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5-2894 364 S. W. 2d 153

Opinion delivered January 28, 1963.

John B. Driver, for appellant.

Opie Rogers, for appellee.

CARLETON HARRIS, Chief Justice. Kenneth Dixon, appellee herein, instituted suit in the Chancery Court of Searcy County against appellant, Lester A. Heinen, seeking to cancel and set aside a clerk's tax deed issued to appellant on February 23, 1961. The lands had been sold on November 10, 1958, because of non-payment of taxes allegedly due for the year, 1957. At the time of the tax sale, the lands in question were listed in the name of E. R. Martin. Thereafter, appellant instituted suit in the Chancery Court seeking to quiet and confirm the title to said lands in him.[1] Notice was published for four weeks

[1] The action was instituted under provisions of Chapter 19, Ark. Stats., 1962 Replacement, entitled "Quieting Title" (Sections 34-1918 through 34-1925).

during the month of March, 1961. The complaint was supported by the affidavits of two persons (Annis M. Walsh and Gibson L. Walsh), who stated that they were residents of Searcy County, familiar with the property, and that they knew Lester A. Heinen was the owner of the lands, had been in possession for more than the last past three years, and there were no adverse occupants or claimants. No personal service was obtained upon any person, the county clerk certifying that E. R. Martin's whereabouts were unknown, and that she had been unable to apprise Martin of the pendency of the action. On May 4, 1961, the Chancery Court entered its decree quieting and confirming title to the lands in question in appellant. In October of the same year, appellee instituted the present suit, alleging that he was the owner of said lands in fee simple; that Heinen had obtained a tax deed to the lands, purporting to convey same to appellant, but that the tax deed was of no effect because the sale was void. Appellee then alleged twenty-two grounds for voiding the sale, and, in addition, asserted, "The plaintiff delivered his list of lands on which he desired to pay tax to the collector, including the lands herein, and by oversight the collector failed to include the lands herein involved in the list and this renders the sale void." The prayer of the complaint was that the tax deed be cancelled and held for naught, and that appellee be permitted to redeem the property. After the filing of various pleadings and Requests for Admissions, the cause proceeded to trial, and on March 27, 1962, the court entered its decree, finding,

"The records of the Quorum Court fails to disclose that proper levy of taxes for the year 1957 were made in Searcy County; the purported sale of lands were made for amounts that involved overcharges, even if the levy of taxes had been properly made and the tax sale was not advertised as required by law."

The court held the tax sale, and deeds executed thereunder, void, and vacated the decree of confirmation which had been entered in May. Title to the lands was quieted and confirmed in Dixon as against appellant. Appellee

tendered a sufficient amount to cover taxes and penalty, together with interest. From the decree entered, Heinen brings this appeal. For reversal, appellant asserts that the Chancellor erred in permitting evidence to be introduced as to facts and circumstances existing prior to the confirmation decree, and further, that appellee's suit was a collateral attack upon the confirmation decree, and not permissible. It is also asserted that that decree was *res judicata.*

The facts show that Martin was the owner of the land in 1957, and during said year sold the lands to W. E. DeRamus. On October 10, 1960, DeRamus and wife entered into a contract to sell the lands to Dixon for $10,500. The contract provided for a cash payment of $1,500.00, the balance to be paid at the rate of $50.00 per month, except that commencing in April, 1967, an additional sum of $160.00 would be paid every six months. An executed deed was turned over to Ray Wheeler, agent in escrow, to be delivered to Dixon when the contract had been paid out. It appears from the evidence that Wheeler had been in charge of the lands for a long number of years, having served as agent for some of the prior owners.

The confirmation decree did not have the effect of a complete and final adjudication, *i.e.,* appellant cannot avail himself of the plea of *res judicata,* for that decree was subject to attack. Section 34-1923, Ark. Stats., 1962 Replacement, provides that a confirmation decree "shall not be valid for any purpose as against the owner of such land, his heirs or assigns, who was, at the time of such decree rendered in actual possession of the same, unless he be made a party to such action by personal service of motion therein." As heretofore stated, Dixon had entered into a contract to purchase the lands a year before the confirmation decree was rendered, and the proof is ample that he had been in possession of said lands. According to Wheeler, Dixon pastured cattle on the land from the time that he agreed to purchase same, and the entire property was under fence. In fact, Wheeler testified that, in behalf of prior owners, he had rented the property to

other persons in 1957, 1958, 1959, and 1960 (until the purchase by Dixon), and that cattle were pastured on the lands in question for the greater part of the time during those years. Otis Jennings testified that he had pastured the cattle on the land until, and after, the property was sold to Dixon, and that he and appellee had erected additional fence posts as a matter of holding the cattle within the premises. As herein pointed out, though the tax records did not list Dixon as the owner of the lands, no service was obtained upon any person.

Heinen testified that he viewed the property in December of 1958 or January of 1959, and that he didn't see anyone in the house, or notice any cattle on the place. He stated that a neighbor told him that no one had lived on the property for three years, and he did not observe cattle on subsequent visits. We think, however, that the preponderance of the evidence clearly supports the chancellor's finding that Dixon was in possession of the lands, as we have defined that term. It follows that under the pertinent portions of Section 34-1923, heretofore quoted, the confirmation decree was void. A void decree is subject to collateral attack. *Lambert* v. *Reeves,* 194 Ark. 1109, 112 S.W. 2d 33, *Laflin* v. *Drake,* 218 Ark. 218, 237 S.W. 2d 32.

As a purchaser under a contract, in possession of the land, Dixon held the right to redeem, and was entitled to present any meritorious defense to the decree obtained by Heinen. *Harrison* v. *Mobley,* 211 Ark. 772, 202 S. W. 2d 756. That case also holds that the invalidity of a tax sale is a meritorious defense. The trial court found that the sale was void because no tax was levied; further, that even if a levy had been properly made, the lands were sold for an unlawful tax in that there were overcharges, and finally, that the tax sale was not advertised as required by law. There is actually no dispute that these facts are correct, and it follows that the sale was void. *Plant* v. *Johnson,* 208 Ark. 217, 185 S. W. 2d 711, *Lumsden v. Erstine,* 205 Ark. 1004, 172 S. W. 2d 409. See also 84-1103 Ark. Stats. 1960 Replacement.

Finding no error, the decree is affirmed.

ARK. STATE HOSPITAL *v.* KESTLE.

5-2822 364 S. W. 2d 804

Opinion delivered January 28, 1963.

[Rehearing denied March 11, 1963.]

Pope, Pratt & Shamburger, By: *M. Jack Sims,* for appellant.

Virgil R. Moncrief and *John W. Moncrief,* for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant, Arkansas State Hospital for Nervous Diseases, filed this action against appellee, J. E. Kestle, to recover $1,710.00 for room, board, lodging, and treatment furnished Mrs. J. E. Kestle (wife of appellee) between the dates of March 1, 1959, and October 1, 1960. The Trial Court rendered judgment for Appellee Kestle and this appeal ensued, in which appellant urges three points:

"I. A husband is liable for the cost of maintaining his wife in the State Hospital under the provisions of Arkansas Statutes (1947), Section 59-230; and under the common law he is liable for the furnishing of necessaries to his wife.

"II. A husband is not liable for the 'observation' period for his wife's maintenance in the State Hospital under the provisions of Arkansas Statutes (1947), Section 43-1301, but his liability for a later commitment for medical treatment is not thereby altered.

"III. Court erred in construing Anna Kestle's commitment as detention of a criminal or convict rather than the maintenance, care and medical treatment of a mentally ill person."

We find it unnecessary to consider appellant's second and third points, because our determination of the first point is fatal to appellant's case. In the Trial Court a jury was waived and the cause was submitted to the Court upon stipulated facts, as contained in the Circuit Court judgment; and here are *all* of such stipulated facts:

"That at the time the said Anna Kestle was committed to the State Hospital for Nervous Diseases by Order of this Court, she was under charge of the crime of murder in the first degree; that it was to the best interests of the State of Arkansas and to the best interest of the said Anna Kestle that she be committed to the State Hospital for Nervous Diseases for treatment.

"That Anna Kestle was a patient in the State Hospital during the dates as pleaded in the complaint of the plaintiff, and received maintenance, medical care, and treatment while therein; that the said Anna Kestle is the lawful wife of the defendant, J. E. Kestle; that charges in the amount of One Thousand Seven Hundred Ten Dollars ($1,710.00) were assessed for the maintenance, medical care, and treatment of the said Anna Kestle by the plaintiff, the Arkansas State Hospital for Nervous Diseases; that the deefndant, J. E. Kestle, had no connection with the hospitalization of his wife, Anna Kestle, but that the said Anna Kestle was committed by Order of the Court of Arkansas County on October 4, 1958, under the provisions of Act III of 1936, as amended (Arkansas Statutes (1947) Section 43-1301). That on November 1, 1958, this Court further ordered that the said Anna Kestle be committed to the State Hospital for Nervous

Diseases for treatment; that this was subsequent to and by virtue of the official report of the physicians at the State Hospital for Nervous Diseases declaring the wife of the defendant to be mentally ill at the time of her examination to the degree of legal irresponsibility."

We emphasize that the foregoing are *all* of the facts shown in the record before us; and we rest our affirmance on the conclusion that these stipulated facts are not sufficient to support a reversal of the Circuit Court judgment. Mrs. Kestle was charged with murder and committed to the State Hospital for observation on October 4, 1958, under the provisions of § 43-1301 Ark. Stats. On November 1, 1958, the State Hospital authorities reported to the Circuit Court that Mrs. Kestle was mentally ill; and the Circuit Court ordered that Mrs. Kestle be retained in the State Hospital for treatment. This order of the Circuit Court was apparently[1] under the authority of Act No. 413 of 1957 and also Act No. 241 of 1943.[2] Under the said order of the Circuit Court, Mrs. Kestle remained in the State Hospital for treatment until October 1, 1960;[3] and the State Hospital filed this action against Mr. Kestle on September 24, 1960, alleging that Mr. Kestle, as the lawful husband of Mrs. Kestle, was liable to the appellant, and that the $1,710.00 covered items of necessary services and maintenance rendered to Mr. Kestle's wife. Under the first point in appellant's brief, recovery against Mr. Kestle is based on § 59-230 Ark. Stats. and also on the claimed common law duty of a husband to furnish maintenance and necessaries for his wife. We consider these points separately.

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[1] Act No. 235 of 1959 and Act No. 77 of 1961 were subsequent to Mrs. Kestle's commitment in this case.

[2] The 1957 Act Stated: "The Superintendent may also request a writ of commitment for any patient for whom he deems it to the best interest of the patient that such a writ be issued, for the purpose of retaining the patient in the hospital for such time as the superintendent deems necessary for proper care and treatment."

The 1943 Act stated: "PATIENTS HELD UNTIL RESTORED. Any person admitted to the State Hospital under the provisions of Sections 9 and 10 of this Act, shall be there and then kept until restored to reason, which fact shall be ascertained as in case of other patients in the State Hospital."

[3] In fact, the record in this case does not disclose when or how she was released, if at all.

I. *The Duty Under The Statute.* The germane portion of § 59-230 Ark. Stats. reads:

"Pay for maintenance of patients — If any patient admitted to the State Hospital be found, upon examination, to possess an estate, over and above all indebtedness, more than sufficient for the support of his or her dependents, his or her natural or legally appointed guardian shall pay out of such estate into the office of the business manager of the State Hospital, in advance, an amount equal to one (1) month's maintenance, at a rate to be fixed by the Board of Control (State Hospital Board) from time to time on the basis of maintenance costs, and in addition, shall supply the patient with sufficient and suitable clothing, and shall remove said patient when so required and notified by the Superintendent. If the patient remains in the State Hospital more than one (1) month, such payments shall be made, monthly in advance, for the whole period during which the patient remains in the State Hospital. If the patient has no such estate of his own, then his obligation shall exist against any person who is legally bound to support such patient. Inability to pay shall not, however, cause any person to be refused admission to or discharged from the State Hospital."

Thus, the statute places the primary duty of support on the "natural or legally appointed guardian." Further along, the statute says, "If the patient has no such estate of his own, then his obligation shall exist against any person who is legally bound to support such patient." Under the wording of this statute, the primary obligation is on the estate of the patient; and it is only after there has been a showing that the patient has no estate that the claim can be made against "any person legally bound to support such patient."

In other words, the fact, that the statute first allowed recovery against the guardian and then later provided for recovery against others "if the patient has no estate," convinces us that the burden was on the appellant in the case at bar to establish that Mrs. Kestle had no estate; and the establishment of that fact was a con-

dition precedent to recovery against Mr. Kestle. If the Legislature had intended the husband to be liable under the statute, irrespective of the estate of his wife (the patient), then the statute would have imposed liability on the guardian of the patient "or any other person legally liable for the maintenance of the patient."

Since the stipulated facts do not mention the presence or absence of any estate of Mrs. Kestle, and do not mention any prior effort to recover from her guardian, we are compelled to the conclusion that the appellant has failed in its burden of proof in seeking to recover from Mr. Kestle under the statute. What defenses the guardian might offer to an action is a matter not now before us, so we need not speculate on appellant's second and third points.

II. *The Common Law Liability Of The Husband To Support The Wife.* The appellant argues that Mr. Kestle is liable for the amount claimed, regardless of § 59-230, because he is the husband of Mrs. Kestle; that the husband is liable at common law for necessaries furnished the wife; and that the amount claimed by the State Hospital is for the maintenance of Mrs. Kestle and is a necessary. But, even if the statute (§ 59-230) does not supersede the common law in a factual situation such as the one here (a point on which we now express no opinion), nevertheless the stipulated facts in this case are not sufficient to establish an absolute liability on Mr. Kestle for the support of his incarcerated wife.

All of the authorities, in discussing the relative obligations of marriage, are practically agreed that the husband is liable for necessaries furnished his wife only under certain conditions.[4]

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[4] Typical of the general statements is this one from 26 Am. Jur. 954, "Husband and wife" § 355:

"Apart from the contractual liability of a husband for goods and services which are within the classification of necessaries, under certain conditions he is rendered liable by law when such goods and services are furnished his wife. A husband is liable for necessaries furnished his wife where they are furnished her when he is derelict in his duty to support her, whether his dereliction lies in his refusal or in his neglect; and although he has a primary right, so long as he acts reasonably, to determine what are necessaries for her and to dictate the source from which they shall be procured and the manner in which they shall

In 26 Am. Jur. 970, "Husband and Wife" § 372, in discussing the burden of proof, the text reads:

"One who furnishes a wife with necessaries takes the risk of establishing a case against the husband, and the burden is on him to prove the existence of the elements of the husband's liability for the goods or services furnished. Thus, he has the burden to prove that the husband failed or neglected to support his wife, and that the articles furnished her were necessaries . . . The view has been taken that a person seeking to hold a husband liable for necessaries furnished his wife while they were living apart has the burden of showing that the separation has taken place under such circumstances as will render the husband liable; the fact that the person furnishing the wife with the necessaries had no knowledge of the separation does not relieve him from such burden of proof."

In 26 Am. Jur. 995, "Husband and wife" § 399, there is a discussion of the liability of the husband for the maintenance of his wife while she is insane; and the holdings are summarized in this language:

"A husband who has neglected to provide support and care for his insane wife is liable for the expense of support and care furnished her by an individual or private asylum. However, there is a difference of opinion as to a husband's duty to support and care for his wife and as to his liability for necessaries furnished her, where she is in a public institution because of insanity. One view is that there is such a duty and liability according to the husband's financial ability. Statutes

be purchased, he may be held liable for an article or service furnished her which is one of that class of items of goods or services with which he normally is required to provide her, as well as for an article or service, such as medical services, with which he is bound to provide her under particular circumstances, irrespective of the fact that he supports her generally, unless the article or service is furnished on her credit alone. Sometimes the rule is merely stated that he is liable for necessaries furnished her, but such a statement of the rule leaves open the question of when and under what circumstances goods or services furnished her are necessaries, and fails to indicate the effect of an extension of credit exclusively to the wife . . . The burden of proof of the facts requisite to establish the liability of a husband for necessaries rests upon the party who asserts such liability. Whether or not the husband has made a suitable provision for the wife in reference to her support is a question for the jury, under all the facts and circumstances."

consistent with this view have been enacted in some jurisdictions. A contrary view is that the husband is under no such duty or liability while she is confined in a public institution for the insane, the theory being that the husband is not derelict in his duty to support her, since her presence at the institution and absence from home are not due to his refusal to support her at home or with his consent."[5]

We do not have to decide in this case on which side of the conflicting authorities Arkansas will stand because we revert to the stipulated facts in the record before us. These facts do not recite that Mr. Kestle had any connection with the hospitalization of his wife. There is no stipulation that Mr. Kestle had failed to maintain a home for Mrs. Kestle or had been unwilling to provide her with treatment in a private institution. It seems unreasonable to say that the State can take a man's wife away from him, incarcerate her in a hospital on an unproven charge, refuse to allow the husband to have his wife in a private institution for treatment, and still charge the husband for her maintenance. We do not know any of the facts in the case at bar, other than those that have been stipulated. We limit our present holding to those stipulated facts heretofore detailed; and, under them, we are unwilling to say that the appellant has made a case against Mr. Kestle sufficiently strong to reverse the Trial Court and render judgment for the appellant.

It therefore follows that the judgment is affirmed.

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[5] We have carefully studied the cases cited to sustain the text, and have also studied the cited annotations. In addition, we call attention to the following: *Thompson* v. *State Hospital*, 208 Ark. 970, 188 S.W. 2d 503; annotation in 48 A.L.R. 733, entitled, "Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum"; annotation in 33 A.L.R. 2d 1257, entitled, "Liability of incompetent's estate for care and maintenance furnished by public institution or hospital before incompetent's acquisition of any estate or property"; annotation in 60 A.L.R. 2d 7, entitled, "Husband's liability to third person for necessaries furnished to wife separated from him"; *Briskman* v. *Central State Hospital* (Ky.), 264 S.W. 2d 270; *Sprain* v. *State Board* (Wisc.), 263 N.W. 648; *Guardianship of Gardner*, 220 Wisc. 490; and see also 29 Am. Jur. 180 *et seq.*, "Insane persons" § 57 *et seq.*

Opinion delivered January 28, 1963.

[Rehearing denied March 4, 1963.]

[redacted]

No brief filed for appellant.

Frank Holt, Atty. General, by: *Thorp Thomas,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. The appellant was convicted of rape and sentenced to life imprisonment.

We find the testimony to be amply sufficient to support the jury's verdict of guilty. Shortly before ten o'clock on the night of September 28, 1961, the prosecutrix, a young married woman, was alone in a self-service coin-operated laundry in Fayetteville. The defendant came in and persuaded her to get in her car and attempt to start his car by pushing it out a highway. According to the prosecutrix, the defendant was a complete stranger to her.

The defendant's automobile failed to start after having been pushed for a mile or more, and the de-

fendant came to a stop beside the highway. The prosecuting witness testified that as she was turning her car around to return to the laundry the defendant came over to the vehicle, forced his way into the driver's seat, and started driving down the highway. Despite the prosecutrix's struggles and attempts to escape, the defendant, who weighed nearly 300 pounds, was able to keep her in the car while he turned off the highway and parked behind a little church, where, according to the testimony of the prosecuting witness, he committed the act of rape.

The prosecutrix's testimony is to some extent corroborated by that of three youths of college age who were driving together that night in Fayetteville. Their attention was attracted to Bishop at about eight thirty, when apparently he ran deliberately into a car that was waiting for a traffic light to change. Later in the evening these boys saw Bishop emerge from the laundry with the prosecutrix, and they decided to follow the two cars out the highway. All three of them testified positively that they could see the prosecutrix fighting and struggling with the defendant just before he turned abruptly off the highway. The boys did not follow Bishop when he left the highway, but after waiting for a few minutes at a point farther down the road they decided to return to Fayetteville, where two of them informed the sheriff of what they had seen.

Bishop was the only witness called by the defense. He testified that he had struck up an acquaintance with the prosecutrix in a record shop, several months before the event in question. Although both of them were married, he succeeded in making several dates with the woman, and they had sexual relations on three of these occasions. Bishop testified that the prosecutrix telephoned him at about nine or nine thirty on the night of the alleged crime, asking him to meet her at the laundry. He was still at work on a construction job between Fayetteville and Springdale and came into town in his work clothes. He testified that after they had failed in their attempt to get his car started they drove together

to the churchyard, where an act of intercourse took place with the prosecutrix's co-operation and consent.

The record is large, but we have narrated the salient facts. It is quite evident that, in spite of the conflicting testimony, the prosecutrix's version of the matter constitutes substantial evidence sufficient to support the verdict.

It is insisted that the court erred in permitting the three youths to testify about Bishop's having run into another automobile earlier in the evening, since this incident involved a separate offense. The testimony, however, was undoubtedly relevant, for it explained to the jury why the boys happened to become interested in Bishop's conduct and hence why they were following him when they observed his struggles with the prosecutrix. As we pointed out in *Alford v. State,* 223 Ark. 330, 266 S. W. 2d 804, independently relevant testimony is admissible even though it may involve proof of another offense.

Defense counsel also objected repeatedly to testimony indicating that on the night in question Bishop was dirty, unshaven, and ill-smelling. This proof had a direct bearing upon the matter of Bishop's credibility, since the jury might well have believed that he would not have appeared in such an unkempt state if he was telling the truth about his past relationship with the prosecutrix and about her having asked him to meet her that night.

The court properly allowed the prosecuting witness to testify that she identified the accused at the county jail on the day after the offense. *French* v. *State,* 231 Ark. 677, 331 S. W. 2d 863. Nor did the court err in permitting the defendant to be cross-examined about prior convictions and offenses, the jury having been instructed that these matters were to be considered only as bearing upon the defendant's credibility. *Whittaker* v. *State,* 171 Ark. 762, 286, S. W. 937. We have studied the other assignments in the motion for a new trial and consider them to be without merit.

Affirmed.

FRANK HOLT, J., disqualified.

BROWN *v.* LAND, INC.

5-2832 364 S. W. 2d 659

Opinion delivered January 28, 1963.

[Rehearing denied March 4, 1963.]

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

Wright, Lindsey, Jennings, Lester & Shults, for appellee.

GEORGE ROSE SMITH, Associate Justice. The appellant Brown and the appellee Land, Inc., were the proprietors of adjoining residential subdivisions in suburban Little Rock. This is a suit by Land to enjoin Brown from committing repeated trespasses upon two very narrow strips of ground that Land claims to have reserved as unplatted buffer zones between the two additions. The chancellor issued a preliminary injunction, but upon final hearing that order was dissolved and the plaintiff Land was denied any relief. Brown became the appellant by first lodging the record in this court, but the main questions are presented by Land's cross appeal, which we discuss first.

In 1958, before any of the property was platted, Brown owned a tract that was bordered on the north and on the west by an L-shaped parcel owned by Land. On September 3, 1958, Land recorded a plat of what we will refer to as Briarwood Addition No. 1, lying immediately north of Brown's property. Later on Land dedicated what we will refer to as Briarwood Addition No. 2, lying immediately west of Brown's property. In both cases the original plat proved to be defective, and in both cases Land subsequently filed an amended and substituted plat in which an attempt was made to reserve a narrow strip along the common boundary with Brown. The two phases of Briarwood Addition involve wholly distinct issues and must be considered separately.

The original plat of Briarwood Addition No. 1 showed a street, 25 feet in width, named Princess Drive, that lay along the southern edge of the addition and abutted Brown's property to the south. A municipal regulation requires that a dedicated street be at least 50 feet wide. What Land actually intended, without so stating, was to dedicate a half street, in the expectation that Brown would contribute the other half.

Brown, however, refused to donate the other half of the street, and, in fact, it developed that he had acquired title by adverse possession to part of the 25-foot strip platted by Land as Princess Drive. To meet this difficulty Land filed a revised plat of Briarwood No. 1, in

which Princess Drive was moved northward 25 feet, leaving an unplatted strip between the south edge of this street and Brown's northern property line, as established by adverse possession.

When Brown later platted his own tract as Cardinal Heights Addition and began using Princess Drive as a means of access in the development of his property, Land brought this suit for an injunction. Land contends that it effectively canceled its original dedication of Princess Drive and that therefore Brown commits a trespass whenever he crosses the buffer strip that Land reserved in its revised plat.

We think the chancellor was right in holding that the first dedication was still in force, so that Brown was entitled to use Princess Drive as a public thoroughfare. It is conceded that Land sold a number of lots in Briarwood No. 1 between the filing of the original plat and the filing of the amended plat. Thus at the outset Land is confronted with our long-established rule that when the owner of land plats it into lots and blocks and sells lots by reference to the plat, he is held to have dedicated the streets to public use, "and such dedication is irrevocable." *Mebane v. City of Wynne,* 127 Ark. 364, 192 S. W. 221.

In seeking to escape the effect of this settled principle Land argues that its initial dedication of Princess Drive was merely conditional, since the width of only 25 feet did not conform to the city's minimum requirement. Nevertheless, the city approved the original plat, and there was nothing to put innocent purchasers of lots within the addition on notice that the dedication of Princess Drive was subject to retraction. Apparently the 50-foot minimum requirement is not rigidly adhered to by the city, for it seems to have approved the revised plat also, even though it purported to dedicate only a 25-foot right of way for Princess Drive. The appellee cites *Love v. Hicks,* 214 Ark. 229, 215 S. W. 2d 138, as authority for its contention that the dedication of a half street is revocable, but in that case the 20-foot strip in dispute

was not shown by the plat to be a street, as is the case here.

It is also argued that the original bill of assurances for Briarwood No. 1 reserved to a majority of the landowners within the addition the power to set aside any provision in the dedication. Hence, it is argued, the revised plat was a valid exercise of this reserved power and effectively superseded the first attempted dedication of Princess Drive.

We need not determine whether it would be possible for the proprietor of an addition to reserve the power to do away with the streets within the area after he had sold lots by reference to the plat, for in this instance the language of the bill of assurances is not so unmistakable as it would have to be to achieve that result. This is the pertinent sentence in the bill of assurances: "Any and all of the covenants, provisions or restrictions set forth in this Bill of Assurances may be amended, modified, extended, changed, or cancelled, in whole or in part, by a written instrument signed and acknowledged by the owner or owners of over fifty per cent (50%) in area of land in this Subdivision . . . "

It will be seen that the power is reserved to change or cancel any "covenants, provisions or restrictions" in the bill of assurances. It seems plain that the reserved power was intended to apply to such matters as the restriction of the land to residential use, limitations upon the size and location of structures within the addition, minimum requirements for the area and width of lots, a prohibition against the keeping of animals or poultry, and many other similar covenants and restrictions that are set forth in the bill of assurances. By contrast, the location of the streets is shown by the plat rather than by the bill of assurances and does not fall within the general scope of a covenant, provision, or restriction. We think it clear that in order for the dedicator to reserve such a far-reaching and drastic power as that of vacating a street, perhaps even after homes have been built in reliance upon its existence, the intention should be ex-

pressed so clearly as to leave no room for doubt. Since that degree of clarity is wanting here, we conclude that Land did not retain the authority to set aside its dedication of Princess Drive. With respect to this phase of the cross appeal the decree is affirmed.

The first plat of Briarwood Addition No. 2 portrayed the subdivision as being bounded on the east by the Brown tract, as defined by the original Government survey. It was found, however, that Brown had maintained an encroaching fence along this boundary for many years and had acquired title by adverse possession to part of Land's property.

To meet this difficulty Land decided to replat Briarwood No. 2 and to that end directed its engineers to survey a line that would lie slightly west of Brown's fence, so that there would be no question about Land's title. Land's engineers testified positively that these instructions were obeyed, that while the fence was still standing they surveyed a line lying slightly west of the fence and revised the dimensions of the abutting lots to leave an unplatted buffer strip between the fence line and the eastern boundary of the lots. A new plat of Briarwood No. 2, conforming to this survey, was filed.

Thereafter Brown, in the course of developing his Cardinal Heights Addition, sought an outlet for his main sewer line. To this end he bought Lot 224 of Briarwood No. 2, which was one of the eastern tier of lots in that addition, and ran his sewer line from Cardinal Heights across Lot 224 to a sewer main that Land had placed in the street immediately west of Lot 224. In its complaint in the case at bar Land sought to require Brown to remove the sewer line from the unplatted strip that separated Lot 224 from what had become Cardinal Heights. In defending the case Brown contended, and the chancellor found, that Land's engineers, in resurveying the property, had failed to leave any space between Lot 224 and the fence line. Hence there was no trespass, and the request for a mandatory injunction was denied.

We think the weight of the evidence to be against the chancellor's conclusion. By far the most convincing

testimony is that of Land's engineers, who alone surveyed the line while the fence still existed. Brown's witnesses did not attempt to determine the location of the fence until after it had been removed. Their efforts to reconstruct the position of a line that admittedly was not straight are not persuasive. Indeed, the testimony of Brown's principal witness, Powers, is actually favorable to Land, indicating that Lot 224 lies about two feet west of the fence line. Even such a narrow strip is sufficient to support Land's prayer for relief, as the rule of *de minimis* does not apply to controversies involving the ownership of real property. *Leffingwell* v. *Glendenning,* 218 Ark. 767, 238 S. W. 2d 942. Upon this phase of the cross appeal the decree must be reversed and the cause remanded for the entry of a mandatory injunction.

By the direct appeal Brown contends that the chancellor erred in failing to award him damages for Land's wrongful procurement of the temporary injunction (with respect to the alleged trespasses in Briarwood No. 1). There is, however, no proof by which these damages can be determined in dollars and cents, and the chancellor's action in charging the costs against Land was in effect an award of nominal damages to Brown. *Reader Railroad* v. *Green,* 228 Ark. 4. 305 S. W. 2d 327. The decree is therefore affirmed upon the direct appeal, with the appellee to recover its costs in this court only.

SONGER *v.* STATE.

5064 364 S. W. 2d 155

Opinion delivered January 28, 1963.

Terral, Rawlings & Matthews, for petitioner.

Frances Holtzendorff, for respondent.

PAUL WARD, Associate Justice. On June 12, 1962 petitioner was judged in contempt of court and fined for disobeying an order of the court pertaining to the custody of Chris Songer, a nine year old son of the petitioner. He now brings before us, by certiorari, the record of the contempt proceedings, seeking to have the order of contempt quashed.

Since many relevant facts and circumstances are set out in *Songer* v. *Songer,* 229 Ark. 228, 314 S. W. 2d 233 (opinion June 16, 1958) we deem it sufficient for this opinion to set out below a brief summary of the testimony contained in the record which preceded and led up to the contempt order.

The petitioner and his former wife were divorced in 1956; they had five children at the time; the two older ones are married and they both appear to be bitter toward their father at this time; one boy, Larry, now 14, is living with his father (the petitioner) and is not involved here; the youngest child is living with her mother and is not involved; Chris is now nine years old, and an incident over his custody precipitated this litigation. Petitioner has married again, and Mrs. Songer is now married to a Mr. Halcumb. The parties have been in court almost continuously over the custody of the children.

Following the directive in our decision referred to above, the trial court gave petitioner custody of Chris

with his mother having the right to have him from Friday to Sunday each two weeks. The record discloses that Chris' visits to his mother were a constant source of trouble. It seems that Chris' father and mother each thought the other was mistreating him, and each vied for his company and affection.

On June 12, 1962 the trial court (apparently at the request of both parties) entered of record an order, the pertinent part of which reads:

"That the plaintiff (Mrs. Halcumb) shall have the right to pick up the parties' minor son, Christopher Songer, at noon on June 15, 1962, and to take said minor child on a trip with her out west, and shall return the said child to the home of the defendant by 5:00 p.m. on July 1, 1962."

When Mrs. Halcumb went by Mr. Songer's home at the designated hour to pick up Chris, preparatory to making the trip out west, she was unable to get him to go with her. Mrs. Halcumb, thinking that Mr. Songer had contrived to disobey the court's order, had him cited for contempt. A hearing was had at which testimony was given by many witnesses, including all the members of the family (except Chris) referred to above. At the conclusion the trial court found: "That the defendant, Herschel Lee Songer, is in contempt of court for violation and disobedience of the order of this court on June 12, 1962." Then the court assessed a fine of $50 against the petitioner and sentenced him to three days in jail, but the jail sentence and $40 of the fine were suspended "pending the future good behavior and cooperation of the defendant with the court and the plaintiff regarding plaintiff's visitation privileges . . . "

It is our conclusion, after careful consideration, that the order of the trial court should be sustained. Under our view of the case it is unnecessary to review all the evidence because we think the petitioner has a misconception of the applicable law. It is his contention that he was fined on a charge of criminal contempt of court, and that, therefore, we must find the evidence shows him

guilty beyond a reasonable doubt, or reverse the trial court. We are not in agreement with this contention for reasons set out hereafter.

The distinction between civil and criminal contempt proceedings is clearly set out in the case of *Blackard, et al.* v. *State,* 217 Ark. 661, 232 S. W. 2d 977, to which reference is made for a fuller explanation. One primary distinction is that the purpose of punishment for criminal contempt is to preserve the dignity of the court, while the other is to enforce the rights of the third parties. No doubt the two purposes often merge as we think they do in this case. It appears from the wording of the court's order that the petitioner was punished because he disobeyed the court's mandate (that is, to preserve the dignity of the court) and also to insure cooperation of the petitioner in the future (that is, to enforce the rights of Mrs. Halcumb). It is not questioned that punishment for civil contempt will be upheld by this Court unless the order of the trial court is arbitrary or against the weight of the evidence. However, it is not necessary for us to hold the petitioner was found guilty of only civil contempt in order to sustain the trial court. We think the trial court should be sustained even if the petitioner were guilty of criminal contempt. In this situation the rule is clearly set out in the *Blackard* case, *supra,* where it is stated:

"On review by this Court in such proceedings by certiorari, we do not try the criminal contempt case *de novo,* despite any such language so intimating as contained in *Jones* v. *State,* 170 Ark. 863, 281 S. W. 663. Rather, we review the evidence just as we would in an appeal in any criminal case. The trial court in the first instance, in a criminal contempt proceeding must find the cited person guilty beyond a reasonable doubt. Then, on *certiorari* proceedings this Court reviews the record to determine whether the evidence, when given its full probative force, is sufficient to sustain the finding of the trial court. See *Stewart* v. *United States,* 236 Fed. 838; *Binkley* v. *United States,* 282 Fed. 244; *Davidson* v. *Wilson,* 286 Fed. 108; and *In re Oriel,* 23 Fed. 2d 409."

Weighing the testimony under the above rules, we find there is substantial evidence to support the order of the trial court.

We purposely refrain from again setting out the testimony which reeks with bitterness and family strife. It must be conceded that no witness testified he saw or heard petitioner influence Chris' decision not to accompany his mother on the occasion mentioned. There were, however, conceded circumstances from which the trial judge (who saw and heard the witnesses) could have reasonably concluded the petitioner did fail to cooperate in carrying out the court's order. One such circumstance is the tender age of Chris, indicating he would obey his father; one is the fact that the petitioner left on an extended trip with Chris a very short time after Mrs. Halcumb went by to pick him up; and, another is that the petitioner had prearranged to leave on an out of state trip at the exact time Chris was to leave with his mother.

We call attention to the fact that the suspension of a part of the petitioner's punishment cannot be revoked but is in effect a remission. See: *Stewart, et al.* v. *State,* 221 Ark. 496, 254 S. W. 2d 55.

Writ denied.

TOLER *v.* TOLER CONVALESCING HOME.

5-2831 364 S. W. 2d 680

Opinion delivered January 28, 1963.

[Rehearing denied March 4, 1963.]

Levine & Williams, for appellant.

Brockman & Brockman, H. Murray Claycomb, for appellee.

SAM ROBINSON, Associate Justice. In 1942 Lula R. Toler established a home for aged negroes in Pine Bluff. In 1946 she organized a corporation named the Negro Relief Association and conveyed the property on which the home was located to the corporation. In 1956, while Lula Toler was an officer of the corporation, the Negro Relief Association executed a deed to the property to the Toler Convalescing Home. There was attached to the deed a resolution of the Negro Relief Association showing that the name of that organization was changed to that of the Toler Convalescing Home.

Lula Toler, the dominant party connected with the convalescing home, died in 1958. The home continued to be operated by a board of directors until the members of the board resigned after having filed this suit to enjoin William H. Toler from interfering with the operation of the home and requiring him to return certain records. This is an appeal from the decree of the Chancellor granting the relief prayed.

The Chancellor gave a great deal of consideration to this case and wrote an able opinion with which we are in accord and which we accept. The opinion is as follows:

"This is an action involving 'an Old Folks' Home' for Negroes in Jefferson County. The Home was initiated by Mrs. L. R. Toler, who was a former Home Demonstration Agent for Jefferson County.

"Originally, the Home was financed by public donations. Mrs. Toler caused a charitable corporation to be formed which bore the name of 'The Negro Relief Association'. She then deeded some real property which she owned personally to this corporation.

"The Negro Relief Association, by resolution changed its name to the 'Toler Convalescing Home' and executed the deed on the real property it owned to the Toler Convalescing Home in August of 1956 by its purported president, T. B. Richards and secretary, Mrs. L. R. Toler. This deed with a copy of a resolution changing the name and authorizing the deed attached, were recorded in the records of Jefferson County. Hereafter the Negro Relief Association will sometimes be referred to as the Relief Ass'n. and The Toler Convalescing Home will be referred to as the Home. When money was borrowed from local banks a corrected deed with the signature of both T. B. Richards and L. R. Toler properly acknowledged was duly executed and recorded.

"L. R. Toler was the executive secretary-treasurer of the organization from its beginning in 1942 to her death in 1958; first, in the Relief Ass'n. and then in the Home.

"Though the operation first was supported by public donations, it later qualified under state and federal law to receive help from the public welfare and other sources. Its revenues at the time of the beginning of this action were largely from state and federal sources.

"When Mrs. Toler died August 17, 1958, the board of the Home met and appointed Kathryn Player to take her place. William H. Toler, defendant, appeared at this meeting of the board which occurred just a few days after the death of Mrs. Toler.

"On October 30, 1958, William H. Toler caused a meeting to be held of what was alleged to be the original board of the Relief Ass'n. This board selected him as secretary-treasurer to fill the alleged vacancy caused by the death of Mrs. L. R. Toler. Thereafter he attemtped

to take charge of the Home. The Board of the Home brought this action to stop his efforts and asked for a restraining order against him.

"It appears that after the commencement of the action that William H. Toler caused so much trouble with the various people involved with the operation of the Home that the members of the board — who were serving without salary — resigned at or prior to the first hearing of this cause. The funds which were being received from the state and federal authorities were not paid but were being held up by the authorities because of the confusion between the Home and William H. Toler. The sixty odd patrons of the Home were dependent entirely upon the welfare funds.

"At the first hearing it was apparent that this action could not be disposed of at that time so the Court on its own motion appointed a receiver. William H. Toler was present and was represented by legal counsel. He was represented first by Mr. Harold Flowers, later by Mr. Joe Holmes, both of the Pine Bluff Bar and lastly by Mr. J. Edward Jones of the Chicago Bar.

"Numerous hearings have been held prior to the trial. Judge Mullis and Judge Dawson each made various orders. It is not believed necessary to set out all of the manifold orders in detail.

"It is sufficient to say that William H. Toler was cited on several occasions prior to the trial and was found guilty of contempt at one hearing before a prior judge. His sentence was withheld based upon his future compliance with the orders of the Court. At the trial he showed every willingness to comply with the former orders of the Court. He turned over to the Clerk a typewriter, property of the Home, this being the last of the personal property which he had taken into his possession.

"No minutes of the Relief Ass'n. nor of the Home were introduced other than resolutions adopted by the respective boards. It is admitted that William H. Toler took all of the records then existing of the Home and

later delivered them to the Clerk of this Court. He testified that some of the records had been destroyed by Kathryn Player, a person who had been Mrs. Toler's assistant for several years and who was designated in writing by Mrs. Toler to succeed her in the event of her death or retirement.

"At the trial it developed that William H. Toler had caused a private corporation to be organized in which he held 6500 shares of 10,000 authorized to be issued. He admitted that this private corporation was formed for the purpose of operating the Home when the Relief Ass'n. should recover it. He volunteered the statement that he expected the Negro Relief Ass'n. to pay him for every day that he had spent in Pine Bluff, including the time of trial.

"Many pleadings and motions were filed which are not necessary to be set out in detail. Many of these motions and pleadings were doubtless inspired by the fact that the defendant's counsel at the trial was not familiar with our liberal practice. Probably these motions and pleadings would seem necessary to one trained in the more technical procedures of another state. William H. Toler abandoned at the trial any claim of personal interest and acted solely in his alleged capacity as secretary and treasurer for the Relief Ass'n.

"The primary issue in this action is whether or not the Negro Relief Ass'n may recover the real property from the Toler Convalescing Home which would carry with it the operation of the Home. Subordinate issues are:

1. Was the appointment of a reeciver by the Court on its own motion proper?

2. Was the restraining order against William H. Toler proper?

3. Was there fraud or duress in the execution of the deed and the authorizing resolution by the Relief Ass'n to the Home?

4. Was the action of the Relief Ass'n board proper and if so, did it take precedence over the act of the board of the Home?

"Both the Relief Ass'n and the Toler Convalescing Home were non-profit corporations organized in the Circuit Court of Jefferson County under our statutes. The Toler Home resulted from the adoption of a resolution by the Negro Relief Ass'n changing its name to read 'Toler Convalescing Home' and which resolution adopted all of the articles of incorporation of the Relief Ass'n except its name, which resolution was duly recorded in the Jefferson County records. It is doubtful that this was tantamount to organizing a new corporation.

"Prior to the death of Mrs. Toler the Home had been receiving from the State Welfare Office payments that amounted to $75 per person monthly. There were in excess of sixty patrons of the Home when this action was instituted in 1958. At the time of trial in 1961, the monthly payments which were being paid to the receiver had been raised to $90 per person and the number of patrons had been increased to seventy-four. This monthly payment was in excess of $6,000.00.

"There can be no vested interest in these welfare payments regardless of whether the Relief Ass'n or the Home prevails here. The Welfare Department has the right to refuse payment if its requirements are not met. The fact is that it was withholding its monthly payments at the time of the first hearing. That fact was the reason that the Court appointed a receiver on its own motion because it desired to protect the patrons of the Home from the obvious difficulties which would follow further withholding of the funds.

WHICH CORPORATION SHOULD PREVAIL?

"It is doubtful whether there are two corporations. Rather it would seem to be one corporation with a changed name. However, under the assumption that a change of names meant a change of corporation, deeds for the real property owned by the Relief Ass'n were executed and recorded conveying the same to the Home.

The deeds appear valid on their face except that one has a defective acknowledgment. The other deed was given to correct this defect.

"A contention is made that the original directors — A. A. Cooper and J. S. Smith — were still in office because the Relief Ass'n constitution provides '. . . that the first board of directors . . . hold office until their successors are elected and qualified.' It is contended that because there are no minutes showing the election of succeeding directors that A. A. Cooper and J. S. Smith are still de jure officers.

"To support this contention A. A. Cooper, the first president of the Relief Ass'n testified that no election of a successor to him had been held. However, his testimony was so vague on details that a president should know and was manifestly wrong in some matters, the Court could give but little weight to his statements.

"The Relief Ass'n adopted a resolution February 16, which resolution was duly recorded in the Circuit Clerk's office on March 8, 1951. This resolution showed J. S. Smith was president and L. R. Toler was secretary. Other names appear as directors on this resolution but two of these names, J. S. Smith and L. R. Toler were a majority of the original board of the Relief Ass'n. Under the Articles this constituted a quorum. Nowhere in this resolution is the name of A. A. Cooper.

"From the date of the resolution until October 30, 1958, A. A. Cooper made no assertion of record to his claim to be president of the Relief Ass'n. No credible evidence was offered to show that he took any action which would evidence the fact that he still claimed to be president of the Relief Ass'n prior to October 30, 1958. In addition Mr. T. X. Jones, a member of the Jefferson County Bar in good standing, testified that Mrs. Toler, executive secretary and treasurer, informed him when he was preparing a deed to convey the property from the Relief Ass'n to the Home, that A. A. Cooper was not president, that he had been removed from the board. The Court does not believe that A. A. Cooper was either presi-

dent or a member of the board at or after the execution of the resolution in '51 and above referred to.

"Whether it was necessary to execute deed after the change of the name is not important in this action because the defendant has not overcome the presumption of validity that follows an acknowledged deed which has been duly recorded. On the other hand, if it be one and the same corporation with a changed name then there could be no recovery. While the records of the corporate action under either name are scanty the actions of the Home as shown of record seems to be fuller than those of the Relief Ass'n and show some continuity of personnel and action. There were no records introduced showing that the Relief Ass'n attempted to take any action or claim to exist as such, from the time of the name change until two and a half months after the death of Mrs. L. R. Toler. The Court accepts the recorded resolutions and other actions in writing of the Home board as being done in good faith and with no ulterior motives.

WAS THE APPOINTMENT OF A RECEIVER PROPER?

"If the Court had failed to appoint a receiver in 1958 in all probability the Home would have failed and its sixty odd patrons would have been thrown upon the community. Grasping for control of substantial monthly payments should not be permitted to injure patrons who were wholly dependent upon the welfare payments. The fact that the Home was indebted to the extent of $13,000, which has since been paid off by the receiver, was a strong circumstance indicating the necessity of a receiver.

WAS THE RESTRAINING ORDER PROPER?

"William H. Toler, evidently under the impression that if he made enough trouble that the physical properties of the Home would be turned over to him voluntarily, had seized the records and made himself so generally disagreeable that the officers and directors resigned rather than to endure his conduct. To have permitted him to continue this conduct against the receiver would in all probability caused the receiver to have likewise resigned.

Unless his conduct was restrained the appointment of a receiver would have been useless.

WAS THERE FRAUD OR DURESS IN THE EXECUTION OF THE DEED?

"The Relief Ass'n alleged fraud and duress in the execution of deeds and resolutions changing its name. The proof failed to substantiate these allegations.

WAS THE ACTION OF THE RELIEF ASS'N BOARD IN ATTEMPTING TO NAME WILLIAM H. TOLER SECRETARY-TREASURER PROPER?

"Since the Court does not accept the claim of A. A. Cooper that he was president or a member of the board on and after 1951 when the resolution of the Relief Ass'n was signed by J. S. Smith as president, it follows there could not be a legal meeting in 1958 of the board of the Relief Ass'n for the reason that only one member, J. S. Smith of the original board was present. The Court accepts the actions of the Home board as binding and taking precedence over the attempted action of the Relief Ass'n in October of 1958.

FINDINGS

"The Court finds the issues generally for the plaintiff and makes the following specific findings, to-wit:

"The Relief Ass'n may not recover from the Toler Convalescent Home. The title to the real property described as

> Lot Three in Block 10 of Geisreiter's Subdivision of the West Fractional Half of Section 6, Township 6 South, Range 9 West, Jefferson County, Arkansas,

is in the Toler Convalescing Home and the said Home has the right and responsibility of operating the said property and the home thereon situated.

II

"The appointment of a receiver was proper and necessary.

III

"The restraining order against William H. Toler was proper and necessary.

IV

"There was no fraud or duress in the execution of the deed of conveyance by the Negro Relief Association to the Toler Convalescing Home nor in the execution and adoption of the resolution changing the name of the Relief Ass'n to that of the Home. The attempted act of the board of the Negro Relief Ass'n in 1958 does not take precedence over its prior act and is a nullity.

"In the case of *Bosson* v. *Women's Christian National Library Association,* 216 Ark. 334, 225 S. W. (2) 336, our Court made it clear that corporations of the type involved in this action are of the same nature as a charitable trust and said:

'Being public utilities of a very high order, charities are intimately associated with the state which exercises over them full supervision so that their property, funds and revenues shall not be diverted to any improper purpose, and that trustees and agents shall perform the duties assigned to them with honesty and fidelity and for the best advantages of the charitable uses designated by the donor or donors. For these ends the Chancery Courts have an original and inherent jurisdiction.'

"The Court retains jurisdiction of this case. It extends to the parties herein at period of thirty days in which to make suggestions to the Court as to the method of securing a proper board for the Toler Convalescing Home to operate the home when the receiver shall have been discharged.

"Receiver shall continue to operate said home until such a time as this litigation shall have been finally concluded, at which time the reeciver shall make a final accounting of her actions as such and when said accounting shall have been approved by the Court she shall be discharged from further responsibility as receiver.

"Mr. Murray Claycomb will prepare the precedent, submitting copies to other counsel at the same time that it is submitted to the Court. If no objection be made within five days, the same will be entered of record. If objections are raised, the Court will set an early date for passing upon them."

The attorney for the appellee convalescing home was appointed by the Chancellor and petitions this Court for the allowance of a reasonable fee for representing appellee on appeal. The petition is granted, and since the Chancellor is more familiar with the financial position of the parties, that Court is directed to allow such fee.

Affirmed.

TURNER *v.* ARROWHEAD LAND CO.

5-2890 364 S. W. 2d 148

Opinion delivered January 28, 1963.

Alonzo D. Camp, for appellant.

Wood, Chestnutt & Smith, for appellee.

JIM JOHNSON, Associate Justice. This is a suit for damages arising out of alleged fraud and misrepresentation by a vendor to his vendees as to the location of the boundary lines of a building lot.

Appellants, A. Britt Turner and Lucille Turner, his wife, purchased Lot 10, Block 1, Unit 3 of Arrowhead Lake Estates, on Lake Hamilton in Garland County, from appellee, Arrowhead Land Company, Inc., in 1958, and thereafter during 1959 and 1960 built a house on the lot. After the house was built, appellants discovered that the house was situated partly on Lot 9, the adjacent lot to the west. Appellants then purchased Lot 9, which was owned by a third party, for the sum of $1,400.00. Appellants thereupon sued appellee in the Garland County Circuit Court, alleging that appellee, previous to their purchase, had misrepresented the property to appellants, by showing appellants the correct corner of Lot 10 on the road and the corner of Lot 9 on the lake, instead of all the true corners of Lot 10, so that appellants thought the lot boundaries ran at an approximate 45-degree angle from the lake to the road. As part of their damages, they further alleged that they were required to pay to the owner of Lot 8 the sum of $50.00 for damage to his lot done by the former owner of Lot 9. By agreement of the parties the cause was tried before the court. The court, sitting as a jury, found that appellants had failed to prove by a preponderance of the evidence that appellee, its agents or employees, was guilty of any fraud or misrepresentation as charged in the complaint, and that appellants failed to prove any damages for which judgment could be rendered. Appellants promptly appealed.

For reversal appellants urge that they sustained their burden in proving allegations of fraud and misrepresentation by a preponderance of the evidence. Where the court sits as a jury, this is not the test. It is axiomatic that the findings of fact of a trial court sitting as a jury have the same force and effect as the findings of a jury, and that such findings of fact will not be disturbed on appeal if there is any substantial evidence to support it. *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d

1089; *Peterson* v. *Garland County,* 188 Ark. 1167, 65 S. W. 2d 18; *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 322. It is stated further, in *Wall* v. *Robling,* 207 Ark. 987, 183 S. W. 2d 605, that:

"On appeal from the findings of the court in a case of this kind we must give to the evidence adduced on behalf of the prevailing party the strongest probative force that it will reasonably bear. *St. Louis Southwestern Railway Co.* v. *Morgan,* 144 Ark. 641, 215 S. W. 589; [and other cases cited]."

Appellants and their witnesses testified that appellee's salesman showed them the correct corner of Lot 10 on the road and erronously showed them the corners of Lot 9 on the lake as being the corners of Lot 10, which would make the lot boundaries run approximately at a 45-degree angle from the lake to the road. Appellants testified that they saw a plat of the property, and one of appellants' witnesses stated that the salesman had a copy of the plat with him when they were shown the property and that "when we went around the four corners he showed us the four corners on the plat". Appellants testimony further showed that there were iron pipes and wooden stakes at the four corners of each lot, that the corners on the road were marked with the lot numbers, but that the stakes at the lake front had no markings.

Appellee's witnesses testified that the subdivision was laid out by a licensed surveyor, that all lot corners were marked with wooden stakes and iron pipes, that the front corners (on the road) had white stakes with red numbers designating the lot, block and unit number, and that on the corners on the lake the wooden stakes bore the same markings with blue keel crayon. The surveyor further testified that the brush was cut along lot lines in order to make the survey, some three months prior to appellants' purchase.

Appellee's salesman testified that he showed appellants the correct lot corners, that they walked out the corners and lot lines of Lot 10. and that he had a plat

with him at the time. Appellee's manager testified also about the marking and staking of the lots, and further testified that he had instructed all salesmen to "show the true lines and always take the plat with them and acquaint the people with the lot they are getting . . ."; that they had had no difficulty with any other lot in Arrowhead, and that pointing out the wrong lot line would be no advantage but simply cause trouble.

Giving the evidence adduced on behalf of appellee the strongest probative force that it will reasonably bear, as we must, we find that there is substantial evidence to support the finding of the trial court.

Appellants' second point urged for reversal is that by a preponderance of the evidence appellants' damages were clearly proven. Although consideration of this point is not necessary for determination of this case, we note from the record that appellants clearly proved their expenditures. However, there is a total failure of proof tending to show that appellants suffered a loss as a result of these expenditures. The record being thus, we cannot disturb the trial court's finding that appellants failed to prove any damages for which judgment could be rendered.

The judgment is therefore affirmed.

COOPER *v.* CHEROKEE VILLAGE DEVELOPMENT CO., INC.

5-2921 364 S. W. 2d 158

Opinion delivered January 28, 1963.

Harry L. Ponder, for appellant.

Herschel H. Friday, Jr. and *John Mac Smith,* for appellee.

FRANK HOLT, Associate Justice. Appellant seeks to have a financing or loan agreement between the appellees declared usurious and, therefore, invalid pursuant to the provisions of Article 19, § 13 of the Constitution of the State of Arkansas. He asks that any existing indebtedness under such contract be cancelled and forfeited and that a permanent injunction be issued against appellees.

Appellee, Cherokee Village Development Company, Inc., [hereafter referred to as Cherokee] and appellee, Northern Financial Corporation [hereafter referred to as Northern] each answered, entered its appearance and submitted to the jurisdiction of the court. In separate answers, each appellee admits that the loan agreement provides for a greater rate of interest than 10% per annum which, under Arkansas law, would constitute usury but alleges, however, that the substantive law of New York, rather than Arkansas, is applicable. Appellees affirmatively ask for a declaratory judgment holding the agreement valid and enforceable. The cause was submitted upon the pleadings and a stipulation of facts. The trial court upheld appellees' contention that the substantive law of New York governs and the agreement is valid and enforceable.

The pertinent facts agreed upon are as follows. Appellant is a citizen and resident of the State of Arkansas and is the owner of 600 shares of the capital stock

of appellee, Cherokee. Cherokee is a corporation organized under and existing by virtue of the laws of the State of Arkansas with its principal place of business in Sharp County, Arkansas. Appellee, Northern, is a corporation organized under and existing by virtue of the laws of the State of New York and has its principal place of business in the City of New York, New York. Northern has not qualified to do business in the State of Arkansas and has no office or place of business in Arkansas. Northern is a commercial financing company.

Cherokee is the owner, subject to rights of way, easements, liens, lots sold and contracts for the sale thereof, of a tract of real estate situated in Arkansas and containing approximately 6,375 acres. Cherokee has developed and improved said tract of real estate, platted portions thereof into lots, has sold some of said lots and entered into contracts of sale with reference to other lots. It will continue to do so in the future.

In early 1962, Cherokee entered into negotiations with Northern to obtain financing for these operations. These negotiations between representatives of Cherokee and Northern took place in Arkansas and in New York. The negotiations led to an agreement between between the parties dated April 30, 1962, a copy of which was made a part of the record. The loan agreement drafted by Cherokee, the borrower, was executed and deliverd in New York City and the agreement expressed the intent of the parties that the laws of the State of New York shall govern their contractural rights and duties.

Generally stated, the loan agreement classifies the aforesaid contracts of sale into two types of "eligible paper". One type, Class A Paper, being the contracts on which at least six installment payments, but less than twelve, have been paid to Cherokee by the purchaser. The other type, Class B Paper, being contracts on which twelve or more such installment payments have been paid. Such contracts, designated by the loan agreement as eligible paper", are also designated as "collateral" and are to be pledged, assigned and delivered by Cherokee to

Northern in New York to secure the loan. Northern agrees to advance and deliver to Cherokee, by depositing in a New York bank account of Cherokee, as requested from time to time, such sums as shall not exceed thirty-three and one-third per cent of the unpaid balance of Class A Paper and as shall not exceed fifty per cent of the unpaid balance of Class B Paper. Cherokee agrees to pay interest upon the advances so made to it at the rate of 1/27 of one per cent per day (equalling approximately 13⅓ per cent per annum). There is sufficient eligible paper to permit a loan well in excess of one million dollars.

Under the terms of the loan agreement Cherokee agrees to continue to make collection of payments under the said contracts of sale which are assigned as collateral. Such collections are to be received by Cherokee in trust for Northern and deposited in a special bank account in the Bank of Ash Flat, Arkansas, maintained in Cherokee's name. The funds so received are to be remitted daily by check to Northern, these being the only withdrawals from this bank account. All such remittances are to be delivered to Northern in New York and are not to be effective until three days after receipt to permit bank clearance and collection. When thus collected, the remittances are credited by Northern against Cherokee's indebtedness. Upon any contract of sale being paid in full by the buyer, Northern must redeliver such contract to Cherokee. The loan agreement is to continue in effect from year to year until terminated as specified in the agreement. Cherokee reserves the right to terminate this agreement upon thirty days notice to the event it is able to secure necessary refinancing from commercial banks, other institutional lenders, or public financing.

The appellees have been operating under this agreement with the said contracts of sale being assigned and pledged to Northern, loans being made thereon to Cherokee, and payments being made on those loans including interest at a rate of more than 10 per cent per annum (approximately 13⅓% per annum).

Appellees, Cherokee and Northern, have filed a financial statement with the Clerk of Sharp County, Arkansas, and the Secretary of State, pursuant to certain provisions of the Uniform Commercial Code, Ark. Stats. 85-1-101, *et seq.* (Act. 185 of the Acts of Arkansas of 1961).

It is undisputed that if the substantive law of Arkansas is applicable, the loan agreement is usurious and void; however, if the substantive law of New York is applicable, the contract is valid and enforceable.

On September 17, 1962, the trial court rendered its decree holding that the validity, interpretation and effect of the loan agreement are to be determined by the substantive law of New York and, therefore, it is valid and enforceable. The court dismissed the appellant's complaint with prejudice. From this decree appellant brings this appeal.

For reversal appellant pursues five points:

(1) The transaction is one affecting the title to Arkansas land and its validity is to be determined by Arkansas law.

(2) Arkansas is the state with the most significant contracts and therefore Arkansas law must govern the contract.

(3) The Uniform Commercial Code as enacted by Arkansas requires that the contract be governed by Arkansas law.

(4) Even if the validity of the contract is to be determined by New York law, Arkansas substantive law is applicable under the doctrine of *Renvoi.*

(5) The strong public policy of Arkansas against usurious contracts demands a finding of invalidity.

We consider these points in the order presented.

(1) Appellant's theory is that the contracts of sale, which are the principal collateral, when assigned, pledged and delivered to Northern, in effect transfer an interest

in the retained legal title to Arkansas land. Further, that in the event of any default by Cherokee, Northern is authorized to dispose of the contracts at either public or private sale, thereby effecting another transfer of title to the Arkansas land.

The title to land is controlled by the law of the situs of the particular land in question. *O'Bar* v. *Hight,* 169 Ark. 1008, 277 S. W. 533; *Nakdimen* v. *Brazil,* 137 Ark. 188, 208 S. W. 431; *Polack* v. *Steinke,* 100 Ark. 28, 139 S. W. 538; Lefler, Conflict of Laws, (1959) § 140.

However, we think the facts in the instant case are more closely analogous to the cases in which the borrower has executed a promissory note in another state, payable in such other state, to be secured by a mortgage on Arkansas land. In these note and mortgage cases, this court is committed to the rule that the governing law is to be determined under the ordinary choice of law rules for contracts, just as if there were no mortgage. *Smith* v. *Brokaw,* 174 Ark. 609, 297 S. W. 1031; *Boston Mutual Life Inc. Co.* v. *Newton,* 174 Ark. 547, 297 S. W. 1035; *Dupree* v. *Virgil R. Coss Mortgage Co.,* 167 Ark. 18, 267 S. W. 586; *Tenny* v. *Porter,* 61 Ark. 329, 33 S. W. 211. However, this court is not committed to any choice of law rules of contracts which is a sham to evade the usury laws of our state.

In *Tenny* v. *Porter, supra,* this court stated the rule:

"The law of the place which determines the validity of a contract secured by a mortgage determines whether the mortgage be valid or usurious, irrespective of the place where the land which is subject of the mortgage is situated * * * ."

It is our opinion that the situs of the land is not controlling as to which state's laws are to be applied in determining the validity of the loan agreement in this case.

(2) In determining what law governs the validity of a multistate contract four different bases have been used: (1) The law of the state in which the contract was made; (2) the law of the state in which the contract is

to be performed in its most essential features; (3) the law of the state which the parties intended to govern the contract, provided that state has a substantial connection with the contract; and, (4) the law of the state which has the most significant contracts with the matter in dispute (also known as the "center of gravity" or "grouping of contracts" (theory). See Lefler, Conflict of Laws, (1959) §§ 124, 125.

Arkansas has, on different occasions, applied the first three of these theories. *Smith* v. *Brokaw, supra,* (place of making); *American Farm Mtg. Co.* v. *Ingraham,* 174 Ark. 578, 297 S. W. 1039, (place of performance); *McDougall* v. *Hachmeister,* 184 Ark. 28, 41 S. W. 2d 1088, (intent of the parties). The "center of gravity" theory, which appellant urges upon us, was inaugurated in *Auten* v. *Auten,* 308 N. Y. 155, 124 N. E. 2d 99. This court has not found occasion to employ it nor do we now find it necessary in this case.

From a review of the facts in this case we are of the opinion that upon the application of any of the three traditional rules, recognized by this court, that the law of New York is controlling.

This agreement was drafted by the borrower, Cherokee, and offered to the lender, Northern, in New York. It was in New York that this contract was executed and delivered or where the last act necessary to complete the contract and impose legal obligations was consummated. The contract was made in New York. Leflar, Conflict of Laws, (1959) § 122; Restatement, Contracts, § 74; Williston, Contracts (3rd Ed. 1957) § 97; *Smith* v. *Brokaw, supra.*

As to performance, it is in New York where all advances, repayments and remittances are to be made and all collateral assigned. It is in New York that the contract is to be performed in the main or its essential features. *American Farm Mtg. Co.* v. *Ingraham, supra.*

By the terms of the contract, it is the express intention of the parties that the laws of New York govern its validity. Cherokee and Northern had the right to select

and intend the law of New York to govern the contract since New York has substantial contacts with the contract. *McDougall* v. *Hachmeister,* 184 Ark. 28, 41 S. W. 2d 1088; *Dupree* v. *Virgil R. Coss Mortgage Co., supra.* Of course, they could not validly agree to such if New York had no substantial connection with the agreement.

(3) We are only concerned in this case with the question of usury. Thus, we do not reach the question of whether the Uniform Commercial Code, Ark. Stats. 85-1-101, supports the appellant's argument because the Uniform Commercial Code does not affect the Arkansas law on usury. See Ark. Stats. 85-9-201.

(4) *Renvoi* is the doctrine under which the court of the forum, in resorting to a foreign law, adopts the rules of the foreign law as to conflict of laws, which rules may in turn refer the court back to the law of the forum.

We deem it unnecessary to decide whether this court will follow the *renvoi* doctrine in this case. Suffice it to say that if this court applied the whole law of New York, which includes the New York law on conflict of laws, the result in this case would be the same as we reach on other grounds. In determining which state's law governs the validity of a contract, New York has apparently committed itself to the "center of gravity" or "grouping of contracts" theory. *Auten* v. *Auten, supra.* Applying that theory to the instant facts, it is evident that New York is the state with the most significant contacts with the matter in dispute.

(5) This court has consistently inclined toward applying the law of the state that will make the contract valid, rather than void. *Whitlock* v. *Cohn,* 72 Ark. 83, 80 S. W. 141; *Dupree* v. *Virgil R. Coss Mortgage Co., supra; American Farm Mtg. Co.* v. *Ingraham, supra; Wilson-Ward Co.* v. *Walker,* 125 Ark. 404, 188 S. W. 1184.

This is not a case of a cloak for usury or where the parties to a wholly Arkansas contract have sought to avoid the Arkansas usury law by having the validity of the contract determined by the law of a state having no substantial connection with the contract. On the contrary,

this is essentially a New York contract. It is quite natural for a New York lender to loan its money in New York, to require it to be repaid in New York and to stipulate that the contract be governed by familiar New York law. These are *reasonable requirements* for a lender to exact.

The parties in this case were dealing fairly with each other with full disclosure. Cherokee drafted the agreement and presented it to Northern for acceptance. Cherokee reserved the right to terminate the agreement on thirty (30) days notice if it were able to obtain the required refinancing from commercial banks, other institutional lenders, or public financing. We see nothing so reprehensible about this agreement that it would require us to discard our recognized rules of conflict of laws in order to hold the agreement to be void.

The decision of the lower court is, therefore, affirmed.

GRANITE MOUNTAIN REST HOME *v.* SCHWARZ, ADM'R.

5-2840 364 S. W. 2d 306

Opinion delivered February 4, 1963.

[redacted]

Fred A. Newth, Jr., and *Marshall N. Carlisle,* for appellant.

Pope, Pratt & Shamburger, by *Donald S. Ryan,* for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal by Granite Mountain Rest Home, Inc., from a judgment entered by the Pulaski County Circuit Court, following a jury verdict, wherein the rest home was held liable for the death of Harley L. Hall, Sr., a patient at the home at the time of his demise. Hall was admitted to the home, at the age of 89 years, in April, 1959. He was placed there by his children, who paid $50 per month of the charge made ($140 per month), while the State Welfare Department paid the balance of $90 per month.[1] On July

[1] Hall also received a personal welfare check of $5.00 per month for his personal use.

8, 1960, Hall became violently ill, was removed from the home to Baptist Hospital, and died the next day. Dr. M. D. McClain, a general practitioner of Little Rock, treated Hall, and was of the opinion that the death was due to pneumonia, which was brought on by Hall's consumption of kerosene. Suit was instituted against appellant by the administrator of the estate of Hall, alleging that,

"while the said Harley Lucian Hall, Sr., was in the exclusive care, custody and control of the defendant, the defendant did carelessly and negligently cause or allow the said Harley Lucian Hall, Sr., to consume a large volume of kerosene or similar substance, which resulted in his death on July 9, 1960."

It was further alleged that Hall suffered horrible pain and mental anguish for a period of approximately 36 hours before his death. Damages were sought for the estate in the amount of $20,000, and the sum of $5,000 was sought for mental anguish by the eight surviving children. After the filing of an answer denying the allegations, and various motions, the cause proceeded to trial. The jury returned a verdict for appellee (for the estate) in the amount of $7,500. From the judgment so entered, appellant brings this appeal. For reversal, appellant relies upon three points, the first being that the court erred in not directing a verdict for the home, and the other two relating to two allegedly erroneous instructions which were given by the court.

We are unable, under our established procedure, to consider the first point for reversal, *viz,* that the court erred in not directing a verdict for appellant. A motion for directed verdict was made by appellant at the conclusion of plaintiff's (appellee's) testimony, and was denied by the court. Whether this action by the trial court was correct is of no moment, for upon the motion being overruled, appellant proceeded to offer its evidence. We have held that when one proceeds, after the denial of such a motion, to introduce proof, he waives the error of the court in failing to grant same. *Grooms* v. *Neff Harness Co.,* 79 Ark. 401, 96 S. W. 135, *Ft. Smith Cotton Oil*

Co. v. *Swift and Co.,* 197 Ark. 594, 124 S. W. 2d 1. This is the only motion that appellant can have reference to, for it did not renew the motion at the conclusion of all the evidence. As stated in Wigmore on Evidence, Volume 9, Third Edition, one "cannot take advantage of the judge's *original erroneous refusal* to direct a verdict for insufficiency at the time of the first motion if he does *not renew* the motion at the close at all the evidence." The reasoning employed, is, of course, apparent, for if one has waived his original motion, and does not renew same, there is nothing to be passed upon by the court at the conclusion of the evidence. No error could have been committed by the court at this point — for nothing was presented.

There is yet another reason why this point cannot be considered. In *Rock-Ola Manufacturing Corp.* v. *Farr,* 226 Ark. 279, 290 S. W. 2d 2, this court said,

"Appellant's abstract does not show that any proper motion or objections were presented to the trial court to raise, here, the question of the sufficiency of the evidence to support the jury's verdict.

"No instructions or objections thereto and no motion for an instructed verdict at the close of the testimony were shown. Thus, appellant allowed the issues to be presented to the jury without making any objection. Not only did appellant *allow* the fact issues to be presented to the jury, but, by reference to the record [not abstracted], we find appellant *requested* instructions [given by the court] on the questions of fraud and breach of warranty. By such action appellant waived the question of the sufficiency of the evidence."

In the instant case, as pointed out, no request for directed verdict was made at the conclusion of all the testimony; appellant did request several instructions, and five were given, as requested, relating to the question of negligence. In *Rock-Ola Manufacturing Corp.* v. *Farr, supra,* this court, likewise, said,

"We note further however, it was held in the *Clayton* case, *supra,* and in *Missouri Pacific Railroad Com-*

pany et al., v. *Lamb,* 195 Ark. 974, 115 S. W. 2d 864, that even where no motion for an instructed verdict was requested, the point could be raised in a motion for a new trial which questioned the sufficiency of the evidence. That rule is of no avail to appellant in this case however because no motion for a new trial was made. Act 555 of 1953, Section 11, permits but does not require a motion for a new trial. Section 21 of said Act does require an aggrieved party to '. . . make(s) known to the court the action which he desires the court to take . . .' This was not done by appellant in this instance."

Nor was it done in this instance.

Appellant contends that reversible error was committed by the trial court in giving Plaintiff's Instruction No. 6. That instruction reads as follows:

"You are instructed that the defendant nursing home is under a duty to exercise such reasonable care for the protection and well being of the patients as the patient's known physical and mental condition requires, *and must exercise such reasonable care as is required by the patient's condition as should have been determined by such nursing home in the exercise of ordinary care,*[2] and such care to the patient must be in proportion to the patient's inability to look after his own safety and well being. This duty of care extends to safeguarding patients from dangers due to his own mental incapacity.

"Thus, if you find the defendant, Granite Mountain Rest Home, Inc., knew that the plaintiff deceased, Harley Lucian Hall, Sr., was mentally defective, if at all, as to need close supervision and that the defendant failed in its duty to give such supervision and care, and that such failure, if any, constituted negligence and was the cause of Harley Hall, Sr., death, then you are instructed to find for the plaintiff."

The attack on the instruction is directed to the italicized portion. Appellant contends this phrase told the jury that the home did not exercise ordinary care in determining the patient's condition, and further asserts that

[2] Emphasis supplied.

the instruction actually makes a finding of negligence on the part of appellant. We do not agree. It is true that the instruction is awkwardly worded, but no specific objection was made. Appellant made only a general objection, and the instruction is not inherently erroneous. We think the court was, in effect, saying, "and must exercise such reasonable care as is required by the patient's condition as that condition should, in the exercise of ordinary care, have been determined by such nursing home." In our view, this language means the same as that used by the trial court. At any rate, the complaint made cannot be reached by a general objection.

Error is also alleged in the giving of Plaintiff's Instruction No. 9. Here, it is contended that there was no evidence to support the instruction, but again, only a general objection was made. The instruction is not inherently erroneous. Appellant's contention (relative to the lack of evidence), would have been entirely suitable in arguing that a verdict should have been directed (if such a motion had been made at the conclusion of the evidence), but, in questioning the instruction, a specific objection was necessary.

For the reasons herein set forth, we find no merit in any of the points asserted by appellant for reversal.

Affirmed.

Mr. Justice Holt not participating.

Beaty *v.* Gordon.

5-2886 364 S. W. 2d 311

Opinion delivered February 4, 1963.

Eddy & Eddy, for appellant.

Gordon & Gordon, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a boundary line dispute between neighbors, and is here on both direct and cross appeal.

Mr. and Mrs. Gordon owned their home in Morrilton, and their property had a frontage of 95 feet on Griffin Street; and Mrs. Emma Lee Beaty owned a vacant lot, having a frontage of 60 feet on Griffin Street, and being immediately north of and adjacent to the Gordon property. In 1959 Mr. and Mrs. Beaty decided to build their home on the vacant lot; but there was no definite marking of the boundary line and no legal survey had been made. Mr. Beaty and three others were to construct the Beaty home, and Mr. Beaty consulted with Mr. Gordon about the division line. From that conversation, Mr. Beaty thought his foundation was being laid five feet north[1] of the Gordon property line. After the Beaty home was completed and occupied, and this dispute arose as to the boundary, the Beatys, in August, 1961, had a survey made by Mr. Ragsdale, a civil engineer; and he reported that the foundation of the Beaty home was six or eight inches north of the Gordon north line.

[1] The city building code of Morrilton required an interval between the building and the property line, and the building inspector advised Mr. Beaty that the distance was five feet.

Because of further dissension between the neighbors, Mrs. Beaty filed suit against the Gordons to quiet her title to the property she claimed. The Gordons cross complained, alleging that the eaves of the Beaty home actually extended over the Gordon property line; and they prayed:

". . . that the Court compel the plaintiff to move her house five feet North of the boundary line separating the plaintiff's property from the defendants' property, and that the Court award the counterclaimants the sum of $1,000.00 for the unlawful trespass on defendants' property, and for all other equitable relief to which they may be entitled."

A new survey made by Mr. Ragsdale seemed to indicate that the eaves of the Beaty home extended over the property line. After a lengthy trial, and a personal inspection by the Chancellor, the Chancery Court found that the eaves of the Beaty roof actually extended six inches over the property line and thereby damaged the Gordon's property $1,000.00. But the Chancery Court refused to require the Beatys to remove the roof encroachment because of the expense involved and because the Gordons had allowed the encroachment to be made. On her direct appeal Mrs. Beaty makes these points:

(A) The Parties made a Binding Agreement as to the Location of the Boundary Line Before Plaintiff Began Construction of Her House.

(B) The South Line of the Plaintiff's Property has been Established by Acquiescence for Over 20 Years.

(C) No Damages Were Proved by Defendants.

(D) Defendants Are Estopped to Claim Any Damages.

On the cross appeal Mrs. Gordon[2] claims that she is entitled to a mandatory injunction to compel Mrs. Beaty to remove the encroachment at all events; and Mrs. Gordon also contends that, because of the building code of

[2] The Gordon property was owned by entirety; shortly after the trial below Mr. Gordon died, and the cause has been revived as to his estate because of the $1,000.00 judgment.

Morrilton, Mrs. Beaty's wall and foundation must be moved five feet from the property line.

So much for the history of the litigation and the issues. The learned Chancellor, in an evident effort to restore harmony between these neighbors, entered a decree whereby Mrs. Beaty would not be required to remove the encroaching eaves, but in lieu thereof would pay Mrs. Gordon $1,000.00 as damages. Such would have been a good settlement, but neither party was satisfied and the case comes to us on both direct appeal and cross appeal.

1. *The Cross Appeal of Mrs. Gordon.* We hold that the cross appeal of Mrs. Gordon is determinative of the litigation. The overwhelming weight of the evidence supports the Chancellor's finding that the eaves of the Beaty house actually encroached on the Gordon property; and, under our cases, such encroachment, even though small, should be abated. We have repeatedly held that the doctrine of *de minimis non curat lex* has no application where real estate is involved. *Fulks* v. *Fredeman,* 224 Ark. 413, 273 S. W. 2d 528. In *Leffingwell* v. *Glendenning,* 218 Ark. 767, 238 S. W. 2d 942, it was held that the owner of a lot, whose contractor inadvertently built a retaining wall separating adjacent property, was under legal compulsion to remove a protrusion varying from a fraction of an inch to nearly four inches, over a distance of twenty-six feet. In *Jernigan* v. *Baker,* 221 Ark. 54, 251 S. W. 2d 999, the eaves of the offending house extended over the building line (as fixed by bill of assurance, rather than municipal ordinance); and, in ordering the removal of the encroachment caused by the eaves, we said: "No one could seriously argue that eaves are not a part of the attached building, and in the instant case a projection of more than three and a half feet constituted an invasion of the area Jernigan had every cause to believe would always remain unobstructed. It follows that a mandatory injunction requiring removal should have been given."

To overcome the effect of these holdings, Mrs. Beaty urges: (a) that the line had been fixed by acquiescence

over many years; and (b) that Mr. Gordon agreed to the boundary line. The Chancery Court found the preponderance of the evidence to be contrary to these contentions; and we agree. The line had never been established, so there could have been no "acquiescence." Mr. Gordon was old and feeble and had no authority from Mrs. Gordon to bind her to a boundary line agreement; and Mrs. Gordon offered a reasonable explanation as to why she delayed a very short time in objecting to the Beaty foundation: her son was a civil engineer and had to come from Kansas to survey the line and advise his mother. It must be remembered that Mrs. Beaty instigated this litigation by invoking the aid of equity to quiet her title; yet Mrs. Beaty admitted that no legal survey was made prior to construction. The burden was on Mrs. Beaty to be diligent in making a survey before she could ask equity to declare an estoppel against Mrs. Gordon for a short delay in protesting. For these reasons, language contained in *Hamilton* v. *Smith,* 212 Ark. 893, 208 S. W. 2d 425, is not applicable to the case at bar.

The Chancery Court should have ordered the removal of the encroachment of the eaves of the Beaty house, insofar as the eaves extended over the Gordon property line. Mrs. Gordon insists that the Beaty house should be moved five feet from the property line; but we do not agree that Mrs. Gordon has sustained her position to that extent. In *Jernigan* v. *Baker,* 221 Ark. 54, 251 S. W. 2d 999, the landowner had the benefit of a bill of assurance under which he could seek relief. In the case at bar, there is only a city ordinance of Morrilton. The City is not a party to this suit, and may have agreed to the Beaty construction, or may now be bound by it; so we cannot consider here the alleged violation of the ordinance. With the cross appeal of Mrs. Gordon granted to the extent herein stated, it follows that Points A, B, and D, urged by Mrs. Beaty (as previously listed), are decided adversely to her.

II. *Damages.* The Trial Court awarded Mrs. Gordon $1,000.00 damages because the eaves of the Beaty house would continue indefinitely to encroach on the

Gordon property. Even assuming that the evidence as to such damages was sufficient to support the award, nevertheless the encroaching eaves are to be removed, so the amount of damages awarded must also be reversed.

CONCLUSION

To the extent herein stated, the decree is reversed on both direct appeal and cross appeal; and the cause is remanded with directions to the Chancery Court to enter a decree and have further proceedings in accordance with this opinion. All costs are assessed against appellant.

WAGNON *v.* BARKER.

5-2896 364 S. W. 2d 314

Opinion delivered February 4, 1963.

Sexton & Morgan, for appellant.

Hardin, Barton & Hardin, for appellee.

George Rose Smith, J. This is an action by K. B. Wagnon and his wife for damages sustained in a traffic collision between their car and that of the appellee, T. C. Barker. Mrs. Wagnon was injured and the Wagnon car was damaged. Submission of the case to the jury, without interrogatories, resulted in a general verdict for the defendant. For reversal the Wagnons question the sufficiency of the evidence and the court's action in giving and refusing instructions.

The Wagnons owned their car jointly. At the time of the accident Mrs. Wagnon was being driven upon a shopping trip by her granddaughter, Sally Ann Bercher, in circumstances from which the jury were justified in finding that Mrs. Bercher was acting as her grandmother's agent. This question of agency was submitted to the jury; we must assume that it was resolved against the appellants.

Just before the collision Barker had been parked, facing south, on the righthand side of Towson Avenue, a four-lane street in Fort Smith. Barker pulled away from the curbing, intending to make a U-turn and travel northward. After he had almost cleared the outer righthand lane, where he had been parked, and was about three-fourths of the way across the inner lane, his engine died. Barker tried to start his car, but it seemed to be flooded. He first saw the Wagnon automobile, approaching from the south, when it was about a block away. It appeared to Barker that Mrs. Bercher didn't see him: "She was just coming too fast to stop, and it looked like she didn't even see me there." Barker stated that his car had been standing still in the street for "quite a while" before Mrs. Bercher applied her brakes. The Wagnon car left 72 feet of heavy skid marks and struck the Barker vehicle with great force, throwing Mrs. Wagnon into the windshield.

Mrs. Bercher admitted candidly that she did not see Barker's car "until it was just too late. When I looked up he was in my lane, and I slammed on the brakes and went into him, and I couldn't stop." On cross-examination she confessed that she had not seen where Barker

came from; he was already stopped when she first saw his car in her path.

Giving the evidence its strongest force in favor of the verdict, we think it plain that there is substantial proof to support a finding that Mrs. Bercher's negligence was at least equal to that of Barker. (The jury could well have believed that if Mrs. Bercher had been traveling at a lawful speed and had been keeping a proper lookout she would have seen Barker in ample time to have stopped before reaching his car.) Under our comparative negligence act the plaintiffs were not entitled to recover if the negligence of their agent equaled or exceeded Barker's negligence. Ark. Stats. 1947, § 27-1730.2.

It is now argued by the appellants that Mr. Wagnon, at least, should recover his share of the property damage, since Mrs. Bercher was his wife's agent, not his. Had this contention been urged in the trial court the jury might have found that Mrs. Wagnon had implied authority to bind her husband in the selection of a driver for the family car. But this contention was not made below. To the contrary, the plaintiffs, by their requested instruction No. 2, asked the court to submit as an issue of fact the question of Mrs. Bercher's agency for both the Wagnons, and that issue was actually submitted by the court's instruction No. 4. A party who requests the submission of an issue of fact is not in a position to contend that no such issue existed. *The Home Company* v. *Lammers*, 221 Ark. 311, 254 S. W. 2d 65.

The court's instruction No. 4 is challenged upon two grounds, but neither of the defects now urged was mentioned in the single specific objection that was made in the court below. There was no general objection. We have repeatedly held that when a party makes only a specific objection to an instruction he waives all other objections. *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, 124 S. W. 1048; *Southern Bauxite Co.* v. *Brown-Pearson Cash Feed Store,* 172 Ark. 117, 288 S. W. 377; *Coca-Cola Bottling Co. of Blytheville* v. *Doud,* 189 Ark. 986, 76 S. W. 2d 87: The opinion in *Trumbull* v. *Martin,*

137 Ark. 495, 208 S. W. 803, indicating that an unfounded specific objection may be treated in this court as a general objection, is contrary to our cases both before and after that decision and cannot be regarded as a correct statement of the law.

The court properly refused the plaintiffs' instructions No. 4 and No. 5. The former would have been abstract and confusing to the jury, in that it embodied a number of traffic rules that were of no importance in this case. It mentioned, for example, a driver's duty to signal for a turn during the last 100 feet before turning. But Mrs. Bercher admittedly was not looking ahead and did not even see the Barker automobile; so it is plain that whether Barker gave a signal was immaterial.

Instruction No. 5 would have told the jury that neither the owner of a car, nor a passenger, is liable, merely because of the relationship, for the negligence of the driver. Liability on account of negligence was covered by the instructions that were given. We are wholly unwilling to order a new trial simply because the court refused to give a negative charge setting out matters that counsel were at liberty to argue to the jury upon the basis of the instructions that were actually given.

Affirmed.

KUHL *v.* ARK. STATE BOARD OF CHIROPRACTIC EXAMINERS.

5-2874 364 S. W. 2d 790

Opinion delivered February 4, 1963.

[Rehearing denied March 11, 1963.]

Dan McCraw, for appellant.

Martin, Dodds & Kidd, for appellee.

SAM ROBINSON, Associate Justice. The appellants, William E. and Robert J. Kuhl, are chiropractors authorized to practice in the State of Arkansas. On the 8th day of November, 1960, the Arkansas State Medical Board filed a complaint in the Pulaski Chancery Court, wherein it was alleged that the above named appellants were engaged in the illegal practice of medicine in this state. The complaint alleged that the appellants were doing about a dozen different things that constituted the practice of medicine.[1]

On the 5th day of June, 1961, the Arkansas State Board of Chiropractic Examiners, acting on authority of Ark. Stats. 72-407, filed charges against appellants alleging that they had illegally engaged in the practice of medicine as charged in the complaint which had been filed in the Chancery Court by the Medical Board; and further, that they were guilty of unethical conduct. A summons was issued and served.

On June 13, 1961, appellants filed a motion asking that they be given an immediate hearing on the charges which had been filed on June 5. The hearing was set for June 28. On that date when the matter came on to be heard on the merits, appellants made an oral motion that the Chiropractic Board be required to make the charges more definite and certain. The motion was overruled

[1] See *Miller* v. *Reed,* 234 Ark. 850, 355 S. W. 2d 169.

and the Board proceeded with the hearing. After hearing all the evidence produced, the Chiropractic Board ordered that appellants' license as chiropractors be revoked. By *certiorari* appellants took the case to Circuit Court where the order of the Board was affirmed.

On appeal to this court appellants contend, first, that the Board's action in overruling the motion that the charges be made more definite and certain was error that calls for a reversal. We do not agree. The charges were filed by the Board and summons issued and served on June 5, 1961. Allegations charging appellants with the illegal practice of medicine had been filed in Chancery Court by the Medical Board November 18, 1960, more than six months before the charges were filed by the Chiropractic Board. Moreover, during the interim between June 5, 1961 and the time of the hearing on June 28, the only thing filed by appellants was a request for an immediate hearing. Not until the day of the hearing on June 28, did appellants ask that the charges be made more definite and certain. In these circumstances there was no error in denying the motion.

While the matter was pending in the Circuit Court appellants filed a motion asking that the Chiropractic Board be required to deliver to the attorneys for appellants "all books, records, correspondence and minutes pertaining to any disciplinary action taken or contemplated against any chiropractor since the creation of the board for the purpose of permitting defendants to inspect same and copy if desired". The motion was overruled by the trial court. We fail to see in what manner the action taken by the Board in some other case would be relevant to the case at bar.

After the taking of testimony before the Chiropractic Board and while the matter was still in the hands of the Board, Dr. Murphy, a member of the Board, called a doctor on the staff of the Missouri Pacific Hospital and questioned him about certain facts to determine if appellant, Dr. William Kuhl, had testified truthfully or falsely concerning his dealings with the hospital and the treatment of Missouri Pacific Hospital patients. Of

course, if the judge of a court or a juror adopted such means to ascertain the facts, we would quickly hold that it was error to obtain evidence in that fashion. But members of the Chiropractic Board are not lawyers and they are not jurors with a judge available to tell them what they may or may not do. In all probability, members of the Chiropractic Board know nothing about the rules of evidence and perhaps they could never hear an involved case without making errors in admitting or rejecting evidence, if their action in that respect were tested by the rules of evidence applicable to a court of law.

In *Bockman* v. *Arkansas State Medical Board,* 229 Ark. 143, 313 S. W. 2d 826, we had the same point under consideration and there we said: "This is not a criminal prosecution, in which the accused is entitled to be confronted by the witnesses against him. It is an administrative proceeding, civil in nature, . . .". It is further stated in that case that the Board could not proceed at all if it were required to observe technical rules of evidence. Also, we said in the Bockman case: "Upon this point it is our rule in proceedings like this one that the board's action will not be set aside on *certiorari* unless there is an entire absence of substantial evidence to sustain the findings, . . .". But even so, we would send this case back to the Board of Chiropractic Examiners for a new trial if it appeared that appellants did not receive a fair trial, or that Dr. Murphy's action in talking to a doctor at the Missouri Pacific Hospital, and perhaps other chiropractors, was in any way prejudicial to appellants; but we cannot see how appellants were prejudiced in any manner by the conversations, because regardless of what was said, and notwithstanding anything that may have been said, there is competent evidence in the record which shows that appellants' license to practice chiropractics must be revoked.

Even though the Board is not bound by strict rules of evidence, the essential rules of evidence by which rights are asserted or defended must be preserved. But a hearing does not cease to be fair merely because rules of evidence and procedure applicable in judicial proceed-

ings have not been strictly followed, or because some evidence has been improperly rejected or received. *Bilokumsky* v. *Tod,* 263 U. S. 149. To render a hearing unfair, the defect or practice must have been such as might have lead to a denial of justice, or there must have been absent one of the elements of due process.

Ark. Stats. 72-604 defines the practice of medicine, in part, as follows: ". . . suggesting, recommending, prescribing or administering any form of treatment, operation or healing for the intended palliation, relief, or cure of any physical or mental disease, ailment, injury, condition or defect of any person with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever; . . .".

A chiropractic license entitles "the holder thereof to adjust by hand the displaced segments of the vertebral column and any displaced tissue in any manner related thereto for the purpose of removing any injury, deformity or abnormality of human beings". Ark. Stats. 72-404.

Of course if any information Dr. Murphy obtained, not in the presence of appellants, had to be relied on in any respect to support a finding that appellants unlawfully engaged in the practice of medicine, the judgment would have to be reversed; but such is not the case. The printed matter on appellants' statement of account form contains a list of the treatments they hold themselves out as giving, which are listed as follows:

"(1) Adjustments, (2) Vitamins or Supplements, (3) Plasmatic Therapy, (4) Traction, (5) Muscle Stimulation, (6) Diathermy, [The generation of heat in tissues of the body, as a result of the resistance presented by the tissues to electric currents of high frequency that is forced through them.] (7) Ultrasonic Therapy, [Super sound wave treatment] (8) Infrared Therapy, [Pertaining to or designating those rays which lie just beyond the red end of the visible spectrum, such as are emitted by a hot nonincandescent body. They are invisible and nonactinic and are detected by their thermal effect.

Their wave lengths are longer than those of visible light and shorter than those of radio waves.] (9) Ultraviolet Therapy, [Outside the visible spectrum at its violet end; said of rays more refrangible than the extreme violet rays and opposed to infrared.] (10) Ear Irrigations, (11) X-Rays and Fluoroscopy, (12) Endo or Electrocardiogram, [A tracing made by means of the electric needle of an electrocardiograph which shows the contractions of the heart muscle.] (13) Special Interpretations, (14) Laboratory Examinations, (15) Physical Examinations, (16) Basal Metabolism, [The changes going on continually in living cells, by which energy is provided for vital processes and activities in the body, and new material is produced to repair the waste.] (17) Hydro-Therapy [Mineral baths] (18) Blood Count—Urine."

Moreover, appellants sent out literature to other chiropractors offering to do laboratory work and, among other things, they stated: "You no longer have to send your patient or children to other doctors to be treated for stomach worms or pin-worms: Read the enclosed bulletin on the one week treatment and Medication, you may legally give your patient for the above infestations."

It will be noticed that they advise other chiropractors to give "medication". They also furnished forms in connection with taking urine specimens in which they indicate that they could diagnose many diseases, including cancer, by examination of the urine. All this adds up to the fact that appellants did not confine their practice to that of chiropractics, but also engaged in the practice of medicine.

Ark. Stats. 72-407 gives the Chiropractic Board authority to revoke appellants' license "for prescribing any form of medical treatment without having first complied with the law governing the practice of medicine or any method which is not chiropractic". There is no showing that appellants have complied with the law governing the practice of medicine, and not only is there substantial evidence, but by a great weight of the evidence appellants prescribed treatments and methods of treatment which are not chiropractic.

The Chiropractic Board's authority to revoke a license is not an arbitrary one; such authority must be exercised in a proper manner. Ark. Stats. 72-407 gives the Board authority to revoke a license on certain specified grounds one of which is "prescribing any form of medical treatment". Here, when any and everything that may have been said in appellants absence is wholly disregarded, there remains overwhelming evidence that appellants engaged in the practice of medicine, and it is an aggravated case. The evidence shows that over a considerable period of time members of the Chiropractic Board had attempted, without success, to get appellants to confine their practice to chiropractics. In this case, if the Board had failed to revoke the license on evidence which is properly in the record, there would have been an abuse of authority.

The judgment is affirmed.

DEAN *v.* COLE.

5-2847 364 S. W. 2d 305

Opinion delivered February 4, 1963.

Garner, Shaw & Kimbrough, for appellant.

Ralph Robinson, Lonnie Batchelor, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a decree dismissing a complaint against a state police officer and another for want of jurisdiction.

In February, 1962, appellant J. D. Dean filed a taxpayer's suit in the Crawford Chancery Court against appellees Ray Cole and T. R. Nash. The complaint alleged that Cole, individually and in his capacity as supervisor of the Alma Division of the Arkansas State Police, permitted appellee Nash to haul loads in that county in a grossly overloaded condition, without requiring Nash's trucks to be weighed, or if weighed, without charging him for the excess weight; that he had allowed Nash to purchase "NR" licenses for his trucks when the trucks had not been properly assessed or entitled to use that type of license; and that the state and county were thereby deprived of revenue, which resulted in a violation of Article 16, § 13 of the Arkansas Constitution. Appellant prayed for a temporary and permanent injunction against appellees together with a judgment for all funds due the state and county. Appellees demurred to appellant's complaint. On April 24, 1962, the trial court ruled that it did not have jurisdiction of appellant's alleged cause of action and dismissed the complaint. Appellant has appealed, contending only that Crawford County is the proper venue for this action.

In *Downey* v. *Toler, Judge,* 214 Ark. 334, 216 S. W. 2d 60, this court had occasion to pass upon substantially the identical question raised in the instant case. The Downey case involved a suit which was filed in Grant County against two state police officers and another individual. This court there examined the venue statutes and stated:

". . . [W]e conclude that, for the purposes of determining venue in actions against them, for acts done in their official capacity (as alleged in this case by the plaintiffs in the circuit court), the members of the Arkansas State Police are State officers within the purview of § 1397, Pope's Digest [Ark. Stats. § 34-201], and can be sued for official acts only in the county of the official residence of the Arkansas State Police, which is Pulaski County."

The court then ruled that the Grant Circuit Court was without jurisdiction to proceed in the action and granted a writ of prohibition against the Grant Circuit Judge.

In the case at bar, since the acts here complained of could only have been permitted or committed by appellee Cole in his official capacity as a member of the Arkansas State Police and not as an individual, the legal principle of *Downey* v. *Toler, Judge, supra,* is controlling. Therefore the decree of the trial court must be affirmed.

Mr. Justice Holt not participating.

Ark. State Highway Comm. *v.* Witkowski.

5-2867 364 S. W. 2d 309

Opinion delivered February 4, 1963.

Dowell Anders and *Edward H. Boyett,* for appellant.

Russell & Hurley, for appellee.

Frank Holt, Associate Justice. This is an appeal from a condemnation proceeding. The appellant, the Arkansas State Highway Commission, brought this suit to acquire land in the Crystal Hill area of Pulaski County needed for the construction of a portion of Interstate Highway No. 40. Four different tracts of land, each belonging to the appellees, M. E. and Ann Ruth Witkowski,

were involved in this proceeding and separate verdicts were rendered as to each tract. This appeal relates only to tract 41 which consists of 9.05 acres from a part of 41.88 acres. The other three tracts consist of several platted lots. Tract 41, or the 9.05 acres, is raw acreage. Other facts pertinent to this appeal are discussed in connection with the three points appellant urges for reversal.

POINT 1. Appellant contends that it was reversible error for the court to admit in evidence appellees' Exhibit A and B, with testimony relative thereto, which are plats showing the subject property as being divided into lots, blocks and streets.

Exhibit A is a map showing the general location of appellees' four tracts of property in relation to other property in the same area, some of which is subdivided into lots, blocks and streets and some of which appears as raw acreage. The map also represents that a large portion of the 9.05 acres involved [tract 41] is divided into two tiers of lots numbered 1-25 with a street running between the two rows.

Exhibit B is another plat or map showing only the same numbered lots, their size, a street, a road and 31.5 acres of appellees' property as being "reserved for future development."

Appellees, landowners, purchased this property in 1954 and began to subdivide it in 1956. They were also successful in bringing to this property such improvements as a road, gas and water lines. In February, 1961, before the taking of the property in September, 1961, appellees had their regularly employed civil engineer prepare Exhibits A and B in furtherance of their plans to subdivide the property for residential purposes. This property is in the midst, or nearby other property which is platted into and recorded as subdivisions.

Appellee, M. E. Witkowski, had previously acquired other property and developed such into subdivisions. This was his fifth such venture. It is undisputed that the highest and best use of the property in question is for residential purposes. These exhibits were offered and

admitted in evidence only for the limited purpose of showing the highest and best use of the property as being for residential purposes and for the further purpose of showing the improvements existing thereon [gas and water lines and gravel road] some several months before the taking by the appellant. This evidence could not result in conjecture or speculation by the jury as to market value to the prejudice of appellant. *Ark. State Highway Comm.* v. *O & B Inc.*, 227 Ark. 739, 301 S. W. 2d 5.

Appellant urges that the exhibits are inadmissible as evidence in view of our ruling in *Arkansas State Highway Comm.* v. *Watkins,* 229 Ark. 27, 313 S. W. 2d 86. The facts in that case, on this point, are quite different. There testimony was admitted as to the number and value per lot of the property. It is true that witnesses in the case at bar testified they considered the value of other lots in the area; however, there was no testimony as to the value per lot of the subject property. The testimony, as to value, was on a raw acreage basis of the tract. Thus, we hold that the court was correct in admitting appellees' Exhibits A and B under the facts in this case.

POINT II. Appellant next contends that there was reversible error by the court in permitting E. T. Caldwell, a witness for appellees, to testify as to a comparable sale of property by him without the proper foundation of comparability to the property in question. Mr. Caldwell testified that he had recently sold, for $1,900.00, a block of land 150 feet wide and 284 feet long located in the Crystal Hill area. Mr. Caldwell testified that although he lived in the Crystal Hill area he did not know Mr. Witkowski or the location of any of his property. The only evidence as to proximity to subject property is reflected by appellees' Exhibit A and then proximity must be based upon conjecture. No further evidence by Mr. Caldwell or any other witness was offered to show a comparison or similarity between the Caldwell and Witkowski property [tract 41].

Evidence of a sale of property to establish the market value of another is admissible when similarity be-

tween the two tracts has been shown. *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30.

There can be no fixed definition of similarity or comparability. Similarity does not mean identical, however it does require some reasonable resemblance. See Nichols, Eminent Domain, Vol. 5, § 21.31, p. 439. There are certain criteria of similarity which can be utilized to establish a reasonable resemblance. Important factors of similarity to be considered are location, size and sale price; conditions surrounding the sale of the property, such as the date and character of the sale; business and residential advantages or disadvantages; unimproved, improved or developed land. None or any combination of these criteria were sufficiently shown, "connected up" or "tied in" as between the Caldwell and Witkowski tracts to establish a reasonable resemblance. In the case at bar the jury could only speculate in applying the evidence in question to the market value of the subject property.

Since the proper foundation was not laid for the admissibility of the questioned evidence, we must consider this prejudicial error for which we reverse this case.

POINT III. Appellant next contends that it was reversible error to refuse to strike the testimony of appellees' witness, Thomas Cox, because he was not sufficiently familiar with the subject property to testify as to the value of same on a "before and after" basis. Since this case is being reversed we see no need to discuss this point inasmuch as this alleged error is not likely to occur in another trial.

Reversed.

5-2871 364 S. W. 2d 671

Opinion delivered February 11, 1963.

[redacted]

Moses, McClellan, Arnold, Owen & McDermott, for appellant.

Gaughan & Laney and *Fred E. Briner,* for appellee.

CARLETON HARRIS, Chief Justice. Benton C. Mize, who died in 1898, was survived by his widow and five children, namely, Maggie Lawhon, Jeff Mize, Mattie Hamilton, Dora Sheridan, and Henry B. Mize. At the time of his death, he was the owner of a certain 120 acres of land located in Saline County. The widow died in 1904, and thereafter various members of the family occupied portions of the land until 1913, when D. J. Sheridan, husband of Dora, purchased the interest of three of the heirs, viz., Maggie Lawhon, Jeff Mize and Mattie Hamilton. D. J. and Dora Sheridan lived on the land and reared a family there. Dora died in 1927, and D. J. died in 1931. There-

after, in 1933, their heirs agreed on the division of the 120 acres. There were five children, L. B. Sheridan, Havis Sheridan, Will Sheridan, Thomas Sheridan, and Della Reed. Thomas, the eldest brother, did not desire any of the land, and deeds were prepared by a Benton attorney, and executed by the parties, conveying 30 acres to each of the other heirs. The four children each assumed responsibility for their respective 30 acres, and paid taxes in their own names.[1] Henry Mize died in 1958, leaving a widow and several children. In October, 1959, appellants (some of the heirs of Maggie Lawhon, Mattie Hamilton, Jeff Mize and Henry B. Mize) instituted suit in the Saline Chancery Court, seeking partition of the 120 acres. The court held that the heirs of Maggie Lawhon, Mattie Hamilton, and Jeff Mize, were bound by the deeds executed by their ancestors to D. J. Sheridan; further, "that a deed was never delivered by H. B. (Henry) Mize, but that the heirs of Henry Mize are now barred by laches and they are estopped from claiming any interest in said land; that the defendants, Will Sheridan, L. B. Sheridan and Havis Sheridan, derived their respective interest in said land by inheritance from their mother, Dora Mize Sheridan, and their father, D. J. Sheridan, and by exchange of deeds among themselves and purchases from others; * * *". Title was quieted in appellees, L. B. Sheridan, Havis Sheridan and Will Sheridan. From the decree so entered, comes this appeal. For reversal, appellants simply assert that the doctrine of laches does not apply against those seeking to enforce a legal title.

Able counsel for appellants cite several cases in support of their contention; on the other hand, counsel for appellees cite approximately a like number of cases to sustain their position. Actually, both sides cite several of the same cases. It is apparent that the decision in each case is controlled by the facts of the particular litigation.

In the instant case, the evidence reflects that Henry B. Mize, as a boy, lived in the home of D. J. Sheridan for

[1] Della Reed failed to pay the taxes on her 30 acres and it subsequently forfeited to the state, was sold by the state to one Albert Childress, and was later purchased by L. B. Sheridan and Havis Sheridan.

quite some period of time, paying no room or board. While proof on the part of appellees was that Mize promised to execute a deed for his interest in the property, we attach no significance to this testimony, since Henry Mize was, at the time, a minor. After leaving the farm here involved, Mize farmed at Hensley, subsequently lived for about nine years south of Little Rock on the Arch Street Pike, and after other moves, bought a place on Base Line Road, and lived there for twenty years until his death.

According to the testimony, when D. J. Sheridan sold timber off the land in 1927, Henry contended that he owned a 1/5 interest. Sheridan contended that he owned the property and it was finally agreed that the lumber company would hold the money and Henry could make his claim; however, the latter never did make claim to the money, and it was eventually paid to Sheridan. The evidence further showed that Henry Mize visited the property at times throughout the years. In 1947, the Sheridan heirs had the land surveyed and the corners marked and lines blazed. Adjoining land owners were notified of the survey and a notice was published in the newspaper. It certainly would appear that Mize, a resident of Pulaski County for most of his life after leaving Sheridan's home, and having made at least some trips back to the area, would have been cognizant of the fact that the Sheridan heirs were claiming the property as their own. Improvements were made by the Sheridans, parts of the land cultivated, taxes paid on the separate tracts, and these acts were certainly indicative of a claim of absolute ownership.

At any rate, according to Mrs. Mize, widow of Henry, her husband decided to "do something" four or five years before his death. Evidence presented by Mrs. Mize and Bill Mize, a son, reflected that Henry had an abstract prepared in 1952 or 1953, and talked with a lawyer. The attorney held the abstract for a time, and turned it over to another attorney, who died with the abstract in his possession. Mrs. Mize testified that her husband then had another abstract made, but no subse-

quent action was taken. The widow also stated that her husband had known that L. B. Sheridan and Havis Sheridan had built homes on the land.

From the facts herein enumerated, it is established that for a period of more than forty years, though he lived within a comparatively short distance of the land, did some visiting with members of the Sheridan family, and was aware of the improvements that had been made to the premises, no action was ever taken by Henry Mize to enforce his claim to the property. As stated at the outset, authority is cited by both sides, though some of the cases cited by appellants likewise recognize the defense of laches where the facts justify that defense.

For instance, in *Tatum* v. *Arkansas Lbr. Co.*, 103 Ark. 251, 146 S. W. 135, this court said,

"Laches in legal significance is not mere delay, but delay that works disadvantage to another. So long as parties are in the same condition, it matters little whether he presses a right promptly or slowly within limits allowed by law; but when knowing his rights he takes no step to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from the loss of evidence, change of title, intervention of equities, and other causes; but, when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief."

We have held that as between co-tenants, possession of one is the possession of all, *unless there has been an actual ouster or the possession be hostile to the right of the others. Ashley* v. *Garrett,* 218 Ark. 126, 234 S. W. 2d 513. We are of the view that the proof in the instant case sustains the argument of appellees. A case that bears some similarity to the one at bar is *Mitchell* v. *Malvern Lbr. Co.,* 222 Ark. 266, 258 S. W. 2d 549. There, we said,

"With a variety of defenses suggested by the appellee, we select laches as the one on which to rest the affirmance. The uncontradicted evidence established:

(a) that even though the lands were wild and unimproved, nevertheless Malvern has all the time since 1934 paid all taxes on the lands under a deed duly of record and definitely describing the lands, and Malvern has all the time had the lines around the lands painted and blazed, and two of its employees have regularly checked the lands at least twice each month to see that there was no trespassing;

(b) that some of the plaintiffs have resided within one mile of the lands and have frequently passed by the said lands;

(c) that McKinley Mitchell—the moving spirit in the present litigation—learned in 1942 of the sale of the lands to Malvern and of Malvern's possession of the lands, and offered in that year to 'redeem' the lands;

(d) that after learning of Malvern's deed and possession in 1942, there was a delay until 1952 before instituting the present suit;" * * *

It is also, of course, noticeable that though, according to the proof, Mize apparently made some preliminary preparations in 1952 or 1953, to seek enforcement of his claim, *he never did institute suit, and this litigation did not commence until after his death.*

We think the facts support the conclusion reached by the Chancellor.

Affirmed.

LILLARD *v.* STATE.

5065 365 S. W. 2d 144

Opinion delivered February 11, 1963.

[Rehearing denied March 18, 1963.]

Harry C. Robinson, for appellant.

Jack Holt, Jr., Atty. General, by, *Dennis W. Horton* and *Jack L. Lessenberry*, Assistant Attorneys General, for appellee.

ED F. MCFADDIN, Associate Justice. Appellant Dave Lillard was duly charged with the crime of murder in the first degree (§ 41-2205 Ark. Stats.) for the homicide of Mack King. Appellant's trial[1] resulted in a conviction of murder in the second degree (§ 41-2206 Ark. Stats.), and a sentence of seven years; and from that judgment this appeal is prosecuted. The motion for new trial contains six assignments.

I. *Sufficiency Of The Evidence.* Assignments 1 to 4, inclusive, concern this topic. At about 9:30 P.M. on June 14, 1960, Mack King and his brother, Pete Mack, along with two other persons (William Hill and Leon Majors), were in front of the Twin City Social Club, located on State Street in Little Rock. Some of the four named persons were seated, and some were standing. Appellant Dave Lillard drove by in his car and Pete Mack said, "Hey, David, you looking for me?"; to which appellant

[1] The homicide occurred on June 14, 1960; appellant was allowed to, and did, make bail; he obtained repeated continuances; and the trial from which comes this appeal was held on June 21, 1962.

replied, "No, I thought maybe you-all was looking for me — you been messing in my business." With nothing further said, the appellant seized his 12-gauge shotgun, emerged from his car, and fired several shots, which resulted in the death of Mack King. No other person fired any shots. The Coroner testified that Mack King died that night as a result of multiple shotgun wounds which fractured the third and fifth ribs, punctured the left lung, and injured the spinal column, the face, and body. The homicide by appellant was established. Appellant, testifying in his own behalf, stated: that he emerged from his car and started shooting; that Pete Mack had threatened him; that Pete Mack put his hand in his pocket as though he were "reaching for a gun"; and that appellant was shooting at Pete Mack and not at Mack King, whom he shot.

We have detailed a sufficient amount of the testimony to establish that appellant's assignments are without merit. Second degree murder — of which the defendant was convicted — requires the proof of (1) unlawful killing, and (2) malice. *Wooten* v. *State,* 220 Ark. 750, 249 S. W. 2d 964. The killing was admitted, and no witness substantiated the appellant as to Pete Mack making any movement that might have indicated that he was "reaching in his pocket for a gun." Malice and intent to kill may be implied from the use of a weapon, such as the shotgun used by appellant in this case. *Wallin* v. *State,* 210 Ark. 616, 197 S. W. 2d 26. The fact that appellant intended to shoot Pete Mack and by mistake shot Mack King is no defense. In *Clingham* v. *State,* 207 Ark. 686, 182 S. W. 2d 472, we said:

"Where one, in an attempt to murder, slays by mistake a person other than the intended victim, he is nevertheless guilty of murder. *Ringer* v. *State,* 74 Ark. 262, 85 S. W. 410; *Brooks* v. *State,* 141 Ark. 57, 216 S. W. 705; *Daniels* v. *State,* 182 Ark. 564, 32 S. W. 2d 169; 26 Am. Jur. 179."

To the same effect see *Gaines* v. *State,* 208 Ark. 293, 186 S. W. 2d 154; *Henley* v. *State,* 210 Ark. 759, 197 S. W. 2d 468; and *Johnson* v. *State,* 214 Ark. 902, 218 S. W. 2d 687.

The evidence was amply sufficient to take the case to the jury and to support the verdict and judgment rendered.

II. *Admission Of Photographs.* The fifth assignment in the motion for new trial reads:

"The Court erred in allowing the State to offer a series of seven pictures, marked Exhibits 'a', 'b', 'c', 'd', 'e', 'f', and 'h', over the objections and exceptions of the defendant."

Exhibits "a", "b", "c", and "d" were pictures of the deceased, taken shortly after the killing, and these pictures showed that he was shot in the back, in the face, in the head, and in the neck. Exhibit "f" was a picture of the door to the Twin City Social Club, showing that at least twelve shots hit the door; and Exhibit "h" showed that at least ten shots hit the door facing. These pictures were admitted over appellant's objections. Exhibit "e" was a picture originally ruled out by the Court, but then later introduced without objection, and it showed the street in front of the social club. There was no error in the ruling of the Court admitting any of these pictures. It was testified that every picture was taken at the direction of and in the presence of the officers, that the pictures were accurate, and that each fairly and truthfully represented the subject matter. See *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621; and *Oliver* v. *State,* 225 Ark. 809, 286 S. W. 2d 17.

III. *The Jury Panel.* The sixth assignment in the motion for new trial reads:

"The Court erred in refusing to grant the defendant's motion to quash the jury panel because the jury had been improperly selected as set out in his motion, over the objections and exceptions of the defendant."

Only two witnesses were offered to sustain the motion[2] to quash. The first witness was Mr. Gip Robertson (Chief

[2] The motion to quash the jury panel was filed on June 21, 1962, and read:

"That the entire jury panel should be quashed, because the defendant is a negro, and the Commissioners of this Court could not, and did not select a fair and impartial jury to try the defendant, or any other member of the negro, or colored, race, by designation with a

Deputy Tax Collector of Pulaski County), who introduced the current printed poll tax book of Pulaski County, and testified that in preparing the book when the copy of the poll tax receipt showed the letter "C" opposite the name of the person paying the poll tax, then the printed list likewise showed the letter "C", which meant that the person paying was a Negro; but that if a person wrote in for a poll tax receipt and did not designate color, then there was no "c" shown by such name. That was the extent of the testimony of this witness, except the following:

"Q. Mr. Robertson, do you have anything to do with the selection of the commissioners or jurors?

"A. No.

"Q. Do you know whether or not the jury commissioners use the designations after the names to select the jury list?

"A. I do not.

"MR. ADKISSON: That is all.

"THE COURT: As a matter of fact, you don't know whether or not they use this list at all, do you?

"A. No, I don't know."

The only other witness called on the motion to quash was P. B. Frederick (Deputy Circuit Clerk); and he testified that five Negroes were then serving on the regular and alternate jury panel in the First Division Circuit Court in which this case was being tried. We have given the sum total of all the evidence adduced by the appellant on his motion. The Trial Court refused to quash the jury panel; and we find the evidence offered by the appellant to be entirely insufficient to reverse the ruling of the Court. No Jury Commissioner was called to state how the panel was selected; and it was not even shown

capital letter (c) opposite the name of each negro or colored person, which is a violation of the defendant's constitutional rights as provided by the Constitution of the State of Arkansas, and the constitution of the United States.

"That there is not a fair representation of negroes or colored people on the Jury Panel because the Jury Commissioners are able to exclude them because of the way the qualified electors are designated."

that no Negroes were on the jury that was selected to try this case.

The appellant cites two cases in his behalf. One is *Avery* v. *Georgia,* 345 U. S. 559, 73 L. Ed. 1244, 73 S. Ct. 891; and the other is *Bailey* v. *Henslee,* 287 F. 2d 936. Each of these cases presented a factual situation vastly different from that in the case at bar. In the Avery case, it was shown that no Negro was selected to serve on a panel of sixty jurors. In the case at bar, it was shown that five Negroes were on the panel at the term of Court in which the appellant was tried. There was no testimony that any discrimination was used by the Jury Commissioners in selecting the personnel for the panel.

The opinion of the Eighth Circuit Court in *Bailey* v. *Henslee (supra)* is scholarly and thorough. In that case, decided in March 1961, Judge Blackmun reviewed all of the leading cases on the matter of discrimination in selection of a jury, and listed nine factual matters present in that case, which "taken in the aggregate lead us to the conclusion that a *prima facie* case of limitation of members of the Negro race in the selection of this defendant's petit jury panel was established . . . " The seventh of these factual matters mentioned by Judge Blackmun was the use of the letter "c" after the name of a Negro poll taxpayer. The absence in the present case of any evidence of the other eight factual matters regarded as essential in the Bailey-Henslee case, clearly demonstrates that the appellant has failed to show racial discrimination. Furthermore, the fact that there were five Negroes on the jury panel of the First Division[3] Circuit Court at the time the appellant was tried goes far to negative any claim of discrimination. The Trial Court was correct in refusing to quash the jury panel on the evidence offered by the appellant.

Finding no error, the judgment is affirmed.

ROBINSON and HOLT, JJ., not participating.

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[3] At one time the jurors from the Second and Third Divisions of Pulaski Circuit Court could be used in the First Division; but Act No. 3 of the First Extraordinary Session of 1961 provided that jurors impaneled on the regular or special panels of the Second or Third Division of the Pulaski Circuit Court could not serve in the First Division.

BAILEY *v.* STEWART.

5-2897 364 S. W. 2d 662

Opinion delivered February 11, 1963.

[redacted]

Williams & Gardner, for appellant.

Jeff Mobley, for appellee.

GEORGE ROSE SMITH, J. This is an action by Mr. and Mrs. John L. Stewart to recover damages for personal injuries suffered by Stewart in a traffic accident and for the ensuing loss of consortium suffered by his wife. The defendant Bailey appeals from a judgment, entered upon a jury verdict, awarding $10,000 to the husband and $1,000 to the wife. The appellant questions the sufficiency of the evidence and the amount of each award.

It is first contended that Bailey was entitled to a directed verdict, for the reason that Stewart's injuries were caused solely by the negligence of a third person, Jimmy F. Cossey. We think the court was right in submitting the case to the jury, whose verdict found Bailey and Cossey to be joint tortfeasors, with 50 per cent of the total negligence being attributed to each of them.

The accident happened on a November afternoon near a drive-in cafe in Dardanelle, where Stewart was standing outside a window provided for take-out purchases. Cossey, driving a car owned by Don Duvall, and Bailey, driving his two-ton truck, were approaching the vicinity of the cafe from opposite directions. Cossey attempted to turn left, across Bailey's traffic lane, to enter the cafe parking area. Cossey testified that he signaled his intention to turn, with his arm and with his signal light, and that he thought he could turn safely in front of the truck, which was still some distance away. In this thought Cossey proved to be mistaken. Bailey's truck, after laying down 42 feet of skid marks, struck the righthand side of Cossey's car, which had almost completely left the street, and knocked it with great force against a parked truck. The latter vehicle rolled forward and pinned Stewart to the wall of the cafe, causing serious and painful injuries to both his legs.

We think it plain that the issue of Bailey's negligence involved a question of fact for the jury. Bailey testified that Cossey did not give a signal of any kind. The jury could have found, however, that the signal was actually given and that consequently Bailey was guilty of negligence in failing to observe it and thereby avoid the collision.

We do not consider Mrs. Stewart's $1,000 judgment to be excessive. A wife's right to recover for loss of consortium was recognized by our decision in *Missouri Pacific Transp. Co.* v. *Miller,* 227 Ark. 351, 299 S. W. 2d 41. Stewart was 36 years old at the time of his injury. He was confined to a hospital for eleven days and to his home for six weeks. During much of this time he was

completely helpless, lying in bed with at first both legs and later one leg suspended in the air in a cast. Mrs. Stewart acted in the home as her husband's nurse, giving up her job to be with him constantly and to attend to all his physical needs. It was about six months before Stewart was able to walk without crutches. In the circumstances it cannot be said that the verdict for Mrs. Stewart is so excessive as to require a reduction in this court.

This brings us to the principal question in the case: Did the trial judge, in entering a judgment in favor of Stewart for $10,000, correctly interpret the jury's answer to a special interrogatory upon the subject of Stewart's damages? The appellant contends that the award should have been credited with a settlement of $9,000 that Stewart had received from Cossey and Duvall, leaving a net liability against Bailey of only $1,000.

Bailey, the original defendant, brought Cossey and Duvall into the case as third party defendants. They pleaded, and subsequently proved, that they had extinguished their liability by the payment of $9,000 to Mr. and Mrs. Stewart. The release which the Stewarts executed, and which was introduced at the trial, recited that it was intended to conform to the Uniform Contribution Among Joint Tortfeasors Act and to relieve Cossey and Duvall from any liability for contribution. Ark. Stats. 1947, § 34-1005, was referred to in the release.

The trial judge, in instructing the jury, explained that the Stewarts' execution of the release did not relieve Bailey from liability, but the court did not indicate to the jury whether or not Bailey was entitled to benefit by the $9,000 compromise settlement. Instead, the trial judge told the jury that he would be able to enter a proper judgment if the jurors answered certain interrogatories, among which the following (with the jury's answers) are pertinent to this appeal:

"1. Do you find from a preponderance of the evidence that the plaintiff, John L. Stewart, is entitled to

recover damages in this action from the defendant, John M. Bailey?

"Yes.

"2. If your answer to the above question is 'Yes' then answer this question:

"What do you find from the evidence, if any, to be the actual damages sustained by the plaintiff, John L. Stewart, if any, without reference to the amount of payment in settlement as made by Jimmy F. Cossey and Don D. Duvall?

"$10,000.00

(Insert actual damages, if any)"

Before the court entered judgment upon the verdict the Stewarts' attorney filed a motion asking that Stewart be given judgment for the full $10,000, or, in the alternative, that he be granted a new trial owing to the jury's mistake. With this motion counsel tendered an affidavit, signed by the jurors, stating that the jury had intended for the $10,000 award to be in addition to the $9,000 settlement. The parties submitted briefs upon Stewart's motion. The trial court, citing *Giem* v. *Williams,* 215 Ark. 705, 222 S. W. 2d 800, and *Walton* v. *Tull,* 234 Ark. 882, 356 S. W. 2d 20, held that Stewart was entitled to judgment for the entire $10,000, without any credit being given for the $9,000 settlement.

We lay aside, as did the circuit judge, the jurors' affidavit. Such an attempt to explain the verdict is incompetent, for reasons of public policy, and should not have been made. *Reiff* v. *Interstate Business Men's Acc. Assn.,* 127 Ark. 254, 192 S. W. 216.

The *Giem* case and the *Walton* case, relied upon by the trial judge, do not quite reach the point at issue. In the former we held that where the jury had been informed of a compromise payment made by another tortfeasor its amount should not have been subtracted from the verdict, as the jury had already taken it into consideration. In the *Walton* case we indicated (and later

declared, after the trial below, in *Woodard* v. *Holliday,* 235 Ark. 744, 361 S. W. 2d 744) that such a deduction would be proper where the jury had not been told about the settlement made by the other tortfeasor.

Those cases would be controlling if it were not for the fact that here the pivotal question was explicitly submitted to the jury by the court's interrogatories. The court asked the jury, by the interrogatory we have quoted: "What do you find . . . to be the actual damages sustained by the plaintiff, John L. Stewart, if any, *without reference to the amount of payment in settlement as made by Jimmy F. Cossey and Don D. Duvall?*"

We cannot construe the clause that we have italicized as being the equivalent of saying "*after first having deducted*" the amount of the Cossey-Duvall payment. In fact, the actual statement and the one we have just suggested are diametrically opposite. We find it impossible to hold that a finding of the actual damages "without reference" to the amount of a compromise settlement is in effect a finding of those damages after the amount of the settlement has been taken into account.

The appellant asks that we end this litigation by reducing Stewart's judgment to $1,000. We are not convinced that justice would be achieved by that course. The Stewarts' post-trial motion asked for judgment in the full amount of the verdict *or* for a new trial. The circuit judge erroneously entered judgment for the full amount. Had he rejected that part of the movants' prayer he might still have granted a new trial upon the ground that a net award of $1,000 damages to Stewart (the amount of the verdict less the amount of the settlement) would have been against the weight of the evidence. *Oliver* v. *State,* 34 Ark. 632; *Bockman* v. *World Ins. Co.,* 222 Ark. 877, 263 S. W. 2d 486. The fact that the trial judge actually entered a judgment for the full $10,000 strongly indicates that he would not have regarded a $1,000 recovery as representing everything that Stewart was entitled to. In this situation the only fair course is to grant Stewart's alternative prayer for a new trial.

The judgment in favor of Stewart is reversed, and, unless he elects within seventeen days to accept a judgment for $1,000 in accordance with the verdict, the cause will be remanded for a new trial.

WILHELM *v.* TAYLOR, JUDGE.

5-2910 364 S. W. 2d 674

Opinion delivered February 11, 1963.

George K. Cracraft, Jr., for petitioner.

Howell, Price & Worsham, Gentry & Gentry, John Anderson, David Solomon and *Charles Roscopf*, for respondent.

PAUL WARD, Associate Justice. This proceeding calls for an interpretation of Ark. Stats. § 27-340, which provides a method of obtaining service on a "non-resident" person, firm, partnership, etc. The decisive issue is whether the above section of the statutes applies to the petitioner, Mary Ruth Wilhelm, under the facts and circumstances of this case.

Factual Background. The uncontroverted material facts pertinent to a decision of the issue above mentioned are as presently set out. Prior to 1953 the petitioner was

a domiciliary of Kansas; about that time she moved to Helena, Arkansas where she began working, as an anesthesiologist, in a hospital; while so engaged she assisted Dr. Kirkman in operating on one Mose Tittle in June of 1959; on about the first of 1960 petitioner left Helena and went to Houston, Texas where she began work in a hospital and where she is still working. Petitioner remained in Helena continuously (or practically so) from the time she arrived in 1953 until she left in 1960.

On June 13, 1961 the said Tittle filed a suit in the Phillips County Circuit Court against the petitioner, Dr. Kirkman, the hospital (where the operation was performed) and the insurance carrier, seeking damages for (alleged) personal injuries caused by the (alleged) negligence of the petitioner and the doctor. No attempt was made to obtain service on petitioner until about the first of April 1962 when Tittle undertook (without success) to get personal service and to serve her as a domiciliary of Arkansas. Then, after the doctor and the insurance carrier had filed cross-complaints against petitioner, they attempted to get service on her as a "non-resident" of Arkansas under the statute first mentioned. It is conceded that the methods of service used conformed with the provisions of the statute.

In considering the issue presented it must be conceded that: (a) Petitioner was never at any time a domiciliary of this state; (b) petitioner lived constantly in this state about six years; (c) petitioner remained in Helena about six months after the operation on Tittle; (d) petitioner is now, and has been since January 1960, a resident of Texas.

Petitioner made a special appearance in the tort action and moved the trial court to quash the attempted service, and to dismiss the alleged cause of action against her on the ground the court had acquired no jurisdiction over her person. In denying the motion, the trial court, among other things said:

"... that the word 'resident' as used in Act No. 347 of the acts of 1947 (Section 27-340 Ark. Stats. Anno.) is

synonymous with domicile and means one having a permanent residence or domicile within the State of Arkansas and as the defendant, Mary Ruth Wilhelm, was and is a non-resident of this state within the meaning of said Act, service upon the Secretary of State as therein provided is sufficient service to give this court jurisdiction of her person and her motion to quash service under said statute ought to be overruled . . . "

After careful consideration we are led to the conclusion that the action of the trial court cannot be sustained. We have attempted below, for the sake of brevity, to copy only so much of § 27-340 as is applicable to the facts of this case.

"Any non-resident person . . . who shall do any . . . character of work or service in this State shall, by the doing of such . . . be deemed to have appointed the Secretary of State . . . to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action accrued or accruing from . . . the performing of such work . . . by any such non-resident . . . "

(The statute further provides that such service will authorize a personal judgment.)

This Court has so many times, and so uniformly, recognized a distinct difference between "residence" and "domicile" that only a few typical decisions need be cited: See: *Krone* v. *Cooper,* 43 Ark. 547; *Norton* v. *Purkins, Judge,* 203 Ark. 586, 157 S. W. 2d 765; *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Lawrence,* 215 Ark. 718, 223 S. W. 2d 823. In the *Cooper* case, *supra,* it was pointed out that the word "domicile" had a broader meaning than the word "residence", and that one could be a resident of a place without being domiciled there. In the *Norton* case, *supra,* it was held a person could "reside" in a place up to two years and not be domiciled there. The Court was there construing an Act of the Legislature, and said: "We do not think that 'resided', as used in this act, necessarily means one's permanent abode or legal residence or domicile." In the

Lawrence case, *supra,* this Court was called upon to distinguish between the meaning of residence and domicile as applied to Act 314 of 1939 where a question of venue was raised. The question was posed and answered by the Court in the following language:

"The answer to the question of venue posed depends upon the answer to these two questions. (1) Is residence synonymous with domicile? (2) If not, was appellee a resident of Pulaski County at the time of his injury? If the words 'Residence' and 'Domicile' are synonymous, then the Clark County circuit court had jurisdiction, as we think the testimony was sufficient to support a finding that appellee's domicile was in Clark County at the time of his injury.

"In our opinion the words are not synonymous and cannot properly be used interchangeably. Cases without number have pointed out the difference in meaning which the words import, and our own early case of *Krone* v. *Cooper,* 43 Ark. 547, is one of these."

From the above and many other similar statements by this Court we are compelled to conclude the petitioner was, at the time the alleged tort action arose, a "resident" of Arkansas. That being true, it must follow that she was not a "non-resident", and therefore not subject to service under § 27-340 of the Ark. Stats. This case is easily distinguished from *Harrison* v. *Matthews* (decided December 17, 1962), 235 Ark. 915, 362 S. W. 2d 704, which deals with service on a non-resident who was also a domiciliary of this state.

Remedy. The respondent's contention that prohibition is not the proper remedy, because the trial court's order was based on a disputed question of fact, is without merit. We are unable to see where the court's ruling involved any factual dispute.

Writ granted.

Opinion delivered February 11, 1963.

Shaver, Tackett & Jones, for appellant.

Jack Holt, Jr., Attorney General, for appellee.

SAM ROBINSON, Associate Justice. Appellants, C. R. Daley, Johnny Loveday, and R. Loveday, have appealed from a conviction of the crime of false pretense. They were charged with defrauding Jessie A. Mason, an elderly man 82 years of age, out of about $650.00 by representing that they were qualified termite exterminators. The case was tried before the Court sitting as a jury. The Court found all three defendants guilty and they have appealed, contending that the evidence is not sufficient to sustain the verdicts.

It is firmly established that, when sitting as a jury, the Court's finding carries the same weight as a jury verdict, and if there is substantial evidence of guilt it is sufficient to sustain the trial court.

The evidence is overwhelming to the effect that the appellants defrauded Mr. Mason out of about $650.00 in connection with work they did on his house and premises

in exterminating termites and other pests. The great weight of the evidence proves that they collected over $900.00 for doing about $230.00 worth of work.

The only question is whether appellants' acts amounted to false pretense within the meaning of Ark. Stats. 41-1901, which provides: "Every person, firm or corporation who with intent to defraud, cheat or avoid payment therefor, shall designedly by color of any false token or writing, or by any other written or oral false pretense, obtain a signature to any written instrument, or obtain any money, personal property, right of action, service, information or other valuable thing or effects whatever, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly."

The information charges that the defendants obtained the money from Mr. Mason by falsely representing to him that they were qualified termite exterminators. The evidence is sufficient to show that all three appellants made such representation, and we think the evidence shows that in representing to Mr. Mason that they were qualified, they used that term in the sense that they were licensed. One of the definitions of the word "qualified" as given by Webster is: "Having complied with the specific requirements or precedent conditions for an . . . employment". The appellants had no license.

Ark. Stats. 77-131 provides: "Any person, firm or corporation who shall, for compensation, give advice, or engage in work for the control of insect pests, or plant diseases, including structural insect pests, and/or rodents, or shall engage in the business of treating seed for the control of such pests or diseases, or who shall solicit such work in any manner, shall be deemed guilty of a misdemeanor unless said person, firm or corporation is in possession of a valid license issued for that purpose by the State Plant Board, . . . ".

Ark. Stats. 77-132 provides: "When application is made for such license, the State Plant Board shall prescribe in advance an examination in writing which

shall be given by some person designated by the State Plant Board who is not interested financially or otherwise in pest control work in Arkansas, and such representative shall examine the applicant by a written examination as above prescribed and graded by said examiner and said examination passed shall be certified to the State Plant Board for approval. . . . ".

Ark. Stats. 77-133.1 provides for an inspection by the State Plant Board.

Ark. Stats. 77-136.1 authorizes the Board to require monthly reports from licensed operators giving the description and location of properties treated, and such other information relative thereto as the Plant Board shall deem advisable.

If appellants had been licensed exterminators they could have been required to make reports and the State Plant Board could have investigated their work. In these circumstances it would have been more difficult for them to perpetrate a fraud.

There is substantial evidence to sustain a finding that appellants falsely represented themselves as qualified termite exterminators for the purpose of fraudulently obtaining a considerable amount of money.

Affirmed.

BAKER *v.* STATE.

5062 365 S. W. 2d 119

Opinion delivered February 11, 1963.

[Rehearing denied March 18, 1963.]

Charles W. Atkinson and *James R. Hale,* for appellant.

Jack Holt, Jr., Attorney General, by *Milas H. Hale,* Asst. Atty. Gen., for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a conviction for aggravated assault. Appellant, Albert Frank Baker, and the prosecuting witness had been acquainted for about ten years and had previously had trouble of a non-violent nature. On March 15, 1962, they met inadvertently at a place of business in Lincoln, Arkansas. A conversation ensued during which the prosecuting witness armed himself with a piece of a grain drill and appellant armed himself with a mowing machine sickle guard. Both left the building by the front door and a fight ensued in which the prosecuting witness used a stabilizer bar from a Ford tractor, which was in his car, and appellant used the sickle guard. Both parties received some injuries, and after the prosecuting witness had knocked appellant down with the stabilizer bar, they were separated, the sheriff was called, and appellant placed under arrest. Appellant was charged by information with the crime of assault with intent to kill. At trial, the jury returned a verdict of guilty of aggravated assault and fixed appellant's punishment at a fine of $1,000.00 and 180 days in jail. Appellant has appealed from the judgment on the verdict.

Appellant's principal point urged for reversal contends, "That the court erred in refusing to permit appellant to testify about and to show the jury the nature and extent of the injuries he sustained at the hands of the prosecuting witness."

The record relative to this point is as follows:

"Q. In what condition — tell the jury in what condition were your wounds?

"Prosecuting Attorney: State objects. Not material for the purpose of this action.

"The Court: I will sustain the objection. What is the materiality?

"Defendant's Counsel: It certainly is material. We would like to make a record on it.

"The Court: All right, make your record. I will sustain the objection. It was an hour later.

"Defendant's Counsel: Pardon? I don't know what the time was.

"The Court: I will sustain the objection. You can make your record, in the absence of the jury.

"Defendant's Counsel? (Out of the hearing of the jury.) Let the record show that if he were permitted to answer, this witness would state that he received a serious injury, cut several inches long on the top of his head and that he was bleeding profusely from that wound when he arrived at the sheriff's office and that he remained there for approximately one and one-half hours before he was ever taken to a physician for examination or treatment.

"The Court: All right.

"Defendant's Counsel:

Q. Mr. Baker, were you later, or ultimately taken to a doctor.

A. Yes, sir.

Q. Who took you?

A. Bill.

Q. Bill Brooks?

A. Yes.

Q. To which doctor were you taken?

A. He took me down to that clinic. I believe his name was Dr. Clark.

Q. Dr. LeMon Clark? He saw you?

A. Yes, sir.

Q. Did Dr. Clark examine you, sir?

A. Yes, sir.

Q. Will you tell the jury what, if any, treatment he administered to you?

Prosecuting Attorney: State objects.

The Court: Sustained. It isn't material.

Defendant's Counsel: We certainly think it is material, the kind of injuries Mr. Baker sustained.

Prosecuting Attorney: Doesn't matter whether it was little, great, or what, under our theory.

The Court: The burden is on the state.

Defendant's Counsel: (Out of hearing of the jury.) Note our exceptions and let the record state that if permitted to answer, this witness would state that Dr. Clark examined his injuries and sutured the wound in his head and that it took eleven stitches to sew up the wound."

The State forcefully argues that the trial court acted properly in excluding evidence of appellant's injury since it was not relevant due to the fact that self-defense was not part of appellant's plea. Appellant's plea to the information was not guilty. Under the general plea of not guilty appellant had the right to avail himself of any defense which the testimony adduced tended to establish. *Flake* v. *State,* 156 Ark. 34, 245 S. W. 174. Appellant testified that he thought the fight was over when he and the prosecuting witness left the building; that the prosecuting witness then pulled an iron stabilizer bar from his car and swung the bar at appellant with both hands, at which time appellant threw the sickle guard which bounced off the top of the prosecuting witness' head. In our view, testimony such as this brought into issue the question of whether appellant acted in self-defense. It follows therefore under the facts in this case the jury should have had the benefit of this excluded testimony on the question of who was the probable aggressor.

Reversed.

HOLT J., disqualified.

Dissenting opinion on denial of petition for rehearing delivered March 18, 1963.

PAUL WARD, Associate Justice. The majority has denied the petition for a rehearing in this case. Although I helped to make the original opinion, I am now convinced it was wrong and that the petition for a rehearing should be granted. My reasons for this change in position are set out hereafter.

One. The opinion (236 Ark. 91 at pages 92, 93) sets out as the first error the refusal of the court to allow appellant to tell the condition of his wounds. This assignment cannot be considered by us because no exceptions were saved. In the *Criner* case (236 Ark. 220) which we handed down on March 4, 1963 we refused to reverse for the reason no exceptions were saved. Also, in addition, the court allowed Baker (appellant) to make a record of what his testimony would have been. It was "that he received a serious injury, cut several inches long on top of his head . . . " This same testimony was later placed in the record by Dr. Clark as will be shown later.

Two. The next excluded testimony relied on for a reversal is set out in the opinion on pp. 93 and 94. In this instance an exception was saved by appellant. I submit there are two good reasons why no reversal error was committed.

(a) Appellant was again allowed to make a record of what his testimony would be if allowed to answer the questions propounded to him. Here it is: ". . . Dr. Clark examined his injuries and sutured the wound in his head and that it took eleven stitches to sew up the wound." As will be shown later, Dr. Clark's testimony was substantially to the same effect.

(b) Aside from what is said in (a), there is another reason why the court did not commit reversible error. Appellant never did, during the entire trial, tell the trial court why he thought the excluded testimony was admissible. Only on appeal did appellant contend the testimony was admissible to show the probable aggressor. It is not fair to the trial court (as we have said many times) to let him be trapped into error — if it was error.

The record at pages 269 *et seq* shows the testimony of Dr. LeMon Clark which was allowed to go to the jury. At page 270 it shows that the court first refused to let Dr. Clark testify, but following that Dr. Clark did testify in substance, regarding appellant's wounds, as follows:

> I was concerned with the laceration on his scalp; it went right straight back almost in the middle of his skull; it was 3 or 3½ inches long; it went right down to the skull — to the bone; it was lying open; it was almost as though it had been cut with a knife.

