for the claimant, the maximum attorney's fee as provided by the workmen's compensation law.' "

The Commission's opinion and award are in all things correct. In *McDaniel* v. *Hilyard,* 233 Ark. 142, 343 S. W. 2d 416, we considered in detail under what circumstances a disability could be apportioned; and we quoted the following from Larson's Workmen's Compensation Law, Volume 2, page 58, § 59: "To be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident." In the case at bar, Holmes had suffered a heart attack in 1957, but that heart attack was not producing any degree of disability at the time of the

[2] This case is reported in 233 Ark. 786, 346 S. W. 2d 685.

heart attack in this case in June, 1960. Holmes had returned to work and was engaged by Wilson Hargett Construction Company as a pipe fitter and was earning $160.00 a week. The attack in 1957 had resulted in no impairment of Holmes' earning capacity; and the appellant and its insurance carrier are not entitled to claim any theory of apportionment to reduce the amount that Holmes is entitled to receive for the heart attack which he sustained in June 1960 and which has left him incapable of earning any money at the present time. It is well to note that in its opinion in this case, the Full Commission said of Holmes' 1957 heart attack: "It should be noted that this first attack was not claimed as an industrial injury and the claimant had returned to full employment between the first and second heart attacks." The Workmen's Compensation Commission correctly followed our holdings in *McDaniel* v. *Hilyard,* 233 Ark. 142, 343 S. W. 2d 416; and *Glass* v. *Edens,* 233 Ark. 786, 346 S. W. 2d 685.

Affirmed.

PALMER *v.* NELSON.

5-2823 361 S. W. 2d 641

Opinion delivered November 12, 1962

Claude F. Cooper, for appellant.

Rhine & Rhine, for appellee.

GEORGE ROSE SMITH, J. This dispute involves the boundary line, three quarters of a mile in length, that separates the appellant's land on the east from the appellees' land on the west. In this suit, brought by the appellant, the chancellor fixed the line according to a fence and a turnrow that have marked the boundary for many years and that vary from the government survey by as much as 61 feet. The appellant contends in effect that the decree is against the weight of the evidence.

When adjoining landowners acquiesce for many years in the location of a fence as the visible evidence of the line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Carney* v. *Barnes,* 232 Ark. 549, 338 S. W. 2d 928; *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S. W. 2d 490. Although a boundary by acquiescence is usually represented by a fence, the same reasoning applies when a turnrow, a lane, a ditch, or some other monument is tacitly accepted by the landowners as the visible evidence of the dividing line.

In case at bar the preponderance of the evidence supports the conclusion that the line fixed by the trial court has become the boundary by long acquiescence.

This suit was filed in 1960. Hobert Nelson, one of the appellees, testified that his family had owned the Nelson land ever since his father bought it in 1941. This witness states that when the elder Nelson acquired the property the disputed line was marked by a fence where the land was in woods and by a turnrow where it was in cultivation. Later the Nelsons extended the fence for some distance along the turnrow. Hobert testified positively that he and his father cultivated their fields up to the turnrow, claiming ownership, and that their neighbors cultivated up to the turnrow on the other side. Nelson's testimony is corroborated by several other witnesses, by aerial photographs, and by surveys that show the location of the fence-turnrow line.

The appellant knew nothing about his tract until he bought it from E. W. Whitlock in 1958. Whitlock testi-

fied that his father purchased the land in about 1941. This witness did not deny that the boundary was marked through the years by the fence and turnrow. He said in substance that he and his father did not know just where the true line was, but he admitted that there had never been any controversy between the Nelsons and the Whitlocks about the boundary. On the whole case we are convinced that the chancellor was right in adopting the line that was openly marked and tacitly accepted by the parties and their predecessors in title for nearly twenty years.

Affirmed.

NATHAN *v.* STATE.

5054 361 S. W. 2d 637

Opinion delivered November 12, 1962

Charles Roscopf, David Solomon, Jr. and *A. M. Coates,* for appellant.

Frank Holt, Atty. General, *by Jack Holt, Jr.,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. Appellant, Willie B. Nathan, Jr., was charged, by information, with the crime of raping Mrs. Virginia Jo Ringer. He was found guilty of assault with intent to rape and sentenced to twenty-one years in the state penitentiary.

The uncontradicted testimony of Mrs. Ringer was essentially as here set out. She, her husband, and two children (one three years old and one less than a year old) lived in a trailer (in a trailer camp) near Helena; On Saturday morning shortly after three o'clock a man (she thought to be a negro) came into the room where she was sleeping, placed his hand over her mouth, threatened to kill her if she made a noise, and forced her to have intercourse with him. On this night a young girl sixteen years old (named Mickey Yates) was sleeping in another room of the trailer with the two children. According to Mrs. Ringer's description of the man who attacked her he was young, colored, had a fuzzy face, and wore a dark shirt, resembling a T-shirt, but she could not later identify appellant as the man who assaulted her. After the man left she promptly told Mickey Yates about what had happened and notified the police. Her husband, as was his usual custom, had left the trailer about three o'clock a. m. to go to work.

Appellant took the stand and denied he was ever in that particular trailer or that he knew anything about the alleged assault. The State introduced in evidence a written statement, signed by appellant, in which he admitted he tried to have intercourse with Mrs. Ringer at the time and place before mentioned. A police officer testified that appellant made substantially the same admission to him the day before the written statement was signed.

Appellant ably urges five separate grounds or points for a reversal. Since we have reached the conclusion that the case must be reversed on one point we deem it unnecessary to discuss fully the other points in which we find no reversible error.

1. If appellant's statement had been properly admitted in evidence under correct instructions, then there

would have been sufficient evidence to support the verdict of the jury.

2. The record shows that appellant's attorney objected to a certain statement alleged to have been made to the jury by the prosecuting attorney in his opening statement. The alleged statement was a reference to the fact that appellant had been subjected to a lie-detector test. Over appellant's objection the trial court refused to declare a mistrial. If any possible error is indicated above we think it was later waived by appellant when he testified concerning the same incident.

3. A confession signed by appellant was introduced in evidence. After the jury had retired for deliberation they asked to see the confession, and the request was granted by the court. Appellant contends it was reversible error for the court to give the jury the confession without, at the same time, giving them all exhibits which had been introduced in evidence. Supporting this contention appellant relies on Ark. Stats. § 43-2138 which reads:

"Upon retiring for deliberation, the jury *may* take with them all papers which have been received as evidence in the cause." (Emphasis added.)

This section of the statutes has never been construed in connection with the precise point here raised. It is our opinion, however, that the word "may" (in the statute) indicates the statute was intended to be permissive and not mandatory. In the absence of any request by appellant for the jury to receive the other exhibits, we hold the trial court had a right to give them the one they requested to see.

4. Appellant ably contends the trial court erred in admitting in evidence the oral and written statements referred to previously. This contention is based on appellant's testimony that the statements were made under coercion and threats, and in the presence of officers who did not warn him the statement could be used against him. The officers emphatically denied that any force was used or threats made, but it does appear from a careful

examination of the record that the oral admissions were made to the officers before appellant was advised of his legal rights. It further appears that these oral admissions were substantially the same as those in the written statement made later when appellant was properly advised of his legal rights. However, we are not basing a reversal on this point, and therefore refrain from any exhaustive discussion of it. By disposing of the point in this summary manner it is not to be inferred that we are necessarily giving our unqualified approval to the procedure followed by the officers in this instance.

5. After careful consideration we have reached the conclusion that it was reversible error for the trial court to refuse an instruction, requested by appellant, to the effect that a confession made by an accused in the presence of officers is presumed to be involuntary. The pertinent part of the requested instruction reads as follows:

"The presumption of the law is that any confession made by a defendant, when he is in custody of officers, whether these officers be the sheriff, detectives, policemen, the prosecuting attorney, or any other officer, is involuntary and incompetent and cannot be considered by you.

"The effect of that presumption is to cast the burden of proof upon the state to prove by a preponderance of the testimony that the confession was voluntary. They must overcome this presumption of law to your satisfaction and show that the confession was voluntary.

"If you find that the defendant, during the time of his custody, was under the influence of officers at any time such would make any statement or confession involuntary, the law presumes that this influence continues and makes all other statements or confessions made by him thereafter incompetent until the state shows by a preponderance of the testimony, that this influence has been removed."

We find it necessary to consider the issue here raised from two viewpoints: (a) Is appellant's *statement* to be

treated as a *confession;* and, if so, (b) should the instruction have been given?

(a). The reason given by the trial court for refusing to give the instruction was: ". . . in this case that this is not a confession, but is simply a statement containing an admission against interest . . ." The court's statement is based of course on the fact that appellant did not admit he committed rape (or an attempt to rape) on Mrs. Ringer, but that what he did was with her consent. It must be admitted however that, from a practical standpoint and under the facts and circumstances of this particular case, such an admission almost amounted to a confession of guilt. In any event we hold that the same rules governing admissibility apply in both instances here. In the case of *Bram* v. *United States,* 168 U. S. 532, 18 S. Ct. 183, 42 L. Ed. 568, a similar issue was under consideration. The essence of the court's holding in that case is revealed by its statement found at page 541 of the U. S. Reports:

"Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt. The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence: 'The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess.' "

To the same effect is the decision in *Calvin Cofield* v. *State* (Ala. 1962), 136 So. 2d 897. On page 901 there appears this statement:

"[3] In Alabama, inculpatory admissions in the nature of a confession—that is, directly relating to the fact or circumstances of the crime, and connecting the defendant therewith—are subject to the same rules of admissibility as direct confessions and are admissible only after a predicate of voluntariness is established. *Baker* v. *State,* 35 Ala. App. 596, 51 So. 2d 376."

See also *Davis* v. *State,* 182 Ark. 123, 30 S. W. 2d 830.

(b). Treating the introduction of the admission in the same way we would treat the introduction of a confession, we are driven to the conclusion that appellant's rights were not fully protected in the absence of the requested instruction, and it is clear from the record that such rights were not protected by any other instructions.

This Court has repeatedly approved an instruction to the effect that a confession in the presence of officers is presumed to be involuntary. See: *Monts* v. *State,* (September 18, 1961) 233 Ark. 816, 349 S. W. 2d 350. In that case we approved an instruction almost identical to the one here requested. See also *Charles* v. *State,* 198 Ark. 1154, 133 S. W. 2d 26. Not only was it proper for the court to tell the jury the confession was presumed to be involuntary, but also it was proper to tell the jury the burden was on the State to overcome that presumption by a preponderance of the evidence. We so held in the *Monts* case, *supra.* Not only was it proper for the trial court to so instruct the jury but we think he was required to do so. In *Forester* v. *State,* 224 Ark. 194, 272 S. W. 2d 320, there is this statement:

"Each of said requested instructions was in conflict with Instruction No. 12 given by the court which correctly required the state to prove the voluntary character of the confession by a preponderance of the evidence."

The State concedes that any confession made in the presence of officers is presumed by law to be involuntary.

In view of the above, and under the peculiar facts of this case, we must conclude that the court should have given the requested instruction.

It is noted that if the instruction requested by appellant had been combined with other conflicting or improper instructions the trial court could have properly refused to give it under the holding in the *Forester* case, *supra*. However, we find this was not the situation here. As a matter of fact, after the court's refusal to give the aforementioned instruction the court refused appellant's request for a specific instruction "to the effect that these statements are presumed to be involuntary".

Again, we recognize that it is not error in every instance for the court to refuse to inform the jury of a legal presumption where evidence is introduced to overcome it. However, if that rule is applicable here it does not afford a justification of the court's refusal to give the instruction requested by appellant which also dealt with the burden and quantum of proof imposed on the State.

Reversed.

DONHAM, COMMISSIONER *v.* NEELY CO.

5-2825 361 S. W. 2d 650

Opinion delivered November 12, 1962.

Lyle Williams, for appellant.

Warner, Warner & Ragon, for appellee.

SAM ROBINSON, Associate Justice. The appellee, F. S. Neely Company, is engaged in the mining business in western Arkansas. Arko Briquettes, Inc. is a wholly owned subsidiary. In the state income tax returns filed by the Neely Company for the years 1957, 1958, and 1959, it deducted losses alleged to have been sustained by Arko Briquettes, Inc. for each of those years, and also deducted a sum each year because of depletion of gypsum deposits which the Neely Company was mining.

On December 14, 1960, the Revenue Commissioner for the State of Arkansas notified Neely that the heretofore mentioned deductions had been disallowed and that there was a deficiency in the sum of $3,970.98 in the amount of income tax paid. Pursuant to Ark. Stats. 84-2037, Neely requested a hearing before the Revenue Commissioner for the purpose of protesting the proposed deficiency. Following a hearing on the matter, the Commissioner notified appellant that the additional assessment of $3,970.98 was correct and proper. Acting pursuant to Ark. Stats. 84-2038, the Neely Company then filed this action in the Sebastian Chancery Court, and the amount in controversy was deposited in the registry of the court.

In the complaint it is alleged that all of the outstanding capital stock of Arko Briquettes, Inc. is owned by the plaintiff, and that the Commissioner was in error in not allowing Neely to deduct from its income, the losses sustained by Arko Briquettes, Inc.

The Complaint further alleges "that the disallowance of the percentage depletion . . . is invalid and not in accord with the statutes applicable thereto; that the statutes provide for the depletion of oil or mineral deposits at the rate of fifteen percent of gross income from the property during the income year where the mineral deposit has been discovered through exploitation by the owners or lessees; plaintiff alleges that it is entitled to said depletion allowance on the coal and gypsum mined by it or from its leases, and that the Commissioner's action in disallowing same is arbitrary, capricious and invalid."

The Revenue Commissioner filed a Demurrer to the Complaint alleging: "The Complaint of the plaintiff does not state facts sufficient to constitute a cause of action."

The trial court overruled the Demurrer; the Commissioner refused to plead further, but stood on the Demurrer. Thereupon, the Chancellor entered a decree for the plaintiff, Neely. The Commissioner has appealed.

The only issue properly before this Court is whether the Complaint states a cause of action that is good against a general Demurrer.

Assuming that the Complaint shows on its face that the appellee, Neely Company, improperly deducted from its income, losses sustained by its subsidiary, Arko Briquettes, Inc., there is the further allegation that the Revenue Commissioner was in error in failing to allow the appellee specified credits for depletion as provided by statute. This allegation states a cause of action. The rule is firmly established that where a general demurrer is filed to a complaint as a whole, if any count of the pleading is good and states a cause of action, the demurrer should be overruled. *Spicer* v. *Spicer,* 227 Ark. 258, 297 S. W. 2d 931, *Mortensen* v. *Ballard,* 209 Ark. 1, 188 S. W. 2d 749. It has been said "that a bad part in a pleading does not make the whole bad, but a good part makes the whole good enough to withstand a general demurrer". 41 Am. Jur. 452.

But appellant contends that the demurrer should have been sustained because the complaint fails to show that in claiming credit for depletions, appellee complied with the rules and regulations promulgated by the Commissioner under authority of Ark. Stats. 84-2041. Appellant argues that Art. 170 of Regulation No. 10, adopted by the Commissioner, provides that in order for a taxpayer to be entitled to depletion he must file with the Commissioner an affidavit setting forth the method by which the mine was acquired, the date it was acquired, and a chart of the number of mines located in the immediate vicinity of the mine upon which he makes, or

is making, a claim of discovery depletion, at the time this mine was opened, with approximate distances shown therein.

Although the Commissioner may have adopted a valid rule requiring a taxpayer to furnish certain information in claiming specified deductions and may successfully defend an action because of the failure to supply such information, the complaint is not fatally defective — because of the failure to specifically state that the taxpayer has complied with such rules. The complaint is perfectly clear as to what deductions the taxpayer is claiming. If one of the defenses to the action is that the plaintiff has not complied with the rules made by the Commissioner for claiming such deductions, the question of whether the rules have been complied with is a question of fact; such defense should have been raised by an answer to that effect. "A demurrer raises questions of law as to the sufficiency of a pleading, apparent on the face of the pleadings. It does not present issues of fact, which must be raised by proper plea or answer." 41 Am. Jur. 452.

In testing the sufficiency of a pleading by a general demurrer, every reasonable intendment should be indulged to support the pleading, and if the facts stated in the pleading, together with every reasonable inference therefrom constitutes a cause of action, the demurrer should be overruled. *Dodson* v. *Abercrombie,* 212 Ark. 918, 208 S. W. 2d 433; *U. S. Fidelity & Guaranty Co.* v. *Moore,* 233 Ark. 703, 346 S. W. 2d 524; *Sharp* v. *Drainage Dist. No. 7 of Poinsett Co.,* 164 Ark. 306, 261 S. W. 923.

Affirmed.

LAMBERT *v.* CHILDS.

5-2796 362 S. W. 2d 10

Opinion delivered November 12, 1962.

[Rehearing denied December 10, 1962.]

[redacted]

John L. Anderson, for appellant.

Norton & Norton, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a judgment on the mandate issued by this court in *Childs* v. *Lambert,* 230 Ark. 366, 323 S. W. 2d 564. In the original case the facts disclosed that G. C. Childs entered into a contract to purchase 40 acres of land in Phillips County. Immediately after entering into the contract, Childs and his wife, Elnora, with their children moved onto the land. Thereafter G. C. Childs transferred the contract. It was undisputed that his wife Elnora was not a party to the transaction. On December 5, 1955, Mr. J. B. Lambert, the original vendor as well as the ultimate recipient of all of Childs' transferred interest, caused the Childs family to be evicted from the property. On December 6th, the day after her eviction, Elnora Childs filed suit, seeking, as wife of G. C. Childs, to establish her right which attached to his equitable interest under the homestead law, sought an accounting from Lambert under the contract of sale and prayed that ". . . he be charged with the rental value for the dwelling thereon situated, with interest, etc., until possession should be restored to her and that she be allowed a reasonable time to redeem the property by payment of any balance due

Lambert thereon". The trial court dismissed her complaint and quieted title in Lambert. On appeal this court reversed and in so doing held that Elnora Childs ". . . is not estopped to assert her claim to homestead rights in the property" and that she is ". . . entitled to perform for her husband the purchase contract made by him in order to save her interest in the homestead". The mandate stated " . . . that this cause be remanded to said Chancery Court with directions to grant Mrs. Childs a reasonable time within which to redeem and for further proceedings to be therein had according to the principles of equity, and not inconsistent with the opinion herein delivered."

After a motion for judgment on the mandate, the trial court, from the original record, made certain findings and then proceeded to further trial on the mandate. The court heard extensive testimony and rendered a detailed accounting between the parties. From judgment on the mandate comes this appeal and a cross-appeal.

On direct appeal appellant relies upon six points for reversal, while appellees rely upon five points for reversal on cross-appeal. All of the appellees' points question the correctness of the accounting and only one of appellant's six points reaches the issue we, on trial *de novo,* find to be decisive of this case.

During the trial on the mandate, the fact was established that Elnora Childs had joined with her husband in at least three conveyances of the property to various third parties. The last conveyance was to a Mr. Sizemore. All of the parties who claimed an interest in the property joined in this conveyance which resulted in the placing of $9,500 in the registry of the court pending a final adjudication of the case. All of these conveyances were made subsequent to the original trial and prior to the adjudication on the mandate. The germane point urged by appellant for reversal is as follows: "The court erred in refusing the motion of appellant that there be no further proceedings based on the mandate of the Supreme Court and that the Chancery Court enter an order decreeing all funds in the hands of the clerk be paid to

appellant for the reason that Elnora Childs had only the right to redeem her homestead and now having abandoned that right by joining in the sale to Sizemore and participating in that sale and selling a speculative interest in this lawsuit, she has completely abandoned any right she has in the homestead as defined by the Supreme Court."

The Sizemore conveyance was made upon a contract which recites that the parties ". . . agree that this contract shall be without prejudice to any of them as to any of the issues made or to be made in said suit". We find it unnecessary to decide the legal effect of the sale to Sizemore since it is clear from the record that previous to the sale to Sizemore, G. C. Childs and Elnora Childs, his wife, on April 4, 1958, executed and delivered a warranty deed with "full release and relinquishment of right or possibility of right of dower and homestead" in the property here in question to one George K. Cracraft, Jr., trustee; that thereafter on September 4, 1958, G. C. Childs and his wife Elnora Childs "bargained, sold and conveyed" unto one S. M. Capps "their entire right, title and interest, including dower and homestead" in the property held by Cracraft, trustee, for and in consideration of the sum of $200 ($25 of which went to pay Trustee Cracraft's fee) and the further consideration of ten percent of any clear profit Capps might make on a resale of the property. This contingent or speculative ten percent interest in the profits, if any, at the time of the trial on the mandate was the only remaining interest the Childs had in the outcome of this lawsuit and that interest, in our view, was not an interest in the land here in question but was in fact a balance of the consideration owing by Capps in the event Capps made a clear profit on the sale to Sizemore.

Notwithstanding the following observation by the trial court in its findings * * *

"It has come to the Chancellor's attention that since the reversal of this case, the lands have been conveyed by both Mr. Childs and Mrs. Childs, and that the wife has conveyed her homestead rights in the lands involved."

* * * the learned Chancellor dutifully proceeded to trial on the mandate and made his findings based upon the facts as they existed at the time of the original trial. In a usual case arising out of a reversal of a Chancery decree, this would have been the correct procedure but in the present case our mandate granted Elnora Childs a reasonable time in the future within which to perform a specified act, *i.e.*, redeem. We did not direct her to redeem. She had the choice of electing to redeem. Certainly if the cost to redeem had exceeded the value of the property, she no doubt would have refused to redeem. Elnora Childs' rights from the inception of this litigation were based solely on the homestead law. The homestead interest is a creature of statute. It is more than a mere privilege, it is a right. On the part of a wife it is a right of veto against alienation and encumbrances, as well as the right of occupancy jointly with the owner of the homestead. 40 C.J.S., Homesteads, § 4. The early and oft cited case of *Killeam* v. *Carter*, 65 Ark. 68, 44 S. W. 1032, graphically describes the nature of a woman's homestead as follows:

"The law wisely grants to the widow the privilege of occupying the homestead so long as she desires. But it is a privilege purely personal to her, which she can neither convey to nor share with another. She may enjoy the rents and profits only so long as she intends it as a home. Strictly speaking, she has no estate in the land itself, but only the privilege of occupancy. *Alienation by her confers no rights, but it means abandonment, and the termination of her right of homestead.*" [Emphasis ours.]

As set out above, this court, in the earlier appeal, held that Elnora Childs was entitled to perform for her husband the purchase contract made by him in order to save her interest in the homestead, and directed that she be given a reasonable time within which to redeem. She did not redeem, but instead chose to join with her husband in a conveyance of the property to third persons prior to redemption. Therefore, since alienation by Elnora Childs meant abandonment and the termination

of her right of homestead and that such conveyance by her conferred no rights, her vendees took nothing and her rights of homestead ceased to exist. Accordingly, the decree is reversed and the cause is remanded for entry of orders consistent with this opinion.

GEORGE ROSE SMITH, J., dissents.

MARYLAND CASUALTY CO. *v.* TURNER.

5-2811 361 S. W. 2d 646

Opinion delivered November 12, 1962.

S. Hubert Mayes and *S. Hubert Mayes, Jr.,* for appellant.

Griffin Smith, for appellee.

NEILL BOHLINGER, Associate Justice. The appellee, Yancy B. Turner, was the holder of a contract from

United States Corps of Engineers for certain revetment work on the Arkansas River at a place known as Brown's Bend.

In order to comply with his contract, the appellee entered into a contract with the Mississippi Valley Engineering and Construction Company to furnish the rock requirements for the job, delivered in place on the job site. It appears that the Mississippi Valley Engineering and Construction Company produced the stone at a quarry near Sweet Home and, having no trucks, the Company entered into a contract, or hired trucks, to accomplish that part of its contract with the appellee whereby it was to deliver the rock to the appellee's barges or on the banks at the site of the work.

One of the trucks, the one involved in this case, was owned by a man named Koch and driven by a man named Freeman. It does not appear that the appellee was a party to the contract between the Mississippi Valley Engineering and Construction Company and its haulers and therefore we treat the hauling merely as a part of the work to be performed and the activity of Mississippi Valley.

The activities of the appellee were covered by a general liability policy issued by the Maryland Casualty Company, the appellant here. On August 8, 1960, the truck owned by Koch and driven by Freeman was being lowered over the slope of the river bank to enable the dropping of its load of rock at a point designated by the appellee. While the truck was thus being lowered over the bank and while an employee of the appellee was assisting in scraping the rock out of the truck, the bulldozer owned by the appellee, to which the truck in question was connected by means of a cable, slipped back over the river bank and the truck fell into the river and was damaged thereby.

Koch brought suit against the appellee in the Pulaski Circuit Court to recover damages to his truck. The appellee called upon his insurance carrier, appellant here, to defend him under the terms of the general comprehensive liability policy which he alleged was in force at the

time of the accident. Appellant refused to defend on the grounds of a policy exemption which exempted from coverage damage to "tools or equipment while being used by the insured in performing his operations." The appellee then filed the present suit for a declaratory judgment in the Pulaski Circuit Court and that court found in favor of the appellee and held that the Maryland Casualty Company was obligated to defend Turner in this case but denied Turner's request for penalty and attorney's fee. From that judgment the appellant prosecutes this appeal. Appellee cross-appeals from the trial court's denial of attorney's fees.

This brings squarely before us the question as to whether or not the truck which was damaged was being used by the appellee in his operation at the time of the accident. The exemption relied on is that the policy does not apply to damage to "tools or equipment being used by the insured in performing his operations." The word "*Used*" is, to some extent, employed by insurance companies as a substitute for the phrase "care, custody, and control," in exemption clauses in liability policies. In the case of *Hardware Mutual Casualty Co.* v. *Crafton*, 233 Ark. 1020, 350 S. W. 2d 506, we said:

"The care, custody and control clause in liability policies, so far as our research has extended, appears to be almost universally used but its construction is, to a large extent, dependent upon circumstances of each case and we conclude that the phrase should be applied with common sense and practicality."

Therefore, approaching the construction of the phrase with common sense and practicality, we make use of the following quotation from *Great American Indemnity Co. of N. Y.* v. *Saltzman*, 213 F. 2d 743, which was a federal case applying Arkansas law and which case is cited in the *Crafton* case, *supra*:

"Of course if the term 'use' is construed to embrace all its possible meanings and ramifications, practically every activity of mankind would amount to a 'use' of something. However, the term must be considered with regard to the setting in which it is employed."

So in order to arrive at the setting in which the term is used, we revert to the contract between the appellee and the Mississippi Valley Engineering and Construction Company which contains these two applicable provisions:

"(1) Miss. Valley Engineering & Construction Co. agrees to furnish all labor, equipment, materials, supplies and other necessary items to produce and furnish approximately 42,500 tons of quarry-run stone with fines. Said quarry-run stone to be delivered to Yancy B. Turner's barges by trucks or dumped on the bank from trucks as designated by Yancy B. Turner.

(2) Yancy B. Turner, Contractor shall furnish the scales and the necessary men and equipment to dump the rock from the trucks to the barges, and/or on the bank as designated."

From these provisions in that contract it is evident that Mississippi Valley was bound by its solemn commitment to deliver the stone by truck to the appellee's barges or to dump the stone on the bank from trucks as designated by the appellee. It was Mississippi Valley's stone from the time it was quarried until it was placed at the point designated by appellee, Turner. To hold that paragraph two (2) would be controlling we would have to hold that the appellee's commitment to furnish the necessary men and equipment to dump the rock from the trucks to the barges or onto the river bank would completely nullify the Mississippi Valley's commitment to dump the rock where Turner designated. This dumping the rock where Turner designated was a service for which Mississippi Valley was to be paid and it therefore appears that the appellee's commitment to furnish men and equipment was merely to facilitate the Mississippi Valley Company in making its delivery of the rock and was not intended to and did not give the appellee the use, care, custody and control of the truck involved. The idea that appellee's commitment was to furnish men and equipment is, under the circumstances, incompatible with the obligation of the Mississippi Valley which was to put the stone in place.

It appears that some defect in the unloading apparatus of the truck here involved became apparent before

the truck was lowered over the slope and the appellee's men, acting under provision two (2) of the contract, lent their assistance in correcting that defect but that is not taking control of the truck. An analogous situation would be if the truck had mired down at the site and the appellee's men and equipment pulled it out, or changed a tire. These things would not give to the appellee the use of or the care, custody or control of the truck. This concept is strengthened by the case of *Boswell* v. *Travelers Indemnity Company,* 120 A. 2d 250, 38 N. J., Super. 599, where the court said:

"* * * that an insured 'uses' property within the meaning of the exclusion clause only where he puts it to his own service or to the purpose for which it was ordinarily intended."

The purpose for which Mississippi Valley and its subcontractor were using the property was to comply with provisions one (1) of the contract between appellee and Mississippi Valley. That was the purpose for which it was intended and for which it was being used and the trial court properly found that the truck in question was not being used by the appellee.

The appellee, among other things, asked that he be allowed an attorney's fee. The trial court denied this prayer and in that the court was in error. Section 66-3239, Ark. Stats. provides as follows:

"In all suits in which the judgment or decree of a court is against a life, fire, health, accident and liability insurance company, either in a suit by it to cancel or lapse a policy or to change or alter the terms or conditions thereof in any way that may have the effect of depriving the holder of such policy of any of his rights hereunder, or in a suit for a declaratory judgment under such policy, or in a suit by the holder of such policy to require such company to reinstate such policy, such company *shall also be liable to pay the holder of such policy all reasonable attorneys'* fees for the defense or prosecution of said suit, as the case may be, which fees shall be based on the face amount of the policy involved; said attorneys' fees to be taxed by the court where the same is heard on original

action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected." [Emphasis added]

Attorneys' fees in these types of cases are specifically provided for in the statute and should have been allowed by the trial court. In the case of *David H. Curran* v. *Security Insurance Company,* 195 F. Supp. 562, which was an application for a declaratory judgment under Arkansas law, United States District Court for the Western District of Arkansas said:

"In view of the conclusion that the court has reached, the plaintiff is entitled to recover a reasonable attorney's fee, and the court, even in the absence of testimony as to the amount of such fee, may fix the same based upon the record before it."

In 5 Am. Jur., Attorneys, § 190, p. 376, it is stated:

" * * * The services of an attorney, when rendered in litigation before the same court which is passing upon the value of such services, may, of themselves, constitute evidence from which the court alone, unaided by opinion of others as to value, or even in defiance of opinion evidence, may reach a conclusion."

The right to fix the fee of appellee's attorney is in either the trial court or this court. We have reviewed the record in this case, which involves $2,525.00, and we find that a fee of $500.00 should have been allowed appellee's attorney for services in the trial court and here on appeal. There can, of course, be no penalty or interest.

This judgment is therefore modified to the extent of allowing a $500.00 fee to appellee's attorney and is in all other respects affirmed.

5046 361 S. W. 2d 646

Opinion delivered November 12, 1962.

[redacted]

PER CURIAM

On February 7, 1962 appellant was convicted of grand larceny and sentenced to the penitentiary for six years, which sentence he is now serving.

On April 9, 1962 there was filed in this Court a certified copy of the Circuit Court judgment. No other matters of any kind have been filed, except the brief of the Attorney General. There is no motion for new trial, and no bill of exceptions. We have nothing before us except the Circuit Court judgment, which is valid and regular on its face. See *Whelehon* v. *State,* 233 Ark. 229, 343 S. W. 2d 563.

Therefore, the Circuit Court judgment is affirmed.

BLACK *v.* THOMPSON.

5-2802 361 S. W. 2d 753

Opinion delivered November 19, 1962.

L. A. Hardin, Carl Langston, W. J. Walker, for appellant.

Alston Jennings, Sol J. Russell, C. Byron Smith, Jr. and *Reed W. Thompson,* for appellee.

CARLETON HARRIS, Chief Justice. This is the third appeal involving some phase of the Ward Millard Black estate. The first two cases involved the validity of a purported will of the decedent.[1] In the first case, we reversed and remanded for additional proof, and in the second case, we held that the purported will was a forgery, and reversed the findings of the trial court.

The present appeal stems from an order of the Pulaski County Probate Court, allowing attorney fees of $2,500 to appellees for services rendered in representing Clio Thompson, administratrix of the estate of Black.

[1] For a detailed discussion of the facts, see *Black* v. *Morton,* Law Reporter of February 27, 1961, 343 S. W. 2d 437, and *Black* v. *Morton,* Law Reporter of December 18, 1961, 352 S. W. 2d 177.

It might be here pointed out that appellees only asked for fees for representing the estate, and not for defending the will. Appellant, Walter L. Black, Jr., a nephew of the decedent, and sole heir of the estate,[2] contends that appellees are entitled to no fee whatsoever. Appellees have cross-appealed, contending that the fee allowed by the court was inadequate. Appellant asserts that appellee attorneys entered into a contingent fee contract with the beneficiaries of the purported will, whereby the former were to receive one-third of the estate if the will was finally (following trial court hearings and appeals) admitted to probate, and since such will was declared of no effect, appellees are not entitled to compensation. He calls attention to the provision of Section 62-2209, Ark. Stats. Anno. (1957), which provides,

"When any person nominated in a will as executor or the administrator with the will annexed, in good faith defends it or prosecutes any proceedings for the purpose of having it admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney's fees in such proceedings."

Appellant maintains the key language of the statute is "in good faith," and asserts that the record shows that Clio Thompson, as a proponent of the forged will, did not act in good faith.

In the first place, we do not agree that the allowance of the attorney's fee is dependent upon the good faith of the administratrix,[3] but since appellant urges that this is controlling, we will briefly discuss the contention. In our view, the record does not support the allegation that Miss Thompson was not acting "in good faith". Miss Thompson and Mrs. Olive Perzigian were cousins of the deceased, and were both beneficiaries under the forged will; however, the purported bequest to these two, along with purported bequests to two other

[2] Walter L. Black, Sr., a brother of Ward Millard Black, died during the pendency of the will contest. The estate is valued at over $100,000.

[3] Of course, no fee would be allowable to the administratrix unless the will was offered for probate in good faith.

members of the family amounted to only an approximate 25% of the total estate. The principal beneficiary of the instrument was Cecil C. Morton, ex-convict, and employee of the drug store operated by Ward Millard Black; according to the terms of the "will", Morton was beneficiary of approximately 75% of the estate. A reading of the two opinions in the *Black* cases will, we think, leave the reader with the unqualified view that the forgery was instigated, and carried out, by Morton, and others acting under his influence or direction. Certainly, the last opinion makes clear that this was the feeling of our court. Be that as it may, the testimony fell far short of establishing that Miss Thompson had any part in a conspiracy to forge the will, and it might be mentioned that her general background is not at all compatible with the role of a forger. She is principal of the Lamar High School, and the evidence leaves the impression that she is a responsible citizen.[4] We cannot assume that people act "in bad faith", nor does the record in the original case so indicate. According to the testimony in that case, Miss Thompson was advised some 10 months after the death of Black that her cousin had left a will, and the will was delivered to her. This information was voluntarily given by one of the witnesses, who, according to the evidence, was unknown to Miss Thompson prior to the delivery of the instrument. Actually, she would have been remiss in her duty had she failed to offer the will for probate (since it was not established that she helped procure it). Surely, no one could logically contend that Miss Thompson should have destroyed or thrown away the "will"; after all, there were other beneficiaries named in the instrument, members of the family, who, unquestionably, had no part in any forgery, and were entitled to have same offered for probate. These beneficiaries,

[4] The record in the first case (made a part of the record herein) discloses that Miss Thompson holds a Bachelor of Arts degree from College of the Ozarks, a Master's degree from the University of Arkansas, and 30 hours graduating credit from the University of Oklahoma and Northeastern State Teachers College. During the war, she was with the War Department as an instructor in the Armed Service Forces Technical Command. She has also worked for the United States Treasury Department and in the Comptroller's Division of Douglas Aircraft Corporation.

most likely, would have "raised the roof" if Miss Thompson had refused to proceed. The very fact that the probate court admitted the will to probate is a strong circumstance within itself that she was entirely justified in offering it for admission.

However, as stated at the outset of the preceding paragraph, we do not consider that the "good" or "bad" faith of Miss Thompson in offering the will for probate, is controlling as to the allowance of the attorneys' fee. Rather, we think the fact that these attorneys were *appointed by the court* to represent the administratrix of the estate, and thereafter rendered service in behalf of the estate, entitles them to remuneration. After all, once they were appointed, the duty of advising the administratrix, and performing necessary functions in behalf of the estate, was incumbent upon them, and they were accountable to the court for the manner in which they discharged those duties. If the probate court has the authority to appoint attorneys (and it has such authority), then, certainly, it has the power to recompense them for their services. The probate court would be indeed impotent if it were powerless to compensate those that it has appointed to perform certain functions. We are not here concerned with any contract that might have been entered into between appellees and beneficiaries under the purported will; we are only concerned with the acts of the attorneys in representing the administratrix, and the estate, as directed by the probate court. The amount of the fee allowed by the court is not questioned by appellant; he simply insists that no fee at all should be granted. The record reflects that appellees were appointed attorneys for the estate on June 21, 1960, and they have served as attorneys for the estate since that time. When Miss Thompson was authorized to take charge of the drug store on that date, she found that appellant, former administrator, had surrendered the drug and narcotic permit, and it was, of course, necessary that another be obtained. According to her testimony, the lawyers worked two to three weeks assisting in negotiating with the proper authorities for restoration

of the permit. She stated that she sought the advice of the attorneys once a week in administering the estate,[5] but the record does not make clear the period of time covered by these conferences; nor did the witness specify the problems encountered, or the nature of the advice given. Of course, advice rendered, relative to the will contest, cannot properly be considered in the matter before us. The testimony reflected that the total cash receipts from June 21, 1960, through January 31, 1962, were $159,006.80. Other than assisting in obtaining the permit, and rendering the legal advice mentioned, no specific acts of service to the estate are shown by appellees (who did not testify), but we think the amount allowed by the court was justified, and, according to the transcript, prior attorneys, representing the estate at the time appellant was serving as administrator, were allowed a fee of $3,000.

Appellees have cross-appealed, contending that they are entitled to a fee of $7,000 under the provisions of Sub-section (d) of Section 62-2208, 1961 Supp. That section sets out the fee that shall be allowed to attorneys, basing same on the market value of real and personal property reportable in the probate court. Appellees (cross-appellants) assert that provisions of this statute are mandatory. We are not here required to decide whether the legislature can establish mandatory fees — thus taking away all judicial discretion, because the section relied upon also provides, "the attorney so employed shall prepare and present to the Probate Court all necessary notices, petitions, orders, appraisals, bills of sale, deeds, leases, contracts, agreements, inventories, financial accounts, reports and all other proper and necessary legal instruments * * * and for *said*[6] legal services such attorney * * * shall be allowed a fee based on the total market value of the real and personal property reportable in the Probate Court." There is no showing in the present record that counsel have performed these services. We find it difficult to believe that the General Assembly intended for an attorney to receive a fee based

[5] This would roughly total about seventy-five conferences.
[6] Emphasis supplied.

on a percentage of the property reportable in a probate court, *irrespective* of the amount of work done by the attorney. Such an interpretation would manifestly be unfair, for numerous estates require dozens of prepared orders, while others, of the same monetary value, require but few. The trial court seems to have been entirely familiar with the amount of work performed by appellees, and the services rendered to the estate. It placed a value upon those services, and we are unable to say that the court's finding was erroneous.

Affirmed on both direct and cross-appeal.

Justices SMITH and ROBINSON dissent.

GEORGE ROSE SMITH, Associate Justice, dissenting. The attorneys who are now demanding a fee from the estate represented the proponents under a contingent fee contract which would have entitled them to a fee of about $35,000 if the will had been upheld. If, however, the will was declared to be a forgery, as proved to be the case, they would receive nothing.

I think the contracting parties evidently intended that the attorneys' compensation be governed solely by the contingent fee contract. If the validity of the will had been sustained the attorneys would have been entitled to one-third of the estate for their services. I am unable to believe that they would have demanded, much less have been entitled to, an additional fee for representing one of their clients in her capacity as administratrix.

But the will was found to be a forgery. Since the lawyers were to receive no extra compensation for representing the administratrix if the will had been upheld, it should follow that they receive no such extra compensation if the will be rejected. Otherwise they are in the position of collecting a contractual fee from their clients if they are successful in defending the will and of collecting a non-contractual fee from the appellant, as the sole beneficiary of the estate, if they are unsuccessful. The plain result of this view of the law is to encourage

the tender of a forged will in every instance, for its proponents have everything to gain and nothing to lose.

ROBINSON, J., joins in this dissent.

WAGNON *v.* PORCHIA.

5-2806 361 S. W. 2d 749

Opinion delivered November 19, 1962.

Bernard Whetstone, for appellant.

Lamar Smead, James M. Rowan, Jr., and *Shackleford & Shackleford,* for appellee.

ED F. MCFADDIN, Associate Justice. This case results from a traffic mishap which occurred on July 30, 1960, when a pickup truck driven by J. W. Wagnon was struck by a car driven by the appellee, Raymond Porchia. Wagnon was killed and Porchia was injured. Porchia filed action against the estate of Wagnon, claiming that the collision was entirely the fault of Wagnon. Mrs. J. W. Wagnon, as Special Administratrix, filed answer, denying that Wagnon was negligent; and she also cross-

complained against Porchia for damages, alleging that his negligence caused the collision and the death of Wagnon. Wagnon carried liability insurance, and his insurance carrier effected a settlement with Porchia and the claim of Porchia against the Wagnon estate was settled and dismissed;[1] but the settlement by the Insurance Company did not affect the claim of Mrs. Wagnon, as special administratrix, against Porchia. That claim was tried before a jury and resulted in a verdict and judgment for Porchia. It is from that trial that the present appeal is prosecuted.

I. *Motion To Strike Answer To Cross Complaint.* Porchia's original complaint was filed on October 14, 1960. On November 2, 1960, Mrs. Wagnon filed her answer and cross-complaint; and the answer to the cross-complaint was not filed by Porchia until April 5, 1961. Because of such delay, the appellant, on September 28, 1961, moved that the answer to the cross-complaint be stricken and Porchia found to be in default, citing in support of such motion § 27-1137 Ark. Stats.; *Pyle* v. *Amsler,* 227 Ark. 785, 301 S. W. 2d 441; and *Walden* v. *Metzler,* 227 Ark. 782, 301 S. W. 2d 439. The Trial Court denied the motion to strike; and, under the facts shown by the evidence, we hold such ruling to be correct.

Mrs. Wagnon was represented by another attorney when her answer and cross-complaint were filed; and that attorney continued in the case until after April 14, 1961, when the insurance company settled the claim of Porchia against the Wagnon estate. Mrs. Wagnon's original attorney then withdrew from the case and she retained her present counsel. The answer to the cross-complaint was filed while Mrs. Wagnon's original attorney represented her, and he never claimed a default

[1] The Order of Dismissal recites:
"IT IS THEREFORE, BY THE COURT, CONSIDERED, ORDERED AND ADJUDGED That plaintiff's complaint is dismissed with prejudice and that this dismissal fully releases and forever discharges J. W. Wagnon and Mrs. J. W. Wagnon, special administrator of the estate of J. W. Wagnon, Central Surety and Insurance Corporation and all agents, successors and assigns and all other persons, firms, and corporations, of and from any and every claim, demand and cause of action whatsoever which the plaintiff now has or may hereafter have against the said defendants."

and testified that he had no idea of claiming one. He remained in the case until after April 14, 1961. It is easy to see that from the time of the filing of Mrs. Wagnon's cross-complaint until the insurance company effectuated its settlement, there were negotiations in progress and such negotiations accounted for the failure of Porchia's attorneys to file the answer to the cross-complaint. It was not until the original complaint was settled and it was seen that the negotiations were ended that it became necessary to file the answer to the cross-complaint. So the Trial Court was correct in refusing appellant's motion to strike the answer to the cross-complaint. See *Easley* v. *Inglis,* 233 Ark. 589, 346 S. W. 2d 206.

II. *Exclusion Of Evidence.* The traffic collision between the Porchia car and the Wagnon pickup truck occurred on U. S. Highway No. 79; and both vehicles were going in the same general direction. Porchia was traveling northerly from Stephens to Camden, and he overtook and passed a truck driven by the witness, Gene Kesner. This passing of the Kesner truck was less than a half mile from the place where the collision subsequently occurred. Kesner testified that he continued to travel 55 miles per hour; that Porchia was traveling 75 miles an hour when he passed the Kesner truck; that after passing the Kesner truck Porchia increased his speed to 85 miles an hour; that when Kesner last saw the Porchia car it was traveling 85 miles an hour and "fishtailing",[2] that the Porchia car rounded a curve so Kesner did not continuously see the Porchia car, but the mishap occurred 175 yards from the curve. Kesner was traveling 55 miles an hour and when he reached the curve the collision had already occurred 175 yards away. In short, when Kesner last saw the Porchia car, it was traveling 85 miles per hour and the collision occurred only 175 yards farther down the road.

[2] This word "fish-tailing" is very descriptive, as used by the witness, and as a verb found in Webster's Third New International Dictionary as: "to move with a side to side or whipping motion of the stern . . . "

The Court refused the above mentioned testimony of the witness Kesner; and this occurred:

"The Court: I think his testimony about where he passed him, and how he passed him almost a half mile back wouldn't be competent testimony, because it is too remote from the scene of the accident. What was he doing at the time of the accident, that is the thing that is proper here. And the other time the closest was 175 yards.

"Mr. Whetstone: He said he was going faster than 85 miles an hour at that time.

"The Court: I think that testimony is too remote, as to the scene of the accident.

"Mr. Whetstone: How fast he was going 175 yards before the collision?

"The Court: He said he observed him as he went down the hill, and then as he went out of sight he was fish-tailing."

The ruling of the Trial Court is challenged by the appellant; and we hold that the Kesner testimony was admissible and the Trial Court was in error in excluding it. Appellant cites and relies on two Arkansas cases. The first is *Mo. Pac. Trans. Co.* v. *Mitchell,* 199 Ark. 1045, 137 S. W. 2d 242, in which a witness was permitted to testify that when the Missouri Pacific bus passed the witness four or five miles from the scene of the accident, the bus was going 75 miles an hour and that the bus continued to drive rapidly until it passed out of view. It is true that in the cited case other witnesses testified that the bus continued at a high and dangerous rate of speed; but, in holding that the questioned testimony was admissible, we cited from Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 9, § 6171, as follows:

"Generally speaking, any evidence of conditions leading up to or surrounding an automobile accident, which will throw light on the question of whether a traveler was in exercise of due care at the time of the

accident, is admissible, in an action for injuries growing out of such accident."

The second Arkansas case relied on by appellant is *Jelks* v. *Rogers,* 204 Ark. 877, 165 S. W. 2d 258, wherein a witness testified as to the speed of a truck which passed him three blocks away from the intersection. Of that testimony, we said:

"We are unable to agree with the contention that the testimony of Berry Provence as to the speed of the truck when it passed him, about three blocks south of the intersection, was inadmissible. It was competent as a circumstance tending to show the speed of the truck at the time of the collision."[3]

To sustain the ruling of the Trial Court excluding the proffered testimony, appellee relies on *Schwam* v. *Reece,* 213 Ark. 431, 210 S. W. 2d 903. In that case the Court refused to allow a witness to testify as to the speed and manner in which the defendant was driving the bus *on another trip* about thirty minutes prior to the accident, and two or three miles from the scene of the collision. In holding that the ruling of the Trial Court was correct, Justice Millwee, in referring to the case of *Pugsley* v. *Tyler,* 130 Ark. 491, 197 S. W. 1177, distinguished it from the two cases here relied on by appellant, by using this language:

"That case, like the one at bar, is to be distinguished from those cases involving the admissibility of evidence where it is shown that the speed at which the driver was traveling was one continuous act of negligence and not a separate and different act from the one involved in the collision. See *Mo. Pac. Trans. Co.* v. *Mitchell,* 199 Ark. 1045, 137 S. W. 2d 242; *Jelks* v. *Rogers,* 204 Ark. 877, 165 S. W. 2d 258."

In the case at bar, the excluded testimony of Kesner was that the Porchia car was going 85 miles an hour

[3]It will be observed that in *Jelks* v. *Rogers* the testimony related to a speed three blocks, or more than 900 feet, from the scene of the collision, whereas, in the case at bar, the testimony of Kesner as to the speed of the Porchia car was when the car was 175 yards, or 525 feet, from the scene of the collision.

when he last saw the car a distance of only 175 yards before the collision. A car traveling 85 miles an hour is going in excess of 41 yards a second, so the collision occurred less than five seconds after the Porchia car was last observed by Kesner as traveling at a speed of 85 miles an hour. Certainly neither the distance of 175 yards nor the time lapse of five seconds could render the testimony of Kesner too remote. We hold that Kesner's proffered evidence was not too remote, and should have been admitted.[4]

III. *Permitting Appellees To Argue The Settlement Of The Original Complaint.* Since the case is being reversed and it is possible that there will be a new trial, we think it proper to mention this point raised by the appellant. In the closing argument appellee's attorney told the jury, over appellant's objection, that Porchia's claim had been settled; and said:

"He got paid for his damages and there is no complaint about that . . . if he had not been in the right the people that found out all about it . . . would not have settled and paid Porchia off. Now I want you to think about that when you go out there to deliberate on this case. According to the evidence in this case they settled with Porchia a short time after this happened, and paid him for whatever his damages were."

We think this argument was improper. Our search has not revealed a case like this one, in which an insurance carrier has settled with the plaintiff and the defendant has continued to prosecute the cross-complaint against the original plaintiff. Either the jury should have been fully informed about the whole matter, or all argument on the point should have been silenced by the Court. We reach the conclusion that the better practice is for the Court to merely tell the jury that the original complaint is out of the case, that it has been disposed

[4] In 46 A. L. R. 2d page 9 there is a splendid annotation entitled, "Admissibility, in action involving motor vehicle accident, of evidence as to manner in which participant was driving before reaching scene of accident." Also in *Comins* v. *Scrivener* (10th Circuit), 214 F. 2d 810, our case of *Mo. Pac.* v. *Mitchell*, 199 Ark. 1045, 137 S. W. 2d 242, is cited as being in accord with the general rule.

of, that it is not a matter before the jury, and that the jury will not speculate about it. Thus, neither side can use the settlement of the original complaint in any way. The Trial Court attempted in the case at bar to make such a ruling because in the instructions he told the jury:

"You are instructed that you are not to speculate or consider with reference to any other possible claims or litigation growing out of this collision but you are to confine your deliberations and considerations solely to the merits of this single cause of action of the Wagnons against Raymond Porchia. You are instructed that in making your findings in this case that the jury is not required to speculate as to what happened or as to any phase of the case but a verdict should be, and must be, based upon a preponderance of the evidence or testimony."

The instructions were proper: the vice was in allowing the appellee's attorney to make the argument which we have quoted.

For the error in refusing the proffered testimony of the witness Kesner, and for the error in the improper argument, the judgment is reversed and the cause is remanded.

MILLER *v.* BEST.

5-2829 361 S. W. 2d 737

Opinion delivered November 19, 1962.

W. H. Botts and *George E. Pike,* for appellant.

Chris Carpenter, for appellee.

George Rose Smith, J. This is essentially an action in ejectment. The 30-acre tract in question was apparently owned by Mertice Best Miller at her death intestate in 1935. If so, title then passed to her brother and sister, the appellees; but Mertice's surviving husband, Tom Miller, remained in possession under his curtesy right. In 1952 Tom Miller executed a deed by which, after reserving a life estate in himself, he purportedly conveyed the fee title to his three brothers, the defendants below.

Tom Miller died in 1953, and his brothers took possession of the tract. The appellees, contending that they acquired a possessory right upon Tom's death, brought this action in 1955 to recover the land and the 1954 and 1955 rents. The Miller brothers defended the suit not so much upon a claim of title in themselves as upon the ground that the plaintiffs were unable to prove their own title and therefore could not prevail in ejectment. *Beloate* v. *Hathcoat,* 208 Ark. 1100, 188 S. W. 2d 619. At the close of the proof the trial court directed a verdict for the plaintiffs on the issue of title and submitted the claim for rents to the jury, who found for the defendants upon that issue.

The appellants are right in their contention that the court erred in directing a verdict for the plaintiffs on the issue of title. The proof is demonstrably defective in that it does not supply a legally sufficient description of the 30 acres in controversy. In the absence of such a description it would be manifestly impossible for the trial court to frame a judgment directing that the plaintiffs be put in possession of the land.

In their pleadings and proof the plaintiffs sought to trace their chain of title back to their father, A. N. Best, as a common source of title. The deeds to Best, however, were patently invalid for want of an exact description of the property being conveyed. Here are the descriptions from three of the deeds:

1. "Thirty acres in the Northern part of Spanish Grant No. 2425 and West and adjoining the ten acre tract known as the Will Lemons tract."

2. "Forty (40) acres in the Northern part of Spanish Grant No. 2425, adjoining the ten (10) acre tract known as the Will Lemons tract."

3. "North Western part of Spanish Grant No. 2425 containing (20) acres twenty acres, more or less, same being all the land owned by us in said Grant No. 2425, having previously sold [by the other two deeds] balance owned by us to A. N. Best."

It is settled that "part" descriptions such as these are void for indefiniteness. *Ketchum* v. *Cook,* 220 Ark. 320, 247 S. W. 2d 1002. Although a surveyor testified that he was able to locate the tracts from the descriptions that we have quoted, he must have relied upon physical evidence such as fences, for the language of the deeds supplies no clue that could lead to an identification of the property. The rule is that the conveyance itself must furnish that clue. *Turrentine* v. *Thompson,* 193 Ark. 253, 99 S. W. 2d 585.

This surveyor also produced a plat that purportedly portrays a 70-acre tract (of which the land now in controversy is a part) that lies in the northwest corner of Spanish Grant No. 2425. The plat is incomplete, however, in that it shows a rectangular tract that does not lie square with the compass, but the extent of the deviation is not specified. It would thus be impossible to use this plat as a means of locating the land in controversy.

Both the amended complaint and the trial court's judgment identify the parcel in dispute as the south 30 acres of a 70-acre tract that is described by metes and

bounds. The trouble is that the accuracy of this description is not established by the proof. Indeed, if the rectangular 70-acre tract lies at almost a 45-degree variation from the points of the compass, as the surveyor's plat indicates, it may be doubted whether a reference to the south 30 acres of a tract so situated is a definite description.

The trial court, in directing a verdict for the plaintiffs, apparently took the view that Tom Miller's possession was not adverse to the plaintiffs' title and may even have inured to their benefit. Even so, the plaintiffs had the burden of proving their right to the possession of a specific tract of land, and in the absence of an exact identification of the property that burden was not met. The case must therefore be remanded for a new trial upon the issue of title—in part, at least, a question of fact.

There is a second issue. One of the defendants, Byron Miller, died on February 24, 1960, and the cause was not revived in the names of his administrator and his heirs until August 8, 1961. The appellants contend that after the death of a defendant in an action for the recovery of real property only, the cause must be revived against the heirs within a year. Ark. Stats. 1947, §§ 27-1013 and 27-1014. It is therefore insisted that in the case at bar the order of revivor came too late.

A sufficient answer to this argument is that the present action is not one for the recovery of real property only. The complaint asked judgment for the rents that had been collected by Byron Miller and his brothers. Byron's heirs would not be personally liable upon this claim for rents, *Cavender* v. *Smith,* 8 Iowa 360; so it was properly a demand against Byron's estate. Hence it became necessary to revive the cause in the name of Byron's administrator as well as in the names of his heirs (who had inherited his claim to the land).

The statute provides that an order to revive against the personal representative *and* the heirs cannot be made until after six months from the qualification of the per-

sonal representative. Ark. Stats., § 27-1015. Since a period of a year is then allowed for the entry of the order, § 27-1016, it is apparent that the revivor in the case at bar, having been made within eighteen months after the death of Byron Miller, was timely. See *Peay* v. *Pulaski County,* 103 Ark. 601, 148 S. W. 491.

Reversed and remanded for a new trial.

SHROEDER *v.* JOHNSON.

5-2812 361 S. W. 2d 739

Opinion delivered November 19, 1962.

A. A. McCormick, for appellant.

Sexton & Morgan and *Charles R. Garner,* for appellee.

PAUL WARD, Associate Justice. This is the second appeal involving the same parties and the same intersection collision between two automobiles. For the decision on the first appeal see: *George Shroeder* v. *Billy Wayne*

Johnson, Mary Imogene Johnson, T. J. Johnson, and *Arlene Johnson,* 234 Ark. 443, 352 S. W. 2d 570.

Since the first opinion contains a full statement relative to the physical features leading up to and surrounding the collision we deem it unnecessary to repeat many of them here. Appellant's car while proceeding east on a secondary road collided with the car driven by Arlene Johnson while it was going north on Highway 45 which is a principal artery of traffic. There was a stop sign on the secondary road where it intersected the principal highway. The collision occurred near the middle of the intersection. With this brief statement we will now discuss the four grounds relied on by appellant for a reversal.

1. We are unable to agree with appellant's contention that the trial court erred in refusing to direct a verdict in his favor at the close of the plaintiffs' testimony. Mrs. Arlene Johnson, who was driving her car, testified that as she approached the intersection and slowed down she saw appellant's car approaching from the west as it was some distance from the intersection; it was moving from behind the big church sign or stop sign; she naturally thought he would stop before pulling out on the highway; when she saw he was not going to stop she honked the horn and immediately applied the brakes, but was unable to avoid the accident. Mrs. Imogene Johnson, who was in the car with Arlene, stated she saw appellant approaching the intersection slowly — just barely moving — and he didn't stop. There was other corroborating testimony, but what we have set out is sufficient to constitute substantial evidence of appellant's negligence under the circumstances of this case. See our quotation from *Ness* v. *Males,* 201 Md. 235, 93 A 2d 541, set out in the first *Shroeder* opinion.

2. It is next insisted that the trial court erred "in refusing to permit Mr. Lile Johnson to testify". During the trial appellant's attorney announced he would like to call Lile Johnson to testify relative to an experiment he made the previous day by driving a car (similar to the

one driven by Mrs. Arlene Johnson at the time of the collision) to determine the distance it took to stop at certain speeds — on Highway 45 approaching the intersection. After a conference in chambers the trial judge refused to admit the testimony. This ruling was not reversible error for many reasons. In the first place, it was a matter within the discretion of the court. See: *Little Rock Gas & Fuel Co.* v. *Coppedge,* 116 Ark. 334, 172 S. W. 885. In addition, the trial court pointed out several instances of different conditions and circumstances obtaining when Mrs. Johnson was driving and when the experiment was performed.

3. Appellant contends the judgments are excessive. The jury awarded $2,009.17 to Mrs. Arlene Johnson which is the only amount challenged. The challenge is based solely on the following incident. Mrs. Johnson, after being knocked unconscious with lacerations about the head, spent five days in the hospital. One day after she returned home she was feeding her baby when it caused the plastic nursing bottle to strike her (Mrs. Johnson's) head and broke the stitches on a laceration. As a result Mrs. Johnson had to return to the hospital to have the stitches reset and stayed seven days. It is appellant's contention that "the proximate cause of this last injury was plaintiff's own negligence and that the verdict is excessive." One answer to this contention is that there is nothing in the record to show the jury allowed anything for the "last injury." We have carefully reviewed the other testimony (unchallenged here by appellant) relative to Mrs. Johnson's injuries, and cannot say the jury's judgment in the stated amount is not supported by substantial evidence.

4. Under the last allegation of error appellant states: "The jury's verdict is contrary to the law and the evidence." Appellant has argued no exceptions to any instructions given by the court. It would serve no useful purpose to reiterate the testimony relative to the negligence or lack of negligence on behalf of the parties

involved, since we have already noted sufficient evidence to support the jury's verdict.

Finding no error the judgment of the trial court is affirmed.

WOODARD *v.* HOLLIDAY.

5-2803 361 S. W. 2d 744

Opinion delivered November 19, 1962.

Cockrill, Laser, McGehee & Sharp, for appellant.

Lightle & Tedder, for appellee.

JIM JOHNSON, Associate Justice. This case arises out of an automobile collision. On April 13, 1959, appellant F. M. Woodard was riding as an occupant in a car owned and driven by B. A. Yount, driving north on U. S. Highway 64-67, when Yount struck head-on a vehicle owned by appellee Lois Holliday, driven by appellee Donald L. Holliday and in which Priscilla Holliday was a passenger. This occurred south of North Judsonia Junction in White County. Appellees filed suit in White County Circuit Court on July 31, 1959, against B. A. Yount and

appellant, alleging the occurrence of the collision, that Donald and Priscilla Holliday sustained injuries in the collision and that the automobile of Lois Holliday was damaged. They further alleged that the collision was caused by Yount's negligence and that Yount's negligence was imputable to appellant. The complaint sought damages in favor of each of the appellees and against Yount and appellant, jointly and severally. The complaint was amended on December 3, 1959, to add West Bend Aluminum Company as a defendant, alleging that Yount and appellant were acting in furtherance of West Bend's business when the collision occurred, that the negligence of Yount was imputable to West Bend, and renewing all other allegations. West Bend appeared specially and moved to quash service on the grounds that it was a nonresident corporation not doing business in Arkansas, which motion was overruled. The cause came on for trial on October 2, 1961, and before the jury was impanelled appellee advised the court that a separate settlement had been made with West Bend, and that a dismissal would be taken as to West Bend and a covenant not to sue executed. This dismissal order was filed October 13, 1961. The case proceeded to trial. Appellant moved for a directed verdict at the appropriate times, contending that there was no substantial evidence upon which to base a finding that the negligence of Yount was imputable to appellant and the complaint not containing any other allegation of fault on appellant's part should be dismissed as to him. At the conclusion of the proof the trial court ruled that the evidence was insufficient to justify submission to the jury of the question of whether there was a principal-agent relationship between appellant and Yount, but did submit to the jury the question of whether appellant and Yount were engaged in a joint enterprise at the time of the collision. The jury found for the appellees, and on interrogatories specifically found that appellant and Yount were engaged in a joint enterprise. Judgment was granted against Yount and appellant, jointly and severally. From the judgment comes this appeal and a cross-appeal.

I. Direct appeal.

Appellant urges for reversal that the trial court erred in refusing to direct a verdict for appellant because there was no substantial evidence to base a finding that the negligence of B. A. Yount was imputable to appellant.