At page 272 of the record the doctor said he sutured the cut with seven stitches. The doctor goes on at great length to describe the condition of appellant — much more than appellant had said he would do.

In all fairness to the trial court (and to the continuity of the law) I submit the petition for a rehearing should be granted.

5-2836 364 S. W. 2d 665

Opinion delivered February 11, 1963.

Levine & Williams, for appellant.

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

FRANK HOLT, Associate Justice. This is an appeal from the order of the Grant County Probate Court admitting the will of F. D. Sullivant to probate and dismissing the appellants' contest of the will.

Francis D. [F. D. or Bud] Sullivant, age 78, was found dead on the side of a road in Grant County, the county of his residence, on September 14, 1961. He was divorced and had no children. He was survived by three brothers, Austin, Raybon and Birt Sullivant, a sister, Della Lybrand, and two nephews, Carl and Earl Appling, the sons of a deceased sister [Jennie Appling] of Sullivant.

On September 16, 1961, a petition for the appointment of an administrator was filed by Austin Sullivant. All of the above named heirs, except Birt Sullivant, joined in this petition. The petition was granted on September 18, 1961, in an order appointing the National Bank of Commerce of Pine Bluff, Arkansas, as administrator and issuing Letters of Administration to said bank as administrator of the estate.

On December 8, 1961, the Probate Court [after a two-day trial, December 5 and 6] rendered its Order and Judgment wherein the court admitted to probate the questioned will; denied and dismissed the appellants' petition challenging the validity of the will; appointed Birt Sullivant executor; removed the aforesaid bank as administrator and cancelled the Letters of Administration previously issued to the bank as administrator of the estate. The appellants appeal from this Order.

On appeal, this cause comes here *de novo* and this court will affirm unless the order of the Probate Court is against the preponderance of the evidence. *Parette* v. *Ivey*, 209 Ark. 364, 190 S. W. 2d 441.

Appellants' first point for reversal includes questions concerning the making and proof of the will: No will was introduced in evidence; there is no will in the record; and the proponent failed to prove by competent testimony the execution of the will of F. D. Sullivant.

A study of the record in this case reveals that the will in question and proof of will were properly filed, together with the petition for probate thereof, on September 22, 1961. On the same date the record recites that the court entered an order in which the said will is referred to in these words: " * * * on this date Birt Sullivant presented to the court a will, proof of will attached to a petition for admission thereof to probate * * * " In this order the court granted the appellants sufficient time to file any pleadings desired to contest the will and set the case for trial.

At the trial the two attesting witnesses to the will testified in support of the validity of the will. James C. Cole, the attorney who drafted and witnessed the will testified in part:

"Q. In the file here it is filed what proposes to be the last will and testament of F. D. Sullivant. Is that your signature on that?

A. Yes sir. That is my signature."

Lois Green, legal secretary who typed and witnessed the will, testified in part:

"Q. I hand you what proposes to be the last will and testament of Mr. Sullivant. Is that your signature?

A. Yes sir, it is.

Q. This will was dated October 11, 1960. Were you a member of Cole and Scott at that time?

A. Yes sir.

Q. This is your signature?

A. Yes sir.

* * *

Q. I notice in this will that you and Mr. Cole initialed the first page of it. * * * Is that your initial?

A. Yes sir, I did."

Also, in the final Order from which comes this appeal, the court found, among other things, that:

"The decedent left as his last will and testament an instrument dated the 11th day of October, 1960, and due and proper proof of the execution and publication thereof in the manner required by law has been made. The decedent, at the time the will was made, was of sound and disposing mind and memory and executed same as his own free will and act and not as a result of coercion, fraud or undue influence. Said will is entitled to be admitted to Probate as the last will and testament of the decedent * * * . IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that the instrument dated the 11th day of October, 1960, tendered to this court as the last will and testament of the decedent, should be and is hereby admitted to probate as such * * * ."

The record also reflects that a copy of said will is included in the record. The two attesting witnesses, James C. Cole and Lois Green, presented proper and sufficient proof of the will in compliance with Ark. Stats. §§ 60-403 and 62-2117. We find the questioned will was presented to and examined by the court, and further, was admitted to probate and made a part of the record in this case.

As a part of Point One the appellants also urge for reversal that the proponent of the will failed to prove by competent testimony the execution of the will by F. D. Sullivant. They assail the competency of the testimony of James C. Cole as being based upon privileged communication since Mr. Cole drafted and witnessed the will. Mr. Cole's testimony was proper and competent. *Bradway* v. *Thompson,* 139 Ark. 542, 214 S. W. 27; *Peoples National Bank* v. *Cohn,* 194 Ark. 1098, 110 S. W. 2d 42. Also, Mr. Cole's testimony is challenged since he was employed by the proponent of the will to represent the estate. When the will contest developed, although Mr. Cole continued as an attorney of record, another attorney, Joe W. McCoy, was also employed who tried the case chiefly in the Probate Court and presented the case on oral argument before this court. In *Rosenbaum* v.

Cahn, 234 Ark. 290, 351 S. W. 2d 857, we held to be qualified, as an attesting witness, the attorney who also drafted the will and was named therein as attorney for the estate. In the case at bar, Mr. Cole drafted the will and was not named in the will in any manner. Since Mr. Cole was not named in the will as a beneficiary or otherwise, we hold Mr. Cole was qualified to testify as an attesting witness under Ark. Stat. § 60-402 (c).

Appellants' second and remaining point for reversal includes the contention that F. D. Sullivant was not competent to make a will and that the will was procured by fraud and undue influence.

The burden of proving mental incompetency, undue influence or fraud which will defeat a will is on the party contesting it: *Werbe* v. *Holt,* 218 Ark. 476, 237 S. W. 2d 478; *Walsh* v. *Fairhead,* 215 Ark. 218, 219 S. W. 2d 941; *McWilliams* v. *Neill,* 202 Ark. 1087, 155 S. W. 2d 344; *Smith* v. *Boswell,* 93 Ark. 66, 124 S. W. 264.

Appellants attempt to shift this burden of proof to the proponent of the will by relying on the rule in *Orr* v. *Love,* 225 Ark. 505, 283 S. W. 2d 667. There this court said:

"When it is shown that the will is drawn or procured by a beneficiary, there is a presumption of undue influence * * * . It is incumbent on those, who, in such a case, seek to establish the will, to show beyond reasonable doubt, that the testator had both such mental capacity, and such freedom of will and action, as are requisite to render a will legally valid."

In that case the testatrix made four wills in less than a month. The proponent of the last will, the daughter-in-law, was one of the principal beneficiaries who had her own lawyer prepare the will according to her individual instructions and contrary to the terms of the first will. In the case at bar it is true that Birt Sullivant is the sole beneficiary and that he, his wife, Minnie, and son, Sidney, accompanied F. D. Sullivant to Mr. Cole's office on October 11, 1960, when the will was drafted. However, Mr. Cole was already representing F. D. Sullivant on two

matters[1] and had never represented Birt Sullivant. The will was drafted according to the explicit directions of F. D. Sullivant without any prompting or instructions from Birt or his family. F. D. paid for the will himself. These facts are not sufficient to shift the burden of proof to the proponent in this case.

We proceed now to a discussion and decision on the question of whether appellants have shown circumstances which preponderate in favor of a finding of mental incompetency, fraud or undue influence. We find no evidence of fraud in this case.

The questions of mental competency and undue influence are so closely related and interwoven that we treat them together. *Parette* v. *Ivey, supra; Brown* v. *Emerson,* 205 Ark. 735, 170 S. W. 2d 1019; *Phillips* v. *Jones,* 179 Ark. 877, 18 S. W. 2d 352.

Numerous witnesses appeared for appellants and appellee at the trial of this cause. Lay witnesses, such as neighbors and acquaintances of the decedent, appeared on behalf of appellants. The testimony of these witnesses most favorable to the appellants can be summarized thusly: One witness testified that at times F. D. was all right but at times he had "spells" but she never witnessed these "spells", also, that in her opinion he was not capable of managing his own affairs; another witness testified that she didn't think F. D. was crazy but his mind wasn't right at times; another witness testified that in her opinion "he was very incompetent" and he needed Christian fellowship; another testified that when he saw F. D. in April, 1961, he was irrational in his actions and speech and that he was not as alert in September, 1961; another expressed the opinion that F. D.'s mind was bad; another, that he had bad eyesight but no other disabilities; another, he needed medical and spiritual attention and a better diet.

[1] A pending criminal charge based on a warrant issued because of alleged threats and show of violence to the wife of his nephew, Carl Appling, on September 14, 1960. Also, a pending petition, signed by Austin Sullivant and Mrs. J. W. Lybrand, brother and sister of J. D., to commit him to the State Hospital. This petition was filed on September 23, 1960.

Mrs. B. L. Ross, a tax consultant, testified on behalf of appellants that F. D. Sullivant visited her office on several occasions with reference to tax matters and he seemed confused in his thinking; that he expressed intense dislike for most of his relatives, especially Birt and his family. Mrs. Ross testified about and exhibited a signed document she said she formulated and typed up at F. D.'s request on April 19, 1960. This instrument is captioned "Facts I Want To Make Known While My Sister, Jennie Appling, Is Alive And Before My Memory and Eyesight Get Any Worse." The document recites that he did not believe in wills and would never sign a will as long as he lived, had his right mind and knew what he was doing. Mrs. Ross testified that subsequently, on one of his last visits, she said to him, "Mr. Bud, one time you said you hated Mr. Birt as bad as you hate Mr. Austin," and he said, "Yes, but we patched up our business."

Raybon Sullivant, a brother toward whom F. D. had no animosity, testified that he visited with F. D. six or seven times the last two years of his life and he saw him ten days before his death. He stated that the ill relationship between F. D. and Birt began to change for the better about April, 1960. He testified that since 1958 Bud's mind and body seemed to have deteriorated faster and that Bud couldn't remember things well; that he had a persecution complex and a confused mind. He testified that after their sister, Jennie Appling, died in June, 1960, Bud went all to pieces and "lost his cradle of support."

We now proceed to examine the testimony presented on behalf of appellee, Birt Sullivant, in proving the validity of the will. Appellants object to such testimony on the basis that these witnesses did not have adequate opportunity to observe the manner, habits and conduct of F. D. Sullivant. We find no merit in this contention.

There was medical testimony from several witnesses that F. D. was capable of transacting business. The most

persuasive medical evidence is that given by Dr. Arthur Fowler, Jr., who observed him almost twice daily as his patient when F. D. was in the Jefferson Memorial Hospital at Pine Bluff, Arkansas from September 27, 1960 until October 4, 1960. His complaint, at this time, referred to pain in his knees, his back, and a cough. Dr. Fowler gave as his opinion that F. D. Sullivant was in good general condition for a man of his age (77); that he was mentally alert and that in his opinion he was capable of transacting business. F. D. also told him he was going to make a will which he did a few days later on October 11, 1960.

There is testimony from bank officials with whom F. D. had business transactions that they considered him capable to transact his own business. Other witnesses testified in support of validity of the will but we do not deem it necessary to detail such.

No witness for contestants or contestee testified as to F. D. Sullivant's mental capacity on October 11, 1960, the date the will was executed, except Mr. Cole who drafted and witnessed the will and his legal secretary, Lois Green, who typed and witnessed the will. Both testified that F. D. Sullivant was mentally competent and gave definite instructions as to the contents of the desired will without prompting or participation by anyone. He asked if he had to leave the heirs not getting anything a dollar; he heard the will dictated; the will was read to him after it was typed; he paid $15.00 and asked for a receipt after the will was signed.

During the discussion about the desired contents of the will, F. D. related that he and his brother Austin had not visited with each other in twenty-five years; however, that it hadn't been that long since he and his sister, Mrs. J. W. (Della) Lybrand, had visited each other. Also, F. D. stated that they [Austin and Della] had "done so dirty", by trying to lock him up, and he appeared "as mad as a wet hen." This attitude seems to stem from the filing of a petition on September 23, 1960, signed by Austin Sullivant and Mrs. J. W. (Della) Lybrand, seeking to commit him to the State Hospital. This action

appears to have been prompted by F. D.'s alleged show of violence and threats toward the wife of a nephew, Carl Appling, when she went to visit him on September 14, 1960. A warrant was issued thereon. The fifth paragraph of his will reads as follows:

"FIFTH: By way of explanation, I am aware that I have other brothers and sisters but due to personal relationships and the absence of personal relationships over a period of the last several years, I am intentionally omitting leaving anything to them in this will."

The general consensus of all the testimony in this case is that F. D. Sullivant was characterized as a recluse and miser with many eccentricities and loved money, it seemed, to the exclusion of anything else.

In *Parette* v. *Ivey, supra,* we find the following cogent language which is most applicable to this case and we quote at length:

"* * * As was said by this court in *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695: 'It is elementary that, subject to statutory restrictions, every person of sound mind and disposing memory has the untrammeled right to dispose of his property by will as he pleases, however capricious and unjust such disposition may appear to be. Sound mind and disposing memory constitutes testamentary capacity which is said to be the ability of the testator to retain in memory without prompting the extent and condition of the property to be disposed of, to comprehend to whom he is giving it, and to realize the deserts and relations to him of those whom he excludes from the will. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405. This definition presupposes a mental capacity sufficient to execute a will free from undue influence. *Tobin* v. *Jenkins,* 29 Ark. 151. With respect to the ability to know the extent and condition of the property to be disposed of and to whom it is being given, and to appreciate the deserts and relations to the testator of others against whom he discriminates or excludes from participation in his estate, it is unnecessary that he actually has this knowledge. It is sufficient if he has the mental capacity to understand the effect of his will as

executed. "Capacity to understand the effect of making one's will, and not actual understanding, is the test of mental capacity required of the testator." *Huffaker* v. *Beers,* 95 Ark. 158, 128 S. W. 1040; *Emerich* v. *Arendt,* 179 Ark. 186, 14 S. W. 2d 547,' and in one of our early cases on the subject, *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 690, this court held: (Headnote 2) 'The infirmities of age and even a partial eclipse of the mind, will not prevent a person from making a valid testament if he can retain in his memory, without prompting, the extent and condition of his property, and understands to whom he is giving it and is capable of appreciating the relations to him and merits of others whom he excludes from any participation in his estate,' and on the question of undue influence, (Headnote 1) 'The undue influence which avoids a will is not the influence which springs from natural affection, or is acquired by kind offices, but it is such as results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property. And it must be directly connected with the execution of the will and specially directed towards the object of procuring a will in favor of particular parties.'

See, also, *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405, wherein this court said: 'Testators are not required by law to mete out equal and exact justice to all expectant relations in the disposition of their estates by will, and the motives of partiality, affection, or resentment, by which they naturally may be influenced, are not subject to examination and review by the courts. *Barricklow* v. *Stewart,* 163 Ind. 438, 72 N. E. 128; *Clapp* v. *Fullerton,* 34 N. Y. 190, 90 Am. Dec. 681. If one has the capacity indicated to make a will then he may make it as "eccentric, injudicious and unjust as caprice, frivolity or revenge can dictate." ' " [Citations omitted]

From all of the testimony we are unable to say that the findings of mental competency and lack of undue influence, by the Probate Court, were against the preponderance of the evidence. The decree is therefore affirmed.

HARRIS, C. J., not participating.

5-2888 364 S. W. 2d 794

Opinion delivered February 18, 1963.

Dowell Anders, H. Clay Robinson and *Don Langston,* for appellant.

Donald Poe, for appellee.

CARLETON HARRIS, Chief Justice. This is an eminent domain action instituted by the State Highway Commission against Ethel M. Ptak; J. B. Hawthorne and wife, Ethel Hawthorne, and Guy W. Alexander and wife, Gladys Alexander, to acquire additional property along Highway No. 270 for highway purposes. In July, 1961, the commission filed a complaint and Declaration of Taking, depositing the sum of $50.00 for Tract No. 1 (owned by Ethel Ptak); $1,300.00 for Tract No. 2 (owned by the Hawthornes), and $500.00 for Tract No. 14 (owned by the Alexanders).[1] The Circuit Court of Scott County entered its order, giving possession of the property to the Highway Commission. On May 22 and 23, 1962, the case was tried in the Scott County Circuit Court and the jury returned the following verdicts relative to the tracts herein mentioned:

Tract No. 1, owned by Mrs. Ptak, the sum of $850.00.

Tract No. 2, owned by the Hawthornes, $8,000.00.

Tract No. 14, owned by the Alexanders, $3,000.00.

From the judgment entered on these particular tracts, the Highway Department brings this appeal. For reversal, appellant asserts that the court erred in not striking the testimony of Tiny Powell, a real estate dealer, for the reason that Powell was not qualified to give an opinion as to market value, since "(a) he did not know market value in the area, and (b) he did not know the physical facts about the property to be valued." It is likewise asserted that the court committed reversible error by permitting testimony relative to the cost of moving certain houses on Tracts No. 2 and No. 14.

Mr. Powell is in the real estate and insurance business, having been so engaged for 12 years. He is a resident of Mena,[2] owns the Midwest Realty Company, and was the only value witness called by the land owners.

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[1] Numerous other parties and numerous tracts of land were included in the suit, but this appeal relates only to the tracts and parties mentioned.

[2] The property is located at Wye City, not a great distance from Mena.

As far as general qualifications are concerned, the witness would appear to be qualified in the field of real estate values, and probably was sufficiently familiar with market values in the area (though he did not specifically so state), but after reviewing the evidence, we agree with appellant that Mr. Powell did not seem to be well versed as to the physical facts concerning the properties herein involved.

The Hawthorne tract was composed of approximately 46 acres, and the Highway Department condemned .015 of an acre. Mr. Powell valued the entire tract at $25,000 before the taking, and $10,000 after the taking. We have held that where there is a partial taking of a land owner's property, the measure of damages is the difference between the market value of the whole land before the taking and the value of the remainder after the taking. *Arkansas State Highway Commission* v. *Fox,* 230 Ark. 287, 322 S. W. 2d 81. But the fact that Mr. Powell gave the property a before (the taking) and after (the taking) value does not, within itself, raise the testimony to that degree known as substantial evidence. As was stated in *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738,

"There was no evidence introduced tending to prove the damages except the opinions of witnesses as to the value of the land taken and as to the market value of the properties before and after the taking. Where a witness gives his opinion as to damages, such testimony must be considered in connection with related facts upon which the opinion is based. * * * Whether there is substantial evidence to support a verdict is not a question of fact, but one of law. Because a witness testifies as to a conclusion on his part does not necessarily mean that the evidence given by him is substantial, when he has not given a satisfactory explanation of how he arrived at the conclusion."

In *Missouri-Pacific Transportation Company* v. *Bell,* 197 Ark. 250, 122 S. W. 2d 958, we also stated that whether there is any substantial evidence to support the verdict, is a question of law and not of fact. In *St. Louis S. W. Ry.*

Co. v. *Brasswell, Admr.*, 198 Ark. 143, 127 S. W. 2d 637, it was stated,

"It would seem, however, that in any view to be taken, the issues are whether the evidence *is* substantial, and *who* is to judge of that quality. If this is not a question of law, then substantiality loses its significance, with the result that *any* testimony may suffice. If we acquiesce in this construction there is an abdication of judicial responsibility."

This, then, being the rule, let us look at the testimony of Mr. Powell in this case.

Relative to Tract No. 2, the Hawthorne land, the following appears in the transcript:

"Q. Now then, let's go down to the Jim Hawthorne property. That's Tract Two, Three and Seventeen. Is it your understanding that Tract Number Two includes the Jim Hawthorne houses north of the highway?

A. Yes, sir.

Q. Now on what highway was that—is Jim Hawthorne's property located on?

A. 270.

Q. And on which side of the highway is Tract Number Two?

A. My understanding is it's on the north side.

Q. Now what do you find there along the highway of Tract Number Two abutting up close to the highway?

A. I would like to ask a question here to clarify my own mind, please sir. You spoke of Tract 16, did you not?

Q. I think it is 17, Mr. Powell.

A. I probably included that in this Tract 2, if it's all on the north side. * * *

Q. How much land—do you know how much land [land taken from Tract No. 2]?

A. Only the front footage that I have and that's what I based my appraisal on was front footage. In my belief you cannot base highway values on acres.

Q. Yes, sir. Now on a front footage there will he still have the same front footage after this widening?

A. Well, I am sure he will have the same front footage.

Q. He will still have the same length of front footage will he not?

A. Possibly.

Q. You don't know sir?

A. Well, according to the map it should be."

Tract No. 14, owned by the Alexanders was composed of approximately 30 acres, and the Highway Department condemned 0.46. Powell valued the entire tract at $15,000 before the taking, and $4,500 after the taking. Relative to the land, the testimony included:

"Q. How many acres of frontage do Mr. and Mrs. Alexander have in Tract 14?

A. From an acreage standpoint I couldn't tell you.

Q. How many feet of frontage do they have?

A. Mr. Alexander?

Q. Yes.

A. A total of 792 feet, I believe—on the south side of the highway. * * *

Q. Do you have any idea how much land the highway department is condemning from this Tract 14?

A. I didn't consider it from the standpoint of acreage.

Q. Do you know how many square feet the Highway Department has condemned?

A. No.

Q. Do you know how wide the strip is the Highway Department is condemning?

A. Yes sir, around 27 feet wide—I wouldn't be positive about that.

Q. You didn't know that the Highway Department is condemning a little less than half an acre?

A. I wasn't interested in the acreage.

Q. You didn't think that was of any importance?

A. No, the frontage involved was the thing that I was looking at. * * *

Q. On this property he has a log house. Is that correct?

A. Yes.

Q. Do you have any idea how far that log house is from the right of way?

A. From the new survey you mean?

Q. Yes sir.

A. Exact footage I couldn't say. I didn't measure it.

Q. He also has on there a chicken house, does he not?

A. Yes.

Q. And an orchard?

A. Yes sir.

Q. And a pump house and two wells?

A. Yes sir. There's two wells on the property to my knowledge.

Q. And a workshop and a garage?

A. Yes sir.

Q. All these things are still there after the taking are they not?

A. To my knowledge, yes sir.

Q. Did you know that Mr. Alexander had his property up for sale and was asking $8,500 at the time the Highway Department took the property?

A. No, I did not.

Q. Would you have given any consideration to that had you known it?

A. Pardon me?

Q. Would you have paid any attention to that if you'd known it?

A. I would have at his request."

Tract No. 1, owned by Mrs. Ptak, was composed of approximately 2½ acres, and the Highway Department condemned .002 of an acre. Mr. Powell valued this tract at $10,000 before the taking and $1,000 after the taking. From the record:

"Q. With reference to Tract No. 1 of which Mrs. Ptak is admitted to be the owner, what would you say would be the fair market value of this particular tract of land in the condition it was in July of 1961 immediately before they enlarged the highway?

A. A minimum of $10,000.00.

Q. Now what would you say was the fair market value of this particular tract of land immediately after this highway had been enlarged and the work done there?

A. Well, I hadn't particularly noticed it until May 17 and at that time I figured it was worth $1,000.00."

Here, an objection was interposed by the department to the effect that an appraisal is to be made on the basis of value immediately before and immediately after the taking, and Mr. Powell then testified that the value immediately after the taking in July, 1961, and May 17, 1962, was the same.

We think it apparent from the quoted testimony that the witness was not sufficiently familiar with the properties to make a proper appraisal, and that under these circumstances, his testimony cannot be considered substantial evidence. In fact, the trial court evidently strongly considered striking the testimony. Again, quoting the record,

"Q. Do you have any idea how many acres were in Tract 14 — on the south side that belonged to the Alexanders before the taking? A. No, not the acreage. I believe I stated a few minutes ago I didn't know the acreage in it. I wasn't interested in the acreage. Mr. Robinson: 'Now at this time I would like to make a motion (before the bench). I'd like to move to strike his testimony. He doesn't know the lengths involved, or how much land the Highway Department is taking. I don't see any way in the world he could appraise that property with any basis in fact at all. For that reason I move that his testimony be struck — on these three properties I have just cross examined him on.'

The Court: 'I certainly feel inclined to grant the motion. This witness has shown an absolute disregard of any sincere attempt to reach an evaluation of these properties. He acts totally indifferent except rattling off the figures without giving any basis for it. I'm going to take your motion under consideration.' "

Subsequently, however, the court denied the motion.

We think appellant's objection to the testimony was proper. Powell was not familiar with the total acreage involved before the taking, nor the acreage remaining after the taking, nor did he know how many square feet were taken. He stated that he appraised the property entirely on a frontage basis. Such an appraisal, of course, relates to only a portion of the property, and was only an additional fact to be considered in the overall appraisal. He was not familiar with the distances of the improvements from the right of way; he was not acquainted with the construction plans, and did not know the proposed status of the properties after completion of the work.

Much of the witness' testimony leaves the impression that his inspection of the premises was only casual, and in some instances it would appear that his information was acquired by means other than viewing the property. For instance, in his appraisal, he apparently combined Tracts No. 2 and No. 17 (both owned by Hawthorne) as one tract for appraisal purposes. These tracts are over a mile apart, and are separated by property owned by several different persons. When asked as to which side of the highway Tract No. 2 was located, he replied, "*My understanding* is its on the north side."

In appraising the Ptak property after the taking, Powell stated that he had not particularly noticed that property until May 17, 1962, (a few days before the trial) whereas the actual taking had occurred in July of the previous year.[3] The witness testified that the "corner has been killed", (Ptak property), meaning that the property was inaccessible at the time of the trial, but he admitted that he did not know whether it would be inaccessible when the construction had been completed: "I don't know what the planning is on it, no * * * I looked at it as I seen it — as is." Of course, on May 17, construction of the highway was in progress, and it would appear that Mr. Powell's appraisal took into consideration the disrupted condition of the land at this particular time. This was not a proper element of damage. We have held "that a municipality or other public agency, in the construction or improvement of streets, is not responsible in damages for temporary interference with the use of abutting property." *Donaghey* v. *Lincoln,* 171 Ark. 1042, 287 S. W. 407.

While two of the three land owners testified as to the before and after value of their respective properties, it is extremely doubtful that their testimony, standing alone, could meet the test of substantial evidence. Much of Mr. Hawthorne's testimony was prefaced by "I guess," and portions of Mr. Alexander's testimony were

[3] Powell never did testify that he made an actual appraisal of the property before July, 1961. He stated that he had been "acquainted" with the property for ten or eleven years.

likewise rather indefinite. At any rate, Mr. Powell appeared to be the principal witness for appellees, and we certainly are unable to say that the jury disregarded his testimony. We have held many times that where error is committed, and proper objection is made, such error will be treated as prejudicial unless it be shown that the appellant was not prejudiced thereby. *Equitable Discount Corp.* v. *Trotter,* 233 Ark. 270, 344 S. W. 2d 334.

Appellant's second point relates to the court's alleged error in permitting evidence relative to the cost of moving certain houses on Tracts No. 2 and No. 14. Testimony was introduced as to the cost of relocating the houses by a house mover, plumbing contractor, electrician and a carpenter. Testimony showed that the total cost of moving the Alexander house would amount to $2,719.60, and the total cost of moving several houses on the Hawthorne property was given as $3,952.80.[4] It might be first said that some of this testimony was entirely speculative and remote. An example is given by testimony of Fred Austin, an electrician. From the record:

"Q. Did you go to Jim Hawthorne's property?

A. Yes, sir.

Q. How many houses did you see there * * *

Q. Now the house south of the highway, I will ask you if this is the house that you went to which has been marked Exhibit No. 15. Is that the picture of it — that's south of the highway?

A. I believe so.

Q. Now then, what would you say was the cost of restoring the electrical appliances and wires in that house?

A. That was the one on the south side?

Q. Yes sir.

[4] According to Witness Powell, the highest and best use of the Hawthorne and Ptak properties was for commercial purposes.

A. That would be $85 on that one.

Q. Isn't it a fact that you only looked at three houses of Jim Hawthorne on the north side?

A. Yes, that's right. The ones on up I didn't go look at.

Q. Have you got those combined or have you separated those three houses on the north side?

A. Those on the north side I just estimated the moving of the poles and everything that it would take and then it would average out at $100 a house.

Q. A $100 on each house?

A. Yes sir, and $35 on running wire to the well if they moved the well — if a new well was drilled."

Evidence of the cost of improvements for restoration purposes and of relocation costs is proper. *Arkansas State Highway Comm.* v. *Speck,* 230 Ark. 712, 324 S. W. 2d 796. But, as was stated in that case,

"Let it be borne in mind that these prospective expenditures are not the measure of damages, but are only an aid in determining the difference in the before and after value of the property."

Again, in *Kirk* v. *Pulaski Road Improvement District No. 10,* 172 Ark. 1031, 391 S. W. 793, we stated,

"The record also shows that it would cost more than $2,000 to erect a retaining wall which would prevent the embankment of the plaintiff's property, abutting the improved street, from further caving in. While this proof was competent to show the damage to plaintiff's property it was not the measure of her damages. In cases of this sort, the owner is entitled to recover the difference between the market value of her property before the taking or damage to it and the market value afterwards."

It follows that restoration costs are proper evidence, but this cost must be fairly definite, and the evidence should reasonably define the improvements or changes

that must be made, *i.e.,* the distances that the houses must be moved, etc. Actually, the testimony in this case is somewhat contradictory. Alexander testified that it was extremely doubtful that his house could be moved at all, since it was of log construction with a concrete foundation, and it would be almost impossible to move it without tearing it up. Hawthorne also testified that at least one of his houses could not be moved. The mere fact that a building is closer to the highway does not, in itself, establish damage. In fact, in some instances, benefits might accrue which would offset any damage. The land owner must show that the proximity of the highway to his house, occasioned by the taking, decreased the market value of the property, and the difference in such value before and after the taking would constitute the damage, rather than the cost of moving the house. *Mississippi State Highway Commission* v. *Smith,* 192 So. 447. Of course, if the jury should find that the cost of moving a house would call for a greater expenditure than the damage occasioned by the proximity, the land owner would only be entitled to the proximity damage.

It is apparent that the jury considered the cost of moving the houses as actual damages rather than as an aid in determining the difference in the before and after value of the property. The record reflects the following:

"(At 3:45 the Foreman of the jury came in alone and inquired of the Court and counsel, if the jury could return a verdict which included cost of moving houses and make a requirement that the houses be moved. The Court instructed them that they could not place such a requirement in this verdict.)"

For the reasons herein set out, the judgment is reversed and the cause is remanded to the Scott County Circuit Court.

JONES *v.* BARNETT.

5-2859 365 S. W. 2d 241

Opinion delivered February 18, 1963.

[Rehearing denied March 25, 1963.]

John Harris Jones, for appellant.

Bridges, Young & Matthews, Gene Baim, for appellee.

ED. F. MCFADDIN, Associate Justice. The present case is a sequel to *Selig* v. *Barnett,* 233 Ark. 900, 350 S. W. 2d 176. We are here asked to decide whether the appellant Jones is entitled to an attorney's fee for services rendered in that case; and, if so, how much fee should be allowed. The Trial Court allowed Mr. Jones a fee of Ten Thousand Dollars, and from that decree there is this appeal and cross appeal. A study of the opinion of this Court in *Selig* v. *Barnett, supra,* is essential to an understanding of the present litigation. Ben J. Altheimer is, and has been for many years, an incompetent; and his co-guardians are Mrs. Elsie J. Selig and Mr. R. S. Barnett. These persons have served as co-guardians for a number of years. In 1957, with the sanction of the Pro-

bate Court, there was a different attorney for each of the co-guardians: Mr. Barnett was represented by Mr. Frank Bridges of the Bridges firm;[1] and Mrs. Selig was represented by Mr. Gene Baim.

In 1957, the Trustees of the Altheimer Foundation brought suit against the Trustees of the Testamentary Trust of Ben J. Altheimer, Sr., seeking to reopen a 1948 decree and have certain property awarded to the Foundation Trustees as against the Testamentary Trustees. Mr. R. S. Barnett was one of the Foundation Trustees and acted in such capacity in the said 1957 suit, although he was also co-guardian of Ben J. Altheimer, Jr. Shortly after the said 1957 suit was filed, Mrs. Elsie J. Selig, co-guardian of the incompetent Ben J. Altheimer, Jr., received information as to some doubt about the validity of the Ben J. Altheimer Foundation, and that the Testamentary Trustees had failed to present such issue in the 1948 proceedings. It was reasoned that if the Altheimer Foundation was invalid, then all the property of the Foundation would belong to the Testamentary Trustees, and would materially increase the estate of the incompetent, Ben J. Altheimer, Jr. Accordingly, Mrs. Selig consulted with Mr. Baim, who represented her as co-guardian, to see what steps, if any, should be taken by Mrs. Selig, as co-guardian; and Mr. Baim advised her that Mr. John Harris Jones, appellant in the present case, was a most capable lawyer in such matters. Accordingly, Mr. Baim and Mrs. Selig consulted Mr. Jones; and as a result, Mr. Jones and Mr. Baim filed an intervention for Mrs. Selig, as co-guardian, in the pending 1957 suit brought by the Foundation Trustees against the Altheimer Testamentary Trustees. Mr. Baim and Mr. Jones continued to represent Mrs. Selig as co-guardian in that litigation to and including the denying of the petition for rehearing in this Court in the case of *Selig* v. *Barnett, supra.*

In due time after the conclusion of that litigation, Mr. Baim and Mr. Jones each filed a claim in the guard-

[1] The name of the firm has been changed several times. It is now Bridges, Young, and Matthews.

ianship proceedings of Ben J. Altheimer, Jr., pending in the Jefferson Probate Court, for legal services rendered to the co-guardian, Mrs. Selig, in the said case of *Selig* v. *Barnett*. Mr. Barnett, as co-guardian, resisted the allowance of any fee to either attorney. The Probate Court entered a judgment[2] allowing Mr. Baim a fee of $4,000.00 and Mr. Jones a fee of $10,000.00. Mr. Jones has appealed, claiming he is entitled to a fee of $55,200.00; and Mr. Barnett, as co-guardian, has cross appealed.

1. *The Cross Appeal Of Barnett.* As stated, Mr. Barnett, as co-guardian, has cross appealed, claiming that the Probate Court was in error in allowing any fee to Messrs. Baim and Jones for representing Mrs. Selig, as co-guardian, in the case of *Selig* v. *Barnett*. This cross appeal deserves first consideration, because a decision in favor of Mr. Barnett on this point would make unnecessary the consideration of any other matters. Mr. Barnett insists, *inter alia,* that:

(a) The litigation for which attorneys' fees are requested was conducted by one co-guardian without the consent or approval of the other co-guardian and is therefore unauthorized and not a proper exercise of the guardian's duties;

(b) The attorneys were representing Mrs. Elsie J. Selig, and not the Estate of Ben J. Altheimer; and the attorneys for Mrs. Selig should not be allowed attorneys' fees for litigation commenced for the personal interest of the guardian.

(c) The proper method for securing payments of fees from a ward's estate is on the petition or accounting of the guardian; and

(d) The allowance for attorneys' fees must be based on services which were reasonable, necessary, and conferred benefit upon the ward's estate.

We find no merit in the cross appeal. Mrs. Selig, as co-guardian, had a duty to her ward to recover for him

[2] The Probate Court allowed expenses of $202.85, which we consider as an uncontested item; so we refer only to the fees for legal services as being contested.

any property to which he was entitled. She had received information, from a source which she considered reliable, to the effect that the entire Altheimer Foundation was invalid. She could not act in conjunction with her co-guardian, Mr. Barnett, because he was one of the Trustees of the Altheimer Foundation which had filed the suit against the Altheimer Testamentary Trustees; and, of course, Barnett as guardian could not consistently oppose the claim of Barnett as Trustee of the Altheimer Foundation. So Mrs. Selig consulted Mr. Baim, who was the attorney that had represented her for some time as co-guardian; and it was at his insistence that she consulted Mr. Jones, who agreed to, and did, assist in the intervention of Mrs. Selig as co-guardian. The intervention was not frivolous or trifling: it represented a real issue. Even though it was ultimately unsuccessful, it was nevertheless an issue that Mrs. Selig, as co-guardian, prosecuted in good faith. Messrs. Baim and Jones rendered faithful and extensive service to Mrs. Selig, as co-guardian.

It is urged that Mrs. Selig, as one of the beneficiaries in the Altheimer Testamentary Trust, would also have benefited personally if her intervention as co-guardian had been successful; and from this fact Mr. Barnett insists that Messrs. Baim and Jones were representing Mrs. Selig personally. But the evidence indicates most strongly that Messrs. Baim and Jones were representing Mrs. Selig only as co-guardian in the intervention. The question of a fee to be paid by Mrs. Selig personally was never mentioned. Messrs. Baim and Jones testified, without express contradiction, that Mrs. Selig made the statement to them that her reason for bringing the action was solely for the benefit of her ward; that it was to benefit him, her first cousin; and that she was his closest relative in Arkansas. The attorneys stated that they were never given any indication that Mrs. Selig was doing any of this for her personal good, and that they were repeatedly told by Mrs. Selig that she was doing what she did because she thought it her duty to her ward. We are convinced, and hold, that Messrs. Baim and Jones

represented Mrs. Selig as co-guardian and not as an individual. When the attorneys filed their petition in the Probate Court for a fee for representing Mrs. Selig as co-guardian, she took the position that it was for the Probate Court to determine the issue. Called by the Court, she testified:

"I don't see how I can be anything but neutral. I am Jack's Guardian and I should remain neutral.

"THE COURT: You are neither approving nor disapproving the allowance of a fee?

"I will leave it to your discretion. . . . The Court has always set the fees in this matter."

Mr. Barnett insists that the Probate Court cannot allow a fee until the guardian requests it, and cites, *inter alia; Lothrop* v. *Duffield* (Mich.), 96 N. W. 577; *In Re Garbini's Guardianship* (Calif. App.), 83 P. 2d 508; *Hutton* v. *Gwin* (Miss.), 195 So. 486; and *Hunt* v. *Maldonado* (Calif.), 27 P. 56. But, under the testimony of Mrs. Selig, a heretofore copied, and under the peculiar facts of this case, we hold that the Probate Court had the power to grant the petition of Messrs. Baim and Jones for legal services rendered to Mrs. Selig as co-guardian. Section 57-637(b) Ark. Stats. is a part of the probate Code, and provides:

"Upon the petition of any person having a claim against the estate of a ward for services lawfully rendered to the ward or his estate . . . the court may, after notice, upon appropriate hearing, direct the guardian to pay such claim." Also, § 57-641 Ark. Stats., a part of the Probate Code says: ". . . The guardian may employ legal counsel in connection with the discharge of his duties, and the court shall fix the attorney's fee which shall be allowed as an item of the expense of administration."

Of course, in the normal guardianship proceeding, the guardian should first get the authorization of the Probate Court to employ an attorney; but this is not an ordinary case. Here: Mrs. Selig, with the consent of the

Probate Court, had for years employed Mr. Baim as her attorney in such guardianship; there was an apparent conflict between the co-guardians; and Mrs. Selig's regular attorney called in Mr. Jones to assist him in the litigation. The Probate Court knew all along that Mr. Jones was acting with Mr. Baim as attorney for Mrs. Selig, as co-guardian, because in the course of the *Selig* v. *Barnett* litigation in the Chancery Court, and in this Court, the Jefferson Probate Court made repeated orders in the Ben J. Altheimer, Jr. guardianship case, authorizing Mrs. Selig, as co-guardian, to pay expenses incurred in the Chancery case. These included orders made in 1958 and 1959, authorizing the guardian to pay for expenses incurred in the Chancery case of *Selig* v. *Barnett.* There was also an order of June 21, 1960, made by the Probate Court, authorizing Mrs. Selig, as co-guardian, to expend from the ward's estate, the amounts necessary for the filing in the Supreme Court of the appeal from the decree in the Chancery Court, for the cost of the record designated for such appeal, and for the cost of printing the abstract and brief on such appeal. Certainly the Probate Court was kept fully informed that these attorneys of Mrs. Selig, as co-guardian, were representing her as such co-guardian. We hold that the cross appeal of Mr. Barnett is without merit.

II. *The Amount Of Attorney Fee That Mr. Jones Should Recover.* Having found that Messrs. Baim and Jones, as attorneys for Mrs. Selig, as co-guardian, were entitled to receive a fee, the next question is what the fee should be. The Probate Court allowed Mr. Baim a fee of $4,000.00 for his services to Mrs. Selig, as co-guardian; and Mr. Baim has not appealed, so the correctness of the fee allowed Mr. Baim requires no further comment. The Probate Court allowed Mr. Jones a fee of $10,000.00, and he has appealed, claiming that he should be allowed a fee of $55,200.00 Mr. Barnett insists that the $10,000.00 is more than adequate. Mr. Jones' claim is based on the number of hours he spent in the case of *Selig* v. *Barnett,* computed at the rate of $25.00 an hour. He kept a most accurate record, and his original work sheets were

introduced in evidence, showing every minute devoted to the case of *Selig* v. *Barnett* from June 25, 1957, to and including November 6, 1961. The original work sheets are before us, and they show a total of 2208 hours spent by Mr. Jones. He testified in the Probate Court, and urges here, that the Probate or Chancery Court had allowed compensation to other attorneys in the Selig-Barnett case, and the earlier companion case of *Selig* v. *Morrison*,[4] on the basis of $25.00 per hour; and that he is entitled to compensation at the same rate per hour. His brief here is an excellent treatise on the legal profession in general, and fees in particular.

Notwithstanding all of the foregoing, we find it impossible to fully agree with Mr. Jones' conclusions. There are many factors, in addition to that of *hours spent*, to be considered in the problem of fixing a just and adequate fee for an attorney in any specific case[5] In *Sain* v. *Bogle*, 122 Ark. 14, 182 S. W. 515, we said: ". . . in determining what is a reasonable attorney's fee, it is competent and proper to consider the amount and character of the services rendered, the labor, time, and trouble involved, the nature and importance of the litigation or business in which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys."

In many of the cases cited, the Court, in fixing the fee, has had the benefit of the testimony of other attorneys as to what such witnesses considered to be a

[4] *Selig* v. *Morrison*, 230 Ark. 216, 321 S. W. 2d 769.

[5] Some of our own cases involving the problems of fixing an attorney's fee are: *Lilly* v. *Robinson*, 106 Ark. 571, 153 S. W. 820; *Sam* v. *Bogle*, 122 Ark. 14, 182 S. W. 515; *Martin* v. *Manning*, 124 Ark. 74, 186 S. W. 302; *Bayou Meto Dist.* v. *Chapline*, 143 Ark. 446, 220 S. W. 807; *Slayton* v. *Russ*, 205 Ark. 474, 169 S. W. 2d 571; *Mo. Pac.* v. *McDonald*, 206 Ark. 270, 174 S. W. 2d 944; *Turner* v. *Turner*, 219 Ark. 259, 243 S. W. 2d 22; and *Whetstone* v. *Travis*, 223 Ark. 856, 269 S. W. 2d 320. See also opinion by Judge John E. Miller in *Monsanto Chem. Co.* v. *Grandbush*, 162 F. Supp. 797. There are also annotations in 143 A.L.R. 672, and 56 A.L.R. 2d 13, entitled, "Amount of Attorney's compensation in absence of contract or statute fixing amount"; and these annotations show the general trend of the holdings in the various jurisdictions. See also 5 Am. Jur. 379, "Attorneys at Law" § 198.

reasonable fee for services rendered in the matter in question; but there is no such testimony in the case at bar except the testimony of Mr. Baim and Mr. Jones; so Mr. Jones' case rests largely on the basis of the number of hours worked, multiplied by $25.00 per hour. We are entirely unwilling to adopt such as an exclusive basis in the case at bar. It is possible that in a matter extending over several years, as did this case, the law of diminishing returns would apply to the hours consumed. Furthermore, in *Whetstone* v. *Travis,* 223 Ark. 856, 269 S. W. 2d 320, we quoted from an earlier case:

" 'Although this testimony (as to a reasonable fee) was not directly contradicted by appellants, the trial court, and this court on appeal, are not required to lay aside their general knowledge and ideas of values of such services, and are not entirely controlled by testimony of this nature . . . In determining what would be a reasonable fee we take into consideration the amount of time and labor involved, the skill and ability of the attorneys, and the nature and extent of the litigation.' "

Other important factors to be always considered in a case such as this one relate to the ability of the estate to pay the fees both of Mr. Baim and Mr. Jones. The Trial Court had access to the record in the case of *Selig* v. *Barnett,* just as we have, and the Trial Court fixed Mr. Jones' fee at $10,000.00. Without prolonging this opinion, it is sufficient to say that after considering the entire record and all the various factors involved in the problem of fixing a fair and reasonable attorney's fee in this case, we reach the conclusion that Mr. Jones is entitled to a fee of $17,500.00.

Therefore, the case is affirmed on cross appeal; and is reversed on direct appeal and remanded with directions to enter a decree allowing Mr. Jones a fee of $17,-500.00. In all other respects, Probate Judgment is affirmed.

HARRIS, C. J., not participating.

JOHNSON, J., dissents in part.

JIM JOHNSON, Associate Justice (dissenting in part). I agree with the majority view that the lawsuit in which appellant served as principal counsel, *Selig* v. *Barnett*, 233 Ark. 900, 350 S. W. 2d 176, "was not frivolous or trifling," but to the contrary in my view it was one of the most complicated, involved and best prepared cases ever to be presented to this court. Appellant masterfully presented for his clients a serious claim for property worth in excess of a half million dollars. The evidence was undisputed that during the period between June 25, 1957, through November 6, 1961, appellant worked 2208 hours on the litigation for which he seeks compensation. The question of whether appellant is entitled to compensation for his services is settled by the trial court and this court on appeal as reflected by the majority opinion. My only disagreement with the majority is in the amount of the fee which should have been allowed. The number of hours spent on this case is absolutely undisputed in the record and the quality of the work which we have reviewed on appeal as well as the work sheets in the present record amply bears out appellant's claim to the hours of work devoted to this matter. The 2208 hours devoted to this litigation figures out to be over 42 hours a week for an entire year spent on this single case.

The record is further undisputed that other attorneys in the same litigation were paid on the basis of the Jefferson County Bar Association minimum fee schedule of $25.00 per hour. The record is further undisputed that the estate is not only able to pay the requested fee but that the estate is accustomed to paying fees commensurate with the basis urged by appellant.

Appellant cogently stated my sentiments relative to the fee awarded by the trial court and the fee awarded here on appeal when he said, "[The] fee is 'better than a poke in the eye with a sharp stick'. If lawyers were mendicants, it would seem ungrateful to appeal from allowance of such a substantial sum. But a lawyer who has performed services is not in a position of a beggar before the courts when the time comes for the determination of his fee.

"If an attorney offered employment from a client, whose fee must be set by the court, is in a perilous position, so also is the client. In setting attorneys' fees the courts protect not only the attorney but also the client and the public. Reasonable fees are those which are not so small 'that well prepared attorneys would avoid that class of litigation or fail in the employment of sufficient time for thorough preparation, but should be for the purpose of compensating * * * in engaging counsel thoroughly competent to protect his interests.' *John Hancock Ins. Co.* v. *Magers,* 199 Ark. 104, 132 S. W. 2d 841, 846."

The American Bar Association has published a number of treatises on the economics of law practice. See American Bar Association Economics of Law Practice Series. These publications graphicly point out the fact that "a Lawyer's time and advice are his stock in trade." A. Lincoln. With the high cost of a legal education, maintenance of an adequate library, maintenance of law offices, equipment and furniture, telephone and other utilities, secretarial help, materials and supplies, postage, fees, professional association dues and other expenses and costs incidental to the practice of law [the realities of which have not yet become lost in my memory of the days prior to donning the robes nor dulled by the State so kindly lifting most of these burdens from my shoulders], I am unwilling to become a party to a precedent which sets $7.92 per hour as adequate gross compensation for services of members of the Bar of Arkansas.

Therefore I strongly dissent to that portion of the majority opinion which finds appellant's services to be worth less than the minimum fee schedule adopted by the Jefferson County Bar Association.

5-2915 364 S. W. 2d 801

Opinion delivered February 18, 1963.

Bernard Whetstone, for appellant.

Brown & Compton, for appellee.

GEORGE ROSE SMITH, J. Roy L. Frisby and Gene A. Hathcote were both killed when the truck in which they were riding left the highway and overturned. The truck was owned by Olin Mathieson Chemical Corporation and was being driven by Hathcote, its employee. The appellant, Ruby Frisby, as the administratrix of her husband's estate, first brought an action for wrongful death against the Mathieson company, in the federal court. Later on she brought this action, also for wrongful death, against the appellee, as the administrator of Hathcote's estate. The federal case was tried first and resulted in a jury verdict for the defendant. The appellee then moved for a dismissal of the state court action, pleading the judgment in the federal court as *res judicata.* This is an appeal from an order sustaining that motion and dismissing the suit.

The question is whether the judgment in favor of the employer, as the defendant in the first action, is *res judicata* in the second action brought by the same plaintiff against the employee whose negligence was involved.

This question was fully analyzed in *Davis* v. *Perryman,* 225 Ark. 963, 286 S. W. 2d 844, which controls the case at bar. There we noted that in most instances a judgment for or against the employer is not conclusive in a later action against the employee, because the two defendants are not in privity. But we recognized and gave effect to a narrow but well-established exception to this general rule; that is, "the plaintiff, after a prior unsuccessful damage action against the master or servant for alleged negligence of the servant, is barred from maintaining a subsequent action involving the same mishap when it was and is conceded in both actions that the servant was all the time acting within the scope of his employment and the only questions in the two actions are negligence and contributory negligence." The reason for the limited exception is that in the specific situation to which it applies the plaintiff has already had his day in court upon the issue of the servant's negligence and as a matter of public policy is not entitled to a second trial upon that exact issue. We repeatedly emphasized in the *Davis* case that the first judgment is *res judicata,* under the exception, only when it is conceded that the servant was acting in the scope of his employment, for only in that situation can it be known with certainty that the earlier decision against the plaintiff was based upon the issue of negligence.

The case at bar does not fall within the exception to the general rule. In the federal court the Mathieson company relied upon three defenses, all involving issues of fact that were submitted to the jury: First, Frisby was a guest in the truck, so that Mathieson would not be liable for ordinary negligence on the part of Hathcote. Second, Hathcote was not acting within the scope of his employment in allowing Frisby to ride in the vehicle, so that Frisby was a trespasser toward whom Mathieson did not owe a duty of ordinary care. Third, Hathcote was

not negligent. The federal court case, submitted to the jury without interrogatories, resulted in a general verdict for the defendant. It is possible that the jury believed Hathcote to have been negligent but nevertheless exempted Mathieson from liability, upon a finding that Hathcote was acting outside the scope of his employment in permitting Frisby to ride in the truck. We cannot be certain that the appellant lost the first case upon the sole issue of Hathcote's negligence. The exceptional bar of *res judicata* is therefore inapplicable, and this action can be maintained.

Reversed.

LOVELESS *v.* DIEHL.

5-2841 364 S. W. 2d 317

Supplemental Opinion on rehearing delivered February 18, 1963.

Rolland A. Bradley, for appellant.

Robert W. Henry, for appellee.

George Rose Smith, J., on rehearing. This is an appeal by the sellers from a decree directing specific performance of a contract for the sale of land. In our original opinion, in the belief that we were achieving substantial justice, we set aside the chancellor's award of specific performance and instead limited the purchasers to their monetary damages, which we fixed as the difference between the contract price and the slightly greater sum for which the purchasers had agreed to sell the property to a third person, 235 Ark. 805.

This possibility of substituting damages for specific performance was not mentioned in the original briefs. In their petition for rehearing the appellees earnestly insist that our decision did not in fact reach a completely just result. Briefing the legal point for the first time, counsel contend that the court's denial of specific performance is not warranted in the circumstances of this case.

After reconsidering the question we have concluded that the petition for rehearing is well-founded.

Our prior decisions recognize the possibility that in a few unusual situations a court of equity may in its discretion deny the plaintiff the right of specific performance. But the remedy of specific performance, in giving the complaining party exactly what he bargained for, ordinarily affords complete and perfect relief and therefore is usually to be awarded *as a matter of course.*

The point was discussed in *Sims* v. *Best,* 140 Ark. 384, 215 S. W. 519, where we said: "Finally, it is insisted that the right to specific performance is not absolute, but is a matter of discretion with the chancellor. While this is true, the discretion is a sound judicial discretion, controlled by established principles of equity, and where the contract is in writing, is certain in its terms, is for a valu-

able consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, *it is as much a matter of course for a court of equity to decree its specific performance* as for a court of law to award a judgment of damages for its breach." (Italics added.) It will be noted that every one of the conditions just mentioned (a written contract, certainty, etc.) is present in the case at bar.

Much to the same effect is this holding in *Dollar* v. *Knight,* 145 Ark. 522, 224 S. W. 983: "Where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the remedy in the particular case. It is as much *a matter of course* for courts of equity to decree a specific performance of a contract for the conveyance of real estate, which is in its nature unobjectionable, as it is for courts of law to give damages for its breach." (Italics added.)

In the present case we find no valid reason for a denial of specific performance. To the contrary, the equities in the case strongly demand that this remedy be afforded. The purchasers, according to the great weight of the evidence, expended some $5,000 or more, in money or in labor, in improving the property. Apparently the land in its improved state is worth more than the contract price, for otherwise the sellers would hardly be so strenuously resisting this suit for enforcement of the agreement. To deny specific performance, and to award instead an amount of damages far below the buyers' expenditures in improving the property, would result in the sellers' being unjustly enriched for their culpable refusal to carry out their promise.

The only reason that occurs to us for a denial of specific performance is the fact that the buyers entered into an agreement to sell the land to Dr. Hart. It is plain enough, however, that they had a perfect right to resell the land if they wanted to. Whether they kept it, sold it, or gave it away was of no concern to the sellers. To

refuse specific relief on account of the proposed resale would establish an unsound precedent, diminishing the transferability of property, since in similar situations prospective buyers would be reluctant to bind themselves to a purchase contract, for fear that it might prove to be unenforceable.

Now that the appellees' right to specific performance has been reinstated there remain three issues which were argued in the original briefs but which we did not find it necessary to decide in our original opinion.

First, the appellants insist that the purchasers are not entitled to prevail, for the reason that they failed to make a physical tender of $21,000 in cash within the period allowed for the exercise of their option to buy the property.

This argument fails to distinguish the two meanings which the term tender may have. When a duty of performance rests upon only one of the contracting parties, as in the case of an open account or promissory note, an actual offer of the money owed is essential to a valid tender. But the law is otherwise when both parties are under a duty to perform, and the question is whether one of them has made a sufficient offer of performance to put the other in default. Williston discusses this distinction clearly and accurately:

"It is said that the strict rules of tender are not applicable to a conditional offer to perform a concurrent condition; that what is essential is that it shall appear to the court and shall have been made clear to the other party to the contract that the exchange agreed upon would be carried out immediately if the latter would do his part. This requirement involves both ability on the part of the plaintiff to perform and an indication of that ability to the other party. The actual production of the money or other thing which the plaintiff is to give is said to be unnecessary.

"As the courts have said 'the word "tender," as used in connection with such a transaction, does not mean

the same thing as when used with reference to the offer to pay money where it is absolutely due, but only a readiness and willingness to perform in case of the concurrent performance by the other party, with present ability to do so, and notice to the other party of such readiness.' " Williston on Contracts (3d Ed.), § 833.

Diehl testified that about two weeks before the expiration of his lease he told Loveless that he was exercising his option to purchase, that he had a man who was ready to pay for the property, and that he wanted a deed. Loveless promised to execute the deed and voluntarily added that the Federal Land Bank had a loan against the land and that he would get the abstract of title from the Land Bank so that it could be examined. Thereafter Loveless failed to make any move toward carrying out his agreement to sell, and as soon as the time expired he refused to consider the matter further. At no time during the life of the option did Loveless either demand or put himself in a position to demand that the purchase money be physically tendered. The chancellor's finding that the purchasers made a sufficient offer of performance is not against the preponderance of the evidence.

Secondly, the appellants contend that the chancellor should not have charged them with $2,600 as the rental value of the land, at the rate of $100 a month, during the period between the expiration of the lease and the entry of the decree. The complaint was filed sixteen days after the termination of the lease and of course did not contain a prayer for rents, as none had then accrued. The undisputed proof showed that the land was rented for $100 a month both under the Loveless-Diehl lease and thereafter, and, further, that this was the fair rental value of the property. When the chancellor entered his decree 26 months after the inception of the controversy he treated the complaint as having been amended to conform to the proof and awarded the buyers a judgment for the rental value of the land.

The court was right in charging the sellers with the rental value of the land while they were in possession, but he should have gone farther and charged the purchasers with interest at the legal rate upon the unpaid purchase price during the same period. The two charges are equitably offsetting and should go together. The sellers are charged with the rental value because they have had the use of the buyers' land, and the buyers are charged with interest because they have had the use of the sellers' money. Both charges are ordinarily made in situations where the creditor, such as a mortgagee, for example, has been in possession of the debtor's property. *Holcomb* v. *Bowe,* 154 Ark. 543, 243 S. W. 803; *Hamner* v. *Starling,* 185 Ark. 948, 50 S. W. 2d 615; *Zini* v. *First Nat. Bk.,* 228 Ark. 325, 307 S. W. 2d 874; Hughes, Arkansas Mortgages, §§ 521 and 525. To make either charge without the other is evidently unwarranted, for it gives the favored party the use of both the land and the money. On this point the decree must be modified to require the purchasers to pay interest upon the purchase price and to require the sellers to pay interest upon each monthly installment of rent from its accrual.

Finally, by cross appeal the Diehls contend that the Lovelesses waived their right to collect the milking equipment note by repossessing that property. We think the chancellor was right in holding that the repossession was merely incidental to the sellers' action in taking control of the farm as a whole and so did not amount to a waiver of their right to enforce the note. Inasmuch as the purchasers had been deprived of the use of their property the chancellor absolved them from payment of interest upon the note, which we think to be a proper balancing of the equities. When the purchasers obtain specific performance of the contract they will be entitled to the milking equipment and will be under a duty to pay for it.

The decree is modified as indicated, and the cause is remanded so that the account may be stated in accordance with this opinion and a final decree be entered.

JOHNSON, J., not participating.

HARRIS, C. J., and MCFADDIN, J., dissent.

CARLETON HARRIS, Chief Justice (dissenting). I originally voted to reverse this case because of the fact that, in my opinion, no proper tender of the $21,000.00 was made to Loveless by Diehl, or anyone in the latter's behalf. However, with the same feeling as that expressed in the present majority opinion (the belief that we were achieving substantial justice), I joined in the original opinion handed down by this court.

It is true that the substitution of damages for specific performance was not argued in the original briefs; however, the complaint filed by appellees, after asking for specific performance, prays, in the alternative, for damages.

I am still of the view that no proper tender was made and I think this true even under the discussion by Williston, quoted by the majority. A portion of that quotation reads as follows:

" 'As the courts have said "the word 'tender,' as used in connection with such a transaction, does not mean the same thing as when used with reference to the offer to pay money where it is absolutely due, but only a readiness and willingness to perform in case of the concurrent performance by the other party, *with present ability to do so,*[1] and notice to the other party of such readiness." ' "

I cannot ascertain from the record that either Diehl or Dr. Hart had the "present ability" to make the payment of $21,000.00. In fact, there is no contention that Diehl was able to make the payment himself, but he testified, as stated by the majority, that "he had a man who was ready to pay for the property." This, of course, was a reference to Dr. Hart. Let us, therefore, examine the record for the purpose of determining Hart's ability to pay that amount.

Dr. Hart first testified that he could have raised the money "in a matter of 48 hours." But he then became more specific in his testimony as follows:

[1] Emphasis supplied.

"You were talking about whether I had the money. I had some money available. I had some property both in Kansas and in Arkansas and I was wanting to use this property in Arkansas as collateral and had hoped to borrow enough money locally with this collateral, which was a three hundred acre farm in Conway County, to purchase the lands here locally without having to jeopardize the business venture in Kansas. I would rather have had that locally. I had talked to the bank, The First State Bank, Mr. Tom Wilson and he had approved a loan of $10,000.00 to me if I needed it and I asked several people. I had talked with Mr. Atchison about it. I had done some banking with both banks and I talked to him about it to see what he thought and, of course, we discussed the value of the real estate, whether it was worth so much money. Then, I went over to see Mr. Ligon. I've had some experience with Federal Land Bank in Kansas and familiar, more or less, with their interest rates and I was asking Mr. Jimmy Ligon about the possibility if they would like to finance it and he told me that it might be valuable for me to contact Mr. Loveless and talk with him; that he was of the opinion *that Mr. Loveless, possibly, would carry part of the note;*[2] that he might be interested in carrying part of the note for me to purchase the property from Mr. Diehl and that was the reason that I went to see Mr. Loveless."

Further, from Dr. Hart's testimony:

"Q. All right. Now, have you at all times since then been ready, willing and able to go on and purchase it if — at the price you agreed on then?

A. Yes, sir, I have.

Q. You are willing and able now?

A. Yes, sir.

Q. *Within a reasonable time, perhaps a very few days,*[3] you can raise the money and pay Mr. Diehl so he can pay Mr. Loveless in cash?

[2] Emphasis supplied.
[3] Emphasis supplied.

A. That's correct. Yes, sir."

The transcript reflects the following testimony by Mrs. M. Coburn, a real estate broker, with whom the property had been listed for sale:

"Q. Now, did you ever have any conversation with Dr. Hart that was here on the stand about the purchase of the place?

A. Yes. Dr. Hart came to my office with —. It was along about Thanksgiving and they wanted to know if the place was listed and I told them we had it listed and he said he would like to buy the place and I thought we were going to perhaps negotiate a deal for it, but he mentioned that he had to —. I mentioned that the way it was set up, it would have to be all cash *and he said he could raise the all cash, but he'd have to sell some property or make arrangements on other property*[4] and that he was going back to Kansas and that he would see us a little later. Well, I tried repeatedly to call him on the phone and I never could get him and I didn't know what happened to him and I heard later that he was trying to buy it through Speaker, so I don't know if that was a true rumor or not."

Dr. Hart denied the pertinent statements of this particular conversation, but, to me, his own testimony is sufficient to establish that he did not have $21,000.00 in cash ready for payment to Loveless before December 15, 1959. Under the contract, Diehl had until that date to exercise his option. Loveless testified that Dr. Hart talked with him on December 12 or 13 and discussed buying the place by paying $7,000.00 down, and the balance on terms, but no agreement was reached. Hart did not again talk with Loveless about purchasing the property until *after* the lease agreement (and option) had expired. Dr. Hart likewise testified that he did not talk with Loveless the second time until December 16.

The majority state,

[4] Emphasis supplied.

"The purchasers, according to the great weight of the evidence, expended some $5,000 or more, in money or in labor, in improving the property. Apparently the land in its improved state is worth more than the contract price, for otherwise the sellers would hardly be so strenuously resisting this suit for enforcement of the agreement. To deny specific performance, and to award instead an amount of damages far below the buyers' expenditures in improving the property, would result in the sellers' being unjustly enriched for their culpable refusal to carry out their promise."

I should like to point out that Diehl, entirely voluntarily, wanted to sell this property to Dr. Hart for $22,000.00, which means, according to the majority statement just quoted, that he would lose $4,000.00 by making the sale. In other words, since he was willing to lose $4,000.00 (if he expended $5,000.00 on the place) there certainly was no reason for this court to go beyond the figure that he was willing to accept himself. Diehl was willing to accept $1,000 more than his purchase price, which was the amount of damages we awarded him. Nor can I see that specific performance is called for either legally or equitably, when the sole beneficiary of this holding by the court will be Dr. Hart, a rank outsider — who never had a contract — who was not a party to the litigation — who suffered no loss — and who, according to my view, never did tender to Loveless the $21,000.00 in cash.

I, therefore, respectfully dissent to the granting of the rehearing.

Ed. F. McFaddin, Associate Justice (dissenting). I dissent from the opinion of this Court granting a rehearing; and stoutly maintain that the opinion of December 3, 1962, was correct and should stand. In that opinion there was this language:

"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."

The present opinion granting the rehearing uses this language:

"Our prior decisions recognize the possibility that in a few unusual situations a court of equity may in its discretion deny the plaintiff the right of specific performance. But the remedy of specific performance, in giving the complaining party exactly what he bargained for, ordinarily affords complete and perfect relief and therefore is usually to be awarded *as a matter of course.*"

The opinion quotes from *Simms* v. *Best,* 140 Ark. 384, 215 S. W. 519, and *Dollar* v. *Knight,* 145 Ark. 522, 224 S. W. 983, following the above quoted language. But the opinion on rehearing fails to quote this language from *Dollar* v. *Knight:*

"It is allowable in the exercise of a sound discretion to deny specific performance 'where the case is not clear, or where the complainant is in the wrong, or there are considerable countervailing equities.' *Watkins* v. *Turner, supra.*"

The case at bar comes within the last quotation from *Dollar* v. *Knight,* because (a) the case is not clear; and (b) there are considerable countervailing equities. The dissenting opinion of the Chief Justice in this case shows that it is not entirely clear that the Diehls made a sufficient tender of any kind; and there are certainly countervailing equities because the sum of $1,000.00 is all that the Diehls would have gained if they had received the deed under the contract; and to grant them judgment for that amount is to end the litigation. In *Watkins* v. *Turner,* 34 Ark. 663, Judge Eakin denied specific performance because the case was not clear.

Furthermore, I desire to make reference to the case of *Cole* v. *Salyers,* 190 Ark. 53, 76 S. W. 2d 669, which is more recent than any of the cases cited in the opinion that is granting a rehearing. Cole brought suit for specific performance; there was uncertainty as to the power of the agent to give time for Cole to act. In denying specific performance because of such uncertainty, this Court used this language:

" 'Courts of equity have always reserved the right of exercising a sound discretion in suits for specific performance and generally refuse relief where the case is not clear, or where the complainant is in the wrong, or there are considerable countervailing equities. In such cases equity refuses to interfere, and leaves the parties to their rights and remedies at law.' *Watkins* v. *Turner,* 34 Ark. 663; *Smith* v. *Price,* 125 Ark. 589, 189 S. W. 167; ***Dollar*** v. ***Knight,*** 145 Ark. 522, 224 S. W. 983."

Also in *Cole* v. *Salyers,* Cole as plaintiff had, as an alternative to specific performance, prayed for damages. This Court refused damages, not because of the absence of the right of specific performance, but because no damages were shown. The Court said:

"The appellant asked in the alternative, in the event he should not be able to procure specific performance, that he have damages. The proof indicates that, under the prevailing conditions, the value of the property was not substantially in excess of $900. That being true, there

could be no damages, even if there were a breach of contract."

The plaintiffs' prayer to the complaint in the case at bar was in this language:

"WHEREFORE, Plaintiffs pray that defendants be required to specifically perform said lease agreement and the option therein contained, and that plaintiffs be adjudged to be entitled to conveyance of said lands from defendants; that, in the alternative, defendants be required to reimburse plaintiffs for expenditures made by plaintiffs in making permanent improvements to and upon said lands in the sum of $7,000.00, and for judgment against defendants for breach of contract in the sum of $2,000.00; for the costs herein, and for all other relief to which they may be entitled."

When the plaintiffs prayed for damages as an alternative to specific performance, the court of equity has the right to decide whether to award specific performance or damages; certainly when the case is not clear and when there are countervailing equities, as in the case at bar. Without prolonging this dissent, it is sufficient to say that I stoutly maintain that the opinion of December 3, 1962 reached a practical result in giving the Diehls $1,000.00 as damages, which is all they would have received if the deed had been delivered to them; and the opinion of December 3, 1962, therefore, would have ended the litigation. Now the majority is continuing the litigation by remanding it for further consideration by the Chancery Court.

Original opinion delivered Dec. 3, 1962 (235 Ark. 805).

SMITH *v.* SMITH.

5-2929 365 S. W. 2d 247

Opinion delivered February 18, 1963.

[Rehearing denied March 25, 1963.]

F. C. Crow, for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. Pursuant to a petition filed by appellant herein (Minnie Hazel Smith) the Chancery Court of Nevada County, on December 1st, 1958, ordered appellee herein (James Leslie Smith) to pay her $18.75 per month for maintenance. No divorce was asked, and there were no minor children involved. The record discloses that appellee, after being cited for non-payment once or twice, made all payments up to (at least) November 13, 1961.

On the last mentioned date the Chancery Court of Miller County granted appellee a divorce from appellant. Appellant was served with notice of the divorce proceedings and was present when the decree was rendered, but made no objections of any kind, and did not prosecute an appeal from the decree. The decree states that appellant sought no affirmative relief. In other words, appellant did not ask Miller County Chancery Court to grant her alimony or maintenance.

Later, on April 2, 1962, appellant filed a petition in the Chancery Court of Nevada County to punish appellee for failure to make the maintenance payments for the first three months of 1962. The trial court refused to hold appellee in contempt, stating:

"... there is no further liability on the part of the Defendant, to pay any other or further alimony to the Plaintiff herein, and he is relieved of any and all liability of any and all kinds, by reason and virtue of the Decree of Divorce heretofore granted in the Chancery Court of Miller County ..."

In prosecuting an appeal from the above order, appellant relies on two points for a reversal which we now discuss.

One. It appears to be the contention of appellant that the Miller County Court, in the divorce proceeding, had no jurisdiction to grant or deny alimony to her since the Nevada County Court had already made her a monthly allowance of $18.75 for maintenance. In Mr. Smith's complaint for divorce (in Miller County) there appears this allegation: "... the Defendant is gainfully employed and has an income of her own and that she is not entitled to any alimony or money judgment of any kind against this Plaintiff." In her answer to the above allegation Mrs. Smith pleaded *"res judicata"*, stating the matter had already been adjudicated by the Nevada County Court. The Miller County Court granted Mr. Smith an absolute divorce but did not grant any alimony to Mrs. Smith.

Appellant does not question the jurisdiction of the Miller County Court to grant the divorce, and, since she was personally served, it must be admitted the court had jurisdiction over her person. If Mrs. Smith had asked the Miller County Court for alimony or maintenance the court had jurisdiction to grant or deny the same. In the case of *Tracy* v. *Tracy,* 184 Ark. 832, 43 S. W. 2d 539 we said "The general rule is that the final order and decree supersedes an order for temporary alimony. . . ." In *Wagster* v. *Wagster,* 193 Ark. 902, 103 S. W. 2d 638, we cited and approved the above statement or rule, and then went on to state:

"That is the general rule where both parties are present, and where the court has jurisdiction over both issues, divorce and alimony. It has, however, never been

held by this court that the granting of a divorce, where no personal service has been had on the defendant, is a bar to the alimony granted by another court that did have jurisdiction over both parties."

It follows from what we have heretofore said that the trial court was correct in refusing to hold Mr. Smith in contempt of court for refusing to continue the monthly payments of $18.75.

Two. In her brief appellant says it is felt that the Second Division Chancellor had no authority to issue any type of order on July 26, 1962. The order referred to is the one (signed by "Ben Shaver, Chancellor Second Division") refusing to hold Mr. Smith in contempt. Appellant concedes that Judge Shaver was Chancellor of the Second Division of the Nevada County Chancery Court. Appellant's objection is based on an instrument signed by the Chancellors of the First and Second Divisions purporting to assign the trial of cases in the Second Division to the First Division after July 1, 1962. We find no merit in this contention. In the first place the transfer agreement was for the convenience of the two chancellors, it does not purport to increase or diminish their jurisdiction, and they were at liberty to waive or change its provisions at any time. Moreover, appellant made no objection to the presiding chancellor during the entire trial. We are reluctant to believe the chancellors meant for one of them to try a case and for the other one to decide it.

Affirmed.

5-2866 364 S. W. 2d 785

Opinion delivered February 18, 1963.

LaTourette & Rebman, G. F. Gunn, Jr., St. Louis, Mo., House, Holmes, Butler & Jewell, for appellant.

Lloyd M. Roach, Tyler, Texas, *Louis Tarlowski,* for appellee.

SAM ROBINSON, Associate Justice. Appellant, Superior Forwarding Company, a common carrier operating trucks over highways in this State, petitioned the Arkansas Commerce Commission for authority to operate over four specific routes as follows:

No. 1. Between Jonesboro and Little Rock.

No. 2. Between Jonesboro and Stuttgart.

No. 3. Between Corning and Harrisburg.

No. 4. Between Little Rock and West Memphis.

Appellees, other carriers operating in the territory involved, protested the granting of such authority. The Commission granted the petition in part. Appellant was

authorized to operate between Harrisburg and Jonesboro, and between Jonesboro and Hoxie. The remainder of the petition was denied.

East Texas Motor Freight Lines has authority to operate intrastate between Little Rock and the Missouri line, through Hoxie. Previously, with approval of the Commission, this permit had been leased to Superior. By reason of this leasing arrangement with East Texas Motor Freight, Superior had authority to operate between Little Rock and Hoxie. The Commission, therefore, did not give consideration to Superior's petition to operate between those points, and so stated in its order. Since 1959 Superior had been authorized to operate between Little Rock, Hot Springs, Malvern, Pine Bluff, and intermediate points.

There is a practice in the transportation business known as "tacking". This consists in transportation companies combining rights granted by separate permits so as to enable the carrier to furnish through service to points it is authorized to serve by the separate permits. In other words, by tacking its authority to haul from Harrisburg to Jonesboro, and its authority to haul from Jonesboro to Hoxie, and the authority it had under the lease from East Texas Motor Freight to haul from Hoxie to Little Rock, along with its authority to serve Hot Springs, Pine Bluff, etc., it could furnish straight through service between all those points. That is what happened here, and that is what this appeal involves.

The order of the Commission did not prohibit tacking and therefore, apparently everyone concerned considered that the authority granted to Superior did authorize the carrier to tack, and that Superior intended to do so. In their brief, appellees, the protesting carriers, state: "Tacking together separate grants of operating authority enables a motor carrier to furnish a through service, if there be a point common to the separate authorities and operations are conducted through a common point, *where the certificates contain no restrictions against tacking.* Appellant admitted it proposed a

tacking of routes, if its application was granted." (Emphasis ours.) Again appellees state: "In the absence of the Court directed restriction against tacking, appellant would be permitted to operate a through service . . . ". Appellees further state: "Arbitrarily, it [the Commission] refused, in spite of these findings, to specifically prohibit joinder or tacking, thereby granting authority for a through service . . . ".

Realizing that Superior would be able to tack since that procedure had not been prohibited by the Commission, appellees herein filed a petition with the Commission for a rehearing on that point and asked that Superior be denied the right to tack. The Commission overruled the petition, and by denying appellees' motion to amend the original order by inserting a provision prohibiting tacking, the Commission made it clear that the authority granted to Superior allowed tacking. Appellees here, appealed to the Circuit Court. There, the matter was heard by the Court on the record made before the Commission and the order of the Commission denying the petition to prohibit tacking by Superior was reversed. Superior has appealed to this Court.

The practice of tacking is manifestly so reasonable and beneficial to the public that it should not be prohibited except in the most compelling circumstances, and such circumstances are not shown to exist here. Ordinarily, it would be useless and utterly ridiculous to require Superior to unload at Jonesboro, freight originating at Harrisburg, and load it on another truck to make the trip to Hoxie, and then unload it again and reload it for the trip to Little Rock, when Superior has authority to operate between all the points mentioned. Of course, it would actually cost a great deal more to handle freight in that manner, and the shipper or consignee would eventually pay the bill.

But, if by tacking Superior would be able to furnish such competition that in the long run it would not be in the public interest, tacking should be prohibited; mere competition in itself, however, is no sound reason to deny the public the additional service. *Atlanta-New Orleans*

Motor Freight Co. v. *United States,* 197 F. Supp. 364 (1961). In that case the Court quoted from *Norfolk Southern Bus Corp.* v. *United States,* 96 F. Supp. 756, as follows: "Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. [Citations omitted]. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor."

Appellees offered no evidence in support of their motion that Superior be denied the right to tack. Their principal argument is that the record shows that the Commission denied Superior the authority to haul straight through because adequate service of that kind was being rendered by appellees. But by tacking, Superior could do the very thing the Commission denied it the right to do. Appellees stated in their brief: ". . . the Arkansas Commerce Commission has specifically found that the public convenience and necessity does not require any service from Jonesboro to Little Rock, and other points served by the appellees, because appellees are adequately and satisfactorily serving the public, . . . ".

We do not construe the findings and order of the Commission as denying Superior the right to furnish through service; and neither did the Commission so construe its order, as evidenced by the fact that appellees' petition to prohibit tacking was denied by the Commission. As we construe the order of the Commission, tacking was anticipated, and the denial of that part of appellant's original petition for authority to haul from Hoxie to Little Rock was due to the fact that Superior already had that authority and would be permitted to tack. In this respect the Commission said: "For practical purposes, applicant holds interstate authority over substantially all of the routes embraced in this application. Vehicles are stationed at all terminals for road and pick-up and delivery service. If this application is granted, it is proposed to give overnight delivery service to all

points in Arkansas." The Commission further said: "The record is clear that motor carrier service between Corning, Pocahontas, Newport, Jonesboro and Harrisburg is inadequate to meet the need of present shippers, not to mention the plans of such shippers for expansion of their business. *Inasmuch as applicant is presently operating in intrastate commerce between Little Rock and the Arkansas-Missouri State line over U. S. Highway 67 with service at all intermediate points, and the statement of applicant that duplicate operating rights are not sought, no consideration will be given to a grant of authority over said route.*" (Our emphasis.)

Moreover, in the Commission's order in question there is set out some of the evidence considered in granting appellant additional authority. The Commission said: "The representative of a machine products company in Jacksonville [this is between Hoxie and Little Rock] testified he has 21 competitors in St. Louis that get overnight service to Jonesboro. He recently lost a $4,000 job due to inability to guarantee overnight delivery from Jacksonville to Jonesboro. Outbound shipments amount to about 2,000 pounds. The witness is not presently offered *single line service which he considers essential to points in Arkansas where his customers are located.* [Our emphasis.]

"A manufacturer of shoe lasts located at Walnut Ridge also receives lasts from Jonesboro and Harrisburg to be repaired and returned. Its outbound daily volume amounts to between 2 and 4,000 pounds for Jonesboro, Paragould, Searcy, Harrisburg, Conway, and Russellville. Presently he is getting better delivery service to St. Louis, Missouri, than to Harrisburg, Arkansas. *He requires overnight service and prefers single line service for speed of delivery and reduction of damage to merchandise.*" (Our emphasis.)

The effect of the Commission's order and denial of the motion to prohibit tacking is that tacking is permitted, and we should not lightly regard the findings of the Commission. This Court in *Wisinger* v. *Stewart,* 215 Ark.

827, 223 S. W. 2d 604, quoted as follows from *Arkansas Express, Inc.* v. *Columbia Motor Transport Co.,* 212 Ark. 1, 205 S. W. 2d 716: " . . . it must be remembered that we are dealing with the finding of a tribunal erected by the Legislature for the special purpose of investigating and determining matters of the nature here involved; and the finding of such a tribunal on a fact situation may not be upset by the courts unless the finding is clearly against the weight of the testimony."

Appellees cite a long list of cases from other states holding that the authority to tack must be based on convenience and necessity of the public, the same as any other authority is granted the carrier, and that the burden is on the applicant carrier to show such convenience and necessity. Appellant cites federal cases holding that the burden is on the one opposing the tacking to show that it should not be allowed. Our statutes do not specifically cover the point, *nor* has this Court had occasion to rule on that issue, and we do not reach it now, because by overruling the petition to prohibit tacking the Commission has specifically passed on the question of whether tacking in this case should be allowed and we cannot say that the finding of the Commission in that respect is contrary to the weight of the evidence. It follows, therefore, that the Circuit Court erred in overruling the Commission.

Reversed.

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

CARLETON HARRIS, Chief Justice (dissenting). By combining certificates already held, and joining routes at the common point of Hoxie, appellant is enabled to render direct service to Little Rock, Pine Bluff, Searcy, Hot Springs, and numerous other points.

The great weight of state court decisions is to the effect that a motor carrier may not tack or combine certificates having a common point, so as to render a through service, unless there is proof that public convenience and necessity require the through service, and unless the regulatory commission finds that the public

need does require the service. Appellee cites cases from Michigan, Wyoming, Kentucky, Oklahoma, Ohio, New York, Florida, and Pennsylvania, wherein the courts held as above stated. In fact, I find no state decision that holds to the contrary.

I do not consider the proof sufficient to establish that public necessity and convenience require additional service. Five or six witnesses (representing concerns at Jonesboro, Walnut Ridge, Corning, Harrisburg, and Jacksonville) testified to a need for service, but I find no testimony that indicates any need for added service between Jonesboro and Little Rock, Pine Bluff, Stuttgart, Hot Springs, Malvern, Arkadelphia, Searcy, and other points, which Superior can now serve. Several witnesses testified as to the adequacy of the present service that is being rendered by other companies, and, to me, the absence of any testimony for the need of additional service from some of the larger cities mentioned, is rather conspicuous.

In fact, in turning down appellants application for a permit to operate between Jonesboro and Little Rock, Jonesboro and Stuttgart, and other routes applied for, the commission, after summarizing the present service offered by protesting carriers, found as follows:

"As seen, it appears that protesting carriers are offering adequate service between points on the routes applied for, with the exception of the route between Hoxie-Walnut Ridge, Jonesboro and Harrisburg."

This finding necessarily included service between the cities mentioned in the first and third paragraphs, and I therefore, am of the opinion that the commission should have prohibited Superior from "tacking."

It should also be borne in mind that even if there had been proof of the need of additional service, under our decisions, existing carriers must be afforded an opportunity to improve their service, and fail to make such improvement, before a new carrier may be certificated. *Fisher* v. *Jonesboro Transfer Co.,* 234 Ark. 40, 350 S. W. 2d 516; *Mo. Pac. R. R. Co.* v. *Williams,* 201 Ark. 895, 148

S. W. 2d 644; *Taylor* v. *Black Motor Lines, Inc.,* 204 Ark. 1, 160 S. W. 2d 859; *Arkansas-Best Freight System, Inc.* v. *Missouri Pacific Freight Transport, Inc.,* May 29, 1961; *Potashnick* v. *Fikes,* 204 Ark. 924, 965 S. W. 2d 615; *Santee* v. *Brady,* 209 Ark. 224, 189 S. W. 2d 907. This, of course, has not been done in the present case.

The majority states.

"Appellees cite a long list of cases from other states holding that the authority to tack must be based on convenience and necessity of the public, the same as any other authority is granted the carrier, and that the burden is on the applicant carrier to show such convenience and necessity. Appellant cites federal cases holding that the burden is on the one opposing the tacking to show that it should not be allowed. Our statutes do not specifically cover the point, *nor has this Court had occasion to rule on that issue, and we do not reach it now,*[1] because by overruling the petition to prohibit tacking the Commission has specifically passed on the question of whether tacking in this case should be allowed and we cannot say that the finding of the Commission in that respect is contrary to the weight of the evidence."

I do not quite understand the italicized language for it definitely appears to me, that in permitting appellant the privilege of tacking, the majority is holding that the applicant carrier does not have to show public convenience and necessity. This is, as heretofore pointed out, contrary to every state decision that I have found, and I believe this to be the first state court holding to this effect. Inasmuch as Superior's operations in this litigation are of an *intrastate* nature, it would appear that decisions from sister states should be persuasive, rather than decisions in federal cases involving *interstate* commerce. However, as I interpret the quoted statement of the majority, it likewise is not placing on the protesting carriers the burden of showing that tacking should not be allowed. I am unable to comprehend how this case can be determined without that issue being passed upon.

[1] Emphasis supplied.

Actually, it seems to me that the majority is passing on the question, and is taking the federal view, but even so, I feel that the testimony introduced by protestants established that the additional service is not necessary, and my thoughts in this connection are substantiated by the finding of the commission itself (heretofore quoted) that the present carriers are offering adequate service.

For the reasons herein stated, I respectfully dissent.

I am authorized to state that Justices McFaddin and Ward join in this dissent.

Baker *v.* John Deere Co.

5-2887 364 S. W. 2d 802

Opinion delivered February 18, 1963.

William H. Drew, for appellant.

Chowning, McHaney, Mitchell, Hamilton & Burrow, for appellee.

Jim Johnson, Associate Justice. This is a suit by the assignee of eight promissory notes against the obligor for the payment of three of the notes, after the obligor had asked the assignee for the total of all she owed and

had paid to the assignee its quoted "pay-off" amount by check marked "payment in full of all indebtedness", which amount was in fact the total amount owed on only five of the eight notes.

In 1956 and 1957, one G. L. Chapman farmed lands owned by appellant, Ophelia Baker. He had purchased farm equipment from Missco Implement Co. in Blytheville in 1955 and 1957, and gave three title-retaining promissory notes, which were assigned to appellee, The John Deere Company of St. Louis, and held at Memphis for collection. Chapman had also purchased equipment from Chicot Implement Co. in Lake Village during 1956 and 1957, and gave five notes therefor, which were also assigned to appellee and held at Little Rock for collection. In the latter part of 1957, Chapman abandoned his crop and absconded to Oklahoma, leaving appellant with a mortgage on Chapman's crops and equipment, and in order to salvage a part of the debt, appellant accepted a bill of sale to this security, including the equipment covered by the notes.

In November 1957, there was about $33,000.00 due on all the notes. In January 1958, appellant paid appellee $11,562.03 and assumed the balance by endorsement of the notes. In December 1958, appellant asked Chicot Implement Co. for the total pay-off amount, who in turn requested this information from appellee's Little Rock office, who advised Chicot Implement Co. that the net amount due was $16,796.59. Appellant paid this amount by check marked "Payment in full of all indebtedness of Ophelia Baker or G. L. Chapman". About a month later, appellee advised her that it had made a mistake in the pay-off figure by omitting the three notes held in Memphis and requested payment of $3,117.38. After appellant refused to pay this additional amount, appellee filed suit in Chicot Chancery Court, praying that appellant's account be reopened, corrected and reformed to include the amount of the three omitted notes. The trial court found that there was an account stated between the parties, that the account should be reopened, surcharged and restated because of mutual mistake, and granted judg-

ment to appellee for the amount sued for. From the judgment comes this appeal.

For reversal appellant argues primarily that there was an accord and satisfaction. The trial court found that there are two elements necessary to constitute an accord and satisfaction, which are: (1) a disputed amount involved, and (2) there is a consent to accept less than the claimed amount in settlement of the whole. *McMillan* v. *Palmer,* 198 Ark. 805, 131 S. W. 2d 943. After a detailed review of the testimony, the trial court found that while a dispute as to the amount may have existed prior to December 1958, concerning certain credits, these credits were forgiven by appellant and that no dispute existed between the parties when appellant gave appellee her check for $16,796.59. The court then found that since there was no dispute between the parties, the second issue, *i.e.* consent to accept less than the claimed amount in settlement of the whole, was therefore moot. The trial court further found that a mutual mistake existed between the parties, stating that appellee "never agreed to accept or take less than was due it, nor did defendant [appellant] contend, in the final analysis that she owed the plaintiff less than the full amount of the notes."

Appellant testified, "I wasn't expecting them to make a mistake and companies like that are not supposed to make mistakes and I took them at their word — I was honest in my part and figured they was too."

In the landmark case of *Jewell* v. *General Air Conditioning Corp.,* 226 Ark. 304, 289 S. W. 2d 881, this court approved the following definition of a mutual mistake, where each party thought it was receiving everything due it on the contract and that neither consented to take less than what was actually due, but the net result was different, there arose a mutual mistake.

From what has been said relative to the principal points and after a careful review of the complicated

record (most of which consisted of depositions) relative to other arguments for reversal, we are unable to say that the Chancellor's findings are against a clear preponderance of the evidence.

Stricklen v. *Mitchell,* 234 Ark. 31, 350 S. W. 2d 319.

Affirmed.

5-2904 365 S. W. 2d 140

Opinion delivered February 25, 1963.

Richard W. Hobbs, for appellant.

Holt, Park & Holt, for appellee.

CARLETON HARRIS, Chief Justice. This is a divorce action. Appellee, Charles W. Bryant, a conductor on the Missouri Pacific Railroad, owns his home, and resides in Little Rock. Appellant, Rachel Bryant, owns her home in Hot Springs, and was living there on the date of the marriage (November 4, 1960). The parties lived together in the home of appellant until March 6, 1961. On March 8, 1961, Mrs. Bryant instituted suit for divorce against appellee in the Garland Chancery Court.[1] On April 12, the parties agreed to a temporary support order which provided that appellee should pay the sum of $100.00 per

[1] The complaint does not appear in the record, and accordingly the grounds for divorce are not shown.

month support, court costs, and a $100.00 fee to appellant's attorney. This order was complied with until September 6, 1961, at which time, according to the evidence, the case was to be heard finally; however, Mrs. Bryant took a nonsuit, and the court dismissed her complaint without prejudice. On March 7, 1962, Mr. Bryant instituted the present action for divorce in the Pulaski County Chancery Court, alleging that Mrs. Bryant had willfully deserted him for the period of one year without reasonable cause. Appellant filed an answer and cross-complaint wherein she denied appellee's allegation, and sought a divorce on grounds of desertion and general indignities. She further prayed that she be given her statutory rights in all properties owned by Bryant, for an award of permanent alimony, and a reasonable sum for attorney's fee and suit money.

On hearing, the court granted Mr. Bryant an absolute divorce, dismissed the cross-complaint of Mrs. Bryant, directed appellee to pay to appellant the sum of $100.00 per month as alimony and maintenance for a period of nine months, and awarded Mrs. Bryant's attorney a fee of $100.00. From the decree so entered, appellant brings this appeal. It is here contended that the court erred in granting Mr. Bryant a divorce, rather than granting the divorce to Mrs. Bryant and awarding her property rights as provided by statute.

The contentions of each of the parties are as follows:

Mr. Bryant, 58 years of age, whose first wife had died, testified he and appellant had agreed, that upon their marriage, they would temporarily live in her home in Hot Springs until she could make arrangements to sell the property, at which time she would move to Little Rock with appellee. Mr. Bryant's job headquarters with Missouri Pacific is Little Rock, as he stated, "Union Station in Little Rock." It was, of course, necessary, in order to live with his wife, that he drive back and forth from Little Rock to Hot Springs. The witness stated that after a month, he told appellant that it was time for them to move to Little Rock; that he was getting tired of driving back and forth. He testified that he constantly

asked her about selling the property, and she replied that she wanted to sell her home and move; however, she took no steps to do so. Mrs. Bryant finally, around the middle of February, listed the property with a real estate dealer.[2] Mr. Bryant stated that on two or three occasions, prospective purchasers came by to look at the property, but upon asking the sale price, received the reply from his wife that "she had not decided." He said that he made up his mind to move back to Little Rock on March 6, and so informed his wife. She inquired, "was I coming back payday and I said yes. 'I will be back payday and I want you to make up your mind by then what you are going to do.' " Payday, as reflected by the evidence, was on March 14. Appellee stated that he never did go back for the reason that when he returned from his railroad trip "a deputy sheriff met me and subpoenaed me that I had been sued for divorce." That suit was instituted by Mrs. Bryant on March 8.

Appellant testified that she did not want to get married until her property was sold, but that appellee said that he would give her all the time she needed. She stated that, inasmuch as all of her furnishings would not be needed in the Little Rock home,[3] she planned to give part to her daughter and son,[4] but that her daughter, who lived in Denver, had a nine-months-old baby, was also six months pregnant, and was not able to make the trip to Hot Springs at the time. She said that her son did get a dining room suite. Mrs. Bryant testified that appellee had told her before the marriage that he "would not gripe about driving back and forth," and she stated that he did not make any complaint after the marriage about the inconvenience of the systematic or regular journeys from Little Rock to Hot Springs.

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[2] According to a stipulation entered into between the parties, appellant listed the property with J. N. Leeson of Hot Springs on February 15, 1961, for the sale price of $20,000.00. Mrs. Bryant also testified that she listed the property for sale about a week earlier with another real estate dealer.

[3] Mrs. Bryant's home contained 7 rooms, while the apartment in Little Rock, owned and occupied by Mr. Bryant, only contained 4 rooms.

[4] Mrs. Bryant had been married previously, but was divorced from that husband in 1945.

According to appellant, on March 6 at her home in Hot Springs, Mr. Bryant "told me he could not live with me any longer for thinking about his deceased wife, and he called her Nora." She testified that he then packed and left, stating, "I will send you money on the 15th." She mentioned two other complaints. On one occasion Mr. Bryant had called from Little Rock and informed her that he had to stay overnight in that city to see about renting an apartment, but he did not return to Hot Springs until the next night; upon being asked as to what he had been doing during that period, he answered, "It's not any of your darn business and I don't want to be asked questions or fussed at." She also testified that the following week he did not come in until 2:00 o'clock in the morning, and, when questioned as to his activities, replied that he had been out "playing."

Mrs. Callie Jones, a close friend of Mrs. Bryant's, testified that she never heard Mr. Bryant make any complaints about his wife, or the fact that appellant had not sold her property. She also testified that she was in the home a few days before March 6 (when appellee left appellant's home), and heard Mrs. Bryant state that she was ready to go to Little Rock, but Mr. Bryant refused the offer.

We think the chancellor was correct in denying a divorce to appellant. In the first place, her testimony relative to the purported statement of appellee as to his reason for leaving, is entirely without corroboration; nor is there corroboration of her testimony in regard to the two occasions when appellee did not return to the home at the proper time. Of course, even if the occurrences had been corroborated, it could hardly be said that these three isolated instances of alleged misconduct constituted such indignities as to entitle appellant to a divorce. She did not testify that her husband constantly talked about his deceased wife, but only that he mentioned it on the occasion of his leaving.

Appellee's contention of desertion would likewise be uncorroborated except for one very pertinent fact. That fact is undisputed and admitted; two days after

Mr. Bryant left the home in Hot Springs, appellant instituted suit for divorce. It seems strange, if Mrs. Bryant really intended to move to Little Rock with her husband, that she would have filed suit almost immediately, particularly inasmuch as the recited evidence shows that the difficulties between the parties were of a minor nature. It would certainly appear that if appellant had a genuine desire to live with appellee, she would not have instituted the suit so quickly.

Nor does she cite compelling reasons for failure to accompany her husband to his home. After all, the sale of the property could have been adequately handled by a real estate dealer while Mrs. Bryant was in Little Rock with her husband; upon being advised that a sale was ready for consummation, or that her daughter was ready to make the trip from Denver, appellant could have returned to her home to complete details. It is, of course, noticeable that the property was not even listed for sale until more than three months after the marriage.

The transcript contains a copy of the order entered by the Garland Chancery Court on September 6. That order reads as follows:

"On this day comes the plaintiff, by her Solicitor, Richard W. Hobbs, Esq., and moves the Court to dismiss this cause of action without prejudice;

"And the Court being well and sufficiently advised in this matter doth order, adjudge and decree that this cause of action be, and same is hereby dismissed without prejudice; *and the restraining order issued on March 8th, 1961,*[5] be, and the same is hereby vacated."

While the record does not contain the original order, and the italicized portion could possibly have reference to restraining appellee from disposing of property, or withdrawing funds from a bank, etc., it more likely appears (since specific property or money is not mentioned in the testimony) that the purpose of the restraining order was to prevent Mr. Bryant from going about appellant. Under such circumstances, he could not, of

[5] Emphasis supplied.

course, have returned to the home without risk of a contempt citation. Be that as it may, we think that Mrs. Bryant could not have more forcefully demonstrated her intention to remain in her own home in Hot Springs (instead of going to Little Rock with appellee), than by instituting the suit for divorce within two days after Mr. Bryant left the house.

In *Dobson* v. *Dobson* (not in Arkansas Reports) 89 S. W. (2d) 932, this court stated,

"It is true, of course, that the husband has the right to establish a home in such place as his business necessities may require and that the wife, if she willfully refuses to make her home with him at such place, is guilty of desertion."

See also *Bateman* v. *Bateman,* (Ill.) 85 N. E. 2d 196. Certainly, "business necessities" dictated that Mr. Bryant maintain his residence in Little Rock, and we are unable to say that the Chancellor's finding that Mrs. Bryant deserted her husband is against the preponderance of the evidence.

It likewise follows that the court's action in dismissing the cross-complaint was proper.

The decree is accordingly affirmed.

Appellant asks for a reasonable attorney's fee as compensation for services rendered in taking this appeal, together with an amount sufficient to cover costs. In accordance with the holding in numerous cases, though the wife has not prevailed in this litigation, the request is granted. See *Gardner* v. *Gardner,* 225 Ark. 828, 286 S. W. 2d 23. We think, under the circumstances, that an additional fee for appellant's attorney should be allowed in the amount of $100.00, together with her costs.

It is so ordered.

Mr. Justice Holt not participating.

5-2905 365 S. W. 2d 122

Opinion delivered February 25, 1963.

[Rehearing denied March 18, 1963.]

Phillip H. Loh, for appellant.

Nathan Gordon and *Felver A. Rowell, Jr.,* for appellee.

ED. F. MCFADDIN, Associate Justice. The appellant, as a citizen and taxpayer, filed a petition in the Conway Circuit Court praying for a writ of mandamus against "The Conway County Court and its Judge, Tom Scott," as sole defendant.

The petition for mandamus, along with the amendment thereto, alleged: that the Collector of Conway County in transcribing and certifying the list of persons who paid poll tax, failed to include with the name of the poll tax payer his residence, post office address, voting precinct, and school district, all of which information is required by § 3-227 Ark. Stats.; that the County Clerk likewise failed in the same particulars; and that the Morrilton Headlight, in printing the list of poll tax payers, likewise failed in the same particulars. The petition alleged that § 3-227 Ark. Stats. "makes it mandatory upon the County Court to enforce the provision of said Act by deducting sums from the Collector for errors made in transcribing and certifying poll tax receipts . . . and the defendant refuses to assess and withhold penalties

from sums due the collector of Conway County." The prayer of the petition was: "Plaintiff prays a writ of mandamus from this Court to require the defendant to comply with the laws of Arkansas § 3-227 Ark. Stats."; and the prayer of the amendment was for an order "to compel the defendant to enforce such statute (§ 3-227 Ark. Stats.) by collecting the penalties owed by the Collector, Clerk, and printer for the errors committed by them."

To the petition and amendment the defendant filed a demurrer,[1] and also a motion to dismiss. The Court reserved decision on these two defensive pleadings until the plaintiff had offered all desired evidence; and then the Court overruled the defensive pleadings, held that the plaintiff's proof was insufficient to grant the prayed relief, and dismissed the complaint.

From that adverse judgment the plaintiff, as appellant, brings this appeal, and urges a threshold question, which is that the defendant did not file an answer within the time provided by § 33-107 Ark. Stats., and the Trial Court should have granted the plaintiff the prayed injunction because of defendant's default. There are several answers to this threshold question. In the first place, § 33-107 Ark. Stats. says that if no answer be filed, then "upon a proper showing suitable relief shall be speedily granted." Even in the absence of an answer, the burden was on the plaintiff to make a "proper showing"; and that presented the question of the sufficiency of the plaintiff's evidence. In the second place, this question of a claimed default was never mentioned in the Trial Court and cannot be raised here for the first time. See *Lambert* v. *Lambert,* 229 Ark. 533, 316 S. W. 2d 822. A third and equally conclusive answer to the appellant's contention on this default matter is that defendant was not in default. The original petition for mandamus was filed on June 12, 1962, and the amendment a few days later; on June 20, 1962, the defendant filed the demurrer and also the motion to dismiss. These defensive

[1] The demurrer claimed: (1) the complaint and amendment failed to state a cause of action; (2) an absence of jurisdiction; and (3) a defect of parties.

pleadings were filed in ample time and were not disposed of until the final judgment herein, so the defendant was never in default as regards defensive pleadings.

The main insistence of the appellant is that he introduced the printed list containing the names of the poll tax payers of Conway County for the year 1961 (legal voters from October 1, 1961 to September 30, 1962); that such list[2] shows only the name and color of the voter and the township in which he resides; and that the list does not even purport to give the other information required by § 3-227 Ark. Stats., that is, it does not give the residence, post office address, and school district of each voter. In the course of the trial the appellant undertook to show errors and duplications in the printed list as filed, but was prevented from doing so by the ruling of the Trial Court that the proffered evidence was hearsay. We find no error in the Trial Court's ruling in the hearsay matter.

We come, then, to the real insistence of the appellant, which is that the County Court and Judge thereof should be required by mandamus to enforce the provisions of § 3-227 Ark. Stats. To this issue the appellee presents here a series of answers:

(1) The appellee claims that the provisions of § 3-227 Ark. Stats. are contrary to Amendment No. 8 of the Arkansas Constitution, as construed in such cases as *Wilson* v. *Danley,* 165 Ark. 565, 265 S. W. 358; *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257; and *Wilson* v. *Luck,* 201 Ark. 594, 146 S. W. 2d 696. We forego any discussion of the appellee's contention on this point because a case is not to be decided on constitutional issues if it can be decided on any other issue, as this one can. *Holt* v. *Howard,* 206 Ark. 337, 175 S. W. 2d 384; *Smith* v. *Smith,* 223 Ark. 627, 267 S. W. 2d 771.

(2) The appellee urges that § 3-227 Ark. Stats. was repealed by § 3-118 Ark. Stats. Likewise, we forego any discussion of this second point urged by appellee because

[2] It is apparent that the printed list as filed was prepared in conformity with § 3-118 Ark. Stats., rather than in conformity with § 3-227 Ark. Stats.

there is no need to consider the question of repeal of statutes, since this case can be decided on the remaining issue.

(3) The third point urged by the appellee is that the Trial Court should have sustained the defendant's demurrer to the complaint because the complaint did not state facts sufficient to constitute a cause of action; and it is on this point that we rest our affirmance of the Trial Court's decree, even considering all the evidence that was introduced in the case. This is because the Trial Court reached the correct result, even on an erroneous theory. When the decision of the Trial Court is correct, it will be sustained when supported by principles of law thought by the Trial Court not to obtain. *State* v. *Gus Blass Co.,* 193 Ark. 1159, 105 S. W. 2d 853; *Gage* v. *Ark. Central,* 160 Ark. 402, 254 S. W. 665; and *Polk* v. *Stephens,* 126 Ark. 159, 189 S. W. 837.

The plaintiff's entire case was based on the provisions of § 3-227 Ark. Stats., which relates to the certified list of poll tax payers. That statute says that such list shall contain, *inter alia,* the name of the poll tax payer, and also the ". . . residence, post office address, school district, and voting precinct"; and the § 3-227 further says: "For each error rendering void the poll tax receipt in the transcribing, certification, or printing of the names, color, residence, post office address, school district, or voting precinct . . . the collector, clerk, or printer making the same shall be assessed the sum of $1.00, which sum or sums shall be deducted from any sums due such officer or printer from the County when settlements are made with such officer or printer, *and the enforcement hereof is made mandatory upon the County Court.*" (Emphasis supplied.) It is solely because of the italicized language that the plaintiff filed this mandamus action in the Circuit Court; and we hold that the plaintiff misconceived his remedy.

The fact that the statute said that it was "*mandatory upon the County Court*" does not mean that mandamus from the Circuit Court is the proper remedy. "Mandatory" means "obligatory", as opposed to "di-

rectory." The plaintiff, as a citizen and taxpayer, should have appealed from any order of the County Court wherein the County Court failed to follow the statute relied on by the plaintiff. Mandamus cannot be used to correct an erroneous decision already made. *Jackson* v. *Collins,* 193 Ark. 737, 102 S. W. 2d 548. Mandamus does not issue where there is any other adequate remedy. *Snapp* v. *Coffman,* 145 Ark. 1, 223 S. W. 360; and *Ghent* v. *State,* 189 Ark. 747, 75 S. W. 2d 67. Mandamus will not be granted where there is a remedy by appeal. *Cantley* v. *Irby,* 186 Ark. 492, 54 S. W. 2d 286; *Mance* v. *Mundt,* 199 Ark. 729, 135 S. W. 2d 848; and *Karoley* v. *Reed,* 233 Ark. 538, 345 S. W. 2d 626. Mandamus is not a writ to control the discretion of an inferior tribunal. *Nixon* v. *Grace,* 98 Ark. 505, 136 S. W. 670; *Cantley* v. *Irby,* 186 Ark. 492, 54 S. W. 2d 286; *Karoley* v. *Reed,* 233 Ark. 538, 345 S. W. 2d 626; *Jackson* v. *Collins,* 193 Ark. 737, 102 S. W. 2d 548.

Since mandamus was not proper in this case, we affirm the judgment of the Trial Court dismissing the plaintiff's complaint.

HARTSOCK *v.* FORSGREN, INC.

5-2918 365 S. W. 2d 117

Opinion delivered February 25, 1963.

Sexton & Morgan, for appellant.

Shaw, Jones & Shaw, for appellee.

George Rose Smith, J. This is an action brought by the appellant, individually and as the next friend of her minor son, Billy Avery Faulkner, to recover damages for personal injuries suffered by the child. The circuit court sustained a demurrer to the complaint and dismissed the suit. The only question is whether the plaintiff's pleading states a cause of action for negligence.

The complaint avers that the defendant, in the course of its business, maintained a large tank for the storage of tar. Despite repeated protests (presumably by the plaintiff or other neighbors), the defendant allowed the tar to spill over, so that it flowed from the defendant's premises into an area where the plaintiff's son and other members of the public were accustomed to walk and play.

On July 7, 1961, Billy Avery, then nine years old, walked into the tar to such a depth that his feet were covered up to his ankles. When the child reached his home his parents, "upon seeing the tar on his feet and recognizing the necessity that all of the same promptly be removed therefrom, did attempt to remove the same in the most prudent and careful manner possible by taking said child into the middle of their back yard to remove said

tar by the use of gasoline, the only effective cleaning substance available at the time.'' While the parents were so engaged a second child ran into the yard and unexpectedly exploded a cap-pistol cap, creating a spark that ignited the gasoline fumes and resulted in serious burns to Billy Avery's legs.

The circuit court was right in sustaining the demurrer, for the facts do not show that the child's injuries were proximately caused by negligence on the part of the defendant. We reach this conclusion whether we devote our attention primarily to the question of negligence or to that of proximate cause. The two things, as we observed in *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797, shade into each other. We need not now attempt to draw fine lines of distinction.

To be negligent a person must be in a position to realize that his conduct involves a hazard to others. In the *Hill* case we described a negligent act as ''one from which an ordinary prudent person in the actor's position —in the same or similar circumstances—would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner.'' Later, in *Collier* v. *Citizens Coach Co.,* 231 Ark. 489, 330 S. W. 2d 74, we added: ''Foreseeability is an element in the determination of whether a person is guilty of negligence and has nothing whatever to do with proximate cause.'' Moreover, when the voluntary acts of human beings intervene between the defendant's act and the plaintiff's injury, the problem of foreseeability is still the same: Was the third person's conduct sufficiently foreseeable to have the effect of making the defendant's act a negligent one? Harper & James, The Law of Torts, § 20.5; Rest., Torts, § 447.

This defendant, in allowing tar to overflow into an area used as a playground, could be charged with the duty of anticipating the likelihood that a child might get pitch upon his feet. But this possibility does not involve, in the language of the *Hill* case, such an appreciable risk of harm as to cause an ordinarily prudent person either not to do the act or to do it in a more careful manner.

It is a commonplace everyday occurrence for children to get tar or other harmless viscous substances upon their skin. Such matter may be, and ordinarily is, washed off without any danger whatever to the child. To hold that this defendant was under a duty to guard against the remote chance of what actually occurred in this case would be in effect to strike the element of foreseeability from the concept of negligence in such a situation and thus to impose an absolute liability upon persons handling tar and similar innocuous substances.

With respect to proximate cause the term is usually defined as a cause which, "in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Collier* v. *Citizens Coach Co., supra; Ben M. Hogan & Co.* v. *Krug,* 234 Ark. 280, 351 S. W. 2d 451. Testing the case by this definition, it is apparent that proof of every fact alleged in the complaint would not present an issue for the jury, since the overflow of the tar did not lead in a natural and continuous sequence, unbroken by any efficient intervening cause, to the accidental igniting of gasoline fumes in the Hartsocks' backyard.

A much stronger case than this one for the imposition of liability was considered in *Pittsburgh Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647, 18 L.R.A., N.S. 905. There the defendant carelessly discarded dangerous dynamite caps in a place where they were picked up by a child. By contrast, the present appellee created a condition that was essentially harmless. In the *Horton* case we held that the action of the child's parents, in permitting him to keep the dynamite caps for a week, exempted the defendant from liability when one of the caps later exploded and injured another child. There the parents' intervening conduct was merely a passive failure to correct a hazardous situation. Here it was the appellant and her husband who actively introduced the highly dangerous and inflammable liquid that caused the injury. (Needless to say, the allegation that the parents acted in the most prudent and careful manner is a conclusion of law not admitted by demurrer. *Seubold* v.

Fort Smith Spec. Sch. Dist., 218 Ark. 560, 237 S. W. 2d 884.) Upon the authority of the *Horton* case we must conclude that the appellee's conduct was not the proximate cause of the accident giving rise to this suit.

Affirmed.

ADAMS *v.* TACKETT, COUNTY JUDGE.

5-2934 365 S. W. 2d 125

Opinion delivered February 25, 1963.

James H. Pilkinton, for appellant.

R. T. Boulware, H. L. Wilkinson, Royce Weisenberger, John W. Goodson, Rose, Meek, House, Barron, Nash & Williamson, for appellee.

PAUL WARD, Associate Justice. In separate memorandum opinions (dated June 2 and July 25, 1962) the circuit court approved certain steps taken by the County

Judge and County Court of Lafayette County to procure and develop industry in said county under the provisions of Amendment No. 49 of the State Constitution. Appellants, as taxpayers, now prosecute this appeal for a reversal on grounds hereafter set out and discussed. Because of the limited issues raised it is not necessary to copy or fully abstract much of the testimony or the numerous exhibits contained in the record.

On March 7, 1962 appellee, the County Judge of Lafayette County, signed an order consisting of four pages, detailing a proposed bond issue in the amount of $210,000 under the provisions of Amendment No. 49 to the Constitution of Arkansas for the purpose of securing and developing industry within the county. The order calls for an election to be held April 10, 1962, sets forth the form of ballot to be used, and specifies four weeks notice in a newspaper—all in regular and approved form. The notice was given, the election was held, and the vote was 1,205 for and 888 against the bond issue.

On April 11, 1962 the county judge signed an order (four pages) directing that notice be given of the sale of $210,000 of bonds "for the purpose of aiding in securing and developing industry within Lafayette County" —to be held May 10, 1962. The procedural steps and the form and contents of the orders are not challenged.

Certain taxpayers took an appeal from the above mentioned orders to the circuit court, and other taxpayers asked the circuit court to review the orders on a petition for a writ of *certiorari.* Pending a hearing on the above, White and Company, Inc. (the company purporting to establish an upholstery business under a memorandum agreement with the county judge, dated February 26, 1962) filed an intervention, claiming it was interested in the pending litigation. To this pleading the taxpayers filed an answer and cross-complaint stating, among other things, that Amendment No. 49 requires a final contract before bonds can be legally issued. To the above cross-complaint White and Company, Inc. filed a demurrer which the trial court sustained.

Certified copies of the orders previously mentioned, together with other exhibits were filed in the circuit court, and testimony was introduced. Thereupon the trial court found all issues against the appellants (taxpayers), and this appeal follows.

Appellants make the following contentions: *One,* the two orders signed by the county judge are not valid; and, *Two,* the trial court erred in sustaining the demurrer filed by White and Company, Inc.

One. It is the contention of the taxpayers that the order dated March 7, 1962, calling the election, and the order dated April 11, 1962, directing notice of the bond sale, are invalid because the county court was not legally in session when the orders were entered. There is no merit in this contention, considering the applicable law and the facts of the case as shown by the record. Ark. Stats. § 22-115 reads:

"If any court shall not be held on the first day of the term, such court shall stand adjourned from day to day, until the evening of the third day."

Section 22-116 reads:

"If at that time the court shall not be opened such court shall stand adjourned until the next regular term, and all cases, civil, penal and criminal shall stand adjourned over until the next term of such court."

A reference to the Revised Statutes, Chapter 43, and Ark. Stats. § 22-101 leaves no doubt that the above quoted statutes deal with county courts.

There is ample testimony in the record to support the trial judge's finding that Judge Tackett (the County Judge) transacted county court business within the first three days of the January Term and the April Term, 1962. The county clerk testified the records showed court was held on January 3, 1962 and on April 2, 1962. Judge Tackett testified likewise, and the circuit court entered its finding in accord therewith. Appellants also point out there is no showing that the sheriff was present as required by Ark. Stats. § 22-614 or that court was held with open doors as required by Ark. Stats. § 22-608. In

our opinion the last section simply means the doors shall not be locked or that people shall not be prevented from attending court. There is nothing in the record to show either of these situations obtained in this case. We interpret the other section to mean the sheriff can be forced to attend a session of the county court, but not that he could prevent a session from being legally held merely by staying away. Any other interpretation would be most unreasonable.

Two. In the cross-complaint (to the intervention) filed by the taxpayers it was in substance alleged: The memorandum agreement dated February 26, 1962 was never approved by the county court, and is not legally binding on the county; The bond issue is not for the best interest of the county; Amendment No. 49 requires a final contract containing all details before any bonds are sold; and, no tax can be voted without the county court's approval.

In our opinion the trial court properly sustained the demurrer to the above cross-complaint. If, as alleged, the memorandum agreement is invalid, that is no legal defense to the procedure followed by the county judge for he was in no way relying on it. Under the provisions of Amendment No. 49, the people, by their votes, decide whether a project of this kind is or is not for their best interest. The trial court was correct in finding that Amendment No. 49 does not require a final contract before bonds can be issued. Insofar as the amendment requires, the contract can be (and perhaps should be) executed after the bonds are sold. It is only then that the parties are in a position to make definite commitments. Most of appellants' professed fears should be allayed by the language found in Section 5 of the amendment which insures that

"... the County Court of the county shall exercise jurisdiction over the sale or exchange of any such bonds voted by the electors at an election held for that purpose and shall expend economically the funds so provided."

As stated in the case of *Hackler* v. *Baker, County Judge,* 233 Ark. 690, 346 S. W. 2d 677, we see no reason why money derived from the sale of bonds in this case ". . . should not be subject to the same safeguards as any other revenues," under the general law. Any taxpayer of Lafayette County will have the same right to challenge any future order of the county court relative to this undertaking that he had to challenge the previous orders, or to challenge any order affecting his interest.

Finding no error, the judgment of the trial court is affirmed.

Affirmed.

SEABOURN *v.* STATE.

5063 365 S. W. 2d 133

Opinion delivered February 25, 1963.

Martin L. Green, Edward E. Bedwell and *J. Sam Wood,* for appellant.

Jack Holt, Jr., Attorney General, by *Jack L. Lessenberry,* Chief Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Billy Seabourn, was charged in Sebastian County with murder in the first degree in the killing of George Schuh, a soldier. He was convicted of murder in the second degree, sentenced to 21 years in the penitentiary, and has appealed.

Appellant owned and operated the Hi Boy Bar in Ft. Smith. There are two rooms. In the front room there are booths, a bar where beer is dispensed, and a music machine. In the back room there are booths, a small dance floor, and a speaker connected with the music machine.

About 1 a. m. on June 28, 1962, appellant, while in his place of business, shot and killed George Schuh, a private in the Army. Schuh was shot in the back of the head with a .38 caliber pistol held in the hands of appellant, who claims that the shooting was accidental while acting in self defense.

The principal contention of appellant on appeal is that the evidence is not sufficient to sustain a conviction of murder in the second degree.

Ark. Stats. 41-2201 provides: "Murder is the unlawful killing of a human being, in the peace of the State, with malice aforethought, either express or implied". 41-2205 defines murder in the first degree as: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree." All other murder is murder in the second degree. Ark. Stats. 41-2206.

On appeal, the evidence must be viewed in the light most favorable to the State. *Wooten* v. *State,* 220 Ark. 750, 249 S. W. 2d 964.

Appellant did not work at the Hi Boy Bar on the day of the killing. There were two employees on duty, Jack Jones, the bartender, and Ellen Rink, a waitress. Appellant was in and out of the place two or three times that day. The last time he went there was shortly after 10 p.m. and he stayed until after the killing, which occurred about 1 a.m. He drank several beers.

Beer was not served after 12:45 a.m. and the place closed at 1 a.m. Between 12:30 and 1 a.m., George Schuh, who was killed a very short time after he entered the bar, came into the place and went into the back room looking for a couple of friends. There were six or eight soldiers in the back room who had been there for some time drinking beer. Some of them had tried to date the waitress, Ellen Rink, and had "made passes" at her. She complained about the soldiers' conduct in that respect and stated that she did not want to serve them any more beer; the last round of drinks was, therefore, taken to the soldiers by the bartender, Jones. The soldiers were laughing and drinking.

The appellant, Seabourn, who had been sitting at the bar since some time after 10 o'clock, went into the back room a few minutes before 1 o'clock and told the soldiers that it was about time to close and time for them to leave. According to appellant, one little fellow got up and took his glass of beer back to a booth in the rear of the room, and Schuh placed his hand on Seabourn's shoulder and told him that they would leave in a few minutes. Seabourn testified that he went back to the bar and got his .38 revolver that he kept in a drawer and went again to the back room for the purpose of getting the soldiers to leave, carrying the pistol as a bluff, thinking that the sight of the weapon would hurry the soldiers along.

The soldiers did leave and Seabourn claims that he followed them out to near the front of the building; that after all the soldiers were out except Schuh, and per-

haps one other, Schuh turned around and Seabourn claims that he struck Schuh with the .38 pistol thinking that Schuh was about to attack him, and that the gun went off accidentally.

But Ellen Rink, the waitress, testified that it was when the soldiers were actually leaving, and were in the front room on the way out the door that Seabourn got the pistol and followed them. In any event, Schuh was shot in the back of the head, and appellant was unable to explain to the satisfaction of the jury just how he could have been shot in that manner if he was facing appellant.

Appellant's version of the killing is not corroborated by the circumstances. In the first place, he claims that at the time he struck Schuh with the revolver it was in a holster. The holster—one with a closed end—was found on a table in the bar, and there was no bullet hole in it. After the shooting there remained in the barroom one soldier, a Sgt. Redmond; the bartender, Jack Jones; the waitress, Ellen Rink; and appellant, with the body of Schuh, who apparently was killed instantly.

A few minutes after the shooting, appellant's wife arrived and she, appellant, and Redmond took Schuh to the hospital in appellant's car. While at the hospital, appellant called the bartender, Jack Jones, and told him to get rid of the .38 pistol; that he had hidden it behind the speaker. However, Jones found the pistol on the floor where it must have fallen from behind the speaker. He and the waitress, Ellen Rink, put the pistol in Ellen's purse, where it was found by officers the next day.

Appellant is married, but he had been dating the waitress, Ellen Rink. He had been drinking over a period of several hours, and although he contends that he consumed only a few beers, he could have been angry with the soldiers for having tried to date Ellen and having made passes at her. The soldiers had done or said nothing that justified appellant in getting his pistol and following them to the door. They were his customers, laughing and having a good time and drinking what he had to sell. If they sought to date the waitress it was

nothing more than the natural result of having imbibed of appellant's stock in trade. Moreover, since appellant is a married man, the soldiers were probably at greater liberty to date Ellen than was appellant.

There is not a scintilla of evidence that would lead any reasonable person to believe that Schuh was about to make an attack on appellant. But appellant did make a murderous attack on Schuh with a deadly weapon, if only used as a club. Ark. Stats. 41-2202 provides: "The manner of the killing is not material, further than it may show the disposition of mind, or of the intent with which the act was committed". 41-2204 provides: "Malice shall be implied when no considerable provocation appears or when all the circumstances of the killing manifest an abandoned and wicked disposition".

Ark. Stats. 41-2246 provides: "The killing being proved, the burden of proving circumstances of mitigation, that justify or excuse the homicide, shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest, that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."

No witness testified that he actually saw the shooting; the defendant is the only person who knows how it occurred, and the jury did not believe his unreasonable version of it. It was proved beyond any doubt that appellant killed the deceased with a deadly weapon by shooting him in the back of the head.

In *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621, the Court quoted from *Townsend* v. *State,* 174 Ark. 1180, 298 S. W. 2 as follows: "The law implies malice where there is a killing with a deadly weapon and no circumstances of mitigation, justification, or excuse appear at the time of the killing. Inasmuch as no one can look into the mind of another, much latitude is allowed in the introduction of testimony on the question of motive, and the only way to decide upon the mental condition of the accused at the time of the killing is to judge it from the attendant circumstances."

The intent to kill is not necessary to constitute murder in the second degree. *Wooten* v. *State,* 220 Ark. 750, 149 S. W. 2d 964.

Appellant objected to the failure of the Court to instruct the jury that the intent to kill was a necessary element of voluntary manslaughter. We fail to see how this could have been prejudicial to the appellant since he was convicted to second degree murder, but be that as it may, the intent to kill is not a necessary element in the crime of voluntary manslaughter. *Robertson* v. *State,* 212 Ark. 301, 206 S. W. 2d 748.

Appellant complains of the Court refusing to give a requested instruction telling the jury that in the event they found the defendant guilty of homicide and had a reasonable doubt as to the degree, they should give him the benefit of the doubt and find him guilty of the lower degree. The Court, on its own motion, gave a complete instruction fully and correctly explaining this point to the jury.

Finding no error, the judgment is affirmed.

JEFFERY *v.* GORDON.

5-2900 365 S. W. 2d 128

Opinion delivered February 25, 1963.

Holt, Park & Holt, for appellant.

Shelby R. Blackmon, Wm. A. Eldredge, Jr., and *George E. Pike, Jr., Mehaffy, Smith, Williams, Friday & Bowen,* for appellee.

JIM JOHNSON, Associate Justice. This action was brought by appellant, Elmer Jeffery and John W. McCracken, d/b/a J. W. McCracken, Contractor, against appellees Norman N. Graves and Warren L. Graves, d/b/a Graves Brothers, Contractors, and C. D. Gordon, Contractor, to recover damages to a highway overpass which appellant alleged was proximately caused by the negligence of appellees in parking a truck-load of baled hay beneath the steel and concrete span. A fire from unknown origin burned the hay and the heat thus generated, warped and damaged the overpass. Appellant was required to repair the damaged portion of the overpass before it could be accepted by the Arkansas Highway Department.

At the close of appellant's evidence, appellees' motion for a directed verdict was granted by the trial court. From that verdict comes this appeal.

By way of prelude, we find ourselves in agreement with Professor William Prosser who commented on the causation factor in his learned treatise on the law of tort: "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which opinions are in such a welter of confusion." Prosser, Torts 218 (2d ed.). Our own reported cases are full of attempts to fix and define within certain limits a comprehensible meaning to the term "proximate cause", but in the final analysis the term is so elusive that we are compelled in each case which reaches us to consider it upon its own merits in the light of all the attending circumstances it presents. This case is no different.

The law is well settled in this state that before one can be held liable for an alleged negligent act, that act must be the proximate cause of the injury complained of,

and also be of such a nature that the consequent injury should be one which, in the light of attending circumstances, a person of ordinary foresight and prudence would have anticipated. *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816, 31 L.R.A., N.S. 1020.

The first question we are asked to resolve is: did appellant offer evidence that the act of parking the truck of baled hay beneath a steel and concrete structure constituted negligence, and if so, was that act the proximate cause of appellant's injury? The law is equally well settled that proximate cause must be shown. *Meeks* v. *Graysonia, N. & A. R. Co.,* 168 Ark. 966, 272 S. W. 360. Assuming without deciding that the act of parking the hay was an act of negligence we must consider the second portion of the question. Did appellant offer proof of any nature that this act was the proximate cause of the injury? We think the answer is found in appellant's entire offer of proof on causation, which we set out in full from the record:

"Direct Examination

Q. State your full name to the jury.

A. Bill Struebing.

Q. By whom are you employed?

A. Arkansas State Police.

Q. What division are you in?

A. Fire Marshal Section.

Q. How long have you been in that section?

A. Since it was transferred to the State Police in 1955.

Q. You are head of that section?

A. Yes.

Q. Have you received any particular training in that field as fire marshal work?

A. I have attended schools in Oklahoma, A & M now Oklahoma University and I have attended Purdue University and University of Texas.

Q. During these courses of studies have you had occasion to study the sources of heat and fire potential of hay and straw?

A. Yes sir.

Q. During the five years you have been chief of the fire marshal section have you had occasion to make investigations and studies of fires and fire with relationship to burning of buildings?

A. Yes we have investigated fires in hay barns and structures of that type.

Q. Can you state from your studies and from your experience whether or not hay is said to be highly inflammable substance?

A. Yes it is classified as such.

Q. Will you state whether or not straw is classified as such?

A. General classification would be vegetation such as hay and straw, broom corn, tobacco and crops of that nature.

Q. They all fall under the same general category?

A. Yes.

Q. Will you state whether or not under certain given conditions straw might be combustible?

A. You are talking about spontaneous ignition. If the moisture content is over thirty there is a possibility of fermentation which causes heat and if allowed to generate over a period of time it can generate enough heat to where fire will occur.

Q. This can happen under certain given situations as far as straw is concerned?

A. Hay and straw that classification with the moisture content.

Q. You can not make a determination on investigation unless you make an extensive study of the product at a given time?

A. Yes as to humidity and things of that nature.

Q. With reference to the discussion we had concerning this fire, you were not called in to investigate this matter?

A. No sir. That was not brought to our attention.

Cross Examination

Q. Will you explain what is hay?

A. Hay, in my opinion, would be a crop that could be fed to cattle.

Q. What is straw?

A. Straw is a byproduct of a grain crop after the grain has been removed.

Q. Is there any difference in your opinion whether hay or straw as to the combustibility?

A. After the heat is built up they both burn with rapid combustion.

Q. What do you mean by rapid combustion?

A. Well rapid, rapid oxygenation after a certain temperature is reached the fuel involved in this area will rapidly ignite and a rapid fire spread will be the result.

Q. Is there any difference in the combustibility of hay and straw?

A. Again the moisture content would have some bearing, that and humidity.

Q. As far as the two, when the moisture content is the same is there any difference in the combustibility?

A. It would take less heat to ignite this leaf than straw if the heat temperature were raised to that degree both would ignite possibly at the same rate.

Witness excused.''

From the foregoing testimony, which was the only offer by appellant as to causation, all the court and jury were told is that under certain circumstances and conditions hay is subject to spontaneous combustion, or, as the witness said, spontaneous ignition. The court and jury were not told that these same or similar circumstances existed at the place and time the hay became ignited from a cause appellant concedes is unknown and which appellant argues must be left to conjecture.

Causation is a fact as much as negligence is a fact. It must be proved. *Meeks* v. *Graysonia N & A R Co., supra.* We unhesitatingly reject any suggestion that conjecture and fact are on an equal plane. *Biddle* v. *Jacobs,* 116 Ark. 82, 172 S. W. 258. To avoid conjecture in the instant case, appellant should have offered some substantial evidence, however slight, that the same or similar circumstances and conditions within the hay itself (such factors as suggested by appellant's expert witness, *i.e.,* moisture content, humidity, etc.) constituted such a hazard that appellees could have or should have foreseen the consequences of the act of parking that load of hay at that place and at that time, or some other causation traceable to appellees.

It is within common knowledge of mankind that hay is combustible. But it is not within common knowledge of mankind what circumstances and conditions must exist to cause hay to burst into flame from heat it has generated. Appellant produced adequate evidence to show the necessary circumstances and conditions which could cause hay to ignite spontaneously. But after giving appellant's evidence its strongest probative force and every legitimate inference that may be adduced from the testimony and exhibits, *St. Louis S. R. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215; *Cousins* v. *Cooper,* 232 Ark. 605, 339 S. W. 2d 316, there is a total failure of evidence to show that these circumstances existed or that appellee knew or should have known that these existed at the time and place of the act for which appellant complains.

It therefore follows that failure by appellant to submit evidence to place the fact of causation into dispute

created no question of fact for a jury to decide. The trial court properly ordered a directed verdict. To hold otherwise could make hay handlers insurers as a matter of law.

The second question, which involves the relationship of master and servant between the appellees, has now become moot.

Affirmed.

ROBINSON, J., dissents; HOLT, J., not participating.

SAM ROBINSON, Associate Justice (dissenting). The Court instructed the jury to find for the defendants, appellees.

On appeal there are two questions to be decided. First, was the evidence sufficient to take the case to the jury on the question of whether appellees were negligent in leaving a load of hay in such proximity to the bridge that the bridge was damaged when the hay caught fire. The majority has assumed that the evidence is sufficient to prove negligence in that respect.

The second question is whether the evidence is sufficient to take the case to the jury on the question of proximate cause. The majority has held as a matter of law that the conceded negligence was not the proximate cause of the damage to the bridge. I maintain that it was a question for the jury as to whether appellees' negligence was the proximate cause of the damage.

In discussing proximate cause, Professor Prosser says: "In cases where reasonable men might differ—which will include all but a few of the cases in which the issue is in dispute at all—the question is one for the jury." *Prosser on Torts,* Second Ed., P. 281.

This Court said in *Federal Compress & Warehouse Co.* v. *Free,* 190 Ark. 969, 82 S. W. 2d 253: "The question of proximate cause, as this court has already said, is not one of science or legal knowledge, and is a question ordinarily for the jury, to be determined as a fact from the particular situation, in view of the facts and circum-

stances surrounding it. *The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments . . . Several incidents may occur in regular or natural sequence, but it is not necessarily true that the primary cause thereof is, on that account, not the proximate cause of the injury suffered.*" (Emphasis ours.) To the same effect is *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1199.

In *Dixie Furniture Co.* v. *Deason,* 226 Ark. 742, 293 S. W. 2d 706, the furniture company moved a stove and failed to cap a gas pipe. One of the issues in the case was whether the failure to cap the pipe was the proximate cause of an explosion. This Court said: "Whether the failure to put a cap on the pipe was the proximate cause of the injuries was a question for the jury."

In *Booth & Flynn* v. *Price,* 183 Ark. 975, 39 S. W. 2d 717, this Court said: "It is claimed, however, by counsel for appellants that this was not the proximate cause of the injury of appellee. They insist that his own conduct in going into the flames to turn off the stopcock near the main tank was an intervening cause, and that therefore appellants are not liable. The general rule is that what is the proximate cause of an injury is a question for the jury. It is to be determined as a fact in view of the circumstances attending it." A judgment for the plaintiff was affirmed.

If reasonable men might differ as to whether an act or omission is the proximate cause of damages sustained, that question should be submitted to a jury. It is said in *Coca Cola Bottling Co.* v. *Shipp,* 173 Ark. 130, 297 S. W. 856; "In every case where fair-minded men would honestly differ about a question, that fact makes it a question for the jury and not for the court."

It being shown beyond any possibility of doubt that proximate cause is a jury question where the minds of reasonable men might differ, it only remains to be pointed out that the evidence in this case is such that reasonable men might differ on that question.

In the majority opinion it is stated: "It is within common knowledge of mankind that hay is combustible." Mr. Bill Struebing of the State Fire Marshal's office, testified that hay is highly inflammable and classified as such. In fact, it is so inflammable that it will spontaneously ignite under certain conditions.

In *Gibson Oil Co.* v. *Sherry,* 172 Ark. 947, 291 S. W. 66, an employee of the oil company negligently allowed a mixture of gasoline and water to run down a gutter in the street. Sherry, standing on the curb, lit his pipe and threw the match into the gutter, igniting the gasoline and the resulting fire destroyed Sherry's automobile. A judgment for Sherry was affirmed. Of course, before the jury could find for the plaintiff, they had to find that the act of allowing the gasoline to run into the street was a proximate cause of the damages.

In *Eisenkramer* v. *Eck,* 162 Ark. 501, 258 S. W. 368, a judgment for Eck was affirmed. Eisenkramer had permitted trash and weeds to accumulate on property adjoining Eck; such matter caught fire and destroyed Eck's barn. Of course, it was a jury question of whether Eisenkramer's act of allowing the weeds and trash to accumulate was the proximate cause of the burning of Eck's barn.

In the case at bar, a truck load of highly inflammable material was placed directly under the bridge where a carelessly dropped match or cigarette, or lightning for that matter, could set it on fire. It is conceded that the evidence is sufficient to show that appellees were negligent in leaving the hay at that point. It was a question for the jury whether such negligence was the proximate cause of the damage to the bridge.

In my opinion the trial court erred in directing a verdict for appellees. For this reason I respectfully dissent.

5-2901 365 S. W. 2d 136

Opinion delivered February 25, 1963.

Huey & Rothwell, by *William D. Rothwell,* for appellant.

Mahony & Yocum, Brown & Compton, Tom Haley, for appellee.

FRANK HOLT, Associate Justice. This action began by the Cameron Crude Oil Corporation filing a Bill of Interpleader for the purpose of determining the true owners of certain oil royalties it holds so that Cameron would know to whom the royalties legally should be paid. The interpleader, Cameron, is the owner and operator of a pipe line and purchases and runs crude oil from oil wells which include two wells on the property in question.

Cameron has accumulated and paid the funds into the registry of the court.

The appellant, Marie E. Darsow, claims she is the sole owner of these funds. The appellees, Letha K. Landreth and numerous other parties hereinafter named, claim they, and not Marie E. Darsow, are the owners thereof. Darsow asserts that her claim arises from a deed dated May 4, 1923, executed by Ben and Minnie Fife.

The primary issue involved in this case is the construction and interpretation of this deed which is a "Mineral Deed and Royalty Contract" conveying an undivided one-half interest "in and to all of the oil, gas and other minerals" that might be produced from certain described lands in Bradley County, Arkansas.

The deed recites that the consideration of $200.00 was paid by V. C. Wall; the granting clause designates Susie C. Eikner as the grantee of an undivided one-half interest in the property in question; the granting clause recites further that the deed is subject to an oil and gas lease [same date as deed] from Fife to Wall, the delay rentals clause is in favor of "V. C. Wall or *her* heirs or assigns," that in the event the lease is allowed to become ineffective for any reason "the lease interest and all future rentals on said land, for oil, gas and mineral mining privileges shall be owned jointly by Ben Fife and V. C. Wall;" the habendum clause is in favor of "V. C. Wall and unto *his* heirs and assigns forever"; the deed recites the grantors are "to warrant and forever defend" said property "unto the said V. C. Wall and unto her heirs and assigns;" the release of dower and homestead rights by Minnie Fife was "unto and in favor of the said V. C. Wall." This deed was recorded as of May 19, 1923 and is hereinafter referred to as the "Eikner Deed." [Emphasis added]

As stated, this deed was dated May 4, 1923. On June 26, 1923, V. C. Wall and Maggie B. Wall, his wife, reconveyed this same property by quitclaim or release deed to the Fifes. This quitclaim or release deed is recorded as of September 19, 1923. Hereafter it is referred to as the "Wall Deed."

Ben Fife died intestate prior to 1929. Beginning in 1929, his widow and heirs made several conveyances through which the undivided one-half interest in question was conveyed to and is now claimed by the following persons: Letha K. Landreth, 1/8; Sue Turley Montgomery, 1/16; W. Shannon Goodwin, Olive L. Goodwin and Mary G. Meinert, 1/64; Wong Wingshear, 1/32; Wong Sam 1/32; First Presbyterian Church of El Dorado, Arkansas, 1/64; Roy Fife, 7/192 and Dr. J. G. Ferguson, 35/192. These parties are the appellees.

The proportions claimed by the appellees add up to an undivided one-half interest which is the same undivided one-half interest claimed by the appellant, Marie E. Darsow, through the "Eikner Deed."

Marie E. Darsow, the appellant, is the daughter of Susie C. Eikner, now deceased. On July 5, 1953, Susie C. Eikner conveyed the undivided one-half interest in question to her said daughter. This deed is recorded as of September 4, 1953. We shall refer to it as the "Darsow Deed."

The trial court held that the "Eikner Deed" created a resulting trust in favor of V. C. Wall; that Wall, as such *cestui que trust,* reconveyed to the Fifes by the "Wall Deed" all the interest the Fifes had conveyed by the "Eikner Deed;" that the execution of the "Darsow Deed" was a violation of the trust by the trustee, Mrs. Eikner, under the "Eikner Deed"; that Darsow is not a *bona fide* purchaser; and ordered Darsow, as successor to the trustee, to execute a deed to the appellees.

From this decree the appellant, Darsow, brings this appeal and for reversal relies on five points which, for purposes of discussion, will be merged into two major points:

1. The court erred in finding a resulting trust in favor of V. C. Wall.

2. Even if a resulting trust were created, the court erred in not finding Darsow to be a *bona fide* purchaser who took free of the trust.

We agree with the trial court's interpretation and construction of the "Eikner Deed" that a resulting trust was created. In this case the consideration was paid by V. C. Wall and the title taken in the name of Mrs. Susie C. Eikner.

"Resulting trusts arise where the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent, in theory of equity, appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title. In such case a trust results in favor of the person for whom the equitable interest is thus assumed to have been intended, and whom equity deems to be the real owner." *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437, quoting from *Bray* v. *Timms,* 162 Ark. 247, 271 and 272, 258 S. W. 338.

"* * * In *Murchison* v. *Murchison,* 156 Ark. 403-407, 246 S. W. 499, 500, we said: 'while it is necessary that the proof to establish a resulting trust should be clear, satisfactory and convincing, it is not essential that it be undisputed.' In *Reeves* v. *Reeves,* 165 Ark. 505, 264 S. W. 979, we held, quoting syllabus: 'In order to constitute a resulting trust, the purchase money or a specified part of it must be paid by another, or secured by another at the same time or previously to the purchase, and must be a part of that transaction.' " *Stacy* v. *Stacy, supra.*

The deed itself is the best evidence that a resulting trust was intended. In this deed there is a solemn recital that V. C. Wall paid the consideration of $200.00 and took the title in the name of Mrs. Susie C. Eikner. Mrs. Eikner's name does not appear again anywhere in this deed, although the name of V. C. Wall, as previously stated, appears several times in other vital portions of the deed. This court has held that a resulting trust can arise by implication of law and by the circumstance that the money of the real purchaser [Wall] and not that of the grantee [Eikner] in the deed forms the consideration. *Stacy* v. *Stacy, supra; Wilson* v. *Wilson,* 211 Ark. 1030, 204 S. W. 2d 479.

A resulting trust must be established by evidence that is clear, convincing and satisfactory. *Wilson* v. *Wilson, supra; Keith* v. *Wheeler,* 105 Ark. 318, 151 S. W. 284. We think the evidence in this case meets these requirements. Not only does the "Eikner Deed" reflect proof of a resulting trust, the subsequent quitclaim deed shortly thereafter from Wall to the Fifes reaffirms such intent of the parties.

However, where the purchase price is paid by one party, such as Wall in this case, and the title is taken in the name of another, such as Mrs. Eikner, this presumption of a resulting trust is rebuttable. *Dobbs* v. *Dobbs,* 225 Ark. 397, 282 S. W. 2d 812. On this issue the court found that Mrs. Eikner was never in possession of the "Eikner Deed"; that Mrs. Eikner did not recognize that she had any interest in the disputed property until 1953 when an agent for an oil company approached her about securing an oil and gas lease on the property in question, after which she deeded it to her daughter, Mrs. Darsow. There was no proof that Mrs. Eikner furnished the money for the consideration. According to Mrs. Darsow, Mrs. Eikner's brother was in El Dorado, Arkansas during 1923 and was using some of Mrs. Eikner's money to lease and purchase mineral interests in Arkansas. There is no proof that the brother knew Wall, but according to Mrs. Darsow, her mother was acquainted with Wall. The court also found there is no evidence or proof that Wall was the agent for the grantee, Mrs. Eikner, in this transaction.

We agree with the trial court that this proof is insufficient to rebut the proof of a resulting trust when considered in the light of the solemn recitals of the "Eikner" and "Wall" deeds.

Appellant contends that there was no consideration paid by Wall to the Fifes for the May 4, 1923 deed and, therefore, there can be no resulting trust in favor of Wall who did not pay any consideration. The answer to this argument is simple and brief. The deed from the Fifes to Wall recites:

"* * * for and in consideration of the sum of Two Hundred Dollars ($200.00) to us cash in hand paid by V. C. Wall of El Dorado, Arkansas, the receipt whereof is hereby acknowledged, * * *."

We have held that: "* * * Parol testimony is admissible to show the true consideration upon which a deed rests, *but may not be used to show there was no consideration.*" *Mitchell* v. *Smith, Adm.*, 206 Ark. 936, 175 S. W. 2d 201. [Emphasis added] See also *Toney* v. *Raines,* 224 Ark. 692, 275 S. W. 2d 771. The testimony of Mrs. Minnie Fife Shinpoch, widow of Ben Fife, that Wall did not pay the $200.00 as recited in the deed was inadmissible to destroy this resulting trust. Therefore, appellant offers no valid objection on this point.

A beneficiary of a resulting trust, such as Wall, may transfer his interest. *Honnett* v. *Williams,* 66 Ark. 148, 49 S. W. 495; Restatement of Trusts, 2d, § 407; Scott on Trusts, § 407. V. C. Wall had a right to reconvey to the Fifes all his beneficial interest that had been conveyed under the "Eikner Deed". This quitclaim deed terminated the interest of Wall and left Mrs. Eikner, who had the naked legal title, with no further interest in the disputed property. This reinvested in the Fifes title to the questioned property and made it subject to valid transfers by them to the appellees.

The appellant contends that even if the "Eikner Deed" created a resulting trust, Marie Darsow is still entitled to the one-half undivided interest as she is a *bona fide* purchaser of the interest from the trustee. It is true that a *bona fide* purchaser from the trustee takes the property free of the trust. *Ellis* v. *Nickle,* 193 Ark. 657, 101 S. W. 2d 958. The essential elements of a *bona fide* purchase are: (1) valuable consideration, (2) the absence of notice, and (3) the presence of good faith. *Manchester* v. *Goeswich,* 95 Ark. 582, 130 S. W. 526.

As stated by the trial court, the transaction was between the mother and daughter; the consideration was nominal with no independent evidence of payment of

the consideration; the daughter had actual knowledge that the mother did not have possession of the "Eikner Deed"; and Mrs. Darsow had record notice of the resulting trust in the "Eikner Deed" since such deed and the "Wall Deed" were recorded in 1923. Therefore, it cannot be said under the proof in this case that Mrs. Darsow is a *bona fide* purchaser.

Having carefully reviewed all the points relied upon by appellant, we are of the view that the trial court is correct and its decree is accordingly affirmed.

VICTOR BROADCASTING CO., INC. *v.* MAHURIN.

5-2914 365 S. W. 2d 265

Opinion delivered March 4, 1963.

Moses, McClellan, Arnold, Owen & McDermott, for appellant.

Catlett & Henderson, Griffin Smith, for appellee.

CARLETON HARRIS, Chief Justice. Southwestern Broadcasting Company, an Arkansas corporation, owned and operated Radio Station KVLC in Little Rock. Lake Broadcasting Company, an Arkansas Corporation, operated Radio Station KIKS at Sulphur, Louisiana. Southern National Insurance Company, likewise an Arkansas corporation, owned most of the stock in both broadcasting companies. Robert M. Saxon was the principal stockholder in

this company. Dale Mahurin, appellee herein, was manager of the two stations, and was a minority stockholder in each of the broadcasting corporations, as well as a member of the Board of Directors of each.

In October, 1960, Albert Stegall, representing persons desiring to buy a majority of the stock in each of the broadcasting corporations, commenced negotiations with Saxon for the purchase of such stock from the Southern National Insurance Company. Negotiations culminated in the execution of a contract on February 27, 1961. The prospective purchasers thereupon applied to the Federal Communications Commission for authority to operate the stations, and the applications were approved and the transfer of the stock made, together with the surrendering of the management of the companies, on June 1, 1961. In the meantime, Mahurin continued with his duties as manager, and remained on the Board of Directors of each company.

Following the applications to the Federal Communications Commission, Victor Broadcasting Company, Inc., was incorporated under the laws of this state, and at approximately the same time Victor Radio Company, Inc., was likewise organized under the laws of Arkansas, it being contemplated that the Southwestern Broadcasting Company stock (purchased by Stegall's principals) would be transferred to Victor Broadcasting Company, and the Lake Broadcasting Company stock (likewise purchased by Stegall's principals) would be transferred to Victor Radio Company. On June 15, 1961, a joint stockholders meeting was held between stockholders of Southwestern and Victor Broadcasting Company, at which time said stockholders voted to merge the two companies. On the same day, a similar stockholders' meeting was held between Lake and Victor Radio Company, at which time resolutions were passed authorizing the merger of those two companies. Mahurin was present at both meetings, and voted the shares that he owned in Southwestern, and 14 shares by proxy, for the merger of the first two mentioned companies; he voted the 6,000 shares that he owned in Lake Broadcasting Company and 2,800 shares

by proxy in favor of the merger of the last two mentioned corporations. The merger has never been completely perfected.

The services of Mahurin were terminated on June 20, and twenty days later, appellee asserted to Lake and Victor Radio Company that the attempted mergers were void, and demand was made upon Victor for the fair market cash value of the stock which Mahurin held in the Lake Company. On August 4, 1961, Southwestern instituted suit against appellee, alleging that the latter had converted various items belonging to the broadcasting company to his individual use. Mahurin answered, denied any wrongful acts, and asserted matters justifying the taking; a cross complaint was filed alleging that his vote in favor of the merger was obtained by the fraudulent acts of Southwestern and Victor Broadcasting Company; that representations had been made to him that there would be no changes in the management or policies of the company; that he had relied upon such material representations, and would have voted against the merger except for same, and have demanded payment in cash for his stock interest or provided by the laws of this state. Relief sought concluded with the prayer that he be awarded the fair cash value of his minority stock interest in Southwestern. On August 7, Lake Broadcasting Company filed a suit containing substantially the same allegations, and Mahurin filed an answer and cross-complaint similar to that mentioned above.

After the filing of various substituted pleadings and various amendments, and the substitution of some parties, the cases were consolidated and heard by the Chancery Court. On trial, that court dismissed the complaints of the complaining companies as being without equity, except for amounts admittedly owed the companies by Mahurin. As to the cross-complaint, the court found that the evidence clearly established that Mahurin was induced by fraud and misrepresentations to "part with the valuable right he had to require the payment to him of the cash value of his stock" as a condition to the mergers and "except for such fraud, misrepresentation and concealment the cross-complainant would have been entitled to

receive the fair value of his stock in cash, and that such fair value is the appropriate measure of cross-complainant's damages for the fraud which was perpetrated upon cross-complainant.'' Judgment was rendered for appellee against Victor Radio Company in the sum of $27,927.00 and against Victor Broadcasting Company in the amount of $622.67. The decree further provides that upon payment of the judgments, appellee's stock interest in Lake Broadcasting Company and Southwestern Broadcasting Company ''shall be terminated and cease, and cross-complainant, Dale D. Mahurin, is ordered and directed to deliver all of his stock in said corporations to their respective successors for the purpose of cancellations.''

From the decree so entered, comes this appeal. Appellants have abandoned their appeal insofar as it relates to the court's dismissal of the complaints filed against Mahurin, and the only question presented here is whether appellee was entitled to recover on his cross-complaints. While the facts as hereinbefore set out, appear somewhat complicated, the issue is actually quite simple and poses only the question, ''Is appellee entitled to receive the fair cash value of his minority stock and, if so, did the chancellor properly determine that value?''

Mahurin testified that when he learned Stegall's group intended to buy the majority interest in the radio stations, he talked to Stegall and a Mr. Tiberris about selling his stock to them, but was advised they did not want to buy his stock because they did not know anything about the radio business, were only buying as an investment, and it was their desire that he stay on and operate the stations. Appellee stated that Stegall assured him that he would have the same privileges, same salary, and same arrangements as previously. He exhibited a letter from Stegall, dated December 27, 1960, which welcomed Mahurin and other employees into the organization, and *inter alia* stated:

''We hope that each of you will remain in your present position and continue to render the dedicated and efficient service that you have in the past.

"I feel that some of your associates may be disturbed at the change of ownership of this stock, however, you may assure them that we plan no change in the management, staff or policy of either station and are looking forward to a long and happy association with each of you."

Mahurin obtained an attorney to prepare a contract of employment, which was done, but appellee stated that Stegall, when shown the contract, though commenting that it appeared to essentially contain the agreement reached, said that it would have to be sent on to a Mr. Muscat, who was out of this country at the time, for approval. The witness testified that, relying upon Stegall's assurances that he would be retained by the company, and that a contract would be entered into, embracing the terms of the one presented to Stegall by Mahurin, the latter voted for the merger. Appellee testified that except for Stegall's assurance, he would not have voted for the merger.

R. M. Saxon, substantially the owner of Southern National Insurance Company, testified that his company purchased KVLC in 1950 and KIKS in 1956, and that Mahurin had been employed as engineer and manager for a period of 13 years. Saxon stated that he, along with Mahurin and Charles W. Davis, constituted the directors of the two companies. He corroborated Mahurin's testimony that the purchasers assured appellee that he would be continued in his employment as manager, at the same salary, and under the same conditions of his (then) present employment. Saxon said that these assurances were given by Stegall and Tiberris.

Charles W. Davis, secretary-treasurer of Lake and Southwestern, likewise testified that the purchasers stated that they would not have bought the stations without being sure Mr. Mahurin would stay; that these statements were made in Mahurin's presence. He added that he saw the contract which Mahurin had caused to be prepared, and the contract embraced essentially the terms that had been offered to Mahurin by the purchasers. Davis testified that he learned about 15 days after the

new owners took over operations that Mahurin had been discharged and he (Davis) was shocked to hear of it. The witness was complimentary of Mahurin's management policies with the stations that he had operated.

Mr. Albert Stegall, secretary of Southwestern, Lake, Victor Broadcasting, and Victor Radio (subsequent to the purchase of the stock), testified that he made no representations whatever to Mahurin relative to the latter's voting for or against the merger. He stated he told Mahurin that the contract which the latter submitted was ridiculous but that he would submit it to the proper people who had authority to sign it. Relative to the letter that he had written to appellee, the witness stated that the purpose of the letter was to allay any apprehension that employees of the staff might have as to their future status under the new management. He testified that Mahurin was removed from his position because a partial audit uncovered additional accounts payable that the purchasers had not theretofore known about; that unpaid accounts in the amount of approximately $15,000.00 were found, and employees that the purchasers had no prior knowledge of, were listed on the books.

Appellants first contend that the evidence does not justify the court's finding that appellee should be awarded compensation for his minority stock interest. It is argued that there was no fraud, because at the time the promise of continued employment to Mahurin was made, appellants actually were sincere in their representations, and intended to retain Mahurin as manager; that the change of mind occurred because of the alleged irregularities appearing after the audit. Furthermore, appellants assert that the promise related to an event to occur in the future, rather than relating to a present or preexisting fact, and that under our cases, any representations and promises as to future conduct, are merely statements of opinion as to what the promissor intends to do, and the party to whom they are made has no legal right to rely on such representations. We do not agree with either of these contentions. Discussing the last first, appellants' argument that fraud cannot be predicated upon representations of events to occur in

the future is, generally speaking, sound. But this rule of law does not apply if one makes a false promise, knowing at the time that it will not be kept, and injury results to the person relying on same. In *Coleman* v. *Volentine,* 211 Ark. 594, 201 S. W. 2d 592, this court said, "Ordinarily an action for fraud and deceit may arise only from false representation as to a past or existing situation, but there is authority for the holding that where one makes a false promise, knowing at the time that it will not be kept, the person injured thereby may have relief in action for fraud."

In *Wilson* v. *Southwestern Casualty Ins. Co.,* 228 Ark. 59, 305 S. W. 2d 677, it is likewise stated:

"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."

Our most recent holding to this effect was *Thomason* v. *Hester Mobile Home Mfg.,* 235 Ark. 529, 361 S. W. 2d 94. As to the contention that the representation of continued employment was originally made in good faith, we are of the opinion that the weight of the evidence is to the contrary. Proof reflects that approximately a week after appellee voted for the merger, appellants offered to purchase Mahurin's stock at approximately 50% ($12,996) of the value finally allowed by the chancellor. Mahurin asserts that the representations were made to him in order to obtain his favorable vote for the merger, and then to purchase his stock for less than half its value. Appellee states in his brief:

"Is it not also logical that such assurances which induced his cooperative vote were made with absolutely no intention of performance when only six days later he peremptorily received an offer to purchase, which in truth was a demand that he sell his stock, and upon declining, was discharged for sham reasons."

Be that as it may, we think the circumstances justified the chancellor in reaching his conclusion. It is quite noticeable that though appellants apparently were most

anxious to retain Mahurin at the outset, his services were terminated within two weeks after he had cast his vote in favor of the merger. To say the least, this was most unusual, particularly when it would appear that the new owners had a prior opportunity to examine the records; in fact, several months intervened during the period of negotiations, and the final consummation of the purchase. Apparently, the purchasers had every opportunity to investigate appellee for they had repeatedly told him that they desired to retain his services. During the trial, Stegall was asked, "What did you know about Mr. Mahurin on June 21 you did not know on June 15, 1961?" The witness answered, *"I do not know what I would have known specifically."*

Also, there is some significance in the fact that, while appellants contended that Mahurin had misappropriated funds, suit was not instituted by the corporations until after receiving appellee's notice of July 20, wherein Mahurin asserted that the attempted mergers were void, and made demand for the fair market cash value of the stock which he held in the Lake Company. It might be added that, although this litigation was commenced by the filing of the complaints against Mahurin, and though the chancellor found such complaints were without equity and dismissed them, that ruling has not been appealed to this court, which possibly is indicative of the strength (or lack of it) of appellants' allegations in the first place. At any rate, (we hold that the chancellor's finding that fraud was practiced upon Mahurin, and that appellee relied upon the fraudulent representations to his detriment, is not against the preponderance of the evidence.)

Appellants further urge that appellee is not entitled to recovery because he did not comply with the statutory provisions relative to receiving payment for his stock. This argument has reference to Section 64-703, Ark. Stats. 1957 Replacement, which provides the procedure for payment of the fair cash value of the stock of any stockholder voting against the merger. We do not deem a discussion of this contention necessary, inasmuch as,

in our view, the provisions of that section, and remedies therein granted, are not exclusive where fraud is present. Minority stockholders can maintain a suit for relief if fraud is practiced. *Johnson* v. *Baldwin,* (S. C.), 69 S. E. 2d 585; *Alabama Fidelity Mortgage & Bond Co.* v. *Dubberly, et al,* (Ala.), 73 So. 911; *May* v. *Midwest Refining Co.,* (Me.), 121 F. 2d 431.

It is further asserted that the merger has never been consummated and Mahurin still has all of the stock in Lake and Southwestern that he ever had. This argument can be of no aid to appellants. For one thing, the record reflects that everything necessary to effect the merger has been done except for the technical filing with the Secretary of State; Mr. Joseph Peter Trantino testified that the merger took place on June 15, 1961, but, "Due to the fact that the actual book merger did not take place until August 18, I was elected President of all four corporations on July 3, 1961." He stated that he was the custodian of the records of all four companies. For that matter, it would appear that appellants are estopped by the pleadings to assert that the merger was not completed, for the record reflects that Southwestern Broadcasting Company amended its complaint as follows:

"That the original plaintiff in this action Southwestern Broadcasting Company was merged into plaintiff corporation on or about the 18th day of August, 1961.

"That the style of this action be changed to reflect the plaintiff to be Victor Broadcasting Company, Inc., and that Victor Broadcasting Company, Inc. be substituted for Southwestern Broadcasting Company as plaintiff. That the amended complaint be amended only in this particular and in accordance with the style of this pleading."

An identical amendment to the complaint was filed relative to Lake Broadcasting Company and Victor Radio Company. Having asserted the merger of the corporations, appellants cannot now be heard to deny that fact.

Finally, it is contended that the chancellor used an erroneous method in arriving at the fair cash value of

Mahurin's stock. The stock is not regularly traded, and there appears no set formula to determine the "fair cash value." The court reached the figure allotted on the basis of the testimony of Charles W. Davis. The record reflects that Davis was asked the following question, relative to the Lake stock: "Based on the adjusted[1] purchase price of the contractual purchase price of the majority stockholders, in KIKS, what is the fair cash value of that stock?" The answer was, "Four point eight, five space two." The witness then stated that Mahurin owned 6,000 shares and that the value of his stock, based upon the Saxon sale (as adjusted) to Stegall and his principals, was $29,112. He likewise stated that, using the same formula, Mahurin's three shares of stock in Southwestern had a value of $1,644.00.

We think, since there is no specified formula for determining the "fair cash value" of the stock in question, that the chancellor, under the facts in this case, was justified in basing this value on the testimony of Davis.

Finding no error, the decree is affirmed.

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[1] This, according to appellee's brief (and which is not disputed by appellants) has reference to a compromise figure reached by the appellants and the Saxon interests. From the brief:

* * * "appellants after first entering into a written contract establishing the per share value subsequently filed a law suit alleging misrepresentations by the Saxon interest and that per share value was then adjusted and compromised by a lower figure. Since appellants, of necessity, acquiesced in the compromise of the suit against Saxon which reduced the contractual value per share they certainly are in no position to complain of the adoption by the Chancellor of the same value they acquiesced in after the Saxon dispute." * * *

CAMPBELL *v.* BASTIAN.

5-2916 365 S. W. 2d 249

Opinion delivered March 4, 1963.

H. G. Partlow, Jr., for appellant.

Reid & Burge, Gardner & Steinsiek, for appellee.

Ed. F. McFaddin, Associate Justice. This case arises from a traffic mishap between two trucks: one was owned by Appellant Campbell and driven by James Ellis; and the other was owned by appellees, Bastian Truck Service (hereinafter called "Bastian"), and driven by Dallas Peters. Both vehicles were proceeding in the same direction. The Campbell truck being in front, undertook to turn left to enter the driveway of the Campbell home; and the Bastian truck, undertaking to pass the Campbell vehicle, struck it and caused damage to both vehicles. Bastian filed action for damages; Campbell denied liability and cross complained for his damages. From a jury verdict and judgment for Bastian, Campbell brings this appeal, urging the points now to be discussed.

I. *Continuance.* The traffic mishap occurred in April 1960; the action was filed in September, 1960; and the case was continued in both the January 1961 term, and the June[1] 1961 term. In the January 1962 term Campbell filed motion for continuance because of the absence

[1] The terms of the court are fixed by § 22-310 Ark. Stats. In referring to these as the "June" and "January" terms, we are using convenient words for identification.

of James Ellis, who was the driver of the Campbell vehicle in the traffic mishap; and the cause was continued for the term. When the new term started in June 1962, Campbell again moved for continuance because of the absence of James Ellis; the motion was denied; and the cause was tried on June 18, 1962. The denial of the motion for continuance in June 1962 is the point here argued.

We find no error committed by the Trial Court in denying the motion for continuance. The record shows that Campbell did not know the present whereabouts of Ellis and could give no assurance that he would be present if a further continuance should be granted. Campbell had obtained one or more continuances because of the absence of Ellis; yet Campbell, even in June 1962, had never located Ellis and could not say when, if ever, Ellis would be present. The Trial Court did not abuse its discretion in overruling the motion. See *Black & White Cab Co.* v. *Doville,* 221 Ark. 66, 251 S. W. 2d 1005, and cases there cited.

II. *Campbell's Motion For Instructed Verdict.* At the close of the plaintiffs' case, Campbell moved for an instructed verdict. This motion was denied and such ruling is assigned as error. We find no merit in this assignment. When the Court denied Campbell's motion for an instructed verdict at the close of Bastian's case, Campbell proceeded to introduce his evidence, but did not renew his motion for an instructed verdict at the close of the entire case. In such a situation, Campbell's original motion was waived. *Grooms* v. *Neff,* 79 Ark. 401, 96 S. W. 135; *Ft. Smith Cotton Oil Co.* v. *Swift,* 197 Ark. 594, 124 S. W. 2d 1; and *Granite Mt. Rest Home* v. *Schwarz,* 236 Ark. 46, 364 S. W. 2d 306 (Case No. 2840, Opn. February 4, 1963). We add, however, that even if the motion had been made at the end of the entire case, it should have been overruled.

III. *Refusal of Requested Instruction.* Campbell presented to the Court his requested Instruction No. 6, which contained this language:

"(B) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable or prudent having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

The refusal of the Court to give the above instruction is assigned as error; but we find this assignment to be without merit. The evidence showed that the Bastian truck was undertaking to pass the Campbell truck when the Campbell truck turned to the left; and the Court gave a series of instructions[2] on the duty of a vehicle overtaking and undertaking to pass another vehicle proceeding in the same direction. This was not a case of a vehicle following behind another vehicle, but rather, a case of passing a vehicle; and it would have confused the issues for the Court to have given the "following too close" instruction in a case where all the testimony showed that it was an "overtaking and passing" situation.

IV. *Agency Of James Ellis.* The Trial Court instructed the jury that James Ellis *was the agent of Campbell* in driving the Campbell truck at the time of the collision; and Campbell insists that such agency was a question for the jury. In other words, Campbell claims that the question of agency should have been submitted to the jury rather than declared as a *matter of law.* It is true

[2] Among other instructions, there was the Court's Instruction No. 8 (given without objection), which contained this language:

"(A) The operator of the vehicle in front has the superior right to use of the highway and the driver of the rear vehicle in handling of his vehicle must recognize the superior right of the vehicle in front although the forward vehicle operator is not relieved from the duty of exercising ordinary care for his own safety and the safety of others.

"(B) No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the righthand side of the roadway before coming within 100 feet of any vehicle approaching from the opposite direction.

"(C) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

"A signal of intention to turn right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning."

that, ordinarily, agency is a question of fact to be determined by the jury; but agency becomes a question of law for the court when the material facts concerning it are not disputed and only one reasonable conclusion can be drawn therefrom. 3 C.J.S. p. 325, "Agency" § 330. As the Court of Appeals of Kentucky said in *Wolford* v. *Scott,* 257 S. W. 2d 594:

"Where the facts are in dispute and the evidence is contradictory or conflicting the question of agency, like other questions of fact, is to be determined by a jury. However, where the facts are undisputed, the question becomes one of law for the court. *Horne* v. *Hall* (Ky.), 246 S. W. 2d 441."

The Supreme Court of Vermont, in *Luce* v. *Chandler,* 195 A. 246, an automobile case, used this language:

" 'Where the facts are undisputed and only one inference can reasonably be drawn from them, the court must determine whether they create an agency.' 1 Meacham on Agency (2d ed.) § 295. Clearly the evidence above admits of no opposing inference and is so conclusive in character that this question became one of law for the court rather than one of fact for the jury.' "

With the rule thus stated, we now examine the evidence to see if there are any material facts in dispute regarding agency; and we find that the admission made by Campbell when he was testifying destroys the foundation of his argument on this point. Here is Mr. Campbell's testimony as to how Ellis happened to be driving the Campbell truck at the time of the traffic mishap:

Q. "What was the purpose of Mr. Ellis driving your truck?

A. "He didn't have any account to drive it for me. It was parked by his house and I asked would he mind driving it out there for me and I would pick him up."

This testimony by Campbell made Ellis his agent. In the American Law Institute's Restatement of the Law of Agency, § 1 Comment A, this appears:

"The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control."

In 2 Am. Jur. p. 13, "Agency" § 2, this appears:

"An agency may be defined as a contract, either express or implied, upon a consideration, for a gratuitous undertaking, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which that other assumes to do the business and render an account of it."

In Black's Law Dictionary an agent is defined as:

"A person authorized by another to act for him, one entrusted with another's business."

Campbell testified that he asked Ellis to drive his truck from Ellis' house to Campbell's house. Ellis was in the process of driving the truck on the prescribed route and was turning into Campbell's driveway when the traffic mishap occurred. When an owner asks another person to drive a vehicle for him to a certain place and such requested person undertakes to comply with the request and is on the prescribed route, it is clear, as a matter of law, that the driver in such situation is acting as the agent of the owner and not as a bailee of the vehicle. Because of Campbell's testimony as herein quoted, we find no error committed by the Trial Court in declaring as a matter of law that Ellis was the agent of Campbell.

Affirmed.

HOLIMAN *v.* DOVERS.

5-2883 366 S. W. 2d 197

Opinion delivered March 4, 1963.

M. C. Lewis, Jr., for appellant.

Hall, Purcell & Boswell, for appellee.

GEORGE ROSE SMITH, J. This is a dispute between two factions in the Landmark Missionary Baptist Church of Traskwood, Arkansas. The appellants, the minority group, brought suit to enjoin the pastor, Elder A. Z. Dovers, and the majority group from using the church property for the preaching and teaching of doctrines fundamentally contrary to the Landmark Missionary Baptist faith. The chancellor refused to grant the relief sought, finding that the deviations which had occurred were not of sufficient consequence to call for the intervention of equity.

This church was organized in 1902 and had existed for almost sixty years when the present controversy, centering upon the pastor's theological views, reached a crisis in 1961. At a church meeting in August of that year the majority, by a vote of 54 to 47, defeated a motion to dismiss the pastor. An ensuing attempt to censure the minority failed, but a week later the majority directed the church clerk to notify the minority members that they would have no voting privileges in the church until they had apologized for their conduct. The minority reacted to that letter by filing this suit a few days later.

Before turning to the proof we may note that the controlling principles of law are not open to serious dispute. The civil courts are not concerned with mere schisms stemming from disputations over matters of religious doctrine, not only because such questions are essentially ecclesiastical rather than judicial but also because of the separation between the church and the state. And even when property rights are involved the rival factions may be remitted to their remedy within the denomination if its form of government is such as to permit an appeal to higher ecclesiastical authority.

The situation is different, however, in the case of self-governing congregational churches, such as the Landmark Missionary Baptists. Here the courts do not hesitate to assume jurisdiction when a schism affects property rights, for in this form of church government each local congregation is independent and autonomous. There is no recourse within the denomination. See *Elston* v. *Wilborn,* 208 Ark. 377, 186 S. W. 2d 662, 158 A. L. R. 179.

Although congregational churches are governed by a majority vote of the membership, the church property must be devoted to church purposes. We mentioned this matter in *Hatchett* v. *Mt. Pleasant Baptist Church,* 46 Ark. 291, saying: "In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church." In a later case we added that the majority controls unless there has been "such an abrupt departure from congregational principles" as to discredit

the ruling group. *Ables* v. *Garner,* 220 Ark. 211, 246 S. W. 2d 732.

It is firmly settled that the controlling faction will not be permitted to divert the church property to another denomination or to the support of doctrines, usages, and practices basically opposed to those characteristic of the particular church. *Davis* v. *Scher,* 356 Mich. 291, 97 N. W. 2d 137, reviewing many cases; *Reid* v. *Johnston,* 241 N. C. 201, 85 S. E. 2d 114. As the court said in *Dix* v. *Pruitt,* 194 N. C. 64, 138 S. E. 412: "In other words, a majority in a Baptist Church is supreme, or a 'law unto itself' so long as it remains a Baptist church or true to the fundamental usages, customs, doctrine, practice, and organization of Baptists. For instance, if a majority of a Baptist Church should attempt to combine with a Methodist or Presbyterian Church, or in any manner depart from the fundamental faiths, usages, and customs which are distinctively Baptist and which mark out that denomination as a separate entity from all others, then, in such case, the majority could not take the church property with them, for the reason that they would not be acting in accordance with distinctively Baptist principles. Or suppose a majority of a Baptist Church should determine to abandon immersion and receive members without either an individual profession of faith or baptism, such majority could not take possession of the church property and exclude the minority who remained true to the fundamental faith and practice." In harmony with these views equitable relief was granted in *Franke* v. *Mann,* 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856, where, as in the case at bar, the controlling group engaged a minister whose beliefs were contrary to those of the sect in question.

The extensive record before us consists mainly of testimony explaining the Landmark Missionary Baptist articles of faith. Among the plaintiffs' many witnesses were nine leading clergymen of this particular sect, whose total ministerial experience exceeded 230 years. These men were in complete agreement about a number of basic doctrines of the church, such as the view that a person who has been saved cannot later become lost, the belief that the un-

pardonable sin (the rejection of Christ) can be committed only by the unsaved, and several other religious tenets that we need not enumerate.

Elder Dovers was the only witness for the defendants. He was thirty-five years old at the time of the trial. His background of experience included an eighth-grade education, seven years work in a filling station, a half year of study in a Missionary Baptist seminary, and seven years in the ministry. Elder Dovers testified at great length and was entirely candid in conceding that he believed and preached doctrines contrary to the Landmark faith as understood by the plaintiffs' witnesses. This pastor derived many of his beliefs from his own study of the Bible. He taught his flock that a person who has been saved can later be lost, that the saved can be guilty of the unpardonable sin, and that he interpreted a number of other articles of faith in a way that differed from the orthodox Landmark Missionary Baptist thinking.

It being substantially undisputed that Elder Dovers' beliefs were contrary to the accepted doctrines and usages of the church, the only remaining question is whether the differences are so important as to justify the intervention of a court of equity. As we have indicated, the variance must be fundamental; relief will not be granted where the division is based upon doctrinal distinctions that are not vital or substantial. *Guin* v. *Johnson,* 230 Ala. 427, 161 So. 810; *Beard* v. *Francis,* Tenn. App. 309 S. W. 2d 788.

Whether particular articles of belief are so fundamental as to be of the very essence of a given creed is evidently a question to be decided by the church itself; the civil courts cannot assume independent authority to arbitrate the niceties of ecclesiastical disputations. Hence we must be guided solely by the evidence in the case, as it sheds light upon the position traditionally taken by the Landmark Missionary Baptist Church.

We find the decided weight of the testimony to be against the chancellor's conclusion that the doctrinal differences disclosed by the evidence are unimportant. Witness after witness testified that these are cardinal beliefs in this church, that anyone who rejects them is not a Land-

mark Baptist, and that the teachings of Elder Dovers are heresy. Several of the minority group felt so strongly about the matter that they had withdrawn from the Traskwood church before the trial. The situation is rather like that described in *Parker* v. *Harper,* 295 Ky. 686, 175 S. W. 2d 361: "The evidence in the case at bar is that both local groups do regard the grounds upon which they have divided as very vital and substantial. Other than their declarations, the sorry fact is that they have proven to be important and potent enough to break up the struggling little church . . . We are of the opinion there was such departure from the faith of the founders of the church at Martin as calls for the protection of their property rights by the courts."

In reaching our conclusion we stress the fact that we have no concern whatever with the merits of the theological differences between these parties. The majority members of this church or of any church are of course at liberty to adopt any religious belief they choose, whether it be a liberal Baptist theology, Presbyterianism, Greek Catholicism, or Mohammedanism. Morever, the majority members have a similar right to engage a pastor who will preach the doctrines of their choice. But the vital point is that the majority are not entitled to devote the property of the Landmark Missionary Baptist Church at Traskwood to a faith contrary to that for which it was dedicated. We are aware of no case holding that the majority members of a church have the absolute power to use its property for any purpose they select; certainly no such case has been cited. If the courts are not to afford any protection for property rights in such a situation then there is literally no limit to the purposes to which the majority might divert the church property.

The decree must be reversed, but it seems unnecessary for the appellants to be granted the sweeping relief sought by their complaint, by which all the majority members would be enjoined from taking part in the control of the church property. We think it to be sufficient for Elder Dovers, whose ministry has been the central point of controversy, to be restrained from acting as

pastor of the church. This limitation upon the court's decree may aid the congregation in regaining its original unity.

Reversed.

McFaddin, J., dissents.

[Supplemental opinion on rehearing delivered April 15, 1963, p. 460.]

Ed. F. McFaddin, Associate Justice (dissenting). The Majority of the Court is deciding questions relating to the religious doctrines of the Landmark Missionary Baptist Church of Traskwood, Arkansas; and I desire to most vigorously disassociate myself from determining such religious questions. I maintain that it is no part of the prerogatives or duties of a Justice of the Arkansas Supreme Court to pass on religious questions.

To buttress its conclusions as to the preponderance of the evidence on the question of what are the fundamental doctrines of the church in question, the Majority says that the preacher, Reverend Dovers, had "an eighth grade education, seven years work in a filling station, a half year of study in a Missionary Baptist Seminary, and seven years in the ministry"; whereas the witnesses for the minority faction in this church dispute on doctrine were "nine leading clergymen of this particular sect, whose total ministerial experience exceeded 230 years." Surely the Majority is not totally unfamiliar with the statement, "A little child shall lead them"![1]

This Court should not decide what are the fundamental doctrines of the Landmark Missionary Baptist Church of Traskwood. Courts are not supposed to decide questions of religious doctrine. In *Elston* v. *Wilborn*, 208 Ark. 377, 186 S. W. 2d 662, this Court[2] said:

"Many questions are mentioned by appellants, such as the calculation and disposition of the tithe, the form of church government, the right of the pastor to 'disfellowship' a member, and other issues of doctrine. Judicial tribunals must leave such matters to ecclesiastical

[1] Isaiah 11:6.

[2] The Court was at that time composed of Chief Justice Griffin Smith, and Justices Frank G. Smith, Edgar L. McHaney, J. Seaborn Holt, R. W. Robins, Ed. F. McFaddin, and Minor W. Millwee.

writers. In the United States of America, where Church and State are separate, the courts have steadily asserted their refusal to determine any controversy relating purely to ecclesiastical or spiritual features of a church or religious society. The courts intervene only to protect the temporalities of such bodies, and to determine property rights."

I maintain that we would do well now to leave matters of doctrine to ecclesiastical writers. Furthermore, in *Elston* v. *Wilborn,* we classified churches as regards the form of church government into four groups, one of which was the congregational group, just as is the Landmark Missionary Baptist Church in the case at bar; and we quoted from 45 Am. Jur. 764:

"Thus, when a church, strictly congregational or independent in its organization, is governed solely within itself, either by majority of its membership or by such other local organism as it may have instituted for the purpose of ecclesiastical government, and holds property either by way of purchase or donation, with no other specific trust attached to it than that it is for the use of the church, the numerical majority of the membership of the church may ordinarily control the right to the use and title of such property."

It is conceded by all parties that the Landmark Missionary Baptist Church of Traskwood is a *congregational* church and, as such, I contend should be governed by the will of the majority. The church property here in issue was deeded in one instance to the "Landmark Missionary Baptist Church of Traskwood, Arkansas"; in another instance to the "Deacons of the Landmark Missionary Baptist Church of Traskwood, Arkansas"; and in another instance to the "Trustees of the Missionary Baptist Church of Traskwood, Arkansas." There was no prohibition in the deeds forever precluding the majority of the church from selecting a preacher who preached as the majority decided, and that is the only real question in this case: is the majority free to select the preacher that it desires?

In *Booker* v. *Smith,* 214 Ark. 102, 214 S. W. 2d 513, there was a dispute between two factions in the Antioch Baptist Church. The opinion recites:

"From the evidence in the record, the following facts appear: In 1902, there arose a dispute among some of the Baptist churches in Arkansas as to the handling of money for mission purposes. One group to the dispute was called 'Convention Baptists,' and the other group was called 'Landmark Baptists.' . . . The dispute between the Landmark Baptists and the Convention Baptists finally came to the surface in the Antioch Church in 1924. In September of that year, at a regular meeting of the church, there was a vote taken to determine whether the Antioch Church would adhere to the Convention Baptists or to the Landmark Baptists; and the vote was 31 for the Convention Baptists and 14 for the Landmark Baptists. . . . "

The dispute in that church as to how the money should be handled for mission purposes was probably as severe as is the dispute in the case at bar, relating to the preaching of Pastor Dover, but in that case we said: "Thus, in September, 1924, the Antioch Church, by a majority vote, adhered to the Convention Baptists." We upheld the right of the majority; and that is what I vote to do in the case at bar.

The Majority Opinion cites cases from other jurisdictions to support the conclusion that the majority in a congregational church cannot rule if it is not adhering to the fundamental faith and practice. I admit there are such cases from other jurisdictions; there are Annotations in 8 A.L.R. 105 and in 70 A.L.R. 75, on facets of this question; but I maintain that Arkansas should not align itself with those other states. We should continue to adhere to what our own cases[3] have held, through the

[3] Here are some cases from the Arkansas Supreme Court involving congregational churches; and in each instance — despite any dicta therein contained — we have always upheld the majority faction: *Hatchett* v. *Mt. Pleasant Baptist Church,* 46 Ark. 291; *Monk* v. *Little,* 122 Ark. 7, 182 S. W. 511; *Elston* v. *Wilborn,* 208 Ark. 377, 186 S. W. 2d 662; *Booker* v. *Smith,* 214 Ark. 102, 214 S. W. 2d 513; *Ables* v. *Garner,* 220 Ark. 211, 246 S. W. 2d 732; *Chambers* v. *Jones,* 222 Ark. 596, 262 S. W. 2d 285; *Rush* v. *Yancey,* 233 Ark. 883, 349 S. W. 2d 337.

years, as regards congregational churches; we have supported the vote of the majority. I dislike any other conclusion.

In *Ables* v. *Garner,* 220 Ark. 211, 246 S. W. 2d 732, there was an attempt to have this Court decide a doctrinal dispute in a Landmark Missionary Baptist Church; and in refusing to overturn the majority vote of the congregation regarding the disputed issue, we said: "The same majority now says it has not abandoned, or substantially deviated from the faith . . . " In short, the majority of the particular church was allowed to determine its faith; but in the case at bar, this Court is allowing some preachers who are not members of the Landmark Missionary Baptist Church of Traskwood to determine what *should be* the faith of the majority of that church. These two sentences, used by Judge Battle in *Hackett* v. *Mt. Pleasant Baptist Church,* appear to me to correctly state the rule:

"The Mt. Pleasant (colored) Baptist Church, it appears, is a congregational church. The majority had the right to control in the church government and to select its pastor and control its house of worship."[4]

To start settling doctrinal questions in congregational church disputes is to embark on a sea of religious turmoil that may ultimately result in shipwreck. Certainly the settling of doctrinal disputes is no part of the duties or prerogatives of Justices of the Arkansas Supreme Court. Heretofore we have followed the principle of "majority rule." That is the way I would dispose of all congregational church questions; so I dissent from the holding of the Majority in the case at bar.

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[4] In *Monk* v. *Little (supra),* Justice Hart said of the opinion in *Hatchett* v. *Mt. Pleasant Baptist Church:* "The opinion in the case was delivered by Judge Battle, who was specially fitted to speak on the subject, not only because of his learning and eminence in the law, but also because of his long and close connection with the Baptist faith."

Opinion delivered March 4, 1963.

[redacted]

Claude Cooper, W. B. Howard, for appellant.

Jack Holt, Jr., Attorney General, by, *Thorp Thomas* and *Russell J. Wools,* Asst. Attorneys General, for appellee.

PAUL WARD, Associate Justice. Appellant, M. L. Criner, was charged in a two count indictment with having forged the name of "Sam Simmons" on a check drawn on The Farmers' Soybean Corporation of Blytheville and with uttering the same, all with the intent to defraud said corporation out of its money and property. After a lengthy trial the jury found appellant guilty on both counts. The court fixed the punishment at six years on each count and pronounced judgment accordingly with

the terms to run concurrently. From said judgment appellant now prosecutes this appeal, asking a reversal on four separate grounds hereafter discussed.

Since appellant does not question the sufficiency of the evidence to sustain the verdicts, we deem it sufficient for this opinion to make only such a summary abstract of the testimony as is necessary to an understanding of the issues. Appellant was an employee and also the assistant manager of said corporation which buys and stores soybeans, wheat and other grains raised in that vicinity. He had authority to weigh grain purchased for the company and to issue checks to the sellers. Apparently the theory of the prosecution was that appellant would "buy" grain from a fictitious seller, sign a check to the "seller", forge the name of the fictitious payee on the back of the check, and then cash the check and keep the money. Treating the testimony in the light most favorable to sustain the convictions, we find substantial evidence to support the jury in finding: Appellant signed a company check in the amount of $529.90, dated October 19, 1960, payable to "Sam Simmons"; The name of the payee represented a fictitious person; Appellant wrote the name "Sam Simmons" on the back of the check; Appellant then presented the check to a teller in the First National Bank in Blytheville, received the amount of money above mentioned, and kept same.

One. The first point urged by appellant is: "The court erred in refusing to allow appellant to take the deposition of Bud Neal, a non-resident witness." At the prior term of court appellant had been tried and acquitted of a charge similar to this one, and Bud Neal (a resident of Missouri) was present as a witness. The trial in the case on appeal was set for (Thursday) April 5, 1962. On the day before (April 4) appellant filed a motion for continuance until the next term of court in order to take the deposition of Neal as a material witness. In the motion it is stated that Neal would not come voluntarily to testify but was ready to give his deposition. The required affidavit was attached, and due diligence was alleged. The trial court denied the motion, and no error based on the denial is now urged.

Appellant's motion for a continuance (above mentioned) was denied on Wednesday, April 4, 1962. The trial began the following morning (Thursday) and continued until 4 p.m. on Friday (the next day) at which time the State rested its case, and court recessed until the following Monday morning, April 9. At 7:30 a.m. Saturday (April 7) appellant filed an affidavit in compliance with Ark. Stats. § 43-2011 and requested the presiding judge to give him permission to take the deposition of Neal. The judge refused to grant the request at that time, but did give appellant a hearing on the following Monday after the trial had been resumed. At that time the trial judge denied the request on the ground that the application ". . . was not made at the proper time and with due diligence."

We think the trial court was correct in denying appellant's application to take the deposition of Neal, a non-resident, considering the applicable law and the facts of this case. In the case of *Jones* v. *State,* 205 Ark. 806, 171 S. W. 2d 298, we had occasion to interpret §§ 3946-49 of Pope's Digest which is the same as § 43-2011 relied on by appellant, and we held due diligence was a prerequisite on the part of the applicant. Some of the language there used is particularly applicable here.

"The defendant in the case at bar, in filing a motion to take depositions was seeking a continuance by indirection, because the granting of the motion would have gained for him the continuance that had been denied."

Appellant has no quarrel with the *Jones* decision, but does say: "We simply contend that we did exercise diligence on our motion for the taking of the deposition." We are wholly unable to agree with appellant in the above statement. Not only does the timetable of events preceding the application (as above set out) strongly indicate lack of diligence on the part of appellant, but the record is replete with testimony to the effect that appellant knew or should have known months before the trial that Neal would not be present at the trial to testify in person.

Two. We see no merit in appellant's argument of former jeopardy and *res judicata.* It was shown that appellant was tried and acquitted on a similar charge in the same court about five months previously. In that case appellant was charged with having forged the endorsement of G. D. Renfro to a check (drawn on the same corporation as in the present case) and having uttered the same. During that trial several checks drawn on the same company (including the Simmons check) were introduced by the State on the theory that they showed a common plan, scheme and method of operation on the part of appellant. There can be no contention that appellant is now being tried for the same offense for which he was formerly tried. Obviously it is possible for him to be innocent of forging the Renfro check and still be guilty of forging the Simmons check. In the case of *Binganan* v. *State*, 181 Ark. 94, 24 S. W. 2d 969, we said: " 'The test is . . . whether he [the defendant] has been put in jeopardy for the same offense.' " See also: *Johnson* v. *State,* 199 Ark. 196, 133 S. W. 2d 15.

Three. It is here contended that the court erred in allowing a State's witness, who was not an expert, to express an opinion on the similarity of handwriting. Briefly, the facts and circumstances upon which this contention is based are as follows: John Caudill, a witness for the State, and the secretary of the Soybean Company, was shown a number of questionable checks which had been written on his company by appellant. He stated that appellant had a very distinctive signature which made it easy to recognize his handwriting, and that to a layman or ordinary person it was apparent that the same person who had written the face of the checks had endorsed them. It was then objected that the witness was not an expert. The State's attorney said: "That is correct." After another objection was made the court looked at the checks and again overruled the objection. We do not think the court committed reversible error in permitting the witness to testify. That the witness was familiar with appellant's handwriting is shown by his statement that it was distinctive and easily recognized. In 20 Am. Jur. Evi-

dence § 837, at page 701, in speaking of "Qualification of Witness" we find:

"It is necessary, in order that a lay witness may be qualified to express an opinion upon an issue of the genuineness of a disputed signature or handwriting, that it appear that he have some familiarity with the handwriting of the person in question . . . Of course, the opinion of a witness as to the genuineness of a signature, based upon limited opportunities for knowledge of the handwriting of the person whose signature is in question, may have but little probative value, but it is admissible nevertheless."

In the case of *Walsh* v. *Fairhead, Executrix,* 215 Ark. 218, 219 S. W. 2d 941, we held, in substance, that a non-expert witness may testify as to his opinion after stating the facts upon which the opinion is based. See also *Naylor* v. *Eagle,* 227 Ark. 1012, 303 S. W. 2d 239.

Four. Finally, appellant says the court erred in giving Instruction No. 7-A because it was a comment on the evidence. The instruction reads as follows:

"You are to consider and try this case solely and wholly upon the evidence adduced herein and upon the instructions of law given herein, and you are not to consider any reference to any former trial as it is incompetent herein."

Appellant objected to the instruction but was overruled by the court. The attorney for appellant, who incidentally did not participate in the trial of the case, makes a strong written and oral argument to show the instruction was prejudicial. However, we are not at liberty to rest our decision on the validity or invalidity of that argument since appellant did not save exceptions to the ruling of the court. In the early case of *St. Louis Iron Mountain & Southern Ry. Co.* v. *Raines,* 90 Ark. 482, 119 S. W. 266, this Court, in dealing with a similar situation, said:

"But the appellant is in no attitude to complain of the action of the court in refusing to do this; for it did not save any exception to the ruling of the court on that point. To render an assignment of error available on

appeal, an exception must not only be saved at the trial to the ruling of the court, but the exception must be preserved in the motion for a new trial."

This rule has been consistently followed or approved. Act 555 of 1953 changed the rule as it applies to civil cases but not as to criminal cases. See *Cotton* v. *Ingram,* 114 Ark. 300, 169 S. W. 967; *Harvey et al* v. *Kirk,* (Ark.) 168 S. W. 2d 827; *Wiley* v. *State,* 234 Ark. 1006, 356 S. W. 2d 240; and *Carnal* v. *State,* 234 Ark. 1050, 356 S. W. 2d 651.

Affirmed.

ROBINSON and JOHNSON, JJ., dissent.

HOLT, J., disqualifies.

PHILLIPS *v.* PHILLIPS.

5-2884 365 S. W. 2d 261

Opinion delivered March 4, 1963.

G. W. Lookadoo and *M. C. Lewis, Jr.,* for appellant.

Sam L. Anderson, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Maggie Phillips, and appellee, Henry Phillips, married April 19, 1946. Henry filed this suit for divorce on October 7, 1958. Maggie filed an answer and cross complaint denying the allegations of the complaint and asking that she be granted a divorce. The trial court denied Henry a divorce on his complaint, but granted Maggie a divorce on the cross complaint. Neither side has appealed from that part of the decree granting the divorce, but property rights are involved and Maggie has appealed from that part of the decree dealing with the property, and the failure of the court to award alimony, and has asked for an additional attorney's fee.

At the time of the marriage, Maggie owned a piece of property of almost a city block in area on Albert Pike Street in Hot Springs, hereinafter called the Albert Pike property. This property, obtained by Maggie in a settlement with a former husband, cost $6,500.00; $2,500.00 had been paid on the purchase price, leaving a balance of $4,000.00 owed at the time of the conveyance to Maggie.

About two months after the marriage to appellee, Phillips, Maggie conveyed the property to a third party, who in turn conveyed it to Maggie and appellee as an estate by the entirety. In explaining her reason for creating the estate by the entirety in the property, at one point Maggie testified: "Well, you see, it was like this: He said to me, 'if something would happen to you,' he wouldn't get anything, so he wanted to have his name on the deed, and he promised me he'd be good to me, and I said, 'Well, all right then, we'll just put your name on, add your name on the deed,' and we just added his name on the deed."

At another point she testified:

"Q. . . . Will you state why that transaction took place, why the deeds were made which put title in Mr. Phillips' name?

A. Yes, because, you see, he told me when we got married, you see, that I put his name on the paper because he told me if I didn't, well, he didn't feel like working, didn't feel like helping, and he was always fussing, so I thought if it would take that to go ahead and get along, you know, as wife and husband should get along, I'd put his name on, and I thought that any time he didn't do right, I could take it back off, see. Instead it wasn't that way, and then after I put his name on there, he started getting smart and not doing right."

Again she testified:

"Q. Would you have put his name on the property other than the fact that you all were married?

A. No, I put his name only in there because he said that if I would put his name in there he would be good to me, and he was a fussin' all the time so I put his name on there."

Maggie contends first, that an estate by the entirety was created in the property in consideration of, or by reason of the marriage, and that the property should be reconveyed to her in pursuance to Ark. Stats. 34-1214 which provides: "In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and where the divorce is granted to the wife the court shall make an order that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; . . . "

The above part of Ark. Stats. 34-1214, adopted in 1893, was copied from Section 462 of the Kentucky Code of Practice, adopted by Kentucky in 1854. In *Phillips* v.

Phillips, 9 Bush (Ky.) 183, and *Flood* v. *Flood,* 5 Bush (Ky.) 167, the Kentucky Court construed Section 462 to mean: " . . . the word 'consideration' in this act, [means] 'the act of marriage, or some agreement or contract touching or relating to the act of marriage,' and the expression 'by reason thereof' 'to relate to such property as either party may have obtained from or through the other by operation of the laws regulating the property rights of husband and wife.' "

Subsequently, in 1876, Kentucky adopted Section 425 of the Code which amended the 1854 act by adding the words "and any property so obtained without valuable consideration shall be deemed to have been obtained by reason of the marriage."

In *McNutt* v. *McNutt,* 78 Ark. 346, 95 S. W. 778, it was pointed out that our statute 34-1214, passed by the General Assembly in 1893, was adopted from Kentucky's 1854 Code and not from the Kentucky Code as amended by the act of 1876; that at the time of our adoption of the Kentucky Code it had been construed as above mentioned in the Phillips and Flood cases, and that we adopted along with the act the construction which had been placed on it by the Kentucky Court. The McNutt case has been followed consistently. *Dickson* v. *Dickson,* 102 Ark. 635, 145 S. W. 529; *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 867; *Turner* v. *Turner,* 219 Ark. 259, 243 S. W. 2d 22; *McClure* v. *McClure,* 220 Ark. 312, 247 S. W. 2d 466.

It will be seen from the testimony of Mrs. Phillips in the case at bar, that the estate by the entirety was not created in consideration of the act of marriage. In fact, there is no substantial evidence that the property was ever mentioned or considered by the parties before the marriage, nor was Henry's claimed interest in the property created by reason of the operation of law.

Next, Mrs. Phillips contends that if an interest in the property was not obtained by Phillips in consideration or by reason of the marriage within the meaning of the statute, it was conveyed to him as trustee and that he holds it in trust for her. The conveyance was made to

Phillips 14 years before Mrs. Phillips made any claim that he was holding the property in trust. Even if it is assumed that by reason of the husband and wife relationship and no consideration being paid, Phillips was holding an interest in the property in trust for his wife, the direct testimony, including that of Mrs. Phillips, along with the circumstantial evidence, overcomes such presumption and proves by a preponderance of the evidence that the conveyance to Phillips was an outright gift. The effect of Mrs. Phillips' testimony on that point is that Mr. Phillips did not want to do any work on the property unless he owned an interest, and for that reason in addition to his promise to be good to her, and to keep peace in the family, she made the conveyance.

In *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848, the Court said: "A wife, however, may make a direct gift or transfer of her property to her husband, and it will be sustained if not made through improper or undue influence. If the evidence clearly shows that it was the intention of the wife by such transfer to make a gift to her husband, then such transaction will be upheld. In such cases inquiry will be directed to the circumstances under which the instrument of transfer was executed by the wife. If it clearly appears that the transaction between the husband and wife was fairly entered into, and it was her intention to make him a gift, it will be held as binding as a transaction made between other parties."

The enhancement in value of the property is not, in itself, sufficient to show the intention of the parties, but it does shed some light on the intention of the parties when borrowing money to improve the property. Mrs. Phillips owned only a $2,500.00 equity in the property at the time of the conveyance of the interest to Phillips. Subsequently, considerable improvements were made and the property is now worth between $50,000 and $75,000. Money was borrowed on the property several times for the purpose of buying and improving other property and to improve the Albert Pike property. Phillips signed the notes and obligated himself personally for the repayment of such loans. There is no showing that Mrs. Phil-

lips ever informed the banks at the time of obtaining loans that Phillips was not a *bona fide* owner of an interest in the property. We cannot say that the Chancellor's finding that Phillips owns an estate by the entirety is contrary to a preponderance of the evidence.

In the year 1958, the parties borrowed money on the Albert Pike property for the purpose of constructing a store building on leased property located on Highway 270 in Garland County, west of Hot Springs, and to open a store in the building. Henry claims that he is the sole owner of the 270 store, and Maggie contends that she is a partner in that business. The Chancellor found in favor of Henry on this point. We have reached the conclusion that the preponderance of the evidence supports Maggie on this issue.

Ever since they were married, with the exception of one period of about a year, Henry and Maggie have operated a store at one place or another. Maggie is the one that had the "know how". She had been operating a store or a market since she was a teen age girl. About 1953 they borrowed the necessary money and built a brick store building on the Albert Pike property. Later they sold the store to one Johnson. During the time Johnson was operating the store on the Albert Pike property, Henry and Maggie decided to open the store on Highway 270. It was then that they borrowed money, both being obligated for its repayment, and built and opened the 270 store.

The store was opened in December and Maggie worked there until about the following May. In the meantime Johnson had given up the store on the Albert Pike property and Maggie opened it again. In June she had to go to the hospital for an operation, and while there, Henry moved all the groceries and most of the fixtures to the 270 store.

Maggie was certainly a partner in establishing the 270 store and the evidence does not show that the parties dissolved the partnership, nor has it been dissolved by operation of law. Therefore, the parties are still partners in the 270 store, and Maggie is entitled to an ac-

counting from Henry on the operation of the store. Likewise, since Henry is an owner of an estate by the entirety along with Maggie in the Albert Pike property, he is entitled to an accounting from her on that property. Appellee makes no contention that Maggie is not the owner of the store on the Albert Pike property.

Maggie was granted the use of the house in which she lives, rent free, but was awarded no alimony. We believe that since she was awarded no alimony, she should also have rent free, that part of the store building in which she operates a store.

Appellant was allowed an attorney's fee of $650.00 in the trial court. She is allowed an additional sum of $500.00 as attorney's fee in this court.

The cause is reversed with directions to enter a decree not inconsistent herewith.

HYDER *v.* NEWCOMB.

5-2919 365 S. W. 2d 271

Opinion delivered March 4, 1963.

Milham & Cummins, for appellant.

Fred E. Briner, for appellee.

JIM JOHNSON, Associate Justice. This case involves a suit for specific performance of an oral contract to convey real property. According to the testimony, on January 23, 1960, appellant Evelyn Glenn Hyder showed appellee, Inez Newcomb, some property she owned in Saline County and agreed to accept $2,000.00 for 35 acres. Appellee gave appellant her check for $500.00, on which was written, "Part payment on 35 acres of land (Bal. $1,500.00)." Some time thereafter, timber was cut on the property, by mistake. Appellant and appellee each told the timber cutters that each individually owned the property, but appellant was the one who obtained the court order to stop the cutting, and the one whom the timbermen paid for the timber removed. Thereafter, on May 23, 1960, appellee filed this suit in Saline Chancery Court for specific performance of the oral contract, alleging purchase of the property on January 23, 1960, part payment of $500.00, evidenced by the check, that the balance of the purchase price was to be paid upon delivery of the deed and abstract, that appellee took possession of the property, that appellant had failed and refused to execute the deed, although appellee was ready and willing to pay the balance; further that appellant converted funds to her own use from sale of timber belonging to appellee; and prayed that the contract be specifically enforced and appellant be required to pay into the court the proceeds from sale of the timber. Appellee deposited $1,211.12 in the registry of the court.

Appellant answered, denying the allegations and pleaded the statute of frauds in bar of any oral contract.

Trial was held August 25, 1962, before the Chancellor, who ordered appellant to execute a quit-claim deed conveying any interest she may have in the 35 acres to appellee, gave appellee credit for the $68.00 paid to appellant for the timber, directed appellee to pay $220.88 more into the registry of the court, and assessed ap-

pellant for all costs. From the decree comes this appeal.

On trial *de novo,* we must determine from the record before us whether the check, the description and the part payment, individually or collectively, are sufficient to take this contract out of the statute of frauds.

The statute of frauds is contained in the Revised Statutes of 1838 and has been a part of the Arkansas law since that time. We are therefore blessed with a formidable, and unusually consistent, array of cases interpreting its provisions. The section of the statute of frauds involved here is as follows:

"Ark. Stats. 38-101. No action shall be brought; . . . fourth, to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; . . . unless the agreement, promise or contract, upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized."

There are several cases remarkably similar to the case at bar. One in point is *Hotopp* v. *Adair,* 144 Ark. 629, 223 S. W. 393. We quote from that opinion.

"The complaint sets forth an oral agreement except so far as the exhibited checks and memoranda on the back of the envelope containing them constitutes a written contract. The statute provides that a contract for the sale of lands 'shall be in writing and signed by the party to be charged therewith, or signed by some other person for him thereunto properly authorized' Kirby's Digest § 3654. The only writings set forth as constituting the contract fall short of compliance with the statute, in that the property is not described and no means of identification are furnished. Defects in this respect can not be cured by oral testimony. The check signed by Claud Adair, one of the appellees, recites that it was given 'for bonus on house and lot.' This is not sufficient identification, nor does it furnish any means of identification.

"It is alleged in the complaint that the property described therein was the only real estate owned by appellees, but, accepting that as true, it does not follow that the recitals of the check are sufficient to identify it. Even though appellees owned but one piece of property, it does not follow from the language as a matter of law or as a matter of fact that the contract necessarily was intended to describe that particular property. *Moreover, the check is not sufficient as a contract for the reason that it does not set forth the terms in any other respect.* Before a court of equity will compel the performance of a contract for the sale and purchase of real estate, it must be definite and certain." [Emphasis ours.]

In *Stanford* v. *Sager,* 141 Ark. 458, 217 S. W. 458, involving not only a check but also letters relative to sale of the property, this court held:

"In negotiations between Ross, as the agent of Sager, and Stanford, the proposed purchaser, it nowhere appears that there was any memorandum containing a description of the lands to warrant specific performance. Treating all the letters in evidence as constituting the contract between the parties, yet in none of these letters is the land to be conveyed specifically described nor is there any description of the land in the check which Stanford sent Ross and which was cashed by Ross as earnest money.

"The appellants contend that this check and the correspondence between Ross and Stanford constitutes the written contract. Conceding this, yet, since the land to be conveyed is nowhere accurately described, the court was clearly correct in holding that the contract could not be specifically performed.

". . . 'The contract must disclose a description which is in itself definite and certain or one which is capable of being made certain by other proof, the contract itself furnishing the key by which the property may be identified.' "

Since the check in the case at bar was insufficient as a memorandum, *inter alia*, for lack of the terms of

the contract as well as an accurate description of the property, we must now determine whether there is sufficient part performance to take this case out of the statute of frauds.

Appellee's partial payment is undisputed, but part payment alone is not sufficient part performance to take the contract out of the statute of frauds. *Starrett* v. *Dickson,* 136 Ark. 326, 206 S. W. 441; *Fryer* v. *Mabin,* 158 Ark. 579, 250 S. W. 877. However, partial or full payment together with taking possession pursuant to the contract is generally considered sufficient part performance. *Arkadelphia Lbr. Co.* v. *Thornton,* 83 Ark. 403, 104 S. W. 169; *Branstetter* v. *Branstetter,* 115 Ark. 154, 170 S. W. 989. Appellee alleged that she took possession of the property as of January 23, 1960. However, the testimony relating to the cutting and sale of the timber, as well as appellee's testimony that

". . . Well, I called her the first week after we bought it and I asked when was she going to make us a deed. She said as soon as she had time to dig out the papers. I said don't go to any unnecessary trouble but we would like to have it as quick as possible. We had a bunch of cows we had to get shut of or either have some place to put them and Pat had bought the wire to build a fence. So as time drifted on it was put off and put off."

clearly shows that appellee had not taken possession of the property and that appellant had yielded no dominion or possession to appellee. There is no other evidence on the question of possession. This being true, it follows that there was no such part performance of the contract as would take the case out of the statute of frauds.

It is true, as appellee intimates in her argument, that the statute of frauds should not grant a person a license to welch on a deal, nevertheless, in the sale of land there have been certain requirements ordained by law which are mandatory. Accordingly, on the whole case, appellee having failed to meet the test "that before a court of equity may grant specific performance of a parol contract to convey land, the evidence of such agreement must be clear, satisfactory and convincing." *Rolfe* v.

Johnson, 217 Ark. 14, 228 S. W. 2d 482; *Meigs* v. *Morris,* 63 Ark. 100, 37 S. W. 302; *Walk* v. *Barrett,* 177 Ark. 265, 6 S. W. 2d 310; the decree must be reversed and the cause will be remanded with directions to dismiss the complaint for want of equity; all costs will be taxed against appellee.

This case having been fully developed and the matter of the payment of the $500.00 being undisputed, in order to minimize further proceedings, we find appellee is entitled to recover the payment made to appellant together with interest from the date of the receipt thereof. *Gilton* v. *Chapman,* 217 Ark. 390, 230 S. W. 2d 37.

Reversed and remanded with directions.

CLAY *v.* BRAND.

5-2911 365 S. W. 2d 256

Opinion delivered March 4, 1963.

Ralph Robinson, Hardin, Barton & Hardin, for appellant.

Theron Agee, for appellee.

FRANK HOLT, Associate Justice. This is an action to rescind a written contract of sale. By said contract, the appellees, Mr. and Mrs. Brand, purchased from the appellant, Mrs. Clay, a tourist court (Wedgewood) which is located south of Mountainburg, Arkansas. As the basis for rescission, the appellees allege that appellant fraudulently misrepresented to them the adequacy of the water supply and sewage system at the Court. The appellees claim that they reasonably relied upon appellant's assurances of adequacy. Appellant denies making any such representations and asserts the water supply and sewage system are adequate if properly operated. The written contract is silent with reference to the water supply or the sewage system. The trial court granted rescission of the contract and this appeal follows.

The appellant and her former husband, Mr. Houck, now deceased, had owned and operated the Wedgewood Court for about 18 years before the sale to appellees. Originally the court consisted of six units and the appellant later added two units. She also operated a beauty shop at the Court. The water need was supplied from a "bored well" and a 300-gallon storage tank operated by an automatic pump system. The storage tank was added to the supply system by the appellant several years ago.

The appellees, at the time of the purchase, resided in Texas where he was employed as a store manager and she operated a beauty shop. While visiting relatives in Fort Smith in June, 1961, the appellees contacted Mr. Don Roderick, a local realtor, about purchasing a motel or tourist court. Mr. Roderick showed them the Wedgewood Court and appellees (buyers) claim that on June 7, 1961, the day they made the inspection tour of the Court, the appellant (seller) made the alleged misrepresentations.

On July 14, 1961, the contract of sale was signed by the parties and the appellees took possession of the Court the next day. They occupied and operated the Court until early January, 1962. By the terms of the contract the purchase price was $35,000.00. The appellees paid the required $2,500.00 initial payment, the balance to be paid in installments of $310.00 per month. These payments

were made on August 15, September 15, and October 15, 1961. Following the last payment appellees claim they became convinced the water supply and sewage facilities were inadequate and they made no further payments. On December 22, 1961, the appellant, through her attorney, wrote the appellees demanding that they vacate the Court and return possession to appellant pursuant to the terms of their sale agreement.

On December 28, 1961, the appellees filed their complaint in equity seeking rescission of the contract. They also asked for the recovery of the down payment of $2,500.00, the three monthly payments totaling $930.00, the value of the improvements to the property to the extent of $613.75, and cost of repairs to the water and sewage system totaling $250.00.

In granting rescission the court found that the appellant: " * * * made representations, amounting to fraudulent representations, that there was an adequate supply of water in the well on said premises and connected with the water lines and system in the cabins and buildings thereto belonging for the operation of a motel and beauty shop when in truth and in fact there was no such adequate supply of water, which fact was known to the defendant at the time of such representations; that the plaintiffs have met the burden of proof as to fraud by a preponderance of the evidence which is clear and convincing and that they are entitled to a rescission of the contract * * * ." In granting rescission the chancellor awarded recovery only for the $2,500.00 down payment and gave to appellant the choice of paying the $613.75 or allowing the improvements to be removed. There is no cross-appeal.

For reversal appellant urges that the chancellor's findings that the appellant, seller, made fraudulent misrepresentations to the appellees and that the water supply is inadequate are against the clear preponderance of the evidence.

The appellee, Mrs. Brand, testified that the appellant, Mrs. Clay, told her when she inspected the tourist court there was "plenty of water here" and that Mrs.

Clay brought the matter up several times; that Mrs. Clay assured her there was an adequate water supply for the needs of the house, the court and the beauty shop. Mr. and Mrs. Brand testified that the problem of a water shortage began about two weeks after they took possession of the Court and that they made their complaint to the real estate agent, Mr. Roderick, who testified he relayed this complaint to Mrs. Clay. Mrs. Brand testified that: "* * * after we had protested to Mr. Roderick and he acted more or less as embassy for us, that she and Mr. Clay came up there one Sunday afternoon and brought some linens back to the motel, and she told me — she walked out in the back with us, and she walked over there, and she said, 'Now, I will tell you what. We used to buy water from Henry.[1] We got water from him and paid him so much, but you may be smarter. I don't know who owns that property over there that is standing vacant. Just drill you a well right here and try to tap their vein, because it is an everlasting well.'" The appellee, Mr. Brand, testified that during their inspection tour Mrs. Clay represented to him, his wife, and her father, Sam Turner, that there was "enough water to run a beauty shop, do the motel linens, and an adequate water supply." Mr. Turner testified that he was present during the inspection of the Court and heard Mrs. Clay on two occasions represent that there was an adequate supply of water.

The Brands testified that because of the water shortage it was necessary to buy water and have it hauled to the Court on many occasions. Mrs. Brand estimated they had bought approximately twenty loads of water from Everett Tucker. Mr. Tucker testified that he had hauled and sold water to the Brands "quite a few times." According to him, the capacity of the tanks in which he hauled water was 720 gallons.

The Brands testified that they had employed Frank Parker, a plumber, in an effort to correct the shortage. Mr. Parker testified: "Well, I know the last time I was up there I got a call on the well pump, to check the water

[1] Henry Hevron, a former neighbor of Mrs. Clay, was a non-resident of the state at the time of the trial.

pump, and I told them that evidently they just didn't have enough water to furnish the whole court." The Brands fixed this date as the latter part of October and thereafter made no further payments. There were other witnesses whose testimony tends to corroborate that of the appellees.

The appellant emphatically denies that the subject of a water supply was ever discussed during the negotiations; that the appellees made any inquiry with reference to this subject, and that she, or anyone in her behalf, ever made any representations with reference to the water supply. She asserts that during the 18 years that she operated the Court and since taking possession again on January 4, 1962, she has never experienced any shortage of the water supply. Appellant claims that the water supply problem was due to the appellees' inability to understand and properly operate the water supply system rather than an actual shortage in the water supply. Several witnesses appearing in behalf of Mrs. Clay corroborated her version of this dispute.

Of course fraud is never presumed and appellant contends that the quantum or degree of proof required to prove fraud is not found in this case. She relies on the case of *Biddle* v. *Biddle,* 206 Ark. 623, 177 S. W. 2d 32, from which we quote:

" * * * There is no rule more firmly established than the one that fraud will not be presumed, and the burden is on the party alleging it to prove it by a preponderance of the evidence *which is clear and convincing. Irons* v. *Reyburn,* 11 Ark. 378; *Home Mutual Benefit Ass'n.* v. *Rowland,* 155 Ark. 450, 244 S. W. 719, 28 A. L. R. 86; *U. S. Ozone Co.* v. *Morrilton Ice Co.,* 186 Ark. 485, 54 S. W. 2d 282; *Russell* v. *Brooks,* 92 Ark. 509, 122 S. W. 649; *Crider* v. *Simmons,* 192 Ark. 1075, 96 S. W. 2d 471." (Emphasis added)

The cases cited by the *Biddle* case in support of the quoted rule are not authority for the rule in its entirety. The *Irons* case and *Home Mutual Benefit* case are authority only for the proposition that fraud will not be presumed. The *U. S. Ozone* case states the same rule and goes on to say that the findings of fact by the chancellor

will not be set aside unless against the preponderance of the evidence. The *Russell* case states:

" * * * While fraud will not be presumed, and while the burden is on him who alleges it to prove same by clear and satisfactory evidence, still it need not be shown by direct or positive evidence, but may be proved by circumstances."

The *Crider* case relates that "fraud must be clearly proved" but the court was not there called on to apply that language to the facts since the case concerned an administrator who, acting in that capacity, had sold property in his charge to himself indirectly and the court found that this was legal fraud although the proof may not have been sufficient to find fraud in the ordinary case. We think these cases do not support the quoted rule as to "preponderance of the evidence which is clear and convincing."

We are aware that later cases have quoted with approval the rule as stated in the *Biddle* case. See *Bryan* v. *Thomas,* 226 Ark. 646, 292 S. W. 2d 552; *Robinson* v. *Williams,* 231 Ark. 166, 328 S. W. 2d 494. But the "clear and convincing" language seems to have evolved from that line of cases which require that in order to cancel or reform a solemn writing because of fraud, accident or mutual mistake the proof must be clear and convincing. *Eureka Stone Co.* v. *Roach,* 120 Ark. 326, 179 S. W. 499; *Martin* v. *Hempstead Co. Levee Dist. No. 1,* 98 Ark. 23, 135 S. W. 453; *Michell Mfg. Co.* v. *Ike Kempner & Bro.,* 84 Ark. 349, 105 S. W. 880; *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139; *Green* v. *Bush,* 203 Ark. 883, 159 S. W. 2d 458.

Thus, it appears that two rules of law with respect to proof of fraud have been developed with reference to written instruments. One, the ordinary rule which requires proof of fraud by a preponderance of the evidence and, two, the stricter rule which requires proof of fraud by a preponderance of the evidence which is clear and convincing.

The distinction between the two rules was recognized in *Manhattan Credit Company* v. *Burns,* 230 Ark. 418, 323 S. W. 2d 206 where this court said:

" * * * We think the proof sufficient to establish the fact that the contract was obtained by misrepresentation, and this is so whether the case falls within the ordinary rule that fraud is to be proved by a preponderance of the evidence, *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524; *Gregory* v. *Consolidated Utilities,* 186 Ark. 406, 53 S. W. 2d 854; *Rose* v. *Moore,* 196 Ark. 527, 118 S. W. 2d 870, or within the rule that a stricter degree of proof is required when a solemn written instrument is to be upset. *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139; *Green* v. *Bush,* 203 Ark. 883, 159 S. W. 2d 458."

In the present case the written contract is silent with reference to an adequate water supply which is the subject of the alleged fraudulent misrepresentation. Thus, the proof on this subject does not alter or contradict any of the written terms of this contract. Therefore, we believe that the ordinary rule as to proof of fraud by a preponderence of the evidence is applicable in this case.

However, even if the stricter degree of proof were required in this case, we cannot say that the findings of the chancellor are against the preponderance of the evidence which is clear and convincing.

Appellant also contends that the appellees had actual knowledge of the exact nature and limitations of the water system prior to the purchase and cannot now assert that they were misled by any statement of the appellant. It is argued that a casual inspection of the Court would have called to the attention of the appellees a sign in each cabin which stated: "We use water from a bored well, please conserve water, do no washing. If you leave a commode stuck it will pump the well dry." These signs were visible in each cabin on the date the appellees made their inspection. The very existence of these signs could have prompted a discussion of the adequacy of the water

supply which resulted in the alleged fraudulent misrepresentations.

In *Castleman & Son* v. *Schuhardt,* 128 Ark. 445, 194 S. W. 1028, we quoted from *Hunt* v. *Davis,* 98 Ark. 44, 135 S. W. 458, as follows:

"Although a purchaser must act with prudence and diligence in seeking the available means of ascertaining the truth, yet if the seller having peculiar knowledge of the matter, by any misrepresentation or artifice, induces the buyer to rely on his false statement, then the seller will not be heard to say that the buyer could have ascertained the truth. The very representations relied upon may have caused the purchaser to forbear from making further inquiry. If the false representations are made with the intent to induce the other party to act thereon, ordinary prudence does not require the party to test the truth of such representations where they are within the knowledge of the party making them or where they are made to induce the other party to refrain from seeking further information."

Appellant further contends that the appellees, by their continued occupancy and other affirmative acts, ratified the contract of sale after discovery of the alleged inadequate water supply and have, therefore, waived any right to rescind the sale which they might have had. Neither do we agree with this contention. The appellees made no further payments after they became convinced that there was an inadequate water supply. Under the facts in this case the appellees brought their action for rescission in apt time. *Allen* v. *Overturf,* 234 Ark. 612, 353 S. W. 2d 343; *Ft. Smith Lumber Co.* v. *Baker,* 123 Ark. 275, 185 S. W. 277. Also see *Massey* v. *Tyra,* 217 Ark. 970, 234 S. W. 2d 759; *Kotz* v. *Rush,* 218 Ark. 692, 238 S. W. 2d 634, quoting *Danielson* v. *Skidmore,* 125 Ark. 572, 189 S. W. 57.

Certainly an adequate water supply is a very material factor in the successful operation of a modern motel or tourist court. Mr. Roderick, the real estate agent, testified that the location is the most important factor "and water would possibly be second", and "that it takes

a great deal of water." He, himself, owns and operates a motel. The misrepresentation of a material fact is actionable fraud. *Fausett & Company, Inc.* v. *Bullard,* 217 Ark. 176, 229 S. W. 2d 490; *Massey* v. *Tyra, supra.*

In the instant case the testimony in behalf of the appellees and the appellant is diametrically opposed and in hopeless conflict. The chancellor was in a position to observe the witnesses and evaluate their testimony and, therefore, we cannot say in this case that his findings were against the preponderance of the evidence.

The decree is affirmed.

JOHNSON, J., dissents.

WEBB *v.* MILLER.

5-2903 365 S. W. 2d 450

Opinion delivered March 11, 1963.

Paul Jameson and *O. E. Williams,* for appellant.

No brief filed for appellee.

CARLETON HARRIS, Chief Justice. Appellants, Virgil Webb and wife, Wilma, instituted their complaint against Albert J. Miller and wife, Grace wherein it was alleged that appellees had wrongfully entered upon appellants' property (the west 17.8 feet thereof) and had dug holes, destroyed surveyor's markers, piled fencing materials on the premises, and deprived appellants of the use and enjoyment of their land. It was further asserted that said unlawful acts would be continued; that the appellants would sustain irreparable damage unless appellees were enjoined, and a mandatory injunction was sought to prohibit interference with appellants' possession, and to require appellees to remove a fence which the Webbs contended was located on their premises. Appellees answered with a general denial, and further asserted,

"that a fence existed between plaintiffs and defendants for more than seven years and that these defendants have occupied and claim said lands for more than seven years; that the line fence between the parties was existing at the time plaintiffs purchased their property and that the plaintiffs are now estopped to claim any lands belonging to these defendants or to claim that

the fence is not the line; that uncertainty as to the property lines existed between defendants and plaintiffs' predecessor in title and said latter parties agreed upon the boundaries."

On trial, the court dismissed the complaint for want of equity, and from the decree so entered, appellants bring this appeal.

The record reflects that Miller and wife purchased lands, which included the property here in question, in April, 1956. Thereafter, in October, 1959, Miller and wife conveyed a portion of the property to A. D. Morris, using a metes and bounds description. The deed called for 200 feet running east and west, and 65 feet running north and south.

In June, 1961, Morris and wife conveyed the land to the Webbs, using the description under which they had acquired such lands from Miller. The dispute in this litigation involves 17.8 feet on the west side of the property. At the time the Millers made their purchase in 1956, a fence was located at the north end of the property which divided the Miller lands from property owned by Jack Elam, to the immediate north.[1] To the south, a fence was erected to separate the land purchased by Morris from other Miller property immediately south of the Morris property line. The fence which is really pertinent to this litigation is to the west, dividing the present Webb property (formerly Morris) from the Miller property on the west, said fence being erected by Miller in 1957, prior to the time of the conveyance to Morris. The Webb and Miller property is bounded on the east by the highway. Appellants contend that they are due to have 200 feet running east and west, as called for by their deed, but the fence erected on the west by Miller, running north and south, cuts their east and west footage to slightly over 182 feet.

Don Kemp, engineer and surveyor, testified on behalf of appellants. He used the description in the deed from Morris to Webb in making the survey, and intro-

[1] This fence was subsequently replaced by Morris after he purchased the land.

duced a plat, based on the results of such survey. This plat sustains the position taken by Webb, since it shows that Webb's east and west line extends 17.8 feet west of the fence erected by Miller. No surveyor testified on behalf of appellees. Miller testified that he had previously had a survey made relative to the north and south property lines, but the west line was accepted as a proper line by Morris: "That was accepted as a line because that line was there before Mr. Morris and I made any deal. Had been established by me, and Mr. Morris accepted that as a line." The witness testified that he owned the area west of the fence: "There is 410 feet by 210 feet back there." He stated that before he erected the west line fence, he "measured from the edge of the highway back to where we put the fence and established a 200 foot line back there and put it." In explaining the difference between the fence location and the property line presently claimed by the Webbs, the witness said, "There's a part of this Webb property in the highway, as there is with mine, part of it is in the highway." He testified that in measuring the 200 feet west, "We had a surveyor's marking[2] to go by, as far as east and west is concerned." However, he did not admit that Webb was entitled to 200 feet. Miller stated that he had gotten a Mr. Shreve to make a survey, "and he started to survey and he come out with the wrong answer and he quit." He further said that after the sale to Morris, he and the latter measured 65 feet, north and south, but Morris had nothing to do with measuring the 200 feet east and west.

A. D. Morris, who had purchased from the Millers, and subsequently conveyed the same land to the Webbs, testified that Miller told him that the west fence was the west line of the property; he verified Miller's statement that they measured 65 feet from north to south, but that no measurement was taken of the supposed 200 feet running east and west. The witness testified that he never did question the footage from east to west, and that no difficulty arose between him and Miller. He stated that

[2] This statement had reference to a survey made about 3 years previously at a time when Miller was endeavoring to establish his north property line. He measured from a stake which the surveyor had set out in establishing the north line.

under the deed he was supposed to get "200 x 65. I was well satisfied with it myself. I never did question it or try to find out." Further, from the evidence:

"Q. What was the statement, if any, between yourself and Miller as to the boundaries of your property, **particularly the west line of your property?**

A. Just the west fence was the boundary line, the property line, and I—

Q. How do you know?

A. I say the west fence, I took it as the line, and I told him I would put the upper chain-link fence on the north if he wanted to put one on the south and we would have it all fenced in, and he said he would. So, I told the gentleman from Springdale and that's what happened. And I took the fences as the line, now, but have it surveyed and established, I never did do it and had nothing to do with that whatever. That's the way I bought the place and the way I sold it.

We are of the opinion that, under our cases, this testimony does not establish an agreed boundary line. In *Clements* v. *Cox,* 230 Ark. 818, 327 S. W. 2d 83, this court said:

" * * * appellees' witnesses testified that they had never heard of any agreed boundary line; admittedly the deed itself does not contain any provision that the land purchased was other than that contained in the description, nor does the record reflect that appellees had any notice of appellants' claim of an agreed boundary line at the time they purchased the property."

In *Brown Paper Mill Co., Inc.* v. *Warnix,* 222 Ark. 417, 259 S. W. 2d 495, we stated,

"We agree with the chancellor's conclusion that the mere existence of the fence did not affect the title to the area in controversy. The record does not show that there was ever an agreement upon the fence as the boundary line. A few witnesses testified that they understood the location of the fence to represent the line, but their belief was based merely on the fact that the fence was there and hence added nothing to the physical facts."

In Barham v. *Gattuso,* 216 Ark. 690, 227 S. W. 2d 151, likewise

"Second, it is contended that the parties have by their conduct established the partition as the boundary. Neither the deeds nor the lease referred in any way to the partition; the land was described simply as the north half of the lot. In this respect the case differs from *McCall* v. *Owen,* 212 Ark. 984, 208 S. W. 2d 463, where the deeds referred to a fence that was not actually on the true line. We held that the grantees were bound by this reference; but the rule is different when the conveyance uses only a legal description, and it is later found that the fence or other monument is not accurately placed. (Citing cases.) In the latter situation the case is like any other in which adjoining landowners, through ignorance rather than by agreement, recognize an erroneous common boundary. Possession must then be adverse and must continue for the statutory period of seven years in order to ripen into title."

Finally, as applicable in this case, in *Carney* v. *Dunn,* 221 Ark. 223, 252 S. W. 2d 827, we said:

"We conclude that when all the evidence is considered, the finding of the trial court that appellants had failed to establish the hedge as the agreed boundary line was not against the preponderance thereof. While Mr. LePlant, Sr., owned both lots, he clearly had the right to establish the true line between them to be the center line as platted and to so convey them under the recorded plat description without exceptions. This we hold the preponderance of the testimony shows he and his heirs did. The parties were bound by the descriptions in their deeds."

Let us apply these holdings to the facts before us. There is no evidence that Mr. and Mrs. Webb had ever heard of any agreed boundary line, nor that they had any notice of Miller's claim of such an agreement, and, of course, the deed does not contain any provision that the land purchased was other than contained in the description. As pointed out in *Brown Paper Mill,* the mere existence of the fence did not affect the title to the

area in controversy. The Webbs testified that they saw the fence, but thought nothing about it, considering that they were getting 200 feet. As stated by Mr. Webb, "I was more or less going by what Mr. A. D. Morris told me. Mr. Morris never showed us the property." Morris, admittedly, never did show the land to the appellants. "I just told them I had a deed that was 65 x 200 and I sold them what I had, see. In other words, I give them a deed to the—the same kind of deed that I had." Nor did Morris ever testify that there was any dispute between him and Miller as to the proper line.

Actually, it appears, to use the language in *Barham* v. *Gattuso, supra,* that Morris, "through ignorance rather than by agreement" recognized an erroneous boundary. As hereinbefore set out, he simply, upon Miller's stating that the fence constituted the boundary, "took it as the line." In other words, Morris merely "acquiesced." Of course, acquiescence, for the statutory period, will ordinarily confirm a boundary line. In *Seidenstricker* v. *Holtzendorff,* 214 Ark. 644, 217 S. W. 2d 836, we said,

"Acquiescence, by owners of adjoining lands, in a boundary line, as shown by a division fence, for more than seven years will ordinarily confirm the boundary line as thus located, even though the fence may not be placed on the true line between the tracts."

Here, however, Morris did not purchase the property until 1957; in fact the fence was not even constructed by Miller until 1956, so there could have been no acquiescence for seven years. Let it also be remembered that the Millers, prior to the conveyance to Morris and wife (and the subsequent conveyance to the Webbs) owned the entire tract, and could, after a proper survey, have conveyed the intended amount of land to Morris, or, at least, have mentioned the fence in the conveyance. This is all the more reason appellees should be bound by the description in the deed.

Looking at the other allegations in the answer,[3] we find the claim of adverse possession. This claim must

[3] Appellees have not filed any brief with this court.

fail for the reason pointed out in the preceeding paragraph.

The answer also alleges that appellants are estopped to claim the footage in question because the fence was in existence at the time they made the purchase. Likewise, there is no merit in this contention, as we have previously pointed out that no one advised the Webbs that the fence supposedly marked an agreed boundary line, or that they were not entitled to actually receive all the land called for by their deed. The record does not reflect that they had notice of any kind or nature that such a contention would be made. For the reasons herein set out, the decree is reversed, and the cause is remanded to the Washington Chancery Court with directions to enter a decree not inconsistent with this opinon.

ARK. STATE HIGHWAY COMM. *v.* COOK.

5-2912 365 S. W. 2d 463

Opinion delivered March 11, 1963.

[Rehearing denied April 1, 1963.]

Dowel Anders and *H. Clay Robinson,* for appellant.

T. E. Webber and *John O. Moore,* for appellee.

ED. F. MCFADDIN, Associate Justice. The primary question in this case is the width of the right of way of Highway No. 71 through Arabella Heights Addition to Texarkana in Miller County. The appellant contends that the right of way is 100 feet wide, and the appellees claim that the right of way is only 80 feet wide. The Trial Court agreed with the appellees, and the Highway Commission brings this appeal on that issue. Also, there is a second issue which relates to the refusal of the Chancery Court to reopen the case for further testimony.

I. *The Width Of The Right of Way.* In 1925 there was filed the original plat of Arabella Heights, which showed a 60-foot right of way for the Lynn Ferry Road running diagonally through the addition. On November 25, 1927, the County Court of Miller County, on petition of the State Highway Commission, made an order[1] for changes in Highway No. 71; and, according to that order, a right of way 100 feet wide was designated for the highway through Arabella Heights; and the change in location placed the new highway approximately two blocks south and west of the old Lynn Ferry road. In 1929 there was filed a revised plat of Arabella Heights Addition; and this 1929 plat showed the highway right of way as taking a course and direction practically, if not identically, the same as the 1927 County Court order; but the 1929 plat showed the *highway right of way to be only 80 feet wide instead of 100 feet wide,* as in the County Court order.

It is this difference of 20 feet (being 10 feet on each side of the present highway) that is the subject of this litigation. Various persons purchased property and con-

[1] This order was under § 76-917 Ark. Stats. In addition to the cases hereinafter cited, the following are some that also concern rights of the landowners under this section: *Sloan* v. *Lawrence Co.,* 134 Ark. 121, 203 S. W. 260; *Greene Co.* v. *Hayden,* 175 Ark. 1067, 1 S. W. 2d 803; and *Miller Co.* v. *Beasley,* 203 Ark. 370, 156 S. W. 2d 791.

structed buildings on the faith of the 1929 plat, some of the buildings even being on the 10-foot strip in question on each side of the highway. It is definitely shown that in all of the time from 1929 to 1962 the State Highway Commission has made no use of any part of the presently claimed 10-foot strip on each side of the 80-foot right of way shown on the 1929 revised plat.

In 1962 the Highway Commission undertook to take possession of the additional 10-foot strip on each side of the 80-foot right of way, claiming that the 1927 County Court order made the right of way 100 feet and that the landowners were bound by that court order. Thereupon, the appellee Cook, as owner of property which included the 10-foot strip, filed this suit to enjoin the Highway Commission from entering on the 10-foot strip. Other landowners similarly situated intervened and made common cause with appellee Cook, and all of these landowners are appellees herein. The Highway Commission, in addition to claiming the full 100-foot right of way under the 1927 County Court order, also asked for a declaratory judgment to the effect that the right of way was in fact 100 feet, as fixed by the County Court order.

With the issues thus joined, the burden was on the Highway Commission to show notice to the landowners of the making of the 1927 order by the County Court;[2] and the Highway Commission proceeded with its case. There was no evidence that any landowner in Arabella Heights had ever filed any claim for compensation under the 1927 order;[3] so, to show notice to the landowners of the 1927 order, the Highway Commission undertook to establish that there was an *actual entry* on the lands under the County Court order which was dated November 25, 1927. A witness called by the Highway Commission was Mr. M. A. Lynn, an assistant resident engineer of the Highway Department. He testified that he was working for the Highway Department when Highway No. 71 was constructed, and that the work started on Highway

[2] This is in keeping with our holding in *Arkansas Highway Comm.* v. *Anderson*, ... Ark. ....., 354 S. W. 2d 554.

[3] So the case of *Arkansas Highway Comm.* v. *Cook*, 233 Ark. 534, 345 S. W. 2d 632, has no factual application to the case at bar.

No. 71 in Arabella Heights either in the later part of 1926 or the early part of 1927. Mr. Lynn testified that the route was surveyed and laid out in 1925 or early 1926, and that the construction in Arabella Heights "where somebody could go out and see they were building a road" was in late 1926 or early 1927.

After the witness Lynn had testified, the appellees insisted, and the Court found, that the Highway No. 71 was constructed *before* the County Court order of November 25, 1927, and therefore the County Court order was no notice to the landowners since the highway had already been constructed when the order was made. The appellees made applicable to the situation here such cases as *Arkansas State Highway Comm.* v. *Dobbs,* 232 Ark. 541, 340 S. W. 2d 283; and *Arkansas State Highway Comm.* v. *Anderson,* 234 Ark. 774, 354 S. W. 2d 554. In the case of *Arkansas Highway Commission* v. *Dobbs,* we had before us a situation in which a highway was already in existence when a County Court order was placed of record showing an enlarged right of way; property owners received no notice of said order by summons or by entry on the alleged widened portion; and this Court held that the County Court order was, in itself, no notice to the abutting landowners, citing and relying on *Bollinger* v. *Highway Comm.,* 229 Ark. 53, 315 S. W. 2d 889; and *Highway Comm.* v. *Holden,* 217 Ark. 466, 321 S. W. 2d 113.

In the latter case of *Highway Comm.* v. *Anderson,* we followed the same rule as in *Highway Comm.* v. *Dobbs,* and differentiated the case from that of *Highway Comm. v. Cook,* 233 Ark. 534, 345 S. W. 2d 632, where there had been payment of claims under the County Court order and such payments did, of course, constitute notice.

Thus, on the evidence offered, the Chancery Court held that the Highway Commission had failed to sustain its position: it had failed to show that there was ever any entry under the 1927 County Court order and had also failed to show any other notice to the landowners of the 1927 County Court order. The decree of the Chancery

Court was in favor of the landowners;[4] and we find no error in that decree.

II. *Refusal To Reopen The Case.* We are thus brought to the second issue in the case in which the appellant complains of the refusal of the Chancery Court to reopen the case for further and contradictory evidence. The case was tried in the Chancery Court on April 26, 1962; and at the conclusion of the hearing on that date the Court announced its decision, as heretofore stated. On May 2, 1962, the Highway Commission filed a motion asking that the Chancery Court reopen the case so that the Highway Commission might present other evidence as to when Highway No. 71 was actually constructed through Arabella Heights. Mr. Lynn, the witness offered by the Highway Commission in the original hearing, desired to state that he had made a mistake in his testimony, and that the highway through Arabella Heights was not actually constructed until after the County Court order. The effect of such change of testimony would have been material. It really amounted to a recantation by the witness Lynn of his former testimony. The Highway Commission offered to support Mr. Lynn's recantation by copies of letters and other matters in the files of the Highway Commission. The Chancery Court conducted a hearing on the motion of the Highway Commission to reopen the case; and on May 15, 1962, refused to allow the case to be reopened.

To discuss the various problems relating to surprise, diligence and recantation, would serve no useful purpose. After carefully examining the record, we have concluded that the Trial Court did not abuse its discretion in refusing to allow the case to be reopened; and so we affirm the action of the Chancery Court in that matter.

Finding no error, both the decree and the order of the Chancery Court are in all things affirmed.

[4] The Highway Commission had asked for a declaratory judgment. The decree recited that the Commission "may post proper security with the Clerk of this Court in this cause for the just compensation of the plaintiffs and interveners for the proposed taking of their property aforesaid, . . . and upon the due posting of such security the defendant Commission may show the same to this Court and apply for a supersedeas of the injunction . . ." The Highway Commission did post the bond and did apply for and receive a supersedeas.

CHANDLER *v.* BOARD OF TRUSTEES OF THE TEACHER RETIREMENT SYSTEM OF THE STATE OF ARK.

5-2922 365 S. W. 2d 447

Opinion delivered March 11, 1963.

Roy Finch, Jr., for appellant.

Warren & Bullion, Bruce Bennett, Atty. General, By, *Jack L. Lessenberry,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. This is a taxpayer's suit by which the appellant attacks the constitutionality of those statutes that permit the employees of the Arkansas Education Association (the AEA) and the Arkansas Teacher Association (the ATA) to participate in the State Teacher Retirement System. The defendants were the trustees of the Retirement System, the State Auditor, and the State Treasurer. The AEA and the ATA were permitted to in-

tervene and become the real defendants. The chancellor found the statutes to be valid and accordingly dismissed the complaint. The principal issue is whether this use of state funds is for a public purpose.

The teacher retirement system was created by Act 266 of 1937. Under that act retirement benefits were available to public school teachers only. The plan was financed by deductions from the teachers' salaries and by equal matching contributions on the part of the State. By Act 80 of 1949 the employees of the AEA and of the ATA were permitted to participate in the plan, their contributions also being matched by the State. This arrangement was continued in force when the statutes were recodified by Act 93 of 1957. Ark. Stats. 1947, §§ 80-1437 *et seq.* The funds of the retirement system are kept in various accounts in the State treasury, the State's annual contribution being transferred from the Public School Fund to the Employers Accumulation Account. Ark. Stats., § 80-1442.

The institution of this suit on February 14, 1961, seems to have been the immediate cause for an amendment to the statute. By Act 210 of 1961, approved one month after this proceeding was filed, the State discontinued its practice of using public funds to match the AEA and ATA contributions and required instead that the matching funds be provided by those organizations as a condition to their continued participation in the retirement system. Ark. Stats., § 80-1442 (6.3). In view of this amendment to the statute the appellant now makes two contentions: First, the State's former practice of using tax moneys to match the contributions of the AEA and ATA employees should be declared unconstitutional, and the State Treasurer should be directed to set the matter right by making the necessary book entries to transfer those matching funds (about $18,750) from the Employers Accumulation Account back to the Public School Fund. Secondly, the AEA and ATA employees should be declared to be ineligible to participate in the State Teacher Retirement System.

After studying the matter with much care we have concluded that the appellant is right in both his contentions.

The parties have argued the constitutional questions largely with reference to only two provisions in the State Constitution—the privileges and immunities clause (Art. 2, § 18) and the illegal exactions clause (Art. 16, § 13). We have no hesitancy in considering the due process clause as well (Art. 2, § 8), for in a taxpayer's suit the plaintiff represents the citizens as a whole and cannot be permitted to waive contentions that should be asserted. See *McCarroll* v. *Farrar,* 199 Ark. 320, 134 S. W. 2d 561, and *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72.

No principle of constitutional law is more fundamental or more firmly established than the rule that the State cannot, within the limits of due process, appropriate public funds to a private purpose. A century ago the basic doctrine was simply stated in the leading case of *Brodhead* v. *City of Milwaukee,* 19 Wis. 624: "The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot in the form of a tax take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well being of the community required to contribute."

Our own decisions are to the same effect. Since it is tacitly conceded in the case at bar that the controlling issue is that of public purpose, we think it necessary to quote from only one of our cases, *Texarkana-Forest Park Paving etc., Dist.* v. *State,* 189 Ark. 617, 74 S. W. 2d 784: "The power to pay gratuities to individuals is denied to the Legislature generally by constitutional mandate, and usually a gift of money to an individual would be an appropriation of public funds to private use, which cannot be justified in law."

The question before us centers upon the essential nature of the AEA and the ATA: Are these organiza-

tions public or private in character? The testimony relates almost wholly to the AEA, the ATA being its counterpart among the Negro teachers and actually having no employees at present who participate in the teacher retirement system.

The AEA is a voluntary association, organized as a nonprofit corporation and having as its members active and retired public school teachers, administrative and clerical employees of public school institutions, and a few others such as textbook publishing company representatives. The AEA is supported solely by the dues paid by its members. It receives no funds from the State and is unquestionably a private organization rather than an agency of the State.

It was shown by the testimony of the AEA's assistant executive secretary that some of the association's activities, such as its continuing effort to raise the standards and status of teaching as a profession, have furthered the cause of public education within the state. On the other hand, the bylaws of the association provide for a standing Legislative Committee, and the witness in effect conceded that the association, with the assistance of its members, engages in lobbying activity in support of its legislative program. Except for the fact that the members of the association are for the most part public employees, the testimony does not indicate that the AEA is in any sense more dedicated to public service than a bar association, a medical society, or any other voluntary professional organization.

We can reach no conclusion except that the use of tax moneys to provide a retirement income for AEA and ATA staff employees cannot be classified as an expenditure for a public purpose. A retirement allowance represents compensation paid to the recipient. *Daggett* v. *St. Francis Levee Dist.*, 226 Ark. 545, 291 S. W. 2d 254. The workers in question, however, are not employees of the State. There is no sound reason why their salaries should be supplemented by the taxpaying public. Although the cause of public education is undoubtedly furthered by the activities of the AEA *members*, there is no indication that

the AEA *employees* devote their time to the public service. Even if such a showing had been made, the public services would still have been rendered by these people in the course of their work for a private employer, unsolicited by the State and affording no basis for a claim against the State.

Counsel for the intervenors seek to distinguish the AEA from a bar association or medical society on the ground that most of the AEA members are public employees. So they are, but there is no reason why public employees cannot form an association to advance their private interests. For example, the case of *Potts* v. *Hay,* 229 Ark. 830, 318 S. W. 2d 826, was concerned with a labor union composed of members of the Little Rock police force. All the members of the union were public employees and, as such, could be provided with retirement pay at public expense. *Adamson* v. *City of Little Rock,* 199 Ark. 435, 134 S. W. 2d 558. Yet it is obvious that the business agent of the union would not be a public employee and could not be given a retirement allowance from the pockets of the municipal taxpayers. The staff members of the AEA are in no better position.

The intervenors' case is no stronger if their employees are considered simply as individuals, without reference to the identity of their employers. There is no constitutional justification for the State's conferring upon these workers, in private employment, benefits that are denied to others in similar circumstances. Of course these retirement allowances are not comparable to welfare grants, unemployment compensation, and other payments that are available to everyone falling within a broad classification and are justified by the State's power to relieve poverty and prevent the destitute from becoming public charges. The teacher retirement plan is not designed to take into account the financial condition of its beneficiaries.

Act 210 of 1961, requiring the AEA and the ATA to match their employees' contributions, does not remedy the situation. Tax moneys are still being devoted to a private purpose, because (*a*) the administrative expense

of the system is in part borne by the State, and (*b*) the retirement allowances are life annuities, Ark. Stats., § 80-1445; so if an annuitant should live long enough to receive more in benefits than had been contributed to his account, the remaining annuity installments would have to be paid with public funds.

There is also proof in the record, and some discussion in the briefs, of a third organization, the Arkansas Athletic Association, which the statutes treat in the same manner as the AEA and the ATA. The complaint, however, sought no relief with respect to the AAA, nor is this organization a party to the case. Hence we express no opinion upon this phase of the case, for a declaratory judgment would not be binding upon an association which is not a party to the case. *Laman* v. *Martin,* 235 Ark. 938, 362 S. W. 2d 711.

The decree must be reversed and the cause remanded for the entry of a judgment declaring to be unconstitutional the statutes which seek to permit the AEA and ATA employees to participate in the State Teacher Retirement System. In harmony with our holding in *Young* v. *Clayton,* 223 Ark. 1, 264 S. W. 2d 41, the court will also direct the State Treasurer, to the extent that the funds have not been disbursed, to make the necessary entries to restore to the Public School Fund the unauthorized transfers to the Employers Accumulation Account.

Reversed.

FRANK HOLT, J., disqualified.

REEVES *v.* MILES.

5-2906 365 S. W. 2d 460

Opinion delivered March 11, 1963.

Joe Holmes, for appellant.

John Harris Jones, for appellee.

PAUL WARD, Associate Justice. On June 4, 1957 appellant, Irene Reeves, executed a regular warranty deed conveying to appellees, Johnnie Miles and Susie Miles (husband and wife), a parcel of land (2.6 acres) described by metes and bounds. The deed recited a consideration of $270 paid by appellees and received by appellant.

After appelles had erected a house on the above described parcel of land, appellant filed a complaint in chancery court against appellees asking to have the said deed cancelled on the ground of fraud, in that appellees promised and failed to "look after and support" her during the remainder of her natural life. During the hearing on the above complaint the court permitted appellant to treat the same as amended to ask for a reformation of the deed. Under this amendment appellant attempted to show she intended to convey to appellees only one acre of land whereas she actually conveyed 2. 6 acres. At the close of appellant's testimony the trial court sustained appellees' written demurrer to the evidence. Appellant now prosecutes this appeal, asking for a reversal on three separate designated points.

We find it unnecessary to examine any of the points relied on since we have concluded the decree of the trial court must be affirmed because of appellant's failure to comply with Rule 9 (d) of this Court. This rule, in substance, requires appellant to abstract such material parts" . . . of the pleadings, proceeding, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this Court for decisions."

Although the record contains more than fifty pages of pleadings, exhibits, and testimony, appellant has presented us with no abstract of the same. The casual

references in the argument to this testimony are not sufficient for us to formulate an informed opinion on the merits of the case. In such a situation this Court has heretofore uniformly affirmed the trial court's decree or judgment. See: *Ellington* v. *Remmel,* 226 Ark. 569, 293 S. W. 2d 452; *Porter* v. *Time Stores, Inc.,* 227 Ark. 286, 298 S. W. 2d 51; *Farmers Mutual Ins. Company* v. *Watt, Et Ux,* 229 Ark. 622, 317 S. W. 2d 285; and, *Anderson* v. *Stallings,* 234 Ark. 680, 354 S. W. 2d 21.

The fact that the appellant, in her reply brief, has abstracted the record does not, in our opinion, justify us in waiving the total failure to comply with Rule 9 (d) in the first instance. To do so would be manifestly unfair to the appellees. They were not required to supply the deficiency and were at liberty, if they thought the abstract to be insufficient, to proceed upon the assumption that the decree would be affirmed. To allow the appellant to supply the abstract in the reply brief would have the effect of trapping the appellees. We stress the fact that here the appellant's omission was total; we do not intimate that an appellant would be penalized for a mere deficiency such as may result from inadvertence or from a failure to anticipate the appellee's arguments.

Affirmed.

HARRIS, C. J., and MCFADDIN, J., concur.

ED. F. MCFADDIN, Associate Justice (concurring). I concur in affirming the decree of the Chancery Court on the merits of the case.

The original abstract filed by appellant was fatally defective when measured by Rule 9 of this Court; but prior to submission appellant filed, in a reply brief, a sufficient abstract of the record. Such filing prior to submission was said to be proper in *St. L. RR.* v. *Newman,* 105 Ark. 63, 150 S. W. 560; and also in *Thompson* v. *Dierks Lumber Co.,* 208 Ark. 407, 186 S. W. 2d 425.

So I considered the cause on the merits, and reached the conclusion that the Chancery decree was correct. The Chief Justice joins in this Concurrence.

LIMBERG v. LUTZ.

5-2924 365 S. W. 2d 713

Opinion delivered March 11, 1963.

[Rehearing denied April 8, 1963.]

[redacted]

White & Martin, for appellant.

Warner, Warner & Ragon, for appellee.

SAM ROBINSON, Associate Justice. Appellants, Mary Limberg, and her son-in-law, Hugh Connor, filed suit against Herman A. Lutz and Fred A. Lutz, conducting a plumbing business as a partnership under the firm name of Lutz Brothers. The Complaint alleges that the defendants negligently set appellant Limberg's dwelling house on fire while doing some plumbing.

Mrs. Limberg alleged damages in the sum of $11,046.57. Hugh Connor alleged that some personal property he had in the house was damaged in the sum of $824.88. Bertha Connor, wife of Hugh, filed an Intervention in which she alleged personal property damages to the extent of $116.70. The defendants, appellees herein, filed an Answer and Motion to Dismiss the Complaint and Intervention, alleging that Mrs. Limberg and

the Connors were not the real parties in interest; that they had insurance which covered the loss sustained by reason of the fire; that the insurance company had paid the loss and had been subrogated to the rights of the plaintiff.

Mrs. Limberg and the Connors filed a response to the motion, stating that they were the real parties in interest and pointing out that the insurance company had not requested that it be made a party and had not intervened. The trial court entered an order holding that the Providence-Washington Insurance Company was a necessary party and directing that the complaint be dismissed unless the insurance company was made a party plaintiff. The insurance company filed a motion to set aside the order requiring it to become a party plaintiff, and alleged that it was not a necessary party, and further, that it waived any cause of action it might have against the defendant Lutz by reason of the assignment. The motion was overruled. The insurance company filed a complaint and the case proceeded to trial.

During the trial it developed that Mrs. Limberg had fire insurance covering damages to the property to the extent of $6,500.00 and that the full amount of the insurance had been paid to her. The trial resulted in a verdict for the defendants. All the plaintiffs and the intervenor in the Circuit Court have appealed.

The principal contention by appellants is that the trial court erred in forcing the insurance company to become a party plaintiff by ordering a dismissal of the case unless the insurance company joined as a plaintiff.

The first question is whether the insurance company was a necessary party to the maintenance of the suit. Mrs. Limberg's claim against the Lutz Brothers up to $6,500.00 had been assigned to the insurance company; therefore, of course, that company was a proper party, but was it a necessary party? Appellees cite as sustaining their position, the case of *National Fire Ins. Co.* v. *Pettit-Galloway Co.*, 157 Ark. 333, 248 S. W. 262, but that case merely holds that since the cause of action was not assignable by law, the assured was the real party in inter-

est and a necessary party plaintiff. The question of whether *the insurance company, the assignee,* was a necessary party was not an issue. Appellees also rely on the case of *Home Ins. Co.* v. *Lack,* 196 Ark. 888, 120 S. W. 2d 355, There, the insurer and the assured had joined as plaintiffs in a case similar to the case at bar, and this court held that the insurance company was a proper party. There was no issue of whether it was a necessary party.

Another case relied on by appellees is *Chicago R.I. & P. R. Co.* v. *Cobbs,* 151 Ark. 207, 235 S. W. 995. Cobbs, the owner of property destroyed by fire, and the insurance company insuring against the loss, and assignee, filed suit against the railroad company alleging that the fire was caused by the negligence of that company. Both the insurer and the assured were parties plaintiff. The issue on the joinder of parties question was whether the insurance company was a proper party. There was no issue of whether it was a necessary party, but by way of *obiter dictum* the court said the insurance company was a necessary party. In *Motors Insurance Corp.* v. *Coker,* 218 Ark. 653, 238 S. W. 2d 491, we pointed out that the issue in the Cobb case was whether the insurance company was a proper party. In *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566, the court said; "Where the loss exceeds the amount of the insurance, so that payment under the insurance contract constitutes but a partial satisfaction of the damages sustained, leaving a residue to be made good by the wrongdoer, it has been held that insured may maintain in his own name the action against the tort-feasor, which may be for his own benefit and for the benefit of the insurer. In such case insured may recover the full amount of the loss for which the tort-feasor is liable and insurer is not a necessary party." In *Dowell, Inc.* v. *Patton,* 221 Ark. 947, 257 S. W. 2d 364, the court not only held that the insurance company was not a necessary party, but also held that evidence of its payment to the assured was not admissible. The rule in the McGeorge and Dowell cases was approved in *Summerhill* v. *Shannon,* 235 Ark. 617, (October 29, 1962).

Our conclusion is that the insurance company was not a necessary party to the litigation. Having reached that determination, the next question is whether the plaintiffs and intervenor were prejudiced by the trial court's action in compelling the insurance company to become a party plaintiff by ordering that the action be dismissed unless the company joined as plaintiff.

The insurance company objected to being made a party at its own risk, because it could not have maintained a separate suit against Lutz Brothers. *Motors Insurance Corp.* v. *Coker, supra.* Mrs. Limberg and the Connors did not want the insurance company in the case as a party plaintiff, and the insurance company did not want to be a party. In these circumstances, we feel it was prejudicial to the plaintiffs' interest to have the case confused by injecting the subject of insurance. In both the Dowell and Summerhill cases, above mentioned, we held that evidence was not admissible to show plaintiff's loss was partially covered by insurance. In addition, a plaintiff has the right to plan his trial and course of action according to his own views so long as his procedure is valid. He should not be compelled to have another party associated with him when such other party is not necessary to the action and when neither he nor the other party desire such association.

There can be differences of opinion on the selection of the jury and other procedures, and the bringing of such a party into the case may confuse the jury. This very thing appears to have occurred in the case at bar. When the jury returned the verdict for the defendants, the foreman of the jury said to the court: "I would like to make a little comment following this verdict, if I may . . . and I'd like to state on behalf of the jury that we took several ballots before making this decision and it was the feeling of the jury that although there may have been some indication of negligence, there was enough improvement, and on the basis of this they returned this unanimous verdict." Apparently, the foreman was talking about the repairs to Mrs. Limberg's house exceeding in value the $6,500.00 in insurance. Of course, the Connors were also in the case.

Appellants also argue that the court erred in refusing to permit counsel to examine veniremen on the doctrine of *res ipsa loquitur*. This was a matter of discretion with the trial court.

For the error in compelling the insurance company to become a party plaintiff, the judgment is reversed and the cause remanded.

SOUTHERN FARM BUREAU CASUALTY INS. CO. *v.* ROBINSON.

5-2885 365 S. W. 2d 454

Opinion delivered March 11, 1963.

Cockrill, Laser, McGehee & Sharp, for appellant.

Murphy & Arnold, for appellee.

JIM JOHNSON, Associate Justice. On August 22, 1956, appellant Southern Farm Bureau Casualty Insurance Company issued its automobile liability policy to Forrest B. Booth. The policy was in effect on May 28, 1958, when Booth had an automobile accident in Illinois. At the time Booth was driving the car and appellee Bartis Robinson was a passenger. Robinson was injured and hospitalized. Booth returned to Arkansas.

On June 30, 1958, Robinson filed suit against Booth in Illinois and on July 15, 1958, Booth received in Arkansas by registered mail a notice of the action and a copy of the process. There is evidence, controverted, that Booth did not forward the suit papers to appellant until October 10, 1958, and that it was not until September 16, 1958, that appellant learned of the Illinois action as a result of a telephone call from Robinson's attorneys. Appellant took a non-waiver agreement from Booth on October 9, 1958, and then answered, entering his appearance in the Illinois action. Thereafter on October 21, 1958, appellant filed a declaratory judgment action against Booth in the United States District Court, Eastern District of Arkansas, Northern Division, in which action appellant alleged that Booth did not deliver the suit papers to appellant as required by his policy and therefore it was not liable under the policy.

Booth did not answer appellant's complaint, and on January 6, 1959, a judgment by default was entered against Booth. On February 7, 1959, appellee filed a motion in the United States District Court to set aside the judgment and allow him to defend, which was denied.

On February 13, 1959, appellant obtained permission of the Illinois court to withdraw the answer its Illinois attorneys had filed for Booth, and Booth was given notice thereof and time in which to employ counsel and defend the action if he so desired. Booth did not file an answer, and on September 13, 1960, Robinson took a default judgment against Booth in the amount of $20,000.00 in the Illinois action. Thereafter on January 2, 1961, appellee reduced his Illinois judgment against Booth to an Arkansas judgment and an execution was issued against Booth which was returned unsatisfied.

Having exhausted his remedies against Booth, appellee then filed this suit directly against appellant in the Independence Circuit Court under the authority of Ark. Stats. § 66-526.

At trial the jury awarded appellee $5,000.00 damages, $818.94 medical expenses, no interest, and costs of $71.90. The trial court entered its judgment on October 27, 1961, for the amount of the jury award, together with interest on the Illinois judgment until it was reduced to an Arkansas judgment, interest on the Arkansas judgment, the statutory penalty, attorneys fees and costs against appellant. For reversal of that judgment, appellant relies on four points, each of which we shall consider separately.

I

"The trial court erred in holding that the judgment of the United States District Court was not conclusive of the single factual issue in the instant action."

Restated, this question is, "Can a default declaratory judgment between an insurer and an insured, instituted while suit is pending in a foreign jurisdiction between the insured and an injured person, which suit the insurer is defending, destroy the rights of the injured person who was not a party to the declaratory judgment proceedings?"

When the United States District Court denied appellee's motion to set aside the judgment and allow appellee to intervene and answer, the District Court filed a

Memorandum Opinion denying the motion for lack of timeliness, in which the Court stated in part:

"Aside from that, however, I would give serious consideration to granting the motion, notwithstanding the movant's lack of diligence if I felt that there was any real likelihood of his being seriously prejudiced in a subsequent action against the company on account of the entry of the default judgment. I do not believe, however, that there is any substantial danger of such prejudice. The movant has never been a party to this action and is not bound by the judgment; in my opinion he will be perfectly free, should he ultimately obtain a judgment against the insured, to litigate with the company the question of whether the insured complied with the requirements of the policy. *Allstate Insurance Co.* v. *Thompson,* D. C., Ark., 121 F. Supp. 696, 702-3."

The manifest purpose of the "direct action statute" (Ark. Stats. § 66-526) is to protect the rights of the injured and not the rights of the insurer or the insured. The rights of the injured arose at the time of the injury, 46 C.J. S., § 1191, p. 122, and are antagonistic to the rights of both the insurer and the insured. Under the facts here presented, it cannot be said that the insured and appellee were in privity with each other either in law or in fact.

On the specific point here in question, Professor Appleman in his comprehensive works, Insurance Law and Practice, vol. 20, § 11371, states what appears to be the general rule as follows:

"Persons who have been injured in an automobile accident are certainly proper parties to a suit by the liability insurer to determine coverage of its policy and the better rule would seem to be that they are both proper and necessary parties to the maintenance of the suit. Hence, it would be error to dismiss such person from the declaratory judgment suit . . . However, if the court does not or cannot secure jurisdiction over them their rights cannot be destroyed by their non-appearance; nor can such rights be determined where they are not made parties to the suit."

The rationale of this rule is sound and since the specific question here presented appears to be a case of first impression in this jurisdiction, we adopt it as our own.

Applying the rule as adopted to our consistent literal construction of the Arkansas Declaratory Judgment Act (Ark. Stats. § 34-2501, *et seq.*), "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," *Johnson* v. *Robbins,* 223 Ark. 150, 264 S. W. 2d 640; *Laman, Mayor,* v. *Martin,* 235 Ark. 938, 362 S. W. 2d 711; we conclude that the U. S. District Court's declaratory judgment was not res judicata as to appellee who was not a party to the action.

II.

"The trial court erred in refusing to grant appellant's motion for a directed verdict on the ground that there was no substantial evidence that insured Booth complied with the policy provisions requiring immediate delivery to the company of suit papers."

The policy provision here referred to is Section 3 of the Conditions of the policy:

"3. Insured's Duties. The insured, or someone on his behalf, shall as soon as practicable after an accident or loss:

(a) give written notice to the Company containing all particulars;

* * *

(c) immediately deliver to the Company all papers in connection with any claims or suits; . . . "

Appellant forcefully argues that Booth's own testimony relative to delivery of the suit papers to the company in compliance with the policy provision was such as to fall short of fulfilling the requirement that it be substantial in nature. It is true that Booth's testimony was generally contradictory, however he consistently main-

tained that he "showed" the papers to appellant's agent shortly after receiving them. Be that as it may, the policy provides that notice shall be given by the insured, or someone on his behalf. There is substantial evidence that appellant received notice of the suit and that it was not prejudiced by delay in receiving such notice. Appellee's Illinois attorney, William C. Murphy, testified that he was retained by appellee on June 8, 1958, and that on June 16, 1958, he wrote appellant's agent about appellee's claim. He exhibited a copy of his letter and the signed receipt. Suit was filed in Illinois on June 30th and service perfected on July 7th. In the meantime appellant employed, on June 24th, an Illinois claims adjusting agency, who called on appellee's attorney on June 26, 1958. Right after Labor Day, 1958, Mr. Murphy called appellant's agent about the pending suit and at his suggestion called the Little Rock office of appellant. He followed up this conversation with a letter to the Little Rock office dated September 17, 1958. On October 1, 1958, Mr. Murphy sent appellant a notice that he would present the matter for default judgment on October 11, 1958. On October 8, 1958, Edwards Streit, also an Illinois attorney, contacted Mr. Murphy stating that he represented appellant, and on that same date Mr. Murphy wrote Mr. Streit that he would do nothing further on the case until he was advised whether appellant was declining coverage or was accepting coverage. On November 1, 1958, Mr. Streit called Mr. Murphy and advised him that appellant was in the case all the way.

Thereafter on November 17, 1958, appellant filed an answer, but then on February 13, 1959, appellant withdrew its answer.

In *M. F. A. Mutual Ins. Co.* v. *White,* 232 Ark. 28, 334 S. W. 2d 686, concerning a similar policy provision, this court held:

"The purpose of the stipulation in the policy was to afford the insurance company an opportunity to control the litigation and interpose a defense against the claim on the merits of the case. Since the first action was dismissed without prejudice there was no judgment,

no payment, and no liability against appellant was sought; hence, it is clear that there was no breach of the conditions of the policy by failure of appellee to give notice of the first suit."

In that case, the first suit brought by the injured party was dismissed voluntarily and without prejudice even though she was entitled to a default judgment when she discovered that the insured had not given the insurer notice of the suit, and then immediately filed an identical suit. The insured complied with policy provisions on the second suit. In the case at bar, appellant had ample opportunity to investigate the case and interpose a defense, and the testimony is uncontroverted that appellant did both investigate the claim and interpose a defense. The state of the record being thus, we find that the trial court properly denied appellant's motion for a directed verdict and properly submitted the question of compliance with the policy provisions to the jury.

III.

"The trial court erred in refusing to instruct the jury that appellee's rights under appellant's policy were no greater than the rights of its insured, Forrest B. Booth."

Appellant objected to the trial court's deletion of the following words from an offered instruction: "You are further instructed that the rights of the plaintiff are no greater than the rights of Booth."

The record reveals that in the first and second paragraphs of appelant's answer, appellant admitted that appellee "is entitled to recover *in his own right* for all medical expenses incurred within one year after the date of the accident," and then denied that it is indebted to appellee in any manner under the policy except for the medical payments. This is inconsistent with the offered instruction. Appellant's answer concedes that appellee's rights were greater than Booth's, if only for the medical expense coverage, which disposes of the necessity of our reaching the question of whether Booth

had, at the time of the present trial, lost his rights by the default judgment rendered against him in the U. S. District Court.

IV.

"The trial court erred in rendering judgment for appellee for certain interest despite the verdict of the jury refusing to award interest."

Before retiring, the jury was instructed in part as follows:

"I will hand you three forms of verdict; the first one reads: 'We, the jury, find for the plaintiff, Bartis Robinson, and fix his recovery as follows: Coverage A, $5,000.00; Coverage C, $818.94; Interest,' and there you will find a dollar sign and a blank where you would insert whatever amount you agreed upon, "Costs, $71.90.'

"The second form of verdict reads: 'We, the jury, find for the plaintiff, Bartis Robinson, for his medical expenses only under Coverage C and in the amount of $818.94."

"The third form of verdict: 'We, the jury, find for the defendant, Southern Farm Bureau Casualty Insurance Company.' "

The jury returned with the first verdict, signed by nine jurors, but with the interest left blank. In response to a question, the court advised the jury that they did not have to include interest. The attorneys for both parties objected to this instruction, on different grounds. The jury retired and then returned with the verdict form marked, "No. int.", signed by all twelve jurors.

Appellee's complaint prayed for interest on the full $20,000.00, in accordance with Paragraph 3 of the policy under its "insuring agreement" which provides:

"(b) All expenses of the company, all costs taxed against the insured in any suit and all interest accruing after entry of judgment and until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon."

In our view, this provision provides for interest on the entire judgment until tender has been made of an amount up to the policy limits. 76 A.L.R. 2d 983. There is no showing that tender has ever been made even of the medical payments which appellant admits it owes.

Arkansas Statutes § 29-124 provides as follows:

"Creditors shall be allowed to receive interest at the rate of six [6] per cent per annum on any judgment before any court or magistrate authorized to enter up the same from the day of signing judgment until the effects are sold or satisfaction be made; . . . "

From the mandatory wording of this statute, it is apparent that as a matter of law appellee was entitled to interest if he was entitled to a judgment. The jury having found that appellee was entitled to judgment, the awarding of interest then becomes a matter of simple computation "of six per cent per annum from the date of signing judgment." On motion of appellee, after briefs and argument of counsel, the court found that appellee was entitled to interest on the Illinois judgment until it was reduced to an Arkansas judgment, and interest on the Arkansas judgment from the date of its entry to the date of the trial. We find no error in the trial court's correction of its own error in submitting the question of interest to the jury. After careful consideration of all points urged for reversal, we find no error and the judgment is therefore affirmed.

Counsel for appellee have moved for additional attorneys' fee because of services rendered on this appeal. We are of the opinion that the motion should be granted, and the fee is fixed at $500.00.

It is so ordered.

5-2930 365 S. W. 2d 461

Opinion delivered March 11, 1963.

Gentry & Gentry, for appellant.

Richard W. Hobbs, for appellee.

FRANK HOLT, Associate Justice. The appellant, Dagmar Joy Johnson Lytton, brought this suit against the appellee, Lewis P. Johnson, individually and as executor, to have a recorded deed declared void on the allegation of it being a forgery. The original deed was not produced in evidence.

The chancery court dismissed appelant's complaint "for lack of proper proof and evidence and for want of equity." On appeal, for reversal appellant relies on the following points: (1) The legal presumption given to a recorded deed, properly acknowledged, was overcome by appellant's proof and (2) the preponderance of the testimony shows that the deed and acknowledgment was a forgery.

Appellant is the daughter of Mabel F. Johnson and Charles H. Johnson, both deceased, the mother and father having been divorced in 1924. Subsequent to the divorce, the father of appellant conveyed several lots of property to her and had the deed recorded on April 13, 1926. Appellant testified that she did not know of the conveyance by her father to her until the death of her mother in April, 1961.

A deed, dated November 12, 1929, from appellant to Mabel F. Johnson reflects that it was acknowledged before a notary public on November 15, 1929. The deed was recorded in 1938.[1] The deed recited consideration of $500.00 and love and affection. Appellant, also, claims no knowledge of this deed from her to her mother. It is this deed that appellant alleges to be a forgery.

Mabel Johnson married the appellee, Lewis P. Johnson, a nephew of her former husband who was Dagmar's father, in May, 1930. Appellee testified that his wife kept the deed in the safe in her flower shop and gave it to him to have recorded in 1938 so that a loan could be procured by them for the purpose of building a residence on such property which they did. He testified that he has not been able to find the original deed.

Appellant testified that the purported date of the acknowledgment of the deed, November 15, 1929, was the date on which she married a previous husband. She testified that she did see a notary public that day but that it was for the purpose of transferring some traveler's checks. Appellant asserts that the failure of appellee to produce the original deed created the presumption that if such deed were produced it would be favorable to appellant's claim. The failure or inability of the appellee to produce the original deed, under the facts in this case, raised only suspicions against the validity of the duly recorded instrument. *Temple, Administrator* v. *Smith, et al,* 222 Ark. 834, 262 S. W. 2d 898.

Although we do not have the original deed before us, we have held:

"A certificate of acknowledgment was appended to the mortgage, and it was duly placed of record, and this made a *prima facie* case of the proper execution of the deed. Crawford & Moses' Digest, § 1532 [Ark. Stat. 28-921]; *Polk* v. *Brown,* 117 Ark. 321, 174 S. W. 562; *Nevada County Bank* v. *Gee,* 130 Ark. 312, 197 S. W. 680." *Straughan* v. *Bennett,* 153 Ark. 254.

[1] At the time this deed was recorded in 1938, nine years after its date, facilities for photostating such instruments were not available in the recorder's office.

See also *Lynn* v. *Quillen,* 178 Ark. 1150, 13 S. W. 2d 624.

The burden is upon appellant, therefore, to disprove the authenticity of the acknowledgment. In the case of *Miles* v. *Jerry,* 158 Ark. 314, 250 S. W. 34, we said:

" * * * This court has uniformly held that where a grantor appears and makes some kind of acknowledgment before an officer authorized by law to take such acknowledgment, the recitals of the certificate of such officer, regular on its face, are, in the absence of fraud or duress, conclusive of the facts therein stated. *Bell* v. *Castleberry,* 96 Ark. 564, 132 S. W. 649.

A different question presents itself in the case of a certificate of acknowledgment alleged to have been forged. A proper acknowledgment is an essential part of the execution of a conveyance of land, and it is competent for the grantor to show the falsity of a certificate of acknowledgment. Where the grantor never appears before an officer to acknowledge the deed and the officer makes a false certificate that the grantor did appear, his act is wholly without authority of law, and void. Every one must be subject to the risk of forgery by officers authorized to take acknowledgments. No one can claim that an estate in land should be divested by forgery, and the forgery need only be established by a preponderance of the evidence."

Whether it be contended that the acknowledgment was wrongfully made by the notary or that the notary's acknowledgment was forged, we feel that from a review of the record appellant has failed to sustain her burden of proof. This court was faced with a similar situation in *O'Kane* v. *First National Bank of Paris,* 189 Ark. 396, 72 S. W. 2d 537, where we said:

" * * * Appellant stands alone in denying that she appeared and acknowledged the instrument. She is contradicted, not only by her interest in the result of this lawsuit, but by the certificate of the officer and two officers and employees of the bank, and by her admission that she actually signed her name to it. The burden was upon her to establish the falsity of the certificate of the notary, and this she has failed to meet."

In the instant case, appellant admitted that she appeared before a notary on November 15, 1929, for the purpose of transferring some traveler's checks. We cannot think of a situation in which it would be necessary for a notary to acknowledge such a transaction and there is no such proof offered. This statement, that she appeared before a notary, along with the fact of appellant's interest in the lawsuit, plus several inconsistencies in her testimony, warranted the chancellor in ruling that she had not sustained her burden of proof. We cannot say that the chancellor's finding was against the preponderance of the evidence.

The decree is, therefore, affirmed.

ABEL OF ARK. *v.* RICHARDS.

5-2945 365 S. W. 2d 705

Opinion delivered March 18, 1963.

Milham & Cummins, for appellant.

Ben M. McCray, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Abel of Arkansas, Inc., is an Arkansas corporation engaged in the business of processing sand and gravel into aggregate for construction use, and its plant is located on the Saline River near Benton. Appellee, Mike Richards, is a

resident of Benton engaged in contracting, and hauling gravel and other products. On August 27, 1960, appellant and appellee entered into a written contract, whereby the company agreed to pay Richards "the sum of 55 cents per cubic yard of raw gravel and aggregate taken from the Airport lands and removed and placed on the grounds in the plant of Abel;" appellant also agreed to pay to Richards an additional sum of 10 cents per cubic yard for an easement across Richards' lands.[1] Richards agreed to "put at least 500 cubic yards of aggregate in the plant per day," except Sundays, and unless prevented by high water. Abel agreed to pay Richards for the gravel at the time of sale, or collection, but not later than 60 days after the sale. The contract was to run for one year.

On February 1, 1962, appellant instituted its complaint against Richards alleging that the latter had breached the contract by failing to deliver the 500 cubic yards per day, and that the company had been damaged in the sum of $42,753.50. Judgment was sought in that amount. Following the filing of a demurrer by appellee, a substituted complaint was filed by appellant, seeking identical relief, but specifically setting up the manner in which the figure of $42,753.50[2] had been reached. Richards answered with a general denial, and filed his cross complaint against appellant seeking judgment in the sum of $5,825.45. It was alleged that no payments had been made to appellee since February 28, 1961, though appellant had sold a substantial amount of gravel since that time. Judgment was sought for alleged amounts due because of such sales, and the balance of appellee's claim was predicated upon alleged rent due from the company for the use of certain equipment belonging to Richards, and for alleged conversion of, and damage to, other equipment owned by appellee. After the filing of other pleadings and interrogatories, the cause proceeded to

[1] The object was to install a washing plant, for the purpose of stockpiling sand, gravel, and other aggregate at Abel's plant.

[2] According to the pleadings, "The $42,753.50 sued for herein is the amount or difference between what plaintiff was to pay defendant, plus the expense of processing the materials into finished products under the contract and the market value of the number of yards which defendant failed to deliver to plaintiff's plant under said contract."

trial, and the jury returned a verdict for Richards on his cross complaint in the sum of $6,712.00. The amount was reduced by the court to $5,825.45, inasmuch as Richards had only sought that sum in the cross complaint. From the judgment entered by the court in the last amount, appellant brings this appeal. Several points are urged for reversal which we proceed to discuss.

It is first asserted that the court erred in permitting counsel for appellee to cross-examine J. P. Brumbelow, Secretary and Treasurer of appellant company, relative to certain matters that had not been included in the interrogation on direct examination, and which (according to appellant) related only to the cross complaint filed by appellee. In the first place, the examination appears mainly to enlarge upon questions which were touched upon in the direct examination, and in the next place, though the general rule is that cross-examination must be confined to only those facts and circumstances connected with the matters actually stated by the witness during direct examination, we have also recognized the discretionary power of the trial court to allow variations from the customary order. Ordinarily we decline to consider as error any variation sanctioned by the trial court unless there is an abuse of discretion. *St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 398, 119 S. W. 665; *Hightower* v. *Sholes,* 128 Ark. 88, 193 S. W. 257. See also article entitled "Cross Examination and Impeachment" by Jerome K. Heilbron, attorney of Fort Smith, at Page 41, Volume 15, Arkansas Law Review. We find no abuse of discretion in the present instance, particularly inasmuch as the subject matter was covered by later witnesses.

In making his opening statement to the jury, counsel for appellee remarked that the litigants "threw this contract out the window and made an oral contract." Appellant objected to the statement on the ground that no oral agreement had been pleaded. The objection was overruled. It is true that the answer and cross complaint do not assert any agreement made subsequent to the original contract, but we are unable to see that any prejudice resulted to appellant from the statement made by counsel in his opening remarks. After all, this was merely a

statement — not evidence. A more proper moment for this objection to have been made was at the time the proof of a new agreement was offered. Richards offered this proof during his testimony—and no objection of any nature was made by appellant.

It is asserted that the judgment is contrary to the evidence, but the duty of passing upon the evidence was a proper prerogative of the jury, and not this court. The testimony was quite conflicting, constituting what is sometimes referred to as a "swearing match" between the litigants and their respective witnesses, and presented the questions of whether the parties proceeded entirely under the original agreement or under a subsequent agreement, which party first violated the contract under which they were operating, or whether, possibly, both abandoned any agreement that had been made. The company contended that Richards did not deliver the gravel in the quantities, nor manner, called for by the contract, and evidence was offered in support of that contention, and to explain the amount of damages sought ($42,753.50) in the complaint. From the testimony of Brumbelow:

"The total number of days should have been 365, but we started with October 26th, which is 295—I beg your pardon—294 days, and we—and I counted them by the calendar—it was 42 Sundays taken from that 294 which would leave 252 days. Of course, the contract had a high water clause, it would necessarily have a bad weather clause, and the added high water clause by most stated contracts will give a twenty-five percent leverage for high water on their contract, which we gave to him in determining the number of days of operation. So we took twenty-five percent off the 252 which would have been 63 days that we were allowing him for high water, would have been a total of 189 operating days at the plant. Now, 189 days times five hundred yards per day would have been 94,500 yards of material that should have been put to the plant in the 189 days of operation. Now, he actually put to the plant in those days a total of 8,993 yards. That figure I gave you while ago was correct. He actually put 8,993 yards to the plant, which, incidentally was only

sixteen days of operation for the plant out of that particular year forfeiting the contract, which would leave the amount under the contract of 85,507 yards, and that times fifty cents would be $42,753.50."

Several other witnesses testified that Richards never did deliver as much as 500 cubic yards in any one day, and gravel was not delivered in sufficient amounts to permit full operation of the plant.

Appellee disputed these statements, testifying that he started hauling gravel as soon as the plant was ready for operation (some time in October). Richards stated,

"They had some gravel on the ground in the stockpile at all times, except one time when Mr. Ament asked me to shut off hauling for one week. There was so much stuff there, we had him covered up on the ground, so he could not get around with his loader, and it was one week there that we did not haul any gravel for him at his request. * * * Well, we would back up there with a load of gravel and nine times out of ten we would have to sit there and wait anywhere from ten minutes to an hour, and then when we did get a chance to dump it out we would have to raise the bed at least three times, because it would run over on the belt and it would shut down, and we would sit there. Every load we put in it was like that. They would ask us to do that because the conveyor belt would break. And on several occasions they would have to stop hauling and clean that hopper out with a shovel." Other witnesses also testified substantially to the same facts.[3] Appellee testified that he finally quit hauling because "they went broke and didn't have any money to operate on."

Certainly, there was evidence under which the jury could find that a supplemental agreement was entered into. The testimony reflects that it became necessary to enter into a further contract relative to obtaining gravel to supplement the amount of gravel being hauled from

[3] Testimony was also offered by appellant that Richards entered into a federal contract and moved to Sheridan to service a gravel haul from Sheridan to Redfield; appellee offered testimony that appellant company entered into a contract with the Burks Company to haul gravel to the premises without his (Richards') knowledge.

the river.[4] An agreement was entered into to pay Richards $1.05 per yard for gravel hauled from another location. While Brumbelow testified "that was all Mike's idea," the company did accept the gravel, and paid Richards for part of it. Admittedly, appellant still owes Richards $618.40.

Appellant complains that Richards should not have been permitted to present the proof just mentioned, since his pleadings did not assert this agreement; however, as heretofore pointed out, this evidence was offered without objection. In *Fairbanks-Morse & Company* v. *Hogan,* 201 Ark. 1114, 148 S. W. 2d 162, we said:

"Where the plaintiff acquiesced in the method of examining witnesses and did not contend trend of the testimony thus adduced was outside the scope of the pleadings, the answer will be treated as having been amended to conform."