This court has consistently held that in order for a joint enterprise to arise two fundamental and primary requisites must concurrently exist, to-wit: A community of interest in the object and purpose of the undertaking in which the automobile is being driven and an equal right to direct and govern the movements and conduct of each other in respect thereto. If either or both of these elements is absent, there is no joint enterprise. *Stockton* v. *Baker,* 213 Ark. 918, 213 S. W. 2d 896.

In the case of *Wymer* v. *Dedman,* 233 Ark. 854, 350 S. W. 2d 169, we quoted with approval the following excerpt from 4 *Blashfield,* Ch. 65, § 2373, pp. 500-501:

"The doctrine of joint adventure, in connection with the operation of motor vehicles, should be restricted to those cases where the common right to control its operation and the correlative common responsibility for negligence in its operation either are clearly apparent from the agreement of the parties or *result as a logical and necessary conclusion from the facts as found.*" [Emphasis ours.]

The record reveals that B. A. Yount, a defendant below and the driver of the car which struck appellees was called as a witness by appellees. In addition to admitting negligence in the operation of his vehicle, he testified at length as to his relationship with appellant.

At the time of the collision, Yount was employed as a salesman for the West Bend Aluminum Company. When the collision occurred, he had been working for more than a year with appellant, who was his area manager. He had been employed through appellant, who furnished him with his employment contract. He had been trained by appellant, regularly attended sales meetings at appellant's home, delivered his orders to appellant, and received his commission checks through appel-

lant. He and appellant traveled together two or three times a week, going from town to town looking for prospects, working together. Yount would go where appellant suggested, and visa versa. Appellant had an overriding commission on Yount's sales. On the day of the accident, appellant suggested delivering a coffee maker to a customer of Yount's in Bald Knob and indicated that he, appellant, had one or two people in Bald Knob that he could call on while on the trip. Part of Yount's testimony is as follows:

"Q. Now then, did you know any of the customers Mr. Woodard was going to call on in Bald Knob?

"A. No sir.

"Q. Would you have known how to get to them?

"A. No sir.

"Q. In what way would you have found out how to get there?

"A. I would have asked him how to get to their house and when he told me that is the way I would have gone.

"Q. How would you get to customers Mr. Woodard wanted to get to?

"A. If we were in my car, I would go the way he wanted me to, and if we was in his car I would suggest sometimes stopping here and let me see these people here.

"Q. In this instance did you know where you were going except that you were going to deliver the coffee maker?

"A. No sir.

"Q. Who would you have relied on to tell you where to go?

"A. F. M., after I got the coffee maker delivered."

Prosser on Torts (2d Ed.), § 65, discussing the law of joint enterprise, states that:

"The prevailing view is that a joint enterprise requires something beyond the mere association of the parties for a common end, to show a mutual 'right of control' over the operation of the vehicle — or in other words, an equal right in the passenger to be heard as to the manner in which it is driven. It is not the fact that he does or does not give directions which is important in itself, but rather the understanding between the parties that he has the right to have his wishes respected, to the same extent as the driver. In the absence of circumstances indicating such an understanding, it has been held that . . . fellow servants in the course of their employment, although they may have a common purpose in the ride, are not engaged in a joint enterprise."

Many cases have denied the existence of a joint enterprise where nothing was shown except that two fellow employees had been riding together upon a common mission in the course of their employment. *Gilmore* v. *Grass,* 10th Cir., 68 F. 2d 150; *Dameron* v. *Yellowstone Trail Garage,* 54 Ida. 646, 34 P. 2d 417; *Stoker* v. *Tri-City Ry. Co.,* 182 Iowa 1090, 165 N. W. 30; *Slowik* v. *Union St. Ry. Co.,* 282 Mass. 249, 184 N. E. 469; *Loomis* v. *Abelson,* 101 Vt. 459, 144 Atl. 378.

In the case at hand the testimony does tend to establish the first requirement, a common purpose. But they do not show that Yount agreed that Woodard was entitled to an equal voice in the control of the car or that, if the two had been riding in Woodard's automobile, Yount would have had such an equal voice in its control. (The latter situation is important, because any control that Woodard might have exercised as a superior employee would not satisfy the requirement of *equality* of control.) Joint control and joint responsibility should go hand in hand; neither should exist without the other. If the passenger shares the responsibility for the physical control of the vehicle then it is proper for him to share the liability for the driver's negligence. But if the responsibility of control is not shared then the liability ought not to be shared. In the case at bar the trial court's error lies in permitting the jury to infer the

existence of the second requirement from proof of the first, which in effect amounted to doing away with the second requirement altogether.

In reviewing the denial of a motion for a directed verdict, we must view the evidence, with reasonable inferences arising therefrom, in the light most favorable to the party against whom the motion was directed. *Missouri Pacific Rd. Co.* v. *McKamey,* 205 Ark. 907, 171 S. W. 2d 932. After applying this rule, we still must hold that the trial court erred in refusing to direct a verdict for appellant and in submitting the question of joint enterprise to the jury.

II. Cross-appeal.

The point relied upon by appellees on their cross-appeal is that the trial court erred in ordering the sums alleged to have been paid by West Bend Aluminum Company on a covenant not to sue should be credited upon the amount of the verdict of the jury.

The complaint originally filed by appellees sought a recovery against B. A. Yount and appellant, jointly and severally, for personal injuries and property damage sustained in the collision. Thereafter appellees amended their complaint to add West Bend as a party defendant, increased the prayer for damages and sought judgment against Yount, appellant and West Bend, jointly and severally, on the allegation that Yount's negligence proximately caused their injuries and damages and was imputable to appellant on a theory, *inter alia,* of joint enterprise and to West Bend on a theory of master-servant. In due course West Bend filed an answer and prior to trial entered into a settlement with appellees, under the terms of which West Bend paid appellees $5,000, and appellees dismissed their complaint as to West Bend with prejudice and executed a covenant not to sue in favor of West Bend. Appellant moved the court for permission to introduce evidence of the payment from West Bend at the appropriate stage of trial, which motion was denied. When the verdicts were announced, appellant, in chambers, moved the court to credit the

$5,000 payment on the amount set forth in the jury verdict. The trial court allowed the sum received as a credit to the damages. Appellees allege this was error and that the judgment should be reformed and entered for the full amount found by the jury.

Section 4 of the Uniform Contribution Among Tortfeasors Act, Ark. Stat. § 34-1004, reads as follows:

"Release of one tortfeasor — Effect on injured person's claim. A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid."

This statute was approved by this court in *Giem* v. *Williams,* 215 Ark. 705, 222 S. W. 2d 800. In that case evidence as to the amount paid by one of the joint tortfeasors was introduced into evidence at the trial of the other tortfeasor. After the verdict, the court correctly refused to reduce the amount of the verdict by the amount paid by the other tortfeasor prior to trial, since the jury was advised of the settlement and the amount prior to reaching its verdict. As the court said in that opinion:

"At all events, as between appellants and appellee, appellants in the trial of the case before the jury obtained the full benefit of the above-quoted section by introducing into evidence, proof as to the amount of money that appellee received from Tune. Certainly, in such circumstances, appellants were not entitled to have the court — after the verdict — make the allowance *again.*" [Emphasis ours.]

In the instant case, the trial court refused appellant permission to introduce evidence of West Bend's settlement payment to appellees, but after verdict the trial court, under the theory that the law of joint tortfeasors applied, correctly credited the judgment with the $5,000 payment, since the jury had no knowledge of the West

Bend settlement and therefore assessed the total damages of appellees. Therefore, the principal question presented for our consideration is whether the law of joint tortfeasor relating to releases and covenants not to sue is applicable to this case.

This appears to be a case of first impression in Arkansas.

The rule set forth in 42 ALR 2d 958 is as follows:

"A master and servant each are liable for injuries caused by the negligence of the servant in the course of his employment. The servant is liable because he committed the tort and the master is liable under the doctrine of respondeat superior. While they may not be joint tortfeasors in the sense that their joint acts caused an injury, a majority of the courts hold that their liability is joint and several and each is liable to the full extent of the injuries and they may be joined in an action in the same manner as joint tortfeasors. The law of joint tortfeasors relating to releases and covenants not to sue is applicable." *United States* v. *First Sec. Bank of Utah,* 208 F. 2d 424, 42 ALR 2d 951.

We are constrained to approve and adopt this rule, for to hold otherwise will permit appellees to recover more than a fairminded jury determined their damages to be.

Affirmed on cross-appeal.

For the error in failing to direct a verdict for appellant and in submitting the question of joint enterprise to the jury, the judgment must be reversed, and, since the case appears to have been fully developed, the cause is hereby dismissed as to appellant. *Shanks* v. *Clark,* 175 Ark. 883, 300 S. W. 453.

RICHARD *v.* SMITH.

5-2834 361 S. W. 2d 741

Opinion delivered November 19, 1962.

[redacted]

R. H. Peace, for appellant.

William I. Prewett, for appellee.

NEILL BOHLINGER, Associate Justice. The appellant, Levi Richard, was the owner of forty (40) acres of land in Union County, Arkansas and on June 20, 1960, he conveyed the forty (40) acres by warranty deed to the appellee, Walter J. Smith, for a consideration of $2,000.00 which was paid him.

The appellant had two sons, the elder, Roy J. Richard, lived in California and the younger, Elgie Lee Richard, resided at times with the appellant and at other times lived in Topeka, Kansas.

After the sale of the land by the appellant, he moved to the home of his sister who seems to have advised the older son in California of the sale and that son came to see his father and thereafter filed in the Union Chancery Court an action as next friend of Levi Richard in which he prayed the cancellation of the deed conveying the appellant's land to the appellee on the ground that at the time of the signing and delivery of the deed the appellant was "infirm and wholly incapable of attending to busi-

ness by virtue of his age and infirmities and being mentally incapable."

The appellee duly answered and the issues being joined, proof was taken from which the chancellor found for the defendant, who is the appellee herein.

To sustain the issue for the appellant there was introduced the testimony of Dr. James H. Clark who stated that he had treated the appellant since January of 1953 and had treated him for a mental condition and had had the appellant in the hospital on June 9, 1960; that he had noted a steady deterioration in the mental and physical health of the appellant since he began treating him and that on June 20, 1960, he regarded the appellant as senile and it was the doctor's opinion that the appellant was incapable of knowing the value of anything or unable to transact business on the date of the deed. The doctor admitted that he was a *urologist* and not a *neurologist* but he did not regard the appellant as having a neurotic condition, but due to old age and long standing high blood pressure, he did not think the appellant's brain got the proper supply of blood.

The appellant's sister, Mollie Pearl Kilgore, testified that the appellant had lived with her from June of 1960 and that his mental condition was about the same as it had been for about a year prior to the sale of the land and his physical condition was not good; that he had trouble dressing himself and she had trouble getting him to talk; that one time he had gone to the woods and stayed out there all night; that sometimes his memory was poor and at other times not so poor; that the appellant had told her that he did not sell his place but had leased it for $1,600.00.

Appellant's son, Roy J. Richard, testified that he came to El Dorado some few hours after his father had deeded the property to the appellee; that his father could not dress himself as he was 'mindless'; that he would talk good for a while and then his mind would wander off; that he had been in that condition for about three

years and was in that condition at the time he deeded the land to the appellee.

Witnesses for the defendant below, appellee here, comprised people who had known the appellant for many years and, for the most part, resided in that community. They had had business dealings with him and he had at times worked for some of them and they had performed services for him and these witnesses testified that they had observed no change in appellant through the years except that he was growing older. It appears from the testimony that he was capable of buying his groceries and supplying his own needs and there is nothing in the testimony of his neighbors which would indicate that he was incompetent.

There was recently before us the case of *Donaldson* v. *Johnson,* 235 Ark. 348, 359 S. W. 2d 810, [September 10, 1962] which involved a woman of advanced age who suffered from diabetes and other disorders and would have intervals in which she was mentally unstable but at other times was perfectly competent. She deeded her home to her granddaughter and in that case we said:

"The test of mental competency to execute a deed is found in *Petree* v. *Petree,* 211 Ark. 654, 201 S. W. 2d 1009, where we quoted *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510, as the applicable rule in cases of this kind.

'If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting *his own interest in dealing with another* is all the law requires. If a person has such mental capacity then, in the absence of fraud, duress, or undue influence, mental weakness, whether produced by old age or through physical infirmities, will not invalidate an instrument executed by him. *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590;

Seawel v. *Dirst,* 70 Ark. 166, 66 S. W. 1058; *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *McEvoy* v. *Tucker,* 115 Ark. 430, 171 S. W. 888.' [Emphasis added]

The *Pledger* case was also quoted approvingly in *Hunt* v. *Jones,* 228 Ark. 544, 309 S. W. 2d 22.

Even the doctors who testified that Mrs. Donaldson was mentally incompetent agreed that she could have lucid intervals. Since it is shown that Mrs. Donaldson had periods in which she was normal, it becomes a question as to her mental condition at the time the deed was executed. It is not a question as to mental condition before or on the afternoon of the day on which she executed the deed, but in the morning at the time the deed was signed did she have the capacity that is demanded by the authority quoted above.''

The above case is especially applicable to the case at bar. It is not a question as to his mental condition before or after the signing, but at the time he alienated his land and as to that time there are two witnesses, the appellee and the municipal clerk and notary who prepared the deed. The appellee states that the son, Elgie Richard, and the appellant, Levi Richard, came to his house in regard to selling the land in controversy; that the appellant did the talking and said he wished to sell his property as his son was preparing to leave and he wanted to give him some money which he didn't have and he wasn't getting enough money to live on and pay his doctor bill. The other witness was Annie Lee who was a municipal clerk and notary public who testified that she made the deed at the request of the appellant who gave her a description of the land without prompting or reference to any memorandum; that she prepared a check for his payment and delivered it to him in her office and that she thought, according to the way most people act, that appellant was particularly competent and she commendably states that had she thought him incompetent, she would not have taken the acknowledgment.

The appellee further testified that he had endeavored to buy the land for less than the $2,000.00 re-

quested by appellant, but the appellant was adamant and the appellee finally paid the price asked.

We think this clause from the above cited decision is pertinent here:

" 'If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. * * * ' "

The appellant met all of these requirements.

The appellant's son, Roy J. Richard, raised the question of inadequacy of price and stated that he valued the property at $4,000.00 plus the value of the buildings, although he does not give any facts on which he bases his idea of value. Nor does it appear that he owned, had bought or sold land in the vicinity of his father's land. The only comparable sale that is presented is the purchase from another of a piece of land adjoining the land here involved for which the appellee paid only $35.00 an acre. Another witness, without giving comparable sales, valued the land at $75.00 an acre if the minerals were included. Part of the minerals had been disposed of and we are unable to gather from that testimony any firm basis of value. Another witness who lived about two (2) miles from the property testified that he had sought to buy land adjoining his own for $100.00 an acre but there is nothing in the record to indicate whether or not that land was comparable to the land here involved.

The chancellor therefore concluded that at the time the appellant sold his land he had the mental capacity to protect his interest and to know what he was selling and it seems to us from this record that some of the idiosyncrasies noted by the appellant's witnesses are but concomitant of advancing years. The testimony of those who were with him at the time the transaction was consummated negates the basis of raising the red flag of

fraud. The proof is conclusive that the appellant knew what he was selling and what he was to get. He gave part of his money to his younger son and put the rest in the bank to his own credit.

The chancellor refused to void the transaction and in that he was correct and the decree is here and now affirmed.

5-2835 362 S. W. 2d 4

Opinion delivered November 26, 1962.

Mann & McCulloch, for appellant.

John N. Killough and *Harold Sharpe,* for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Holder D. Taylor, brought suit against appellant, on an accident insurance policy issued by appellant company, providing coverage for the loss of the sight of an eye through accidental means, when such loss resulted directly from an accident, and independent of other causes. The company denied liability, contending that appellee's loss of vision

in his eye was due to conditions other than an accident. The policy provided a benefit of $500.00 for the loss of one eye, but provided that the benefit should be decreased to $250.00, if claimant were over 65 years of age. Appellee, who was over 65, originally sued for $500.00, but amended his complaint during the trial, reducing his demand to $250.00. Following the completion of evidence, appellant refused to pay this latter amount. The jury returned a verdict in favor of Taylor in the sum of $250.00, and the court entered its judgment against appellant in the sum of $430.00, including the amount sued for, an attorney's fee in the amount of $150.00, and 12% penalty, together with interest at the rate of 6% from February 12, 1962, until paid. From such judgment, appellant brings this appeal. For reversal, the company relies upon four points, which we proceed to discuss, though the first three are so interrelated that they will be discussed *en masse*.

Appellant first argues that the trial court should have directed a verdict for it; in other words, it contends there was no substantial evidence that appellee lost the sight of his eye by accidental means. The evidence reflected that Taylor had been afflicted for a long number of years with ptosis of the right upper eye lid,[1] though appellee testified that the vision of that eye was as good as that of the other eye; that the eye had been "drooped a little for 50 years, but it never bothered me, it never hurt at all". He stated that the "drooping" never covered over ⅓ of the eye until after he suffered an accident on July 12, 1960. According to the witness, on that date, he went to the L'Anguille River bottoms with Walter Nelson for the purpose of cutting timber. Taylor stated that a bug flew into his eye and "it hurt so bad I had to sit down on a log for an hour or so trying to get it out". He testified that he finally managed, by constant rubbing and the use of a handkerchief, to take from his eye a small, hard shell, black bug. Taylor stated that he worked the balance of the day

[1] According to Dr. Thomas G. Price, physician of Wynne, Arkansas, ptosis is a "drooping or falling down" and applies to different organs. In this instance, the right eye lid "drooped" over the eye. According to Dr. J. Max Roy, a practicing physician of Forrest City, ptosis "mav affect the vision in the eye if it is completely covered."

and endeavored to work the next day, but, due to pain from the eye, left the woods, and went to see Dr. Price. The fellow worker, Nelson, corroborated the occurrence, testifying that the bug did fly into appellee's eye, "and we stopped and worked a while there and finally got a little black bug out of his eye". The physician prescribed medicine to be placed in the eye, but, according to Taylor, the swelling and pain grew worse, and in 4 or 5 weeks he realized that "the sight was gone". Taylor testified that he wrote the company, advising of the accident, and the loss of sight of his eye; a statement by Nelson, confirming the accident, was also enclosed. Dr. Price filled out the medical blank, showing that he had treated Taylor on three occasions, the treatment consisting of hot packs, antibiotics and sedation. Dr. Price did not state that appellee had lost the sight of his eye.[2] Taylor subsequently received a reply, wherein the company denied liability. From appellee's testimony: "Well, I seen Dr. Myers in Memphis, and the best I recall, the company requested me to go to him to see if my eye was out; I did, and I went over there and he charged me $25.00 for the examination and he said it was completely out, my vision was gone."[3] Dr. Myers (Roland H.), likewise, did not state in his report that the accident was responsible for the loss of vision, and, in fact, his report indicated that he did not consider the bug's flying into the eye to be the cause of the loss of vision.[4] Appellant attempted to offer this report in evidence, but upon objection, the court refused to permit it, since the doctor was not present to testify, and his deposition had not been taken. This ruling was correct. See *Shearman Concrete Pipe Company* v. *Wooldridge,* 218 Ark. 16, 234 S. W. 2d 382. In that case, we said, "As to the injuries received by Earl Wooldridge and his wife and two daughters, there was offered the testimony

[2] Dr. Price also made a later report on November 4, 1960, in which he stated, "I am unable to state the amount of vision in the rt. eye before or after onset of his illness."

[3] This last was, of course, hearsay, but was not objected to.

[4] His report stated, "Examination of right eye did not show any evidence of scarring of the lids, conjunctiva or cornea as result of getting a bug in his eye on July 12, as would be expected if getting the bug into the eye was the cause of loss of vision." Neither this evidence, nor any other finding in the report of Dr. Myers, was viewed by the jury.

of the parties, the testimony of Dr. Eberle, and also the written report of Dr. Krock, who was not called as a witness. It is in regard to this written report of Dr. Krock that an error occurred which necessitates a reversal and a remanding as to the appellant, Bridges.

"Prior to the trial, the plaintiffs' attorneys had an agreement with the attorneys for Shearman and Daniels that such written report, signed by Dr. Krock, might be admitted in evidence without requiring him to be present. However, no such agreement was made by the attorneys for Bridges; and of course the written report — upon Bridges' objection—was inadmissible as to him, since it was 'hearsay'."

At the trial, Dr. Max Roy, a physician of Forrest City, who had examined Taylor a few days earlier, testified that Taylor had no vision in his eye, but that he could not say how, or when, appellee lost his sight. Counsel for Taylor then propounded the following hypothetical question:

"Assuming the plaintiff, Harold D. Taylor, had sight in his right eye on July 11, 1960 assuming further that on July 12, 1960, a hard shell bug flew into his eye while he was in the woods; assuming further that Mr. Taylor was unable to receive immediate medical attention and it took Mr. Taylor a half-hour to an hour, or more, to get the hard shell bug out of his eye, and assuming that during the process of getting the hard shell bug out of his eye, without any surgical instruments he was in severe pain; assuming infection resulted from the bug that got in his eye. Based upon your experience as a physician and your examination of Mr. Taylor, do you have an opinion, assuming all the facts I have related to be true, based on a reasonable medical certainty, whether Mr. Taylor's loss of sight in the right eye could have been caused by the hard shell bug flying into his right eye?"

The question was objected to by appellant on the ground that the interrogatory did not include the fact that Taylor had previously had eye trouble. When the objection was overruled, Roy answered that he had an opinion; it was

entirely possible that the loss of sight could have been caused by the bug flying into Taylor's right eye. There was no error in permitting the hypothetical question. In *Missouri-Pacific* v. *Hampton,* 195 Ark. 335, 112 S. W. 2d 428, we said:

"Appellants next contend that the court erred in permitting Dr. McGill to testify to the hypothetical question that in his opinion the death of deceased was caused by the injury. The appellants' attorney objected to the question and the court asked him on what ground. He stated: 'On the ground that he hasn't given the statement that the man never claimed to be injured or given any history of the injury to the doctors who treated him or made any complaint of that kind at all.' * * *, if appellants' counsel thought there were any facts omitted from the question which were essential to forming a conclusion, his remedy is to put those additional facts before the witness on cross-examination."

See, also, *Shaver* v. *Parsons Feed & Farm Supply, Inc.,* 230 Ark. 357, 322 S. W. 2d 690.

Summarizing, appellant asserts that appellee never did establish that the loss of vision was occasioned by the accident. It points out that the "claim for benefits" did not contain a statement to this effect by either physician who had examined Taylor; further, that Dr. Roy's testimony was only to the effect that the accident *could* have caused appellee's trouble. The foregoing evidence, says appellant, is not substantial. The company vigorously contends throughout its brief that appellee did not furnish proof of his claim, as contemplated by the contract, since he did not transmit to the company satisfactory medical proof that the accident caused the loss of sight.[5] It may well be that the proof was not satisfactory to appellant, but Taylor complied with provisions of the contract by sending in his claim, together with the statement of Dr. Price. For that matter, there is no requirement in the

[5] While testifying, Mr. Marcus Braun, president of the company, admitted that Taylor had lost the sight of his eye, but he contended that no proof had been furnished that he lost it as a result of the accident.

policy that he must furnish medical proof, and certainly he was not required to continue sending statements from a doctor until appellant was satisfied. Such a procedure could have continued indefinitely. The filing of the claim for benefits put appellant on notice that appellee was making a claim under his policy, and the company was entitled to make whatever investigation it desired or petition the court for an order for medical examination after the suit was filed. § 28-357, 1962 Replacement, Ark. Stats. See also *Reed* v. *Marley,* 230 Ark. 135, 321 S. W. 2d 193. If the law required that a claimant satisfy a company as to the validity of his claim before instituting suit, no lawsuits, of course, would ever be filed—and likely, many claims would remain unpaid.

The company strongly argues that the report of Dr. Myers should have been admitted, and from its brief, appellant evidently feels that the report constituted strong evidence in its behalf. We have previously cited authority that this report was inadmissible, but we should like to also point out that there was nothing to prevent appellant from either taking the deposition of Dr. Myers or having him present in the court room to testify. In such event, not only would the report have been admissible, but the jury would have had the benefit of his expert opinion.

Relative to Dr. Roy's testimony, we agreed that he did not definitely state that the accident caused the loss of vision, but under our decisions, this was not necessary. In *American Life Insurance Company* v. *Moore,* 216 Ark. 44, 223 S. W. 2d 1019, this court said,

"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."

After all, we do not know how Dr. Roy, since he did not see the occurrence, could have definitely stated that a bug flying into Taylor's eye caused appellee's loss of vision.

Probably numerous other foreign objects lodging in the eye would have produced this same effect. We think his testimony, *coupled with that of appellee and Nelson,* made a jury question. Here again, appellant states that up until the time Dr. Roy testified, no physician had even stated that the injury could have caused the loss; that it had no knowledge that this witness would so testify, and it again reiterates that such proof (still maintaining that it was not sufficient) should have been submitted to the company prior to litigation. However, the record reflects, that after all the evidence had been heard, including that of Dr. Roy, appellee again offered to settle his claim for $250.00, but was refused. Quite some space in the brief is devoted to the argument that even if substantial evidence was offered to the effect that the sight of the eye was lost by the accident, no evidence was offered that the loss of sight was irrecoverable. The policy provides that loss with regard to eyes means "entire and irrecoverable loss of sight". We find no merit in this contention. In the first place, the record does contain some evidence relative to this point. As previously pointed out, Taylor testified that Myers said that his eye "was completely out, my vision was gone". While, as also herein mentioned, this was hearsay evidence, it was not objected to, and, therefore, became competent evidence, and due to be considered by the jury. Counsel had some time earlier objected to appellee's reference to a statement purportedly made by the doctor, but this was not a continuing objection, and did not include the quoted testimony. In McCormick on Evidence (1954), we find,

"A failure to make a sufficient objection to evidence which is incompetent waives as we have seen any ground of complaint of the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of whatever rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. Such incompetent evidence, unobjected to, may be relied on in argument, and alone or

in part may support a verdict or finding. This principle is almost universally accepted, and it applies to any ground of incompetency under the exclusionary rules."

Our own court has so held on numerous occasions. Mr. Braun, President of New Empire Insurance Company, while testifying, was asked by the company's counsel, "Have you received anything (referring to statements) that he suffered irrecoverable complete loss of sight other than what Dr. Roy said this morning?" Answer, "Yes, Sir, we have." For that matter, on September 27, 1960, Mr. Braun, by letter directed to Mr. Taylor, in which the claim was rejected, stated, "Should you eventually lose the sight of your eye as a result of this accident, please let us know, and we shall be glad to reconsider your claim." It will be noted that the word "irrecoverable" is not used in the letter. Be that as it may, we hold there was sufficient evidence in the record for the jury to find that the loss of sight was irrecoverable and there is not one line of evidence to the contrary. In accordance with this discussion, we are of the view that evidence of a substantial nature was offered justifying the jury in reaching its verdict.

Appellant complains that the court erred in not giving certain instructions that it offered. Appellant's Requested Instruction No. 1 provides as follows:

"You are instructed that the burden of proof in this case is on the plaintiff, Holder D. Taylor, to prove by a preponderance of the evidence the allegations in his complaint. And in this connection, plaintiff must prove that he suffered the complete and irrecoverable loss of sight in his eye due solely to bodily injury through accidental means. Said loss of sight must have resulted from said accidental means directly and independently of all other causes. If plaintiff's loss of sight (if any) was due to any means other than purely accidental, then your verdict must be for the defendant, New Empire Insurance Company, and you will answer the interrogatories propounded by the Court accordingly."

Appellant points out that the following provisions are not covered by any other instructions given by the court:

"* * * plaintiff must prove that he suffered the complete and irrecoverable loss of sight in his eye due solely to bodily injury through accidental means. Said loss of sight must have resulted from said accidental means *directly and independently of all other causes.*"[6]

Of course, appellant must offer a correct instruction, or else he cannot be heard to complain. The instruction offered is not correct, in that the italicized language did not properly state the law. In *Fidelity Reserve Ins. Co.* v. *English,* 226 Ark. 210, 288 S. W. 2d 951, this court said,

"It is contended that the appellee's disability did not result solely from accidental means, within the language quoted above.[7] The undisputed facts are that the appellee accidentally stepped on a roofing tack, gangrene developed despite medical attention, and the afflicted leg had to be amputated below the knee. The appellant's argument is based on proof that the appellee, a woman past sixty, suffers from arteriosclerosis, without which the wound would not have become gangrenous. In construing language like that appearing in this policy we have uniformly held that the injury is covered if the accident precipitates the disability, even though the condition would not have occurred without the contributing effect of a preexisting disease."

Several cases are cited in support of this holding.

Appellant's Requested Instruction No. 2 defined the term, "accidental". We think the court's statement of the case and other instructions sufficiently covered this point. Appellant's Requested Instruction No. 3 dealt with matters already covered in this opinion, wherein we have held contrary to appellant's view.

Finding no reversible error, the judgment is affirmed.

Counsel for appellee has moved for an additional attorney's fee because of services rendered on this appeal.

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[6] Emphasis supplied.

[7] The policy provided benefits for loss "resulting solely from bodily injuries effected directly and independently of all other causes through accidental means."

We are of the opinion that the motion should be granted, and the fee is fixed at $100.00.

It is so ordered.

WARD, TRUSTEE *v.* CITY DRUG CO., INC.

5-2800 362 S. W. 2d 27

Opinion delivered November 26, 1962.

Ward & Lady and *Penix & Penix,* for appellant.

Kirsch, Cathey & Brown, for appellee.

ED. F. MCFADDIN, Associate Justice. The real issue to be decided on this appeal is whether certain of the appellees are entitled to acquire eighty shares of stock in the City Drug Company for $21,703.31. The Lower Court so found; and appellant challenges that finding. The appellees are City Drug Company, Inc., A. H. Maddox, Rex N. Moore, Solon McGaughey, Omer E. Bradsher, and Jimmy C. Dodd. The real appellant is Lee Ward, Trustee in Bankruptcy of Dr. E. D. McKelvey, Bankrupt.[1]

Dr. McKelvey, along with the appellees, Jimmy C. Dodd and Drs. Maddox, Moore, and McGaughey, were the

[1] Dr. E. D. McKelvey appears by his attorney to support the position of the appellant. The First National Bank of Paragould appears by its attorneys to protect the undisputed claim of the Bank; but we style Lee Ward, Trustee in Bankruptcy, as the appellant.

only stockholders in the corporation styled City Drug Company, Inc. in Paragould, Arkansas, which, as its name implies, was engaged in the retail drug business. Dr. McKelvey owned eighty of the 240 shares of stock in the corporation;[2] and his stock was pledged to the First National Bank of Paragould to secure a note of $9,500.00. Prior to January 1, 1961, Dr. McKelvey was a partner with Drs. Maddox, Moore, McGaughey, and Bradsher in the general practice of medicine; but Dr. McKelvey became financially involved and the partnership was dissolved by signed agreement on January 9, 1961. Thereafter, Dr. McKelvey continued to practice as an employee of the other named doctors at a salary of $1,000 a month, and they were also to pay him $396.94 per month for twenty months for his interest in the previous partnership.

In 1961 several creditors, who had obtained judgments against Dr. McKelvey for sizable amounts, had writs of garnishment served, not only on Drs. Maddox, Moore, McGaughey, and Bradsher, but also on the City Drug Company; and because of these garnishments the said garnishees (present appellees) on May 29, 1961, filed Case No. 8574 as a complaint in equity and bill of interpleader, naming the said judgment creditors and Dr. McKelvey as defendants, and praying court instructions as to the payment of the garnished funds. The First National Bank, because of the pledge to it by Dr. McKelvey of his eighty shares of stock in the City Drug Company, was brought into the case as third party defendant by one of the judgment creditors.

While the aforementioned suit No. 8574 was pending, the City Drug Company and the other appellees who were stockholders in the corporation, attempted to pay Dr. McKelvey's $9,500.00 note to the First National Bank and obtain from the bank Dr. McKelvey's stock certificate for eighty shares of stock in the Drug Company. This effort was because of Bylaw No. 1 of the Drug Company, and an agreement signed by Dr. McKelvey, as hereinafter to be

[2] Dr. Maddox owned eighty shares; Jimmy Dodd owned forty shares and managed the drug company; Dr. Moore owned twenty shares; and Dr. McGaughey owned twenty shares.

discussed. On June 22, 1961, the Bank declared Dr. McKelvey's $9,500 note due and made demand for payment. Dr. McKelvey then, on June 30, 1961, filed action in the Circuit Court to enjoin the Bank from transferring the stock certificate to the present appellees; Dr. McKelvey obtained a temporary injunction; and this law action was later transferred to the Chancery Court and became Case No. 8604 therein.

With cases Nos. 8574 and 8604 in the status mentioned, Dr. McKelvey was adjudicated a voluntary bankrupt on July 31, 1961. The present appellees filed an amendment to their pleadings on September 6, 1961, suggesting such bankruptcy and still claiming their right to acquire the McKelvey stock because of Bylaw No. 1 and the agreement signed by Dr. McKelvey. Hon. Lee Ward was duly appointed Trustee in bankruptcy of Dr. McKelvey, and was authorized to intervene in the pending suits, which he did by pleading on October 12, 1961. The two cases Nos. 8574 and 8604 were consolidated and tried; and from that trial, there is this appeal. The position of the Trustee in bankruptcy was, and is, that the McKelvey stock in the Drug store was worth $48,000.00, which was far more than the $21,703.31 which the appellees were offering to pay. The Trustee insisted that the 80 shares of stock should be sold at public auction, the Bank paid in full, and the balance paid into the Bankruptcy Court to go to the general creditors of Dr. McKelvey. The position of the appellees was, and is, that they are entitled to acquire the 80 shares of stock by paying a total of $21,703.31, being the value, as determined by the bylaw of the Corporation and the agreement signed by Dr. McKelvey; that from such an amount the Bank should be paid in full and the balance should go to the Bankruptcy Court. The Trial Court upheld the contention of the appellees, and the Trustee in bankruptcy has appealed. The question is whether the Trial Court was correct in sustaining the contentions of the appellees.

I. *The Maturity Of The Bank's Note.*

The appellant vigorously urges: (a) that the McKelvey note was not due on June 22, 1961; (b) that the Bank

could not accelerate the maturity as it attempted to do; and (c) that there was no legally sufficient tender to the Bank by the appellees on June 22, 1961, or any other time. To support these contentions, the appellant quotes from the note, and the germane portion reads:

"Paragould, Ark. 4-1-61. On demand, after date, and if no demand is made, then on the 1st day of Oct., 1961, for value received, I, We or Either of us promise to pay to the order of First National Bank of Paragould, Ark. Ninety five Hundred and no/100 Dollars $9500, for value received, with interest at the rate of 6 per cent per annum from date until paid. This note is secured by pledge of the securities mentioned on the reverse hereof, with the right to call for additional securities should the same decline, and on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver without notice, the whole of said property or any part thereof, or any substitutes therefor, or any additions thereto, at public or private sale, at the option of the payee herein . . ."

The appellant says that the clause in the note, *about demanding additional security,* limits the opening words in the note *(i.e., "on demand")* to a demand *only when the security is deemed insufficient;* and that the security was never deemed insufficient because the Drug Company admits the pledged stock to be worth in excess of $21,000 and the note was only for $9,500 and interest. On these and other matters the appellant urges that the demand on June 22, 1961, and the Bank's attempt to mature the note, were abortive and insufficient. These are all interesting questions which we find it unnecessary to decide.[3] The question of the right of the Bank to mature the note and make demand on June 22, 1961 (or at any other date before October 1, 1961) becomes of no importance and is not decided because, when the Trustee in bankruptcy

[3] The two Missouri cases of *Brown* v. *McGuire* (Mo. App.), 101 S. W. 2d 41, and (Mo. Sup. Ct.) 121 S. W. 2d 754, involved a note which stated, "On demand, and if no demand be made then on the 1st day of Feb. 1933, . . ." We are not here concerned with negotiability of such a "demand note," in the light of our holding in *Murrell* v. *Exchange Bank,* 168 Ark. 645, 271 S. W. 21.

intervened in the pending litigation on October 12, 1961, and claimed the right to have the McKelvey certificate of stock in the Drug Company sold, the note was then past due at all events, and such intervention by the Trustee was the assertion of a claim by a "creditor armed with process";[4] and the determining issue became whether the Drug Company could exercise its prerogatives as claimed under the Bylaw No. 1 and/or the agreement signed by Dr. McKelvey, as hereinafter discussed. The McKelvey injunction case had temporarily prevented the appellees from acquiring the McKelvey stock from the Bank, so the question of the maturity of the note by demand prior to October 1, 1961 became moot, when the Trustee in bankruptcy pleaded on October 12, 1961 and the case was tried on November 8, 1961. We therefore hold that the appellant's contention about the maturity of the Bank's note is beside the point on this appeal.

II. *The Bylaw No. 1.* As aforesaid, on October 12, 1961 the appellant, as Trustee in bankruptcy of Dr. McKelvey, intervened in the two Chancery suits. On that date the McKelvey note to the Bank was past due at all events, and the appellees were claiming the right to acquire the McKelvey stock for the book value of the stock. The Trustee in bankruptcy resisted such contention; and that is the issue—and the only issue—to be decided.

It was shown that in 1958 the Drug Company had filed with the Secretary of State an amendment to its charter,[5] which provided, *inter alia,* that the corporation might "adopt by-laws placing limitations upon the sale, transfer, or pledge of the stock of the corporation to the extent not prohibited by law . . . and the individual stockholder shall have accepted such by-law with the fact of its acceptance to be endorsed upon his stock certificate then, thereafter the restrictions, limitations and options as herein referred to shall bind the individual shareholder

[4] See § 47 of the Bankruptcy Act (11 U.S.C.A. § 75), and *Imperial Assur. Co.* v. *Livingston* (8th Cir.), 49 F. 2d 745, 74 A.L.R. 1336; and see also 6 Am. Jur. p. 914, "Bankruptcy" § 637.

[5] This amendment to the Articles of Incorporation was duly filed with the Secretary of State on July 7, 1958 and was duly recorded with the County Clerk of Greene County on July 8, 1958.

of the corporation whose certificate is so endorsed, his assigns, mortgagees, pledgees, heirs, administrators, and personal representatives." It was also shown that on April 18, 1960 the City Drug Company duly adopted Bylaw No. 1, effective the same day, which stated, *inter alia:*[6]

"The corporation, or its appointee, shall be entitled to acquire and purchase from a shareholder, or his estate, any and all shares of stock in the City Drug Company, in accordance with the terms of this By-Law . . . Should any shareholder pledge his stock for any personal debt of the shareholder without having redeemed said pledge prior to the maturity of the debt or any extension thereof."

The Bylaw further provided that the price to be paid for the said stock should be "the book value of the stock as of the close of the last fiscal year of the corporation, plus interest at six per cent per annum from the close of said fiscal year to the date on which said purchase option shall be exercised, and the consideration shall be paid less any intervening dividends paid."

The stock of Dr. McKelvey[7] was at that time pledged to the First National Bank to secure a note, of which the $9,500 note herein represents a renewal. The secretary of the Drug Company delivered a typewritten copy of the Bylaw No. 1 to the Bank, with the request that the copy be attached to the McKelvey stock certificate, in compliance with § 64-315 Ark. Stats.; but the Bank refused to receive the Bylaw and attach it to the stock certificate because Dr. McKelvey objected. The appellant urges most strenuously that this Bylaw No. 1 was never endorsed on the stock certificate, as required by § 64-315

[6] This Bylaw No. 1 is quite lengthy, occupying five typewritten pages in the transcript. The topic headings in the Bylaw are:
"A. Conditions upon which corporation or appointee shall be entitled to acquire stockholder's stock.
B. Effective date and terms of purchase.
C. Cessation of option to purchase.
D. Effective date of Bylaw.
E. Endorsements upon stock certificates."
The portions of the Bylaw pertinent to this case are stated in this opinion.

[7] The 80 shares of Dr. McKelvey's stock were evidenced by several stock certificates, but we have all the time referred to these certificates collectively as "stock certificate."

Ark. Stats., and therefore the Bylaw lacks validity. Appellee urges, with equal tenacity, that the secretary of the corporation delivered a copy of the Bylaw to the Bank to be attached to the certificate; that Dr. McKelvey prevented such accomplishment; that both the Bank and Dr. McKelvey knew of the Bylaw; and that equity regards that as done which ought to have been done. There is respectable authority to sustain the position of each side;[8] but we find it unnecessary to rest our holding on the validity, *vel non,* of the Bylaw because, at all events, Dr. McKelvey and the Trustee in bankruptcy of his estate are bound in law and in equity by the agreement which Dr. McKelvey signed with the other stockholders, as now to be discussed.

III. *The Agreement Signed By All The Stockholders.* At the time Bylaw No. 1 was adopted by the corporation on April 18, 1960, all of the stockholders of the corporation (and this included Dr. McKelvey) signed this instrument: "Approval of By-Law. The undersigned, being all of the shareholders in City Drug Company, together with the wives of the married shareholders, do approve the foregoing By-Law and agree that their stock, as now or hereafter owned by them in City Drug Company, shall be held subject to the terms thereof. This agreement shall bind the undersigned, their heirs, executors, administrators, and assigns. Dated this 18th day of April, 1960." Stockholders may make such agreements between themselves, regardless of the validity of a bylaw of the corporation. In 13 Am. Jur. 412, "Corporations" § 336, the text summarizes the holdings:

"The right to transfer shares of stock may be restricted by agreement of the stockholders so long as such

[8] In 29 A.L.R. 2d 901 there is an annotation entitled, "Construction and effect of § 15 of Uniform Stock Transfer Act prohibiting restriction on transfer of shares unless such restriction is stated on the certificate"; and cases from various jurisdictions are there cited. There is another annotation in 61 A.L.R. 2d 1318 entitled, "Validity of restrictions on alienation or transfer of corporate stock." See also 13 Am. Jur. 413, "Corporations" § 338; and 18 C.J.S. 923, "Corporations" § 391 (c). Among other cases, we mention *Palmer* v. *Chamberlin* (5th Cir.), 191 F. 2d 532; *Hopwood* v. *Topsham* (Vt.), 132 A. 2d 170; *Baumohl* v. *Goldstein* (N. J.), 124 A. 118; *Doss* v. *Yingling* (Ind.), 172 N. E. 801; and *Tomoser* v. *Kamphausen* (N. Y.), 121 N. E. 2d 622.

restriction is not contrary to public policy as being in restraint of trade. The tendency of the courts is to sustain a restriction imposed by a corporation upon the alienability of stock, if reasonable and the stock has been accepted following its adoption and with knowledge of its provisions, whether such restriction is valid as a bylaw or not, on the ground that it constitutes a valid agreement between the stockholders and the corporation, especially if it goes no further than to give an option on the stock for a limited period. These principles are particularly applicable as against stockholders who assent to, or participate in, the adoption of the bylaw."

And in 13 Am. Jur. 413, "Corporations" § 338, in discussing the validity of a bylaw restraining a stockholder from selling his stock in the open market without giving the other stockholders a prior opportunity to purchase the same, the holdings are summarized:

"According to the weight of authority, such a bylaw is valid and binding upon the stockholder, either as a regulation within the powers of the corporation or as a contract obligation voluntarily undertaken by the stockholder."

In *Krauss* v. *Kuechler* (Mass.), 15 N. E. 2d 207, 117 A.L.R. 1355, there was involved a corporation of four stockholders; and in 1933 the corporation had attempted to adopt a bylaw which gave the surviving stockholders the right to acquire the certificates of any stockholder that might die. All four stockholders signed the instrument agreeing to such bylaw. In 1935 one stockholder died and when the survivors sought to acquire his stock they were met with the claim that the bylaw had not been filed in the office of the Secretary of State, as required by law. The Supreme Judicial Court of Massachusetts upheld the right of the surviving stockholders to acquire the stock of the deceased stockholder, basing the holding on the agreement signed by all the stockholders and entirely disregarding the validity, *vel non,* of the bylaw. Justice Qua, speaking for the Court, said:

"Even if the purported new by-law of March 3, 1933, never took effect as a valid by-law, either because it amounted to an amendment to the agreement of association and was never 'filed in the office of the state secretary' as required by G. L. (Ter. Ed.) c. 156 § 43, or for other causes, we see no reason why all the stockholders of a corporation cannot bind themselves to such a regulation by mutual agreement and estop themselves and their representatives thereafter to deny its validity. *Brown* v. *Little, Brown & Co., Inc.,* 269 Mass. 102, 106 *et seq.,* 168 N. E. 521, 66 A.L.R. 1284. See *Longyear* v. *Hardman,* 219 Mass. 405, 106 N. E. 1012, Ann. Cas. 1916D, 1200; *Cunningham* v. *Commissioner of Banks,* 249 Mass. 401, 420, 144 N. E. 447; *Mitchell* v. *Mitchell, Woodbury Co.,* 263 Mass. 160, 164, 160 N. E. 539. 'It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested; provided the interest was known, and no objection was made by the parties, and no fraud or bad faith is shown.' *New England Trust Co.* v. *Abbott,* 162 Mass. 148, 153, 38 N. E. 432, 434, 27 L.R.A. 271; *Doherty* v. *Phoenix Assur. Co.,* 224 Mass. 310, 315, 112 N. E. 940."[9]

In the case at bar, Dr. McKelvey and all the other stockholders entered into a mutual agreement on April 18, 1960—more than one year before McKelvey's bankruptcy—whereby each stockholder gave the corporation and the other stockholders the right to acquire any pledged stock at a determinable value, if the pledge should not be redeemed at maturity. There was no fraud or unfairness of any kind in the agreement. Some of the other stockholders had their stock pledged at the time the agreement was signed. The agreement was fair: it was an option to pur-

[9] In addition to the cases listed in the foregoing quotation, there are many cases sustaining the agreement signed by the stockholders, regardless of the validity of the bylaw. Some such cases so holding are: *Doss* v. *Yingling* (Ind.), 172 N. E. 801; *Henry Simons* v. *Simons* (Minn.), 44 N. W. 2d 726; *Model Clothing* v. *Dickinson* (Minn.), 178 N. W. 957; *Federal Services Finance* v. *Bishop Natl. Bank* (9th Cir.), 190 F. 2d 442; *First National Bank of Canton* v. *Shanks* (Ohio), 73 N. E. 2d 93; and the score of other cases therein cited. See also 19 C.J.S. 922, "Corporations" § 391(b); and Fletcher-Cyclopedia of Private Corporations, Permanent Edition, § 5455 *et seq.*

chase at an ascertainable price—upon the happening of a contingency. The evidence shows that the amount tendered to the Bank in this case for the McKelvey stock was carefully ascertained and determined by an accountant in strict compliance with the method agreed upon by Dr. McKelvey and all the stockholders on April 18, 1960. The appellant, as Trustee in bankruptcy of Dr. McKelvey, elected to intervene in the pending litigation and is bound by the agreement relied on by appellees.

Affirmed.

ABERCROMBIE *v.* GREEN.

5-2807 362 S. W. 2d 12

Opinion delivered November 26, 1962.

J. B. Milham, for appellant.

Hall, Purcell & Boswell, for appellee.

GEORGE ROSE SMITH, J. This is an appeal from two orders entered by the Honorable John L. Hughes, Special Chancellor, in a child custody case. The only indication in the record of the special chancellor's authority to act in the case is this stipulation: "It is stipulated and agreed by and between the parties, Joe E. Purcell, Attorney for the plaintiff, and J. B. Milham, Attorney for the defendant, that John L. Hughes serve as special Chancellor to hear the petition of the plaintiff on February 10, 1962."

The constitution and statutes require that a special circuit judge or chancellor be elected by the attorneys in attendance on the court and that the proceedings be entered upon the record. Ark. Const., Art. 7, § 21; Ark. Stats. 1947, § 22-339. Where the parties attempt to select a special judge by agreement the proceedings are void, and the appeal must be dismissed. *Dansby* v. *Beard,* 39 Ark. 254; *Gaither* v. *Wasson,* 42 Ark. 126; *Jenkins* v. *Incorporated Town of Caraway,* 219 Ark. 236, 242 S. W. 2d 348.

Appeal dismissed.

GAITHER, EX'R *v.* HOBGOOD.

5-2824 362 S. W. 2d 18

Opinion delivered November 26, 1962.

J. E. Still, for appellant.

McMillan & McMillan, for appellee.

PAUL WARD, Associate Justice. John E. Gaither died testate on October 2, 1961 at the age of 89, survived by his widow, Pearl F. Gaither. To understand the import of this litigation it is necessary first to summarize certain portions of Mr. Gaither's will pertinent to the issue involved.

Among other provisions of the will there are the following:

(a) Deceased's brother, Fred Madden Gaither, is named executor. Two others named did not qualify.

(b) Deceased's niece, Nita Joyce Gaither Woods, her husband and her children were given a life estate in his 314½ acre farm provided they paid his widow $600 annually. (The deceased had no children.)

(c) It created the "Gaither Family Trust", with George G. Clark, James C. Hobgood and Jett Black as Trustees, and gave all deceased's property both real and personal, to the Trust. The Trustees were not allowed to mortgage the property unless authorized by the congregation of the Arkadelphia Presbyterian Church. After the death of deceased's widow the Trustees were to distribute annually the net income from the Trust equally to the Arkadelphia Presbyterian Church, to Arkansas College at Batesville, to the Austin Seminary at Austin, Texas, and to the Vera Lloyd Home at Monticello.

After the will was admitted to probate on November 22, 1961, the Executor filed a petition (on November 22, 1961) asking for authority to sell a certain interest in the real estate to pay claims against the estate in the amount of $3,917.28, stating there was only $108.81 in cash available to pay same. Attached to the petition was a "Description of Property to be Sold", which reads:

"The reversionary interest of the John E. Gaither farm, which includes Tax Parcels No. 4578, No. 4579, No. 7673, No. 7688, No. 7667, and No. 7670, all in Clark County, Arkansas, being 314½ acres, more or less.

The city property known as the W.O.W. Lodge Building, Tax Parcel No. 12401, more particularly described as: 25 feet of the North end of Lot 7, and 25 feet of the North end of Lot 18, all in Block 47, Browning's Survey of the City of Arkadelphia, Arkansas."

It was further stated in the petition that the property would "probably bring the sum of $5,000". A hearing on the above petition was set for January 9, 1962.

On January 8, 1962 the Trustees filed an objection to the proposed sale, stating they do not believe it is necessary to sell the property, but instead they asked to be permitted to negotiate a loan for a sufficient amount to pay

estate debts. In the alternative they asked that, if a sale is ordered, they be allowed to designate the property to be sold.

The issue was presented to the court upon the above pleadings without the introduction of any testimony. The court denied the Executor's petition to sell, stating: (a) The Trustees have offered to raise the necessary money to pay the estate debts, and if this is done there will be no reason to sell the property; (b) The Trustees are given the six months period allowed for the filing of claims in which to raise the money and pay the debts of the estate. From this order comes this appeal.

For the reasons hereafter mentioned we affirm the trial court's order, conceding, for the purpose of this opinion only, that it is an appealable order.

(a) It was the duty of the Executor, the Trustees, and the court to preserve the Trust intact if reasonably possible. Therefore, the court properly gave the Trustees an opportunity to do this by raising the necessary money to pay debts. Appellant objects on the ground that the will prevents the Trustee from mortgaging the real estate without the approval of the Arkadelphia Presbyterian Church which approval they do not have. The answer to this objection is that the Trustees may not intend to place a mortgage on the real estate. They may be able to raise the necessary money in some other manner. It is possible that the Trustees might want to try to take advantage of the provisions of Ark. Stats. § 62-2705.

(b) If it does become necessary to sell real estate we think the trial court would have the right to allow the Trustees to select the property to be sold. The record discloses that only $2,408.41 in debts have been allowed and approximately $2,300 more claims filed. The inventory discloses there are five separate parcels of real estate valued at a total of $57,000. One piece is valued at $25,000; one at $5,000; one at $5,000; one at $10,000; and, one at $12,000. It seems reasonable to us that the necessary money might be raised by the sale of less Trust property than that proposed by appellant.

(c) We think it is incumbent on the trial court to avoid, if possible, the sale proposed by appellant. The value of the "reversionary interest" proposed for sale would depend on how long the life tenants lived. This unknown element would certainly not tend to produce offers favorable to the Trust.

Affirmed.

UTLEY *v.* HECKINGER.

5-2809 362 S. W. 2d 13

Opinion delivered November 26, 1962.

J. H. Spears, Jake Brick, J. W. Kirkpatrick, Memphis, Tenn., for appellant.

Hale & Fogleman, for appellee.

SAM ROBINSON, Associate Justice. This action grows out of a traffic mishap which occurred about 2:30 a.m., July 10, 1959, on Highway 55 north of James Mill Overpass in Crittenden County. Three vehicles were involved; a truck equipped as a wrecker, a heavily loaded Diamond T truck, and a 1954 Pontiac. The wrecker was owned by appellant, E. L. Heckinger, and operated by his employee, appellee, Vernon Odell Griggs. The truck was owned by appellant, M. T. Utley, and was being driven by his employee, Jimmy Marshall. The Pontiac was owned and being driven by appellee, Mary White. Burdie Mae Cross, J. D. Cross, and Betty Jean Cross, minors and relatives of Mary White, were also occupants of the Pontiac.

Griggs had driven the wrecker belonging to Heckinger to the above mentioned point on Highway 55 to pull a truck out of a ditch. After performing that task, the wrecker was stopped partly on the paved portion of the highway so that the equipment used in pulling the truck onto the pavement could be loaded onto the wrecker. The truck that had been in the ditch proceeded on its way and was not involved in the collision that followed.

While Griggs, the driver of the wrecker, was loading the chains, pulleys, etc., Mary White, driving her Pontiac with the Cross children as passengers or guests, approached from the north. There was a heavy fog, and a short distance behind the White car, travelling in the same direction, was the Utley truck.

There is evidence to sustain a finding that the Utley truck struck the rear end of the Mary White Pontiac and knocked it into the Heckinger wrecker. All three vehicles were damaged. Mary White received serious injuries, and the Cross children were injured to some extent.

This action was commenced by Heckinger and Griggs filing suit against Utley. Heckinger seeking compensation for damages to his wrecker, and Griggs seeking compensation for alleged personal injuries. Utley filed an answer and cross-complaint denying liability and alleging negligence on the part of Heckinger and Griggs. Also, Utley made Mary White a third-party defendant and

alleged that the accident was due to the negligence of Heckinger, Griggs, and Mary White, and asked that he be awarded judgment against all of them for damages to his truck and cargo.

Mary White answered Utley's complaint and filed a cross-complaint and also made Heckinger and Griggs third-party defendants. The Court gave the parties 90 days additional time in which to plead. Heckinger filed his answer to Utley's cross-complaint one or two days after the allotted time had expired. Later, Utley filed a motion to dismiss the Heckinger answer to the cross-complaint because it was not filed in statutory time. The answer to the cross-complaint was filed on August 16, 1960. The motion to dismiss was not filed by Utley until the 27th day of November, 1961, at which time depositions had been taken and the parties were in court ready for trial. Utley waived the right to have the answer to the cross-complaint dismissed by not making a motion to that effect in apt time. *Burton* v. *Sanders,* 230 Ark. 67, 321 S. W. 2d 209.

Lovie Allen, for herself and as mother and next friend of the Cross minors, filed suits against Utley, Heckinger and Griggs, alleging damages she had sustained by reason of medical expenses for the children and damages suffered by the children by reason of alleged personal injuries. The cases were consolidated for trial.

Griggs filed no answer to Utley's cross-complaint. Utley filed a motion for a default judgment. Ark. Stats. 27-1135 provides: "A defendant to any complaint or cross-complaint must appear or plead either generally or specially the first day after expiration of the period of time set forth below, as the case may be: First: Where the summons has been served twenty (20) days in any county in the state." Ark. Stats. 29-401 provides: "Judgment by default shall be rendered by the Court in any case where an appearance or pleading, either general or special, has not been filed within the time allowed by this Act; provided, that the Court may for good cause allow further time for filing an appearance or pleading, if application

for granting further time is made before expiration of the period within which the appearance or pleading should have been filed; and that nothing in this Act shall impair the discretion of the Court to set aside any default judgment upon showing of excusable neglect, unavoidable casualty or other just cause." No attempt was made to show excusable neglect, unavoidable casualty or other just cause for Griggs' failure to answer Utley's cross-complaint. Therefore, under the provisions of Ark. Stats. 29-401, Utley was entitled to a default judgment on his cross-complaint against Griggs, and since Utley's judgment on the cross-complaint should have been rendered prior to the actual trial, Griggs could not recover on his complaint. "If more than one action between the same parties and with reference to the same subject-matter is pending, the first judgment rendered in either action bars the other action, regardless of priority in time of commencement." *Sims* v. *Miller,* 151 Ark. 377, 236 S. W. 828, *Adams and Rusher* v. *Henderson,* 197 Ark. 907, 125 S. W. 2d 472. It follows that the judgment in favor of Griggs in the sum of $225.00 must be reversed and his complaint dismissed. It might be added that Griggs' failure to answer Utley's cross-complaint resulting in a default judgment, is in no way prejudicial to Heckinger or Utley.

We come now to the principal point in controversy between Heckinger, Utley, Mary White, and Lovie Allen in her own right, and as mother and next friend of the Cross minors. In selecting the jury, the Court, over the objection of Utley, directed the Clerk to furnish the parties a list of 21 veniremen from which to select a jury of 12. The Court allowed Heckinger and Griggs to challenge three, allowed White and Allen to challenge three, and allowed Utley to challenge three. Ark. Stats. 39-229 provides: "Each party shall have three [3] peremptory challenges, which may be made orally—but if either party shall desire a panel, the court shall cause the names of twenty-four [24] competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of eighteen [18] shall be drawn and entered on a list in the order in which they were drawn,

and numbered. Each party shall be furnished with a copy of said list, from which each may strike the names of three [3] jurors and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve [12] names remaining on said original list shall constitute the jury." Ark. Stats. 39-231 provides: " . . . Where there are several persons on the same side, the challenge of one [1] shall be the challenge of all under this subdivision."

The statute does not provide for a total of more than 18 veniremen, drawn from a total of 24, from which to select a jury of 12. In *Fidelity-Phenix Fire Ins. Co.* v. *Friedman,* 117 Ark. 71, 174 S. W. 215, the Court said: "It is evident that if the contention now made by the defendants should be sustained by the court that one of the principal objects of the statute would be defeated. If the defendants were each entitled to three peremptory challenges then it follows as a matter of course that the plaintiffs would be entitled to three peremptory challenges against each of the defendants. The result would be an unnecessary consumption of time in the formation of the jury. New panels would have to be summoned because it is obvious that the regular panels would be exhausted before the jury could be obtained if the plaintiffs and defendants were allowed three peremptory challenges each, as contended for by counsel for the defendants." In *Flowers* v. *Flowers,* 74 Ark. 212, 85 S. W. 242, this Court affirmed a judgment in a will case where there were three parties antagonistic to each other and each of the three was allowed three challenges, but that case was decided in 1905, and since that time has not been mentioned on the point involved here. On the other hand, this Court has held, in effect, that under our statutes, the parties must be arranged in two groups and each group given three challenges. *Waters-Pierce Oil Co.* v. *Burrows,* 77 Ark. 74, 96 S. W. 336, *Ft. Smith Light & Traction Co.* v. *Bailey,* 153 Ark. 574, 241 S. W. 42.

To affirm the case at bar we would have to overrule *Hogan* v. *Hill,* 229 Ark. 758, 318 S. W. 2d 580. There, we recognized that where there are several parties there

might be difficulties in selecting a jury under our present statute, but we made it clear that if there was to be a change it must be by an act of the Legislature. In the Hogan case, Hill sued Hogan in tort. Hogan brought Moffatt and Melton into the case as third-party defendants. Melton and Moffatt contended that they were entitled to three challenges separate and apart from Hogan. We said: "Melton and Moffatt, the third party defendants, in seeking a reversal present an able argument on a very interesting question. They point out, and we must agree, that their interest was in conflict with the interest of the Hogan Co. On this basis they contended they were entitled to three peremptory challenges in the selection of the jury in addition to the three such challenges the court allowed the Hogan Co. We can readily understand the justice and fairness of this view, but we think it is one that addresses itself to the Legislature and not this court. Ark. Stats. § 39-229 which deals with peremptory challenges says 'Each party shall have three (3) peremptory challenges.' Section 39-231, in part, provides: 'Where there are several persons on the same side, the challenge of one shall be the challenge of all under this subdivision.' As was stated in the case of *Crandall* v. *Puget Sound Traction, Light & Power Co.*, 77 Wash. 37, 137 P. 319, in dealing with this same question, 'the right of peremptory challenge is wholly a creature of statute, and not of common law.' Looking solely to our statutes, referred to above, the answer still is not clear. The first section refers to each *party* without defining party. Likewise, there is an element of uncertainty in the use of the words 'on the same side' as used in the latter section. We have concluded, however, that the decisions of this court and other courts have resolved this uncertainty against the contention of Melton and Moffatt here."

In the case at bar, the parties were found to have suffered damages in the following amounts:

Heckinger	$ 2,500.00
Griggs	225.00
Utley	3,000.00
White (Prop. Damage)	950.00

White (Per. Injury)	47,500.00
Cross, J. D.	750.00
Cross, Betty Jean	200.00
Cross, Burdie Mae	100.00
Allen	586.55

Damage was attributed to the negligence of Utley to the extent of 83%, and 17% to the negligence of Heckinger and Griggs. Judgments were rendered accordingly; such judgments must be reversed by reason of the error in allowing nine challenges.

Under the statutes, the Court must have some discretion in the grouping of the parties for the purpose of exercising challenges, and we believe that when all the pleadings in the case and the situation of the parties are considered, the fairest grouping in the circumstances would be to allow Utley alone three challenges, and allow Heckinger, Mary White, and Lovie Allen, in her own right and as mother of the Cross children, together, three challenges, as there appears to be an entente cordiale between those parties.

Fourteen points are argued on appeal. It is not necessary to mention most of them, as they are not likely to arise in another trial. But we do believe that we should mention that the evidence is not sufficient to prove the damages to Mary White's automobile. There was no direct evidence on this point at all. One witness testified that he knew the value of automobiles, and that an ordinary 1954 Pontiac was worth $1,000.00 or $1,200.00 in 1959; and another witness testified that the Mary White Pontiac was in good condition prior to the wreck, but we do not think this evidence is substantial as to the value of this particular car.

Utley introduced moving pictures of Mary White walking with the aid of crutches and driving her automobile. These pictures were shown in this court and it appears from the record that the last few feet of the film show Mary White walking faster than she was actually moving. The trial court instructed the jury not to consider

that part of the film. We believe it would be better not to show that part at all.

In his argument to the jury, counsel for Mary White told the jury "I have had experience in a case that had an injury just exactly like this, skull, cranial, facial injury of Mary White. We didn't even put them to a trial and they paid them close to $50,000.00." The argument was improper. Counsel is given considerable latitude in his argument to the jury, but he cannot argue facts that are not in evidence. Here, counsel was not giving his opinion on the weight of the evidence in the case on trial, but was telling the jury the facts about what happened in another case. Evidence of the amount of a settlement in another case would not have been admissible in the case at bar as a yardstick for damages, or any other purpose, and since it was not in evidence it could not be argued. *Missouri Pacific Railroad Co.* v. *Emberton,* 230 Ark. 865, 327 S. W. 2d 726.

Judgment in favor of Griggs is reversed, and his complaint against Utley is dismissed. The other judgments are reversed and the cause remanded for new trial.

ABERDEEN OIL CO. *v.* GOUCHER.

5-2814 362 S. W. 2d 20

Opinion delivered November 26, 1962.

M. A. Hathcoat, for appellant.

R. V. Laverty, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a decree quieting title. Appellees, Walter and Alice Goucher, filed suit against Aberdeen Oil Co., Inc., and Crescent Oil & Gas Corp., appellants, and others, seeking to quiet title to certain real property in themselves and to cancel certain mineral grants of record. Appellees' predecessor in title, J. W. Stills, purportedly executed, on February 12, 1930, a mineral deed conveying 7/8ths interest in all oil, gas and other minerals on Stills' property to E. C. Catlett, which deed was recorded on March 4, 1930. This instrument recited a consideration of $1.00, and was signed by mark, the mark being witnessed by the notary public who notarized the instrument. In August 1930 and in 1932, Catlett and his wife made several conveyances of parts of their undivided 7/8ths interest (appellant corporations being the ultimate purchasers through Catlett's remote grantees of almost one-half of the mineral and oil rights on the subject property). On May 4, 1946, Stills deeded the lands herein involved to appellees Goucher, which deed was recorded September 18, 1946. On March 15, 1962, appellees filed their amended complaint against appellants and others, alleging ownership of the land and seeking to cancel the mineral grant from Stills to Catlett and other instruments made pursuant thereto as clouds upon appellees' title, alleging that the mineral grant was fraudulently obtained, that there was no valid consideration given, and that appellees had been in adverse possession and paid all taxes on the lands for more than seven years. After trial of the case on March 28, 1962, the chancellor decreed the

mineral grant from Stills to Catlett and all subsequent conveyances thereunder cancelled as clouds on appellees' title, and quieted and confirmed title in fee simple in appellees. In its opinion, the trial court stated, *inter alia:*

"That the 'Oil, Gas and Mineral Grant' . . . was obtained and placed of record by payment of $1.00 consideration for a 7/8th interest in all oil, gas and other minerals under or pertaining to 130 acres of the above described lands. There is no contention or proof of consideration in addition to the $1.00 recited in the deed, and the presumption is that the recited consideration is the true one. The mineral grant and the record thereof reflects on its face that the signatures of the grantors were made by "mark" only indicating that because of either illiteracy or infirmity they were incapable of signing their names.

"Here we have an alleged conveyance of a fee interest in 130 acres of land for the token consideration of $1.00 only coupled with the signatures of the grantors by 'marks', and this combination of circumstances disclosed upon the face of the mineral grant instrument itself, and the record thereof, constitute a badge of fraud sufficient to place all of the defendants herein upon inquiry as to whether the purported mineral grant was a *bona fide* transaction."

From the decree comes this appeal. For reversal, appellants rely on two points: (1) That the findings and judgment of the trial court are contrary to law; and (2) that the findings and judgment of the trial court are against, and not supported by, a clear preponderance of the evidence.

The evidence in the record includes the mineral grant and conveyances subsequent to it, agreed statement of facts between the attorneys for the parties, and testimony taken in open court and by interrogatories.

The facts are undisputed that the mineral deed from Stills to Catlett was recorded in the proper county some 32 years ago; that appellants without notice of defect or adverse claims paid a valuable consideration to their pre-

decessors in title for their mineral interests; that all the parties to the deed from Stills to Catlett as well as the notary public who took the acknowledgment to the deed are dead.

We have recently considered the quantum of proof necessary to set aside a deed, in *Simmons* v. *Murphy,* 235 Ark. 519, 360 S. W. 2d 765, (opinion delivered October 8, 1962), in which we stated:

"This court has consistently held that in a proceeding to cancel a solemn deed, on the theory of nondelivery or otherwise, the quantum of proof required must rise above a preponderance of the testimony; it must be clear, cogent and convincing." *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253.

On trial *de novo* we have diligently searched the record for evidence of the quantum necessary to meet the test of the rule set out above. Not only have we failed to find such evidence but also we find virtually an absence of proof as to fraud, adverse possession of the mineral interest, *Schuman* v. *Certain Lands,* 223 Ark. 85, 264 S. W. 2d 413; *Jones* v. *Brown,* 211 Ark. 164, 199 S. W. 2d 973, and lack of consideration. This being true, the sole question remaining for our determination is whether a deed, reciting a consideration of $1.00 coupled with the signatures of the grantors by marks, disclosed on the face of the instrument, is void as a matter of law.

A mere inadequacy of consideration is not sufficient to set aside a deed without accompanying acts of fraud or deception. *Luther* v. *Bonner,* 203 Ark. 848, 159 S. W. 2d 454; *Penney* v. *Long,* 210 Ark. 702, 197 S. W. 2d 470. There is absolutely no proof of fraud shown by the evidence in this case. Fraud is never presumed, but must be affirmatively proved. *Green* v. *Bush,* 203 Ark. 883, 159 S. W. 2d 458, and burden is on the one pleading fraud to establish it. *Gerlach* v. *Cooper,* 217 Ark. 596, 232 S. W. 2d 458. Before inadequacy of price will be considered a sufficient ground for cancellation of a conveyance it must be so great that it shocks the conscience. *Cunningham* v. *Love,* 202 Ark. 375, 150 S. W. 2d 217; *Braswell* v. *Brandon,* 208

Ark. 174, 185 S. W. 2d 271; *Johnson* v. *Foster,* 201 Ark. 518, 146 S. W. 2d 681. There is no proof in this record as to value, if any, of the oil, gas and mineral rights conveyed. That there is an actual consideration which is legal and of some value is enough. *Luther* v. *Bonner, supra.*

One is bound by whatever he uses as a substitute for his name. *Walker* v. *Emrich,* 212 Ark. 598, 206 S. W. 2d 769. The signing of a deed by a properly witnessed mark does not affect its validity. This has been the law in Arkansas "since the memory of man runneth not to the contrary." This common law rule was adopted as a part of the Civil Code of 1868. See Ark. Stats. § 27-109. *Watson* v. *Billings,* 38 Ark. 278.

The law as to consideration and signature by mark being thus established, and in the absence of proof tending to question the verity of either, it follows that the coupling together in the same instrument of a recited consideration of $1.00 and execution of the instrument by mark does not ipso facto render the instrument void. To hold otherwise would place in question some of the best established titles to real property in this state. Accordingly, the decree is reversed and the cause is remanded with directions for the entry of orders consistent with this opinion.

HENDRIX *v.* THOMAS.

5-2787 362 S. W. 2d 22

Opinion delivered November 26, 1962.

Maner & Stanley, by *Fenton Stanley,* for appellant.

Joe W. McCoy, for appellee.

NEILL BOHLINGER, Associate Justice. This case was brought in the Chancery Court of Hot Spring County by Charlie V. Hendrix, an incompetent, by his brothers and sisters as his next friend against Robert Thomas and Dovie J. Thomas and sought the cancellation of two deeds which the appellant, Charlie V. Hendrix, and his wife had executed conveying their home in Malvern, Arkansas to the appellees.

It was alleged that Charlie V. Hendrix was mentally incompetent to transact his business affairs and that Eliza J. Hendrix, the wife of Charlie V. Hendrix, was physically and mentally depressed and that while she was in the home of the appellees and in that state of health she was fraudulently induced to transfer the property in Malvern to the appellees; that the transfer of the title to their property was void by reason of the mental incompetency of the grantor; that the deeds were procured by duress and the exercise of undue influence by the appellees; that the deeds were given without consideration or upon a grossly inadequate consideration; and, that there was such a failure of the consideration that the transaction resulted in a fraud upon Charlie V. Hendrix.

While the case was pending, the First National Bank in Little Rock, having been appointed guardian of the estate of the incompetent, was substituted as plaintiff.

The case was duly tried and on October 3, 1961, the chancellor entered a decree dismissing with prejudice the complaint in this cause and from that action comes this appeal.

The record reflects that on the 13th day of May, 1959, the title to the property here involved was transferred by the appellant, Charlie V. Hendrix, to Eliza J. Hendrix, his wife, and she in turn delivered a warranty deed to the same property to the appellees herein, the deed reciting

$1.00 and other considerations and she retained in such deed a life estate in herself.

Much testimony was taken before the chancellor and it appears that Charlie V. Hendrix, if not incompetent, was suffering from a speech impairment and that his wife had cared for him for a long period of time in realization of his lack of capacity to care for himself and his physical needs. It further appears that Eliza J. Hendrix was, at the time of the execution of the deeds on May 13, 1959, suffering from a malignancy from which she died the following September. After the death of Eliza J. Hendrix, the appellees took the incompetent appellant to their home and three days after the burial of Eliza J. Hendrix, on September 21st, the appellees transported the appellant, Charlie V. Hendrix, to the federal mental hospital at Ft. Roots where he remained until he was released to his sister, Mrs. Madie Pippin, in December of 1959. He has remained in her home near Jacksonville, Arkansas, ever since.

The evidence is, for the most part, convincing that Charlie V. Hendrix was an incompetent and the Probate Court of Pulaski County so found but there is an absence of testimony as to whether or not Charlie V. Hendrix, at the time of the execution of the deeds on May 13, 1959, was aware of the extent and value of his one piece of property and to whom he was transferring it or for what consideration, but the following facts are clear: Eliza J. Hendrix was dying of a cancer; the appellee, Mrs. Dovie J. Thomas, was her sister and appellees seem to have made a number of trips to the home of Charlie V. Hendrix and Eliza J. Hendrix in Malvern; they carried Mrs. Hendrix to a hospital and to doctors and for a while moved Mr. and Mrs. Hendrix to the Thomas home in Little Rock. We are now confronted with the question as to whether or not if Charlie V. Hendrix, as the chancellor found, was capable of transferring and disposing of his entire estate, were the circumstances such as to preponderate in favor of a finding of fraud in the procurement of the two deeds by which Hendrix divested himself of his home. One deed was made to his wife and at the same time the wife executed her deed to that home to the appellees.

The consideration recited in the deeds is $1.00 and other valuable considerations. In searching for the fraud that is alleged we look to the circumstances by which appellant's home was transferred to the appellees. Viewing the testimony, as to the consideration, in the light of the circumstances that confronted Hendrix and his wife we find it difficult to believe that the deeds were given, as the appellee, Mrs. Thomas, stated, "they gave me that for helping them in their illness." There was nothing rendered to the appellants by the appellees in the period that preceded the death of Mrs. Hendrix in September that would not have been prompted by a warm personal friendship in addition to services which would be engendered by the tie of blood and we conclude that the next statement of the appellee, "yes, she asked me if I would take care of him [Hendrix] and I said I would see that he was cared for," was the basic reason for the conveyance.

There are two other witnesses as to the promises which prompted the giving of the deeds. The appellee, Dovie J. Thomas, testified: "I said I promised my sister that I would care for him," and the witness, Mrs. Spears, who heard the conversation when the deeds were explained by the attorney who drew them, was definite in her statement: "The place was to be deeded to Mr. and Mrs. Thomas to see after Mr. Hendrix." Mrs. Pippin, the sister of the incompetent appellant and who is the duly appointed guardian of his person, testified in regard to a conversation with Dovie J. Thomas: "She said she promised Liza that she would take care of Charlie but she didn't promise that she would take care of him at her house." However, it is immaterial as to which line of testimony we take. Whether the out-and-out statements of Mrs. Thomas and Mrs. Spears that the appellees would care for the incompetent, or the more guarded statement of the appellee, Robert B. Thomas, that he would see he was taken care of is true, the result is the same for the appellees have failed to do either of these two things.

Eliza J. Hendrix was buried on September 21, 1959, and her husband, the incompetent appellant, was taken by the appellees to their home in Little Rock and on Septem-

ber 24th, or three days after they started caring for the appellant, they delivered him to the mental hospital. When the appellees placed the incompetent in the mental hospital they were doing nothing for him that he could not have done for himself. He had earned the right to the care which the government hospital afforded by reason of his service in the army. He could have committed himself, for the appellees testified that the incompetent had his admission card on him when they delivered him there, or he might have been committed by any veteran's agency or by a court and the only thing that the appellees furnished toward his care was the automobile ride from their home in Little Rock to the mental institution at Ft. Roots.

There seems to have been but one person, after the death of the appellant's wife, who has displayed any degree of interest or care for his welfare and that is his sister, Mrs. Pippin. She made efforts to have him released from the mental institution and finally, in December, the hospital authorities deemed it prudent and released the incompetent to her.

The only logical conclusion that can be taken from the testimony in regard to the deeds is that the sole asset that the incompetent had to shield him from charity was his home which was given away. His plight was so pitiful that one witness testified that his wife had to fix his food on his plate and watch him while he was out in the yard as though he were a little child. Death was imminent for the wife and she therefore gave up their sole asset to assure him of some degree of care and comfort after her death.

This support the appellees have failed to provide. They have not cared for him or seen that he was cared for and when they saw the doors of the mental institution close on him they deemed their promise of care had been fulfilled. Neither can they take refuge behind the fact that a guardian was appointed for him. The books are replete with instances in which guardians have been faithless to their trust and the estates of incompetents and minors have, in many instances, been dissipated and some incom-

petents and minors, for lack of care by their guardians, have suffered hardship and privation which their estates might have mitigated. If this incompetent has a kind and considerate guardian it is by a fortuitous circumstance for which the appellees can take no credit.

The appellee, Mrs. Thomas, seems to have objected at the hospital to the custody of the incompetent being given to Mrs. Pippin and while the record discloses recitals of care and solicitude on behalf of the appellees toward Mr. and Mrs. Hendrix prior to the death of Mrs. Hendrix, we find no instance in which the appellees have concerned themselves as to the extent and kind of care that the incompetent was receiving since Mrs. Hendrix' death although they had received a valuable piece of property under a promise that they would care for him.

In the case of *Cannon* v. *Owens,* 224 Ark. 614, 275 S. W. 2d 445, we said:

"* * * It is true that when a promise of future support is made in good faith, the cause of action for its breach is personal to the promisee and cannot be asserted by his heirs. *Priest* v. *Murphy,* 103 Ark. 464, 149 S. W. 98; *Jeffery* v. *Patton,* 182 Ark. 449, 31 S. W. 2d 738. But nonperformance of the promise may also be evidence of fraud in the original procurement of the deed, giving rise to a cause of action that does survive the promisee's death. *Phillips* v. *Phillips,* 173 Ark. 1, 291 S. W. 802; *Richey* v. *Crabtree,* 198 Ark. 25, 127 S. W. 2d 269."

In the instant case we have the nonperformance of a promise and that nonperformance had its inception within three days of the burial of the incompetent's wife.

In *Owen* v. *Owen,* 185 Ark. 1069, 51 S. W. 2d 524, we said:

"This court is committed to the doctrine that, where a deed is executed in consideration of the agreement by the grantee to support the grantor, and this agreement is made by the grantee for the fraudulent purpose of securing the deed, and without intending to carry it out, and it has this effect, it constitutes a fraud vitiating the conveyance, and

equity will set it aside. *Salyers* v. *Smith,* 67 Ark. 526, 55 S. W. 936; *Boyd* v. *Lloyd,* 86 Ark. 169, 110 S. W. 596; *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286; *Jeffery* v. *Patton,* 182 Ark. 449, 31 S. W. 2d 738; and *Federal Land Bank of St. Louis* v. *Miller,* 184 Ark. 415, 42 S. W. 2d 564."

The same rule was laid down and discussed in *Brimson* v. *Pearrow,* 218 Ark. 27, 234 S. W. 2d 214:

"* * * In the recent case of *Green* v. *Whitney,* 215 Ark. 257, 220 S. W. 2d 119, we reaffirmed the following rule stated in the leading case of *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286: 'This court is committed to the doctrine, which is supported by the great weight of authority, as announced in 4 R.C.L., p. 509, § 22, that: "Where a grantor conveys land, and the consideration is an agreement by the grantee to support, maintain, and care for the grantor during the remainder of her or his natural life, and the grantee neglects or refuses to comply with the contract, that the grantor may, in equity, have a decree rescinding the contract and setting aside the deed and reinvesting the grantor with the title to the real estate." *Salyers* v. *Smith,* 67 Ark. 526-531, 55 S. W. 936; *Priest* v. *Murphy,* 103 Ark. 464, 149 S. W. 98; *Whittaker* v. *Trammell,* 86 Ark. 251, 110 S. W. 1041.

The rationale of the doctrine is that an intentional failure upon the part of the grantee to perform the contract to support, where that is the consideration for a deed, raises the presumption of such fraudulent intention from the inception of the contract and, therefore, vitiates the deed based upon such consideration. Such contracts are in a class peculiar to themselves, and where the grantee intentionally fails to perform the contract, the remedy by cancellation, as for fraud, may be resorted to regardless of any remedy that the grantor may have had also at law.

It thus appearing that the deed from Eliza J. Hendrix to Robert B. and Dovie J. Thomas should be set aside, it brings us to consideration of the deed from Charles and Eliza Hendrix to Eliza Hendrix. In the recent case of

Henslee v. *Boyd,* 235 Ark. 369, 360 S. W. 2d 505, this court said:

"* * * The two instruments were executed together, in the course of the same transaction, and should be considered as a single contract not only in the matter of interpretation, *Gowen* v. *Sullins,* 212 Ark. 824, 208 S. W. 2d 450, but also, we think, in the determination of whether rescission is proper."

We therefore treat both instruments as a part of the same scheme and both deeds should accordingly be set aside.

The decree in this case is accordingly reversed and remanded with directions to cancel the deeds above referred to and vest the title to the involved property in the guardian of the estate of Charlie V. Hendrix, incompetent.

The chancery court will take proof and ascertain if any rents and profits have accrued from this property since the death of Eliza Hendrix and enter proper judgments in behalf of the estate of the appellant, Charlie V. Hendrix.

In briefing the case for the appellant the attorneys have failed to include a transcript of the testimony of the appellees which is required by Rule No. 9 of the rules of this court, (d) the abstract being designed to bring before the court the material parts of the pleadings, proceedings, facts, documents, and other matters in the record that are necessary to all questions presented to this court for decision. The appellees have, in order for this court to be advised of the facts, supplied the deficiency in appellant's abstract. The trial court will ascertain the costs to the appellees of supplying that part of the abstract and judgment against the appellant will be entered for that amount. Otherwise, the appellant will recover costs. It is so ordered.

CALDWELL *v.* MCLEOD.

5-2833 362 S. W. 2d 436

Opinion delivered December 3, 1962.

O. W. "Pete" Wiggins, for appellant.

Cockrill, Laser, McGehee & Sharp, for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to an automobile accident which occurred in North Little Rock on June 21, 1961. Appellant, R. E. Caldwell, was driving his automobile north on Olive Street and William H. McLeod, appellee, was driving west on East Broadway. The collision took place in the intersection. McLeod instituted suit against Caldwell, alleging various counts of negligence, and sought judgment against the latter for damage to his automobile in the sum of $229.15. Caldwell answered, wherein he denied the allegations of negligence, and filed his own cross complaint, alleging negligence on the part of McLeod. Judgment was sought in the amount of $1,008.50 as alleged damage to his automobile.[1] The case was tried by the court, sitting as a jury. Sole witnesses were appellant, appellee, and Sgt. Larry W. Patterson of the North Little Rock Police Department, who was called as a witness on behalf of appellee. At the conclusion of the testimony, the court entered its judgment, finding that the collision "was unavoidable, and occurred without negligence on the part of either driver"; the complaint and cross-complaint were there-

[1] Subsequently, Caldwell reduced his claim to $987.00.

upon dismissed. From this judgment, Caldwell brings this appeal; McLeod has not cross-appealed. Appellant relies upon one point, *viz.,* that the physical facts clearly establish that the damages to his car were caused by the sole negligence of appellee.

Caldwell testified that he was driving north on Olive Street, and stopped at a stop sign before entering into East Broadway. East Broadway is a four-lane thoroughway. According to the witness, an east-bound car on Broadway, driven by a lady unknown to appellant, had entered into the intersection, blocking his way across. This car then backed out of the intersection, and the lady signaled Caldwell to proceed. He stated that he looked, saw no traffic approaching and entered into the intersection. His car was struck by appellee.

Officer Patterson testified that the approximate point of impact was 13 feet south of the north curb of Broadway, and 4 feet west of the east curb line of Olive.[2] He stated that the accident happened 2 feet over the center line of the two west-bound lanes on Broadway.

McLeod testified that he was traveling west, in the inside lane (nearest to the center line); that "as the officer stated, there were cars blocking, or cars piled up on Broadway there with an opening for Olive Street". According to the witness, he was approximately two to three car lengths[3] from the intersection when he first saw the front of the Caldwell car entering into Broadway; that he hit the brake, and almost immediately struck appellant's vehicle. He estimated his speed at 25 to 30 miles an hour.

Of course, our view as to whether the collision was due to negligence on the part of either, or both parties, is immaterial; we are only concerned with whether there was substantial evidence to support the trial court's finding that the accident was unavoidable. We think this query is immediately answered if we pose but a single

[2] Broadway is about 44 feet wide.

[3] McLeod was driving a Ford Falcon.

question *viz.,* "Can it be said, as a matter of law, that there was negligence on the part of either litigant?" Unless that question can be answered in the affirmative, appellant cannot prevail. From the facts herein recited, it is apparent that the question of negligence was a question of fact (rather than a question of law), and the jury, or court, sitting as a jury, are the triers of fact questions. The term "unavoidable accident" actually means a collision occurring without negligence on the part of either driver. Appellant testified that he stopped at the stop sign, looked, and saw no cars approaching. Appellee testified that he was proceeding at a lawful rate of speed, and the Caldwell car suddenly came out from the side street; though he applied his brakes, there was not sufficient time to stop. In addition, the evidence reflected that there was gravel on the street, spilled from large trucks which had been hauling to the expressway, which could have made stopping more difficult. Certainly, the question of whether appellant, (after stopping at the stop sign), was negligent in moving on into Broadway, or whether appellee was driving too fast under the circumstances existing at the time, were questions of fact to be determined by the trial court, sitting as a jury. While the court, in reaching its conclusion, did not divulge its reasons, it could well have found that the accident was occasioned by the act of the unknown woman, who motioned to appellant to enter into Broadway, *i.e.,* the court could have found that the driver of this third car was entirely to blame for the collision.[4] While appellant argues that there was no substantial evidence to support the court's finding of unavoidable accident, he is really complaining (as set out in his point for reversal), that the court found no negligence on the part of appellee. This is actually the issue, since appellee has not cross-appealed; a finding of no substantial evidence that Caldwell was free of negligence would certainly not benefit appellant. We are unable to say from the record in this case, that there was no substantial evidence that

[4] Of course, the fact that one might be guilty of negligence in following the directions of an unauthorized "traffic director" would be of no aid to appellant in this case.

appellee was operating his automobile, under all the attendant circumstances and conditions, in the exercise of ordinary care, *i.e.,* without negligence.

Affirmed.

WARD, J., concurs.

LATTY *v.* LATTY.

5-2816 362 S. W. 2d 676

Opinion delivered December 3, 1962.

[Rehearing denied January 7, 1963.]

Batchelor & Batchelor, for appellant.

Jeff Duty, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a dispute between the divorced parents of a little boy, as to visitation rights of the father.

John and Catherine Latty were married on March 14, 1957; and on April 6, 1961 the Benton Chancery Court awarded John Latty a divorce on his cross-complaint, but gave Catherine Latty the custody of their 3-year-old son, Jimmy Latty, and required John Latty to pay $50.00 each month for the support of the little boy. Catherine Latty had removed to Kiowa, Oklahoma (some 200 miles from Benton County, Arkansas) during the course of the divorce litigation; and the decree of April 6, 1961 had this provision as to the visitation rights of John Latty:

"The custody of the minor child, Jimmy John Latty, should be awarded to plaintiff (Catherine Latty) with the right to the defendant (John Latty) for reasonable visitation, including a visit with said child every other week-end at his home in Benton County, which will include an over-night stay with the defendant on a Saturday night. The burden is upon the plaintiff (Catherine Latty) to bring the child for the visit and return the child at her own expense. The defendant is further granted the temporary custody of said child for one month during the summer, such month to be chosen by the defendant, but he shall give reasonable notice of the time for such visit, which shall be not less than two days prior to his coming after the child. The expense of coming after and returning the child for this month's visit during the summer shall be borne by the defendant."

On December 22, 1961, Catherine Latty filed a petition in the Benton Chancery Court seeking, *inter alia*: (a) modification of the above copied visitation provisions; and (b) increased monthly payments because another child had been born to the Lattys after the divorce decree had been granted. At the hearing from which comes this appeal, the Chancery Court rendered a decree on January 25, 1962, which increased the monthly payments required of John Latty to $60.00 per month (on account of the birth of the other child), and made this provision as to John Latty's visitation rights to his now 4-year-old son Jimmy:

"That part of the Petition which seeks to modify the Decree of April 6th, 1961 as to custody and visitation rights concerning the minor child, Jimmy John Latty, should be denied, and said Decree as regards custody and visitation rights should remain as rendered and unchanged.

"It is further found by the Court that the Plaintiff and Cross-Defendant, Catherine Latty, should deliver said child, Jimmy John Latty, to the Defendant and Cross-Plaintiff, John Latty, Jr., on the week-end visits as provided for in said Decree, between 2:00 and 2:30 P.M. on Saturday and that said child shall remain

with the defendant and Cross-Plaintiff until 1:30 P.M. on Sunday."

On this appeal, Catherine Latty challenges the Chancery Decree on five points; but we find none to possess merit except the one now to be discussed; and it relates to the requirement in the decree that Catherine Latty bear the entire expense of delivering Jimmy Latty to his father, and returning to receive the boy.

Since the making of the original visitation order on April 6, 1961, there has been a change in conditions, in that Catherine Latty has another baby; and naturally such baby requires her attention. The distance from Kiowa, Oklahoma to Benton County, Arkansas was shown to be approximately 200 miles, and a four or five hour journey by automobile, which seems to be the best method of transportation in this case. Catherine Latty has no automobile; and to comply with the Court's decree she must either borrow her step-father's car, or borrow or rent a car from some other person. We conclude that it is an unjust burden to charge her with the responsibility and expense of delivering Jimmy Latty to his father in Benton County, Arkansas for each bi-weekly visit, as well as the expense of returning to receive the child at the end of such visit. It was shown that John Latty has an automobile, and that he rarely works on Saturdays and Sundays. We therefore conclude that John Latty is better able to make the bi-weekly trips, than is Catherine Latty.

We, therefore, modify the decree of January 25, 1962, to this extent only: John Latty may go to Catherine Latty's home in or near Kiowa, Oklahoma every other week, if he so desires, and get his son Jimmy at any time after 8:00 A.M. on Saturday; but must return the child to the mother in or near Kiowa, Oklahoma not later than 6:00 P.M. on the next day (Sunday); and the expense of the trip will be borne by John Latty and no part of such expenses will be deducted from the $60.00 per month support money which he is to pay.

As so modified, the Chancery decree is affirmed at the cost of appellee.

LOVELESS *v.* DIEHL.

5-2841 364 S. W. 2d 317

Opinion delivered December 3, 1962.

[Rehearing granted Feb. 18, 1963—See 236 Ark. 129.]

Rolland A. Bradley, for appellant.

Robert W. Henry, for appellee.

ED. F. MCFADDIN, Associate Justice. Appellees, W. A. Diehl and wife, filed suit against Appellants, J. E. Loveless and wife, for specific performance of an option contract, and in the alternative prayed for damages. Appellants, Loveless and wife, denied the claim for specific performance; and, by counterclaim, sought judgment on a note. Trial in the Chancery Court resulted in a decree awarding Diehl and wife specific performance and damages; and also awarding Loveless judgment on the note. Both sides have appealed.

Mr. and Mrs. Loveless owned a farm of 79 acres in Faulkner County; and they leased the farm to Mr. and Mrs. Diehl for a 3-year term beginning December 15, 1956, at a rental of $100.00 per month, payable in advance. The lease instrument also contained this option:

"It is mutually agreed and understood between the parties hereto that Lessees shall have an option to purchase said property at any time during the life of this lease, it being specifically understood that at any time between December 15, 1956, and December 15, 1959, that said option can be exercised by the Lessees wherein

they will be permitted to purchase said lands for a total purchase price of $21,000.00."

The Diehls took possession of the land and spent several thousand dollars in improvements. Also, Mr. Diehl purchased from Mr. Loveless a "pipeline milking system complete with two walk through stalls," and executed therefor his promissory note for $1,440.95; and no part of this note has been paid. The Diehls evidently intended to seasonably exercise the option to purchase the land; but as time went on they found it impossible to do so. In order to salvage what they could from the expenditures they had made for improvements, the Diehls listed the property with real estate brokers, hoping to find a purchaser who would pay in excess of the $21,000.00, the amount required to be paid to exercise the option with Loveless.

Shortly before the option expired, the Diehls agreed with Dr. J. W. Hart to sell him the place for $22,000.00; which, after paying the Loveless option of $21,000.00, would have left the Diehls $1,000.00. It is clear that Dr. Hart could have paid the $22,000.00 for the property. The evidence is in conflict as to the conversations and dealings between the Diehls and Dr. Hart on the one side, and the Lovelesses on the other; but it is reasonably clear that before December 15, 1959, Dr. Hart would have paid the $22,000.00 if Mr. Loveless had not interfered with the Diehl-Hart trade, by disclaiming any intention to sell the property to Diehl. Such interference and disavowal by Loveless made unnecessary any further tender of the $21,000.00 to him. (*Read's Drug Store* v. *Hessig-Ellis Drug Co.,* 93 Ark. 497, 125 S.W. 434.)

After December 15, 1959 the Diehls moved a portion of their property from the premises; and the Lovelesses took forcible possession, and rented the property to Mr. Waggoner for $100.00 per month; and there are claims and counterclaims because of such forcible possession, and also claims for rent, and damages. No useful purpose would be served by detailing the testimony of the various witnesses and differentiating our

conclusions from those of the learned Chancellor. After a careful study of all the evidence, we have decided that the best way to conclude this litigation is as follows:

1. The Diehls are entitled to judgment against the Lovelesses for $1,000.00, being the amount the Diehls would have realized if they had purchased the property from the Lovelesses for $21,000.00 and sold it to Dr. Hart for $22,000.00. Under the situation as it existed in December 1959, the judgment of $1,000.00 gives the Diehls all the relief that a deed from the Lovelesses would have given them. The Diehls admitted that they could not have purchased the property except by obtaining the money through resale to Dr. Hart. He was ready, able, and willing to purchase in December 1959, but was not bound to do so thereafter. Furthermore, the Diehls prayed for damages in the alternative to specific performance, and we conclude that the amount of $1,000.00 is the amount of damages they established in connection with the option to purchase; and this conclusion eliminates any rental claims of the Diehls after December 15, 1959. In thus awarding the clearly established damages in lieu of specific performance, we are exercising the sound discretion which a court of equity has in cases involving specific performance. Such discretion has been recognized in: *Orr* v. *Orr,* 206 Ark. 844, 177 S.W. 2d 915; *Cole* v. *Salyers,* 190 Ark. 53, 76 S.W. 2d 669; and *Simms* v. *Best,* 140 Ark. 384, 215 S.W. 519. See also *Jamison Coal Co.* v. *Goltra* (8th Cir.), 143 F. 2d 889; 154 A.L.R. 1191; and see also 49 Am. Jur. p. 13 *et seq.,* "Specific Performance" § 8 and § 9.

2. Mr. Loveless is entitled to judgment against Mr. Diehl on the milking equipment note for $1,440.95, with interest at six per cent per annum from January 15, 1957 until paid. The $1,000.00 damages as awarded the Diehls in the paragraph just above is to be credited on the Loveless judgment as of December 15, 1959; and Mr. Loveless will have judgment against Mr. Diehl for the balance. The appellees' claim to strike this note item was correctly denied by the Chancery Court.

3. The claim of the Lovelesses for balance of rents, and the claims of the Diehls for loss of property were considered by the learned Chancellor as offsetting. At least, each claim was so disputed by evidence as to be unproved; and in this we agree.

It follows that the Chancery decree is reversed and the cause remanded, with directions to enter a decree in keeping with this opinion; and each party will bear the cost of the entire case that such party has incurred.

JOHNSON, J., not participating.

ARK. STATE HIGHWAY COMM. *v.* LIGHT, JUDGE.

5-2931 363 S. W. 2d 134

Opinion delivered December 3, 1962.

[Rehearing denied January 14, 1963.]

Dowell Anders, H. Clay Robinson and *Wm. H. Donham,* for petitioners.

Hale & Fogleman, Rieves & Smith, Spears & Sloan, for respondents.

GEORGE ROSE SMITH, J. This petition for a writ of prohibition (or a writ of certiorari) involves a construction of Act 115 of 1953, regulating the procedure by which the Highway Commission may deposit estimated compensation in the registry of the court in condemnation cases. Ark. Stats. 1947, §§ 76-534 to 76-541. The particular ques-

tion at issue is the extent of the trial court's power to permit the landowner to withdraw the deposit before trial.

In 1960 the commission filed a proceeding for the condemnation of eight tracts of land in Crittenden county. Upon the filing of the petition the commission deposited $111,300 in the registry of the court, as estimated compensation to the landowners. By various orders of the court the property owners were permitted to withdraw the original deposit from the court's registry. The commission concedes that these withdrawals of the initial deposit were allowed by the statute. Ark. Stats., § 76-537.

Later on the defendant landowners asked the court to increase the amount of the deposit, contending that the commission's estimate had been too low. After a hearing the court directed the commission to deposit an additional $176,200. This was done. On October 15, 1962, the court, over the commission's objection, entered an order permitting the landowners to withdraw the additional deposit.

The commission then filed its petition in this court, asking us to prohibit the circuit court from enforcing the order just mentioned. After a preliminary hearing counsel dropped their insistence that a temporary writ of prohibition be issued; that writ tests only the question of jurisdiction, and the circuit court plainly has jurisdiction over funds that have properly been deposited in its own registry. Instead, counsel now ask that we treat the petition as one for certiorari, as we may do, *Wasson* v. *Dodge,* 192 Ark. 728, 94 S. W. 2d 720, and quash the challenged order as being void for want of statutory authority.

In seeking certiorari the commission maintains that it has no effective remedy by appeal, because after final judgment in the condemnation proceeding the validity of the interlocutory order of distribution may present only a moot question. Even so, certiorari will not lie unless the trial court exceeded its jurisdiction in making the

order. *Brown & Hackney, Inc.*, v. *Stephenson,* 157 Ark. 470, 248 S. W. 556.

We need not speculate whether the absence of statutory authority would render an order such as this one actually void, for in our opinion the court did not exceed the power conferred by Act 115. Sections 3 and 5 of the act permit the commission to acquire title to the land and the right to possession by making a deposit of the estimated compensation. Section 8 allows any landowner who feels aggrieved at the amount of the deposit to ask the court to require the deposit to be increased.

Section 4, which we find to be controlling, reads as follows: "Upon the application of any party in interest, and upon due notice to all parties, the court may order that the money deposited in the court, or any part thereof, be paid forthwith to the person or persons entitled thereto. If the compensation finally awarded shall exceed the amount of money so deposited, the court shall enter judgment against the State of Arkansas and in favor of the parties entitled thereto for the amount of the deficiency. If the compensation finally awarded shall be less than the amount of money so deposited and paid to the persons entitled thereto, the court shall enter judgment in favor of the State of Arkansas and against the proper parties for the amount of the excess." Ark. Stats., § 76-537.

In arguing that the section just quoted applies only to the commission's original deposit and not to any additional amount required by the court, counsel rely mainly upon the sequence in which the sections appear in the act. That is, § 3 permits the commission to make the original deposit at the inception of the case, § 4 empowers the court to order that the money be paid forthwith to the landowners, and § 8 authorizes the court to require that the deposit be increased. It is contended that the legislature would have inserted the provisions of § 8, having to do with the additional deposit, ahead of § 4, having to do with the distribution of the fund in court, if the lawmakers had meant for such an additional de-

posit to be subject to the court's authority to order an immediate withdrawal of the money.

We are not impressed by this argument. The legislature plainly intended for the landowner, in a proper case, to have an immediate right to withdraw the estimated compensation when the full amount was fairly deposited in the first instance by the commission. We can think of no good reason for finding a contrary legislative intent merely because the deposit of full and fair compensation had to be directed by the court.

Moreover, the commission's argument would mean that the legislature, in the first sentence of § 4 of the act, had reference *only* to the commission's original deposit when it was directed that "the money deposited in the court" be paid forthwith to the landowner. Yet the next sentence in § 4 provides for a judgment in favor of the State if the compensation finally awarded exceeds "the amount of money so deposited." Obviously the second sentence refers to the additional deposit as well as to the initial one; so we cannot reasonably declare that the first sentence is not equally comprehensive.

The commission's real concern seems to be that if an excessive amount of estimated compensation should be paid over to an insolvent landowner the commission might later be unable to collect its judgment for the overpayment. It is perhaps a sufficient answer to point out that the trial court evidently has some discretion in the matter, since § 4 of the act permits the court to order a distribution of the money deposited "or any part thereof." In any event, however, this question is not at issue in the case at bar, since an application for certiorari does not involve a review of the trial court's exercise of discretionary authority.

Writ denied.

HARRIS, C. J., and BOHLINGER, J., not participating.

ROBINSON, J., dissents.

CITY OF EL DORADO *v.* ARK. PUBLIC SERVICE COMM.
5-2707 362 S. W. 2d 680
Opinion delivered December 3, 1962.
[Rehearing denied January 7, 1963.]

J. V. Spencer, Jr., for appellant.

Mehaffy, Smith & Williams, by *Pat Mehaffy* and *Herschel H. Friday, Jr., R. H. Thornton, Jr.* and *Mark Woolsey,* for appellee.

PAUL WARD, Associate Justice. This appeal comes from a judgment of the Pulaski County Circuit Court which affirmed an order of the Arkansas Public Service Commission. Said order related to a controversy between the Arkansas Louisiana Gas Company and the cities of El Dorado and Pine Bluff. One reason for the cities involvement was that the Arkansas Louisiana Gas Company was attempting to raise the minimum monthly service charges on certain domestic customers' meters from $1.17 to $1.87. Hereafter we may refer to the Arkansas Public Service Commission as "Commission,"

to the Arkansas Louisiana Gas Company as the "Company", and to the cities as appellants.

How the litigation arose. In 1957 the Commission asked the Company to present certain facts with respect to the various municipal taxes paid by the Company to municipalities throughout the state. No further steps appear to have been taken until early 1961 when the Company filed a petition with the Commission stating it was prepared to present the requested information, and also asking the Commission to examine and adjust the minimum service charges on certain customers' meters. In the hearings that followed it was developed (generally speaking) that some cities were taxing the Company meters nothing, others a small amount, and others a much larger amount. It was also developed that the Company had fixed a monthly minimum charge of $1.17 on each meter in certain cities (Group A), a greater charge on cities in another group and no charge in still another group. The Company asked to raise the charge in Group A to $1.87 and to lower the higher charges to $1.87. This adjustment, approved by the Commission, resulted in an increase of revenues for the Company. Appellants took the position that the Company could not justify raising the minimum service charge without showing it would not result in earnings of more than 6.34% on its over-all operations. This percentage of return was apparently agreed to by the parties, and it was found to be fair in *Acme Brick Company* v. *Arkansas Public Service Commission,* 227 Ark. 436, 299 S. W. 2d 208. To meet this burden the Company showed that because of a labor wage scale increase (over which it had no control) its operating expenses had increased by $200,000 annually. Also the Company, in order to meet the burden, asked the Commission to make certain adjustments necessitated by the unusually severe weather experienced in 1960. Other adjustments were also asked to be made in order to determine whether the Company was making more than 6.34% on its investment. It should be noted at this time that the purpose of these extensive proceedings, shown in a record of seven volumes, was not primarily to reduce

or increase gas rates generally. The extensive hearing became necessary, however, because appellants insisted (and the Commission agreed) that the Company would not be entitled to any additional revenues without first disclosing its over-all revenues and expenses pertaining to its operation in Arkansas, as applied to the Company's services to distribution customers as distinguished from industrial customers. This procedure was approved in the *Acme Brick Company* case, *supra,* where we said: ". . . it is necessary for the Commission to allocate or apportion the joint costs of transmitting gas from the well to customers according to each class of customer's responsibility therefor."

It is the Company's contention, after making a full disclosure of its pertinent operational revenues and expenses, that its net income does not exceed the 6.34% return.

Appellants challenge several items of expense and income claimed by the Company and allowed by the Commission, which items we will later examine.

Fundamental Rules. Before proceeding to discuss the merits of the aforementioned items it is deemed appropriate to restate briefly some of the well established fundamental rules, as we conceive them to be, by which we must be guided.

(a) It is the duty of the Company to operate in such manner as to give to the consumers the most favorable rate reasonably possible. This stems from the fact that the State has given the Company the exclusive right to sell and distribute gas to its customers. Consequently the Company bears a trust relationship to its customers and must conduct its operations on that basis and not as if it were engaged in a private business with no restrictions as to the income it could earn.

(b) In a hearing of this nature the burden is on the Company to justify any rate increase requested from the Commission. See: *City of Fort Smith* v. *Southwestern Bell Telephone Company,* 220 Ark. 70, 247 S. W. 2d 474. This in part stems from the nature of its relation-

ship just mentioned and also from the fact that it has possession of all pertinent records. If the burden were not on the Company, aggrieved cities or persons would be greatly handicapped for lack of funds, organization, and access to material information.

(c) The Commission, with its training and personnel, performs the function of weighing and passing on the facts presented to it, and in that field its findings are like those of a jury and must be allowed to stand if based upon substantial evidence, free from fraud and not arbitrary. See: *Inc. Town of Emerson* v. *Ark. Public Service Commission,* 227 Ark. 20, 295 S. W. 2d 778. As we see it, the Commission has two distinct duties: One is to the Company to see that it may charge such a rate as will give it a fair return on invested capital; The other is to see that the consumer shall not pay more than necessary to produce such fair return. If, however, the Commission misapplies any principle of law in reaching its conclusions they are subject to reexamination by this Court.

Since the records, as introduced in evidence by the Company and interpreted by the Commission, reveal no excess earnings, it is incumbent on us, as we examine the several points relied on by appellants, to seek the correct answers to two questions: One, did the Commission make any conclusion of fact which is not supported by substantial evidence; and, Two, did the Commission, in reaching any conclusion, violate any principle of law or approved procedure?

For convenience and clarity we choose to discuss the numerous objections raised by appellants under two principal classifications: *One,* dealing with substantial evidence; *Two,* dealing with law or proper procedure.

One.

In the following discussion each of appellants' points is quoted from their brief.

(a) "The Order of the Commission is Arbitrary, Unreasonable and Without Evidentiary Support in

Eliminating $2,640,000 of Actual Revenue on Account of 'Weather' ".

In line with appellants' insistence throughout the hearing that the Company had no justification for raising certain minimum fixed charges, it is contended that the Commission erred in adjusting the Company's income because of the weather conditions in 1960. The undisputed evidence shows that the Company did have a sizeable increase in revenues for that year due to the increased sale of gas. Evidence was introduced to show that this increase amounted to anywhere from $4,208,088 (as contended by the Company) to $1,667,960 (as reflected by Exhibit 4 of appellants) as compared to an average over the past 14 years. After due consideration the Commission fixed the allowable figure at $2,640,000.00. We cannot say that this figure fixed by the Commission is not supported by substantial evidence. In this connection it is pointed out, also, that the evidence showed that the Company, due to the same factor, had an increase in expenses in the amount of $848,978 for the year 1960 over and above the average expenses for the past 14 years. In reaching its final conclusion the Commission took into consideration both the increased revenues and the increased expenses. Due to the self-evident fact that utility rates cannot be adjusted from day to day, but are made for the foreseeable future, we think the action of the Commission in this instance was proper and fully justified under rules established not only by our own Commission but by the decisions in other states. The record discloses that on two previous occasions the Commission adjusted rates based on weather conditions.

See: *Re: Public Service Company of Colorado,* 34 P.U.R. 3d 186 (1960); *Re Plateau Natural Gas Company,* 36 P.U.R. 3d 452 (1960); *Re Diamond State Telephone Company,* 28 P.U.R. 3d 121 (1959); *Re Gas Light Company of Columbus,* 31 P.U.R. 3d 350 (1959); *Re Columbia Gas of Kentucky,* 36 P.U.R. 3d 401 (1959); and *Re Central Maine Power Company,* 29 P.U.R. 3d 113 (1959).

(b) "The Commission Order is Arbitrary, Unreasonable and Without Evidentiary Support in Eliminating over $4,000,000 Products Extraction Income."

The record disclosed that the Company wholly owns the Arkansas Louisiana Chemical Corporation (hereafter referred to as "Arkansas") which engages in many activities among which is extracting and processing the liquid hydrocarbons from natural gas. It is further shown that the Company permits Arkansas to extract the liquid hydrocarbons from much of the gas which is distributed to its customers. In this process Arkansas derives considerable profits. It is the contention of appellants that these profits should be added to the Company's overall revenues. If this were done of course it would tend to reduce the customers' rate. The Commission allowed Arkansas to retain the profits. In the case of *Associated Mechanical Contractors of Arkansas, Etc.* v. *Arkansas Louisiana Gas Company,* 225 Ark. 424, 283 S. W. 2d 123, we put the stamp of approval on the participation of the Company in a private business. The last paragraph of the cited case makes it clear, we think, that although a utility may own or engage in a private business and retain the profits therefrom for the stockholders, none of the expenses incidental thereto can be charged to the utility customers. In connection with the point under consideration there is substantial evidence to show that all expenses incurred by Arkansas in its operations are charged to Arkansas and not to the utility customers. We understand from appellants' argument they contend the cost of transporting the gas from its source to Arkansas' plant is borne by the utility customers and not by Arkansas. It is pointed out, however, that insofar as we can tell, this cost would accrue whether the gas is processed or is piped directly to utility customers. Therefore no error is shown in the Commission's findings. It is pertinent, however, in this connection to point out that it would be error for the Commission to charge the customers with any expense which contributed solely to the profit of Arkansas. It is also the duty of the Company to keep its books

in such a way as to be able to inform the Commission so it could make a proper ruling in a situation like this.

(c) "The Commission Order is Arbitrary, Unreasonable, and Without Evidentiary Support in Eliminating $1,054,432.71 of Income From Gas Transported for Others."

It is disclosed by the record that the Company transported gas, using its distribution system, for other persons or corporations and derived therefrom in revenues the amount of $1,054,432.71. There is substantial evidence to support the Commission in finding that the reasonable expense of transportation amounted to $425,523 and that the distribution customers were given credit for this amount by reducing the rate base by $3,889,557. This, of course, resulted in a profit of $629,000 for the Company or the stockholders. It is insisted by appellants that the latter amount should inure to the benefit of the customers and not to the benefit of the stockholders as held by the Commission. In this we think appellants are in error because as we have already pointed out, the Company has a right to engage in nonutility operations and keep all of the benefits derived therefrom as long as it pays all the expenses incidental thereto.

(d) "The Commission Order Is Arbitrary, Unreasonable and Without Evidentiary Support in Eliminating $2,563,078 of Income from Sales to Other Gas Utilities."

What we have already said disposes, we think, of appellants' objections here considered. It appears that in 1960 the Company purchased gas for the sum of $5,761,994 and resold it to other gas utility companies for $8,294,952 resulting, apparently, in a profit of $2,532,958. Under the ruling of the Commission this profit inured to the Company or the stockholders and not to the benefit of the customers. This was in line with eliminating all expenses and all income relative to these non-utility sales in like manner as previously pointed out. This was also in accord with the previous ruling of the Commission in *Re Arkansas Louisiana Gas Company,* 97 P.U.R.

(n.s.) 67 (1952) where, it is pointed out the Commission in considering a similar question said:

"The sales from the 'nonutility' sales are all sales to other utilities. They are not sales to ultimate consumers, but are 'sales for resale'.

"We hold, therefore, that while such properties are utility in nature that they should be excluded from the determination of the rate base, and similarly from revenues and expenses applicable to the 3-B customers."

The only way we can see how the Company's distribution customers might be adversely affected would be for the Company to sell its gas at a lower rate than that which it charges the customers or to deplete its available supply of gas to a point where the customers might be eventually affected. In the case of *Federal Power Commission* v. *Sierra Pacific Power Company,* 350 U.S. 348, 100 L. Ed. 388, 76 S. Ct. 368 (1956), the Court in discussing a similar situation said:

"In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."

There is no showing here that such a result has come about from the Company's sale of gas to other utilities.

(e) "The Commission Order is Arbitrary, Erroneous and Without Evidentiary Support in Allowing 'Fictitious' Income Taxes as an Expense of the Company."

We have carefully considered appellants' contention that the Commission erroneously allowed the Company to withhold money for the purpose of paying income taxes without deducting therefrom what is designated as "fictitious" income taxes which it will never be called on to pay. To fully understand this contention necessitates a consideration of Act 175 of the Acts of 1957. Generally speaking the effect of this act was to take cer-

tain gas producing properties out of the rate making base and allow the Company to charge its customers the fair field price. Appellants point out that the production properties, when considered for income tax purposes, are subject to certain income tax deductions detailed as follows: (1) abandoned lease and non-producing well drilling $727,000; (2) depletion, gas $1,904,000, and (3) intangible well drilling expense $2,667,000. It is appellants' contention that these sums should be deducted from the amount withheld by the Company for payment of income taxes. In this we think they are in error. We think the effect of Act 175 of 1957 was to disassociate the Company owned oil and gas production properties from all consideration in connection with rate making. That is the effect of the Commission's holding and that is clearly the contention of the Company. We quote from the Company's Brief at page 175 the following:

"The producing arm of the Company is accorded the same treatment as a third party producer selling gas to the Company. Both must pay, from the dollars appropriate to the value of the product, all expenses connected with drilling producing wells [and] all losses of 'dry holes'."

We understand this to be a commitment by the Company that hereafter all expenses incurred in developing its oil and gas operations and all losses resulting therefrom, will be paid and sustained by the Company stockholders and not by the utility customers. In other words, the result of Act 175 is that from here on the rate payable by gas customers will in no way be affected by the success or failure of said oil operations. That being true, it is immaterial to the Company's customers whether the Company's stockholders pay taxes on the oil production properties or not or whether they take depletion allowances or not. Under this view the Commission was correct in refusing to require the Company to take the allowable deductions mentioned from the amount withheld for the payment of income taxes. Except for this failure on the part of the Commission, we understand

that appellants have no objections to the amount withheld by the Company.

(f) "There Is No Substantial Evidence of Any Discrimination and No Allocation to Group A Customers."

By order of the Commission the monthly minimum fixed charge per meter was fixed at $1.87 for customers. Previously the fixed minimum charges varied in different towns. In towns on the integrated system (towns served by the main line distribution system) the charge had been $1.17. This class of town is also designated as Group A towns. In another group of towns the charge had been $1.50; in another it was $1.90; in another it was $2.00; and in others it was $2.50.

The reasons, as we understand them, given by appellants may be stated in the following way:

1. In Group A towns the average service expense per customer (or meter) is lower than $1.87, so there is no justification for the increase in that group.

2. In the other towns the average service expense is much greater than $1.87. This would therefore result in the towns in Group A subsidizing the other towns.

3. Due to the fact that there are a great many more customers in Group A towns than there are in the other towns, resulting in increased revenues, the Company would not be entitled to the increased revenues without first showing it would not earn more than 6.34% on its fixed base rate.

The answer to the last argument is that it has been shown elsewhere in this opinion that the Company will not be earning more than the allowed rate. The answers to the other arguments are found, we think, in facts and considerations presently set out.

It must be understood that the Commission, in approving a fixed minimum charge, has many things to take into consideration. In making a determination it would be unreasonable to expect it to fix a charge that would eliminate all inequities. This fact was recognized in *Ogden City* v. *Public Service Commission,* 123 Utah 437,

260 P. 2d 751, 123 Utah 443, 260 P. 2d 754, where the following statements are found:

"The order of the Commission is not only an exercise of its legal authority, but appeals to basic equities—at least eliminating one discrimination in a field where it is impossible to eliminate them all.

"Public policy seeks the elimination of as many discriminations as possible in a field where total elimination thereof is difficult or impossible of achievement. * * * "

It must be realized also that the Commission must consider not only the facts as they exist on any given date, but it has the right to consider what conditions may be in the foreseeable future. For instance, the expert evidence shows that the monthly distribution expense, in Group A towns, was more than the $1.87 allowed by the Commission (or $1.95) and that in 1961 it would likely be $2.04. We must agree with appellants that there appears to be a discrimination against the Group A towns and in favor of the non-integrated towns since it costs more per meter to serve the latter than it does the former and yet all customers pay the same minimum charge. But there are other things which the Commission had a right to consider. Some of the non-integrated towns floated bond issues and installed their own distribution systems without cost to the Company. This of course voided the necessity of increasing the Company's rate base when in turn it inured to the benefit of all gas customers. In addition, it was shown that the cost of furnishing gas and services to the non-integrated towns was so high that were they forced to pay their numerical proportion of same, they would be required to pay almost prohibitive rates. In our opinion the Commission had a right to consider that feature in arriving at a proper minimum charge which would enhance the development and general welfare of the entire state. This right may reasonably be inferred from the language used by the legislature in Act 175 of 1957, section 3.

In view of all we have said above we are unable and unwilling to say the Commission acted arbitrarily

or without the support of substantial evidence in fixing the minimum monthly service charge at $1.87 per meter.

Two

The remaining points or objections are distinguished from the ones previously discussed in that they deal primarily with questions of law or proper procedure while the others involved primarily questions of substantial evidence.

(a) "The Commission Order Is Arbitrary, Erroneous and Contrary to Law in Allowing Loss From Merchandising and Jobbing as a Utility Expense, and in Failing to Assign Cost to Arkansas Louisiana Finance Company."

The record reveals that the Company engages in certain forms of merchandising, sales promotion and advertising. Appellants do not appear to question the legal right to engage in these activities, nor would they be justified in doing so. In the case of *Associated Mechanical Contractors of Arkansas, Etc.* v. *Arkansas Louisiana Gas Company,* 225 Ark. 424, 283 S. W. 2d 123, we held that the Commission had no authority to prohibit the Company from selling and installing air-conditioning equipment.

However, appellants do contend that the expenses incidental to such merchandising should not be allowed as a utility expense. The great weight of authority appears to be against such contention. See *West Ohio Gas Company* v. *Public Utilities Comm. of Ohio,* 294 U. S. 63, 55 S. Ct. 316, 79 L. Ed. 761 (1935); *Consolidated Gas Company of New York* v. *Newton,* 1920 F P.U.R. 483, 267 F. 231 (2 Cir. 1920); *Public Service Company of New Hampshire* v. *New Hampshire,* 30 P.U.R. 3d 61, 102 N.H. 150, 153 A. 2d 801 (1959); and *Wichita Gas Company* v. *Public Service Commission,* 1928 D P.U.R. 124, 126 Kan. 220, 268 P. 111 (1928). The record reflects that the Company engages in merchandising only such items that are related to its utility business and would tend to increase the sale of gas. So, we hold that the Commission had the authority to permit the Company to charge to utilities ex-

pense proper items of merchandising, and that it did not act arbitrarily in doing so on the reasonable theory that increased gas sales would tend to lower the price paid by consumers. Based on the same reasoning the Commission correctly allowed the expense of Company advertising to be charged to utilities expense.

Notwithstanding the above, appellants properly argue that the Company has no right to make improper charges, i.e., charges which do not promote the interest of the consumers. One argument is based on the expenses incurred, and allowed, in connection with the operation of the Arkansas Louisiana Finance Company which is wholly owned by the Company. It is pointed out that the finance company makes a profit which inures to the stockholders (in effect) but that certain expenses of operation—such as billing and collecting—are charged to utility expenses. In other words, it is pointed out that the stockholders get all the profits and the consumers pay part of the expense. We think appellants' contention in this connection would have merit if the finance company were engaged in serving the general public, but as we understand from the record, this is not the case. The finance company handles only the accounts of customers who buy gas-using-equipment from the Company. Such being the case we conclude the Commission, under its broad discretionary powers, had the right to treat this item on the same basis as it did the items of merchandising and advertising—that is, all the activities tended to promote an increase in the sale of gas.

(b) "The Commission Order Is Arbitrary, Erroneous and Contrary to Law in Failing to Consider 'Over-all' Company Operations."

Under this point appellants say it was arbitrary and unlawful for the Commission (in reaching its several conclusions) to fail and refuse to consider the Company's "over-all" operations. We agree with the general principle announced in 73 C.J.S., *Public Utilities* § 13, page 1008, that:

"According to many decisions, a public utility is entitled to charge and receive for its product or service

such rates, and such only, as will give it as profit a fair return on the reasonable value of its property at the time used and useful in the public service. . . ." It is pointed out by appellants that the Commission failed to consider several items of revenue accruing to the Company, which items, in view of the conclusion hereafter reached, we deem it unnecessary to set out in detail.

We can also agree with appellants contention that the Commission would have no right to grant the Company an increase in minimum fixed charges if, to do so, the Company's earnings would exceed the allowable return—in this case fixed at 6.34%. We can readily understand how appellants were led to think, during the hearing, that the Commission was going to give consideration to the Company's over-all revenues and expenses. In spite of all we have said, however, we are forced to conclude, from a full examination of the entire record, the Commission did not intend to (and did not in fact) give full consideration to the Company's operation as it pertained to industrial customers, but only to its operation pertaining to distribution customers. In this, we think, the Commission acted correctly within its discretionary powers based on sound reason and in accord with precedent. See: *Acme Brick Company* case, *supra.* There are sound reasons for separating the income and expense referable to industrial customers from distribution customers. It was also stated in the *Acme Brick Company* case, *supra,* that industrial customers use "approximately 80% of all gas passing through the Company's lines". It is not unreasonable to assume this percentage may increase as the state becomes more industrialized. To supply this volume of gas and for the Company to give to industrial consumers contractual assurance of an adequate supply at a stabilized price, it is understandable that the Company must make long range purchase contracts. This could mean that a profit or a loss would result. It has been properly said that a utility exists primarily for the benefit of distribution customers. We think the Commission can therefore properly determine that it

would not be to the best interest of the distribution customers for them to run the risk of absorbing the losses the Company might incur in servicing industrial customers. It must logically follow, therefore, that the Commission should not compel the Company to give to the distribution customers any profits that might likewise accrue. We conclude therefore that appellants had no right to demand an over-all accounting in this particular proceeding. It is also pointed out that both sides agreed that the proper rate was 6.34% as fixed in the *Acme Brick Company* case, *supra.*

(c) "The Order of the Commission Is Clearly Arbitrary, Unlawful and Erroneous and Without Substantial Evidentiary Support in Allowing a 'Field Price'."

The point is here made that the Commission acted unlawfully and without evidentiary support in allowing a "fair field" price. We can find no merit in this contention. Act 175 of 1957 (Ark. Stats. § 73-1903) fixes the method to determine the price which the Company can charge (as an operating expense) for the gas purchased from its own gas wells. It is "the fair value or reasonable market price of such natural gas at the point at which the gas is delivered into the transmission system" of the Company, "or within the vicinity of the field or fields where produced".

The method used in this instance was to average the price at which several sales were made. By the Company's calculations the average was 18.74 cents per MCF; other calculations by appellants resulted in an average of 14.26, and the Commission fixed the price at 16.57. The contention is made that some of the Company's prices were based on gas sold, not at "the transmission system", but at other points after it had been transmitted for some distances (not shown) through the Company's system. In principle we are in agreement with the above contention. We think the clear intention of the statute (above quoted) is that the price of gas was not to be determined at some distant place after it is transported in the Company system. Otherwise, the distribution

system would be used for Company benefit by the use of utility property—or at the expense of the distribution customers. We cannot, however, say this was done in this instance, or that the Commission did not consider that factor. The Commission's findings show conclusively that they were aware of the correct procedure. The Commission refused to allow the price of 18.74 based on the Company's calculations and it allowed more than 14.26 based on the appellants' calculations. The Commission pointed out, however, that some of the sales in appellants' calculations included sales made some time previously and therefore were not true indications of the present price. In view of all we have said above we are unable and unwilling to say that the Commission, in fixing the price it did, acted arbitrarily, unlawfully, or without substantial evidence.

(d) "The Commission Order Is Clearly Arbitrary, Unlawful and Erroneous in Using a Year Ending Rate Base Without Adjusting Revenues to Year End Levels and Without Crediting Against Rate Base Income Tax Accruals."

Apparently it is not argued that the Commission had no authority to fix a rate base predicated on year-end figures of plant investment, but it is insisted that in doing so, it must consider year-end revenues and expenses, citing the Commission's holding in its own case, 7 P.U.R. 3d 561, 563 (Docket U-905). The answer to this objection is that we cannot say the Commission did not take into consideration (along with other factors later mentioned) the year-end level of both revenues and expenses in fixing the rate base in this instance. Only two expert witnesses, Clayton and Flanders, made calculations for the Commission's consideration relative to a proper rate base. Clayton's figure, the smaller of the two, was the one adopted by the Commission.