See also *R.C.A. Victor Co., Inc.* v. *Daugherty,* 191 Ark. 401, 86, S. W. 2d 559.

There was likewise testimony under which the jury could have found that appellant company was not in sufficient operating condition to use 500 cubic yards of aggregate each day. While this was stoutly denied by witnesses for appellant, the question was, as heretofore stated, entirely one for the jury to determine. Appellant frequently reiterates in its brief that appellee did not start hauling gravel until October, whereas Richards was supposed to start hauling in the latter part of August. Appellee's answer to this contention was simply that the plant was not, at that time, operating in a manner that would enable it to handle the loads called for in the original agreement. In addition, it will also be noted from the testimony of Brumbelow (heretofore quoted) that the company, in figuring up the amount of damages in the complaint, *used the commencement date of October 26.* In other words, it would appear that, in effect, appel-

[4] This was occasioned by the condition of the gravel hauled from the river. "It had so much polution of dirt and shale that they stopped me. It looked like a lot of gravel but when you reached down and picked it up there was this old black mud in it and it wasn't altogether in the strippings either."

lant abandoned the contention that appellee first violated the contract by not starting in August, and waived appellee's failure to do so, for in seeking damages, it relied on events that occurred subsequent to the 26th day of October.

Appellant also complains that the evidence (upon which the verdict for appellee was based) does not constitute substantial evidence. This objection primarily refers to various items mentioned by Richards in his testimony, which related to damage to his equipment. For instance, Richards testified that the company used a loader belonging to him and damaged it to the extent that he had to "tear it down and completely overhaul it" at a cost of $2,300. Appellee testified that he was not present at the time this was done and had acquired the information from his operator. Appellant says this evidence was inadmissible because it was hearsay evidence. Of course, it is hearsay evidence, but an examination of the record reflects that no objection was made at the time this testimony was given. In *New Empire Ins. Co.* v. *Taylor*, 235 Ark. 758 (Law Reporter of Nov. 26, 1962), 362 S. W. 2d 4, this court, quoting McCormick on Evidence, said:

"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."

Appellant also asserts that the cost of repair was not the proper method to prove damage to secondhand equipment, but, as stated, no objection was made when the testimony was introduced. This same holding likewise

applies to various other items of damage offered by Richards that are now questioned by appellant, but to which no objection was made at the time of the introduction.

Appellant contends that inasmuch as the jury returned a verdict in an amount greater than that sought by appellee in his cross complaint, the court erred in not setting the verdict aside rather than reducing the judgment in the amount of $876.55. No motion to set aside the judgment was made, but at any rate, we cannot see how appellant was prejudiced by the court's action; the reduction inured to the benefit of the company, and, in fact, a failure to have reduced the judgment to the amount sued for, would have constituted error. *Cohn* v. *Hoffman,* 45 Ark. 376; *Turner* v. *Smith,* 217 Ark. 441, 231 S. W. 2d 110.

Appellant asserts that the court erred in failing to instruct the jury on behalf of the plaintiff (appellant) as orally requested by plaintiff's attorney, and that the court's Instruction No. 1 failed to apprise the jury of the company's rights. The objections which were made to this particular instruction are not well grounded, and appellant did not offer any instructions in its own behalf.

Appellant complains about certain instructions that were given to the jury by the court at the request of appellee. Appellee's Instruction No. 2, which dealt with the burden of proof on the part of the plaintiff, is challenged by appellant, but we find no error in the instruction. Complaint is made of appellee's Instructions No. 4 and No. 6, which are similar to each other. No. 4 reads as follows:

"You are instructed that the failure of one party to a contract to comply with its terms releases the other party from complying with it, so if you find from the evidence in this case that the plaintiff, Abel of Arkansas, did not comply with the terms of the contract sued on herein, then there was no further obligation on the part of the defendant, Mike Richards, to comply with the terms of said contract."

An objection was made to this instruction on the basis that there was no evidence upon which to base it, and it was therefore abstract and "it is admitted by the defendant in his evidence that he did not deliver any aggregate to the plant until October 28." We have already in our prior discussion answered the quoted statement, and, as previously pointed out, there was evidence that Abel had not complied with the contract, so the objection is not well taken. Appellee's Instruction No. 6 reads as follows:

"You are instructed that one breaking a contract cannot recover on said contract, so if you find from the evidence in this case that the plaintiff, Abel of Arkansas, first breached the contract sued on herein, then your verdict should be for the defendant, Mike Richards, on the complaint of the plaintiff."

Objection was made that this instruction "is not a correct declaration of the law." Of course, this objection is no more than a general objection, which is only good if an instruction is inherently erroneous, *i.e.*, the instruction could not be correct under any circumstances. A general objection was not sufficient to challenge this instruction, and appellant failed to point out specific errors.[5]

[5] While there are several cases that seem to support these instructions (*Mo. Pac. Railway Co.* v. *Yarnell,* 65 Ark. 320, 46 S. W. 943, *Nakdimen* v. *Baker,* 111 F. 2d 778, and some others), the statement that the one who first breaches a contract cannot recover on the contract, is generally qualified by other language. In *St. Louis - S. F. Ry. Co.* v. *Mo. Pac. Rd. Co.,* 176 Ark. 1016, 5 S. W. 2d 364, this court pointed out, "There are exceptions to this general rule, growing out of the nature of the thing to be done and the conduct of the parties." In *Griffin* v. *Chesney,* 168 Ark. 240, 269 S. W. 582, we said, "There is more uncertainty about who committed the first breach, and this appears to be the principal question of fact in the case. Cases are cited holding that the party who commits the first *substantial* (our emphasis) breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform. This is, of course, a well settled principle of the law." A pertinent discussion is found in Corbin on Contracts, Volume 6, Chapter 68, Sections 1253 and 1254. Without necessarily indicating our full approval or acceptance of the language therein used, we quote portions of those sections as interesting observations on the subject. From Section 1253 (Page 7): "It is not always that a breach of contractual duty by one party to a bilateral contract discharges the duty of performance on the part of the other. As the term "breach" is used, a contractor who has committed a breach is guilty of a wrong for which some remedy is available, the remedy varying with the case. Being guilty of a wrong does not make him an outlaw or deprive him of all rights, even the rights that were created by the very contract that he breaks. This is true, in spite of many a contrary

Appellant asserts some other alleged errors, but these are either not argued in the brief, or are found to be without merit.

No reversible error appearing, the judgment is affirmed.

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dictum, even when his breach is 'wilful.' Indeed, it seems best to say that breach by one party never discharges the other party, regarding breach merely as a wrong without regard to the extent and quality of its ill effects." From Section 1254 (Page 17): "There is an often repeated doctrine to the effect that any wilful breach by one contractor discharges the other from further duty, without regard to the extent or materiality of the performance that is wilfully refused or withheld. The harshness with which such a rule as this would often operate, grossly penalizing the one party for a comparatively slight harm to the other, has generally been avoided, either by making no reference to the doctrine at all or by strained interpretations of the word 'wilful.' It is generally true that, in cases where the doctrine is expressly relied on, the breach is not only wilful but is also material in character and extent; frequently the breach that the court has in mind is a wilful and total abandonment.

But if the doctrine is strictly and honestly applied, in a case where one party wilfully commits a slight and immaterial breach, then there is a discharge by wilful breach, even though the nonperformance is one that would not in itself have been of the essence and there is no discharge by failure of consideration or by nonperformance of a condition. This is not justice."

ROOK *v.* MOSELEY.

5-2879 365 S. W. 2d 718

Opinion delivered March 18, 1963.

Barber, Henry, Thurman & McCaskill, for appellant.

L. Weems Trussell, DuVal L. Purkins, for appellee.

ED. F. MCFADDIN, Associate Justice. This cause stems from a traffic mishap which occurred in Fordyce on October 19, 1961. Mrs. Milner, accompanied by Mrs. Moseley, was driving north on U. S. Highway No. 67 and gave a signal and proceeded to turn right. The other car, driven by R. T. Livingston and proceeding in the same direction, was behind the Milner car, and crashed into the Milner car, causing property damage and personal injuries to the ladies (appellees here), who filed this action for damages against both R. T. Livingston and C. C. Rook.

It was alleged, and is urged here, that Rook was the owner of the vehicle Livingston was driving; that Rook allowed Livingston to drive the car, either as bailee or agent; that Rook knew, or should have known by the exercise of ordinary care, that Livingston was a careless and reckless driver and drove while intoxicated; and that Livingston's driving while intoxicated was the cause of the traffic mishap in this case. Livingston filed general denial; Rook denied ownership of the car, alleging a sale to Livingston; and also claimed no knowledge or reason to suspect that Livingston was other than a fine and competent driver at all times. Jury verdict was in favor of the plaintiffs and against both defendants. Rook alone prosecutes this appeal, and urges four points. We group these in suitable topic headings.

I. *Ownership Of The Car Livingston Was Driving.* Appellant Rook insists that all the evidence shows that he did not own the vehicle Livingston was driving; and that the Trial Court should have given an instructed verdict

in favor of Rook. The evidence shows that the Livingston vehicle was registered under the Motor Vehicle Title Certificate Law (§ 75-101 *et seq.* Ark. Stats.) in the name of "C. C. Rook or Mrs. C. C. Rook." Rook and Livingston both testified: that on October 16, 1961 (three days before the traffic mishap here involved) Rook sold the automobile to Livingston for an agreed price of $200.00; and that Livingston paid $50.00 in cash at the time, and was to pay the balance at the rate of $50.00 per month. There was no contemporaneous writing to evidence this alleged sale to Livingston; but Rook and Livingston both testified that some time about November 1, 1961 (after the mishap) they went before a Justice of the Peace and executed a title certificate assignment, and that by May 1, 1962, Livingston had paid Rook the full $200.00 for the car.

On the other hand, the Chief of Police of Fordyce testified that immediately after the collision Livingston told him that he (Livingston) did not own the car and was only trying it.[1] This testimony of the Chief of Police was admissible to contradict the testimony of Livingston, which was to the effect that he had bought the car. Livingston and Rook are both parties in the case, so their testimony is not undisputed as a matter of law. *Ball* v. *Hail,* 196 Ark. 491, 118 S. W. 2d 668. The fact that the car was, at the time of the mishap, registered in the name of C. C. Rook or Mrs. C. C. Rook, is evidence of title in them. *Robinson* v. *Martin,* 231 Ark. 43, 328 S. W. 2d 260. There is nothing to show that Mrs. Rook, prior to the traffic mishap, made any sale; and so the only testimony of the sale is that of Rook and Livingston; and, as aforesaid, their testimony is disputed.

Section 75-157 Ark. Stats., which is a part of the Certificate of Title Law governing vehicles, provides:

"The owner of a motor vehicle who has made a *bona fide* sale or transfer of his title or interest and who has

[1] Here is the question which was admitted over the objection of Rook: "Q. State what your investigation developed as to the ownership of the car as stated by the driver of the 1950 Plymouth." "A. I asked him did the car belong to him and he said no. Said he was just trying the car out."

delivered possession of such vehicle and the certificate of title thereto properly indorsed to the purchaser or transferee shall not be liable for any damages thereafter resulting from negligent operation of such vehicle by another."

It is not claimed that Rook ever properly endorsed the title certificate to the purchaser or transferee so as to be exempted from liability under this section. Of course, if he had made a *bona fide* sale to Livingston before the traffic mishap such could have avoided his liability. *House* v. *Hodges,* 227 Ark. 458, 299 S. W. 2d 201; but the question of a *bona fide* sale to Livingston was the question in dispute; and we think a case was made for the jury as to the ownership of the car at the time of the traffic mishap. By its verdict, the jury found Rook to have been the owner; and there was evidence to support such finding.

II. *Rook's Liability For Livingston's Mishap.* The plaintiffs-appellees sought to hold Rook liable for the damages caused by Livingston on the theory that Rook had entrusted his automobile to Livingston, who he knew, or with the exercise of ordinary care should have known, was a person who drove an automobile while intoxicated; and that Livingston did drive the automobile while intoxicated, and caused damages to the plaintiffs. We have a number of cases which recognize that liability may be imposed on an owner under such circumstances.[2] See *Chaney* v. *Duncan,* 194 Ark. 1076, 110 S. W. 2d 21; *Ozan Lbr. Co.* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341; *Ark.-*

[2] In *Chaney* v. *Duncan,* 194 Ark. 1076, 110 S. W. 2d 21, we quoted from Berry on Automobiles, 7th edition:

"'Aside from the relation of master and servant, the owner of an automobile may be rendered liable for injuries inflicted by its operation by one whom he has permitted to drive the same on the ground that such person, by reason of his want of age or experience, or his physical or mental condition, or his known habit of recklessness, is incompetent to safely operate the machine . . . if the person permitted to operate the car is known to be incompetent and incapable of properly running it . . . the owner will be held accountable for the damage done because his negligence in entrusting the car to an incompetent person is deemed to be the proximate cause of the damage. In such a case of mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner in entrusting the machine to an incompetent driver, and of the driver in its operation.'"

La. Lbr. Co. v. *Causey,* 228 Ark. 1130, 312 S. W. 2d 909; and *Waller* v. *Yarbrough,* 232 Ark. 258, 337 S. W. 2d 641. See also Am. Jur. Vol. 5A, page 590 *et seq.,* "Automobiles and Highway Traffic," § 580 *et seq.* In Vol. 5A of American Jurisprudence, at page 592, in discussing the owner's knowledge of the driver's unfitness, the holdings are summarized:

"In order to hold the owner of an automobile liable under the common law rule charging him with liability for the negligence of an incompetent, reckless, or unfit driver to whom he entrusted his car, the plaintiff must establish by competent evidence that the owner had knowledge of the driver's incompetent, inexperience, or reckless tendency as an operator, *or that, in the exercise of ordinary care, he should have known this from facts and circumstances with which he was acquainted.* That knowledge may be established by the fact that he knew of specific instances of carelessness or recklessness or *by the proof that the driver's incompetence was generally known in the community.*" (Emphasis our own.[3])

It is practically undisputed that Livingston was thoroughly intoxicated at the time of the traffic mishap, which occurred on October 19, 1961; and Livingston has not even appealed from the judgment against him. It was also thoroughly established that Livingston had been guilty of driving while intoxicated on other occasions. But Rook stoutly denied that he had any knowledge, or reason to suspect, that Livingston would drive a car while intoxicated. The plaintiffs-appellees were unable to show that anyone had ever informed Rook that Livingston was a person who drove a car while intoxicated; so the plaintiffs-appellees undertook to show that Rook, by the exercise of ordinary care, should have known that Livingston was a person who drove a car while intoxicated because such was Livingston's general reputation in the community in which he and Rook

[3] There are Annotations in American Law Reports on various phases of such situations. See 36 A.L.R. 1148; 68 A.L.R. 1013; 100 A.L.R. 923, 168 A.L.R. 1375; 120 A.L.R. 1311; 112 A.L.R. 1020; and 20 A.L.R. 2d 1210.

resided. We come then to the general reputation of Livingston as being a drunken driver.[4]

Rook and Livingston both lived in or near Pine Bluff in Jefferson County, Arkansas; both worked for the Cotton Belt Railroad; and belonged to the same Union. Obviously, the evidence as to Livingston's general reputation of being a drunken driver should have been directed to, and confined to, his general reputation in that regard in Pine Bluff and Jefferson County, because that is where he and Rook lived and resided; and Rook is the person sought to be charged with such general reputation. There were two witnesses who undertook to testify as to the general reputation of Livingston as being a drunken driver *in Dallas County, Arkansas, and in South Arkansas,* as distinguished from the general reputation of Livingston in Pine Bluff and Jefferson County, Arkansas. One of these witnesses was Kenneth Rogers, a member of the State Highway Patrol stationed in Fordyce, Arkansas. Over the objection of Rook's attorney, Rogers was permitted to state that the reputation of Livingston in *South Arkansas* was that of a drunken driver. The other witness was Clary Atkinson, Sheriff of Dallas County, who was permitted, over the objection of Rook, to make like answer.

The Court was in error in allowing this testimony of general reputation to be presented to the jury. The question was what was Livingston's general reputation as being a drunken driver *in Pine Bluff and Jefferson County.* That is where Rook resided, and that is the only location to which the question should have been addressed regarding Livingston's general reputation as being a drunken driver. The Court committed reversible error in allowing the testimony of Kenneth Rogers and Clary Atkinson in the particulars herein detailed; and because

[4] Of course, the correct terminology is the general reputation of Livingston "as being a person who drove a car while he was intoxicated," but for brevity we use the expression "drunken driver" to mean the same as the language just quoted.

of such error the judgment must be reversed and the cause remanded for a new trial.[5]

III. Other Errors. We need not call attention to other errors, as they may not occur again; but there is one matter of instructions that should be called to the attention of the parties in the event of a new trial. Plaintiffs' Instruction No. 6 read:

"You are instructed that if anyone permits another to drive his car, knowing that such person is in the habit of becoming intoxicated and driving a car in this condition, or, by the exercise of ordinary care should have known that such person is in the habit of becoming intoxicated and driving a car in this condition, the owner of the automobile is liable for any injury caused by the negligence of such driver."

Of course, the instruction should also have concluded with these words: *"that may have resulted from drunken driving."* The italicized language should be added to the instruction.

For the admission of the incompetent evidence relating to the general reputation, the judgments of Mrs. Moseley and Mrs. Milner against C. C. Rook are reversed, and their causes of action against C. C. Rook are remanded for a new trial on all issues; but the judgments of Mrs. Moseley and Mrs. Milner against R. T. Livingston have been settled by the original verdict and judgment, since Livingston is not a party to this appeal. See *Calloway* v. *Cherry,* 229 Ark. 297, 314 S. W. 2d 506.

[5] There was one witness, Bill Gober, Chief of Police of Fordyce (whose testimony seems to have been admitted without objection) as to Livingston's general reputation in Pine Bluff and Jefferson County. If objection had been made to this testimony it might have been excluded as hearsay or subsequently acquired; but since there was such testimony, we think the cause should be remanded for a new trial.

JONES *v.* JONES.

5-2940 365 S. W. 2d 716

Opinion delivered March 18, 1963.

Mehaffy, Smith, Williams, Friday & Bowen and *Jerry T. Light,* for appellant.

Wright, Lindsey, Jennings, Lester & Shults, for appellee.

George Rose Smith, J. This appeal is from a supplemental order in a divorce case. The original decree approved a settlement agreement which provided in substance that the family home would be sold and the net proceeds paid to the wife. The house was duly sold on March 1, 1961, but a dispute arose about whether two items (an accrued mortgage payment and certain outstanding taxes) should be deducted from the proceeds of sale or be charged independently against the husband. The matter was submitted to the chancellor, who decided both points in favor of the husband.

We attach no importance to the manner in which these two items were treated in the contract of sale, which was prepared upon a real estate broker's printed form. It was evidently immaterial to the purchaser whether the two items were deducted from the purchase money or were paid from the sellers' pockets, for presumably the gross price would have been adjusted to reflect either the inclusion or the exclusion of the two deductions. The really controlling question is that of determining the intention of the husband and wife, as expressed in their written contract of settlement.

This is the pertinent language in the settlement

agreement: "The real property held jointly by the Husband and the Wife as an estate by the entirety, located at 12 Blue Ridge Circle, Little Rock . . . shall be sold in the immediate future . . . The Wife shall continue to reside in the property until she purchases a new home in accordance with the conditions and terms subsequently set forth herein. Pending sale of the property at 12 Blue Ridge Circle, the Husband shall pay all taxes and special assessments against the property, shall continue to pay the monthly mortgage payments thereon as well as all premiums on insurance policies providing coverage on the property. The Wife shall not be required to pay rent while she is in possession of 12 Blue Ridge Circle. Control of the sale . . . shall be exclusively in the hands of the Husband, and the Wife agrees to execute any and all deeds . . . After the property has been sold, the proceeds obtained thereby are to be used first to pay commissions incurred in the sale and to satisfy in full the mortgage on the property, with the remainder of the proceeds of the sale to be paid to the Wife for the purchase of a new residence; but in no event shall the sum paid by the Husband to the Wife as the net proceeds of the sale be less than Twenty-five Thousand ($25,000.00) Dollars. If the net proceeds of the sale shall exceed Twenty-five Thousand ($25,000.00) Dollars the Wife shall be entitled to the full proceeds."

We consider first the mortgage payment. The entire mortgage debt was not actually satisfied in the course of the sale, because the purchaser did not pay all the purchase price in cash. Instead, the contract required the sellers to pay an annual mortgage installment, consisting of $1,500.00 in principal and $832.50 in accrued interest, that fell due on March 1, 1961 (which happened also to be the closing date for the sale of the house). The purchaser assumed the mortgage balance of $17,000 that remained after the application of this annual payment.

We hold the mortgage payment to be chargeable to the husband. The settlement agreement required him to "continue to pay the monthly mortgage payments" until the property was sold. This language plainly cast upon the husband the duty of keeping the mortgage payments

current, so that the wife might receive the entire equity in the home.

The fact that the mortgage installment in controversy happened to fall due on the exact date of the sale does not really alter the case. To begin with, this payment, with interest, had accrued during the preceding year. It was therefore a mature obligation, fairly chargeable to the husband under the terms of the settlement agreement. Moreover, even though all the mortgage payments were actually *annual* installments, the parties elected to provide in their contract that the husband should pay the *monthly* mortgage payments. The written contract evidences careful draftsmanship; there is no good reason to suppose that the reference to monthly payments was other than deliberate. We think it reasonable to conclude that the parties meant for the husband's obligation to be treated as accruing from month to month; for otherwise he might reduce his wife's equity in the property by more than two thousand dollars simply by closing the sale a day or two before March the first.

We are also of the opinion that the husband should be charged with the 1960 general taxes, amounting to $630.16. These taxes were payable, though not delinquent, upon the day of sale and were a lien as between the sellers and the buyer. Ark. Stats. 1947, §§ 84-913, 84-107, and 84-807. The settlement agreement provided that, pending the sale, the husband should pay all taxes and special assessments upon the property. Later on there is a clause directing that the proceeds of sale be applied to pay real estate commissions and the mortgage debt, but there is no mention of using the money to pay current taxes. Reading the agreement as a whole, we can discover nothing to indicate that the burden of paying the taxes was ever to fall upon the wife. To the contrary, that responsibility was explicitly placed upon the husband. This reasoning also applies to that part of a 1961 special assessment, amounting to $13.81, that was charged against the sellers by the sales contract. This assessment was apparently due and payable, and a lien as between the grantors and the grantee. Ark. Stats., §§ 20-412 and 50-401. It was therefore an obligation of the husband.

Reversed.

THOMPSON *v.* FIELDS.

5-2923 365 S. W. 2d 862

Opinion delivered March 18, 1963.

[Reheading denied April 15, 1963.]

[redacted]

Spears & Sloan, for appellant.

Rieves & Smith, By: *Elton A. Rieves III,* for appellee.

PAUL WARD, Associate Justice. Appellant, James Thompson, owns a farm which he rented to appellee, Bill Fields, for the year 1960. The agreed rental was $20 per acre, or a total of $2,320, which amount was evidenced by a note signed by appellee and delivered to appellant.

It is not disputed that appellee took over the land (largely through an employee named James Ward) about the first of 1960, that he put it into cultivation (mostly cotton and soybeans), that he cultivated it until about the middle of July, 1960 when appellant took over the operation by cultivating, harvesting, and marketing the crops. This litigation arises out of a dispute as to whether appellee abandoned the crops and, if not, what accounting, if any, should appellant make to appellee.

On February 14, 1961 appellee filed a complaint in circuit court alleging that appellant "wrongfully assumed control of the entire crops." He asked for the market value of the crops (at the time they were taken

over), less the agreed rental and less certain other items about which there is no dispute.

In answer to the above, appellant admitted taking over the crops, but says he did so after appellee had abandoned the same, and then only to "recoup his loss" which (he says) would have resulted from the failure of appellee to properly cultivate the crops, and from the abandonment. Appellant also alleged that an accurate accounting of his expenses and income showed a deficit of $804.82 for which he asked judgment against appellee.

A jury trial resulted in a verdict against appellant and in favor of appellee in the amount of $3,465.10 for which judgment was rendered. For reasons hereafter set out, we have reached the conclusion the judgment of the trial court must be affirmed.

Since appellant, on appeal, raises no objection to any of the court's instructions or to the admissibility of any testimony or to the size of the verdict, only one question is presented for our consideration. It is: Does the record reflect substantial evidence to support the jury's verdict? In deciding this question we are holding, in view of the size of the verdict, that the jury had to find appellee did not abandon the crops and that appellant wrongfully took them over.

Appellee testified, in substance, that he rented the farm for the year 1960 for $2300, and gave a note to appellant in that amount; that on February 2 or 3 he moved James Ward on the place who, with the help of Joe Murphy and his (appellee's) brother, planted the land in cotton and beans — using three tractors; that they planted all the land; that he farmed land in Missouri but also looked after the operation on appellant's land; that they cultivated the crops, which looked fine, until about the middle of July when appellant told him he was taking over the crops, and that he did take over and proceeded to cultivate, harvest, and market the same. Appellee further testified he did not abandon the crops and never had any intention of doing so. In substance, James Ward said: I have worked the land for appellee; the crops were in good shape, still growing, and ready to

"lay by" when appellant told me I was working for him and started paying me some time in July.

Appellant admitted he rented the land to appellee on the terms previously stated; that appellee placed it in cultivation; and, that he took over the crops. His defense was that the crops were not being worked properly, and that his action was necessary to prevent a loss to him. Several other witnesses testified concerning the conditions of the crops and the manner in which they were handled and marketed by appellant, but it throws very little, if any, light on the real issues previously mentioned. We have carefully examined the entire record and we find it contains substantial evidence, when viewed in the light most favorable to appellee, to sustain the jury's verdict. See: *Missouri Pacific Railroad Co.* v. *Hampton,* 195 Ark. 335, 112 S. W. 2d 428, and *Talley* v. *Morphis,* 232 Ark. 91, 334 S. W. 2d 652.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

CONTINENTAL CASUALTY CO. *v.* HAWKINS.

5-2941 365 S. W. 2d 722

Opinion delivered March 18, 1963.

John H. Joyce and *Glen Wing,* for appellant.

E. J. Ball, for appellee.

JIM JOHNSON, Associate Justice. This is a suit to collect the proceeds of an accident insurance policy brought by the estate of the insured who drowned in a swollen river some distance from her stalled car.

On Saturday night, May 8, 1961, shortly before 11:00 p.m., the insured, Miss Carmelia Irene Hilliard, left the residence of Dr. Howell E. Leming to go to her home which was about five miles from Fayetteville. During that day there had been heavy storms and rainfall, and when the insured left the residence of Dr. Leming, it was very stormy with heavy rain. Earlier in the evening the insured's automobile had stalled in water near her residence, which caused her to have the automobile removed by a wrecker. On Sunday morning, the automobile was found with the right rear wheel off the side of the road on the western approach to the White River bridge. The sheriff, upon notification, had the automobile removed to Fayetteville. The insured was missing. A search ensued, and the next day her body was found about one-eighth of a mile downstream on White River from where the automobile was found.

It is undisputed that the White River was out of its banks and that there was considerable high water across the road on the eastern approach to the bridge. Some water had crossed the road on the western approach behind the deceased's automobile, however there was no showing that there had been any accumulated or overflow water in, under or around the parked automobile, nor was there a showing that the automobile was found to be parked or located in a position of peril.

Suit was brought by Catherine Hilliard Hawkins and Helen Hilliard Bestle, co-executrixes of the insured's estate, appellees, against appellant, Continental Casualty Company, on its accident insurance policy issued to the

decedent February 6, 1961, which was admittedly in force at the time of her death. Appellant denied liability, contending that the death was not caused in a manner described in the schedule of accidents contained in the insurance policy. The policy provision sued on reads, "Section C. Injury sustained in consequence of (a) and while riding as a passenger or a driver in a private pleasure type (1) automobile . . . "

The trial court sitting as a jury heard the evidence and personally inspected the scene where the automobile and insured's body were found. The court concluded that the policy was in force, that decedent died of accidental drowning, that the accidental death was in consequence of and while driving a private pleasure type automobile and that the stalling of the automobile on the bridge abutment in the proximity of high flood waters of the river was the proximate cause of her drowning, and granted judgment for the amount sued for, statutory penalty and attorneys fee.

The principal question presented for our consideration is whether the accident occurred within the rule laid down in *Walden* v. *Automobile Owners Safety Insurance Co.,* 228 Ark. 983, 311 S. W. 2d 780.

In the Walden case the insured, between one and four o'clock a.m., drove his automobile into a bauxite mining pit filled with water. There were no witnesses to the accident, but the next morning the insured's automobile was found partly submerged in the water, and the insured's body was found in 12 or 15 feet of water about 75 to 100 feet away from the automobile. The autopsy showed that the insured came to his death by drowning. The beneficiary of the insurance policy sought to recover under a clause which provided:

"Insurance Company . . . does hereby insure Dan E. Walden . . . against loss from accidental bodily injury sustained while driving or riding within any automobile, truck or bus for business or pleasure during the term of this policy, provided such bodily injuries are caused solely by reason of an automobile, truck or bus accident."

In commenting on the facts in that case, this court said, "[T]he insured accidentally drove his car into the water; that it was dark, and the insured suddenly found himself in water that came up into the seat of the car; that in an attempt to escape from his very hazardous predicament he went out the window of the car and was drowned . . . " and concluded with approval of the case of *Wright* v. *Aetna Life Ins. Co.,* 10 F. 2d 281, saying, " 'In the present case [Wright] the real accident was not when Wright's head struck the road, but when car control was lost. Such lost car control was the critical accident time, and the dominating factor which subjected the riding passenger to present peril and later death.' The same is true in the case at bar [Walden]. The real accident was when Walden drove into the water in the mining pit, and that was the thing that subjected him to danger and brought about his death."

In the case at bar the physical facts can lead only to the conclusion that deceased approached the bridge, and if any water over the road was evident at the time, it was a small flow which she crossed at the low end of the bridge approach; that she drove onto the bridge approach which raised her safely above the water level; that she saw deeper water on the other side at the low end of the approach across the bridge; that she backed her car and the right rear wheel became stuck off the shoulder of the road, in a perfectly unimperiled location; that instead of remaining in the car safe and dry, she opened the door, removed herself from the car and closed the door.

Notwithstanding the trial court's personal inspection of the scene of the tragedy, under the virtually undisputed facts here presented we have no choice but to conclude that the insured was not impelled to escape from her predicament by thoughts of peril or emergency induced by accidental loss of control of her car in water, which is the rule laid down by the Walden case.

We consider the liberal rule in the Walden case to be sound, 6 Blash. Auto. Pt. 2, § 4125, however to broaden the rule to the extent here urged would be to in-

terpret the policy beyond its clear terms and would effectively result in a rewriting of the policy between the parties, a province which is not ours. *State Farm Mutual Automobile Ins. Co.* v. *Belshe,* 195 Ark. 460, 112 S. W. 2d 954; *St. Paul Fire & Marine Ins. Co.* v. *Kell,* 231 Ark. 193, 328 S. W. 2d 510.

Reversed and dismissed.

MABRY *v.* CORLEY.

5-2943 365 S. W. 2d 711

Opinion delivered March 18, 1963.

Milham & Cummins, for appellant.

No brief filed for Appellee.

FRANK HOLT, Associate Justice. This is an appeal from a decree of the Saline Probate Court disallowing the claims of the appellants against their father's estate.

In September of 1949, Maud E. Covington acquired 25 acres of ancestral land by partition action in the Saline Chancery Court. On February 15, 1956 she and her husband, J. W. Covington, conveyed, by warranty deed, the said property for the consideration of $7,500.00 cash. Mrs. Covington died about a year later. in January

of 1957. She was survived by her husband and their three adult children, Charles Covington, Geraldine Covington Mabry and Sarah Covington Coocher. Mr. Covington died on April 17, 1961, at the age of 85, leaving as his heirs the three above named children and another daughter, Trebie Corley, by a previous marriage. Trebie Corley was duly appointed executrix of her father's estate pursuant to the terms of his will.

Mrs. Mabry, Mrs. Coocher and Charles Covington, appellants, filed separate claims against the estate of their deceased father, J. W. Covington, in the amount of $2,500.00 each. These claims were based on a purported oral agreement with their father that during his lifetime he would have the use of the $7,500.00 and upon his death each of them would receive, by the terms of his will, one-third of this amount, or $2,500.00. We do not have before us the provisions of the will. In due time the executrix, the half sister of appellants, filed her accounting to the effect that she had personally paid all debts of the estate; that the total value of the estate was $896.43; that the claims of her two half sisters and half brother, each in the amount of $2,500.00, had been filed against the estate; that she had not approved them, and asked that they be disallowed by the court. This appeal comes from a decree of the court disallowing each of appellants' claims.

For reversal appellants urge, in effect, that the order of the probate court disallowing their claims was against the preponderance of the evidence.

The appellants, Geraldine Mabry and Charles Covington, were allowed to testify, over the objections of appellee, about this alleged oral agreement with their father. The appellant, Sarah Coocher, did not appear to testify. Appellee contends that the testimony of appellants as to any transaction or conversation between themselves and their deceased father was incompetent and in violation of the Constitution of Arkansas, Schedule, § 2,[1] which provides:

[1] Commonly known as "The Dead Man's Statute".

"In civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, interstate or ward, unless called to testify thereto by the opposite party. Provided, further, that this section may be amended or repealed by the General Assembly."

The probate court overruled appellee's objection on the ground that he considered the three claims separately and that each claimant could testify as to the decedent's transactions or conversations with the other claimants. This was a correct ruling on the law as announced in *Bush, Admx.* v. *Evans,* 218 Ark. 470, 236 S. W. 2d 1013, wherein we held that the probate court could consider a husband and wife's claim as separate claims and allow each claimant to testify as to the decedent's transaction with the other claimant. It is a well defined principle of law that appeals from a probate court decree are heard *de novo* just as appeals from chancery and, further, that the burden is upon the claimant to prove the claim by a preponderance of the competent evidence. *Credit Industrial Co., et al* v. *Blankinship,* 230 Ark. 371, 323 S. W. 2d 198; *Harris* v. *Harris,* 225 Ark. 958, 286 S. W. 2d 849.

Mrs. Mabry testified, in substance, that some time after the death of her mother she took her father to Pine Bluff, where her sister, Sarah Coocher, resided, and these three discussed disposition of the $7,500.00. It appears that Mrs. Mabry, Mrs. Coocher and their father then proceeded to Dermott and further discussed the problem with Charles Covington, whereupon it was agreed that their father could have the use and benefit of the $7,500.00 and upon his death it would be divided between Geraldine, Sarah and Charles. She further testified that she, her sister and her brother, before the Pine Bluff-Dermott trip, had never contacted each other about such an "arrangement" and that they just "automatical-

ly had the same opinion''. Charles Covington testified in support of his sisters' claims.[2]

The testimony supports the alleged oral agreement between claimants and their father but other circumstances belie the validity of their claims. The three claims in this case are based solely upon the testimony of two of the claimants. The third claimant, for some reason, did not appear to testify. Although technically claimants are not parties to each other's claims, it cannot be said that they are disinterested witnesses.

Some mention is made of a loan of $2,500.00 of this money, and of the placing of some money in a bank account, but we do not have the benefit of any records of such transactions. There is no proof in this record, other than appellants' testimony, how much, if any, of the $7,500.00 was in existence at the time their mother died which was about a year after she received this sum.

The Probate Judge was in a position to observe the demeanor of the witnesses when they testified, their manner of speech and their willing or unwilling answers to questions propounded to them. The probate Judge had the opportunity to observe more than printed words which is all we have before this court. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517.

After a careful review of the record *de novo* we cannot say that the trial court erred in disallowing the three claims. The decree is therefore affirmed.

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[2] Claimant, Charles Covington, complains that he was not allowed to testify fully about his sisters' claims. After reviewing his testimony we find no merit in this contention.

VAUGHAN *v.* SUTTON.

5-2953 365 S. W. 2d 863

Opinion delivered March 25, 1963.

Terral, Rawlings & Matthews, for appellant.

Catlett & Henderson, for appellee.

CARLETON HARRIS, Chief Justice. This suit involves the question of whether a certain deed should be cancelled. Stephen Vaughan was the owner of a certain 40 acres in Pulaski County, Arkansas. After the death of Vaughan, and through a division of this property by the exchange of deeds, a daughter, Lee Anna Vaughan, became the record owner of 10 acres (of the 40), which is the property in dispute in this litigation. Lee Anna died

on February 5, 1951, leaving a son, Charles Lafayette (hereinafter called Lafayette), as her only heir. Lafayette, who, according to the testimony, drew Welfare benefits because of mental deficiency, sometimes worked at the Sutton Grocery, with which some of his relatives traded.

In the meantime, the property here involved had forfeited because of the non-payment of taxes, and Robert L. Kumpe purchased same at a Sheriff's Tax Sale, and on January 7, 1950, received a deed to the property from the Pulaski County Clerk. After the death of Lee Anna Vaughan, Lafayette and other relatives learned of the sale of the 10 acres to Mr. Kumpe. Lafayette, together with Ollie Vaughan Fuller, a cousin, went to Mr. H. M. Sutton, Sr., and requested his aid in getting the property back. Sutton, according to the evidence, promised to help, and, thereafter, events admittedly occurred as follows:

About April 7, 1951, Kumpe and wife, at the request of Sutton, executed a quitclaim deed, conveying the property to Lafayette; this deed was delivered to Sutton upon the latter's paying to the grantors the sum of $50.00 in cash. The deed was not recorded. On April 27, 1951, Lafayette died intestate, leaving appellants as his heirs at law. Sutton refused to deliver to appellants the deed executed by Kumpe and wife, and refused to accept payment of the debt (occasioned by the payment of the money to Kumpe by Sutton on behalf of Lafayette at the time of the delivery of the deed). On May 7, 1951, Kumpe and wife, at the request of Sutton, executed and delivered to the latter another quitclaim deed, conveying the same property to Sutton that Kumpe had previously deeded to Lafayette. This deed was recorded the following day.

On December 6, 1952, appellants, Stephen Vaughan, an uncle of Lafayette, William Vaughan, an uncle, and Ollie Vaughan Fuller, Aretha Harris Odom, Helen D. Harris, Elsie Harris Terry, and James Russell Harris, cousins of Lafayette, instituted suit against H. M. Sutton, Sr., and his son, H. M. Sutton, Jr., alleging that the defendants had fraudulently obtained a deed from R. L.

Kumpe in the name of H. M. Sutton, Sr., in an effort to defraud appellants of their property; that they (appellants) had offered to pay the balance due on the property, but that the defendants had refused to accept same, and they prayed that, upon depositing into the registry of the court the amount found to be the balance due from Lafayette, H. M. Sutton, Sr. be ordered to execute his deed, conveying the property to them. On December 8, a notice *Lis Pendens* was filed by appellants, setting out that appellants were claiming the property under a deed executed by Kumpe to Sutton, Sr., and that Sutton was holding as a trustee for their benefit.

On December 20, H. M. Sutton, Jr., filed a separate answer, setting up that he had no personal knowledge of the transaction, had nothing to do with it in any manner, and asking that the complaint be dismissed as to him. H. M. Sutton, Sr., on the same date filed a motion to make the complaint more specific. After filing one amendment to their complaint, appellants, on April 10, 1953, filed a second amendment stating, in effect, that they had mistakenly sued H. M. Sutton, Jr., that he was in no way involved in the litigation; "that the party they intended to sue, and against whom they now adopt their original complaint, is H. M. Sutton, Sr.," and relief was sought, as originally prayed, against this defendant. A new summons was issued, and the Return of the Sheriff of Pulaski County reflects that H. M. Sutton, Sr., was personally served on April 13, 1953. From that time to the day of trial, Sutton never filed any sort of pleading. On May 17, 1954, Sutton and wife conveyed the property to appellees, W. R. Davis and Lula M. Davis for a cash consideration of $1,500.00. Thereafter, in May, 1955, Davis and wife filed a motion alleging that they had purchased the property from Sutton, were the real parties in interest, and should be made parties defendant. On September 7, 1955, the motion was granted. The Davises then filed an answer, denying all material allegations of the complaint.

Appellants then further amended their complaint by asserting that Davis and wife had received the deed to the property "long after the suit had been filed and with

notice thereof." The court was asked to cancel the deed from Sutton to these defendants. On June 21, 1962, the cause was tried,[1] and at the conclusion thereof, the court dismissed the complaint for want of equity, and quieted and vested title in the appellees, W. H. Davis and Lula M. Davis. From the decree so entered, appellants bring this appeal.

We are firmly and unhesitatingly of the opinion that this decree should be reversed, and we think that appellants have established their case by evidence that is clear, cogent, and convincing. Lincoln Fuller, who had married Ollie Vaughan, testified that Lafayette had worked for Sutton, and on learning of the forfeiture of the land, had asked Sutton for his help. Fuller testified that he was present and heard Lafayette make the request for financial assistance in recovering the property, and heard Sutton agree to render the aid. Ollie Vaughan Fuller testified that she later heard Sutton tell Lafayette that he had obtained the deed from Kumpe, and would turn it over to her cousin "when he finished paying him the money what he owed him." Robert L. Kumpe, a postal transportation clerk, testified that he bought the property in question at the tax sale, and subsequently received a deed from the clerk. Thereafter, he was contacted by Sutton who desired to purchase the property for Lafayette. From the record:

"Well, this fellow Lafayette, I don't even remember whether that was his last name or first name, but anyway, it stuck in my memory because you know that French name for a colored fellow, I thought was kind of peculiar. * * * And Lafayette owed him some and he was — wanted me to make out the deed to Lafayette and he would act as his agent."

The witness then testified that he and his wife signed a deed, conveying the property to Lafayette, and the Notary Public who took the acknowledgement, delivered it to Sutton. Kumpe stated that Sutton later called him again and advised that Lafayette had died,

[1] There is no explanation in the record of why the case remained pending for 9 years after the second summons was served on H. M. Sutton, Sr., and 7 years after the motion filed by Davis.

"So because Lafayette owed him some money, he wanted me to make out the deed to him, make another deed to him. * * * Well, it was kind of aggravating. It was against my policy. My policy was when I bought this land I let the people that owned it, I let them have it back for taxes and a little interest, but anyone else why I would appraise it you know and get some value out of it, but he was so insistent and I was kind of aggravated with him anyway and my wife was kind of sick, so I went against my policy and he had another deed made out. * * * I carried the deed over to him, Mr. Sutton, and he said he would dispose of the other deed."

Kumpe was positive that at the time the first deed was given, Sutton had stated that he was acting for Lafayette, and it is totally undisputed that the first executed deed named Lafayette as the grantee.

Testimony on the part of appellants reflected that following the death of Lafayette, Sutton advised representatives of appelants,

"You will have to pay me $40.00[2] before you can get these papers."[3] Ollie Vaughan Fuller testified that when this amount of money was offered to Sutton, he refused it and stated that he would have to receive $60.00; that Sutton said,

"Don't be in a hurry. We have plenty of time. What do you all want to be in a hurry for?"

Subsequently, Sutton refused the $60.00 when it was tendered to him.

Appellees first argue that there was no writing signed by Sutton to the effect that he would hold the deed and deliver same to Lafayette upon repayment, and that the agreement therefore was in violation of the Statute of Frauds. In answering this contention, we need go no further than to state that the Statute of Frauds was not

[2] It is not clear from the record whether Sutton paid Kumpe $40.00 or $50.00 for the first deed.

[3] This statement had reference to the deed and a mortgage which appellants testified was given to Sutton by Lafayette to secure the money advanced by Sutton for the purchase from Kumpe, but the execution of the mortgage was not established by competent evidence.

pleaded, and we have held on numerous occasions that that statute is an affirmative defense which cannot be relied upon unless specifically pleaded. *William* v. *Jones, Special Administrator,* 208 Ark. 303, 186 S. W. 2d 160. *S. H. Kress Co.* v. *Moscowitz,* 105 Ark. 638, 152 S. W. 298, and cases therein cited.

Appellees then assert that neither a resulting trust, nor a constructive trust,[4] was created for the reason that the misrepresentation that creates a trust of this character must be made before, or at the time, legal title is acquired by the promissor; appellees contend that the circumstances herein do not bring into being a constructive trust because the legal title (in the first deed) was actually placed in Lafayette, though that grantee paid no part of the consideration. From the brief:

"Here, H. M. Sutton, Sr., procured the execution of the first deed by Robert L. Kumpe conveying the property to Charles Lafayette, and H. M. Sutton, Sr., paid the full consideration for such conveyance and received and kept the deed. Charles Lafayette never paid any part of the consideration. After the death of Charles Lafayette, H. M. Sutton, Sr., received a new deed from Robert Kumpe conveying the lands to H. M. Sutton, Sr. There was no fraud, actual or otherwise, in the transaction.

"At the time Charles Lafayette allegedly entered into negotiations with Sutton to assist him in acquiring Kumpe's tax title to the property, neither Lafayette nor these Appellants had the slightest right, title or interest therein; the time for redemption from the tax sale having expired during the lifetime of Lee Anna Vaughan."

Actually, it is not necessary, in determining this litigation to enter into a detailed discussion of whether either a resulting or constructive trust was created, for the evidence establishes unquestionably that Kumpe and wife executed the first deed to Charles Lafayette. This means that at the time of the second deed, Kumpe had no title to convey. Therefore, the second deed, naming

[4] Definitions of a resulting trust and a construction trust are cited in *Mulligan* v. *Payne,* 232 Ark. 922, 341 S. W. 2d 53

Sutton as grantee was of no effect. Of course, since the deed was not recorded, a *bona fide* purchaser could have obtained a valid deed from Kumpe, but Sutton (having the deed in his possession) had full knowledge that Lafayette held the legal title. This actually disposes of the litigation, but we think also that a "trust *ex maleficio*"[5] or constructive trust was raised under the circumstances of this csae. It is true that normally, when a constructive trust arises, legal title has been placed in one person, though the beneficial interest is to be enjoyed by another person, but we do not consider this an absolutely essential element. In *Wofford* v. *Jackson,* 194 Ark. 1049, 111 S. W. 2d 542, this court, quoting from Pomeroy's Equity Jurisprudence, said:

" 'Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, * * * They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership.' "

At any rate, equitable relief should not be refused because of technical distinctions, where the evidence firmly establishes that fraudulent acts have been committed, and equitable principles violated. Here, it is plain that Sutton advanced the money (which was paid to Kumpe) for the benefit of Lafayette, and was holding the deed as security for the repayment of the money; it even appears that Kumpe might not have sold the property except for the fact that it was being returned to the original owner.

According to the testimony of Lee Smith, a real estate salesman for 20 years in the city of Little Rock, the 10 acres involved in this litigation, if sold together with the other 30 acres, would be worth $1,000.00 per acre; if sold separately from the other 30 acres, the property would have a value of $750.00 per acre. The witness

[5] According to Bouvier's Law Dictionary (3rd Revision) Vol. 1, "on account of misconduct."

stated that in 1951, if sold with the 30 acres, the land would have been worth approximately $250.00 per acre, and if sold separately, should have brought $200.00 per acre.[6] Sutton did not see fit to file an answer denying the allegations of the complaint, and we think the evidence clearly establishes that, upon learning of the death of Lafayette, he saw an opportunity to acquire the title for himself, and accordingly "put off" the appellants until a second deed could be acquired from Kumpe.

W. R. Davis and Lula M. Davis, appellees herein, were not innocent purchasers, having purchased the property from Sutton on May 17, 1954. This was a year and a half after the first suit was filed by appellants; a year and a half after the notice *Lis Pendens,* and over a year after the complaint was amended and a new summons served on Sutton. Davis testified that he bought the property through a realtor and "thought he was buying it from Vaughan." He stated that he had bought a lot of property without an abstract, and was "gambling" on this property.

In accordance with the views herein expressed, the decree is reversed and the cause is remanded to the Chancery Court with directions to cancel the deed from Kumpe to Sutton, to cancel the deed from Sutton to the Davises, and to take the proper and necessary steps to invest title to the property here involved, in the heirs of Charles Lafayette, as prayed by appellants.

[6] It was stipulated between the parties that O. D. Burroughs possessed practically the same qualifications as those of Smith, and his testimony would be the same as that of Smith.

LAFAYETTE HOTEL CO. *v.* GORDON AND FERGUSON.

5-2947 365 S. W. 2d 857

Opinion delivered March 25, 1963.

[redacted]

House, Holmes, Butler & Jewell, By *Philip E. Dixon,* for appellant.

Terral, Rawlings & Matthews, By *Gail O. Matthews,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is an action to recover for loss of property entrusted to one alleged to be a bailee. The plaintiff-owner is Gordon & Ferguson, Inc., and the defendant-alleged bailee is LaFayette Hotel Company.

Mr. Goldstein was a traveling salesman, and appellee's samples[1] were plainly visible in his car. Goldstein registered as a guest at the LaFayette Hotel; the doorman took the car and contents for overnight parking; and was specifically instructed by Mr. Goldstein to carefully lock the car. The doorman of the hotel parked the Goldstein car in the basement of a garage near the hotel. The next morning, when Mr. Goldstein requested the doorman to bring the car, it was discovered that someone had broken the glass of the car and stolen the samples. The theft was reported to the police, but none of the stolen property was ever recovered. Gordon &

[1] The samples consisted of wearing apparel and other articles, and the value of the stolen articles was stipulated to be $1,210.69.

Ferguson, Inc. brought this action, claiming that the hotel company, as bailee, was liable for the loss of the stolen samples. The cause was submitted to a jury, which returned a verdict for the plaintiff-owner; and on this appeal the hotel company urges two points, both relating to instructions.

I. *Refusal To Give An Instructed Verdict For Appellant.* It is vigorously insisted that all the doorman of the hotel did was to take the car across the street, park it, and return the keys to the hotel desk; and that no negligence was shown to have been committed by the hotel or its employees. Based on this line of argument appellant claimed below, and insists here, that an instructed verdict should have been given for appellant. But there was other evidence in the case which we consider vital and now mention. (a) The hotel advertised "convenient garage services at the door"; (b) the hotel would store cars for its guests at no place other than the storage facilities used in this instance; (c) the desk clerk admitted — at one place in his testimony — that Mr. Goldstein asked him if the car and contents would be safe and the desk clerk assured him that they would be; (d) the doorman of the hotel selected the place to store the car in the basement of the garage; (e) Mr. Goldstein testified that after the theft he observed the place where the car was stored was very poorly lighted; and (f) the only precautions taken by the storage garage against such a theft was the use of a merchant watchman who "came around about three times a night."

The foregoing testimony, along with the other facts as previously detailed, made a case for the jury: there was the delivery of a car by a guest to the hotel for storage; the hotel was advised that there were articles in the car; the hotel was instructed to lock the car; the hotel assured the guest that the car and contents would be safe; there was a failure to return the contents; and there was evidence sufficient to go to the jury on the question of negligence of the bailee in storing the car at a poorly lighted place, and also as to the sufficiency of the precautions taken against such a theft. The Trial

Court was correct in refusing an instructed verdict for the defendant.

II. *Giving Of Plaintiff's Instructions Nos. 1 and 3.* Even though there was sufficient testimony to take the case to the jury, nevertheless some of the instructions offered by the plaintiff were fatally defective and require a reversal of the judgment. Over the general and specific objections of the defendant, the Court gave the plaintiff's Instructions Nos. 1 and 3, and each of these instructions was erroneous. Here is Instruction No. 1, with the erroneous matter italicized:

"You are instructed that it is the burden of the plaintiff to prove the delivery of the automobile containing the articles of clothing, the acceptance by the defendant or its agents, notice of the contents to the defendant or its agents and the failure of the defendant to return the contents. If these matters are proved, the plaintiff has established a *prima facie* case of negligence and the burden devolves upon the defendant to explain the loss by showing that it used due care. If the plaintiff proves these matters and *the defendant fails to explain the loss by showing that it used due care, your verdict will be for the plaintiff.*"

Here is Instruction No. 3, with the erroneous matter italicized:

"You are instructed that a theft by a third person is not a defense for the defendant's failure to return the articles *unless the defendant shows that the theft was not occasioned by its failure to use due care.*"

It will be observed that in both of these instructions the Court told the jury that the burden was on the defendant to show due care for the property, rather than the burden being on the plaintiff to show that the defendant-bailee was negligent. Such was the error in each instruction. In *James* v. *Orrell,* 68 Ark. 284, 57 S. W. 931, the very point here in issue was decided; and the Court quoted from Storey on Bailments, 8th Ed. § 410: "'. . . it would seem that the burden of the proof of negligence is on the bailor, and proof merely of the loss is not sufficient to put the bailee on his defense.'" In *Turner* v.

Weitzel, 136 Ark. 503, 207 S. W. 39, Chief Justice McCulloch quoted from an earlier case: " 'The mere loss of the property does not ordinarily fix a liability for the loss upon him (bailee), but it must be further shown that said loss arose by reason of his negligence.' " In *Hornor Trans. Co.* v. *Abrams,* 150 Ark. 8, 233 S. W. 825, the Trial Court gave an instruction which said that if goods were stored with a bailee for hire ". . . and they were lost while in the possession of the defendant company (bailee), then you will find for the plaintiff for the value of the goods, as shown by the evidence." In holding such instruction to be erroneous, Chief Justice McCulloch, speaking for this Court, said that if the goods were not returned, ". . . it devolved upon them (bailees) to explain the loss *before the plaintiff (bailor) could be put upon proof as to negligence.*" (Emphasis our own.)

In *Scott* v. *Columbia Compress Co.,* 157 Ark. 521, 249 S. W. 13, the opinion recites:

"The instructions given by the court told the jury in substance, that the burden of proof rested upon appellee (bailee) to account for the loss of the cotton, but that if it was shown that it was destroyed by fire, the burden was upon the appellant (bailor) to establish negligence on the part of the appellee or its servants in permitting the cotton to be thus destroyed. These instructions were in accordance with the repeated decisions of this court."

In *Hall* v. *Stover,* 215 Ark. 485, 221 S. W. 2d 41, we said that the burden was on the bailor to prove that the bailee's negligence was the cause of the damage to the property. There is nothing in *National Garages, Inc.* v. *Barry,* 217 Ark. 593, 232 S. W. 2d 655, which changes the holding of these cases. We there quoted from American Jurisprudence to the effect that when the bailor proves the bailment and a failure to return the property, the duty devolves on the bailee to "go forward"; but we added:[2] "One who brings an action against a garage or

[2] On the question of the liability of a garage man for theft or unauthorized use of an automobile, see Annotations in 131 A.L.R. 1175 and 43 A.L.R. 2d 403. In 24 Am. Jur. 490, "Garages" etc. § 13, in discussing the liability of the garageman for theft, the text states the rule: "In any case, of course, the owner, in order to recover, must establish negligence on the part of the garage keeper."

livery stable keeper based upon the latter's negligence ordinarily has the burden of proving such negligence or want of due care on the defendant's part."

The plaintiff's Instructions Nos. 1 and 3, given by the Court over the specific objection of the defendant, placed the burden on the defendant-bailee to prove itself free of negligence instead of placing the burden on the bailor to prove the negligence of the bailee. The question of negligence was a vital issue, involving storing the car in the place where it was stored, and also the watchman service. These were the claimed matters of negligence; and the burden was on the appellee-plaintiff to prove the negligence, rather than on the appellant-defendant to prove absence of negligence. We cannot escape the fact that the Instructions Nos. 1 and 3 were fatally defective; and by reason thereof the judgment is reversed and the cause is remanded.

HARRIS, C.J., and WARD, J., would reverse and dismiss.

CHICAGO MILL AND LUMBER CO. *v.* DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

5-2926 366 S. W. 2d 184

Opinion delivered March 25, 1963.

[Rehearing denied April 22, 1963.]

Daggett & Daggett, By *W. H. Daggett,* for appellant.

F. N. Burke, Jr. and *Shaver & Shaver,* for appellee.

George Rose Smith, J. This is a suit by the appellant to quiet its title to certain land in Lee County, subject to the levee right-of-way of the St. Francis Levee District. The ultimate question is whether the district, as the holder of the dominant easement, or the lumber company, as the owner of the servient estate, is entitled to the proceeds derived from the cutting and sale of mature timber within the right-of-way. The chancellor awarded these proceeds, amounting to $3,270.14, to the levee district.

This 70-year-old district maintains 158.6 miles of main levee along the Mississippi River. For some years the United States Engineers have been in charge of new construction, while the district has been responsible for furnishing the right-of-way and maintaining the levee system.

That portion of the right-of-way now in question was acquired by the district, partly by purchase and partly by condemnation, from the appellant's predecessors in title, between 1904 and 1942. In 1957 the Engineers decided to enlarge this part of the levee and to that end directed the district to remove the timber growing in the borrow pits on the river side of the levee. After this suit was filed the lumber company and the levee district cooperated in removing the timber and put the proceeds in escrow, subject to the final decision in the case.

The district contends that for many years it has kept a strip of growing timber next to the levee, as a protection against the washing action of flood waters, and that the proceeds from the sale of this timber should go to the district. The landowner replies that the protecting role of the trees came to an end when they were cut down, so that the money from selling the logs belongs to the landowner. We are of the opinion that the district has the stronger side of the argument.

That the levee ought to be sheltered behind a line of woods is shown by the weight of the evidence. This is an earthen levee, about 25 feet high and tapering from a 200-foot base to a 25-foot crown. No trees are permitted upon the levee itself, which is kept as pastureland to hold

its topsoil in place. The directors have found it best to leave the borrow pits on the river side of the levee, for their location behind the structure would tend to weaken it by seepage and boils.

Since about 1940 the levee board has consistently maintained a growth of trees, mostly cottonwood, in the borrow pits. When flood waters rise against the side of the levee the trunks and foliage of this timber tend to obstruct the wind-driven waves and protect the levee by reducing the washing action of the river. For more than twenty years the district has kept signs posted along the levee, giving notice that the timber is reserved for wash protection and is not to be cut. The directors have guarded the timber against trespassers and, when possible, have collected the value of trees wrongfully cut. The district's chief engineer testified that no timber had ever been sold (before this controversy) except some that had been damaged by fire or by storm.

Upon these facts the district is entitled to prevail. Even though it owns only an easement, there is no inequity in the recognition of the district's claim. Under our law it is firmly settled that when a permanent easement is taken by eminent domain, depriving the owner of the use of the property, the compensation must equal the full value of the land, as if a fee were being acquired. *Railway* v. *Combs,* 51 Ark. 324, 11 S. W. 418; *State ex rel. Pub. & Parks Comm.* v. *Earl,* 233 Ark. 348, 345 S. W. 2d 20. Hence, with respect to the easements obtained by condemnation, the district is not receiving an undeserved windfall. With respect to the easements that were purchased, the district's grantors did not insert in their conveyance any reservation of timber rights.

Even in the case of a permanent easement the landowner retains timber rights to the extent that their assertion is not inconsistent with the rights of the condemnor. *Patterson Orchard Co.* v. *Southwest Ark. Utilities Corp.,* 179 Ark. 1029, 18 S. W. 2d 1028, 65 A.L.R. 1446. Here, however, the timber was unquestionably needed by the district in its long-term program of levee protection. Its engineer testified that the trees in dispute

were grown for the purpose of wave wash protection and were being sold only on account of the levee enlargement. For more than two decades the district invested its funds in safeguarding this timber. Under the district's long-standing policy it is faced with the expense of planting and maintaining a new strip of woodland in front of the section to be built by the U. S. Engineers. In the circumstances the district has demonstrable property rights in the timber it has nurtured for twenty years. To turn the harvest over to the landowner, leaving the district to bear the expense of undertaking its program anew, would clearly result in unjust enrichment to the owner of the servient estate.

The holding in *Nicholson* v. *Board of Mississippi Levee Com'rs,* 203 Miss. 71, 33 So. 2d 604, relied upon by the appellant, is not in point. There the court, in holding that the levee district had an easement rather than a fee, awarded the landowner the timber that was cut from the right-of-way. But the distinguishing factor is that in the *Ncholson* case, unlike the one at bar, there was no contention that the timber had ever been needed for levee purposes. To the contrary, the court said: "Indeed, the bill states and the demurrer admits, that, the timber which is the subject of this controversy, is not needed or useful in the construction or repair or maintenance of levees."

Affirmed.

ROBINSON, J., dissents.

HARRELSON *v.* WHITEHEAD.

5-2932 365 S. W. 2d 868

Opinion delivered March 25, 1963.

Mehaffy, Smith & Williams, By *William H. Sutton,* for appellant.

Cockrill, Laser, McGehee & Sharp, for appellee.

PAUL WARD, Associate Justice. While Wayne Harrelson, age 15, was riding a motorcycle on Wright Avenue in Little Rock he collided with the automobile driven by appellee, Nathan A. Whitehead. The collision occurred about 7:30 p.m. Suit filed by Wayne's father, in his own right and next friend of Wayne, resulted in a jury verdict in favor of the defendant, Nathan A. Whitehead.

On appeal, appellant relies only on alleged errors in the instructions. It is contended by appellant that the court erred in refusing to tell the jury (in effect) that: (a) Wayne (being a minor) should not be held to the same standard of care for his own safety as if he had been an adult; and (b) appellee owed Wayne a higher degree of care than he would have owed him had Wayne been an adult. There was a third assignment of error but, in view of the disposition hereafter made of the other two, there is no need to discuss it.

(a) Because appellee charged Wayne with contributory negligence appellant requested the court to instruct the jury that he should "not be held to the same standard of care for his own safety as a person of adult age . . . " Appellant cites the following decisions to substantiate this request: *St. Louis, Iron Mountain & Southern Railway Company* v. *Sparks,* 81 Ark. 187, 99 S. W. 73; *Garrison* v. *St. Louis, Iron Mountain & Southern Railway Company,* 92 Ark. 437, 123 S. W. 657; *St. Louis Southwestern Railway Company* v. *Adams,* 98 Ark. 222, 135 S. W. 814; *Nashville Lumber Company* v. *Busbee,* 100 Ark. 76, 139 S. W. 301; and, *Kansas City Southern Railway Company* v. *Teater,* 124 Ark. 1, 186 S. W. 294. In the *Sparks* case *supra,* we said:

"It has been frequently held that a child is not required to exercise the same capacity of self-preservation and the same prudence that an adult should exercise under like circumstances."

It is our opinion, however, that the above decisions are not in point, because none of them involve a minor who was riding a motorcycle or driving a vehicle on the public highway. In fact, it appears that the exact issue here raised is one of first impression in this state and that it has seldom been raised in other jurisdictions. There is a statement in 77 A.L.R., 930 relative to the care imposed by law on a minor in a case of this kind, which reads:

"It is believed that in many cases, especially those involving negligence or contributory negligence in the operation of motor vehicles, the point goes by default, all concerned acting under the assumption that an adult standard applies."

We agree with the above mentioned assumption as being both sound and reasonable. A casual review of our statutes pertaining to safety on the highways discloses that no distinction, expressed or implied, is made between the degree of care to be exercised by a minor and an adult. Note the following sections in Ark. Stats.: § 75-302 defines a "vehicle" as any device not moved by human power; defines a "motor vehicle" as a vehicle self-propelled; § 75-303 defines a "person" as every natural person . . . ; § 75-601 says no "person" shall drive a "vehicle" on a highway at a speed greater than is reasonable and prudent . . . ; §§ 75-604 and 75-605 say no "person" shall drive in such and such a manner; and, §§ 75-609 and 75-610 refer to what a "driver" of a vehicle shall or shall not do. In none of these statutes is any distinction made between a minor and an adult.

As regards safety to the traveling public we see no valid distinction between a vehicle driven by a minor and one driven by an inexperienced or reckless adult. As to the duty imposed on the latter, this Court, in *Hughey* v. *Lennox,* 142 Ark. 593, 219 S. W. 323, had this to say:

"An unskilled or inexperienced driver is not to be excused from liability for injuries inflicted because of his inexperience and unskillfulness. On the contrary, he should not frequent places where injury is liable to result from inexperience or unskillfulness in handling a car.

When a person operates an automobile along a public highway frequented by other travelers, he assumes the responsibility for injuries resulting from his own unskillfulness in the operation of the car.''

Courts of other jurisdictions which have considered the issue here presented have consistently held minors to the same degree of care as adults in driving on the highways. In *Wilson* v. *Shumate,* (Mo. 1956) 296 S. W. 2d 72, the Court in construing a statute essentially like § 75-601 mentioned previously, held ''reversibly erroneous'' the following instruction:

'' 'You are further instructed that in considering whether or not plaintiff is guilty of contributory negligence, as defined in other instructions, you should take into consideration plaintiff's age, her intelligence and discretion, and, if you find from the evidence that plaintiff did not possess the intelligence and discretion of an adult at the time of her injuries, then the jury may consider these facts in determining whether or not plaintiff was guilty of contributory negligence on the occasion in question.' ''

After quoting the statute, the Court said:

''Plaintiff (a minor) in this case was the operator of a motor vehicle and the standard under which she was to operate that vehicle was fixed by law. Consequently, her 'age, her intelligence and discretion' and whether she did or did not 'possess the intelligence and discretion of an adult' were not proper matters for the jury to consider . . . ''

To the same effect is the holding in *Dellwo* v. *Pearson,* (Minn. 1961) 107 N. W. 2d 859, where we find this significant language:

'' 'To give legal sanction to the operation of automobiles by teen-agers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults.' ''

See also: *Betzold* v. *Erickson,* 35 Ill. App. 2d 203, 182 N. E. 2d 342 (Ill. 1962) and *Elliot* v. *Jensen,* 9 Cal. 642, 187 Cal. App. 2d 389.

(b). Appellant next contends the court erred in refusing to tell the jury, in effect, that appellee owed Wayne (because he was a minor) a greater degree of care than he would have owed him had he been an adult. This contention is refuted, we think, by the conclusion we have already reached. If Wayne were obligated to exercise the same degree of care (for his own safety) as an adult, then there is no logical reason to impose on appellee a higher degree of care merely because Wayne happened to be a minor.

Moreover, from the record it is clear that appellee did not and could not have known a minor was riding the motorcycle. The law very wisely does not require appellee to guard against a hazard of which he was not aware and could not have been aware of by the exercise of due care. See: *Smith* v. *Wittman,* 227 Ark. 502, 300 S. W. 2d 600.

Affirmed.

FERRI *v.* BRAUN.

5-2935 366 S.W. 2d 286

Opinion delivered March 25, 1963.

[Rehearing denied April 29, 1963.]

William H. Drew, for appellant.

John F. Gibson, for appellee.

SAM ROBINSON, Associate Justice. On June 14, 1962, appellees, Earl T. Braun and his wife, Marie, filed this suit against appellant, Joe Ferri, alleging damages to Earl in the amount of $3,500.00, and damages to Marie in the sum of $9,900.00, growing out of an automobile collision. Appellant, Ferri, failed to answer within the prescribed time, and on August 6, 1962, the Brauns were awarded judgment for the total amount asked in the complaint.

On September 1, 1962, within the proper time, Ferri filed notice of appeal. He also filed a designation of the record on appeal, designating the entire record filed with the Clerk, and a narrative statement as follows: "On the 9th day of July 1962 this cause was called on the docket by the Honorable G. B. Colvin, Jr., Circuit Judge, Chicot County, Arkansas, and noted that the defendant, Joe Ferri, had not filed Answer herein. The Sheriff of Chicot County, John H. Biggs, thereupon called to the bar of this Court, the defendant, Joe Ferri, three times to appear, and who appeared not, and thereupon without any testimony being presented, rendered judgment as prayed in the complaint filed by the plaintiffs, Earl T. Braun and Marie R. Braun. There was no testimony presented by the plaintiffs herein, nor any witnesses in behalf of plaintiffs." Ark. Stats. 27-2127.4 provides: "A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narartive statement, may require testimony in question and answer form to be submitted for all or part thereof."

The judgment provides, *inter alia,* that evidence was adduced by the plaintiffs and that there was proof that Earl T. Braun had been damaged in the sum of $3,500.00, and proof that Marie R. Braun had been damaged in the sum of $9,900.00. The judgment was for the respective parties in the sums mentioned.

There must be evidence to support an award of damages in a default judgment. *Greer* v. *Newbill,* 89 Ark. 509, 117 S. W. 531; *Greer* v. *Strozier,* 90 Ark. 158, 118

S. W. 400. Here, the judgment recites that there was proof of damages. In the narrative statement appellant says: "There was no testimony presented by plaintiffs herein, nor any witnesses in behalf of plaintiffs." The real question is whether the parties are bound by the recitation in the judgment that there was proof of damages, or can appellant show, in the manner attempted here, that there is no substantial evidence to sustain the judgment.

Although the defendant, appellant, failed to file an answer, he had the right to cross-examine witnesses giving testimony as to damages and he had the right to introduce testimony in mitigation of damages. In other words, he had the right to contest the element of damages; it necessarily follows that he has the right to question on appeal the sufficiency of the evidence to support the amount of damages awarded. In *Clark* v. *Collins,* 213 Ark. 386, 210 S. W. 2d 505, the court said: "In the early cases of *Thompson* v. *Haislip,* 14 Ark. 220, and *Mizzell, et al.* v. *McDonald, et al.,* 25 Ark. 38, this court laid down the rule that in a hearing to determine the amount of damages after default, a defendant has a right to cross-examine the plaintiff's witnesses and to introduce evidence in mitigation of damages. In the last case cited Chief Justice Walker, speaking for the court, said: 'As regards the first question, the defendants, by failing to plead in bar, confessed the plaintiffs' right to recover damages, but not the amount of damages claimed in the declaration; because, if such is the effect of a judgment by default, then there would be no necessity for calling a jury to inquire of damages, and judgment would, without the intervention of a jury, be rendered for the amount of damages set forth in the plaintiff's declaration. It must therefore follow, that although the assumpsit to pay for the goods, averred to have been sold and delivered is admitted by the default, and no longer an open question for contest, such is not the case as regards the amount of damages to be recovered. In the case of *Thompson* v. *Haislip,* 14 Ark. 220, this court recognized this rule, and held that upon a writ of inquiry of damages, the defendant had a right to cross-examine a wit-

ness introduced by the plaintiff, and that it was error to refuse such permission. And we think that, upon principle, the decision in that case is alike applicable to this. The open question before the jury was as to the amount of the damages to be assessed, and if the defendant be permitted (as we have held he should be) to cross-examine a witness introduced by the plaintiff, for the purpose of reducing the amount of damages, we think, for the same reason and upon principle, he should be permitted to introduce evidence for the purpose.' ''

In his narrative statement of the evidence, served on counsel for appellee along with the notice of appeal, appellant says there was no evidence of damages. This was just another way of saying there was no substantial evidence to support the judgment. In these circumstances, the appellee had the right to require that the evidence be supplied in question and answer form. But appellees did not avail themselves of the opportunity to make such evidence, if any, a part of the record; therefore, the record contains no substantial evidence to support the judgment.

Since the question of damages was apparently not fully developed, the cause will not be dismissed, but is reversed and remanded for new trial on the issue of damages.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). I maintain the appeal in this case should be dismissed without prejudice to the appellant's right to file a motion in the Trial Court for correction of the record.

According to the transcript before us, the Circuit Court of Chicot County, on July 9, 1962, entered this judgment in this case:

''ON this day this cause comes on to be heard, being the day regularly set therefor, plaintiffs appearing in person and through their attorney, JOHN F. GIBSON, and defendant, although called three (3) times at the bar of this Court, failed to appear though summoned in the time and manner provided by law. The cause is submitted to the Court on the Complaint and on the summons

showing service personally on defendant more than twenty (20) days prior, and the evidence adduced by the plaintiff, from all of which the Court finds:

"I. THE Court has jurisdiction of the parties and the subject matter herein.

"II. DEFENDANT, by failing to file an Answer in the time and manner provided by law, has waived a right to trial by jury on the issue of damages.

"III. PROOF has been shown that the plaintiff, EARL T. BRAUN, has been damages in the sum of THIRTY-FIVE HUNDRED ($3,500.00) DOLLARS, as a direct result of the negligence of the defendant, JOE FERRI.

"IV. PROOF has been shown that the plaintiff, MARIE R. BRAUN, has been damaged in the sum of NINETY-NINE HUNDRED ($9,900.00) DOLLARS, as a direct result of the negligence of the defendant, JOE FERRI.

"IT IS, THEREFORE, ORDERED AND ADJUDGED that the plaintiff, EARL T. BRAUN, do have and recover of and from the defendant, JOE FERRI, the sum of THIRTY-FIVE HUNDRED ($3,500.00) DOLLARS, together with costs herein, for which execution may issue.

"IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, MARIE R. BRAUN, do have and recover of and from the defendant, JOE FERRI, the sum of NINETY-NINE HUNDRED ($9,900.00) DOLLARS, together with costs herein for which execution may issue.

"DATED THIS July 9, 1962

"(Signed)

G. B. Colvin, Jr.

Circuit Judge."

The judgment recites that there was "evidence adduced by the plaintiff"; and in stating the amount of damages awarded the judgment recites in two instances,

"proof has been shown . . . " The photographic copy of the judgment in the record before us bears the manual signature of the Circuit Judge. To impeach the above solemn recitations in the judgment, the appellant here offers a "narrative statement" which, in its entirety, reads:

"NARRATIVE STATEMENT

"On the 9th day of July, 1962 this cause was called on the docket by the Honorable G. B. Colvin, Jr., Circuit Judge, Chicot County, Arkansas, and noted that the defendant, Joe Ferri, had not filed Answer herein. The Sheriff of Chicot County, John H. Biggs, thereupon called to the bar of this Court, the defendant, Joe Ferri, three times to appear, and who appeared not, and thereupon without any testimony being presented, rendered judgment as prayed in the complaint filed by the plaintiffs, Earl T. Braun and Marie R. Braun. There was no testimony presented by the plaintiffs herein, nor any witnesses in behalf of plaintiffs.

"(Signed) William H. Drew, Attorney for Defendant."

This narrative statement was evidently prepared in supposed keeping with § 27-2127.4 Ark. Stats., which reads:

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

I maintain that the "narrative statement" here offered by appellant does not comply with the statute which says it is to be "a condensed statement in narrative form of all or a part of the testimony." The so-called "narrative statement" in this case does not purport to be a statement of "all or part of the testimony": rather, it says that there was no testimony taken. The sole purpose of the narrative statement in this case is to impeach the recitals of the judgment signed by the Judge;

and that is not the purpose of a narrative statement. The solemn recitals in the judgment cannot be impeached in any such manner. The "narrative statement" is a successor to the former bill of exceptions; and in *Arkadelphia Lbr. Co.* v. *Asman,* 79 Ark. 284, 95 S. W. 134, we said of an earlier case:

"This court held that the record, showing that the regular judge presided, could not be attacked by recitals of the bill of exceptions, and dismissed the appeal. *Arkadelphia Lumber Company* v. *Asman,* 72 Ark. 320. The court held that if the record failed to speak the truth in that respect the remedy was to procure an amendment."

If a bill of exceptions could not be used to impeach the recitals of a judgment, then certainly a narrative statement cannot be used to impeach the recitals of a judgment; and I give this case of *Arkadelphia Lumber Company* v. *Asman, supra,* as my authority for saying that appeal herein should be dismissed without prejudice to the plaintiff's right to apply to the Trial Court for correction of the record. Our cases show that such can be done. In *Schofield* v. *Rankin,* 86 Ark. 86, 109 S. W. 1161, Chief Justice McCulloch said:

"It can not be regarded otherwise than as well settled now that a court of record has plenary and continuing powers over its own records for the purpose of amendment, so as to make the records speak the truth concerning its proceedings. *Bobo* v. *State,* 40 Ark. 224; *Ward* v. *Magness,* 75 Ark. 12; *Groton Bridge Co.* v. *Clark Press Brick Co.,* 68 C.C.A. 577. An appeal from a judgment or decree does not deprive the court which rendered it of control over its records or of jurisdiction to amend them."

And in *Poole* v. *Oliver,* 89 Ark. 85, 115 S. W. 952, the Court said:

"If the appellant's contention is right, that the cause was not disposed of at the July term of court, and a decree was entered as of that date in vacation, the decree would be void. *Biffle* v. *Jackson,* 71 Ark. 226; *Boynton* v.

Ashabranner, 75 Ark. 415. That is a matter, however, which this court can not consider upon this record. This record shows a decree of the July term of the Calhoun Chancery Court. If in fact the record is wrong, it must be amended, and the appellant has an appropriate remedy to cause the record to speak the truth."

So I maintain that appellant should have applied to the Circuit Court to correct the record if, in fact, no evidence was heard on the matter of damages; and that appellant cannot use the "narrative statement" to impeach the judgment, any more than he could have used the former bill of exceptions to impeach the recitals of the Circuit Court judgment.

For these reasons, I dissent from the Majority Opinion, which reverses the judgment in this case.

PENNSYLVANIA MILLERS MUTUAL INS. CO. *v.* WALTON.

5-2925 365 S. W. 2d 859

Opinion delivered March 25, 1963.

Wright, Lindsey, Jennings, Lester & Shults, for appellant.

Wooton, Land & Matthews, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from an order dismissing a cross-complaint against an insurance agent by the insurer seeking indemnity from the agent for a loss.

For some years Mrs. H. A. Ross had purchased residence insurance from appellee W. I. Walton, an agent for

appellant, Pennsylvania Millers Mutual Insurance Company. In 1958, appellee wrote Mrs. Ross about a new policy on residence and contents known as the homeowner's policy. Pursuant to the letter Mrs. Ross went to appellee's office and discussed the new policy with appellee Mrs. Mildred Cagle, an employee of appellee Walton. On one side of a printed brochure which was enclosed in the letter to Mrs. Ross were two columns, one for listing present coverages and the other for coverages available under the homeowner's policy. On the other side of the brochure were pictures of common hazards, including water escape damage. Mrs. Cagle filled in the two columns, showing all coverages listed as being included in the new policy recommended to Mrs. Ross, and Mrs. Ross then purchased the policy. Mrs. Ross kept the brochure and apparently did not read the policy when she received it.

When Mrs. Cagle issued the policy, the testimony indicates, she knew there were three different types of homeowner's policies, but did not know that water escape damage was not covered by the Type A policy issued to Mrs. Ross (but was covered under Types B and C, more extensive policies), nor did appellee Walton, who checked the form of the policy before signing it, appear to know of the lack of coverage.

On March 2, 1961, Mrs. Ross' home suffered water escape damage. In reply to a call, appellee Walton advised that the loss was covered. It is undisputed that the Type A policy does not cover water escape damage.

When appellant denied liability under the Type A policy, Mrs. Ross brought suit against the company seeking reformation of the policy on the ground of mutual mistake on her part and that of the company's agent. Appellant answered, denying coverage, and cross-complained against appellees alleging that if appellee's agency had been guilty of a mistake, error or omission permitting reformation, then appellant, as principal, was entitled to indemnity from the agent guilty of the error or omission. Mrs. Ross then amended her complaint to seek relief jointly and alternatively from appellant and appellees.

Following a trial on the merits, the Chancellor held that the policy should be reformed because of the mutual mistake and the omission, through error, to issue a policy covering water escape damage; that Mrs. Ross was entitled to judgment against appellant less the difference in the premium paid on policy A and that due under policy B, and that appellees were not liable to appellant for the error or mistake of appellee Cagle.

For reversal, appellant contends that since the liability to the policy holder of appellant was, under the undisputed evidence, caused by a mistake, error or omission of appellees, appellant's agents, and moreover, since the trial court expressly so held, the trial court erred in denying to appellant its prayer for indemnity from its agents.

Following the reformation of the insurance contract, which decree is not appealed from, the only issue which faces us now is the liability, if any, of appellees, as agents, to appellant, as principal. This resolves the question to one of agency law generally. Appellant argues forcefully that the Chancellor found as a fact that appellees made a mistake, which appellant urges resulted in the loss sued upon here. This is a *non sequitur*. It does not follow, in the absence of a showing of collusion or bad faith, that appellees are liable to appellant for a loss occasioned on an insurance contract which appellees had full power and express authority to make on behalf of appellant.

Assuming, without deciding, that appellant's conclusion is correct that the mistake by appellees was negligence *per se,* the relationship of that mistake to the pertinent facts must be kept in mind. What did the mistake relate to? It relates to the mistaken belief of appellees that Policy A contained the coverage of Policy B. Appellees had full power to bind appellant to Policy A, to Policy B, and Policy C, the latter having no bearing on the case at bar. Had there been no mistake and had appellees issued Policy B in the beginning, no liability could be laid at appellees' feet. Appellee issued Policy A and that policy, coupled with other writing, induced the

Chancellor to reform Policy A into Policy B. Under this set of facts the only claim appellant could have on appellees would be for the difference in the cost of Policy A and the cost of Policy B. Had the Chancellor not correctly assessed that difference in cost to the insured, appellees would have been liable to appellant for that amount (and the insured in turn would have been liable to appellees for the difference).

In its brief, appellant states that there is an abundance of well-established precedent to support its contention and complains that it has been "whipsawed" by the trial court. Appellant fails to point to any of these precedents and we have diligently searched the case law of this state and find no case directly in point. However, the case most nearly in point appears to be *Phoenix Ins. Co.* v. *Banks & Co.,* 114 Ark. 18, 169 S. W. 233, which is against appellant's contention. Cases from other jurisdictions relating to insurance generally are of little help. While not directly in point with reference to the facts here, we think *State Insurance Co.* v. *Richmond,* 71 Iowa 519, 32 N. W. 496, presents an apt simile on the agency matter here involved.

"It is a very important consideration that the company was not drawn into a contract of insurance against a risk which it does not insure against . . .

"If a merchant's clerk should sell goods on credit, which he is employed to sell in that way, and to a person to whom he might properly sell, but for a price less than he was expressly required to obtain, the measure of the merchant's recovery against the clerk in an action for damages would unquestionably not be greater than the difference between the two prices, and that, too, even if the buyer should become insolvent, and not pay anything. If, on the other hand, the clerk should sell property of his employer of a kind which he was not employed to sell at all, he probably would be held responsible for the whole value . . .

"Having, then, reached the conclusion that the risk assumed was within the appellant's business, and that it was only a question of rates, the appellant should have

shown, before it could recover more than nominal damages, that it was damaged in the matter of rates. With this view, the judgment must be affirmed."

Affirmed.

SUPERIOR FORWARDING CO. v. GARNER.

5-2869 366 S. W. 2d 290

Opinion delivered March 25, 1963.

[Rehearing denied April 29, 1963.]

Reid & Burge, Frierson, Walker & Snellgrove, J. F. Sloan, III, for appellant.

Pollard and *Hastings,* By *Odell Pollard, Barrett, Wheatley, Smith & Deacon,* By *J. C. Deacon,* for appellee.

FRANK HOLT, Associate Justice. This is an action for the recovery of damages arising out of an accident involving three vehicles and resulting in the deaths of three persons. The appellee, William Francis Garner, administrator of the estate of Mrs. Mavis Jean Smith, sued Superior Forwarding Company, Inc., and Johnny Hunt,

the appellants, and the estate of Richard L. Palmer to recover damages for the benefit of Mrs. Smith's estate and her three minor children.

The appellee alleged in his complaint that the death of Mrs. Smith was a result of the concurring negligence of Johnny Hunt, the employee of Superior Forwarding Company, Inc., and Richard L. Palmer. The appellants filed their joint answer denying any negligence on their part and alleged, among other things, that the cause of the accident was the concurring negligence of Edward M. Spurlock, Mrs. Smith, and Richard L. Palmer. Various other pleadings were filed in this action. Upon a trial judgment for the appellee was rendered for $44,005.00. The jury apportioned the degrees of negligence at 50% to the Spurlock estate, 25% to the Palmer estate, and 25% to the appellants, Hunt and Superior Forwarding Company, Inc. The appellants made timely motions for a directed verdict which were overruled by the court.

On appeal appellants rely on several points for reversal, one being the point that the trial court should have directed a verdict for appellants, Superior Forwarding Company, Inc., and Johnny Hunt. Since we agree with the appellants on this point it is unnecessary to discuss the others.

The rule is well settled in our state that if there is any substantial evidence, when viewed in the light most favorable to the plaintiff and given its highest probative value, the question must be submitted to the jury. *Glidewell* v. *Arkhola Sand & Gravel Co.,* 212 Ark. 838, 208 S. W. 2d 4. We thus proceed to examine the evidence in this case.

This tragic accident, taking the lives of Mrs. Smith, Spurlock and Palmer, occurred on State Highway No. 63 four miles east of Hoxie, Arkansas at about 12:55 A.M. on December 24, 1960. Mrs. Smith, a widow, was a passenger in a 1957 Chevrolet hardtop automobile owned and operated by Spurlock. Palmer was alone, driving a 1955 Chevrolet convertible automobile. Hunt was the driver of a 1958 International trailer-truck owned by his

employer, Superior Forwarding Company, Inc. The appellee alleged in his complaint that Mrs. Smith and Spurlock were traveling west in the direction of Hoxie and were being followed by Hunt; that Palmer was driving east and was meeting Spurlock and Hunt when his car veered over the center line of the highway and collided with the Spurlock automobile and then Hunt's trailer-truck simultaneously collided with these two passenger cars.

During the trial, the court permitted the appellee to amend his complaint to conform to the proof and allege that he was entitled to recover regardless of what direction the Spurlock car was traveling. It could not be determined with any certainty from the testimony or physical evidence in which direction the Spurlock and Palmer vehicles were traveling. Hunt testified at the trial that he could not say which one of the vehicles he was following. He had previously given two written statements to the contrary. In fact, the court instructed the jury, without any objection, that as a matter of law, the vehicle being followed by the truck was free of negligence. This instruction reads as follows:

"You are instructed that the driver of the automobile proceeding on the highway toward Hoxie, Arkansas, under the undisputed evidence in this case is not guilty of any act of negligence and is not liable to any party in this action."

In spite of this instruction the jury found the drivers of both passenger cars negligent. It could be that the jury was unable to determine which of the two passenger vehicles preceded the truck. The court offered to have the jury consider further its failure to follow this instruction. The appellants objected. The court ruled the appellants could not later complain and overuled their motion for a new trial.

Palmer, 23 years of age, was a ministerial student at Bob Jones University at Greenville, South Carolina and had been visiting in the home of his financee's parents

at Fort White, Florida. He left there early on the morning of December 23, 1960, en route to his home in Kansas City, Missouri for Christmas.

Mrs. Smith, a widow 34 years of age with three minor children, on the night of December 23rd left her home between 8 and 8:30 P.M. in the company of Spurlock after making arrangements for the proper care of her children. Both Spurlock and Mrs. Smith were residents of Jonesboro, Arkansas. There is no evidence as to where the couple was going or at what time Mrs. Smith would return to the Smith home.

Hunt, the driver of the trailer-truck, was a resident of Little Rock, Arkansas, and an employee of Superior for about nine years. Since Mrs. Smith, Spurlock and Palmer were killed in this accident, Hunt is the only surviving eyewitness. Hunt testfied that he left Little Rock about 8 P.M. on the evening of December 23rd to make his regular round-trip to Jonesboro; that he left Jonesboro about 12:05 A.M., December 24th, to return to Little Rock; that he was proceeding west in the direction of Hoxie at about 50 miles per hour when he came up behind a car traveling in the same direction as himself and proceeding at a speed which Hunt estimated at about 40 miles per hour. He further testified that he was approaching the front vehicle for the purpose of passing when he saw the lights of an oncoming vehicle about a mile distant coming at what appeared to be a high rate of speed; that he slowed down his speed to that of the car preceding him and maintained a distance of 80 to 100 feet behind this car without ever attempting to pass it; that the highway was straight and level and when the oncoming car about 75 to 100 feet up the road from the other passenger car, its right wheels went of the pavement a foot or so onto the shoulder of the highway while still traveling at a fast rate of speed and then came back onto the pavement and crossed into the wrong lane running into the car preceding Hunt; that the vehicles collided with a "splattering" impact, like an egg dropped on the floor, about 90 to 100 feet in front of him, the force of the Jonesboro bound car pushing both cars back toward Hunt's truck, spinning clockwise together down

his travel lane and hitting the front of his truck in only a second or "just seconds", causing the truck to jack-knife and stop in such position with the trailer and most of the tractor in his proper traffic lane.

Hunt testified there wasn't much damage to his truck except from the fire. He testified that the first impact with his truck was not severe and did not jolt him very hard and the rest of the impact was at the drive axle. The front end of the Spurlock vehicle was found wedged under the right side of the tractor of Hunt's vehicle. Most of the rear section, or the main wreckage of Spurlock's car was found approximately 75 to 90 feet back of the trailer toward Jonesboro in the Hoxie traffic lane. The bodies of Spurlock and Mrs. Smith were at a point east of this main wreckage of the Spurlock car or about 100 feet from the rear of the trailer. Hunt further testified that while following the unknown vehicle he had taken his foot off the accelerator and had his foot on the brake but could not say that he did or did not apply his brakes at any time before the impact with his vehicle. There were no skid marks found from any of the vehicles.

The Palmer car came to rest on the north shoulder of the Hoxie bound traffic lane with its rear end near the edge of the highway, the front end pointed toward the northeast, or the ditch on the north side of the highway. The rear portion was about even with the front end of the trailer with a distance of about 8 or 10 feet between the trailer and the car. There was damage to the left front part of the car which would indicate a head-on collision. The right front door was damaged from a heavy blow. The rear portion was undamaged. Palmer's body was removed from his car.

The truck, the Palmer car and the front section of the Spurlock vehicle burned with portions of the asphalt road damaged by fire. Wreckage was strewn and scattered and it cannot be ascertained from the position of the vehicles which passenger car had been proceeding in which direction. Dirt, glass and debris were found on the highway from a point even with the tractor for a distance of approximately 125 feet to the rear of the

trailer. The only visible evidence of any cut or mark on the highway was approximately 75 to 100 feet east of the rear of the trailer. Appellee contends that the only logical explanation of the position of the impact with Hunt's truck is that it occurred somewhere in the vicinity of the main wreckage of Spurlock's car. However, there was no evidence indicating a dragging of the wreckage by the tractor. A state policeman testified that he investigated the accident immediately afterwards and on two other occasions that day but was unable to find "any evidence where the impact occurred."

According to Hunt, he experienced no ice or hazardous driving conditions before the accident. He first noticed some ice on a portion of the road after he got out of the truck and walked a few steps following the accident. Two drivers who traveled Hunt's route, coming up on the scene of the accident shortly thereafter, testified they had encountered no ice or hazardous driving conditions before they arrived. Another witness, who lives about "one-half of a quarter" from the scene of the accident, testified that upon being awakened by explosions from the gasoline and tires he walked to the scene and never observed any ice or slippery walking conditions. According to some witnesses, weather conditions were causing ice to form, moving from the north or Hoxie toward the scene of the accident. No witness testified that before the accident occurred there existed any ice or other hazardous road conditions between Jonesboro and the scene of the accident.

The specific acts of negligence attributed to Johnny Hunt on which appellee relies are: (1) Failed to keep a proper lookout, (2) was driving at a fast, reckless and unreasonable rate of speed for the then existing conditions, (3) failed to reduce his speed commensurate with existing road conditions, (4) failed to keep his vehicle under control, (5) was following too close, and (6) was carelessly attempting to overtake and pass the vehicle in front of him.

According to the evidence in this case, Hunt was keeping a proper lookout inasmuch as he observed the

oncoming car and thereupon stayed in his proper lane of traffic awaiting the approaching car to pass him. He also slowed his vehicle to a speed of approximately 40 miles per hour and maintained a distance of 80 to 100 feet behind the car preceding him without attempting to pass this vehicle. There is no proof there was any ice or hazardous driving conditions between Jonesboro and the scene of the accident.

The court instructed the jury properly, and without objection, that the maximum speed limit was 60 miles per hour. There is no evidence in this case that at any time Hunt failed to keep his vehicle under control. What more could Hunt, or any driver under the circumstances then existing, have done when this oncoming vehicle, moving at a high rate of speed, suddenly veered across the highway and crashed into the vehicle preceeding Hunt? *Shearman Concrete Pipe Co.* v. *Wooldridge,* 218 Ark. 216, 234 S. W. 2d 382. There is no proof that Hunt was traveling other than in his own proper lane, where he should have been, at all times before and after this accident. Under the provisions of Ark. Stats. Anno., 75-614, Hunt had a right to follow the preceding vehicle at a reasonable and prudent distance for the purpose of overtaking and passing it. Hunt denies, and there is no proof to the contrary, that he ever attempted to pass the vehicle in front of him. There are no physical facts in this record that Hunt's vehicle was ever out of its proper lane of traffic. In fact, when Hunt's vehicle came to rest the trailer was wholly within the proper traffic lane with the tractor in a jackknife position and the front end across the center line.

On the basis of the record presented to us in this case we are of the opinion that the trial court should have directed a verdict as requested by the appellants. As we view the evidence in this case, appellee's cause is based on inferences, speculation and conjecture. We do not find any substantial evidence to support any of the allegations of the appellants' alleged acts of negligence in this case. The burden was upon the appellee to produce some substantial evidence from which the jury might find some act or omission constituting negligence by the ap-

pellants as alleged in appellee's complaint. Such evidence can be established either by direct or circumstantial evidence but the appellee cannot rely upon inferences based on conjecture or speculation in order to establish proof of negligence.

In *Kapp* v. *Sullivan Chev. Co.,* 234 Ark. 415, 353 S. W. 2d 5, Mrs. Kapp was injured in a three-car collision in which her car seat belt broke. She brought suit against the appellee alleging that her injuries resulted from a defective seat belt. This court held that a directed verdict in favor of the defendant-appellee was proper and in doing so stated:

" * * * Several *possible* causes of the break are argued, but in truth, they are only *possibilities,* and do not reach the status of probabilities. Negligence cannot be established by guess work. As stated in *Henry H. Cross Co.* v. *Simmons,* 96 F. 2d 482, a decision under Arkansas law:

'To submit to a jury a choice of possibilities is but to permit the jury to conjecture or guess, and where the evidence presents no more than such choice it is not substantial, and where proven facts give equal support to each of two inconsistent inferences, neither of them can be said to be established by substantial evidence and judgment must go against the party upon whom rests the burden of sustaining one of the inferences as against the other.' "

In *Glidewell* v. *Arkhola Sand & Gravel Co.,* 212 Ark. 838, 208 S. W. 2d 4, this court said:

" * * * Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof, * * * ".

In *Moran* v. *State,* 179 Ark. 3, 13 S. W. 2d 828, we said:

"* * * It is not allowable, under the rules of evidence, to draw one inference from another, or to indulge presumption upon presumption to establish a fact. Reasonable inferences may be drawn from positive or

circumstantial evidence, but to allow inferences to be drawn from other inferences, or presumptions to be indulged from other presumptions, would carry the deduction into the realm of speculation and conjecture."
See also *Martin* v. *Arkansas Power & Light Co.,* 204 Ark. 41, 161 S. W. 2d 383; 20 Am. Jur. § 165, p. 169.

It is true that since Hunt is a party-defendant his testimony is presumed to be disputed and contradicted. Either rejecting Hunt's testimony altogether or considering it in the light most favorable to appellee, there is still lacking any substantial evidence to support a verdict in favor of the appellee. In *Bennett* v. *Wood,* (CA 8) 271 F 2d 349, the court said:

"The rejection of Bennett's testimony relating to the facts surrounding the accident does not aid the plaintiff in establishing her case. The burden is upon the plaintiff to prove negligence which proximately caused the injuries claimed. Defendants do not have the burden of proving freedom from negligence. *Glidewell* v. *Arkhola Sand & Gravel Co., supra,* 208 S. W. 2d at page 8; *Kisor* v. *Tulsa Rendering Co.,* DCWD Ark., 113 F. Supp. 10, 16."

Assuming we found sufficient evidence of negligence to constitute a jury question in this case, even then the verdict in favor of the plaintiff-appellee could not be permitted to stand. The appellee had the burden of proof to establish not only negligence on the part of the defendants-appellants, but also that such negligence was a proximate cause of Mrs. Smith's death. In *Kapp* v. *Sullivan, supra,* we said:

" * * * Negligence alone is not sufficient. It must be established that such negligence was a proximate cause of the damages suffered."

Hunt described the collision between the Spurlock and Palmer cars as a "splattering impact," somewhat like dropping an egg on the floor, resulting in it splattering and breaking into several pieces. The condition of Mrs. Smith's body was such that it appears her death was instantaneous. The oncoming vehicle, whether driven

by Spurlock or Palmer, was traveling at a high rate of speed when it collided with the other passenger car [either Spurlock's or Palmer's] which latter vehicle Hunt estimated to be traveling at approximately 40 miles per hour. Thus, the two vehicles collided at a combined speed which produced the described splattering result. According to Hunt he was approximately 100 feet behind the first impact and the two cars spun clockwise and collided with him after he had traveled about one-half the distance to the first collision.

According to the evidence in this case it is only by conjecture and speculation that it can be said in which direction the Spurlock and Palmer vehicles were proceeding at the time of the accident. Apparently the jury could not or refused to so find. It is only by conjecture or speculation that a jury could determine why the oncoming vehicle approaching at a high rate of speed swerved across the road and collided with the vehicle preceding Hunt; that this "splattering" impact did or did not instantly cause Mrs. Smith's death; that Mrs. Smith was or was not propelled from the vehicle in which she was a passenger at the time of this impact; that Mrs. Smith was or was not in the wreckage when it collided with Hunt's vehicle; that she was or was not dead when this impact occurred; that Hunt was negligent in any manner or that any negligence of his was a proximate cause for the damages sought herein.

We do not mean to say that a disinterested or non-party eyewitness is necessary. Physical facts can supply the required evidence. However, in this case the physical facts are in such hopeless conflict that they lead only to conjecture and speculation. Verdicts cannot stand on such evidence.

We stated the rule in *Turner* v. *Hot Springs Street Ry. Co.*, 189 Ark. 894, 75 S. W. 2d 675:

" * * * juries are not permitted to guess or speculate as to the proximate cause of an alleged injury, the burden resting upon [plaintiff] to show by a preponder-

ance of the evidence that her injuries were caused by some negligent act or omission of [defendant].''

See also *Bennett* v. *Wood, supra.*

The burden was on the plaintiff to prove not only the appellants were negligent, but such negligence was a proximate cause of the damages suffered. This causal connection cannot be proved by conjecture and speculation. This proximate cause must be proved by direct or circumstantial evidence as a fact. In this case there are insufficient proven facts, connected and related to each other, from which it can be reasonably inferred that any negligence on the part of appellants was a proximate cause of the accident.

It is our opinion that there was no substantial evidence of negligence or proximate causation to make a question for the jury. Therefore, we must reverse this judgment and dismiss this case. It is so ordered.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice (dissenting). I do not agree with the majority view. In addition to the rule requiring that appelant Johnny Hunt's testimony be considered as disputed and controverted, there is a stronger rule applicable to this case which is set out in *Penny* v. *Gulf Refining Co.*, 217 Ark. 805, 233 S. W. 2d 372, as follows:

''A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men could possibly find the issues for the plaintiff. In such circumstances, the trial judge must give to the plaintiff's evidence its highest probative value, taking into account all reasonable inferences that may sensibly be deduced from it, and may grant the motion only if the evidence viewed in that light would be so insubstantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury.''

Viewing the evidence according to the rules of this court, I find in appellant's own abstract the following testimony of a disinterested witness:

"My name is John Newton White and I live approximately 3½ miles east of Hoxie on Highway 63. I went to the scene of the accident on Highway 63 last December 24th. I was concerned for fear my daughter was in it. I was in bed, but was awake, waiting on my daughter to get home. She should have been in and I was concerned about her. The road was slick at the time, not real bad but dangerous. About dark that night I had been out seeing about the stock and it had been raining and getting freezing weather. I heard the crash, looked out the window and saw the fire. I had heard a car pass my house before making a noise like it had a leaky muffler. I just heard one crash. I got up and called the ambulance and police and then walked to the scene. I had to walk careful to keep from sliding."

This witness whose home is located in close proximity to the crash testified positively that he heard only one crash. Certainly this is substantial evidence from which the jury could have found that this was a simultaneous collision.

From the severity of the collision with appellant's truck as indicated by the physical facts as established by the testimony and photographs in the record, a jury could have found that appellant's truck contributed to causing the death of Mrs. Smith.

It is settled law that once a plaintiff has shown a defendant's negligence concurred with the negligence of another in producing an injury he is entitled to recover unless the defendant shows that the negligence of the other party would have produced the injury independently of his own negligence. *Oviatt* v. *Garretson,* 205 Ark. 792, 171 S. W. 2d 287; *Lydon* v. *Dean,* 222 Ark. 367, 260 S. W. 2d 465; 38 Am. Jur., Negligence, § 63, p. 715. In my view appellant completely failed to make such a showing.

Was there any substantial evidence from which reasonable men could possibly have found that appellant was negligent? The jury heard the testimony of appellant Johnny Hunt who admitted to making the 155-mile trip from Little Rock to Jonesboro while driving a huge transport truck on this rainy night of the accident in

less than four hours and after making business stops at Searcy and Newport, and after taking more than 30 minutes to eat a steak in Newport. The jury further heard the evidence developed at trial which showed that Johnny Hunt, driver of the Superior truck, gave a written and signed statement a few hours after the wreck to the manager of the Superior Forwarding Company terminal at Jonesboro and to the insurance adjustor for Superior which stated that the vehicle proceeding down the highway toward Hoxie in front of him was occupied by two persons and that the vehicle meeting them was a convertible.

Five days after the accident when he was in Little Rock, the evidence showed Hunt gave another written and signed statement, with the consent of his employer, to a representative for the Spurlock estate and within that statement again stated that the car he had been following was a Chevrolet hardtop and that the vehicle meeting him was a Chevrolet convertible.

Hunt testified at the trial he really didn't know which vehicle was in front of him and which vehicle he was meeting. In addition to this impeachment the jury was asked by appellants to believe that appellant could accurately describe the speed and control of an oncoming vehicle at a considerable distance when he couldn't testify on the witness stand as to which car he had been following. This is the same witness who after suffering comparatively slight injuries admittedly failed to check on the welfare of the occupants of the other vehicles, one of which apparently burned to death. It is true that Johnny Hunt was the only surviving eye witness to this collision but as stated above his testimony is disputed as a matter of law and from the verdict rendered by the jury it is evident that they chose not to believe him as a matter of fact, which of course they had a perfect right to do. On appeal this court in the majority opinion chooses to disagree with the jury and relies almost completely for its finding of no substanial evidence upon the testimony of Hunt.

What was the evidence as to the weather conditions? The witness John Newton White testified as set out above concerning the weather conditions both before and after the collision. Johnny Hunt testified that he noticed ice on the road immediately after he got out of his truck. Witness John W. Troutt, Jr., City Editor and photographer for the Jonesboro Evening Sun, testified that he arrived at the scene not later than 1:30 A.M., which was not more than 30 minutes after the wreck had occurred, and that as he was driving west from Jonesboro to the scene of the wreck he encountered ice at the town of Sedgwick on west to where the wreck occurred. He also testified that he slowed his speed down considerably after going west from Sedgwick. Witness Robert F. Warden testified that he arrived at the scene at about 1:10 A.M., which would have been not more than 15 minutes after the wreck, and that in going to the scene he traveled the highway on which the wreck occurred and that the highway was icy and very slick. Witness Charles White, a fireman from Walnut Ridge, testified that the roads were icy and very slick. Witness Alvin Taylor testified that he was the first motorist to arrive on the east side of the scene of the accident and that he arrived there some time between 12:00 and 1:00 A.M. and that when he got out of his car he noticed that there was ice on the highway. Appellant admitted he was driving his heavy tractor and trailer at a speed of 50 miles per hour. It is my view that reasonable minds could differ as to whether 50 miles per hour was an excessive speed for a big tractor and trailer to have been driven on an icy highway at night.

Appellant admitted that he was following the automobile in front of him at a speed of 50 miles an hour. He estimated the speed of the preceding automobile to be 40 miles per hour. He said he was following within 80 to 100 feet of the vehicle in front of him. Such a distance is barely more than the combined length of his tractor and trailer. His trailer alone was 40 feet in length. He admitted that he ordinarily would not follow another vehicle any closer than three to four hundred feet. However, he tried to justify the fact that he was within 80 to

100 feet of the vehicle in front of him by stating that he had overtaken the vehicle in front of him and started to pass but saw another automobile approaching from the opposite direction at a distance of one mile or more away. When he saw the approaching automobile, he discontinued his effort to pass. Although he realized that the approaching automobile was traveling at a terrifically high rate of speed when he first saw it a mile or more away, and, nevertheless, he remained within 80 to 100 feet behind the car in front of him. Even though he felt that three to four hundred feet was a safe distance for him to follow another vehicle, he did not adjust his speed so as to get a safe distance back, in spite of the fact that he knew he was going to meet a vehicle which he described as traveling at a terrifically excessive rate of speed. Once he abandoned his effort to pass, he could not escape the duty imposed upon him by Sec. 75-614 of the Arkansas Statutes Annotated, which provides that a driver of a motor vehicle shall not follow another closer than is reasonable and prudent, particularly in view of the fact that he had more than ample time to get a prudent distance back.

A reasonable and prudent distance for appellant Johnny Hunt to follow another vehicle would certainly be more than 80 to 100 feet and under the existing circumstances, a jury might well find that a prudent distance would be even more than the three to four hundred feet which he testified he ordinarily considered to be a safe distance for him to follow another vehicle.

There was further evidence relative to Hunt's driving, such as failure to swerve his vehicle and failure to apply brakes, from which a jury could have found that Hunt was negligent in failing to keep a proper lookout and failing to exercise ordinary care.

From the whole case it is my view that appellee need not have proved by direct evidence that Mrs. Smith's death was caused by the sole negligence of Johnny Hunt. I believe it is sufficient if the facts proved are of such a nature, and are so connected and related to each other, that the conclusion therefrom may be fairly inferred. In

the case of *Biddle* v. *Jacobs,* 116 Ark. 82, 172 S. W. 258, this court in ruling on the sufficiency of the evidence as to whether defendant's negligence was the proximate cause of the deceased's death, said:

"In actions for damages on account of negligence, plaintiff is bound to prove, not only the negligence, but that it was the cause of the damage. This causal connection must be proved by evidence as a fact, and not be left to mere speculation and conjecture. *The rule does not require, however, that there must be direct proof of the fact itself. This would often be impossible. It will be sufficient if the facts proved are of such a nature, and are so connected and related to each other that the conclusion therefrom may be fairly inferred.*" [Emphasis mine.]

For the reasons stated above, I respectfully dissent.

5-2937 366 S. W. 2d 721

Opinion delivered April 1, 1963.

[Rehearing denied May 6, 1963.]

[redacted]

Scott & Davidson, for appellant.

Jeff Duty, for appellee.

CARLETON HARRIS, Chief Justice. This is a Replevin action wherein all facts were stipulated by counsel, and submitted to the Benton County Circuit Court for determination as a matter of law. The admitted facts, as set forth in the stipulation and pleadings, are as follows:

Stafford McCumber, a resident of Amite County, Mississippi, on June 10, 1961, purchased from the Frazier Automobile Supply Company of McComb, Mississippi, a certain Plymouth automobile, under a conditional sales contract. This contract was sold and assigned to Fred Felder d/b/a Felder Finance Company of McComb on the same date. The conditional sales contract was not, and has never been, filed for record in the chattel mortgage records in the office of the Chancery Clerk of Amite County, Mississippi.

Thereafter, McCumber brought the automobile to Benton County, Arkansas, and on December 21, 1961, sold the car to Benton County Motors, Inc., appellant herein. This automobile was purchased by the company from McCumber as a trade-in, without notice of any defect of title, in the ordinary course of trade, and as a *bona fide* purchaser for value without notice. The conditional sales contract had not been filed within the State of Arkansas, nor has it ever been filed in this state. At the time of the institution of the suit by appellee, McCumber was in default under the terms of the contract, and remained in default as of the time of the trial. After argument and the submission of briefs, the court, in addition to facts already enumerated, made the following findings:

That said title retaining note at the time of its execution to the present time constitutes a security interest between the maker, Stafford McCumber and the Frazier Auto Supply Company, or its assignees.

That permission was not given to Stafford McCumber by Frazier Auto Supply Company or its assignees to remove said automobile from the state of Mississippi.

That the plaintiff, Fred Felder, holds the title retaining note to the above-described automobile and as such holder is entitled to immediate possession thereof and that the title retaining note of plaintiff is superior to title certificate issued to defendant by the Commissioner of Revenue of the State of Arkansas.

That the certificate of title issued to the above described automobile by the Commissioner of Revenues of the State of Arkansas, should be and is hereby cancelled and set aside."

Judgment was entered in accordance with these findings, and from such judgment comes this appeal.

We are of the opinion that the court erred in holding that Felder was entitled to the possession of the automobile, and that his title-retaining note was superior to the title held by appellant. Subsection 6 of Section 8075-01 (a part of the Motor Vehicle Sales Finance Act of Mississippi) M. V. S. F. provides as follows:

"'Retail installment contract' or 'contract' means an agreement, entered into in this state, pursuant to which the title to, or a lien upon the motor vehicle, which is the subject matter of a retail installation transaction, is retained or taken by a retail seller from a retail buyer as security, for the buyer's obligation. The term includes a chattel mortgage, a conditional sales contract and a contract for the bailment or leasing of a motor vehicle by which the bailee or lessee contracts to pay as compensation for its use a sum substantially equivalent to or in excess of its value and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of the contract. No such retail installment contract shall be valid and binding against subsequent lien holders or purchasers for value without notice unless the same shall be filed for recording in the chattel mortgage records in the office of the chancery clerk of the county of the residence of the retail buyer within ten (10) days after the date of said retail installment contract."

Admittedly, this contract was not filed for recording.

Section 75-160, Ark. Stats. Anno., 1961 Supp., provides as follows:

"(a) No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances with or without notice until the requirements of this article [§§ 75-160, 75-161] have been complied with.

(b) There shall be deposited with the department a copy of the instrument creating and evidencing such lien or encumbrance, which instrument is executed in the manner required by the laws of this State with an attached or indorsed certificate of a notary public stating that the same is a true and correct copy of the original and accompanied by the certificate of title last issued for such vehicle.

(c) *If a vehicle is subject to a security interest when brought into this State, the validity of the security interest is determined by the law of the jurisdiction where the vehicle was when the security interest attached, subject to the following:*[1]

1. If the parties understood at the time the security interest attached that the vehicle would be kept in this State and it was brought into this State within thirty (30) days thereafter for purposes other than transportation through this State, the validity of the security interest in this State is determined by the law of this State.

2. If the security interest was perfected under the law of the jurisdiction where the vehicle was when the security interest attached, the following rules apply:

(A) If the name of the lien holder is shown on an existing certificate of title issued by that jurisdiction, his security interest continues perfected in this State.

(B) If the name of the lien holder is not shown on an existing certificate of title issued by that jurisdiction the security interest continues perfected in this State for four (4) months after a first certificate of title of the vehicle is issued in this State, and also, thereafter if, within the four (4) month period, it is perfected in this State. The security interest may also be perfected in this State after the expiration of the four (4) month period; in that case perfection dates from the time of perfection in this State.

3. *If the security interest was not perfected under the law of the jurisdiction where the vehicle was when the security interest attached, it may be perfected in this State; in that case, perfection dates from the time of perfection in this State.*"[2]

The italicized provisions determine the law in this litigation. According to Webster's Third New International Dictionary, the word "perfect" means to "finish; to complete or put in final form in conformity with law." Admittedly, this lien was neither perfected under the law of Mississippi nor the law of Arkansas, and appellant was admittedly a *bona fide* purchaser.

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[1] Emphasis supplied.
[2] Emphasis supplied.

Appellee argues that the Mississippi recording and filing requirement does not affect the transaction between appellant and McCumber which occurred in Arkansas, asserting that the filing statute only protects *bona fide* purchasers dealing with the property within the state of Mississippi. Citations are given from authorities on conflict of laws. (Appellee then states that the law of the state to which the chattel was removed, and is situated at the time of the transaction, controls the effect of the subsequent transaction upon the title.) With this statement we agree, for we deem the Arkansas law controlling. However, appellee contends that Section 75-160 (heretofore quoted) has no effect upon this particular transaction because the Act only requires that conitional sales contracts on *registered* vehicles be filed. We do not consider this contention to be sound, for we are firmly of the opinion that the legislative purpose in enacting the legislation found in 75-160 was to protect *bona fide* purchasers. Certainly, the legislature did not intend to give to one, who complies neither with the statute requiring registration nor the statute requiring the filing of the conditional sales contract, a greater right than that given to one who complies only with the registration provision. A reading of the entire chapter (Title 75, Motor Vehicles) and amendatory acts seems to make clear that Section 75-160 has reference to all vehicles which are required to be registered. For that matter, though such fact is not included in the stipulation, the vehicle here in question was registered; this we know by the fact that the court ordered the registration cancelled. The record does not reflect when the act of registration occurred, and, of course, the burden was upon appellee, as plaintiff, to establish his case.[3]

In accordance with the views herein expressed, the judgment is reversed and the cause remanded with directions to enter judgment for the appellant.

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[3] Both parties have gone out of the record on this point. Appellee states that the appellant registered the vehicle "and secured a title after McCumber had sold it to appellant." Appellant states that the vehicle in question was first registered in Mississippi to McCumber, and that after the car was brought to Arkansas, "application for Arkansas registration was made by McCumber, the Mississippi evidences surrendered to the proper Arkansas authorities and a certificate of title first issued to McCumber in Arkansas." Appellant also asserts that this point is advanced here for the first time on appeal. We, of course, do not consider either version since the record does not reflect which is correct.

AMERICAN INSURERS' LIFE INS. CO. *v.*
THE FIRST NAT'L. BANK IN BLYTHEVILLE.

5-2868 367 S. W. 2d 97

Opinion delivered April 1, 1963.

[Rehearing denied May 20, 1963.]

[redacted]

Harry E. Meek, for appellant.

Graham Sudbury, Marcus Evrard, Pope, Pratt & Shamburger, by: Richard L. Pratt and Joseph L. Buffalo, Jr., E. J. Ball, for appellee.

Ed. F. McFaddin, Associate Justice. This litigation arose by complaint filed by the First National Bank in Blytheville against The American Insurers' Life Insurance Company and also Mrs. Gladys Gill, executrix of the estate of H. Noble Gill, deceased. There were answers, cross-complaints, and interventions by various parties; and a great mass of evidence and exhibits were offered in the trial in the Chancery Court, so that the record now before us is voluminous and the issues are varied. At the outset, we identify the parties:

(a) The First National Bank in Blytheville is a national banking corporation and is hereinafter identified as "Bank."

(b) Mrs. Gladys Gill is the executrix of the estate of H. Noble Gill, who departed this life testate on June 11, 1960, a citizen and resident of Mississippi County, Arkansas.

(c) The American Insurers' Life Insurance Company is an insurance company organized under the laws of Arkansas on the 28th day of February, 1958; and will be hereinafter identified as "American Insurers."

(d) Lester Gill is a brother of H. Noble Gill, deceased.

(e) Other parties, referred to as "Intervenors," were creditors of H. Noble Gill, and are Primrose Oil Company, Blytheville Propane Company, Buchanan Agency, and Marcus Evrard.

This appeal brings into the open some of the tangled affairs of the late H. Noble Gill. He owned interests and

equities in a number of enterprises in Eastern Arkansas, including stock in the Cape County Milling Company of Jackson, Missouri, and in the Dell Compress of Dell, Arkansas; and also lands in Mississippi County, Arkansas, and in the State of Mississippi. Most all of his holdings were encumbered, but the general public thought he had considerable equity. On February 28, 1958, H. Noble Gill organized the "American Insurers"; and transferred to it substantially all of his various holdings and equities for 1,941,468 shares of no par value stock in American Insurers. Among other assets there was the equity of his shares of stock in the Cape County Milling Company held by the Bank. Gill envisaged that he could sell some of his stock in American Insurers[1] to pay the Bank's claim, and also that a large income tax liability would be avoided. For convenience, we list and discuss the controversies between the various litigants.

I. *The Issues Between The Bank And American Insurers.* At all times from August 4, 1956 to his death, H. Noble Gill was indebted to the Bank in large sums of money; and the Bank, along with other security, all the time held for the protection of its loan all of the duly endorsed stock certificates of H. Noble Gill in the Cape County Milling Company. These certificates totalled three-fourths of all the preferred and common stock of said company. On May 4, 1959, H. Noble Gill, to evidence accumulated indebtedness, executed a note to the Bank for $60,000.00, secured by all of his stock certificates in the Cape County Milling Company held by the Bank. There was also other security not necessary to be described. This $60,000.00 note was reduced by payments, so that at the time of Gill's death the balance due the Bank was $30,000.00 and interest; and on September 7, 1960, the Bank filed this suit.

The American Insurers claimed title to the certificates free of the claim of the Bank because (a) H. Noble Gill executed a "Transfer of Stock"[2] to American Insurers on February 28, 1958; (b) the Bank (acting by its Vice

[1] With the exception of one block of 30,000 shares, all the other 225 persons who purchased stock in American Insurers purchased the H. Noble Gill shares.

President Reese) informed American Insurers on February 28, 1958 that on payment of $74,000.00 the certificates would be delivered to American Insurers; and (c) American Insurers (by Mr. Butler) paid the Bank the $74,000.00. The Chancery decree awarded relief to the Bank; and against that decree American Insurers prosecutes this appeal.

We conclude that the decree, in favor of the Bank, was correct in awarding it a prior claim on the Cape County Milling Company stock. We begin with the thoroughly established fact that H. Noble Gill's stock certificates in Cape County Milling Company were endorsed by him and pledged to the Bank as security for his then or thereafter indebtedness to the Bank.[3] Furthermore, the Bank has completely established the amount of the indebtedness of H. Noble Gill to the Bank. So the Bank has made a complete case for itself, unless and until the American Insurers as the adverse claimant can disprove or rebut the Bank's claim.

The claim of American Insurers was really estoppel: that is, American Insurers claimed that the representative of the Bank told it that for $74,000.00 the Bank would release the H. Noble Gill stock certificates in Cape County Milling Company held by the Bank; and American Insurers paid the $74,000.00. The American Insurers had the burden of proving such estoppel (*Watson* v. *Murray,* 54 Ark. 499, 16 S. W. 293); and the Chancellor, who saw the witnesses, held that the evidence was not sufficient to sustain American Insurers on this point. We rest our affirmance on the delay and laches of American Insurers. The alleged representation by Mr. Reese was on February 28, 1958. In March 1958 American Insurers learned—as it admitted[4]—that the Bank would not deliver the stock

[2] This instrument is copied in toto in Topic IV of this opinion.

[3] The wording of the pledge is an broad as can be imagined. A portion of the wording is mentioned in Topic II *infra.*

[4] Mr. Butler testified that his check to the Bank was dated March 17, 1958; that a few days later H. Noble Gill delivered to Butler for American Insurers the notes of Gill and the assignment from the Bank; that Butler called Reese at the Bank and was advised that the Bank had credited the $74,000.00 on the said notes, and would not surrender the shares of stock in Cape County Milling Company until additional amounts were paid; so American Insurers learned of all of this in March 1958.

certificates. Instead of demanding a return of the $74,000.00, American Insurers kept the notes and the assignment tendered by the Bank, as tantamount to a novation.

The American Insurers never returned the notes and assignment to the Bank; so from March 1958 to and including the trial below, American Insurers kept what the Bank tendered in lieu of the Cape County Milling Company stock certificates. From March 1958 until American Insurers filed its first pleading in this case on September 23, 1960, American Insurers never asked any court to require the Bank to surrender the Cape County Milling Company stock certificates free of the claim of the Bank. In the interval from March 1958 to September 1960, Mr. Reese, the Vice President of the Bank and the person alleged by American Insurers to have made the $74,000.00 representation, has died. H. Noble Gill, who is alleged to have heard the $74,000.00 representation, has died. There was thus a delay of two years and six months by American Insurers after it had full notice of the Bank's refusal; and during that time many, many events have happened which have materially changed the situation of the litigants from that existing in March 1958. American Insurers was the delaying party. It took the chance that H. Noble Gill would make a success of his insurance venture. American Insurers cannot "have its cake and eat it also." This is a clear case of loss of a claim by laches. See *Walker* v. *Norton,* 199 Ark. 593, 135 S. W. 2d 315; and *Falls* v. *Jackson,* 205 Ark. 435, 186 S. W. 2d 787. We affirm the Chancery decree in favor of the Bank on the Cape County Milling Company stock certificates.

II. *The Issues Between Lester Gill and American Insurers.* On February 7, 1957, the indebtedness of H. Noble Gill to the Bank had become so large that it was in excess of the aggregate amount of credit that the Bank could extend to one individual (that is, it was in excess of $60,000.00); so on the date mentioned Lester Gill, as a favor to his brother, H. Noble Gill, and at the request of

the Bank, executed a note to the Bank for $25,000.00, signed by Lester Gill. H. Noble Gill gave his personal note to Lester Gill for $25,000.00, which was endorsed and was also held by the Bank; and Lester Gill claimed that the Bank agreed that he would be subrogated to the security of the Cape County Milling Company stock certificates held by the Bank. Lester Gill intervened in this litigation to have his indebtedness paid out of any excess of the proceeds of said security after the Bank had been paid; and the Bank acquiesced in such intervention. American Insurers resisted the claim of Lester Gill.

In addition to its claim for all the stock certificates of Gill, as previously discussed, American Insurers further claimed: (a) that on February 28, 1958 H. Noble Gill executed a "Transfer of Stock" [5] to it, whereby American Insurers became entitled to all the stock certificates of H. Noble Gill held by the Bank; (b) that the pledge instrument held by the Bank would not cover the Lester Gill claim; and (c) that the claim of subrogation was a mere afterthought.

The Chancery decree was in favor of Lester Gill's claim; and a careful study convinces us that the decree in favor of Lester Gill was correct. It was clearly established that Lester Gill's note was credited as a payment on H. Noble Gill's indebtedness to the Bank; that H. Noble Gill's note to Lester Gill was held by the Bank as collateral of the Lester Gill note; and that the loan agreement of H. Noble Gill to the Bank covering pledge of collateral covered any and all direct, indirect, absolute, or contingent liabilities of H. Noble Gill to the Bank, as well as any "endorsement, draft, bill of exchange, note, guarantee, letter of credit, or other obligation, or in any other manner." Furthermore, there was positive testimony of the express representations of the Bank officials to Lester Gill that he would be subrogated to the Bank's security.

The Chancellor saw the witnesses and heard them testify and believed their testimony; and we cannot say that the Chancellor's findings on this issue are against

[5] This instrument is copied in toto in Topic IV of this opinion.

the preponderance of the evidence. So we affirm the decree in favor of Lester Gill for subrogation. See *Talbot v. Wilkins,* 31 Ark. 411; and *Briscol* v. *American Southern Trust Co.,* 176 Ark. 401, 4 S. W. 2d 912.

III. *Amounts Received by American Insurers From Cape County Milling Company.* It was shown that the Cape County Milling Company paid to American Insurers, or paid to others for its use and benefit, the total sum of $21,572.07. These payments were because American Insurers assumed control of Cape County Milling Company after February 28, 1958; and this amount of $21,572.07 was claimed by American Insurers as "dividends." American Insurers had acquired from another party the certificates for one-fourth of the common and preferred stock in Cape County Milling Company, and was entitled to actually receive only one-fourth of the $21,572.07; so in fact received an excess of $16,790.05. If the sale of the Cape County Milling Company stock fails to bring enough to satisfy the judgment of the Bank and Lester Gill, judgment shall then go against American Insurers and in favor of the Bank and/or Lester Gill for the deficit, up to the $16,-790.05, being three-fourths of the amount received by American Insurers from Cape County Milling Company.

IV. *The Issues Between American Insurers and Mrs. Gladys Gill, Executrix of the Estate of H. Noble Gill, Deceased.* The Chancery Court found and decreed that the American Insurers had no valid claim to the stock of H. Noble Gill in the Cape County Milling Company that was pledged to the Bank; that the "transfer instrument" relied on by American Insurers was ineffectual; and that the Estate of H. Noble Gill should receive any and all proceeds from the sale of the pledged Cape County Milling Company stock above what was necessary to pay the Bank and Lester Gill. The American Insurers has appealed from such decree in favor of Mrs. Gill, Executrix; and we conclude that the Chancery Court was in error in the decree in favor of Mrs. Gill, as executrix, as against the American Insurers.

The American Insurers' Life Insurance Company was organized on February 28, 1958, in Little Rock, Ar-

kansas; and H. Noble Gill was the moving spirit in the said organization. Among other incorporators, there were W. H. Patton, an accountant, and E. J. Butler, an attorney. The plan of H. Noble Gill was to organize the American Insurers' Life Insurance Company, to transfer to it substantially all of his various holdings and equities for no par value stock in American Insurers; and then to sell some of the said stock without incurring any large income tax liability. Gill did transfer to American Insurers by deed all of his equity in 2,000 acres of land in Mississippi County, Arkansas, 5,500 acres in the State of Mississippi, and certain other assets; for all such transferred and attempted transferred assets Gill received, either outright or in escrow, a total of 1,941,468 shares of no par value stock in American Insurers.

Among other stocks which H. Noble Gill attempted to transfer to American Insurers was his stock in the Cape County Milling Company, but this stock was pledged to the Bank, as previously mentioned, and Gill was unable to obtain the release of the stock from the pledge. When the final date arrived for Gill to transfer his holdings to the American Insurers for the said no par value stock, he informed his fellow incorporators that his stock in the Cape County Milling Company (he owned three-fourths of the total stock) was pledged to the First National Bank in Blytheville and he would have to transfer the stock subject to the claim of the Bank. There was insistence that the insurance organization be immediately completed and the charter issued that day, so E. J. Butler, as the organizing attorney of American Insurers, prepared this instrument, which H. Noble Gill executed:

"TRANSFER OF STOCK

"THIS WRITING WITNESSETH: That I, H. Noble Gill, of Blytheville, Arkansas, have on this twenty-eighth day of February, 1958, and by this instrument do on this date, bargain, sell, transfer, assign and set over unto the American Insurers' Life Insurance Company, Little Rock, Arkansas, 4,023 shares of the capital stock of the Cape County Milling Company, Jackson, Missouri, said shares being represented by Cape County Milling

Company Stock Certificate[6] Numbers 61, 62, 63, and 66 and in consideration therefor, I have received from American Insurers' Life Insurance Company of Little Rock, Arkansas, 450,023 shares of the no par capital stock of said Insurance Company.

"I hereby warrant to American Insurers' Life Insurance Company, Little Rock, Arkansas, that the value of the Cape County Milling Company stock is $450,028.84 based on appraised values of The Lloyd Thomas Company, Chicago, Illinois, and I at this time leave up with American Insurers' Life Insurance Company 438,608 shares of its stock in escrow to guarantee the value of the Cape County Milling Company stock, which is hereby transferred to said Insurance Company, and I do hereby irrevocably approve, constitute and appoint Tull Johnson my attorney to transfer the said Cape County Milling Company stock on the books of the said corporation with full power of substitution in the premises.

"WITNESS my hand on the date and year hereinbefore first written.

"/s/ H. Noble Gill

"Witnessed by /s/ E. J. Butler."

We have held in Topics I and II, *supra,* that the Bank, as the holder of the stock certificates, had a superior claim for itself and for Lester Gill; and we now hold that the instrument entitled "Transfer of Stock" was effectual and valid as between H. Noble Gill and American Insurers to transfer his remaining interest in the pledged stock to American Insurers. Section 64-310 Ark. Stats. is Section 10 of the Uniform Stock Transfer Act, and reads:

"An attempted transfer of title to a certificate or to shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall

[6] The fact that the numbers on the stock certificates differ is immaterial.

be determined by the law governing the formation and performance of contracts."[7]

When H. Noble Gill signed the instrument entitled "Transfer of Stock" and delivered the real estate deeds to American Insurers, he received a total of 1,941,468 shares of no par value stock in American Insurers. The fact that he left 750,000 shares in escrow does not alter the fact that he received consideration for the transfer. On the strength of the signed instrument, $74,000.00 was paid by American Insurers to the Bank, as heretofore detailed. If H. Noble Gill were living today, he could not avoid his obligations and liabilities under the Transfer of Stock instrument. It is true that the executrix of an estate occupies the double role of being not only the person representing the decedent, but also the representative of creditors, legatees, etc. (*Hobbs* v. *Cobb,* 232 Ark. 594, 339 S. W. 2d 318); but Mrs. Gill, as executrix of the estate, stands in this case in the same position as H. Noble Gill would stand if he were alive and before the Court on the contract here involved. In 21 Am. Jur. 583, "Executors and Administrators" § 337, in discussing the contracts of the decedent, the holdings of the various jurisdictions are summarized in this language: "Generally, all contractual obligations which survive the death of the obligor are binding on his executors and administrators in their representative capacity and may be enforced against his estate to the extent of the assets thereof, subject, of course, to all proper grounds of defense."

The executrix claims that American Insurers has really disaffirmed the entire transfer of assets by Gill to American Insurers because it filed an instrument declaring the values as represented by Gill to be excessive. But that instrument did not amount to a disaffirmance

[7] For some cases from other jurisdictions involving this section, see *Parsons* v. *Lipe,* 286 N. Y. Supp. 60, 200 N. E. 31; *Whitney* v. *Nolan* (Mass.), 6 N. E. 2d 386; *Johnson* v. *Johnson* (Mass.), 13 N. E. 2d 788; *Lockhart* v. *Dickey* (La.), 108 So. 483; *Estate of Ezra Connell* (Pa.), 128 A. 503, 38 A. L. R. 1362; *Salmon* v. *Moore* (Miss.), 118 So. 2d 867. While not directly in point, we call attention to the following as persuasive: *Aycock* v. *Bottoms,* 201 Ark. 104, 144 S. W. 2d 43; and *Leonard* v. *Taylor,* 183 Ark. 933. 39 S. W. 2d 704.

of the conveyance: rather, it was an affirmance of the contract and a claim of breach of warranty.

The executrix, by cross-complaint against American Insurers, sought to recover the equity of H. Noble Gill in the stock certificates here involved. On such cross-complaint the executrix had a burden of proof which was not discharged. So we reverse all that part of the Chancery decree in favor of the executrix and against American Insurers.

V. *The Issues Between The Intervenors And American Insurers.* The intervenors were creditors of H. Noble Gill, with claims filed and allowed against his estate, and some, if not all, of these intervenors were creditors of Gill before he made the transfer of his assets to American Insurers. The germane allegations of the interventions were: (a) that the Cape County Milling Company stock pledged to the Bank was worth in excess of $200,000.00; (b) that the instrument entitled "Transfer of Stock" was of no effect; (c) that stock was not issued and delivered to Gill by American Insurers for the Cape County Milling Company stock; and (d) that the purported transfer of the Cape County Milling Company stock by Gill to American Insurers was a fraudulent conveyance. The Chancery decree awarded relief to Mrs. Gill as executrix and thereby afforded relief to the intervenors.[8] Since we have reversed the decree awarding relief to Mrs. Gill as executrix, it becomes necessary to consider whether the intervenors have established any right to relief as against American Insurers, the transferee from Gill, even assuming each of the intervenors

[8] The Chancery decree contains this language: "e. If the 'Transfer of Stock' instrument were definite and certain in its terms and if the estate of H. Noble Gill were barred by estoppel from claiming title and ownership in said stock, such transfer would be void even as against the estate inasmuch as possession of the Cape County Milling Company stock did not accompany such instrument; no good consideration was received by Gill, and the transfer would have, in fact, delayed and hindered the collection of debts by creditors of Gill, from which the Court must presume the intent to hinder and delay creditors. Ark. Stats. Sec. 68-1302, Sec. 68-1304. . . . "(7) The Court concludes that the creditors intervening have sought the basic relief that the stock above described be declared the property of the estate of H. Noble Gill, deceased, which the Court has done, and no further relief or conclusions need be made relative thereto."

to have been a creditor of H. Noble Gill prior to the transfer to American Insurers on February 28, 1958.

When we sustained the "Transfer of Stock" instrument against Mrs. Gill, executrix (as we did in Topic IV, *supra*), we disposed of the claims of the intervenors as to the effectiveness of such instrument; so we pass to the other claims, as heretofore listed. The actual value on February 28, 1958 of the Cape County Milling Company stock pledged to the Bank is a matter of uncertainty. The value was materially increased by the death of H. Noble Gill, because the Cape County Milling Company collected approximately $100,000.00 on a life insurance policy it carried on his life. But for the purposes of this decision, we may assume the total value of the pledged stock to have been $200,000.00 on February 28, 1958. American Insurers issued to H. Noble Gill a total of 450,028 shares of its no par value stock for *all* of the shares of preferred and common stock in Cape County Milling Company. One fourth of the total shares of said preferred and common stock were owned by Tull Johnson unpledged, and he endorsed and delivered his certificates to American Insurers and in return therefore H. Noble Gill delivered to Tull Johnson 30,000 shares of Gill's stock in American Insurers. Some of these shares delivered to Johnson came from unpledged shares of H. Noble Gill because he left 438,608 shares in escrow with American Insurers to guarantee the warranty of clear title of the shares pledged to the Bank. The fact that Gill left part of the shares in escrow to guarantee the warranty did not alter the fact that American Insurers had issued the shares to Gill.

The fact that stock issued by American Insurers to Gill had some value at the time of issuance is amply attested by the record: E. J. Butler paid Gill $25,000.00 in cash for 25,000 shares; and W. H. Patton paid Gill $40,000.00 for 40,000 shares. Gill sold stock to a number of people for $1.00 per share; Gill was able to borrow $93,000.00 from a large bank here in Arkansas on the pledge of some of his shares of stock in American Insurers; and shortly before his death Gill was in the process of organizing a sales campaign, to sell some of

his shares in American Insurers at $3.00 per share. If the stock Gill received from American Insurers was not worth $1.00 per share, it was because Gill had overvalued his own assets; and if that be true, his creditors were in no worse position after the stock deal than they were before the stock deal. The value of Gill's estate in 1960 is not the test of the value of the stock he received in 1958. The evidence is entirely insufficient to afford the intervenors any relief on the theory of a fraudulent conveyance under § 68-1302 *et seq.* Ark. Stats.

After exploring the entire record we reach the conclusion that the intervenors, as creditors of H. Noble Gill, have established no rights in excess of the rights asserted by Mrs. Gill as executrix, and the interventions should have been dismissed for want of equity.

VI. *Rulings As To Evidence.* In various instances some of the parties to this appeal have complained of the rulings of the Chancery Court, either for admitting, or refusing to admit, tendered evidence. We have not ignored these contentions: rather, we have considered proffered evidence which we found should have been admitted and have disregarded improper evidence against which proper and timely objections were made. It would unduly prolong this opinion and serve no useful purpose to discuss all of these instances. We merely mention them so that no one will think the contentions have been overlooked.

CONCLUSION

The Chancery decree is affirmed in part and reversed in part, all as herein stated; and the cause is remanded to the Chancery Court for further proceedings not inconsistent with this opinion; the costs of this appeal are to be borne equally by American Insurers and the executrix of the estate of H. Noble Gill.

HARRIS, C. J. and JOHNSON, J., dissent in part.

CARLETON HARRIS, Chief Justice (dissenting in part). I disagree with those portions of the opinion which hold:

(1) that the bank holds a first lien on the Cape County Milling Company stock;

(2) that Lester Gill has a lien on the Cape County stock.

Testimony on the part of appellant reflects that E. J. Butler, Secretary of the insurance company, contacted A. B. Reese, a vice-president of the First National Bank in Blytheville, for the purpose of determining the amount of payment that would be required by the bank before the latter released Noble Gill's Cape County Milling Company stock. Butler stated that Reese advised that a payment of $74,000 would release the stock, together with a lien on certain real estate in Mississippi County. Since about $80,000 had been raised through the sale of Noble Gill's insurance shares, Butler, around the middle of March, and in reliance upon Reese's statement, sent $74,000 to the bank. This remittance was represented by a $67,000 cashier's check and Butler's personal check on his special account for $7,000. While the method of payment[1] is not established, it is undisputed that the $67,000 cashier's check was payable to Butler, *as Trustee,* and endorsed by him in that capacity. The $7,000 check was signed by Butler and drawn on "E. J. Butler Special Account." After cashing these remittances, Reese sent Butler two promissory notes and a junior mortgage (which were of no value to the company as far as I can see), each instrument being assigned by the bank, to E. J. Butler. This would certainly indicate that Reese knew that someone other than Noble Gill had a beneficial interest in these funds.

The related facts are not commented upon by the majority, so I take it that there is no finding that Butler

[1] It was never established whether Butler sent these checks through the mail with a letter of transmittal, or whether the checks were taken and delivered to Reese, personally, by Noble Gill. Butler's office had been destroyed by fire, and many records were burned.

did not communicate with Reese and obtain the assurances that he testified to. The majority opinion on this point is predicated on the delay and laches of American Insurers, *i.e.*, the return of the $74,000 was not demanded, and for two and one-half years, the insurance company took no action to enforce its claim to the stock.