In adopting the figure most favorable to the rate payers, the Commission had the prerogative and the duty to consider a variety of pertinent items which have been approved not only by this Commission but by court de-

cisions. Some of these items are: Rates and bases must be made, not for a day or a month, but for the foreseeable future; It is common knowledge that prices for labor and materials (for operation and construction) have advanced in the past few years and probably will advance in the years ahead; and to meet the growing demand by the public for a better and expanded service the Company must be prepared financially to provide these services. The Commission, as shown by its order, took these and other items into consideration in fixing the rate base at $36,756,234, and we are in no position to say, with confidence, it acted arbitrarily or without substantial evidence.

On the whole, the important issue is whether the Company will be allowed (on the above rate base) to earn more than the approved and accepted earnings of 6.34%. Clayton's calculations (Exhibit No. 10) show the Company's earnings will be only 4.57%.

(e) "The Commission Order Is Clearly Unlawful in Limiting the Amount of Municipal Taxes Which May Be Levied Against the Company."

The short answer to the above objection is that the Commission's order does not in any way limit, or tend to limit, the amount of any kind of taxes a city or town may wish to levy. However, there are other objections in this connection which grow out of the situation presently set forth.

As stated in the beginning, the Company requested the Commission to eliminate certain "discriminations" with reference to the taxes levied, in various amounts, by municipalities against customer meters. In attempting to properly and equitably solve this situation, the Commission first divided the municipalities into four groups—A. B. C. and D. based upon features, unnecessary to describe, which grouping we cannot say was arbitrary. It then discovered that the municipal tax charge per meter for the year 1960 within the municipalities so grouped was as follows:

Group A	From 20 cents to $2.34, some levying none
Group B	From 20 cents to $4.28, some levying none
Group C	From 22 cents to $1.12, some levying none
Group D	No tax levied in any municipality.

Based on the above, the Commission properly found that discrimination existed. Properly, because all taxes paid by the Company are paid out of revenues derived from all customers. Thus, customers living in municipalities where no tax, or a small tax, was levied are forced to help pay the taxes levied by other municipalities. Consequently, the Commission, no doubt realizing perfection could not be reached in such a complex situation, by its order permitted the following procedure: In municipalities in Groups A & B, where the tax exceeds $2.00 per meter, the Company can charge the excess to the customer; and in municipalities in Groups C & D, where the tax exceeds $1.00 per meter, the Company can likewise charge the excess to the customer. We are unable to say that the Commission, in so doing, acted arbitrarily or without substantial supporting evidence, or that it acted without authority. The inequities resulting from imposing unequal municipal taxes against a public utility were considered in *City of Newport News* v. *Chesapeake and Potomac Telephone Co.,* 198 Va. 645, 96 S. E. 2d 145 (1957), where the Court, among other things, said:

"The result is a form of taxation without representation, which has aroused historic protest in this country."

See also: *State Ex Rel Pacific Telephone & Telegraph Co.* v. *Department of Public Service,* 19 Wash. 2d 200, 142 P. 2d 498 (1943).

(f) "The Order of the Commission Denying Motion of the City of El Dorado and Approving Escalator Clauses and Increases Thereunder Without Notice or Hearing Is Arbitrary, Unlawful and Not Supported by Any Evidence."

(This point is urged only by the City of El Dorado.)

To understand El Dorado's argument under this final point it is necessary to give a brief history of what led up to the point here considered.

On October 1, 1958, the Company filed what is called Rate Rider 2-58 with the Commission. This was in fact an escalator clause. Generally speaking, it provided for the Company to receive a rate increase or decrease depending on the rise or fall of the price the Company had to pay for gas to be distributed to its customers. No notice was given by the Company or the Commission to any city, rate payer, or the general public. It appears that the Commission never did formally approve the escalator clause but permitted it to become effective by operation of law.

Pursuant to provisions of the escalator clause the Company, on November 1, 1958, filed for an adjustment of its rate in accordance with the claimed increased cost of gas. The Commission authorized the Company to increase the price of gas sold to its customers an additional 3.5 cents per MCF of gas; on November 1, 1959, an increase in the amount of 1.5 cents per MCF was authorized; and, on November 1, 1960, an increase in the amount of 2 cents per MCF was allowed. During this hearing El Dorado strenuously objected to the above procedure, contending that it was irregular and unlawful because no notice had been given and because the Commission did not require the Company to justify the increase.

On October 15, 1961, by direction of the Commission, the Company filed a new escalator clause which was approved by the Commission on the following day. Again, no notice was given and no hearing on the merits was granted. On October 31, 1961, El Dorado filed exceptions to the above procedure but was overruled by the Commission without a hearing.

It is first insisted by El Dorado, "The Escalator is not authorized by Statute". We see no merit in this because Ark. Stats. § 73-219 does provide for a "sliding

scale'' or an ''automatic adjustment'' of rates. The use of escalator clauses as a method of adjusting utility rates without having to resort to long-drawn-out and expensive over-all hearings has been, at least in part, recognized by our Court in the case of *Aluminum Co. of America* v. *Arkansas Public Service Commission, et al.,* 226 Ark. 343, 289 S. W. 2d 889 (1956), in which it was said that Ark. Stats. § 73-219 ''seems to recognize some sort of escalator clause to be possible in some situations''. They have frequently been approved by legal writers and courts and Commissions in other jurisdictions. See ''Escalator Clauses in Public Utility Rate Schedules'', 106 U. Pa. L. Rev. 964 (1958); ''Cost Adjustment in Utility Rate Schedules'', 13 Vand. L. Rev. 663 (1960); *Cities Service Gas Producing Co.* v. *Federal Power Commission,* 233 Fed. 2d 726 (10 Cir., 1956); *City of Chicago* v. *Illinois Commerce Commission,* 13 Ill. 2d 607, 150 N. E. 2d 776 (1958); and *Mississippi Public Service Commission* v. *Home Telephone Company, Inc.,* 236 Miss. 444, 110 So. 2d 618 (1959).

The pivotal question therefore to be decided is (a) whether or not notice must be given before the escalator clause is filed with the Commission and (b) whether the public must be notified before any raise is allowed by the Commission pursuant to the escalator clause. In an effort to dispel some of the confusion that perhaps prevails, we proceed now to examine some of the pertinent statutes.

First, there is Section 18 of Act 324 of 1935, as amended, set out in Ark. Stats. § 73-217. Without copying this section of the statutes and without discussing it fully, suffice to say that it provides that no utility shall make any change in its existing rates except after 30 days notice to the Commission. It also provides that ''the utility shall also give notice of the proposed changes to other interested parties *as the* [*Department*] *Commission in its discretion may direct*''. (Emphasis supplied.) The above quoted sentence, and especially the emphasized portion, might well be subject to more than one

interpretation. It might be argued that the Commission in its discretion may direct that no notice at all be given to anyone. This is not our interpretation, particularly in view of the provisions of the preceding section of the statutes (73-216) wherein is set out a number of people and organizations who may be interested parties in any rate change, namely: any Chamber of Commerce, Board of Trade, mercantile associations, municipality or any twenty-five public utility users. In our opinion the only discretion the Commission has in this connection is to require the utility to give notice to one or more of the above interested parties. It is important to bear in mind that the procedure under § 73-217 apparently envisions a full scale rate hearing which might well involve many weeks or months of hearing and the expenditure of several thousands of dollars.

Secondly, apparently it was the desire of the legislature to avoid such a lengthy and expensive hearing to make what might be termed minor adjustments. Pursuant thereto the legislature enacted Section 20 of Act 324 of 1935, set out in Ark. Stats. § 73-219 mentioned above. Speaking generally of this section, it appears to provide an abbreviated procedure whereby the utility rates can be raised or lowered depending on one item (or at least a very few items) affecting income or expenses of the utility, such as in the present case where an increase in the utility rate depends on the price the Company is required to pay for the purchased gas for distribution. It will be noted that this section does not require any notice to be given to the general public, either at the time of filing the schedule or subsequently when an adjustment is made pursuant thereto. The section does contain this language, "Nothing in this section shall prevent the Department [Commission] from revoking its approval at any time and fixing other rates and charges for the product or commodity or service, if after reasonable notice and hearing the Department [Commission] finds the existing rates or charges unjust, unreasonable, insufficient or discriminatory". We take this to mean that once the Commission fixes a definite

rate it cannot lower the rate without giving notice to the utility affected, and cannot raise the rate without notifying, in some way, the rate payers.

After carefully studying the various provisions of the statute relative to the question here involved we are unable to see how the interests of the utility customers or the rate payers are in any way prejudiced because of the lack of notice. Ark. Stats. § 73-205 provides, "The utility shall keep copies of such schedules open to public inspection under such rules and regulations and at such places as the Department [Commission] may prescribe". It cannot logically be contended that the rate payers' interest is prejudiced at the time the utility files an escalator clause with the Commission, because at that time no change is made. Likewise, it is difficult to understand why the rate payers would be prejudiced when the Commission, as in this case, increases the utility rate to compensate for an increase in the price of purchased gas. In the first place, when such a raise is effected, that of itself would be notice to the rate payers and they could then ask the Commission to set aside the increase under the provisions of § 73-219 heretofore quoted. In the second place, if long-drawn-out and expensive rate hearings are to be avoided, it does not seem unwise, or prejudicial to the rate payers, for the Commission to pass on the relatively simple question of whether or not there had been an increase in the price of purchased gas. This is not to say, of course, that if any customer or organization feels that to grant this increase in rates would result in the utility earning more than the allowed rate (6.34%), recourse may not be had to a full hearing under the provisions of Ark. Stats. § 73-216.

All of the above reasoning basically stems from the inevitable fact that utility rates cannot be adjusted every few months or every year, otherwise there would be no cessation of such procedure. As has heretofore been said, it is the duty of the Commission to fix a rate of return not for a day or a week but for the foreseeable future.

It is objected by El Dorado that the schedules filed by the Company in this case did not provide, as § 73-219 requires, "for a fixed period". This objection again calls for an interpretation of the statute. The term "fixed period" could refer to the length of time the escalator clause is to remain in effect, or it could refer to the length of time between adjustments. We prefer the latter interpretation for the following reasons. We cannot see that any useful purpose would be served by limiting the time the escalator clause would be in effect, because it could be renewed at any time by the utility filing another one. Also, the Commission has the authority, either on its own motion or on petition, to revoke the escalator clause for good cause. On the other hand, we can readily see good reasons for limiting the time (for instance) an increased rate adjustment (made on the price of gas) should be allowed to remain in force. This is because it may well be assumed that the price of gas can decrease within a year's time. If this situation should arise, then the Commission would have the opportunity to make a re-examination once every year.

It is our conclusion therefore, based on all we have heretofore said, that the judgment of the trial court should be affirmed.

Affirmed.

George Rose Smith, J., not participating.

McFaddin, J., concurs.

Ed. F. McFaddin, Associate Justice (Concurring). I agree with the Majority that the judgment should be affirmed; but on some points I have arrived at my conclusion by a method of reasoning which is different from that contained in the Majority Opinion; and therefore I concur in the result.

It is unnecessary for me to list the various points of concurrence, but I do mention one. It is Topic Two (f) in the Majority Opinion, which is captioned: "The

Order of the Commission Denying Motion of the City of El Dorado and Approving Escalator Clauses and Increases Thereunder Without Notice or Hearing is Arbitrary, Unlawful and Not Supported by any Evidence."

This point is urged by the City of El Dorado; and is a challenge, not only on the legality of escalator clauses, but on the procedure that the Arkansas Public Service Commission has employed in allowing escalator clauses to take effect. Escalator clauses are legal; but I am firmly of the opinion that the Commission should not allow any escalator clause to go into effect in any case without first giving notice to all interested parties; and I think this Court should now definitely so hold.

It was shown that without notice the gas rates had been increased by escalator clauses; and I think such procedure was wrong; but the question becomes moot in the case at bar because the increases by escalation were in 1958, 1959, and 1960; and, in the hearing from which comes this appeal, all of these escalation increases were considered; and it was found that the rate allowed by the escalation clauses had not exceeded the allowable rate. All interested parties and municipalities were heard in the present case, and the rate now in effect, even by such escalation clauses, was found to be less than the allowable rate; so the effect of the previous escalation increases in 1958, 1959, and 1960, is really moot.

ADAMS *v.* STATE HIGHWAY COMM.

5-2752 362 S. W. 2d 425

Opinion delivered December 3, 1962.

Kaneaster Hodges, for appellant.

Dowell Anders and *Thomas B. Keys,* for appellee.

SAM ROBINSON, Associate Justice. Appellee, Arkansas State Highway Commission, condemned a fraction of an acre of land for highway purposes. On the property there was a small house built of hollow tile. The Commission estimated the condemned property to be worth $3,550.00, and deposited that amount in the registry of the Court. The property owners moved that the deposit be increased. On authority of Ark. Stats. 76-541, the Court granted the motion and ordered the Commission to deposit an additional $1,450.00. The Commission complied, making a total of $5,000.00 deposited. The appellants withdrew the entire amount.

Upon a trial on the merits before a jury, there was a verdict for the property owners in the sum of $4,000.00. A judgment was entered accordingly and the Commission was given judgment against appellants in the sum of $1,000.00, with interest at the rate of six per cent (6%) per annum, to run from the time appellants received the excess compensation until it is repaid. The property owners have appealed.

Appellants argue that there is no substantial evidence to support the verdict. Several witnesses testified on behalf of appellants that the property condemned was worth more than $4,000.00. However, Mr. Robert Hamilton, who qualified as an expert in appraising property values, testified that in his opinion the property owners had been damaged to the extent of only $3,550.00. Mr. Hamilton testified in detail just how he arrived at that figure. He considered the total value of the property before the taking, and the value of that part left to appellants after the taking; he figured the number of square feet in the house, the cost of construction, the depreciation, and other pertinent facts, and arrived at his estimate of the damages. The jury added $450.00 to that estimate. We cannot say Mr. Hamilton's testimony was not substantial evidence of the damages suffered by appellants.

Appellants contend that the jury was drawn in an improper manner. The same method was used in drawing the jury in the case at bar as had been used by the Court Clerk for many years. Counsel for appellant had never objected to that method, and did not object in the case at bar. The first indication of any dissatisfaction with the method of drawing the jury was made at a hearing on a motion for a new trial, which was held subsequent to the trial. Of course, the objection was not made in apt time.

The hearing on the motion for new trial was in connection with appellants' allegation that the juror, Ells Huff, failed to disclose that he was an organizer, officer and director of the Arkansas Good Roads Association, and the further allegation that the Court erred in excusing until a later time, twelve jurors who had just sat in another case, resulting in their absence from the courtroom at the time the jury in the case at bar was selected.

There is no merit at all in either of those contentions. Mr. Huff was not asked whether he was a member of the Arkansas Good Roads Association, and he did not think about volunteering the information. There is no showing whatever that Huff's membership in the Arkan-

sas Good Roads Association would in any way disqualify him as a juror, and the thought did not occur to him that one of the parties might want to exercise a peremptory challenge on him because of his membership in the Association.

The Court's action in excusing the twelve members of the panel until a later time in the day, making them unavailable for the case at bar, was in no way prejudicial to the rights of appellants. This Court has held many times that a party is not entitled to any particular juror. The Court said in *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643, "It is thoroughly settled that a defendant has no right to the services of any particular juror. He may only demand that he be tried before a fair and impartial jury, and it is difficult to imagine a case where the judge had excused a juror from further service on the regular panel which would afford any defendant just cause of complaint."

The judgment reads in part "That the plaintiff do have and recover from the defendant, Nola Clyde Adams, judgment in the sum of $1,000.00 with interest at the rate of six per cent (6%) per annum from the 17th day of November, 1960, until paid, said $1,000.00 being the amount in excess of the verdict of the jury withdrawn by defendant." The appellant chose to file a motion for a new trial, setting up nine alleged assignments of error, but the action of the Court in awarding interest was not one of the assignments.

The issue of whether the Court erred in awarding interest was raised for the first time in this Court. This is not a matter that can be successfully urged for the first time on appeal. *Bish* v. *Woods,* 162 Ark. 463, 258 S. W. 352; *Hot Springs Railroad Co.* v. *McMillan,* 76 Ark. 88, 88 S. W. 846; *Heineman Dry Goods Co.* v. *Schiff,* 167 Ark. 422, 268 S. W. 596. We said in *Weeks* v. *McClanahan,* 227 Ark. 495, 300 S. W. 2d 6, "Defendant Weeks argues the court erred in failing to allow him interest on the account due him by plaintiff, but no objection was made below on this ground and it cannot be urged for the first time on appeal."

Appellant argues other points, all of which we have examined, but find no error. The judgment is, accordingly, affirmed.

COATES & RAINES *v.* GREAT AMERICAN INS. CO.

5-2828 362 S. W. 2d 438

Opinion delivered December 3, 1962.

McMillen, Teague & Coates, for appellant.

Wright, Lindsey, Jennings, Lester & Shults, for appellee.

JIM JOHNSON, Associate Justice. This case involves a suit by a general insurance agency against an insurer for services rendered the insurer after notice of termination of the general agency contract had been given.

On October 1, 1952, appellee, the Great American Insurance Company, entered into a contract with appellant, Coates & Raines, a partnership consisting of James M. Coates, Sr., Sam P. Raines, and others, wherein appellant was appointed general agent for the State of Arkansas for appellee. Generally stated, the business of appellant is that of an insurance general agent for fire and casualty insurance companies. Under the contract the duties of the general agent were to make agency plants with agents throughout Arkansas in behalf of the insurer, appellee, to solicit business for appellee from local agents, to supervise losses, to underwrite for appellee the business submitted by local agents, and to remit cash balances to appellee whether or not such balance had been collected from the local agents.

Paragraph Eighth of the contract allowed appellant an over-riding commission on net premiums of the business written for appellee in Arkansas through appellant's activities. This paragraph is as follows:

"EIGHTH: That the Company will allow the General Agents an over-riding commission of Ten percent (10%) of the net premiums, . . .; it being understood that the words 'net premiums' wherever used in this agreement means gross premiums less return premiums and premiums for reinsurance effected by the General Agents."

According to Paragraph Ninth of the contract, appellee agreed to allow appellant an additional contingent commission. This reads as follows:

"NINTH: That the Company will allow the General Agents as further compensation a contingent commision of ten (10) percent of the results that obtain from the business written through the General Agency to be computed in the following manner at the close of each calendar year:"

. . . [Here follows a list of debits and credits]

"The debit items shall be deducted from the credit items and the remainder shall be the result upon which the ten (10) percent contingent shall be calculated."

During the summer of 1958 appellee decided to handle its future business in Arkansas through direct company employees and not through appellant general agency. On July 1, 1958, a vice-president of appellee presented a letter to appellant, which letter complied with all the requirements of termination of the agency contract between appellee and appellant under Paragraph Eleventh of the agency contract. Paragraph Eleventh is as follows:

"ELEVENTH: That this agreement is unlimited as to its duration but that it may be terminated at any time by either party giving 90 days' written notice, in which event the payment of compensation as herein provided that may be found at such time to be due shall be in liquidation of all demands of the General Agents on the Company, and it is expressly understood and agreed that if for any reason the Company shall deem that its interests require termination of this contract, the General Agents are to turn over to it all registers and other records and supplies of the Company in possession of the General Agents; that the General Agents are to make no endeavor to displace the Company from any of the agencies where it may then be located, and in general that the business of the Company is to be turned over to it in its entirety free from any attempt on the part of the General Agents to divert it to other channels, though this clause shall not be understood as preventing the General Agents from planting with the agents of the Company at any time the agency of any other company which may be represented by them."

Subsequent to the termination letter of July 1, 1958, which would have the effect of terminating all business relations between appellant and appellee, but prior to the termination date of October 10, 1958, appellee and appellant established a relationship whereby appellant would write no new policies for appellee, but appellant would continue to service all policies of appellee then on their books until the expiration dates of the various policies. Thereafter appellant continued to service the "run-off" business of appellee until the present date

and is continuing to service such business. During the year 1959, appellee paid appellant the standard ten percent overriding commission provided in Paragraph Eighth, *supra*. At the expiration of 1959, appellee refused to pay the contingent commission (Paragraph Ninth, *supra*) on the underwriting profit, relying on the provisions of Paragraph Ten of the contract, which is as follows:

"TENTH: That the first contingent statement shall cover the period from the date of this agreement to December 31st, 1953. If this agreement should be terminated, contingent statement shall be made at the end of the calendar year in which such termination becomes effective. All losses and expenses for the full calendar year shall be included, and no further contingent statement shall be made nor contingent commission be allowed thereafter."

On July 19, 1960, appellant filed its original complaint seeking recovery for contingent commission under Paragraph Ninth, *supra* of the contract. Appellant thereafter amended its complaint, seeking recovery, alternatively, on the basis of implied contract or on the basis of *quantum meruit*, if the court found—against them on the basis of modified contract.

The Chancellor dismissed the complaint and its amendments, from which appellant appeals. For reversal, appellant generally reiterates his contentions urged in the trial court.

After careful review of the record, we find that the able opinion of the learned Chancellor fairly represents our views. We herewith adopt it as our own. The opinion is as follows:

"I have concluded that the original contract between plaintiffs and defendants was effectively terminated by the notice given by the defendant in July, 1958. I have also concluded that the subsequent arrangements regarding the 'run-off' business does not constitute a modification and extension of the original contract, but rather a different agreement. It is clear from the actions of the

parties in paying and receiving the 10% overriding commission that the parties agreed to such payment to the plaintiffs as compensation for servicing of the 'run-off' business. However, it is my opinion that the provisions for the contingent commission found in the original contract cannot be incorporated into the new agreement in the absence of proof of an express or implied agreement to that effect. Nor can the contingent commission be allowed under the theory of a modification of the old agreement, since none of the terms of the old agreement were agreed to remain in force.

"All contingent commissions due to the plaintiff under the original contract have been fully paid through December 31, 1958, as provided in that contract. I do not believe that the evidence supports any implied agreement that such contingent commissions were to be paid for the 'run-off' business, and certainly there is nothing in the record substantiating an express agreement. In fact, Mr. Coates' testimony reflects that shortly after the arrangements regarding the 'run-off' business was negotiated (probably in August, 1958), Mr. Coates raised the question of contingent commissions with an official of the defendant while on a trip to New York. According to Mr. Coates' testimony, this suggestion was 'laughed off' with the remark, 'Well, you would never earn it.' In the face of this testimony, it seems clear that the defendant had neither expressly or impliedly agreed to the continuation of the contingent commissions called for in the original contract, and I find no evidence which would support a finding that the termination rights of the defendant have been modified or waived. Furthermore, Exhibits 7 through 10 [correspondence between the parties] show beyond doubt that again in June, 1959, the defendant was expressly denying its liability for contingent commissions.

"The services performed by the plaintiffs after the termination of the original contract, while substantial and valuable to the defendant, were substantially less than services which had been performed by the plaintiffs under the original contract. The direct and cross-

examination of Mr. Coates makes this clear. On cross-examination, when asked by defendant's counsel to describe the duties of the general agency, Mr. Coates began by reciting duties such as appointing agents, cultivating agents, teaching agents the business, soliciting business, and developing business through the state. It is my finding that these elements of a general agent's duties are at least as important as the servicing of contracts already written, settlement and investigation of claims, and other activities. It is my opinion that the defendant would not have agreed to pay the same compensation to the plaintiffs for the mere servicing of existing contracts that it had been paying while plaintiffs were performing all of the duties of a general agent. It is my finding that defendant did not agree to do so, either expressly or impliedly.

"During the trial I indicated that I did not believe that the case should be governed by the doctrine of *quantum meruit*. However, because of the request in the brief of the plaintiffs that the Court reconsider this issue, I have done so. I have accepted as true the testimony offered by plaintiffs to the effect that all general agency contracts normally and ordinarily include a basic commission and a contingent commission computed in accordance with the formulas set forth in the original contract in this case, and that such a contingent commission would be considered reasonable compensation. As a matter of fact, the record reflects that the attorney for the defendant stipulated that this was true as a matter of fact. I have therefore accepted this evidence as admitted and undisputed. It is plaintiffs' position that these facts require a finding that 'reasonable value' for plaintiffs' services would have to include the 10% contingent commission. I do not agree. In this case the evidence is clear that, after October 1, 1958, plaintiffs were not acting as general agents for defendant in the usual and ordinary way. Therefore, even though this testimony is accepted as true, it is the Court's finding that fair and reasonable value of the restricted services being performed by the plaintiffs during 1959 would not exceed the 10% overriding commission that plaintiffs have already re-

ceived. It is, therefore, my opinion that even under the theory of *quantum meruit,* the plaintiffs are not entitled to recover judgment for any additional amount.

"It will, therefore, be the finding of the Court that plaintiffs are not entitled to judgment and that judgment herein should be entered in favor of the defendant."

Affirmed.

ROBINSON, J., not participating.

BROCKMAN *v.* ROWELL.

5-2801 362 S. W. 2d 678

Opinion delivered December 3, 1962.

[Rehearing denied January 7, 1963.]

Brockman & Brockman, for appellant.

Jay W. Dickey, for appellee.

NEILL BOHLINGER, Associate Justice. This case involves a dividing line between Lots 7 and 8, Block 36, J. W. Monk's Western Addition to the City of Pine Bluff, Arkansas.

Mrs. E. W. Brockman, Sr., is the holder of record title to Lots 8, 9 and 10 in Block 36 of J. W. Monk's Western Addition, having acquired the property by deeds

from her husband and son, and J. W. Brockman, Sr., her predecessor in title, who had owned the property since 1946.

In 1956 the appellee, Hendrix Rowell, acquired Lots 6 and 7 in Block 36, less that part which had been taken for highway purposes. There appears to have been no dispute as to the original boundary line between Lots 7 and 8, but more than seven years prior to 1956 a fence had been constructed west of the original boundary line dividing the two pieces of property. In 1956 the fence was removed by Rowell or his agents. Mrs. Brockman claims that she, and her predecessor in title, have held the property from the fence east to Lot 8 adversely for more than the statutory period and have thereby acquired title. Three surveys of this property have been put into the record. The first, by J. H. Gould, dated November 15, 1955; a survey by Walter Combs, county surveyor, July 12, 1960; and a plat by Chris L. Wright dated March 14, 1956. In the Combs survey there is shown an old fence line which is five and one-half feet west of the true dividing line between Lots 7 and 8, but as to this fence line, the county surveyor testified that he did not find the old fence line and had inserted it in the plat at the suggestion of the appellant. The court properly refused to consider that survey. The Chris L. Wright survey appears in more detail than the others.

Lot 7, prior to its acquisition by the appellee, had been owned by Susie Hamilton. Susie Hamilton had a fence that was close to the fence which the appellant's predecessor in title had constructed to mark the west line of Lot 8. It appears that Susie Hamilton, while still the owner of Lot 7, built a garden fence next to appellant's fence using small oak posts. She asked permission to attach her fence to the west side of the fence which the appellant had constructed and that appears to have been done. This is the fence line which appellees' witness, Wright, identified and showed on his plat as running parallel with the true property line and one foot west of that line.

The chancellor found that Brockman had a fence which was one foot west of the true property line and that the owner of Lot 7 acquiesced in that as a true line. We have frequently held that when adjoining land owners 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 line by acquiescence. *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S. W. 2d 490. See also *Carney* v. *Barnes,* 232 Ark. 549, 338 S. W. 2d 928.

In the very recent case of *Palmer* v. *Nelson,* opinion November 12, 1962, we had a case involving an agreed boundary and this language was used:

"When adjoining land owners acquiesce for many years in the location of a fence as the visible evidence of the line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence."

The record leaves no doubt that Hamilton and Brockman agreed on that line and each put the fence at the agreed spot and the proof further supports the contention that thereafter Brockman continued in possession of that one foot strip of land on the east side of Lot 7 adversely. The finding of the chancellor on this point is correct and is affirmed.

The appellant has asked damages for trespassing on her property at various times but there is no showing as to who trespassed, for how long, or any damages which the appellant sustained thereby if a trespass was made. Therefore, the court was correct in refusing damages for the trespass alleged by the appellant.

The court's action in dismissing as to the Arkansas Power and Light Company and Southwestern Bell Telephone Company is also affirmed.

HARRIS, C. J., not participating.

5-2821 362 S. W. 2d 446

Opinion delivered December 10, 1962.

[redacted]

Gentry & Gentry, for appellant.

L. B. Smead and *W. C. Medley,* for appellee.

CARLETON HARRIS, Chief Justice. Harris Brothers, a partnership, was engaged in the mercantile business in Calhoun County, and had acquired a considerable acreage of farm and timber lands. The acreage herein involved was owned by Harris Brothers at the time the partnership was adjudged a bankrupt in January, 1932. In July, 1933, the trustee in bankruptcy, in compliance with orders of the referee, sold the lands, at private sale, to E. W. Prothro; in August, Prothro conveyed the lands to Murray Whitfield Coulter and George Prothro Coulter (one and three years old respectively at the time), the deed being recorded in August, 1940. However, on June 13, 1932, the lands were sold to the State of Arkansas by the Collector of Calhoun County for the taxes assessed for 1931. The lands not being redeemed, the Collector of Calhoun County, on November 22, 1934, certified said lands to the State of Arkansas. On November 27, 1935, the Commissioner of State Lands conveyed same to appellee, George Payne. Testimony reflects that Payne went into possession, fenced the lands in January, 1936, and farmed

same from 1936 through 1938. According to the evidence, Payne has paid the taxes each year since the purchase.

Appellants instituted this suit in 1952, praying that title be quieted and confirmed in them, alleging *inter alia* that the "sale was void for the further reason that the certificate of the County Clerk, certifying to the publication of the notice of the sale, was made on the day of the sale and not before the day of the sale." The trial court, on hearing, dismissed the complaint on two grounds,[1] one being that the failure of the clerk to attach his certificate to the delinquent tax list before the date of sale was a mere irregularity, and had been cured by Act 142 of 1935, which act was in effect at the time the property was conveyed by the state to appellee. From the decree dismissing appellants' complaint, comes this appeal.

Appellants' sole effort in this appeal is directed to the proposition that this court should overrule the case of *Coulter* v. *Anthony* (decided in November, 1957), 228 Ark. 192, 308 S.W. 2d 445, which case, appellants contend, overrules numerous prior decisions of this court. In *Coulter* v. *Anthony,* we held that the clerk's failure to execute his certificate showing the publication of the notice of the tax sale until the day of sale (rather than *before* the sale, as required by the law) was a mere irregularity, which was cured by Act 142 of 1935. Incidentally, the lands here in question, were sold in the same 1932 tax sale as the lands involved in *Coulter* v. *Anthony*. Act 142 of 1935 provided,

"Whenever the State and County Taxes have not been paid upon any real or personal property within the time provided by law, and publication of the notice of the sale has been given under a valid and proper description, as provided by law, the sale of any real or personal property for the non-payment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission by any officer in the assessment of said property, the levying of said

[1] The first ground related to the failure of appellants to deraign title from the United States Government, but counsel for both sides agreed in open court that this question is no longer pertinent to a determination of this litigation.

taxes, the making of the assessor's or tax book, the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; provided, that this Act shall not apply to any suit now pending seeking to set aside any such sale, or to any suit brought within six months from the effective date of this Act for the purpose of setting aside any such sale."

Though repealed in 1937, the act was in full force and effect at the time Payne purchased the lands in question from the state.

Appellants' argument that *Coulter* v. *Anthony* overruled numerous cases is erroneous, for if the cases cited in their brief were overruled, such "overruling" occurred back in 1937, when the leading case of *Carle* v. *Gehl* was decided. See 193 Ark. 1061, 104 S. W. 2d 445. There, we held that various requirements of the statute (such as the publication of the notice of sale) are jurisdictional essentials, but that the legislature had the power to dispense with certain other requirements. Failure to perform the latter was held to be a mere irregularity, cured by Act 142. The court said,

"Beyond question it is within the power of the Legislature to provide for the rules by which the foregoing exercise of power may be made both as to time and form, and, having the power in the first place to make such rules, indubitably the Legislature has the power to alter or dispense with the same. Act No. 142 merely provides that irregularities in the assessment or levy should not be ground for setting aside the tax sale. The same provision is made for irregularities in making and filing a delinquent list, the recording of the list and notice of sale *or of the certificate of the publication of said notice.*[2] As all of these requirements might have been dispensed with in the first instance, sales which otherwise would have been invalid for errors or irregularities in these respects are within the power of the Legislature to cure and validate." As to appellants' argument that the court has overruled

[2] Emphasis supplied.

numerous cases, we cite further language in *Carle* v. *Gehl* which directs itself to that argument:

"It is suggested in argument that the above quoted statute was in excess of the power of the Legislature in that its effect was to destroy a vested right and to strike down meritorious defenses as that term has been defined by this court. Learned counsel for appellee, in their excellent brief, argue that this is the only logical conclusion to be reached based on the decisions of this court which, they contend, announce the doctrine that where a tax sale is invalid for any irregularity, informality, illegality or omission on the part of any officer having any duty to perform in connection with the tax proceedings or tax sale, such are meritorious defenses beyond the power of the Legislature to validate even though the requirement, failure to comply with which, constitutes the irregularity, illegality or omission of duty rendering the sale invalid, could have been dispensed with by the Legislature in the first instance.

"The argument made based on our cases, which are cited, is a logical and persuasive presentation of the position taken. It demands and has been given respectful and thorough consideration, but does not convince us of its correctness. We think this view is based largely upon the inaccurate use of the word "void" for "voidable" in many of our decisions. In some of these cases the causes for which tax sales were set aside were palpable irregularities, such as the collector's certificate or affidavit being signed by a deputy sheriff instead of a deputy collector which irregularity could work no real injury to the land owners, and which, in no sense, could be deemed to be a meritorious defense. When the distinction between those omissions or acts which render the sale voidable only and those which are of that gravity which make the sale void is kept in mind, it seems that the effect of our decisions is that to constitute a meritorious defense to a tax sale there must be some act or omission to deprive the former owner of some substantial right."

Some six months later, in the case of *Wallace* v. *Todd,* 195 Ark. 134, 111 S. W. 2d 472, the exact point here at issue was decided adversely to appellant's position. There, we said,

"There is no merit in appellant's contention that the clerk failed to record the list of delinquent lands returned by the collector *and failed to make the certificate of publication of the delinquent list before the day fixed for the sale.*[3]

"Even if it should be conceded that the matters set out in the complaint, with respect to which proof was offered, were of such a nature as to invalidate the sale under authority of numerous decisions of this court, the fact remains that these were merely irregularities or informalities, such as Act No. 142 of 1935 was intended to cure."

It is thus apparent that the view expressed in *Coulter* v. *Anthony* was but a reiteration of decisions rendered *20 years earlier.* As stated in *Anthony,*

"The exact point now presented was decided in *Wallace* v. *Todd,* 195 Ark. 134, 111 S. W. 2d 472, and, in harmony with the reasoning in the *Carle* opinion, it was held that the clerk's failure to make the certificate before the day of sale is an irregularity cured by Act 142. A contrary view was expressed, in a paragraph unnecessary to the decision, in *Union Bk. & Tr. Co.* v. *Horne,* 195 Ark. 481, 113 S. W. 2d 1091, but we regard the *Carle* and *Wallace* cases as sound and adhere to them."

We take this occasion to reiterate that view.

It is true that, some years back, we held in a number of cases that the failure of the clerk to attach his certificate before the sale was a meritorious defense, and in a few cases we used the term, "jurisdictional". However, practically all of these cases were either decided before the passage of Act 142 of 1935, or the provisions of that act were not at issue. In fact, we know of only one case wherein Act 142 was applicable, which seems to hold

[3] **Emphasis supplied.**

contrary to the view herein expressed. This was the case of *Union Bank and Trust Company* v. *Horne*, heretofore mentioned in the quotation from *Coulter* v. *Anthony*. In that case, the belated making of the certificate was given as an additional reason for holding a tax sale invalid. Though the *Carle* v. *Gehl* decision pointed out that erroneous language had been used in some cases, we now emphatically state that, in any case that may arise, wherein this provision of the now repealed Act 142 of 1935 is pertinent, the fact that the clerk failed to certify to the publication of the notice of sale before the day of sale, cannot be relied upon as a defect which will, under any of our decisions, void such sale.

Affirmed.

DICKSON *v.* WOLFE.

5-2837 362 S. W. 2d 427

Opinion delivered December 10, 1962.

Clifton Bond, for appellant.

D. A. Clarke, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellants filed this suit, seeking to reform a deed they had executed to the appellees on August 10, 1959. After a lengthy hearing the Trial Court denied the prayed relief, and this appeal resulted.

In 1958 Mr. and Mrs. Wolfe purchased from Mr. and Mrs. Dickson for $1,500.00 a portion of Lots 9 and 10 in Block 104 of the City of Monticello. Mr. Dickson died intestate on February 5, 1959; and on May 5, 1959 Mrs. Dickson, for $500.00, conveyed to the Wolfes an additional

portion of said Lots 9 and 10. When it was discovered that there were errors in the descriptions in the previous deeds and also that Mrs. Dickson had only a life estate in the property she had conveyed, Mrs. Dickson, joined with the other heirs of Mr. Dickson, executed the August 10, 1959 deed to the Wolfes. On December 9, 1959 the Dicksons (grantors in the August, 1959 deed) filed this suit, claiming that the said deed conveyed more property than was intended; and that there was either a mutual mistake or that the Wolfes had acted fraudulently.

The testimony on the part of the plaintiffs was that the May 1959 deed, as well as the August 1959 deed, included "a strip of land approximately 15 feet wide off of the north side of the property belonging to the plaintiffs, and inside and south of the boundary fence," which was not intended to be conveyed. The plaintiffs claimed that it was agreed that the fence would be the boundary of the conveyed property, but that the deed conveyed a strip fifteen feet wide inside the fence. The testimony on behalf of the defendants was: that they bargained for a thirty-foot strip; that they had it surveyed and described; that the deed was properly prepared; that the description of the property was read to the plaintiffs before they signed the deed; and that there was no mistake.

After hearing all the evidence, the Chancellor delivered a written opinion, from which we copy:

"This action, as the usual reformation action, turns on the burden of proof. The rule is: the plaintiffs having executed and delivered the deed to the defendants—title having passed—'the burden of establishing grounds for reformation rests on the plaintiff' (*Glasscock* v. *Mallory,* 139 Ark. 83). A preponderance of the evidence alone is not sufficient to reform a written instrument (*Hicks* v. *Rankin,* 214 Ark. 77). 'It is well settled by our decisions that before the jurisdiction of equity may be invoked to reform a written instrument by parol evidence, the proof must be clear, unequivocal and decisive' (*Smith* v. *Olin Industries,* 224 Ark. 606). It is not necessary that the testimony be undisputed to reform a deed, 'It suffices if

the testimony, in its entirety, clearly shows that a mutual mistake was made' (*Meekins* v. *Meekins*, 168 Ark. 654).

"In explaining the meaning of the rule of 'the proof must be clear, unequivocal and decisive,' the court said in *Hicks, Special Adms.* v. *Rankins,* 214 Ark. 77: ' . . . in the early American case, October term 1830, *United States* v. *Munroe,* 5 Mason's Rep. 577, Fed. Cas. No. 15,835, Judge Story, speaking for the court, said: "In cases of asserted mistake in written instruments, it is not denied that a court of equity has authority to reform the instrument. But such a court is very slow in exerting such an authority, and it requires the strongest and clearest evidence to establish the mistake. It is not sufficient that there may be some reason to presume a mistake. The evidence must be clear, unequivocal and decisive; not evidence which hangs equal, or nearly in equilibrio.' "

"The evidence necessary to impeach the solemn recitations of the deed must be clear and convincing. As was said in *Bevens* v. *Brown,* 196 Ark. 1177, 120 S. W. 2d 574: 'It must be so clear that reasonable minds will have no doubt that such an agreement was executed. It must be so convincing that serious argument cannot be urged against it by reasonable people.' Tested in the light of this rule, we do not believe the purported agreement should have been accorded that high degree of verity which must attach to alleged verbal reservations or conditions in order to overthrow solemn recitals of a deed. Business transactions must have finality. Conveyances must not be exposed to the caprice of parol, nor explained away by less than that *quantum* of evidence which essentially attains the dignity of clarity, impressing convictions."

The Chancellor then concluded:

"It is found that when the testimony in this record is weighed in the scales of justice that the scales stand in equipoise. This is to state that there is evidence of equal weight, strength and degree on either side. Thus under the rules relating to the burden of proof the complaint of the plaintiffs should be dismissed on this issue."

We have carefully studied the testimony, and we adopt as our own the quoted statements from the Chancellor's opinion. The plaintiffs did not establish any part of their case by the required *quantum* of proof. Certainly on appeal we cannot say that the finding of the Chancery Court is against the preponderance of the evidence.

Affirmed.

ARK. STATE HWY. COMM. *v.* RICH.

5-2826 362 S. W. 2d 429

Opinion delivered December 10, 1962.

Dowell Anders and *Barrett, Wheatley, Smith & Deacon,* for appellant.

Spears & Sloan and *Hale & Fogleman,* for appellee.

GEORGE ROSE SMITH, J. This is a condemnation proceeding in which the State Highway Commission was compelled to deposit in court a great deal more money than the jury later found the land to have been worth. The landowners had the use of the excessive deposit for more than two years. This appeal is from a judgment holding that the landowners are not liable to the State for interest during the time they had the use of the State's money.

The facts are simple. On August 18, 1958, the Highway Commission brought suit to condemn 50.454 acres of the appellees' land, filed a declaration of taking, and paid into court the sum of $69,500 as estimated compensation and damages. On motion of the landowners the circuit court, after a hearing, directed that the deposit be increased to $544,000. The commission complied with the order on January 1, 1959, and on the following day the landowners were allowed to withdraw the entire sum of $544,000. The case was not tried on its merits until July 10, 1961, when the jury fixed the award to the landowners at $325,000.

In entering judgment upon the verdict the court charged the State with interest in the total sum of $7,858.25. This amount was arrived at by adding two items: (*a*) Interest at 6 per cent upon the entire $325,000 valuation from the date of the commission's entry upon the land (which was about a month before suit was filed) until the date of the commission's deposit of $69,500 in court, and (*b*) interest at 6 per cent upon the value of the land less the $69,500 deposited, computed from the date of the first deposit until the date on which the landowners withdrew the whole $544,000.

On the other hand, as we have said, no interest charge was made against the landowners for their use of $219,000 of public funds (the excess of the withdrawal over the value of the land) for a period of some thirty-one months. At the rate of 6 per cent per annum the use of the State's money was worth more than $32,000 to the landowners.

In seeking to defend the inequality that is inherent in the trial court's judgment the appellees make two principal arguments.

First, it is pointed out that the State is liable for the payment of interest in any event, because an award of interest is required by the constitutional guaranty of just compensation when there is a delay between the time of the taking and the time of the payment for the property. *Ark. State Highway Comm.* v. *Stupenti,* 222 Ark. 9, 257 S. W. 2d 37. In fact, the statute under which the action at

bar was filed recognizes the State's liability for interest, Ark. Stats. 1947, § 76-536, but this clause was evidently inserted merely as a necessary introduction to the declaration that interest is not to be allowed to the landowner upon sums paid into court. We are unable to agree with the appellees in their attempt to interpret the legislature's casual reference to the State's undoubted duty to pay interest as a positive declaration that the landowner has no similar duty. To the contrary, the controlling section of the act, providing for judgment either for or against the State, makes no mention of interest in either case. Ark. Stats., § 76-537.

The landowners, unlike the State, are not under a constitutional compulsion to pay interest. Hence, the argument runs, they are exempt from liability under the rule that interest is not ordinarily payable upon an unliquidated demand, there being no default until the exact amount due has been determined.

In the circumstances before us this argument is not sound. The rule against paying interest upon an unliquidated demand is not inflexible. This point was discussed in *Loomis* v. *Loomis,* 221 Ark. 743, 255 S. W. 2d 671, where we said: "Yet when the defendant is actually in default there are many instances in which interest is allowed even though the precise extent of his liability is not determined until the trial. For example, a defendant's liability for breach of a contract to pay a definite sum of money may be uncertain, for the default may have saved the plaintiff the expense of full performance on his own part, and that saving may be a matter for the jury to determine. In spite of this uncertainty interest is recoverable from the date of the breach."

An analogous situation was considered in *City of Ft. Smith* v. *Southwestern Bell Tel. Co.,* 220 Ark. 70, 247 S. W. 2d 474, where the telephone company, after having put into effect a rate increase later found to have been excessive, was required to pay interest from the date of each overcharge rather than from the date when the exact extent of the excess was determined. We reasoned that

"the utility should not have the benefit of the free use of the subscribers' money, when such use came about through the utility's own effort."

In like manner these appellees ought not to have the free use of the State's money after having compelled its payment only by the assertion of a claim based upon an exaggerated idea of their losses. If the appellees' view of the law should prevail it would inevitably result in encouraging landowners to present exorbitant claims against the State in condemnation cases. (Counsel for the appellees quite properly make no particular point of the fact that in this instance the landowners' damages may have been reduced by a change in plan that the commission adopted after the amount of the additional deposit had been fixed by the court. It appears that the commission, before complying with the court's order, unsuccessfully sought to have the court reconsider the matter in the light of the new plan.)

Secondly, the appellees rely upon a number of decisions from other jurisdictions, holding that the landowner is not required to pay interest after having had the use of an excessive deposit in a condemnation proceeding.

All the cases cited are easily distinguishable, for in none of them did the landowner obtain the excessive deposit through his own efforts. For instance, in a representative case, *City of Atlanta* v. *Lunsford,* 105 Ga. App. 247, 124 S. E. 2d 493, the amount of the condemnor's deposit was fixed by three independent assessors. The court, in holding that the property owner was not bound to pay interest when the jury's valuation proved to be smaller than that of the assessors, pointed out that otherwise the condemnor would be able to force the landowner to accept an involuntary loan.

Here the transaction bears no resemblance to an involuntary loan, for the appellees took the initiative in the matter, demanding that the amount of the deposit be increased and adducing proof to sustain their claim. Upon these facts we cannot in good conscience hold that the appellees are entitled to profit by their own error. Yet

that would be the result if they were permitted to use almost a quarter of a million dollars of public funds, interest free, for more than two and a half years.

The judgment is reversed and the cause remanded for the entry of a judgment charging the appellees with interest at the rate of 6 per cent per annum in accordance with this opinion.

BOHLINGER, J., not participating.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting. Article 2, § 22 of the Constitution of the State of Arkansas is as follows:

"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."

Based on this provision of the Constitution, this court has held that advance payment is required as a condition precedent for taking land under an eminent domain proceeding. *Arkansas State Highway Commission* v. *Partain,* 192 Ark. 127, 90 S. W. 2d 968.

Following the opinion in the Partain case, *supra,* the legislature in 1953 enacted Act 115 which provided, *inter alia,* as follows:

"§ 76-536. Title vests upon making deposit. Immediately upon the making of the deposit provided for in section 5 (§ 76-538), title to the said lands in fee simple (or a conditional fee if mineral rights are sought to be preserved to the property owner) or such lesser estate or interest therein as is specified in said declaration, shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein and said judgment shall include as a part of the just compensation awarded, interest at the rate of six per cent (6%) per annum of the amount finally awarded as the value of the property, from the date of the surrender of possession to the date of pay-

ment, but interest shall not be allowed on so much thereof as may have been paid into court. No sum so paid into court shall be charged with commission or poundage."[1]

This act contained no emergency clause and before the effective date thereof this court on April 20, 1953, delivered its opinion in the case of *Arkansas State Highway Commission* v. *Stupenti,* 222 Ark. 9, 257 S. W. 2d 37, wherein it was held that:

"Just compensation means full compensation. While the real loss to appellee might well be described as the denial of the use of his land for the time stated, yet the universally recognized rule for measuring this loss is by calculation of interest on the value of the land."

The conflict between Act 115, *supra,* and the Stupenti case, *supra,* seems to be irreconcilable. The act provided "interest shall not be allowed on so much thereof [amount of judgment] as may have been paid into court", and the opinion in Stupenti provides, "Just compensation means full compensation" and in that opinion this court in determining that interest was due the landowner quoted from *Jacobs et al.* v. *U. S.,* 290 U. S. 13, 54 S. Ct. 26, 78 L. Ed. 142, as follows:

"The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking'. Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added'."

and further in the Stupenti case this court, in rejecting the argument that interest, if any, should run only from the date of entry (May 5, 1950) to the date when appellant made its deposit into the registry of the court, said, "This, of course, would result in no interest at all since the deposit was made March 27, 1950. In all events the proper date from which interest should be computed is the date of entry." It is apparent therefore that this court

[1] It must be noted that the Act clearly states the liability of the Highway Commission for interest on an excess of recovery over deposit, but pointedly omits any provision for interest from the landowner.

has determined that a property owner is entitled to interest from the date of entry as a part of his just compensation regardless of whether the proper amount has been placed in the registry of the court, and that such deposit does not relieve the condemnor from payment of such interest since the interest payment is not considered interest as such but a part of the land owner's just compensation.

In the case at bar we have a landowner who felt that the $69,500 deposit made by the condemnor was grossly inadequate and in proper manner petitioned that the state be required to increase its deposit. After a hearing on the petition, the trial court in its sound discretion found that the deposit should be increased to $544,000. After this increase was ordered the Highway Commission changed its plans for the construction of the proposed highway, providing for additional access to the balance of appellees' property, thereby diminishing materially the prospective damage to the balance of appellees' property. The trial court, avoiding a multiplicity of suits, again in its sound discretion, refused to allow the Highway Commission to reopen the case for the purpose of showing the changes in plans which would have diminished the prospective damage and no doubt would have justified a smaller deposit. Certainly it cannot be said that the trial court abused its discretion in refusing to reopen the case. If this were not so, then there would be no end to the litigation which would result from every change the Highway Commission might decide to make following a judicial determination of the amount of a deposit.

Upon trial of the case, based on the changed plans, a jury found appellees' damages to be $325,000, which amount, even after the plans were changed, is a far cry from the $69,500 the Highway Commission originally placed in the registry of the court which was supposed to be its estimate of the damages which would have been sustained by the landowners. In fact, it is not denied that under the terms of Act 115, the action of the landowner in petitioning for an increased deposit saved the State $38,131.75 in interest alone, not counting the windfall of

$32,000 additional this court is allowing the State by the majority opinion. If the amount of interest due the landowner could be calculated under the plain language of the Stupenti case, *supra,* then the saving to the State caused by this landowner's petition would be almost twice the $38,131.75 saved under Act 115. Yet the majority opinion says, "If the appellees' view of the law should prevail it would inevitably result in encouraging landowners to present exhorbitant claims against the State in condemnation cases." To the contrary, it appears to me that the healthy result would be to cause the State to make a deposit which more nearly represents the true value of the damage which might be sustained by the landowner who is being compelled to sell his land to the State against his will[2] Particularly is this true if it can be said that the portion of Act 115 which prohibits payment of interest on amounts deposited in court is constitutional.

The majority does not cite one single condemnation case to support its conclusion, but instead dismisses the excellent cases cited by appellees with the remark that they are distinguishable, "for in none of them did the landowner obtain the excessive deposit through his own efforts". In my view this is a distinction without a difference, since the principle in all of these cases remain the same. Uniquely under our law the trial court is permitted to order an increase in the amount of a deposit if it can be shown that the amount deposited is inadequate. This is not an *ex parte* proceeding whereby the landowner is the only party heard, but instead the State has the right to be heard and offer evidence of the correctness of the amount of the deposit. After a full hearing the trial court, in the case at bar, correctly determined from the evidence that the deposit was grossly inadequate and should be increased. Now this court by the majority view is saying that the landowner should be penalized because the trial court failed to determine exactly the amount of damages a jury would assess, and as above set out, the final trial was held on a set of facts which did not obtain at the

[2] A fair offer would tend to minimize the necessity of litigation, a policy of law which is universally applied.

hearing on the motion to increase, due to the change in plans made by the Highway Commission. Suppose the trial court had granted the condemnor's motion to reopen the case and offer evidence of its change of plans and after a full hearing determined that the amount of the deposit should have been reduced. Would not the majority view require that the landowner pay interest on the excess for the period of time such excess had been deposited? To ask the question is to answer it. Under our system the landowner had no more control over whether the Highway Department would change its plans than he had over the amount the trial court found to be an adequate deposit. Nor does the landowner have any control over the amount the condemnor chooses to voluntarily deposit. Would not the majority view also apply to a situation whereby the condemnor on its own volition deposited an amount in excess of the ultimate judgment?

The majority in rejecting the logic of the Georgia Court of Appeals in *City of Atlanta* v. *Lunsford,* 105 Ga. App. 247, 124 S. E. 2d 493, chose to discuss only the involuntary loan aspect of the court's reasoning. This is not the strongest case cited by appellees. See *New York Elevated Railroad Co.* v. *Story,* 8 N. Y. State Reports 431, 44 Hun. 177; *St. Louis K. & NWR Company* v. *Knapp, Stout & Co.,* (Mo.), 61 S. W. 300; *Kelly et al.* v. *Okla. Turnpike Auth.,* 269 P. 2d 359; *Maddox* v. *Gulf, Colo. & S. F. Ry. Co.,* (Tex.), 293 S. W. 2d 499. In fact it is the only case cited in which the proposition of an involuntary loan is discussed and to say the least, I agree with the court's logic in its entirety.

The Georgia statute is not identical with ours but in my view it cannot be distinguished in meaning and effect. I quote at length from the Lunsford case, *supra,* as follows:

"No mention of interest is made in Code Section 36-603, which is the section applicable here. It simply provides that, in the event the final judgment fixing the amount to be paid for the land taken is less than the amount of the award of the assessors, the condemnee shall be bound to refund any excess paid to or received by him.

"The law allows interest only because of a contract, express or implied, for its payment, or as damages for the detention of money, or for breach of some contract, or the violation of some duty. It is very generally stated that interest, being of purely statutory origin and not the creature of the common law, shall not be awarded except in such cases as fall within the terms of the statute, unless it has been contracted for either expressly or impliedly. In other words, there is no absolute right, independent of contract, express or implied, or of statute, to interest. *Best* v. *Maddox,* 185 Ga. 78, 194 S. E. 578; Accord, *Irons* v. *Harrison,* 185 Ga. 244 (8), 194 S. E. 749; *Gormley* v. *Eison,* 189 Ga. 259, 5 S. E. 2d 643. This principle has been applied specifically to a condemnation proceeding such as we here deal with. *St. Louis K. & N.W.R. Co.* v. *Knapp, Stout & Co.,* 160 Mo. 396, 61 S. W. 300.

"Certainly there is no express contract on the part of the condemnee to pay interest on any amount, nor do we find any basis for holding that there is any implied contract on his part to do so. The amount of the assessors' award is required to be paid by the condemnor, and it is made available to the condemnee from the time of such payment under the provisions of Art. I, Sec. III, Para. I of the Constitution of 1945 (Code Anno. Sec. II-301) which provides that just compensation must be 'first paid.' *State Highway Department* v. *Hendrix,* 215 Ga. 821, 113 S. E. 2d 761. The condemnation proceeding is, as to the condemnee, involuntary. If the amount of the award was not made available to the condemnee before the taking of his land, it would result in his being deprived of the use of his land and the money which the assessors have determined to represent just compensation therefor until a final judgment could be obtained. Often there is considerable delay between the time of the assessors' award and the trial before a jury. At any time the condemnee takes his money down, it is only natural that he has hope that the amount of the jury verdict will be equal to or in excess of the amount of the assessors' award. Neither the condemnor, the condemnee, nor the court can know what the result may be, thus none can know until final judgment the

amount that must finally be paid and accepted as just compensation. Condemnee is not and cannot be bound to refund any amount until final judgment. Thus it would strain credulity to say that there is any contractual obligation on his part to pay any amount until that time. Interest does not begin to run on an obligation until it is due and payable, in the absence of some contractual or statutory provision to the contrary. Approval of the contention of the city that interest should run on the excess from the time of payment of the award into the registry of the court, or even from the time of the withdrawal thereof, by the condemnee, would amount to holding that the city was authorized to require the condemnee to accept an involuntary loan, amount of which was indefinite and not determinable until some future date when a final judgment might be obtained, and at 'lawful interest' or 7 percent per annum, a rate over which the condemnee could have no control.

"Interest *eo nomine* can only be recovered from the date when the amount of the claim has been liquidated and determined. *Insurance Company of North America* v. *Folds,* 42 Ga. App. 306, 155 S. E. 782, and see 29 C. J. S. Eminent Domain, Sec. 333, page 1386.

"It is urged that, since the General Assembly has provided for the payment of interest by the condemnee on such excess amount in a special master proceedings (Ga. L. 1957, page 387, 396, Code Anno. Section 36-615a), a public policy has been adopted which we should apply uniformly both here and in the 'Three Assessor' type of proceedings. We do not agree. Each type of proceeding is statutory, and each must be had, governed, and determined by the terms of its respective statute. Further, provision for payment of interest by the condemnee on the excess or the difference between the amount of a special master's award and the amount of the final judgment has not yet been tested as to its constitutionality. There is room, we think, for grave doubt that the provision will stand a constitutional test.

"Counsel for the city urged that, since it has been held, in *State Highway Board of Georgia* v. *Warthen*, 54 Ga. App. 759, 189 S. E. 76; *Gate City Terminal Company* v. *Thrower*, 136 Ga. 456, 71 S. E. 903; *Central Georgia Power Company* v. *Stone*, 142 Ga. 662, 83 S. E. 524, that when the amount of the award has been increased by the final judgment the condemnee is entitled to interest on the amount of the increase from the time of the taking of the property, it would be unfair to hold that the city is not likewise entitled to interest on the excess when the amount of the award has been decreased. Again, we do not agree. The interest to which the condemnee is entitled flows from the constitutional guaranty of his just compensation to the condemnee for his property. *Seaboard Airline R. R. Co.* v. *United States*, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 44 S. Ct. 471, 68 L. Ed. 934; *Reed* v. *Chicago-Milw. & St. Paul R. R. Co.*, 25 F. 886.

"Of course, when the final judgment is obtained and the amount that condemnor is required to pay as just compensation is thus finally determined, if there is excess between the amount of the judgment and the assessors' award, both the amount thereof and the obligation to refund by the condemnee has become fixed. Thus it is proper for the court to provide, in this judgment as in other judgments, for the payment of interest thereon from the date of the judgment, and at the lawful rate of 7% per annum. Code Section 110-304 and 57-108. Judgment affirmed."

From what has been said and from 29 C. J. S., Eminent Domain, §333(b), page 1386, wherein it is said, "Where the award has been paid into court, and the amount finally awarded is less than that deposited, the condemnor is not entitled to interest on the balance; and this is so, it has been held, even though the money deposited was turned over to the landowner," I respectfully dissent to the majority opinion.

5-2848 362 S. W. 2d 444

Opinion delivered December 10, 1962.

James L. Sloan, for appellant.

Frances D. Holtzendorff, for appellee.

GEORGE ROSE SMITH, *J.* In 1956 the appellant husband obtained a divorce on the ground of three years' separation, but the court found the appellee wife to be the injured party. The decree awarded the appellee custody of the couple's two children, a one-third interest in the appellant's personal property, a one-third interest for life in his real property, and possession of the family home in Little Rock (owned by the appellant). The decree directed the appellant to keep the home place "in habitable repair."

Last year the appellee filed a petition asking that the appellant be required to make needed repairs to the property. The appellant countered with a request that he be given custody of the children and possession of the home-

stead. This appeal is from an order changing the custody of the children (who expressed a desire to live with their father) but leaving the appellee in possession of the home and directing the appellant to pay the appellee $343 for the purpose of putting the property in a habitable condition.

The appellant's principal grievance is the court's refusal to give him possession of the homestead. He insists that the original award of possession to the appellee was solely and exclusively a provision for child support. Hence, it is contended, the chancellor's action in leaving the appellee in possession of the home, after the custody of the children had been transferred to the father, amounted to an original and therefore impermissible award of alimony, since the decree of divorce made no allowance of alimony. *Miller* v. *Miller,* 209 Ark. 505, 190 S. W. 2d 991.

The record does not bear out this argument. The divorce decree first recited that "the plaintiff [the wife] and said children" should have the exclusive use of the home. Later on the operative part of the decree awarded the exclusive use of the home to the wife. Thus there is no sound basis for thinking that the original award of possession was not meant to benefit the wife as well as the children.

On the merits we find no abuse of discretion in the chancellor's refusal to disturb the appellee's occupancy of the home. It is settled that a decree of divorce may award the possession of the homestead to either spouse, upon such terms as appear to be equitable and just. *Fitzgerald* v. *Fitzgerald,* 227 Ark. 1063, 303 S. W. 2d 576. Here the appellee's claim, in view of her life estate in the property, has a basis in law as well as in equity. She earns about $4,600 a year, while the appellant's annual income exceeds $8,000. If the appellee should be evicted from the property then presumably the court would require in substitution that monetary payments be made by the appellant. In view of all the circumstances we are not convinced that the chancellor erred in his solution to a manifestly difficult problem.

The original decree required the appellant to keep the house in repair. There is no substantial contradiction of the appellee's testimony that this obligation has not been met, for the house is in need of certain specific repairs. The appellee's proof that the work will cost $343 is defective, however. She submitted only a carpenter's written estimate, which was properly objected to as being hearsay. The order will therefore be modified to permit the appellee to have the repairs completed, at the appellant's expense, with the recoverable cost not to exceed $343. Should the appellant consider the actual outlay to be excessive the matter may be resubmitted to the chancellor upon competent evidence.

A minor item of child support, amounting to $57.13, is involved in the appellant's insistence that the chancellor orally announced that the appellant's liability for monthly child support payments would terminate on the date of trial, while the written order that was later entered fixed the date as that on which the two children moved to the appellant's home. The written order is not challenged as being unreasonable, however, and the chancellor was at liberty to reconsider his first conclusion. *Nance* v. *Flaugh,* 221 Ark. 352, 253 S. W. 2d 207. The appellant also complains of the fact that the appellee's attorney was allowed a fee of $100, but in this respect the chancellor's action was in harmony with the law as it has been declared in this state for many years.

With the indicated modification the order is affirmed.

CAIN *v.* WOOD.

5-2820 362 S. W. 2d 441

Opinion delivered December 10, 1962.

Ivan Williamson, for appellant.

Caldwell T. Bennett, for appellee.

PAUL WARD, Associate Justice. Paul Cain, appellant, was the owner of forty acres of land described as the southwest quarter of the southeast quarter of Section 35, Township 13 north, Range 9 west. He filed a suit against Lee Rackley and P. C. Wood, d/b/a Wood Lumber Company (hereafter referred to as Wood), defendants, to recover triple damages (in the amount of $7,836) for knowingly cutting and removing timber from his land.

In the complaint it was alleged that the defendants "were partners or engaged in a joint venture, or that Lee Rackley was the agent, servant, and/or employee of the said P. C. Wood." In Rackley's separate answer he denied the alleged relationship between him and Wood, and also denied owing Cain anything. Wood also denied any such relationship with Rackley or that he caused any timber to be cut on Cain's land.

During the trial, after all testimony had been introduced, the trial court directed a verdict in favor of Wood. The jury returned a verdict in favor of Cain against Rackley for single damages in the sum of $1,200. Rackley has not appealed, and Cain does not prosecute or urge any appeal from the judgment against Rackley.

Cain, in this appeal, does insist that the trial court erred in directing a verdict in favor of Wood, and we agree. The only question involved is whether Wood's relation to Rackley was such as to make him liable to Cain, and that is a fact question. Citations are unnecessary to substantiate the well established rule that all fact questions, supported by substantial testimony, must be presented to the jury.

We have concluded, from an examination of the record, that there is substantial evidence in this case to show Wood had some connection with or control over Rackley in the matter of cutting and removing timber from Cain's land.

Cain's testimony was substantially as follows: He talked with Rackley who said they were cutting timber on his (Cain's) land; That Rackley said Wood sold him the timber and told him to cut it; He stated that Wood said the boys were cutting for him, and that they got over the line, and also said they would pay him for the timber; On another occasion he told Wood the amount he wanted for the timber, that Wood said it was too much, but Wood never denied he was a participant. Dempsey Sutton, a witness for Cain, testified that he cut timber part of the time on land which he thought belonged to Wood but later learned belonged to Cain—that he was cutting for Wood. Ira Tuttle, a witness for Cain, testified that he would "settle" for the timber cut on Cain's land.

There was other testimony and records which tended to show Wood had no connection or relationship with Cain, and which tended to explain away the testimony on behalf of Cain, but this could not, of course, obviate submitting all the testimony to the jury.

Since the judgment against Rackley is final, the reversal as to Cain's claim against Wood will permit a new trial only as to those two parties.

Reversed.

CARR *v.* HALL.

5-2846 363 S. W. 2d 223

Opinion delivered December 10, 1962.

[Rehearing granted January 21, 1963—Supplemental Opinion on Rehearing p. 1044.]

Bernard Whetstone, for appellant.

J. S. Thomas and *G. E. Snuggs,* for appellee.

PAUL WARD, Associate Justice. This is a child custody case, coming to us on appeal from a decree refusing to award custody of an eleven-year-old daughter to the mother, and fixing visitation rights. The issue arises out of the factual background presently set out.

Fannie Mae Hall and Maurice Oron Hall were married in 1950, and they have a daughter named Patricia Louise. On November 15, 1961 Fannie filed a petition for divorce, alleging indignities, in which she stated it was satisfactory to her that custody of Patricia (then ten years old) be given to Patricia's father. On December 18, 1961 a decree was entered in accordance with the petition. There was no appeal. The day following the decree appellant (Fannie Mae) married Curtis Carr.

On May 10, 1962 appellant, represented by new counsel, filed a petition (in the same court that granted the divorce) asking for custody of Patricia subject to visitation rights of appellee. After an extensive hearing, at which petitioner testified, Patricia, the mother of appellee, Dr. Murphy and others, the court, on May 31, 1962, amended the original decree "to the extent that the plaintiff-petitioner is entitled to have visitation with the child, Patricia Louise, at all reasonable and seasonable times." Appellant then promptly moved the court to "spell out the specific terms and conditions of said visitation rights."

About ten days later appellant filed another petition asking the court to require "that the visitations be had entirely away from the home of" appellee. At the hearing both appellant and appellee testified, and the court entered another decree on June 15, 1962. In this decree the court held that "the visitations should be from 9:00 to 12:00 each Saturday morning in a home or house across the road from appellee's home and that petitioner may take Patricia for a ride or to petitioner's home, should Patricia desire to go."

Appellant gave notice that she was appealing from the court's refusal to grant her full custody of Patricia (decree May 31, 1962) and also from the limitations placed on visitation rights (decree June 15, 1962).

We have carefully read the record and considered all of appellant's arguments, but are not convinced the trial court committed any reversible error. Running through all of Patricia's testimony is the strong implication she would not be happy living with her mother and step-father. We are unwilling to substitute our judgment for that of the trial court and thereby force Patricia to leave her father and live with her mother. Patricia is eleven years old and is pictured as a bright intelligent girl. The trial court found that "she knows exactly what this is all about." Appellant now strongly persists that she is greatly disturbed by not being able to have Patricia with her in her new home, but she cannot deny she voluntarily gave up that privilege the year before. The trial court had these parties before him on three separate occasions over a period of several months, and he had a much better opportunity than we have to evaluate the testimony. The court's separate statement of facts which appears in the record shows that due consideration was given to the best interest of Patricia and also to the rights and feelings of appellant.

In numerous decisions of this Court we have clearly pointed out that the best interest of the child is the paramount consideration of the Court in custody cases. See: *Oliphant* v. *Oliphant,* 177 Ark. 613, 7 S. W. 2d 783; *Miller*

v. *Miller,* 208 Ark. 1058, 189 S. W. 2d 371; *Duffy* v. *Dixon,* 209 Ark. 964, 193 S. W. 2d 314. The wishes of the involved child may be considered where it is capable of making an intelligent choice. See: *Patterson* v. *Cooper,* 163 Ark. 364, 258 S. W. 988; *Dill* v. *Dill,* 209 Ark. 445, 191 S. W. 2d 829.

In refusing to change the original decree by giving custody of Patricia to appellant, the court first held that appellant could have visitations with Patricia "at all reasonable and seasonable times." Appellee expressed no disagreement with this modification, but appellant asked to have it changed in two respects: viz., she wanted a definite time fixed for visitations, and she wanted the right to visit with Patricia away from appellee's home. The court granted appellant's request in this way. Appellant has the right to take Patricia each Saturday from 9 a. m. to 12 a. m., with or without Patricia's consent, away from appellee's home to a house nearby. During this time appellant can take Patricia riding or she can take Patricia to appellant's home "should Patricia Louise so desire." It seems that appellant's main objection to the court's order is that it gives Patricia the right to decide whether she will or will not go to her mother's home—or go riding with her.

Under the facts and circumstances of this particular case we not only think the court's order was proper but wise and in the best interest of Patricia and her mother. If Patricia were forced to visit in her mother's home it could reasonably increase whatever aversion she now has to doing so. On the other hand, if there is any hope of reconciliation between mother and daughter, appellant is given an opportunity to effect it by love and affection rather than by force. Having Patricia to herself, away from appellee, appellant should be able to persuade Patricia to go with her to her home or to other places. Appellant has been given that opportunity, and who can say it will not succeed? Appellant's fear that appellee will chastise Patricia if she does visit her mother is not justified by the record. Patricia testified that her father never talked to her about her mother in any way that was

unkind; that she was not afraid of her father; and, that her father would not do anything to her if she went to see her mother. As we view this unfortunate situation, appellant is entitled to an opportunity to re-establish a happy relationship with her daughter. She can do this only by love and not by force, and the court has given her that opportunity.

Affirmed.

Harris, C. J., and *George Rose Smith* and *Robinson, JJ.*, dissent in part.

CARLETON HARRIS, Chief Justice, (Dissenting in part). I agree with the majority that the custody of this child should not be changed from the father to the mother, and concur with all that the majority say relative to this point. However, I am of the opinion that the mother should be permitted to take the child to her home on the occasion of the permitted visits. In other words, I would strike that portion of the order which provides "should Patricia Louise so desire," for I am persuaded that the child, even though she were eager to visit in the mother's home, would not do so because of fear of her father. Mr. Hall admitted that he did not want her to go to appellant's home (though he stated that he had not forbidden her), and I am convinced, from reading the testimony, that the child is fearful of acting contrary to his wishes. Mrs. Carr testified in the second hearing that, on going out to her car after visiting with Patricia Louise at the house provided, the little girl said, "Mother, I can't hug your neck, I hope you understand, my Daddy is looking." She also testified that during the visit with her daughter, the latter played the piano while they talked because Patricia did not want her grandmother to hear what was said. Appellant likewise stated that her daughter told her that the grandmother (Mrs. Hall, mother of appellee) had said that if Patricia ever went home with appellant, she could not come back to live. This statement was not denied. Mr. Hall testified that he told Patricia that she did not have to go with her mother to the home unless she wanted to, and various

answers, in both the first and second hearings, indicate his animosity toward his ex-wife. For instance, in the first hearing, he stated that he was afraid if he permitted Patricia to go to Mrs. Carr's home, his ex-wife would get drunk; that, judging from past experience, he could not conceive of any Christian visit that the two might have out of his presence. I do not think the evidence in the hearings justifies such a conclusion on the part of appellee. At another time, Mr. Hall stated, "I do not feel that I have any duty under any circumstances towards Mrs. Carr whatsoever." It is very evident that appellee is rather bitter toward his ex-wife—and perhaps—human nature being what it is—there is some justification. I am not concerned with any duty that he owes Mrs. Carr — but rather only with the duty owed his daughter, and it is my opinion that the child's future welfare, happiness, and stability will be greatly increased if she can have an amiable and happy relationship with both parents. In my view, it is not proper to place the burden on the child for any visit that might be made to the mother's home, for, though I could be in error, it appears to me, in reading the testimony of the parties and the little girl, that a fear of the father's disapproval of any visit to appellant's home, is foremost in Patricia's thoughts.[1] It is true that the little girl stated that she wanted to live with her father—and I have no fault to find with that decision. This, from her testimony, was evidently influenced to a large degree by the fact that her mother married Mr. Carr, and she does not desire to be around her stepfather. Again, I can completely understand this sentiment. But this dissent is not directed to the custody order—only to the 3-hour visi-

[1] Patricia's testimony is vague and uncertain in many respects. For instance, she never specifically stated why she did not want to go to the mother's home, and many of her answers were, "I don't know." There is a definite indication that the father's ideas have influenced her feelings. From the transcript,

"Q. Has your father talked to you about your mother?
A. No.
Q. He hasn't told you, hasn't tried to?
A. He's told me the situation.
Q. He told you what the situation was and that is the reason you didn't want to go see your mother?
A. For what reason?
Q. From what he told you?
A. Well, in a way yes and in a way no."

tation provided on each Saturday morning. I would simply suggest that the mother be permitted to take the child to her home *at a time when Mr. Carr is not present*; in fact, the order could provide that Mr. Carr should not be present when the visit is made.

Because I feel that leaving the decision to visit in the mother's home places pressure upon Patricia Louise, and because I seriously doubt that she will ever make such a visit as long as her father disapproves, I respectfully dissent to that portion of this court's opinion.

I am authorized to state that Justices George Rose Smith and Robinson join in this dissent.

MILLER *v.* STATE.

5056 362 S. W. 2d 443

Opinion delivered December 10, 1962.

W. S. Atkins, for appellant.

Frank Holt, Atty. General, by *Russell J. Wools,* for appellee.

SAM ROBINSON, Associate Justice. On the 4th day of April, 1962, the appellant, John H. Miller, was convicted on a charge of grand larceny, growing out of the alleged stealing of an automobile. At the trial, the State used as a witness, Jacqueline Sartin Miller. The evidence shows that she entered into a ceremonial marriage with appel-

lant at Juarez, Mexico on the 3rd day of September, 1961, and subsequently they lived together as man and wife.

Of course, if Jacqueline is the legal wife of appellant she could not testify against him, but the State contends that she is not his legal wife because on March 29, 1960, appellant had married Betty Lee Handy in East Baton Rouge Parish, Louisiana; and further, that the marriage performed in Mexico is not valid because Jacqueline was only 17 years of age at the time.

There is no evidence that a 17-year-old female cannot enter into a valid marriage contract in Mexico, and we do not take judicial notice of foreign laws. 29 Am. Jur. 69. A marriage valid where contracted is valid anywhere. *State* v. *Graves,* 228 Ark. 378, 307 S. W. 2d 545.

Although there is evidence that appellant married another woman in Louisiana in April, 1960, there is no evidence that such marriage had not been dissolved at the time of appellant's marriage to Jacqueline in Mexico. The law presumes that a marriage is valid, and the mere fact that appellant had been married on another occasion, and no showing that such marriage had not been dissolved, is not sufficient to overcome the presumption of the validity of the second marriage. "Where the marriage is established by evidence, it is presumed to be regular and valid and the burden of proof is upon the party attacking it." *Yocum* v. *Holmes,* 222 Ark. 251, 258 S. W. 2d 535.

No presumption of law is much stronger than the presumption that a marriage is lawful, innocent and not criminal. In *Estes* v. *Merrill,* 121 Ark., 361, 181 S. W. 136, the Court said: "So strong is this presumption and the law is so positive in requiring the party who asserts the illegality of a marriage to take the burden of proving it, that such requirement obtains even though it involves the proving of a negative, and although it is shown that one of the parties had contracted a previous marriage, and the existence of the wife or husband of the former marriage at the time of the second marriage is established by proof, it is not sufficient to overcome the presumption of the validity of the second marriage, the law presuming

rather that the first marriage has been dissolved by divorce, in order to sustain the second marriage.'' See also *Latham* v. *Latham,* 175 Ark. 1037, 1 S. W. 2d 67.

Appellant also complains of the Court's failure to give a requested instruction, but we find no error in that respect.

Because of the error in admitting the testimony of Jacqueline Miller, the cause is reversed and remanded for a new trial.

BURKE *v.* STATE.

5049 362 S. W. 2d 695

Opinion delivered December 10, 1962.

[Rehearing denied January 7, 1963.]

Donald Poe, for appellant.

Frank Holt, Atty. General, by *Milas H. Hale,* Asst. Atty. Gen., for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a conviction for possession of intoxicating liquor in dry territory for purposes of sale.

On February 9, 1962, appellant Paul Burke, while riding as a passenger in an automobile driven by one Gerald Oglesby in Sevier County, was arrested by officers attached to the Weights and Standards Division of the Department of Revenues. Oglesby was driving south on Highway 71 about five miles south of DeQueen, where the officers were temporarily stationed, when he was stopped. After examining their drivers licenses, the officer in charge demanded the key to the trunk of the car, where they found nine cases of jars apparently containing whiskey. Appellant was charged with unlawfully possessing 54 gallons of intoxicating liquor in a dry county for purposes of sale, as a third offender, under the felony provisions of Ark. Stats. § 48-811.1. Upon conviction, he was sentenced to the penitentiary for one year. The testimony is undisputed that Oglesby was not speeding or violating any other traffic laws when he was stopped, and it is also undisputed that the officers had no search warrant. One officer testified that the car looked heavily loaded and that he thought appellant was drunk, so they decided to "check the car." Both arresting officers testified that there was a strong smell of wild-cat whiskey in and about the car, and that they knew appellant had a reputation for dealing in whiskey in Polk County.

Appellant relies on four points for reversal of his conviction. Appellant's first point is: The alleged prior convictions were under a different act and section of the statutes from the information in the instant case, and were for a different crime, that is, selling instead of possessing for purposes of sale. It is unquestioned that criminal statutes must be strictly construed in favor of the defendant, *Hughes* v. *State,* 6 Ark. 131, 1. Eng. 131, and in that vein we examine the statute under which appellant was convicted. From examination of the record, we are unable to determine under what specific statute the appellant's prior convictions were based, but we note that the convictions were subsequent to the passage of Act 395 of 1953 (Ark. Stats. § 48-811.1) and appellant was charged and convicted of crimes which are crimes enumerated by this statute, *i.e.,* sale of intoxicating liquor or beverage. We are, therefore, unable to say that appellant was improperly charged under the felony provisions of Act 395.

Appellant's second point urged for reversal is that no competent proof was offered that the alleged liquor was intoxicating liquor prohibited by law. In the case at bar, the arresting officers and the sheriff of Sevier County (who had custody of the nine cases from the time appellant was arrested) testified that they determined it was liquor from the smell. The cases of liquor were admitted into evidence at the trial. In *Burris* v. *State,* 172 Ark. 609, 290 S. W. 66, this court stated:

"Error of the court is assigned in permitting witness Hayden to testify that he identified the liquor as whiskey by the smell. The opinion of the witness, based upon the smell of the liquor, was competent evidence, and its weight was a question for the jury. It cannot be said as a matter of law that the evidence of the identification of intoxicating liquor must rest upon more substantial basis than that of the sense of smell."

See also *Burns* v. *State,* 179 Ark. 1, 13 S. W. 2d 820; *Hunter* v. *State,* 180 Ark. 613, 22 S. W. 2d 40; *Freyaldenhoven* v. *State,* 217 Ark. 484, 231 S. W. 2d 121; *Fuller* v. *State,* 179 Ark. 913, 18 S. W. 2d 913; and 78 A. L. R.

439. The evidence was competent, and its weight was a question for the jury.

Appellant's third point, that the evidence was obtained by illegal search and seizure and should have been excluded, has given this court considerable concern. In *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816, it was stated:

"The right to be secure against unreasonable searches is guaranteed by Article 2, § 15 of our Constitution and also, in essentially the same language, by the 4th Amendment to the United States Constitution, yet our Court has followed a rule at variance with the Federal rule regarding the admissibility of evidence obtained by search without a warrant. *After careful consideration we have concluded that we will re-examine our former decisions in this connection with a view to changing our announced rule when the question is properly presented to us again.*" [Emphasis ours.]

In the light of this caveat, we have thoroughly examined the record and authorities cited and not cited by the parties. Two cases which are of compelling interest because of the similarity of the fact situations with the instant case are *Carroll* v. *United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, and *Brinegar* v. *United States,* 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879. In both cases the United States Supreme Court held that, under the Fourth Amendment, a valid search of a vehicle moving on a public highway may be had without a warrant, but only if probable cause for the search exists. The Court then went on to rule that the facts there presented amounted to probable cause for the search of the automobiles involved. In a careful and detailed analysis, Chief Justice Taft in *Carroll* v. *United States, supra,* at p. 153, stated:

"We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, *as recognizing a necessary difference* between a search of a store, dwelling house, or other struc-

ture in respect of which a proper warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." [Emphasis ours.]

In the case at bar, the testimony of the officers as to the heavily loaded car, their knowledge of appellant's reputation as a known bootlegger, and the strong odor of wild-cat whiskey in the car all add up to probable cause for the search. As was stated in *Carroll* v. *United States, supra,* and approved in *Brinegar* v. *United States, supra,*:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search . . . But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search *unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise*" [Emphasis ours.]

Our caveat in *Clubb* v. *State, supra,* stated that "our Court has followed a rule at variance with the Federal rule regarding the admissibility of evidence obtained by search without a warrant." In the instant fact situation, our former decisions are *not* at variance with the Federal rule, and there is, therefore, no necessity here for re-examining our former decisions. To hold that this evidence is inadmissible would be to create still further variance with the Federal rule regarding admissibility of evidence obtained by search without a warrant. However, this shall in no way diminish our caveat.

The last point urged by appellant is that the remarks of the prosecuting attorney were prejudicial error.

In his closing argument, the prosecuting attorney apparently stated that the argument of appellant's counsel

was misleading, to which appellant made timely objection. The court sustained the objection and admonished the jury to base their verdict on the testimony as they gained it from the witnesses who testified and on the law as given them by the court, and on those two things alone. He further instructed them to disregard anything that was not in the record that was mentioned by the attorneys. The balance of the prosecuting attorney's closing argument as transcribed was not such an expression of opinion of counsel as to be so flagrant as to deliberately, purposely and effectively arouse the passion and prejudice of the jury. As stated in *Adams* v. *State,* 176 Ark. 916, at p. 939, 5 S. W. 2d 946:

"This court will always reverse where counsel go beyond the record to state facts that are prejudicial to the opposite party, unless the trial court, by its ruling, has removed the prejudice. *Hughes* v. *State,* 154 Ark. 621, 243 S. W. 70 [and other cases cited]. But this court does not reverse for the mere expression of opinion of counsel in their argument before juries, unless so flagrant as to arouse passion and prejudice, made for that purpose, and necessarily having that effect."

Finding no error, we affirm.

CARNEY *v.* BARNES.

5-2779 363 S. W. 2d 417

Opinion delivered December 10, 1962.

[Rehearing denied January 28, 1963.]

Douglas Bradley, for appellant.

Gerald E. Pearson, for appellee.

NEILL BOHLINGER, Associate Justice. This is a boundary line dispute and involves a very small piece of inadequately described property adjacent to the holdings of appellants and appellees in the East ½ of Section 13, Township 15 North, Range 2 East.

The appellants are the owners of 44 acres in the NE ¼ of Section 13, Township 15 North, Range 2 East and the appellees are the owners of 44 acres immediately south of the lands belonging to the appellants, the properties being separated by a county road running east and west.

The true line, which is the southern boundary of the lands of the appellants and the northern boundary of the lands of the appellees, appears to have been well established by an adequate survey. But the appellants contend that at some period there had been established a fence line south of the true line which was accepted by the then owners of the property as an agreed boundary line.

It is true that the surveyor found, and other witnesses have supported his finding, that a fence had existed from an eighteen inch white oak tree approximately midway of the north line of the appellees' property west to the established corner at the northwest corner of appellees and the southwest corner of appellants' property. Remnants of the fence still exist and this fence line is south of the true line and south of the county road. Toward the western boundary of appellees' property the county road appears to turn sharply to the north which leaves approximately fifteen feet between the old fence line and the road.

The appellants contend that on this particular fifteen feet and along 445 feet lying between the old fence line and the county road appellees have encroached on property which appellants contend is theirs and appellees have cultivated the property out to the county road.

The case hinges on whether or not the old fence and the fence row was an agreed line between the two pieces of property. While the construction and maintenance of a division fence, when mutually regarded as a boundary, may constitute recognition and acquiescence, mere existence of a fence between adjoining land owners is not of itself sufficient. There must, therefore, be a mutual recognition of the fence as the dividing line.

The property owned by the parties hereto was formerly part of what is known as the Tulley estate. Silas Tulley, who owned the land involved and which he sold in the early 1930's, was the owner when the county road was put through this area. He is in a better position than any other witness as to the erection of the fence and he testified that he had a fence on the north line of his property and that when the road was put there his fence was moved back south from the line; that at that time he knew where the true line was and that it was north of where his fence was moved; that the road was put there in about 1924 and that he knew at that time where the true line was and he was claiming to the true line which was north of his fence.

We fail to find in the record the testimony of any of the subsequent owners of this property in which it is shown that the parties agreed on the old fence as a boundary line, nor is there such a mutual recognition and acceptance of that fence as a boundary line that would constitute acquiescence. The appellees and their predecessors in title appear to have cleaned off the disputed strip between the fence row and the true line and up to 1959 the appellees appear to have exercised control normally associated with ownership over the disputed strip of land. 1959 appears to have been the first year that an attempt was ever made to cultivate the area in dispute and in that year the appellees planted some beans on the disputed land and the

appellants came over and disced up appellees' beans and planted that strip for themselves.

As we recently said in the case of *Webb* v. *Curtis,* 235 Ark. 599, 361 S. W. 2d 87:

" * * * 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." Citing *Cossey* v. *House,* 227 Ark. 100, 296 S. W. 2d 199.

There is an absolute lack of testimony that Mr. Tulley or his successors in title ever intended to claim anything except to the true line which is as we stated, north of the old fence. The old fence would, therefore, appear to have been erected as a barrier and not as a boundary and we find nothing in this case that is in any way persuasive that anybody ever agreed to the old fence as a boundary between the properties involved and certain it is that the appellees have exercised the usual perogative of ownership in cleaning up the land in question and the only venture that we find by the appellants onto the land involved is the attempt to plant a small area in beans at the west end of the property adjacent to the old slough and that entrance was as recent as 1959.

While it is ordinarily contemplated that a county road order will be entered setting out the county road and defining the boundaries, that does not appear to have been done in this case, but strange indeed would be the theory that if a man erected a fence as a barrier adjacent to a county road that the land between his fence and the road would be subject to entry by the landowner on the other side of the road.

The chancellor very properly found that the appellants had failed to maintain the issues that devolved upon them and that finding we affirm.

WELLS, EXECUTRIX *v.* HAYES.

5-2855 362 S. W. 2d 700

Opinion delivered December 17, 1962.

Roy Finch, Jr. and *Thorp Thomas,* for appellant.

Sharp & Sharp, for appellee.

CARLETON HARRIS, Chief Justice. Appellants, Ruby A. Wells and R. L. Wells, are the wife and son, respectively, of L. L. Wells, deceased. Mrs. Wells is executrix of her late husband's estate. During his lifetime, L. L. Wells operated a busness known as "Arkansas Tastee Freez," a distributor in this state for the sale of "Tastee Freez" ice cream stores. Mrs. Wells and the son worked with Mr. Wells in the business during the period of time hereinafter referred to. On February 27, 1954, L. L. Wells and R. L. Wells,[1] d/b/a Arkansas Tastee Freez Company, entered into a contract with Randall Hayes and Jennie V. Hayes, husband and wife, and appellees herein, wherein the former agreed to sell their Tastee Freez business, including the realty and improvements, for the sum of $12,200. On the same date, a contract was entered into between the parties whereby Arkansas Tastee Freez Company leased to appellees, for a period of

[1] The record does not make entirely clear the interest of R. L. Wells in the business. Appellants' brief speaks of him as an employee, but, as herein set out, he did join in the contracts.

six years,[2] certain equipment used in making the ice cream and further agreed to sell (and the purchaser to buy) Harlee Freezers, to be likewise used. The agreement, *inter alia,* provided that appellees would use only Tastee Freez mix (or such other mix as approved by lessor), and they were to purchase the mix at the price of $1.24 per gallon, less a rebate at the end of the year. This price included a 30 cents per gallon surcharge, of which 10 cents, according to the contract, was to be sent to Harlee Manufacturing Company for advertising. Appellees further agreed to use only supplies, such as flavors, sundae toppings, spoons, containers, straws, uniforms, etc., that had been approved by the lessor, and to use only such equipment in connection with operating the freezers and feeders as had been approved by the lessor. Numerous other provisions were included which are not particularly pertinent to this litigation. The last paragraph of the agreement provides,

"It is further agreed that in the event of the cancellation of this agreement, the Lessor shall have the right and option to purchase the Harlee Freezers and special topping cabinet sold to Lessee at the Lessee's cost thereof less an amount equal to 50% of said cost as depreciation for the first year or any part thereof, an additional amount equal to 20% as depreciation of said equipment for the second year or any part thereof, and an additional amount equal to 5% of the cost of said equipment as and for depreciation in each of the third, fourth, fifth, and sixth years."

Pursuant to the agreements, appellees purchased the business (which admittedly has been completely paid for) and used the Tastee Freez mix in 1954, 1955, 1956 and part of 1957. The 30 cents surcharge was paid monthly until March 9, 1957, when appellees, through their then attorney, advised the Arkansas Tastee Freez Company that they would no longer use this mix, and the

[2] The contract provided that the lease would be automatically renewed for successive periods of six years each, unless either of the parties advised the other to the contrary, in writing, at least 30 days prior to the conclusion of any six-year period.

30 cents surcharge was not paid subsequent to that date. After that time, appellees commenced using a mix other than Tastee Freez, and without approval of appellants. In the March 9 letter, appellees advised Arkansas Tastee Freez Company that it could pick up the feeders, and could purchase the freezer on the terms outlined in the last paragraph of the agreement. No reply was received to the letter, and on August 7, counsel for appellees again advised Arkansas Tastee Freez that the agreement was being cancelled and the equipment could be picked up. On August 10, L. L. Wells sent his check for $468.55 as per the terms of the lease agreement, to cover the cost of the Harlee freezer, topping bar, deep freeze and topping rail, advising that the items would be picked up the following week. This was subsequently done. L. L. Wells died on January 24, 1958. On August 23, 1958, appellants instituted their complaint against appellees, alleging that the latter had breached their agreement (by ceasing to use Tastee Freez mix) and that there were due, as royalties, 30 cents per gallon for each gallon of ice cream mix used since March 9, 1957. An accounting was prayed, and appellants sought judgment in whatever amount might be found to be due them.[3] On trial, the court dismissed the complaint. From the decree so entered, appellants bring this appeal.

The evidence reflects that appellees, after March 9, 1957, sold 3,210 gallons of mix during the balance of that year, 3,810 in 1958, and 2,360 in 1959. In their brief, appellants contend that, based upon the 30 cents per gallon surcharge, they should have received judgment for the sum of $2,814.00. We do not quite understand how appellants contend for this amount, inasmuch as the proof shows that 10 cents of the 30 cents was to be paid to the Harlee Manufacturing Company for local and national advertising, and 10 cents was to be sent to the National Buying Association to help pay the operating cost for that organization.[4] However, inasmuch as we agree that

[3] Appellants alleged that they believed that the amount would be in excess of $50,000.

[4] The association purportedly operated for the purpose of permitting lessees to purchase products cheaper (by buying through the association).

the chancellor correctly dismissed the complaint, this matter is immaterial.

The contentions of each are simple. Appellants simply assert that Mr. and Mrs. Hayes breached the contract. Appellees assert two defenses, alleging that they were induced into entering into the agreement through false representations, and further, that the lease agreement between the parties was cancelled. The first mentioned deals with the complaint of appellees that, though they had been told that products could be bought much cheaper by buying through the Tastee Freez National Buying Association, actually the prices were much higher. This was a reference to the mix, topping for ice cream sundaes, spoons, and various other supplies that were purchased. It is also asserted that no technical assistance was provided by the company relative to the operation of equipment, as set forth in the contract. It is not necessary that we discuss this contention (false representations) for we think the litigation is definitely determined by the provisions of the last paragraph of the agreement, heretofore referred to.

It may be (though this is not argued by appellants) that the company, in including this cancellation paragraph in its printed contract, intended that it become operative only at the conclusion of the six year term of the lease, *i.e.,* in event one or both of the parties did not desire to renew the agreement. However, there is nothing in the contract which so provides; that instrument simply recognizes the right of cancellation, and Mr. L. L. Wells, evidently the principal operator of Arkansas Tastee Freez Company, likewise, recognized the right of cancellation. This is definitely shown by his actions subsequent to receiving the communication from appellees' counsel. The August 7 letter in behalf of appellees to Arkansas Tastee Freez Company advised as follows:

"Gentlemen:

"On March 9 I advised that Randall Hayes and Jennie V. Hayes of Clarendon, Arkansas, did not intend to continue in the sale or further use of Tastee Freez

products and were cancelling their agreement with you. I also advised you that you could pick up the Harlee Manufacturing Company feeder or feeders and that you could purchase the Harlee freezer if you so desired. To this date I have not heard from you concerning same. If I do not hear from you concerning the purchase of the Harlee freezer within ten days from the date of this letter I will assume you do not wish to purchase same and Mr. and Mrs. Hayes will make other disposition of same.

"Yours very truly,"

On August 12, Mr. Wells replied as follows:

"Dear Sir:

"Enclosed you will find my check for $468.55 to cover the costs of the 2500 Harley freezer, complete with pump and the Anheiser-Busch topping bar, deep freeze and the topping rail.

"This is in accord with the operator's agreement and depreciated as per their schedule of 50% for the first year or fraction thereof; 20% for the second year then 5% for the third year or fraction thereof.

"The original cost of the equipment was $1445. on the freezer and $430. on the deep freeze complete.

"I will arrange to have this picked up some time next week.

"Respectfully,"

Moreover, though Wells did not die until nearly six months later, no action was taken by him on account of a breach of contract, nor does the record reflect that he ever made any such contention. In fact, neither Arkansas Tastee Freez, nor any one in their (its) behalf, ever made any demand on appellees for the surcharge before the filing of this action. It would certainly seem that if Mr. Wells, or appellants, considered that appellees had breached the contract, legal steps would have been taken; actually, if such a view were held, it is somewhat puzzling that action was not commenced when the letter of March

9 was received, some five months before Wells exercised his right to purchase the equipment. Be that as it may, we think unquestionably that the agreement was cancelled by the *actions of the parties*. According to Webster's Third New International Dictionary, the word "cancel," *inter alia,* means "revoke, annul, invalidate, remove from significance or effectiveness, call off." This is exactly what happened in this instance, and it might be here mentioned that Mr. Wells, in joining in the cancellation, received certain benefits, in that he was able to purchase the equipment heretofore mentioned at a price which, according to the testimony, was considerably less than the value of said equipment.[5]

It follows, from what has been said, that we find no merit in appellants' contention that the trial court committed error in denying them judgment for damages for breach of contract.

Affirmed.

[5] For instance, there was testimony that Hayes had the opportunity to sell the freezer alone for $750.00.

TRADERS & GENERAL INS. CO. *v.* HENDERSON.

5-2793 362 S. W. 2d 671

Opinion delivered December 17, 1962.

Mahony & Yocum, for appellant.

Wendell Utley and *Jack Machen,* for appellee.

CARLETON HARRIS, Chief Justice. The question here presented is whether Traders & General Insurance Company had issued its Workmen's Compensation Insurance Policy (# 12621) granting coverage to the employees of Farr Production Company of Texarkana, and if such policy was in effect on July 11, 1960. O. H. Henderson, an employee of Farr, suffered a compensable injury on that date. Appellant had issued a Workmen's Compensation Policy covering Farr for the previous year, and some time prior to June 9, 1960, Farr had made application to appellant for a renewal of this coverage for the period of time beginning July 10, 1960, and ending July 10, 1961. Traders & General sent the new policy (renewing the insurance for such period of time) to the Wade and Wade Agency, also of Texarkana, on June 14. The agency retained the policy in its possession for some 56 days while Farr was endeavoring to make arrangements to pay a $1,000 deposit premium, required by the company before delivery could be made. The $1,000 was not paid, and on August 9, 1960, the policy was returned by the agency to the company for cancellation "flat."[1] The company contends the policy was never issued; appellee, supported by Farr Production Company, contends that arrangements were made with the agency for payment of the premium; that said premium was charged to Farr, and the policy was in full force and effect on the date of Henderson's accident. The referee held that the policy was in effect, and the full commission held likewise. On appeal, the Circuit Court affirmed the commission. From such judgment, Traders & General appeals to this court.

Without discussing at length the testimony, or arguments advanced, by appellant, we think clearly there is

[1] This is an insurance expression, meaning in effect "from the beginning, or inception, of the policy." Here, it meant that the cancellation was as of July 10, 1960.

substantial evidence in the record to support the finding that the policy had been issued. Decker Wade, a partner in the agency firm, testified,

"We carried Mr. Farr's insurance for the year of 1959, that is, July 10, 1959 to July 10th, 1960 and his policy was received in our office prior to the expiration and we held it and explained to him that we would have to have a deposit premium which is outlined and stipulated by the company of one thousand dollars before we could turn the policy over to him. There was a considerable amount of premium involved and once we release that policy without any money, we as the agents are liable for that earned portion. Mr. Jones [2] came in the office and arrangements were made whereby they would pay for the policy, the Workmen's Compensation and the general liability and also on some trucks that he had but the payment was never made; * * * "

A statement, dated November 22, 1960, appears in the transcript, showing various charges to Farr, together with credits that had been given. While counsel disagree as to the meaning of this statement, it definitely does show a charge to Farr of $2,238 on "WC 12621." This entry was made on July 10, and the sum listed is the amount due as shown by the policy itself. Also the evidence reflects that the previous policy had been issued on a credit basis, and according to the testimony, some portion of payment was still due on that policy. This tends to support Farr's testimony of an "open account" with Wade; however, there are matters appearing in the record which are even more pertinent to the issue, and which constitute substantial evidence of the issuance of the policy. For one thing, appellant company recognized the claim, and actually made payments. On August 15, appellant directed a letter to Farr Production Company seeking information relative to whether Henderson had performed any work since his accident, whether he was unable to work at that time, and inquiring as to when he was expected to return to work. The company paid

[2] This refers to Robert Jones, bookkeeper for Farr Production Company.

five weeks' compensation to Henderson (July 13 to August 17) in the amount of $175.00, and other expenses in connection with the claim, all of which totaled $346.56. Decker Wade testified that the claim on Henderson was filed with the Claims Department of Traders & General "during the period of time" that the policy was being returned in the mail to the company, "and they went ahead and processed the claim, not knowing that the policies were in the process of being cancelled" * * *. This statement is a bit difficult to understand since the policy was returned to the company on August 9, and the letter (from the company to Farr) heretofore referred to, was dated August 15; of course, any payment covering compensation through August 17, was made even some time later.

The company sent notice to the Workmen's Compensation Commission, advising that the policy had been cancelled. While the notice of cancellation stated that the policy was cancelled as of July 10, 1960, the commission approved the cancellation as of September 1, 1960. This was in conformity with Sub-section (b) of Sec. 81-1338, Ark. Stats., 1960 Replacement, which provides,

"No contract or policy of insurance issued by a carrier under this act [§§ 81-1301—81-1349] shall be canceled prior to the date specified in such contract or policy for its expiration until at least fifteen [15] days have elapsed after a notice of cancellation has been sent to the Commission and to the employer, provided, however, that if the employer procures other insurance within the fifteen [15] day period, the effective date of the new policy shall be the cancellation date of the old policy.[3]

Possibly the most potent evidence to the effect that the policy had been issued, is contained in a notice sent to the Workmen's Compensation Commission by appellant. This notice was sent in compliance with Rule No. 3 of the Commission, which provides,

[3] No other insurance was obtained by the employer.

"Every employer within the operations of the Arkansas Workmen's Compensation Law shall file with the Commission proof of its compliance with the insurance provisions of the Law. *A notice from the insurer, through the Arkansas Compensation Rating Bureau, certifying this fact, will be received as acceptable proof.*"[4]

The notice, which was received by the Commission on July 25, 1960, is as follows:

TO THE ARKANSAS WORKMEN'S COMPENSATION COMMISSION: THIS IS TO CERTIFY THAT THE WORKMEN'S COMPENSATION INSURANCE POLICY OF THE EMPLOYER DESCRIBED HEREIN HAS BEEN

Issued.....renewal.....Date.....June 9, 1960.....

Cancelled.....Date.....

Amended.....Date.....

Employer.....Farr Production Co.....

Address.....Wadley Bldg., Texarkana, Texas.....

Nature of Business.....Oil or Gas Well drilling.....

Place of Business.....State of Arkansas.....

Agency Writing.....Wade, Wade and Associates.....

Number of Policy.....WC-12621..... Date.....7-10-60.....

Expires.....7-10-61.....

Policy Amended as Follows:.....

.....

.....

.....

Carrier:.....Traders & General Insurance Co.....

By:.....

WC-689

The purpose of such a notice is to enable the Commission to know that the Workmen's Compensation Law is being complied with. Certainly, if the certification is effec-

[4] Emphasis supplied.

tive *only if the company has received its premium*—such certification means nothing,—and it will be noted that this notice does not state that the insurance has been *conditionally* renewed.[5] Rather, the notice is a certification that a Workmen's Compensation Policy is in effect from July 10, 1960, to July 10, 1961. Of course, it would hardly be feasible to expect the Commission to conduct an investigation to determine whether the company had received its premium. Be that as it may, this certification by appellant is certainly cogent and convincing evidence that it had issued the policy in question.[6]

As previously stated, we think there was substantial evidence to support the finding of the Commission, and the judgment of the Circuit Court is affirmed.

[5] Of course, if it so stated, the rule would not be complied with, and the certification would be unacceptable.

[6] Appellant says that the sending of the certifying notice was a "clerical slip."

OZMENT *v.* MANN.

5-2838 363 S. W. 2d 129

Opinion delivered December 17, 1962.

Paul K. Roberts, for appellant.

W. P. Switzer, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a partition suit brought by the appellants; and resisted by the appellees on the ground that the appellants have no interest in the lands sought to be partitioned. The crucial point in the case is the effect of certain *nunc pro tunc* proceedings.

On June 2, 1961, appellants, Lawson Ozment and the heirs of his brother, Tom Ozment, filed this suit in the Ashley Chancery Court against Floyd Mann and the other appellees, seeking to have a sale of the lands of J. Y. Mann, deceased, and a division of the proceeds between the appellants and the appellees. The complaint admitted that each of the appellees was entitled to some interest in the land, but urged that the appellants were also entitled to some interest because—as the complaint alleged—J. Y. Mann had adopted Lawson Ozment and Tom Ozment as his sons in 1898. The appellees denied the validity of the adoption order, and the Chancellor's decision was based on the invalidity of the original order of adoption in 1898 and the ineffectiveness of the subsequent *nunc pro tunc* orders in the adoption proceedings.

1. *The 1898 Adoption Order.* The only claim of appellants to any interest in the lands of J. Y. Mann, deceased, is because of the adoption order of 1898; but the original order of 1898 is fatally defective because neither the petition[1] nor the order[2] recited that J. Y. Mann or the Ozment

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[1] The petition reads:

"TO THE HONORABLE PROBATE COURT OF BRADLEY COUNTY.

"The undersigned would respectfully petition your Honor to make an order for the adopting of Lawson Ozment age 11 years old and Thomas Ozment age 8 years old and they (have) no parents living and that the said children have no property and the said Petitioner does solemnly swear he asks for the adoption of said children and that they have no home and that they may be cared for to their best interest and they have the name of the Petitioner, Your petitioner would ever pray and AWCL. J. Y. MANN.

"Sworn to and subscribed before me this 10 day of Oct., 1898.

"B. F. Langston, Clerk, by H. S. Turner, D. C.

"ON REVERSE: NO. 889 Petition of J. Y. Mann for the adoption of Lawson & Tom Ozment. Examined and approved October 10, 1898.

"Filed Oct/98 B. F. Langston, Clerk, by H. S. Turner, D. C.

boys were residents of Bradley County; and we have repeatedly held that an adoption order is void if it fails to recite such essential jurisdictional facts. *Den* v. *Brown,* 216 Ark. 761, 227 S. W. 2d 623. Mr. J. Y. Mann died intestate in 1928; and the interest of the appellees became vested at that time, subject only to the widow's rights; so nothing in Act No. 137 of 1935, Act No. 369 of 1947, or Act No. 408 of 1947 can make valid the void adoption order of 1898. See *Dean* v. *Brown, supra.*

II. *The Nunc Pro Tunc Orders.* There are two of these: the first was on September 1, 1961; and the second was on December 4, 1961. When the appellants ascertained that the 1898 order of adoption was void, they undertook to remedy the situation by filing in the Bradley Probate Court a petition for order *nunc pro tunc*[3] to include the essentials as to residence. The petition was filed on June 13, 1961 (the partition suit having been pending since June 2, 1961); and on September 1, 1961 the Bradley Probate Court, without notice to any of the appellees, made its order *nunc pro tunc,* which recited that evidence was heard in 1898 which showed that J. Y. Mann and the two Ozment boys were then residents of Bradley County.

[2] The adoption order of the Bradley Probate Court of October 10, 1898, reads:

"J. Y. Mann Petition to have Tom & Lawson Ozment adopted as his Sons. GRANTED.

"Comes J. Y. Mann and files his petition praying the Court for an order adopting Tom & Lawson Ozment as the sons of the said J. Y. Mann and it appearing from the evidence of the said J. Y. Mann and others that the said Tom Ozment is only 8 years of age and Lawson Ozment is 11 years old and that the said children have no parents living. The Petition of the said J. Y. Mann is by the Court considered and granted. It is Therefore by the Court ordered that the said children be and they are hereby adopted as the sons of the said J. Y. Mann and they shall be entitled to and receive all the rights and interests in the estate of such adopted Father by descent or otherwise.

"It is ordered that Court adjourn until Tuesday Morning at 9 O'Clock. s/ J. C. Bratton, Judge."

[3] *Nunc pro tunc* orders in adoption matters have been considered by this Court in a number of cases, of which the following are some: *Dean* v. *Brown,* 216 Ark. 761, 227 S. W. 2d 623; *Grimes* v. *Jones,* 193 Ark. 858, 103 S. W. 2d 359; *Newell* v. *Black,* 201 Ark. 937, 147 S. W. 2d 991; *Ward* v. *Magness,* 75 Ark. 12, 86 S. W. 822. For *nunc pro tunc* orders generally see: *Vaughan* v. *Vaughan,* 223 Ark. 934, 270 S. W. 2d 915; and *Eiland* v. *Parkers Chapel Church,* 222 Ark. 552, 261 S. W. 2d 795, and cases there cited.

Then, on December 4, 1961—at the same term[4] in which the September 1, 1961 *nunc pro tunc* order had been entered —the Bradley Probate Court, on its own motion, set aside the September 1, 1961 *nunc pro tunc* order, and, with the attorney for the appellants present, entered an order *nunc pro tunc* regarding the original adoption order of 1898; and the germane portion of said December 4, 1961 order reads:

"It is therefore, by the Court considered, ordered and adjudged that the Petition for Order *Nunc Pro Tunc* and Amendment to Petition for Order *Nunc Pro Tunc* filed herein, be, and the same is granted and the clerk of this Court, be, and he is hereby directed to enter now for then the following corrected order and judgment: 'Come J. Y. Mann and files his Petition praying the court for an order adopting Tom and Lawson Ozment as the Sons of the said J. Y. Mann and it appearing from the evidence of the said J. Y. Mann and others that J. Y. Mann is a resident and citizen of Bradley County, Arkansas, and that the said Tom Ozment is only 8 years of age and Lawson Ozment is 11 years of age and that both Tom Ozment and Lawson Ozment are residents and citizens of Bradley County, Arkansas, and that the said children have no parents living. The Petition of the said J. Y. Mann is by the court considered and granted. It is therefore by the Court ordered that the said children, be, and they are hereby adopted as the sons of the said J. Y. Mann and they shall be entitled to receive all the rights and interests in the estate of such adopted Father by descent or otherwise.

"*It is further ordered that this order shall not in any wise either in law or equity be construed or held to effect or prejudice the rights of any person or persons who may have acquired either by purchase or descent any vested rights in the estate either real or personal of J. Y. Mann, now deceased, who have not had notice of the application*

[4] The terms of the Bradley Probate Court are fixed by statute (§§ 62-2004 and 22-406 Ark. Stats.) as being the fourth Monday in January and the second Monday in June of each year. The order of December 4, 1961 was at the same term as the September 1, 1961 order; so we must consider the December 4, 1961 order as the only valid *nunc pro tunc* order.

for this nunc pro tunc order and/or the proceedings. All rights of said person or persons not having said notice are hereby preserved. (Emphasis supplied.)

"IT IS SO ORDERED.

"To all of which the Petitioner objects and excepts, which objections and exceptions are hereby noted of record. /s/ James Merritt, Probate Judge.' "

Appellants object very strenuously to the italicized portion of the December order and claim that the Bradley Probate Court had no right to add such a limitation on the *nunc pro tunc* order. But the fact remains that the Bradley Probate Court, on its own initiative, had full power at the same term to set aside any order it had made. *Stinson* v. *Stinson,* 203 Ark. 883, 159 S. W. 2d 446; *Wright* v. *Ford,* 216 Ark. 55, 224 S. W. 2d 50; *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797; *Eakin* v. *Cities Service Co.,* 228 Ark. 979, 311 S. W. 2d 530; and West's Digest, "Judgment" § 341. So the December 4, 1961 order *nunc pro tunc* is the only one left to be considered.

III. *The Effect In The Present Case Of The Nunc Pro Tunc Order Of December 4, 1961.* The appellants claim that the Bradley Probate Court should not have included in the *nunc pro tunc* order of December 4, 1961 the italicized paragraph, as heretofore quoted. There are several answers to this claim of the appellants. In the first place, the appellants could have given due notice to the appellees of the intention to have a hearing on the motion for order *nunc pro tunc,* and thereby have the appellees bound by whatever order might have been entered.[5] Secondly, the appellants could have challenged by direct appeal the power of the Bradley Probate Court to include the italicized language in the *nunc pro tunc* order of December 4th; but it does not appear that this course of procedure has been pursued.

[5] In *Simpson* v. *Talbot,* 72 Ark. 185, 79 S. W. 761, Mr. Justice Battle said: "The Chancery Court had the authority to amend the record of its decree at a subsequent term, so as to make it speak the truth, but it cannot do so without notice first given to the party against whom it is made. *Martin* v. *State Bank,* 20 Ark. 636; *Alexander* v. *Stewart,* 23 Ark. 118; *King* v. *Clay,* 34 Ark. 300." To the same effect see *Irby* v. *Drusch,* 216 Ark. 130, 224 S. W. 2d 366.

A court, such as the probate court, has power to limit the relief that it may grant. See *Quality Excelsior Coal Co.* v. *Reeves,* 206 Ark. 713, 177 S. W. 2d 827. Particularly in *nunc pro tunc* proceedings a court should be careful to see that the rights of innocent third parties are not prejudiced by orders made long after the original record of proceedings has been published. In *Melton* v. *St. L. I. M. & S. Ry.,* 99 Ark. 433, 139 S. W. 289, Justice Frauenthal recognized that the rights of innocent third parties are not to be prejudiced by the entry of an order *nunc pro tunc.* In American Jurisprudence, Vol. 30A, page 580, "Judgments" § 594, the holdings are summarized as regards entering of orders *nunc pro tunc:*

"The acts of a court in rectifying an error or misprision in its own records of judgments in having the corrected entry made *nunc pro tunc* are often declared to be largely a matter of judicial discretion, . . . and it would seem that the exercise of the discretion should be confined to the determination of questions of fact and of considerations such as the effect of the entry on innocent third persons, . . . "

And again, in American Jurisprudence, Vol. 30A, page 601, "Judgments" § 626, in discussing *nunc pro tunc* orders as affects the rights of third persons and the power of the court to make protective provisions in entering the orders *nunc pro tunc,* the holdings are summarized:

"It is a doctrine adhered to by many courts that when it becomes necessary to correct the record of a judgment by an amendment thereof and the entry of the amendment *nunc pro tunc,* such corrective action will not be taken to prejudice or affect adversely the rights of innocent third persons, acquired intermediate the original judgment and its amendment *nunc pro tunc,* especially where such third persons have superior equities due to their diligence in making the property involved subject to the payment of the debts. By way of removing all doubt, the protection

accorded the intervening rights is sometimes expressed in the order allowing the amendment, . . .'"[6]

In objecting to the italicized portion of the *nunc pro tunc* order of December 4, 1961, the appellants are in the inconsistent position of relying on the December *nunc pro tunc* order to make valid the void adoption order of 1898, and at the same time attacking the very order on which they rely. On the present appeal we must give full effect to the entire order of December 4, 1961. The case of *Grimes* v. *Jones,* 193 Ark. 858, 103 S. W. 2d 359, affords the appellants no support; because in that case the *nunc pro tunc* order contained no savings clause for innocent third persons or unnotified parties; whereas the *nunc pro tunc* order of December 4, 1961 here before us contains such a savings clause.

As heretofore recited, J. Y. Mann departed this life intestate in 1928, and the title to the lands here involved vested in the appellees (as admittedly being some of his heirs at law), subject to the widow's rights;[7] so the appellees had a right to be heard in the Bradley Probate Court in any attempt to rectify the original Probate Court adoption order. Their rights were protected by the savings clause. The appellants have failed to prove by a valid and unconditional order of adoption that the Ozment boys were ever legally adopted by J. Y. Mann. The Chancery Court dismissed the appellants' complaint; we find no error; and the decree is affirmed.

JOHNSON, J., dissents.

PAUL WARD, Associate Justice (dissenting). The majority affirm the case on the ground that no notice was given to appellees when appellants petitioned for the two *nunc pro tunc* orders. My reasons for disagreeing with the majority are as hereafter set out.

1. It was not necessary, in a proceeding of this type to give notice to appellees.

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[6] See also the following: Freeman on Judgments, 5th Ed. § 138, 49 C. J. S. page 255, "Judgments" § 121; 2 C. J. S. page 427, "Adoption of Children" § 40 (d); and annotation in 14 A. L. R. 2d 224 entitled: "Necessity of notice of application or intention to correct error in judgment entry."

[7] Mr. J. Y. Mann's widow departed this life in 1961.

The cases relied on by the majority are not in point. The case cited by the majority to show notice must be given is *Simpson* v. *Talbot,* 72 Ark. 185, 79 S. W. 761. This was a mortgage foreclosure suit. After the decree was entered and after the term of the court had elapsed, one party applied to the court to have the decree amended to speak the truth. No notice was given to the other party to the foreclosure suit. In a short opinion this Court said:

"The chancery court had the authority to amend the record of its decree at a subsequent term, so as to make it speak the truth, but it cannot do so without notice first given to the party *against whom it is made.*" (Emphasis added.)

It seems clear to me that the italicized words of the court meant *against the other party to the original suit.* Any doubt as to whom the court meant in using the above words was removed by this Court in the case of *Irby* v. *Drusch,* 216 Ark. 130, 224 S. W. 2d 366. In that case this Court, in referring to the *Simpson* case, *supra,* said:

"The court's order was therefore erroneous for notice must first be *given to parties to the original action when nunc pro tunc relief is sought. Simpson* v. *Talbot,* 72 Ark. 185, 79 S. W. 761; *Bridwell* v. *Davis,* 206 Ark. 445, 175 S. W. 2d 992." (Emphasis added.)

It is hardly necessary to point out that these appellees *were not parties* to the original adoption proceedings in Bradley County on October 10, 1898.

2. In order to sustain the result reached by the majority opinion it is necessary to overrule the case of *Grimes* v. *Jones,* 193 Ark. 858, 103 S. W. 2d 359, which they completely ignored and which is, to my knowledge, the only case in point. In that case Grimes contended:

"that the appellees, under the amended pleadings, would be allowed to introduce an order of the probate court amending, *nunc pro tunc,* the original order of adoption; that the amending order was made *without notice to appellant;* that the first order was void *ab initio* . . ." (Emphasis added.)

In spite of such contention we affirmed the trial court.

In this case there are strong equities in favor of appellants who stand to lose their inheritance because of no fault on their part but because of a doubtful technicality of the law applied by the majority. In a court of equity all doubts should be resolved to achieve equity—not to defeat equity.

JOHNSON, J., joins in this dissent.

GRIFFIN *v.* SOLOMON.

5-2844 362 S. W. 2d 707

Opinion delivered December 17, 1962.

A. M. Coates, for appellant.

David Solomon, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellants were cotenants with Arthur Cotton, Jr. He mortgaged the lands to the appellees; and the Chancery Court held that

such mortgage gave the appellees a lien on appellants' interests. This appeal challenges that decree.

On October 20, 1938 Arthur Cotton, Sr. made application to the State of Arkansas to receive a donation deed[1] to a tract of 80 acres in Phillips County, Arkansas, and hereinafter called "the land." Cotton, with his wife and five children moved on the land, complied with the requirements of the law, and received a deed from the State on February 19, 1941. In the application to the State in 1938, and in the deed from the State in 1941, the name of the applicant and grantee was "Arthur Cotton"; and it is clearly shown that the said Arthur Cotton was in 1938 a Negro man, 56 years of age,[2] and that he had a son named Arthur Cotton (hereinafter sometimes called "Arthur Cotton, Jr.")[3] who was twenty years of age in 1938. It is the identity of name of the father and son which misled the appellees and caused the confusion which resulted in this litigation. For clarity, we refer to these as "Arthur Cotton, Jr." and "Arthur Cotton, Sr."; although in all the conveyances herein mentioned the name of said party, either as grantor or grantee, was merely "Arthur Cotton."

The wife of Arthur Cotton, Sr. died in 1946; and Arthur Cotton, Sr. died on June 8, 1948, while occupying the land. He was survived by five children, being: (1) Arthur Cotton, Jr., a son; (2) Quincy Cotton, a son; (3) Elijah Cotton, a son; (4) Cora Cotton Griffin, a daughter; and (5) Elizabeth Cotton Snowden, a daughter. All of these five children are of full age; and the last named four are the appellants. After the death of his father, Arthur Cotton, Jr. returned from Michigan and occupied and farmed the lands. For a short time, his two brothers, Quincy and Elijah, were also on the land, but Quincy soon moved, and in 1950 Elijah also moved; so only Arthur Cotton, Jr. re-

[1] This was under the Act approved April 4, 1887—as amended—and contained in § 8636 *et seq.* Pope's Digest of 1937. The present statute is § 10-905 *et seq.* Ark. Stats., which contains the more recent Act No. 331 of 1939.

[2] The death certificate of Arthur Cotton, Sr. shows that he was born on May 8, 1882, and died on June 8, 1948.

[3] The testimony of Arthur Cotton, Jr. gives the date of his birth as November 2, 1918; and his marriage certificate in 1950 shows he was then 31 years of age.

mained on the land, occupying and farming it under a claimed agreement with his cotenants that he would maintain the improvements, and pay the taxes. At some irregular intervals he paid some of his cotenants amounts said to be rent.

While so occupying the lands, Arthur Cotton, Jr. (listing himself merely as "Arthur Cotton") joined with his wife, Annie Mae, executed the following instruments, each of which was duly recorded:

(1) On October 5, 1955 Arthur Cotton and wife executed a right-of-way deed to Beaver Bayou Drainage District, conveying a right-of-way over the lands.

(2) On June 21, 1955 Arthur Cotton and wife executed a deed of trust to L. K. Grauman to secure an indebtedness of $550.00, which was satisfied in 1956 from the proceeds of the next mentioned transaction.

(3) On January 11, 1956 Arthur Cotton and wife executed a deed of trust to the Helena National Bank to secure an indebtedness of $1,000.00, which was satisfied from the proceeds of the next mentioned transaction.

(4) On January 25, 1957 Arthur Cotton and wife executed a deed of trust to L. K. Grauman to secure an indebtedness of $1,182.90, which was satisfied in 1959 from the proceeds of the next mentioned transaction.

(5) On April 11, 1959 Arthur Cotton and wife executed a deed of trust to B. M. Solomon to secure an indebtedness of $2,000.00 and other advances; and this is the instrument that the appellees are seeking to foreclose.

In each of the instruments numbered 2 to 4 inclusive, Arthur Cotton and wife mortgaged the entire land and warranted the entire title to the grantee. Furthermore, Arthur Cotton obtained redemption deeds from tax sales and improvement delinquencies, either expressly or impliedly representing himself as the owner of the land. On January 14, 1961 B. M. Solomon *et al.*, the present appellees, filed this suit to foreclose the April 11, 1959 deed of trust, as above mentioned; and "Arthur Cotton and his

wife, Annie Mae Cotton,'' were listed as the only defendants. Their answer was that they owned only an undivided one-fifth interest in the land and that the other four-fifths interests were owned by his cotenants, being the appellants in this case. The appellants, Elijah Cotton, Quincy Cotton, Cora Cotton Griffin, and Elizabeth Cotton Snowden, intervened and claimed that each owned an undivided one-fifth interest in the land; that Arthur Cotton, their cotenant, only owned one-fifth interest and had no right to encumber any interest in the lands except his one-fifth interest. To this intervention, the appellees responded:

''If the intervenors are the owners of 4/5ths of the lands described, it is at least rather peculiar that they now assert their claim in a suit for a past due debt when Arthur Cotton and his wife have executed deeds of trust on such lands on four occasions and executed a perpetual right of way.

''Plaintiffs deny that the intervenors have any interest in such lands, but allege that if they have, then they are estopped from asserting such claim due to laches, negligence in the manner in which the land has been handled in that Arthur Cotton has been permitted by them to use the land as his own, and the intervenors knew, or should have known, that if they owned the interest in the land they have assisted and participated by their silence and failure to act in permitting Arthur Cotton and his wife to falsely and fraudulently procure loans in his and his wife's name on deeds of trust on such lands as if the lands were his own.''

Trial in the Chancery Court resulted in a decree in favor of the appellees, holding that the interest of each of the four appellants was subject to the lien and indebtedness claimed by the appellees; and this appeal is by appellants to reverse that decree.

A careful study has failed to reveal a sound basis on which to rest an affirmance of the Chancery decree. When Arthur Cotton, Sr. died intestate in 1948 as the owner of the lands, the title descended to his five children, who became cotenants (§ 50-411 Ark. Stats. and *Sanders* v. *San-*

ders, 145 Ark. 188, 224 S. W. 732). Mere lapse of time does not dissolve a cotenancy. *Hollaway* v. *Berenzen,* 208 Ark. 849, 188 S. W. 2d 298. Arthur Cotton, Jr. testified positively and unequivocally that he never held the land adversely to his cotenants. But even if his testimony should be disbelieved, nevertheless the appellees failed to show any acts by Arthur Cotton, Jr. which would amount to a disseizin of his cotenants. In *Hardin* v. *Tucker,* 176 Ark. 225, 3 S. W. 2d 11, we said:

"In *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958, it was held that, in order for the possession of a tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed. The reason is that the possession of one tenant in common is *prima facie* the possession of all, and the sole enjoyment of rents and profits by him does not necessarily amount to a disseizin. Hence, for the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such acts that notice may be presumed."

The fact that Arthur Cotton, Jr. encumbered the entire title in the instruments heretofore listed, did not *ipso facto* encumber the appellants' interests. *Friar* v. *Baldridge,* 91 Ark. 133, 120 S. W. 989. In *Garner* v. *Horne,* 219 Ark. 762, 245 S. W. 2d 229, in affirming the holding of the Trial Court that the interest of a nonsigning cotenant was not lost, we said:

"As to Mrs. Odum's one-fourth interest, little need be said. She did not agree to sell her interest to the Garners and did not sign any papers to them, and she disavowed any power of W. D. Horne to act for her. In the record in this case we cannot find facts sufficient to support any application of 'agency by estoppel', as urged by appellants; so we affirm as to Mrs. Odum's interest."