Let it be borne in mind that Noble Gill, as the founder and president of the company, actually had charge of the operations and the failure of the company to make demand was apparently because of the fact that Gill did not desire to do so. It would appear that Gill continued to receive personal advancements from the bank on the basis of the fact that the latter was holding the stock, but Gill, having assigned this stock to the insurance company, was in no position to use it for personal purposes.

It is difficult for me to understand why Reese, or other bank officials, would not have known that the stock had been assigned by Noble Gill to the insurance company, inasmuch as brochures announcing this fact had been circulated widely in Eastern Arkansas.[2] This testimony incidentally, was not admitted, not considered by the trial court, (nor mentioned by this court) and I consider it competent and relevant evidence, and quite pertinent to the issue of whether the bank knew that someone else was making a claim to the stock.

It appears to me that the bank applied Butler's remittance, either according to its own wishes, or according to the wishes of Gill, whereas, according to the testimony of Butler, the bank, through its vice-president, had knowledge that the money was sent for the purpose of acquiring the milling stock.

In fact, it can hardly be disputed that the bank, somewhere along the way, acquired knowledge of the stock transfer since, in filing its suit against the Gill estate to foreclose its alleged lien on the stock, the insur-

[2] Butler testified that he personally gave Reese a copy of the brochure which stated that the Cape County stock had been transferred to American Insurers' Co.—though this was subsequent to the $74,000 transaction.

ance company was made a party defendant under the following allegation:

"The plaintiff has been informed, and therefore alleges, that prior to his death the said H. Noble Gill entered into an agreement by which he transferred all of his rights in the shares of corporate stock that have been mentioned herein, subject to the right of this plaintiff therein, to the defendant, American Insurers' Life Insurance Company."

If it developed that Mr. Reese underestimated the amount necessary to pay the bank's lien on the Cape County stock, it is apparent to me that subsequent payments were more than adequate to cover the indebtedness. On the basis of the testimony of E. M. Regenold, President of the bank, it would appear that on the date the Butler remittance was applied by Reese, the Cape County stock was encumbered to the extent of $98,551.41; therefore, the estimate of Reese would have been short in the amount of $24,551.41. But it is admitted by the bank in its complaint that it had subsequently made collections totaling $29,687.11 on the balance of the indebtedness secured by the stock. It appears to me that the instant suit by the bank was predicated on additional advances made to Gill against the stock *after* the bank became apprised of the insurance company's interest in such stock. A study of the liability ledger sheet shows that as of September 19, 1959, (which was more than a year after Butler protested to Reese that the $74,000 had been misapplied), Noble Gill's debt had gone up to $65,200, including an obligation of $5,200, represented by a demand note which was an entirely new loan. Riley Jones, a vice-president of the bank, testified that in July, 1958, Gill's debt was increased from $30,450 to $60,000.

While, as stated, I disagree with the majority holding as heretofore set out, I do recognize that, because of the failure of the insurance company to take steps to enforce its rights, there is something to be said for the view taken by the court majority. However, I much more strongly disagree with the court's holding that Lester Gill is entitled to a lien on the Cape County stock.

Aside from the fact that I feel that the bank had notice that Noble Gill had previously assigned the stock to the insurance company, I cannot see how Lester Gill, under the facts and circumstances herein, is entitled to such a lien. This transaction took place on February 25, 1957. Let it be borne in mind that Noble Gill did not receive one dime by virtue of the note executed from Lester Gill to the bank; he had already obtained his statutory limit from the bank (then $60,000), and the note given by Lester Gill was *entirely for the benefit of the bank.* Here again the transaction was handled for the bank by Mr. Reese, and according to Lester Gill, "Mr. Reese told me the bank was in the process of helping Noble with some refinancing, but that his line of credit had been exceeded; that the bank was expecting examiners and that the matter of Noble's account had to be straightened up before they could further proceed."

I do not understand how the bank could create a lien on Noble Gill's stock for the benefit of Lester; in my view, some overt act on the part of Noble Gill would have been required, and no such overt act appears in the record. Noble Gill gave to Lester his note to cover the $25,000, *but this note was unsecured.* To me, the facts set forth in the preceding paragraph preclude any lien on the stock in favor of Lester Gill; in addition, further actions of the bank indicate that that institution did not consider that Noble Gill's note to Lester was secured by the Cape County stock for,

(1) The bank sued Lester on February 3, 1961, in Circuit Court, asking judgment against Lester, *but asking no lien on* the Cape County stock.

(2) The bank filed the suit here on appeal to foreclose a lien on the Cape County stock, but in this suit it made no claim that it held an additional lien on the stock arising out of the Lester Gill transaction.

(3) The bank's liability ledger sheet, covering Lester's borrowings, does not reveal the alleged lien.

The majority is relying upon the "anaconda"[3] mortgage executed by Noble Gill. I cannot agree that this instrument lends any weight to the contentions made by appellee, Lester Gill. In the first place, the instrument was not signed by Noble Gill; rather, it was signed by O. E. Hunnicutt, acting as attorney-in-fact, and Hunnicutt, in affixing his signature purportedly acts on behalf of the "Gill Gin Company" and "H. Noble Gill," the company and Gill being joint signers. I think, under a proper interpretation, the instrument would apply only to such line of credit as the bank might extend to Gill Gin Company and Noble Gill, *as joint obligors.*

In addition, I feel that the majority has reached a strained construction of this document when they hold that the stock securing Noble Gill's original loan would also secure a subsequent note of Noble Gill's which the payee (Lester Gill) merely hypothecated to the bank.

Lester Gill testified that (at the time of the trial) he had in his possession 10,000 shares (2,000 of which he held as trustee for his two sons) of the insurance company stock, which he had received from Noble Gill. When asked if the 10,000 shares were given to him in payment of the obligation that was due him from his brother, he replied, "It was not mentioned to me by him." He then stated he had helped Noble financially at prior times, and that on a previous occasion he had loaned $25,000, and had been given 2,000 shares of American Insurers' stock by Noble, who said, "Here is what you bought." He testified that the insurance company stock was not issued to him in connection with this particular loan, but he stated that he did not know why the note given to him by Noble did not provide that it was secured by the Cape County stock. Finally, the transcript reveals that the cross-examination of Lester Gill concluded as follows:

"Q. Do you have any record of these loans that you stated a while ago you previously made to Noble for which the American Insurers' stock was issued to you?

[3] So characterized by this court in *Fuller* v. *Berger*, 180 Ark. 372, 21 S. W. 24 419.

A. American Insurers' Insurance Company stock was not issued to me in connection with this loan.

Q. I say, do you have any record of the other loans you made to him for which you say this stock was issued?"

A. I didn't say the stock was issued in connection with any loan.

Q. Do you say he gave it to you?

A. He handed it to me and said, 'This is what you bought.' I did not know I was going to receive it and didn't want it.

Q. Was it for the $25,000.00 note?

A. There was not anything mentioned."

Irrespective of the significance of this testimony, I feel, for the reasons set forth in the preceding paragraphs, that Lester Gill is not entitled to a lien on the Cape County stock.

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

KOONCE *v.* OWENS.

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Opinion delivered April 1, 1963.

Burl C. Rotenberry, Cockrill, Laser, McGehee & Sharp, for appellant.

Marvin Holman, Mark E. Woolsey, for appellee.

GEORGE ROSE SMITH, J. The appellee sued for personal injuries sustained by her in a traffic accident that occurred in Pine Bluff. The jury's verdict was for the defendant, but the trial court granted a new trial, finding the verdict to be against the weight of the evidence. *Bockman* v. *World Ins. Co.*, 222 Ark. 877, 263 S. W. 2d 486. In appealing from this order the defendant has filed the required stipulation for judgment absolute if the order be affirmed. Ark. Stats. 1947, § 27-2101.

In a case of this kind the question is whether the trial court abused its discretion in ordering a new trial. As we said in *Blackwood* v. *Eads*, 98 Ark. 304, 135 S. W. 922: "The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused."

Here we think the trial judge's action to have been clearly correct. There was hardly any question about the defendant's negligence. Just before the accident three cars were standing in line in the street, waiting for the forward car to make a left turn at an intersection. The defendant, without any apparent excuse, drove his car into the rear end of the third vehicle and propelled it with great force against the middle car, in which the plaintiff was riding as a passenger.

The plaintiff alleged that the impact caused a whiplash injury to her neck and back and also caused her to develop a severe case of diabetes. Whether the trauma could have caused diabetes was a sharply disputed question of fact, but the allegation of a whiplash injury was supported by the decided weight of the proof. Hence the trial judge did not abuse his discretion in setting aside the verdict for the defendant.

The judgment is affirmed and the cause remanded for a new trial upon the issue of damages only. Ark. Stats., § 27-2150.

Opinion delivered April 1, 1963.

Rose, Meek, House, Barron, Nash & Williamson, by *J. W. Barron,* for appellant.

Hall, Purcell & Boswell, for appellee.

PAUL WARD, Associate Justice. Appellee, Dalton O. Northern, operated a filling station at Benton for many years. In 1952 he entered into a written agreement with appellant, United States Rubber Company, to handle its automobile tires. Appellant guaranteed its tires against defective materials and workmanship. Under the agreement appellee was to make adjustments on tires when purchasers complained of defects. The way in which these adjustments were to be made is the real issue in this litigation.

How this litigation arose. The written agreement under which the parties operated was renewed (by a new instrument) nearly every year from 1952 to 1958 but the agreement relative to adjustments is, in substance, the same in all the written agreements. During these years appellee purchased tires from appellant, resold them to his customers, and made a large number of adjustments.

When the parties dissolved their business relations in 1959, it was found that appellee owed appellant about $2,300 for merchandise purchased. Accordingly, appellee

executed three notes—all payable in 1959. When appellee failed to make payment appellant filed suit on July 29, 1960. Since appellee, in effect, confessed judgment, that item is no longer an issue.

On October 28, 1960 appellee filed a counterclaim (to the above mentioned complaint) which, in effect, stated: (a) the written contract is admitted; (b) according to the written agreement the company "guaranteed unconditionally its tires and tubes against defective workmanship and material without limit as to time or mileage"; (c) according to agreement appellee was to adjust with his customers tires which were found to be defective; (d) after such adjustments the company was to reimburse appellee for all his costs and expenses in making the adjustments; (e) tires delivered to him by the company during 1955, 1956, 1957, 1958, and the first part of 1959 were for the most part defective in both workmanship and marterials and were of an inferior nature which resulted in appellee having to make numerous adjustments; (f) the cost to appellee in making these adjustments during said years was $27,533.95; and, demand for said amount had been made on and refused by the company. In reply, appellant denied every material allegation in the counterclaim.

A trial resulted in a jury verdict in favor of appellee (on his counterclaim) and against appellant for the sum of $12,600 (later, apparently, adjusted to $9,854.01).

At the close of all the testimony appellant moved for a directed verdict in its favor. The trial court denied the motion, which action, in our opinion, constituted reversible error.

The Issue. We set out below certain portions of the written agreements which are pertinent to the main issue in this case.

(a) The company's guarantee reads:

"Every tire or tube of our manufacture, bearing our name and serial number is guaranteed to be free from defects in workmanship and material without limit as to time or mileage. *If our examination* shows such tire

or tube has failed under the terms of this guaranty, we will either repair it or make a reasonable allowance on the purchase of a new tire or tube." (Emphasis supplied.)

(b) Regarding adjustments the agreements provide that appellee:

"Would handle adjustments of the Company's merchandise in accordance with the terms of its policy for adjustment in effect from time to time.

* * *

". . . *shall refer,* in accordance with the Company's established procedure, *all claims* for adjustments or replacements of tires *to the Company and shall await the Company's approval and instructions before making any adjustment or replacement on behalf of the Company.*" (Emphasis supplied.)

The agreements further provide:

"This contract constitutes the entire agreement between the parties and supercedes all prior or contemporaneous agreements, written or oral, of every sort.

"This agreement is not subject to change or modification by any verbal statements or agreements, or by trade customs of any kind, or by written communication of any kind except when signed by Sales Manager of the Company or other properly authorized person on his behalf."

From the above it seems apparent that the written agreement invested appellant with the right to say when adjustments could or could not be made. In spite of this, however, appellee seeks now to recover from appellant for adjustments which appellant had admittedly rejected. As we understand appellee's position he admits he cannot recover under the terms of the written agreement. We take this to be true because, at the close of his testimony, he asked the court for permission to proceed on the theory that the written agreement was changed by an oral agreement, and that such oral agreement gave

him the exclusive right to make adjustments regardless of whether appellant approved or disapproved the same. There are two reasons why we cannot accept appellee's contention.

One. Appellee bases his claim on adjustments made as early as December 14, 1955 and as recent as September 2, 1958, but he does not fix the date of the alleged oral agreement. It is apparent however that, in order to substantiate his earliest claim, the oral agreement must have been in existence prior to December 14, 1955. We find however that appellee signed a written agreement on November 25, 1957 which contains the following language:

"This contract constitutes the entire agreement between the parties and supersedes all prior or contemporaneous agreements, written or oral, of every sort."

The same language also appears in the written contract signed by the parties on January 20, 1958. The case of *Dunlop Tire & Rubber Corporation* v. *Fred E. Thompson, et al.,* (Ark. 1959) 273 F. 2d 396, is very similar both as to facts and issues to the case here under consideration, and is decisive against appellee's contention here. Pertinent here is the following paragraph found in that opinion:

" 'When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.' "

Two. Aside from what we have said above, we find no substantial evidence in the record to support a finding that appellant orally agreed to waive its right to reject adjustments made by appellee. There is evidence that appellee did make adjustments without first submitting the tires to appellant for its approval or disapproval, but this in no way tends to prove appellant waived its right to reject adjustments already made by appel-

lee. The record is replete with evidence that appellant did, through the years 1955 to 1959, exercise its right to reject or disapprove adjustments previously made by appellee. Appellee could not deny but readily admitted that he knew appellant never ceased to exercise its right to reject. This was made clear by appellee's own testimony as to how the claims for adjustments were made:

"Q. And in numerous instances the company would pay the claim and in numerous instances they would refuse the claim, is that correct?

"A. Right.

"Q. And the controversy that we are squabbling about today is the claims they did not pay, the claims the company refused, is that correct?

"A. Yes.

"Q. And that went on during the years '57, '56, and '55, is that correct?

"A. Right."

At another time appellee testified that each time he sent in an adjustment he had made and appellant declined to allow it, appellant ". . . would send me back a letter on each tire that was turned down". In view of the above state of the record we are driven to the conclusion that the trial court should have directed a verdict in favor of appellant. The judgment of the trial court is reversed as to appellee's counterclaim and said cause of action is dismissed.

Reversed and dismissed.

ARK. STATE HIGHWAY COMM. *v.* MARLAR.

5-2927 366 S. W. 2d 191

Opinion delivered April 1, 1963.

[Rehearing denied May 6, 1963.]

Dowell Anders, Thomas B. Keys, for appellant.

Graves & Graves, for appellee.

SAM ROBINSON, Associate Justice. The Arkansas State Highway Commission filed this suit to enjoin appellee, Steve Marlar, from interfering with the Commission in removing shade trees and building a road on property in which Marlar owns the fee. The Chancery Court issued the injunction, but as a condition required the Commission to make a bond in the sum of $10,000.00.

On appeal the Commission contends that the Chancellor erred in requiring the bond. The Complaint herein was filed on June 12, 1962; the matter was set for hearing and heard on June 22, 1962. The appellee had filed no pleading at the time of the hearing. The statutory time in which a pleading could be filed had not expired.

It developed at the hearing that a county court order had been entered in 1958 condemning for highway purposes the property involved in this proceeding; and that another court order was entered in January, 1962 condemning the same property. The Chancellor did not reach the merits of the case, but simply required the Highway Commission to make a bond to protect the property owner in the event it should develop at a hearing on the merits that he was entitled to recover damages. It may develop that Marlar is bound by the 1958 order; that he filed no claim within a year and is not entitled to recover damages. On the other hand, it may be that Nevada County or the Highway Commission will have to reimburse him for damages sustained by the taking under the 1962 order.

Appellant made the required bond, thereby putting the restraining order into effect and has, therefore, accepted the benefits of the decree. Presumably, the shade trees have been removed, the road has been widened, and Marlar has suffered all the damages he will ever suffer by reason of the restraining order having been issued. In these circumstances, by making the bond the appellant is estopped to say that the Court erred in requiring the bond.

The general rule is that one cannot accept the benefits of a decree and question its validity. *Baker* v. *Adams,* 198 Ark. 482, 129 S. W. 2d 597; *Mathis* v. *Litteral,* 117 Ark. 481, 175 S. W. 398; *Bolen* v. *Cumby,* 53 Ark. 514, 14 S. W. 926. In 2 Am. Jur. 974 it is said: "The general rule . . . is that a litigant who has, voluntarily and with knowledge of all the material facts, accepted the benefits of an order, decree, or judgment of a court, cannot afterwards take or prosecute an appeal or error proceeding to reverse it."

In the case at bar, appellant could not have gone on the property and destroyed the shade trees and widened the road, pending appeal, without making the bond as provided in the court order, which the appellant chose to do. In these circumstances, appellant is now estopped to say that the Court erred in requiring the bond.

The appeal is dismissed.

McFaddin, J., not participating.

Allen *v.* Overturf.

5-2944 366 S. W. 2d 189

Opinion delivered April 1, 1963.

M. D. Anglin, for appellant.

J. E. Simpson, for appellee.

JIM JOHNSON, Associate Justice. This is a suit for damages allegedly sustained by appellants, Frank C. Allen and Laura E. Allen, as a result of alleged false representations of appellee, Elmer Overturf, a real estate broker. In 1958 appellee showed appellants some farm property near Green Forest which appellants contracted to purchase the same day, and thereafter took possession. In 1960 appellants filed this suit against appellee, alleging that appellee had knowingly falsely represented to appellants that there was plenty of water on the farm, that as a result of relying on these representations and buying the farm, appellants had to have a well drilled, stock pond built, and otherwise suffered damage to the total extent of $6,687.50. Appellee answered, denying the allegations and pleaded affirmatively that appellee had been relieved of any responsibility by the following provision in the escrow (purchase) agreement:

"Purchasers herein agree and state that they have personally viewed and inspected the above described property and hereby release and relieve Elmer and Fay Overturf of and from any responsibility regarding said sale and property, except as herein stated."

and cross-complained for $5,000.00 damages for slander in filing the action.

On July 20, 1961, after submission of appellants' evidence to the court and jury, the trial court directed a verdict for appellee on the ground that appellants had relieved appellee of any liability in the escrow agreement. Appellants appealed, and this court reversed the trial court, stating in its mandate that "The court erred in

directing a verdict as testimony introduced was sufficient to raise a jury question as to whether there was fraud on the part of the appellee." See *Allen* v. *Overturf*, 234 Ark. 612, 353 S. W. 2d 343.

On retrial, the jury found for appellee on the complaint and appellants on the cross-complaint, and judgment was entered accordingly, from which this appeal was taken. For reversal, appellants rely on six points, none of which are discussed, for the reason hereinafter stated.

The procedural rules of the Supreme Court are designed to foster efficient and intelligent review of the cases presented on appeal. For the expedition desired by all litigants and attorneys, this court has provided that appellant should abridge the pleadings, proceedings, facts, documents, and other matters contained in the record and necessary to an understanding of the questions presented to this court. This abstract we deem far more desirable from the standpoint of the court's time as well as appellant's purse, than requiring multiple copies of the record. Obviously it is impractical and inefficient to expect each of the seven justices to have to minutely examine the usually-voluminous record in each of the seven or more cases assigned each week. Hence the provision in Rule 9 that:

"The appellant's abstract or abridgment of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record *as are necessary to an understanding of all questions presented to this court for decision.*" [Emphasis ours]

Appellants have attempted to abstract a 129-page record into five pages of their brief. While we can visualize instances where such succinctness would be an adequate or ample abstract of the pertinent record, in the case at bar the condensation of the record contained in the abstract and brief is insufficient for the members of this court to reach that understanding of the questions presented necessary for a decision.

We remind the Bar:

"We are not required to explore the one record (transcript) that is presented to us, this duty rests on appellant, and it is further his duty, as indicated, to furnish this court such an abridgement of the record that will enable us to understand the matters presented. This he has not done.' *Ellington* v. *Remmel,* 226 Ark. 569, 293 S. W. 2d 452; *Porter* v. *Times Stores, Inc.,* 227 Ark. 286, 298 S. W. 2d 51.

For such failure, we have no choice but to affirm the judgment of the trial court. *Commissioner of Labor* v. *Danco Construction Co.,* 226 Ark. 797, 294 S. W. 2d 336; *Griffin* v. *Mo. Pac. Rd. Co.,* 227 Ark. 312, 298 S. W. 2d 55; *Farmers Union Mut. Ins. Co.* v. *Watt,* 229 Ark. 622, 317 S. W. 2d 285; *Royster* v. *Royster,* 233 Ark. 20, 342 S. W. 2d 302, *Anderson* v. *Stallings,* 234 Ark. 680, 354 S. W. 2d 21.

Affirmed.

CITY OF PIGGOTT *v.* EBLEN.

5-2951 366 S. W. 2d 192

Opinion delivered April 1, 1963.

Trantham & Knauts, by *Hugh W. Trantham,* for appellant.

Kirsch, Cathey & Brown, for appellee.

FRANK HOLT, Associate Justice. The appellant, the City of Piggott, Arkansas, enacted Ordinance 209 declaring that: " * * * Pinball machines or other gaming devices are a public nuisance * * * ". The ordinance further provides that it is unlawful for any business establishment or individual to possess pinball machines in any manner within the city. A violation of this ordinance is punishable by a fine of not less than $5.00 nor more than $25.00 per day.

The appellee, Mrs. Dena Eblen, doing business as Paragould Music Company, is the owner of coin operated pinball machines which she had placed on the business premises of the other appellees, Henry C. Martin, doing business as A & W Root Beer Stand; Raymond Arehart, doing business as Ray's Drive-In; and Amos Latta, doing business as Mohawk Cafe and Latta's Service Station. These appellees, the machine owner and location owners, brought suit in chancery court seeking injunctive relief and a declaratory judgment invalidating the ordinance.

Appellant, a City of the Second Class, in its response denied that pinball machines are classified in the ordinance as gaming devices and alleged that minors [school children] were permitted to use them and play them in such a manner as to constitute a public nuisance. Appellant contended that it had the power and authority to enact and enforce the questioned ordinance.

The chancery court held the ordinance unconstitutional as being contrary to the Constitution and Statutes of Arkansas by classifying pinball machines as gaming devices and prohibiting them within the limits of the city. The court permanently enjoined the appellant from enforcing the ordinance as to pinball machines and amusement games as defined by Ark. Stat. § 84-2611. From this decree appellant brings this appeal.

On appeal it is the conteniton of appellant that the ordinance, declaring the possession and operation of pinball machines to be a public nuisance, is not contrary to the Constitution and the Statutes of Arkansas and, further, that a nuisance *per se* did in fact exist by reason of the operation of pinball machines within the limits of the city.

Appellees and appellant agree by their pleadings that the gross receipts from the pinball machines are distributed equally between the machine owner and the location owner; that the machines are coin operated and permit the person operating the machine, upon deposit of a coin therein, to play a game by the shooting of marbles or round objects which, depending upon the skill of the operator, will register various scores and record them upon the machine; that neither the machine owner nor the location owner pay any rewards for the scores except that free games are given upon certain specified scores being registered; and that the appellees have paid all city and state license fees imposed by both the city and state.

The question presented is whether the appellant has the authority to enact and enforce this ordinance. We have had occasion in many cases to define the extent of the powers of municipalities in our state. We have consistently followed the definition which was reiterated in *Yancey* v. *City of Searcy,* 213 Ark. 673, 212 S. W. 2d 546, in the following language:

"It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted

in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." [Emphasis ours]

Also see *Arkansas Utilities Co.* v. *City of Paragould,* 200 Ark. 1051, 143 S. W. 2d 11; 37 Am. Jur., 722.

The function and purpose of a municipal government was succinctly expressed in *Cumnock* v. *City of Little Rock,* 154 Ark. 471, 243 S. W. 57, where we find this principle of law quoted by this court with approval:

"* * * Municipal corporations are created to aid the State Government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted."

With this well established principle of law before us we now proceed to review legislation in our state on the subject of coin operated amusement devices. Act 167 of 1931 [Ark. Stat. 84-2601] provides that the business of owning, operating, or leasing such machines is a privilege for which licenses can be required and taxes imposed. Its validity was approved in *Thompson* v. *Wiseman,* 189 Ark. 852, 75 S. W. 2d 393. Act 137 of 1933 [Ark. Stats. 84-2602] defines such machines as: " * * * any machine, * * * which is operated by placing in same through a slot, or any kind of opening or container, any coin, * * * before such machine operates or functions."

Act 201 of 1939, as amended, [Ark. Stat. 84-2611] specifically provides that amusement games played on pinball machines are lawful even though free games be given upon certain scores being made. This Act provides in pertinent part:

"Amusement games shall include such games as Radio Raffles [Rifles], Miniature Football, Golf, Baseball, Hockey, Bumper, Tennis, Shooting Galleries, Pool Tables, Bowling, Shuffleboard, *Pinball Tables,* Marble Tables, and other Miniature games whether or not it shows a score and not hereinafter excluded in Section 3 [§ 84-2612][1] hereof, and where the charge for playing is collected by a mechanical device. The terms 'any money or property,' or 'other articles,' or 'other valuable thing,' or 'any representative of anything that is esteemed of value,' as used in the anti-gambling statutes * * * shall not be expanded to include a free amusement feature such as the privilege of playing additional free games if a certain score is made on a *pinball table* and on any other amusement games described in this section.' [Emphasis added]

This same Act [Ark. Stats. 84-2613—2617] provides for the imposition of a privilege tax by the state at $5.00 per machine annually and, also, permits municipalities to tax the pinball machines provided the municipal tax does not exceed that imposed by the state. This Act [Ark. Stat. 84-2614] further provides that where the state tax has not been paid the machine is declared to be a public nuisance subject to seizure and sale by the state upon an order by the Pulaski Chancery Court if the owner does not redeem the machine within ten (10) days by paying the tax due and the costs. No such power is granted to municipalities if a municipal tax is not paid. Act 60 of 1949 [Ark. Stats. 41-1122—1123] makes it unlawful to permit any person under eighteen (18) years of age to play or operate a pinball machine and provides for a fine of not less than $25.00 and not more than $500.00 for violation thereof. Act 120 of 1959 [Ark. Stat. 84-2622] provides that the business of owning, operating, or leasing coin operated devices is a privilege subject to a state tax, and Ark. Stat. 84-2625 imposes an annual license fee of $250.00 and expressly prohibits any munici-

[1] "Nothing herein contained shall be deemed to legalize, authorize, license or permit any machine commonly known as slot machines, Roscoes, Jackpots or any machine equipped with any automatic money payoff mechanism."

pality from levying such a privilege tax on the basis of this Act.

Thus, it is readily apparent that a conflict exists between the questioned ordinance and the statutes. In *Shipley Baking Co.* v. *City of Hartford,* 182 Ark. 503, 31 S. W. 2d 944, the municipality adopted an ordinance requiring payment of a fee for inspecting food sold in the city. The Legislature had conferred upon the State Board of Health the power to inspect bakeries and regulate the sale of their products. There our court said:

"* * * the *statute* giving the power of regulation in the sale of foods and drinks was *paramount,* and that it is elementary law that a municipal ordinance, in so far as it conflicts with the statute, is invalid. *The reason is that the statute of the State operates within the limits of the municipal corporation the same as it does elsewhere, and that local laws and regulations are at all times subject to the paramount authority of the Legislature.* Hence, ordinances of cities and towns inconsistent with statutes on the same subject must be held of no effect unless they are authorized by an express legislative grant." [Emphasis added]

When we apply, in the case at bar, the long recognized rule governing municipal powers, as announced in the cited cases, we must agree with the trial court that the ordinance in question is in conflict with our state statutes on this same subject. The statutes of our state, being paramount and supreme, have pre-empted the appellant in this field of legislation and, therefore, render the ordinance a nullity.

The appellant contends that the use of the pinball machines by minors [school children under eighteen (18)] constitutes a public nuisance and, therefore, pursuant to Act 24 of 1897 [Ark. Stat. 19-2305] empowering municipal corporations to prevent and abate nuisances the city can validly abate the alleged nuisance by this ordinance. In this case three adult witnesses testified that they had observed children under the age of eighteen (18) playing these machines between school hours. Two

of these minors testified that they had played the machines on many occasions. There is no evidence of gambling on these machines. Appellant is not empowered, of course, to declare something to be a public nuisance which the state has clothed with legality because the state law is paramount and supreme. Therefore, this contention is not valid.

Further, we have held in many cases that the mere declaration in a city ordinance that a certain act constitutes a nuisance does not make it such in fact. *Ward* v. *City of Little Rock,* 41 Ark. 526; *Town of Arkadelphia* v. *Clark,* 52 Ark. 23, 11 S. W. 957; *Merrill* v. *City of Van Buren,* 125 Ark. 248, 188 S. W. 537; *Wilkins* v. *City of Harirson,* 218 Ark. 316, 236 S. W. 2d 82; *Arkansas State Board of Architects* v. *Clark,* 226 Ark. 548, 291 S. W. 2d 262. In *Town of Dardanelle* v. *Gillespie,* 116 Ark. 390, 172 S. W. 1036, the city adopted an ordinance declaring the keeping of a pool hall in the city limits to be a nuisance and prohibited the keeping or operation of such. In declaring this ordinance invalid the court said:

"* * * not being nuisances *per se,* town councils would have no authority to prohibit their maintenance, unless that authority was conferred by express legislative enactment, or unless their maintenance was made unlawful by the laws of the State."

We have held that although pool halls might be regulated by a city council to prevent them from becoming public nuisances, such authority would not permit a city to suppress completely the existence of a lawful business by imposing an annual fee of $600.00 and requiring a bond of $1,000.00 conditioned upon the observance of certain regulations. *Bryan* v. *City of Malvern,* 122 Ark. 379, 183 S. W. 957.

Declaring pinball machines to be illegal is a subject which addresses itself to the wisdom of the legislature. It is not the function or within the power of this court to invade the constitutional authority of the legislature, a coordinate branch of our government. The fact that this ordinance cannot stand does not leave appellant help-

less and disarmed in suppressing the alleged illegal acts. It is not denied in this case that no request or effort was ever made to invoke any of our penal laws that might be applicable to the facts in this case. The statutes which presently legalize the existence of pinball machines also make it a violation of the law to permit any person under eighteen (18) years of age to play them. [Ark. Stats. 41-1122 — 1123, supra] The owners of those establishments which permit children under eighteen (18) years of age to play these machines are subject to these provisions.

The trial court was correct in declaring the questioned ordinance invalid as being contrary to the Constitution and Statutes of this state. The decree is affirmed.

Opinion delivered April 8, 1963.

[redacted]

Shaver & Shaver, for appellant.

Bruce Bennett, Atty. General, by *Richard B. Adkisson,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Sam Henry Clay was charged with the crime of burglary, the information alleging that Clay unlawfully broke and entered a house belonging to the prosecuting witness herein, and located in the city of Wynne, with the intention to commit a felony. After the court appointed counsel to represent appellant, a motion was filed for a Bill of Particulars, and the Prosecuting Attorney provided the information that the felony referred to was the offense of rape and/or sodomy. A plea of not guilty was entered and on trial Clay was found guilty of the offense of burglary, but the jury was unable to agree upon his punishment. Thereafter, the court fixed the punishment, and sentenced Clay to a term of 21 years in the Arkansas State Penitentiary. From the judgment so entered, appellant brings this appeal. For reversal, two points are relied upon, first, that the evidence is insuffi-

cient to show that appellant unlawfully broke into or entered the home of the prosecutrix, and second, the evidence is insufficient to show the criminal intent necessary to convict appellant of burglary. These points will necessarily have to be discussed together as the evidence offered by the state bears upon each separate contention.

The testimony reflects that the prosecuting witness received a telephone call on a Thursday afternoon, the party at the other end of the line inquiring if he could speak to a Miss Gatssinger. Upon being informed that no one lived at the residence by that name, the party said, "No, don't you remember, I talked to you in the saloon yesterday." The prosecutrix then advised the caller that he had the wrong number, and hung up.

The prosecuting witness awakened around 6:10 on the morning of March 4, 1962.[1] She heard someone walk up the steps to the house, which she took to be the paper boy, and, thinking nothing about it, "dozed for about 10 more minutes." She awakened of a sudden and turned on her light. "I do not know why. When I did, I saw this much of somebody. Not their head, but saw their arm, like this, around the bannister of my stairs, the thing that holds up the stair steps." She stated that a glove was on the hand that she saw, and when she yelled, "Who are

[1] The witness originally testified that the date was February 11, and the information charged that the offense was committed on that date. It developed, however, during the trial that she was confused about the date, and the proper date was undoubtedly March 4. The prosecuting witness subsequently testified that she reported the occurrence to the Chief of Police on the same day that it occurred, and if his records reflected March 4, "they would be correct." Out of hearing of the jury, the state moved that the information be amended to conform to the proof, *i.e.*, to change the date accordingly, and counsel for appellant objected.

The court then inquired, in case it permitted the information to be amended, if counsel desired time within which to produce evidence concerning the change in date. This request was not made by appellant, and the court stated: "The court would not permit the information to be amended to reflect a different date if it appeared that such a change would materially and substantially prejudice the defendant's defense in this case. The reason that the court made the previous inquiry was so that it could be informed as to, whether or not, a delay in the immediate proceedings would, in the judgment of counsel for the defendant, enable them to provide evidence which might be productive of some recognizable defense. The question is one rather of fact than of law, and in the absence of a specific request for a continuance to some future time certain, the court will permit the information to be amended as indicated to conform to the proof introduced in the court."

you, and what do you want?", the person fled. She then observed that the front door was ajar, but did not see anyone. Around two hours later, the witness received a telephone call and the person on the telephone apologized for coming to her house, for doing what "he had did," and stated he was sorry and meant no harm, but "had to see" the prosecutrix. He inquired if she would meet him somewhere, and made other remarks, to which she replied, "You get across town with your kind." The witness testified that she recognized the voice of the caller as the same man who had called on Thursday; immediately thereafter, she notified the Chief of Police and gave him the information which has been herein related.

The witness stated that on the same day, she found on the steering wheel of her car a paper (gross receipts tax monthly report form) which contained the following item of printing, "I am playing this while you are sleeping" (referring to radio). She also stated that her car would not start because the battery had "run down." This paper also was turned over to the Police Department.

The evidence reflects that on March 7, the prosecuting witness received a paper back book through the mail, entitled "Another Kind of Love." The inside cover and first page contained filthy and obscene language which had been printed by pencil, and which included the following phrase, "The same thing Laura (one of the characters in the book) want to—do to—this other girl is what I want to do to you ....." (Here appeared the given name of the prosecuting witness.) Enclosed in the book was a printed letter which requested her to meet the writer of the letter at the ice plant. This book was likewise turned over to the authorities. About a month later, appellant was taken into custody. Among his personal effects was a card which had been issued to him by the Cross County Department of Public Welfare entitling appellant to food assistance. On the back of this card appeared a telephone number[2] which Kenneth Shaw, the Chief of Police at Wynne, testified was the telephone number of the prose-

[2] The name and address of another person also appeared on the back of the card, but apparently have no connection with the instant charge.

cuting witness. Other exhibits were offered in evidence which were taken from Clay's personal effects, but a discussion of these exhibits is not necessary in determining whether there was sufficient evidence to sustain the conviction.

Clay made a statement to Shaw in the presence of State Patrolman W. A. Tudor, which was reduced to writing and offered in evidence at the trial. According to these policemen, the statment was voluntarily made; Clay was not threatened, abused or coerced in any manner, and no promises were made to induce the giving of the statement. The officers testified that appellant was advised that he could have an attorney, but Clay declined the offer. In his statement, which was introduced into evidence, Clay related that he went to the home of the prosecuting witness on a Saturday night, sat in her car for a while (which was parked in the driveway), and at that time printed the words on the paper which she subsequently found on the steering wheel. He stated that the next morning (about 8:00 o'clock) he went back to the house and knocked on the front door, and upon doing so, the door "came open because it wasn't shut good." He said that he "stuck" his head in the door, but turned around and left when the prosecutrix came to the head of the stairs. He then stated that he called her on the telephone and told her that he was sorry for coming to the house; that he kept thinking about her and "wanted to be with her," and on the next day, he printed a letter which he sent to her, together with the book heretofore mentioned. Clay admitted printing words to the effect that he desired to commit the act of sodomy upon her, but stated, "I didn't really mean all of this stuff." Subsequently, according to the testimony of the police chief, Clay denied that he had gotten into the car belonging to the prosecutrix or that he had gone to her house. Appellant subsequently told the officers that a white man had told him to write the letter and mail it and had given him $2.00 for doing so. However, Clay later gave a statement to Deputy Sheriff Ivy Ringold and Officer Tudor to the effect that these last statements were not correct. Ringold testified that Clay reiterated

the truth of the original statement, *i.e.,* that he sent the book, printed the words in the book, and had intended to do to the prosecuting witness what he had printed. As the deputy quoted Clay, "That was my intention, but now it is not."

Eddis Heath, a barber of Wynne, testified that appellant was employed by him in February and March of 1962, as a shoe shine boy. Heath stated that he saw the book, "Another Kind of Love," in the possession of appellant, and also saw the hand printing on the inside of the cover and the first page; that Clay put the printing in the book around the last of February. Heath also testified that he saw Clay printing a letter, which was done at the same time the printing was placed in the book. The barber said that he picked up both the book and letter and glanced at them, noticing the printing, but did not read the contents. He testified that the last time he saw appellant with the book, the latter was "wrapping it up" in paper similar to Exhibit 1, placed in evidence by the State.[3]

Four letters were offered in evidence which Clay purportedly had written to the prosecuting witness. These letters bear the signature of "Sam Henry Clay," "Samuel H. Clay," and "Sam H. Clay."

No evidence was offered on behalf of the appellant.

To summarize, we have the testimony of the prosecuting witness that a person did unlawfully enter her home; that she received a call on Thursday, and a call on Sunday (following the entry) from a person seeking a date; that she received the book, "Another Kind of Love," which contained hand printed matter (wherein the person doing the printing expressed the desire to commit the act of sodomy upon her); she found the printed note on the steering wheel, the note indicating that someone was sitting in her car, playing the radio; and the battery of her car was "run down" to the extent that the car would not start. The testimony of Heath corroborates that Clay had the book in his possession at the shop, that he printed words in the book, and wrapped it in the manner in which

[3] This exhibit consisted of the book, and paper in which it was wrapped.

it was received by the prosecuting witness. The testimony of the Chief of Police, Kenneth Shaw, established that the telephone number of the prosecuting witness was found in the possession of appellant, and appellant admitted the acts herein enumerated. We have held that the extrajudicial confession of a defendant, accompanied by proof that the offense charged was actually committed by someone, will warrant a conviction. *Monts* v. *State,* 233 Ark. 816, 349 S. W. 2d 350; *Ezell* v. *State,* 217 Ark. 94, 229 S. W. 2d 32, and cases cited therein. Here, of course, there are several facts that corroborate the admissions of the appellant. We think the testimony is sufficient to establish that Clay unlawfully, and with the intent to commit a felony, entered the home of the prosecuting witness. We have held that the offense of burglary is complete even though the intention to commit a felony is not consummated. *Thomas* v. *State,* 107 Ark. 469, 155 S. W. 1165, and cases cited therein. The prosecutrix[4] testified positively that the intruder was coming up the stairs, that she saw part of his body, and that he fled when she screamed. Clay admitted his presence at the house on this Sunday morning, though he stated that he only "stuck" his head in the door. We think the evidence is sufficient that Clay entered the premises for the purpose of committing a felony, *viz.,* sodomy. As stated in *Duren* v. *State,* 156 Ark. 252, 245 S. W. 823, "It is not essential that the state prove by direct evidence an intention to commit a felony, for this fact may be, and generally is, established by proof of circumstances which indicate the intention of the burglar***". We are of the opinion that the circumstances herein set out constituted evidence of a substantial nature, and justified the jury in reasonably finding that Clay entered the home with the intention to commit a felony.

No contention is made that the confession was unlawfully obtained, and no ruling of the court which would constitute prejudicial error, is asserted. It is simply contended that the evidence is not sufficient to establish that

[4] This term has been used throughout the opinion, interchangeably with "prosecuting witness" to prevent embarrassment to the intended vitcim, though, of course, the state is the actual party.

Clay entered the home, or that he entered with the intention to commit a felony. As herein stated, we find no merit in these contentions.

The judgment is affirmed.

Holt, J. not participating.

PICKENS *v.* STATE.

5061 366 S. W. 2d 283

Opinion delivered April 8, 1963.

No brief filed for appellant.

Bruce Bennett, Atty. General, by *Jack Holt, Jr.,* Asst. Atty. Gen., for appellee.

ED. F. MCFADDIN, Associate Justice. The jury found the appellant, Elvis Pickens, guilty of the crime of knowingly receiving stolen property (§ 41-3934 Ark. Stats.), and fixed his punishment at five years in the penitentiary. From a judgment on the verdict and an unavailing motion for new trial there is this appeal. The motion for new trial contains nine assignments, but we find it necessary to consider only such assignments as relate to the action of the Court in submitting the case to the jury on the charge of knowingly receiving stolen property.

On the morning of April 11, 1962, Mr. Hale found that a plateglass window had been broken in his store and three power saws had been taken. Each of these had a value of $150.00 or more. About 11:00 o'clock the same morning, the appellant, Elvis Pickens, tried to sell one of these power saws for $25.00 to the manager of the Economy Lumber Company. Pickens carried the saw to the Lumber Company store; while the attempted sale was in progress the officers arrested Pickens; and Hale identified the saw as one of the three that had been stolen from his store. Pickens admitted he knew that the saw was stolen, and took the officers to his home and showed them the other two stolen saws concealed in the house. Pickens claimed—so the officers testified—that three men (two of whom he named) brought the saws to his home in the night time, telling him that they were stolen, and offering to give him one of the saws for concealing the other two. The law enforcement officers were never able to find either of the named men, if there were such persons. Mr. Hale identified all three of the saws as stolen from his store, and they were returned to him.

The appellant and another man were brought to trial on an information which contained only two counts. The first count charged burglary (§ 41-1001 *et seq.* Ark. Stats.) in breaking and entering the store of Hale with intent to commit larceny; and the second count in the indictment charged the offense of grand larceny (§ 41-3901 Ark. Stats.) in the stealing and taking away of the property of Hale in excess of the value of $35.00 (§ 41-3907 Ark. Stats.). There was no count in the indictment charging the appellant or the other man being tried with the crime of knowingly receiving stolen property (§ 41-3934 Ark. Stats.). When all the evidence had been heard, the Court charged the jury on the crimes of (1) burglary, (2) larceny, and (3) knowingly receiving stolen property. The jury acquitted the other defendant of all three crimes; and the jury acquitted the appellant Pickens of the crimes of burglary and larceny, but convicted him of the crime of knowingly receiving stolen property; and it is this submission of the issue—of knowingly receiving stolen property—that is now before us.

The appellant's attorneys objected most strenuously to the Court submitting the case to the jury on the charge of knowingly receiving stolen property,[1] pointing out that the information on which the appellant was tried had only two counts—that of burglary and grand larceny—and had no count charging the offense of knowingly receiving stolen property. We are thus presented with the question of whether the defendant may be convicted of the offense of knowingly receiving stolen property when no count in the information charged that offense.

It is axiomatic that a defendant cannot be convicted for an offense of which he is not charged. In *Thornhill* v. *Ala.*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, the Court quoted from an earlier case: "Conviction upon a charge not made would be a sheer denial of due process." The Supreme Court of South Carolina in *State* v. *Cody,* 186 S. E. 165, used this language:

"In all criminal prosecutions, the defendant has a constitutional right to be informed of the accusation against him; and it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. It would be contrary to

[1] We mention some of the specific objections and exceptions made by the attorneys for the defendants: "The information in this case charges the defendants, each and both, with the offense of burglary and grand larceny; that was the accusation against them and that was the charge upon which we prepared, and the charge upon which we announced ready for trial; and we are objecting to a charge of receiving stolen property being submitted to the jury because it is not charged in the information. It is not embraced in the charge. . . . We had no idea there would be an issue of stolen property involved—of receiving stolen property; that there would be any such charge submitted to the jury. . . . And in connection with this objection they ask leave to withdraw their announcement of ready upon the case and that the Court declare a mistrial and that they be permitted a reasonable time to prepare their defense to the charge of receiving stolen property. That at no time were they apprised of the fact that they would be prosecuted for receiving stolen property and that they were entitled in advance to be so apprised. At no time were they given an opportunity to get ready on this charge. That the defendants are entitled to know the nature of the charge against them and the theories upon which the State would seek to take this case to the jury; and that they did not in their opening statements make any statement about the case being submitted on the issue of receiving stolen property. That the defendants object and except to the action of the Court in overruling their motion to be permitted to withdraw their announcement of ready in this case, and ask for a mistrial."

all rules of procedure, and violative of his constitutional right, to charge him with the commission of one crime and convict him of another and very different one. He is entitled to be informed of the accusation against him, and to be tried accordingly. *State* v. *Harbert,* 185 N. C. 760, 118 S. E. 6."

Of course, when a defendant is charged and tried on a greater offense, he may be convicted of a lesser offense *included in the greater offense.* Some examples showing this rule are: (a) trial on a charge of first degree murder will support a conviction of second degree murder or manslaughter (*McPherson* v. *State,* 29 Ark. 225; *Arnold* v. *State,* 179 Ark. 1066, 20 S. W. 2d 189; (b) trial on a charge of rape will support conviction of assault with intent to rape (*Sherman* v. *State,* 170 Ark. 148, 279 S. W. 353). Without giving other examples, the point is clear that it is only when the lesser offense is included in the greater offense that the conviction of the lesser offense can stand;[2] so the question here becomes: Is the offense of knowingly receiving stolen property (under § 41-3934 Ark. Stats.) a lesser offense of either burglary or larceny, so that an indictment or information charging only the greater offense will support a conviction of knowingly receiving stolen property?

We answer the posed question in the negative. Knowingly receiving stolen property (§ 41-3934 Ark. Stats.) is an entirely separate offense from larceny or burglary and is not a lesser offense of either. In *Hughey* v. *State,* 109 Ark. 389, 159 S. W. 1129, a defendant was charged with grand larceny; and we said: "Neither can he be convicted upon an indictment for larceny of receiving stolen property, knowing it to have been stolen." The holdings in other jurisdictions are in accord with our own holdings on this question. In *Abshire* v. *Commonwealth* (Ky.), 136 S. W. 2d 567, the Kentucky Court of Appeals used this language:

[2] For other instances of the lesser offense being included in the greater, see West's Arkansas Digest, "Indictment and Information" § 189.

"The crimes of larceny and of knowingly receiving stolen property are not degrees of the same offense, although they may be joined in one indictment under Section 127, Criminal Code of Practice; *Goodin* v. *Commonwealth,* 235 Ky. 349, 31 S. W. 2d 380. There was no count in the instant indictment charging defendant with knowingly receiving stolen property, therefore, he could not have been convicted of that offense under the present indictment."

In 52 C.J.S. 800, "Larceny" § 5, the holdings[3] from the various jurisdictions are summarized:

"The crimes of larceny and receiving stolen goods knowing them to have been stolen are different offenses, and not degrees of the same offense, . . ."

We point out that since knowingly receiving stolen property is a separate offense from either burglary or larceny, it follows that the appellant, Elvis Pickens, has not been placed in jeopardy in this case for the offense of knowingly receiving stolen property under § 41-3934 Ark. Stats., and may still be charged and tried for knowingly receiving stolen property. In 22 C.J.S. 760, "Criminal Law" § 290, the holdings on this point are summarized:

"*Larceny and receiving stolen goods.* Although there is some authority to the contrary, an acquittal or conviction of larceny, or of aiding, abetting, and procuring the commission of larceny, is no bar to a subsequent indictment for receiving stolen goods, as the two crimes are separate and independent, require different facts to prove them, and the proof of either will not sustain a charge of the other. A prosecution for receiving stolen goods will not bar a prosecution for alleged theft of the same property; . . ."

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[3] For those interested in pursuing a further study of this question, we mention the following: *In Re Powell* (N. C.), 84 S. E. 2d 906; *State* v. *Neill* (N. C.), 93 S. E. 2d 155; *Goodin* v. *Commonwealth* (Ky.), 31 S. W. 2d 380; *Aaronson* v. *U. S.* (4th Cir.), 175 F. 2d 41; *People* v. *Negrin,* 201 N. Y. S. 2d 59; *Samples* v. *State* (Okla.), 337 P. 2d 756; *State* v. *Dancyger* (N. J.), 143 A. 2d 753; *People* v. *Russell* (Calif.), 94 P. 2d 400; and see Annotation in 136 A.L.R. 1087, entitled: "May participant in larceny or theft be convicted of offenses of receiving or concealing the stolen property."

We therefore conclude that the Trial Court was in error in this case in submitting to the jury the question of whether the appellant was guilty of the offense of knowingly receiving stolen property; and the judgment herein is reversed. Since the appellant is on bond, the cause is remanded with directions to cancel liability on the bond; but without prejudice to the right of the State, if it so desires, to legally charge and try the appellant for the offense of knowingly receiving stolen property.

Holt, J., not participating.

MARTIN *v.* STATE.

5042 366 S. W. 2d 281

Opinion delivered April 8, 1963.

No brief filed for appellant.

Bruce Bennett, Attorney General, by *Russell J. Wools,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. The appellant, Minnie Lee Martin, was charged with first degree murder, convicted of second degree murder, and sentenced to twenty-one years in prison.

The proof would have sustained a verdict of guilty upon the more serious charge. The accused, a woman of 55, and the decedent, Rosie Lee Futrell, aged 26, lived across the street from each other in Texarkana. On the morning of the homicide the two women happened to meet in the home of two neighbors, Percy Williams and his wife. Minnie Lee had recently been reconciled with her husband, Charlie Martin, after an extended separation. Minnie Lee accused the younger woman of having "gone" with Charlie and insisted that in the future she leave Charlie alone. After a brief argument Minnie Lee drew a pistol from her pocket and fired three shots at Rosie Lee, inflicting fatal wounds.

The only real question for the jury was whether the appellant acted in self defense. There is no testimony supporting this defense except the accused's own statement that Rosie Lee was moving her hand along her dress, which led the accused to think she might be about to reach into a pocket for a knife. The jury was justified in rejecting this explanation. The deceased was apparently unarmed, while the accused had a loaded pistol. Minnie Lee testified that she was carrying the weapon because there was no lock on the door of her home; she was afraid the gun might be stolen if she left it at home. Obviously this flimsy explanation did not account for the incriminating fact that the pistol was loaded.

There was testimony that immediately after the crime the appellant voluntarily admitted to the arresting officers that she had shot the deceased. The only timely objection to this proof was based on the fact that the accused's declaration did not amount to a detailed confession. Even so it was competent as an admission. *Reed* v. *State,* 102 Ark. 525, 145 S. W. 206. Later on there was a motion to strike all the testimony of both officers, on the ground that the accused's statements were not shown to have been voluntary. Even though we think the voluntary nature of

the admissions to have been a question for the jury, the point is actually immaterial. Most of the officers' testimony was clearly admissible; so in any event the motion to exclude *all* their testimony was properly denied. *Buchanan* v. *State,* 214 Ark. 835, 218 S. W. 2d 700.

Minnie Lee at first told the officers that she had thrown the pistol into an outdoor toilet. When the weapon was not found there the coroner, with the permission of Minnie Lee's husband, searched the Martin home and found the gun in a chest of drawers. We find no reversible error in the court's action in permitting the State to introduce the pistol in evidence. Even if the weapon had been inadmissible it does not appear that the appellant could have been prejudiced. Both Percy Williams and his wife, witnesses for the State, testified that Minnie Lee shot the deceased. The two arresting officers testified that Minnie Lee admitted the shooting. As a witness in her own behalf Minnie Lee stated without hesitation that she shot Rosie Lee. The fact that the decedent was shot by the accused with a pistol has been throughout the case an undisputed fact, established by the testimony offered both by the prosecution and by the defense. We are unable to see how the appellant could have been prejudiced in any manner whatever by the fact that the jurors were permitted to see the pistol.

After the case was submitted to the jury the jurors deliberated for about an hour before being excused for the night. The next morning the court gave an instruction urging them to reach a verdict if they could conscientiously do so. At that point the court correctly denied the defense attorney's request for permission to make an additional argument to the jury. Such a request is properly granted when a supplemental instruction brings into the case a new rule of law for the jury to consider, *Jackson* v. *State,* 216 Ark. 341, 225 S. W. 2d 522, 15 A. L. R. 2d 484; but here the court's additional charge did not have that effect.

We do not find any other issue of sufficient merit to require discussion.

Affirmed.

Holt, J., not participating.

PIERCE *v.* PIERCE.

5-2909 366 S. W. 2d 276

Opinion delivered April 8, 1963.

[redacted]

Felver A. Rowell, Jr., for appellant.

Williams & Gardner, for appellee.

PAUL WARD, Associate Justice. Prior to July 21, 1957 M. H. Pierce and Mary C. Pierce owned and operated, as partners, the M. H. Pierce Lumber Company. On the date above mentioned Mary C. Pierce died testate and Joe S. Pierce (her son) was duly appointed executor of her estate. Later M. H. Pierce (after operating the lumber company for an undisclosed period of time) died testate and his estate is now being administered by his wife as executrix.

On January 24, 1961 Joe S. Pierce (as executor) filed a verified claim for $7,953.14 against the M. H. Pierce estate. The claim was itemized and explained as follows:

"50 per cent of the truck and car account of M. H. Pierce Lumber Co., a partnership	$1,092.94
"50 per cent of the undivided timber account of M. H. Pierce Lumber Co., a partnership	6,860.20
"Total	$7,953.14

"This balance due the Mary C. Pierce Estate is reflected by the books of M. H. Pierce Lumber Company, a partnership, and by the books of M. H. Pierce, an individual doing business as M. H. Pierce Lumber Company, and can be substantiated from same."

The claim was disallowed by the executrix of the M. H. Pierce estate. It was then presented to the Probate Court and was there allowed by order dated May 12, 1962. From that order comes this appeal.

The only witness to testify was Joe S. Pierce, the executor of the estate of Mary C. Pierce, and the only testimony material to the issue here raised is hereafter set out.

"Q. Have you had an opportunity to examine the records of the partnership of M. H. Pierce Lumber Company?

"A. Yes, sir.

"Q. Are they in the courtroom?

"A. Yes, sir.

* * *

"Q. Mr. Pierce, I hand you here what purports to be a ledger and ask you if you can identify it?

"(At this time the witness is handed ledger book to examine.)

"A. That's a ledger of M. H. Pierce individual. M. H. Pierce Lumber Company and it is individual.

"Q. Will you examine that and see if you can find anything in there indicating any indebtedness owed by M. H. Pierce to the Mary C. Pierce estate?

"MR. ROWELL: Objection your Honor. The witness has stated that's a personal journal of Mr. M. H. Pierce, and all those entries in that book as I understand it and my knowledge of the books are made in the handwriting of M. H. Pierce individually, and he can't testify to that.

"THE COURT: Even though they were, these are not transactions the witness has had with the deceased."

At the top of page 90 of the ledger appears the following:

"1957 Mary C. Pierce Estate

Acct. Payable"

Just beneath the above appears these two lines:

"Aug. 3	Cars and Truck	$1,092.94
"Aug. 3	Band Timber	6,860.20"

Referring again to the claim

"Q. Has it been paid?

"A. No."

The point on which appellant places most emphasis for a reversal is that the court erred in allowing the ledger to be introduced in evidence. In support appellant relies on Section 2 of the Schedule of the State Constitution which, in material parts, 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. . . ."

It is first argued, and we agree, that the above statutes applies to a technical party such as an administrator. See: *Smart, Administratrix,* v. *Owen,* 208 Ark. 662, 187 S. W. 2d 312, where, in speaking of Schedule, § 2 of the Constitution, we said:

"We have held that this statute applies to those who are technically parties to the suit. . . ." (Citing cases.) The technical party referred to there was the administratrix. It appears, however, to be the contention of appellant that the ledger (or the introduction of the ledger by the executor) in some way constituted a *transaction with the testator*—that is M. H. Pierce, deceased.

After careful consideration of this issue and of appellant's contentions, we are forced to the conclusion that the ledger was properly introduced in evidence. We find nothing in the testimony of Joe S. Pierce (as previously set out) which refers to any transaction he had with M. H. Pierce during his lifetime. It is only testimony of such a transaction that the statute forbids. This was clearly stated in *Strayhorn* v. *McCall,* 78 Ark. 209, 95 S. W. 455 in these words: "It is only as to 'transactions with . . .' the deceased that the opposite party is rendered incompetent to testify." This restrictive meaning of the words "transactions with" was impressively indicated in the early case of *Giles, Adm'r.* v. *Wright,* 26 Ark. 476. The Court there was called on to interpret the meaning of Article 7, Section 22 of the 1868 Constitution which is the same as Schedule § 2 of our present constitution. The court there said:

"It is plain that it is not the design to exclude the testimony of such parties, as to all matters in controversy, in which the testator, intestate or ward, had been interested, or in any manner connected with, but only in relation to *strictly personal transactions, or such as were directly and personally with him,* and where in the nature of the case, the privilege of testifying could not be reciprocal and of mutual advantage." (Emphasis added.)

To put a more liberal interpretation on the statute involved would not seem to be in line with modern enlightened thinking. Robert A. Leflar, former Dean of the University of Arkansas School of Law, in an article published in 2 Ark. L. Rev. 26 at page 36 said:

"The 'dead man statute' is a relic of an almost bygone era in the law, and it may be confidently expected that it will be erased from the statutes in the not-far-distant future. In this respect it is like the disqualification of convicted felons as witnesses, which persisted in Arkansas until 1913. Under each disqualification there developed a great mass of cases, making learned distinctions and dwelling on minute differences. In each instance the courts were seeking to limit as narrowly as possible a rule which originally made some sense, but whose reasonable

basis could better be cared for in modern times by letting the jury consider the credibility of the evidence fully rather than by excluding it altogether. Both rules tended toward the concealment of the truth rather than toward its discovery."

It is also contended by appellant that appellee failed to meet the burden of proof necessary to establish the claim. This contention is not tenable in view of the conclusion we have previously reached.

Affirmed.

MILLSAP *v.* WILLIAMS, JUDGE.

5-2970 366 S. W. 2d 705

Opinion delivered April 8, 1963.

[Rehearing denied May 6, 1963.]

Warren & Bullion, for appellant.

Sexton & Morgan, for appellee.

SAM ROBINSON, Associate Justice. This is a prohibition procedure wherein petitioners, I. Hal Millsap, Jr. and Millsap Oil & Gas Company, a Delaware Corporation, seek a Writ of Prohibition directed to the Honorable Paul X. Williams, Chancellor of the Logan Chancery Court, to prevent the trial of an action in Logan County wherein Herman Swartz, et al, are palintiffs, and petitioners herein are named as defendants. The petition for prohibition alleges that the Chancery Court of Logan County does

not have proper venue and does not have jurisdiction of the subject matter.

The Complaint alleges that the defendants induced the plaintiffs to purchase stock in the Millsap Oil & Gas Company by false, fraudulent, and untrue representations; that the corporation is now insolvent; and the complaint asked that a receiver be appointed for the corporation and an accounting be had, and that plaintiffs recover judgment against the individual defendants.

On September 24, 1961, summons was issued to the Sheriff of Pulaski County for I. Hal Millsap, Jr., I. Hal Millsap, Sr., and for the Millsap Oil & Gas Company. The Sheriff served copies of each on Nancy J. Hall, Secretary of State. On October 3, 1961, a motion was filed to quash the summons. On July 27, 1962, summons was issued to the Sheriff of Benton County for I. Hal Millsap, Jr., I. Hal Millsap, Sr., and Millsap Oil & Gas Company. The return shows service on I. Hal Millsap, Jr. as agent for the corporation. On July 30, 1962, another summons was issued for I. Hal Millsap, Jr. and the return shows he was served in Benton County.

At a hearing on the motion to quash the service of summons it developed that the corporation's authority to do business in this state had been revoked. It was also shown that parties living in Logan County may be indebted to the corporation. The trial court overruled the motion to quash. The petition here for prohibition followed.

Respondents base their right to maintain the action in Logan County on Ark. Stats. 27-608, which provides: "An action, other than one of those mentioned in sections 84, 85, and 90 [§§ 27-601—27-603], against a non-resident of this State, or a foreign corporation, may be brought in any county in which there may be property of or debts owing to the defendant."

Since it appears that the defendant corporation is not authorized to do business in this state, the above statute is applicable if there is property of or debts owing to

the corporation in Logan County. There appears to be considerable controversy as to whether such debts exist. It is a question of fact. In *Twin City Lines, Inc.* v. *Cummings*, 212 Ark. 569, 206 S. W. 2d 438, it is pointed out that where the jurisdiction of the trial court depends on a question of fact, prohibition will not lie, citing *Crowe* v. *Futrell,* 186 Ark. 926, 56 S. W. 2d 1030; *Terry* v. *Harris,* 188 Ark. 60, 64 S. W. 2d 80; *LaFargue* v. *Waggoner,* 189 Ark. 757, 75 S. W. 2d 235 *Chapman & Dewey Lumber Co.* v. *Means,* 191 Ark. 1066, 88 S. W. 2d 829.

But petitioners also contend that Ark. Stats. 27-608 is not applicable here, because the corporation has a place of business or an office in Arkansas where service of summons may be obtained against an agent of the corporation; that the applicable statute is 27-347, dealing with service on foreign corporations. A question of fact is again involved. I. Hal Millsap, Jr. testified:

"Q. Where is the office of Millsap Oil & Gas Company?

A: The books and stock records are kept in Rogers by the Barclay Accounting Company.

Q: Where were the books and records on September 21, 1961?

A: Rogers, Arkansas.

Q: Millsap Oil & Gas Company has an office at Siloam Springs?

A: No, Sir. Only wherever I happen to be is the office. No furniture. I answer the correspondence through my office from Siloam Springs."

Petitioners further contend that the Chancery Court of Logan County has no jurisdiction to appoint a receiver for the corporation, and cite *Macon* v. *LeCroy,* 174 Ark. 228, 295 S. W. 31. But in that case the court said: "The Central company is a foreign corporation, and the courts of this State have no authority to dissolve and wind up its business; the rights of courts of equity in this State are limited to taking charge of the property within the juris-

diction of the court and enforcing the rights of creditors here. *Dickey* v. *Southwestern Surety Ins. Co.*, 119 Ark. 12, 173 S. W. 398, Ann. Cas. 1917B, 634, and cases cited." Of course, a court of equity could take charge of property in its jurisdiction only through a receiver.

I. Hal Millsap, Jr. also argues that the action can be maintained against him only in the county in which he was served with summons. In this case, the Millsaps and the corporation are made joint defendants. I. Hal Millsap, Jr. was served in Benton County. It is possible that a judgment against him would be good, but if an invalid judgment is rendered against him he has an adequate remedy by appeal.

The petition for prohibition is denied.

JACKSON *v.* SMITH, CHANCELLOR.

5-2939 366 S. W. 2d 278

Opinion delivered April 8, 1963.

James P. Baker, Jr., for appellant.

David Solomon, for appellee.

JIM JOHNSON, Associate Justice. This is a petition for a writ of prohibition seeking, on jurisdictional

grounds, to prohibit a chancery court from trying a declaratory judgment action.

On June 19, 1962, the residuary legatees under the will of Ann H. T. Coley, the Phillips National Bank and Walter L. Coley, executor of the estate of Ann H. T. Coley, filed a petition for declaratory judgment naming the petitioners, C. J. Jackson and Frank Jackson Jordan, as defendants in the Phillips Chancery Court, asking for a determination of rights as to the ownership of certain shares of capital stock in the Phillips National Bank.

The complaint states that the executor in his inventory, filed in the Phillips Probate Court, listed 80 shares of capital stock of Phillips National Bank as owned by the testatrix and as an asset of the estate; that the residuary legatees filed their exception to the inventory stating that the testatrix actually owned 200 shares of such stock; that the executor responded in Probate Court stating that Phillips National Bank has in its possession 160 shares of the stock issued in the name of the testatrix, and the executor only has constructive possession of 80 shares; that the Phillips National Bank had issued 200 shares of its capital stock to Ann H. T. Coley, which are still so recorded on its corporate books, and the bank actually has in its possession 160 of the shares; that C. J. Jackson and Frank Jackson Jordan claim some interest therein, the latter claiming by an assignment from Jackson, and that either or both of them have in their possession certificates representing 40 shares, which are registered on the corporate books in the name of Ann H. T. Coley.

In response to this petition the defendants filed a motion to dismiss alleging several jurisdictional grounds. The motion to dismiss was overruled and the defendants (petitioners herein) were ordered to file their answer by December 1, 1962. This petition for a writ of prohibition followed.

The first point relied upon by petitioners is that the chancery courts of Arkansas are without jurisdiction to hear petitions for declaratory judgment. Although it is not necessary to reach this point, since the question keeps arising we feel impelled to lay it at rest.

Petitioners contend that the chancery court is without jurisdiction to entertain declaratory judgment petitions because of an express limitation in the Constitution of 1874 providing that chancery courts shall have jurisdiction in equity matters only as then exercised by courts of equity; and that the declaratory judgment is purely the creation of statute which was not known to equity jurisdiction as it existed in 1874. Respondent contends that the declaratory judgment act did not change or increase the jurisdiction of equity, but is purely a procedural addition to our civil procedure.

The Constitution of 1874, Article 7, § 15, states:

"Until the General Assembly shall deem it expedient to establish courts of chancery the circuit court shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law."

In 1903 the legislature established separate chancery courts in every county of the state. Jurisdiction of these courts is stated in Ark. Stats. § 22-404 as follows:

"Chancery courts shall have original jurisdiction in all matters in equity as fully as is now exercised by the several circuit courts of this state in counties where no separate chancery courts have heretofore been established. Appeals to Supreme Court may be taken from the orders, judgments and decisions of the chancery courts in the same manner as now provided by law for appeals from the circuit courts in equity cases."

In *Young* v. *Young,* 207 Ark. 36, 178 S. W. 2d 994, where the act establishing three year separation as a ground for divorce and abolishing recrimination as a defense thereto, was attacked as unconstitutional as diminishing equity jurisdiction, this court stated in part:

"We recognize that the *jurisdiction* of our courts of equity (as the jurisdiction in 1874) can neither be enlarged or restricted. But there is a distinction between (1) *jurisdiction and* (2) *grounds for the exercise of jurisdiction.*

[Quoting from *Marvel v. State ex rel. Marrow,* 127 Ark. 595, 193 S. W. 259, 5 A.L.R. 1458] 'The act in question has not conferred upon the chancery courts of this state any additional jurisdiction. It has merely prescribed a new condition upon which this ancient jurisdiction may be exercised. The act is remedial in its nature and, while the Legislature can not enlarge or restrict the jurisdiction of chancery courts, it is entirely within the province of the Legislature to prescribe the procedure for the exercise of this jurisdiction and to prescribe new conditions under which that jurisdiction may be exercised.' "

In this light, we now examine the Declaratory Judgment Act of 1953 (Ark. Stats. §§ 34-2501-34-2512). Section 1 (§ 34-2501) provides:

"Courts of record *within their respective jurisdictions* shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." [Emphasis ours.]

It is hardly necessary to examine further. By its own terms, "within their respective jurisdictions," this act does not attempt to enlarge or alter the jurisdiction of any court. The chancery court clearly has jurisdiction to render declaratory judgments where the subject matter of the declaration is within equity jurisdiction, and we so find.

Whether the subject matter in the instant case is a matter for equity jurisdiction appears to be a question of fact. Upon its face the complaint does not seem to be wholly without the jurisdiction of equity. This is a question which could be tested by appeal. If the court is without jurisdiction, a proper remedy would be by motion to transfer, as provided by Ark. Stats. § 27-208 as follows:

"An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal

of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket."

The case of *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13, is directly in point, in which it was stated:

"The writ [of prohibition] is never exercised 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."

Writ denied.

ATKINSON *v.* VAN ECHAUTE.

5-2928 366 S. W. 2d 273

Opinion delivered April 8, 1963.

Phillip H. Loh, for appellant.

Charles H. Eddy and *Gordon & Gordon,* for appellee.

FRANK HOLT, Associate Justice. On June 20, 1961, Julius Van Echaute died testate at 76 years of age. The appellee, Janie Van Echaute, was the testator's second wife. The appellant, Emily Van Echaute Atkinson, and six other adult children by his first marriage also survive him. Appellant was nominated in the will to serve as executrix. The testator provided in his will that all of his property be sold or converted into cash as soon as possible after his death and that the cash proceeds be divided equally between his wife and his seven children. According to the inventory of his estate, the real property consisted of a forty (40) acre farm and the personal property consisted of household goods valued at $50.00.

After the will was duly probated the appellee-widow filed an instrument in which she elected to take against the will and asked that she be alloted her dower interest in the estate as provided by law. Later, upon her petition, the land was sold for $4,825.00 cash. Appellee then petitioned the court to allow her one-third (⅓) of the sale price as her dower. Upon a hearing on her petition the court found that she had elected to take against the will and have her dower awarded as provided by law and, further, "that because of the directions of the will, the court finds that the entire estate consisted of personal property at the death of Julius Van Echaute, and his widow, Janie Van Echaute, is entitled to one-third of the gross estate in fee". The court ordered payment to her of one-third of the gross estate ($4,875.00) or $1,625.00. At a previous proceeding, upon petition of the appellee for her widow's statutory allowances, the court awarded her $1,000.00 [Ark. Stat. 62-2501 (a)], certain items of furniture and furnishings [Ark. Stat. 62-2501 (b)], and $250.00 as sustenance [Ark. Stat. 62-2501 (c)]. From these two separate orders appellant brings this appeal and for reversal relies on two points: (1) The court erred in the method of awarding appellee's dower interest; and (2) the court erred in awarding $1,000.00 as a widow's allowance. We hold that the appellant is correct in both of these contentions. Appellant takes no exception to the court's allowance of household goods and sustenance.

POINT ONE. [Award of dower interest] Courts seek to give effect to the desires and intentions of a testator. In the case at bar the testator specifically provided in his will that upon his death his property was to be sold and converted into cash and divided equally between his wife and seven children. His widow, the appellee, renounced the will and elected to take against it. She asked that her dower interest be allotted as provided by law. This she had a right to do. Ark. Stats. 61-218—60-501. After her dissent from the will the realty was converted into $4,825.00 cash with her approval. She contends that by the doctrine of equitable conversion the realty consisted of personal property at the death of her husband. Thus, she asserts her claim to one-third (⅓) absolutely of the gross estate $4,875.00) or $1,625.00. Ark. Stat. 61-202. If the proceeds of the gross estate were divided equally in eight shares, as directed by the testator, appellee would be entitled to approximately $610.00.

Intent is the determining factor in applying the doctrine of equitable conversion. In 19 Am. Jur., p. 4, Equitable Conversion, § 4, we find the governing rule in the case at bar expressed as follows:

"The purpose of the doctrine of equitable conversion is to give effect to the intention of the testator, settlor, or contracting parties, and it will not be given an effect contrary to such intention. For example, where the will of a decedent directs the executor to sell land left by the decedent and the decedent's widow elects to take her share under the law aside from the will, equity does not regard the land as personalty so as to allow the widow to take a distributive share."

Further, in § 5 we find:

"The doctrine of equitable conversion cannot be invoked where the intention of the testator fails or is incapable of accomplishment by reason of illegality, lapse, or other cause, because the sole purpose of the doctrine in the case of a will is to effectuate the testator's intention."

In the case at bar the testator's intention fails or cannot be accomplished because appellee disclaimed the will.

In 18 C.J.S., p. 77, Conversion, § 49, the rule is further announced that where the widow "*elects to take against the will, there is no conversion so as to entitle the widow to a share in the realty as personalty.*" [Emphasis added.]

In 91 A.L.R., Anno. p. 868, we find the following comment on this subject:

"Where the surviving spouse renounces the will and elects to take under the intestate laws, the courts are unanimous in holding that such survivor is not entitled to the benefit of a provision in the will directing a conversion. Having elected to take against the will, the surviving spouse cannot assert any claim under the will."

When appellee renounced her husband's will she destroyed the will as to herself. Consequently her dower rights vested as if her husband had died intestate. Ark. Stat. 60-501. That being true, her dower is to be carved from that property which her husband possessed at his death and not from the property thereafter changed from realty to personalty. *Kitchens* v. *Jones,* 87 Ark. 502, 113 S. W. 29; *Johnson* v. *Johnson,* 92 Ark. 292, 122 S. W. 656.

Our dower statute provides that the widow shall have a vested life interest in one-third of her husband's lands. Ark. Stat. 61-201. Since the realty was sold for $4,825.00 cash, upon the request[1] of appellee and with the approval of the court, she is entitled to a life estate in the proceeds of this sale. The proper and approved method of computing the present value of her vested life estate is outlined in Ark. Stats. 50-701—706. See also, *Dowell* v. *Dowell,* 209 Ark. 175, 189 S. W. 2d 797 and *Godard* v. *Godard,* 210 Ark. 769, 197 S. W. 2d 554. Appellee was 72 years of age at the time of the sale. According to the table in Ark. Stat. 50-705, her life expectancy then was 9 years. The record does not show a determination of the prevailing rate of interest and, therefore, we must use the legal rate of six percentum (6%). *Dowell* v. *Dowell, supra.* At the appropriate place in the table we find the figure 5.9212. By this statute we now compute the present value of appellee's life estate in this manner: $4,825.00 ÷ 3 = $1,608.33; $1,608.33 × 6%

[1] By this action she waived her homestead rights.

= $96.50; $96.50 × 5.9212 = $571.39 which is the present value in commutation of her income rights before deduction of her proportionate share of the cost of sale which the record does not show.

POINT TWO. [Widow's allowance] Appellant contends that the court erroneously awarded the appellee $1,000.00 cash as a widow's allowance pursuant to Ark. Stat. 62-2501 (a). This statute provides in pertinent part:

"In addition to * homestead and dower rights, the widow *** shall be entitled to have ** out of the property *owned by the decedent at the time of his death,* personal property, *** of the value of one thousand dollars ***." [Emphasis added.]

By the plain terms of this statute the allowance to a widow can only be made from whatever personal property existed at the husband's death. In *Kitchen* v. *Jones, supra,* this court said:

"The status of the decedent's estate is fixed under this statute when he dies, and the *allowance* contemplated by it must be made out of the personal property *as it then existed,* and not from the proceeds of realty which may thereafter assume personal form." [Emphasis added.] Also, see *McLerkin* v. *Schilling,* 192 Ark. 1083, 96 S. W. 2d 445.

It follows, from this and our discussion of point one, that appellee's allowance under this statute is limited in this case to the $50.00 which was the total value of the testator's personal property at his death as listed in the inventory of the estate.

The decree is reversed and remanded with directions to enter a decree not inconsistent with this opinion.

GOLDEN *v.* ORKIN EXTERMINATING CO.

5-2955 366 S. W. 2d 713

Opinion delivered April 15, 1963.

[redacted]

Walter G. Wright, Curtis L. Ridgway, Jr., Q. Byrum Hurst, and *Wood, Chesnutt & Smith,* for appellant.

Wootton, Land & Matthews, for appellee.

CARLETON HARRIS, Chief Justice. Jimmy Lee Golden, appellant herein, on January 18, 1961, signed an employment contract with appellee, Orkin Exterminating Co. of Ark., Inc. Provisions of the contract, which are pertinent to this litigation, are as follows:

"The Company is engaged in the pest control, exterminating, fumigating and termite control business and has built up and established a valuable and extensive trade in said territory, which consists of the following:"

(Here several cities in this state are listed, but this litigation only involves three cities, Hot Springs, Malvern and Arkadelphia.)

"The Employee hereby expressly covenants and agrees, which covenants and agreements are of the essence of this contract, that he will not, during the term of this agreement and for a period of two (2) years immediately following the termination of this agreement, for any reason whatsoever, directly or indirectly, for himself or on behalf of, or in conjunction with, any other person, persons, company, partnership or corporation:

(a) call upon any customer or customers of the Company solicited or contacted by the Employee or whose account was serviced by the Employee, pursuant to his employment hereunder, for the purpose of soliciting or selling any pest control, exterminating, fumigating or termite control service for the eradication or control of rats, mice, roaches, bugs, vermin, termites, beetles or other insects;

(b) nor will he divert, solicit, or take away any such customer or customers of the Company or the business or patronage of any such customers of the Company for the purpose of selling a service for the eradication or control of rats, mice, roaches, bugs, vermin, termites, beetles or other insects;

(c) nor will he call upon, divert or solicit any person, persons, company, partnership or corporation for the purpose of selling any service for the eradication or control of rats, mice, roaches, bugs, vermin, termites, beetles or other insects anywhere within the territory stated in Paragraph 6(d);

(d) nor will he engage in the pest control, exterminating, fumigating or termite control business anywhere within the territory as specifically delineated and described as follows: Hot Springs, Arkadelphia, * * * Malvern, * * *."

Paragraph 7 provides,

"The Employee does expressly understand and agree that his responsibilities and obligations as to each and every covenant as set forth in Paragraph 6 above shall pertain and apply in every particular (in addition to the

territory stated in Paragraph 6 above) to that territory of the Hot Springs, Arkansas office of the Company in which the Employee has worked for any period not less than ninety (90) days during any part of the twelve (12) month period next preceding the termination of this agreement, for any reason whatsoever."

On May 31, 1962, Golden resigned as an employee of appellee company and on the following June 4, accepted employment with appellant, Arab Termite and Pest Control Company of Hot Springs, Inc. On July 13, 1962, Orkin filed this action, praying, *inter alia,* that Golden be enjoined from competing with appellee in its pest control and exterminating business in the city of Hot Springs, and that he be permanently enjoined from engaging in such business anywhere within the territory of Hot Springs, Arkadelphia, Malvern, and intermediate locations constituting the territory in reasonable proximity thereto for a period of two years from the date of the decree. On July 25, the complaint was amended to include Daniel C. Dykes, a former employee of appellee, who at the time of the filing of the complaint, was serving as manager for Arab. Requests for Admissions were directed to Golden and Dykes, after which an answer was filed by all defendants. Prior employment by Orkin was admitted, but all other material allegations were denied. Further Requests for Admissions were served upon appellants, and thereafter the cause proceeded to trial. After hearing oral testimony, the court entered its decree, finding that Golden "is bound by the terms of his contract not to engage in termite or pest control work within the area described in said contract which is defined to be the cities of Hot Springs, Arkadelphia and Malvern, and within five (5) miles of the corporate limits of said cities," and in accordance with this finding, enjoined Golden from engaging in the termite and pest control business in the area involved for a period of two years from May 31, 1962 (the date of the termination of his contract).[1] From the decree so entered, appellants bring this appeal.

[1] Other issues raised in the complaint, including damages sought against Dykes and Arab Termite and Pest Control Co. of Hot Springs, were reserved for later determination.

The only question presented on this appeal is the validity of the Chancellor's action in including in the injunction the area five miles beyond the corporate limits of Hot Springs, Arkadelphia and Malvern. In other words, appellants contend that the contract only justifies an injunction to prohibit Golden from engaging in termite and pest control work within the corporate limits of these cities.

The limited attack upon the court's decree is due to our holding in *Orkin Exterminating Co.* v. *Murrell,* 212 Ark. 449, 206 S. W. 2d 185, wherein we held that a certain contract between Orkin and Murrell (an employee) of the same type as the contract here involved, was valid. In that case, Murrell agreed that he would not engage in the pest control business in certain cities in this state, nor within "a 75-mile radius of each of these said cities" for a period of one year immediately following the termination of his employment. We held that the restraint imposed upon Murrell, under the circumstances, was such as would only afford a fair protection to Orkin and that the covenant was accordingly reasonable in its terms. Here, appellants point out that the 5-mile radius, included in the Chancellor's injunction, was not embodied in the contract between the parties, and it is asserted that the Chancellor therefore erred in extending the injunction to territory beyond the city limits. We agree with appellant's contention insofar as it relates to the cities of Malvern and Arkadelphia, but we disagree as to Hot Springs.

The proof reflects that, though appellant Golden only worked the city limits of Arkadelphia and Malvern, he admittedly, in addition to territory within the city limits of Hot Springs, worked the Lake Hamilton and Lake Catherine areas. While there is no specific testimony that he worked these areas for a period of 90 days,[2] Golden did testify that he had worked the Hot Springs territory for the last few months before the termination of his employment with Orkin, and it definitely appears

[2] No contention is made in appellant's brief that he did not work in this area for 90 days.

from the actions of Golden and appellee, that as to Hot Springs, each recognized that the area for extermination solicitation and service extended beyond the city limits and included the lake area. We have held that the construction placed upon a contract between parties, as reflected by their words and acts, must be given consideration. In *Hurst* v. *Flippin School Dist. No. 26,* 228 Ark. 1151, 312 S. W. 2d 915, this court said:

"It is well settled by our decisions that, in construing a contract the meaning of which is doubtful, the construction placed thereon by the parties to it, as reflected by their words and acts, must be given consideration. See cases cited in *Lutterloh* v. *Patterson,* 211 Ark. 814, 202 S. W. 2d 767, where we approved this statement from 12 Am. Jur. 787: 'In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms.' "

While it is true that the words "5-mile radius" do not appear in the contract, the Chancellor evidently used this figure with the view of covering that territory wherein Golden had worked, serviced, and solicited business during his employment with Orkin. Since it is admitted that the lake areas were solicited during that period, we think the extension of the injunction to the 5-mile radius beyond the city limits (of Hot Springs) was reasonable.

In accordance with the views herein expressed, we are of the opinion that the injunction entered by the Garland Chancery Court was too broad in its terms in enjoining Appellant Golden from engaging in termite or pest control work within a 5-mile radius of the corporate limits of the cities of Malvern and Arkadelphia. As to these cities, the injunction should have been limited to that territory solely within the corporate limits. With this modification, the decree is remanded to the Garland Chancery Court with directions to enter a decree not inconsistent with this opinion.

GEORGE ROSE SMITH and JOHNSON, JJ., dissent.

GEORGE ROSE SMITH, J. (dissenting). I think the decree should be further modified by excluding the area lying within a five-mile radius of the city limits of Hot Springs.

In view of the established breach of contract the appellee was entitled to injunctive relief with reference to the area within the city of Hot Springs. That phase of the case is not in issue upon this appeal. But the only way in which the appellee could obtain relief with respect to the area contiguous to the city limits was by proving, under Paragraph 7 of the contract, that Golden had worked in that suburban area for not less than ninety days during the last year of the contract.

In my opinion the appellee did not meet this burden of proof. In fact, the complaint did not even allege such a cause of action. The complaint did quote Paragraph 6 of the contract, which embraced the territory within the city limits, but the complaint did not even mention Paragraph 7 (except that a copy of the contract was attached as an exhibit). As far as I can discover, the exceptional ninety-day provision by which the ambit of the contract could be extended was not mentioned anywhere in this case until the appellee's brief was filed.

There was no testimony that Golden worked for ninety days in this suburban area. In fact, the majority's holding in this respect is really based upon a single question and answer in the course of Golden's testimony:

"Q. But for the last few months [before the termination of the contract] you had worked in the Hot Springs territory?

"A. Right."

The plaintiff unquestionably had the burden of proving that Golden had worked within the suburban Hot Springs area for the minimum of ninety days required by the contract. Even if that fact had been alleged in the complaint, and it was not, the proof would still be insufficient to establish the allegation. In view of the

fact that the burden of proof was on the appellee, I cannot say that testimony that Golden had worked for a few months in the Hot Springs territory (which under the contract included the twenty cities listed in Paragraph 6) amounted to proof that he had worked for at least ninety days within every part of the area lying within a five-mile radius of the city limits.

The appellant concedes the correctness of the greater part of the decree; he appeals only from that part of the order including territory contiguous to Arkadelphia, Malvern, and Hot Springs. In view of the fact that Hot Springs is by far the largest of these three cities, as well as being the appellant's home, it is fair to suppose that the real issue on this appeal is the Hot Springs suburban area. Thus the appellant is really losing his appeal; I think he should win it.

JOHNSON, J., joins in this dissent.

PULTS *v.* PULTS.

5-2985 367 S. W. 2d 120

Opinion delivered April 15, 1963.

[Rehearing denied May 20, 1963.]

James E. Evans and *John H. Joyce*, for appellant.

Wade & McAllister, for appellee.

ED. F. MCFADDIN, Associate Justice. At the close of appellant's case, the Chancery Court sustained the appellee's written demurrer to the evidence; and the issue on this appeal is whether the Court was correct in its ruling. This requires an application of our holding in the case of *Werbe* v. *Holt*, 217 Ark. 198, 229 S. W. 2d 225, and the subsequent cases involving the same question.

On December 16, 1961, appellee, Mrs. Alice Pults, received a decree of divorce from appellant, George Pults. A property settlement agreement was incorporated in the decree which provided, *inter alia,* that Mrs. Pults would have the care and custody of the two minor sons of the parties during the entire period of minority. One of the boys was then fourteen, and the other was nine. The decree also provided that Mr. Pults would pay Mrs. Pults $200.00 per month for the support, maintenance, and education of the two boys. There was also a property settlement between Mr. and Mrs. Pults, which need not be detailed.

As stated, this decree was on December 16, 1961; and fifteen days later Mr. Pults contracted another marriage. Then, on July 24, 1962, Mr. Pults filed the present petition for reduction of the monthly payments for his two sons, claiming that the expenses caused by his subsequent marriage, plus his decreased income, made it difficult, if not impossible, for him to pay the $200.00 per month for the support of his own sons. He wanted to pay only $100.00 per month. The case came to trial; and after Mr. Pults had offered his desired evidence, the Chancellor sustained Mrs. Pults' written demurrer to the evidence. We copy the Chancellor's opinion:

"The question now presented on demurrer to petitioner's evidence, is whether there has been such a material change in circumstances relative to Mr. Pults since the entry of the decree on December 16, 1961 as would entitle him to, and justify the Court in granting, a modification of the money payments presently required of him. On such demurrer the testimony offered must be viewed in the light most favorable to Mr. Pults.

"Under his testimony, the reason he seeks a change, and the material difference that he alleges has occurred, is that he has suffered a reduction in income so that he is no longer able to meet the scale of payments contained in the property settlement and the decree. Now, actually, he doesn't plead this at all. He pleads that the change in circumstances is that he has remarried, and that his expenses have increased. The matter of his income being reduced was brought out by the proof, but not being objected, the Court may treat the pleadings as amended to conform to the proof, where offered without objection. So, the status of the matter now is that he relies upon the fact that he has remarried since the entry of the decree of divorce, which is a change of circumstances, and that his income has been reduced by about one-half since the decree of divorce. Now, accepting all these things as true, the question is, on this demurrer: does this make a case for the reduction of the money payments? Are these such material changes as would justify a modification in the support order?

"In the opinion of the Court neither of these events, under the state of the proof here, is sufficient to justify a change in the decree. In the first place, the proof does not show that he has suffered a 50% reduction in income or that he has suffered any reduction in income. The proof shows that as of the calendar year 1960, and maybe for some or a part of the calendar year 1961, his income from his employment was $12,000.00 a year. It shows that as of and prior to the entry of the decree of divorce, his salary was $125.00 a week, no bonuses, no dividends, no stock holdings. It also shows that between some time in August of '61 and the entry of the decree in December, he sold his stock for an ultimate purchase price of $30,000.00. The testimony shows that his salary income thus far in 1962 is $125.00 a week, exactly what it was when this divorce was granted and for some time prior thereto. He owned some lots in Springdale which he has since sold for $3,000.00. That is merely a substitution in the form of the asset, the exchange of land for money. The same is true as to his former stock ownership. It doesn't appear to me that there has been any

material change at all, either on the score of assets or time wages.

"Second, as to the remarriage: Under the proof he was married exactly 15 days after the divorce, which is of no consequence except to this extent: there is certainly no one in a proper position to criticize the fact of his right to remarry; but when he did so with the knowledge and memory of the property settlement and the decree only 15 days old in his mind, by no stretch of reasonable imagination can it be suggested that he didn't know what he was doing. He knew what his obligations were under the property settlement and the decree. These were, so far as can be determined, fully and freely and openly entered into and were mutually binding. To say now that he is in a "bind" because he has remarried and has incurred some new expenses, or at least a recurrence of former expenses that he is required to meet as a married person, and that by reason thereof he is not now able to meet the decretal obligations, is to pose the analogy of a drunk man pleading innocent to a charge of speeding because he was so drunk he did not know what he was doing, which, of course, as you know, is no defense at all.

"It's all well and good to show a change of circumstances, but when those changes are wrought by the affirmative and knowledgeable action of the person himself, then he has no standing to come into a court of equity and ask relief from the burden that he voluntarily has assumed. In the opinion of the Court, petitioner has not made a *prima facie* case, and the demurrer should be, and is, sustained. The petition is dismissed at the cost of the petitioner."

As sympathetic as we are with the problem confronting the Chancellor and his evident recollections of the divorce case so recently before him, we nevertheless conclude that the evidence offered by Mr. Pults required that it be weighed in the scales of reasonableness, and its force tested in the balances of equity and justice. We think the excellent opinion of the Chancellor clearly demonstrates that there was such a weighing and test-

ing, and such weighing and testing are not to be done in ruling on a demurrer to the evidence. The demurrer should have been overruled, so the Court could do the required weighing and testing.

It is true that Mr. Pults was drawing an annual salary of only $6,000.00 a year when the divorce decree was granted, as compared with the salary of $12,000.00 a year before the divorce suit was instituted; so Mr. Pults made no case on decreased earning capacity; but he did show expenses which he detailed amounting to $7,107.23 a year. Some of these expenses were for interest on the mortgage that he put on his house to make the property settlement with Mrs. Alice Pults; some of the expenses were for repairs and upkeep of the house. While remarriage is not in itself a sufficient change in circumstances to justify in the eyes of the law the reduction of payments by a father for the upkeep of his own children, still the remarriage, coupled with other circumstances, requires a court to weigh the facts in the scales and to test them in the balance of justice and equity. It is this "*weighing*" that is entirely absent when a chancellor sustains a written demurrer to the evidence at the close of the petitioner's case. If the Chancellor had overruled the demurrer and the respondent had introduced no evidence and the Chancellor had then on final decision reached the same conclusion, we would have affirmed the decree because there would have been a *weighing* of the evidence, which is not permitted in passing on a demurrer.

So we must reverse the decree and remand the cause for further proceedings not inconsistent with this opinion; but since this is an equity case we adjudge all the costs against the appellant.

Opinion delivered April 15, 1963.

Johnson & Johnson and *John C. Finley,* for appellant.

Bruce Bennett, Attorney General, by *Leslie Evitts,* Chief Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. The appellant was charged with first degree murder. At the first trial he pleaded guilty and was sentenced to death. We reversed that conviction for an error in the instructions to the jury. *Walton* v. *State,* 232 Ark. 86, 334 S. W. 2d 657. At the second trial, after the plea had been changed to not guilty, the appellant was again convicted and sentenced to death. We affirmed that conviction. *Walton* v. *State,* 233 Ark. 999, 350 S. W. 2d 302.

The Supreme Court of the United States, reviewing our second decision by certiorari, vacated our judgment and remanded the case for further consideration in the light of *Hamilton* v. *Alabama,* 368 U. S. 52, 7 L. Ed. 2d 114, 82 S. Ct. 157, which was decided after we had affirmed the case upon the second appeal. *Walton* v. *Arkansas,* 371 U. S. 28, 9 L. Ed. 2d 9, 83 S. Ct. 9.

In the *Hamilton* case the court reversed a capital conviction on the ground that the accused did not have the assistance of counsel at the arraignment. When the case at bar was returned to us for reconsideration the

record did not completely reflect everything that occurred at Walton's arraignment on June 22, 1959. We therefore reinvested the trial court with jurisdiction, so that the deficiency might be supplied. We now have the complete record.

The homicide occurred during the night of June 19, 1959. Walton was arrested the next morning and signed a written confession on June 21. The information, charging first degree murder, was filed on June 22. On that morning Walton was brought into the courtroom at the county seat. The court reporter's record of the proceedings recites the presence of the circuit judge, the prosecuting attorney, the circuit clerk, the accused, the sheriff, and a member of the State Police Department.

The information and the warrant of arrest were read to the accused. In reply to questions by the court Walton stated that he was not financially able to employ counsel. The court indicated that he would appoint attorneys for Walton and would not permit him to plead to the charge until he had talked with his counsel. The record then continues:

"The Court: (To Prosecuting Attorney) Do you have any questions to ask the defendant, Mr. Spencer?

"Mr. Spencer: Yes. (To defendant) Did you make a statement to the State Police at Texarkana?

"The Defendant: I made one to Mr. Thrash yesterday.

"Mr. Spencer: Is this your signature — 'Edward Walton, Jr.'?

"The Defendant: Yes, sir.

"Mr. Spencer: I want to ask you, did you make that statement freely and voluntarily?

"The Defendant: Yes, sir.

"Mr. Spencer: You weren't threatened or promised anything to make the statement, were you?

"The Defendant: No, sir, they were very nice.

"Mr. Spencer: It's your own free and voluntary statement?

"The Defendant: Yes, sir.

"Mr. Spencer: I would like to introduce it as Exhibit No. 1 to his arraignment.

"The Court: I will leave it in the custody of the court reporter, with your permission, and it will be a judicial confession. (To defendant) This is a statement you made to the officers yesterday?

"The Defendant: Yes.

"The Court: Is it a true confession—

"The Defendant: Yes, sir.

"The Court: —given of your own free will and accord?

"The Defendant: Yes, sir.

"The Court: No attempt was made to influence you to make it? They didn't beg you to make it, or promise you any reward if you would make the statement, did they?

"The Defendant: No, sir.

"The Court: It was a free and voluntary statement?

"The Defendant: Yes, sir.

"The Court: And it is a correct statement?

"The Defendant: Yes, sir."

At the second trial, now under review, the court reporter was called as a witness for the State and was permitted to read to the jury the questions and answers that we have just quoted. Counsel for the accused objected on the ground, among others, that the testimony violated the rights of the defendant under the Fourteenth Amendment to the Constitution of the United States. The specific point now before us was not argued in the original briefs, as *Hamilton* v. *Alabama* had not

yet been decided, but under our practice in capital cases a timely objection in the trial court is all that is required to preserve a point for review. *Rorie* v. *State,* 215 Ark. 282, 220 S. W. 2d 421.

We have concluded that the judgment must be reversed. In *Hamilton* v. *Alabama* the court reasoned that Hamilton was entitled to counsel at the arraignment, because under the law of Alabama substantial rights are lost if not asserted at that time. Hence the question here is whether Walton suffered the loss of a substantial right by not having an attorney at the proceeding on June 22.

This question must be answered in the affirmative. The circuit judge was careful not to permit Walton to plead to the information until he had conferred with his attorneys, but the admissions that were elicited by the prosecuting attorney may well have been as damaging as a plea of guilty. It cannot be doubted that Walton's insistence to the trial jury that his written confession had been involuntary was seriously weakened by the narrative of what happened in the courtroom on the morning of June 22. If Walton had been represented by counsel, as was his right after the case reached the courts, his attorney would certainly have warned him that he was not compelled to answer any questions with reference to the voluntary character of his confession. We are fully convinced that, in the light of the decision in *Hamilton* v. *Alabama,* the court reporter's testimony was inadmissible and prejudicial, entitling the appellant to a new trial.

Reversed.

HOLT, J., disqualified.

5-2949 366 S. W. 2d 716

Opinion delivered April 15, 1963.

Tommy H. Russell and *Ruby E. Hurley,* for appellant.

Holt, Park & Holt, for appellee.

PAUL WARD, Associate Justice. Appellant, Bettye Jo Beyer, and appellee, Eva Victoria Pope, assert rival claims to approximately $9,000 on deposit with the First Federal Savings and Loan Association of Little Rock and approximately $4,500 on deposit with the Peoples Bank and Trust Company of Van Buren. Appellant is the daughter and appellee is the widow of Elmer Pope who died March 9, 1962. Although the building and loan association and the bank were made parties, neither has any further interest in this litigation, so we will hereafter refer to the daughter and widow as appellant and appellee respectively, and we will refer to the building and loan association as association and to the Van Buren bank as bank.

The facts and circumstances leading up to this appeal are hereafter briefly set out in approximately chronological order.

For some time prior to February 14, 1961 Elmer Pope and appellee lived together as husband and wife. On said date Pope filed a suit against appellee for a divorce. At that time Pope had on deposit (in his own name) the sums previously mentioned. No steps were

taken in the suit until January 18, 1962 when a decree of divorce was entered in favor of Pope. A detailed property settlement was embodied in the decree but it has no bearing on the issues here presented.

On February 8, 1962 Pope (while in the hospital) executed a power of attorney authorizing Ruby E. Hurley to "transfer and change" the account in the association and in the bank "to read as follows: Elmer Pope and Bettye Jo Beyer (with full right of survivorship)". In a few days the said accounts were changed in substantial compliance with the terms of the power of attorney.

On February 9, 1962 the divorce decree was annulled, and five days later Pope executed a will leaving all his property to appellee. On the 19th of the same month Pope revoked the power of attorney, and promptly notified the association and the bank to change the accounts back to his name as they were originally.

George Tyler, the assistant secretary of the association, testified in substance: I have a record of Pope's account: On January 16, 1962 it was in the name of Elmer Pope; on February 9, 1962 it was changed to Elmer Pope and Mrs. Bettye Jo Beyer with right of survivorship. The account was later changed to the name of "Elmer Pope". It remained that way until Pope's death on March 9, 1962. J. J. Izard, president of the bank, testified by deposition: A savings account was opened February 1, 1961 in the sum of $9,000 in the name of Elmer Pope: A power of attorney came to me to change the account to make it "or Bettye Jo Beyer or survivor": the account was changed to read "Elmer Pope and Bettye Jo Beyer"—the amount being $4,467.77; later I received a Revocation of Power of Attorney signed by Elmer Pope, dated February 23, 1962; on February 23, 1962 I put the account back in the name of "Elmer Pope", and wrote Mr. Pope the next day that the change had been made. Appellant, who lives in Pennsylvania, received from her attorneys herein the association book and signature cards; she signed the cards and returned them and the book to the attorneys; she never signed

anything to release the money, and thought it took both signatures (her's and her father's) to release the money.

After Pope's death, appellant filed a complaint against the association and the bank to have them pay the money to her as the survivor named in the joint accounts, and to enjoin them from paying the money to anyone else. Thereupon appellee intervened, claiming the said funds as the sole beneficiary under the will of her deceased husband. The trial court entered a decree in favor of appellee, and this appeal follows.

The pivotal issue is whether, under the above set of facts, Pope had the right to change the joint accounts to his own name? Or, to state the same issue another way, did appellant have a vested interest in the joint accounts? It is our conclusion, after careful consideration of the facts and the applicable law, appellant had no vested right in the accounts and that Pope did have a right to change them back to his own name. It is not disputed that if the money belonged to Pope at his death it passed to appellee under his will.

As pertains to the funds in the association the issue here, we think, is controlled by the decision in the case of *Davis* v. *Jackson,* 232 Ark. 953, 341 S. W. 2d 762. There, Don L. Davis, a widower deposited $10,000 in a building and loan association in the name of "Don L. Davis or Patricia Jackson" (a granddaughter—appellee). Later he married appellant—Davis, and then had the association change the account to include the name of appellant instead of the name of appellee. Upon the death of Davis both parties claimed the money. The trial court held the granddaughter could recover because a joint tenancy had been created which could not be revoked at the pleasure of either party (to the account) alone. In reversing the trial court we made certain announcements which, we think, call for an affirmance of the case under consideration (as it pertains to the association account). In the cited case we held that Ark. Stats. § 67-820 (b) was applicable, and that it gave the depositor the right to change (during his lifetime) a joint account. We also called attention to *Ferrell, Ad-*

ministratrix v. *Holland,* 205 Ark. 523, 169 S. W. 2d 643, noting that a different result was reached there because the account had *not* been changed before the depositor died. Finally, in the cited case we find this conclusive statement: "Appellee takes the view that one Mrs. Jackson's name was placed on the certificate, she had a vested interest in the property. This position cannot be maintained, for the statute itself precludes such a result."

Based on the decision in the *Davis* case we must conclude therefore that appellant had no vested right in the account to which her name was added, and that Elmer Pope had the right to have the account placed back in his own name. It is apparent that the reasoning in the *Davis* case would have been the same if the word "and" instead of "or" had connected the names of the two payees.

Likewise, and for much the same reasons, we hold that the trial court was correct in awarding the bank deposit to appellee. Ark. Stats. § 67-521 reads, in pertinent part as follows:

"When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as *joint tenants,* and the same, together with all interest thereon, shall be held for the exclusive use of the person so named, and may be paid to either during the lifetime of both. . . . " (Emphasis added.)

If, therefore, Pope had the right to draw out the money in the bank (in the name of him and appellant) then it can hardly be contended he had no right to change the account back to his own name. It is not disputed that he did make such a change here during his lifetime. This question of a right to change the account did not arise in the case of *Park* v. *McClemens, Executor,* 231 Ark. 983, 334 S. W. 2d 709, relied on to some extent by appellant. In that case the depositor made no attempt, during her lifetime, to change the account to her own name.

Since, as we have above concluded, Pope had a right, during his lifetime, to change the joint accounts, it must follow that he did not irrevocably give the money (accounts) to appellant.

This is true, because it is essential to a gift *inter vivos* that the giver part with all control over the gift.

Appellant contends that the trial court erred in permitting appellee to testify to certain conversations with her husband, in violation of the so-called deadman's statute. We need not discuss this contention since, in the opinion, we have not considered any of this testimony.

Affirmed.

JOHNSON, J., dissents.

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

5-2956 366 S. W. 2d 899

Opinion delivered April 15, 1963.

[Rehearing denied May 13, 1963.]

Coleman, Gantt & Ramsay, for appellant.

George E. Pike and *House, Holmes, Butler & Jewell,* for appellee.

SAM ROBINSON, Associate Justice. The appellee, Arkansas Power & Light Company, is a corporation organized under the laws of this State for the purpose of generating, transmitting, and supplying electricity for pub-

lic use under the authority of Ark. Stats. 35-301—16. The power company filed this suit to condemn a right of way for a high voltage transmission line across lands owned by appellant, Hattie Boone Black. The Complaint was filed in the Circuit Court of Arkansas County; on defendant's motion, the cause was transferred to equity. The Complaint was filed December 16, 1959; on the same day the Court issued an order authorizing the power company to go on the land and construct the line upon the making of a bond as directed by the Court. The bond was made, the power company proceeded to construct the line, and at the time the cause was heard in Chancery Court, the line was in use.

There was a taking by the power company of a right of way 125 feet wide near the southern boundary line of appellant's property in two sections. There is a fraction over 26 acres in the right of way. The Chancellor found that the land taken for the right of way was worth $250.00 per acre, or a total of $6,632.50, and that appellant's land adjacent to the right of way was damaged in the sum of $2,123.50. A judgment was rendered for the total sum of $8,756.00 and interest.

Appellant's principal contentions on appeal are that the power company did not have the right to take the right of way, and that inadequate damages were awarded.

Appellant first argues that the trial court erred in holding that after the power company introduced its charter and the statutes were considered, the burden was on appellant to show an improper use of the power to condemn. Conceding without deciding that the trial court was in error on this point, it does not follow that the ruling was in any manner prejudicial to appellant, because the power company proceeded to introduce sufficient evidence to show that it was necessary to construct the transmission line to properly supply electricity to the public.

Appellant maintains that the preponderance of the evidence does not show that the transmission line was needed by the Arkansas Power & Light Company to serve its customers in Arkansas. The line is the main trans-

mission facility from the power company's generating plant at Helena to its Woodward Distribution Station at Pine Bluff. Appellee's entire distribution system is connected with the Woodward Station. The mere fact that the power company built at Helena a generating plant at the cost of millions of dollars, and a 230,000 kilowatt transmission line from Helena to Pine Bluff at the cost of more millions of dollars, is pretty strong evidence that the line was needed in Arkansas for Arkansas customers, and there is no substantial evidence in the record tending to prove the contrary. In addition, we quote from appellant's brief an abstract of the testimony of Mr. Carroll Walsh, chief engineer of the power company, to the effect that, in his opinion, the line was necessary: ". . . that it was necessary to add some additional generation to their system to carry the loads expected for 1961; that the generation was, as an engineering decision, located at Helena; that a part of the generation was needed in East Arkansas, but a big part of it was needed at Pine Bluff, where they had large loads and no generation plant, the nearest one being at Little Rock, so it was necessary to build a transmission line to carry a heavy block of power from the new plant at Helena to take care of the loads in the Pine Bluff area."

Appellant says that the effect of this evidence was largely destroyed by cross-examination, but we do not agree. True, it appears that on some occasions the power company sends into other states, electricity generated at Helena and transmitted over the line crossing appellant's property, but this is done pursuant to an agreement with other power companies whereby appellee is enabled to bring into this state, when the occasion demands, for the use of its Arkansas customers, electricity generated elsewhere. The effect of this arrangement is beneficial to the people of this state, as it assures a constant and sufficient supply of electricity at all times.

Appellant stoutly argues that the compensation awarded for the 26 and a fraction acres condemned and for damages to the remaining property is inadequate.

The Chancellor made a finding that the land taken for the right of way was worth $250.00 per acre, and that damages to the remaining land amounted to $2,123.50. Of course, the amount of damages sustained is a question of fact, and we will not reverse the Chancellor on a fact question unless the decree in that respect is against the preponderance of the evidence. Here, we do not feel that the Chancellor's finding of damages is against the weight of the evidence. Appellant and several of her witnesses testified that the land taken was worth more than $250.00 per acre, and she and some of her witnesses testified that all of the farm land, consisting of more than 1,200 acres, had been damaged to the extent of $50 or $60 per acre. On the other hand, several qualified witnesses appeared in behalf of the power company and testified that the land taken for the right of way was worth $250.00 per acre or less, and that there was no damage to the land outside of the right of way.

The power line crosses appellant's property within 110 to 125 feet of its southern boundary line. Appellant owns only about 13 acres south of the right of way of the power line. It appears that at the time the line was constructed, appellant had an oat crop on the property. The Chancellor made an award in the sum of $2,123.50 for damages to the land outside of the right of way. The evidence would sustain a finding that there was no damage to appellant's property north of the right of way. If $1,000.00 was allowed for damage to the oats, there remains almost $90.00 per acre for damages to the 13 acres. Moreover, appellant can continue to cultivate the 125 foot strip in the right of way, notwithstanding she has been paid the full fee value, provided, of course, that she does not interfere with the transmission facilities. She may not be able to fertilize the 13 acres as well as formerly, because now it may be difficult to use an airplane for that purpose; but even so, we do not find that the amount of damages awarded by the Chancellor is against a preponderance of the evidence.

Affirmed.

Opinion delivered April 15, 1963.

Fred A. Newth, Jr., for appellant.

Howell, Price & Worsham, for appellee.

JIM JOHNSON, Associate Justice. Appellant Bessie Mack sued her sister, appellee Sadie Cole, to set aside a deed. Appellant alleged that appellee had knowingly made false representations to her and her late husband, that they relied upon the representations and executed an absolute warranty deed conveying their home to appellee. Appellant further alleged that the parties had in fact agreed that appellant should retain a life estate in the property. At the close of appellant's testimony, the Chancellor sustained appellee's demurrer to the evidence and dismissed the complaint. An appeal was perfected by appellant and this court in *Mack* v. *Cole,* 233 Ark. 234, 343 S. W. 2d 791, held that the Chancellor had erred in sustaining the demurrer to the evidence and remanded the case for further proceedings.

Thereafter appellant amended her complaint seeking judgment for mortgage payments made by appellant, to which appellee answered that appellant had agreed to make the mortgage payments as rent for the privilege of living in the house. When the case proceeded to trial again, the parties stipulated that all of the testimony in the original proceedings should be made a part of the

record, and then introduced further testimony. Upon conclusion the court ruled in favor of appellee and dismissed appellant's complaint. This appeal ensued.

The first point urged for reversal is that the court erred in dismissing appellant's complaint. The question involved here is whether, in the light of all the evidence, appellant sustained the burden of proof to establish by clear and convincing evidence that the deed executed by appellant and her late husband was induced by fraud and misrepresentations on the part of appellee and therefore should be set aside and cancelled.

We have been favored with excellent briefs and we particularly noted appellant's fine abstract of the testimony adduced at both trials.

The following facts are generally undisputed: appellant and her late husband agreed to sell their home to appellee for $4,000 and assumption of the outstanding mortgage. They executed a warranty deed which retained a life estate and mailed the deed to appellee, which was rejected by her. Thereafter a quitclaim deed was sent which also retained a life estate, and which was also rejected by appellee. Later appellee came to Little Rock and had Beach Abstract Company prepare a warranty deed. At closing appellant and her husband executed that deed and received approximately $4,000.00. Appellant continued to live on the property, collecting rent from various tenants, and paying the mortgage payments and taxes. From there on, the testimony is in hopeless conflict. Appellant and four of her witnesses testified that appellee at one time or another stated that appellant had a life estate in the property, whereas appellee and five witnesses testified to statements of appellant diametrically opposed to her allegations.

It is well established by a host of cases rendered by this court that the quantum of proof necessary to set aside a deed 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; *Sandefer* v. *Sandefer,* 219 Ark. 943, 245 S. W. 2d 568; *Aber-*

deen Oil Co. v. *Goucher,* 235 Ark. 787, 362 S. W. 2d 20. From all the evidence adduced in this case, we on trial *de novo,* cannot say that the Chancellor, who heard and observed the witnesses, was in error in concluding that appellant failed to produce the quantum of proof required to set aside the deed.

Appellant's second point urged for reversal is that the court erred in failing to award judgment to appellant for payments she paid on the mortgage.

It is axiomatic that appellant, or any other tenant, can be forced to pay rent, or move, by an owner of rented property. In the instant case appellant's own witness, the escrow officer of the closing department of Beach Abstract Company, testified that when appellee came in to arrange the closing, she stated: "I am buying this property from my sister. I live in Chicago. She is going to continue to live there. She is going to collect the rent and all I am going to do is let her make the payments to the Guardian Company [mortgage holder]". Appellant's testimony shows that after the closing appellant did live on the property, did collect rent of about $175 per month, and did make the mortgage payments of $40.60 a month to the Guardian Company. From the testimony and the subsequent conduct of the parties, the Chancellor could reasonably find that this was the agreed rental between the parties, and no one has contended that appellant is entitled to a refund of *rent.* We find no error.

Affirmed.

SHELTON *v.* DANIEL.

5-2933 366 S. W. 2d 709

Opinion delivered April 15, 1963.

[redacted]

Hall, Purcell & Boswell, for appellant.

Fred E. Briner, for appellee.

FRANK HOLT, Associate Justice. This is an action to quiet and confirm title to one hundred and twenty (120) acres of land. The appellees are Rachel Daniel, widow of J. W. Daniel, and their adult children, Doyle Daniel, Dorman Daniel, Guinn Daniel and Clint Daniel. The appellant is Liller Mae Shelton, widow of Robert Shelton. The appellees assert in their complaint that their ownership of this farm is based upon (1) a lost and unrecorded deed made in 1920 by Robert Shelton conveying the property to J. W. Daniel and R. W. Daniel, a partnership; (2) an order of the Saline Chancery Court on September 16, 1927; and (3) that appellant's title claim is barred by laches and estoppel. Appellant filed her answer and denied the validity of each of appellees' claims. Appellant contends she is the rightful owner because (1) she is the surviving widow of the record holder of the legal title, Robert Shelton, who died intestate in 1920 and (2) she has a quitclaim deed dated in 1959 from her children

and heirs of her deceased husband. The court vested title in appellees and therefrom comes this appeal.

Thus, the evidence on these rival claims necessarily covers a span of approximately forty (40) years. For several years before Robert Shelton died intestate in 1920 he had an open account with J. W. Daniel and R. W. Daniel who owned, as a partnership, a general mercantile store. It is undisputed that Shelton owed the store an annual balance which in 1918 amounted to $229.76. Mrs. Rachel Daniel testified that Mr. Shelton gave her husband, J. W. Daniel, an instrument in 1918 or 1919 which she understood was a deed based on their various business transactions. She claimed that the instrument or deed was entrusted to her lawyer, now deceased. No such instrument or deed is recorded or found. The partnership ledger on Shelton's account reflects the following entry dated January 20, 1919: "By payment by place even." J. W. Daniel died intestate in 1926 and on September 16, 1927, the chancery court decreed a partition of the partnership property and therefrom awarded the lands in question to appellees. The appellant was not made a party to this proceeding. It is undisputed that since about 1918 J. W. Daniel, or his widow and heirs, the appellees, have paid the taxes on this property except in 1959 when appellant's daughter paid them as delinquent taxes. The appellees have never lived on the property. However, in addition to the payment of taxes for approximately forty (40) years, they have exercised other acts of ownership and control such as leasing the property to numerous tenants for farming purposes, building and maintaining fences thereon, the rebuilding of a dwelling which had burned; using the lands for pasture and raising cattle; the planting of some 2,000 pine seedling trees on two different occasions; the cutting of timber and otherwise general management of the property. The testimony of other witnesses tends to corroborate appellees.

Appellant admits that her husband, Robert Shelton, had business transactions with J. W. Daniel and, according to her and her daughter's testimony, Shelton gave Daniel a mortgage on the farm about 1919, which mort-

gage was transferred from his mules to the farm so he could sell the mules. There is no record evidence of such mortgage. Mrs. Shelton denied ever signing any instrument in favor of the Daniels. She testified she was never financially able to pay the mortgage she thought existed. There is no evidence that appellant or anyone else ever made any effort to determine from the appellees or elsewhere the existence, amount, or terms of such a mortgage. Her daughter testified that she had consulted several lawyers before 1949 about their legal rights and for the past 15 years she and other members of the family, living in close proximity, had frequently observed the farm with the belief appellees "were entitled to use it until the mortgage was paid." According to the evidence appellees' right of ownership of the land was challenged in 1959. This consisted of two acts: Appellant's daughter paid the delinquent taxes and appellant filed a quitclaim deed to the property, which deed was executed to her by the heirs of Robert Shelton, her deceased husband.

The decree recites that the court:

"* * * finds the lands in question * * * were owned by Robert Shelton and that J. W. Daniel purchased said lands from Robert Shelton on or about the year 1918. That a deed was never delivered to J. W. Daniel but that the heirs of Robert Shelton are now barred by laches and estopped from claiming any interest in said lands * * *."

Appellant urges for reversal that the doctrine of laches does not apply against those seeking to enforce legal title. We think that the recent case of *Mize* v. *Mize,* opinion dated February 11, 1963, Law Rep. No. 3, is ample authority to reject this contention of appellant. The facts in the *Mize* case are similar to the case at bar. Both of these cases were tried before the same Chancellor and similar decrees were rendered in each case. In the *Mize* case we said:

"From the facts herein enumerated, it is established that for a period of more than forty years, though he

lived within a comparatively short distance of the land, did some visiting with members of the Sheridan family, and was aware of the improvements that had been made to the premises, no action was ever taken * * * to enforce his claim to the property.''

Further, quoting from *Tatum* v. *Arkansas Lbr. Co.*, 103 Ark. 251, 146 S. W. 135:

'' 'Laches in legal significance is not mere delay, but delay that works disadvantage to another. * * * The disadvantage may come from the loss of evidence, change of title, intervention of equities, and other causes; but, when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.' ''

We think this most recent decision by this court is sufficient on which to rest our affirmance of the trial court's decree.[1]

Furthermore, in one of our earlier cases, *Walker* v. *Norton, Exec.*, 199 Ark. 593, 135 S. W. 2d 315, the subject of laches was considered. The following language is pertinent to the facts in the instant case:

''* * * the rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. * * * [Citing cases]

This court is committed to the rule that long and unreasonable delays wherein prejudice has resulted by reason of change of conditions or loss of evidence, laches may rightfully be invoked against one so neglecting his alleged rights.'' [Citing cases]

We think, also, that the appellant makes a ''stale demand'' in this case. The question of laches and stale

[1] See, also, *Neal* v. *Stuckey*, 202 Ark. 1119, 155 S. W. 2d 683; *Falls* v. *Jackson*, 208 Ark. 435, 186 S. W. 2d 787; *Mitchell* v. *Malvern Lumber Co.*, 222 Ark. 266, 258 S. W. 2d 549; and 30 C. J. S. § 112, p. 520, § 113, p. 525.

demand arose in the case of *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S. W. 2d 425. In that case a mineral claimant was omitted from a foreclosure suit in 1923 and asserted his claim in 1945. In determining what was a reasonable time in which this claimant had a right to redeem his interest this court said that, in the absence of circumstances supporting a plea of laches, the best guide for determining a reasonable time is the equitable rule of a stale demand. In defining this equitable doctrine we said that it is:

"* * * one that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length . . . as to create a presumption . . . that it has been abandoned . . . It is an inherent doctrine of jurisprudence that nothing less than conscience, good faith, or reasonable diligence can call courts of equity into activity, and they will not grant aid to a litigant who has negligently slept on his rights and suffered his demand to become stale, where injustice would be done by granting the relief asked."

Also, we think the facts in the case at bar support the presumption of a lost grant. In *Carter* v. *Goodson,* 114 Ark. 62, 169 S. W. 806, the plaintiff brought an action in 1914 to eject from the land the defendant who had exercised acts of ownership and possession for approximately 45 years. On the question of the existence of a lost deed the court, as authority for applying the doctrine of a lost grant, quoted with approval this language:

"When possession and use are long continued they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed

of conveyance, to which the occupant of the land is entitled, or may lead to its loss after being executed. * * *

The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect. * * * the reason for attaching such weight to a possession of this character is the notoriety it gives to the claim of the occupant; and, in countries where land is generally occupied or cultivated, it is the most effective mode of asserting ownership."

Also, see, 2 C.J.S., Presumption of Lost Grant, § 231, p. 873.

In the case at bar the appellant has permitted her claim to rest dormant for approximately forty (40) years while living in reasonable proximity to the lands in question and being fully aware of the long and consistent dominion and control of the lands by the appellees. We think the facts in this case support the Chancellor's decree.

The decree is affirmed.

Supplemental opinion on rehearing
delivered April 15, 1963.

GEORGE ROSE SMITH, J., on rehearing. Each side has filed a petition for rehearing. We shall first consider the appellees' petition.

In seeking a reconsideration the majority faction makes two principal contentions. First, it is insisted that our reference to the differences between the congregational form of church government and other forms of church government implies that a congregational church is subject to judicial control in property matters, while other churches are not.

This is not the case at all. It is unquestionably the duty of the courts to decide legal questions involving the ownership and control of church property regardless of the form of ecclesiastical government that may be in effect. A dispute arising in a congregational church, however, may reach the courts more rapidly than a sim-

ilar dispute under another form of church government, for there is no possibility of an appeal to higher authority within the denomination.

When recourse is provided within the denomination itself, the complaining parties must avail themselves of that remedy before resorting to the courts. *Sanders* v. *Baggerly*, 96 Ark. 117, 135, 131 S. W. 49. Yet in many instances, especially when the controversy is between a local church and the parent organization, the dispute, as far as it concerns property rights, is ultimately determined by the civil courts. For example, an individual church is free to secede from the denomination if it elects to do so, but it cannot take the church property with it where the effect of that action would be to devote the property to doctrines fundamentally different from those to which the property was dedicated. *Trustees of Pencader Presbyterian Church* v. *Gibson,* 26 Del. Ch. 375, 22 Atl. 2d 782; *Presbytery of Bismarck* v. *Allen,* 74 N. D. 400, 22 N. W. 2d 625. Conversely, if it is the parent organization that has departed from the basic articles of faith, as by an unauthorized merger with another denomination, the local church has a right not only to secede but also to retain its property. *Boyles* v. *Roberts,* 222 Mo. 613, 121 S. W. 805. Thus the differences in the form of church government do affect the procedure by which a property dispute may reach the courts, but there is no discrimination in the rules that are to be applied when the case is eventually submitted for judicial decision.

Secondly, the majority faction presents this argument: "The court usurped a function of the local church in deciding that certain doctrines were fundamental because differences among the members thereto resulted in a split in the church. In a congregational church, no authority has the power to determine what doctrines are fundamental to that church. This authority to determine doctrine is solely a matter for the church to decide by vote of the membership."

On the spiritual side the appellees' position is undoubtedly well taken. The majority group are, as we

stated in our original opinion, completely at liberty to adopt any religious beliefs they choose and to engage a pastor who will preach the doctrines of their choice. For a court to restrict the exercise of such spiritual rights would clearly involve an inadmissible invasion of religious freedom.

But on the temporal side the appellees are wrong. Here the issue is one of property—nothing more. If the majority prevail in this case they will be entitled to remain in control of the physical church property at Traskwood, while the minority will of necessity have to find another place in which to hold their services. If the minority prevail those two roles will be reversed. Thus, stripped of nonessentials, what the majority are contending for in this litigation is not freedom of religious belief but simply the right to enjoy the possession and the use of tangible church property.

That property, however, was acquired by the church through the contributions and sacrifices of many members, past and present, throughout the sixty years that the Traskwood church has existed. The property was dedicated for use as a Landmark Missionary Baptist church. Even though each Landmark Missionary Baptist church is a self-governing unit, the evidence clearly shows that the Landmark Missionary Baptists are a denomination adhering to certain doctrines that are regarded, and have for many years been regarded, as fundamental. It was to the perpetuation of those doctrines that the property now in question was dedicated by those whose efforts brought about its acquisition.

In this situation the majority faction cannot divert the property to beliefs that radically depart from the purposes to which the property was originally dedicated. A fair statement of the general rule appears in *Reid* v. *Johnston,* 241 N. C. 201, 85 S. E. 2d 114: "While it is true that the North Rocky Mount Missionary Baptist Church is a self-governing unit, a majority of its membership is supreme and is entitled to control its church property only so long as the majority remains true to the fundamental faith, usages, customs, and practices

of this particular church, as accepted by both factions before the dispute arose . . .

"A majority of the membership of the North Rocky Mount Missionary Baptist Church may not, as against a faithful minority, divert the property of that church to another denomination, or to the support of doctrines, usages, customs and practices radically and fundamentally opposed to the characteristic doctrines, usages, customs and practices of that particular church, recognized and accepted by both factions before the dissension, for in such an event the real identity of the church is no longer lodged with the majority group, but resides with the minority adhering to its fundamental faith, usages, customs and practices, before the dissension, who, though small in numbers, are entitled to hold and control the entire property of the church."

The uncompromising position of these appellees—that as the majority group they are absolutely free to divert the church property to any purpose they choose—was stated and answered in an opinion that has become a classic case in this field of the law: "After the majority has recognized itself a party to a controversy that should be settled in the interest of peace and harmony, the claim that it should itself sit in judgment to determine that controversy is somewhat novel. The minority lay at the door of the majority the charge of heresy. The majority say: 'We constitute the church. All power is vested in the church, and hence in us. We determine that the charge is false.' This is the precise claim made by appellees as to the power of a majority, and it is the precise action taken by appellees as a majority in Mt. Zion Baptist Church . . . In view of this, the claim of the majority that 'if it desires to change to a Mormon church it may do so, and no person or persons, no man or body of men, either civil or ecclesiastical, has any right or power to interfere,' is not strange. The position leads to this: Consider the majority of a particular Baptist church as guilty of the grossest violations of and the wildest departure from the church covenants and faith. Being accused by the minority, the accused sit in judg-

ment, which it declares in its favor, and then pleads the judgment it declares as conclusive of its innocence, because no other man or body of men has authority to interfere. However such a rule may serve in purely ecclesiastical relations, we unhesitatingly say the civil law will not adhere to it where the result is to divert trust property from its proper channel." *Mt. Zion Baptist Church* v. *Whitmore,* 83 Iowa 138, 49 N. W. 81, 13 L.R.A. 198.

The principles announced by the Iowa court are so demonstrably logical, so plainly fair and just, so completely unanswerable, that it is not surprising to find that they have been adopted in 27 of the 28 states in which the question now before us appears to have been considered. In most of the cases cited in the appendix to this opinion the courts granted the relief sought, restoring the faithful minority to the control of the church property. In many of the cases the pastor, who was ordinarily selected by the majority, was also enjoined from using the church property. It is true, of course, that in nearly every instance the court was compelled to determine a delicate issue in a religious controversy—whether there had been such a departure from the original articles of belief as to require the intervention of equity. But, in view of the controlling rule of law, that question becomes an issue of fact governing property rights, and consequently it becomes the duty of the court to decide the question, not as an ecclesiastical determination but as a temporal and judicial issue upon which property rights depend.

(For the benefit of those students of the law who may be inclined to study the authorities in detail, we are citing in an appendix to this opinion one case from each of the 27 jurisdictions which have unequivocally adopted what is overwhelmingly the majority view throughout the United States, with only Texas taking the contrary position.)

The appellees' petition for rehearing is denied.

The appellants insist in their petition that in merely restraining Elder Dovers from using the church property

we did not grant the minority the full relief to which they are entitled by law. Upon further consideration we are of the opinion that this contention is correct. We had hoped to promote unity in the church, but it is evident that our proposed solution to the controversy would not achieve that end. We have no doubt that the members of the majority group are wholly sincere in their adherence to the views expressed by Elder Dovers. That being true, it follows that the majority faction could not conscientiously devote the church property to beliefs conforming to the faith, usages, customs, and practices of this church, as they existed before this schism arose. Thus the dispute is certain to recur in the same form as long as the majority faction is in control of the church property.

The appellants' petition for rehearing is granted, and the cause is remanded for the entry of a decree placing the appellants in possession of the church property.

APPENDIX

Jurisdictions holding that in a controversy such as this one the courts will enjoin the majority faction from devoting the church property to purposes constituting a fundamental departure from the traditional faith, customs, usages, and practices of the church:

Alabama: *Guin* v. *Johnson,* 230 Ala. 427, 161 So. 810.

California: *Baker* v. *Ducker,* 79 Calif. 365, 21 P. 764.

Colorado: *Baptist City Mission Society* v. *People's Tabernacle Congregational Church,* 64 Colo. 574, 174 P. 1118, 8 A.L.R. 102.

Connecticut: *McAuliffe* v. *Russian Greek Catholic Church,* 130 Conn. 521, 36 Atl. 2d 53.

Delaware: *Trustees of Pencader Presbyterian Church* v. *Gibson,* 26 Del. Ch. 375, 22 Atl. 2d 782.

Georgia: *Chatfield* v. *Dennington,* 206 Ga. 762, 58 S. E. 2d 842.

Illinois: *Stallings* v. *Finney,* 287 Ill. 145, 122 N. E. 369.

Indiana: *Smith* v. *Pedigo,* 145 Ind. 361, 33 N. E. 777, 19 L.R.A. 433.

Iowa: *Mt. Zion Baptist Church* v. *Whitmore,* 83 Iowa 138, 49 N. W. 81, 13 L.R.A. 198.

Kansas: *Huber* v. *Thorn,* 189 Kan. 631, 371 P. 2d 143.

Kentucky: *Parker* v. *Harper,* 295 Ky. 686, 175 S. W. 2d 361.

Michigan: *Davis* v. *Scher,* 356 Mich. 291, 97 N. W. 2d 137.

Minnesota: *Lindstrom* v. *Tell,* 131 Minn. 203, 154 N. W. 969.

Mississippi: *Linton* v. *Flowers,* 230 Miss. 838, 94 So. 2d 615.

Missouri: *Boyles* v. *Roberts,* 222 Mo. 613, 121 S. W. 805.

New Hampshire: *Hale* v. *Everett,* 53 N. H. 9, 16 Am. Rep. 82.

New Jersey: *Grupe* v. *Rudisill,* 101 N.J. Eq. 145, 136 Atl. 911.

New York: *Saint Nicholas Ukrainian Orthodox Church* v. *St. Nicholas Ruthenian (Ukrainian) Greek Catholic Church,* 157 N.Y.S. 2d 586.

North Carolina: *Reid* v. *Johnston,* 241 N. C. 201, 85 S. E. 2d 114.

North Dakota: *Presbytery of Bismarck* v. *Allen,* 74 N. D. 400, 22 N. W. 2d 625.

Ohio: *Kemp* v. *Lentz,* 46 Ohio Law Abs. 28, 68 N. E. 2d 339.

Pennsylvania: *Church of God* v. *Church of God,* 355 Pa. 478, 50 Atl. 2d 357.

South Carolina: *Middleton* v. *Ellison,* 95 S. C. 158, 78 S. E. 739.

Tennessee: *Beard* v. *Francis,* 43 Tenn. App. 513, 309 S. W. 2d 788.

Virginia: *Finley* v. *Brent,* 87 Va. 103, 12 S. E. 228.

West Virginia: *Canterbury* v. *Canterbury,* 143 W. Va. 165, 100 S. E. 2d 565.

Wisconsin: *Franke* v. *Mann,* 106 Wis. 118, 81 N. W. 1014.

Contra. Texas: *First Baptist Church of Paris* v. *Fort,* 93 Tex. 215, 54 S. W. 892, 49 L.R.A. 617.

(Original opinion delivered March 4, 1963, p. 211.)

CARLETON HARRIS, C. J., concurs.

ED. F. MCFADDIN, J., dissents.

CARLETON HARRIS, Chief Justice (concurring). There has been a great deal of confusion and misunderstanding as to the position taken by this court, and I desire to take this opportunity to comment upon these aspects of the case wherein the greatest amount of misunderstanding seems to have arisen.

First, the question of separation of church and state is not involved in this litigation. This court is not concerned with the beliefs of any individual; no one is being told to accept any particular doctrine; no one is advised that one doctrine is preferable to another; Elder Dovers and his followers may expound their beliefs next door to the present building, across the street from the present building, or, as far as we are concerned, at any place in the world—*except in the property involved in this litigation, which was dedicated to another purpose.* This brings me to the second point of misunderstanding.

As a Baptist, I am, of course, well aware that an individual Baptist church is entirely independent and autonomous, and its affairs cannot be directed by the denominational organization. I should like to call attention to the fact that, while the tenets and beliefs of Landmark Missionary Baptist in general were radically departed from by the interpretations and preaching of Elder Dovers, the articles of faith *under which this particular church was operating* were likewise violated.

The third point of misunderstanding is possibly the one that I desire most to comment upon. It has been suggested that in granting the relief sought by appellants, this court has set a precedent, *i.e.,* we have rendered a

holding heretofore unknown to the law, and not found in judicial annals. This assertion is completely and totally erroneous. The majority has pointed out that 27 states have held what this court is holding today, with only one state taking a contrary position. A case is cited in the appendix from each of those 27 jurisdictions; actually, several cases of like import appear in the Reports of each of these states, and in some states numerous cases are cited to the same effect. Most of the cases involve one or another of the various groups of the Baptist faith, though I have read cases that relate to several other denominations that also operate as congregational type churches.

Without endeavoring to determine definitely when the first holding was rendered to this effect, I can say that cases, holding the view herein expressed, have been declared the law as early as 1868. *Hale* v. *Everett,* 16 AM Rep. 82.

The most recent case that I am aware of is *Huber* v. *Thorn,* 371 P. 2d 143. This case was decided less than a year ago (May 5, 1962, with rehearing denied on June 22, 1962) by the Supreme Court of Kansas. The litigation involved the largest Baptist church in Kansas, the First Baptist Church of Wichita. According to the opinion, written by Justice Jackson, the property was worth approximately two million dollars above existing indebtedness. After giving a brief historical review of the Baptist church in this country from the time of Roger Williams, and recognizing "that one of the firm principles of the Baptist church has been that each church was its own master and might run its own affairs as an autonomous church," the court proceeded to discuss the schism that had arisen in the congregation. Though a majority had voted on two occasions (once by a vote of 1,174 to 235, and subsequently by a ratio of 2½ to 1) to take certain action, the Supreme Court found that the vote by the majority violated the tenets, rules and practices of the church, and directed the trial court to issue an injunction against the majority, as sought by the minority. *Reid* v. *Johnston,* 85 S. E. 2d 114, one of several cases from North Carolina, a rather well known case, is cited, and quoted from, in the

present majority opinion. This case was decided a little over eight years ago.[1]

Not only is the overwhelming weight of authority in support of the position here taken, but the language of our own cases is likewise in complete accord. While we have had no cases involving the use of church property, where the evidence established that the majority had departed from basic doctrines and tenets, there is certainly no question in my mind as to the action this court would have taken had that issue been presented and sustained. I should like to briefly discuss our Arkansas cases where Baptist churches were involved.[2] First, however, let it be pointed out that all of the cases (wherein property rights were at issue) hold that a court has jurisdiction to settle property disputes in a congregational church. Reference will be made to this in discussing the opinions.

Chambers v. *Jones, Chairman,* 222 Ark. 596, 262 S. W. 2d 285, involved simply the question of whether a pastor was legally discharged. *Rush* v. *Yancey,* 233 Ark. 883, 349 S. W. 2d 337, related to the question of whether a pastor was properly discharged and, further, whether a certain meeting, at which some members were excluded, was a legal meeting. No question of departure from doctrine was raised in either case. In *Hatchett, et al,* v. *Mt. Pleasant Baptist Church, et al,* 46 Ark. 291, a majority of the members of the church discharged the pastor because of disorderly conduct, but he endeavored to continue to preach. Again, no question of deviation from basic church tenets or doctrine was at issue. This court, in upholding the trial court, which had enjoined Hatchett from acting as pastor, said, "In a congregational church, the majority, *if they adhere to the organ-*

[1] The North Carolina Supreme Court, in its judgment, stated concisely the general rule: "That the true congregation of the North Rocky Mount Missionary Baptist Church consists of the plaintiffs and all other members of the congregation who adhere and submit to the characteristic doctrines, usages, customs and practices of this particular church, recognized and accepted by both factions of the congregation before the dissension between them arose."

[2] *Rush* v. *Yancey,* 233 Ark. 883, 349 S. W. 2d 337; *Chambers* v. *Jones, Chairman,* 222 Ark. 296, 262 S. W. 2d 285; *Ables* v. *Garner,* 220 Ark. 211, 246 S. W. 2d 732; *Monk* v. *Little,* 122 Ark. 7, 182 S. W. 511; *Hatchett* v. *Mt. Pleasant Baptist Church,* 46 Ark. 291; *Booker* v. *Smith,* 214 Ark. 102, 214 S. W. 2d 513.

ization and to the doctrines,[3] represent the church." In *Monk* v. *Little,* 122 Ark. 7, 182 S. W. 511, a dispute arose in the Little Flock Primitive Baptist Church. Here, two factions disagreed as to who should serve as pastor, but no question of departure from basic doctrine was presented to this court, the contentions relating entirely to two questions, *viz.,* whether the petition of an excluded member for restoration to the church should have been granted,[4] and whether the two factions had agreed to abide by the decision of a council of ministers which had heard the case. Both sides, of course, wanted to use the church property. This court, in its opinion, set forth the two principles of law which are likewise present in the instant litigation. Quoting from that case:

"(1) In the case before us, *property rights are involved, and the court properly assumed jurisdiction of the case.*[5a]

(2) In the case of *Hatchett, et al,* v. *Mount Pleasant Baptist Church, et al,* 46 Ark. 291, the court expressly held that in a congregational church the majority, *if they have adhered to the organization and to the doctrines of the church,*[5b] represent the church."

In *Ables* v. *Garner,* 220 Ark. 211, 246 S. W. 2d 732, a Landmark Missionary Baptist Church case, the trial court held that conduct of the church, "such as the designation of messengers as observers and their attendance when the North (American Baptist) Association convened, and conduct of the church in purchasing or in not purchasing particular literature, — these were not such departures from the faith entertained by the acting body as to justify civil interference with property rights." The trial court found that essential tenets had not been impaired and this court, on appeal, in an opinion by the late Chief Justice Griffin Smith, said,

"We are unable to say that these findings were contrary to preponderating evidence. Our cases hold that

[3] Emphasis supplied.

[4] The original vote on the hiring of the pastor was a tie, and the vote of the excluded member, had he been restored to membership, apparently would have broken the tie.