In their response to the intervention, the appellees claimed—as heretofore copied—that the appellants were guilty of negligence and laches, and also were barred by

estoppel; but we find no evidence or applicable rule of law or equity to support any of these pleas. As to negligence and laches, mere lapse of time does not dissolve a cotenancy *(Hollaway* v. *Berenzen, supra)*. It is not negligence for one cotenant to allow another cotenant to occupy the land; and that is the extent of the evidence against the appellants. Arthur Cotton, Jr. never surrendered possession to any third person so as to make applicable cases such as *Parsons* v. *Sharpe,* 102 Ark. 611, 145 S. W. 537. The case of *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958, is one involving cotenancy. The plaintiff, A. J. Singer, left Arkansas in 1878, and in 1895 his cotenants, assuming him to be dead, divided the land between themselves and executed partition deeds, which were recorded. When A. J. Singer sought to recover his interest in the land, the Trial Court instructed the jury that the partition deeds, *being recorded,* were notice to A. J. Singer that there were claims adverse to his interest. In holding such instruction to be erroneous this Court said:

"After the plaintiff's brother and sisters made partition of the land in 1895 and each one went into possession of his allotted share, they executed mutual deeds to each other. Some of these deeds were filed for record, and the court instructed the jury that placing the deeds in the recorder's office for record was notice to the plaintiff of the execution of the deeds. This was error. Both the plaintiff and the defendants, who are his brothers and sisters, derived title to the land as heirs of their deceased father. These partition deeds were not in the line of plaintiff's title, and he was not required to look for them. *Rosell* v. *Chicago Mill & Lumber Co.,* 76 Ark. 525; *Turman* v. *Sanford,* 69 Ark. 95."

The appellees, likewise, have failed to establish any estoppel. That Arthur Cotton, Jr. used the identity of names to deceive the appellees is rather clearly shown; but there is no evidence that the appellants knew of such deceit or in any way participated in it. Since the appellants did not know that Arthur Cotton, Jr. was encumbering the entire title, they cannot be held responsible for the fact that the appellees believed Arthur Cotton, Jr. to be the

owner. In *Pettit-Galloway Co.* v. *Womack,* 167 Ark. 356, 268 S. W. 353, we said:

"In other words, to constitute silence an estoppel, there must be both the opportunity and the duty to speak, and the action of the person asserting the estoppel must be the natural result of the silence, and the party maintaining silence must be in a situation to know that some one is relying thereon to his detriment."

It therefore follows that the decree of the Chancery Court is reversed and the cause is remanded, with directions to set aside the decree heretofore rendered and have further proceedings not inconsistent with this opinion. It is indicated in the record that some of the funds obtained from the various mortgages or deeds of trust executed by Arthur Cotton, Jr. were used to pay taxes and special assessments. By subrogation, the appellees may have a lien on the interests of the appellants in the lands for their proportionate amounts of such taxes and special assessments. If so desired, the appellees may establish such amounts in the Chancery Court. Aside from these items, the appellees have no lien on the interests of the appellants in the lands.

HARRISON *v.* MATTHEWS.

5-2818 362 S. W. 2d 704

Opinion delivered December 17, 1962.

[redacted]

McMath, Leatherman, Woods & Youngdahl, for appellant.

Mahony & Yocum, for appellee.

George Rose Smith, J. By Act 54 of 1961 our courts are authorized to enter personal judgment against a nonresident defendant who was domiciled in this state either at the time the cause of action arose or at the time he was served with process under the act. Service is had by sending a summons and a copy of the complaint to the nonresident defendant, by registered or certified mail. Ark. Stats. 1947, § 27-339. The question here is whether this new method of obtaining personal jurisdiction can be used with respect to a cause of action that arose before the act was passed.

This action was brought by the appellant Harrison to recover damages for personal injuries sustained by him when an oil derrick collapsed in Union County, Arkansas, on May 4, 1960. One of the defendants, the appellee Matthews, was domiciled in Arkansas when the accident happened, but he left the state before this suit was filed on June 7, 1961 (which was also the effective date of Act 54). Matthews was domiciled in Louisiana on January 12, 1962, when he was served by registered mail pursuant to the new act. This appeal is from an order quashing the service and dismissing the action against Matthews, upon the ground that Act 54 is not applicable to a case involving a cause of action that antedated the statute.

There can hardly be any serious question about the constitutionality of the act as it applies to causes of action arising after the statute went into effect. When a tort occurs in Arkansas, as it did here, this state has a sufficient connection with the controversy to justify basing jurisdiction upon domicile, and service by registered mail is a fair method of providing the defendant with notice and an opportunity to be heard. *Milliken* v. *Meyer,* 311 U. S. 457, 85 L. Ed. 278, 61 S. Ct. 339; *International Shoe*

Co. v. *Washington,* 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154; *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199; *Kelso* v. *Bush,* 191 Ark. 1044, 89 S. W. 2d 594; 15 Ark. L. Rev. 428.

The rule by which statutes are construed to operate prospectively does not ordinarily apply to procedural or remedial legislation. "The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should receive a more liberal construction, and should be given a retrospective effect whenever such seems to have been the intention of the Legislature." *State ex rel. Moose* v. *Kansas City & M. Ry. & B. Co.,* 117 Ark. 606, 174 S. W. 248. Upon this reasoning we held that the enactment of our venue act, restricting the venue in tort cases, required the dismissal of a case that was properly pending when the act took effect. *Fort Smith Gas Co.* v. *Kincannon,* 202 Ark. 216, 150 S. W. 2d 968.

Act 54 did not create new substantive rights. Whatever cause of action this appellant now has was already in being when the statute was adopted. Its only effect was to permit a plaintiff to obtain personal jurisdiction in the courts of this state over a nonresident defendant. The act is procedural in nature, merely providing in this instance a new forum for the enforcement of existing rights. Being procedural, the act applies to all cases filed after it became effective.

This is the view that has been taken in the only two states where the exact question has arisen. Under similar statutes in California and New Mexico the courts have held that the new procedure is available in cases involving causes of action that already existed when the acts went into effect. *Allen* v. *Superior Court,* 41 Calif. 2d 306, 259 P. 2d 905; *Owens* v. *Superior Court,* 52 Calif. 2d 822, 345 P. 2d 921; *Gray* v. *Armijo,* 70 N. M. 245, 372 P. 2d 821. We think these decisions to be sound, for, as the court observed in the *Owens* case, just cited, the "defendant has no vested

right to have the jurisdiction of the courts of this state limited as it was at the time he left the state."

The appellee relies principally upon *Gillioz* v. *Kincannon,* 213 Ark. 1010, 214 S. W. 2d 212. Domicile was not involved in that case. There Gillioz, a nonresident contractor, damaged the plaintiff's land in the course of engaging temporarily in business in Arkansas. After Gillioz had returned to his home in Missouri our legislature adopted an act which provided that any nonresident doing business in Arkansas would be deemed to have appointed the Secretary of State as his agent for service in cases arising from the business so done. Ark. Stats., § 27-340. We held that the statute did not operate retroactively to permit the plaintiff to obtain jurisdiction over Gillioz in Arkansas.

That decision is clearly distinguishable from the case at bar. The statute in the *Gillioz* case gave the nonresident visitor a choice, warning him that if he engaged in business in Arkansas he thereby appointed the Secretary of State as his agent for service and subjected himself to suit here. But the nonresident was free to avoid the risk of litigation in Arkansas simply by electing not to do business in the state. Gillioz had come and gone before the statute was enacted. Obviously it could not with justice have been applied to his prior visit, for such a retrospective construction would have deprived Gillioz of any choice in the matter, attaching to his Arkansas visit a significance that it did not have when it was made.

By contrast, the present case does not turn upon the defendant's freedom of choice. The appellee certainly did not choose to live in Arkansas from 1941 until 1960 simply because he knew that he could escape the state's personal jurisdiction by changing his domicile. Thus the reasoning upon which the *Gillioz* decision rested is not pertinent in the dispute now before us. There is no just basis for exempting this appellee from accountability in this state for a tort committed while he was domiciled here.

Reversed.

SPINK *v.* MOURTON.

5-2819 362 S. W. 2d 665

Opinion delivered December 17, 1962.

Ben Core, for appellant.

Nabors Shaw, Donald Poe, Dobbs, Pryor & Dobbs, for appellee.

GEORGE ROSE SMITH, J. This is an action by Paul W. Spink and his wife to recover damages from Malvin Mourton, an insurance agent at Mena, because of Mourton's allegedly negligent failure to obtain a personal property floater policy for the Spinks. The jury returned a verdict for Mourton. The Spinks then moved unsuccessfully for a judgment notwithstanding the verdict. They now contend that there is no substantial evidence to support the verdict and that the trial court should therefore have granted their motion for judgment *non obstante veredicto.*

The proof must be examined in detail. In July of 1959 Spink was notified by his insurer, Western Fire In-

surance Company, that the fire policy upon his home and the floater policy upon his household goods and personal effects were to be canceled on August 1. In an effort to obtain similar coverage elsewhere Spink discussed the matter with Mourton, a local soliciting agent, on the evening of July 27. Mourton assured Spink that he could write the fire policy, but he explained that he had never written a personal property floater and would have to make a call to Little Rock to find out about this coverage.

The next day, July 28, Mourton telephoned Lewis Johnson, the Little Rock manager for Farmers Union Mutual Insurance Company—one of several companies represented by Mourton. Johnson said that his company did not write personal property floaters, but he offered to pass the request on to E. W. Turner, whose agency, the Farmers' Insurors Agency, did write such policies. Mourton and Johnson discussed the premium charge for a floater policy and concluded that it would be about twelve dollars for each $1,000 of insurance.

Later that same morning, July 28, Spink came by Mourton's office. Mourton assured him that the matter had been taken care of, that he was covered as of noon on July 30. Mourton testified that in giving this assurance he relied upon Johnson's promise to submit the application to Turner. Mourton collected from Spink the premium for the proposed fire policy and the premium (as estimated by Mourton) for the personal property floater. That afternoon Mourton mailed to Johnson an application for the fire policy and a list of the personal property to be covered by the floater. The fire policy was issued in due course by Johnson's company, and Johnson forwarded the list of personal property to Turner, as he had promised to do.

Instead of writing a one-year floater policy Turner's agency issued only a ten-day binder, effective July 30, with Anchor Casualty Company as the insurer. The binder was enclosed in a letter that reached Mourton's office on August 4. The letter is not in the record, but the other evidence indicates that in the letter Turner asked for

additional information as a basis for writing the floater policy.

Mourton's office mail was customarily opened by his secretary, Jo Ann Cole. She read Turner's letter and told Mourton what it said, but she wholly failed to notice that the binder was to expire after ten days. Mourton, without reading either the letter or the binder, directed Miss Cole to send the binder back to Turner, along with the information that he wanted. In complying with these instructions Miss Cole sent Turner, for his information, the floater policy that Spink had formerly had with Western Fire.

In response to this communication Turner again wrote to Mourton, on August 9. He pointed out that the ten-day binder had expired. Assuming that the Western Fire floater policy was still in force, for he had never been informed of its cancellation, Turner again asked for more information as a basis for issuing the requested substitute policy upon some future date.

At about daybreak on August 10 Mourton left with his family for a short vacation in Colorado; so he was not in his office when Turner's letter arrived. Miss Cole opened the letter but took no action toward replacing the lapsed coverage. The Spinks' home and household effects were destroyed by fire on August 13. When Mourton returned to his office on August 15 he forwarded to Turner a check for the premium upon the proposed floater policy, but Turner disclaimed liability and refused the tender. The Spinks recovered their real property loss from Johnson's company, which had issued the fire policy, but they eventually learned that no insurer had issued a personal property floater. The present action was brought to hold Mourton liable for negligence in failing to obtain such a policy.

The verdict was in favor of Mourton. Now it is true that the trial judge might have granted a new trial if he found the verdict to be against the preponderance of the evidence. *Bockman* v. *World Ins. Co.*, 222 Ark. 877, 263 S. W. 2d 486. But this case does not involve a motion for a

new trial; instead, the request was for a judgment notwithstanding the verdict. Such a motion may be granted if there is no substantial evidence to support the verdict. *Stanton* v. *Ark. Democrat Co.,* 194 Ark. 135, 106 S. W. 2d 584. In other words, as counsel for the Spinks rightly concedes in his brief, the motion for judgment n.o.v. was properly denied unless it can be said that the trial court should have directed a verdict in favor of the plaintiffs. That is the issue.

Owing to the fact that the plaintiff has the burden of proof—that is, the burden of persuading the jury that he is entitled to win the case — a directed verdict for the plaintiff is a rarity. As we said in *Woodmen of the World Life Ins. Soc.* v. *Reese,* 206 Ark. 530, 176 S. W. 2d 708: "A verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, unless such fact is admitted, or is established by the undisputed testimony of one or more disinterested witnesses and different minds cannot reasonably draw different conclusions from such testimony."

The problem is especially acute in negligence cases, for the standard of care — that of a reasonably careful person—is apt in almost every case to become an issue of fact for the jury. In one of the few cases that have discussed this exact point the Court of Appeals for our circuit had this to say: "Negligence and proximate cause will become transformed from questions of fact into questions of law rather on probative deficiency than on probative abundance. Thus, no matter how strong the evidence of a party, who has the burden of establishing negligence and proximate cause as facts, may comparatively seem to be, he is not entitled to have those facts declared to have reality as a matter of law, unless there is utterly no rational basis in the situation, testimonially, circumstantially, or inferentially, for a jury to believe otherwise." *United States Fire Ins. Co.* v. *Milner Hotels,* 8th Cir., 253 F. 2d 542.

Testing the case by our language in the *Reese* case, *supra,* we cannot declare that the trial court should have

directed a verdict for the Spinks unless we are prepared to announce that no reasonable person could draw any conclusion from the proof except that Mourton was negligent in failing to obtain the floater coverage. It seems plain that the proof is not so completely one-sided as that. The jury may have thought that Mourton acted with reasonable care in assuming that Johnson would see that the policy was issued by Turner's agency. Or that Mourton acted with reasonable care in relying upon his secretary's understanding of the pivotal letter from Turner. Or that Mourton, had he read the letter and binder himself, might in the exercise of due care have overlooked the single line of type giving the expiration date of the binder. Or that Mourton's absence on vacation when Turner's second letter arrived, at a time when it was still not too late to obtain coverage, was an excusable misfortune rather than culpable negligence. All these questions involve niceties of judgment, matters of degree, about which we cannot say that all fair-minded men must necessarily arrive at the same conclusion. Hence a question of fact was presented; so the motion for judgment notwithstanding the verdict was properly denied.

There is one other issue. The appellants also sought to recover from Farmers Union Mutual Insurance Company, Turner, Farmers' Insurors Agency, and Anchor Casualty Company, upon the theory that each of these defendants was under a duty to notify the Spinks personally that the ten-day binder was to expire on August 9. Upon this issue the trial court directed a verdict in favor of the defendants.

The court's action was correct. There is no suggestion that any of these defendants had any direct communication with the Spinks before the loss occurred. They dealt only with Mourton, the local soliciting agent. As a matter of common knowledge we know this to be the usual practice in the insurance business. There is literally no proof whatever to support the contention that these defendants were under an obligation to inform the Spinks of the expiration date that appeared on the binder sent to Mourton.

To have submitted that issue to the jury would have empowered that body to impose liability upon the basis of speculation and conjecture rather than upon the basis of any evidence in the record. Hence the directed verdict was proper.

Affirmed.

[redacted]

BOOKOUT *v.* HANSHAW.

5-2849 363 S. W. 2d 125

Opinion delivered December 17, 1962.

[redacted]

Ward & Lady, for appellant.

Jack Lessenberry and *Dennis W. Horton,* for appellee.

PAUL WARD, Associate Justice. Appellant, Bill Bookout, sued appellee, Victor Hanshaw, for $6,000 actual damages and $6,000 punitive damages based on an alleged "unwarranted, illegal, malicious, and violent assault". From a jury verdict in favor of appellee appellant, setting out several alleged errors, prosecutes this appeal. Briefly stated the situation giving rise to the alleged assault developed as presently set out.

On March 10, 1961, Hanshaw, a member of the State Police, along with other such members, set up a so-called road block at the junction of Highways No. 1 and No. 90 near Rector (Clay County) for the purpose of checking automobile licenses, drivers' licenses, and automobile mechanical defects such as lights, brakes, etc. Viewing the testimony in the light most favorable to sustain the verdict, the jury could have found: The latter part of February, 1961, (about ten days before this incident) appellee saw appellant driving a car with a 1960 license, but no ticket was given; Appellant appeared to resent being accosted, stated that he usually carried a gun and that he was a rough character. When appellant approached the road block on March 10, 1961, appellee, in the course of his duty, informed appellant that the tail light on his car was not burning. Appellant got out of his car to look, found appellee was right, and then got back in his car. At this point appellee asked to see appellant's driver's license, explaining that he needed the information to fill out a warning ticket; at first appellant refused, saying, "I don't have to give these to you, I am afraid you will tear them up or won't give them back". When appellee told him he would be in violation of the law if he refused, he handed over the license; After the warning ticket was made out and given to appellant, he threatened appellee telling him he would definitely take care of him later and started to drive off. Thereupon, appellee told appellant to get out of the car but he refused; when appellant refused the second time appellee opened the door of the car and took appellant by his left arm; appellant made two lunges to free himself, and appellee used only the necessary force to remove or help appellant from the car. Ap-

pellee stated: "What it amounted to, I more or less helped him from the car".

Although there is a conflict in the evidence as to just what happened when appellant got out of the car, appellee said "No blows were struck", and other witnesses corroborated this statement. Anyway, appellant got back in his car and drove away. Appellee further testified: "I removed Mr. Bookout from the vehicle with the intent to arrest him and to determine whether or not he was carrying a weapon".

1. We find no merit in appellant's contention the court erred in not striking appellee's amendment to his answer. Appellee's original answer amounted to a general denial. Later, five days before the trial, he filed an amendment, stating, in effect, that appellant was hostile during the investigation, and had previously threatened his life; He only took precautionary measures to ascertain the nature of said threats; He acted at all times in a lawful, prudent and reasonable manner. Appellant admits the trial court had broad discretion, but says it abused its discretion by refusing to strike the amendment to the answer. This contention seems to be based on the fact that the amendment was filed only five days before the trial, but appellant did not plead surprise or ask for a delay of the trial to make further preparation.

2. Neither do we find any error in the court's refusal to instruct a verdict as to appellee's liability. Appellant asked for this instruction on the ground appellee "admitted that he did commit an assault and battery upon plaintiff Bookout and no justification for that act has been shown".

The above contention by appellant amounts to challenging the sufficiency of the evidence to support the jury's verdict. In support appellant cites the case of *Orr* v. *Walker,* 228 Ark. 868, 310 S. W. 2d 808. In that case we affirmed a judgment for Walker against Orr, a Little Rock policeman. But in doing so we set out the testimony, and then we said it was "sufficient to sustain a verdict". The

cited case merely holds that a jury question was raised by the testimony, as is true in this case.

It is insisted that "mere words never justify an assault", citing *Bergdorf* v. *Chandler,* 220 Ark. 727, 249 S. W. 2d 562. That case, however, is distinguished from this case on the facts. Here, there was more than words—there is testimony of threats and resistance to an officer to deter him in the performance of his lawful duty. No officer was involved in the cited case. Therefore, it was for the jury to say whether appellee was justified in doing whatever (the jury found) he did do to appellant. It cannot be said that the testimony was undisputed on that point, as has been pointed out.

Under this same point appellant says it was error for the court to give Instruction No. 3, to-wit:

"You are instructed that if you find from the evidence that defendant acted in investigating the threat of the plaintiff, if any, and acted justifiably and took plaintiff in his custody and used only such force as was necessary and reasonable at the time to put plaintiff under control and custody, then you are instructed to find for the defendant."

Appellant makes no argument and cites no authority to show the above instruction is wrong. He apparently takes the position that there is no evidence to support it. What we have already set out concerning what took place refutes that position. It was for the jury to say whether appellee used more force than was "necessary and reasonable". We find that the instruction was properly given.

3. The trial court refused appellant's requested instruction which reads:

"You are instructed that the defendant Hanshaw had no right to place plaintiff Bookout under arrest or place his hands in any manner upon any part of the person of the plaintiff Bookout without first informing plaintiff Bookout that he was about to be arrested and stating the offense for which he was to be arrested."

To justify the above instruction appellant relies on Ark. Stats. § 43-416 and the decision in *Minton* v. *State,* 198 Ark. 875, 131 S. W. 2d 948. The section of the statute mentioned says, in effect, that the officer making an arrest shall tell the person (about to be arrested) he is going to arrest him and also the reason for doing so. We think appellant has misconstrued the statute as it applies to the facts of this case. This is a case where appellee tried to arrest the appellant for an offense committed in his presence. The facts here (as the jury could have found) are that the trouble resulted from appellant's resistance to and interference with an officer in the discharge of his duty. This being true, we think the *Minton* case, *supra,* supports appellee rather than appellant. In that case this Court, in construing the above statute said: "But this statute has no application when the offense is committed in the presence of the officer . . ."

We see no error in refusing to give the instruction in this case.

4. Appellant requested the court to give his Instruction No. 3. We set out only the first portion:

"You are instructed that every man is the sole custodian of his person. No one—*not even an officer of the law*—has the right, etc. . . ." (Emphasis added.)

The court gave the requested instruction after deleting the words emphasized above. This was not error because the court had no right to emphasize the rights and duties of an officer of the law as a distinct class of persons.

5. Finally it is insisted the court erred in instructing the jury it might consider appellant's reputation as a violent and turbulent person. Considering the court's entire instruction on this point, we find no error. It reads as follows:

"Evidence has been introduced as to the character of the plaintiff tending to show that he is a violent and turbulent person. On the other hand, evidence has been given to show the general reputation of defendant for peace and quietude. Such evidence, if any, is not admitted to justify the defendant's action, but may be considered by the jury

for the sole purpose of determining who was the probable aggressor."

First, it is noted that appellant does not base his objection to the instruction on the ground there is no substantial evidence to show he was a "violent and turbulent person" or to show appellee was a quiet peaceable man. His objection appears to be based on the general rule of law, "that the reputation of a plaintiff for turbulence or peacefulness in an action for assault and battery is not admissible for any purpose." The only authority cited by appellant to sustain his view is 6 C.J.S., *Assault and Battery,* § 41, P. 859. It is true that under said section, sub-section (a) the general rule is announced as stated. However, in the same paragraph an exception to the general rule is stated. Such exception is where the reputation of the parties is "placed in issue by the nature of the proceeding itself, as where there is a dispute as to who was the aggressor." The exception to the rule was also recognized and sustained in the case of *Bartlett* v. *Vanover*, 260 Ky. 839, 86 S. W. 2d 1020. In that case appellee assaulted appellant who sued for damages. Evidence (as to the reputation of each party) was offered and the court held it was proper for the purpose of showing who was the aggressor. In 4 Am. Jur. *Assault and Battery* § 172, in speaking of character evidence, there appears the following statement:

"The law recognizes the fact that in human experience, the known reputation or character of an assailant as to violence and turbulence has a very material bearing on the degree and nature of the apprehension of danger by the person assaulted, and also that one who is turbulent and violent may the more readily provoke or assume the aggressive in an encounter."

In this connection we also point out that the court's instruction did not mention the *reputation* of appellant. Appellee was not influenced by what he knew of appellant's *reputation* but by what he *knew* about appellant's violent and turbulent disposition.

Therefore, under the facts and circumstances of this case as previously set out, we think the instruction was both proper and appropriate. When appellee was threatened by appellant after the trouble over the driver's license, that threat alone might or might not have justified appellee in attempting to get appellant out of the car to search or arrest him. Therefore, it was proper for the jury to know they could consider appellant's violent disposition so they could correctly determine whether appellee used more force than was necessary in discharging his duty as an officer.

Finding no error, the judgment of the trial court is affirmed.

Affirmed.

HARRIS, C. J., not participating.

MCFADDIN AND JOHNSON, JJ., dissent.

ED. F. MCFADDIN, Associate Justice (Dissenting). I dissent from the affirmance because I am convinced that the Trial Court committed reversible error in giving Instruction No. 4, as requested by the defendant. This instruction reads:

"Evidence has been introduced as to the character of the plaintiff tending to show that he is a violent and turbulent person. On the other hand, evidence has been given to show the general reputation of defendant for peace and quietude. Such evidence, if any, is not admitted to justify the defendant's actions, but may be considered by the jury for the sole purpose of determining who was the probable aggressor."

Hanshaw, a State Policeman, stopped Bookout at a roadblock and informed him that the tail light of his car was not burning. Bookout emerged from his car, looked, and found that Hanshaw was right, and reentered the car. Then Hanshaw wanted to see Bookout's driver's license; and finally Bookout showed him the license. All this time Bookout was seated in his car, ready to drive away; and

when Hanshaw gave Bookout a warning ticket, Bookout, while still seated in his car, told Hanshaw that he would see him later, and started to drive away. It makes no difference what Bookout said to Hanshaw as he was about to drive away, because *words* do not justify an assault (*Burgdorf* v. *Chandler,* 220 Ark. 727, 249 S. W. 2d 562).

Hanshaw grabbed Bookout and pulled him out of the car, and thereby committed an assault on Bookout. What caused the assault? Something that Bookout said to Hanshaw; but we have held that mere words never justify an assault. So, under such holding, Hanshaw was not justified in assaulting Bookout; and any seizing of the person of another is an assault. The Court instructed the jury, without objection of Hanshaw, as follows:

"You are instructed that Officer Hanshaw, the defendant, has admitted that he did commit an assault and battery upon plaintiff Bookout and if you find from a preponderance of the evidence that no justification for that act has been shown then your verdict will be for the plaintiff, Bill Bookout; and you may fix his compensatory damages at such sum as you find from a preponderance of the evidence will fairly compensate him for physical pain, medical expenses, humiliation, disgrace, and damage to his reputation."

Thus, the Court told the jury that Hanshaw had admitted an assault and battery upon Bookout; and to the instruction Hanshaw raises no complaint.

With an unjustified assault committed on Bookout by Hanshaw (in grabbing Bookout out of his car), it was erroneous for the Court to then tell the jury that the reputation of Bookout and Hanshaw might be considered on the question of "who was the probable aggressor": that is the language of the Instruction No. 4. It had already been established and admitted that Hanshaw was the aggressor; and so the Instruction No. 4 should never have been given; and I submit that the case should be reversed for error in giving that instruction. It is clear that Hanshaw was the aggressor and committed an unjustified assault and battery on Bookout.

JOHNSON, J. joins in this dissent.

SMITH *v.* SMITH.

5-2857 362 S. W. 2d 719

Opinion delivered December 17, 1962.

[redacted]

G. S. Snuggs, for appellant.

Thomas D. Wynne, Jr. and *Frank W. Wynne,* for appellee.

PAUL WARD, Associate Justice. The issues to be decided on this appeal emanate from an attempt to partition land in which appellant (a minor) held an undivided one-half interest in fee and appellee held a dower interest. One Henderson Smith was the owner of the land at the time of his death in 1942. Appellant is his grandson and appellee is his widow. Appellant is eighteen years old and has at all pertinent times been represented by a guardian who is his mother.

Stripped of the maze of pleadings and legal maneuvers, the real issues to be decided are as hereafter set out.

One. Appellant contends the widow, having only a lifetime interest, could not maintain the partition suit she filed herein. This contention is based upon our holding in

the case of *Monroe* v. *Monroe,* 226 Ark. 805, 294 S. W. 2d 338, decided October 22, 1956, and *Krickerberg* v. *Hoff,* 201 Ark. 63, 143 S. W. 2d 560. However, the law in this respect was changed by Act 324 of 1957. Section 1 of that act (presently found in Ark. Stats. § 34-1801) specifically includes "Any persons having any interest and desiring a division of land held . . . as assigned or unassigned dower" among those who can petition the circuit or chancery court for partition of land.

Two. Appellant insisted in the trial court and insists here that no summons was served on him individually but only on his guardian. We see no merit in this contention for several reasons. Ark. Stats. § 34-1803 gives the guardian of an infant the right to appear and defend for him. This section appears in the Civil Code as § 540 along with other sections dealing with partition of land. The record in this case also shows that appellant appeared and asked for (and received) affirmative relief against appellee on the ground she had committed waste. Appellant, having made himself a party to the litigation, could not complain of lack of service on himself. *Evans* v. *Davis,* 146 Ark. 595, 226 S. W. 520.

Three. In addition to what has already been said there is still another over-all reason why we must affirm the decree of the trial court. The partition decree was entered on April 15, 1961, and no notice of appeal was filed within thirty days as required by statute (Ark. Stats. § 27-2106.1). A decree partitioning land is a final decree from which an appeal could have been prosecuted. See: *Branstetter* v. *Branstetter,* 130 Ark. 301, 197 S. W. 688.

Appellant has also attempted to appeal from the order of confirmation entered on January 16, 1962, but his only assignment of error is that he was not served with notice. The record discloses, however, that he was personally served with notice on December 23, 1961 that the confirmation hearing would be on January 16, 1962. Moreover, the notice of appeal from that order was filed 37 days after it was entered.

No error appearing, the decree of the trial court is affirmed.

Affirmed.

McFaddin, J., not participating.

McMillan, *Trustee v.* Powell.

5-2839 362 S. W. 2d 721

Opinion delivered December 17, 1962.

McMillan & McMillan, J. Bruce Streett, W. H. Kitchens, for appellant.

Harry Crumpler and *Lamar Smead,* for appellee.

Sam Robinson, Associate Justice. On August 11, 1958, Delbert Powell filed this action alleging that he and Al and Alice Grandbush are owners as tenants in common, along with others, in three separate leasehold estates producing oil and gas; that in the course of operations, Powell had expended large sums of money; that the Grandbush's proportionate part of the expense of such operations

amounts to the sum of $21,912.93. It was further alleged that Monsanto Chemical Company is the purchaser of the oil and gas produced on the properties. Powell asked that such company be required to pay to him the oil and gas runs going to the credit of the Grandbushs until the alleged indebtedness is paid in full.

Later, H. W. McMillan was made a party. It developed that Mr. McMillan had obtained a judgment against Grandbush on June 4, 1958, execution was issued June 7, 1958, and levied July 10, 1958. This was a month or so prior to the time Powell filed this suit.

McMillan bought the Grandbush interest at the execution sale, and now the only controversy is between Powell and McMillan. Powell contends that he has a right to be reimbursed for money spent in the operation of any and all of the leases out of oil and gas produced on any one of the leases. On the other hand, McMillan maintains that Powell is entitled to be reimbursed for money spent in the operation of a lease only from the sale of oil and gas produced from that particular lease. The Chancellor held that Powell should be reimbursed in full from the sale of oil and gas from any or all of the leases. McMillan has appealed.

The three leases involved are known as the Reynolds Berg Lease, the Laney Lease, and Reynolds Brothers Lease. Appellee states his position as follows: "Obviously the appellee seeks to recover the money expended by him in the maintenance and improvement of such property from the three leases herein involved for the reason that the well upon the Reynolds Brothers Lease was nonproductive and he would never recover the money expended by him in the improvements without recovering the runs from the three leases."

The appellee recognizes the rule that, to quote appellee, "The rights of contribution of tenants in common who make repairs and improvements upon common property without the consent of the other tenants is not ordinarily entitled to contributions beyond the benefits actually recovered from such property or particular

lease.'' But appellee contends that in the case at bar, the rule has no application because the improvements were made with the consent of the then owner, Grandbush. It appears that the only consent given by Grandbush was in 1957 when he agreed to drilling, completing and equipping ''a well on the Reynolds Brothers Lease,'' which resulted in a dry hole.

The leases are not worked as one operation. Separate records were kept on the operation of each lease. Moreover, the owners of the three leases are not identical. This case is controlled by *Ashland Oil and Refining Co.* v. *Bond,* 222 Ark. 696, 263 S. W. 2d 74. There, it was pointed out that ''when one tenant in common has drilled a producing oil well upon the common property he must be given credit for his reasonable expenses upon being required to account to the cotenant for the oil withdrawn from the land.'' But that the share of the proceeds from all wells owned by co-lessees could not be applied against the expenses of reworking just one of the wells. It was further pointed out in the Ashland case that in the absence of an agreement, the operator incurred the expenses of reworking a well at his own risk and was entitled to be reimbursed by a co-lessee only to the extent of the value of the co-lessee's share produced from such well, if any.

Reversed with instructions to enter a decree not inconsistent herewith.

CLEMENT *v.* DAVIS.

5-2851 362 S. W. 2d 706

Opinion delivered December 17, 1962.

Levine & Williams, for appellant.

W. Lee Tucker, for appellee.

SAM ROBINSON, Associate Justice. The only issue involved in this appeal is the validity of eight write-in votes cast for appellee, Homer J. Davis, in an election of School Board Directors wherein appellant, Lavone Clement and Davis were opponents. Appellant contends that the votes are invalid because an X was not placed in the square at the end of the name written in. The trial court held that the write-in votes for Davis are valid, and Clement has appealed.

Ark. Stats. 3-826 provides: "In all elections, except Primary Elections, at the bottom of each list of names for each position or office appearing on the ballot there shall be a blank line, or lines, for possible write-in votes for that position or office. There shall be no write-in votes in Primary Elections." In this section there is nothing said about putting a square at the end of the blank line in which an X could be marked.

Ark. Stats. 3-827 provides: "At the right of the name of each candidate and on the same line there shall be a square. Above each Act, Amendment, or Measure to be voted on there shall be two [2] words 'For' and 'Against'—one above the other with a square to the right of each word and on the same line." This section provides for a square at the end of the name of each candidate. This means the name printed on the ballot and has no application to the name written in by a voter. This is the only reasonable construction to be placed on the statutes.

To hold that a voter must put an X in a square at the end of a name written in would be to say that a voter might take the trouble to go to the polls, obtain a ballot, write in a name that did not appear on the ballot, and then vote for someone else. It cannot be said that the lawmakers anticipated such unreasonable conduct on the part of anyone. In *Brannon* v. *Perkey,* 31 S. E. 2d 898, the Court held

that it was not necessary to put an X in the box at the end of a name written in. There the Court said: "The statutory provision just quoted is a legislative recognition of the right of a voter to select some person other than those nominated for office and whose name is not printed on the ballot. It is unnecessary to the validity of a vote cast that a cross mark appear in the space to the left of the name so written."

Affirmed.

LAMAN, MAYOR *v.* MARTIN.

5-2850 362 S. W. 2d 711

Opinion delivered December 17, 1962.

Glenn C. Zimmerman and *William G. Fleming,* for appellant.

Warren & Bullion, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises out of an action for declaratory judgment. Appellees, Billy Martin and others, who were dismissed from their

jobs with the North Little Rock Electric Department, brought this suit for declaratory judgment and mandatory injunction against appellants, Laman as Mayor of North Little Rock and Jarvis as manager of the North Little Rock Electric Department, seeking a declaration that appellees are entitled to the rights, remedies and protection of municipal civil service under Act 339 of 1939, and therefore entitled to job re-instatement and back pay. Appellants demurred, stating that they were not proper parties defendant, and answered denying, *inter alia,* that Act 339 of 1939 applied to the City of North Little Rock, and urged the unconstitutionality of the act.

The trial court found that Act 339 of 1939 was valid and constitutional; that those employees of the City of North Little Rock who are covered by the terms of Act 339 of 1939 are entitled to the protective coverage of that statute; that appellees were entitled to a hearing before the North Little Rock Civil Service Commission to determine the propriety of their discharge under Act 339; that the court had no jurisdiction to grant a money judgment for past wages; and that the judgment was without prejudice to appellees to secure further relief in the court in the event that the Civil Service Commission refused to grant them a hearing. From this decree comes this appeal.

Appellants' first point urged for reversal is: "Appellants are not proper parties to defend this suit for declaratory judgment."

At the hearing, appellants asked for a ruling on their demurrer, but the trial court stated that it would withhold the ruling until the record was made. Thereafter, a memorandum opinion was filed by the court, which did not rule on the demurrer. Appellants filed a motion for specific ruling on their demurrer, prior to entry of the final decree, but the record does not reflect any ruling by the trial court. To reiterate, the demurrer simply stated that "Defendants are not proper parties defendant to defend this action."

Act 274 of 1953, as amended, is our declaratory judgment statute. Section 10 of that act (Ark. Stats. § 34-2510) is as follows:

"Parties.—When the declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard."

This court set out the requisites for a proper suit under the declaratory judgment act in *Andres* v. *First Ark. Development Finance Corp.*, 230 Ark. 594, 324 S. W. 2d 97:

"Our declaratory judgment act (§ 34-2501 *et seq.* Ark. Stats.) was not intended to allow *any* question to be presented by *any* person: the matters must be justiciable. In Anderson on 'Declaratory Judgments' 2d Ed. § 187, the general rule is stated as to declaratory judgments:

. . . " 'The requisite precedent facts or conditions, which the courts generally hold must exist in order that declaratory relief may be obtained, may be summarized as follows: (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; in other words, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.'

"In the same authority in § 221 at page 488 the rule is stated:

" 'The Declaratory Judgment Statute is applicable only where there is a present actual controversy, and all interested persons are made parties, and only where justiciable issues are presented.' "

In an action instituted against a school district and its directors relative to location of a school building, in *Johnson* v. *Robbins,* 223 Ark. 150, 264 S. W. 2d 640, we held, in part, as follows:

. . . "And second, all necessary parties have not been brought into court. The Act requires that all persons 'shall be made parties' who have any interest which would be affected by the declaration. Ark. Stats. § 34-2510 [*supra*]. Elsewhere the court have very sensibly stressed the importance of this requirement, for it is evident that no controversy would be terminated by an adjudication not binding upon everyone concerned. *Updike Inv. Co.* v. *Employers' Liability Assur. Corp.,* 128 Neb. 295, 258 N. W. 470; *Kilroy* v. *O'Connor,* 324 Mass. 238, 85 N. E. 2d 441. A declaratory decree in this case would not bind the County Board of Education, which, though not a party hereto, is required to approve whatever school site is chosen. It follows that a decree would not end the dispute, since the County Board would still be entitled to an opportunity to be heard on the question. We need not now go so far as to say, as some courts have, that the presence of all necessary parties is jurisdictional; for in any event we regard the defect as sufficiently fundamental to be reached by demurrer."

In the case at bar, only the Mayor and the manager of the City electric department were made parties. Appellees seek to establish the validity of a municipal ordinance (the civil service ordinance). This being true, then the clear wording of Ark. Stats. § 34-2510, *supra,* makes the City of North Little Rock a necessary party. Under the Act here in question and the declaration sought, the City Council of North Little Rock as well as the Civil Service Commission of North Little Rock would be proper parties. Further following the wording of the statute, *supra,* because Act 339 of 1939 was alleged to be un-

constitutional by appellants, a copy of the proceeding was required to be served on the Attorney General, who is entitled to be heard in such matters. It follows, therefore, since all parties who have an interest which would be affected by the declaration have not been made parties to the action, and as stated in *Johnson* v. *Robbins, supra,* "that no controversy would be terminated by an adjudication not binding on everyone concerned", the decree is reversed.

LEVINE, ADM'R *v.* NEWLANDER.

5-2852 362 S. W. 2d 698

Opinion delivered December 17, 1962.

Levine & Williams, for appellant.

Brockman & Brockman, for appellee.

JIM JOHNSON, Associate Justice. The issues involved in this appeal are the construction of a clause in a deed and whether there was an effective gift.

On April 1, 1957, Mrs. Maggie J. Ksir executed a deed retaining a vendor's lien to secure the $21,000 unpaid balance of the purchase money, evidenced by a promissory note bearing 4% interest payable in monthly installments of $130 each, commencing May 1, 1957, and

continuing until the principal and interest were paid in full. The deed was duly recorded in Jefferson County. The grantees of the deed, John and Mary Ann Walker, were not related to the grantor or to the niece and nephew mentioned in the deed. In addition to the customary terms used in a deed and in addition to the retention of the vendor's lien, the following language was set forth:

"At the time of the death of the Grantor, if any portion of the balance of the purchase money note and interest remains unpaid, the Grantees are hereby authorized to make such payments of the balance of said unpaid purchase money note and interest to Joe Ksir, 3010 East Ballard Street, Roswell, New Mexico, and Ethel Newlander, 422 Carlisle Avenue, Albuquerque, New Mexico.

"The Grantor herein transfers said balance and interest to said nephew and niece above named, and they to receive said balance and to acknowledge satisfaction of the full payment when made and release said lien herein retained upon the records of Jefferson County, Arkansas; and they, Joe Ksir and Ethel Newlander, to become the owners of said balance, share and share alike; and in case of default, may foreclose on said lands for any balance due."

Joe Ksir and Ethel Newlander, appellees here, were the nephew and niece of the deceased husband of Mrs. Maggie Ksir. They were not apprised of Mrs. Ksir's action until after her death when they received a letter of notification from the personal representative of her estate. At Mrs. Ksir's death, there was a balance due on the purchase money note of $17,000. The personal representative refused to give the note to appellees, holding it to be an asset of the estate. Appellees filed a petition in the probate court seeking to require delivery of the note in accordance with the terms of the deed, together with the money collected by the administrator.

The administrator, appellant here, answered, contending that the alleged transfer or gift of the balance of the debt accruing after Mrs. Ksir's death was ineffectual and void, because (1) there was no contractual relation-

ship between the parties, nor were there present in the transaction any of the essential elements to constitute it an *inter vivos* gift; and (2) as a testamentary bequest, it was devoid of any of the formalities made prerequisite under our statutes relating to wills.

The Chancellor ruled that the alleged gift was an effective gift at the date of the deed, not a gift of a future interest contingent upon the death of Mrs. Ksir. He concluded his opinion by finding that: "It would be impossible to deliver in 1957 when a gift was made, the balance of the note due at the time of the death of the donor for there was no way of knowing when the donor's demise would occur. The language contained in the deed to one who is a stranger both to donor and donees shows convincingly and clearly that Maggie J. Ksir intended to make a gift to a nephew and niece named therein. The effect of this language was to constitute the grantees in the deed as the trustees of the donees for the purpose of making the gift effective."

For reversal, appellant relies upon two points: (1) the provisions in the deed did not constitute a valid *inter vivos* gift to appellees; and (2) the attempted gift was merely a void testamentary gesture lacking the formalities of a will.

The fact situation here is strikingly similar to *Coley* v. *English,* 235 Ark. 215, 357 S. W. 2d 529, decided a few weeks after the decree in the instant case. In the Coley case, Mrs. Ann H. T. Coley contracted to sell some real property in 1957. In the contract was the following provision:

"It is further mutually agreed between the Parties, Seller and Purchasers, in the event the said Seller, A. H. T. Coley, shall depart this life before the entire purchase price shall have been paid, as herein agreed, the contract shall continue in force provided all its conditions have been promptly met by the said Purchasers, and all subsequent payments, which would and should have been paid to A. H. T. Coley, Seller, had she lived, will be paid to her

husband's nephew, Walter Lee Coley, who at the time of the making of this contract, lives in Dayton, Ohio."

This contract was in full force and effect in 1960 when Mrs. Coley died testate. Her will was admitted to probate and Walter L. Coley, the same person named in the contract above, was appointed executor. The purchasers asked for and were granted specific performance of the contract. The probate court directed Walter Coley, as executor, to convey the lands to the purchasers pursuant to the contract. The balance owing on the property, $7,000, was paid into the registry of the court. The court thereafter ordered the $7,000 paid to Walter Coley as executor, to be distributed to the residuary legatees named in Mrs. Coley's will. Walter Coley appealed from this order in his individual capacity, contending that he was a third party beneficiary and claiming the $7,000 as a gift under the contract.

This court has held that the conditions which must exist in order to constitute a valid *inter vivos* gift are: (1) the donor must be of sound mind; (2) must actually deliver the property to the donee; (3) donor must intend to pass title immediately, retaining no future control of the subject matter; and (4) the donee must accept the gift. *Tucker* v. *Peacock,* 216 Ark. 598, 227 S. W. 2d 929; *Carlson* v. *Carlson,* 224 Ark. 284, 273 S. W. 2d 542.

In the *Coley* case, this court held:

"In the case before us now, the promisee [Mrs. Coley] retained full control over the contract and, had she lived, she would have been the sole beneficiary or recipient of the full consideration due on the contract. At no point does appellant show an actual or constructive intent on the part of the promisee to relinquish such control of the contract as would cause a presumption that appellant was entitled to anything until the promisee's death. The terms of the contract clearly stated that appellant was to receive nothing until the death of Ann H. T. Coley, and then only such amount (if any) as might be remaining due on the contract. This provision of the contract clearly shows an intent on the part of Ann H. T. Coley to make a testamentary disposition of property

contrary to the solemn requirements of a will. From the clear language of the contract there is no inference of an intent on the part of Ann H. T. Coley to convey a present interest in the contract to appellant as would constitute a valid gift *inter vivos*. See *Baugh* v. *Howze,* 211 Ark. 222, 199 S. W. 2d 940."

Despite the very able brief of counsel for appellees, and the Chancellor's fine opinion, we are unable to distinguish the case at bar from the *Coley* case, and we must, therefore, reverse.

SAVAGE *v.* SPICER.

5-2815 362 S. W. 2d 668

Opinion delivered December 17, 1962.

Bernard Whetstone, for appellant.

Brown & Compton, for appellee.

NEILL BOHLINGER, Associate Justice. This case stems from an automobile accident in which Richard Savage, a minor, was alleged to have been injured while the occupant of a car driven by Ronnie Spicer, a minor. The

complaint alleges that the appellant, Richard Savage, and appellee, Ronnie Spicer, were students at the El Dorado High School and members of the high school band and while preparing to go as members of the band to a football game they were assigned by the band director to go in the car belonging to Charles E. Spicer and driven by Ronnie Spicer in order to carry their large instruments to relieve the congestion on the regular school bus.

The appellant, Richard Savage, for himself and father prayed $75,000.00 in damages. The defendants answered and thereafter the appellants filed their first amendment to the complaint in which they alleged that the band director had specifically delegated to Ronnie Spicer the task of transporting Richard Savage and his instrument and that the band director was the authorized agent of the El Dorado School District; that the El Dorado School District was the holder of a public liability policy issued by the Hartford Accident and Indemnity Company and prayed the issuance of a summons against the Hartfor Accident and Indemnity Company and that they have judgment under said policy.

It further alleged in said amendment that the appellee, Charles E. Spicer, carried a public liability policy at the time of the accident but the name of the carrier was unknown to the appellant and prayed that the insurance carrier for Spicer be made a party defendant to the end that judgment might be entered against such carrier.

The Hartford Accident and Indemnity Company demurred to the amended complaint on the grounds that the amendment to the complaint did not state facts sufficient to constitute a cause of action against the Hartford Accident and Indemnity Company. The court sustained this demurrer and the first point presented here is the question as to whether or not the court erred in sustaining the demurrer to the amendment to the complaint. We conclude that it did not.

The ancient doctrine that the king can do no wrong and hence could not be guilty of tort has come down to us through the years and is embodied in our constitution

under the phrase that the sovereign state will never be made a defendant in its courts. This immunity from being made a defendant has been extended to the various arms and branches of the state government through which the sovereign state discharges its functions.

Time was when the functions of the school were comparatively simple and the pupils walked to school and returned to their homes without assistance from the school district. In a time fraught with change, conditions have so altered that today it is necessary for the school districts to transport pupils to and from school, in some instances a considerable distance, and to this end they operate now on the thoroughfares of the state large numbers of school buses, trucks and private vehicles to accomplish the diverse activities of the school. As would normally be expected, accidents ensued and the citizens that suffered loss in such accidents were confronted with a situation wherein there was no redress in the courts against the districts.

To correct this injustice, the Legislature of 1947 provided that if liability insurance was carried by an immune agency, the person suffering loss or damage covered by such insurance could have a direct cause of action against the insurer.

"Ark. Stats. § 66-517. Liability insurance carried by nonprofit organization or public agency — Direct action against insurer.—When liability insurance is carried by any * * * school district, * * * and any person, * * * suffers injury or damage to person or property on account of the negligence or wrongful conduct of any such organization, * * * its servants, agents or employees acting within the scope of their employment or agency, then such person, firm or corporation so injured or damaged shall have a direct cause of action against the insurance company * * * with which said liability insurance is carried * * *"

The emergency clause of the act (Act 46, Acts of 1947) reads:

"Section 5. Whereas liability insurance policies are being written and issued to associations, corporations and organizations which cannot be sued on torts and premiums are being collected by liability insurance companies on such policies without any benefit either to the insured or whoever may be injured and damaged, this act, being necessary to the public peace, health and safety, an emergency is hereby declared to exist, and this act shall be in effect from and after its passage."

In this case we have such a liability policy but, like other insurance policies, it provided that the insured would pay a certain sum of money and the insurer would protect against certain liabilities in connection with the operation of the specific vehicles set forth in the policy. Each vehicle which the insurer is covering is specifically described and the policy further provides that the insurance afforded by such policy is in respect to the vehicles listed in the policy and for which a premium charge has been or is to be paid. The car operated by the appellee is not listed in that policy.

It is suggested, however, that since the appellees' car was being operated as an adjunct or substitute for one of the vehicles listed in the policy that direct action against the insurer should be accorded to the appellants. We do not agree.

While it is true that a substitution of vehicles is contemplated by the policy, it is further provided that the substitution is permitted where the insured automobile is withdrawn from normal use if the school district notifies the company of the substitution. There was no substitution here or any showing that the insured vehicle was withdrawn from service.

In addition to the demurrer by the Hartford Accident and Indemnity Company, the appellees, Ronnie and Charles E. Spicer, moved that paragraphs eight (8) and nine (9) of the amendment to the complaint be stricken. These paragraphs alleged that the appellants were informed and believed that the appellees carried a public liability policy at the time of the accident, the limits of

the policy and the name of the insurance company being unknown to the appellants and that the definition of the word "insured" in such policy applied to "organizations legally responsible for the use of the appellees' car." The appellants contended that this clause extended coverage to the school district; asked that the name of the insurance carrier of the appellees be divulged and it be made a joint defendant under the direct action statute; and that they have judgment against such insurance carrier.

The court sustained the appellees' motion to strike these paragraphs and in that we agree.

The direct action statute, quoted above, provides that if a school district carries liability insurance and causes injury to any person, that person may bring suit directly against the school district's insurance carrier. The purpose of the statute is set out in the emergency clause quoted above. The direct action statute applies only to insurance companies issuing policies to such immune organizations. The purpose of the statute is clear and that purpose is not served by extending the act to allow a direct action against the insurer of an individual.

There is no question of procedure here involved and we pass only on the action of the court in sustaining the general demurrer to the complaint against the Hartford Accident and Indemnity Company and in deleting the paragraphs in the amended complaint which sought to make an insurance policy carried by private individuals come within the statute which permits direct suit against insurers of agencies that are immune to such action.

The decision of the trial court in both of these actions is affirmed.

5-2854 363 S. W. 2d 535

Opinion delivered December 17, 1962.

[Rehearing denied February 4, 1963.]

J. Wesley Sampier and *Jeff Duty,* for appellant.

Crouch, Blair & Cypert, for appellee.

NEILL BOHLINGER, Associate Justice. This is an action brought by appellant, John Townsend, in the Benton County Circuit Court to recover damages to which he alleged he was entitled by reason of a breach of contract by the appellee, Standard Industries, Inc.

The appellant, in his complaint, pleaded an oral agreement under which he stated that the appellant and appellee had operated from December, 1960 until April, 1961. He alleged the agreement was that he would move his sawmill onto certain lands owned by the appellee and would drag or haul timber from appellee's land after the timber had been felled by the appellee, and saw the same to size and dimension as directed by the appellee and that from December, 1960 to April, 1961 he had so performed.

The complaint states further:

"And that on or about the 20th day of April, 1961, the parties signed a written contract embodying the terms and provisions of their agreement under which they had been performing and complying, since sometime during the month of December, 1960, and which said written contract was prepared by the defendant, Standard Industries, Inc., a copy of which, marked Exhibit "A", is attached hereto and made a part hereof fully as though set out word for word herein."

It is the contention of the appellant that under the agreement appellee was to cut all the timber on what is roughly designated as the appellees' land comprising approximately 800 acres of timber land and appellant was to haul it to his mill, cut it to specification and sell it to appellees for a certain price.

The appellant's complaint alleges that after a lapse of time he was notified that no more timber would be bought and that he then moved his mill from the farm and brought this action for damages in the amount of $8,565.49 which he alleges he sustained by reason of the appellees' breach of contract.

The plaintiff, in his complaint, set out an oral agreement under which the parties operated from December, 1960 until April, 1961, as stated *supra,* but then stated that they had signed a written contract embodying the terms and provisions of their agreement.

The writing which appears as Exhibit "A" and which was incorporated in the complaint as if set out word for word is as follows:

"I, *John Townsend,* agree to set my sawmill on Standard Industry Farm, Rt. 1, Rogers, Ark. I will pick up logs from the farm, haul them to mill & will cut lumber as desired for $4 per 100 board ft.

I will cut, split & haul all white oak that will make Staves or heading for 2/3 amount received.

/s/ John Townsend
Standard Industries Farm
/s/ Grover Fuller

I, Grover Fuller, will check lumber each Saturday & move it from mill—and count Board feet—

/s/ Grover Fuller''

The appellees [defendants below] filed a demurrer to the complaint on grounds it failed to allege facts which would constitute a cause of action, which the trial court sustained.

For the purpose of determining the sufficiency of the complaint on demurrer, the allegations contained in the pleadings must be taken as true. *Moore* v. *North College Avenue Improvement Dist. No. 1 of Fayetteville,* 161 Ark. 323, 256 S. W. 70. In the instant case it appears that the parties proceeded on the strength of some conversations in regard to the cutting of appellees' timber. In April, however, there was a writing signed by both the parties hereto and appellant's complaint sets forth the written document as ''embodying the terms and provisions of their agreement under which they had been performing and complying'' which document is ''attached hereto and made a part hereof fully as though set out word for word herein.'' Therefore, whatever had been discussed or contemplated by the parties is brought within the focus of a writing signed by the parties and the appellant has a cause of action only if this writing is a contract.

The rule that in law cases an exhibit will not be considered in determining the sufficiency of the complaint on demurrer is not applicable here because the alleged contract is made a part of the complaint ''as though set out word for word herein.'' Therefore, the terms of the writing are the very essence of the complaint and is the basis on which the action is predicated.

This is not a case in which parol evidence may be introduced to contradict or vary the terms of the written contract because from the allegations it purports to be a complete contract embodying all the terms and provisions of the agreement, and the rule as stated in *Graves* v. *Bodcaw Lumber Co.*, 129 Ark. 354, 196 S. W. 800 is that:

"* * * it is Hornbook law that all prior negotiations leading up to the written contract are merged therein, and, further, that evidence of contemporaneous parol agreement is not competent to vary the terms of the written agreement." [Citations omitted]

There is no allegation made that this is a severable contract so it must be considered as a whole.

From the terms of the writing, this is not a contract for the sale of all the output of the mill, nor is it a contract for the sale of all the timber on a given tract of land. Nothing in the writing, into which all the agreements have been merged, provides how much timber is to be cut nor when it is to be cut. There is no agreement to provide any specific logs for Townsend to cut, hence there is no mutual agreement. The quantity of logs to be cut is neither expressed nor implied in the alleged contract and thus cannot be ascertained.

The most that can be said is that the parties had agreed on a plan of operation but they did not make a contract.

As was said in *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 184, 131 S. W. 460:

"A contract to be enforceable must impose mutual obligations on both of the parties thereto. The contract is based upon the mutual promises made by the parties; and if the promise made by either does not by its terms fix a real liability upon one party, then such promise does not form a consideration for the promise of the other party. As is said in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Clark,* 90 Ark. 504, 'mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration for the act or promise of the other; that is, neither party is bound unless both are bound.' A contract, therefore, which leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other. Such are the contracts wherein one promises to buy all that the other may desire to sell; or wherein one

promises to sell or deliver all that he may desire or choose to sell or deliver. *Davie* v. *Lumberman's Mining Co.,* 93 Mich. 491; *Cummer* v. *Butts,* 29 Am. Rep. 530.

And such, too, is the nature of the contracts wherein the quantity sold can not be made reasonable to appear or is incapable of an approximately accurate estimate. *Campbell* v. *American Handle Co.,* 117 Mo. App. 19.

But a contract to sell and deliver to another all that one party may require in an established business, or all the product that the other party may produce for a definite period from a certain mill or plant, does impose such a fixed obligation as to save the mutual character of the promise. In such cases the quantity sold can be made to reasonably appear, and is capable of an approximately accurate estimate. And so a contract for the sale of the entire output of a mill of a known capacity for a definite period would be binding, although the amount so sold is not definitely ascertained.'' [Citations omitted]

The demurrer to the amended and substituted complaint was properly sustained and upon failure of the appellant to plead further the action was dismissed with prejudice. This action of the lower court is affirmed.

McFaddin, Robinson & Johnson, JJ., dissent.

Sam Robinson, Associate Justice (dissenting). According to any reasonable construction of the complaint in this case it alleges that the plaintiff and defendant entered into an oral contract whereby, for a stipulated amount, the appellee employed appellant to saw into lumber all of the logs from 800 acres of timberland. The complaint further alleges that at a later date the oral agreement was reduced to a written contract; that appellant performed part of the contract and had stood ready, willing and able to complete his part of the contract if he had been permitted to do so by appellee, but that appellee had breached his part of the contract by failing to furnish the logs to be sawed into lumber.

The majority is holding that the writing does not constitute a contract, but that appellee is bound by the terms

of this unenforceable agreement and can not introduce parol testimony to add to the writing to show that the parties actually did enter into a valid contract. In my opinion, the majority has improperly applied the parol evidence rule. Before this rule is applicable, there must be a valid written contract between the parties. The majority holds, and I agree, that there is no such contract.

In 20 Am. Jur. 954 it is said: "The rule, commonly known as the 'parol evidence rule,' which excludes evidence of prior or contemporaneous oral agreements which would vary a written contract *presupposes* the existence of an existing valid written contract. Speaking generally, if the parol evidence attacks the legality . . . of the contract, it does not fall within the condemnation of the so-called 'parol evidence rule'." (Emphasis ours.) And, on page 955 of the same volume of Am. Jur., it is said: "The rule that parol evidence is inadmissible to contradict or vary a written contract applies only to a written contract which is in force as a binding obligation."

In 32 C.J.S. 823 it is said: "It is of course necessary to the application of the parol evidence rule to contracts that there shall be a complete written contract between the parties."

"The trial court assumed that such testimony was incompetent under the rule that parol testimony is not admissible to vary the terms of a written contract. While this is the law, it does not necessarily apply here, for if appellant's construction of the transaction is correct, no contract was entered into." *Marshall Motor Service* v. *Norm Co.,* 194 Ark. 805, 109 S. W. 2d 662. Likewise in the case at bar, if there is no written contract, there is nothing to prohibit proof of an oral contract.

The majority points out that there is no written contract between the parties, and then cites *Graves* v. *Bodcaw Lumber Co.,* 129 Ark. 354, 196 S. W. 800, to the effect that parol evidence is not admissible to vary the terms of a valid and binding written contract. In that case there was a valid written contract; the Court said: "The writing sued on here showed a complete contract."

Appellant alleges in the complaint an oral agreement constituting a valid contract. Only recently, in the case of *Donham, Commissioner* v. *Neeley,* Law Reporter of November 12, this Court held that an entire complaint is not demurrable if any good cause of action is stated, and that in testing the sufficiency of a pleading against a general demurrer, every reasonable intendment should be indulged to support the pleading.

In my opinion the complaint in this cause states a valid oral contract. The parol evidence rule, which is actually a rule of substantive law because of rights acquired under a written contract, is not applicable because there is no valid written contract. I would, therefore, reverse the judgment.

JOHNSON, J., joins in this dissent.

PURNELL *v.* MISSOURI PACIFIC RY. CO.

5-2861 362 S. W. 2d 674

Opinion delivered December 17, 1962.

Griffin Smith, for appellant.

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

NEILL BOHLINGER, Associate Justice. The appellant brought this action alleging that as an employee of the appellee railroad he was injured in the course of his employment through the negligence of appellee and sought damages under the Federal Employer's Liability Act [commonly referred to as FELA].

The trial resulted in a verdict for the appellee and the appellant prosecutes this appeal, presenting an abbreviated record and relying upon the following points:

"Appellee's Instruction No. 3 was prejudicially erroneous in (1) instructing in terms of common-law proximate causation instead of the much broader terminology of the FELA; (2) omitting any definition of proximate cause, when it was couched in binding terms; (3) excluding speculation as to injury and damages; and (4) excluding presumptions as a basis for inference of negligence."

Appellee's instruction No. 3, the one here challenged, is as follows:

"You are instructed that no presumption arises from the mere happening of an injury to a railroad employee and you cannot guess, surmise or speculate on the issues of negligence, proximate cause or damages. The burden of proof is on the plaintiff to establish by a preponderance of the evidence all of the following: (1) that the defendant railroad was guilty of negligence; (2) that such negligence, if any, was a proximate cause of the plaintiff's injury and damage, if any.

If you find and believe that the evidence on any one of these points does not preponderate in favor of the plaintiff, or that the evidence in regard thereto is evenly balanced, then your verdict must be in favor of the defendant, Missouri Pacific Railroad Company."

The appellant objected, both generally and specifically, to the giving of this Instruction No. 3 as follows:

"(The court gave such instruction over the general objections of the plaintiff. The plaintiff further specifically objected to said instruction because it erroneously states

there is no presumption from the happening of an accident, when under FELA it has been frequently held that the rule of *res ipsa loquitur* freely applies; further, since there is evidence of negligence an instruction in terms of legal presumptions is misleading and superfluous; it erroneously tells the jury that plaintiff has the burden of proving that the negligence of the railroad was a proximate cause of the plaintiff's injury, which places a higher burden on plaintiff than the statute requires, since the statute only requires a showing that negligence 'in whole or in part' caused injury; the instruction is predicated on a 1947 decision which was long since qualified or overruled.)"

This appeal poses the following question: Is negligence which is "a proximate cause" of an injury the same as negligence which "in whole or in part" causes an injury?

It is well settled that when the correctness of instructions to a jury is a question, the instruction complained of must be examined in conjunction with all the instructions given. The appellant in this case requested four instructions which were given as follows:

"Plaintiff's Instruction No. 2. The Federal Employers Liability Act, which was in force at the time of this occurrence, provides that whenever an employee of a railroad is injured while engaged in the course of his employment, and the *injury results in whole or in part* from the negligence of any of the officers, agents or other employees of the railroad, then the railroad shall be liable in damages to the injured employee. (Emphasis added) * * *

* * * No. 4. Under the terms of the Federal Employers Liability Act, in any action brought against a railroad to recover damages for injury to an employee, the employee shall not be held to have assumed the risks of his employment in any case where the *injury resulted in whole or in part* from the negligence of any of the officers, agents or employees of the railroad. (Emphasis added) * * *

* * * No. 6. If you find from a preponderance of the evidence that defendant railroad failed to use ordinary care to provide plaintiff a reasonably safe place to work and was therefore negligent and such negligence, if any, *in whole or in part caused* plaintiff to be injured, your verdict should be for plaintiff. (Emphasis added) * * *

* * * No. 8. If you find from a preponderance of evidence that plaintiff was injured and that defendant was negligent, and that such negligence, *in whole or in part, caused* plaintiff's injury, then the fact that because of a previous injury in the same area of his body plaintiff may have been susceptible to injury than would otherwise have been the case, if you so find, would not affect his right to recover for his present injury, if any (Emphasis added) * * *"

Therefore the jury was instructed that if the defendant's negligence, in whole or in part, caused plaintiff's injury the railroad company would be liable in damages. We do not conclude that defendant's (appellee's) instruction No. 3 is in conflict with the four instructions which the appellant requested and which were given, nor does instruction No. 3 vary "the injury results in whole or in part", as given in appellant's instructions.

It is noted that the court said, in instruction No. 3: "(1) that the defendant railroad was guilty of negligence; (2) that such negligence, if any, was *a* proximate cause of the plaintiff's injury and damage, if any. * * *" [Emphasis added]

The use of the indefinite article "a" in connection with "proximate cause" was before this court in the case of *Lydon, et al.* v. *Dean,* 222 Ark. 367, 260 S. W. 2d 465, where we found error in an instruction in which the trial court changed the reading of the instruction by changing "a proximate cause" to "the proximate cause."

Reading appellant's four instructions in connection with appellee's instruction No. 3, which is complained of here, we find no variance or conflict.

Appellant contends, however, that under FELA the happening of an accident justifies a presumption of negligence as the doctrine of *res ipsa loquitur* applies.

The phrase, *res ipsa loquitur,* is a picturesque way of describing a balance of probability on a question of fact on which little evidence either way has been presented. It is true that the U. S. Supreme Court has applied *res ipsa loquitur* in FELA cases, but only where there is present recognized requirements of extraordinary unusual occurrences. The application of *res ipsa loquitur* in FELA cases is well set forth in *Herdman* v. *Pennsylvania Ry. Co.,* 77 S. Ct. 455, 1 L. Ed. 2d 508, 352 U. S. 518:

"* * * The proofs do not meet the tests laid down by this Court in *Jesionowski* v. *Boston & M. R. Co.,* 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401, 169 A.L.R. 947, 21 N.C.C.A. N. S. 563. The employee's injuries in the *Jesionowski* Case resulted from a derailment. This Court held that derailments are 'extraordinary, not usual, happenings,' so that when they occur 'a jury may fairly find that they occurred as a result of negligence.' "

The extraordinary circumstances that make applicable the doctrine of *res ipsa loquitur* are absent in this case. The appellant pinpoints the cause of his injury; that is, that the journal box was defective, requiring extraordinary force and that when the lid of the journal box gave way he stepped back suddenly and stepped back on some object that he alleged the appellee had left at that location and that he was therefore not furnished with a safe place to work. The doctrine of *res ipsa loquitur* does not apply in this case.

The judgment of the trial court is, therefore, affirmed.

DEDNAM *v.* AMERICAN MACHINE & FOUNDRY CO.

5-2862 363 S. W. 2d 419

Opinion delivered January 7, 1963.

[redacted]

Howell, Price & Worsham, for appellant.

Riddick Riffel, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen Compensation case. Herbert H. Dednam was employed by A. M. & F. Company from February, 1956, to September, 1957. He contends that he sustained temporary total disability in September, 1957, by reason of dermatitis, occasioned by his employment. Appellees take the position that the dermatitis was not the result of Dednam's employment. The claim was first heard before a referee in February, 1959, and a subsequent hearing was held in April of that year. Upon the referee finding for appellees, an appeal was taken to the full commission, at which time additional evidence was submitted. From an adverse ruling by the commission, appellant appealed to the circuit court, and thereafter filed a motion to remand the cause to the commission for further development of medical testimony, and to require the appellees to produce and make available certain chemical specimens and samples. The circuit court denied the motion to remand and entered its judgment affirming the decision of the

Workmen's Compensation Commission. From such judgment, comes this appeal.

Dednam testified (February, 1959) that when he commenced working for the company, his duties consisted of polishing and buffing metal, but he subsequently "worked on the acid chain and on the nickel plated chain." Part of the duties of the latter task consisted of placing rejected parts in a large vat of acid (which removed paint from the parts). He stated,

"Well, it had a strong smell to it, and when I first discovered that this, when it started taking effect on me it felt like a bunch of pins and things, everytime I was around these machines, like a bunch of pins and things, it would feel like it was sticking in my skin when I would start sweating."

Dednam testified that this only happened when he was around the acid;

"It formed just like heat would form on a person's body. And everytime I would sweat it would burn and swell up. * * * Well, it would swell up; my ankles and legs swoll up where I couldn't work."

Appellant first went to the company doctor (Dr. Hall) in August or September of 1956, and was later treated by Dr. J. A. Johnson. Dr. Johnson rendered a report on October 2, which he sent to the insurance carrier, stating,

"Patient has lesions on lower legs for past six weeks. Started out itching and now has a large number of lesions that look like an allergy. Not a permanent defect—Allergy."

According to Dednam, he received treatment from Dr. Johnson for about six months, and subsequently was referred by Dr. Hall to the Cazort-Johnston Allergy Clinic for allergic studies. Dr. Thomas G. Johnston of the clinic gave numerous patch tests, and on September 19, 1957, submitted a report, observing, *inter alia,* that the dietary history indicated certain foods caused asthma when Dednam was small, and stating in his report,

"His past history is quite significant in that he has had fall hay fever for the past seven to eight years. His hay fever, as he remembers it, starts in late August and lasts to October or middle November * * * In 1953, 1954, and 1955 he had hay fever from May until October.[1] He also had small bumps on his skin but they would tend to come and go and did not tend to form infected areas."

Dr. Johnston diagnosed appellant's condition as atopic dermatitis, adult form, severe. He stated,

"On examining his skin we found a tremendous amount of excoriated lesions with a purplish hue chiefly on his lower extremities. These did not have the characteristic appearance of a contact dermatitis, and would have been and are characteristic of the adult form of atopic dermatitis."

Included in the report were recommendations for treatment, including dietary suggestions. Dr. Johnston summarized his impressions, as follows:

"In our opinion this is not an occupational dermatitis. There is no question but that Mr. Dednam would have trouble, in our opinion, regardless of where he worked, unless he was able to spend 24 hours a day in an air conditioned place. He obviously would do much better out on the desert or on the sea as was the case while in the Navy. We have explained to him that with treatment it might be possible that he could live a comfortable life here in Little Rock, but the adult form of atopic dermatitis is extremely difficult to manage, and if there is the possibility of his obtaining a job elsewhere, he should make an attempt to do so. We do not feel that his employment has anything to do with the cause of his skin problem."

In conformity with the recommendation, Dednam went to California in October, and stayed in that state for approximately two and one-half months. According to his testimony, his condition (rash and swelling) re-

[1] Appellant denied that he told Dr. Johnston that he suffered from hay fever from May until October in the years mentioned or that he had told Dr. Johnston of dietary trouble with certain foods.

mained the same, and he only worked for about one week. He returned to Arkansas around the first of December, and testified that he had since been unable to resume any work[2], "no more than trying to pick up a little change here and there to take care of my family. * * * I helped my dad do a little carpenter work, and he helped me in that way, and he also helped support me and my family." Dednam was subsequently treated at the Veterans' Hospital by Dr. W. P. Scarlett, and was discharged by the hospital on June 26, 1958, with Dr. Scarlett making a final diagnosis of "atopic dermatitis, adult form, probably aggravated by chemicals, treated, improved."

Reona Dednam, wife of appellant, testified that her husband had not been bothered by any sort of allergy before he started working for A.M.F. Cycle Company.

In April, testimony was resumed before the referee. Frank Ford, a fellow employee, testified as to when Dednam's ailment commenced, and Nathaniel Dednam, a brother, verified the condition of appellant. Jerry Williams, job foreman, testified that appellant was never assigned to work at the vat regularly, but only worked in that capacity when the regular operator was absent, or was behind on the job. He stated positively that Dednam did not work at the vat as much as once a week during the period of his employment.

During the proceedings at the second hearing, the referee inquired if counsel would like to have the compounds, used in the tank, and around the buffing department, provided "so that some allergist can check them to see if the claimant is allergic to it, or if it could be, in his opinion, the cause of this dermatitis." Counsel for both sides agreed that this could be done. It was suggested that the chemical components and sample of "M-629" be obtained. However, no order was entered directing that samples be obtained, or requiring further tests to be made.

[2] At the time of the first hearing before the referee in February, 1959, appellant had resumed visits to Dr. Thomas Johnston for treatment.

Subsequently appellees' attorney advised by letter that Dr. Johnston has gone to the company plant, and made tests relative to the sulphuric acid. The letter further set forth that the substance, "M-629" was not used until July, 1957, which was, of course, nearly a year after appellant's complaint commenced. However, it was stated,

"If there is any rational reason why it is necessary to test this claimant with the M-629 substance, we would not object to doing so, but since it was not being used when the claimant first began having dermatitis I could see no useful purpose in this additional test."

Appellant made known his objection to Dr. Johnston's further testifying, unless the samples were furnished. Thereafter, on July 7, 1959, counsel for appellant directed a letter to the referee as follows:

"This will confirm our telephone conversation of yesterday in which I advised that inasmuch as the respondent has withdrawn its request for an additional hearing, the claimant also is willing for an opinion to be rendered on the evidence in the case as it now stands, and we do not desire additional hearing."

Following the referee's decision in behalf of appellees, the matter was appealed to the full commission where Herbert's father testified in support of his son's contentions, and a letter was offered by appellant from Dr. H. Ray Fulmer of Little Rock, wherein Dr. Fulmer agreed that the diagnosis of atopic dermatitis was correct. Pertinent portions read as follows:

"I do not feel that the man's occupation played any significant part in causing this trouble or in influencing its course. The only manner which I can conceive of his work influencing the dermatitis would be that any type of local irritant such as acids or acids fumes would aggravate any already existing dermatitis. Such aggravations, of course, would be primarily a subjective aggravation; i.e., it would produce more itching, stinging, etc. and such aggravation would be expected to cease when

the patient was no longer in contact with the irritating substance."

Upon the commission affirming the referee, appellant appealed to the circuit court. Here, a motion to remand the cause to the commission for the consideration of newly discovered evidence, was filed. The motion alleged that the chemical components of the various solutions used by the company in its tanks and vats were unknown to appellant, were under the exclusive control and knowledge of the company, and the company had failed and refused to divulge the components of such solutions or to make same available for the purpose of allergy tests on Dednam. Attached to the motion was a statement from Dr. Calvin J. Dillaha, skin specialist of Little Rock, directed to appellant's counsel, as follows:

"I have recently spent some time reviewing the two briefs on Herbert Dednam and I am convinced if it is still possible to reopen his case, that we could demonstrate that his work was indeed a factor in the development of his cutaneous problem. I should be happy to discuss this with you or one of your associates at a convenient time. I feel with adequate preparation this could be presented to the commission or a court in such a fashion that it would be most convincing."

The court was asked to remand the cause and to require the company "to produce and make available to the claimant's physician and skin specialist" samples of the solutions used by appellee in its plant during the period in question. The circuit court denied the motion, finding that appellant

"has failed to show that he exercised due diligence in the discovery of the evidence upon which he predicated his motion. He further failed to show that such evidence is not cumulative and that it would justify a different result than reached by the Commission without said evidence."

The court then found that the decision of the Workmen's Compensation Commission denying compensation bene-

fits was supported by competent, substantial evidence, and affirmed the commission's decision.

For reversal, it is first argued by appellant that "the findings of the commission are not supported by the weight of evidence." Of course, we cannot concern ourselves with whether the commission's findings are supported by the *weight* of evidence, for compensation cases are not tried *de novo*. Rather, we examine the record with the view of determining whether there was substantial evidence to support the commission's findings. As herein set out, Dr. Thomas G. Johnston was of the opinion that Dednam's condition was not an occupational dermatitis, and he did not feel that the employment had anything to do with causing appellant's skin problem; in fact, he stated there was no question but that Dednam's trouble would have occurred, irrespective of where he worked "unless he was able to spend 24 hours a day in an air-conditioned place." It will be observed that Dr. Fulmer's report which was offered by appellant is far from positive; the doctor stated that any local irritant would aggravate the already existing dermatitis; however, he added that "such aggravation would be expected to cease when the patient was no longer in contact with the irritating substance. It is noticeable that Dednam's dermatitis *did not* cease when he left his employment; in fact, it continued during the period that he was in California and through the commission hearing, which was close to three years after the condition first appeared. At any rate, on the one hand, we have the positive testimony of Dr. Johnston, and, on the other hand, the statement of Dr. Fulmer, and a statement by Dr. Scarlett that the dermatitis was "probably aggravated by chemicals." We think, and particularly since his views are supported by the circumstances herein mentioned, that Dr. Johnston's findings and opinion constituted substantial evidence. Appellant complains that appellee failed to produce the samples of various chemicals involved, as per the arrangements made before the referee at the April, 1959, hearing, and argues that this failure to produce the evidence (which it had the power to produce), creates a

presumption that the evidence would be detrimental to appellees. The cases cited by appellant have no application to the fact situation herein, and as previously stated, we find no order requiring appellants to furnish these samples, nor any order directing further tests. The sulphuric acid test was made by Dr. Johnston, the doctor's findings being adverse to appellant's contention, and counsel for appellees reported that the M-629 was not in use when Dednam's skin trouble commenced. Be that as it may, appellant did not insist upon an order, or compliance with the agreement, but rather, through counsel, advised the referee that "the claimant also is willing for an opinion to be rendered on the evidence on the case as it now stands, and we do not desire additional hearing." Let it also be remembered that the discussion, relative to the obtaining of samples, took place before the referee ever rendered his decision, and no further effort was made between then and the time of the hearing by the commission (or at the time of the commission hearing) to obtain an appropriate order. We find no merit in appellant's first contention.

As to appellant's motion to remand to the commission, we think the court acted correctly in denying same. In *Mason* v. *Lauck,* 232 Ark. 891, 340 S. W. 2d 575, this court pointed out the conditions under which a circuit court could properly grant the relief herein sought. From the opinion,

"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."

The Pulaski Circuit Court, as reflected in its order, heretofore quoted, held that these conditions had not been met. We find no evidence in the record that would indicate this finding to be erroneous. Of course, as pointed out in the *Lauck* opinion, to permit the losing party to bring in new evidence after a final award by the commission (unless the proper conditions are present to justify a remand) would greatly hamper the finality of proceed-

ings before the compensation commission. In such event a "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."

The judgment of the Pulaski Circuit Court is affirmed.

WEST *v.* CARTER.

5-2875 363 S. W. 2d 415

Opinion delivered January 7, 1963.

Shackleford & Shackleford, for appellant.

A. A. Thomason, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellants insist that they were entitled to an instructed verdict in their favor. That is the only issue presented.

The appellants are J. A. West *et al.,* doing business as West Lincoln-Mercury Company, and the appellee is Harry Carter, an individual. Carter contracted to purchase from appellants a used 1958 Pontiac automobile. To complete the transaction, Carter delivered to appellants a 1955 Chevrolet automobile and signed a condi-

tional sales contract which, with insurance and carrying charges, was for a total amount of $1,332.96, and which was payable in monthly installments of $55.54. Within a few days after the transaction, Carter reported to appellants that the Pontiac car was not in good "A-1 condition," as it had been represented to him; something was wrong with the A-frame; one door would not stay closed; the car had a tendency to "dart" in the steering. Appellants assured Carter that the Pontiac would be put in good condition, and did undertake repair work on the car on three different occasions over a period of as many months; and the repair bill amounted to an excess of $100.00.

Appellants had transferred the conditional sales contract to the Universal C.I.T. with recourse. When the first monthly payment became due, Carter told appellants he would not make the payment because the car was defective; but appellants assured Carter that if he would make the payment, appellants would repair the car to Carter's satisfaction. On such repeated promises and representations Carter made three monthly payments; but then refused to make any more, since the Pontiac remained unsatisfactory. Thereupon, appellants reacquired the conditional sales contract from Universal C.I.T. and filed action against Carter for the balance on the contract, plus $60.51 balance on open account for repairs. Carter's defense was that appellants had been guilty of false representations as regards the condition of the Pontiac, in that it had been wrecked and was never put in good condition, as represented. Trial to a jury resulted in a verdict and judgment thereon; that appellants should return to Carter the 1955 Chevrolet, or its value of $400.00; and that Carter should return to appellants the 1958 Pontiac, or its value of $1,012.62; and that Carter recover his costs. To reverse that judgment, appellants bring this appeal, urging only one point: "The Court erred as a matter of law in failing to direct a verdict in favor of appellants for the relief sought."

The appellants urge (a) that Carter admitted executing the conditional sales contract; and (b) that Carter

admitted making three payments on the contract after learning that the Pontiac was defective. Because of these matters, appellants claim that Carter waived any and all defects in the Pontiac car; and appellants cite and rely on three cases, to-wit: *Hignight* v. *Blevins,* 220 Ark. 399, 247 S. W. 2d 996; *Teare* v. *Dennis,* 222 Ark. 622, 262 S. W. 2d 134; and *Advance Aluminum Co.* v. *Davenport,* 224 Ark. 440, 274 S. W. 2d 649. To these cases, others might be added, one of which is *Kern-Limerick* v. *Mikles,* 217 Ark. 492, 230 S. W. 2d 939, wherein we cited *Pate* v. *McWilliams,* 193 Ark. 620, 101 S. W. 2d 794:

"In *Pate* v. *McWilliams, supra,* the seller brought suit on a title retaining contract involving automobiles; and the buyers cross complained for damages, because of alleged fraudulent misrepresentations inducing the sale. The evidence showed that the buyers used the cars from May until December; and after having received full knowledge that the alleged representations were not true, the buyers continued to make payments on the automobiles. On such evidence the trial court instructed a verdict for the seller in his action for the balance of the contract price; and this Court affirmed, saying:

" ' . . . appellants waived the right to defend on the ground of a fraudulent procurement of the contract, by making no complaint and by using the trucks and making monthly payments thereon long after they claimed to have discovered that the Dodge truck consumed more gas and oil than the Chevrolet trucks had consumed.'

"See, also, *McDonough* v. *Williams,* 77 Ark. 261, 92 S. W. 783, 8 L. R. A., N. S. 452, 7 Ann. Cas. 276, as a case involving waiver; and also 24 Am. Jur. 34, *et seq.;* 56 Am. Jur. 122, *et seq.*; and 67 C. J. 289, *et seq.* Other cases on waiver involving sales are collected in West's Arkansas Digest, 'Sales,' key number 50."

It is true that we have repeatedly held that where a buyer continues to make payments without protest, after learning of the misrepresentations inducing the sale, then such payments constitute a waiver.[1] But, in

[1] In *Sirmon* v. *Roberts,* 209 Ark. 586, 191 S. W. 2d 824, there is a definition and discussion of "waiver."

the case at bar, the evidence clearly reflects that Carter made the payments only after he was repeatedly assured by the appellants that they would repair the Pontiac and fulfill their representations. Such assurances by appellants to Carter caused him to make the payments which he made; and this evidence differentiates the case at bar from the cases cited by appellants. In *Pate* v. *McWilliams, supra,* we held that the purchaser waived his defense, of fraudulent representations inducing the contract, when, after learning the representations to be false, he (a) continued to make the monthly payments and (b) made no complaint. In the case at bar, the purchaser (a) made repeated complaints, (b) the seller undertook to repair the defects, and (c) the purchaser made the monthly payments only after the seller had promised to remedy the defects. Thus the cases holding that payments after discovery of defects justify an instructed verdict for the seller can have no application here because of the factual situation. The issue was fairly presented to the Circuit Judge when the appellants made the motion for an instructed verdict. Here is the language of the appellants' attorney, and the Court's reply thereto:

"(By Mr. Shackleford): The basis for the motion for a directed verdict for the Plaintiff is upon the fact that the Defendant has waived any right to ask for a recision of the contract based upon fraud or misrepresentation of the Plaintiffs by virtue of this actions in keeping the vehicle in his possession and making payments thereon pursuant to the provisions of the contract."

"(By the Court): I would agree that you are right except for the fact that the defendant testified that the plaintiff, or the plaintiff's manager, told him to go ahead and make the payments, that they would repair this vehicle and put it in proper shape; and I think that does away with any right of pleading waiver."

The ruling of the Trial Court was in line with the language of the Georgia Court of Appeals in *Kimbrough* v. *Adams,* 16 S. E. 2d 96:

"The making of any payment by the defendant to the plaintiff on the purchase price, if the defendant made any, before the truck was finally returned, and pending the efforts of the plaintiff to make the repairs, would not as a matter of law constitute a waiver by the defendant of any fraud of the plaintiff inducing the contract. In *Couch* v. *Thompson,* 34 Ga. App. 383 (3), 129 S. E. 794, 795, the court held: 'Where, after discovering the fraud, the purchaser paid the purchase money under an agreement with the seller that the seller would make good to the purchaser any damage resulting from the fraud, there was no waiver of the fraud.' "

In short, the question of whether Carter relied on the statements of the appellants in making the payments was a proper matter for the jury; but, under the evidence in the record, the Court was correct in refusing an instructed verdict in favor of appellants.

Affirmed.

Holt, J., not participating.

GILBERT *v.* SWILLEY.

5-2863 363 S. W. 2d 412

Opinion delivered January 7, 1963.

John L. Wilson and *James H. Pilkinton,* for appellant.

W. S. Atkins, for appellee.

George Rose Smith, J. This case involves the custody of Kelly Gilbert, the three-year-old daughter of the appellant John G. Gilbert and the appellee Gayle Gilbert Swilley. When the couple were divorced in February of 1961 the court awarded the custody of the child to the other two appellants, Mr. and Mrs. Glen Gilbert, who are John G. Gilbert's father and stepmother. After the divorce the child's mother married Conrad Swilley. Early in 1962 Mrs. Swilley filed a petition asking that she be given the custody of her child. The chancellor granted that relief. In seeking a reversal the principal appellants, Mr. and Mrs. Glen Gilbert, insist that the appellee failed to prove a sufficient change of circumstances to justify the court in modifying the original decree.

The appellee was only sixteen years old when she and John G. Gilbert were married in 1956. Their child, Kelly, was born in August of 1959. The couple lived in Winnfield, Louisiana, until their separation in April or May of 1960. John then returned to Hempstead county, Arkansas, and placed the child in the care of Mr. and Mrs. Glen Gilbert. There is some dispute about whether Gayle Gilbert voluntarily surrendered her child at the time of the separation.

In June of 1960 John G. Gilbert filed suit for divorce on the ground of indignities. The case was pending for about eight months. During the latter part of that time Gayle, who was still living in Winnfield, became intimate with her present husband. The two candidly admit that Gayle was three months pregnant when Gayle's husband obtained his divorce on February 6, 1961. Gayle Gilbert and Conrad Swilley were married five days later. There is ample testimony to support the conclusion that their home in Winnfield is a suitable Christian place for the child. Swilley joins his wife in asking for the care and custody of Kelly Gilbert.

The child's father lives in Hope. He, too, remarried soon after the divorce, but he and his present wife do not ask for custody of the child. Instead, Gayle's peti-

tion is resisted primarily by the Glen Gilberts, who insist that the child be permitted to remain with them. Their home, too, is a suitable one for the child.

We do not think the chancellor's finding of changed conditions to be against the weight of the evidence. When the divorce decree was entered the appellee had no home of her own and was hardly in a position to ask for Kelly's custody. Now that the appellee has remarried and established a home the situation is completely changed. As the chancellor observed, if this petition should be denied the little girl will grow up without ever really knowing her own mother.

Nor do we find merit in the appellants' contention that a change of custody is not for the best interest of the child. As between a mother and grandparents the mother is entitled to the custody of her child in the absence of a showing that she is unfit to be entrusted with the child's care. *Duncan* v. *Crowder,* 232 Ark. 628, 339 S. W. 2d 310. That showing has not been made here. The appellants put much stress upon the appellee's relationship with Swilley before their marriage, but infidelity on the part of a wife is not necessarily a sufficient reason for depriving her of the precious privilege of bringing up her own child. *Blain* v. *Blain,* 205 Ark. 346, 168 S. W. 2d 807. In this case we cannot say that the chancellor, who had the advantage of seeing the parties as they testified, reached the wrong decision.

Affirmed.

McFaddin, J., not participating.

5-2865 363 S. W. 2d 413

Opinion delivered January 7, 1963.

J. B. Milham, for appellant.

Hall, Purcell & Boswell, for appellee.

PAUL WARD, Associate Justice. Appellant, Mrs. Sarah Corruthers (formerly Mrs. Sarah Bubbus), and appellees, E. M. King and J. W. Bennett, are adjoining landowners. Appellees built a fence across the road which appellant used to cross their land and she filed suit in chancery court to enjoin the maintenance of said fence. The trial court found appellant had been using the road by permission of appellees, dismissing her complaint, and this appeal follows:

Briefly stated, the material facts are as presently set out. In 1935 appellant and her first husband (Gus Bubbus) purchased 40 acres of land in Saline County and about the same time appellees each purchased land adjoining appellant's land. The three families were friendly and neighborly until Mr. Bubbus died in 1945 when appellant (and her children) moved away. Up until about 1938 Mr. and Mrs. Bubbus drove to and from their home on the forty over a road across appellees' land. There can be little doubt that this use of the road was permissive because appellees put a gate across the road, and then appellant and her husband opened up another

road across appellees' land which they used until appellant moved away in 1945. Since that time appellant used the road two or three times each year until appellees closed the road two years ago.

There is no definite or positive evidence to show the character of the use of the road after the first road was abandoned, showing whether it was adverse or permissive. However, the road was across unenclosed and unimproved lands of appellees and the law presumes its use by appellant was not adverse but permissive. See: *Bridwell* v. *Arkansas Power & Light Company,* 191 Ark. 227, 85 S. W. 2d 712; *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S. W. 2d 461; *Brundidge* v. *O'Neal,* 213 Ark. 213, 210 S. W. 2d 305; and, *Barbee* v. *Carpenter,* 223 Ark. 660, 267 S. W. 2d 768. Under the holding in the O'Neal case, *supra,* the burden was on appellant to show the use of the road was adverse to the rights of the appellees and not with their permission.

It is our conclusion, therefore, that the trial court was justified in finding appellant's use of the road was permissive, and in dismissing her complaint.

Affirmed.

CHOCTAW, INC. *v.* GREAT AMERICAN INSURANCE CO.

5-2853 363 S. W. 2d 410

Opinion delivered January 7, 1963.

Wright, Lindsey, Jennings, Lester & Shults, for appellant.

John M. Lofton, Jr., for appellee.

SAM ROBINSON, Associate Justice. The Benton Plumbing Company, hereinafter called Benton, contracted with the City of Sparkman to do certain work and furnish materials in the construction of a water and sewer system. Appellee, Great American Insurance Company, made Benton's performance and payment bond. Benton bought from appellant, Choctaw, Inc., materials used on the job. Money paid by Sparkman to Benton and in turn paid by Benton's check to Choctaw, was credited to Benton's account, but not all of it to the payment of the debt for the materials furnished for the Sparkman job.

Benton ran into financial trouble and Great American had to take over and complete the job. Choctaw filed this suit against Great American, asking judgment on the performance and payment bond in the sum of $3,963.77 as the balance due for materials which had been furnished Benton for the Sparkman job. Great American answered and set up the defense that all of the account except $546.86 had been paid. The case was tried before the court sitting as a jury. From a judgment in favor of Great American, Choctaw has appealed.

The crediting by Choctaw of payments by Benton to purchases other than those on the Sparkman job came about in this manner: Benton had purchased materials from Choctaw for many years prior to the time that Choctaw was furnishing materials on the Sparkman job, and during the time the Sparkman job was in progress, materials were also furnished to Benton on other jobs.

On December 21, 1959, Benton sent to Choctaw a check in the sum of $3,871.83. There was nothing said about the job to which it should be credited. Choctaw inquired of Benton as to how the payment should be

applied. Benton replied, "Just apply check to our account balance." Choctaw, therefore, applied the check to the oldest items ordered by Benton. On February 7, 1960, Benton sent Choctaw a check in the sum of $1,534.73 without any notation as to how it should be credited. Again, Choctaw made inquiry as to how the payment should be applied and was told by Benton to apply it to the plumbing account. When subsequent checks in the sum of $1,250.00 and $1,000.00 were received with no designation of how the payments should be applied, Choctaw applied them to Benton's plumbing account. All of these payments were with money paid to Benton by Sparkman.

This is the issue: Assuming that there is substantial evidence to support a finding that Choctaw knew, or by the exercise of ordinary care should have known, that payments made by Benton were with money Benton had received from Sparkman, was Choctaw legally bound to credit the payments to the Sparkman job?

To sustain the judgment, appellee relies on the cases of *Longbell Lumber Co.* v. *Auxer,* 221 Ark. 672, 255 S. W. 2d 163, and *Wells* v. *Planters Lumber Co.,* 230 Ark. 570, 327 S. W. 2d 1, but we do not think those cases are controlling here. Both of those cases were in Chancery Court and involved the proposition of the plaintiff lumber companies seeking to establish liens on the defendants' homes where the lumber companies had improperly applied payments made by contractors. In the circumstances of both of those cases it would have been inequitable for the Court to have enforced a lien. Moreover, in those cases the property owners who had paid the money to the contractors were parties to the litigation and strenuously objected to the lumber companies having failed to apply the payments to the debt against the property; but here, Sparkman is not a party to this litigation and has made no complaint as to how the payments were applied.

Ordinarily, the debtor has a right to direct the application of payments. *Harrison* v. *First National Bank of Huntsville,* 117 Ark. 260, 174 S. W. 553. But, as pointed out in *White River Production Credit Ass'n.* v. *Grif-*

fin, 198 Ark. 249, 128 S. W. 2d 701, there is an exception to this rule, and that is if the creditor had notice that the money had been furnished his debtor upon an understanding, expressed or implied, that it was to be applied toward a particular debt, it could not be appropriated to the payment of another debt. Here, there is no showing that Sparkman made payments to Benton with the expectation or agreement, expressed or implied, that Benton would use the money to pay for the materials furnished on the Sparkman job. In fact, it would appear that Sparkman was not concerned with what Benton did with the money since it was fully protected by the bond furnished by appellee insurance company.

Assuming that Sparkman could have complained about the payments not being credited to its job, it does not follow that the bonding company can complain. In the above mentioned White River Production Credit Ass'n. case, the Court quoted with approval as follows from *National Surety Co.* v. *Southern Lumber & Supply Co.,* 181 Ark. 105, 24 S. W. 2d 964: "The right to apply payments exists only between the original parties, and no third person, such as guarantor, surety, indorser or the like, has any authority to insist on an appropriation of the money in his favor where neither the debtor nor the creditor has made such appropriation." The Court further said in the National Surety Co. case, "While the authorities are not entirely in accord, third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of several debts, cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payments in the manner most beneficial to such persons. This rule applies as well to a corporation engaged in the business of writing surety bonds for a compensation, as to an ordinary accommodation surety."

The payments were credited by Choctaw as directed by Benton; Sparkman has made no complaint. In the circumstances, Great American has no right to direct a change in the application of the payments.

Reversed.

5059 363 S. W. 2d 530

Opinion delivered January 7, 1963.

[Rehearing denied February 4, 1963.]

[redacted]

L. M. Alexander and *W. M. Herndon,* for appellant.

Frank Holt, Atty. General, by: *Jack Holt, Jr.,* Asst. Atty. General, for appellee.

JIM JOHNSON, Associate Justice. Appellant, Isiah Bingley, was charged by information with the crime of first degree murder for the killing of Henry L. Thomas. Appellant was tried by a jury, found guilty of the crime of voluntary manslaughter and sentenced to seven years in the state penitentiary. From such judgment comes this appeal.

For reversal, appellant argues that (A) there was no substantial evidence to sustain the jury verdict; (B) that the trial court erred in refusing to instruct the jury on involuntary manslaughter; and (C) that there was an irregularity in the filing of the information by the deputy prosecuting attorney which would render the information void under Amendment 21 of the Arkansas Constitution.

Ark. Stats. § 41-2208 is as follows:

"Voluntary manslaughter defined.—Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation, apparently sufficient to make the passion irresistible."

The evidence is amply sufficient to support the jury's finding of guilt. In fact the evidence would have supported a finding of a more severe degree of homicide. It is not necessary in the case at bar to view the evidence in the light most favorable to the state, as we must on appeals of convictions of violations of criminal statutes, *Spears* v. *State,* 173 Ark. 1071, 294 S. W. 66; *Brown* v. *State,* 208 Ark. 180, 185 S. W. 2d 274; *Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376; *Grays* v. *State,* 219 Ark. 367, 242 S. W. 2d 701; to conclude that there is substantial evidence to sustain the jury verdict.

This appellant, who incidentally was college educated, armed himself with a .45 caliber army automatic pistol and visited Willie's Cafe, a Negro beer tavern on Washington Avenue in the City of North Little Rock. This was on a Friday night and the place was crowded. By his own testimony, appellant came out of the rest room into the patron's area of the cafe and was there talking to a friend when the deceased, Henry Thomas, touched him on the shoulder and engaged him in conversation. An argument ensued, between deceased and appellant, and, again by his own testimony, appellant believing that Thomas was about to pull a gun on him, drew his own gun from his pocket and fired two or three shots at deceased. The deceased died several days thereafter from a bullet wound and two other patrons suffered minor bullet wounds. Appellant left the scene of the shooting and was not picked up by the officers until sometime later. Appellant admitted lying to the officers and the inconsistencies in his statements, to say the least, were enough to cause a jury to question the veracity of his testimony. Out of all the people who were crowded into this place on the night of this shooting, not one testified in support of appellant's version of how the

shooting occurred. To the contrary, all of the testimony was to the effect that the deceased was not drunk, had used no loud or profane language, made no threats, was not in a belligerent mood. None of the witnesses testified to any misconduct on the part of Thomas. Not one witness testified that he saw a gun or any other weapon on Thomas either before or after he was shot. In fact, there was testimony which would have supported a conclusion that the deceased was shot while leaning upon a table with both hands, talking to a patron of the tavern.

Josie Carter, one of the patrons who was hit by a stray bullet, testified that appellant offered to pay her doctor bill, stating, "I didn't go to shoot you." However when she asked, "Why did you shoot that other boy?", appellant replied, "I meant to shoot him."

The state of the record being thus, it cannot be said that the trial court erred in giving an instruction on first degree murder and in refusing to give an instruction on involuntary manslaughter.

As to the question of whether the information was void under Amendment 21, it is admitted that the name of the prosecuting attorney was written on the information with a typewriter, followed by the typewritten word "by" and then signed by the deputy prosecuting attorney. Appellant contends this was error.

Section I of Amendment 21 is as follows:

"Prosecution by Indictment or Information. All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information filed by the Prosecuting Attorney."

In *Johnson* v. *State,* 199 Ark. 196, 133 S. W. 2d 15, this court held:

"It will be observed that the prosecuting attorney, in filing information, takes the place of the grand jury. It has been said that this is a great power carrying with it possibilities of great oppression if improperly used. There is some conflict in the authorities, but we are of

opinion that under the above amendment to the Constitution [Amendment 21, *supra*], information charging one with a crime must be filed *in the name of the prosecuting attorney.* It is true that it is generally said that a deputy prosecuting attorney, legally appointed, is generally clothed with all the powers and privileges of the prosecuting attorney, but he must file the information *in the name of the prosecuting attorney.* In other words, it is the prosecuting attorney that is given the authority to file information, and not the deputy prosecuting attorney. The deputy, of course, may file information *in the name of the prosecuting attorney,* but he signs the name of the prosecuting attorney, and then his name as deputy." [Emphasis ours.]

In our view, there is no real distinction or deviation from normal practice in typing the name of the prosecuting attorney rather than writing it. *Lesser-Goldman Cotton Co.* v. *Hembree,* 163 Ark. 88, 259 S. W. 5; *Leach* v. *Bald Knob State Bank,* 163 Ark. 91, 259 S. W. 3. There is certainly no misuse of power for a deputy to file informations in the name of the prosecuting attorney, nor in the case at bar was there any action by the deputy repugnant to the holding in *Johnson* v. *State, supra.* The irregularity which the court spoke against in that case was the deputy's signing his own name rather than that of the prosecuting attorney. We concede that this practice would be error but such is not the situation in the present case. Here the name of the prosecuting attorney rather than the deputy appeared in the information and the deputy merely signed for him in compliance with Amendment 21.

From what has been said relative to the points argued, and after a careful consideration of the assignments not argued, we find no error. The judgment is therefore affirmed.

Mr. Justice Holt disqualified.

Opinion delivered January 14, 1963.

[Rehearing denied February 11, 1963.]

[redacted]

George Holmes and *Randall L. Williams,* for appellant.

Frank Holt, Atty. General, by *Thorp Thomas, Asst. Atty. General,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Charles Franklin Fields, was convicted of the crime of rape, and his punishment fixed at death by electrocution. From the conviction and judgment entered thereon, appellant brings this appeal. Since this is a capital case, we have not only examined each allegation of error set up in the motion for new trial, but have, likewise, scanned the transcript, noting each objection made during the course of the trial.

Appellant, an inmate of the State Penitentiary at Tucker Prison Farm, served as a "trusty". On January 15, 1962, Fields escaped,[1] and, while at large, forced his way into the home occupied by the prosecuting witness, Mrs. Myrtle Taylor.[2] According to the evidence, Mrs. Taylor was sitting in a chair, watching television, together with her four-year-old son. Her other children were at school and her husband was away from the home. Mrs. Taylor testified that Fields had a pistol in his hand, and that "He told me to be quiet and to do as he told me and I wouldn't get hurt, but if I didn't that he would kill me because he had just killed a man and what he was going to do now wouldn't be any worse than what he had already done. * * * He pointed the gun at me and asked me if there was any place we could go and I told him 'No' and he said, 'then it will have to happen right here in front of your son.' " Appellant then pushed Mrs. Taylor into the bedroom, and raped her. Thereafter, he made a cup of coffee, and searched for clothes that he could wear. In a short time, Mr. Taylor returned home, and Fields forced Mrs. Taylor out of the house, into the open, where her husband could see her, while he (appellant) remained behind the house. According to the testimony of the witness, she told her

[1] Fields' assignment at the prison farm consisted of feeding and caring for hogs located in an area near the back boundary or southeast side of the farm. He was permitted to carry a weapon for the purpose of protecting the stock from stray dogs that had been killing some of the young pigs. On the date in question, appellant simply walked away from the prison farm, with a pistol in his possession.

[2] The door was fastened by a latch, but Fields kicked it open. From the testimony of Mrs. Taylor, "Q. What brought your attention to the defendant Fields? A. My door being suddenly kicked open, the noise, he was inside the house when I first, at the first commotion the door was just suddenly busted open and there he stood."

husband, "There is a man here that wants the keys to our truck . . . if you don't give him the keys he will kill me." Mr. Taylor then threw the keys to Fields, and the latter got in the Taylor truck and drove away. Mr. Taylor verified his wife's testimony as to the events occurring after he reached the house.

Mrs. Taylor, who according to the evidence, was hysterical, was taken to the hospital, where she was examined by Dr. Charles Reid, a physician of Pine Bluff. Dr. Reid testified that he found evidence of recent sexual intercourse, and that Mrs. Taylor was crying and upset and required a sedative before she could be examined or questioned intelligently.

Other facts, hereinafter mentioned, served to substantiate the charge placed against appellant. The aforementioned evidence was sufficient to sustain a conviction; in fact, the uncorroborated testimony of Mrs. Taylor, standing alone, under our decisions, was sufficient proof to justify the jury in finding that appellant had sexual relations with Mrs. Taylor by force and against her will. See *Hodges* v. *State,* 210 Ark. 672, 197 S.W. 2d 52, *Bradshaw* v. *State,* 211 Ark. 189, 199 S. W. 2d 747.

Appellant moved to strike that portion of the testimony given by Mrs. Taylor, wherein she stated that Fields said that he "had just killed a man, and what he was going to do now wouldn't be any worse than what he had already done." The court, over objections, admitted this testimony for the purpose of showing the intent and design of Fields. No error was committed in admitting this evidence. Certainly, the statement was a threat to the prosecuting witness of what would happen to her if she did not submit to his desires, and, for that matter, a rapist might well make such a remark, irrespective of whether it was true, as a way of frightening his intended victim. This was not a matter of admitting irrelevant evidence as a means of showing a criminal disposition, but rather, the statement was pertinent to the issue of whether Fields forced Mrs. Taylor to have intercourse with him.

It is asserted that the court erred by permitting Dr. Reid to testify as to the emotional condition of the prosecuting witness at the time of his examination, but the assignment is without merit, for we held contrary to this contention in *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9.

Appellant was overtaken and arrested shortly after he left the Taylor home, at which time he surrendered his pistol to the sheriff.[3] While in the car with the officers, Fields was asked by Deputy Sheriff Buck Oliger of Jefferson County if he had raped Mrs. Taylor. Oliger testified that appellant answered, "If she said I did, I did." Oliger also testified that he (Oliger) told appellant that Mrs. Taylor had said that he raped her twice, and Fields replied, "No, only once." This evidence was objected to by appellant, but the court admitted the testimony solely for the purpose of identifying Fields as the man charged with rape. The statements were admissible. Prior to the taking of the evidence before the jury, the court had retired to chambers and heard testimony as to the voluntary nature of the statements. We have approved this procedure. *Brown* v. *State,* 198 Ark. 920, 132 S. W. 2d 15, *McClellan* v. *State,* 203 Ark. 386, 156 S. W. 2d 800. According to the testimony, the statements were entirely voluntary; in fact, there is no evidence anywhere in the record of threats, duress, intimidation, or mistreatment of any nature. Nor is there evidence of any promise of immunity from prosecution, or leniency, as an inducement to Fields to make the statements. While the court limited the evidence to identification of appellant, the testimony was actually allowable in a broader sense. We have held that any voluntary admission, tending to connect a defendant with a crime charged against him is admissible in evidence. *McMillan* v. *State,* 229 Ark. 249, 314 S. W. 2d 483, *Smith* v. *State,* 230 Ark. 634, 324 S. W. 2d 341.

[3] The sheriff, together with a deputy, and the prison superintendent, were already in the vicinity, looking for Fields, and they observed him driving away from the Taylor home in the truck. Mr. and Mrs. Taylor were standing in the yard, and after a brief conversation with the Taylors, the officers started in pursuit. Appellant wrecked the vehicle, after driving about three miles, attempted to escape on foot, and was endeavoring to enter a house when the officers apprehended him. Fields threw his pistol into the air, and the sheriff picked it up off the ground.

During the examination of Gerald Taylor, husband of Myrtle Taylor, counsel for appellant asked the witness if he planned to file suit against the State of Arkansas for damages. The court would not permit the witness to answer the question, but Taylor replied, "I can't answer that."[4] Appellant asserts that he was attempting to show that the outcome of the instant case would have a material effect on a civil claim for damages against the State of Arkansas (based on the alleged attack on Mrs. Taylor). From appellant's brief,

"If in fact a suit was planned or contemplated, the credibility of both the Taylors testimony would be lessened considerably because of their monetary interest in the civil action. If such action was planned by the Taylors, this fact should have been given to the jury and the evidence weighed by the jury along with the other evidence of the Taylors."

It is unnecessary that we determine whether the question, or any answer that might have been given, was, or would have been, relevant, or admissible in the case before us, for no objection was made to the trial court's ruling. In order for this court to consider the alleged error, it was necessary that an objection be made. As we stated in *Jenkins* v. *State,* 222 Ark. 511, 261 S. W. 2d 784:

"Appellant also argues the court erred in one of the instructions on the question of insanity, because it erroneously assumed appellant killed deceased. The record affirmatively discloses that no objections were made by either side to any instructions given by the court. Although Ark. Stats., § 43-2723, provides that in capital cases there need not be any exceptions saved to the rulings of the court, we have repeatedly held that objections must be made to the proceedings complained of, and that there can be no reversal on account of the giving of an erroneous instruction which was not objected to in the trial court. (Citing cases) This same rule is applicable to appellant's contention that the court erred in permit-

[4] It is not clear from the record whether Taylor was stating that he did not know whether he would make a claim against the state, or whether his answer was based upon the court's ruling.

ting two witnesses on rebuttal to testify that appellant had requested a roadhouse band to play 'Shotgun Boogie' shortly before the killing. There was no objection to this and other testimony which the appellant now contends was erroneously admitted."

The court gave fifteen instructions, including one (No. 10), which was requested by the appellant. A general objection was made to the other fourteen instructions. A general objection, of course, is only sufficient if an instruction is inherently erroneous; otherwise, it is necessary that the error of an instruction be specifically pointed out, in order that the trial court may have an opportunity to make any necessary corrections. *Rutledge* v. *State*, 222 Ark. 504, 262 S. W. 2d 650. Actually, the instructions appear to be entirely correct and proper; certainly, none can be classed as inherently erroneous.

As stated at the outset, inasmuch as this is a capital case, we have explored the record and given consideration to each objection made by appellant during the trial.

Finding no errror, the judgment is affirmed.

MR. JUSTICE HOLT disqualified.

KERSTEN *v.* BLACK.

5-2856 364 S. W. 2d 150

Opinion delivered January 14, 1963.

[Rehearing denied February 18, 1963.]

A. James Linder and *James M. Barker, Jr.*, for appellant.

Williamson, Williamson & Ball, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a controversy, between appellant who claims "a common law lien," and appellee who has a mortgage lien. Appellee, M. O. Black, is the father of James L. Black, who farmed lands rented from several owners. On August 28, 1960, James L. Black executed, acknowledged, and delivered to M. O. Black a mortgage to secure a note of $7,000.00 and all other advances. The mortgage was duly recorded the same day, and was on the then growing 1960 rice crop and soybean crop of James L. Black. The rights of M. O. Black under this mortgage form the basis of the present suit. The appellant, W. F. Kersten, is a feed and fertilizer merchant in Ashley County, and also a purchaser of rice and soybean crops. In 1960 James L. Black purchased rice and soybean seed and fertilizer from Kersten, apparently on open account; and at the time of the harvest season, the balance due by James L. Black to Kersten was $3,767.54. Kersten testified that James L. Black promised to pay Kersten the furnish account out of the proceeds of his 1960 crop; and such promise is an ingredient of appellant's claimed common law lien.

When James L. Black's 1960 rice crop was harvested and the rent paid, the remaining proceeds were insufficient to pay M. O. Black, and there was left a sizable balance. Then came the 1960 soybean harvest. Kersten purchased the soybean crop from James L. Black, and promptly in turn sold it to others in New Orleans and elsewhere. After Kersten paid the rent due the landowners there remained in Kersten's hands $10,869.46 proceeds of the soybean crop. By three checks in November 1960, Kersten disbursed to James L. Black a total of $800.00. On November 29, 1960, Kersten paid the appellee, M. O. Black, $5,500.00 as a part of the proceeds of the soybean crop; and from said amount, M. O.

Black paid the Farm Home Administration $4,852.42, as the balance due on the James L. Black first mortgage, and retained the remaining $647.58 to apply on the indebtedness that James L. Black owed M. O. Black. On January 11, 1961, Kersten paid M. O. Black the further sum of $1,000.00 from the proceeds of the soybean crop. There remained in the hands of Kersten the sum of $3,569.46 as the balance of the soybean crop; and it was for the recovery of this amount that M. O. Black filed the present suit.[1] Kersten claimed and testified that James L. Black owed him a total of $3,767.54, which was $198.08 more than the $3,569.46 that Kersten held in his hands as the balance of the proceeds of the soybean crop; and Kersten claimed the right to retain the $3,569.46 by virtue of a "common law lien."

The Trial Court held that Kersten had a common law lien on the proceeds of the soybean crop, but had waived his common law lien in favor of appellee's mortgage lien. From such holding as to the waiver, Kersten brings this appeal, claiming that there was no sufficient evidence to establish a waiver. To answer Kersten's contention, the appellee claims (a) that his mortgage lien is superior to any common law lien that Kersten might claim; and (b) that if Kersten ever had any common law lien, he lost it by disposing of the soybeans, and also by recognizing the superior rights of M. O. Black's mortgage.

I. *The Lien of The Mortgage Held By M. O. Black.* The mortgage from James L. Black to M. O. Black was duly executed, acknowledged, filed for record, and recorded on August 25, 1960. Under our statutory law, M. O. Black had a lien from that date which was notice to all the world. Section 51-1002 Ark. Stats. reads:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice

[1] James L. Black was originally made a defendant in this case; but he filed a voluntary petition in bankruptcy on April 29, 1961 and obtained his discharge in bankruptcy on June 30, 1961.

to all persons of the existence of such mortgage."

Section 51-1004 Ark. Stats. reads:

"All mortgages executed on crops already planted, or to be planted, shall have the same force and effect to bind such crops and their products, as other mortgages now have to bind property already in being."

Thus the lien of M. O. Black was superior to any subsequently acquired lien.

II. *The "Common Law Lien" of Kersten.* Appellant claims that he had a "common law lien" on the 1960 soybean crop of James L. Black for all that Kersten furnished to enable Black to plant, cultivate, harvest, and market the said soybean crop; that such lien arose from possession; and that when Black delivered the soybeans to Kersten the "common law lien" became superior to the mortgage lien of M. O. Black, regardless of the fact that M. O. Black's mortgage was of record prior to the delivery of the soybeans to Kersten.[2] In *Driver* v. *Jenkins,* 30 Ark. 120 (1875), Mr. Justice Walker said of a common law lien: "The lien rests upon the idea, that the party having it has a right in, or to, the property until his claim has been paid or satisfied by the owner of the property."[3] But when Kersten received possession of the soybeans (as purchaser and subsequently to be noted), even then there was of record the mortgage of M. O. Black, and Kersten's claim was subject to the

[2] Learned counsel for appellants succinctly states Kersten's contention as to the "common law lien"; ". . . we feel it imperative to determine the nature of the right of lien. The authorities are almost unanimous in holding that the right of lien is not property right, neither a *jus ad rem,* nor a *jus ad re.* It is a personal prerogative or power that attaches to a person called a lienholder, which he may or may not exercise in order to retain possession of goods of his debtor until certain charges are met. *Driver* v. *Jenkins,* 30 Ark. 120; *Burrow* v. *Fowler,* 68 Ark. 178; *Ruggles* v. *Walker,* 34 Vt. 468; *McCombie* v. *Davis* (K.B. 1805), 7 East 5, 103 Eng. Reprint 3; Brown On Personal Property, Sec. 120 at Page 533. The right of a lien does not arrive until lienor accomplishes possession of the subject matter of the lien, and when this is accomplished, the duration of the lien is measured by the duration of the possession. *Burnett* v. *Mason,* 7 Ark. 253; *Driver* v. *Jenkins, supra; Burrow* v. *Fowler, supra; Weber Implement and Auto Company* v. *Pearson,* 132 Ark. 101. Thus, the authorities show that the lien at common law is founded upon the conception of possession and is highly personal in its nature."

[3] For similar definitions of a common law lien see 33 Am. Jur. 425, "Liens" § 16; 37 C.J. 307, "Liens" § 3; 58 C.J.S. 836, "Liens" § 3; and Jones on Liens, 3rd Ed. § 3.

paramount right of that mortgage: so Kersten's right, if any, could not become superior to the mortgage held by M. O. Black.

There are also other answers to the appellant's claim. Under any concept of the "common law lien," it arose only when possession was obtained, and existed only so long as possession was retained.[4] Kersten did not take possession as a lien claimant, but as a *purchaser* of the soybeans. He promptly sold the soybeans and parted with possession, and thereby lost whatever common law lien he might ever have enjoyed. There is also the matter of the recognition of M. O. Black's superior rights, on which point the Chancellor rested his opinion; and we find that ground to be sound. The evidence established that when Kersten paid M. O. Black the $1,000.00 in January 1961, Kersten promised to pay M. O. Black the balance of the proceeds of the soybean crop. This promise was clearly a recognition of the superior right of M. O. Black to the proceeds of the soybean crop.

A treatise of considerable length could be written on this matter of common law liens and how far they have been affected by statutory liens;[5] but we summarize from our own holdings. In *Bennett* v. *Taylor,* 185 Ark. 794, 49 S. W. 2d 608, after reviewing our earlier cases, we said: "Indeed, we are of the opinion that the only common-law lien that has been recognized by the statutes or courts of this state is that which was recognized at common-law as artisans' lien by which a chattel which had been improved or repaired was impressed

[4] See 33 Am. Jur. 434, "Liens" § 29; 37 C.J. 325 and 330, "Liens" § 33 and § 46; and 53 C. J. S. 853 and 859, "Liens" § 8 and § 12.

[5] In addition to the articles on liens in American Jurisprudence, *Corpus Juris,* and *Corpus Juris Secundum,* previously mentioned, there is also the volume, "Jones on Liens." Some of our own cases not previously mentioned are worthy of study: *Barnett* v. *Mason,* 7 Ark. 253; *Roberts* v. *Jacks,* 31 Ark. 597; and *Burrow* v. *Fowler,* 68 Ark. 178, 56 S. W. 1061. Also we mention the following: 37 Mich. Law Review, p. 283: "Extent to which common-law artisan's lien has been supplanted by statute"; note in 50 L.R.A. 719, "Liens depending on possession"; *Sweet* v. *Pym,* 16 Eng. Rul. Cases 142, and the English and American notes following the case. In Case and Comment for November-December 1957 (Vol. 62, No. 6), page 34, there is a most interesting article entitled, "Joseph Story's Unsigned Article on 'Common Law Liens,'" written by John Charles Hogan.

with a lien in favor of the workman so long as it remained in his possession. *Gardner* v. *First National Bank,* 122 Ark. 464, 184 S. W. 51."

We conclude that the decree in favor of M. O. Black was correct; and it is affirmed.

HOLT, J., not participating.

EDENS *v.* STATE.

5053 363 S. W. 2d 923

Opinon delivered January 14, 1963.

[Rehearing denied February 11, 1963.]

Marcus Feitz, Gus R. Camp and *Guy Brinkley,* By: *Gus R. Camp;* for appellant.

Frank Holt, Atty. General, by, *Jack Holt, Jr., Asst. Atty. General;* for appellee.

GEORGE ROSE SMITH, J. The appellant was convicted of having embezzled ten thousand dollars that had been entrusted to him as an agent. Ark. Stats. 1947, § 41-3927. The jury left the matter of punishment to the trial judge, who sentenced the defendant to imprisonment for eighteen years, with six years of the sentence being suspended. The motion for a new trial contains 35 assignments of error, most of which are argued in the appellant's brief. We shall discuss only the more important points.

I. The evidence is sufficient to support the conviction. Dr. T. B. Harper, the prosecuting witness, testified that he and the accused sought to purchase certain land in Greene county as a partnership venture. Dr. Harper deposited $10,000 with Edens, who did not have permis-

sion to use the money for any purpose except that of purchasing the property. The land, however, was sold by its owner to some third person. When Dr. Harper requested the return of his deposit he discovered that Edens did not have the money and was unable to make restitution. This testimony is sufficient to support the jury's conclusion that Edens unlawfully converted to his own use funds that had been entrusted to him as an agent, as charged in the information.

II. Before the trial the accused filed a motion for a bill of particulars, asking for such matters as copies of any instruments to be used in evidence by the State, any statements taken by the State from its witnesses, and other similar information that we need not detail. The court directed the State to furnish the accused with a copy of Dr. Harper's check for the $10,000 deposit, but in other respects the motion was denied.

Although denominated a motion for a bill of particulars the motion was actually a request for discovery. Our discovery statute does not apply to criminal cases. *Bailey* v. *State,* 227 Ark. 889, 302 S. W. 2d 796. The true function of a bill of particulars is to require the State to set forth the criminal act in detail and with sufficient certainty to apprise the defendant of the crime and enable him to prepare his defense. Ark. Stats., § 43-804. The information filed against Edens was quite definite in specifying the offense being charged. Hence the so-called motion for a bill of particulars was properly denied, for the accused was already aware of the exact offense for which he was to be tried.

III. On the day of trial the accused asked for a continuance on the ground that a certain file containing information about the transaction with Dr. Harper had been subpoenaed by a federal agency and had not been returned to Edens. At the hearing upon this motion it developed that the file had been in the federal agency's possession for six months or more and that Edens had made practically no effort to retrieve it. In the circumstances the trial court did not abuse its discretion in denying the motion for want of diligence. *Bryan* v.

State, 179 Ark. 216, 15 S. W. 2d 312. Furthermore, Edens' testimony in support of the motion was not sufficiently definite to prove that the file contained any specific documents tending to exonerate him.

IV. After the trial had begun, and while the State's first witness was being questioned, defense counsel moved for a mistrial on the ground that the prospective jurors had not been sworn to give truthful answers to questions asked upon the *voir dire* examination. Ark. Stats., § 39-226. It affirmatively appears that counsel were aware of this omission while the jury was being selected, but they made no objection until after the trial had begun. The judgment recites that defense counsel announced in open court that all members of the jury "were good for the defendant." In the circumstances the objection was waived. See *Bowlin* v. *State,* 175 Ark. 1115, 1 S. W. 2d 553.

V. Dr. Harper testified that he and Edens had intended to pay $55,000 for the land in question, with each to contribute equally. Dr. Harper was allowed to testify that in addition to the payment of $10,000 that was set forth in the information against Edens he also paid to the accused an additional $17,500 (the rest of his half of the purchase price) and that he had not gotten back any of his money. The defendant's objection to the latter testimony was correctly overruled. The two payments were made only a few days apart and were elements of the same transaction, especially as it appears that Dr. Harper later asked for the return of *all his money.* Hence the State was entitled to prove both payments in order to show the whole transaction. *Autrey* v. *State,* 113 Ark. 347, 168 S. W. 556. Since the testimony was admissible for one purpose it was incumbent upon the defense to ask the court for an admonition limiting the effect of the proof. *Amos* v. *State,* 209 Ark. 55, 189 S. W. 2d 611. No such request was made.

VI. Dr. Harper was evidently somewhat reluctant to give evidence against Edens. We think the court was right in refusing to permit defense counsel to bring out the fact that Dr. Harper did not ask that Edens be prose-

cuted, did not wish to see him go to the penitentiary, and the like. Such an attitude on the part of the prosecuting witness has no bearing upon the guilt or innocence of the accused and, on the issue of credibility, does not tend to show that he is prejudiced *against* the defendant. Thus the testimony would have served no legitimate purpose and apparently was offered only as a basis for an argument that Edens was being persecuted by the prosecuting attorney.

VII. Objection is made to the court's action in including in its original instructions to the jury a statement that if the jury found the defendant guilty but were unable to agree upon the punishment they might leave that matter to the court. The giving of such an instruction is not reversible error. *Downs* v. *State,* 231 Ark. 466, 330 S. W. 2d 281. In *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304, we observed that where it appears that such an instruction "is or may become necessary or proper," it is the better practice for the court to give it before the jury first retires to consider its verdict. Even so, we did not intend to state that the instruction should routinely be given in every case, and if the *Underwood* case has been so interpreted we take this opportunity to point out that ordinarily there is no occasion for the jury to be supplied with this information.

VIII. In the course of his closing argument the prosecuting attorney stated that the State's evidence was undenied by anyone (the defendant having offered no proof whatever). This argument did not amount to a comment upon Edens' failure to testify; for it was properly a contention that the testimony should be believed, because it was uncontradicted. *Davis* v. *State,* 174 Ark. 891, 298 S. W. 359.

We have considered the other assignments of error but do not find them to necessitate discussion.

Affirmed.

WARD, J., not participating.

HOLT, J., disqualified.

BLACK *v.* CLARY.

5-2864 363 S. W. 2d 528

Opinion delivered January 14, 1963.

Shaver, Tackett & Jones, for appellant.

Robinson & Robinson, for appellee.

PAUL WARD, Associate Justice. This is a dispute between appellant and appellees over the title to certain lands formed by accretion.

Appellees, Odell Clary and George Gaston, bought their land from R. P. King in 1948. This land, which is described by metes and bounds, consists of 231 acres lying in fractional sections 7 and 8, Township 18 south, Range 25 west. All this land (prior to accretions) was in Lafayette County, and all of it lies east of Red River. It appears from the record that at one time the southeast boundary of appellees' land was the center line of what is called Old Red River or Kitchen's Bend Lake. Appellant owns land known as Kitchen's Bend Island, in fractional sections 7, 8, 17 and 18, Township 18 south, Range 25 west—all in Miller County. The plat introduced in the record shows that appellees' lands lie north and west of appellant's land; that the center line of Old Red River or Kitchen's Bend Lake was originally the dividing line between the two parcels of land, and that Lafayette County (at this particular point) is north of Miller County.

It appears undisputed that many years ago, as the bed of Red River shifted positions, new land was added by accretion to the lands of appellant and appellees. It appears also that the said accretions began at a point in the middle of what is now Old Red River and continued to form in a southwesterly direction. This accreted land is the subject of this litigation. It is undisputed that in 1946 R. P. King built a fence from the point above described (where the accretion began) which ran in a southwesterly direction (apparently) to Red River as now located. It is indicated by the plat introduced in evidence that this fence runs from Lafayette County to Miller County.

Appellees filed this suit on January 6, 1961, in Lafayette County, to enjoin appellant from trespassing on the accreted land on the north side of the fence previously described, and asking to have their title quieted to the accreted lands north of the said fence and for $1,000 in damages. The trial court, after a full hearing, denied damages, but decreed that title to the disputed lands (north of the fence) be "fully invested and confirmed in plaintiffs by the laws of accretion and of adverse possession".

From the above decree appellant prosecutes this appeal, seeking a reversal on the two grounds hereafter set out.