[5] a. and b. Emphasis supplied.

in a congregational church the majority, acting as local church rules provide, represents the organization *unless there is a departure from essential doctrines.*"[6a]

Further in the opinion, this court refers to the case of *Booker* v. *Smith,* 214 Ark. 102, 214 S. W. 2d 513, and states,

"It was said that the rights of different factions forming a religious body under the congregational form of church government are to be determined by the membership and that a majority controls. This statement, of course, assumes that the vote has been cast according to established rules. *It also presupposes that from a doctrinal standpoint there has not been such an abrupt departure from congregational principles as to discredit the prevailing group as a matter of law.*"[6b]

Booker v. *Smith, supra,* involved the Antioch Baptist Church in Bradley County, Arkansas. The Antioch church was organized prior to 1866. In 1868, a tract of one acre was conveyed to three named persons as "deacons of the Baptist church in trust for a place of religious worship." From the opinion:

"From the evidence in the record, the following facts appear: In 1902, there arose a dispute among some of the Baptist churches in Arkansas as to the handling of money for mission purposes. One group to the dispute was called "Convention Baptists," and the other group was called "Landmark Baptists." This appears as a statement vouched for by a witness: " 'In 1902, a division came among Arkansas Baptists and the Landmark body was organized.' " The same witness said of the Antioch Church: 'Q. You testified that it could not have been a Landmark Church before 1902, because the Landmark Church was not organized before 1902? A. The Landmark Association was not.' "[7]

According to the opinion, the dispute between the two groups within the Antioch Church came to the surface

[6] a. and b. Emphasis supplied.

[7] This information was evidently placed in the opinion as a matter of showing that the Landmark Baptists could not have been the intended recipients of the property since this group was not in existence at the time the deed was obtained.

in 1924. At a regular meeting a vote was taken to determine whether the church would adhere to the Convention Baptists or to the Landmark Baptists, and the vote was 31 to 14 for the Convention Baptists. Thereafter, a settlement was effectuated whereby the Landmark Baptists were allowed to use the church building the first and third Sundays of each month, since the Convention Baptists held services only on the second and fourth Sundays. The testimony reflected that members of the two groups would attend the other's church services; however, after 20 years of this joint use of the building, litigation developed which eventually made its way to this court, the case being decided in November, 1948. We said:

"Appellants here are the representatives of the Convention Baptist group, and they claim full control of all the church property subject only to the use agreement made in 1924. Appellees are the representatives of the Landmark Baptist group, and are seeking either to sustain the decree of the chancery court or—by cross appeal—to obtain an election to determine the present numerical strength of the two groups. *It is admitted that both the Convention group and the Landmark group at Antioch have remained true to the Faith and Doctrines of the Baptist church.*[8]

"The only reason for judicial intervention is the settlement of the property rights claimed by the rival groups."

This court held that the matter was settled by the 1924 election, but certainly the question of deviation from basic doctrine was not involved, since, as shown by the opinion (here quoted), both groups were admittedly true to Baptist doctrine. Furthermore, the trust was originally created for "Baptists" and, as shown by the opinion, the Landmark group was not in existence at the time of the execution of the deed.

To me, it is apparent, from this review of our own decisions, that the rule, upon which the present case is decided, was recognized by this court many years ago.

[8] Emphasis supplied.

Actually, in nearly 15 years on the bench, I cannot recall any issue where there is more unanimity of opinion by state courts than on the question here presented.

It has been said that a Baptist church is the "purest democracy in the world," which is also to say that majority rule is a recognized principle of that denomination. But like other great principles, legal and constitutional, there is a limitation. For instance, we recognize that every adult citizen of Arkansas is entitled to vote in every election—but only if he holds a proper poll tax receipt! The Constitution of these United States and the Constitution of the State of Arkansas guarantee freedom of speech—but this does not mean that one can slander his neighbor with impunity! Both documents likewise guarantee freedom of the press—but this does not give license to libel! Yes—in a Baptist church, "the majority rule"—but with the limitation that property, dedicated to specific doctrines and tenets, cannot be appropriated by a majority from a faithful minority, and used for the promotion of alien beliefs or dogma!

Accordingly, I am of the view that the property dedicated to the doctrines, usages, customs and practices of the Traskwood Landmark Missionary Baptist Church, *as set forth in the articles of faith and abstract of faith under which the Traskwood church was operating,* cannot be diverted to the use of those whose doctrines and usages are contrary to such articles and abstract of faith, and who would thus use the property contrary to the purpose for which it came into being.

Ed. F. McFaddin, Associate Justice (dissenting). On rehearing there is a supplemental opinion and a concurring opinion. In accordance with the views expressed in my original dissent, I would grant the appellees' petition for rehearing and affirm the decree of the Chancery Court. The more I study this case, the more thoroughly I am convinced of the correctness of the views stated in my original dissent; and I register this present dissent so that no one will think I have weakened in my position.

5-2974 366 S. W. 2d 897

Opinion delivered April 22, 1963.

[redacted]

Caldwell T. Bennett and *W. E. Billingsley,* for appellant.

Murphy & Arnold, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from the Probate Court of Independence County, Arkansas, wherein a claim filed by appellant, Ray C. Chamberlain, against the estate of Claude C. Crawford, deceased, was disallowed because it was not filed within the statutory period.[1]

Claude Crawford departed this life in Memphis, Tennessee, about June 10, 1961, and his Last Will and Testament was admitted to probate in Shelby County, Tennessee, on June 15. On August 18, 1961, a petition was filed in the Independence County Probate Court, seeking ancillary administration for certain property located in that county.

Pat Crawford, a brother of the deceased, and executor under the will admitted in Shelby County, was named personal representative for the ancillary administration on August 26, 1961. Thereafter, on September 1, 1961, the personal representative caused to be published the

[1] The court never did reach the merits of the claim.

"Notice to Creditors," notifying all creditors to exhibit their claims within six months from the first date of publication, or be forever barred. On September 26, the several heirs of Claude C. Crawford filed an "Entry of Appearance and Waiver of Notice." On March 15, 1962, appellant filed his claim against the estate of Claude C. Crawford, which the court disallowed, the court finding "that the claim of Ray C. Chamberlain be disallowed as not being filed within the six months period allowed for claims against the estate after publication of notice to the creditors." From such order, comes this appeal.

The appeal is predicated on the fact that the several entries of appearance and waivers of notice by the heirs of the testator were not filed until September 26, 1961, and appellant contends that the notice to creditors could not have been legally published until after the entries of appearance and waivers of notice had been filed. He thus asserts that his claim was filed within proper time; in other words, that the six months statute did not commence to run until September 26.

We do not agree with this contention. At the outset, it will be noted that appellant is not complaining of lack of notice to himself, but rather is complaining of an alleged lack of notice to the heirs. Of course, if the heirs had felt aggrieved at any action taken, or were of the view that some right had been denied them because no notice was given, theirs was the prerogative (under certain circumstances) to complain, but that question is not here presented. In fact, the heirs filed no demand for notice, and, as herein stated, subsequently entered their appearance and waived notice. Section 62-2107, Ark. Stats., provides:

"If an interested person desires to be notified before a will is admitted to probate or before a general personal representative is appointed, he may file with the clerk a demand for notice. A demand for notice is not effective unless it contains a statement of the interest of the person filing it, and his address or that of his attorney. After filing same, no will shall be admitted to probate and no personal representative shall be appointed other than a

special administrator until the notice provided in Section 49 (Sec. 62-2110) has been given."

Section 62-2109 further provides:

"Upon filing the petition for probate or for the appointment of a general personal representative, if no demand for notice has been filed as provided in Section 46 (Sec. 62-2107), and if such petition is not opposed by an interested person, the court may, in its discretion, hear it forthwith or at such time and place as it may direct, without requiring notice."

Still further, from Section 62-2111:

"Promptly after the letters have been granted on the estate of a deceased person, the personal representative shall cause to be published a notice of his appointment, stating the date thereof, and requiring all persons having claims against the estate to exhibit them properly verified to him, within six months from the date of the first publication of the notice, or they shall be forever barred and precluded from any benefit in such estate. * * * "

The remaining statute, applicable to this litigation, is Section 62-2601.[2] We think this claim was clearly barred under either § 62-2111 or § 62-2601.

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[2] Pertinent portions of Section 62-2601, are as follows:

a. STATUTE OF NONCLAIM. Except as provided in Sections 111 [§ 62-2602] and 119 [§ 62-2610], all claims against a decedent's estate, other than expenses of administration and claims of the United States which, under valid laws of the United States, are not barrable by a statute of nonclaim, but including claims of a state or territory of the United States, and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred as against the estate, the personal representative, the heirs and devisees of the decedent, unless verified and presented to the personal representative or filed with the court within six months after the date of the first publication of notice to creditors.

b. STATUTES OF LIMITATION. No claim shall be allowed which was barred by any statute of limitation at the time of the decedent's death.

c. WHEN STATUTE OF NONCLAIM NOT AFFECTED BY STATUTES OF LIMITATION. No claim shall be barred by the statutes of limitation which was not barred thereby at the time of the decedent's death, if the claim shall be presented to the personal representative or filed with the court within six months after the date of the first publication of notice to creditors. * * * *

In *Wolfe* v. *Herndon,* 234 Ark. 543, 353 S. W. 2d 540, we said:

"In analyzing the statutes our starting point must be § 100 of the Probate Code, which sweepingly declares that, except in two instances, all claims against a decedent's estate, 'whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise,' shall be forever barred unless presented to the personal representative or filed in court within six months after the first publication of the notice to creditors. Ark. Stats., § 62-2601. This language unmistakably expresses the legislative intention to require the assertion of all claims, including those sounding in tort, within the six-month period."

Further:

"McAllen Wolfe complains that his guardian *ad litem* was not appointed in strict compliance with the statute. This is immaterial. The question is whether his claim against the Jacobs estate has been presented within the time allowed by law. * * * In the absence of a savings clause it was incumbent upon McAllen to present his claim in compliance with the statute. The asserted procedural irregularity could not affect his affirmative duty of establishing his claim according to law."

Since the record reflects that statutory requirements were followed by the personal representative, and that appellant's claim was filed more than six months after the first publication of notice to creditors, it follows that the claim was properly disallowed.

Affirmed.

5-2988 366 S. W. 2d 894

Opinion delivered April 22, 1963.

[redacted]

John L. Anderson, for appellant.

George K. Cracraft, Jr., for appellee.

ED. F. MCFADDIN, Associate Justice. The posed question is the validity of a gift *inter vivos.* The appellants and appellees together constitute all the heirs at law of R. E. Corder, who died intestate on November 27, 1960, possessed of considerable realty. His estate has been administered and the heirs desire to partition the property. The only issue on this appeal is the validity and effect to be given an instrument executed by R. E. Corder to the appellee, Monte E. Corder.

In December 1952 R. E. Corder was the owner of the store building in Helena, Arkansas, described as 416 York Street, and Monte E. Corder was operating the Corder Furniture Store in said building. On December 16th Mr. R. E. Corder executed the following instrument:

"In consideration of the affection that I have for my nephew, I, R. E. Corder, give to my said nephew, Monte E. Corder, the right to occupy a store building located at 416 York Street, Helena, Arkansas, where he

now operates the Corder Furniture Company free of rental charges so long as he desires to continue said operation. /s/ R. E. Corder."

This instrument was duly acknowledged and placed of record in Phillips County, Arkansas, by R. E. Corder, and delivered by him to Monte E. Corder, who has continued at all times from December 16, 1952 to the present to operate the Corder Furniture Store at 416 York Street, and has paid no rent to anyone for such use.

The appellants, as plaintiffs, filed this suit, praying that the said instrument be declared null and void and that the property be sold free of any claims of Monte E. Corder under said instrument. The appellees claim the instrument to be valid. The Chancery decree was in favor of the validity of the instrument;[1] and on this appeal the

[1] The Chancellor rendered a written opinion, which we copy:

"It is my understanding that at this stage of the litigation between the parties to this action the Chancellor is requested to make a determination only of the legal effect of the certain written instrument dated December 16th, 1952, executed by R. E. Corder, by which he gave or undertook to give to his nephew, Monte Corder, the right to occupy a store building located at 416 York Street in Helena, Arkansas, where he at this time operated the Corder Furniture Company free of rental as long as he desires to continue said operation. The instrument was executed by R. E. Corder, acknowledged in proper form and placed of record in the Recorder's Office which indicates delivery. As the stipulation seems to indicate possession and occupancy has been exercised by Monte Corder for nearly ten years since the date of the instrument. The question for decision seems to be to determine if Monte Corder has the right to continue to occupy the building free of rent as against the heirs and next of kin of R. E. Corder, deceased. The record seems to indicate that R. E. Corder died intestate and there was no testamentary provision with reference to this property or any of his other assets . . .

"I do not term this instrument as a lease agreement as between the parties making it but rather the donation or gift of a property right by an uncle to his nephew. The intentions of R. E. Corder as reflected by the writing appear to be definite and certain and I do not find any legal preclusion which would negate such a conveyance. While the instrument is not drawn as a good lawyer would have drawn it, the writing is clear and unambiguous though the term 'as long as he desires to continue said operation' could have been couched in more certain terms. I think it is manifest that R. E. Corder intended for Monte E. Corder to occupy the premises for so long a time as he operated the furniture company in the location, and he should be permitted to continue his occupancy free of rent until he ceases to use the building for that purpose. Of course there would be no title in Monte Corder under the instrument and the rights he acquires by reason of it would terminate upon his death. The grant under the instrument could not be enlarged to include any other property or buildings other than at 416 York Street, Helena, Arkansas."

appellants urge two points, which we now list and then consider together in deciding this case:

"I. The instrument in question does not meet the requirements of a gift '*inter vivos*'.

"II. The instrument in question does not meet the requirements of a lease agreement and is void for uncertainty."

The intention of R. E. Corder is clear; but the appellants insist that such intention was not accomplished in compliance with legal requirements. We agree with the Chancery decree that the instrument is valid. It was a completed gift *inter vivos* and conveyed to Monte E. Corder a right in the property analogous to a widow's right of homestead. To make a valid gift *inter vivos*: (a) the donor at the time must have been of sound mind; (b) must have actually delivered the subject matter of the gift to the donee; (c) by such act must have intended to pass title thereto to the donee to take effect immediately; and (d) the donee must have actually accepted it as a gift. These are the requirements specifically stated in *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030, and recognized in the authorities generally (24 Am. Jur. p. 738 *et seq.,* "Gifts" § 20 *et seq.*).

(a) That the donor, R. E. Corder, was of sound mind has not been questioned in this case. (b) That R. E. Corder actually delivered the subject matter of the gift to Monte E. Corder is clearly established, because Monte E. Corder was in possession of the property and the instrument was delivered and placed of record. 24 Am. Jur. p. 749, "Gifts" § 32 *et seq.*; 28 C. J. p. 637, "Gifts," § 26; 38 C.J.S. p. 802, "Gifts" § 22; Annotations in 63 A.L.R. 545 and 48 A.L.R. 2d 1409. (c) That R. E. Corder intended to pass to the donee the title of the gift (*i.e.,* the free use of the property for the limited time) is established by the fact that R. E. Corder continued to live from 1952 to 1960 and saw his donee occupy the property, rent free, during all such period of time. (d) That the donee, Monte E. Corder, accepted the gift is established by the fact that he has continued at all times in possession of the property, rent free. A gift *inter vivos* may be of

any kind of property, *i.e.,* real, personal, or mixed. 24 Am. Jur. p. 763 *et seq.,* "Gifts" § 66 *et seq.;* 38 C.J.S. p. 808, "Gifts" § 30 *et seq.*

The appellants insist that the gift was *conditional,* since the free use of the building was to be for only so long as Monte E. Corder operated a furniture store therein. We hold the gift was absolutely unconditional. It was beyond the power of the donor, R. E. Corder, to make a termination of the gift after the delivery. The fact that when the gift should expire by its terms there would be a reversion to the estate of R. E. Corder did not and does not keep the gift from being unconditional. The reverter did not make the gift conditional: it showed the termination of the right of Monte E. Corder. The fact that on December 16, 1952, R. E. Corder did not know for how long such use would continue did not make the gift conditional or defeasible or uncertain.

The appellants insist that the instrument did not create a valid estate; and that at most it was an estate at sufferance and therefore could be terminated by either party. We do not agree with appellants' contention. As we have said, the right of Monte E. Corder to use the store building at 416 York Street is analogous in many respects to the homestead right of a widow under Art. 9, § 6 of our Constitution. She has a homestead right for her life, subject to abandonment. *Garibaldi* v. *Jones,* 48 Ark. 230, 1 S. W. 149; *Neeley* v. *Martin,* 126 Ark. 1, 189 S. W. 182; *Van Pelt* v. *Johnson,* 212 Ark. 398, 259 S. W. 2d 519. In the case at bar, Monte E. Corder had the personal right to use the store building for a furniture store, subject to abandonment.

Finding no error, the decree of the Chancery Court is affirmed.

Opinion delivered April 22, 1963.

[redacted]

William T. Stahl, for appellant.

Bruce Bennett, Atty. General, by *Jerry L. Patterson,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. Appellant, James Daniel Norman, was found guilty by a jury of the crime of robbery, and the court sentenced him to six years in the penitentiary.

To better understand the issues raised on appeal by appellant, we set out below a summary of the facts and circumstances attending the alleged offense, his apprehension, and his trial.

The testimony shows: that appellant (or someone alleged to be appellant) engaged a taxi (driven by A. J. Shepperson) in Memphis at about two a.m. on December 3, 1957, for the purpose of driving to Marion, Arkansas; that they drove two miles past Marion when appellant drew a pistol on Shepperson and forced Shepperson to give him $15; that appellant was taken into custody by R. E. Craig (a deputy sheriff) on January 18, 1962, in Hawkinsville, Georgia, where appellant was an inmate of a county prison farm, and; that he was promptly confined in the

Crittenden County jail where he remained until tried on September 18, 1962. The information was filed January 29, 1962.

Appellant's contention for a reversal is based on three separate grounds, to-wit: *One,* introduction of certain evidence; *Two,* disqualification of the trial judge; and, *Three,* insufficiency of the evidence.

One. The state, in order to explain the delay (from 1957 to 1962) in trying appellant, and in order to avoid the provisions of Ark. Stats. § 43-1602 and to invoke the provisions of § 43-1604, offered to prove by R. E. Craig that appellant made certain statements to him about the length of time he had served in the Georgia prison. Appellant objected to the testimony, but after the trial court admitted the testimony and explained its purpose, no exception was saved to the ruling of the court. In this situation we are not at liberty to examine the merits of the objection, as was fully explained in *Criner* v. *State,* 236 Ark. 220, 365 S. W. 2d 252.

Two. Before the trial began appellant filed a motion, asking the trial judge to disqualify himself and to transfer the cause to another judge. The motion was denied, and appellant saved his exceptions. We have no hesitancy in approving the action of the trial court. However, in explanation of the action of the trial judge and also the attorney who made the motion, we set out below, the attending facts and circumstances.

Previous to the trial the court had appointed an attorney to represent appellant, but, for reasons set out in the record, the attorney requested to be and was relieved of the appointment. Thereupon, the present attorney was appointed to handle the defense. The first attorney's request was in a letter to the trial judge. Appellant objected to certain portions of the letter which, he thought, might tend to prejudice the trial judge against him. In overruling the motion the trial court commented frankly on the situation, making a full disclosure of his attitude. Among other things the court, in referring to the letter, said: It "did not nor does it at this

time cause the court, as it now exists, to have any bias or prejudice against the defendant.''

Appellant, in his brief, commendably admits the trial judge was not disqualified (under the provisions of Article 7, § 20 of the Constitution or Ark. Stats. § 22-113) because of any interest in the case. Appellant suggests that the trial judge might have disqualified himself in keeping with certain language quoted (from 15 R.C.L. 530, § 18) in the case of *Hudspeth* v. *State,* 188 Ark. 323, 67 S. W. 2d 191. However, neither the cited opinion nor the quoted language sustains appellant. The latter, in speaking of bias or prejudice as a disqualification of a judge, says ''. . . this must be shown as a matter of fact, and not as a matter of opinion of the defendant or any other person.'' In the case under consideration not only are there no facts showing bias or prejudice, but no one even expresses an opinion that either existed. As aptly stated by the trial court at the time the motion was overruled, it could not ''in carrying out the duty required of it, disqualify for the reasons alleged.''

Three. The question raised as to the sufficiency of the evidence to sustain the conviction relates only to the identity of the person who robbed Shepperson. Shepperson, on direct examination, was ''quite sure'' the appellant was the man who robbed him — he saw appellant in the light near the Peabody Hotel in Memphis. On cross-examination the witness appeared to be somewhat less certain, as shown by the following:

''Q. Remember, you are under oath?

''A. That is right.

''Q. Sworn to tell the truth?

''A. That is right.

''Q. Can you, beyond a doubt, say that this is the man, the passenger in your cab that night?

''A. This gentleman looks like the gentleman, only had a shorter haircut.

''Q. Can't say, positively?

"A. Five years makes a lot of difference, but to me the face of the gentleman looks the same to me.

"Q. Is it true, you cannot say, positively, this is the man?

"A. I can't say, under oath, no, I won't say it."

Following the above the state introduced a picture of appellant made when he was placed in the Crittenden County jail. On recall of Shepperson by the state this picture was shown to him and he was asked if that was the man who robbed him.

"A. Yes, sir. This is the gentleman.

"Q. Can you tell the jury of whom that is a picture?

"A. That is a picture of the gentleman sitting over here.

"Q. Can you say —

"A. That is the man right there, he is much heavier there and the crew haircut.

"Q. Hair cut similar or different from the man?

"A. Hair cut just about that way, short haircut.

"Q. Does, Mr. Shepperson, does seeing that picture make you any more or less certain of your identification of the defendant?"

* * *

"A. I believe, I am more certain.

"Q. What do you tell the jury, Mr. Shepperson, now, about whether this is the man who committed the crime?

"A. Without a doubt, I believe, this is the man."

In view of the above testimony we are unwilling to say the jury verdict was not supported by substantial evidence.

Affirmed.

HOLT, J., disqualified.

5-2877 366 S. W. 2d 889

Opinion delivered April 22, 1963.

[redacted]

Luke Arnett and *Herrn Northcutt,* for appellant.

Mark E. Woolsey, for appellee.

SAM ROBINSON, Associate Justice. On the 9th day of July, 1952, the Administrator of the Employment Security Division of the State Labor Department filed with the Circuit Clerk of the Franklin Circuit Court, a certificate of assessment of contributions levied against appellee, Paul Mayner, under authority of the Arkansas Employment Security Act, Ark. Stats. 81-1115 - 81-1122. On September 12, 1961, appellant caused an execution to be issued on said assessment which, according to the statute, has the force and effect of a judgment. On November 1, 1961, appellee filed this action petitioning the court to set aside the purported judgment and to quash the execution, contending that the recorded assessment does not have the force and effect of a judgment; that it is invalid and void. The court granted the petition, set aside the judgment, and quashed the execution. The Commissioner of Labor has appealed.

Ark. Stats. 81-1117(e) provides: "If any person, firm, or corporation shall become delinquent in the payment of any contribution or interest or penalties required to be paid by the act, it shall be the duty of the Administrator, when the amount of such contribution, interest, and penalties is determined, either by the report of the employer or by such investigations as the Administrator may have made, to assess the contributions, interest and penalties so determined against such delinquent employer, and to certify the amount of such contributions, interest, and penalties to the Commissioner, and mail or otherwise deliver a copy of said assessment to the delinquent employer. At the end of ten [10] days thereafter, said assessment shall become *prima facie* correct, and the Administrator shall certify the amount of said delinquent contributions, interest, and penalties to the clerk of the circuit court of the county wherein the employer is domiciled or has a place of business and it shall be the duty of the clerk to file such certificate of record and to enter the same in the record of the circuit court for judgment and decrees under the procedure prescribed for filing transcripts of judgments by sections 8440 and 8442 of Pope's Digest of the Statutes of Arkansas, 1937 [§§ 26-1121, 26-1123], and thereupon the said assessment shall have the force and effect of a judgment of the circuit court. Execution shall thereupon be issuable, at the request of the Administrator, his agent or attorney, or any other employee of the Employment Security Division of the Department of Labor of the State of Arkansas, forthwith by the clerk of the circuit court, directed to the sheriff, who shall make a levy on any property, assets, or effects of the employer against whom the contribution is assessed."

Appellee Mayner contends, and the trial court held, that the certificate filed with the circuit clerk is null and void because it shows on its face that ten days had not elapsed from the time the Administrator made the assessment of delinquent contributions until the certificate of delinquency was executed. The matter was certified by the Administrator to the Commissioner of Labor on the 27th day of June, 1952, and on the 7th day of July,

the Administrator certified that ten days had expired. Appellant contends that even if it is conceded that under the wording of the statute the first and last day should be excluded and therefore ten days had not expired, the appellee still cannot prevail.

There is no allegation or showing that appellee has a meritorious defense to the assessment. Appellant points out that under our statute and decisions, a judgment shall not be set aside until there is a showing of a meritorious defense to the action in which the judgment is rendered. Ark. Stats. 29-509 provides: "A judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment is rendered. . . . ". In *Overton* v. *Alston,* 199 Ark. 96, 132 S. W. 2d 834, it was held that a judgment could not be set aside on certiorari even though erroneous and void, unless it appears from the petition that petitioner has a meritorious defense to the action. See also *St. Louis & San Francisco Railroad Co.* v. *Bowman,* 76 Ark. 32, 88 S. W. 1033. In *Berringer* v. *Stevens,* 145 Ark. 293, 225 S. W. 14, it was held that "valid" as used in the statute, is synonymous with the word "meritorious". See also *Haville* v. *Pearrow,* 233 Ark. 586, 346 S. W. 2d 204; *Alexander* v. *Jones,* 233 Ark. 708, 346 S. W. 2d 692.

Appellee contends that there is a distinction between a judgment and the assessment filed with the clerk in this case, which, according to the statute, has the force and effect of a judgment. We can see no valid distinction between a judgment and a recording having the force and effect of a judgment. The two are synonymous. There was an analogous situation in *Davis* v. *Bank of Atkins,* 205 Ark. 144, 167 S. W. 2d 876, where the court said: "The effect of this action on the part of appellee under the section of the statute, *supra,* was to transfer completely the judgment from the justice court, an inferior court, to the circuit court, a superior court, and to give this judgment *the same force and effect,* and the same remedies for enforcement, as if the judgment had been originally rendered by the superior court." (Our italics).

Here, the statute provides that when the assessment is filed with the clerk it shall have the force and effect

of a judgment. This being true, it cannot be set aside until there has been a showing of a meritorious defense.

Reversed and remanded for further proceedings not inconsistent herewith.

JOHNSON, J. dissents.

JIM JOHNSON, Associate Justice (dissenting). In reversing this case the majority has indulged an assumption that is, in my view, contrary to the record. The majority has assumed the judgment which the trial court set aside is valid on its face, when in fact the record reveals unequivocably that it is not *prima facie* correct or *valid* on its face. The law on this question has long been settled by *Woodburn* v. *Driver,* 81 Ark. 333, 99 S. W. 384 (83 C.J.S. p. 794), where this court held that a judgment in a summary proceeding must be such as is authorized by law. Was this judgment authorized by law?

The record reveals that the Administrator of the Employment Security Division of the State Labor Department proceeded under Ark. Stats. §§ 81-1115 - 81-1122. As provided under § 81-1117(e), the Administrator is to notify a delinquent employer of an assessment against the employer. This section further provides: "At the end of ten [10] days thereafter, said assessment shall become *prima facie* correct, and the Administrator shall certify the amount of said delinquent contributions, interest and penalties to the clerk of the circuit court of the county wherein the employer is domiciled or has a place of business and it shall be the duty of the clerk to file such certificate of record and to enter the same in the record of the circuit court for judgment and decrees under the procedure prescribed for filing transcripts of judgments by sections 8440 and 8442 of Pope's Digest of the Statutes of Arkansas, 1937 [§§ 26-1121, 26-1123], and thereupon the said assessment shall have the *force and effect of a judgment of the circuit court.*" [Emphasis mine.]

This is clearly a summary proceeding and the strict construction which we are forced to give it, *Files* v. *Robinson & Co.,* 30 Ark. 487; *Prairie Creek Coal Mining Co.* v. *Kittrell,* 107 Ark. 361, 155 S. W. 496, 50 Am. Jur.,

Statutes, § 406, makes it mandatory that any judgments rendered pursuant to these statutes conform to the very letter of the law.

The record shows, and it is not contended otherwise by the majority, that the Administrator was premature in filing the certificate of assessment. This premature action does not follow the strict letter of the statute invoked by the Administrator. It naturally follows, therefore, that this premature action taken by the Administrator deprives that action of any force of law rendering the action nugatory and invalid upon its face, and thereby making it unworthy of taking on the "force and effect" of a judgment of the circuit court.

This being true I cannot escape the conclusion that in the absence of a judgment, Ark. Stats. § 29-509 does not obtain to a summary proceeding such as is here presented.

For the reasons stated, I respectfully dissent.

ARK. STATE HIGHWAY COMM. *v.* DEAN.

5-2963 367 S. W. 2d 107

Opinion delivered April 22, 1963.

[Rehearing denied May 20, 1963.]

Dowell Anders and *H. Clay Robinson,* for appellant.

David O. Partain, for appellee.

JIM JOHNSON, Associate Justice. This appeal involves the question of whether a land owner received notice of condemnation of part of his land for highway purposes by the County Court and was thus afforded an opportunity to seek just compensation.

In 1927 the Crawford County Court entered an order condemning a right of way for U. S. Highway No. 71 from Fine Springs south to Alma. The order condemns a right of way 35 feet wide to the right or west side of the centerline of an existing county road. In 1932 appellees R. P. Dean and wife purchased two acres of land on the west side of Highway 71, one acre from J. A. Bradley and one acre from S. M. Denniston. The county records reflect payment of compensation to Bradley, but no record of payment to Denniston for the property condemned. This action involves the land purchased from Denniston.

In 1961 the Highway Commission began reconstruction of Highway 71 and in so doing entered upon the entire 35 feet of right of way west of the centerline. In 1962 appellees filed an action for an injunction against Standard Industries, Inc., the contractor doing the reconstruction, seeking to enjoin them from trespassing on appellees' land. Appellant, the Arkansas State Highway Commission, as the real party defendant, was permitted to intervene in the action. At trial the parties entered into the following stipulation:

(1) that a valid order of the Crawford County Court of August 10, 1927, condemns the original right of way for U. S. Highway 71 and that this order condemns a right of way of 35 feet to the right (west) of the centerline between Stations 180 and 185 which is across the property deeded to appellees by Bradley and Denniston;

(2) that the county record books reflect that Bradley was paid just compensation for condemnation of his property under the 1927 condemnation order;

(3) that although the county records show payment to a number of people pursuant to the court order, there is no record of payment to Denniston;

(4) that the question presented to the court by the stipulation was whether notice of the condemnation of 35 feet of right of way west of the centerline of U. S. Highway 71, by means of the order of the Crawford County Court dated August 10, 1927, was ever given to the owner of the land so condemned so that he was afforded an opportunity to seek just compensation for the property from the county court;

(5) that a portion of the area lying between the centerline of U. S. Highway 71 and a line 35 feet from the centerline has been used and maintained as a highway since 1927, so that even if the Court finds that the owner of the land never received notice of the taking, yet the plaintiffs (appellees) will not be entitled to an injunction to keep the Highway Commission from entering upon the whole 35 foot area; and if the court holds against the Highway Commission on the question of notice, then it will make a factual determination of the area actually used and maintained for U. S. Highway 71;

(6) that if the court holds against the Highway Commission the landowner will be permitted to seek his just compensation from the Crawford County Court for the taking of the property in question and the Highway Commission will be required to put up an open-end indemnity bond guaranteeing payment of just compensation to the plaintiffs in case the Crawford County Court is financially unable to pay the claim of the plaintiffs.

In its opinion, the trial court set out the stipulation in full, discussed the testimony of appellant's two witnesses and exhibits, as well as appellee's testimony, and found that the area lying between the centerline of Highway 71 and a line 17 feet west of the centerline had been condemned, but that the property lying west of that had not been condemned and is the property of appellees; the court then stated that appellees would be permanently enjoined from interfering with the construction work and that they would be permitted to seek their just compensation from the county court for the taking of the property lying between 17 and 35 feet west of the centerline of Highway 71, across the acre purchased from Denniston,

and then required the Highway Commission to file a bond guaranteeing payment of just compensation to appellees in case the county court is financially unable to pay appellees' claim. The decree was entered September 11, 1962, from which the Highway Commission has appealed.

For reversal appellant contends that the period of limitation of one year contained in the County Court Condemnation Act [Ark. Stats. § 76-917] bars any claim for just compensation for the property disputed between the parties.

The question here presented is whether such notice of the county court order of 1927 was ever given to the owner of the land condemned as would afford the owner an opportunity to seek just compensation for his property within the one-year statutory limitation.

Where, as here, there was no payment of compensation for the taking of land and no publication of notice proved, the burden is on appellant to prove that the landowner had actual notice of the taking of his land. *Arkansas State Highway Commission* v. *Anderson,* 234 Ark. 774, 354 S. W. 2d 554.

Appellant attempted to prove notice by testimony on ditching and fencing, that is that the Highway Department cut ditches 29 to 35 feet from the centerline in 1932 and had all fences moved back to 35 feet from the centerline, which were such acts of sovereignty by the Highway Department as to put the land owner on notice. Appellant's witness, a draftsman for the Highway Department, testified that examination of old records of the Highway Department showed that the contractor was reimbursed for moving fence, but admitted that it was not possible to tell from the old records exactly what stations were involved in moving the fence; that the records simply made reference to so many rods of fence and did not indicate where they were. Appellant's other witness, a highway engineer, testified that it was customary in 1927 to cut ditches 29 to 35 feet from the centerline, but was unable to testify about the ditch on the property here involved. On the other hand, appellee testified that some

of the Bradley acre had been fenced, but that there was no fence on the Denniston acre when he purchased and moved onto that unimproved property. He further testified that there was a ditch 7 or 8 feet from the edge of the slab which he filled in in 1932. (The slab extended west 9 feet from the centerline.) To bolster appellees' contention that no entry was made beyond 17 feet west of the centerline until the present widening of Highway 71 was commenced, he offered the description of the property deeded him which runs, "West 17 feet to a point on the north line of said forty acre tract, which point is 8 feet west of the west side of the concrete slab of Highway No. 71."

There was some evidence taken from appellant's exhibits which indicated the straightening of a slight curve or jog in the existing county road over which Highway 71 was constructed along the front of appellees' property; even so, taking the evidence as a whole, we cannot say that the Chancellor's finding that appellant failed to meet the burden of proof was against the preponderance of the evidence.

This court has consistently held that an action of the State Highway Department in improving and paving an existing road is insufficient to put adjoining property owners on notice that additional lands were being taken so as to set in motion the one year statute of limitations for the filing of claims for the taking of lands under a county court condemnation order. *Bollinger* v. *Arkansas State Highway Comm.*, 229 Ark. 53, 315 S. W. 2d 889; *Arkansas State Highway Comm.* v. *Dobbs*, 232 Ark. 541, 340 S. W. 2d 283; *Arkansas State Highway Comm.* v. *Anderson, supra.* In the absence of such notice, the decree is affirmed.

McFaddin, J., concurs; Smith and Robinson, JJ., dissent.

Sam Robinson, Associate Justice (dissenting). Denniston did not attempt to make a conveyance of any portion of the property embraced within the right of way of Highway 71. After setting out the description in the deed

of the land conveyed, there is this provision: "Except from this conveyance that part of the property taken by the right of way Highway No. 71, United States Highway No. 71."

Appellee Dean has never owned any part of the property in the right of way of Highway 71 and in these circumstances I cannot see how he is entitled to be paid for something that he does not own and has never owned.

In addition to what has been said, I think the evidence is overwhelming to the effect that Denniston, Dean's predecessor in title, had notice of the taking of the small strip of his land for highway purposes.

On August 10, 1927, the Crawford County Court made an order condemning for the construction of Highway 71, a right of way extending 35 feet on the west side of the centerline of an existing road from Fine Springs, South to Alma, Arkansas. At that time Denniston owned one acre of unimproved land adjacent to the road and the new right of way would take about 18 feet off the east side of the Denniston acre.

The condemnation was made by the County Court and the statutes allow the owner 12 months in which to make a claim for compensation. The order of condemnation and the taking of the property is sufficient notice to the owner even though he may have received no other notice. The twelve month period in which he can make his claim begins to run from the time of the taking. *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260, *Arkansas State Highway Commission* v. *Dobbs,* 232 Ark. 541, 340 S. W. 2d 283.

Only a few months after the order for the taking in 1927 a new road was built. The evidence is convincing that the right of way across the Denniston acre was taken at that time. Some of the plans and specifications for the road built in 1927 were introduced in evidence. These plans show clearly that there was a fence across the front of the Denniston property. The plans call for moving it back a distance of 5 feet, which would make it 35 feet from the centerline of the highway. The records of the

Highway Department introduced in evidence, show a contract was made for moving the fence, and payment was made for moving it. The plans and specifications call for the cutting of a ditch at a distance of from 29 to 35 feet from the centerline of the highway, which would place it on property involved in this litigation. Dean has filled in the ditch across the acre involved since he purchased it, but claims that it was only about 17 feet from the centerline. The ditches on property both to the North and South of the acre involved were from 29 to 35 feet West of the centerline. The road built in 1927 was a Federal Aid Project, and according to government requirements the ditches had to be from 29 to 35 feet from the centerline. There is no reason why any exceptions would be made to the Denniston acre, because it was unimproved at the time.

All the circumstances indicate that Denniston was fully aware that the right of way was being extended to a distance of 35 feet from the centerline. In my opinion, there is no substantial evidence to the contrary.

For the reasons set out herein, I respectfully dissent.

Ed. F. McFaddin, Associate Justice (concurring). I concur in the affirmance of this decree. It is my understanding of the evidence in this case that there was a preexisting highway in front of the Denniston property before the 1927 County Court order; and the said 1927 Court order was to widen the already existing right-of-way by taking an additional strip from the landowners. I do not find any definite evidence to show that there was ever any entry by the Highway authorities on the additional strip so taken. In this situation I think the case at bar is ruled by such cases as *State Highway Comm.* v. *Holden,* 217 Ark. 466, 231 S. W. 2d 113; and *Ark. State Highway Comm.* v. *Cook,* 236 Ark. 251, 365 S. W. 2d 463 (Opinion March 11, 1963).

ARK. STATE HIGHWAY COMM. *v.* WEBSTER.

5-2979 367 S. W. 2d 233

Opinion delivered April 22, 1963.

[Rehearing denied May 27, 1963.]

Dowell Anders and *Thomas B. Keys,* for appellant.

Fred M. Pickens, Jr. and *Wayne Boyce,* for appellee.

FRANK HOLT, Associate Justice. The appellant, Arkansas State Highway Commission, brought this action in an eminent domain proceeding against Rufus Webster and Pearl Webster, appellees, for the acquisition of a fee simple title to .12 of an acre of their land for the use and purpose of widening an existing hard-surface highway. This land was part of a tract of 1.58 acres owned by the appellees. Upon a jury trial the verdict resulted in favor of the appellees and their damages were assessed in the sum of $2,250.00.

On appeal, the appellant contends that the trial court committed reversible error in admitting into evidence the landowner's exhibit No. 3 which is a photograph. The picture represents a view of the Webster and adjoining property before completion of the construction or widening of the highway. It depicts the flooded condition of

the newly graded ditch following a heavy rain. Mr. Webster testified that the water almost covered his driveway. There were other pictures in evidence of a different nature depicting various views of the property before and after the taking thereof which tended to aid the jury.

From the testimony surrounding the introduction of this picture we think it is clear that the jury understood, as reasonable men certainly would understand, the evidentiary value of this questioned picture when considered along with the other pictures introduced in evidence. We think the admissibility of this photograph, under the facts in this case, comes well within the sound discretion of the trial court. We have consistently said:

> " * * * The admission, relevancy and materiality of photographs as evidence is left to the discretion of the trial judge and, unless that discretion has been abused, his ruling will not be disturbed."

McGeorge Contracting Co. v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566. See, also, *Lee* v. *Crittenden County,* 216 Ark. 480, 226 S. W. 2d 79. There was no abuse of discretion by the court in the instant case in admitting this photograph into evidence. Also, it was sufficiently accurate to be of some aid and value to the jury on the issue before them. There is no proof in this case that this particular picture was misleading to the jury and, therefore, prejudicial to the appellant. *Southern National Insurance Co.* v. *Williams,* 224 Ark. 938, 277 S. W. 2d 487.

The appellant further contends that the landowner's witness, D. L. Buffington, did not know the width of the old right-of-way and did not take into consideration the construction of the new highway in arriving at the landowner's damages. From a review of Mr. Buffington's testimony we think that he was sufficiently knowledgeable of those factors in determining his estimate of the landowner's damages.

Next, the appellant complains that its witness, Curtis Hutchins, was not permitted to testify fully about the distance from the proposed right-of-way line to the outer limits of the construction as reflected by a sketch map.

From a study of the record in this case we find that upon the introduction into evidence of this sketch map as an exhibit to Mr. Hutchins' testimony the following occurred:

"Q. What are the construction limits on these particular plans?

A. The construction limits of Mr. and Mrs. Webster's property, the construction will lack roughly from 10 to 12 foot going out to the present right-of-way line before the additional taking of the 13 feet. In other words, we will have the additional taking and another roughly 12 feet between the present right-of-way line and the construction line."

In view of this testimony we are of the opinion that this point is not well taken.

Appellant next contends the court should have given its requested Instruction as to the measure of damages. Appellant argues that the true measure of damages, as reflected in the requested instruction, is the difference between the value of the land before the *construction* and the value after *construction* of the highway. The court instructed the jury that the measure of damages would be the difference between the fair market value of the entire tract of land before the *taking* and the fair market value of the remaining land after the *taking* for highway purposes. We have consistently approved the rule that the measure of damages is the difference between the fair market value of the affected lands before and after the taking of the landowner's property. In *Board of Directors, St. Francis Levee Dist.* v. *Morledge,* 231 Ark. 815, 332 S. W. 2d 822, we said:

"By a long line of decisions we have established that the determination of the damage, in cases like these, is to be measured by what the property was reasonably worth before the taking, and what the remainder of the property is worth after the taking."

See, also, *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706; *Arkansas State Highway Comm.* v. *Fox,* 230 Ark. 287, 322 S. W. 2d 81.

We have also said that the measure of damages is the value of the land before the construction and after the construction of a road. *Herndon* v. *Pulaski County,* 196 Ark. 284, 117 S. W. 2d 1051. In the particular case before us, we think the same result would be reached by applying either method in determining the damages. We find no prejudice to appellant's rights by the refusal of the requested instruction.

The appellant also contends there is no substantial evidence to support the verdict of the jury. Whether there exists substantial evidence to support a jury verdict is a question of law. *Arkansas State Highway Commission* v. *Covert,* 232 Ark. 463, 338 S. W. 2d 196. The Websters, the landowners, testified that they purchased this property in 1956 for the sum of $4,950.00; that in March of 1960 they moved upon the property; that before the taking by appellant in May, 1961, they made sufficient repairs for the dwelling to be liveable and they restored an existing building adequately to conduct therein a profitable cafe and tavern business. They testified that as a result of appellant's taking a 13 foot strip across the front of their property abutting upon the existing highway, the parking area for customers would be reduced from a space for twenty (20) cars to ten (10) cars, or a fifty per cent reduction. They testified that before the taking their property was worth $10,000.00 and after the taking, $5,000.00. Thus, they estimated their damages to be the sum of $5,000.00.

Mr. Buffington, a real estate dealer and appraiser in that locality, testified for appellees that the property was worth $8,600.00 before the taking and $6,000.00 after the taking. Consequently, the appellees had been damaged in the sum of $2,600.00. Mr. James Parish, another local realtor and appraiser, testified for appellees that before the taking he placed a value of $8,500.00 on appellees' property and after the taking a value of $5,500.00, making a difference of $3,000.00 in the fair market value. Mr. Curtis Hutchins, a staff appraiser for the appellant, testified that before the taking he considered the property to be worth $5,600.00 and after the taking to be of the value of $5,225.00. Therefore, in his opinion the land-

owner's damage would be $375.00. Mr. Wesley Adams, an appraiser for appellant, testified that the value before the taking was $6,025.00 and after the taking the value was $5,625.00. Thus, the damage to the appellees' property was $400.00. From these several witnesses we have the variance from $5,000.00 to $375.00 as the damages to appellees' property.

We have consistently held that in determining the sufficiency of the evidence to support a verdict we must view the evidence, with every reasonable inference arising therefrom, in a light most favorable to the appellee and if there is any substantial evidence to support the verdict rendered by the jury, the triers of the facts, we will not disturb it on an appeal. *Arkansas State Highway Comm.* v. *Addy,* 231 Ark. 381, 329 S. W. 2d 535; *Arkansas State Highway Comm.* v. *Covert, supra.*

We view the evidence in this case to be sufficiently substantial to support the jury verdict of the award of damages. Therefore, we affirm.

5-2996 367 S. W. 2d 114

Opinion delivered April 29, 1963.

[redacted]

Robert E. Irwin, for appellant.

Parker Parker, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellants seek to have nullified an order to punish them for contempt. The order was made by the Pope Chancery Court (Judge Wiley Bean presiding) on July 16, 1962, and contained this language:

"IT IS THEREFORE BY THE COURT, ordered, adjudged, and decreed that the Defendants, Leo Casey and Ella Casey, shall comply with the decree of this Court dated 24th day of October, 1961 within 30 days of this date.

"It is further ordered and directed that the Clerk of this Court issue a commitment to the Sheriff of Pope County to arrest said Ella Casey and Leo Casey, and hold them in the Pope County Jail subject to the further orders of this Court, should the said Leo Casey and Ella Casey fail and refuse to comply with the Decree of October 24, 1961."

The point appellants now seek to urge is that the decree of October 24, 1961 was void and therefore they should not be required to comply with the order of July 16, 1962. The first time the appellants ever questioned the validity of the decree of October 24, 1961 was by a "Response" filed by them on June 22, 1962, which response reads:

"That the original judgment in this case entered on October 24, 1961, is void for the reason that the Act under which Honorable John G. Rye was appointed special Chancellor during the temporary absence of the duly elected Chancellor George O. Patterson, is unconstitutional."

Although there is no evidence of any kind in the record in this case, the appellants say in their brief in this Court:

"In September, 1961, Judge Patterson became ill and certified himself unable to perform his duties as Chancellor. On September 25, 1961, Honorable Orval E. Faubus, Governor of Arkansas, appointed Honorable John G. Rye, a member of the Pope County Bar, to serve as special chancellor. This appointment was made by virtue of Act 417 of 1941 which appears as Ark. Stat. 22-437 through 22-440. During the time the Honorable John G. Rye was serving as special chancellor, under his appointment by the governor, the evidence and testimony was transcribed and presented to Judge Rye for determination. Judge Rye rendered a decree of specific performance in favor of the plaintiff."

In short, the appellants here insist that the decree of October 24, 1961 was void and therefore the appellants should not be required to comply with the order of July 16, 1962.

There are several answers to appellants' insistence:

1. Whether John G. Rye was a *de jure judge* or a *de facto* judge of the Pope Chancery Court on October 24, 1961, is entirely immaterial on the present appeal. The Pope Chancery Court was a *de jure* court, and John G. Rye was presiding as Judge thereof when he rendered the

decree of October 24, 1961. Appellants gave notice of appeal from that decree, but abandoned the appeal. So the decree of the Pope Chancery Court of October 24, 1961 is final. We held in *Pope* v. *Pope,* 213 Ark. 321, 210 S. W. 2d 319, that when the court was *de jure* and the judge presiding was merely *de facto,* nevertheless the judgments and decrees of the Court were valid. That case settles the validity of the decree of October 24, 1961 in the case at bar.

2. Another reason why appellants cannot prevail on their argument in the present case is because the record here before us shows that on May 17, 1962, Judge Wiley Bean (whose status as a *de jure* judge of the Pope Chancery Court is not questioned by the appellants), while presiding over the Pope Chancery Court, reviewed the entire case on motion for citation and held that the decree of specific performance made on October 24, 1961, was in all respects valid and binding on the present appellants. An order was then entered by the Pope Chancery Court on May 17, 1962, directing the appellants, present in Court at the hearing, to comply with the said order within ten days. There was no appeal from the order of May 17, 1962; and it is the refusal of the appellants to comply with that order by Judge Bean that brought about the citation for contempt here involved. In short, the order of May 17, 1962 is final and binding on the appellants.

3. A third reason for holding against the appellants is the fact that they did not perfect an appeal from either the decree of October 24, 1961 or the order of May 17, 1962. Rather, the appellants elected to ignore those orders; and when brought before the Court for punishment for contempt, they sought to plead the invalidity of the previous orders. We held in *Carnes* v. *Butt,* 215 Ark. 549, 221 S. W. 2d 416, and again in *Hickinbotham* v. *Williams,* 227 Ark. 126, 296 S. W. 2d 897, that a party who violated an order of injunction could not test the validity of the original order when cited for contempt for its violation. Those cases are ruling here, and the appellants cannot resist the punishment for contempt by claiming invalidity of the orders of which they were contemptuous. The remedy of the appellants was to appeal from

the orders which they considered erroneous; and they failed to prosecute such appeals.

Finding no merit in the appellants' contentions, we afford them no relief, whether we treat this as an appeal or a *certiorari* proceeding.

BATES *v.* ORR.

5-3055 367 S. W. 2d 122

Opinion delivered April 29, 1963.

Ponder & Lingo, by *Harry L. Ponder,* for appellant.

Mehaffy, Smith & Williams, Friday & Bowen, for appellee.

Caldwell T. Bennett and *Carmack Sullivan, Amici Curiae.*

PAUL WARD, Associate Justice. This litigation stems from the consolidation of two school districts in Sharp County. Presently set out is a summary statement of the pertinent facts involved.

On December 4, 1962 the electors of Hardy School District No. 38 and Ash Flat School District No. 4 approved (by a vote of more than four to one) the consolidation of said school districts into one district to be known as Highland School District No. 42. This proceeding was had under Act 125 of 1961, being Ark. Stats. §§ 80-446 *et seq.* The ballots used in both districts were identical except that the ballots for each district were designated by its appropriate name.

The ballots contained two proposals to be voted upon. *One,* consolidation, stating that the new consolidated school facilities would be located upon the "Moody, Pogue and Wiles property," upon which "options have been secured"; *Two,* submission of a 41 mill school tax including

". . . (a) 25 mills for the maintenance and operation of schools; and (b) 16 mills of this tax is to be collected annually and will constitute a continuing annual levy until the payment in full of the principal and interest of a proposed bond issue of $264,125, which will run approximately 22 years and will be issued for the purpose of erecting and equipping new school buildings, making improvements and additions to existing school facilities, acquiring a site, and refunding $14,113 in outstanding school indebtedness."

Following proper certification of the election, the directors of the two districts met and proceeded to operate as one board for the new district, as is provided in the Act. It proceeded to advertise and sell school bonds in the amount of $264,125. Delivery of the bonds was held up pending our decision on certain objections arising out of the entire proceedings. According to appellant's statement on appeal, the principal objection raised was that the directors of District No. 42 decided to locate the school facilities on property other than the Moody, Pogue and Wiles property. This point, along with four others,

is relied on by appellant for a reversal of the trial court which approved the consolidation proceedings, the issuance of the bonds, and the substituted site for the school facilities.

The matter reaches this Court in the following manner. S. C. Bates, appellant, (representing property owners in the two districts) filed suit in chancery court against the directors of the consolidated district to force them to select the site mentioned in the ballot (Moody, Pogue and Wiles property); and also to invalidate (for reasons later discussed) the entire consolidation proceedings.

One. We find no merit in appellant's argument that "the question on consolidation . . . was not submitted in the form designated" by Section 4 of said Act 125 of 1961. We have carefully examined the form of ballot used here and find that it is substantially in conformity with the requirements of said section. In fact both are alike as to form and it would serve no useful purpose to set them out for comparison.

In this same connection appellant especially urges that the ballot used was fatally defective because it gave the voter no opportunity to vote *for consolidation* and *against* the designated *site* or vice versa. We can understand how, under some circumstances an objection of this type might have merit, but not so in this case. In the first place, as shown by the ballots, the proposed site had not actually been secured. In other words, the selection of a site rested finally within the power and discretion of the directors where this Court has said it rests. See: *Johnson* v. *Robbins,* 223 Ark. 150, 264 S. W. 2d 640. As will be made apparent later, the change of sites could not have prejudiced the voters in any material way.

Also it is argued that the ballot is fatally defective because it violates Amendment No. 40 to the Constitution. This amendment, in pertinent part, provides that the directors of each district shall prepare and make public sixty days in advance of the annual school election a proposed budget and fix the rate of tax levy. It is pointed out by appellant that this could not have been done in this

instance because District No. 42 was not in existence sixty days before the annual election held on December 4, 1962. We see no merit in this argument for the following reasons. Since this case is not a direct attack on the manner in which the election was held, we must assume that it was in all respects in compliance with the law and that every prerequisite was met. Therefore, we can assume the directors in the two original districts complied with the law — including Amendment No. 40. Section 7 of said act provides that the new district succeeds "to all the rights and property of the districts consolidated", etc. Appellant does not, and cannot successfully, deny the districts had a legal right to consolidate and to vote the necessary millage to operate and construct the buildings. We know of no legal inhibition against the old districts doing in one election what they might have done in two elections. This was a regular school election, therefore the voters could have voted against consolidation and against the increased tax rate and still (under Amendment No. 40) the old rate would have been in effect in each old district.

Two. Appellant here states that "The court erred in finding that the consolidation was valid," relying on his argument presented under point "One" above, which we have already rejected. It is our opinion that the procedure set out in Act 125 of 1961 was correctly followed in this case.

Three. It is next contended that the act does not authorize submitting, on the same ballot, the question of consolidation and also the question of issuing bonds based on a tax levy. In view of what we have already said we deem it unnessary to discuss this point further than to say the contention is technical and deals with form rather than substance.

Four. We find no merit in appellant's further argument that said act is invalid because it is in violation of Amendment No. 40 to the Constitution, which provides that tax money voted by a school district shall not be used for any other purpose (than school purposes) or by any other district. As to the purpose for which the money

involved here will be used, there is no question or dispute — it will be used for school purposes. Also, for all intents and purposes, the tax money in this instance was voted by and will be used in the same district — District No. 42. Also, the question here raised was decided adversely to appellant by the decision in *Bonner* v. *Snipes,* 103 Ark. 298, 147 S. W. 56.

Five. We come now to the final point and the one upon which appellant presumably relies most heavily for a reversal.

As before stated, the ballot on the consolidation proposal contained these words — ". . . with the new school plant to be located on the Moody, Pogue and Wiles property, upon which options have been secured." It is the contention of appellant that when the majority voted affirmatively on the above ballot it, *ipso facto,* created a binding obligation on the directors of the new district to place the school facilities on that property and nowhere else. The logical conclusion of that contention would be that the entire project would have to fail if the designated site could not, for any reason, be secured. We are not convinced by that line of reasoning, nor do we find that any statute or court decision of this State binds or impels us to adopt it. To support appellant's position reliance is placed on certain language found in the case of *Matthews* v. *Rural High School District No. 5 of Johnson County,* 120 Kan. 347, 242 P. 1016. The language, in effect, is that an affirmative vote on the proposition of issuing bonds to erect a school building is a sufficiently definite and valid designation of the site. Neither the facts nor the opinion in the above cited case lend any support to appellant's argument. In that case two elections were held. One authorized consolidation and designated the "location at Spring Hill." The next year the directors purchased twenty acres of land "in and adjoining Spring Hill," and paid $7,000 for it. Four years later the voters authorized bonds to erect a school house "on the land owned by the district adjoining the city of Spring Hill." After the directors had started construction on that site, Matthews (as a taxpayer) tried to enjoin construction on that particular site. The trial court merely refused the

injunction, and the Supreme Court properly affirmed. The issue presented here was not raised or discussed in the cited case.

We have concluded the trial court was fully justified in approving the site (other than the one designated) upon which to erect school facilities. The situation and facts supporting that conclusion are, in essence, as follows: (a) The directors were unable (because one of the landowners declined to honor his agreement) to secure the designated site; (b) The optioned site would have cost around $6,000; (c) The new site was donated to the district, and was suitable for all purposes; and, (d) The new site was adjacent to the designated site and both sites abut U. S. Highway No. 62.

Under the above set of facts we cannot believe that any elector, who voted for consolidation because of the designated site, would have voted against consolidation had he known the change would be made in site locations. In other words, we think the difference between the sites was too insignificant to affect the electors' vote, or to justify a reversal.

Affirmed.

VANLANDINGHAM *v.* GARTMAN.

5-2957 367 S. W. 2d 111

Opinion delivered April 29, 1963.

Barber, Henry, Thurman & McCaskill, for appellant.

Joe W. McCoy, for appellee.

SAM ROBINSON, Associate Justice. Appellee, Mildred Gartman, was sitting in her automobile which was properly parked in front of her home in Sheridan, Arkansas, when appellant, Harold Vanlandingham, drove his car into the back of the Gartman automobile. Mrs. Gartman was seriously injured. She filed this suit against Vanlandingham. He defended on the theory that he ran into the Gartman car in order to avoid striking a little girl that ran across the road in front of him. He was drinking at the time, and there was evidence to the effect that there was no little girl involved. The plaintiff recovered a judgment in the sum of $20,000.00. Vanlandingham has appealed.

There are two issues: First, appellant contends that the court made a reversible error in refusing to give his Instruction No. 2, as follows: "If you believe from the evidence that the sole, direct and proximate cause of the injuries, if any, of Mildred Gartman was some act or omission or conduct on the part of some third party, then it would be your duty to return your verdict in favor of the defendant, Harold Vanlandingham."

While Instruction No. 2 may be a correct statement of the law, appellant was in no way prejudiced by the court's refusal to give it in view of other instructions given at appellant's request. Appellant's requested Instruction No. 4 given by the court is as follows: "Under the law no one is legally liable to another for damages caused by an unavoidable mishap.

"If you find and believe from the evidence in this case that insofar as Harold Vanlandingham was concerned, the mishap was an unavoidable one and was not the result of negligence on his part, then your verdict will be in favor of the defendant."

The court also gave appellant's Instruction No. 5, as follows: "When the driver of an automobile is suddenly confronted with an emergency not created by his own negligence, he is not held to the same accuracy of judgment as is required of him under ordinary circumstances.

"If, therefore, you find that Harold Vanlandingham was suddenly confronted with an emergency not created by any negligence on his part, then you will test his conduct by what a reasonably prudent person might have done under the same or similar circumstances, and if you find that he made a choice of conduct such as a reasonably prudent person might have made under those circumstances, then he would not be guilty of negligence, even though it might afterwards appear that it would have been wiser or better for him to have chosen a different course of conduct."

Jurors are presumed to be intelligent people. They must have understood from the instructions given that appellee could not recover if her injuries were caused solely by some third person. The court is not required to give repetitious instructions. *Little Rock Railway & Electric Co.* v. *Green,* 78 Ark. 129, 93 S. W. 752; *Nuckols v. Flynn,* 228 Ark. 1106, 312 S. W. 2d 444.

The next issue is whether the trial court erred in permitting attorney for plaintiff, appellee, to use a chart he had prepared to illustrate his argument to the jury on the question of damages, particularly damages for pain and suffering. There was evidence that appellee had suffered and would continue to suffer considerable pain. She had asked for a judgment in the sum of $25,000.00. In arguing the amount of damages that should be awarded for pain and suffering, appellee's attorney illustrated his argument with a chart showing that she had already suffered 521 days, and further, if this item was computed at the rate of $12 per day it would amount to $6,144.00. He further illustrated on the chart that since appellee had a life expectancy of 34 years, if allowed $0.50 per day for future suffering, it would amount to $6,205.00. The trial court overruled appellant's objection to the use of the chart.

In a matter of this kind the trial court must exercise a sound discretion. If the chart was used in a manner to make it appear to the jury that evidence had been introduced to the effect that appellee's pain and suffering was worth $12 per day and in the future would be worth

$0.50 per day, it would be error to permit the use of the chart because, of course, no such evidence was introduced; but where, as here, it is perfectly clear that the figures on the chart or blackboard were nothing more than argument by counsel, we cannot say there was an abuse of discretion by the trial court in permitting its use. In *John A. Westland, Inc.* v. *O'Bryan Construction Co., Inc.,* 187 A. 2d 507, Jan. 2, 1963, the court said: "Neither blackboards nor other forms of visual display may be used with uninhibited freedom. *Bone* v. *General Motors Corporation,* Mo., 322 S. W. 2d 916, 71 A. L. R. 2d 361; see also *Killary* v. *Burlington — Lake Champlain Chamber of Commerce, Inc.,* Vt., 186 A. 2d 170. Courts set themselves against the use of these methods to mislead, or where the use is not fairly based on the evidence. But, by and large, this is an area where the trial court's authority over the conduct of the trial gives it large discretion, and its exercise of control will not be disturbed lightly. The complaining party must demonstrate prejudice to procure this Court's intervention. The defendant has not done so here."

This point has been before a good many courts in the past few years. There is a note on the question of per diem or similar mathmatical basis for fixing pain and suffering in 60 A. L. R. 2d 1347. There is a long annotation on the question of the use of a blackboard, chart, diagram, or placard not introduced in evidence relating to damages in 86 A. L. R. 2d 239. Practically all the cases dealing with the subject are cited. See also Ark. Law. Rev., Vol. 17, No. 1.

In numbers, the cases are about equally divided on the question. We feel, however, that the weight of authority is to the effect that it is not an abuse of discretion for the trial court to permit the use of a blackboard or chart as was done in the case at bar. Several theories have been advanced as a basis for excluding per diem amount arguments for damages for pain and suffering, including: that there is no evidentiary basis for converting pain and suffering into monetary terms; it is improper for counsel to suggest a total amount for pain and suffering, and

therefore wrong to suggest per diem amounts; that to do so amounts to the attorney giving testimony, and expressing opinions and conclusions on matters not disclosed by the evidence; and juries frequently are misled thereby into making excessive awards.

In *Ratner* v. *Arrington,* 111 So. 2d 82, a great many of the cases in point are cited, and there the court said:

"The items or elements of damages listed on the chart in this case, and which thus were argued to the jury, all were supported by some evidence of established or calculable monetary value, except the elements of 'pain and suffering' and 'physical disability and inability to lead a normal life.' As to those two elements, we are not prepared to hold that it was prejudicial error for the trial court to allow counsel for appellee, in argument to the jury, to suggest an amount which he felt would be proper and reasonable to be awarded as damages therefor. Nor do we hold it was error to include a suggested per diem amount approach to such an award."

In the case at bar, along with other allegations, the plaintiff alleged that she had been damaged by reason of physical pain and mental anguish endured in the past and which she would suffer in the future by reason of the injury sustained. Of course, no witness can say a person has been damaged so much per day by reason of such suffering, and neither can a witness say that a person has been damaged $5,000.00, or any other amount, by reason of suffering; but a plaintiff can allege great pain and suffering and can prove such assertion in various ways. On the other hand, a defendant can deny that there has been any pain and suffering. This is frequently done and evidence is introduced to that effect.

As we see it, there is no sound reason why an attorney in the case should be precluded from arguing the amount of damages that should be awarded for pain and suffering, assuming of course, that evidence has been introduced showing pain and suffering, as was done in the case at bar. Likewise, the defense attorney can argue that none or very little damage has been suffered in that

respect. Of course it behooves the courts to see that no unfair tactics are used; for instance, although an attorney might use a chart or blackboard to illustrate his argument, it would not be fair to place the illustration where it could be seen by the jury at times when the attorney was not using it in making his argument. If the jury could see it all day it would be the same as arguing the case all day.

In the case at bar, no unfair tactics were used. It was made perfectly clear that the chart was merely an illustration of the argument; that it was not evidence; and the court specifically limited the jury's view of it to the time counsel was actually making his argument.

We find no error.

Affirmed.

SPENCE *v.* VAUGHT.

5-2958 367 S. W. 2d 238

Opinion delivered April 29, 1963.

[Rehearing denied May 27, 1963.]

Barber, Henry, Thurman & McCaskill, for appellant.

Mehaffy, Smith, Williams, Friday & Bowen, by *R. Ben Allen* and *Boyce R. Love,* for appellee.

JIM JOHNSON, Associate Justice. This case involves the Arkansas guest statutes, Ark. Stats. §§ 75-913 - 75-915. The action was instituted by appellees DeWitt Vaught and Georgia Vaught, his wife, against appellant Lucy Spence for damages resulting from an automobile accident occurring on February 11, 1962. Appellant and appellee Mrs. Vaught had attended Sunday School and church at Houston, Arkansas, although they lived in Perryville. Mrs. Vaught had gone to Houston with her daughter, who left early. Mrs. Vaught asked appellant, who is Mr. Vaught's aunt, for a ride back to Perryville. About two miles out of Houston the automobile veered to the right off the road and into a ditch. The automobile turned over, injuring appellee severely.

Trial of the case before a jury resulted in a verdict in favor of appellees. For reversal of the judgment on the verdict, appellant contends that there is no evidence of wilful and wanton misconduct on the part of the appellant and a verdict for the appelant should have been directed by the trial court.

The Arkansas guest statute referred to above, Ark. Stats. § 75-913, reads as follows:

"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 others."

The operative portion of § 75-915 is as follows:

"No person transported or proposed to be transported by the owner or operator of a motor vehicle as a guest, without payment for such transportation, nor the husband, widow, executors, administrators or next of kin of such person, shall have a cause of action for damages against such owner or operator, or other persons responsible for the operation of such car, for personal injury, including death resulting therefrom, by persons while in, entering, or leaving such motor vehicle, unless such injury shall have been caused by the wilful misconduct of such owner or operator."

Each personal injury case involving the guest statutes must be examined on its own. As we said in *Harkrider* v. *Cox,* 230 Ark. 155, 321, S. W. 2d 226.

"[I]t is a question in each case whether the particular facts therein made a jury question as to wilful and wanton negligence.

. . . "In *McAllister, Administrator* v. *Calhoun,* 212 Ark. 17, 205 S. W. 2d 40, we quoted with approval from *Splawn, Administratrix* v. *Wright,* 198 Ark. 197, 128 S. W. 2d 248: 'Whether an automobile is being operated in such a manner as to amount to wanton and wilful conduct in disregard of the rights of others must be determined by the facts and circumstances of each individual case.' "

The evidence presented in the case at bar is, naturally, controverted. According to Mrs. Vaught's testimony, the car had begun to make a singing noise, then a grinding noise, and then a swerve lasting over some period of time, with Mrs. Vaught making warnings to appellant to slow down to see what the trouble was, and with appellant

ignoring her warnings. According to appellant, the accident happened very quickly, with there being a sudden swerve and the car veering into the ditch, and at no time were there any warnings from Mrs. Vaught. Appellee Vaught and another witness testified that there was a rim cut on the highway and rubber marks about 3/10ths of a mile or more long leading up to the rim cut. Appellant's husband testified to a gouge or cut in the highway made by a tire rim about 15 to 20 feet from where the car ended up, but would swear to no other marks. Mrs. Vaught testified appellant was driving 50 to 60 miles per hour and did not slow up. Appellant testified that her speed was 45 to 50, that the accident was instantaneous and that she never could find the tire or wheel marks.

Appellant moved for a directed verdict at the close of appellees' testimony, which was overruled. The criterion for trial courts in considering motions for directed verdicts is well-stated in *Smith v. McEachin,* 186 Ark. 1132, 57 S. W. 2d 1043:

"It is a rule of universal application that, where the testimony is undisputed and from it all reasonable minds must draw the same conclusion of fact, it is the duty of the court to declare as a matter of law the conclusion to be reached; but, where there is any substantial evidence to support the verdict, the question must be submitted to the jury. In testing whether or not there is any substantial evidence in a given case, the evidence and all reasonable inferences deducible therefrom should be viewed in the light most favorable to the party against whom the verdict is directed, and if there is any conflict in the evidence, or where the evidence is not in dispute but is in such a state that fair-minded men might draw different conclusions therefrom, it is error to direct a verdict."

Examining the record to determine "the state of the evidence", it is relevant to review the types of negligence and their standards for determination. Negligence is the failure to use ordinary care. *Johnson* v. *Coleman,* 179 Ark. 1087, 20 S. W. 2d 186. Gross negligence is the failure to use even slight care. *Memphis & L. R. R. R.* v. *Sanders,*

43 Ark. 225. Wilful negligence is the same as gross negligence with the added factor that the actor knows, or the situation is so extremely dangerous that he should know, that his act or failure to act will probably cause harm. *Scott* v. *Shairrick,* 225 Ark. 59, 279 S. W. 2d 39.

Applying these standards to the situation as testified to by appellee, it is not illogical to conclude that appellant was negligent when she failed to slow down after the car started humming; she was grossly negligent when she failed to slow down after the car began swerving; and she was wilfully or wantonly negligent in failing to slow down after the grinding noise started, the car swerved more violently, she was twice warned to slow down, and she still continued to drive at the same speed of about fifty miles per hour. Viewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the party against whom the directed verdict was sought, we find that fair-minded men might draw different conclusions therefrom, and that therefore the trial court did not err in failing to direct a verdict for appellant.

Appellant's remaining point urged for reversal is that the giving of plaintiffs' (appellees') instruction No. 5 constituted prejudicial error.

Plaintiffs' requested instruction No. 5 reads as follows:

"The plaintiffs have alleged that the defendant was negligent in one or more of the following respects:

(2) failing to keep her vehicle under proper control and

(3) in operating the automobile at a speed in excess of that which was reasonable and prudent under the circumstances then existing.

"You are instructed that under the laws of the State of Arkansas it was the duty of the defendant, Lucy Spence, to exercise ordinary care in the operation of her vehicle to avoid injury to others, and that a failure on her part to exercise such care would be evidence of

negligence. Ordinary care requires every person who operates a motor vehicle upon a public highway to keep his or her vehicle under such control as will enable him or her to check its speed, or to stop it absolutely, if necessary to avoid injury where danger is apparent or reasonably to be anticipated by the exercise of ordinary care. Further, it was the duty of the defendant to exercise ordinary care to operate her vehicle at a speed no greater than was reasonable and prudent under the circumstances, and that a failure to do so would be evidence of negligence.

"You are further instructed in that connection that the lawful maximum speed at which the defendant's vehicle might have been operated at the time and place of the accident here involved was that speed which was reasonable and prudent under the circumstances, but not to exceed 60 miles per hour in any event, and should you find that defendant's vehicle was being operated at the time and place of the accident here involved at a speed which was not reasonable and prudent under the circumstances this would be evidence of negligence to be considered along with other circumstances in the case."

Appellant forceably contends that the giving of this instruction was error because it refers to the duty to exercise ordinary care, and, this being a guest statute case, this instruction could only lead to the confusion of the jury and probably caused the jury to conclude that appellant was under a duty to exercise ordinary care rather than under a duty to avoid being guilty of wilful and wanton misconduct.

A careful review of the record reveals that not only was wilful and wanton negligence or misconduct defined or required in plaintiffs' instructions No. 1, No. 3, No. 9 and No. 11, but also in plaintiffs' instruction No. 6, given immediately after the alleged erroneous instruction. Instruction No. 6 reads as follows:

"Now should you find from a preponderance of the evidence that the defendant, Lucy Spence, was guilty of negligence in one or more of the respects alleged by the

plaintiff, as just related to you, this negligence, without more, would not entitle the plaintiffs to maintain this action, or to recover their damages, if any. As you have previously been instructed, to recover in this action, if at all, plaintiffs must prove by a preponderance of the evidence that the defendant was guilty of wilful and wanton conduct. They must prove not only that the defendant was negligent, but also that she knew, or had reason to believe, that her act of negligence was about to inflict injury, and that she continued in this course of conduct with a conscious indifference to the consequences thereof, exhibiting a wanton disregard of the rights and safety of others."

When all the instructions are thus considered, we cannot say that they incorrectly presented the law, or that the jury could have been misled thereby. *Pinkerton* v. *Davis,* 212 Ark. 706, 207 S. W. 2d 742.

Affirmed.

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

CARLETON HARRIS, Chief Justice (dissenting). In my opinion, the present decision by the court greatly weakens the effectiveness of the Guest Statutes. Appellee, in arguing for affirmance of this case, makes a statement in her brief with which I entirely agree. After reviewing a number of cases, decided under the Guest Statutes, she states, "This review also indicates a trend of the Court toward allowing guest cases to go to the jury under more liberal requirements of proof than in the earlier cases decided immediately after passage of the Guest Statutes." Certainly, I cannot believe that the verdict for appellee would have been upheld under earlier decisions.

In *Splawn* v. *Wright,* 198 Ark. 197, 128 S. W. 2d 248 (decided in May 1939) the guest was a young lady, riding with another young lady and a young man. The driver was operating the automobile at a speed of approximately 45 miles per hour on a gravel road, and on a foggy, rainy

night. In making a curve, the car began to slide and the guests remonstrated with the driver, telling him that he was driving too fast. Later, when the driver reached down to adjust the heater, he lost control of the car, and the guest was injured. The case was allowed to go to the jury, but this court reversed on the basis that there was not sufficient evidence of wilful and wanton negligence to make a jury question. In *Edwards* v. *Jeffers,* 204 Ark. 400, 162, S. W. 2d 472, decided in June, 1942, the driver and guest were ladies who were close friends. According to testimony, the driver was traveling along a gravel road which had several sharp turns; the car failed to complete one turn, and the driver lost control, the automobile turning over in a ditch. The guest testified that the car was moving at a speed of 70 to 80 miles per hour, and further that she warned the driver several times by saying, "Irene, you are driving too fast over this road," and called to the driver's attention the fact that the gravel was loose and there were curves on the road. According to the witness, the operator of the car never did slow down. Again, the trial court allowed the case to go to the jury, but again this court reversed and dismissed on the basis that the testimony fell short of that degree of wilful and wanton misconduct that would warrant a recovery under the statute.

In *Cooper* v. *Calico,* 214 Ark. 853, 218 S. W. 2d 723, a driver, who had been drinking intoxicants, endeavored to move his car from one place on a parking lot to another. In doing so, he allowed the back end of the automobile to protrude over the paving of Highway No. 71, north of Fayetteville. Admittedly, he did not look up or down the highway before attempting to move, because he had not intended to back onto the highway. An approaching vehicle hit the car and injured a guest, a young high school girl. The young lady recovered judgment in the trial court, but this court reversed the judgment, stating:

"No one could successfully deny that his conduct was careless. Certainly he was negligent in not stopping and looking in each direction before placing his Chevrolet and his passengers in a position of peril. But even gross

negligence, under the Guest Statutes, is not enough. There must be a wilfulness, a wantonness, an indifferent abandonment in respect of consequences, applicable alike to self and guests."

Numerous other cases could be cited to the same effect.

I certainly agree that Mrs. Spence was guilty of ordinary negligence, but I cannot agree that her negligence reached the category of wilful and wanton misconduct. It is obvious from the proof that a tire on the Spence automobile was losing air, which occasioned the "humming" sound that was heard. The majority state:

" * * * it is not illogical to conclude that appellant was negligent when she failed to slow down after the car started humming; she was grossly negligent when she failed to slow down after the car began swerving; and she was wilfully or wantonly negligent in failing to slow down after the grinding noise started, the car swerved more violently, she was twice warned to slow down, and she still continued to drive at the same speed of about 50 miles per hour."

From the evidence, all of the above took place in less than a minute, and, as far as wilful and wanton negligence is concerned, (according to the majority, "when the grinding noise started") this only lasted for a very few seconds! On a clear day and straight highway, Mrs. Spence was driving at a moderate and legal rate of speed. Because of her inability to recognize that the tire was going flat, the accident occurred. I reiterate my belief that she was guilty of ordinary negligence, but I do not consider that these circumstances establish wilful and wanton negligence.

I, therefore, respectfully dissent.

I am authorized to state that Justice George Rose Smith joins in this dissent.

Opinion delivered April 29, 1963.

[redacted]

Moses, McClellan, Arnold, Owen & McDermott, by *E. M. Arnold* and *W. E. Henslee,* for appellant.

Chowning, McHaney, Mitchell, Hamilton & Burrow Pope, Pratt & Shamburger, by *Donald S. Ryan,* for appellee.

FRANK HOLT, Associate Justice. This action stems from a controversy about the ownership of a $5,644.80 check made payable to the appellant, Saf-T-Boom Corporation. The check was accepted and paid by the appellee, Union National Bank, upon an unauthorized endorsement.

The appellant demanded that the Bank make good to it, as the named payee, the check which appellee, Robert L. James, had negotiated upon his unauthorized endorsement. The Bank refused and then froze or impounded the balance in James' personal account which was the sum of $1,204.58. Thereupon the appellant filed suit against the appellee, Union National Bank, for wrongful payment to James of the $5,644.80 check. The Bank denied liability and as an affirmative defense alleged, inter alia, that the check was given to appellant without consideration and was not drawn in payment of an existing obliga-

tion to the appellant. The Bank cross complained against James for any amount that might be awarded to the appellant on its complaint. James denied liability to the Bank for cashing the check upon his unauthorized endorsement and cross complained against his employer, Saf-T-Boom Sales and Service Corporation, for sales commissions earned but unpaid to him, together with certain advances made by him to the company. Saf-T-Boom Sales and Service Corporation denied the validity of James' complaint and filed a cross complaint against James for conversion of the $5,644.80 check as company funds belonging to it and in addition thereto asked for damages because of the loss of its franchise rights due to James' unauthorized endorsement, or conduct, all of which James denied.

The appellant, Saf-T-Boom Corporation, is an Arkansas corporation and is the owner and manufacturer of a safety device for crane-type heavy equipment. On February 1, 1960, appellant entered into a contract with appellee, Saf-T-Boom Sales and Service Corporation, a separate and distinct Arkansas corporation, which contract granted to it the exclusive franchise to market these devices within the United States with the exception of the State of Arkansas. On February 1, 1961, Saf-T-Boom Sales and Service Corporation made a contract with the appellee, Robert L. James, by which he became its general manager and sales representative. He was, also, a director of Saf-T-Boom Corporation. In June of 1961, Robert L. James and Jack E. Hill, a fellow salesman, sold twelve of these safety devices, or $5,644.80 worth of them, to the Elliott Equipment Company of Nashville, Tennessee. Based on this sale, the Sales and Service Corporation forwarded a purchase order to Saf-T-Boom Corporation which in turn filled the order by causing the twelve devices to be shipped direct to Elliott, the purchaser. The appellant billed Saf-T-Boom Sales and Service Corporation for the amount of the sale, less the sale commission of 50%. The Sales and Service Corporation billed Elliott. In paying for these devices Elliott, the purchaser, made the $5,644.80 check payable to Saf-T-Boom Corporation, the appellant, and mailed it to 1613 Main Street, Little

Rock, Arkansas, which address was the joint office of both corporations. On July 3, 1961, upon receipt of the check at this address, James proceeded, without authority, to endorse the check "Saf-T-Boom Corporation—R. L. James, Director" and added, "Robert L. James," his personal endorsement. He then presented the check for payment to appellee, the Union National Bank of Little Rock. The Bank honored his endorsement and deposited $5,044.80 in Robert L. James' personal account and gave James the balance of $600.00 in cash. The check was duly paid by the drawee bank at Nashville, Tennessee. At the time of this transaction the appellant, Saf-T-Boom Corporation, maintained its corporate bank account with the appellee, Union National Bank. The Bank had on file the resolution of the appellant's Board of Directors and a signature card authorizing the recognition by the Bank of only two signatures. It is undisputed that James had no authority to endorse this check. Neither did he have authority to negotiate checks for the Sales and Service Corporation.

At the time of this transaction, James contended that his employer, the Sales and Service Corporation, was indebted to him for commissions in the sum of $7,156.25. As distributor, the Sales and Service Corporation was indebted at this time to Saf-T-Boom Corporation, the owner and manufacturer of the safety device, in the amount of $8,874.54.

This litigation was submitted to the Circuit Judge, sitting as a jury, who found that the purchaser, Elliott, was indebted to appellee, Saf-T-Boom Sales and Service Corporation; that the check in question was erroneously made payable to the order of appellant, Saf-T-Boom Corporation, and that the Sales and Service Corporation was the legal owner of the check; that James should have delivered the check to his employer, the Sales and Service Corporation; that Sales and Service Corporation was indebted to James for commissions earned in the sum of $7,156.25; that James had possession of $4,480.00 from the proceeds of the Elliott check; the Court then held that appellant was not a "holder of the check for value" and dismissed the complaint of the appellant; the court also

dismissed the cross complaint of the Bank against James and gave him judgment against the Sales and Service Corporation for $2,676.25 [after allowing a credit of $4,480.00] on his cross complaint; the court then rendered judgment against the Bank for $1,204.58, representing the impounded funds in James' personal account, in favor of the Sales and Service Corporation. From this judgment appellant brings an appeal.

For reversal, Saf-T-Boom Corporation, the sole appellant, contends that as the named payee it is the owner of the check and, since the appellee-bank wrongfully paid the check to James, the Bank is liable to the appellant as payee for the full amount thereof.

In this State we have long adhered to the general rule that when a bank has obtained possession of a check upon the unauthorized or forged endorsement of the payee's signature and then collects the amount of the check, as was done in this case, the bank is liable to the payee for the entire proceeds of the check, notwithstanding the proceeds thereof were paid to the person who negotiated the check. This question was first considered in *Schaap* v. *First National Bank of Ft. Smith,* 137 Ark. 251, 208 S. W. 309,[1] and there our court quoted with approval this language:

" 'No equitable considerations can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security.' "

Further, Mr. Justice Hart, speaking for our court, said:

" * * * The general rule is that an *unauthorized indorsement is a nullity.* * * * In such cases the bank cannot avoid liability by showing that its conduct was governed by good faith and the payee is entitled to recover unless he has been guilty of fraud or negligence in the matter." [Citing cases — emphasis added] There

[1] See also *Wayne Tank & Pump Co.,* v. *Bank of Eureka Springs,* 172 Ark. 775, 290 S. W. 370; *Shultz Const. Co.,* v. *Crawford County Bank,* 182 Ark. 569, 32 S. W. 2d 177.

is no evidence of fraud or negligence by the named payee in this case.

The basis for the almost universal approval of this rule can be summarized in the statement that the possession of a check based upon a forged or unauthorized endorsement of the payee's signature is wrongful and when the money is collected on such a check the collecting bank is liable as for moneys had and received, the bank receiving the proceeds for the use of the payee. Therefore, when the bank received the money on the check it had no more title to the money than it had to the check. 9 C. J. S., Banks & Banking, § 254, pp. 526 & 528; 31 A. L. R. 1068; 67 A. L. R. 1535; 7 Am. Jur., Banks, § 597, p. 432.

In this case it is undisputed that appellee, Robert L. James, had no authority, expressed or implied, to endorse the check in question. When a check is offered to a bank the obligation is upon the bank to determine if the endorsement is genuine and made by the payee or one duly authorized by the payee. Certainly it is a highly suspicious circumstances to cash or credit to one's personal account a check made payable to a corporation.

The Bank and James assert that the appellant was not the owner or holder in due course because the check was not supported by any consideration. We do not consider this contention as a material issue in this case when viewed in the light of our long established rule of law relating to an unauthorized endorsement.[2]

In appropriate proceedings in law or equity the remaining rights as between the various parties, of course, may be further enforced or adjudicated.

We hold that the appellant's right of recovery for the full proceeds of the check from the Bank is complete and the Court erred in holding to the contrary. The judgment is reversed and the cause remanded with directions to enter a judgment in favor of Saf-T-Boom Corporation against the Bank for $5,644.80 and interest.

[2] For recent cases in other jurisdictions on the question of ownership or bank's liability, see *Brede Decorating, Inc.*, v. *Jefferson Bank & Trust Co.*, (Mo. 1961) 345 S. W. 2d 156; *AEtna Casualty & Surety Co.*, v. *Lindell Trust Co.*, (Mo. 1961) 348 S. W. 2d 558; *Leadbetter* v. *Meadow Brook National Bank*, (N. Y. 1963) 236 N. Y. S. 2d 659.

Opinion delivered May 6, 1963.

John B. Driver, for appellant.

Roy Danuser and *Eugene W. Moore,* for appellee.

CARLETON HARRIS, Chief Justice. Helen Cash, appellee herein, was a nominee for the office of school board director at the regular school election held in St. Joe School District No. 69 of Searcy County, on December 5, 1961. Her name was printed on the ballot. Noel Baker, Jr., appellant herein, qualified as a write-in candidate for

the same position. Two hundred thirty-five (235) ballots were cast at the election, and at the conclusion thereof, the election officials certified appellee as the duly elected director of said school district. Within the time prescribed by law, appellant filed his complaint alleging that he received a majority of the votes cast in said election, and that the judges and clerks at said election had wilfully refused to count and tabulate 176 ballots which had been cast by legal electors of the district for him as a write-in candidate for the aforesaid office. One hundred seventy-one (171) names were then listed as individuals who allegedly voted for contestant. Appellant then prayed that these uncounted ballots be counted and tabulated, and that he be declared the duly elected school director. Appellee filed an answer denying that Baker had received a majority of the legal votes cast, but stated that she had no objection to a recount of the ballots, "and the legal votes received by each party hereto be determined and ascertained." The case was heard on April 27, 1962, at which time the court announced:

"Under the pleadings in this case, it seems that the only way it can be determined which of these candidates received the highest number of legal votes is to open the ballot box and count the votes. First, it will be necessary that it be shown that the ballot box is intact, that it is in the same condition it was immediately after the election, in other words that the ballots have not lost their integrity. It will be necessary to show that before they would be legal evidence."

Appellant then called as his witness Mrs. Jimmie Lee Falls, County and Circuit Clerk of Searcy County. Mrs. Falls testified that the ballot box was in the same condition (at the time of the hearing) as when delivered to her by the judges of the election immediately after the certification of the vote. She stated that she sealed the box on the night of December 5. "I took a strip of paper and put it across on it and sealed it. I put scotch tape on it on each side and I initialed that piece of paper that I sealed it with." She testified that the ballot box was still in the same condition as when she sealed it.

Following her testimony, the court stated:

"The Court thinks it has been sufficiently established that the ballot box is intact and the ballots are in the same physical condition that they were at the time they were delivered to the Clerk, so it is hereby ordered that the Clerk as official custodian of the ballot box bring the box into open Court and to open it for the inspection of interested parties."

The ballot box was then opened, and the ballots were individually counted by the clerk, the court reporter, and the attorneys for both parties, the court directing that the ballots should be challenged by counsel as the count proceeded. During the count it developed that a number of ballots reflected that both candidates had been voted for, *i. e.*, an "x" had been placed in the square opposite the name of Helen Cash, and the name of Noel Baker, Jr. had been written in on the next line, and an "x" placed in the square by his name.

After completing the counting, appellant called his father, Noel Baker, as a witness. Baker testified that he saw each ballot as it was counted on December 5, 1961, and no ballot that was counted at that time contained an "x" in both squares. Noel Baker, Jr., then testified that the ballot box had a different appearance at the present (time of the hearing) than when delivered to the clerk on December 5. He stated, "Well, when it was delivered to her, she took an envelope and rolled it up and took mucilage and stuck it over the box like that." Upon request, appellant was given 10 days in which to file a motion challenging the integrity of specific ballots, though the court held that the integrity of the ballot box and verity of the ballots as evidence had not been destroyed.[1] Thereafter, appellant filed his motion asking the court to direct the County Clerk to bring into court

[1] THE COURT: The Court has already passed on the question of the integrity of the ballot box. Testimony was taken on that this morning, and both parties had an opportunity to question the condition of the ballot box fully this morning and testimony was offered and further testimony could have been offered as to the appearance and condition of the box, as to whether or not it showed any signs of being tampered with, and that question I think was fully developed this morning, so far as the appearance of the box itself is concerned.

the official list of electors voting at the election, together with the tally sheets, and, further, to direct the County Treasurer to produce the stub box containing the signature of the voters. Further:

"That when said votes were opened it was disclosed that Forty-seven (47) or more votes which were cast for Contestant disclosed that said voters wrote in the name of Noel Baker, Jr., and placed an "x" in the square opposite his name written in and that according to affidavits hereto attached subsequent to said Election, an "x" had also been placed after the printed name of Helen Cash; thus further destroying the verity of these ballots and further that Forty-seven (47) ballots marked in this manner are too many to have been marked inadvertently by the voters and further that many of the ballots show to have been pulled from the sealed box through the slot by a wire."

The motion was supported by the affidavits of 159 qualified electors who stated that they had voted for Baker, "and that if an "x" appears after the name of Helen Cash, Contestee, it was placed therein by some other person, after they had placed their ballot in the ballot box on the day of the election."

This motion was denied, following which the court rendered its findings of fact and conclusions of law, as follows:

"After a recount of the ballots in open Court in the presence of the parties and attorneys, and after hearing all the testimony in the case, the Court finds the following facts:

"That a total of 235 ballots were cast in the school election in St. Joe District; that 70 ballots were cast for the contestee which are not contested, and that 53 ballots were cast for the contestant which are uncontested; that 47 ballots were cast on which there was a write-in and both boxes were marked with an "x"; that 23 ballots were cast on which there was no write-in name and both boxes were marked with an "x"; that 21 ballots were cast with neither box marked with an "x"; that 8 ballots were cast

with no write-in name and an "x" marked in the box below the name of the printed candidate Helen Cash; that 13 ballots were challenged because of irregularities in the name of the write-in candidate.

"It was stipulated by the parties, and the Court so holds that the 47 ballots on which both boxes were marked with an "x" are not legal votes.

"As to the 23 ballots with no write-in name but both boxes marked with an "x", it could not be reasonably contended that the voters of these ballots intended to vote for the contestant, since they did not write his name on the ballot. The more serious question is whether or not they should be counted for the contestee. The ballots indicate to the Court that they were intended to be votes for the contestee. Of course, the extra "x" mark is superfluous. It doesn't appear to the Court that this is a strong enough reason to disfranchise these voters.

"The 21 ballots which have no "x" mark in either box are irregular and cannot be counted for either candidate.

"It is the opinion of the Court that the 8 ballots with no write-in name, but the "x" mark is in the box below the name of the printed candidate, and no "x" mark following the name of the printed candidate, are illegal votes, and cannot be counted.

"With reference to the 13 miscellaneous challenges, ballots No. 277, 56, 73 and 57 are for Frank Winder as a write-in candidate, obviously these ballots cannot be counted. Ballot No. 11 was cast for W. R. Baker as a write-in, and ballot No. 54 was cast for James Baker as a write-in; obviously these cannot be counted for the contestant. The other 7 miscellaneous challenged ballots, while irregular in form have some indication that the voters intended to cast their ballots for the contestant, and these 7 votes are allowed for the contestant.

"Therefore, the Court finds that the contestant received 60 legal votes and that the contestee received 93 legal votes in said election."

Thereupon, the court entered its judgment finding that Helen Cash was the duly elected school director of St. Joe School District No. 69, and from such judgment appellant brings this appeal.

The above findings concisely state the view of the trial court, and we proceed to briefly review those findings.

While no formal stipulation was entered into that ballots carrying an "x" in both boxes would not count for either side, the parties agreed to treat such ballots in that manner, and in tabulating the individual votes, used that method. The court's finding that the parties had stipulated that such votes would not be counted is supported by the record; for that matter, appellant does not dispute the fact. We hold that the court ruled correctly as to these 47 ballots.[2]

We likewise agree with the court's determination as to the 23 ballots with no write-in name, but with an "x" appearing in both boxes. The "x" in the box after a blank was meaningless, and the court properly counted these votes for appellee.

Certainly the action of the court in holding that the 8 ballots were not votes for either candidate cannot be complained of by appellant since there was no possible way that the votes could have been counted for him.

Six (6) ballots were cast for other write-in candidates, and appellant cannot claim these votes. Seven (7) votes, though irregular in form, were allowed for Baker.

The court erred in one respect, *viz.*, in its ruling relative to the 21 ballots wherein Noel Baker, Jr.'s name was written in but no "x" was placed in the box opposite his name. In *Clement* v. *Davis,* Law Rep. of Dec. 17, 1962, 362 S. W. 2d 706, decided subsequent to the trial court's decision in this case, we held that it is unnecessary to the validity of a write-in vote that a cross mark appear in the square at the right of the name. Baker should therefore have been allowed 21 more votes, but this would not change the outcome of the election.

[2] Also, on some of these ballots, the name of "Noel Baker" rather than "Noel Baker, Jr." was written in.

When all the votes that Baker could possibly lay claim to (counting both those for "Noel Baker, Jr.," and "Noel Baker") are added, we find a total of 128.[3] Yet, appellant's motion was supported by the affidavit of 159 persons. Obviously, a large number of these persons were in error, since there is no contention that Baker's name was erased from any ballot. Favorable action by the court on Baker's motion would have had the same effect as holding another election, to which relief appellant was not entitled.

Since the error herein pointed out does not change the result of the election, the judgment is affirmed.

[3] Broken down as follows: 60 allowed by the court, 47 not counted for either side, and 21 with no "x" in the box.

BLACK AND WHITE, INC. *v.* LOVE.

5-2984 367 S. W. 2d 427

Opinion delivered May 6, 1963.

[Rehearing denied June 3, 1963.]

Wright, Lindsey, Jennings, Lester & Shults and *Philip S. Anderson, Jr.*, for appellant.

William Slater Hollis, for appellee.

ED. F. MCFADDIN, Associate Justice. This case arises because a passenger was injured in a taxicab. The appellee, Black & White, Inc., is an Arkansas corporation, engaged in the operation of taxicabs in the City of Little Rock. On the night of October 24, 1958, Mr. and Mrs. W. C. Love, visitors in Little Rock, along with three other married couples, had a late supper at a restaurant located on Thirteenth Street in Little Rock, and all decided to return to their hotel. Mr. Love called Black & White for two cabs. In a few minutes when the first cab arrived at the restaurant, the driver inquired of Mr. Love if he was the person who had ordered two cabs, and Mr. Love responded in the affirmative. The four ladies entered that cab, to be transported to the hotel; and the four men followed in another cab which came in a few seconds. Enroute to the hotel the cab occupied by the ladies was involved in a traffic mishap and Mrs. Love was injured.

Mr. and Mrs. Love, as plaintiffs, filed action on July 27, 1961, against Black & White, alleging that Mrs. Love was injured because of the negligence of the driver of the cab in which she was riding as a passenger, and that both Mr. and Mrs. Love suffered damages because of her injury. The defendant filed a general denial on August 11, 1961. After the expiration of three years from the date of Mrs. Love's injury, there was an unsuccessful attempt by Mr. and Mrs. Love to add Checker Cab Company as a defendant. The sole defendant, Black & White, Inc., claimed, *inter alia,*[1] that it was not a Black & White cab in which Mrs. Love was injured. Jury trial resulted in a verdict and judgment for Mr. and Mrs. Love for a total of $2,298.00; and Black & White brings this appeal, urging ten points, which we group in suitable topic headings.

I. *Admission Of Evidence.* (a) The Court permitted Mr. Love to testify that he looked in the telephone directory and found the telephone number for Black & White and called that number and ordered two cabs to be sent to the restaurant. The appellant claims the admission of this evidence was error. We hold against the ap-

[1] The issue of whether the driver of the taxicab was negligent is not presented on this appeal.

pellant on this point. Certainly Mr. Love's testimony, that he ordered two cabs from Black & White, had a direct bearing on the case. Mr. Love testified that he placed his wife in a Black & White cab. Mrs. Love became a passenger in the cab in which her husband placed her. She did not have to personally order the cab. Her husband did that for her; and she testified that she was injured while a passenger in a Black & White cab in which her husband had placed her.

(b) Mr. Love was permitted to testify that when the first cab arrived at the restaurant, the driver inquired of Mr. Love if he was the party who had ordered two cabs. We find no error in the admission of this evidence. Mr. Love's testimony, as to the inquiry made by the driver, was cogent evidence that the cab came in response to Mr. Love's order. Unless the driver knew of the order which had been made to Black & White for two cabs, the driver could hardly have made the inquiry which he did.

(c) The police officer, who investigated the traffic mishap while both vehicles were at the scene, testified that his report, made at the time, showed that the cab was a Black & White cab. We find no error in the admission of this evidence. The mishap occurred on October 24, 1958, and the witness was testifying on September 26, 1962. He had a right to refresh his memory and refer to his official report made at the time of the mishap. The defendant had the right to cross examine the witness, as was skillfully done, but such right of cross examination did not render erroneous the admission of the testimony on direct examination.

(d) Anticipating that the defendant would introduce evidence — at it did — that Checker Cab Company was an entirely separate corporation from Black & White, the plaintiffs, over the objection of the defendant, were allowed to prove:

"... that there is one radio dispatcher for both the Checker Cab Company, Inc. and Black and White, Inc., who dispatches the nearest cab to the scene where the customer is to be picked up whether said cab be a Checker or a Black and White cab, so that it would be possible

for a person calling Black and White Cab Company to be picked up by a Checker cab . . . There is one switchboard located at 114 East Markham which receives all incoming calls for both Checker Cab Company, Inc. and Black and White, Inc. and which is operated by one person. Both the radio dispatcher and the switchboard operator were on the payroll of Black and White, Inc. only on October 24, 1958 and for a long period of time before that.''[2]

The Court allowed the foregoing quoted testimony; and we find no error committed. The plaintiffs were making an effort to pierce the fiction of the corporate entities of Black & White, Inc. and Checker Cab Company; and the way the two corporations operated — like a joint venture — was a cogent fact which the plaintiffs were entitled to show.

II. *Remarks Of The Trial Judge In The Presence Of The Jury.* The defendant introduced evidence to the effect that there were in fact three corporations: (1) Capital Auto Leasing & Renting Corporation, which actually owned the motor vehicles and leased them to either of the other two corporations; (2) Black & White, Inc., which operated a taxicab business; and (3) Checker Cab Company, which also operated a taxicab business. Then on rebuttal the plaintiffs offered in evidence the entire stipulation heretofore mentioned in the footnote in Topic II, *supra.* The facts had been stipulated, but the defendant had all the time preserved its objection to admissibility. This stipulation covered, *inter alia*: (1) the identity of the shareholders and officers of each of the three corporations; (2) the division of the salaries of the officers between the three corporations; (3) ''That it is the nature of the business of both Checker and Black & White cab companies for drivers to drive either company's cab when the particular cab that has been assigned to them is being repaired or maintained''; (4) that the

[2] The parties had entered into a lengthy stipulation concerning the two corporations (*i. e.*, Black & White, Inc. and Checker Cab Company), the identity of the stockholders, the blending of business by the two corporations, etc., etc. The stipulation was as to facts, with defendant preserving its objection as to the admissibility. The Court admitted into evidence to the jury the portion shown in the quotation above. The matter of this stipulation is further discussed in Topic II, *Infra.*

officers of the three corporations are identical; (5) that for several months prior to this accident all the cab drivers simply rented their cabs for $10.00 for twelve hours, and there was no written contract between the companies, and the cab drivers' rental agreement was a day to day proposition.

When the plaintiffs offered the stipulation in rebuttal, the defendant questioned the relevancy and/or materiality of the stipulation, and the Court said: "gentlemen, I believe I will let that stipulation be introduced in the record without benefit of it going to the jury because I think what the Court is going to tell the jury to some extent renders this testimony which has just been introduced, and this stipulation, immaterial."

The appellant complains that the language of the Court, as above quoted, was a comment on the weight of the evidence. But under the facts in the case at bar, we hold against the appellant's contention. The Trial Court was merely telling the attorneys that his instructions would render the stipulation immaterial as evidence for the jury to consider, which was true. The instructions given by the Trial Court rendered his remark entirely harmless.

III. *Instructions.* We come then to the big issue in this case, and this relates to the instructions. The appellant here complains of four of these instructions; but what we say about Instruction No. 4 will dispose of appellant's arguments on all four. The Court's Instruction No. 4 reads:

"You are instructed that if you find from a preponderance of the evidence that on the 24th day of October 1958, at about 11:00 P.M., the plaintiff, William C. Love, called the Defendant, Black & White Cab Company, Inc. and requested that it send two cabs to the Brown Jug Restaurant for the purpose of transporting the plaintiffs as passengers in the cabs from said restaurant to their hotel, in Little Rock, and if you further find that pursuant to said call, if any, the Black & White Cab Company dispatched two cabs to the designated address and that one of such cabs, if any, so sent, undertook to

transport the plaintiff, Mrs. Love, to her hotel, you are told that the question of the ownership of the cab would be immaterial since under such findings, if any, by you, the Black & White Cab Company would be legally responsible for a failure, if any on the part of the driver of the cab so dispatched to exercise the highest degree of care toward a passenger in the cab."

In effect, by this instruction the Court told the jury that if Mr. Love called the Black & White Company and ordered two taxicabs, and Black & White elected to send a Checker cab, then Black & White would be liable for the acts of the driver of the Checker cab, just as it would have been liable for the acts of the driver of a Black & White cab. We find no error in the said instruction under the peculiar factual situation shown in this case (and we have not been able to find another case exactly the same). Whether the Trial Court gave the instruction on the theory of joint venture, or on the theory of piercing the entity of the corporate fiction, is not disclosed by the record; but either theory would have justified the instruction.

It was shown here that the two corporations (Black & White and Checker) were so interwoven that there was only one radio dispatcher for both corporations; and the dispatcher sent the nearest cab to where the customer was to be picked up, regardless of whether it was a Checker cab or a Black & White cab. When Mr. Love ordered two cabs from Black & White (as the uncontradicted evidence shows that he did) then Black & White certainly engaged in a joint venture[3] with Checker in sending a Checker cab, if such was actually sent. The operator on the switchboard and the radio dispatcher for the cabs were both on the exclusive payroll of Black & White at the time here involved. Thus the evidence showed a joint venture between the two corporations.

Furthermore, the two corporations were owned by the same stockholders, operated by the same officers, and the cabs were interchanged. It would be putting

[3] See *Martin* v. *Weaver* (Tex. Civ. App.), 161 S. W. 2d 812; and see 48 C. J. S. p. 809 *et seq.*, "Joint Adventures" § 2 *et seq.*

fiction above right and justice to allow Black & White to hide behind the corporate entity of Checker in this case.[4] In *Rounds and Porter Lbr. Co.* v. *Burns,* 216 Ark. 288, 225 S. W. 2d 1, we said: "It is only when the privilege of transacting business in corporate form has been illegally abused to the injury of a third person that the corporate entity should be disregarded." See also *Plant* v. *Cameron,* 228 Ark. 607, 309 S. W. 2d 312.

There are a wealth of cases involving liability of taxicabs claimed to be owned by one party and driven by another, and to discuss these cases[5] would unduly extend this opinion. But the general trend of the holdings seems to be summarized by the Supreme Court of Florida in *Economy Cabs* v. *Kirkland,* 174 So. 222:

"One of the first principles of hornbook law we were taught in the law school was that for every wrong the law provides a remedy. If the law is to be circumvented by litigants as proposed here, then we were taught a futile lesson. They should not be permitted to parade under a flag of truce to garner a profit and then raise the black flag when called on to make restitution for damage perpetrated. *Callas* v. *Independent Taxi Owners' Ass'n,* 62 App. D. C. 212, 66 F. (2d) 192; certiorari denied, 290 U. S. 669, 54 S. Ct. 89, 78 L. Ed. 578; *Vance* v. *Freedom Oil Works Co.,* 113 Pa. Super. 280, 173 A. 496; *Bank of U. S.* v. *Dandridge,* 12 Wheat. (U. S.) 64, 6 L. Ed. 552. This rule applies to and governs all persons to whom defendant furnished transportation, including the plaintiff and those who deal with Economy Cabs as a corporation. Third parties who happen to own a cab and use it in the name of the company at the call of the company and under the colors of the company will be treated as the company. *Anderson* v. *Yellow Cab Co.,* 179 Wis. 300, 191

[4] On piercing the fiction of the corporate entity in taxicab cases, see particularly *Callas* v. *Independent Taxi Owners,* 66 F. 2d 192.

[5] Our own case of *Adams* v. *Summers,* 222 Ark. 924, 263 S. W. 2d 711, has only an indirect bearing on the point here; but see Annotations in 120 A. L. R. 1351 and 131 A.L.R. 797, entitled, "Relation between taxicab company and drivers or owners of cars not owned by company, as regards responsibility for injury or damage." See also *Rhone* v. *Try Me Cab Co.,* 65 F. 2d 834; *Assoc. of Independent Taxi Operators* v. *Kern* (Maryland), 13 A. 2d 374; *Mull* v. *Colt Co.,* 31 Federal Rules Decisions 154; and 13 C. J. S. p. 1314, "Carriers" § 701.

N. W. 748, 31 A. L. R. 1197; *Burke* v. *Shaw Transfer Co.*, 211 Mo. App. 353, 243 S. W. 449; *Rhone* v. *Try Me Cab Co.*, 62 App. D. C. 201, 65 F. (2d) 834."

Under the peculiar facts in this case we find that the Court was justified in giving the Instruction No. 4; and finding no error in the entire case the judgment is affirmed.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, J. (dissenting). I think the trial court made a mistake in telling the jury, in Instruction 4, that if Black & White sent a Checker cab in response to Love's telephone call then as a matter of law Black & White would be liable for the cabdriver's negligence. It seems to me that the trial judge really decided a question of fact that should have been left to the jury.

No particular significance can be attached to the fact that Black & White and Checker employed a common dispatcher. A cab company must evidently have someone continuously on duty to answer telephone calls for cabs, but in a city the size of Little Rock the calls cannot be so numerous as to take up much of the dispatcher's time. Hence it is sensible for two or more cab companies to reduce their overhead expense by using the same dispatcher, and this is true whether the companies are allied through stock ownership or are completely unrelated.

A joint adventure is in the nature of a partnership; each of the parties must contribute property or services to the undertaking and have a right to share in the profits of the business. *State ex rel. Atty. Gen.* v. *Gus Blass Co.*, 193 Ark. 1159, 105 S. W. 2d 853. We ought not to declare, as the majority opinion seems to do, that whenever two taxicab companies employ the same dispatcher they become joint adventurers as a matter of law and therefore assume liability for each other's negligence. It may be that in the case at bar there was sufficient evidence to justify a finding that a joint adventure existed, even though there was no such allegation in the complaint, but if so the issue was nevertheless one of fact, upon which

reasonable men might have differed. It should have been submitted to the jury.

The majority's alternative reason for upholding the instruction stands no better. As we observed in *Rounds & Porter Lbr. Co.* v. *Burns,* 216 Ark. 288, 225 S. W. 2d 1, it is *only* when the privilege of transacting business in corporate form has been illegally abused to the injury of a third person that the corporate entities should be disregarded. In the case at bar Black & White and Checker had the same officers and were owned by the same stockholders, but these facts alone do not destroy their separate identities. There is no proof that, until this case arose, the existence of the two corporations had ever confused anyone. There is no proof that, until this case arose, the existence of the two corporations had ever worked to the injury of any third person. In fact, all that happened here was that Black & White concealed its position, by filing only a general denial, until after the statute of limitations had run against Checker. While there is evidence that would justify the jury in disregarding the corporate entities, the issue was one of fact that ought not to have been taken from the jury by the trial judge.

KILLGO *v.* JAMES, EXECUTRIX.

5-2936 367 S. W. 2d 228

Opinion delivered May 6, 1963.

Clayton Farrar and *Wood, Chesnutt & Smith,* by *Ray S. Smith, Jr.,* for appellant.

M. C. Lewis, Jr., for appellee.

George Rose Smith, J. In 1949 Charles and Ruby Killgo bought a home in Hot Springs, as tenants by the entirety. In 1954 the couple were divorced by a decree of the Garland Chancery Court. The decree approved a property settlement by which the parties agreed to sell the home later on and divide the proceeds. The property had not been sold, however, when Charles died in October of 1959. His heirs, the appellants, then brought this suit for partition against Charles's former wife, Ruby Killgo Dunn, upon the theory that the property settlement and divorce decree had converted the tenancy by the entirety into a tenancy in common, in which case the plaintiffs would have inherited a half interest in the property upon Charles's death. The chancellor rejected that theory, holding that the tenancy by the entirety had continued in existence, so that at Charles's death the title vested by survivorship in Ruby Killgo Dunn. Mrs. Dunn died pending this appeal; the cause has been revived against her heirs and personal representative.

The principal issue—whether the estate was changed into a tenancy in common—turns upon the construction of this language in the settlement agreement: "It is understood that the decree to be entered herein is to provide that Charlie C. Killgo is to have possession, use and control of the [home], together with the furniture therein, until such time as the parties to this case may agree on a sales price for such, at which time, on such agreement, the proceeds are first to be used to reimburse Charlie C. Killgo for all monies he has paid or will pay on the mortgage on same after date of August 1953, after which the balance of the proceeds is to be divided between the parties hereto equally."

The 1954 divorce decree recited the substance of the paragraph just quoted and concluded by declaring that "the property rights settlement between said parties . . . is hereby approved and confirmed in all particulars." (We should add that at Charles's death there was pending a suit for partition that Ruby had filed in 1957, in which she charged that Charles had violated the settlement agreement by refusing to consider a sale of the property. We do not dwell upon this earlier case, as we think it had no effect upon the title, either directly or by way of an estoppel.)

The chancellor was right in holding that the agreement and decree did not change the parties' estate into a tenancy in common. It will be seen upon reflection that the Killgos, like any married couple in the same situation, had a choice of two courses. First, they could, without affecting the nature of their tenancy by the entirety, have simply agreed that they would attempt to sell the land, with the proceeds to be divided equally. In that case the estate by the entirety, with its characteristic right of survivorship, would undoubtedly continue to exist until a sale was accomplished. Secondly, the Killgos, at least by invoking the chancellor's statutory power over tenancies by the entirety, could have agreed that the estate would immediately become a tenancy in common, thereby utilizing the divorce decree to extinguish the right of survivorship. Ark. Stats. 1947, § 34-1215; *Brimson* v. *Brimson,* 227 Ark. 1045, 304 S. W. 2d 935.

We think it plain that the agreement in the case at bar falls in the first category. We cannot find one sentence or even one word, in the agreement or in the decree, to support the conclusion that the parties had an affirmative intention to bring about an immediate termination of the tenancy by the entirety. It is desirable that titles to real property rest in certainty and stability. For a couple to declare that they will sell a piece of property at some future date and divide the proceeds is not even a roundabout way of saying that they will also become tenants in common at once. The language that the Killgos selected, with the advice of counsel, is perfectly consistent with a desire on their part to leave the estate untouched

until a sale should be completed. We do not feel justified in rewriting the contract by reading into it an additional clause that the parties chose to leave out.

There is a second point in the case. The appellants asked in their complaint that the property be ordered sold and that the proceeds be applied first, in accordance with the property settlement agreement, to recompense the plaintiffs for mortgage payments totaling $1,640 that were made by Charles Killgo after August of 1953, with the remaining proceeds to be divided equally between the opposing litigants. Even though we are holding that the tenancy by the entirety continued in force, there is still the question whether the appellants are entitled to assert a charge against the property for the mortgage payments that are involved.

A majority of the court have concluded, although not upon the same reasoning, that the appellants are entitled to charge the property with the mortgage payments. Justices Ward, Robinson, and Johnson are of the opinion that the tenancy by the entirety was converted into a tenancy in common, in which case the mortgage payments are recoverable as a matter of course under the settlement agreement. Justice McFaddin joins in the majority opinion with respect to the tenancy by the entirety but, for the reasons stated in his concurring opinion, is of the view that the mortgage payments are recoverable. The Chief Justice, Justice Frank Holt, and the writer would affirm the decree.

The decree is accordingly affirmed in part and reversed in part, and the cause is remanded for further proceedings.

McFaddin, J., concurs; Ward and Johnson, JJ., dissent.

Ed. F. McFaddin, Associate Justice (concurring). I agree with that part of the Majority Opinion which holds that the entirety estate had not been dissolved at the time of the death of Charles Killgo; but I am of the opinion that Mr. Killgo's estate is entitled to recover the $1,640.00 which he paid after August 1953 to retire the principal indebtedness on the mortgage of the entirety estate.

When Mr. and Mrs. Killgo were divorced they entered into a property settlement agreement which provided:

"It is understood that the decree to be entered herein is to provide that Charlie C. Killgo is to have possession, use and control of the place of the parties . . . together with the furniture therein, until such time as the parties to this case may agree on a sales price for such, at which time, on such agreement, *the proceeds are first to be used to reimburse Charlie C. Killgo for all monies he has paid or will pay on the mortgage on same after date of August 1953,* after which the balance of the proceeds is to be divided between the parties hereto equally." (Emphasis supplied.)

The settlement agreement was approved by the divorce decree, and it determined the disposition to be made of the proceeds of the sale of the premises. The Chancery Court held that Mr. Killgo's occupancy of the property required him to pay the taxes, insurance, repairs, and interest on the mortgage indebtedness; that portion of the decree is not questioned. But the Chancery Court held that Mr. Killgo's occupancy of the property also required him to pay the principal on the mortgage indebtedness. That holding is challenged because it is in direct opposition to the terms of the property settlement agreement of the parties (approved by the Court) which specifically recited that on the sale of the property, Mr. Killgo could recover all principal payments he made on the mortgage after August 1953; and these principal payments were definitely established at being $1,640.00.

In *Jones* v. *Jones,* 236 Ark. 296, 365 S. W. 2d 716, the parties to a divorce suit made a property settlement agreement by the terms of which the husband was to make the mortgage payments on the entirety prop-erty until it should be sold; and we enforced the agreement between the parties. So the Jones case is authority for the statement that Mr. Killgo could have enforced the agreement and recovered the $1,640.00 if the sale had taken place in his lifetime. I maintain the property settlement agreement gave Mr. Killgo a *chose in action*

against the property and his former spouse. The fact that the sale did not take place during the life of Mr. Killgo does not prevent the rights of Mr. Killgo from passing to his estate as any other chose in action. In *Smead* v. *Chandler,* 71 Ark. 505, 76 S. W. 1066, Justice Battle said:

"The terms or phrases 'choses in actions' and 'debt' are used by courts to represent the same thing when viewed from opposite sides. 'The chose in action is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay.' "[1]

That a chose in action passes to the estate of the deceased is established by unlimited authority. See C. J. S. Vol. 26-A, Page 533 *et seq.,* "Descent and Distribution" § 8. The Supreme Court of Utah, in the case of Harper's Estate, 265 P. 2d 1005, held that all property rights granted the husband by a divorce decree vested in his heirs, even when his death occurred prior to the time when the decree became absolute. So I maintain that Mr. Killgo's estate received the chose in action for the $1,640.00 and his estate should have a first lien on the property for such amount.

PAUL WARD, Associate Justice (dissenting). In order to make clear my disagreement with the result reached by the majority it is necessary to consider the matter under two headings.

One. It is my conviction that when Charles and Ruby Killgo secured a divorce in 1954 after they had entered into a property settlement (approved by the court) according to the terms set out in the majority opinion, the settlement was final and amounted to a dissolution of the estate by the entirety. There certainly can be no doubt that this was the intention of Mr. Killgo, Mrs. Killgo, and the chancellor, and this was definitely true after the time for appeal had elapsed. It must be kept in mind that we are not here dealing with a temporary order such as an order for child support or alimony but we are dealing with property rights that have been fixed and are unchangeable except by agreement of the parties.

[1] For other definitions of chose in action see Black's Law Dictionary.

As I interpret the majority opinion, it rests primarily, if not entirely, on the fact that the chancellor did not use certain "magic words" to dissolve the estate by the entirety. It is conceded, of course, that the chancellor did have power to dissolve the estate by the entirety in this instance because the estate came into being after the passage of Act 340 of 1947 (Ark. Stats. § 34-1215). In my opinion it was not necessary for the chancellor to make a specific finding that he was dissolving the estate by the entirety. I am firmly of the view that the decree in this case dissolved the estate by the entirety just as effectively as if the magic words had been used, and that view is supported by respectable authority.

In the case of *United States* v. *48.9 Acres of Land, etc.,* 85 F. Supp. 133 (W. D. Ark.), this same question arose in connection with condemnation of certain lands at one time held as an estate by the entirety by a Mr. and Mrs. Cox. It appears that they were divorced and had a property settlement which in effect was an agreement to divide the proceeds from the sale of the land. The question presented for decision was whether or not the decree of the chancellor amounted to a dissolution of the estate by the entirety. The court decided that the estate had been dissolved and in my opinion the reasoning for that decision is pertinent and controlling here. Among other things the Court said:

". . . a reference to the divorce decree discloses that the parties themselves did dispose by agreement of the lands held by the entirety, and I know of no reason why that agreement, when approved by the Court in the divorce case, was not valid, and in my opinion, the decree of the Court, based upon the agreement of the parties recited therein, did vest the entire title to the lands in A. J. Cox.

* * *

"It is true that the agreement did not specifically mention such an estate, but the agreement did include the identical lands here involved and it was clearly the intention of the parties to definitely and completely settle

their respective rights and the title to the lands as between them.

* * *

"Each understood the ownership and it was clearly their intention to dispose of the estate by the entirety, which as above stated, could have been done by the execution of a deed, but the parties chose to settle the matter by agreement . . . ."

Incidentally, that estate by the entirety was created before 1947 and so that chancellor had no power to dissolve without the consent of the parties.

To the same effect is the decision of *Sheldon* v. *Waters,* 168 F. 2d 483 (5th Cir. 1948), which interpreted the statute dealing with the dissolution of estates by the entirety in the State of Florida. The District Court, in effect, held that an approved agreement to terminate the estate by the entirety in property held by a man and wife was not operative or effective, but the Circuit Court of Appeals reversed that decision using the following language pertinent to this case:

"We conclude there was some sort of agreement between Mr. and Mrs. Waters, for there was conduct by one inconsistent with the continuance of the tenancy by the entirety, acquiesced in by the other."

Two. In my opinion it is immaterial in this case that the land was to be sold when the husband and wife agreed on a price. Any other view would make it possible for either one of them to defeat the entire property settlement by refusing to be agreeable. It can hardly be argued that if one party refused to agree, the other party could not have redress in a court of equity. In this case the wife (whose heirs were awarded all of the land) went into court and asked to have the agreement enforced, seeking only her one-half. This amounted to a recognition on her part that the property settlement was binding on both of them. This was the effect of the holding in the case of *Taylor* v. *Taylor,* 153 Ark. 206, 240 S. W. 6, where the Court said:

"She does not seek to have that decree set aside, but on the contrary seeks to uphold it. It was for her benefit, and she can not consider it valid for one purpose and invalid for another. She must accept or reject it in its entirety."

In the case of *Graham* v. *Graham,* 199 Ark. 165, 133 S. W. 2d 627, it was pointed out that in a divorce suit between Charlie Graham and Mattie Graham, the court ordered the home place to be deeded by the husband to the wife. Apparently the deed had never been executed and in considering this point, the Court said:

"If Chas. G. Graham was directed by the court to deed the property to Mattie Graham, and there was no timely appeal from such order, title would vest without further formality, the deed being only the evidence or muniment of that which had been done."

The above case has been cited with approval in *Person* v. *Johnson,* 218 Ark. 117, 235 S. W. 2d 876, and *Cook* v. *Cook,* 233 Ark. 961, 349 S. W. 2d 809. It is my conclusion, therefore, that it is immaterial that the agreement to sell the property and divide the proceeds had not been carried out in the case under consideration. Based on the reasoning in the cases just cited, chancery court, being a court of equity, will treat that which ought to have been done as having been done.

JOHNSON, J., joins in this dissent.

CHAMBERS BUILT INS CO. *v.* RABB.

5-2980 370 S. W. 2d 39

Opinion delivered May 6, 1963.

[Rehearing denied September 9, 1963.]

Shackleford & Shackleford, for appellant.

Harry Crumpler, Brown, Compton and *Prewett,* for appellee.

George Rose Smith, J. The appellant, a manufacturer of cooking stoves, appeals from a verdict and judgment awarding the appellees $20,000 as compensation for severe burns suffered by their two-year-old daughter, Debra Dianne Rabb. The appellees' complaint alleged that a defect in their kitchen range, which had been manufactured by the appellant, caused a container of grease to catch on fire and injure the child. The serious question in the case is whether there is any substantial evidence to support a finding that the fire was in fact caused by a defect in the above.

Mr. and Mrs. Rabb bought the stove new in 1959. It had been used in the preparation of two meals a day for about three weeks when the fire occurred on the evening of September 8. That night Mrs. Rabb, in preparing supper, fried potatoes in about two quarts of grease in the stove's deep well. Near the end of the meal, which was eaten at a table about two feet from the stove, the door to the storage compartment in the lower righthand part of the stove fell open. Both Mr. and Mrs. Rabb testified that they could see smoke and flame in the compartment, and the grease in the deep well was on fire. Mrs. Rabb at once carried her little daughter out of the house. Mr. Rabb used a garden rake to pick up the container of burning grease and carry it outside. Just after he had backed through the door, however, Debra Dianne threw her arms around his legs and caused the hot container to fall off the rake, splashing burning grease upon the child.

Throughout the case the appellant's theory has been that Mrs. Rabb, after cooking the French fried potatoes, forgot to turn off the burner under the deep well, so that the grease became so hot that it caught on fire. Mr. and Mrs. Rabb testified that the burner was turned off; but,

if they were mistaken about this, there is an abundance of evidence showing that the failure to turn off the burner under the grease could have caused the fire. This testimony is in effect uncontradicted and need not be set out in detail.

To meet their burden of proving a defect in the stove the plaintiffs relied upon the testimony of C. B. Lampkin, a qualified appliance repairman. Lampkin examined the damaged range about a month after the fire, when, following Debra Dianne's release from the hospital at El Dorado, the Rabbs returned to their home at Magnolia. Lampkin found two loose mounting screws at a point where there was a gasket a few inches below the right front top burner on the stove. He said that gas escaping from the leaky gasket would be ignited "almost instantly" by the pilot light for the right front burner. On cross examination he said that if the screws had been loose all along he did not think the stove could have been used for three weeks without a fire.

Lampkin's testimony, viewed in its most favorable aspect, would support a finding that the loose connection had caused gas to be ignited by the pilot light at a point just below the right front top burner, which would place the fire in the upper front area of the storage compartment. It was still necessary, however, for the plaintiffs to show that flames originating in this area could in turn cause the grease in the deep well to catch on fire. Upon this vital point we can find no evidence to support the jury's conclusion that the defective connection was the proximate cause of the fire in the deep well.

The deep well extended downward from the right rear section of the top of the stove. The well itself was a hollow metal cylinder, open at the top and the bottom. Rock wool about an inch and a half in thickness was wrapped around the outside of the well, for insulation. The well was heated by a gas burner at the bottom of the cylinder. The removable container, which at the time of the fire was filled with grease to about two-sevenths of its capacity, was placed in the metal cylinder when being

used for cooking. There was a lid for the well, which Mrs. Rabb put back in place after she fried the potatoes.

The fatal weakness in the appellees' proof is the complete absence of any evidence tending to show how a gas flame in the upper front area of the storage compartment could have ignited the grease in the deep well, in the lower rear section of that compartment. There is no proof whatever that the flame could have come in direct contact with the grease. To the contrary, the substance of Lampkin's testimony on this point is that the leaking gas could not have lit the grease: "You cannot ignite grease in the deep well from anything on the outside." This statement by the witness is unquestionably a correct summation of the situation. With the lid covering the deep well the flames could not have come up through the opening around the front burner, traveled to the back of the stove, and then made their way past the lid in order to descend to the grease at the bottom of the well. Nor, since natural gas is lighter than air, could the fire have traveled downward in the storage compartment to enter the bottom of the cylinder, then up to the top of the metal container, and then down again to reach the grease. There is no possibility that leaking gas could have filled the compartment before igniting, for Lampkin himself testified that the gas would have been ignited almost instantly from the pilot light close by. Finally, there was no explosion. Neither Mr. nor Mrs. Rabb testified that an explosion occurred, and Lampkin said that gas leaking from the loose gasket would have been ignited by the pilot light without an explosion.

There being no proof that the flames came in direct contact with the grease, the only alternative basis for a recovery would be a showing that the flames played against the outside of the deep well and heated it to such an extent that the grease caught on fire. The record contains no evidence to support such a conclusion. Lampkin and one of the appellees' attorneys were invited to attend, and did attend, a demonstration at which the appellant undertook a reproduction of the alleged fire. It was found that if the deep-well burner was not turned off, as the ap-

pellant insists to have been the case, the grease would become overheated to the point of catching on fire in an hour and ten minutes. The effect of Mr. Rabb's testimony was that an hour and ten minutes elapsed between the time when his wife started to cook and the time of the fire. Mrs. Rabb fixed the time at about forty minutes.

At this demonstration the appellant also loosened the mounting screws in question, upon a stove of the same model, and permitted the leaking gas to ignite from the pilot light and burn freely in the upper part of the storage compartment. The grease had first been used to fry potatoes. It was found that its temperature, instead of going up, actually decreased. This is not surprising, in view of the fact that the grease not only was below the point where the heat was applied but also was insulated by the rock wool, the wall of the metal cylinder, the intervening air space, and the wall of the removable container. Moreover, it should be pointed out that the appellant's attempted reproduction of the fire was not in the nature of surprise testimony produced for the first time at the trial. The appellees' lawyer and their expert witness were both invited to view the demonstration well in advance of the trial, so that there was ample opportunity for a rebuttal.

It is fair to say that the appellees have never, in their proof, in their brief, or in their oral argument in this court, demonstrated *facts* upon which it could be found that the leaky gasket caused the grease in the deep well to catch on fire. In effect they bypass this problem, by contending that if Mrs. Rabb turned off the burner under the deep well, as she testified, then the fire could only have come from the defect in the stove. But this argument ignores the vital issue of causation and would permit the jury to find a causal connection when no witness in the case was able to do so.

Reversed and remanded.

McFaddin, Johnson, and Holt, JJ., dissent.

Ed. F. McFaddin, Associate Justice (dissenting). I dissent because I maintain that a case was made for the

jury. As I read the Opinion, the Majority is in effect holding that the plaintiffs, in order to recover in a product liability case like this one, have to prove to a mathematical certainty exactly how the established defect in the product caused the injury. I dissent because such is not my understanding of the applicable rule of law.[1] The plaintiffs proved these essentials: (a) that there was a leak of gas in the stove caused by a defect; (b) that there was a fire in the stove caused by the leaking gas; (c) that the grease caught on fire; and (d) that in removing the flaming grease the little girl was injured. I maintain that when the plaintiffs proved these four points they made a case for the jury and it then became a question of whether the evidence offered by the defendant overcame the evidence offered by the plaintiffs.

At the outset, let me mention these four essentials:

A. *That there was a leak of gas in the stove caused by a defect,* was established by the witness Lampkin, who found the loose screws and stated where the burned places were on the stove.

B. *That the leaking gas caught on fire* was thoroughly established by the testimony of both Mr. and Mrs. Rabb. I quote the testimony of Mrs. Rabb:

"Q. Tell the jury then what happened as you were sitting there at the table, what happened with reference to the stove?

A. We were sitting at the table nearly finished or finished, and there was kind of a spewing sound and the storage compartment door fell down and then there was smoke and a little flame.

[1] In the case at bar the complaint alleged: " . . . that the explosion in said stove and the resulting fire and injuries occurred as a result of the surface burner control unit (referred to as a 'Thermal Eye' by the manufacturer) not being properly secured to the mounting plate, which is connected to the gas supply line. As a result, gas leaked between said unit and the mounting plate and this gas was ignited by the pilot light and the resulting flames ignited the grease contained in the deep well vessel." The answer of the defendant " . . . admits that the deep well cooking container on said range ignited, but denies there was any explosion . . . " *Res ipsa loquitur* does not seem to have been brought into this case in any way. It is a straight issue of whether the defendant was negligent and whether the injuries resulted therefrom.

Q. You say there was sort of a spewing sound, — can you make a noise similar to it?

A. (Witness illustrating.)

Q. And you say the door fell down?

A. Yes, sir.

Q. And then you saw smoke and some flame?

A. Yes, sir.

Q. What part of the stove did you see smoke and flame?

A. The right hand side.

Q. Toward the front or toward the back?

A. Around the front.

Q. By around the front, — would that be around this thermal eye burner?

A. Yes, sir, and under it.

Q. Under what?

A. Under the thermal eye burner and the storage compartment.

Q. You mean the storage compartment and underneath this thermal eye?

A. Yes, sir.

Q. Where else did you see smoke and flame?

A. Up on the eye and the deep-well.

Q. When you took the potatoes out, did you put the lid on the deep-well?

A. Yes, sir.

Q. Where was any smoke or fire with reference to the deep-well?

A. Just around the edge."

Whether one calls the storage compartment door falling down an explosion or not is immaterial. The point

is that the compartment door fell down, and there were both smoke and flame; and Mrs. Rabb observed the flame, not only in the stove, but in the deep-well.

C. *That the grease caught on fire* is likewise established by the testimony of Mrs. Rabb, as above quoted, and also the testimony of Mr. Rabb; and also by the fact that the grease was on fire when some of it fell on the little girl.

D. *That in removing the flaming grease the little girl was injured* was thoroughly established. The causal connection between Mr. Rabb removing the flaming grease and the injury to his daughter is not discussed in the Majority Opinion, but I mention that there was a causal connection. (*Hill* v. *Wilson,* 216 Ark. 176, 224 S. W. 2d 797.) Mr. Rabb did what a person of ordinary prudence would have done in removing the grease; and the little girl, in grabbing her father's leg, could not be charged with negligence.

With these four essentials mentioned, I come to the question of whether the plaintiffs had to trace with mathematical accuracy how the defect in the stove, that allowed the gas to escape, caused the grease to catch on fire. I maintain that when the plaintiffs showed the four essentials above mentioned, they made a *prima facie* case for the jury.[2] Volumes have been written on products liability cases,[3] but I mention only a few which bear on

[2] It was stated in oral argument before this Court, and undenied, that the Rabb stove was delivered to the defendant's retailer in Magnolia after the fire, and that the plaintiffs had no further connection with the stove. The record before us contains testimony as to experiments conducted by the defendant on *other stoves.* Whether the experiments on the other stoves could have been shown if an objection had been made is a matter that need not be discussed, because it does not appear that the plaintiffs made any such objection.

[3] In 80 A. L. R. 2d 488 there is an extensive annotation on the subject, "Liability of manufacturer or seller for injury caused by firearms, explosives, and flamables"; and in 80 A. L. R. 2d 598 there is an extensive annotation on the subject: "Liability of manufacturer or seller for injury caused by household and domestic machinery, appliances, furnishings, and equipment." In 52 A. L. R. 2d 159 there is an annotation on: "Presumption or *prima facie* case of negligence based on presence of foreign substance in food in can or other sealed container." Interesting cases examined on the points here at issue include these: *Otis Elevator Co.* v. *Robinson,* 287 F. 2d 62; *Reynolds* v. *Natural Gas Co.,* 7 Calif. Rep. 879; *Jaeger* v. *Elizabethtown Consolidated Gas Co.* (N. J.), 11 A. 2d 746; *Hilson* v. *Pac. Gas & Elec. Co.* (Calif.), 21 P. 2d

the point here at issue. One of the leading cases is *Skelly Oil Co.* v. *Holloway* (8th Cir.), 171 F. 2d 670; and the scholarly opinion in that case was written by the late Judge Walter G. Riddick of Arkansas. The Holloways' home was destroyed by fire, which they alleged had been caused by propane gas allowed to escape because of the negligence of the Skelly Oil Company. The cause was tried before a Judge without a jury; and from a judgment for the Holloways, the Skelly Oil Company appealed, claiming that the plaintiffs had failed to prove that the fire was caused by the escaping gas. Judge Riddick said:

"The evidence revealed no other reasonably probable source of the fire, except the presence of gas throughout the walls and upper floor of the house. That the fire was first seen coming from the hole in the floor in the bedroom occupied by Elmer Holloway does not conclusively establish that place as the point at which the fire originated . . .

"Nor can it be said on this record that the court's finding that the fire was caused by escaping gas is contrary to conclusively established physical facts and natural laws. The argument on this aspect of the case is based upon known properties of Skelgas. Briefly stated, it is that within the time elapsing between the hour at which defendant's employees finished their work of inspection and repair and the discovery of the fire by Elmer Holloway, it was impossible, conceding the escape of gas, its diffusion, and mixture with air, for the mixture of air and gas in the open space between the rock ledge and the north wall of the lower floor of the house, between the joists supporting the floor on the second level of the house, and in the walls of the second floor of the house, to have reached a concentration above the explosive limit of Skelgas; or, in other words, that within the time specified any possible mixture of Skelgas and air, conceding that such a mixture could have occurred,

662; *Ky. etc. Power Co.* v. *Elliott,* 220 S. W. 2d 964; *Dixon* v. *Montgomery Ward* (Ill.), 114 N. E. 2d 44; *Ehler* v. *Portland Gas Co.* (Ore.), 352 P. 2d 1102; *Lindroth* v. *Walgreen* (Ill.) 94 N. E. (2) 847; and see annotation in 88 A. L. R. (2) 230 entitled "Expert and Opinion Evidence as to cause or origin of fire."

would have remained within the explosive limits of Skelgas, and that instead of a fire in the house there would have been an explosion at the instant of contact of the Skelgas-air mixture with flame.

"In support of this contention recourse is had to laws of physics concerning the rate of expansion of gases; the time required for two gases of equal temperature and pressure to mix by diffusion in the absence of the application of heat or mechanical action, such as the difference in pressure of the two gases; and to a generally accepted formula for the computation of the rate of the flow of gases. The difficulty with defendant's argument and computations is that too many of the decisive factors are only approximately known, if known at all."

The similarity between the argument of the Skelly Oil Company in the reported case, and the argument of the appellant in the case at bar, is instantly apparent. The Skelly Oil Company claimed that the fire could not have happened as the plaintiffs contended; but Judge Riddick affirmed the judgment for the plaintiffs; and I submit that the same result should follow in the case at bar.

Another case worthy of study is *Stadick* v. *Olson's Hardware* (N. D.), 64 N. W. 2d 362. There, a gas stove had exploded and injured the Stadicks, who sued the seller, Olson's Hardware. From a judgment for the plaintiffs the defendant appealed, insisting that the Court should have given a directed verdict for the defendant. The Supreme Court of North Dakota, in affirming the Trial Court, did not require the plaintiffs to show to a mathematical certainty every step from the defendant's negligence to the plaintiffs' injury. Rather, the Court said:

"When the explosion occurred the only fire in the house was in the two pilot lights on the stove. The explosion occurred when the oven was opened by the plaintiff. The conclusion is inescapable that the explosion was caused by an accumulation of free gas in or about the stove. How did the gas come to be there? It had escaped from the system in one of two ways — either a burner

was left partly open by the plaintiff or his wife or the gas escaped through a defect in the system.

"The plaintiff's wife testified that she checked all of the burner valves to see that they were closed when she retired. The plaintiff testified that he looked at the stove before he opened the oven door; and there was nothing wrong with it; and that the burner valves were off. If the testimony of the Stadicks is to be believed, the only reasonable inference is that the gas that exploded escaped from a defect in the system. The evidence produced by the defendants shows that if the system was properly installed there was no danger of leakage . . .

"The fact that a verdict was rendered for the plaintiff indicates that the jury found the evidence of the Stadicks to be credible. On the basis of their evidence it was logical for the jury to infer that their injuries resulted from the explosion of gas that had escaped from the system that had been improperly installed by the defendants, whose negligence in making such an installation was the proximate cause of the damages which the plaintiff suffered."

Without prolonging this dissent, I call attention to the case of *Alldread* v. *Mills,* 211 Ark. 99, 199 S. W. 2d 571. In that case there had been an automobile collision and the appellant insisted that the physical facts entirely disproved the appellee's right to recover. We rejected that plea about physical facts, saying:

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

I maintain that it was for the jury to decide from the established facts in this case as to whether the little girl was injured because of the negligence of the appellant; and so I would affirm the judgment for the plaintiffs.

ARK. STATE HIGHWAY COMM. *v.* JAMES.

5-2942 367 S. W. 2d 236

Opinion delivered May 6, 1963.

[redacted]

Dowell Anders and *Don Gillaspie,* for appellant.

Bruce Bennett, for appellee.

SAM ROBINSON, Associate Justice. Appellee, Mrs. Jewel W. James, filed this suit to enjoin the Highway Commission from using as a part of the right of way of Highway 79, a small piece of land appellee claims that she owns. The Highway Commission has appealed from a decree holding that appellee owns the land involved.

In July, 1906, there was filed for record in Calhoun County, Arkansas, a plat of a part of the town of Thornton. Lots, blocks, and streets were set out in detail. The streets were named and dedicated to the public. North Second Street runs in a northeasterly direction, and Farrell Street runs in a northwesterly direction. These streets intersect at the north corner of block 14. The streets are 60 feet wide. Block 7 lies immediately to the northwest and across North Second Street from block 14.

In 1934 the Highway Commission acquired a portion of block 7 for the construction of Highway 79. In 1939 the Commission gave a Quitclaim Deed to Mrs. R. Hollingsworth purportedly conveying portions of North Second Street and Farrell Street not embraced within the right of way of Highway 79. In 1950 Mrs. Hollingsworth, by Quitclaim Deed, conveyed to appellee herein, Mrs. Jewel W. James, the purported interest she had acquired in the streets from the highway Commission.

The right of way of Highway 79 is 60 feet wide, but not all of it was used when the highway was first built. When the Highway Commission indicated it might use the entire right of way, Mrs. James filed this suit contending that by virtue of the deed from Mrs. Hollingsworth she owns a part of the land within the right of way of Highway 79.

The description in the deed from Mrs. Hollingsworth to Mrs. James is identical to the description in the deed from the Highway Commission to Mrs. Hollingsworth. Although the description in the deed is confusing, it is clear that the parties did not intend that a portion of the right of way of Highway 79 be conveyed to Mrs. Hollingsworth. The description is as follows:

"A part of the Southeast Quarter of Southwest Quarter of Section 12, Township 11 South, Range 14 West, described as follows:

"Beginning at the Northeast Corner of Block 14 in town of Thornton (original survey); thence run North 45 feet more or less to a point on the South right-of-way line of Highway No. 79; thence along South right-of-way line (Southwesterwardly) 225 feet more or less to a point; thence South 35 feet more or less to the Northwest Corner of Block 14; thence along the North line of Block 14 in an Easterly direction 225 feet more or less to the point of beginning."

It will be seen from the deed that it takes in no part of the right of way of Highway 79. In fact, 45 feet North of the "Northeast" Corner of Block 14 would end somewhere near the middle of Farrell Street; it would not go as far as the South right of way line of Highway 79. Then, according to the deed, the line of the property conveyed runs along the South right of way line Southwesterly 225 feet; thence South 35 feet, etc. Thus it will be seen that the description in the deed does not take in any part of the right of way of Highway 79. Moreover, there is attached to the deed, a plat showing the property that the parties intended to be conveyed by the deed from the Highway Commission to Mrs. Hollingsworth, and from Mrs. Hol-

lingsworth to Mrs. James. It does not show that any part of Highway 79 was conveyed by those deeds.

Reversed with directions to dismiss the complaint.

CREEKMORE *v.* IZARD.

5-2907 367 S. W. 2d 419

Opinion delivered May 6, 1963.

[Rehearing denied June 3, 1963.]

Conley Byrd, Ralph W. Robinson and *H. B. Stubblefield,* for appellant.

Daily & Woods, Marvin Thaxton and *Ray Trammell,* for appellee.

Ark. Bar Association, Amici Curiae.

Catlett & Henderson, Amici Curiae.

JIM JOHNSON, Associate Justice. This appeal involves the question of whether a notary public and a realtor are practicing law when filling in simple standardized forms used in real estate transactions. The action was instituted by appellant Alfred Creekmore, a Notary Public in Mountainburg, to declare his right to continue to fill in the blanks in printed real estate forms, bills of sale, etc., none of which he contended constituted the practice of law. Clyman Izard and Fines F. Batchelor, Jr., as officers and members of the Crawford County Bar Association, and Marvin D. Thaxton, Chairman of the Unauthorized Practice of Law Committee of the Arkansas Bar Association, were made parties in their individual and representative capacities as members of a class in accordance with Ark. Stats. § 27-809. After an answer had been filed, Everett O. Sewell, a regularly licensed and bonded real estate broker, was permitted to intervene, alleging that it was desirable for him in connection with his business as a real estate broker to be permitted to fill in the blanks in printed standardized real estate forms prepared or approved by a lawyer; that he possessed the required knowledge and skill to fill in such blanks in connection with real estate transactions handled by him as a real estate broker; and that his doing so would not adversely affect the public interest. Upon a trial on the merits, the trial court found that appellant Creekmore, a notary public, in filling in the blanks of printed forms of bills of sale, chattel mortgages, promissory notes, warranty deeds, quitclaim deeds, options, loan applications, real estate mortgages, deeds of trust, releases and satisfactions of real estate mortgages, powers of attorney, federal income tax returns, notices to quit or vacate real property and mineral (oil and gas) leases, constituted the practice of law; dismissed the intervention of appellant Sewell; and enjoined appellant Creekmore from performing the acts mentioned.

During oral argument, counsel for appellants admitted that they were entitled to no relief unless the rule in the case of *Arkansas Bar Association* v. *Block,* 230 Ark. 430, 323 S. W. 2d 912 could be relaxed. Following the decision in that case realtors were enjoined from the use of forms such as are involved in this case, see *Block* v. *Arkan-*

sas Bar Association, 233 Ark. 516, 345 S. W. 2d 471. Appellants earnestly argue that an engineer, an insurance agent, a banker, a merchant, a stock broker, and practically every other business or professional man does some acts which affect the legal rights of the people they serve, and that to require a person to employ a lawyer in every transaction involving them would virtually bring the wheels of commerce to a halt.

The appellees point out that the decision in *Arkansas Bar Association* v. *Block, supra,* is well decided and should remain undisturbed. In support of the soundness of the Block decision, they call to our attention the fact that it has been followed by a decision of the Arizona Supreme Court in the case of *State Bar of Arizona* v. *Arizona Land Title & Trust Co.,* 90 Ariz. 76, 366 P. 2d 1, and that it conforms to a realtor-lawyer agreement entered into between the American Bar Association and the National Association of Real Estate Boards in 1942. In 28 *Unauthorized* Practice News 252, cited by appellees, the background of the lawyer-realtor controversy in Arizona both prior to and subsequent to the decision in *State Bar of Arizona* v. *Arizona Land Title & Trust Co., supra,* is discussed in detail by Wayland Cedarquist, a lawyer member of the National Conference of Lawyers and Realtors. This article suggests that, in the interest of the realtors, the lawyers and the public, some compromise between the lawyers and realtors should have been resorted to instead of the constitutional amendment which the Arizona realtors proposed.[1]

The Supreme Court of Colorado, in *Conway-Bogue Realty Inv. Co.* v. *Denver Bar Ass'n,* 135 Colo. 398, 312 P. 2d 998, after holding that the preparation of instruments such as are involved here constituted the practice of law, said:

"The remaining and most difficult question to be determined is:

"*Should the defendants as licensed real estate brokers (none of whom are licensed attorneys) be enjoined*

[1] The Arizona constitutional amendment proposed by the realtors, giving them the right to fill in forms such as are involved here, carried by a vote of more than 3 to 1.

from preparing in the regular course of their business the instruments enumerated above, at the requests of their customers and only in connection with transactions involving sales of real estate, loans on real estate or the leasing of real estate, which transactions are being handled by them?

"This question we answer in the negative.

"The announced purpose of these suits are twofold: (a) To protect the licenses, privileges and franchises granted to attorneys from encroachment and damage by reason of the alleged unauthorized acts of the defendants.

"(b) To protect the public and particularly those persons participating in real estate transactions through brokers, from the dangers inherent in the preparation of legal documents by persons unskilled in the intricacies of the law rather than by lawyers.

"The defendants are all engaged in a lawful business. It is considered of such importance that the State of Colorado has adopted regulatory legislation providing for the licensing of persons engaged therein.

" 'No person shall be granted a license until he shall have passed a satisfactory examination and shall have established that he is trustworthy and bears a good reputation for good and fair dealing and is competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interest of the public . . .' C. R. S. '53, 117-1-1.

"We distinguish between the part of the public in quest of legal advice and services and out of which arises only the relationship of attorney and client and those bent on buying, leasing or selling real estate or borrowing money thereon, and out of which arises the relationship of seller-broker, buyer-broker, lessee-broker, lessor-broker, lender-broker or borrower-broker.

"The record shows conclusively that the defendants do not prepare papers or give advice to anyone except their customers who through solicitation or otherwise engage or employ them as brokers.

"On the other hand, the record shows conclusively that the defendants do select, prepare and explain the documents enumerated above at the request of their customers, without charge other than the usual broker's commission, and only in connection with real estate transactions then being handled by them and property left in their charge for management.

. . . .

"The testimony shows, and there is no effort to refute the same, that there are three counties in Colorado that have no lawyers, ten in each of which there is only one lawyer, seven in each of which there are only two lawyers; that many persons in various areas of the state reside at great distances from any lawyer's office. The testimony shows without contradiction that the practices sought to be enjoined are of at least 50 years uninterrupted duration; that a vast majority of the people of the state who buy, sell, encumber and lease real estate have chosen real estate brokers rather than lawyers to perform the acts therein complained of. Though not controlling, we must make note of the fact that the record is devoid of evidence of any instance in which the public or any member thereof, layman or lawyer has suffered injury by reason of the act of any of the defendants sought to be enjoined. Likewise, though not controlling, we take judicial notice of the fact that the legislature of the state, composed of 100 members from all walks of life and every section of the state, usually called upon by their constituents to adopt legislation designed to eliminate evils and protect the public against practices contrary to the public welfare, has never taken any step to prevent continuation of the alleged evil which we are now asked to enjoin.

"The question here to be resolved, and similar questions involving other businesses, has been before the courts of most of the 48 states, with widely divergent views and decisions resulting. There is very respectable authority for enjoining the acts complained of here; there is also respectable authority for denying injunctive relief. We feel that the weight of authority and especially the more recent decisions, sanctions our holding that the acts of

which complaint is made, done without separate charge therefor by licensed real estate brokers only in connection with their established business, and in behalf of their customers and in connection with a *bona fide* real estate transaction which they are handling as brokers, should not be enjoined.

"The plaintiffs have much logic in support of their contentions. Reason, public convenience and welfare seem to be on the side of the defendants.

"We feel that to grant the injunctive relief requested, thereby denying to the public the right to conduct real estate transactions in the manner in which they have been transacted for over half a century, with apparent satisfaction, and requiring all such transactions to be conducted through lawyers, would not be in the public interest; that the advantages, if any, to be derived by such limitation are outweighed by the conveniences now enjoyed by the public in being permitted to choose whether their broker or their lawyer shall do the acts or render the service which plaintiffs seek to enjoin."

In many respects our laws and history are analogous to those recited in the Colorado case.[2] The evidence in this case shows that there are no lawyers in Mountainburg, Arkansas, and for a distance of 20 miles or more in either direction, and that there are no lawyers in Evening Shade, Arkansas, and for a distance of 20 miles or more in either direction, and we take judicial notice[3] that there are many such towns in Arkansas similarly situated in which there are no lawyers. The real estate brokers licensing statutes, Ark. Stats. § 71-1301, *et seq.*, in addition to requiring applicants to bear a good reputation for honesty, truthfulness and fair dealing, require that a broker take a written examination and provide for a $2,000.00 bond, conditioned that the broker and any salesman employed by him shall well and truly comply with the provisions of the brokers licens-

[2] The General Assembly of the State of Arkansas passed Act 135 of 1941, designed to prohibit to some extent the drafting of instruments such as are involved here. This Act was referred to the people and defeated in a referendum in the general election of 1942.

[3] *Metropolitan Life Insurance Co.* v. *Fry*, 184 Ark. 23, 41 S. W. 2d 766.

ing act. The act also gives the public the right to sue directly upon the bond for the violations enumerated in Ark. Stats. § 71-1307.

The testimony introduced on behalf of appellants shows that prior to the decision in *Arkansas Bar Assn.* v. *Block, supra,* it took only a matter of four or five minutes to fill in the blanks on the necessary deed and mortgage forms to complete a real estate transaction, but that since the Block decision it takes some three or four days to get a lawyer to prepare the necessary instruments; and that occasionally the broker takes a blank form, fills in all the necessary information, transmits it to the office of the lawyer, who subsequently retypes the whole instrument, for which he is paid a fee. Testimony further shows that many mistakes result from passing the information necessary to preparing a deed from the broker to the lawyer.

The appellants argued that should we, acting under our rule-making power under Amendment 28 to the Arkansas Constitution, permit a licensed and bonded real estate broker to complete the forms involved in a real estate transaction upon simple standardized forms approved by his lawyer, the broker's lawyer, in addition to the Real Estate Licensing Board, would also have an opportunity to say whether the particular licensed and bonded real estate broker possessed the requisite knowledge and skill to fill in the blanks in the forms approved by him. They also point out that the lawyer, at the same time, by the simple expedient of noting on the forms that they had been approved for a named broker by the approving lawyer, could police the broker's future operations by picking up the forms that he had approved for that particular broker or by refusing to approve additional supplies of forms.

The individual members of this court have spent many hours of research in trying to determine what does and what does not constitute the practice of law. After the oral argument was held, we requested *amicus curiae* briefs. There seems to be no clear cut definition of the term. In *Ark. Bar Assn.* v. *Union National Bank,* 224 Ark. 48, 273 S. W. 2d 408, we said:

"*An Individual Can Practice Law For Himself.* It is generally conceded that an individual who is not a licensed attorney can appear in the courts and engage in what is commonly conceded to be practicing law provided he does so for himself and in connection with his own business."

Many activities fall within the ambit of the practice of law, for instance, a merchant collecting his own bills is not practicing law while a lawyer performing the same service for the merchant would be practicing law.

The relief here sought by appellant Sewell, the realtor, falls within the ambit of the merchant for the filling in of the simple standarized forms here involved is a necessary incident of his business just as the collection of the merchant's bills is a necessary incident of his business. Therefore we are ruling that the decision in *Ark. Bar Assn.* v. *Block,* 230 Ark. 430, 323 S. W. 2d 912, should be modified to provide that a real estate broker, when the person for whom he is acting has declined to employ a lawyer to prepare the necessary instruments and has authorized the real estate broker to do so, may be permitted to fill in the blanks in simple printed standardized real estate forms, which forms must be approved by a lawyer; it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business and that such forms shall be used only in connection with real estate transactions actually handled by such brokers as a broker and then without charge for the simple service of filling in the blanks.

Appellant Creekmore, the notary public, does not stand in the same shoes as the broker. His preparation for a fee of deeds, mortgages, bills of sale, etc., clearly constitutes the practice of law for there is no connection between his business and that of preparing such instruments. The learned trial judge was correct in confining him in his capacity as a notary public to the taking of acknowledgments.

The decree of the trial court also enjoins appellant Creekmore from preparing income tax forms. In this

particular, the decree is too broad. A person does not have to be a lawyer to fill out income tax forms. See *Lowell Bar Assn.* v. *Loeb,* 315 Mass. 176, 52 N. E. 2d 27, 31.

Some question has been raised as to whether this is a proper class action, but under our civil procedure, Ark. Stats. § 27-809, a person is entitled to sue as a member of a class or to sue representative members of a class as a whole. See *Massey, Trustee* v. *Rogers,* 232 Ark. 110, 334 S. W. 2d 664.

From what has been said it follows that the decree is reversed as to appellant Sewell and affirmed with respect to appellant Creekmore except for the injunction against filling out income tax forms, each party to bear his own costs.

McFaddin and Robinson, JJ., dissent.

Ed. F. McFaddin, Associate Justice (dissenting). I am strongly of the opinion that under the authority of the two Block cases,[1] the decree of the Chancery Court herein should be affirmed in every respect, except as to the federal income tax returns. The first Block case was decided in 1959, and the second Block case was decided in 1961; and every matter presented in the present case was before us in those cases. I maintain that we should not overrule cases so recently decided. Trial judges will never know when to follow the rule of *stare decisis* if appellate judges change the holdings with each subsequent case.

The volume containing the first Revised Statutes of Arkansas was published in 1838, and Albert Pike wrote the preface to that volume, which preface is a classic. On Page VII of the preface, there is this language:

"Change and innovation in the law is generally a great evil, and every alteration in existing statutes should be made slowly, cautiously, and with due deliberation. It

[1] The first Block case is *Arkansas Bar Assn.* v. *Block,* 230 Ark. 430, 323 S. W. 2d 912; and the second Block case is *Block* v. *Arkansas Bar Assn.,* 233 Ark. 516, 345 S. W. 2d 471. Throughout this dissenting opinion these cases will be referred to as the "Block cases."

is sometimes better to abide by a law manifestly unjust, unequal, and unfounded in reason than by altering it to unsettle rules of practice and titles to property . . ."

What Albert Pike said of *legislation* is many times more applicable to *judicial decisions*. In *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215, Judge FRANK SMITH, speaking for this Court, quoted from *Taliaferro* v. *Barnett,* 47 Ark. 359, 1 S. W. 702:

" 'A decision of the court when overruled stands as though it had never been, and the court in reversing judgment declares what the rule of law was in fact when the erroneous decision was made.' "

In the first Block case we listed twenty-five instruments which real estate brokers were then using in their business, and we held that, with the sole exception of No. 14 (offers and acceptances), the brokers, in filling in the blank spaces, were Practicing law.[2] Now, in the present case, the two Block cases are specifically "modified" by this language:

"Therefore we are ruling that the decision in *Arkansas Bar Assn.* v. *Block,* 230 Ark. 430, 323 S. W. 2d 912, should be modified to provide that a real estate broker, when the person for whom he is acting has declined to employ a lawyer to prepare the necessary instruments and has authorized the real estate broker to do so, may be permitted to fill in the blanks in simple printed standardized real estate forms, which forms must be approved by a lawyer; it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business and that such forms shall be used only in connection with real estate transactions actually handled by such brokers as a broker and then without charge for the simple service of filling in the blanks."

[2] Here is the language of the opinion: "As indicated, we hold that the preparation of any of the instruments here involved, or any other instruments involving real property rights for others, either with or without pay, save and except Instrument No. 14 above, constitutes the practice of law in this State."

I submit that no person can now tell how many of the twenty-four instruments prohibited to realtors in the first Block decision are now allowed to realtors by the present decision, and how many of the twenty-four instruments prohibited in the first Block decision are still prohibited to realtors. The Majority Opinion in the present case merely says, "permitted to fill in the blanks in simple standardized real estate forms which must be approved by a lawyer." Which forms are "simple standardized real estate forms?" The Majority Opinion does not answer the question. The law is thus left in confusion; and subsequent litigation will be required to settle the confusion. The words of Albert Pike, as contained in the preface to the Revised Statutes of 1838, are certainly applicable to the present case.

There is a splendid way in which this Court can keep itself abreast of the times in conveyancing matters. I have repeatedly urged the Court to adopt such a course; but my suggestions have been brushed aside. I now make the suggestion here. Amendment No. 28 to the Arkansas Constitution was adopted by the People in 1938; and the full text of the Amendment is:

"The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."

Acting under the mandate of that Amendment, this Court on April 24, 1939, promulgated rules regulating the professional conduct of attorneys at law; but this Court has never seen fit to promulgate rules regulating the practice of law so as to clearly delineate when realtors are engaged in the practice of the law. In the first Block case we refused to define the practice of the law, but did hold that the completion of any one of twenty-four different instruments there listed constituted the practice of the law. I thought then and say now that this Court should promulgate rules definitely stating which transactions constitute the practice of the law, and which do not. If, as the years go by, the Court should find that certain changes needed to be made in the rules, then the Court would be free to do so

under the constitutional power. Rules operate prospectively; whereas Court Opinions operate retrospectively, as shown in *Carter Oil Co.* v. *Weil, supra.*

I insist that the present case should be affirmed (except only as to the filling in of federal tax returns); and this Court should either simultaneously or later promulgate rules definitely stating what instruments may not be completed by realtors. Then any interested party or organization desiring a change in the rules may apply to the Court for such change without having overstepped an unstated line. The opinion of the Majority in the present case will inevitably lead to subsequent litigation. The Constitution says: "The Supreme Court shall make rules governing the practice of the law . . ." When we follow the Constitutional mandate it will be unnecessary to have all these suits like the one at bar.

For the reasons herein stated, I respectfully dissent from the Majority holding.

STEINBERG *v.* RAY.

5-2959 367 S. W. 2d 445

Opinion delivered May 6, 1963.

[Rehearing denied June 3, 1963.]

Ben Lindsey, Harry Steinberg and *Barber, Henry, Thurman & McCaskill,* for appellant.

Charles A. Walls, Jr., Joe Melton and *Wright, Lindsey, Jennings, Lester & Shults,* for appellee.

FRANK HOLT, Associate Justice. This litigation is the result of a collision between two automobiles on September 4, 1961, near Jacksonville, Arkansas, resulting in the death of one of the occupants and injuries to the three others. One of the automobiles was driven by the appellee, T. F. McCarty. His wife, Virginia McCarty, was a passenger in his vehicle and suffered injuries causing her death. The appellant, Simon Steinberg, was driving the other vehicle and his wife, Ruth Steinberg, was accompanying him.

A suit was filed by appellee, Bernard Ray as Administrator of the Estate of Virginia McCarty, against Simon Steinberg in the Circuit Court of Lonoke County, Arkansas. Mr. McCarty also filed suit against Mr. Steinberg and Mrs. Steinberg in the same forum. Subsequently, counterclaims were filed by Mr. Steinberg and Mrs. Steinberg against Mr. McCarty. The cases were consolidated for trial. The Court granted Mrs. Steinberg's motion for a directed verdict on the complaint against her which was based upon the allegation of a joint venture. The Court overruled Mr. Steinberg's timely motions for a directed verdict on the complaints against him. The jury returned a verdict in favor of the appellee, T. F. McCarty, in the amount of $13,000.00 and in favor of the appellee, Bernard Ray, Administrator of the Estate of Virginia McCarty, in the amount of $1,300.00. Both verdicts were against Simon Steinberg who appeals. There is no cross-appeal.

Appellant relies for reversal on the refusal of the trial court to direct a verdict in his favor. Therefore, the only issue presented by this appeal is whether there was any substantial evidence to support the verdicts in favor of appellees.

The plaintiffs-appellees allege in their complaints that at the time of the accident appellee-McCarty was driving his vehicle on Highway No. 67 in a southerly direction and the defendant-appellant was entering U. S. Highway No. 67 from State Highway No. 161 on a curving upgrade approach at an unlawful and unreasonable rate

of speed and without yielding as required by law, colliding with McCarty's automobile and that the negligence of the appellant consisted of traveling at an excessive and unlawful speed; failing to keep a lookout; failing to yield the right-of-way; failing to keep his car under control and that the negligence of the appellant was the proximate cause of the accident. The Steinbergs denied these allegations.

To meet the burden of proving these allegations of negligence the appellees rely on the testimony of Olen Hutson, a Jacksonville City Policeman. He testified that he made an investigation following the accident and when he arrived on the scene he found both vehicles in the northbound traffic lane. McCarty's vehicle was found headed in a "northwesternly" direction and Steinberg's in a "northeasternly" direction. He testified that he could not "pinpoint" the point of impact. Further, he estimated McCarty's car to be a distance of ten feet from the point of impact and Steinberg's car about twelve feet from the point of impact on the right or east side of the northbound traffic lane and off the highway in the ditch. He testified that the Steinberg car had left approximately ninety feet of skid marks leading up to the point of impact. He placed the accident as being on Highway No. 67 at or a little north of the access or ingress road coming onto and merging with Highway No. 67. This is where the four-lane highway, No. 67, narrows or merges into two lanes. In response to the question if Hutson could determine by the physical facts where the Steinberg vehicle came from, he replied:

"No, sir, not definitely. I might say it appeared the Steinberg vehicle came off of the old highway on to the new highway."

On cross-examination he testified that at the time of the accident this access or ingress road, with a yield right-of-way sign, was limited to northbound traffic.

Appellee-McCarty, who was 71 years of age, was unconscious for two and a half weeks following the accident. He testified that he had no recollection as to how the accident happened. He testified that he was driving his automobile south from Cabot to Jacksonville and that:

"I was on Highway 67 and I was going that way and there was a road turning off to the left and we were trying to take that road, as far as I can remember now going to Jacksonville and that is all I remember."

Appellant, Steinberg, 62 years of age, denied that he entered No. 67 from the access or ingress road and testified he was already on Highway No. 67 going north, en route from El Dorado to Paragould, Arkansas, and that he was traveling between forty-five and fifty miles per hour as he was leaving the four-lane portion of the highway merging into two lanes; that he first noticed the McCarty car in its proper or southbound lane as it was meeting him and no other car was in sight; that as the two cars neared each other, McCarty pulled from his southbound lane across and into the northbound lane in front of him, whereupon he, Steinberg, applied his brakes and swerved to his right in an unsuccessful effort to avoid the collision. Mrs. Steinberg corroborated his testimony. Hugh Meeks testified that he witnessed the accident from a distance of about two hundred feet and his testimony tended to corroborate Mr. Steinberg's testimony.

We must view the evidence in this case and all reasonable inferences deducible therefrom in the light most favorable to the appellees and if there is any substantial evidence to support the verdict we must affirm it. *Arkansas Power & Light Co.* v. *Connelly,* 185 Ark. 693, 49 S. W. 2d 387; *Davis* v. *Bullard,* 231 Ark. 898, 333 S. W. 2d 481.

However, it is also our duty to determine the sufficiency of the evidence as a matter of law. *St. Louis Southwestern Ry. Co.* v. *Braswell,* 198 Ark. 143, 127 S. W. 2d 637. In this case we said:

"It would seem, however, that in any view to be taken, the issues are whether the evidence is substantial, and who is to judge of that quality. If this is not a question of law, then substantiality loses its significance, with the result that any testimony may suffice."

The burden rested upon the appellees to present proof from which could be adduced some substantial evidence on which the jury might find negligence on the part of

the appellant as alleged in appellees' complaints. The alleged negligence could be established either by direct or circumstantial evidence. Appellees earnestly and forcefully contend that the testimony of the investigating officer, Olen Hutson, is substantial in nature. We cannot agree. Juries are not permitted to base their verdicts on speculation and conjecture. *Kapp* v. *Sullivan Chev. Co.*, 234 Ark. 415, 353 S. W. 2d 5; *Superior Forwarding Co.* v. *Garner,* 236 Ark. 340, 366 S. W. 2d 290.

In the case at bar it is not shown by any factual evidence that the appellant, Steinberg, was negligent or that any negligence on his part was the proximate cause of the accident. The undisputed evidence in this case is that appellant, Steinberg, was proceeding north in his proper lane of traffic and that the appellee, McCarty, was proceeding south in his proper lane of traffic as they approached each other. McCarty admits he was trying to turn to his left and enter an access road. This ingress road was limited to northbound traffic. According to the physical facts in this case the Steinberg vehicle left ninety feet of skid marks behind it leading up to the point of impact and both vehicles came to rest in the northbound traffic lane, or in Steinberg's proper lane of traffic. There is no evidence whatsoever that Steinberg was ever out of his proper lane of traffic.

Further, at or near the scene of this accident there was a large sign visible to southbound traffic with an arrow and the words "Keep Right". This was the direction appellee, McCarty, was traveling.

According to the evidence in this case there is no proof of facts, nor can any reasonable inferences be drawn from the evidence, that establishes any substantial evidence that the appellant, Steinberg, was negligent or that any negligence on his part was the proximate cause of this collision resulting in injuries to the appellees.

We agree with the appellant that the Court should have granted his motions for a directed verdict. Therefore, the case being fully developed, the judgment is reversed and the cause dismissed.

5-2992 367 S. W. 2d 417

Opinion delivered May 13, 1963.

[redacted]

Jeff Duty, for appellant.

Dickson, Putman, Millwee & Davis, for appellee.

CARLETON HARRIS, Chief Justice. This litigation presents solely a question of law. On April 7, 1959, appellant's wife, Mildred Sisemore, was involved in an automobile accident with a car driven by appellee, Junior Neal. On May 14, 1959, Mrs. Sisemore instituted suit against appellee in the Washington Circuit Court, alleging certain acts of negligence, and praying judgment for pain and suffering, loss of earnings, and medical bills in her own right. In July, 1960, the case was tried, and the jury rendered a verdict for appellee herein. No appeal was taken from this judgment.

On November 21, 1961, appellant, Paul Sisemore, filed the instant suit in his own right, against Neal, seeking to recover for loss of consortium, and medical and hospital expenses, this suit arising out of the same accident. Judgment was sought in the amount of $27,000.00. Neal answered, contending that any cause of action stated by appellant "is barred by *res judicata,*" and subsequently filed his request for Admissions of Fact which were in due time answered by appellant.[1]

[1] Answers included admissions that Mrs. Sisemore, in her suit, sought recovery of some of the medical and doctor bills for which appellant seeks judgment in this case. Also, Mrs. Sisemore sought judgment for loss of earnings up to the time of filing her complaint.

Appellee then filed his motion for Summary Judgment as follows:

"That based on the pleadings in said case, on defendant's Request for Admissions of Fact, on plaintiff's Response to said Request for Admissions of Fact, and on the pleadings and judgment filed and rendered in Civil Case No. 3196 on file in the office of the Circuit Clerk of Washington County, Arkansas, and appearing of record in Volume 33 of the judgment records of said Circuit Clerk, there is no genuine issue as to any material fact and that said defendant is entitled to judgment as a matter of law. All the foregoing pleadings, admissions and judgment entered in Case No. 3196 are made a part of this motion by reference."

The court granted the motion, and entered its judgment dismissing Sisemore's complaint with prejudice. From such judgment, appellant brings this appeal.

Though a different type of action was involved, and the suit was heard in Chancery, this court, in *Fleming* v. *Cooper,* 225 Ark. 634, 284 S. W. 2d 857, quoted from 50 C. J. S., Section 798, Page 342, as stating the general and applicable rule:

" A wife will be concluded by a judgment in an action for or against her husband with respect to any right or interest which she claims through or under him; and so likewise will a husband be concluded by a judgment for or against the wife in respect of a right or interest which he claims through or under her."

A similar situation presented itself in *Tollett* v. *Mashburn,* 183 F. Supp. 120 (U. S. District Court, W. D. Ark.). In that case, a husband sought recovery for medical expenses and loss of consortium as a result of injuries to his wife. Judge John E. Miller, in a persuasive opinion, noted that the wife was barred from recovering for her injuries by the statute of limitations, and then stated:

"Unless the defendants are liable to the plaintiff, Berthenia Tollett, they cannot be liable to her husband, Kelsie Tollett. Without doubt the claim of Berthenia

Tollett is barred by the Statute of Limitations, and, since it is barred, the claims of Kelsie Tollett for damages, if any, arising from the assault and battery are likewise barred."

The court then quoted from *Desjourdy* v. *Mesrobian,* 52 R. I. 146, 158 A. 719, as follows:

" 'The husband's right of action for the loss of services and expense in caring for his wife is concomitant with and dependent upon an actionable injury to her. To recover he must prove in the first instance all that his wife would have to prove in order to recover. If the plaintiff's contention is sustained, the analogous situation arises that the main action is barred and the dependent action may be prosecuted notwithstanding.' "

On appeal, the Court of Appeals, Eighth Circuit, affirmed[2] this holding, stating:

"We conclude that the trial court correctly interpreted the law of Arkansas and that the appellant Kelsie Tollett's claim must fall with that of his wife. It may be noted that this comports with the decisions of other jurisdictions that the husband's right to special damages for medical expenses or loss of consortium is derivative and depends upon the wife's successful suit for damages."

In 27 Am. Jur., Section 506, Page 108, appears the following statement:

"Generally however, the cause of action for loss of consortium of the wife does not exist in the husband, unless the defendant would have been liable directly to the wife for the injury to her occasioning the consequential loss to the husband."

Likewise, in Section 507, Page 109:

"Furthermore, it may be noted that ordinarily a defendant cannot be held liable for consequential injuries to the husband unless he also would have been liable to the wife for the direct injury to her."

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[2] *Tollett* v. *Mashburn,* 291 F. 2d 89 (1961).

Appellant relies on the case of *Little Rock Gas & Fuel Co.* v. *Coppedge,* 116 Ark. 334, 172 S. W. 885. But that case only holds that the husband has a separate cause of action (distinct from his wife's cause of action) for loss of consortium. The question now presented was not involved in that litigation.

We think logic unquestionably supports the view here taken. To permit a second suit would authorize "two bites" and would have the actual effect of rendering the prior judgment, wherein Neal was exonerated of liability, a nullity.

Under the authorities herein cited, we hold that the action of the trial court in dismissing appellant's complaint (on the ground that his derivative action for medical expenses and loss of consortium was barred by the adverse judgment in the wife's suit) was correct, and should be affirmed.

It is so ordered.

HINTON *v.* BRYANT.

5-2961 367 S. W. 2d 442

Opinion delivered May 13, 1963.

Duty & Duty, for appellant.

Davis & Mills, for appellee.

ED. F. MCFADDIN, Associate Justice. This is the second appearance of this case in this Court. The first appeal is *Hinton* v. *Bryant,* 232 Ark. 688, 339 S. W. 2d 621; and reference is hereby made to that opinion for the background facts. On the first appeal we held that certain platform scales were realty and passed with the transfer of the land, but that improper evidence had been introduced: so we remanded the cause for a new trial, and we took occasion to remark:

"The appellant also complains that the appellees failed to show that he is legally responsible for the removal of the scales, which were taken away by third persons not parties to this suit. We do not find it necessary to reach this question. Owing to the error indicated[1] the case must be retried, and upon a new trial the plaintiffs may offer additional evidence tending to fix responsibility upon the appellant . . ."

On the new trial, the Circuit Court — a jury being waived — rendered judgment for Bryant for $595.00; and from that judgment Hinton gave notice of appeal and designated a partial record and a definite point, as follows:

"Come now the defendants and designate as the record on appeal herein all the testimony and exhibits thereto of James B. Bryant and also all the testimony and exhibits thereto of W. L. Hinton, together with all the pleadings and judgment of the Court in this cause.

"The point to be argued on appeal in this cause is the sole question of whether or not W. L. Hinton is liable to the plaintiffs under the testimony of James B. Bryant and Walter L. Hinton. The question of the amount of damages and value of the scales will not be a point in the appeal."

Bryant made no additional designation; so we have before us now only the testimony of Bryant and Hinton in the designated point of whether Hinton is liable.[2] Since

[1] That is, as to admission of evidence regarding damages.

[2] Bryant alleged in the complaint that Hinton: ". . . fifteen (15) months after delivery of said lands to these plaintiffs, unlawfully and without authority sold and delivered said scales to Tyson's Poultry,

no additional portions were designated by appellee, we decide the question on the designated record before us. *Manila School Dist.* v. *Sanders,* 226 Ark. 270, 289 S. W. 2d 529; *Kimery* v. *Shockley,* 226 Ark. 437, 290 S. W. 2d 442. Bryant testified that he purchased a 10-acre tract from Hinton by deed dated January 4, 1958, and the platform scales were then attached to the premises; that he rented the premises to Hinton for a short time; that later he acquired possession of the premises; that after he acquired possession of the premises the scales were removed without his consent; and that the damages to the premises amounted to $2,000.00. Bryant did not testify as to who removed the scales.

Hinton testified: that he sold the land to Bryant; that he sold the scales to Tyson Feed & Hatchery for $250.00 during the time he had the land rented; that he ended his rental contract and delivered possession of the premises to Bryant on March 1, 1960; that the scales were still on the premises when he delivered possession to Bryant; and that the scales were removed by Capitol City Scale Company after Bryant went into possession of the land. The original check from Tyson Feed & Hatchery to W. L. Hinton for $250.00 was introduced in evidence. It is dated April 21, 1959, and Hinton testified that the check represented the amount for which he sold the scales to Tyson. Just why Tyson did not remove the scales when he purchased them is not shown; nor is it shown that Tyson had anything to do with the removal of the scales by Capitol City Scale Company. Here is Hinton's testimony:

"Q. Mr. Hinton, you testified that you didn't deliver any scales to Tyson?

A. No.

Inc., by bill of sale containing covenant of general warranty, dated the 21st day of April, 1959; that on or about the 12th day of June, 1959, Tyson's Poultry, Inc., acting on the authority of said bill of sale, entered upon the property of these plaintiffs, took possession of and carried said scales away." Hinton's answer was: "That the defendants deny each and every material allegation contained in the complaint of the plaintiffs." So Bryant had the burden of proving his allegations.

Q. It has been testified by Mr. Bryant that the scales were taken away from his property. Were you there when they were taken away?

A. Well, I wasn't in possession of the property, no, sir.

Q. Do you know who took them away?

A. Yes.

Q. Who was it?

A. The Capitol Scale Company in Little Rock.

Q. How do you know that?

A. I saw them. In passing by there, I saw them taking the scales out.

Q. That's all you know about it?

A. Well, yes, that's all I know. Mr. Bryant was present there at the time.

Q. I say, is that all you know about the removal of the scales?

A. Yes, that's all I know.

Q. Did you authorize anybody to remove the scales?

A. No, sir . . .

Q. Did you ever sell, or deal, any with the Capitol City Scale Company?

A. No.

Q. Did you sell them the scales?

A. No.

Q. Did you have any dealings with them whatsoever?

A. No, sir."

Giving all possible inferences which the trier of the facts was privileged to draw, we still have a situation before us in which the record shows that Hinton sold the scales to Tyson for $250.00 and that after Bryant went

into possession of the land the scales were removed by the Capitol City Scale Company. There is absolutely nothing in the record before us to show that the sale of the scales by Hinton to Tyson caused, or resulted in, the removal of the scales by the Capitol City Scale Company. There is no testimony in the record before us to show that the sale of the scales by Hinton to Tyson was the cause of, or resulted in, the Capitol City Scale Company removing the scales from the land. That is the fatal "gap" in the testimony before us.

We have a wealth of cases in Arkansas which hold that one who sells property from the land of another and *causes the property to be removed* is liable for trespass. One of the leading cases is *Hendrix* v. *Black,* 132 Ark. 473, 201 S. W. 283, L. R. A. N. S. 1918 D 217. There Black owned the land on which Hendrix had a void tax deed. Hendrix executed a timber deed to Edwards, who, under the timber deed, entered on Black's land and cut the timber. Black recovered against Hendrix and we affirmed, saying:

"In short, the facts fully justified the chancellor in finding that the acts of Edwards under the circumstances were trespasses upon the appellee's land; that these acts of Edwards were also the acts of the appellant and that the appellant through Edwards committed the trespass upon the appellee's land. 'Those who authorize the commission of a trespass are equally responsible as those by whose acts the trespass is committed.' *State of Maine* v. *Jesse S. Smith and others,* 78 Maine, 260."

Likewise, in *Lewis* v. *Phillips,* 223 Ark. 380, 266 S. W. 2d 68, we held that generally, where a trespass is committed *by defendant's advice or direction,* the contractual or other relation is immaterial in determining defendant's liability. In *Lewis* v. *Mays,* 208 Ark. 382, 186 S. W. 2d 178, appellant sent timber cutters into the woods, who cut timber from the appellee's land. The defense was that the cutters were independent contractors for whose acts the appellants were not liable. We held the appellants liable, saying: "The general rule applicable to the facts here is stated in § 85 of Cooley on Torts (4th Ed.) as fol-

lows: 'All who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefor.' "

If there had been any evidence that the Capitol City Scale Company was acting as the agent of Tyson, then a case would have been made against Hinton. But we cannot say that the trespass by Capitol City Scale Company was caused by the act of Hinton or Tyson. In 127 A. L. R. 1015, there is an Annotation entitled, "Liability of grantor or lessor of property which he does not own to true owner for trespass by lessee or grantee"; and cases are reviewed from many jurisdictions. To the same effect see also American Law Institute's Restatement of the Law of Torts § 158. But in all the cases that we have found the trespassing person has been the grantee of the person who executed the instrument, or the agent or transferee of such grantee. Here, we find no evidence that the Capitol City Scale Company was in any wise the agent or the remote grantee of Tyson; and so we reverse the judgment and remand the cause for a new trial.

WARD, J., dissents.

PAUL WARD, Associate Justice (dissenting). I am unable to agree with the result reached by the majority. I do agree with the trial judge when he said: ". . . the defendant [Hinton] wrongfully exercised acts of ownership over the scales and constructively became a party to the conversion." It is admitted that Hinton sold the scales (which admittedly belonged to appellee) and collected the sales price of $250. It is admitted he stood by and watched the scales removed by the Capitol City Scale Company. In my opinion this placed the burden on Hinton (not on appellee) to show the Capitol City Scale Company was an imposter. Any other view almost amounts to a license to steal.

It is my opinion that this case is controlled by the principle of law stated in 89 C. J. S. *Trover & Conversion* § 134, page 622:

"In actions for conversion, the conversion must be established by a preponderance of the evidence, but it may be proved either directly or by inference, and may be shown by circumstantial evidence. Any evidence of an act of ownership or control wrongfully exercised over plaintiff's property will suffice as proof of a conversion."

MOELLER *v.* GRAVES.

5-2964 367 S. W. 2d 426

Opinion delivered May 13, 1963.

Ulys A. Lovell and *Darrell D. Dover,* for appellant.

Suzanne Chalfant Lighton, for appellee.

GEORGE ROSE SMITH, J. This is a boundary line dispute. The controlling question is whether adjoining landowners may, even in the absence of any dispute or uncertainty, change the location of the boundary by an oral agreement that is carried into effect by the maintenance of a fence along the agreed line for more than seven years.

There is no real dispute about the parol agreement. What is now the appellees' property was once owned by Marguerite Miles, and what is now the appellants' property was owned by R. E. and R. M. Ming. In 1945 Mrs. Miles and her husband decided to erect a fence between the two tracts, to contain their three cows. Wanting one

end of the fence to be close to their house they meant to start the fence upon their own land, to run it at an angle out to the common boundary, and thence to continue along that line. Instead of employing a surveyor Miles and Ming undertook to step off the line.

Digging the postholes along the boundary proved to be hard work. Ming, who was helping with the project, generously suggested that the attempt to follow the true line be abandoned and that the fence be attached instead to a number of trees upon the Ming property. Mrs. Miles testified that the parties agreed that the fence line would be the permanent boundary, even though the result was to give Mrs. Miles more than the five acres called for by her deed. She quoted Ming as having said, "I won't miss it, because I have over 100 acres." Mrs. Miles's testimony is corroborated by Mrs. Ming, who was the only other one of the contracting parties to be called as a witness.

Mrs. Miles continued in possession of her tract until she sold it in 1958. During those thirteen years the fence remained in place; its location was never questioned either by her or by the various owners who succeeded to the Mings' title. The present controversy arose shortly before the appellants brought this suit, in 1961, to quiet their title to the disputed strip. The appellees pleaded title by adverse possession and relied upon the facts as we have narrated them. The chancellor upheld the oral agreement and accordingly confirmed the title in the appellees.

We have often held that when the location of the true line is in doubt or in dispute the parties may, by parol agreement, fix a line that will be binding, even though their possession under the agreement does not continue for the full statutory period of seven years. *Sherrin* v. *Coffman,* 143 Ark. 8, 219 S. W. 348; *Robinson* v. *Gaylord,* 182 Ark. 849, 33 S. W. 2d 710. The theory of these cases is that the parol agreement does not operate upon the title itself but merely fixes the line to which each party holds under his deed. Hence there is no violation of the statute of frauds. In the case at bar, how-

ever, the appellants contend that there was a violation of the statute, owing to the fact that there was no uncertainty or disagreement about the true line.

The answer to this argument is that even though the parol agreement may in its inception have been contrary to the statute of frauds, for want of any doubt or dispute, the title nevertheless vested by adverse possession after the agreement had been in force for the full statutory period of seven years. *Black* v. *Napier,* 212 Ky. 315, 278 S. W. 834; *Smith* v. *Gerrish,* 256 Mass. 183, 152 N. E. 318. Mrs. Miles testified that after the construction of the fence she and her husband thought that they owned the land up to the fence, "because Mr. Ming gave it to us." It is clear enough that Mrs. Miles and her husband occupied the land for more than seven years in the belief that they owned it. The requirement that adverse possession be hostile does not mean, of course, that the possessor must entertain a conscious feeling of ill-will or enmity toward his neighbor.

Our cases involving the establishment of a boundary line by long acquiescence confirm our present conclusion. For example, in *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18, there had been no prior dispute about the boundary, but we held that the recognition of a fence line for 34 years "shows a quietude and acquiescence for so many years that the law will presume an agreement concerning the boundary." In the case at hand there is no need to resort to such a presumption, for the testimony affirmatively shows that the agreement was actually made.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* JOHNS.

5-2989 367 S. W. 2d 436

Opinion delivered May 13, 1963.

[Rehearing denied June 3, 1963.]

Dowell Anders and *H. Clay Robinson,* for appellant.

Batchelor & Batchelor, for appellee.

George Rose Smith, J. In this eminent domain proceeding the appellant seeks to acquire about half of a twelve-acre tract owned by the appellees. The circuit court, sitting without a jury, awarded the landowners $3,500 as compensation for the property being taken. For reversal the appellant contends that the court erred in refusing to strike the testimony of certain witnesses for the landowners.

Two of the witnesses, Bob Gelly and Joe Snelly, were real estate dealers in Crawford county. After having first stated that they were familiar with land values in the vicinity of the Johns property and that they had inspected this property, both these witnesses expressed their opinion as to the fair market value of the appellees' property before and after the taking. The appellant made an unsuccessful attempt to have this testimony stricken, on the ground that neither witness had stated the facts and reasons forming the basis for his opinion. In insisting that the testimony should have been excluded the appellant cites cases such as *Ark. State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738, holding that the opinion of an expert witness is not substantial evidence when the witness fails to give a fair or reasonable basis for his conclusions.

We think counsel have misconstrued the intent of our cases. It is true that a non-expert witness, such as a layman testifying about a testator's mental capacity, must state the facts upon which his opinion is based be-

fore giving that opinion. *Walsh* v. *Fairhead,* 215 Ark. 218, 219 S. W. 2d 941. But there is no similar condition to the admissibility of an expert's opinion.

An expert witness, after having established his qualifications and his familiarity with the subject of the inquiry, is ordinarily in a position to state his opinion. For instance, a physician might testify that he had examined a certain patient and found him to be afflicted with malaria. That testimony would unquestionably be admissible. Yet if this physician, on cross-examination, were forced to admit that he had found no recognized symptom of malaria and had based his conclusion solely upon the fact that the patient had been bitten by a mosquito, then, under the rule in the *Byars* case, the witness's opinion would no longer constitute substantial evidence.

It was incumbent upon counsel for the appellant to support their motion to strike by showing that the landowners' expert witnesses had no reasonable basis for their opinions. Counsel actually made no effort in that direction, the motion to strike Snelly's testimony having been made without any cross-examination at all. Thus there was a complete failure to overcome the *prima facie* admissibility of the testimony that was challenged.

Near the end of the trial the witness Snelly was recalled in rebuttal and testified that a seven-acre tract contiguous to the Johns land had recently been sold for about $700 an acre. On cross-examination Snelly conceded that the purchaser had been a contractor, who used the seven acres for the excavation of dirt rather than as a home site (which was the use to which the Johns tract was best suited). In view of this dissimilarity counsel for the condemnor asked that all the testimony about the sale of the adjoining parcel be excluded.

This motion was properly denied. Snelly also testified that the other tract was the same kind of land as that being condemned, that the highway department's witnesses had considered the other sale, and that the other tract would not have been sold any more cheaply for any purpose other than the one for which it was actually used. Hence the fact that the contractor used

the tract as a source of dirt did not completely destroy the similarity between the two pieces of land. We have no reason to think that the trial judge could not and did not consider the other transaction in its proper perspective. For much the same reason we are of the opinion that the court did not err in refusing to strike the entire testimony of the witness Owen Bass, a former county assessor. Much of this witness's testimony was competent; so the motion to exclude all his testimony was properly denied. *Nichols* v. *State,* 92 Ark. 421, 122 S. W. 1003.

Affirmed.

EDWARDS *v.* BRIMM, EX'X.

5-2986 367 S. W. 2d 433

Opinion delivered May 13, 1963.

Leo Wulfsohn, Irving Eisenberg, Chicago, Illinois.

L. Weems Trussell, for appellee.

PAUL WARD, Associate Justice. Frances Shelton died on November 8, 1960 leaving a will dated May 4, 1957. The Probate Court of Dallas County entered an order, dated November 18, 1960, admitting the will to probate

and appointing appellee, Beulah Brimm, executrix. On November 19, 1960 the executrix signed and posted a notice (as provided by Act 32 of 1953) to all persons having claims against the estate, stating the will had been admitted to probate. The case number of the proceedings was 981.

On May 13, 1961 Moses C. Edwards (a nephew of deceased) and his wife filed (or attempted to file) a *petition* asking the court to revoke the probate of said will and also filed (or attempted to file) a *claim* against the estate in the amount of $7,433.55. There is no contention by anyone that the *petition* and *claim* were not in proper form.

It is the contention of the executrix, based on the factual situation presently set forth, that the above mentioned pleadings were never legally filed. This was also the finding of the trial court.

The record discloses that appellants and one of their attorneys live in Chicago; that said attorney mailed a letter to the probate clerk at Fordyce, Arkansas (county seat of Dallas County); that in said letter was enclosed the *petition* and the *claim* (above mentioned) for filing in case No. 981; and, that the attorney also mailed a copy of the claim to appellee's attorney of record.

The basic contention of appellee to sustain the decree of the trial court (which dismissed the *petition* and *claim*) is that the *petition* and the *claim* both were captioned "In the Probate Court of Garland County, Arkansas" when they should have been captioned "In the Probate Court of Dallas County, Arkansas."

The order of the trial court, in material parts, reads as follows:

"That the files in this case contain a letter dated May 13, 1961, signed by Irving Eisenberg, addressed to the Clerk of the Probate Court of *Garland* County, Fordyce, Arkansas, enclosing (1) Petition to Contest Will and (2) Claim of Moses C. Edwards and Ida Mae Edwards of 2210 W. 13th St., Chicago, Ill. Both the Petition to Contest the Will and the Claim show in the caption thereof

that they are to be filed in the Probate Court of Garland County, Arkansas . . . The letter dated May 13, 1961, and enclosures were forwarded to the Clerk of the Probate Court of Dallas County, but due to the fact that they were to be filed in the Garland Probate Court, no Notice was given to Beulah Brimm by registered mail as provided by Sec. 113 b of the Probate Code, and no further action was taken thereon.

"The Claim and Petition to Contest the Will were placed in the file of papers in the case of the Estate of Frances Shelton, deceased, in the Clerk's Office in Dallas County, Arkansas, but were not filed."

It is undisputed that appellants had until May 19, 1961 to file the *petition* and *claim*. In view of the language used by the trial court, and in the absence of any contention to the contrary, we think the record establishes the fact that the letter, the *petition,* and the *claim* reached the clerk of the Dallas County Probate Court before the date above mentioned.

For reasons presently set out, we think the trial court erred in striking appellants' *petition* and *claim* from the files. Every fact and circumstance indicates that the substitution of the word "Garland" for the word "Dallas" was merely a clerical error or oversight, and that no one was actually deceived, misled, or prejudiced. It is evident from the record that the Chicago attorney used printed forms sent to him by an associate attorney who lived in Hot Springs (Garland County), which forms were printed for use in "Garland" County. There can be no doubt whatever that the papers were to be filed in case No. 981 pending in the Dallas County Probate Court. They specified case No. 981, they identified the case No. 981 by reference to parties named in that case, and they were mailed to Fordyce in Dallas County. The record also discloses that copies of papers were sent to appellee's attorney of record in case No. 981. Such being the facts and circumstances, to deny appellants their day in court would be an injustice and not in keeping with our liberalized form of pleadings as indicated by Ark. Stats.

§ 27-1160 and § 27-131. Among other things the former section provides:

"The court may, at any time, in furtherance of justice . . . amend any pleadings or proceedings . . . by correcting a mistake in the name of a party or a mistake in any other respect. . . . The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party. . . . "

The latter section reads as follows:

"The rule of common law that statutes in derogation thereof are to be strictly construed shall not be applied to the Code. The provisions of the Code, and all proceedings under it, shall be liberally construed, with a view to promote its object and to assist the parties in obtaining justice."

The general rule as to liberality in pleadings is well stated in 71 C. J. S. *Pleading* § 50, "Clerical Errors; Mistakes in Writing or Spelling":

"Generally mere clerical or typographical errors which could not have misled the opposite party will not vitiate a pleading. Such errors are corrected by the context of the pleading or are self-correcting. Thus mere clerical mistakes, such as the use of one word or one name for another, where there is and can be no doubt as to what word the pleader intended to use . . . will not render a pleading bad. . . . "

We again point out that all the facts and circumstances point unerringly to the intention of appellants to file their pleadings in case No. 981 pending in Dallas County Probate Court pertaining to the estate of Frances Shelton.

We conclude therefore that the *petition* and the *claim* should be considered as properly filed in case No. 981 prior to May 19, 1961.

In view of what we have said above, appellants' *petition* was filed within the time prescribed in Ark. Stats. § 62-2114 b. (2) that is, "within six months after the date

of the first publication of the notice of the admission of the will to probate."

It is our conclusion that the *claim* was also properly filed. Ark. Stats. § 62-2601 a. provides, in pertinent part, that

" . . . all claims against a decedent's estate . . . shall be forever barred as against the estate, the personal representative, the heirs and devisees of the decedent, unless verified and presented to the personal representative or filed with the court within six months after the date of the first publication of notice to creditors."

As previously pointed out, appellants' *claim* was filed with the court within the specified period of six months.

It is the contention of appellee, however, that the trial court was justified in striking the *claim* because no proper notice of the filing of said *claim* was given as provided in Ark. Stats. § 62-2012 c. As appellee interprets this sub-section, it required appellants (in this case) to prepare the notice of filing and deliver it to the clerk ready for posting whereupon the clerk (as provided in Ark. Stats. § 62-2604 b.) "shall, by registered mail, notify the personal representative of the filing of the claim."

We find it unnecessary in this case to pass upon the merits of the above contention. In our opinion there was a substantial compliance with the statute by giving notice to appellee's attorney pursuant to the provisions of Ark. Stats. § 62-2012 e., which reads:

"SERVICE ON ATTORNEY. If there be an attorney of record for a party in a proceeding or matter pending in the court, all notices required to be served on the party in such proceeding or matter shall be served on the attorney and such service shall be in lieu of service upon the party for whom the attorney appears."

It is admitted in this case that appellee's attorney received a copy of appellants' *claim* before May 19, 1961.

It is also argued here by appellee that the trial court was justified in dismissing the *claim* because appellants

did not offer to pay the filing fees. This argument cannot be sustained in view of sub-section h. of said Section 62-2012 which reads:

"COSTS OF NOTICE. All expense incurred in giving notice under the provisions of this Code shall be taxed as costs in the proceeding."

The judgment of the probate court is therefore reversed, and the cause is remanded, for further proceedings consistent with this opinion.

Reversed and remanded.

MOORE *v.* U. S. F. & G. CO.

5-2952 367 S. W. 2d 438

Opinion delivered May 13, 1963.

Yingling, Henry & Boyett, for appellant.

Pollard & Hastings, for appellee.

SAM ROBINSON, Associate Justice. The issue in this case is who shall suffer the financial loss caused by the confiscation of an automobile by the government — the owner of the car or the insurance company who had issued a policy covering the loss of the car.

The case was originally filed by appellee, United States Fidelity & Guaranty Company, against the appellant, Mary Ellen Moore, alleging that she had purchased the automobile in question and as a part of the consideration had executed her title retaining note in the sum of $1,042.80; that the Searcy Bank had been a holder in due course of the note; that the insurance company

had issued a liability and physical damage policy on the car; that the policy provides, in effect, that the bank would be entitled to recover on the policy for the loss of the car, notwithstanding such loss may have been due to an unlawful act of the appellant, Mary Ellen Moore.

The complaint alleges that the automobile had been confiscated by the U. S. Government; that the insurance company had paid the bank the balance of $875.36 owed on the note and had been subrogated to the rights of the bank on the note, and prayed judgment against appellant in that amount. Mary Ellen demurred to the complaint; the demurrer was sustained; the insurance company appealed to this court. *U. S. Fidelity & Guaranty Co.* v. *Moore,* 233 Ark. 703, 346 S. W. 2d 524.

In that appeal, appellee Moore contended that the trial court was correct in sustaining the demurrer because the complaint did not allege any act on her part that would preclude her from recovering for the loss of the car under the terms of the policy of insurance. We reversed the judgment, pointing out that "The settled law relative to demurrer is that when the facts stated in a complaint with every reasonable inference deducible therefrom constitute a cause of action, the demurrer should be overruled."

The complaint alleges that "agents of the Alcohol and Tobacco Tax Division of the U. S. Treasury Department confiscated the heretofore described automobile. Pursuant to said confiscation, said Federal Agency legally sold said automobile and retained the proceeds from the sale."

It was felt that this allegation was sufficient against a demurrer; that there was a reasonable inference deducible from the complaint that Mary Ellen was charged with being guilty of using the car in a manner that might preclude her from recovering on the policy of insurance for its loss. We cited several cases as holding that the Federal Courts would not declare a forfeiture unless there was guilty knowledge imputable to the owner of the forfeited property. Actually, the cases cited deal with situations where the owners of forfeited property were attempting to prevail upon the courts to set aside the for-

feiture on authority of U. S. C. A., Title 18, Sec. 3617. The cited cases point out that a forfeiture can not be set aside where there is guilty knowledge on the part of the owner, not that there must be guilty knowledge before there can be a forfeiture. Guilty knowledge is not necessary to a valid forfeiture. *U. S.* v. *One 1942 Plymouth Sedan Automobile,* 89 F. Supp. 884; *U. S.* v. *One Plymouth Coupe,* 88 F. Supp. 93; *Busic* v. *U. S.,* 149 F. 2d 794.

It must be admitted that our opinion in the first appeal is subject to the construction that Mary Ellen could not recover because the automobile had been confiscated by the Federal Government. The trial court, therefore, adopted that construction and held that the order of forfeiture in the Federal Court was *res judicata* of the question of whether Mary Ellen is entitled to recover on the insurance contract for the loss of the car.

The action in Federal Court was against the automobile — an action *in rem. Waterloo Distilling Corp.* v. *U. S.,* 51 Sup. Ct. 282; *Florida Dealers & Growers Bank* v. *U. S.,* 279 F. 2d 673. Mary Ellen was not a party to the proceeding in Federal Court. The doctrine of *res judicata* is therefore not applicable. *Timmons* v. *Brannan,* 225 Ark. 220, 280 S. W. 2d 393; *Thomas* v. *McCullum,* 201 Ark. 320, 144 S. W. 2d 467; *Seaboard Finance Co., et al* v. *Wright, Admx.,* 223 Ark. 351, 266 S. W. 2d 70.

The issue of whether appellant can recover on the policy of insurance has not been decided on its merits. The judgment is therefore reversed and the cause remanded for a new trial.

WARD, J., dissents.

4992, 4994, 4997 367 S. W. 2d 750

Opinion delivered May 13, 1963.

[Rehearing in Case No. 4997 denied June 3, 1963.]

Harold B. Anderson and *Wiley A. Branton,* for appellant.

Bruce Bennett, Atty. General, by *Clyde Calliotte,* Asst. Atty. Gen., for appellee.

JIM JOHNSON, Associate Justice. These are the so-called "sit-in" cases. They were submitted to this court on January 16, 1961. At that time there were cases claimed to be similar pending in other states.[1] By common consent our decision was delayed awaiting the outcome of cases then pending in which petitions for *certiorari* to the United States Supreme Court had been filed. Since then additional petitions have been filed and there are now pending before the United States Supreme Court at least three cases of this nature in which *certiorari* has been granted. See *Avent* v. *North Carolina, cert.* 370 U. S. 934; *Peterson* v. *City of Greenville, cert.* 370 U. S. 935; *Lombard* v. *Louisiana, cert. gr.* 370 U. S. 935. We were particularly interested in the outcome of the "Garner cases", *Garner* v. *Louisiana,* 368 U. S. 157, 82 Sup. Ct. 248, 7 L. Ed. 2d 207, which appeared to be in point with the cases at bar. From the opinion of the United States Supreme Court in these cases, which were decided December 11, 1961, it developed that the cases did not involve a situation similar to ours and therefore afforded no persuasive authority.

While we originally intended to delay our decision until the United States Supreme Court had decided a case in point with ours, it is against our policy to delay for too long our decision in any pending case. We ascribe to the theory that justice delayed is justice denied. For many years when this court goes into summer adjourn-

[1] *Henderson* v. *Trailway Bus Co.,* (Va.) 194 F. Supp. 423; *Randolph* v. *Commonwealth,* (Va.) 119 S. E. 2d 817; *State* v. *Williams* (N. C.), 117 S. E. 2d 824; *Samuels* v. *State* (Ga.), 118 S. E. 2d 231; *Briscoe* v. *State,* (Tex.) 341 S. W. 2d 432; *Walker* v. *State* (Ga.), 118 S. E. 2d 284; *State* v. *Fox* (N. C.), 118 S. E. 2d 58; *Rucker* v. *State* (Tex.), 342 S. W. 2d 325; *Burton* v. *Wilmington* (Del.) *Parking Authority,* 365 U. S. 715; *Williams* v. *Hot Shoppes, Inc.,* C. A. D. C., April 20, 1961, No. 15610; *Gober* v. *City of Birmingham* (Ala.) 133 So. 2d 697.

ment all cases ready for submission have been decided except some rare cases, like these, which are carried over for a definite reason. These cases have now been pending for over two years. We do not feel that we can properly delay them longer to await a decision of the United States Supreme Court. In order to avoid carrying these cases over another summer we now proceed to a decision.

Our cases here were consolidated.[2] They consisted of three criminal prosecutions against 13 defendants. The prosecutions arise out of the activities of the defendants in seeking to be served at eating facilities maintained for whites, the defendants being Negroes. The three cases involve separate incidents at separate retail establishments. There are factual and legal differences necessitating a different disposition of the cases of one group of appellants as compared to the other two groups.

Case No. 4992, styled *Briggs et al* v. *State,* is a prosecution under Act 226 of the Acts of 1959. It involves a "sit-in" at F. W. Woolworth Company in Little Rock on March 10, 1960.

Case No. 4994, styled *Smith et al* v. *State,* is also a prosecution under Act 226 of the Acts of 1959. It involves a "sit-in" at Pfeifers Department Store in Little Rock on April 13, 1960.

Case No. 4997, styled *Lupper et al* v. *State,* is a prosecution under Act 226 and also under Act 14. It involves a "sit-in" at the Gus Blass Store in Little Rock on April 13, 1960.

In the *Briggs* case, the evidence shows that the Negro defendants seated themselves at a lunch counter in Woolworth's and refused to leave when ordered to do so by police officers. The evidence is undisputed that these defendants were not requested to leave by the management or by anyone with authority to act for the management.

In the *Smith* case, the record shows that all defendants but one left the premises promptly upon the request of the manager.

[2] The cases were consolidated for briefing upon motion of appellants.

The *Lupper* case was tried to a jury and there is adequate evidence on behalf of the State to support a finding that these two defendants, James Frank Lupper and Thomas B. Robinson, refused to leave the Gus Blass Store at the request of the manager.

ACT 226 CASES

We see no distinction in fact or law between the three prosecutions under Act 226 of 1959. Therefore, we will discuss the three cases together insofar as Act 226 is concerned. Of course, it will be necessary to discuss the prosecution under Act 14 separately.

For reversal of the Act 226 cases, it is insisted that:

(1) The Act is unconstitutional because it denied defendants due process and equal protection of the law.

(2) The Act has been applied in an unconstitutional manner.

(3) The evidence was insufficient to support a conviction; and,

(4) The judgment was excessive and harsh.

Since we are of the opinion that Point 3 is well taken,[3] we will not pass upon the constitutionality of Act 226 of 1959. This is in accordance with the established rule of this court that constitutional questions will not be decided where the case may be disposed of on other grounds. *Bailey* v. *State,* 229 Ark. 74, 313 S. W. 2d 388; *Bowling* v. *State,* 229 Ark. 876, 318 S. W. 2d 808.

Section 1 of Act 226 of 1959 [§ 41-1432 Ark. Stats.] reads as follows:

"Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Arkansas, and while therein or thereon shall create a disturbance, or a breach of the peace,

[3] It is noted that these appellants were charged and convicted of a violation of Act 226 of 1959 exclusively and not for a violation of the prohibitions contained in Ark. Stats. § 41-1401 or § 41-1403, the general disturbance of the peace statutes.

in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment."

Under this Act the prohibited offenses are creating disturbances or breaches of the peace. The Act sets forth loud and offensive talk, the making of threats and attempts to intimidate as examples of prohibited conduct. While there was some evidence on the part of the State to the effect that feeling and tension were high, the State offered no substantial evidence that these defendants entered the store to carry out a conspiracy to cause a breach of the peace, nor was there evidence that these defendants or any of them uttered any loud offensive talk, made any threats or attempted to intimidate anyone. The defendants had a right to peacefully seek service at the lunch counters. By the same rule, management had a right to refuse to serve them. Since the peaceful efforts of the defendants to get service at the lunch counters were lawful, and in the absence of a substantial showing that such efforts were organized and calculated to disturb or breach the peace, it cannot be said here that the mere making of these efforts amounted to "creating a disturbance or breach of the peace." It is obvious that the Act contemplates a doing of that which the actor has no legal right to do. The defendants in the *Briggs* case refused to leave at the command of the police officers but in the absence of a request by management of the officers to order appellants to leave the premises, the officers had no right or authority to give such orders. There is no contention in this case that the officers had received such a request from management. Hence, the refusal of the defendants to leave was not unlawful and could not have been unlawful until they refused to leave at the request of the management or the officers in compliance with a request from management. In the *Smith* case all defendants but one left promptly at the request of the management. Certainly

those leaving were guilty of no offense. The case of the one individual (in the *Smith* case) who did not leave promptly gives us more concern. However, we are constrained to believe that any unrest, tension or disturbance existent in the Pfeifer store at that time had already been created by the lawful efforts of all the defendants to obtain service. There is no showing that this act of the defendant created a disturbance or breach of the peace. A different question would be presented had this defendant been prosecuted under Act 14 of 1959 but no such charge was placed against him.

The point which we wish to make completely clear is that the mere fact that the exercise of a lawful right may result in a disturbance or breach of the peace does not make the exercise of that right a violation of the law so long as the right is exercised in a peaceful manner and without force or violence or threats of same. Therefore, we conclude that all defendants in all prosecutions under Act 226 of 1959 should have been acquitted.

In the *Lupper* case, which involves violations of Act 14 of 1959, as well as violations of Act 226, the appellants make the same contentions as to Act 14 as are made as to Act 226 and an additional point is raised as to alleged error in refusing to give certain instructions.

DUE PROCESS AND EQUAL PROTECTION OF LAWS

Section 1 of Act 14 of 1959 [§ 41-1433 Ark. Stats.] reads as follows:

"Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment."

Appellants assert that Act 14 is unconstitutional in that it denies them equal protection of the laws and due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 8 of Article II of the Constitution of Arkansas, and cite *United States* v. *Miller,* D. C., 17 F. Supp. 65; and *Lanzetta* v. *New Jersey,* 306 U. S. 451, 59 Sup. Ct. 618, 83 L. Ed. 888. It is contended that the Act is so vague as to make it impossible to determine what conduct might transgress the statute. It is said that the Act provides no ascertainable standard of criminality. With these contentions we cannot agree. The Act clearly, specifically and definitely makes the failure to leave the business premises of another upon request of the owner or manager a misdemeanor.

It is suggested that the Act could be construed so as to allow an owner or manager to invoke the same because a customer was demanding a refund of money paid for merchandise or because a customer was demanding a delivery of merchandise which he had purchased. Assuming this to be true, we see no reason why the Act amounts to a denial of due process or equal protection of the laws. To remain upon the premises of another after having been requested to leave amounts to a trespass. *State* v. *Clyburn,* 247 N. C. 455, 101 S. E. 2d 295. This does not mean that under the hypothesis suggested by appellants that the aggrieved customer would have no remedy because if management had failed to return his money or deliver merchandise purchased, an action would lie in the courts of this State and the customer could be fully compensated for the failure to return the money or deliver the merchandise. A bill collector has a right to attempt to collect what is due him but he has no right to commit a trespass in the process.

By its terms and on its face, the statute applies to all who refuse to leave and it is not restricted to negroes. There is nothing uncertain, indefinite or vague about Act 14. It prohibits trespass.

While the Legislature and not this court determines public policy by statutory enactments, we feel that it is a wise policy to prevent possible violence and bloodshed by

providing criminal sanctions against trespass. We have held that a citizen of this State may use force and violence short of killing to protect his property against trespass even though the trespasser makes no effort to commit a felony. *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900. The statute here in question simply provides a means whereby the owner of property may be protected in his use and possession of such property without having to resort to force and violence. We are impressed with the proposition that without this salutary statute, violence in repelling trespassers could become commonplace. Certainly, it is in the interest of the public and a valid exercise of the police power to protect the public peace by criminal sanction against trespass. Article 2, § 22 of the Constitution of Arkansas in part is as follows:

"The right of property is before and higher than any constitutional sanction . . ."

The right to hold and enjoy property free from interference by others is one of the most precious rights enjoyed by the citizens of this State. They are entitled to be protected in this right against all trespassers without regard to whether they are colored or white.

The appellants complain that the Act does not require any *mens rea* or criminal intent on the part of the offender. We again disagree; the intent to remain after being requested to leave is a criminal intent.

UNCONSTITUTIONAL APPLICATION OF ACT 14

The appellants contend that Act 14 has been unlawfully and unconstitutionally administered because it is said that the Act would not be invoked or enforced against a white man under the same or similar circumstances, thereby denying appellants equal protection of the laws. There is absolutely no evidence in the record to justify such an assertion. On its face the Act is applicable to all persons without regard to race. Appellants made no effort to adduce evidence to prove that white persons had violated the Act; that these violations were known to the officers and prosecuting authorities and that no arrests and prosecutions had followed such violations. Such proof

would have been necessary in order to justify the present contention. See: *Taylor* v. *City of Pine Bluff,* 226 Ark. 309, 289 S. W. 2d 679, Certiorari denied, 352 U. S. 894, 77 Sup. Ct. 125, 1 L. Ed. 2d 85; also see: *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Snowden* v. *Hughes*, 321 U. S. 1, 64 Sup. Ct. 397, 88 L. Ed. 497; *Hickinbotham* v. *State,* 227 Ark. 1032, 303 S. W. 2d 565.

The appellants have not shown, nor have we been able to find from the record, a single discriminatory act on the part of the State in the enforcement of this statute. It is not unusual for persons charged with crime to assert "discrimination", however, unsupported assertions cannot be held to take the place of evidence.

STATE ACTION

Appellants further assert that the Act has been unconstitutionally applied in that the enforcement of such Act amounts to "state action" in violation of the 14th Amendment to the Federal Constitution. They cite, *inter alia, Shelley* v. *Kraemer,* 334 U. S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161; *Hurd* v. *Hodge,* 334 U. S. 24, 68 Sup. Ct. 847, 92 L. Ed. 1187; *Barrows* v. *Jackson,* 346 U. S. 249, 73 Sup. Ct. 1031, 97 L. Ed. 1586; and *Valle* v. *Stengel,* 176 F. 2d 697. This argument is completely untenable because it presupposes a right in the Negro defendants to be served by the lunch counter operators. In all of the cited cases from the Supreme Court of the United States it is either assumed or specifically stated that the Negroes involved had a right to own and occupy the property in question. In the *Valle* case, the State of New Jersey had enacted a statute giving all persons, irrespective of color, the right to admission of places of public accommodation such as the swimming pool there in question.

There is no right in these defendants under either State or Federal law to compel the owners of lunch counters to serve them. Many states have enacted so-called "public accommodation" statutes but Arkansas is not among them. The Fourteenth Amendment does not guarantee any such right to the appellants.

Appellants place great reliance on the language in *Valle* v. *Stengel, supra*, with reference to the right to contract. However, a reading of the *Valle* case shows that the court merely held that the Fourteenth Amendment and the Federal Civil Rights Statutes only guaranteed to Negroes "a civil status equivalent to that enjoyed by white persons." As previously mentioned, New Jersey had a "public accommodation" statute guaranteeing to all persons, regardless of color, the right to admission to the swimming pool in question. This is considerably different from the situation in the case at bar. Arkansas has no "public accommodation" statute. Management can arbitrarily order white persons to leave lunch counters for any reason whatever. While appellants expound forcefully of the equal privileges and immunities provisions of the Fourteenth Amendment, we cannot escape the conclusion that they are urging this court to grant them an unequal privilege, that is the right to be served in a restaurant because they are colored, even though a corresponding right does not exist in white persons. Appellants' argument must fail because they, regardless of color, had no right or privilege to be served. To hold otherwise would be to employ judicial fiat to coerce unwilling lunch counter operators to afford service to patrons they do not want and did not seek. It can add nothing to the argument to say that they did not want appellants because of their color because appellants had no basic right to be served and the State's action in enforcing the criminal laws against trespass cannot be held to be "state action" abridging the privileges or immunities of citizens of the United States. There is no privilege or immunity to trespass on private property. It should be remembered that the operators of the lunch counter in question have a right not to be deprived of their property without due process of law. This right is guaranteed to them under the same provisions of the Constitution now sought to be invoked by appellants. To hold that anyone may trespass at will simply because his color is different from that of the property owner and that the law is powerless to protect the injured party would be inviting property owners to provide their own means of evicting trespassers. This

would not be consonant with the principles of a nation which regards good order as one of the fundamental objectives of society. The Supreme Court of the United States has approved a municipal ordinance designed to prevent trespass by providing that it should be unlawful for magazine subscription solicitors to go upon private property for the purpose of soliciting orders without having been requested or invited to do so. *Breard* v. *Alexandria,* 341 U. S. 622, 71 Sup. Ct. 920, 95 L. Ed. 1233. In the *Breard* case the court rejected arguments of the appellant solicitor that the ordinance violated: (a) The due process clause of the Fourteenth Amendment; (b) The Federal Commerce Clause; (c) The guarantees of the First Amendment of freedom of speech and the press (made applicable to the states by the Fourteenth Amendment).

In the *Breard* case the court said:

"Since it is not private individuals but the local and federal governments that are prohibited by the First and Fourteenth Amendments from abridging free speech or press, *Hall* v. *Virginia* does not rule a conviction for trespass after notice by ordinance. However, if as we have shown above, p. 1247, a City Council may speak for the citizens on matters subject to the police power, we would have in the present prosecution the time-honored offense of trespass upon private grounds after notice. Thus, the *Marsh* and *Tucker* cases are not applicable here."

We think the quoted language makes it abundantly clear that the act of discrimination in refusing service is that of the individual and thus not subject to the interdiction of the Fourteenth Amendment. The same language also makes it clear that in prosecuting for trespass the State is making a valid exercise of police power. In other words, it makes no difference as to why the individual lunch counter operator did not want the appellants on the premises, because if they remained after a request to leave they became trespassers and the State prosecuted for trespass and not to enforce discrimination.

SUFFICIENCY OF EVIDENCE IN LUPPER CASE

As previously mentioned, there was sufficient evidence to support the verdict of the jury in finding that the defendants Lupper and Robinson refused to leave the premises after having been requested to do so by the manager. It is not our province to pass upon the weight of the evidence. It requires no citation of cases as to the familiar rule that we may not go behind the verdict of a jury which is supported by substantial evidence.

REFUSAL OF REQUESTED INSTRUCTIONS

The appellants complain of the action of the trial court in refusing to give two instructions requested by them. However, a comparison of the instructions which were refused with those which were given by the court makes it crystal clear that the subject matter of the rejected instructions was adequately covered by the instructions given. *Harrison* v. *State,* 222 Ark. 773, 262 S. W. 2d 907.

EXCESSIVENESS AND HARSHNESS OF JUDGMENT

The appellants contend that the fines and punishment meted out to them were excessive and harsh even though they did not exceed the penalties provided by Act 14. This contention has been rejected many times by this court. See: *Johnson* v. *State,* 214 Ark. 902, 218 S. W. 2d 687.

CONCLUSION

For the error indicated, the convictions under Act 226 of 1959 are reversed and the cases having been fully developed are dismissed.

The convictions of Lupper and Robinson under Act 14 of 1959 are affirmed.

Robinson, J., dissents in part; Holt, J., disqualified.

SAM ROBINSON, Associate Justice (dissenting). The majority is holding that there is no substantial evidence to sustain the convictions for violating Act 226 of 1959.

I do not agree. The Act provides that anyone who shall enter any place of business and create a disturbance in any manner whatsoever shall be guilty of a misdemeanor. Not only did the appellants create a disturbance in Pfeifers, Blass and Woolworth's, but they went to those places for the specific purpose of creating a disturbance. The evidence is overwhelming to that effect.

It is clear from the evidence that the appellants did not go to the lunch counters at the places mentioned because they were hungry and wanted food, and no one contends that they went there for that reason. The evidence shows conclusively that on the morning of March 10th a large group of people met at Philander Smith College and there agreed to go to Woolworth's for the purpose of attempting to force that place of business to serve them food, when they had no reason to believe that they would be served such food. About 50 of them walked from the college to Woolworth's; they all went in at the same time and sat down at the lunch counter. There are only 59 seats at the counter. It is a matter of common knowledge that in going from the college to Woolworth's they passed or went near numerous eating places that would have served them food.

Certainly, no operator of a privately owned restaurant is required by law to serve anyone he does not want to serve. The appellants are presumed to know the law, and when they went there they knew they could not lawfully require Woolworth's to serve them food. And they knew to a moral certainty that Woolworth's would not voluntarily serve them.

The evidence is overwhelming that appellants went to Woolworth's for the very purpose of creating a disturbance by violating the custom and practice of the community in seating themselves at a lunch counter reserved for others. Even when they were not served and the lunch counter was closed because of their conduct in occupying the seats, they continued to sit there. Of course, such an unusual occurrence created a disturbance, and someone called the police. When the police arrived and asked them

to remove themselves from the lunch counter, about 45 complied, but five continued to sit there, although the lunch counter had been closed. When all the facts are considered, there is no conclusion to be reached except that appellants went to Woolworth's to create a disturbance, to disrupt business and harass the proprietor. If this is not disturbing the peace, then it is hard to see how anyone could ever commit that offense.

The majority opinion is based on the premise that if a person is doing something lawful, he cannot be guilty of disturbing the peace. In my opinion, such reasoning is not sound. Certainly one has a right to pray or sing or do many other things that ordinarily would not be unlawful, but when such acts are done in a manner calculated to disturb the peace of the community, and does disturb the peace of many people to the extent that officers of the law have to be called to handle the situation, such acts are unlawful.

Disturbing the peace is synonymous with disorderly conduct and is so regarded in our statute. Our disturbing the peace statutes are placed under the heading of Disorderly Conduct in Ark. Stats., Vol. 4, p. 57. There have been many convictions for disturbing the peace or disorderly conduct that have been affirmed where the defendant had not so flagrantly violated the rights of others as was done by the appellants in the case at bar. In the case of *State* v. *Cooper,* 285 N. W. 903 (Minn. 1939), a discharged chauffeur had his former employer's home picketed with a banner reading "Unfair to Private Chauffeurs and Helpers Union, Local No. 912". In sustaining a conviction for disorderly conduct by the one carrying the banner, the Minnesota court said: " 'Conduct is disorderly, in the ordinary sense, when it is of such nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.' Or, as stated further: 'The probable and natural consequence of the conduct is the important element.' As to modern statutes and ordinances relating to disorderly conduct, 'it may be said in general that words and acts which tend to disturb the peace . . . of the com-

munity, or of a class of persons, or of a family, are punishable.' 18 C. J. p. 1216, [§ 2]B, and cases under note 12. And in several jurisdictions it has been held that such conduct 'as in the opinion of the magistrate tends to a breach of the peace' is punishable; 'and even in the absence of such a statutory definition it is generally a question for the magistrate whether or not the particular act complained of is comprehended within the expression "disorderly conduct".' Id. and cases under notes 16 and 17; 8 R. C. L. p. 285, § 306, and cases under note 7. We are of opinion and so hold that it was for the court to determine whether upon this record defendant was guilty, and that its findings in that behalf should not be overturned. The judgment and sentence are therefore affirmed."

In *Bennett* v. *City of Dalton,* 25 S. E. 2d 726 (Ga. 1943), the defendants were distributing a religious magazine known as "The Watch Tower" and caused a crowd to gather. A policeman told them to move on, which they refused to do, stating they were doing the Lord's work and would have to be locked up. They were therefore arrested. In affirming the convictions for disorderly conduct, and notwithstanding the constitutional guarantee of freedom of speech, freedom of press, freedom of worship and religious liberty was involved, the Georgia court said: "The testimony of the policemen authorized the recorder, sitting as both judge and jury, to find that the refusal of the defendants to move on, after having been directed to do so by an officer of the law, constituted disorderly conduct." Certiorari was denied by the United States Supreme Court. *Bennett* v. *City of Dalton,* 64 S. Ct. 197, 320 U. S. 712, 88 L. Ed. 418.

In the New York case of *People* v. *Galpern,* 181 N. E. 572 (1932), a policeman told about five or six men congregated on a sidewalk to move on, which they refused to do. The court found that they were violating no law at the time, but they were guilty of disorderly conduct in refusing to move on when directed by an officer to do so. The court said: "The courts cannot weigh opposing considerations as to the wisdom of the police officer's directions when a police officer is called upon to decide

whether the time has come in which some directions are called for.'' And that is exactly the situation that existed in the case at bar. The police were of the opinion that the situation was tense and such that the Negroes should move on, and only the ones who refused to do so were arrested. In addition to what has been said heretofore, clearly their refusal to move on when directed by an officer of the law created a disturbance within the meaning of the statute.

Under the decision handed down by the majority, a large number of people can go into any place of business, create a disturbance by their presence, disrupt business and annoy the proprietor to no end, and there is nothing he can do except request them to leave, which they can do and immediately return to the restaurant or other place of business and go through the same procedure until the owner breaks down and does business with them or goes out of business.

The trial court was completely justified in finding from the evidence in the cases that the real purpose of the appellants in going to the lunch counter at Woolworth's was to unlawfully harass the owners, thereby compelling such owners to serve food to the appellants or close the lunch counter. Here, the owners adopted the procedure of closing the eating places. The same thing occurred at Pfeifers and Blass.

In my opinion the evidence is ample to sustain the convictions for violating the provisions of Act 226 of 1959, and in addition, Ark. Stats. § 41-1403 provides that if two or more persons assemble together for the purpose of disturbing the peace they are guilty of a misdemeanor.

For the reasons given I therefore dissent.

Supplemental opinion on denial of request for rehearing in Case No. 4997 delivered June 3, 1963.

JIM JOHNSON, Associate Justice. Subsequent to the opinion delivered by this court in *Lupper* v. *State* on May 13, 1963, the United States Supreme Court on May 20,

1963, rendered opinions in four "sit-in" cases the pendency of which was specifically referred to in our opinion as cases in the nature of and similar to the cases at bar. The four cases are *Avent* v. *North Carolina*, # 11; *Peterson* v. *City of Greenville*, # 71; *Lombard* v. *Louisiana*, # 58; and *Gober* v. *Birmingham*, # 66.

Within the time prescribed by the rules of this court, appellants have petitioned for a rehearing urging reconsideration of our opinion in the light of these recent pronouncements of the United States Supreme Court.

A careful examination of copies of the official opinions in these cases furnished us by the Government Printing Office discloses that the court [in *Lombard* v. *Louisiana*, # 58] summarized its own holdings as follows:

"We have . . . held . . . that where an ordinance makes it unlawful for owners or managers of restaurants to seat white and Negroes together, a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance."

In compliance with petitioners' request for review, we have reexamined our opinion in the light of the cited cases and find that appellants did not claim nor was there any showing made relative to the existence of a state law or municipal ordinance in the City of Little Rock which made it unlawful for owners or managers of restaurants or lunch counters to seat whites and Negroes together. Further, appellants did not claim nor was there any showing made that any official command was issued which could remotely have the coercive effect of a law requiring segregation of the races in restaurants or lunch counters. In fact, from our assiduous review of the entire record before us, we have been unable to find any claim, evidence or showing indicating in the slight-

est respect that the decision of the manager in the case at bar to exclude these petitioners from the lunch room was anything except the exercise of freedom of choice. Having thus reviewed our opinion in the light requested, rehearing is denied.

5-2995 367 S. W. 2d 440

Opinion delivered May 13, 1963.

[redacted]

Curtis L. Ridgway, Jr., for appellant.

R. Scott Campbell, for appellee.

FRANK HOLT, Associate Justice. This is an action brought by the appellants against the appellees to determine their respective interests in a 160 acre farm. The appellants and appellees are the various heirs at law of Joseph Hugh Fisher who owned this property when he died intestate about thirty-five years ago. Surviving him as his sole heirs were his six children, Neal Fisher, Joe Fisher, Mint Fisher Richardson, Nancy Fisher Anderson, Sara Fisher and Ada Fisher, all of whom are now deceased except the defendant, Neal Fisher.

On March 19, 1932, Nancy Fisher Anderson conveyed her undivided interest by warranty deed to her sisters, Sara and Ada Fisher, and on the same date they conveyed by warranty deeds their undivided interest in the 160 acre farm to their nephew, Paul Fisher, the defendant-appellee. By virtue of these conveyances he contends he is now the owner of an undivided one-half interest in this property. He did not record his warranty deeds until November 23, 1960, or seven months after the plaintiffs-

appellants, Herbert Nelson Fisher and Lucille Fisher, his wife, recorded a deed on which they base their claim to a superior title.

Their claim to a superior title arose in this manner. In 1956, Neal Fisher, father of the appellee, Paul Fisher, mortgaged an undivided one-third interest [he actually owned an undivided one-sixth interest] in the farm lands to a Mr. Coleman. This mortgage was properly foreclosed and Neal Fisher's interest in the land was conveyed by a commissioner's deed to a Mr. Lowrey and a Mr. Sloan in 1958. On April 16, 1960, Sloan and Lowrey conveyed their interest in this property to the appellants, Herbert Nelson Fisher and Lucille Fisher, his wife. This instrument was recorded by Herbert and Lucille on this same date or approximately seven months before their cousin, Paul Fisher, recorded his 1932 deeds.

Herbert Fisher and his wife, Lucille Fisher, and the numerous other plaintiffs-appellants, as heirs at law of Joseph Hugh Fisher, allege in their pleadings that the 1932 deeds to Paul Fisher are invalid and inoperative because the signatures of Sara and Ada Fisher are not genuine; that the deeds were not executed on the dates named therein, and that if the deeds were signed by the purported grantors the "subject matter of the conveyances" was inserted in the deeds at a date subsequent to the execution thereof. The defendants-appellees, Paul Fisher and his wife, filed a general denial. It was stipulated that the interest of Neal Fisher, which interest he had mortgaged, was duly foreclosed and conveyed by the commissioner's deed.

The Chancery Court found that the plaintiffs-appellants had failed to prove the invalidity of the 1932 deeds; that Neal Fisher and Edna Fisher, his wife, owned and only mortgaged an undivided one-sixth interest, instead of the undivided one-third interest, in said lands which interest was legally divested through the commissioner's deed; that the lands were susceptible of partition or division in kind; that the appellee, Paul Fisher, is the owner of an undivided one-half interest as claimed by him. The Court apportioned the remaining one-half inter-

est among the various appellants and decreed that the property be divided "in equal parts, one of which shall be the property of the plaintiffs, and the other being the property of the defendant, Paul Fisher." From this decree in favor of the appellee, Paul Fisher, comes this appeal.

For reversal appellants rely on the point that an unrecorded conveyance of title is invalid against a subsequent purchaser for value and without notice. This point was not asserted in the pleadings nor was it an issue before the trial court. We have consistently held that where an issue is not presented in the trial of the case it cannot be considered on appeal. *Angelletti* v. *Angelletti,* 209 Ark. 991, 193 S. W. 2d 330. This is on the well-reasoned basis that cases on appeal should be determined on the same issue or issues on which they were presented in the trial court.

However, if we consider the point relied on by the appellants they cannot prevail. Appellants cite Ark. Stat. (Anno.) § 16-115 which provides that an unrecorded instrument is invalid against a subsequent purchaser for a valuable consideration and without notice of a pre-existing conveyance. Thus, such a subsequent purchaser acquires a superior title when he places his title of record before a previous purchaser records his title. This statute, however, applies to purchasers who derive their interests from a common grantor. *Halbrook* v. *Lewis,* 204 Ark. 579, 163 S. W. 2d 171; *Brewer, Exec.,* v. *Fletcher,* 210 Ark. 110, 194 S. W. 2d 668.

In the case at bar the contending parties did not receive the deeds in question from a common grantor since appellee acquired his deeds from Sara and Ada Fisher, and appellants secured their deed from Lowrey and Sloan. Therefore, the above statute is not applicable.

The decree of the Chancery Court is affirmed.

RHEA *v.* M-K GROCER CO.

5-3004 370 S. W. 2d 33

Opinion delivered May 20, 1963.

[Rehearing denied September 16, 1963.]

J. Kenton Cochran, for appellant.

Wright, Lindsey, Jennings, Lester & Shults, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Virginia K. Rhea, for herself and children, filed a claim which arose out of the death of her husband, Boyce Rhea, who died from a brain hemorrhage on February 1, 1960, on which date he was admittedly employed by M-K Grocer Co., Inc. Appellants contend that Mr. Rhea sustained an accidental injury, arising out of and in the course of his employment, and that they are entitled to compensation. The referee found that the brain hemorrhage which Rhea suffered, and which resulted in his death, did not arise out of and in the course of his employment. The full commission sustained this finding, and, on appeal to the Circuit Court, the commis-

sion was affirmed. From the judgment so entered, appellants bring this appeal.

According to the testimony of Clyde Pearson, a fellow worker, Rhea started to work at 7:00 A.M. on the date in question (February 1, 1960), working as a shipping clerk, and after helping load a truck, assisted three or four men in pushing a box car to the proper place for loading, a distance of three or four feet. Before moving this car, it was necessary to push another loaded box car out of the way for the same distance. This was moved by using a pinch bar, and with all parties pushing. Moving the box cars was an unusual duty for Rhea. Pearson was unable to state the time this work took place other than it occurred between 9:00 and 12:00 A.M. He testified that Rhea went to lunch at 12:00 o'clock, and returned from lunch "right at 1:00 o'clock." From the testimony:

"I was sitting in the office. He came through. He generally stopped and talked but he come on through to the back of the store and got him a cup of water and sat down on the floor and I got up and followed him out and when I got out there, why he was setting weaving and I asked him what was wrong and he said he had a severe headache and I asked him if I could do something and he didn't answer me then and then he said 'Somebody has got to do something' and I said 'I'll call an ambulance' and run in the office and told Charles to call an ambulance that something was wrong and I run back out there and Kyle, Hugh and I just lay him on down because he was about to fall."

The witness stated that Rhea was unconscious and he could hear a "gurgle in his throat." The ambulance arrived in about 10 minutes, and Rhea was taken to the hospital.

Leonard Crain, another fellow employee, testified that Rhea came to work on the morning in question prior to 7:00 o'clock, and he verified Pearson's testimony to the effect that Rhea had helped in pushing the box cars. He stated that subsequently Rhea was engaged in "stacking cans" in the warehouse, which required the latter to

pick up cases weighing approximately 40 pounds each, and stacking same above his head. This work, according to the witness, lasted for two or two and one-half hours. Crain said that around 11:00 o'clock, Rhea told the workers "that he had a bad headache, says 'I don't believe I have ever had the headache any worse' and so that was all that was said, and he went back down and stayed downstairs then until noon." Crain further testified that the workers ceased work at 12:00, upon directions from Rhea who "a few minutes before 12:00, between 11:30 and 12:00" had told the employees "to come on down pretty soon that it was time to go." The witness stated that Rhea returned from lunch about 20 minutes until 1:00 o'clock, and suffered the attack 5 or 10 minutes later.

Dr. J. A. Henry, a physician of Russellville, testified that he became acquainted with Rhea in 1952, and performed an operation on the latter at that time for a ruptured liver. He attended Rhea after the attack on February 1. Dr. Henry stated that Rhea suffered a cerebral hemorrhage, and the medical history revealed that the deceased had pre-existing arteriosclerosis. Following Rhea's death, an autopsy was performed. From the testimony:

"It was our opinion that there had been an aneurysm in this region which had ruptured and produced the hemorrhage. This could have been a congenital aneurysm. It could have been an aneurysm due to arterial disease, arteriosclerosis because pathological examination of other arteries in this region revealed evidence of arteriosclerosis."

When asked what would hasten the rupture of an aneurysm,[1] Dr. Henry replied,

[1] According to Dr. Henry, this is the medical descriptive term for the weakening of the wall of an artery. "These aneurysms are of different etiology or cause, caused by different things. First, you can have a congenital aneurysm and by that I mean that the individual is born with a weakness in the wall of the blood vessel and this weakened area becomes ballooned out as would a weak place on an inner tube and then with the stress and the strain of life, the increase in the pressure in the blood vessel, the aneurysm ruptures. These are usually called a Berry aneurysm because when you look at them in the unruptured state they look like a little berry, a little red, say, raspberry. You also get aneurysms in arteries which are due to degenerative disease of the wall of

"Anything that an individual with an aneurysm might do that would tend to increase the pressure of the blood within that diseased artery could naturally tend to cause it to rupture and the things that might increase one's blood pressure would be physical exertion, could be mental strain, certain positions that the body might be placed in that could increase pressure within and say if the aneurysm were in the brain, increase the stress there, the pressure within the blood vessel.

"I want to add that these aneurysms can rupture while at rest. There can be enough stress and strain placed on this weakened place that eventually it just ruptures at some time when even the patient might be asleep but I think that it is without question that any extra stress that would be placed on this blood vessel, particularly anything that would increase the pressure within it such as elevation of the blood pressure would be more apt to cause it to rupture quicker than it would if the stress were not placed upon it."

In response to a hypothetical question, based upon the work that Rhea had been performing, the doctor stated,

"I would think that severe excessive physical exertion would at the time that this exertion was being performed would raise his blood pressure and this man had had a pre-existing moderate elevation of his blood pressure."

The doctor concluded that the exertion by Rhea at his work contributed to the fatal hemorrhage, and he was definitely of the opinion that the rupture would not have occurred as quickly if the work activities had not been engaged in. On cross-examination, Dr. Henry testified that the increased pressure (caused by the work) could have caused the rupture either during the period of exertion or later.

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the blood vessel. Most of these are due to arteriosclerosis which weakens the wall of the blood vessel or due to atherosclerosis of the lining of the blood vessel which weakens it and allows blood to escape in to the wall of the blood vessel and weaken it. * * * It is possible to get an aneurysm due to traumatic injuries such as a gun shot wound or a knife wound which partially severs the wall of a blood vessel and weakens it so that it subsequently dilates in the region of the injury."

Dr. Robert Watson, neurosurgeon of Little Rock, testified in behalf of appellees by deposition on August 25th. The doctor stated that he had read the transcript in detail, consisting of testimony taken on May 26, and on July 24. He was likewise of the opinion that the cause of Rhea's death was a massive cerebral hemorrhage at the base of the brain, as described by the autopsy report. He was then asked the following question by counsel for appellees:

"Q. From the record that you have reviewed and your study of it, what is your opinion as to whether or not the work described in the record which Mr. Rhea did on the day of his death caused or was a causative factor in his death on that date?"

This question was objected to by counsel for appellants, who stated,

"I think you are going to have to detail out the exact facts on which you are questioning him. I think that is a broadside question just asking him of facts based on the entire record. I think he needs to detail it out and make it definite and certain."

The objection was overruled, and Dr. Watson replied as follows:

"I reviewed the record pertaining to what different witnesses said in respect to the work that was done, the type of work, the time element particularly was considered, that the man went on to a supposedly normal lunch hour and returned back to work in a rather normal fashion and then abruptly showed evidences of being in severe difficulties and, based on the information that I gained from reviewing the record, I do not feel that the work that he did was a major factor in the abruptness of his death after the lunch hour."

Further, from the testimony:

"Q. With regard to the time of his death which occurred about one o'clock, can you give us your opinion as to the time he sustained the cerebral hemorrhage?

"A. In view of those factors that I have just enumerated, I feel that the time element between the hemorrhage and the onset of symptoms and also the onset of death was certainly a brief time and by "brief" I mean a matter of minutes."[2]

Dr. Watson then stated that it is very common for people to suffer a brain hemorrhage while simply talking to someone, and "these hemorrhages are common occurring while they are watching TV or while they are driving a car or even in their sleep."

From the record:

"Q. Now in your opinion—I am rephrasing it again. Did the work that this man was doing on the morning of February 1st as reflected by the transcript in this case cause or directly cause the hemorrhage which occurred to his brain according to the record again about one o'clock p.m.?

"A. I reviewed the record as I say and from what information I have, the work did not cause the hemorrhage occurring around one p.m."

The doctor was also of the view that Rhea's work did not contribute in any manner to the hemorrhage. He said, "It is most unlikely and certainly highly speculative and I do not know how one would prove that the work that he did that morning would contribute to his accident."

We are of the opinion that the judgment must be reversed, and the cause remanded to the commission. This conclusion is predicated on the fact that additional evidence was offered by the claimant on September 7, which was not available to Dr. Watson at the time he gave his opinion. This additional information consisted of "bedside notes," "personal history and physical examination," and an affidavit by E. B. Dodson. That affidavit is as follows:

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[2] Dr. Watson explained that under the overall term "hemorrhage of the brain," a person could, in theory, have survived for "maybe days and weeks," but, bearing in mind the nature of the hemorrhage and the location, this could not have been true in Rhea's case, *i.e.*, he did not suffer the hemorrhage at 11:00 A.M. Actually, Rhea did survive for three hours, but was unconscious during the entire period of time.

"I am an employee of Shinn Funeral Home, Russellville, Ark., and was so employed on February 1, 1960. I was present in the office of Shinn Funeral Home on February 1, 1960, when the emergency call came in for an ambulance to pick up Boyce Rhea, deceased, at the M. K. Grocery Co., Inc., here in Russellville.

"When this call came in to the Funeral Home, it was answered by Mr. Avery Shinn. I looked at my watch as Mr. Shinn was taking the call, and at that time it was twelve minutes past twelve o'clock noon (12:12 p.m.), February 1, 1960.

"I accompanied Mr. Shinn with the ambulance to pick Mr. Rhea up. He was unconscious when we arrived at M. K. Gro. Co. Mr. Shinn and I delivered Mr. Rhea to the emergency room at St. Mary's Hospital, Russellville, Arkansas, at approximately 12:22 p.m. or 12:23 p.m. I was present when Dr. Arnold Henry examined Mr. Rhea, and took his blood pressure, which was approximately 12:30 p.m. on February 1, 1960."

It will be recalled that Pearson testified that Rhea returned from lunch "right at 1:00 o'clock," and suffered the attack shortly thereafter. Crain testified that Rhea returned from lunch about 12:40, and suffered the attack five or ten minutes later. Dodson's affidavit indicates that the attack occurred about 12:10, so that there is a variance of nearly an hour between the testimony of Pearson and the affidavit by Dodson. It will be noted that Dr. Watson, in giving his opinion, emphasized the time element, as he said, "The time element particularly was considered, that the man went on to a supposedly normal lunch hour and returned back to work in a rather normal fashion and then abruptly showed evidences of being in severe difficulties, * * * ." Appellees argue that the facts mentioned are immaterial, since Dr. Watson was of the opinion that death, or complete inability to continue work, would have occurred within a few minutes.[3] We do

[3] Dr. Watson testified that the increased blood pressure caused by the strain of lifting cases should have receded to normal limits within a matter of from five to ten minutes after the exertion, and he stated, "whether or not it would remain high for three hours is just medically speculative, most remote and I don't know of any experimentation that ever substantiates blood pressure staying up after three hours after a transient exertion."

not agree. Inasmuch as the referee's finding was based almost entirely on the testimony of Dr. Watson, we feel that the facts should be clearly ascertained. The doctor considered that Rhea took a "normal lunch hour." This term needs clarification. What is meant by a normal lunch hour? Does this have reference to the fact that Rhea left for lunch at his regular time? Does it mean that he was apparently feeling as well as usual, or that he partook of an average meal? Does the quoted statement have reference to the amount of time spent away from work during the noon period? Under common usage, a normal "lunch hour" is probably considered as one hour, as denoted by the term itself. Pearson testified that Rhea went to lunch at 12:00 o'clock, and returned at 1:00 P.M., and yet Dodson's statement, *which was not in the record at the time Dr. Watson read same,* relates that the call for the ambulance occurred at 12 minutes after 12:00. Since Dodson made a record of the time, it would appear that his statement was correct. Under the testimony of either fellow worker, Rhea could not have gone to lunch before 11:30. On the other hand, if Pearson was an hour "off" on the time that Rhea went to, and returned from, lunch, Rhea would have left the plant at about the time of the severe headache complained of at 11:00 A.M. Certainly, it would seem that this point could be more clearly developed. It may be that Dr. Watson's opinion (as to whether the work contributed to the injury) will remain unchanged, irrespective of whether Rhea went to lunch at 11:00 A.M., 11:30 A.M., or 12:00 noon, and it may be considered inconsequential as to whether he remained off during the lunch period for 10 minutes, or an hour—but, as stated, inasmuch as the denial of compensation was based upon the doctor's evidence, we feel that these matters are deserving of clarification. This is particularly true since the conflict in evidence is closely related to the objection appellants made (the fact that Watson's opinion was not elicited by a hypothetical question).

Appellants vigorously argue that the referee and commission committed error in permitting the doctor to give his opinion simply by reviewing the entire record,

rather than requiring appellee's counsel to obtain the doctor's opinion through a hypothetical question embracing pertinent facts, since under the latter procedure, the commission and parties would clearly have known the basis for the doctor's opinion. Appellees defend the method used, and both sides cite several tort cases in support of their positions. Cases cited by appellees deal with situations wherein doctors listened to testimony in the court room and were then permitted to express their opinions. This question is just now arising in compensation cases, and we think a definite rule should be fixed. It is, we think, noteworthy, that in a majority of the cited cases where the practice was permitted, the doctor's opinion was given after listening to the testimony of, or being interrogated about the findings of, only one witness. This is in line with the views of most of the authorities examined. In McCormick on Evidence, Chapter 3, Section 14, Page 30, we find:

"In many jurisdictions, it seems customary to have the expert witnesses in court during the taking of testimony, and then when the expert is himself called as a witness, simplify the hypothetical question by asking the expert to assume the truth of the previous testimony, or some specified part of it. This practice has some advantages, and some limitations. Two obvious requirements are that the facts that the witness is assuming must be clear to the jury, and that the data assumed must not be conflicting. A question which asked the witness to assume the truth of one previous witness' testimony will usually meet these requirements, but as the range of assumption is widened to cover the testimony of several witnesses, or all the testimony for one side the risk of infraction is increased, and when it covers all the testimony in the case, the question would manifestly be approved only when the testimony on the issue is not conflicting and is brief and simple enough for the jury to recall its outlines without having them recited."

In 32 C. J. S., Section 554, Pages 362 and 363, appears the following:

"A desire to economize time has led a number of courts to sanction the practice, in cases where the facts

are undisputed, of dispensing with a recital of facts in a hypothetical question and asking the witness to state his judgment "upon the evidence," or even on such a part of it as is material to the inquiry, although it is conceded to be the better practice to proceed in the regular manner and frame a hypothetical question, one objection to the question on the evidence being that the witness may not be able to remember all the testimony, and to allow him to proceed on what he chances to recollect deprives the parties of any knowledge as to the real basis of his inference. The witness must, of course, have heard the evidence, or be familiar with it, and the question must require him to assume that it is true. * * *

"In some jurisdictions the practice of allowing an expert witness to ascertain the facts directly from the evidence, instead of their being embodied in a hypothetical question, has been condemned and generally disallowed, and even where the practice is allowed it is subject to limitation, and even to curtailment, in the discretion of the court. A question "upon the evidence" should never be permitted where the facts are in dispute, and the testimony is voluminous and complicated, for the reason that such a practice necessarily involves an invasion of the province of the jury, whereas the function of the witness is not to decide on the facts but to assume their truth, and for the further reason that, as the answer of the witness would disclose nothing as to his view of the facts, it would be impossible to tell what facts were used by him in forming his judgment."

In *Arkansas Baking Company* v. *Wyman,* 185 Ark. 310, 47 S. W. 2d 45, we stated that the better practice in obtaining the opinion of an expert witness is by the use of the hypothetical question.

In *Holstein* v. *Quality Excelsior Coal Co.,* 230 Ark. 758, 324 S. W. 2d 529 (compensation case), a doctor gave an opinion based upon a study of the autopsy report and a hospital record. We approved this on the basis of the fact that the autopsy report is a statement of facts rather than an expression of an opinion, and we also approved the use of the patient's clinical history and hospital re-

ports, stating, "These documents were undoubtedly admissible under the statutes that govern in compensation cases, Ark. Stats. 1947, §§ 81-1323 and 81-1327; * * * ."

The reasonableness of requiring expert opinions in compensation cases to be given in response to hypothetical questions can hardly be disputed. In the first place, these cases frequently involve several hearings, and sometimes extend over a period of months. Furthermore, there is often considerable testimony, much of it at variance. It is somewhat doubtful that an expert, while testifying, could keep all of the facts clearly in his mind; certainly, he will give preference to some facts over others, as being more important or pertinent to the issue. The commission, as well as the attorneys, are entitled to know the basis of the expert's opinion. If a doctor is permitted to simply read the entire record, and thereafter give his opinion, based upon that record,[4] without stating the particular testimony, or facts, upon which the opinion is based, he actually becomes a *trier of the facts,* and thus usurps the function of the commission.

In *Hulsizer* v. *Johnson-Brennan Construction Co.,* 232 Ark. 571, 339 S. W. 2d 116, we reversed the finding of the commission, holding that a medical expert, in answering a hypothetical question, assumed a fact not in evidence. In the case before us, it is established that Dr. Watson's views were expressed after reading a record that *did not contain all of the possibly pertinent evidence;* "established," we say, because the evidence had not even been introduced at the time he gave his opinion. This is certainly *not* to say that opinions of doctors should never be obtained until all evidence has been introduced; nine times out of ten the instant situation would not arise, since it is assumed that the commission considers all evidence in reaching its determination. However, where it is not known what testimony the expert relied upon, and part of the testimony is clearly in conflict with later evidence offered, and appears relevant (from the statement of the expert himself) to the issue involved—and where the testimony of such expert is the sole basis for the com-

[4] We, of course, do not mean to imply that the expert should not read the record in advance.

mission's finding, we are firmly of the view that such expert should have an opportunity to review the additional evidence.

For the reasons herein set out, the judgment of the Circuit Court, affirming the commission, is reversed, and the cause is remanded to the Circuit Court with directions to reverse the commission's finding, and remand the cause to the commission for further proceedings in accordance with this opinion.

CITY OF NEWPORT *v.* SMITH.

5-3040 367 S. W. 2d 742

Opinion delivered May 20, 1963.

McDaniel, Ward & Mooney, for appellant.

Kaneaster Hodges and *Wayne Boyce,* for appellee.

ED. F. MCFADDIN, Associate Justice. On August 21, 1962, an election was held in the City of Newport on the issue of the City Manager form of municipal government. The official returns showed 888 votes against the City Manager plan, and 866 for the plan. In due time, the appellees herein instituted this election contest, claiming a number of named persons to have voted illegally. The contestees (appellants herein) cross complained and challenged a number of named voters. Trial in the Circuit Court resulted in a judgment finding and declaring that there were 849 legal votes for the City Manager plan, and only 834 legal votes against it. Thus, the Circuit Court judgment showed a majority of 15 votes for the City Manager plan; and from that judgment there is this appeal by the contestees, presenting the points herein discussed.

I. *Convicted Felons.* The contestants challenged a number of named voters, claiming: "The following persons voted against the passage of said measure whose votes were illegal for the reason that each one had prior to said election been convicted of a felony and was therefore not a qualified elector and was ineligible to vote: . . . " To that allegation, the contestees filed a special demurrer because the contestants had failed to negative the possibility of a pardon of the convicted felon. The Trial Court denied the demurrer, and we see no error. Section 3-101 Ark. Stats., in discussing persons disqualified, says:

"No one who has been convicted of any offense which is a felony at the common law, or by statute, shall be allowed to vote in any election in this State, unless such person shall have been pardoned by the Governor, and the record of the court wherein such person shall have been convicted shall be conclusive evidence of his conviction."

The contestants alleging the disqualification had the burden of proving the felony; and in the offering of such proof the contestees could easily have established that there had been a pardon. Certainly in the pleadings stage, the Trial Court was correct in overruling the contestees' demurrer.

II. *Irregularities In Box 1-A.* The election officials of this box failed to place the number of the voter on the stub, as required by the statute:[1] rather, the election officials endorsed the number of the voter on the back of the ballot, and the list of numbers on the tally sheet was from 1 to 110, consecutively, as the ballots had been numbered. The fact that the judges had not endorsed the number on the stub of each ballot was not contained in any of the pleadings. It was only when the box was opened that the irregularity was discovered. Appellants then claimed that since the election officials had failed to comply with the statute, no votes should be stricken from the Box 1-A. The Trial Court was correct in rejecting the appellants' argument. There was no allegation of fraud in the Box 1-A; and it was not until the box was opened that it was discovered that the judges had endorsed the numbers on the back of the ballots instead of on the detachable stubs. In the absence of any allegation of fraud, it would be putting form above substance to refuse to discard illegal votes from this box merely because the election officials put the number on the back of the ballot instead of on the detachable stub.

III. *Irregularities In Box 1-B.* Ballots Nos. 24 and 49 were challenged in this box; and when the box was opened to identify the challenged ballots it was discovered, for the first time, that the box was entirely empty. Thereupon, contestees (appellants here) moved:

"In the absence of any ballots being found in the official ballot box 1-B by which the Court may determine whether any challenged vote was cast 'for' or 'against' the City Manager proposition, defendants request the Court to declare that the integrity of box 1-B has been wholly destroyed, and that the results certified by the election commissioners for box 1-B be completely discarded and the results thereof subtracted from the 'for' and 'against' totals in the election as a whole."

[1] Section 3-831 Ark. Stats. provides: "Every qualified elector shall be furnished with one (1) ballot. Before delivering the ballot to the elector the Election Judge shall endorse his initials on the upper back (or outerside) of the ballot. A Judge shall also place the number of the voter (which is a designation of the order of his appearance according to the List of Voters) in the blank space in the lowest one (1) inch on the face of the ballot following the words 'List of Voters Number . . .'"

The Court wisely reserved ruling on the motion until the conclusion of the litigation; and then when Box 1-A was opened there was found in Box 1-A a manila envelope containing what the Court found to be the original official ballots that had been cast in Box 1-B. In other words, the ballots from Box 1-B had been placed in a manila envelope and then placed in Box 1-A instead of in Box 1-B. The integrity of the ballots in Box 1-B was not completely destroyed. The appellants did not allege or attempt to prove any fraud by any of the election officials in Box 1-B. Only two questioned ballots were involved; and it would certainly be a deprivation of the right of franchise to the other voters in Box 1-B to have their entire ballots thrown out, when only two votes in the box were questioned. The Trial Court correctly overruled the defendants' motion, as above copied.

At the beginning of the trial the Court announced the procedure in the election contest; and no one disagreed. Here was the announcement by the Court of the procedure:

"From this point on there will be no more amendments to the pleadings except the addition of names, if either side should choose to make that sort of an amendment, from issues already raised by the pleadings. In other words, the pleadings are settled as of this time. The procedure that we will follow will be that the contestants will be permitted to challenge and possibly disqualify all the votes that they question first, then the contestees will be permitted to challenge and possibly disqualify all of the votes which they question because both sides have questioned the legality of various votes. The Court will rule on each of these challenged votes compiling a list as we go and when this list is completed the record will be closed as far as evidence is concerned. The Court will then order the necessary ballot boxes, if any, brought to the courtroom at which time we will determine how many illegal votes were cast and these will be deducted from the certified totals."

Under this procedure only the challenged ballots were involved, and not the unchallenged ballots, and the motion

by contestees (appellants here) to discard the entire box was without merit.

IV. *The Absentee Box.* This box presents the most flagrant violation of election laws of which honest election officials could have been guilty, and gives us most serious concern;[2] but we emphasize that there is not the slightest allegation or suspicion of fraud; and it is this entire absence of any allegation or evidence of fraud or corruption that accounts, in a large measure, for the conclusion we reach on this absentee box. The contestees (appellants) insisted that the integrity of the box had been destroyed because: (a) one of the election officials tore up some of the ballots; (b) the absentee box was never delivered to the proper official at the court house; and (c) the box and the ballots cannot be found.

The evidence established that the judges and clerks of the absentee box counted the votes in the office of the County Clerk the night of the election, with a group of people present, varying from a few to more than a score. As each ballot was taken out of the box, the name of the voter was called, and how such person had voted, that is, "for" or "against" the City Manager plan. This list was compiled on a form for certificate of judges and clerks at the election (§ 3-1007 Ark. Stats.), but those counting the

[2] The allegations of the contestees regarding this absentee ballot box are as follows: "Contestees allege that for the election held on August 21, 1962, in Newport, Arkansas, there was provided a separate and special ballot box for the reception of 'absentee' ballots. The ballots in said Absentee Box were counted under the supervision of (the three named Judges). The clerks on the Absentee Box were (named). During the process of counting the ballots in said box, it was observed that (one Judge) was tearing up ballots as they were counted and tossing the remnants in a waste basket. It is not known how many ballots this Judge destroyed before his acts were discovered and stopped. Notwithstanding the fact that this Judge probably did not know he was violating a law, his actions utterly destroyed the integrity of the absentee box. When the count of ballots in the Absentee Box was almost complete, (one Judge) departed, leaving the ballot box in the custody of (the other election officials). The said Absentee Ballot Box has never to this day been delivered by either of said Judges—nor anyone else—into the custody of either the County Clerk or the County Treasurer. Although contestees, through their attorneys, have made a diligent effort to locate said ballot box, it has not been found. The integrity of the votes cast in the Absentee Ballot Box has been utterly and completely destroyed and the returns from said box should be purged from the totals cast up by the election officials." We have omitted from the quotaton only the names of the Election Judges and Clerks, and indicated by parenthesis in each instance where such omission appears.

ballots had written "For" at the head of one column, and "Against" at the head of the other column; and the name of the voter was placed in the column as he had voted. Thus, all secrecy of the ballot was completely destroyed. A total of 88 votes were cast in the absentee box: 67 had voted for the City Manager plan, and 21 had voted against it. When the 88 votes were compiled, two of the election judges and one of the clerks signed the form and left it on the table in the County Clerk's office; and this form remained in the County Clerk's office. In a day or two, the Clerk requested the Circuit Judge to impound the form; and it was introduced in evidence in this case as Exhibit No. 17. This Exhibit No. 17 is all that was introduced from the absentee box. The ballots were scattered and lost; and this one Exhibit No. 17 is all that remains.

In the trial the Circuit Court accepted the Exhibit No. 17 as valid; and, using it as a basis, held seven votes to have been illegal in the absentee box. The question is whether we should allow this Exhibit No. 17 to be used to show the result of the absentee box. We need not mention the numerous sections of the statutes that were violated by the election officials of the absentee box: the question is whether the entire absentee box should be discarded, or whether only the challenged individual votes should be thrown out; and we emphasize again that there were no allegations of fraud or corruption against the officials of the absentee box.

We think the answer to our problem is contained in the case of *Dixon* v. *Orr,* 49 Ark. 238, 4 S. W. 774. In that case, no return was ever made from Little River Township in Miller County in the election for the office of Sheriff; and Dixon contended that the entire box should be suppressed. The box and tally sheets had been lost entirely, and "the election officers displayed a remarkable deficiency of memory as to the state of the vote." But there were two witnesses who were present when the entire vote was counted in the box, and they testified that 114 votes were cast in the precinct; and of these Dixon received 27, and Orr 87. Such testimony was permitted to stand as the return from that box. The Court said:

"The real inquiry is, who received a majority of the legal votes cast in Miller County for the office of Sheriff? Upon a contest all such votes must be counted, whether they were returned or not. *Constitution of 1874, art. 3, sec. 11; Govan* v. *Jackson, 32 Ark. 553.* Where an election has been legally held and fairly conducted, nothing will justify the exclusion of the vote of an entire precinct except the impossibility of ascertaining for whom the majority of votes were given.

"Now, the poll books and tally sheets made out and properly certified by the election officers, and the ballots themselves, are the primary evidence of the result of an election. But if these are lost, destroyed or stolen, this does not destroy the validity of the count, but resort must be had to secondary evidence."

The authenticity and correctness of the Exhibit No. 17 introduced in the case at bar was thoroughly established. It shows the name of each person who voted an absentee ballot, and exactly how that person voted, and no one has attempted to dispute the correctness of the exhibit. In the absence of fraud or corruption, the Exhibit No. 17 should stand. 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 the election laws. *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257. 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.' "

In *Jones* v. *Glidewell,* 53 Ark. 161, 13 S. W. 723, Chief Justice Cockrill said:

"It is a serious thing to cast out the votes of innocent electors for acts done by others, and it is the province of courts to see that every legal vote cast is counted where the possibility exists."

We therefore conclude that, in the absence of proof of fraud or corruption, and in the absence of evidence going to destroy the integrity and correctness of Exhibit No. 17, the Trial Court was correct in refusing to cast out the entire absentee box, and was correct in allowing Exhibit No. 17 in evidence.

V. *Individual Ballots.* The remaining questions raised by the appellants relate to the correctness of the rulings of the Trial Court regarding the ballots of individual electors. The appellants claim that in thirteen instances the Trial Court held voters ineligible when, in fact, each such voter was eligible. Also the appellants claim that the Trial Court erred in refusing to cast out nineteen votes. It would unduly prolong this opinion and serve no useful purpose to discuss each of these ballots, give the factual situation, and the ruling of the Court thereon. In each instance it was a disputed question of fact as to the residence of the voter; and the determination of such question by the Trial Judge is as final and conclusive as is the verdict of a jury. *Logan* v. *Moody,* 219 Ark. 697, 244 S. W. 2d 499; *Williams* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024. We have carefully examined the evidence as to each of the thirty-two ballots in question, and conclude that no reversible error has been shown by appellants.

The judgment is affirmed.

5-3008 370 S. W. 2d 45

Opinion delivered May 20, 1963.

[Rehearing denied September 9, 1963.]

[redacted]

William R. Horkey, Tulsa, Okla., *Jeff Duty,* for appellant.

Little & Enfield, E. J. Ball, for appellee.

GEORGE ROSE SMITH, J. In 1960 the appellees brought suit against the appellant, seeking to have a refinancing agreement declared to be in fact a mortgage. The case was tried on June 29, 1961. At the end of the hearing the chancellor announced his decision in favor of the plaintiffs and allowed twenty days within which they might redeem the land, by paying the debt with interest. The chancellor made a docket entry summarizing his decision, but he stated orally that the interest would have to be calculated by counsel.

The necessary calculations were made promptly, and a final decree was prepared. It was signed and dated by the chancellor on July 3, 1961, which was the first day of a new term of court. The decree allowed the debtors twenty days in which to redeem their property by paying the sum of $51,779.19, plus interest from the date of the decree. It was further provided that if the plaintiffs failed to redeem the property the lien would be foreclosed, and a commissioner was appointed to sell the land at public auction.

The plaintiffs paid the required amount of money into the registry of the court on July 21, 1961. The defendant refused to accept the tender and took an appeal. We affirmed the decree upon the only issue that was argued, holding that the chancellor was right in declaring the refinancing agreement to be a mortgage. *Helmerich* v. *Lowrance,* 235 Ark. 280, 359 S. W. 2d 447.

After our affirmance the plaintiffs asked the chancellor to enforce his decree by contempt proceedings. The defendant contended that the deposit in the registry of the court on July 21 had come too late, since it was more than twenty days after the chancellor announced his decision on June 29. The trial court rejected this contention, holding that the twenty days ran from the entry of the formal decree on July 3. This is an appeal from a decree vesting the title in the plaintiffs and declaring the mortgage debt to be satisfied in full.

The appellant now argues that the original decree, granting twenty days for redemption, was rendered on June 29, that the chancellor was without power to extend the time after the term of court had lapsed, and that therefore the court was without jurisdiction to enforce an offer of redemption made more than twenty days after June 29, 1961.

This argument is unsound. In the first place, the issue is *res judicata.* The plaintiffs, three days after having paid the money into court, filed a petition asking that their right of redemption be enforced. The appellant resisted the petition upon the precise ground now urged—that the deposit had come too late. On July 27, 1961, the chancellor specifically found that the twenty-day period ran from July 3, the date of the formal decree. The defendant filed a notice of appeal from this order and also sought a writ of prohibition. In denying the application for prohibition we said: "Prohibition is not to be used as a substitute for an adequate remedy of appeal. Whether the date of the decree was June 29th or July 3rd is a disputed question. The Trial Court held on July 27th that the twenty days for tender ran from July 3rd rather than from June 29th. If the Court was in error,

such ruling may be corrected on appeal." *Helmerich* v. *Butt,* 233 Ark. 795, 348 S. W. 2d 878. Thus the appellant was warned that the issue should be raised by appeal. Yet, despite the fact that notice of appeal had been given both with respect to the decree of July 3 and the order of July 27, the question decided by the latter order was not argued upon the first appeal. Under our settled rule the affirmance was conclusive not only of the issues presented but also of those that might have been presented. *Storthz* v. *Fullerton,* 185 Ark. 634, 48 S. W. 2d 560.

Secondly, the appellant's contention is not sound upon its merits. The Benton Chancery Court had in effect a standing order that provided in substance that docket entries would be effective only until superseded by the formal decree, which would then constitute the order of the court. In the same vein, the chancellor's oral decision of June 29 was known to be incomplete, since the amount of the interest due had still to be computed. The parties certainly knew that the court's final word was being deferred until the preparation and approval of the decree. In the circumstances we think the court had the power to act even in the new term. See *Wright* v. *Ford,* 216 Ark. 55, 224 S. W. 2d 50.

Affirmed.

CLEMONS *v.* BEARDEN LBR. CO.

5-2968 370 S. W. 2d 47

Opinion delivered May 20, 1963.

[Rehearing denied September 9, 1963.]

McMath, Leatherman, Woods & Youngdahl and *John P. Sizemore,* for appellant.

Mahony & Yocum, for appellee.

PAUL WARD, Associate Justice. Barney Clemons (either as an employee or as an independent contractor) was working for the Bearden Lumber Company (hereafter called company) when he suffered a heart attack and later died. His widow and minor children filed a claim for death benefits under the Workmen's Compensation Act. The question of whether Clemons' death resulted from his employment was not presented to the commission and it is not an issue here. The commission (and the circuit court) disallowed the claim on the ground that Clemons was not covered by the act because he was an *independent contractor* and not an *employee* of the lumber company. This appeal challenges the substantiality of the evidence to support the findings of the commission.

The Bearden Lumber Company is a lumber manufacturing concern. In the course of providing logs from the forest to keep its mill operating, the company employs a number of persons whom it (here) calls "contractors" to cut logs and haul them to the mill. Barney Clemons was one of these "contractors" whose duty it was to haul the logs from the woods to places on the highway or road so they would be accessible to other trucks which would haul them to the mill. It is not disputed that Clemons

had less than five men under his supervision. The testimony tending to show the relationship between Clemons and the company (whether employee or independent contractor) is not materially in dispute. The problem then largely becomes one of determining the legal effect of definitely determined facts. A summary of the testimony pertinent to the indicated issue is set out below.

Mrs. Clemons (the widow) understood her husband worked for the company; he got one check for labor and another for his one truck and a one-half interest of another truck; the company took deductions for social security, etc., from what he earned at $1.00 per hour. They had three children under age. *Waymon Clemons,* twenty-two year old son of deceased, had worked with his father six to eight months; was paid $1.00 per hour by check from the company; his father had worked for the company ten years; Charley Crawford, employee of the company, directed his father's work in these particulars—scaling the logs, saw to it that land was cleaned up good, told where to get logs; told them when they were doing a poor job; his father told him and the two other men (I. J. and John Mays) what to do; the work hours were turned in to the company and they were paid by company checks. *I. J. Mays* worked with the deceased five years and was paid by the hour by company check—took orders directly from deceased. *John Mays'* testimony was the same. *Larkin Clemons,* brother of deceased; they owned three trucks as partners; all men paid same as other company employees; deceased got one check for wages and another one for use of trucks; Crawford was the company supervisor over deceased; he (Crawford) came out on job nearly every day, and gave instructions in detail; when deceased did anything wrong Crawford got after him; the men (including deceased) were paid by company check, and the company held out for social security; the company told us we had to pay men $1.00 per hour—we never paid any more than that—our working agreement was oral.

The only testimony offered by the company to sustain its contention that Clemons was not an employee but

was in fact an independent contractor was that given by its manager, Garland Anthony, Jr. He did not deny any of the testimony given by claimant's witnesses, and none of his own testimony was refuted. This testimony is long and much of it is repetitious, but the essence may be summarized as follows: The contract with deceased was verbal—whereby he was to be paid $8.00 per thousand feet for logs "banked"; they had similar contracts with men other than the deceased; he had no control over deceased, but did direct his operation—such as choosing the banking area; deceased turned in the payroll (for himself and three men under him) after Crawford scaled the logs. According to a typical week (actually shown by company books) 27,468 thousand feet of logs were banked—$219.74 due at $8.00 per thousand feet—deceased and three men received (gross) $28 each or a total of $112—after deductions deceased got a check for $94.69 on the "contract" and $26.11 for salary (at $1.00 per hour)—the other men received $24.36, $27.16, and $26.11 respectively.

The record further reflects that the payroll sheets kept for deceased and the three men under him were just like those for other regular company employees, and that the company had only one insurance carrier to cover its employees and the insurance deductions made from the paychecks (of the deceased and the three men) were the same as deducted from the paychecks of regular millworkers.

In the face of the above (undisputed) testimony the full commission made the following decisive announcement:

"After a careful study of all the evidence of record, we are of the opinion that the Referee's finding is supported by a preponderance of the evidence and should be and is herewith affirmed *because the evidence clearly establishes that the deceased was free to choose the means and methods by which the details of the work was to be performed* and there is no evidence that would indicate that the deceased was not in full agreement with the bookkeeping system employed by the Bearden Lumber Company." (Emphasis added.)

We fully agree that there is substantial evidence to support the commission in finding (a) Clemons had control of the details of his work and (b) he had no fault with the manner in which the company kept its books. Even so, those findings, in our opinion, fall far short of proving (by substantial evidence) that Clemons was an independent contractor.

For convenience, we first dispose of finding (b). Certainly and without doubt no employee of a large corporation would be expected to object to its "book-keeping system". So, we say, that finding in no way proves Clemons was an independent contractor, and that it was not substantial evidence of such fact.

(a) Let us, then, examine the finding that Clemons was "free to choose the means and methods by which the details of his work was to be performed". The only "details" connected with Clemons' job that the company did not control were insignificant things such as would normally be left to any employee.

Most important, we think, is the fact that it is not denied the company had the right to discharge Clemons at any time. This is most persuasive that the company really had effective control over every detail of Clemons' activities. In the case of *Irvan* v. *Bounds*, 205 Ark. 752, 170 S. W. 2d 674, in considering this same question of control, we quote with approval this statement:

"By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor."

Further on in the same opinion we again quoted as follows:

" ' "The power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists. While it is not the sole test, it is the best test upon the question of control." ' "

Also, it is undisputed that the company instructed Clemons to pay his men (and himself) $1.00 per hour. Realizing this was a strong implication that Clemons (and his men) were employees, the company attempts to explain away the implication by showing it was only a matter of bookkeeping and was only a precautionary measure. The same situation arose in the cited case where Irvan was contending Bounds was an independent contractor, but we had to see to it that Bounds was paid in compliance with the Wage-Hour Law. The Court, however, said:

"A reasonable interpretation of this statement is that Irvan was complying with the Federal Wage-Hour Law as to the pay of these men, and it indicates that Irvan considered Bounds to be an employee, because, if Bounds was an independent contractor, and not an employee, it was not necessary, in order to comply with the federal law, to guarantee him any minimum wage."

In reaching the conclusion that the record fails to contain substantial evidence to sustain a finding that Clemons was an independent contractor, we take into consideration not only what we have heretofore said, but we consider as highly significant the following facts and circumstances: (a) We find many facts, heretofore pointed out, to indicate Clemons was an employee; (b) There is really no fact or circumstance shown by the record to indicate Clemons was an independent contractor that is not also consistent with an employee relationship; and, (c) any other conclusion than the one we have reached could result in serious injustices to laboring people whom the law intended to protect. It is in the record that the company has several other "contractors" like Clemons. It is not unreasonable to expect that many of these "contractors" are judgment proof, and they cannot be forced to carry insurance. Therefore, if we permit employers like appellee to escape liability, there will be no way injured employees and (in case of death) their wives and minor children can be protected. Not only so, but, in this case, there appears another injustice or inequity. The company and the insurance carrier are each receiving

part of the laborer's pay each week which they will (apparently) be allowed to keep without any liability to anyone.

The law imposes on us the duty to interpret the Workmen's Compensation Law liberally to the end that injured employees shall be remunerated for loss of earning power. In that spirit, and under the undisputed facts of this case, we are unwilling to say there is substantial evidence to support the finding of the commission and the circuit court.

The finding, therefore, is reversed and the cause is returned to the circuit court with instructions to remand to the commission for further proceedings consistent with this opinion.

HARRIS, C. J., and MCFADDIN, J., dissent.

GEORGE ROSE SMITH and ROBINSON, JJ., concur.

CARLETON HARRIS, Chief Justice (dissenting). I will agree that the preponderance of the evidence in this case indicates that Barney Clemons was an employee of the Bearden Lumber Company, but as stated in numerous cases, so numerous as to require no citation of authority, this court is not concerned with the question of which side carries the preponderance—we are only concerned with whether there was *any* substantial evidence to support the finding of the commission.

There are several facts which tend to support the finding that Clemons was an independent contractor. He was paid $8.00 per thousand feet (for log banking), and likewise furnished his own trucks and equipment. The majority refer to testimony by the widow and brother of the deceased to the effect that Clemons received one check (the larger check mentioned in the majority opinion) for use of his equipment. This fact is very much in dispute, and is not supported by any other testimony in the record. To me, from the evidence, it clearly appears that the larger check was based upon the number of feet of log banks. At any rate, the matter was in dispute, and the commission had the right to accept either view. In

Parker Stave Co. v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620, this court stated:

"The fact that appellee was paid by the thousand and furnished his own truck tends to indicate that he was an independent contractor. On the other hand, the fact that the employment was to run for no specified time, and the further fact that the stave company could terminate the relation at any time, without liability, are features which indicate that appellee was an employee."

As indicated by that case, the fact that Clemons was paid by the thousand, and furnished his own trucks, are circumstances to indicate that he was an independent contractor. It is not disputed that Clemons had the complete right to hire and discharge the men who worked under him in banking the logs. However, in my opinion, the strongest circumstance indicating that Clemons was an independent contractor is the fact that *all wages, paid to Clemons and his employees, along with Workmen's Compensation deductions on the four men, were charged back to Clemons and deducted from the main check received by him* (based upon the number of feet of log banks). In other words, Clemons' employees were covered for Workmen's Compensation insurance, and *he paid the premium* for this coverage. This is established by the testimony of Garland Anthony, Jr., manager of the Bearden Lumber Company, such testimony, as far as I am able to determine, being undisputed. From the testimony of Anthony:

"He (referring to Clemons) received a payroll check for himself in the amount of $26.11 and a check for Waymon D. Clemons for $24.36, John H. Mays, $27.16, I. J. Mays, $26.11, which was their gross payroll check less their normal deductions. And in addition to that, Barney Clemons was issued a check for the balance of the contract price with the gross payroll deducted and the Workmen's Compensation deducted.

Q. And what did that check represent?

A. It amounted to $94.69.

Q. I know, but what did it represent?

A. The balance of the contract payment for that week."

The majority mention that various deductions were made by the company from the wage checks given to Clemons and his men. Company officers testified that the Bearden Company made the deductions as a convenience to Clemons because he had no bookkeeping facilities, and that the company followed the same procedure with other independent contractors. This strikes me as an entirely reasonable explanation. The fact that Federal Income Tax was withheld, along with deductions for Social Security, Workmen's Compensation Insurance, and group insurance, were only circumstances to consider. In *Smith* v. *West Lake Quarry & Material Co.,* 231 Ark. 294, 329 S. W. 2d 167, we said:

"Appellant insists that the withholding, social security, and unemployment tax matters are, in themselves, conclusive evidence that Smith was an employee of West Lake, and that West Lake is estopped to claim otherwise. Appellant cites these cases to sustain his contention: (here citing cases from other states). A study of these cases convinces us that they do not hold that such tax deductions *conclusively* establish an employer-employee relationship, irrespective of all other evidence. These cases use the fact of tax deductions or insurance payments to corroborate other evidence as to the employer-employee relationship. In short, the tax deductions or the insurance payments are circumstances to be considered along with all the other circumstances in the case in looking at the relationship."

In the same connection, the opinion cites from other Arkansas cases as follows:

"In *Ozan Lbr. Co.* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341, we said that the payment of workmen's compensation insurance on the worker would be 'relevant as a circumstance' in determining whether the relationship was employee or independent contractor. In *Farrell-Cooper Lbr. Co.* v. *Mason,* 216 Ark. 797, 227 S. W. 2d 445, we said: 'Evidence that an employer pays work-

men's compensation or liability insurance on a workman is a *circumstance to be considered in determining whether said workman is an employee* and thus subject to the employer's right and power to control.' (Emphasis supplied.) All the authorities that we have been able to find support the statement contained in Larson on Workmen's Compensation Law, § 46.40, that such tax deductions and/or insurance payments are 'a factor to be given weight,' but are not determinative or conclusive on the issue. To the same effect, see 99 C.J.S. p. 351, 'Workmen's Compensation' § 104.

"The Commission found that the withholding and the tax payments were satisfactorily explained in the case at bar, and we cannot say that there is an absence of substantial evidence to support such finding. With the withholding and the tax payments as only 'circumstances to be considered,' it is clear that a fact question was made as to whether Smith was an independent contractor or an employee; and the Commission's decision on that fact question has ample evidence to sustain it within the purview of our cases, some of which are: *Parker Stave Co.* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620; *Wren* v. *D. F. Jones Const. Co.,* 210 Ark. 40, 194 S. W. 2d 896; *Farrell-Cooper Lbr. Co.* v. *Mason,* 216 Ark. 797, 227 S. W. 2d 445; and *Massey* v. *Poteau Trucking Co.,* 221 Ark. 589, 254 S. W. 2d 959."

The majority emphasize the fact that the company had the authority to discharge Clemons at any time it desired. The opinion also states, "The only 'details' connected with Clemons' job that the company did not control were insignificant things such as would normally be left to any employee." With reference to the right to discharge, let us take note of what this court said in *Ozan Lumber Co.* v. *Garner,* 208 Ark. 645, 187 S. W. 2d 181.

"While it is true that it appears that appellant company reserved the right to discharge appellee and that this is evidence in support of appellee's contention that he was an employee and not an independent contractor, *we have many times held that this right to dis-*

charge is not controlling and is not the sole test.[1a] The rule announced by this court, and since followed in subsequent decisions, in determining whether a workman occupies the status of an employee or that of an independent contractor, is clearly stated in *Moore and Chicago Mill & Lumber Co.* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722, in Headnote 3. 'If there is nothing in the contract showing an intent upon the part of the employer to retain control or direction of the means or methods by which the party claiming to be independent shall perform the work, and no direction relating to the physical conduct of the contractor or his employees in the execution of the work, the relation of independent contractor is created. *The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists.'* "[1b]

Certainly, there is substantial evidence in this record that the manner in which the work was to be performed was entirely in the hands of Clemons.

The men were hired by Clemons; he had the sole right to fire them; his was the sole responsibility of determining how many men he needed for the job; he fixed the pay (except that he must pay a minimum of $1.00 per hour), and the hours each man would work. He had full responsibility in determining the manner in which the work would be carried out. I do not suppose that the company cared whether it was done by truck, or by horse and wagon—so long as the job was completed. The only "control" by the company that I can find in the record relates to the fact that the company woods foreman, Charlie Crawford, would tell Clemons where to bank the logs,[2] and would advise whether the company needed logs for the week, or did not need them. I see nothing incom-

[1a] and [b] Emphasis supplied.