One. It is first insisted by appellant that "The trial court was without jurisdiction". Appellant's argument on this point is: (a) It is conceded appellees' base tract of land was (originally) in Lafayette County, and likewise all of appellant's base tract was in Miller County; (b) It is conceded also that (originally) the line which divided Lafayette County from Miller County also divided appellant's land from appellees' land: (c) Consequently none of the accreted lands could possibly be in Lafayette County, and therefore the chancery court of Lafayette County could not have jurisdiction under Ark. Stats. § 27-601. The pertinent portion of this section, in substance, states: Actions for the recovery of real property or any interest therein must be brought in the coun-

ty in which the property or "some part" thereof is situated.

We would be constrained to agree with the above argument except for one thing—there is nothing in the record (including both the testimony and the plat) which shows conclusively that "some part" of the accreted lands is not located in Lafayette County. That being the situation we must indulge the presumption the trial court had jurisdiction. See: *Tipton, Administrator, Ex Parte,* 123 Ark. 389, 185 S. W. 798. The trial court, in the decree, found as a fact that it "has jurisdiction of the parties and the subject matter". In the case of *Crockett* v. *Bearden,* 203 Ark. 48, 156 S. W. 2d 79, an almost analagous question arose as is presented here, and, in resolving it, this Court said:

"The court exercised jurisdiction in respect of the lands, which it could not have done had the subject-matter been in a different county; hence, the presumption attaches that the lands were in Greene County."

Two. It is also contended by appellant the "evidence was insufficient to award ownership of the accretions to appellees". It is our opinion, however, from an examination of the entire record, that the trial court was justified in finding appellees had acquired the disputed land as accretion to their lands and by adverse possession. R. P. King testified he had purchased the land (now claimed by appellees) in 1946 and took immediate possession; that there were some accreted lands at that time; that he employed the county surveyor to make a survey of the lands and run a line along the center of Old River; that he built a three wire fence in a southwest direction along that line; that he claimed the land to that fence on the north side; that he sold the land to appellees in 1948; and, that he was reasonably sure he notified appellant (or his brother-in-law) he was building the fence; that appellant saw the fence but never objected to it. There was other testimony that the fence was replaced in 1953 by another fence in substantially the same location. Appellant, Clary, testified he and Gaston had been in possession of the land ever since they

bought it in 1947; that they use the land (north of the fence) to pasture cattle; and, that they have improved the pasture. He further testified that appellant never disputed the line until he came into court. The testimony of appellee, Gaston, was substantially the same as that of Clary.

Appellant contends that the possession of appellees was neither adverse nor continuous for seven years but we think the weight of the testimony, coupled with the other facts and circumstances disclosed by the record, supports the finding of the trial court to the contrary.

Notice of adverse possession may be actual or it may be inferred from facts and circumstances, such as grazing cattle, erection of a fence or improving the land. See: *Nall* v. *Phillips,* 213 Ark. 92, 210 S. W. 2d 806; *Baughman* v. *Foresee,* 211 Ark. 149, 199 S. W. 2d 596; and, *Sims* v. *Petree,* 206 Ark. 1023, 178 S. W. 2d 1016.

Affirmed.

DIAMOND ACRES *v.* DIETZ.

5-2889 363 S. W. 2d 914

Opinion Delivered January 14, 1963.

[Rehearing denied February 11, 1963.]

W. S. Walker and *Virgil D. Willis,* for appellant.

John H. Shouse and *J. Loyd Shouse,* for appellee.

SAM ROBINSON, Associate Justice. The appellant, Henry Dietz, and appellee, John Dietz, are brothers. Henry acquired several hundred acres of land near Bull

Shoals Lake in Boone County. He formed a corporation named Diamond Acres, Inc. and conveyed a part of the land to the corporation. His intentions were to divide the land into small tracts or lots and sell them for residential property.

In August, 1959, Henry employed the appellee, his brother John, in connection with the development. Whether John was working for Henry, as distinguished from the corporation, is not made an issue on appeal.

John's salary at the beginning was $60.00 per week. He did all kinds of work that he was called upon to do and continued as an employee of appellants until November, 1961. In January, 1962, John filed this suit contending that in the first part of June, 1960, he and Henry entered into an oral contract whereby John was made general manager of the entire operation and was to receive as consideration for his work, five per cent commission on the gross sales of the real property, and that during 1961 the sales amounted to about $480,000.00; that appellants were indebted to him in the sum of about $20,000.00 on the contract of employment.

Defendants answered asserting that the alleged oral contract of employment was barred by the statute of frauds because it was not to be performed within one year. Henry further alleged that he employed John on August 27, 1959 at a salary of $60.00 per week; that from January 17, 1960 to June 2, 1960, the salary was $75.00 per week; from June 3, 1960 to December 31, 1960, the salary was $125.00 per week; from February 24, 1961 to August 7, 1961, the salary was $125.00 per week, and that the salary had been paid in full. By way of cross-complaint Henry alleged that John owed him $800.00 as borrowed money.

The cause was tried to a jury and there was a verdict for John in the sum of $5,400.00 and a verdict for Henry on the cross-complaint in the sum of $400.00. Thereupon, the Court credited one verdict against the other and judgment was entered for John in the sum of $5,000.00. Henry and his corporation have appealed.

Appellants rely on three points. First, that the alleged oral contract for five per cent commission is barred by the statutes of fraud because the work was not to be performed within one year. Second, that the alleged contract was for the payment of a commission for the sale of real estate, and since John had no real estate or brokers license he cannot recover. Third, that the evidence is not sufficient to support the verdict.

It is clear that the jury did not find for John on the alleged oral contract for five per cent commission. If the verdict had been based on that theory, no doubt, according to the evidence, John would have been entitled to recover about $20,000.00; but according to the allegations in Henry's answer and the evidence introduced by appellants, John was employed during certain periods for a stipulated salary. Appellants' auditor testified as to the total amount paid to John as salary. When the amount paid to him is deducted from the amount appellants admit that John earned, there is left a balance owed to him in excess of the amount of the jury verdict. Appellee has taken no cross-appeal.

The case was submitted to the jury on the theory of whether appellants were indebted to appellee for work done. After having retired to consider its verdict, the jury returned for further instructions and, without objection, they were told by the Court: "If you find that the plaintiff, John Dietz, is entitled to recover for his alleged services to the defendants, in other words, if you find that they had a contract for employment and that he rendered services for which he has not been fully paid, then you would find for the plaintiff in whatever sum you find he had not been paid and insert that in the blank space."

The evidence does not show that John was acting as a real estate agent or broker requiring a license. The evidence is sufficient to support the verdict.

Finding no error, the judgment is affirmed.

5-2845 363 S. W. 2d 539

Opinion delivered January 14, 1963.

Bernard Whetstone, for petitioner.

Thomas D. Wynne, Jr. and *Frank W. Wynne,* for respondent.

JIM JOHNSON, Associate Justice. This is a petition for a writ of mandamus directing the respondent Circuit Judge to set a case for trial.

In September, 1959, petitioner, Bessie Gregory, filed suit in the Circuit Court of Dallas County against Fred Thompson and Henry Thompson, d/b/a Thompson Buick Company, in tort for conversion of cash belonging to petitioner. On November 16, 1959, the case was tried before a jury of twelve and resulted in a hung jury, seven to five in favor of petitioner. The trial court declared a mistrial and dismissed the jury. Thereafter on January 23, 1961, the case was again tried and again resulted in a deadlocked jury, six to six. After several requests for resetting the case for trial, on June 18, 1962, the respondent entered an order permanently denying petitioner's request for trial, stating that, "The Court

is of the opinion that any future trial of this case would simply again result in a deadlocked jury and a mistrial and cause the county further wasted expense." From this order comes this petition for writ of mandamus.

In support of her petition, petitioner contends that the trial court's order effectively and permanently denies her a trial and final adjudication of her rights and deprives her of property without due process of law.

This is apparently a case of first impression. We have been unable to locate any cases in Arkansas or any other jurisdiction that are directly in point.

Petitioner's suit in tort is a "chose in action". It is defined in 73 C.J.S., Property, § 9b, as follows:

"A chose in action means, literally, a thing in action, and is the right of bringing an action, or a right to recover a debt or money, or a right of proceeding in a court of law to procure the payment of a sum of money, or a right to recover a personal chattel or a sum of money by action, . . ."

It is basic property law that a chose in action is personal property. The right to sue for damages is property. See 73 C.J.S., Property, §§2, 9, generally; also *Redfern* v. *Collins,* 113 F. Supp. 892 (Tex.); *Willis* v. *Franklin,* 131 F. Supp. 668, (Tenn.); *Wilson* v. *Brown,* 106 F. Supp. 500 (Ky.).

The California District Court of Appeal, in *Werner* v. *Southern California Associated Newspapers,* 206 P. 2d 952, stated the rule as follows:

"The right to recover actual damage is property and the constitutional guarantees of that right are the same as of other property rights, hence an injured party cannot be deprived thereof without due process of law, which means that he is entitled to a hearing and determination by a court of law."

In the case at bar, petitioner has sued and had two trials, both of which resulted in mistrials. A mistrial is often defined as being equivalent to no trial; certainly

there has been no final determination of petitioner's cause of action. Petitioner contends that to deny her another trial is to deprive her of property without due process of law, in contravention of the constitutional guarantees.

Section 13 of Article 2, Declaration of Rights, of the Constitution of Arkansas, is as follows:

"Redress of Wrongs.—Every person is entitled to a certain remedy for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the laws."

Similar protections are provided in the Constitution of the United States:

"Amendment 14, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Respondent contends that his order was "conformably to the laws". The "laws" referred to are Arkansas Statutes §§ 27-1735 and 27-1736, which state:

"Discharge of jury. The jury may be discharged by the court on account of sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing. [27-1735]

"New Trial After Discharge. In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried immediately or at a future time, as the court may direct." [27-1736]

Respondent argues forcefully that the key word in the above statutes is "may", and that by usual statutory construction "may" is directory or permissive rather than mandatory. With this we agree. Rereading these two statutes, it seems apparent that the legislature intended them to be permissive, to give the trial court discretion in the discharge of juries and in the setting of new trials. However, we cannot go so far as to say that the usual and natural meaning of the words of the statutes, in particular § 27-1736, extends to "may or may not be tried again". From the usual and natural meaning, the legislature apparently intended that the trial court could direct *when* the cause would be tried—immediately or at a future date—not *whether* it could be tried. To hold that the statute gives the trial judge the discretion to bring a cause of action to an untimely end would be holding that a statute could abrogate a constitutional right. The classic and beautiful language of Article 2, § 13 of our Constitution expresses the opinion of this court clearly: "He ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the laws".

Writ granted.

Not participating: McFaddin and Holt, JJ.

Tiner *v.* Baldwin.

5-2891 363 S. W. 2d 532

Opinion delivered January 14, 1963.

Milham & Cummins, for appellant.

Barber, Henry, Thurman & McCaskill, for appellee.

FRANK HOLT, Justice. This is an appeal from an order of the Pulaski Circuit Court denying appellant's petition for a writ of certiorari.

Claimant-appellant suffered a knee and leg injury during employment in Pulaski County. It is stipulated that the accident is a compensable injury. The extent of the injury is disputed. Appellant presented his claim for Workmen's Compensation to the Referee and an award was made. An appeal was taken to the full Commission which increased the award. Claimant-appellant's attorney then filed with the Commission his notice of appeal to the Saline Circuit Court. His notice of appeal reached the office of the Commission one day late and the appeal was consequently denied by the Commission.

Appellant filed a petition for writ of certiorari in Saline Circuit Court on November 24, 1961, alleging that any loss of the right of appeal was through no fault of his own because of the illness of his attorney. The last day for lodging the notice of appeal in the Commission Office was November 13, 1961. On November 7th appellant's attorney was hospitalized, returning home on November 10th. There he was confined in bed until he returned to his office on Monday, November 13th, and mailed the notice of appeal to the Commission which received the appeal the next day. The attorney contends that because of his illness he was unavoidably delayed in filing the notice of appeal on behalf of claimant. On November 29th the Circuit Court of Saline County issued a writ of *certiorari* directing the Workmen's Compensation Commission to send up the records of the cause

to the Saline Circuit Court and on December 5th the records were filed in compliance therewith.

On December 21st, the defendant filed his response to the petition for the writ of certiorari contending the appeal was not timely filed. On February 23, 1962, the defendant filed an amended response to the petition for *certiorari* questioning the jurisdiction of the Saline Circuit to hear the cause since the injury admittedly occurred in Pulaski County.

On March 14, 1962, the appellant moved to transfer the proceedings to Pulaski Circuit Court and the cause was so transferred on March 23rd. Defendant-appellee, on March 21, filed his objection in Saline Circuit Court to a transfer. Neither of the parties filed any additional pleadings in the Pulaski Circuit Court. The court denied appellant's petition for writ of certiorari.

For reversal appellant urges that the Pulaski Circuit Court did not consider that the petition for a writ of certiorari had already been granted; and, if granted, the court should not have denied the petition; further, that the court erred in failing to review the findings and order of the full Commission.

Since the writ of *certiorari* had been issued, and the full record brought up, the Pulaski Circuit Court had two possible results that it could reach, i.e., quash the writ of certiorari or determine the cause on its merits.

On June 28, 1962, the Pulaski Circuit Court made the following order:

"On this day is presented to the Court the Petition for Writ of Certiorari filed herein by the claimant, George Tiner, and said Petition is submitted to the Court upon the record herein, the pleadings of the parties, and the Briefs and argument of Counsel.

From all of which the Court finds that the Petition for Writ of Certiorari should be denied.

It is, therefore, by the Court ORDERED that the Petition for Writ of Certiorari filed herein by the claimant, George Tiner, be and the same is hereby denied."

We think it is significant that the order does not assign any specific reason for denying the petition for writ of certiorari.

The court, in its order, recited that it considered the "record herein, the pleadings of the parties, and the briefs and argument of counsel." The "record herein" contained the Saline Circuit Court's order on November 29, 1961, granting certiorari and also, the "record herein" reflects that on December 5, 1961, the Commission complied therewith by filing "the necessary papers and documents to effect the appeal to your court in this case." We are of the opinion that the Pulaski Circuit Court treated the case as an appeal and, therefore, in denying the writ was affirming the order of the Workmen's Compensation Commission rather than disposing of the case based upon the technicality of the aspects of a timely appeal. The circuit court had the right to treat the case at bar as an appeal in order to fully dispose of all questions presented. *Brown* v. *State,* 206 Ark. 135, 173 S. W. 2d 1016.

In reviewing, on an appeal, the findings of fact of the Commission we are limited in this case to the sole determination of whether those findings are supported by substantial evidence. Ark. Stats. 81-1325 (b). We review the facts in this case: Claimant-appellant Tiner received a compensable injury on September 6, 1960. The extent of the temporary total disability and the permanent partial disability is disputed. The Referee awarded Tiner temporary total disability from September 7, 1960 to April 25, 1961 and found permanent partial disability of 35% to his entire left leg. On appeal the full Commission awarded claimant temporary total disability from September 7, 1960 to May 10, 1961 and permanent partial disability of 50% to his entire left leg.

Tiner, after receiving the admittedly compensable injury, was taken to Drs. Murphy & Jones Clinic where he was treated until May 10, 1961 at which time Dr. Jones found claimant's healing period had ended. During claimant's treatment period he was hospitalized and in

an operation, muscles and ligaments were removed from his left leg and knee. A full length leg brace was eventually furnished him which he preferred to another operation. Appellant objects to the sufficiency of the Commission's award of temporary and permanent partial disability.

As to the award of temporary total disability, Dr. Kenneth C. Jones testified that the healing period ended on May 10, 1961, "from a practical standpoint". He recommended an operation, arthrodesis, which could reduce the permanent disability to 35 or 40%. Dr. E. M. Nixon, in his report of May 1, 1961, wrote that he would "discharge him with a permanent disability of 30% of the entire extremity". Dr. John M. Hundley gave the opinion that he would consider the healing period to be ended when the brace is fitted. Dr. F. Walter Carruthers did not give an opinion as to when the healing period ended, however, it can be fairly inferred from his report that he thought a leg brace was necessary to provide normal ambulation. The appellee offered to provide Tiner, through Dr. Hundley, a leg brace of the recommended type on June 30, 1961. As of October 13, 1961, Tiner had not accepted the brace and offered no substantial reason for his failure to accept it. Suffice it to say there is substantial evidence to support the finding that the healing period ended May 10, 1961, according to the medical evidence in this case.

As to permanent partial disability, Dr. Kenneth C. Jones testified there was a 50% permanent disability to the entire left leg and recommended an operation on the left knee which claimant refused. Dr. Ewing M. Nixon testified there was 30% permanent disability. Dr. John M. Hundley estimated the permanent disability at 35% and Dr. F. Walter Carruthers at 60-65%.

We find, after reviewing the evidence in this case, that the finding of the Commission that the permanent partial disability amounted to 50% is supported by at least substantial evidence if not the weight of the evidence.

We affirm the action of the Circuit Court in upholding the Order of the Commission.

Opinion delivered January 21, 1963.

Sam Montgomery, for appellant.

Frank Holt, Atty. General, by *Russell G. Morton,* Assistant Attorney General, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves the question of the proper method of revocation of a suspended sentence. Appellant, Julius Gerard, Jr., was charged with, and convicted, of the crime of Assault with a Deadly Weapon in the Pulaski Circuit Court on May 25, 1961. The jury fixed appellant's punishment at a fine of $1,000 and one year's imprisonment. Suspension of the penalty was recommended to the court. The court complied partly with the recommendation of the jury by suspending the imprisonment, but refused to sus-

pend the fine, giving Gerard one week in which to pay same.[1] On March 27, 1962, a bench warrant was issued for appellant, wherein he was again charged with Assault with a Deadly Weapon (an entirely separate and distinct charge from that of which he was originally convicted). The court refused to allow bond, and on March 29, Gerard was brought into court in custody of the sheriff. Appellant moved for a continuance, but this motion was denied, at which time the court made the following statement,

"Certain information has come to the Court's knowledge that the defendant here has been in some trouble at a colored honkytonk some time ago—I don't remember just when, and he has further been in trouble—or is in trouble now—on a gaming charge at the AmVet's Post Number Sixty in North Little Rock, which case is now pending before the Municipal Court of North Little Rock —set for trial on the twelfth. It is the Court's further understanding that bond was forfeited on a charge of assault with a deadly weapon two or three days ago, in a disturbing the peace count. I am just making a statement. The purpose of this hearing, of course, is to consider the revocation of a suspended sentence imposed on 5-25-61."

After hearing the testimony of seven police officers of Little Rock and North Little Rock,[2] the court announced that the suspended sentence was being revoked. Counsel for appellant stated that he desired to call witnesses, but the court refused this request, stating, "I don't think you have got any right to call witnesses. This is a summary proceeding." The court also refused to permit appellant to say anything, and entered its judgment, finding that Gerard had violated the terms of his suspension, and that the suspended sentence should be revoked and the defendant committed. Appellant moved for an appeal to the Supreme Court, and asked that bond be fixed, pending the appeal. The motion was denied by the trial court, but on April 18, 1962, this court

[1] The fine has been entirely paid.

[2] The testimony of the officers dealt with alleged offenses on two occasions, March 12th and March 17th, 1962.

granted an appeal and fixed bail, pending disposition of the appeal, in the sum of $2,500.

For reversal, appellant first urges that the court had no jurisdiction on March 29, 1962, to take any action on the judgment rendered on May 25, 1961, since that judgment was final. We do not agree. Of course, the judgment was final in the sense that it was appealable, but it certainly was not final in the sense that it was irrevocable. The meaning of the word, "suspended" (Webster's Third New International Dictionary) is "temporarily debarred, inactive, held in abeyance." In fact, we have already held contrary to appellant's contention. In *State Medical Board* v. *Rodgers,* 190 Ark. 266, 79 S. W. 2d 83, quoting from an earlier case, we said, " 'It was not necessary to decide in that case whether it could be done or not. However, we are now called upon to confirm the doubt there expressed; and we do now so hold. The judgment rendered is not a final one. Evidently, it was in the contemplation of the court that some further order might be entered. The defendant might be brought in under this plea at some subsequent term, and the punishment then imposed which the plea authorized . . .' "

Further, we added,

"We think this case very much in point and decisive of the question here presented. There has been no conviction within the meaning of the statute. There has been no final judgment entered because the sentence has been suspended, and the appellee has not been required to surrender himself in execution of such judgment."

Appellant complains that the provisions of Act 44 of the General Assembly of 1953 were not complied with by the court at the time of the suspension of the sentence. That act authorizes the trial judge "to postpone the pronouncement of final sentence and judgment upon such conditions as he shall deem proper and reasonable as to probation of the person convicted, the restitution of the property involved, and the payment of the costs of the case. Such postponement shall be in the form of a sus-

pended sentence for a definite number of years, running from the date of the plea or verdict of guilty and shall expire in like manner as if sentence had been pronounced; provided however, the Court having jurisdiction may at any time during the period of suspension revoke the same and order execution of the full sentence."

Appellant states that the court did not promulgate any conditions for probation, and did not fix a definite number of years for the suspended sentence to run. We find no merit in appellant's argument. For one thing, according to the record, the trial judge, on March 29, in open court, commented as follows:

"I followed the jury's recommendation on this suspended sentence, and I remember at the time I told Mr. Gerard I didn't want him operating a club, didn't want him around a club, I would like for him to behave himself. A man on Ninth Street at three or four o'clock in the morning and who forfeits bond on a charge of—(here interrupted by counsel)."

There is nothing in the act which provides that any "conditions" must be in writing. For that matter, it would appear that a defendant should know that the suspension of the execution of the punishment given him, is dependent upon his good behavior. Of course, it would probably be helpful, and conducive to the future good conduct of one under a suspended sentence (and therefore, the better practice), for the court to enumerate, to some extent, acts that should be avoided, or places that the defendant should refrain from frequenting, etc., but we do not agree that failure to designate particular conditions has the effect of depriving the trial court of its power to subsequently revoke suspended sentences. It is obvious that the primary purpose of the General Assembly, in passing Act 44, was to set a definite period of time in which a suspended sentence would operate; in other words, the Legislature had the intent to end the practice of a trial court postponing a sentence indefinitely. Here, the sentence was suspended for a definite period of time—one year, and the suspension was revoked

within that time. It follows that this contention is without merit.

It is asserted that the court erred by refusing to allow appellant to present the evidence of witnesses in his behalf, and in refusing to permit the appellant to say anything in his own defense. We firmly agree with this contention, and this error by the court necessitates a reversal. When defense counsel proposed to call witnesses (following conclusion of the testimony of officers), the court refused to permit this to be done, and likewise, when Gerard asked, "Judge, Sir, could I say something?", replied, "No, Sir." It is true that the officers testified to acts on the part of Gerard that appear inconsistent and incompatible with the proper conduct of one under a suspended sentence. However, irrespective of the offense with which one is charged, and regardless of the testimony against him, a defendant is entitled to call his witnesses — and certainly, — to testify himself. A basic principle of American justice is that every defendant is entitled to be heard, and this is a privilege that can be denied to an accused by only one party—the defendant himself. No case is cited by the state that supports the trial court's ruling on this point. Rather, our cases support the position taken by appellant, though they were not decided on the point under discussion. See *Bodner* v. *State,* 221 Ark. 545, 254 S. W. 2d 463, *Parkerson* v. *State,* 230 Ark. 118, 321 S. W. 2d 207. Both of these cases involved revocation of suspended sentences. The opinion in the *Bodner* case reflects that the trial court asked Mrs. Bodner if she was ready for a hearing, and she replied in the affirmative. A review of the transcript in that case reflects that Mrs. Bodner testified quite at length (though to no avail, since her suspended sentence was revoked). The Parkerson case contains language clearly indicating that one charged with acts, which could result in a revocation of his suspended sentence, is entitled to put on his defense, and the transcript in that case reflects, that though the defendant did not testify, or call any witnesses, he was given the opportunity to do so by the trial court.

Appellant complains that he was not given sufficient time in which to prepare his defense, but in view of the fact that this case is being reversed, the question is now moot. It is likewise urged that the court erred in not permitting appellant to make bond. Again, this is no longer of consequence in the case before us, though our concept of the matter is probably best shown by the fact that we, in April, 1962, directed that appellant be allowed bond, pending this appeal.

In accordance with the views herein expressed, the judgment of the Pulaski Circuit Court, entered on March 29, 1962, wherein the suspended sentence originally given appellant was revoked, is reversed and set aside, and the cause remanded to said court with directions to permit appellant to offer such evidence in his behalf as he may desire.

In order that there be no misunderstanding, we call attention to the fact that these proceedings will, in effect, be the same as though heard before the original expiration date of appellant's suspended sentence (May 25, 1962). In other words, appellant cannot now contend that the year has expired, for the appeal taken herein had the effect of tolling, or stopping, the running of the time; nor can it be successfully argued that appellant could not, at most, serve more than approximately two months.[3] Our statute, § 43-2324, Ark. Stats., 1961 Supp. (Act 44, 1953) concludes in the following manner:

"provided however, the court having jurisdiction may at any time during the period or suspension revoke the same and *order execution of the full sentence.*[4]

Reversed and remanded.

Mr. Justice Holt disqualified.

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[3] The original conviction and suspension of sentence occurred on May 25, 1961, and the suspension of sentence was revoked on March 29, 1962.

[4] Emphasis supplied.

Opinion delivered January 21, 1963.

Nance & Nance, for appellant.

Hale & Fogleman, for appellee.

ED. F. MCFADDIN, Associate Justice. The only point urged on this appeal is that the Trial Court committed reversible error in refusing to direct a verdict for the appellant; so in testing the ruling of the Trial Court we view the evidence in the light most favorable to the appellee, as is our rule. *Ark. P. & L. Co.* v. *Connelly,* 185 Ark. 693, 49 S. W. 2d 387; *Life & Cas. Ins. Co.* v. *Kinney,* 206 Ark. 804, 177 S. W. 2d 768; *Mo. Pac. Ry. Co.* v. *Hopper,* 208 Ark. 128, 185 S. W. 2d 88.

Appellant, Southern Pipe Coating, Inc., is a corporation engaged in the business of coating pipe. Appellee, Spear & Wood Manufacturing Company, is a corporation engaged in manufacturing and selling pipe. In January 1959 appellee obtained a contract to sell pipe in Greenwood, Mississippi, provided the pipe was coated to comply with the specifications of the American Water Works Association, herein referred to as "AWWA Specifications." Appellant agreed to coat the pipe for appellee in accordance with such specifications; and it is this contract and the work of the appellant thereunder that gives rise to the present litigation.

The appellant, by letter of February 3, 1959, addressed to appellee, proposed a certain price for "coating and wrapping the following pipe according to AWWA Specifications, the interior to be spun lined; the exterior to be coated and wrapped with 15 pound felt with a whitewash and to be cut back approximately 9 inches from the ends. The pipe is to be sand blasted by you, to be done on your premises in West Memphis, Arkansas, available space is to be provided by you, as well as machinery and handling to be furnished by you."[1] The said offer was accepted by the appellee by purchase order, and the appellant undertook to perform the contract. All parties understood the AWWA Specifications, which were that the thickness of the enamel to be applied should be 3/32 inches thick, plus or minus 1/32 inches tolerance.

There appear to be several methods whereby pipe may be coated with enamel: either the "Weir Method,"[2] the "Trough Method,"[3] or the "Dam Method."[4] The appellant, Southern Pipe Coating, Inc., was free to use any method it desired to accomplish the coating of the pipe to the required specifications. Southern Pipe Coating, Inc. had previously sold to Spear & Wood a trough which could be used in applying the enamel through the trough method; and without so informing Spear & Wood, the appellant intended to use the trough that had been sold to Spear & Wood. But when appellant's workmen reached the premises of Spear & Wood, they found that the said trough had been damaged. Without insisting on the repairing of the trough, the furnishing of another

[1] There were two of these proposals and two purchase orders; but the contract, as shown by the said proposal and purchase order, was the same in both instances.

[2] In the "Weir Method" applying the enamel is accomplished by inserting in the pipe a device, with a nozzle attached to the end, and spraying the enamel onto the pipe while withdrawing the nozzle.

[3] In the "Trough Method," a vee or semi-circle trough is inserted in the pipe; enamel is poured into the trough; and the pipe is rotated. As the pipe turns, the trough is inverted, pouring the enamel onto the pipe, and centrifugal force spreads the enamel over the interior surface of the pipe.

[4] In the "Dam Method," a rubber hose is placed in the ends of the pipe to make a dam, and the enamel is then poured into the pipe. There is some testimony that the "dam method" will not comply with the AWWA Specifications.

trough, or any other equipment to be furnished by appellee, the appellant undertook to coat the pipe by what is called the "dam method."

When appellant had completed the coating, the pipe was shipped to Greenwood for its designated use, and was rejected by the engineer and the contractor because the pipe was not properly coated according to AWWA specifications. Appellee called on appellant to correct the defects in the coating, and there is some controversy between the parties as to what occurred; but there is substantial evidence that the appellant refused to repair the incorrect coating except on a new condition, that is, "machinery and equipment necessary to control thickness of application to be furnished by you." Appellee took the position that appellant should perform the original contract without requiring appellee to furnish any new equipment at such late date. When appellant refused, appellee had the pipe satisfactorily recoated by another company; and then filed this suit for damages, which the jury awarded. From that judgment there is this appeal.

So much for the facts. As heretofore stated, appellant insists that it was entitled to an instructed verdict because the appellee had failed to furnish machinery in accordance with the original contract of February 3, 1959. We have heretofore stated the language of that contract: it said, "available space is to be provided by you,[5] as well as *machinery,*[6] and handling to be furnished by you." Appellant insists that appellee did not furnish the trough (*i.e.,* machinery) that appellant expected; that it was the failure to furnish such trough that brought about the defective coating; and that because a good trough was not furnished originally, then appellee committed the first breach of the contract, and cannot pursue appellant.

We do not agree with appellant's contention that it was entitled to an instructed verdict. Under the evidence, waiver was a question of fact for the jury. We

[5] That is, by Spear & Wood.
[6] Emphasis our own.

have a number of cases which hold that one side may waive a breach of the contract by the other side and then be liable for its own subsequent breach of the contract. Some of these cases are: *Truemper* v. *Thane Lbr. Co.,* 154 Ark. 425, 242 S. W. 823; *Grayling Lbr. Co.* v. *Hemingway,* 128 Ark. 535, 194 S. W. 508; *Wolff* v. *Alexander Film Co.,* 186 Ark. 848, 56 S. W. 2d 424; and *Clear Creek Oil Co.* v. *Brunk,* 160 Ark. 574, 255 S. W. 7. In the last cited case, Chief Justice McCulloch used this language:

"The principle is elemental, that one party to a contract who, with knowledge of a breach by the other party, continues to accept benefits under the contract and suffers the other party to continue in performance thereof, waives the right to insist on the breach. *Friar* v. *Baldridge,* 91 Ark. 133; *Grayson-McLeod Lbr. Co.* v. *Slack,* 102 Ark. 79; *Bennett Lbr. Co.* v. *Walnut Lake Cypress Co.,* 105 Ark. 421; *Marker* v. *East Arkansas Lumber Co.,* 135 Ark. 435; 6 R. C. L. 1022."

In *Bennett Lumber Co.* v. *Walnut Lake Cypress Co., supra,* Mr. Justice HART, in summarizing the evidence of waiver of the first breach in that case, said: "Thus it will be seen that Ladd acted with the full knowledge of all the facts and circumstances connected with the alleged breaches of the contract, and will be deemed to have waived them." To the same effect as our own cases, see generally 12 Am. Jur. 919 *et seq.,* "Contracts" § 354; and 17 C. J. S. 992 *et seq.,* "Contracts" § 491 and § 493.

Even if we assume that the appellant, in February 1959, could have claimed a breach of the contract to have been committed by the appellee (for failure to furnish a usable trough), nevertheless it was a question for the jury as to whether the appellant *waived* such breach by undertaking the performance of the contract after knowledge of such breach. With a jury question made, it follows that the Trial Court was correct in denying appellant's request for an instructed verdict.

Affirmed.

5-2892 363 S. W. 2d 926

Opinion delivered January 21, 1963.

Crouch, Blair & Cypert, for appellant.

Dickson, Putman, Millwee & Davis, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellee to recover double damages under the provisions of Act 283 of 1957, relating to small claims for property damage arising from motor vehicle collisions. Ark. Stats. 1947, §§ 75-918 to 75-920. At the time of the collision the plaintiff's car was being driven by his wife as a bailee; so any negligence on her part was not imputable to him. *Mullally* v. *Carvill,* 234 Ark. 1041, 356 S. W. 2d 238. The trial court, sitting without a jury, found that the defendant had been "one or two percent" negligent and accordingly entered judgment in favor of the plaintiff for double the amount of his damages, which were stipulated to be $200 (and therefore within the purview of Act 283). The plaintiff was also awarded an attorney's fee of $50.

The appellant insists that there is no evidence to support a finding of negligence on his part. The collision occurred on a narrow, muddy country road having two deep well-defined ruts. Mrs. Markham had just crossed a one-lane bridge and was proceeding slowly up a hill. Ford came over the top of the hill at a speed estimated by Mrs. Markham at thirty miles an hour. Mrs. Markham tried to pull over to her right, but she was unable to get out of the ruts. When Ford saw that the other car was staying in the center of the road he tried to stop, but after sliding ten or fifteen feet he struck the Markham automobile, which was either stationary or nearly so.

We are unwilling to hold as a matter of law that Ford was completely free from negligence. He had been over this road earlier that same morning and knew its condition. The court may well have concluded that in starting down the hill at thirty miles an hour Ford did not have his car under proper control, in view of the hazards that were present. Furthermore, Mrs. Markham testified that the normal procedure was for a person to wait at the top of the hill in such a situation. She quoted Ford as having admitted, immediately after the accident, that perhaps he should have stopped at the top of the hill and let the other car pass. Thus there is ample support in the testimony for the trial court's action in attributing at least some negligence to Ford.

A more difficult question is whether the appellant is liable for double damages and attorney's fees. Even though the plaintiff recovered the full amount sued for, Ford contends that he established a "meritorious defense" within this section of the statute:

"In all cases wherein loss or damage occurs to property resulting from motor vehicle collision amounting to two hundred ($200.00) dollars or less, and the defendant liable therefor shall, without meritorious defense, fail to pay the same within 60 days after written notice of the claim has been received, such defendant shall be liable to pay the person entitled thereto, double the amount of such loss or damage, together with a rea-

sonable attorney's fee . . . This liability, which is limited to damage to property, attaches when liability is denied and suit is filed.'' Ark. Stats., § 75-918.

Counsel for the appellant earnestly contend that a defendant is not ''without meritorious defense'' if his contentions present a substantial question concerning his liability. Otherwise, it is argued, the inclusion of this phrase adds nothing to the statute, for the deletion of this language would still leave the defendant liable for double damages whenever he loses the case.

We do not find this argument altogether convincing. To begin with, the position of the phrase in the statute tends to rebut the appellant's argument. The legislature declared that when a loss or damage occurs, ''and the defendant liable therefor shall, without meritorious defense, fail to pay the same within 60 days after written notice,'' then the defendant becomes liable for double damages. Thus the want of a meritorious defense relates not to the issue of ultimate liability but to the failure to pay the claim within 60 days after notice. Apparently the phrase was inserted in the statute to provide for instances when the defendant had a valid reason for not making payment within 60 days, such as the failure of his liability insurance carrier to process the claim within that time or the occurrence of some unavoidable casualty that prevented the defendant from meeting the 60-day deadline.

Secondly, the last sentence in the section declares that the statutory liability attaches ''when liability is denied and suit is filed.'' At that point it cannot be known whether the defendant will interpose a substantial defense at the trial; so it is evident that the liability for double damages arises from the defendant's failure to pay the claim within 60 days rather than from his failure to present a serious defensive issue.

Finally, the basic legislative purpose was evidently to provide an effective remedy for the enforcement of claims so small that in the past they have often not been worth the expense of litigation and could therefore be

ignored by the wrongdoer with impunity. By providing double damages and attorney's fees the lawmakers have endeavored to make the prosecution of such claims worthwhile. Yet in almost every case involving a traffic collision each party is able, with apparent good faith, to blame the other for the accident. If such a defensive maneuver amounts to a meritorious defense it is manifest that the statute might almost as well not have been enacted, for its effective operation becomes negligible. We conclude, therefore, that when, as here, the complaining party gives the required notice and later recovers the full amount of the claim, he is entitled to the benefits provided by the statute. Whether that would also be true in the case of a partial recovery is not before us.

Affirmed.

MATTINGLY *v.* GRIFFIN.

5-2876 363 S. W. 2d 919

Opinion delivered January 21, 1963.

Rieves & Smith, for appellant.

Hale & Fogleman, for appellee.

SAM ROBINSON, Associate Justice. On May 11, 1959, appellee, Elizabeth Ann Simmons, who later married and

is now Elizabeth Ann Griffin, was driving east on Broadway in West Memphis. She stopped at an intersection with the intention of turning to the left, but could not do so immediately because of oncoming traffic. While she was waiting for an opportunity to proceed to her left, the car she was driving was struck from the rear by a car owned by Swift & Company and driven by its employee, Thomas J. Mattingly.

Elizabeth Ann was 18 years of age at the time and in high school. She went to school the next day, but about 3 o'clock she had to call her father to come and get her because of pain in her neck and back. Her father took her to Dr. Deneke, who sent her to the hospital and ordered that her neck be placed in traction. She was put on a hard bed and a halter apparatus was attached to her head and in turn a weight was attached to the halter, causing a pulling effect on the neck. She remained in the hospital for a week wearing this apparatus practically all the time, with the exception of one instance when she left the hospital to take her examinations at high school, and on another occasion when she left the hospital to attend graduation exercises. At the end of the week she went home where she remained for about two weeks and then returned to work.

At the time of the accident, Elizabeth Ann was working at a concession stand at a drive-in from about 6 p.m. to 10 p.m. each day. She earned $25.00 per week and got $10.00 per week as automobile expense. She continued to work at one job or another until the day of the trial, some three years later. She married in September, 1960; a child was born in 1961; and at the time of the trial in April, 1962, she was expecting another child.

Her hospital bill was $126.65, doctor bill $57.00, loss of earnings $105.00. She suffered no broken bones, no bruises, no lacerations, and there was no injury to the boney structure of the back bone. Her injuries consisted of a strain to the muscles, ligaments, and tendons of the neck and back. There were no objective symptoms of the injury. Her subjective symptoms were that her neck and back were painful.

Her father, H. D. Simmons, joined her in the suit and asked for compensation to reimburse him for the damages to his automobile, which was $737.02, the hospital bill, $126.65, and the doctor bill, $57.00. It was stipulated that he was damaged in the sum of $920.67. Elizabeth Ann's actual money damages amounted to $105.00 for loss of time from work; the balance of her damages was due to pain and suffering.

Upon a trial of the case the jury returned a verdict for Elizabeth Ann in the sum of $10,000.00, and a verdict for her father in the sum of $10,000.00. Upon the jury being polled it was discovered that there was an error; that the jury intended to return verdicts for a total of $10,000.00. Thereupon, the Court instructed the jury to retire and reconsider the verdicts. After further deliberation, the jury returned a verdict for Elizabeth Ann in the sum of $8,000.00 and for her father in the sum of $2,000.00. As heretofore mentioned, it had been stipulated that Simmons' damages were $920.67. He therefore promptly filed a remittitur for all of the verdict in excess of that amount. Thereupon, the Court entered judgment for that amount for Simmons, and a judgment for Elizabeth Ann in the sum of $8,000.00.

On appeal appellant contends, first, that the judgment for Elizabeth Ann in the sum of $8,000.00 all of which, except for $105.00, was for pain and suffering, is excessive. Second, that the Court erred in permitting the jury to again consider the verdicts after having returned verdicts for each of the plaintiffs in the sum of $10,000.00. Third, that the Court erred in accepting the verdict of the jury after the plaintiff, Mr. Simmons, had filed a remittitur.

The action of the Court in allowing the verdicts to be corrected was proper. *Clift* v. *Jordon,* 207 Ark. 66, 178 S. W. 2d 1009, and the filing of the remittitur was in no way prejudicial to Simmons.

Elizabeth Ann saw the doctor seven times after she returned to work; the last time was almost two years prior to the trial. She testified, however, that she slept

in the neck harness for eight months after returning home from the hospital. She had a normal courtship and has worked for wages all the time, in addition to doing her housework.

Perhaps the jury was deeply impressed by the self-sacrificing spirit of this young woman. During the time she was going to high school she worked at night at a drive-in from 6 p.m. to 10 p.m. and she passed her grades in school and graduated. She returned to work three weeks after she was injured and worked continuously thereafter. At the time her baby was born she was off work only 30 days. At the time of the trial she was again pregnant but was still working on a paying job in addition to doing her housework and the shopping for the family.

Actually, the evidence does not show that there was much wrong with her. Her physician, Dr. Deneke, testified that she suffered a strain to the muscles of the neck and lower back. The doctor said she had muscle spasms, "A charlie horse". Q: What can cause a spasm to the muscle? A: A simple injury as all of you have had at one time or another.

The least that can be said is that the jury was reckless in the verdicts returned. In the first instance they gave Simmons a judgment for $10,000.00. He had only asked judgment for $1,000.00. Of course it was shown that this was an error, but it was certainly a serious error. It had been stipulated that his damages amounted to only $920.67, and the second verdict for him was for $2,000.00. Elizabeth Ann asked for $10,000.00 for pain and suffering, and the jury's first verdict was for $9,895.00 for pain and suffering, and the second was for a total of $8,000.00.

The fact that the jury returned a $2,000.00 judgment for Simmons, after first having returned a $10,000.00 verdict for him, when it had been stipulated that his damages amounted only to $920.67, shows rather conclusively that the jury was influenced by passion or prejudice or had an incorrect understanding of the facts.

in the case. In the case of *Turchi* v. *Shepherd,* 230 Ark. 899, 327 S. W. 2d 553, we pointed out that "A comparison of awards made in other cases is a most unsatisfactory method of determining a proper award in a particular case . . .". In that case, where a similar injury was involved, we were of the opinion that a $3,500.00 verdict was liberal. In the case at bar, we are of the opinion that any amount above $5,000.00 for pain and suffering is excessive.

Accordingly, if appellee files a remittitur within 15 judicial days, as indicated, the judgment will stand affirmed; otherwise, it will be reversed and the cause remanded for new trial.

It is so ordered.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, (Dissenting). I do not agree with the majority view. The record is clear that the jury intended to return a total overall verdict in the amount of $10,000. It is true that the jury became somewhat confused in the technical aspects of filling out the verdict forms, but this in my view does not justify the majority's conclusion that "the jury was influenced by passion or prejudice or had an incorrect understanding of the facts in the case".

While reviewing this case as an appellate jury, which of course is not our province on appeal from a jury verdict, *Morrison-Knudsen Co.* v. *Lea,* 208 Ark. 260, 186 S. W. 2d 429, the majority in the process of speculating as to why the jury returned the verdict for Mrs. Griffin in the amount of $8,000, observed that "perhaps the jury was deeply impressed by the self-sacrificing spirit of this young woman". To the contrary, it is my view that the jury refused to disregard the substantial evidence of injury and pain which this young woman was caused to suffer and endure as a result of the negligence of appellant.

The evidence is undisputed that Miss Simmons (later Griffin), who had just become 18 years old was

in her father's car when it was hit from the rear. She hit the steering wheel. The next morning she had a soreness all over and woke up real stiff-necked. She went to school, but around 2:00 the soreness got to hurting so bad she called her father to take her to a doctor. It hurt badly when she attempted to make movements of her head or back. She couldn't continue her school work because of the pain and required assistance to go into the doctor's office.

She was placed immediately in the hospital and put in traction, which consisted of a strap under her chin and neck, on either side of her face, buckled at the back to a strap snug against her head, connected to a rope, leading over a pulley with a bucket full of dirt (for weight) hanging at the end of the rope. This pulled her neck back and she lay flat on her back when using it. Application of traction did not relieve all of the pain. When in traction she could get on her side, but was uncomfortable because it twisted her neck. She couldn't lie on her stomach. In the hospital she could move her head slightly. She even ate in traction and could not go to the rest room the first two days. She had pain even when in traction, but hurt a lot worse out of it.

She continued to remain in traction in her home for two weeks every afternoon from about 1:30 P.M., and slept in it at night. She was out of traction in the mornings, but her neck was stiff and uncomfortable and hurt her all the time. She was out of traction from 5:00 P.M. until 9:00 P.M., and slept in it all night, until about 9:00 A.M. The traction did not relieve all pain. She continued to sleep in the traction every night until the first of January, 1960, and used it "quite frequently" in the afternoons after the first three weeks.

Almost there years later (at the time of trial), because of continuing pain in her back, she still sleeps on the hospital bed to relieve the pain three or four nights per week and has at all times since the collision. She has a backache just about every day. The extent of the pain suffered the first eight months was very uncom-

fortable and was severe enough to cause her to cry four or five times, "The pain was unbearable."

Her doctor's testimony verified the existence of her injury and pain, and even appellants' doctor, who examined Mrs. Griffin more than once, confirmed that appellee did have the injuries she testified to, and stated that he found nothing about Mrs. Griffin's attitude, demeanor or conduct that caused him to believe she was faking complaints, but found she was "very well motivated, cheerful, and I think very honest in her statements to me."

To say the least, it is my view that there was substantial evidence to support the jury verdict—certainly it cannot be said that the verdict was so excessive and unreasonable as to shock my conscience. *Grandbush* v. *Grimmett,* 227 Ark. 197, 297 S. W. 2d 647. Accordingly, I would affirm the judgment and therefore respectfully dissent to the majority opinion.

PRINCE POULTRY CO. *v.* STEVENS.

5-2858 363 S. W. 2d 929

Opinion delivered January 21, 1963.

Dickson, Putman, Millwee & Davis, for appellant.

Pearson & Pearson, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises out of a claim for workmen's compensation. Appellee, Wayne Stevens, was employed by appellant S. E. Prince Poultry Company, working out of their egg house in Lincoln, Arkansas. About 4 o'clock in the afternoon of Thursday, March 9, 1961, appellee, in the course of his employment, slipped while loading a case of eggs on his truck and felt pain in his right side. He stopped work for five or ten minutes until the pain eased, then finished loading the truck and returned with the load to his employer's place of business, arriving about 4:30 or 5:00, at which time he reported his injury to his foreman. Appellee then went home, suffered pain that night, returned to work the next morning and reported his injury to his employer's general manager, Miss Maybelle Kirk. The general manager acknowledged that appellee had reported his injury to her on Friday morning. She testified that she told appellee that if he did not get better in a day or two he should see Dr. Jeff Baggett; that appellee was needed to go out on the truck; that he was very uncomfortable when he reported his injury to her; that the company had to have someone show the driver where to go and that appellee was the only person available for that purpose. Appellee relied upon Miss Kirk's instructions and continued to work that day. He suffered pain and was furnished a helper because of the pain. He tried to call Dr. Baggett after talking to Miss Kirk but failed to get him. Appellee also worked the next day and testified that the reason he didn't take off and go immediately to see a doctor was "on account of we had so many eggs out and if they stay out so many hours they are gone", and further, "I wanted to show the boy where the eggs was". Appellee testified that the condition in his side just kept getting worse and worse. He was off Sunday and Monday morning it was worse. Appellee finally saw a doctor Monday, March 13th, four

days after the injury. The doctor testified that he found an indirect inguinal hernia.

Appellee filed a claim with the Workmen's Compensation Commission for compensation for his hernia. The claim was controverted by appellants.

Following an appeal from an award of benefits by the referee, the full commission found that appellee sustained his hernia on March 9, 1961, and that it arose out of and during the course of his employment. The commission further found that all of the requirements of § 81-1313(e) were met except the fifth requirement which required appellee to see a doctor within 48 hours after the occurrence of the hernia. The commission concluded that it had authority to excuse non-compliance with the fifth requirement and did so "since claimant did promptly report his injury to the employer and since his employer did not promptly provide proper medical attention but instead asked the claimant to work the following day at light work and merely told the claimant that if he did not feel better within a day or two he should go to a doctor."

Based on the above findings and conclusions, the commission awarded benefits to appellee. Appellants timely appealed to the Circuit Court of Washington County which affirmed the award of the commission, making an additional finding that appellants were estopped to raise the defense of failure to meet the fifth requirement. From the judgment of the Circuit Court, appellants have prosecuted this appeal.

For reversal appellants rely upon four points, three of which question the substantiality of the evidence to support findings of fact made by the commission. Though appellants' argument on these points is most persuasive, a careful review of the record convinces us that the points are without merit. See *McKamie* v. *Kern-Trimble Drilling Co.,* 229 Ark. 86, 313 S. W. 2d 378; *Shipp* v. *Tanner,* 229 Ark. 815, 318 S. W. 2d 821.

Appellants in their brief concede that the principal question involved in this appeal is whether the Work-

men's Compensation Commission has authority under the law to excuse a claimant's failure to go to a doctor within the time provided by the Workmen's Compensation Act. This question presents a case of first impression in this jurisdiction. The court has, however, considered in a similar case, *Williams Mfg. Co.* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380, the question of whether the Workmen's Compensation Commission had authority under the law to excuse a claimant's failure to give notice to his employer of the occurrence of a hernia within the 48 hours provided by the act. In that case the appellee, working as a laborer for appellant manufacturing company caught with a cant hook a rolling log which was moving at such rapid speed that it gave appellee a severe jerk. The appellee immediately reported his injury to his foreman and at noon went to see Dr. O. R. Kelley, the employer's physician, and told him of the injury. Dr. Kelley gave the appellee some medicine and the appellee went home, returning next day for another visit to the doctor. The appellee was not able to work after receiving the injury. There was some contradiction in the medical testimony, but Dr. Kelley and three other physicians testified that appellee had suffered an umbilical hernia. It was brought out at the hearing, however, that Dr. Kelley did not discover appellee's hernia until several weeks subsequent to the reported injury. The commission after hearing the testimony found that appellee had not given sufficient notice of the hernia within 48 hours after it occurred, as required by the statute. The Circuit Court reversed the finding of the commission and entered judgment in favor of appellee. From that judgment the employer and its insurance carrier prosecuted an appeal. This court, in a well reasoned opinion written by the late and scholarly Justice R. W. Robins, affirmed the judgment of the Circuit Court and in the opinion held that a denial of compensation under the facts disclosed by the record would not be justified, even though the employee may not have specifically given notice of the existence of the hernia within 48 hours after the injury.

In the case at bar the applicable statute is § 81-1313(e) (5). It reads as follows:

"Hernia. In all cases of claims for hernia it shall be shown to the satisfaction of the Commission . . . (5) That physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within forty-eight hours after such occurrence;"

In considering a statute identical to ours in meaning except for a requirement that the hernia was such as to require the attendance of a licensed physician within five days subsequent to the injury instead of the 48 hours provided by our law, the Supreme Court of Mississippi in the landmark case of *Lindsey* v. *Ingalls Shipbuilding Corp.,* 68 So. 2d 872, said:

"It should be noted that the statute does not require that the claimant prove that he was actually attended by a physician or surgeon within five days after the injury. The statute only requires that the claimant prove that the physical distress following the descent of the hernia was such as to require the attendance of a physician or surgeon within five days. The word 'require' is defined in Webster's New International Dictionary as meaning: 'To need; to be under a necessity; as, man requires to feed or to be fed; a fact requires to be stated.' The word is also defined as meaning: 'To demand or exact as necessary or appropriate; hence to want; to need; call for.' It is in this sense, we think, that the word was used in the above statute."

We agree with the interpretation given this statute by the Mississippi court and adopt it as our own, and further find that the words of Justice Robins in the Williams Mfg. Co. case, *supra,* are equally applicable to the case at bar.

"These compensation acts are entitled to and have universally received a liberal construction from the courts. The humanitarian objects of such laws should not. in the administration thereof, be defeated by overemphasis on technicalities—by putting form above substance

"In the case at bar there is no intimation in the record of any malingering, lack of good faith or misrepresentation or concealment of facts, on the part of appellee. Since he suffered an accidental injury in the course of his employment and it clearly appears that he did all that could be reasonably expected of a workman in the way of reporting his injury promptly . . ."

The judgment is affirmed.

CHAMBERS *v.* BIGELOW-LIPTAK.

5-2872 363 S. W. 2d 908

Opinion delivered January 21, 1963.

Bernard Whetstone, for appellant.

Ben D. Lindsey, for appellee.

FRANK HOLT, Associate Justice. This is an appeal from the decision of the circuit court which upheld the opinion of the Referee and the full Workmen's Compensation Commission, both of which denied the appellant's claim for permanent partial disability and death benefits for the widow of the deceased employee, J. C. Chambers.

The first claim arising out of the injury in question was before this court in *Chambers* v. *Bigelow-Liptak Corp.,* 233 Ark. 330, 344 S. W. 2d 588, on March 27, 1961. In that case J. C. Chambers, now deceased, sought total temporary disability and permanent partial disability

benefits based upon his claim that he had suffered a severe case of pneumonia or pneumoconiosis as a result of his working conditions.[1] In that case the Referee, the full Commission and the Circuit Court denied these claims and upon appeal this court affirmed the denial of permanent partial disability. We reversed the denial of total temporary disability and in doing so determined this period of disability should begin with the date of Chambers' illness on December 20, 1959 and end on March 30, 1960.

Chambers died on August 12, 1961, from lobar pneumonia[2] and therefrom comes the present claim by his widow for permanent partial disability and death benefits.

In the present case additional evidence was taken. The appellant, Mrs. Chambers, her son and Chambers' stepson, Ray Folks and his wife, testified that Chambers was strong and healthy before his injury or lung infection with pneumonia in December of 1959 and thereafter his health gradually deteriorated until his death in August of 1961. However, during the fifteen months preceding his death he worked most of the time, in residential construction, and never received medical attention or treatment until he became seriously ill on August 10, 1961, resulting in hospitalization the following night. He died the next day from pneumonia.

Dr. Donald J. Sekinger, who attended Chambers at his death, and Dr. Grady Hill, Jr., who treated Chambers at the time of his injury or illness in December, 1959, and for three months thereafter, testified that in their opinion, from their knowledge of Chambers' case, there was a causal connection between Chambers' death on August 12, 1961, and his original illness or injury in December, 1959. Dr. Hill reaffirmed his original opinion given in the first claim that Chambers had suffered a permanent partial disability and, further, that such existed from the time of his first illness until his death.

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[1] For a detailed account of these facts see opinion in first case, *Chambers* v. *Bigelow-Liptak*, supra.

[2] Dr. Buchman defined lobar pneumonia as a disease of bacterial origin, a massive type of infection.

To the contrary, Dr. Joseph A. Buchman, who examined Chambers and x-rays of him on April 5, 1960,[3] reaffirmed his opinion given in the first or original claim to the effect that Chambers suffered no permanent partial disability. After studying the depositions of Mrs. Chambers, Ray Folks, Mrs. Ray Folks, Dr. Sekinger and Dr. Hill, Dr. Buchman further testified that in his opinion there was no causal connection between Chambers' death on August 12, 1961, and his injury in December of 1959.

Appellant relies on two points for reversal:

(1) That the present claim for permanent partial disability is based on a modification of award pursuant to Ark. Stats. 81-1326, and therefore, the present claim for permanent partial disability is not barred as *res judicata;*

(2) that the denial of death benefits because of no causal connection with the original illness is not supported by substantial evidence.

We discuss these points in reverse order.

Dr. Buchman testified that he personally made a physical examination of Chambers and studied x-rays of his chest in April of 1960 in arriving at his original and present opinion that Chambers was well in April, 1960.

Dr. Buchman further testified:

"Q. Based upon the history that you gained through the patient and the depositions which you have read, taken of Dr. Sekinger, Dr. Hill, the widow, Mr. and Mrs. Ray Folks, do you have an opinion as to whether or not his pneumonia which caused his death in New Orleans on August the 12th, 1961, had any causal connection with his illness of December the 23rd, 1959, and with his employment shortly prior to that?

A. I don't think there is any direct relationship between the two at all.

[3] Dr. Hill last saw and treated Chambers on March 7, 1960, for acute bronchitis. Dr. Buchman was the last physician to see Chambers until his fatal illness.

Q. Why do you say that, Doctor?

A. Well, it's a bacterial infection and I do not see how he could harbor that bacteria so long and not have a lot of symptoms from it and have in April of 1960 a completely normal chest x-ray, that is, a normal chest x-ray for a man of this age."

Dr. Buchman stated further that:

"Q. Now doctor, from the time you examined him and until the date of his death, it was testified to in the depositions which we have mentioned before that Mr. Chambers would spit up blood fairly often and was in a condition that he lost weight consistently. Now, based upon your examination at the time that you saw him and the history testified to, what significance do you place in that as to his accident.

A. I don't think that had any relation to the accident."

Dr. Buchman further testified:

"Q. In other words, Doctor, any pneumonia that he contacted after the date of your examination was a new infection and had nothing in your opinion to do with his exposure in the nut cracker in December of 1959?

A. I don't see how it could bear any direct relation at all."

We view the evidence in this case to constitute substantial evidence in the record to support the Commission's finding there was no causal connection between the original and terminal illness in the present case. In the original case, *Chambers* v. *Bigelow-Liptak Corp.*, supra, we construed as substantial Dr. Buchman's opinion that Chambers had no permanent partial disability and had completely recovered.

We have consistently adhered to the established rule that we will not disturb the findings of fact by the Commission if supported by any substantial evidence. *White* v. *First Electric Cooperative Corp.*, 230 Ark. 925, 327 S. W. 2d 720; *Fagan Electric Co.* v. *Green*, 228 Ark. 477,

308 S. W. 2d 810; *West* v. *Smith,* 225 Ark. 365, 282 S. W. 2d 597.

In the *Carty* v. *Ward Furniture Mfg. Co.,* 229 Ark. 725, 318 S. W. 2d 148, the court said:

"Since the enactment of our Workmen's Compensation Law, we have consistently held that we do not try compensation cases here *de novo,* we are, therefore, not concerned with where the weight of the evidence may lie. When we find any substantial evidence to support the findings of the commission, we must affirm."

Inasmuch as the Commission's finding that no causal connection existed between the death of the employee, Chambers, and his original illness or injury is supported by substantial evidence this, in effect, is also a finding that no permanent disability was occasioned by the first illness. Thus it becomes unnecessary to discuss point number one of appellant's argument which deals with the question of modification of award and *res judicata.*

The judgment of the circuit court is affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, (Dissenting). I do not agree with the majority view.

The two doctors who had actually treated J. C. Chambers testified, without equivocation, that there was a causal connection between the injury Chambers received in 1959 (See *Chambers* v. *Bigelow-Liptak Corporation,* 233 Ark. 330, 244 S. W. 2d 588) and his terminal illness and death. Even the insurance company doctor conceded on cross-examination that there might have been a slight causal connection between the original injury and the death. An autopsy had been performed upon the deceased which disclosed beyond doubt the existence on an old permanent injury in Chambers' right lung, and after introduction of the autopsy report, this same doctor admitted that he discovered permanent disability to Chambers' lung in the one and only examination he ever did of him (which was prior to the first appeal to this court) and that he (the insurance company

doctor) knew all along that Chambers had this permanent disability, but that since he did not know to what to ascribe the permanent disability, he simply wrote on his report that there was no permanent disability![1]

Additional testimony was given by lay witnesses who were intimately associated with Chambers up to the time of his death. Their testimony is undisputed that from the time of his first injury until his death the deceased continued to have recurrent cough and fever, spitting up blood, loss of weight and other symptoms of continuing disability to his lung.

The overwhelming evidence supports an award of compensation. In my view, the slight evidence of the insurance company's doctor, upon which the Workmen's Compensation Commission chose to hang its opinion, was far from substantial. See *Missouri-Pacific Rd. Co.* v. *Davis,* 208 Ark. 86, 186 S. W. 2d 20. To say the least, the rule restated in *Pekin Wood Products Company* v. *Graham,* 207 Ark. 564, 181 S. W. 2d 811 should control here.

For the reasons stated above, I respectfully dissent.

[1] On the first appeal this doctor had reported that the deceased suffered no permanent disability to his lungs as a result of his injury. It was upon this report that the Workmen's Compensation Commission denied the claimant payment for permanent partial disability, and on appeal this same report was declared to be the substantial evidence upon which this court affirmed the Commission's findings as to permanent partial disability.

CARR *v.* HALL.

5-2846 363 S. W. 2d 223

Supplemental opinion on rehearing delivered January 21, 1963.

[Original opinion delivered December 10, 1962, P. 874]

SAM ROBINSON, Associate Justice (on rehearing). Upon further consideration of this case on the petition for rehearing, we have reached the conclusion that the petition should be granted; that the mother should have custody of the child from 9 a.m. to 5 p.m. on Saturdays without any specified restrictions, the same as the father has custody the remainder of the time.

As pointed out in the original opinion, we have held repeatedly that in child custody cases the first consideration is the welfare of the child; however, the child is never represented by counsel; those seeking custody are the ones that are represented. Of course, it is not likely that counsel for the father or mother would argue that custody of the child should be awarded in a manner contrary to the desires of his client. If a lawyer could not conscientiously stand up for the wishes of his client, the father or mother, he would simply withdraw from the case. It is, therefore, of vital importance in cases of this kind that the courts be keenly alert to the necessity of preventing the shortcomings or the merits of the parents from overshadowing the thing that would be best for the child.

A mother's act in voluntarily surrendering custody of her minor daughter to facilitate the remarriage of the mother is so contrary to the usual behavior of a mother that it places her at an extreme disadvantage when, as here, she attempts to regain custody of her daughter, and her action in that respect may militate against her.

But what about the daughter's interest? A mother's love and a normal relationship with the mother is certainly to be desired and cherished. Perhaps there were mitigating circumstances in connection with the mother's acts in the first instance, and it may be that if given a reasonable opportunity the mother can retain or regain the love and affection of her daughter. There can be no harm in giving her the opportunity to re-establish a reasonable mother-daughter relationship; but it would be very difficult in the few hours allowed by the original decree. This is especially true if at the time the mother

and daughter are together they are bound by restrictions that could bring about a strained relationship between the father and daughter, as pointed out in the Chief Justice's dissenting opinion in this case.

It is assumed that the mother will do nothing physically or mentally harmful to the daughter. If this assumption should prove to be incorrect, the Chancellor retains jurisdiction to correct the situation.

Reversed with directions to enter a decree not inconsistent herewith.

Justices McFaddin and Ward would deny the petition for rehearing.

[redacted]

[redacted]