[2] The logs were banked in a location where they could be loaded on the trucks in any kind of weather and hauled to their destination.

patible between these actions and Clemons' status as an independent contractor. If I enter into an agreement with a contractor to haul dirt to build up my yard, I certainly will tell him where to place the dirt—but this does not make the dirt hauler my employee. Nor do I feel that the company should be expected to take a lot of logs that it could not handle. In fact, this could well be a reason for hiring an independent contractor to do this work, *i.e.*, the company would not have to pay out wages during a period of time when it had sufficient logs on hand, or during a period of inclement weather when the logs could not be hauled from the woods.

Summarizing, evidence for appellants shows that the company made deductions for Federal Income Tax, Social Security, group insurance, and Workmen's Compensation Insurance. These facts, according to the authorities, herein cited, were circumstances tending to show that Clemons was an employee, along with the fact that the company could terminate its arrangement with him at any time. On the other hand, the following facts support the inference that Clemons was an independent contractor:

First, he used his own equipment;

Second, he had full charge of hiring and firing his employees;

Third, the manner of accomplishing the work was entirely in the hands of Clemons; and,

Fourth, *all wages paid to Clemons and his employees, along with the Workmen's Compensation coverage, was charged to Clemons and the total amount deducted from the check given him (based on the contract of $8.00 per thousand).*

In other words, *he* paid the wages and the Workmen's Compensation coverage.

I am unable to say that these facts do not constitute evidence of a substantial nature supporting the finding of the commission.

I, therefore, respectfully dissent.

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

George Rose Smith, J. (concurring). I concur in the result reached by the majority opinion, but it does seem to me that the position now being taken cannot be reconciled with the views that were expressed in a number of our prior decisions. Judging by similar situations in the past, we can foresee that there will be constant pressure upon the court to broaden the scope of today's holding, until what will actually be a new conception of the independent contractor relationship has finally been spelled out by the cases. It seems safe to suppose that it will be several years before the full effect of today's decision can be accurately determined.

McLaren *v.* Cross.

5-2976 370 S. W. 2d 59

Opinion delivered May 20, 1963.

[Rehearing denied September 9, 1963.]

Gregory & Claycomb, for appellant.

Bob Bailey, Jr., J. Marvin Holman, Robert E. Irwin, for appellee.

PAUL WARD, Associate Justice. This litigation calls for an interpretation of a will executed by one G. A. McLaren who died on August 7, 1952. The will was admitted to probate on August 27, 1952.

The appellee, Zada Cross, (a beneficiary under the will) filed a petition on May 23, 1953 in the probate court to have the will construed in order to determine (a) when she would receive a bequest of $5,000 and (b) when she would enter into a life estate of eighty acres of land. The probate court ruled it lacked jurisdiction to decide either issue (a) or (b). Upon appeal to this Court we held the probate court did have jurisdiction to adjudicate her claim to the $5,000 but not to her claim relating to the real estate. See *Cross* v. *McLaren,* 223 Ark. 674, 267 S. W. 2d 956, where many of the facts related to the issues in the present appeal are set forth, and which facts will not be repeated here.

Upon remand by this Court issue (a) was presented to the probate court and issue (b) was presented to the chancery court, and in both instances the issues were resolved in favor of appellee. By agreement of the parties, the two cases are consolidated on appeal for briefing and submission. The parties apparently now agree, and we find, that the issue is the same in both cases, and that the decision in one case controls the decision in the other case.

The Issue. The will in question consists of twenty-five separate items, and it is modified by three separate codicils. It is necessary first to point out (in general terms) that the will designates two persons as executrices, that it conveys the bulk of the property to them as trustees, and that the trustee-ship terminates on the more remote of two designated dates: one, thirty years after the death of the testator; the other, upon the death of his widow and daughter. It is not questioned by appellants that the will gives appellee $5,000 and also a life interest in the east half of the southeast quarter of Section 32, Township 7 North, Range 18 West, 80 acres.

The only issue to be decided on this appeal is whether appellee (Zada Cross) gets the above mentioned properties at the death of the testator (as the trial courts held) or whether she gets them at the termination of the trusteeship (as appellants contend).

The portions of the will bearing primarily on the issue mentioned are Item 24 and two codicils which modify said item. The first codicil deletes certain words from Item 24 while the second codicil adds certain words. To simplify and facilitate consideration of Item 24 as modified it will be copied below with the deleted words in capital letters and with the added words in italics.

"After the full expiration of twenty years from my death and the death of both my wife Florence and my daughter, Alta, either before or after the full twenty year period and whichever is latest to occur, then I declare the trust herein created to terminate and my Trustees shall thereupon execute their trustees deed to my granddaughter, Sandra Lee McLaren, and to the issue of her body, but if the said Sandra Lee McLaren, be dead, then said conveyances shall be made to her bodily heirs and if there be no bodily heirs of the said Sandra Lee McLaren living at the termination of this Trust as herein provided, then all property held by my said Trustees shall revert to my estate IN THE EVENT OF SUCH REVERSION BY REASON OF THE DEATH OF SANDRA LEE McLAREN AND FAILURE OF BODILY ISSUE OF HER, THEN IT IS MY WILL, AND I GIVE AND BEQUEATH TO MY COUSIN, ARNIE McLAREN, THE SUM OF FIVE THOUSAND AND NO/100 ($5,000) DOLLARS; TO MY COUSIN TABITHA McLAREN FRONABARGER, OR IN THE CASE OF HER DEATH TO HER DESCENDANTS, ACCORDING TO THE LAWS OF DESCENT AND DISTRIBUTION OF THIS STATE, FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS, to Zada Cross I give bequeath and devise Five Thousand and no/100 ($5,000.00) Dollars, in money, absolutely, and the East Half (E ½) of the Southeast Quarter (SE ¼), of Section 32, Township 7 North, Range 18 West, in Pope

County, Arkansas, for and during her life and under the same terms and conditions as her present lease. *Provided, said Zada Cross complies with the terms and conditions in her lease; then neither my trustees or beneficiaries of my will, may dispossess her of the lands under her lease or disturb her in the peaceable possession of the lands so leased or willed to her.*" (The twenty year period mentioned above was changed by a codicil to a thirty year period.)

The general rule in a case of this type, acknowledged by both parties, is that the intent of the testator, as gathered from the entire will, is controlling. If, however, the intent cannot be determined with certainty from the language in the will, recourse must be had to judicial interpretation and construction. In the case of *Park* v. *Holloman,* 210 Ark. 288, 292, 195 S. W. 2d 546, 548, we find this rule forcefully stated in the following words:

"The polestar of the court, in construing a will, should always be the intention of the testator; and the will itself is ordinarily the only place to which the court should resort to find such intention. If it be in the will expressed in language that is clear and unmistakable the court should go no further, but should put in effect the intention of the testator, as thus clearly set forth in his will."

In *Prall* v. *Prall,* 204 Ark. 1074, 1077, 166 S. W. 2d 1028, the court, quoting from *Kelly* v. *Kelly,* 176 Ark. 548, 3 S. W. 2d 305, said:

" 'The cardinal rule in construing a will is to ascertain and declare the intention of the testator. That intention is to be gained from reading the entire will and construing it so as to give effect to every clause and provision therein if this can be done.' "

In *Quattlebaum* v. *Simmons National Bank, Admr.,* 208 Ark. 66, 68, 184 S. W. 2d 911, the Court said:

"On the question of interpretation and construction of a will, the general rule, running through a long line of our cases, is that it is only where there is some ambiguity

or doubt as to the meaning of the language used in the will that recourse to judicial interpretation or construction is justified.''

It is also well established that ordinarily, the law favors the early vesting of titles. See *Hurst* v. *Hilderbrandt,* 178 Ark. 337, 10 S. W. 2d 491, and *Wallace* v. *Wallace,* 179 Ark. 30, 13 S. W. 2d 810. Also, if there is any inconsistency between any portion of a will and the codicil, the latter will control. In the case of *United States of America* v. *Moore,* 197 Ark. 664, 124 S. W. 2d 807, the court quoted with approval the following language:

'' ' '' . . . the mere taking of a codicil gives rise to the inference of a change in intention, and such an 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.'' ' ''

After carefully studying the language in Item 24 of the will and the effect thereon of the language taken from the two codicils, and applying the rules of construction above mentioned, we have concluded it was the intention of the testator that appellee should come into use and possession of the subject properties immediately following the probation of his will, and that, consequently, the judgment and decree of the trial courts must be affirmed. It must be admitted that this result is not readily deducible from the language used in the original Item 24. In fact the language in that item strongly indicates the testator intended for appellee to wait (to enjoy said properties) until the trust terminated. On the other hand it is difficult to understand why the testator would have deleted the indicated words (by the first codicil) if he did not intend to change the date for the vesting of the property. It must be conceded the testator intended the properties to vest on one of the two designated dates since no other date is mentioned.

A careful study of the language used in the second codicil (shown as emphasized in Item 24 above) also tends strongly to support the conclusion already an-

nounced. This language clearly implies the testator considered the trustees were to have some control over appellee as to how she managed the property "willed to her." This intended control by the trustees, however, is absolutely inconsistent with an intent for the life estate to vest after the trustees had been discharged—that is, after the trust terminated. As pointed out by appellee, if the life estate was not to vest until the trust terminated, it is highly probable that appellee (who is now advanced in years) would have an expectancy of less than two years left in which to enjoy it. It hardly seems reasonable to believe the testator intended to create a situation of this type.

Appellants ably and forcefully argue that an interpretation of the testator's will which allows the gifts to become effective upon his death, violates other portions of the will. In support of this argument they point out that under Items 4 and 7 of the original will the testator "had already made a clear gift in trust of the same properties claimed by appellee under Item XXIV of the will." For reasons presently set forth we do not feel compelled to agree with appellants' interpretation of the meaning of the language in the two mentioned items.

The testator, after directing the payment of his debts and after making certain gifts to his wife, provided in Item 4 that "all the rest and residue" of his estate should go to his trustees "to hold . . . for the term, conditions and purposes hereinafter mentioned and set out . . . " By the use of the above language we think it is possible that the testator meant one of the "conditions" was that appellee should have the two gifts. Item 7 of the will provides that the trustees should hold, for the life of the trust, certain lands which are described. Among these lands is the land in which appellee gets a life estate. Appellants' argument is that one fact contradicts the other; that is, the trustees could not "hold" a parcel of land while appellee had a life estate in the same land. We think, however, that the testator could have intended only that the trustees should not dispose of the *fee simple title* to the land. Support for this intent is found by

reference to Item 21 of the will. There we find this language: "I declare it is not my intention that *fee simple* to any lands . . . shall vest in any beneficiary . . . " (Emphasis added.)

It is our conclusion, therefore, based upon what we have heretofore said, that the judgment and decree of the trial courts should be, and the same are hereby, affirmed.

McFaddin, J., dissents.

Ray *v.* Garner Construction Co.

5-3002 370 S. W. 2d 73

Opinion delivered May 20, 1963.

[Rehearing denied September 9, 1963.]

McMath, Leatherman, Woods & Youngdahl and *Jon P. Sizemore,* for appellant.

Barber, Henry, Thurman & McCaskill, for appellee.

Sam Robinson, Associate Justice. This is a workmen's compensation case. Appellant, Hollis W. Ray, who lives at Sheridan, claims that he was injured while working for appellee, D. H. Garner Construction Company on a job in North Little Rock on June 10, 1960. The Workmen's Compensation Commission denied compensation and Ray has appealed.

On the 23rd day of June, 1960, Ray was operated on for two ruptured discs. There is no question about the discs being ruptured. The only issue is whether there is

substantial evidence to sustain the Commission's finding that Ray was not injured in the course of his employment.

Appellant is 42 years of age and has been a heavy equipment operator for many years. He also preaches on occasion. In April, 1960, he went to work for appellee operating heavy equipment, such as bulldozers, motor graders, etc. Some time prior to June 11, 1960, he made arrangements with his employer to take off from work the week beginning June 13 so that he could help to conduct a revival meeting in Pine Bluff. He worked up until noon Saturday, June 11, the usual quitting time for the week.

The next day, Sunday, June 12, and also on Monday and Tuesday, he preached at Pine Bluff. On Wednesday, June 16, he drove from his home at Sheridan to Pine Bluff to attend the revival service. His wife was with him and they stopped at a super market to get some groceries. He stooped over to get a box of crackers; a sharp and severe pain struck him in the back causing him to become prostrate with pain on his back on the floor of the super market. His wife called Dr. Heirs, a chiropractor of Pine Bluff who had treated Ray for back trouble 10 or 15 times since March 9, 1960. Dr. Heirs immediately went to the super market where Ray was still on his back on the floor. With the help of others the doctor got him into an automobile and took him to the doctor's office. There, a medical doctor was called who administered some shots for pain.

Later Ray returned to his home and the next day went to see Dr. Guy Smith, a chiropractor in Little Rock. This was on Thursday. The following Saturday Dr. Smith recommended surgery to relieve the back condition, and then, for the first time, Ray notified his employer of his claim of having been injured eight days previously. Dr. Horace Murphy was called and the following week, on June 23, he operated and found two ruptured discs which he repaired. Ray was off from work about 4 months and has a 20% permanent disability.

The issue is not whether the evidence is sufficient to sustain a finding other than that made by the Commission, but is there substantial evidence to sustain the order that the Commission did make. Definitely, there is substantial evidence to sustain the Commission.

Appellant claims he was injured in the course of his employment in this manner: He testified that a short time before the end of the work day on Friday, June 10, he cleaned the tracks of the tractor he was operating, and a stone weighing 10 or 12 pounds was lodged in one of the drive sprockets; that he dislodged it; that he tossed it aside and felt a sharp and severe pain in his back. He claims that at that time he injured his back and that such injury resulted in two ruptured discs. This is the alleged injury for which the Commission denied compensation.

There is no evidence at all that appellant received an injury as he claims, except what he says about it; but there is substantial evidence that the discs in appellant's back were not ruptured as he claims on June 10, 1960. Appellant does not say that he felt any pain when he removed the rock from the sprocket, but claims that when he tossed it aside he felt a sharp and severe pain, but notwithstanding such pain he got back on the tractor and drove it to the usual parking place for the night. Although there were two other men on the job, he said nothing to them about having been injured and nothing about being in pain. He drove to his home at Sheridan Friday night and drove back to work the next day and worked the usual time for Saturdays, 5½ hours. Again he said nothing about having been injured and his fellow workers observed nothing unusual about him as he went about his work in the ordinary manner.

Although in making his claim for compensation he says he was in great pain the Saturday morning following the alleged injury on Friday, he drove from his work in North Little Rock to his home at Sheridan, and on Sunday he went to Pine Bluff to preach at the revival. He again attended the revival on Monday and Tuesday. On Wednesday he drove from his home at Sheridan to

Pine Bluff, and while stooping for a box of crackers in a super market, he suffered the injury that disabled him. He claims to have had a severe pain in his back ever since the alleged injury in North Little Rock on Friday. It would not be unreasonable for the Commission to believe that if he was suffering such pain he would not have stooped for the crackers.

The act of stooping in itself was sufficient to cause his disability. Appellant says that he bent his knees in stooping for the crackers. This would put him in a squatting position. Dr. Murphy, who operated on him, testified that a squatting position seems to produce more ruptured discs than anything else. Moreover, Dr. Murphy testified that it does not take a severe injury to cause a ruptured disc; that it can be caused by pushing back a chair or bending over; that a slight motion can cause this type of injury; such things as coughing or sneezing could cause this particular condition that appellant complained of. No doubt appellant had a weak back when he stooped for the crackers. He testified to having had trouble with his back for 10 or 15 years. Dr. Smith corroborated him on that point.

Furthermore, appellant testified that prior to the time of the alleged injury he had X-ray pictures made of his back, but at the time of the hearing before the Commission he said he could not remember who made the pictures. He spoke in a derogatory manner of the doctors who made the pictures, but still could not remember who the doctor was, nor did he produce the pictures. His testimony on that point may have caused the Commission to believe that if his memory was a little better the doctor who made the pictures could have been called as a witness and the X-rays produced, clearing up the question of when the discs ruptured.

Appellant admitted to having had a pain in his back at the point of the ruptured disc ever since two weeks after he went to work for appellee; that the pain had been constant since that time up to the time of the operation; that the pain had gone down into his toes and the ball of his foot. He stated that he had taken sleeping pills in

order to sleep; that the pills had been prescribed for his wife, but he did not know what doctor had prescribed the sleeping medicine. Perhaps the Commission thought it remarkably strange that a man would not know what doctor was prescribing for his wife.

Dr. John Hundley, an orthopedic surgeon, examined Ray on behalf of the appellee and testified positively that Ray denied to him that he had ever had any trouble with his back prior to the alleged episode on June 10, 1960. The record is replete with evidence to the effect that Ray had been having trouble with his back for many years. Dr. Hundley also testified that if appellant had received an injury causing a ruptured disc as he claims on June 10, the pain would have been so excruciating he could not have worked 5½ hours the following day and could not have preached at Pine Bluff.

When all the evidence is considered, it cannot be said that it is not substantial to sustain the finding of the Commission.

Affirmed.

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

CARLETON HARRIS, Chief Justice (dissenting). I find no substantial evidence to justify the finding of the commission denying compensation in this case. Certainly, the fact that he did not report the injury to his employer until eight days later should not be held against appellant, since *the statute gives him sixty days* from the date of such injury to make such a report.[1] Nor do I attach a great deal of significance to the fact that he did not tell two fellow employees about the injury. To place importance on this fact would seem to imply that an injured employee *must* tell a fellow worker that he has been hurt—and this, in spite of the fact that he is *only required to tell his employer within sixty days.* Apparently, the referee did not believe Ray's testimony that he received such an injury on June 10, though his (and the commission's) finding is not predicated on such a fact. However, comment relative to the testimony of Dr.

[1] § 81-1317, Vol. 7A, Ark. Stats., 1960 Replacement.

Ottis Hiers indicates that the referee felt that Ray might be withholding facts.

The referee, in his "Conclusions," stated: "The report of Dr. Hiers, the Pine Bluff chiropractor who examined the claimant just after the incident in the Pine Bluff grocery (Claimant's Exhibit 2 in transcript of 9-28-60 hearing), states that he felt the back condition was due to a job injury related by the claimant as having occurred the previous week at work. Dr. Hiers made no mention of claimant's bending over to pick up a box of crackers, causing the Referee to wonder if the claimant failed to relate it or if Dr. Hiers disregarded it."

Apparently, some significance was attached to this fact, or the referee would not have mentioned it, but the subsequent testimony of Dr. Hiers, whose deposition was taken, clearly dispels any suspicion that Ray was holding back any facts from the doctor. The testimony of Hiers established that Ray gave to him a complete history. From the testimony:

"Well he stated that he was just—of course, they were buying groceries and he had—was going down the aisle and I think his wife was—usually are ahead of their husbands and so forth in grocery stores and he just reached over to pick up a box of crackers and a pain hit him in the back just like that. In other words, there was no mention of him slipping or anything on the floor, anything, that wasn't the case."

In fact, Hiers was asked specifically about both incidents (the rock-throwing incident on the job, and the intense pain suffered when picking up the box of crackers). From the testimony:

"Q. Well, first of all, I would like to ask you if in your opinion there is any connection with the rock throwing incident and the herniated discs based upon those various factors, is there any connection in your opinion?

"A. Well, in my opinion, there had to be previous damage. When we study the makeup of the spinal column, they just don't rupture by bending or picking up

a box of crackers. There had to be previous damage and if that—from the information that he gave me, that is very possibly where the whole thing started. That is where he incurred the damage. * * *

"Q. What would you say was the mechanical function, if any, of the picking up the box of crackers incident which took place just before you saw him in June, in other words, what part did that play in the total disc condition, would you say?

"A. Well, I don't think that that was a major cause. I think the damage had been done previously. It would have had to have been done before that because you couldn't—I don't see any way that you could do that much damage just picking up a box of crackers. The damage had to be previously done in my opinion."

It is thus obvious that the apparent suspicion held by the referee that Ray was withholding facts, was certainly, at least in this instance, unjustified.

Dr. Hiers had already flatly testified that, based upon the condition in which he found Ray, on June 15, 1960, (at the supermarket), based upon the history of the case and Ray's description of what had happened at the job, and, further, based on the fact that Ray was operated on by an orthopedic surgeon, Dr. Horace Murphy, and three extruded herniated discs were found, it was his opinion that the "rock-throwing incident" was the occasion where Ray incurred the damage to his back.

The referee concluded his finding with a reference to the testimony of Dr. Horace Murphy, as follows:

"If Dr. Murphy's statement that excruciating pain could not be long endured, the claimant has not made a case on an injury of June 10, 1960, and if Dr. Murphy's statement that the most recent injury caused the back condition, then such resulted from the incident in the supermarket on June 15, 1960. The claim is denied and dismissed."

Dr. Murphy, in his report, recited the history that had been given to him by Ray. This history is entirely

consistent with appellant's testimony. Murphy recited that Ray told him that he had difficulty "off and on" for the last several years with his back, but had managed to get along fairly well and do heavy work. From the history, Ray told Murphy that he had felt considerable pain in his back while bending over in a crouched position for the purpose of removing a large rock from the machinery that he was operating. Further, that he rested for a while, continued to work, but the pain increased. According to the doctor, he was also told that approximately five days following the initial injury, Ray suffered excruciating pain in the right hip and right leg posteriorly. When asked whether the cracker box incident would have caused the condition which Dr. Murphy found Ray to be suffering from, the doctor replied:

"No. I think the man gave a perfectly straight forward history, having pain when he picked up the rock in a flexed position, I would say from a physiological standpoint that the extruded disc at that time caused this, that is my opinion that this resulted when he was injured originally. * * *

"Q. Can you say with any degree of medical certainty when this disc did extrude whether it was when he lifted or bent over and had excruciating pain in the grocery store?

"A. No, I think if I had to make a statement as to when it actually happened, I would say when he picked up the rock and had the original pain at that time."

Still further:

"Q. Now, if you had a condition such as this man had, do you think in your opinion, that it would be possible for him to continue his work?

"A. I think so for a time. *In fact, the history of it is that usually the patient doesn't have to be taken to the hospital immediately.*[2a] He almost always states that he felt something in his back and that he felt an aching pain in his back and that they try to continue to work. *It is almost rare for a patient to stop work. We have literally*

[2a] and [b] Emphasis supplied.

hundreds of cases and the history that we have taken the patient felt the next morning when he got up a stiff back or he was stiff in the back and he tries to go to work and may do so for a week, at this time the disc probably is developing.[2b]

Certainly, the reports of these two doctors do not substantiate the findings of the referee. Yet, the referee, according to his opinion, portions of which have been herein quoted, apparently relied in large measure upon the testimony of these two doctors to support his finding. In fact, the referee only mentioned the testimony of three doctors in his opinion (the other being Dr. Guy Smith, whose testimony will be hereinafter discussed), and the testimony of all three of these men, to my way of thinking, substantiated Ray's contention. The referee (nor the commission) did not even mention the testimony of Dr. John Hundley, who was the only physician to testify on behalf of the company. Since neither the referee, nor commission, saw fit to comment on Dr. Hundley's testimony, apparently not relying on same, I see no reason for detailed comment. In fact, Dr. Hundley (who examined Ray about a year after the occurrence) stated: "Therefore, I am of the opinion that this patient has had a back operation and that if his history is correct that he did sustain an injury that produced this condition in the lower back requiring an operation."

Dr. Hundley then pointed out that Ray had had prior back trouble and stated:

"I believe this question is not one of a medical nature but that of a legal nature to determine whether or not he did have an injury to the lower back."

The majority say, "There is no evidence at all that appellant received an injury as he claims, except what he says about it; * * *." That statement is literally correct, but there are circumstances that verify appellant's contention. The majority opinion mentions the incident wherein Ray stooped over to get a box of crackers, and suffered the severe pain. It is then related that Dr. Hiers was called, and subsequently a medical doctor

was also called, the latter administering shots for pain. The opinion then recites, "Later Ray returned to his home and the next day he went to Dr. Guy Smith, a Chiropractor in Little Rock." This is the first mention by the majority of Ray's making a visit to Dr. Smith.

Apparently the majority have overlooked Dr. Smith's testimony that Ray went to Smith *on June 11,* which was the next day after the claimed injury on the construction job. Dr. Smith stated that Ray told him at that time that he had developed a severe pain in his lower back while trying to remove a stone from the machine that he was operating. *This certainly corroborates Ray's contention that he received an injury on June 10.* The incident referred to in the majority opinion (the intense pain while stooping to pick up a box of crackers) did not occur until five or six days later. It is true that Ray did again go to Dr. Smith after this occurrence—but his first visit was made the day following the alleged injury on the job—with a full description to that doctor of what had happened. Two days later, Dr. Smith recommended surgery, the employer was notified, and Dr. Murphy was called.

To summarize, we have the testimony of Dr. Horace Murphy, who felt that Ray's condition was caused by the injury *sustained on June 10* (rather than the cracker box incident)—the evidence of Dr. Ottis H. Hiers, who was likewise of the opinion that the condition was caused by the injury on June 10 (rather than the cracker box incident)—and the testimony of Dr. Guy Smith that Ray reported to him the job injury on June 11 (which was several days before the cracker box incident). I consider that the testimony of these men, all of whom are highly reputable, constitutes substantial evidence to support appellant's claim. On the other hand, to support the commission's finding, we have the testimony of two fellow employees that Ray did not report to them that he had been injured, and the fact that Ray did not report the mishap to his employer for eight days. I am unable to consider this testimony as substantial evidence to deny the claim.

I, therefore, respectfully dissent.

I am authorized to state that Mr. Justice Johnson joins in this dissent.

BAXTER LAND CO. *v.* GIBSON

5-3005 367 S. W. 2d 741

Opinion delivered May 20, 1963.

Smith & Smith, for appellant.

Robert B. Gibson, for appellee.

SAM ROBINSON, Associate Justice. This is an action to enforce a lien for an attorney's fee. Dan Holmes died testate August 26, 1958. By his will he left 20 acres to his daughter, Eddie Mae Holmes Nelson. About a year after the death of Holmes his will had not been filed for probate and Eddie Mae employed as her attorney, appellee herein, Robert B. Gibson, to look after her interest and to get for her whatever she had coming under the terms of the will. The contract between attorney and client provides: "It is agreed by both parties that said attorney will receive for his services 33⅓% of any and all property received by Eddie Mae Holmes Nelson from the estate of Dan Holmes." Gibson was successful in getting the Holmes will probated and the matter brought to a conclusion. In the meantime, Eddie Mae had deeded the 20 acres to appellant, Baxter Land Company, Inc. Gibson filed a motion in Probate Court to enforce his lien on authority of Ark. Stats. 25-301. The Probate Court granted the motion and entered an order in effect sustaining the lien.

On appeal appellant raises only one issue. It contends that the Probate Court did not have jurisdiction of the subject matter; that is, jurisdiction to sustain the attorney's lien. There is no contention that at the time of the purchase from Eddie Mae appellant did not know of appellee's contract with her. There is no issue here of priority of equities.

Ark. Stats. 25-302 provides: "The court before which said action was instituted, or in which said action may be pending at the time of settlement, compromise, or verdict, upon the petition of the client or attorney, shall determine and enforce the lien created by this act [section]."

The matter was pending in the Probate Court at the time it was concluded. Under the terms of the contract Gibson was entitled to one-third of any and all property recovered by Eddie Mae. If he had failed to ask for the enforcement of his lien in the court where the matter was pending, he may have been barred from enforcing it in some other court. It is said in 7 C.J.S. 1206: ". . . where the forum is designated by statute and proceedings to enforce attorneys' liens are purely statutory, such proceedings must be brought in the forum so designated." Citing *Carpenter* v. *Hazel,* 128 Ark. 416, 194 S. W. 225.

Affirmed.

ALCORN *v.* ARK. STATE HOSPITAL.

5-2954 367 S. W. 2d 737

Opinion delivered May 20, 1963.

Erwin & Bengel, for appellant.

Pope, Pratt & Shamburger, by *M. Jack Sims* and *Robert D. Ross,* for appellee.

JIM JOHNSON, Associate Justice. Appellee Arkansas State Hospital sued appellant J. N. Alcorn under the provisions of Arkansas Statutes §§ 59-230 and 59-230.1 for maintenance, medical care and treatment furnished to appellant's unmarried daughter during four long stays at the hospital between October 31, 1950 and March 1, 1961. The cause was submitted to the trial court on appellee's motion for judgment and on the following stipulation: (1) appellant admitted the correctness of the account and that his daughter, a member of his household when not confined in the State Hospital, received the benefit of appellee's services; and (2) that appellant raised two issues, (a) that a judgment in this cause of action is dependent upon appellant's ability to pay and therefore appellant should be entitled to submit proof as to his inability to pay, and (b) the statute of limitations is pleaded in bar of all charges made prior to the date of this action. After submission of trial briefs, the court found that the services constituted necessaries and that appellant was liable for the amount sued for. From that judgment comes this appeal.

For reversal appellant urges that the court erred in rendering judgment without requiring proof of ability to pay in order to make a prima facie case, and that the court erred in sustaining appellee's motion to exclude

evidence on the part of appellant with reference to his inability to pay and to maintain his daughter during the period of time involved and at all times during her confinement.

The statutes involved here are as follows:

59-230. "Pay for maintenance of patients — Investigation of ability to pay. If any patient admitted to the State Hospital be found, upon examination, to possess an estate, over and above all indebtedness, more than sufficient for the support of his or her dependents, his or her natural or legally appointed guardian shall pay out of such estate into the office of the business manager of the State Hospital, in advance, an amount equal to one [1] month's maintenance, at a rate to be fixed by the Board of Control [State Hospital Board] from time to time on the basis of maintenance costs, and in addition, shall supply the patient with sufficient and suitable clothing, and shall remove said patient when so required and notified by the Superintendent. If the patient remains in the State Hospital more than one [1] month, such payments shall be made, monthly in advance, for the whole period during which the patient remains in the State Hospital. If the patient has no such estate of his own, then his obligation shall exist against any person who is legally bound to support such patient. Inability to pay shall not, however, cause any person to be refused admission to or discharged from the State Hospital.

"The business manager, following the admission of a patient into the State Hospital, shall make an investigation to determine the extent of the estate, if any, owned by the incompetent patient, and whether he has a duly appointed and acting guardian to protect his property and his property interest. The business manager shall also make an investigation to determine whether the patient has any relative or relatives legally responsible for the payment of maintenance, and shall ascertain the financial condition of such relative or relatives to determine whether in each case such relative or relatives are in fact financially able to pay such charges. All reports in connection with such investigations, together

with the findings of the business manager, shall be kept in the business office and may be inspected by interested relatives, their agents, or representatives, at any time upon application."

59-230.1 "Monthly statement of charges — Certification of unpaid accounts for collection. — Records and Information. The business manager of the State Hospital shall periodically ascertain the per capita cost of maintenance of patients and shall render monthly statements of charges therefor to the guardian or other person whose duty it is to provide care, maintenance or support of each patient, and he shall diligently attempt to collect such charges.

"The business manager shall make monthly certifications to the State Hospital Board of all patient accounts which have been due and unpaid for a period of three [3] months or more. The Hospital Board shall certify such unpaid account to some reputable person or agency, previously approved by the State Hospital Board of Control for collection. The compensation of such person or agency shall be paid from moneys collected on such accounts and the amount of such compensation shall not exceed charges as recommended and approved by the American Bar Association for similar collection work.

"Permanent records shall be kept by the business manager showing to whom and on what date or dates statements of charges are rendered, the amount thereof, payments made thereon, whether such charges have been certified by the Hospital Board, the action taken thereon by the Hospital Board, whether or not any money has been realized by the collecting agent of the Board and such other information as shall be deemed appropriate by the State Hospital Board.

"The Hospital Board shall require such person or agency as it may employ to collect outstanding charges for patient maintenance to furnish the Board with information as to what action has been taken by such agency, the results thereof, what accounts are thought to be uncollectible and such other information as the Board

shall deem appropriate. Such information shall be submitted to the Board over the certification of the collecting agency.

"This act shall be cumulative to existing statutes pertaining to maintenance charges against patients in the State Hospital.

59-115. "Persons liable for support. — The father and mother of poor, impotent or insane persons shall maintain them at their own charge, if of sufficient ability, and the children and grandchildren of poor, impotent or insane parents or grandparents shall maintain them at their own charge, if of sufficient ability."

In the recent case of *Arkansas State Hospital* v. *Kestle,* 236 Ark. 5, 364 S. W. 2d 804, decided after the trial court judgment in the case at bar, this court held that in seeking recovery under Ark. Stats. § 59-230, the burden of proving that a patient confined in the State Hospital has no estate is a condition precedent to recovery for necessaries and treatment against any person who is legally bound to support such patient.

The Act carefully provides for determination of whether the patient has an estate and also whether the patient has any relative or relatives legally responsible for the payment of maintenance who are in fact financially able to pay such charges. Upon determining that the patient is without sufficient estate, as decided in *Ark. State Hospital* v. *Kestle, supra,* it is apparent that the Legislature intended that those persons who may be secondarily liable be so notified, and upon notification to them that the State Hospital Board has made such determination, the secondary liability commences as to indebtedness incurred after receipt of such notice. This is not to say, however, that such liability is absolute.. The legislature in the enactment of Ark. Stats. § 59-115, as set out in full above, carefully made such liability, by the use of the words "if of sufficient ability," dependent upon ability to pay, thereby recognizing the humane responsibilities of society as a whole to provide for those unfortunates when the secondary obligors are

unable to pay. From the entire tenor of the liability statutes it is manifest that the Legislature never contemplated that one should be charged with the support of an incompetent to such an amount as to leave other members of his family in a destitute condition, 44 C. J. S. p. 180, § 75.

In the Kestle case, *supra,* this court acknowledged that under Ark. Stats. § 59-230, the legislature intended that the burden be placed on the State to show the patient's inability to pay as a condition precedent to imposing liability on the secondary obligor. It is our view that the enactment of § 59-230 in no way repealed § 59-115. The liability imposed on the patient by § 59-230 is a positive liability, whereas the liability imposed on the secondary obligor by § 59-115 is, as we have seen, conditioned on ability to pay. This being true, the claim of inability to pay would be in the nature of an affirmative defense to an action seeking to enforce the obligation, and the burden, therefore, to plead and show inability to pay would rest upon the person seeking to invoke the defense. *Faulkner* v. *State,* 6 Ark. (1 Eng.) 150.

Accordingly, it was error for the trial court to sustain appellee's motion to exclude appellant's evidence of his financial inability to maintain his daughter in the State Hospital.

Appellant's final contention for reversal is that the trial court erred in refusing to hold all that part of the bill more than three years old was barred by the Statute of Limitations.

The statutes here under consideration contain no statute of limitation. In *Jensen* v. *Fordyce Bath House,* 209 Ark. 478, 190 S. W. 2d 977, this court stated:

"In the absence of a specific provision in that regard, there is a diversity of opinion among the authorities as to the application of general statutes of limitation to the subordinate political subdivisions of a state. In a discussion of the question in 34 Am. Jur. p. 309, it is said: 'It has been said that the maxim '*nullum tempus occurrit regi*' is an attribute of sovereignty only, and cannot be

invoked by counties or other subdivisions of the state. In many cases, probably a majority, a distinction is drawn between cases where a subordinate political subdivision or agency is seeking to enforce a right in which the public in general has an interest and those where the public has no such interest, and it is held that the statute of limitations, while applicable to the latter character of actions, cannot be interposed as a bar where the municipality is seeking to enforce the former type of action. In these decisions, the view is taken that the plaintiff, in seeking to enforce a contract right, or some right belonging to it in a proprietary sense, may be defeated by the statute of limitations; *but as to rights belonging to the public and pertaining purely to governmental affairs, and in respect to which the political subdivision represents the public at large or the state, the exemption in favor of the sovereignty applies, and the statute of limitations does not operate as a bar.'* " [Emphasis ours.]

In this regard, it has been further said, in 34 Am. Jur., p. 314, § 399, as follows:

. . . "On the other hand, the weight of authority supports the view that the statute cannot be set up as a defense to an action by an incorporated state insane hospital to recover for board and medical attention furnished an inmate, where the hospital is owned and controlled by the state, is a mere governmental agency thereof, and all charges imposed for the care and maintenance of the hospital's inmates are for the benefit of the state and when collected go to the support of the hospital."

We are unwilling at this time to depart from our general rule that the statute limitations does not operate in matters where the public interest is concerned.

In the instant case, there is no showing that appellant's liability has in fact commenced, that is, there is no showing that appellant ever received notice of a determination by the constituted authority of the inability of the patient (principal) to pay all or any part of her accumulated account and that appellant was determined to be secondarily liable.

For the reasons stated herein, this cause is reversed and remanded for further proceedings consistent with this opinion.

TAYLOR *v.* MERCHANTS NATIONAL BANK, EX'R.

5-3010 367 S. W. 2d 747

Opinion delivered May 20, 1963.

Franklin Wilder, Sexton & Morgan, for appellant.

Martin L. Green and *Edward E. Bedwell,* for appellee.

JIM JOHNSON, Associate Justice. This appeal involves two wills, a suit to enforce an oral contract to devise real property, and a claim against an estate for money loaned decedent, all of which have been consolidated for briefing and argument.

On June 12, 1962, the Sebastian Probate Court, case no. 9913, admitted to probate a will of Laura D. Barton bearing the typed date of April 23, 1962. Letters testamentary were issued to appellant Viola Barton, a daughter of the decedent. Thereafter on June 26, 1962, case no. 9921, Elliot Barton, a son of decedent, petitioned for probate of a will of decedent dated April 24, 1962. On July 5, 1962, Barton filed a petition in the first probate case to revoke the letters testamentary granted to appellant on June 12th, on the ground that the will in that case was not the latest will of the decedent.

The two cases were consolidated for trial. Hearing was had August 10, 1962, following which the trial court revoked the letters granted to appellant and the probate of the will dated April 23, 1962, admitted to probate the will dated April 24, 1962, and ordered that letters testamentary be issued to appellee, the Merchants National Bank of Fort Smith as executor of the will of April 24th.

At the hearing on August 10, 1962, appellant presented evidence for the purpose of showing that the will dated April 23rd was actually executed on the 26th or 27th of April and therefore the later will, and that this will was executed by decedent in performance of an oral contract made by decedent with appellant, under which decedent borrowed two sums totaling $3,800.00 from appellant and promised to will real property to appellant if the loans were not repaid before decedent's death.

On August 28, 1962, appellant filed her claim, in the second probate case, for $3,800.00, alleging that she had made two loans to decedent totaling that sum and that no part of it had been paid.

On September 6, 1962, appellant filed a petition in Sebastian Chancery Court seeking specific performance of the alleged oral contract to devise real property.

On January 4, 1963, all parties stipulated that the testimony offered by the opposing parties at the hearing on August 10, 1962, in the Probate Court would be all of the testimony to be considered by the Chancery Court in the specific performance case, and by the Probate

Court in the second probate case concerning appellant's claim. On that same date, January 4th, the trial court entered its decree denying the relief sought in Chancery and dismissing the complaint, and in the Probate case disallowing the claim. From the decrees then entered, appellant has appealed to this court.

Appellant's first point urged for reversal is that the will having the typed date, April 23, 1962, was deceased's last valid will.

The trial court found that the April 24th will was the last valid will of the decedent. Appellant in no way questions the execution and attestation of the April 24th will, or controverts the testimony as to the date of execution of that will. The April 23rd will was first admitted to probate on proof of will forms approved by this court which affidavit states in part, "On the execution date of the instrument" the testatrix signed the instrument and the witnesses signed as attesting witnesses "the attached written instrument, dated 23rd day of April, 1962." Until the April 24th will was offered for probate as a later will, there would be no reason for appellant to show that it was executed other than on the date typed into the instrument. However, once the April 24th will was offered for probate, the burden was then on appellant to show that the April 23rd will was in fact executed other than on the 23rd. We have long required clear, cogent and convincing evidence to vary the terms of any written instrument. *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139; *Green* v. *Bush,* 203 Ark. 883, 159 S. W. 2d 458. Reviewing all the evidence (much of which is patently inconsistent) as we do on trial de novo, and considering only the competent and credible evidence, *Barksdale* v. *Carr,* 235 Ark. 578, 361 S. W. 2d 550; *Nolen et al* v. *Harden et al,* 43 Ark. 307, we do not find such a preponderance of the evidence as to be clear, cogent and convincing that the April 23rd will was executed on any other date than April 23rd.

Appellant's next contention for reversal is that the oral contract to devise the property to appellant should be enforced.

In *Offord* v. *Agnew,* 214 Ark. 822, 218 S. W. 2d 370, our general rule on oral contracts to devise is quoted as follows:

"It is not sufficient that he establish it by a preponderance of the testimony, but that he must go further and establish the contract by evidence so clear, satisfactory and convincing as to be substantially beyond a reasonable doubt."

Reviewing the testimony and reflecting on the conduct of the members of this family, such as the fact that appellant was the one daughter of decedent's three daughters to whom decedent turned when her husband died fifteen years earlier and whom decedent chose to make her home with or near, contrasted with the facts that her only son had traveled to see decedent just twice in the twelve years prior to her death, such an oral contract to devise property is not inconceivable. However, in addition to the apparent financial security of decedent it was shown that subsequent to the making of the alleged loans which were contended to be the consideration for the oral contract to devise the property here in question, appellant purchased from the deceased a small sixteeen or eighteen foot corner off said property and paid the deceased a cash consideration therefor. The payment of money to one's alleged debtor is, to say the least, not consonant with the existence of a debt. This testimony along with the testimony as a whole relative to an oral contract to devise property does not approach that required by the *Offord* case, *supra,* that is, the evidence is not "so clear, satisfactory and convincing as to be substantially beyond a reasonable doubt." Failing this, the Chancellor did not err in refusing to enforce an oral contract.

Appellant's last argument for reversal is that appellant's claim against the estate is not barred by the statute of limitations. In order to consider this point in its proper perspective it must be borne in mind that appellant has failed to establish an oral contract to devise property. This being true, then the simple question here presented is whether appellant's claim against the estate

is barred by the statute of limitations. For this determination we will treat the testimony as uncontradicted that appellant loaned decedent $2,000.00 in 1947 or 1948 to buy a home in Ft. Smith after her husband's death, and that again in 1949 appellant loaned her mother $1,800.00 to buy a larger home. The statute of limitations applicable to such a debt is as follows:

"37-206. The following actions shall be commenced . . . within three (3) years after the cause of action shall accrue: First, all actions founded upon any contract, obligation, or liability . . . [and not in writing] . . ."

Appellee pleaded the statute of limitations in bar to appellant's claim, and the burden is therefore on appellant to show that the running of the statute had been tolled or revived by payment or otherwise. *Johnson* v. *Murphy,* 204 Ark. 980, 166 S. W. 2d 9; *Blake* v. *Commercial Factors Corp., Inc.,* 216 Ark. 664, 226 S. W. 2d 986. There is a total failure of proof on this point.

Finding no error on trial de novo, we have no choice but to affirm the decrees appealed from.

Affirmed.

HARRIS *v.* HARRIS

5-3003 370 S. W. 2d 121

Opinion delivered May 20, 1963.

[Rehearing denied September 16, 1963.]

Mann & McCulloch, for appellant.

Daggett & Daggett, Carrold E. Ray, for appellee.

FRANK HOLT, Associate Justice. The appellee, Quincy Harris, by his next friend, Odell Barrier, brings this action against the appellants to establish his claim that he is the sole and only heir at law of the testator, James Harris, and as a pretermiteed child he is, therefore, entitled to inherit all of his estate, subject to the dower and homestead rights of decedent's widow. In his only will, dated in 1953, James Harris devised a life estate in all of his real estate to Ella Harris, his wife [who pre-deceased him], and upon her death he devised forty acres in fee to his foster son, the appellant Lee Andrew Harris, and then the remainder to the other appellants, in this manner:

"To my children, Jesse Harris, Roosevelt Harris, and Annie Bell Harris all the rest and remainder of my real estate in fee simple, as equal tenants in common." In 1958 Ella Harris died and thereafter James Harris married the appellant, Lettie Harris. In 1961, when James Harris died at 82 years of age, he had not changed any of the provisions of this will, although he had the county and probate clerk, who had the will in his office, to read it to him about seven months before he died.

The appellee, Quincy Harris, contends that appellants, Annie Bell Harris Shears, Jesse and Roosevelt Harris, are not legitimate children of James Harris. On

the other hand, the appellants question that Quincy Harris is a legitimate child of James Harris. The facts surrounding this litigation occurred over a period of approximately 68 years. The appellee, who is a resident of Mississippi, claims that James Harris was married to a Mehalie Hudson in Mississippi, and he is the only child of that marriage. He was born there in 1895, or when his father would have been 16 years of age. Quincy produced witnesses in support of the validity of this marriage and his parentage. There is no marriage certificate supporting this marriage. According to appellee, James [Jim] Harris abandoned him and his mother and came to Arkansas in 1903, or when appellee was eight years of age. Appellee presented evidence that Jim established contact with him beginning about 1948 and from then until Jim died in 1961 he visited him in Mississippi several times and Quincy visited him in Arkansas. There is evidence that James Harris acknowledged to witnesses, and in letters to Quincy that Quincy was his son. James was illiterate and these letters were written by his teenage granddaughter.

The appellants, Roosevelt Harris, Jessie Harris, and Annie Bell Harris Shears, all born in Arkansas, also contend that James Harris is their father. Annie Bell, who was born in 1898, testified that she understood James Harris to be her lawful father and that he came to Arkansas and married Ella Moore, her mother, no later than 1895. Jesse was born in 1902 and Roosevelt about 1904. One witness testified that he first met James Harris in Arkansas in 1900; that he was present in 1904 during a church trial of Ella Moore on charges of immorality when she testified that James Harris was the putative father of Jesse and her expected child [Roosevelt]; that Jim Harris escorted Ella to the church court that night and there said "that those two kids was his kids and that he would marry her. And they married in '04. And they was married by a preacher by the name of H. M. Townsend in the home of the bride." There is no marriage certificate to support this marriage either. It is undisputed that Jim and Ella Moore Harris lived together as husband and wife from about 1905 until Ella

died in January, 1958 and, further, that as husband and wife they reared Annie Bell, Jesse and Roosevelt as their own children. During this interval Jim acquired the lands in litigation.

It is admitted that Jim Harris is not the father of Lee Andrew Harris, the foster son. In 1919 Jim and Ella brought into their home Lee Andrew at five weeks of age who was the son of a neighbor family. In the community Lee Andrew was known, and so designated in Jim Harris' will, as a foster son. He was reared and treated by them as such a child.

The appellants, Annie Bell, Jesse, Roosevelt and Lee Andrew, while growing up in this family, assisted Jim and Ella Harris in the farming and maintenance of the property. It appears that Roosevelt aided in acquiring some of the land which Jim owned at the time of his death.

James Harris died on March 18, 1961. He owned 250 acres of land in Lee County which is the land involved in this litigation. Quincy Harris, with two carloads of his family and relatives, attended James Harris' funeral services on March 26, 1961. The next day the appellee and appellants went to the courthouse where the will was deposited with the county and probate clerk and had the will read to them and other members of their families. This group consisted of twelve or fourteen people. It was then discovered that Quincy's name was omitted from the will. Thereupon, the appellee, the appellants, and their families held a conference among themselves. On Quincy's demand for a part of the estate, or some of the "dirt", they reached an agreement and went directly to a lawyer's office where they asked him to draw the necessary deeds to effectuate their compact. The next day, on March 28, 1961, the appellee, Quincy Harris, with several of his children present, met the appellants, Roosevelt Harris, Jesse Harris and Mabel Harris, his wife, Annie Bell Harris Shears, Lee Andrew Harris and Flora Mae Harris, his wife, and the widow, Lettie Harris, in the lawyer's office and exchanged six partition deeds among themselves dividing the 250 acres.

According to these deeds, Quincy was alloted 20 acres, Lettie 10 acres, and the balance of the land was divided according to the tenor of the will, namely; Lee Andrew, 40 acres, Annie Bell, 60 acres, Jesse, 60 acres, and Roosevelt, 60 acres. The deeds were duly recorded.

On June 15, 1961, the appellee, Quincy Harris, filed suit to set aside these deeds and have the title to the 250 acres of land quieted in him subject to the dower and homestead rights of the widow, Lettie Harris. In his complaint the appellee contends that he is the sole and only legitimate child of Jim Harris; that none of the appellants, Roosevelt, Jesse, Annie Bell, and Lee Andrew, are legitimate children of Jim Harris; that as a pretermitted child he is, therefore, entitled to all of the estate; that the deeds executed by him are void because he was incompetent when he made them and, further, they were partition deeds and invalid because the appellants are not co-tenants.

The appellants denied his allegations and contend that they are legitimate children of Jim Harris and that the deeds are valid in every respect. Appellants pray that their title to the land described in the respective deeds be quieted in them. Upon a trial the Chancellor found that Quincy was the only legal child or heir of Jim Harris and a pretermitted child; that the appellants, Annie Bell Harris Shears, Jesse Harris and Roosevelt Harris are not the children or heirs of Jim Harris as they were in being when he came to Arkansas from Mississippi; that none of the appellants were legally adopted by Jim Harris and that the partition deeds should be cancelled and set aside because, first, they were partition deeds only and therefore vested no title in appellants because they were not co-tenants and, secondly, that Quincy Harris was incompetent at the time of the making of the deeds. The court cancelled the deeds and quieted the title to the lands therein described in the appellee subject to Lettie's dower rights. From this decree the appellants bring this appeal.

For reversal the appellants contend that the trial court erred in finding that Quincy Harris was the sole and only heir of Jim Harris and that Quincy was a pre-

termitted child; that the trial court erred in finding that none of the appellants was an heir of Jim Harris; that the trial court erred in setting aside the deeds on the grounds of incompetency and lack of consideration. Also, that the decree provided only for Lettie's dower interest and did not provide for her homestead rights.

In chancery cases we review and determine appeals *de novo, Nolen, et al,* v. *Harden, et al,* 43 Ark. 307. The appellee attempts to avoid the settlement deeds made in this case on the basis of being incompetent on March 28, 1961, when he signed these deeds and accepted one partitioning and dividing the property in question. To discharge the burden of proof of showing his incompetency, the testimony of Dr. Moore, a general practitioner where appellee lives in Mississippi, was introduced by deposition. He testified that he had administered to the appellee as a family physician before and after March 28, 1961, when the deeds were signed by the appellee. Dr. Moore testified that the last time he saw the appellee before March 28, 1961, was on November 25, 1960, and the next time be observed Quincy was on November 13, 1961. Thereafter, he saw him November 28, 1961 and on March 13, 17 and 21, 1962. Quincy became his patient the first time in August, 1960. In November, 1960, Quincy was hospitalized due to a foot infection and pneumonia. Dr. Moore described him as a nursing problem, confused and forgetful. He testified that his confusion varied and Quincy appeared about normal at times and at other times quite abnormal during hospitalization. He described Quincy's condition as being a fairly typical case of early senile arteriosclerosis dementia. He testified:

"In my medical opinion I do not feel that Quincy was competent at any time during the period of my observation. No day was different from any other." Other witnesses testified that at times appellee appeared confused, agitiated, forgetful, suspicious and had threatened members of his family.

The true test of Quincy's competency in this case is what was his mental capacity or competency when he

signed the deeds on March 28, 1961. No witness who observed him on that date testified that Quincy appeared incompetent then. On the contrary, the lawyer who drafted and explained the deeds and his secretary, who notarized the deeds, observed no incompetency about appellee on March 27 or 28, 1961. A Reverend Hart testified that he was with the group at the reading of the will, the conference thereafter, attended with them the meeting in the lawyer's office, and that Quincy "talked with good judgment." As stated, Quincy returned the next day with members of his family to consummate this agreement. Thus, he, with his children, had until the next day to reflect on his rights and the settlement of them by these deeds. No objection was ever made by appellee or anyone on either of these days as to his competency. Appellee signed the deeds in the presence of members of his family, it appears, by touching the pen and his daughter signing his name.

More than a year later, in May, 1962, when this cause was tried, the appellee, claiming to be incompetent, appeared as a witness in behalf of his claim of parentage. A review of his testimony reflects that he could remember distant and recent events. He recalled going to the lawyer's office and signing the deeds; he testified that James Harris was his father and he remembered seeing him when he was eight years old and the last time he remembered seeing him was when he died and he attended the funeral. Appellee testified he was about seventy years of age; he knew his mother's name; that Jim Harris told him, about three years before he died, that he owned 250 acres; that they had exchanged visits; that he was acquainted with the appellants; that he had no education and could not write; he remembered and identified various acquaintances in Mississippi; he remembered going to the courthouse and listening to the reading of the will; he remembered business transactions such as the purchase of a car in 1955; that he is presently indebted to Odell Barrier; and, further, that he had made an effort to sell the land which he had acquired by this questioned deed.

There is a presumption of law that every man is sane, fully competent and capable of understanding the nature and effect of his contracts. The burden of proving incompetency rested with the appellee, since he seeks to void the signing of these deeds.[1] In *Hunt* v. *Jones,* 228 Ark. 544, 309 S. W. 2d 22, this court said:

"Since the sanity and mental capacity of Miss McCray to make the deeds in question is presumed, the burden rested on the appellants to show her mental incapacity to execute them by a preponderance of the evidence. *Gibson* v. *Gibson,* 156 Ark. 528, 246 S. W. 845. As this court said in *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510: 'The familiar principles of law applicable to cases of this kind have often been announced by this court. 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." [Citing cases]

In the *Hunt* case, Miss McCray had executed two deeds, one in 1953 and one in 1954, which conveyed property owned by her. In 1954, at the age of 86, she died a few months after signing the last deed. Numerous collateral heirs attempted to have these deeds cancelled on the ground of her mental incompetency. Miss McCray also suffered from the disease of arteriosclerosis. Sometimes her mind was clear and at other times she was noisy, belligerent, and mentally confused. Her deeds were held valid.

[1] See Am. Jur., Deeds, § 376, p. 652 and Am. Jur., Insane Persons, § 132, p. 253.

After a careful review of the evidence in the case at bar we think the appellee has failed to meet the burden of proof cast upon him to refute the presumption of his sanity or competency by a preponderance of the evidence. Therefore, the deeds are valid on that issue.

As to the remaining points, we prefer to rest our decision in this case upon the well-known family settlement doctrine which is a favorite of the law. According to the evidence in this case these partition deeds were in settlement of the estate based upon the appellee's claim to part of the property when he discovered, upon a reading of the will, that his name was omitted. Jesse Harris testified that the appellee, Quincy Harris, desired a division of the property. No witness disputed the following quoted testimony by Jesse and Annie Bell. Jesse testified as follows:

"Q. Well, how did you go about doing that?

A. He said he wanted to know what he was going to get before he went home.

Q. He wanted to know what he was going to get before he went home?

A. That's right; yes, sir. I asked 'Well, what do you want?' When I first asked him how much money he wanted he said he wanted some dirt.

Q. Some what?

A. Some dirt.

Q. He said he wanted some dirt?

A. Yes, sir. Then we asked him how much did he want. And he said 'well I'll be satisfied with what you all give me. I know you all been here all the time working it, and I'll be satisfied with what you all give me.' He said "you all been here all the time, and I'll appreciate what you all give me.'

Q. Now, how much land did he say he wanted?

A. That's what I'm saying now, he said 'I'll appreciate what you all do to me.' So we commenced laying it off, and he come down from thirty acres to twenty.

A. * * * And then we asked him if he would be satisfied with twenty and he said "yes, that's all right.' And all his family said 'yes, that would be nice.'

Q. You mean you all compromised on twenty?

A. Yes, sir; on twenty acres.

Q. Then did everybody seem to be satisfied?

A. Yes, sir. Everybody thought that was all right." He further testified that the purpose of the partition deeds was to avoid a lawsuit.

Annie Bell Harris Shears testified the settlement was with Quincy's approval. She testified:

"Q. And did Quincy say he was satisfied that day?

A. Quincy said he was satisfied. He said he was satisfied that day. He sure said it—Jesus knows he said it.

Q. What about his children? Did they seem to be satisfied?

A. They seemed to be satisfied; yes, sir."

The question presents itself, in this case, whether the deeds signed by the appellee and the one received by him are to be construed as a valid and sufficient family settlement. There are many cases in Arkansas, beginning with *Pate* v. *Johnson,* 15 Ark. 275, numerous others cited in *Pfaff, Adm.,* v. *Clements,* 213 Ark. 852, 213 S. W. 2d 356, and the recent case of *Hobbs* v. *Cobb,* 232 Ark. 594, 399 S. W. 2d 318,[2] which approve the doctrine of family settlement in the absence of fraud or mistake. There is no evidence of fraud or mistake in the case at bar. Family settlements are upheld in the absence of a pre-existing dispute. In the *Pfaff* case, *supra,* we said:

"It is not necessary that there be a previous dispute or controversy between the members of the family before a valid family settlement may be made. Thus, in *Martin*

[2] Also, see 38 A.L.R. 734, 739; 54 A.L.R. 977; 118 A.L.R. 1357; 15 C.J.S. Compromise and Settlement, § 3 (b) p. 715; 11 Am. Jur., Compromise and Settlement, § 11, p. 258.

v. *Martin, supra,* there was no dispute at the time of the conveyance or will in question, yet the agreement was called a 'family settlement'." [Citing cases]

The motive to distribute and settle amicably an estate is sufficient consideration for a family agreement. Quoting further from *Pfaff, supra*:

"Likewise, it is not essential that the strict mutuality of obligation or the strict legal sufficiency of consideration—as required in ordinary contracts—be present in family settlements. It is sufficient that the members of the family want to settle the estate; one person may receive more or less than the law allows; one person may surrender property and receive no *quid pro quo.*"

Appellee now contends that he is the sole and only heir of the testator and, therefore, that appellants have no interest in the property in question. In the early case of *Turner* v. *Davis,* 41 Ark. 270, it was claimed that Watkins did not have sufficient interest in the property to support a family settlement. There, Mr. Justice Eakin, speaking for the court, said:

"We cannot go behind the agreement to ascertain the interest of Watkins. It is a matter of no consequence whether he *had curtesy or had nothing.* It was a family contest concerning lands descended, between parties claiming antagonistic interests. The agreement stands on the ground of family settlements, which are as much encouraged and favored in equity, * * * they are supposed to be the result of mutual good will, and imply a disposition to concession for the purpose, regardless of strict legal rights; always excepting cases of fraud, of which nothing in this case appears." [Emphasis added]

The courts have also quickly approved family settlements where the question of legitimacy was involved. In *Bunel* v. *O'Day,* 125 Fed. Rep. 303, the question of legitimacy was an issue between a brother and a sister which resulted in a compromise settlement of the interests each claimed. In refusing to vacate this compromise and in approving it as a family settlement the court said:

"It is a wholesome rule of law, equally founded in sound public policy, that an amicable compromise of a litigation of the character of this should be favored by the courts. No matter if, on further investigation or subsequent development, it should appear that the defend knew at the time that the demand was not well founded in law or in fact, it would not affect the validity of the compromise. If fairly obtained, it should stand. 'The value consists in the release from an uncertain position, with its anxieties, from apparent danger, and from inevitable expenses and trouble.' " [Citing cases]

In *Strong et al* v. *Cowsen,* 197 Miss., 282, 19 So. 2d 813,[3] a partition deed was made between the parties to resolve the doubt about their respective inheritance rights because of a question of legitimacy. In refusing to cancel this partition deed, and upon approving it as a family settlement, notwithstanding the sufficiency of the proof established one of the parties was not a lawful heir, the court quoted with approval from 12 C.J. p. 322 as follows:

"* * *The termination of such controversies is considered a valid and sufficient consideration for the agreement, and the court will go further to sustain it than it would under ordinary circumstances. Accordingly, it has been laid down as a general rule that a family agreement entered into on the supposition of a right, or of a doubtful right, although it afterward turns out that the right was on the other side, is binding, and the right cannot prevail against the agreement of the parties."
The court further said:

"* * * there was something more than the mutual mistake of fact relied on herein that influenced the grantors in the execution of the deed here involved. They were likewise influenced by the desire to avoid the expense of litigation then thought to be necessary to determine the true facts, and by the uncertainties as to

[3] See also *Walker* v. *Walker,* 221 Miss. 225, 72 So. 2d 243; Carter's Succession, 149 La. 189, 88 So. 788; *Kam Chin Chun Ming* v. *Kam Hee Ho,* 371 Pac. 2d 379; *Smith* v. *Mogford,* 21 Week Rep. (Eng.) 472; *Stapilton* v. *Stapilton,* 1 Atk. 2, 26 Eng. Reprint. 1, 12 Eng. Rul. Cas. 100.

what the proof to be subsequently ascertained by an investigation and the litigation might disclose;".

In our state family settlements of property rights will not be set aside except for very strong and cogent reasons. *Hollowoa* v. *Buck,* 174 Ark. 497, 296 S. W. 74. We find no such reasons to exist in the case at bar. These contending parties considered their claim, or the claim of the other, to be uncertain and doubtful and believed it expedient to adjust their differences and beliefs by these partition deeds and thereby set at rest the uncertainty and anxiety of their respective claims which are based upon the terms of the will and the question of their parentage. Family settlements tend to prevent litigation and uncertainty, and maintain peace and harmony even though the result reached is not what a court of justice might determine if its decision was first sought.

The affirmative relief sought by the appellants that these partition deeds be held valid and that title to the lands as described in them be quieted is granted. Therefore, the decree of the trial court is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

5-3019 368 S. W. 2d 77

Opinion delivered May 27, 1963.

McKay, Anderson and Crumpler, for appellant.

Harry B. Colay, for appellee.

CARLETON HARRIS, Chief Justice. This is an adoption proceeding. Harold Henry Hime, a Baptist minister, was the husband of Billie Jo Walthall Hime, and Billie Jo died on September 25, 1957, eight days after the birth of the couple's third child, Sarah Margaret Hime. W. O. Walthall and Lula Walthall, his wife, parents of Billie Jo, and appellants herein, took the baby home from the hospital, along with the two older minor sons. Mr. Hime also lived in the Walthall home while teaching at Bradley; after about six weeks, he became pastor at Bradley, and moved from appellants' home. Hime, according to the testimony, at first, returned to the Walthall home on Friday nights, and subsequently on Saturdays, at which times he would see the children and get clean clothes. In September, 1958, appellee remarried, and took the boys with him to the parsonage at Bradley. Sarah Margaret remained with her grandparents. Mr. Hime, his wife, and sons, remained in the parsonage until January, 1960.

During that period the grandparents visited in his home on several occasions, at which time they took Sarah Margaret with them, and on several occasions returned the boys back to their home for a visit. Mrs. Walthall testified that appellee never did ask for Sarah to spend the night at his home, nor did he take Sarah out when visiting appellants, or ask to do so. A girl baby was born to Mr. Hime and his second wife in September, 1959. Thereafter, appellee and family left Bradley and moved to Fort Worth. Sarah Margaret remained in the home of the grandparents. According to Mrs. Walthall, the Himes, at first, came back for a visit during the summer, and the two families always had Christmas dinner together. She testified that Sarah never did visit with her father, and that no request was made for such a visit. Early in 1961, appellee commenced sending $30.00 per month to the Walthalls for the benefit of the child, the money being a portion of Social Security money (or some fund from the Government) which Hime received in behalf of the children. In May, 1962, the Walthalls received a letter from appellee to the effect that he desired to take his daughter home with him to live. Mr. Walthall directed a letter to Hime, stating that appellants intended to keep Sarah Margaret. In June, appellee filed an action in Habeas Corpus to obtain custody of the child. On the day that this matter was to be heard, appellants filed a petition in Probate Court, seeking to adopt Sarah Margaret, alleging that Hime had abandoned the child for more than six months immediately prior to the filing of their petition for adoption. A motion was also filed by them to continue the Habeas Corpus hearing until after the adoption petition was heard. The motion was granted,[1] and subsequently the petition for adoption was heard by the Probate Court. At the conclusion of the hearing, the judge of that court entered a lengthy and studious opinion, wherein he found that the petition for adoption should be denied. In accordance with this finding, an order was entered dismissing ap-

[1] In his opinion, the trial judge stated, "It was stipulated that in the event petitioners were unsuccessful in the adoption matter, they would not further contest the action in Chancery Court."

pellant's petition, and denying the adoption. From such order, comes this appeal.

Section 56-106, Ark. Stats., dealing with adoption, provides as follows:

"(a) The adoption of a child shall not be permitted without the written consent verified by affidavit, of its parents or parent, if living, except as follows:

(b) The consent of a parent or parents may be dispensed with if the court, upon competent evidence, makes one of the following findings:

(I) The parent has abandoned the child for more than six (6) months next preceding the filing of the petition.

(II) The parent cannot be found.

(III) The parent is insane or otherwise incapacitated from giving consent.

(IV) A guardian of the child has been appointed by an order of the Probate or Juvenile Court giving the guardian authority to consent to adoption without notice to or consent of the child's natural parents. In this case, the written verified consent of the guardian shall be sufficient.

(V) For five (5) years next preceding the filing of the petition for adoption, the child has resided in this State in the sole custody of one of its parents and the other parent has not, during that period contributed to its support, care or maintenance, then the appearance and consent of such other parent, whether or not his or her residence is known, shall not be necessary, and the court may order the adoption upon the consent of the parent who has had the custody, support, care and maintenance of the child.

(c) In case of illegitimacy, the consent of the mother shall suffice except where paternity has been established by judgment or order of a court of competent jurisdiction.

(d) The minority of a parent shall not bar or in any way vitiate his consent to an adoption."

Appellants rely upon Provision (I), and in proceeding under this theory, endeavored to establish that appellee had "given" the child to its grandparents. Four ladies testified that during the first Mrs. Hime's last illness, appellee had told them that if his wife died, he would give the child to Mrs. Walthall; however, on cross-examination, one of the witnesses (Mrs. Fritch) stated that he was "letting them keep Sarah." Two of the other ladies, who testified that Hime "gave" the child to appellants, added that he did not indicate he was abandoning Sarah Margaret, and the fourth testified that he seemed rather perturbed at the time over the critical condition of his wife. Mrs. Walthall stated that after her daughter's death, appellee told her, "Mrs. Walthall, Sarah is yours and Mr. Walthall's." She testified that she didn't want the children separated, and stated that subsequently (when Hime was preparing to take the boys to live with him in Bradley) told him, "Bozo,[1] if you don't take Sarah now, don't ever come back for her." The testimony reflected that on one occasion, Hime attended a homecoming celebration at Southern State College, but did not go by the Walthall home to visit with Sarah. Mrs. Walthall testified that Hime always sent Christmas and birthday presents to his daughter, and had, for seventeen months prior to the filing of the adoption petition, sent the $30.00 heretofore referred to. When asked if he had ever given any indication of deserting and abandoning the child, she replied, "Why, no, I don't suppose you would call it that. He did walk away and leave her when I asked him if he didn't take her then to not ever come back for her. That is the nearest I would call abandon. I don't suppose he called it that and I didn't.

Mr. Hime is a social case worker for Buckner Baptist Benevolences, connected with Buckner Baptist Children's Home, near Fort Worth. He testified that he did not recall ever telling anyone that he was renouncing all rights to Sarah, and he readily admitted that he felt a serious mistake had been made by leaving the child with the grandparents for so long a period of time. He stated

[1] This was appellee's nick-name.

that one reason for leaving Sarah Margaret was to help his mother-in-law, who was extremely upset over the death of her daughter, and he testified that he had not often visited in the Walthall home for two reasons—because of his schooling,[2] pastorates, and work at the orphanage, and further, because he felt that such visits caused emotional disturbances in the family. Appellee stated that he felt his visits had become progressively less welcome[3] but he had left the child with appellants because he did not want to hurt Mrs. Walthall; that finally, however, he felt that the step must be taken, and he directed the letter to appellants, expressing his desire to rear his daughter with the other members of his family. He testified that he received Social Security for the three children (around $60.00 per month for Sarah); that he had been sending $30.00 to the Walthalls, had purchased a participating life insurance policy for Sarah which would mature on her eighteenth birthday, and had established a small bank account for her.

The present Mrs. Hime testified that she wanted Sarah in the home and would do all possible to make a good mother for her.

The evidence establishes that all parties are of good moral character, and from that standpoint, entirely proper persons to rear the little girl.

In reaching our conclusion, it is not necessary to discuss the question of whether a child can be "given away." Suffice it to say that we think the proof falls far short of establishing that appellee abandoned Sarah Margaret. This court, in *Woodson* v. *Lee,* 221 Ark. 517, 254 S. W. 2d 326, quoted a California case[4] which approved Webster's definition of "abandonment" as follows:

"To relinquish or give up with the intent of never again resuming or claiming one's rights or interests in;

[2] Mr. Hime is working on his Master of Divinity degree.

[3] According to his testimony, every letter written by the Walthalls to his household since the death of Billie Jo had been addressed to the two boys, and he stated that he did not recall ever receiving a personal invitation for a visit to the Walthall home unless it was to bring the children.

[4] In re *Cordy,* 146 Pacific 532.

to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance or fidelity; to quit; to forsake."

Certainly, the proof does not reflect that Hime deserted, forsook entirely, renounced utterly, or relinquished all connection with, or concern in, his daughter. Whether, at the beginning, he intended to relinquish any rights or interest in the person of his daughter, with the intent of never again resuming the relationship, is very much debatable under the evidence in this case, but the statute requires that he shall have "*abandoned the child for more than six (6) months next preceding the filing of the petition.*" As heretofore stated, money had been sent for the child's benefit for seventeen months prior to the filing of the petition, gifts had consistently been given on commemorative days, and, in fact, Hime had already filed his petition for a Writ of Habeas Corpus with the intention of obtaining the custody and control of his daughter before appellants ever filed their petition for adoption.

Finding no abandonment of Sarah Margaret by her father, appellee herein, it follows that the order of the Probate Court should be, and hereby is, affirmed.

MAXWELL *v.* STATE.

5057 370 S. W. 2d 113

Opinion delivered May 27, 1963.

[Rehearing denied September 9, 1963.]

[redacted]

Christopher C. Mercer, Jr. and *Delector Tiller,* for appellant.

Bruce Bennett, Atty. General, by *Jack L. Lessenberry,* Asst. Atty. Gen., for appellee.

Osro Cobb, Special Associate Justice. 1. This is a criminal case wherein appellant was charged, under Ark. Stat. Ann. 1947, Sec. 41-3401, with the commission of the offense of rape. Prior to 1915 conviction for this offense carried a mandatory death penalty. By Act No. 187 of 1915 (Ark. Stat. Ann. 1947, Sec. 43-2153) the mandatory death penalty was removed as to all capital offenses and the jury trying the accused was authorized to bring in a verdict of guilty and life imprisonment in the State penitentiary in lieu of the death penalty, if it so desired.

2. At the conclusion of this trial the court provided the jury with three forms of verdicts, as follows: (1) Not guilty; (2) Guilty with life imprisonment; (3) Guilty as charged. After several hours of deliberation the jury returned verdict No. 3, making the death sentence mandatory. Such a sentence was pronounced upon the appellant on April 5, 1962. Execution of appellant has been stayed pending review of the case here on appeal.

3. We have painstakingly examined the entire record. We have considered on its merits every motion made on behalf of appellant and denied by the trial court and we have considered on its merits every objection interposed by counsel for appellant to which adverse rulings were made by the court. In capital cases the formal saving of exceptions to adverse rulings in unnecessary. Ark. Stat. Ann. 1947, Sec. 43-2723.

I. SUFFICIENCY OF THE EVIDENCE

The offense involved was committed on November 3, 1961. Within a matter of hours appellant was taken into custody. State and Federal authorities collaborated in a thorough investigation of the crime and on November 7, 1961, appellant was formally charged by the filing

of a criminal information. Appellant makes no complaint as to the circumstances of his arrest or as to the promptness of the State's attorney in filing the information against him.

Miss Stella Spoon, age 35, lived with her aged and helpless father at 108 Nichols Street in the city of Hot Springs, in Garland County. Near 3:00 a. m. on November 3, 1961, she was aroused by an unusual noise. Clad only in her pajamas, she went into the living room. She saw the form of a man at the window engaged in cutting or breaking the screen. She warned the intruder to leave or she would call the police. The man kept trying to force the screen and she ran to her telephone in the same room to call the police. Almost in the same instant the man burst through the window. Miss Spoon had dialed the operator before she was violently seized and the receiver knocked from her hand. The telephone operator, hearing the screams, connected the line to police headquarters, where an officer heard the screams and the struggle, traced the call, and dispatched officers to the scene.

Once inside the home, the intruder subjected Miss Spoon to a literal nightmare of brutality and abuse. She fought and struggled, but to no avail. She struck the intruder with a purse. When he forced his hand over her mouth to silence her screams she bit his finger, causing it to bleed. Her helpless father tried to aid her, but was struck and left bleeding. She tried to escape through the front door, but was caught. Her attacker kept threatening to kill her and her father as well. She was dragged and forced outside the house without shoes, and while clad only in her pajamas was forced to a remote spot some two blocks from her home, where battered, bruised, bleeding and exhausted she was overpowered and compelled against her will to suffer a deliberate and calculated rape of her person. After the ravage of her person had been accomplished, and before fleeing, her attacker threatened to kill her and her father if she told.

Testimony establishing the identity of appellant as the attacker is clear and emphatic. At the window he

had a part of a nylon stocking on his head, with a knot in it. When he appeared to try to quickly jerk it down over his face it came off. A piece of nylon hose was found near the home of the victim and the FBI Laboratory at Washington, D. C., found in said nylon hose specimens of hair similar in every detail to that of appellant. A thread of nylon combed from appellant's head was found to be exact in all details with the threads of the hose found near victim's house. Negroid hair found in the home of the victim corresponded exactly with hair of appellant.

Officers working on the case were quick to note the fresh injury to appellant's finger and the condition of the clothes he was then wearing. Officers were dispatched to his mother's home, where appellant resided, and she was advised that her son was in trouble. They asked permission to examine his clothes and his mother consented thereto, taking the officers to the clothes closet and permitting them to take a change of clothes and also a blue coat and a trench coat belonging to appellant. The officers forwarded to the FBI Lab in Washington, D. C., the clothing removed from the person of the appellant, his blue suit coat, his trench coat; the victim's pajamas and the strands of hair, nylon thread and hose previously mentioned. The repeated and violent contact between the pajamas worn by the victim and the clothing of appellant left their telltale marks on both garments.

Robert Duckett, Special Agent, FBI Laboratory, whose qualifications were admitted as an expert on hairs, fibers, textiles and related materials, testified: "It has been my experience that when clothing comes in contact with other clothing or objects fibers will be interchanged or deposited. Now working on this assumption, I removed the foreign debris adhering to the T shirt that was submitted to me, the suit that was submitted to me, and the trench cost that was submited to me . . . I mounted the foreign fibers and I compared those foreign fibers that I had recovered from the debris from the garments with the fibers composing the red pajamas. In the debris of the T shirt, in the debris of the suit coat and in the debris of the trench coat, I found red cotton fibers that

matched the fibers composing the pajamas . . . " He also testified in detail as to the matching hair and nylon thread and hose specimens examined as set out above.

Allison Simms, Special Agent, FBI Laboratory, whose qualifications as an expert in analysis of blood stains and body fluids were admitted, testified: "I was examining these articles for the purpose of blood stains and seminal stains. Seminal stains are stains which consist of semen and semen is the male reproductive fluid which contains the male reproductive cell. I examined the pajama bottoms and tested these stains chemically and determined that these reddish brown stains consisted of blood—human blood. In the crotch of the pajamas I identified seminal stains—also on the front portion of both legs of the trousers I identified seminal stains which contained spermatozoa. On the shirt I did not find any semen but there were blood stains present which were human blood . . . "

Miss Spoon struggled with her unmasked attacker in the light of her living room and having never seen him before made a special effort to remember his face. She testified:

"Q. Is that the man? (indicating appellant, then standing to be observed by the witness)

"A. Yes, sir, it is.

"Q. Is there any possible doubt in your mind?

"A. No, sir."

Dr. James H. French (professional qualifications admitted by appellant) examined the victim shortly after the crime in the emergency room of a Hot Springs hospital. He testified: "This patient had numerous bruises, cuts about her person. She had the undersurface of her left toe torn, the greater part of the skin was torn. She had a bruise on her right hip, both wrists had abrasions circling the wrist, she had bruises of both forearms, she had a bruise and swelling of the lower lip, she appeared emotionally upset. I did an internal examination and obtained a smear from the mouth of the womb and found

living spermatozoa of the male germ cells in the secretion."

The evidence in this case met in overwhelming fashion all of the requirements for conviction for the offense of rape (Ark. Stat. Ann. 1947, Sec. 41-3402). *McDonald* v. *State,* 225 Ark. 38, 279 S. W. 2d 44.

II. MOTION TO QUASH INFORMATION

This criminal information was filed under authority of Amendment No. 21 to the Constitution of Arkansas. Appellant requested and was granted additional time by the court in which to enter his plea to the charge. A bill of particulars was provided appellant and his counsel, no objection being interposed thereto. After arraignment and plea of not guilty appellant requested and was given additional time in which to prepare his defense. When appellant was finally placed upon trial he and his counsel knew with particularity the exact nature of the charge. Counsel for appellant and appellant were present in open court on February 5, 1962, when the motion for continuance was granted and an agreed trial date of the case, beginning on March 19, 1962, was set. No additional time was requested for preparation for trial. Hearings on preliminary motions were ended on March 16, 1962, and the court at that time asked counsel for appellant if there was any reason why the trial could not commence on March 19, 1962, as set, and was advised "The defense will be ready." The rights of the accused were fully protected. This Court and the Supreme Court of the United States have many times held such prosecutions by information valid. *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307; *Moore* v. *State,* 229 Ark. 335, 315 S. W. 2d 907, *cert. denied,* 358 U. S. 946; *Hurtado* v. *Cal.,* 110 U. S. 516; *Gaines* v. *Washington,* 277 U. S. 81; *Adamson* v. *California,* 332 U. S. 46. Denial of the motion of appellant to quash was proper.

III. MOTION TO DECLARE STATUTE UNCONSTITUTIONAL IN APPLICATION.

In this motion appellant concedes that our penalty statute for rape (Ark. Stat. Ann. 1947, Sec. 41-3403) is

not unconstitutional on its face, but contends that in its application to appellant and all other members of the Negro race it is unconstitutional for the reason that in Arkansas it is the practice and custom of juries to impose the death penalty upon Negro men who rape white women, without inflicting the same punishment upon other offenders. The court heard evidence on the motion. Lee Henslee, Superintendent, Arkansas State Penitentiary, testified, on call by appellant, that between the dates of September 5, 1913, and October 28, 1960, the records of the penitentiary reflected that there had been 168 executions, broken down by charge and race as follows:

Negro for rape	19	Negro for murder	108
White for rape	1	White for murder	38
		Indian for murder	2

This bare listing of the number of executions does not pretend to cover the total number of such offenses by race or otherwise, nor does it cover trials resulting in acquittals, imposition of life sentences, or cover the intervention of executive clemency.[1] Certainly there was no evidence offered even remotely suggesting that the ratio of violent crimes by Negroes and Whites was different from the ratio of the executions. There was no testimony suggesting that the State's attorneys in the various judicial districts had not been asking for the death penalty in their prosecutions for rape, whether the accused be black or white. In any event, the jury alone could determine the death penalty. The attack therefore appears to be directed against trial by jury.

We have carefully reviewed the decisions of the Supreme Court of the United States cited by appellant in support of his position. We comment briefly as to same. *Pace* v. *Alabama,* 106 U. S. 583. Here an Alabama statute was upheld as not in conflict with the Constitution of the

[1] Most of the opinions of this Court do not identify the race of the defendant, and it is impossible to obtain accurate information without reviewing the transcripts, which may or may not reflect the race of the accused. Appellant has listed only one execution of a white man for rape (which happened a few years ago), and this Court, only a few months ago, affirmed the conviction of another white man, with death penalty, on this charge. See *Fields* v. *State,* 235 Ark. 986, 363 S. W. 2d 905.

United States, although it prescribed penalties more severe for adultery between persons of different races than for members of the same race. And in *Friedman* v. *People,* 341 U. S. 90, the case was dismissed upon motion for want of a substantial Federal question. *Yick Wo* v. *Hopkins,* 118 U. S. 356. In this case it was admitted that discrimination was being practiced against certain persons (Chinese) in denying them permits to operate laundries, although possessed of all qualifications set forth in the city ordinance under review. *Smith* v. *Texas,* 311 U. S. 128, is one of several cases involving discrimination as to race in jury service. *Lane* v. *Wilson,* 307 U. S. 268, involved abuses in voter registration. *Chambers* v. *Florida,* 309 U. S. 227, is a criminal case where the conviction was reversed because of long days of confinement and mistreatment before the filing of charges and where confessions were obtained by coercion.

We fail to find any support in the above cases for appellant's position. Striking down our criminal statutes as to a large segment of the population upon the tenuous grounds urged by appellant is illogical. It could only result in chaos in the difficult job of law enforcement for the protection of the people. This Court concurs emphatically with other appellate courts of the United States in holding that justice should be administered equally and fairly as to all citizens regardless of race or color. Our penal statute for rape applies equally to all citizens of all races. On the record before us we find no basis whatever to declare our penal statute for rape unconstitutional in any respect of verbage or application. Appellant's motion was properly overruled.

IV. MOTION FOR CHANGE OF VENUE

The burden was on appellant (Ark. Stat. Ann. 1947, Sec. 43-1502) to make credible proof to support his motion. A hearing was had. All of the witnesses called by counsel for appellant testified squarely against his position. Incidentally, we note here that in appellant's listing of executions for rape that not a single such case appears to have originated from Garland County, where this case was tried. There was no abuse of discretion by the

trial court in overruling the motion for change of venue. *Speer* v. *State,* 130 Ark. 457, 198 S. W. 113; *Adams* v. *State,* 179 Ark. 1047, 20 S. W. 2d 130.

V. MOTION TO REMOVE TO FEDERAL COURT

Ordinarily such motions are filed directly in Federal Court. No cause was shown justifying such removal, and the trial court properly refused to surrender its jurisdiction. *Rand* v. *State,* 191 F. Supp. 20 (D. C., Ark., 1961).

VI. OBJECTIONS RELATING TO VOIR DIRE

The trial court had the advantage of observing and appraising the demeanor and answers of all prospective jurors. He allowed appellant's counsel the greatest latitude in examining the jurors before they were approved by the court for duty in the case. Indeed, we think the court proceeded in an exemplary manner in securing a jury free from actual or implied bias or prejudice. The objections of appellant concerning the selection of the jury were properly overruled. *Polk* v. *State,* 45 Ark. 165; *Maroney* v. *State,* 177 Ark. 355, 6 S. W. 2d 299; 50 C. J. S., "Juries, Sec. 275 a(1)."

VII. OBJECTIONS AS TO LIMITATIONS OF EXAMINATION OF WITNESSES

We find from the record that the court conducted the trial of this case in such a manner as to provide counsel for appellant every reasonable and legitimate latitude in cross-examination of witnesses—no witnesses having been put on by appellant. All objections of this character are found to be without merit and properly overruled.

VIII. APPELLANT'S VARIOUS MOTIONS TO EXCLUDE ALL EVIDENCE ADDUCED BY PROSECUTION CONCERNING ITEMS OF CLOTHING AND OTHER MATERIALS EXAMINED AT FBI LABORATORY, WASHINGTON, D.C.

When the police authorities sent in for examination the clothing of appellant, the pajamas of the victim, and

the other items, as previously mentioned, such action could have helped to exonerate appellant rather than help to convict him, depending upon the findings at the laboratory. In this case the findings pinpointed the guilt of appellant.

The clothing removed from the person of appellant as an incident of his arrest for the crime under investigation was properly obtained. *Jones* v. *U. S.,* 357 U. S. 493; *Drayton* v. *U. S.,* 205 F. 2d 35.

As to items taken from the home of appellant's mother, with whom appellant resided, the evidence clearly shows that the mother not only consented to the search, but assisted the officers in same. She was present at the trial but did not testify. Neither was a motion filed to quash the evidence obtained at the home. The proof by the State met the burden upon the State in proceeding as it did without a search warrant. *Rigby* v. *U. S.,* 247 F. 2d 584; *Cantrell* v. *U. S.,* 15 F. 2d 953, *cert. denied,* 273 U. S. 768.

"The consent of householder to the search of the house dispenses with the necessity of a search warrant, where his mother, with whom defendant was living, consented to the search, though defendant objected to the search of his room." *Gray* v. *Commonwealth,* 249 S. W. 769 (Ky.).

The right to object to evidence on ground of illegal seizure is waived unless there is a timely motion to suppress the evidence. *Morton* v. *U. S.,* 147 F. 2d 28; *Butler* v. *U. S.,* 153 F. 2d 993, *cert. denied,* 324 U. S. 875. No motion to suppress was filed as to any item sent to the FBI Laboratory.

Lieutenant Crain was examined and cross-examined concerning a blue coat obtained at the home, without any objection being made as to the admissibility of such evidence. The admissibility of said evidence was waived. *Sandusky* v. *Warren,* 177 Ark. 271, 6 S. W. 2d 15.

The objections stated by counsel for appellant to the items sent to the FBI Lab were always made in blanket or in all inclusive form, with no breakdown as to any

given item. Such objections are of no avail where any one of several items covered in the blanket objection was lawfully and properly obtained. *Eureka Oil Co.* v. *Mooney,* 173 Ark. 335, 292 S. W. 681; *Haney* v. *Caldwell,* 35 Ark. 156; *Martin* v. *Monger,* 112 Ark. 394, 166 S. W. 566.

Appellant, in his various motions to strike all evidence introduced concerning the articles sent to the FBI Laboratory, has relied almost exclusively upon *Mapp* v. *Ohio,* 367 *U. S.* 643, leading case in which judicial developments as to search and seizure were reviewed comprehensively. In the *Mapp* case, Dollree Mapp was within her own home. Officers appeared and demanded admittance. She refused because they did not produce a search warrant. After some three hours, and without a search warrant, the officers forcibly entered the home, searching for and obtaining evidence in the form of lewd photographs, subsequently used in evidence. There is no similarity of facts in the instant case with the *Mapp* case, *supra,* and action of the Supreme Court of the United States in reversing *Mapp* v. *Ohio, supra,* is inapplicable here.

The items in question, examined by the FBI Lab, were in court during trial, in their original containers from the FBI. They were described in detail in oral testimony of witnesses who had been in custody of or had examined same at the laboratory. The items were not passed to the jury for personal inspection nor were they listed as formal exhibits to the oral testimony adduced concerning same. The direct examination of FBI Special Agent Duckett; his cross-examination and the direct examination of FBI Special Agent Simms had been completed before any objection was made seeking to strike all of their testimony. Counsel for appellant in making an objection told the court that the articles themselves had been introduced in evidence, although improperly. The crux of the evidence as to the items given laboratory examination was the findings as to the stains, body fluids, similarity of hairs, nylon thread, etc. This evidence was susceptible, absent a stipulation of counsel, to introduction solely in oral form. Even if it had been

possible to conduct the laboratory tests in the presence of the jury, such testing would have been worthless as evidence without oral testimony explaining the results and findings.

Physical objects explained to the jury may be used in presenting evidence without formal introduction. *Meyer* v. *State,* 218 Ark. 440, 236 S. W. 2d 996; *Gordy* v. *State,* 264 S. W. 2d 103 (Texas); Underhill Criminal Evidence, 5th Ed., Sec. 110.

In *Featherston* v. *Jackson,* 183 Ark. 373, 36 S. W. 2d 405, this Court said: "On the trial a rough sketch or map showing tracks or ruts in highway was used by appellee in examining his witnesses. Appellant objected to use of said map. It was not introduced in evidence, but the day after the trial was over he filed a motion to require appellee to file the map. This came too late and the Court correctly denied the motion."

At no time in this case did appellant ask for the formal introduction into evidence of the items examined by the FBI Laboratory.

We therefore conclude that the trial court did not commit error in refusing to strike the testimony of the special agents of the FBI. All other motions of appellant to strike testimony were likewise properly denied.

IX. INSTRUCTIONS

Appellant complains that certain instructions requested by him were not given. An examination of the record discloses that the subject matter of such requested instructions was fully covered in other instructions given by the court. We have consistently held that it is not error to refuse an instruction where the matters are fully covered by instructions already given. *Griffin* v. *State,* 210 Ark. 388, 196 S. W. 2d 484.

X. ARGUMENT OF COUNSEL

Appellant objected to the following remarks of the prosecuting attorney during argument:

". . . He could have choked her to death as easily as not . . . He could have had a knife in his pocket and

pulled it out and she did tell you, I believe, that he had some instrument when he was breaking in the screen. He could have pulled a knife out of his pocket and cut her throat from ear to ear.

THE COURT: He is referring to why she was in fear of her life. Your motion is overruled."

Once inside the home of the victim appellant had access to all the kitchen knives and other possible weapons therein. He repeatedly threatened to kill both the victim and her father. Under the proof in the case we see no impropriety in the ruling of the court.

In his opening statement counsel for appellant stated:

"It is the position of the Defense, and the Defense will prove, both by cross-examination of the witnesses that the State will call and by evidence that it will produce itself that this alleged crime as described by Mr. Whittington could not, and in fact did not take place as he stated . . . That if in fact an assault did take place that certainly it was not rape, that if any assault did take place it was free and voluntary on her part. I think you will find that the evidence as adduced here in the Court, both the evidence produced by the prosecution and by the evidence adduced by the defendant that if in fact an assault did take place it was a free and voluntary act . . . "

An objection was made during closing argument of prosecution and is set out as follows:

"MR. WHITTINGTON: May it please the Court, ladies and gentlemen, when the counsel for the defense made his opening statement he told you that he would prove to you that this matter did not take place as I had told you in my opening statement, that it was a free and voluntary act, and he would prove that it was a free and voluntary act on the part of Stella Spoon. Now, ladies and gentlemen—

"THE COURT: One moment, Mr. Whittington, Mr. Mercer wants to interpose an objection.

"(Out of hearing of the Jury)

"MR. MERCER: Court please, I object to the prosecuting attorney in his argument to the Jury talking about anything the defendant has to prove because the defendant doesn't have to prove anything.

"THE COURT: Well, he is repeating what you said in your opening statement. I think he has a right to refer to it and comment on it.

"MR. MERCER: Court please, it is not incumbent upon the defendant to prove anything.

"THE COURT: I understand.

"(MR. WHITTINGTON CONTINUES ARGUMENT:)

"Now, ladies and gentlemen, while it is not incumbent upon the defendant to prove anything, the defendant's attorney got up here and he told you they were going to prove some things. They don't have to prove anything, I am the one that has to prove the case, let's get that clear. The Court so instructed you. But he told you what all he was going to prove and I am still waiting to hear any of that proof. I haven't heard a word of it. We have people who must have known where the defendant was that night, if he wasn't where he was supposed to be, I haven't heard any of them say he wasn't there . . . "

Remarks of the prosecuting attorney were well within proper limits, and we find no eror in same. *Ark. P. & L. Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. 2d 464; *Cubreath* v. *State,* 96 Ark. 177, 131 S. W. 676.

XI. SUMMARY

The verdict reached and the sentence imposed do not appear to offend the Constitutions of the State of Arkansas or of the United States; the statutes of Arkansas and decisions heretofore rendered by this Court. Appellant received a fair and impartial trial in every respect.

Judgment is affirmed.

HOLT, J., disqualified and not participating.

5-2993 368 S. W. 2d 87

Opinion delivered May 27, 1963.

Patten & Brown, for appellant.

Wright, Lindsey, Jennings, Lester & Shultz, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case in which Mrs. J. R. Williams and her children, as claimants, seek to recover from Central Flying Service compensation because of the death of Mr. J. R. Williams, who perished in an airplane crash. The Central Flying Service, as the alleged employer, denied liability, claiming that Mr. Williams' death did not arise out of and in the course of his employment (§ 81-1305 Ark. Stats.).

Mr. J. R. Williams was a full-time police officer of the City of Little Rock, but was extremely interested in aviation; and sometimes when not on duty as a policeman, he was employed by the Central Flying Service (hereinafter called "Central") on a part-time basis. Central paid him $5.00 per hour as an instructor; and when he served as a pilot on a charter plane he received 20% of the gross revenue for the trip, plus $1.50 per hour for layover time. He had conducted a ground school for student flyers, but no charge for such appears on the books of

Central. He held a commercial pilot's license, a private pilot's rating, an instrument rating, and an instructor's rating. He wanted to qualify for a multi-engine rating, but had never done so.

On July 22, 1958 Mr. W. D. Hill, of the Civil Aeronautics Administration, was in Little Rock to examine James McClellan in a test flight with a multi-engine plane. The plane was owned by Central, but was loaned to Mr. McClellan for the test flight. Mr. Hill invited J. R. Williams and H. K. Gilbert to go on the test flight with him and James McClellan, since both Williams and Gilbert desired to eventually obtain a multi-engine rating. Mr. Hill requested Mr. Holbert, President of Central, for permission to take Williams and Gilbert on the flight, and such permission was granted. It was on this flight that the plane crashed, and all four of the occupants were killed. Mrs. Williams and her children claimed compensation from Central.

The Referee (Hon. J. R. Calhoun) held against the claimants; the Full Commission likewise held against the claimants; and the Circuit Court affirmed the Commission. At each stage of the proceedings there were briefs submitted, some of which are in the record before us. Also, the opinions of the Referee, the Commission, and the Circuit Court are in the record. Counsel for both sides have been diligent and thorough in researching the questions presented. On the appeal to this Court, appellants urge two points, which we will list, but treat together in our opinions:

"1. That the death of Jesse Ralph Williams arose out of and in the course of his employment, in that he was doing a thing which his contract of employment expressly or impliedly authorized him to do and that his presence upon the fatal flight was a concurrent or mutual benefit to the Appellee.

"2. That facts, not being in dispute, create a question of law and the Court on appeal determines the legal question."

The claimants insist: (a) that this particular flight was of substantial benefit to Central since by it Williams would gain information that could aid him in passing a test some time later for multi-engine rating; and (b) that because of this substantial benefit to it, Central is liable as an employer. Claimants cite our own cases of *Fine Nest Trailer Colony* v. *Reep,* 235 Ark. 411, 360 S. W. 2d 189; *Frank Lyon Co.* v. *Oates,* 225 Ark. 682, 284 S. W. 2d 637; and *Robbins* v. *Jackson,* 232 Ark. 658, 339 S. W. 2d 417. Claimants also cite many cases from other jurisdictions, some of which are: *Wamhoff* v. *Wagner Electric Corp.* (Mo.), 190 S. W. 2d 915, 161 A. L. R. 1454; *Kimberly-Clark Co.* v. *Industrial Comm. et al.,* (Wis.), 203 N. W. 737; *Tallent* v. *M. C. Lyle & Son* (Tenn.), 216 S. W. 2d 7; *Phoenix Indemnity Co.* v. *Industrial Accident Comm.* (Cal.), 193 P. 2d 745; *Owens* v. *Bennett Air Service* (N. J.), 45 A. 2d 320; *Blair* v. *Shaw* (Kan.), 233 P. 2d 731; *Garris* v. *Peoples Service Drug Stores, Inc.* (Va.), 174 S. E. 665; *Younger* v. *Motor Cab Trans. Co.* (N. Y.), 183 N. E. 863; and *Chicago, W. & F. Coal Co.* v. *Industrial Comm.* (Ill.), 135 N. E. 784.

On the other hand, Central claims that Williams went on the flight as an invitee of Hill; that Williams was not on duty for Central at the time; and that Central received nothing for the flight. Therefore, Central insists that the death of Williams did not arise out of and in the course of his employment, but arose only because Williams accepted Hill's invitation to accompany them as a guest on the flight. Central cites our own case of *Woodmansee* v. *Frank Lyon Co.,* 223 Ark. 222, 265 S. W. 2d 521; and cases from other jurisdictions, some of which are: *Young* v. *Dept. of Labor and Ind.* (Wash.), 93 P. 2d 337; *Carroll* v. *Western Union* (Wash.), 17 P. 2d 49; *Davlin* v. *Texas General Indemnity Co.,* 254 F. 2d 850 (C. A. 5, 1958); *Dr. Pepper Bottling Co.* v. *Chandler* (Miss.), 79 So. 2d 825; *Taylor* v. *Taylor Tire Co.* (Ky.), 285 S. W. 2d 173; *McQuerry* v. *Smith St. John Mfg. Co.* (Mo.), 216 S. W. 2d 534; *Miller* v. *Greene Co.* (Pa.), 90 A. 2d 262; *Industrial Comm.* v. *Messinger* (Colo.), 181 P. 2d 816; *Stuhr* v. *State Ind. Accident Comm.* (Ore.), 208 P. 2d 450; *Texas Em-*

ployers Ins. Assn. v. Stillwell (Tex.), 307 S. W. 2d 271; and *Butler* v. *Nolde Bros.* (Va.), 55 S. E. 2d 36.

It would unduly extend this opinion to analyze the cases cited by each side, or to undertake to differentiate, on the facts, the various cited cases from the case at bar. After a thorough review of all of the cases, and our own research,[1] we hold that, from all the evidence and circumstances developed in this case, it was for the trier of the facts to draw the inferences and reach the conclusion as to whether the death of Mr. Williams arose out of and in the course of his employment; and we cannot say that such conclusion is without evidence to support it. We like the statement by Professor Larson in his splendid treatise on "The Law of Workmen's Compensation," Vol. 1, § 27.31 (a):

"When an employee, by undertaking educational or training programs, enhances his own proficiency in his work, he does in a sense benefit his employer. On the other hand, self-improvement is primarily the employee's own concern. Obviously the ambitious clerk who is burning the midnight oil studying to become an accountant cannot expect workmen's compensation if his lamp blows up."

In the case at bar, Williams was a full-time paid employee of the Little Rock Police Department; and learning to fly an airplane might be of some advantage to the Little Rock Police Department; but it is not claimed that such outside activities of Williams could make the Little Rock Police Department liable under any theory of workmen's compensation law. Likewise, if Williams obtained a license to fly a multi-engine plane, it might have benefitted Central, if Williams had remained with Central; but it seems to us that the connection between this particular flight and the benefit to Central is a question, the nearness or the remoteness of which rested with the trier of the

[1] Attention is called to the general discussion in 58 Am. Jur. 716 *et seq.*, "Workmen's Compensation" § 209 *et seq.;* to the annotation in 123 A. L. R. 1176, "Injury to employee while engaged in an effort beyond the scope of his duties to increase his value to employer as one arising out of and in the course of his employment"; and to comment note in 161 A. L. R. 1461, entitled: "Accidental injury to employee while doing private work for his own benefit, following a continued practice in that regard, in employer's plant."

facts, who found that the death of Williams did not arise out of and in the course of his employment.

Affirmed.

JOHNSON, J., dissents.

RUSSELL *v.* CITY OF ROGERS.

5-2971 368 S. W. 2d 89

Opinion delivered May 27, 1963.

Jeff Duty, for appellant.

Scott & Davidson, by: *Bob Scott,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the City of Rogers to recover judgment for $8,674.00 under an oral contract by which the appellant Russell agreed to pay the city at the rate of $2.00 a foot for 4,337 feet of sewer line to be laid by the city in an undeveloped subdivision owned by Russell. Russell admits that the line was laid by the city. His defense is that he was induced by misrepresen-

tation to enter into the contract. The circuit judge, considering the matter upon the pleadings and upon Russell's testimony in a deposition offered by the city, sustained the city's motion for a summary judgment in the full amount sued for.

Our recent summary judgment statute, Act 123 of 1961, is a re-enactment of Rule 56 of the Federal Rules of Civil Procedure. Ark. Stat. Ann. § 29-211 (Repl. 1962). It provides that a summary judgment shall be rendered if the pleadings and proof on file show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It has been pointed out, under the Federal Rule, that the theory underlying a motion for summary judgment is the same as that underlying a motion for a directed verdict. Moore's Federal Practice (2d Ed.), § 56.02 (10). Hence any testimony that is submitted with the motion must be viewed in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party.

When Russell's deposition is so considered we cannot say that the city was entitled to judgment as a matter of law. Russell testified that the city had planned to lay the sewer line in his subdivision whether he agreed to it or not. He was told by the city's representatives that the cost would be $4.00 a foot and that the city would pay half the cost if he would agree to pay the other $2.00 a foot when the work was completed. If he did not accept that arrangement then he would be required to pay $4.00 a foot for that part of the line apportionable to each lot as the various lots were connected to the sewer mains. Russell said that he was told that all the property owners were being offered this same choice.

Russell testified that he accepted the first alternative in order to save $2.00 a foot. Before he paid for the completed work, however, he found that he was being discriminated against in that the city was offering to permit other property owners to hook onto the sewer line at any time in the future at a charge of only $2.00 a foot. After discovering this discrimination Russell refused to make the

lump-sum payment that he had agreed to make when the work was completed.

The city argues that even if the misrepresentations were made—and at this stage of the case we must assume they were—they were not material and related only to future matters rather than to existing facts.

Neither point is well taken. A misrepresentation is considered to be material if it would be likely to influence a reasonable person in deciding whether to enter into the proposed contract. Rest., Contracts, § 470; Williston on Contracts (Rev. Ed), § 1490. Russell would undoubtedly have been influenced by the statement that all the property owners were being offered the same choice. If he had known the true facts there was no reason whatever for him to agree to make a cash payment of $8,674.00 as soon as the line was laid, for he could have obtained exactly the same benefits by paying, during a period of years, small installments that could not total more than the amount of the lump-sum charge and would in all probability have been less than that charge.

It is equally clear that the misrepresentation was not merely an expression of opinion about what might happen in the future. It amounted to a positive statement of the method by which the city intended to finance the entire project. Hence the representation pertaining to an existing state of fact upon which Russell was entitled to rely in reaching his decision about the proposed contract.

The appellant closes his brief by asking that the judgment be reversed and that a judgment be entered in his favor. It is quite apparent, however, that there are a number of disputed issues of fact in the case. Consequently, just as in cases where a verdict has been erroneously directed in the court below, the cause will be remanded for a trial on the merits.

Reversed.

5-3000 370 S. W. 2d 132

Opinion delivered May 27, 1963.

[Rehearing denied September 16, 1963.]

[redacted]

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

Ivan Williamson, for appellee.

PAUL WARD, Associate Justice. This litigation stems from a dispute over the boundary line between two parcels of land. Appellees contend that a fence, located in the same place for the past thirty years or more, has been generally recognized as the east boundary line of their property during all of said time. Appellant denies this, and contends the fence is some one hundred to one hundred fifty feet east of his true west boundary line.

In order to better understand the issue and the testimony relating thereto, it is necessary to briefly set forth some of the background facts.

Appellees are the sole surviving heirs of J. H. Coe who died in 1946. Shortly before his death he purchased from one D. C. Johnson the land now owned by his heirs. The deed to him described the land as follows:

A strip of land Two (2) acres in width off and across the East side of the Northwest quarter of the Southwest quarter (NW¼ SW¼) and the Southwest quarter of the Northwest quarter (SW¼ NW¼) of Section Seven (7) in Township Fourteen (14) North, Range Twelve (12) West, lying North of the North Sylamore Creek Bluff and

South of State Highway No. 66, and containing 13 acres of land, more or less.

It is conceded that one John Stewart and his predecessors in title have, for many years, owned the Southeast quarter of the Northwest quarter of the same section above mentioned. It will be seen from the above that the forty acres belonging to Stewart lies east of and adjoins part of the Coe land. In 1959 appellant bought a parcel of land, consisting of one and eleven-hundredths acres, from his father, John Stewart. No definite description of appellant's land is contained in the record, but, for the purpose of this opinion, we will assume it lies along the west line of the Stewart forty acres.

When appellant attempted to destroy part of the said fence, appellees petitioned the chancery court to enjoin him. After hearing testimony on both sides, the trial court found that appellees were " . . . entitled to and are hereby vested with title to . . ." the land west of, and up to, the fence. The trial court's finding and decree were based on seven years adverse possession by appellees, and also on "long acquiescence" by the owners of two parcels of land.

After a careful review of the testimony we are of the opinion the weight of the evidence supports the court's finding that the fence was established as the boundary line by "long acquiescence." The testimony is overwhelming, and in fact it is undisputed, that the fence between the two parcels of land has been in existence continuously and in the same position for more than thirty years. Since 1946 some of appellees have, at different times, lived on the Coe land during which time they have pastured the land, and on occasions they have cultivated the same land. Owners of the Stewart land have at no time during all the years objected to the location of the fence or complained about the occupancy by appellees of the land west of the fence—that is, not until the recent acts by appellant which precipitated this litigation.

It may be conceded, as claimed by appellant, that there never was any express agreement to treat the fence as the

dividing line between the two parcels of land. Such an agreement, however, may be inferred by the actions of the parties. In the early case of *Deidrech* v. *Simmons,* 75 Ark. 400, 87 S. W. 649, this Court said:

"The proprietors of adjacent lands may by parol agreement establish an arbitrary division line, or an agreement may be inferred from long continued acquiescence and occupation according to such line, and they will be bound thereby. (Citing cases.)

* * *

"In *Burris* v. *Fitch, supra,* [76 Cal. 395, 18 Pac. 864] the Supreme Court of California held that the acquiescence by a landowner, manifested by silent assent or submission, with apparent consent, for a long period, in the location of a fence as the dividing line between his land and that of the adjoining proprietor, operates to estop him from questioning the correctness of the location."

On this point, the principle announced in the *Simmons* case has been approved by us many times. See: *Payne* v. *McBride,* 96 Ark. 168, 131 S. W. 463; *Robinson* v. *Gaylord,* 182 Ark. 849, 33 S. W. 2d 710; *Peebles* v. *McDonald, etc.,* 208 Ark. 834, 188 S. W. 2d 289; *Lollar* v. *Appleby,* 213 Ark. 424, 210 S. W. 2d 900; *Batson* v. *Harlow,* 215 Ark. 476, 221 S. W. 2d 17; and, *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S. W. 2d 490. In the last cited case, the trial court held a fence had not been accepted as the boundary line, but we reversed the trial court saying:

"We have frequently held that when adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence."

In the same case we quoted from *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18, this statement:

" 'It is true that in this case the original rail fence line was established without a prior dispute as to boundary; but the recognition of that line for the many intervening years (34 in this case) shows a quietude and acquie-

scence for so many years that the law will presume an agreement concerning the boundary.' ''

See also *Western* v. *Hilliard,* 232 Ark. 535, 338 S. W. 2d 926. There can be no doubt, in this case, that the fence was visible, that it was in place for at least thirty-four years, and that the owners of the land east of the fence ''silently acquiesced'' in the location of the fence.

Appellant called as a witness the county surveyor and offered to introduce a survey of the subject lands on file in his office. The trial court refused the proffered survey and appellant assigns this action as reversible error. For several reasons, we are unable to agree with appellant. In the first place, what the official plat showed was immaterial, since appellees did not claim the fence was located on the true line. In the second place, since appellant did not set out what the survey would have shown relative to the position of the fence and the true line we cannot say appellant was prejudiced by its exclusion. In *Wallace v. Riales,* 218 Ark. 70, 234 S. W. 2d 199, we said:

''We have repeatedly held that an objection to the exclusion of testimony cannot be considered on appeal in the absence of a showing of what the testimony would have been.''

See also *Weston* v. *Hilliard, supra.*

It is our conclusion therefore that the decree of the trial court should be, and it is hereby, affirmed.

CALDWELL *v.* BOARD OF ELECTION COMMRS.

5-3014 368 S. W. 2d 85

Opinion delivered May 27, 1963.

Richard W. Hobbs, for appellant.

R. Julian Glover, for appellee.

PAUL WARD, Associate Justice. One phase of this litigation has already been before this Court. In the case of *Garland County Board of Election Commissioners* v. *Ennis,* 227 Ark. 880, 302 S. W. 2d 76, we held that the matter of abolishing certain townships (and combining them with other townships) was properly before the circuit court on appeal from the county court.

Upon remand the circuit court heard testimony from those opposing abolition of the townships, overruled their motion to dismiss, and then affirmed the order of the county court of December 5, 1956 which abolished certain designated townships and consolidated them with other townships.

The appellants, who are citizens and taxpayers of the abolished townships, seek, on appeal, to reverse the judgment of the circuit court on the grounds hereafter discussed.

One. The primary contention of appellants is that Ark. Stat. Ann. § 18-101 (Repl. 1956) does not invest the county court with power to abolish townships. This section reads as follows:

"The county court of each county in this state, shall from time to time, as occasion may require, divide the

county into convenient townships, subdivide those already established, and alter township lines."

Although this section has apparently never been construed by this Court, we think its language, when read together with related sections, makes appellants' contention untenable. It will be noted that under the quoted section the county court not only has the power to make the initial division, but it also has the power to make divisions "from time to time." We can only conclude from the wording of the section that the legislature meant to give county courts full power over formation of townships in their respective counties—including the power to abolish townships already formed. Section 18-103 directs the county clerk to report to the Secretary of State the establishment of any "new township" which seems to confirm what we have just said. Actually the county court's order "abolishes" nothing of substance, but merely assigns a name to a newly formed township.

Two. Appellants next challenge the sufficiency of the evidence to sustain the judgment of the circuit court. The petitioners, in asking the county court to abolish certain townships and combine them with others, gave as justification the improved conditions of transportation and the financial savings that would result to the county. This was not questioned by appellants. However, they presented testimony by residents of the several townships to show certain inconveniences would result to the people affected. In Davis Township some people would have to travel eight to twelve miles further to vote; in Wheatley Township some would be forced to travel about six miles further; In other instances the extra distance for some to travel was said to be from one to seven miles. On the other hand there was no showing that, with improved roads and improved modes of transportation, these people would be seriously inconvenienced. In the face of the record, as above indicated, we cannot say there was no substantial evidence to support the judgment of the trial court. In the case of *Barker* v. *Wist,* 163 Ark. 511, 260 S. W. 408, this Court considered an appeal from the circuit court on a matter which had been

appealed to it from the county court. In that case we said:

"It is from the circuit court that the appeal comes to this court, and we do not try the case de novo, and . . . we do not, on appeal from the circuit court to this court, consider the question of the preponderance of the testimony."

Three. Appellants say the trial court failed to pass upon appellants' motion to dismiss and upon Giles Evans' intervention because the court was of the opinion those questions were foreclosed by our opinion in the *Ennis* case, *supra.* It is contended this was error on the part of the trial court. An examination of the written findings included in the judgment negates this contention. A portion of such findings reads: ". . . the motion to dismiss filed herein on behalf of the respondents was considered by the court and the same was denied, and the motion to dismiss filed herein on behalf of the intervenor was likewise considered by the court and the same was denied."

The trial court's judgment, in part, reads: ". . . the order of the Garland County Court, dated December 5, 1956, is in all things affirmed and approved." Finding no error, we affirm the judgment of the trial court.

Affirmed.

HENDRICKSON *v.* DUNCAN.

5-3015 370 S. W. 2d 131

Opinion delivered May 27, 1963.

[Rehearing denied September 9, 1963.]

Francis T. Donovan, for appellant.

Virginia H. Ham, for appellee.

SAM ROBINSON, Associate Justice. The issue is whether appellee, Floyce Duncan, shall be required to pay part of the fee for the attorney employed by the appellant, Hendrickson, to take the necessary legal steps to partition 117.90 acres of land. Appellant owns 74/144, appellee owns 60/144, and others own 10/144 of the property. The chancellor held that the proceeding is adversary and that, therefore, appellee is not liable for a pro rata part of the fee for the attorney employed to prosecute the partition proceeding.

Hendrickson has appealed.

The action was instituted by appellant, Hendrickson, filing a complaint in the Chancery Court January 18, 1962 in which he alleged the interest owned by himself, Mrs. Duncan, and others, and asked for partition. Summons was issued and served on appellee as one of the owners. The complaint prays that "partition of said lands be made according to the respective rights of the parties aforesaid, or, if it be found that such partition cannot be had without material injury to the rights of the parties hereto, that said lands be sold and that the proceeds of such sale be divided among said parties . . . "

Appellee, Mrs. Duncan, immediately employed an attorney to represent her, and on February 9, 1962, filed a separate answer in which she asked that she be reimbursed for certain expenses she had incurred in connection with the property and asked that the property be partitioned. Everyone concerned must have understood that although Mrs. Duncan wanted the land itself divided among the owners, she strenuously objected to the land being sold and the proceeds divided. The case was therefore set for trial; the trial was held on April 4, 1962; and the property was finally sold under order of the court.

Mrs. Duncan testified at length on direct and cross-examination. It is clear from her testimony that the pro-

ceeding is adversary. She did not want the property sold as a unit; she wanted to divide it and was willing to take any part; in fact, she offered to take less than the interest she owned if it was divided. Although she was not living on the property at the time suit was filed or at the time the case was tried, she had lived on it for a long time, from 1928 to 1955. She testified that to her the land had a great sentimental value and that she hoped to go back there and retire. She stoutly resisted the sale of the land.

Ark. Stat. Ann. § 34-1825 (Repl. 1960) provides: "Hereafter in all suits in any of the courts of this State for partition of lands when a judgment is rendered for partition, it shall be lawful for the court rendering such judgment or decree to allow a reasonable fee to the attorney bringing such [suit], which attorney's fee shall be taxed as part of the costs in said cause, and shall be paid pro rata as the other costs are paid according to the respective interests of the parties to said suit in said lands so partitioned." This court has held, however, that the foregoing statute is not applicable in an adversary proceeding. *Warren* v. *Klappenbach,* 213 Ark. 227, 209 S. W. 2d 468.

The chancellor's finding that the proceeding is adversary is not contrary to a preponderance of the evidence. Appellee is therefore not liable for a part of the attorney's fee.

It might be added that Act 518 of 1963, dealing with attorneys' fees in a partition action is not applicable here as it did not become effective until this matter had been adjudicated.

Affirmed.

5-2991 370 S. W. 2d 62

Opinion delivered May 27, 1963.

[Rehearing denied September 9, 1963.]

Bruce Ivy, for appellant.

Ed B. Cook, for appellee.

JIM JOHNSON, Associate Justice. Appellants, Jessie Collie and others, are preferred stockholders in appellee, Little River Cooperative, Inc., and are seeking an accounting and an order compelling appellee to comply with its articles of incorporation and by-laws, which provide that an amount not exceeding six per cent of the par value of the fully paid up preferred stock shall be set aside for payment of dividends on such stock, which dividends shall have preference over all other dividends and distributions, and that after such payment there shall be first reserved an amount equal to not less than five per cent of the net savings (net profits) for the purposes of establishing and maintaining an allocated reserve of not less than twenty-five per cent of the aggregate value of all outstanding stock, and that whenever the total amount exceeds this twenty-five per cent the board of directors may apply such excess to paying off ratably by years the oldest outstanding preferred stock in the same order as originally issued. In addition to an accounting, appellants prayed that appellee be enjoined from distributing any patronage refunds (an annual refund to customers of the gin) until the six per cent

dividends have been paid, that appellee furnish appellants a financial statement of the corporation, that appellee be ordered to cancel all preferred stock issued in lieu of cash patronage refunds during those years that the business operated at a loss, that appellee be required to build up and maintain an allocated reserve of not less than twenty-five per cent of the aggregate par value of all the stock, and that appellee be ordered to apply all of the excess of the twenty-five per cent to redemption or retirement of preferred stock in accordance with the by-laws. The trial court found the issues in favor of appellee and dismissed the complaint, from which appellants appeal.

For reversal appellants contend that the trial court erred by ruling, in effect, that appellee's directors had not abused their discretion in the matters of dividends and maintaining the reserve, or that appellants failed to show such abuse.

The Little River Cooperative, Inc., was organized in 1946 under Act 116 of the Acts of 1921 (Ark. Stats. §§ 77-901 *et seq.*), Cooperative Marketing Associations, which provides that five or more persons engaged in the production of agricultural products may form a non-profit, cooperative association for processing, harvesting, marketing, etc., the products of the members. The principal products of this cooperative are cotton and cotton seed. It is empowered to do business with non-members so long as the business transacted with non-members is not greater in value than that transacted with members. The authorized 100 shares of common stock may be owned only by producers who agree to patronize the co-op, and no one may hold more than one share, or transfer it without approval of the board of directors. Common stock does not bear dividends.

Article 7, Sections 3 and 4 of the articles of incorporation read as follows:

"Section 3. The preferred stock of the association shall bear non-cumulative dividends not to exceed six per cent (6%) per annum if earned and declared by the board of directors; and such dividends shall have prefer-

ence over all other dividends or distributions thereof declared in any year. At the discretion of the board of directors, all dividends on preferred stock, or any part thereof, may be paid in additional certificates of preferred stock and/or credits on preferred stock. The preferred stock shall carry no voting rights, and such stock, or any part thereof may be redeemed or retired upon call of the board of directors from time to time, provided said stock is called and retired in the same order as originally issued. All such preferred stock so retired shall be paid for in cash at the par value thereof, plus any dividend declared thereon and unpaid; and such stock shall not bear dividends after the date fixed in the call for its retirement. Upon distribution of the assets of the association, in the event of dissolution or liquidation, the holders of prefererd stock, plus any dividends declared thereon and unpaid, before any distribution is made on the common stock.

"Section 4. After providing for dividends on preferred stock if earned and declared by the board of directors, any balance of annual net income then remaining shall be allocated and/or credited to all patrons, members and non-members alike, on a patronage basis, including such amounts as may be set aside in reserve by the vote of the directors. Any distribution of reserved and other allocated savings at any time shall be made on the basis of patronage in such methods as may be prescribed in the by-laws or ordered by the board of directors."

By-Laws Article X, Section 2, Allocation of Savings, reads as follows:

"The net savings, determined in the manner provided for in Section 1 of this Article, shall be allocated and distributed in the following order and manner:

"(a) An amount not exceeding six per cent (6%) of the par value of the fully paid-up shares of preferred stock outstanding shall be set aside for payment of dividends on such stock.

"(b) The remainder of the net savings shall be allocated to all patrons of the association on a patronage

basis. The basis of allocation shall be prescribed by the board of directors and may show the division of net savings of each activity, or business of the association.

"(c) Before any distribution is made of the net savings after provision for the payment of dividends on stock, there shall first be reserved an amount equal to not less than five per cent (5%) of the net savings for the purpose of establishing, building up and maintaining an allocated reserve of not less than twenty-five per cent (25%) of the aggregate par value of all outstanding capital stock. Such deduction shall be made from the net income of each activity or business of the association as prescribed by the board of directors.

Appellants own about 2.3% of the preferred stock of the co-op, which they obtained in 1956. The co-op paid a 5% dividend on preferred stock in 1956, 4% in 1957, 2% in 1958, none in 1959, 2% in 1960, 3% in 1961 and 4% in 1962.

The general reserve of the association was approximately $4,000.00 as of March 31, 1961 (the end of the fiscal year). Over the years, losses resulting from various ventures of the co-op in the amounts of $5,000, $16,000 and $1,000 have been charged against the general reserve. According to the testimony of the co-op manager, there would have been approximately $29,000 in the general reserve as of March 31, 1961, if these losses had not been deducted from the reserve.

In 1960 the net savings (profits) was $21,744.52; a 2% dividend, $4,100.00, was distributed to the owners of the 16,790 shares of outstanding preferred stock; the balance of the net profit ($17,744.52) was distributed to the 26 member and the few non-member patrons, 95% in cash and 5% in the general reserve to the patrons' credit. In 1962 the net savings (profit) was $44,157.96; a 4% dividend, $8,200.63, was paid to the preferred stockholders; $34,752.50 was distributed as advance patronage refunds. These years were selected at random from the record before us.

Appellants contend that this method of distribution of savings discriminates against the preferred stock-

holders in that there is no prospect for retirement or redemption of the preferred stock, and that although the co-op has shown a profit every year except 1959, a 6% dividend has never been paid, all of which is contended to be an abuse of discretion.

The preferred stock is non-voting stock.

From the record it is clear that the operation, management and control of this enterprise is absolutely vested in the hands of some 26 owners of common stock. From this group has been selected the board of directors who are responsible for the handling of the funds of the co-op. These people along with five or six non-members generally constitute the patrons of the gin here in question. It is undisputed that for many years the gin earned more than enough to pay the maximum six per cent dividend to the preferred stockholders, (and to set aside the minimum five per cent of profits for the allocated reserve), but rather than pay this amount the board voted to pay to themselves and the other patrons of the gin a lion's share of the savings. One of appellee's directors testified that he owns one share of common stock — one $100 share — and has no preferred stock; that for $100 he got in on the operation and last year alone (1961) saved $3,800.00. Appellee's explanation of the handling of the funds of the gin in this manner was, "In order to keep the ginnings up [retain their patrons] so we can pay anything. If we pay six per cent every year, there would come a time when there wouldn't be any earnings left to pay anybody anything." Following this testimony the manager of the gin testified that, "We are putting in new high capacity machinery at a cost of $101,000.00, in order to take care of the business. . . . We lost a thousand bales or better last year in not being able to gin it." Each year at the annual meeting, according to the testimony of one of the directors, the matter of setting up a fund to retire the preferred stock is brought up, and always voted down.

The co-op was built with borrowed money, that is, preferred stock, and there is now outstanding 16,790 shares of preferred stock representing, at $10 per share,

$167,900.00. The 26 active and voting members of the co-op each have one share of common stock worth $100.00, for a total of $2,600.00. (Some of the active members also own substantial amounts of preferred stock. This is not in issue.) The co-op manager testified that there is no market value for the preferred stock. The C. P. A. for the co-op testified that based on ordinary losses, (under the system of distribution practiced by the co-op) it would be very hard to ever build up the general reserve to twenty-five per cent.

It is axiomatic that the owners of a profitable business are entitled to a reasonable share of the profits of that business as well as being able to sell their interest in that profitable business. That is one advantage of our capitalistic system. In the instant case, appellants have received some share of the profits, but have so far been effectively denied any assurance that their stock will be redeemed, while the active members enjoy a profitable return from the investment of the preferred stockholders, all of which impels us to the conclusion that appellee's directors abused their discretion in failing to develop or maintain a rational balance between the amounts paid the preferred stockholders and the active members, and in failing to provide, maintain and build the allocated reserve required by the articles of incorporation.

We consider this case to be controlled by *Driver* v. *Producers Cooperative,* 233 Ark. 334, 345 S. W. 2d 16, and remand the cause for further development in the light of that opinion.

Reversed and remanded.

5-3006 368 S. W. 2d 80

Opinion delivered May 27, 1963.

Digby & Tanner, for appellant.

James L. Sloan and *Wright, Lindsey, Jennings, Lester & Shults,* for appellee.

JIM JOHNSON, Associate Justice. This is a suit to foreclose a materialman's lien. Appellant James S. Scott, doing business as Scott Lumber Company, filed suit in Pulaski Chancery Court on May 18, 1962, against appellees, Cornelias Vuurens and Violet K. Vuurens, his wife, Weston R. Coon and Ruth L. Coon, his wife, and Republic Investment Company of Arkansas, seeking judgment for $5,234.46 against Vuurens and in rem against real property now owned by the Coons and mortgaged to Republic Investment Company, for materials furnished between September 7, 1961 and May 7, 1962, for construction of a house at 3624 Central Street in Little Rock. When building was commenced, Vuurens owned the property and had obtained a construction money mortgage for $7,500.00 from Republic on August 28, 1961. In March when the house was near completion, it was sold to the Coons who executed a mortgage to Republic for $12,100.00, who in turn released Vuurens' construction money mortgage. Appellant sought to have his judgment (when obtained) be declared paramount to the Coons' and Republic's interests in the property, and prayed that the property be sold if the judgment be not

satisfied within a fixed time. The Vuurens answered with a general denial and alleged affirmatively that the debt sued on had been fully paid and extinguished. The Coons filed a general denial, and Republic Investment Company admitted the two mortgages, and alleged that the release and satisfaction of the former mortgage was invalid because of failure of consideration and misrepresentations on the part of Vuurens and prayed that the release of the August 28, 1961 construction money mortgage be set aside and that mortgage be reinstated.

Vuurens then filed a counterclaim against appellant alleging that he (Vuurens) conveyed certain other property in which he owned an interest to appellant in full satisfaction of the debt, and that, if the court should sustain appellant's complaint, then that conveyance should be cancelled.

On October 29, 1962, the Chancellor entered a decree finding that the debt of Vuurens had been fully paid and extinguished, dismissed the complaint with costs taxed against appellant, and dismissed the counterclaim as moot. From that decree comes this appeal.

The principal question involved is whether the parties (appellant and Vuurens) intended that the conveyance of the interest of Vuurens in the other property to appellant be in complete satisfaction of the debt here sued on.

Appellant and Vuurens had been doing business together for three or four years, Vuurens having built 12 houses and appellant furnishing much of the material. At the time Vuurens started to build the Central Street house, he owed appellant a considerable amount of money for materials furnished to other jobs on which the lien time had run. On November 9, 1961, Vuurens paid appellant $1,715.44, and on December 15, 1961, $750.00, which reduced Vuuren's total indebtedness to appellant to approximately $10,000.00. The part of the total indebtedness sued for here for materials and advances furnished for the construction of the Central Street house is $5,234.46.

Vuurens had purchased ten acres of property in southwest Little Rock from Robert Lowe for the sum of $19,000.00, payable $60 a month, on which he still owed about $7,000.00. Since purchasing the Lowe property, Vuurens had improved and sold two front lots which faced on a highway, leaving about 8¼ acres in the tract. Vuurens became three months in arrears in his payments to Lowe, and Lowe elected to accelerate the debt and filed suit in Pulaski Circuit Court on February 27, 1962, for the balance owed. An answer was not filed on behalf of Vuurens, however Lowe's attorney testified that he advised Vuurens' attorney it would not be necessary to file an answer if the arrears were paid to date. Lowe's attorney was later advised by Vuurens' attorney that appellant might pay the arrearage and assume the obligation. On April 20, 1962, Lowe and his attorney went to appellant's office where appellant exhibited a quitclaim deed from Vuurens and his wife and stated that he and Mr. Vuurens had worked out an arrangement whereby he (appellant) was to make an assumption of this obligation. Appellant thereafter paid the arrears, attorneys fee and court costs and assumed the obligation.

There is no dispute about the amount that Vuurens had purchased from appellant, or the amount he paid appellant, and that Vuurens and his wife conveyed the Lowe property to appellant. Virtually all other testimony appears to be disputed.

The value of Vuurens' equity in the Lowe property is disputed — the testimony ranged from $1,000 (appellant's testimony) to around $10,000 (Vuurens' testimony). Expert witnesses for both appellant and appellee testified as to the value of the property in acreage. This 8¼ acres was located adjacent to a new subdivision (Twin Lakes). One of appellant's experts testified on cross-examination that there would be between 3 and 3½ lots per acre involved in this property and that he knew that two lots were sold on this property (out of the original 10 acres) where the F. H. A. permitted $1,500.00 per lot evaluation.

Vuurens testified that he conveyed the Lowe property to appellant in satisfaction of his entire account,

including the account here sued on, and also testified that after the conveyance he received no further statements of account from appellant. Appellant testified that Vuurens told him he had lost the property because his attorney hadn't answered the suit and that the only consideration for the quitclaim deed was his (appellant's) paying the arrearage, court costs and attorneys fee and assuming the balance of the obligation. However, in appellant's deposition taken prior to trial, it was shown that appellant testified in eight different places that he had paid Vuurens a $100.00 consideration mentioned in the deed. Appellant therein stated that he paid the $100.00 "by cash"; that the record "wouldn't show up in my company books"; that he "just paid him" and "without receipt"; that the $100.00 was the only consideration; that he told Vuurens the $100.00 was all that he was to get; that he paid Vuurens the $100.00 when the deed was delivered to him at the appellant's store; and that the phrase "$100.00 and other valuable considerations sounds like a legal term to me." Yet at trial the testimony was that it "gradually came back to him that he had not paid Vuurens $100.00." Appellees argue in effect, and we agree, that it would be inconsistent for appellant to maintain that he paid Vuurens $100.00 and at the same time contend that Vuurens owed him over $10,000.00 on several accounts.

Appellant testified that since Vuurens did not direct him where to apply the November and December payments, he applied them against Vuurens' old accounts. The escrow agent for the National Abstract Company (handling disbursement of the construction money) testified that she called appellant just after each of the payments to be sure that the payments were credited against the account on the Central Street house. She also testified that prior to but while in the process of closing the Coon loan, she called appellant to be sure Vuurens was paid up, and that appellant advised her that his account was "closed in full." Appellant while admitting the telephone conversation with the escrow agent vigorously disputed the contents thereof. The record reveals that approximately two months elapsed between

this conversation and the filing of the present law suit. In the meantime, on April 20, 1962 the quitclaim deed to appellant was executed.

Testimony on other material points is similarly conflicting. This court stated in *Dearien* v. *Lancaster*, 221 Ark. 98, 252 S. W. 2d 72, "With the testimony about evenly balanced we are not in a position to say that the chancellor's conclusions were wrong. The vital issue was that of credibility, and his opportunity to decide that question was immeasurably better than ours." We have examined the record and testimony closely, and on trial *de novo* we cannot say that the chancellor's findings are against the preponderance of the evidence.

Affirmed.

CUMMINGS *v.* UNITED MOTOR EXCHANGE.

5-3007 368 S. W. 2d 82

Opinion delivered May 27, 1963.

J. Fred Jones, for appellant.

S. Hubert Mayes and *S. Hubert Mayes, Jr.*, for appellee.

FRANK HOLT, Associate Justice. This is a Workmen's Compensation case in which the claimant-appellant, Ernest J. Cummings, contends that the payment of compensation benefits to him by the appellee, Maryland Casualty Company, was terminated prematurely.

On March 4, 1960, while employed by the appellee, United Motor Exchange, Inc., the appellant suffered a back injury when his foot slipped in some oil as he attempted to turn an automobile motor on the floor. As a result of this injury the appellant was paid Workmen's Compensation benefits for a period of twenty-five weeks or until September 1, 1960. Appellant contends that the payments for temporary total disability and reasonable medical expenses should have continued until March 6, 1961. The Referee disallowed his claim, the full Commission agreed with the Referee, and from the Circuit Court's judgment affirming the Commission comes this appeal.

The appellant urges for reversal the sole point that there is no substantial evidence he had sufficiently recovered from his unquestioned compensable injury to enable him to return to work on September 1, 1960.

The appellant had previously sustained a back injury in 1956 for which he was being paid a 10% permanent partial disability at the time of the present injury. Following the present injury and until he was discharged by Dr. Richardson it appears that he was hospitalized three separate times for observation and treatments consisting of physiotherapy and traction because of his persistent complaint of being in pain. He was examined by various doctors, including two neurosurgeons, who reviewed spinal myelograms made of him in August, 1957, and in June, 1960. They found no evidence of a herniated or ruptured disc. It is undisputed that his pain and discomfort persisted.

Dr. Richardson, in his final narrative report on July 19, 1960, wrote that upon seeing the appellant on July

12th he "was still complaining of discomfort in his right hip with activity" and "I discussed the problem again with Mr. Cummings and advised him to attempt to return to normal activity in hopes that this discomfort would disappear. As stated before, I am unable to find any physical cause for this man's symptoms and I do not believe that he has any permanent disability." Later he submitted his Surgeon's Final Report and Bill on a printed form according to which he had last seen the appellant on August 17, 1960 in his office. He indicated on this form that he had discharged him as cured and ready to return to work as of September 1, 1960. He did not see the appellant on this date or thereafter. The appellant did not return to work. His undisputed testimony is that following his discharge the discomfort and pain continued and as a result of his "misery" he was so disabled he could not and did not work and was confined to his house until December 27, 1960. On that date the appellant was admitted to the Veterans Administration Hospital where another spinal myelogram was made which then did not disclose a protruding disc. However, because of appellant's persistent complaint upon physical therapy activity, a re-evaluation of this myelogram did show "L-5, S-1 right protruding disc, and on 2-3-61 patient was taken to the operating room where he had an extruding nucleus pulposus removed from the L-5, S-1 interspace on the right." This operation relieved appellant of his pain.

In August, 1961, one of the physicians who originally observed the appellant following his present injury reviewed the Veterans Administration Hospital records and confirmed that the VA spinal myelogram "did show a definite defect at the L-5, S-1 interspace on the right side." He reiterated that the spinal myelograms made in August, 1957 and June, 1960 did not show such abnormality and, further, any disability in June, 1960 would have to be based on claimant's subjective complaints. Dr. T. M. Fletcher, who performed the successful operation, reported:

"This man who has had symptoms of low back pain and sciatica for some time was operated on 2-3-61 with

the removal of a herniated nucleus pulposus on the L-5, S-1 interspace on the right. This was a fairly large lesion and was undoubtedly the cause of his severe symptology. His post operative course was quite good and he was free of pain. * * * At the time of the most recent back strain which occurred in March, 1960, while working, he probably sustained the extrusion of the disc, and from that time up until the time of this hospitalization was disabled with severe back and leg pain."

We recognize the rule that a decision of the Workmen's Compensation Commission will be affirmed if there is any substantial evidence to support it. *Aluminum Company of America v. Williams,* 232 Ark. 216, 335 S. W. 2d 315; *McBride* v. *Ark-La Industries,* 235 Ark. 675, 361 S. W. 2d 532. However, whether the evidence is substantial in nature is also a question of law. *Boyd Excelsior Fuel Co.,* v. *McKown,* 226 Ark. 174, 288 S. W. 2d 614. In the case at bar we think there is no substantial evidence to support the Commission's finding that appellant's healing period ended September 1, 1960. It is true that various examining physicians were of the opinion that the spinal myelograms made in August, 1957 and June, 1960 did not disclose a herniated disc. Neither did the spinal myelogram made in January, 1961, at the Veterans Administration Hospital upon first interpretation. The crux of this case, however, is the question as to when appellant was physically able to return to work. The existence or non-existence of a herniated disc is not the primary issue — it is only a part of the total picture. Upon reviewing the evidence in this case we consider it to be overwhelming, and in fact the medical evidence so reflects, that the appellant was suffering pain and discomfort from an admitted compensable injury during all the time he was hospitalized or under observation. There is no evidence in this record to refute his claim that he continued to suffer pain and discomfort after September 1, 1960. His claim of disability is abundantly corroborated by his admission into the Veterans Administration Hospital on December 27, 1960 where he was hospitalized and treated for several weeks before Dr. Fletcher operated and removed a large lesion

on February 3, 1961. Following this the appellant described his condition as follows: "I feel like a new man altogether since the operation."

It is the intent and purpose of our Workmen's Compensation laws that they should be liberally construed and, further, that doubtful cases are to be resolved in favor of the claimant. *Boyd Excelsior Fuel Co.,* v. *McKown, supra; McBride* v. *Ark.-La Industries, supra.*

The judgment of the Circuit Court is, therefore, reversed and remanded with directions that the Circuit Court remand the case to the Workmen's Compensation Commission with directions to award the appellant temporary total disability from September 1, 1960 to March 6, 1961, together with reasonable medical expenses. Reversed.

5-3011 368 S. W. 2d 265

Opinion delivered June 3, 1963.

[redacted]

Robert E. Irwin, for appellant.

D. B. Bartlett, for appellee.

CARLETON HARRIS, Chief Justice. Appellant and appellee were married in Johnson County on June 9, 1962. The instant suit for divorce was instituted by appellee on August 30, 1962, a few days after the parties had separated, in which she alleged general indignities. Appellant answered with a general denial, specifically pleaded condonation, and filed a "counterclaim" for divorce, likewise alleging general indignities pursued until his condition in life had become intolerable.[1] Following the filing of amendments to the pleadings, the cause proceeded to trial. At the conclusion of the evidence, the court entered its decree, granting appellee an absolute divorce, and from such decree, appellant brings this appeal.

We are unable to consider this appeal on its merits since appellant has failed to comply with Rule 9 (d) of the rules of this court. We have stated numerous times that we are not required to explore a record that is pre-

[1] According to appellant's statement of the case, this "counterclaim" was dismissed prior to the trial. It is not involved in this appeal.

sented to us, but that the duty rests on appellant to furnish this court such an abridgment of the record as will enable us to understand the matters presented. See *Allen* v. *Overturf,* 236 Ark. 387, 366 S. W. 2d 189, and cases cited therein. The pleadings and decree in this case are abstracted, but there is no abstract whatsoever of the testimony and exhibits which cover approximately 65 pages. A few references are made, in the brief itself, to isolated portions of the testimony, but not to a sufficient extent that we can comprehend the full nature of the evidence. As stated in *Reeves* v. *Miles,* 236 Ark. 261, 365 S. W. 2d 460:

"Although the record contains more than fifty pages of pleadings, exhibits, and testimony, appellant has presented us with no abstract of the same. The casual references in the argument to this testimony are not sufficient for us to formulate an informed opinion on the merits of the case. In such a situation this Court has heretofore uniformly affirmed the trial court's decree or judgment. See: *Ellington* v. *Remmel,* 226 Ark. 569, 293 S. W. 2d 452; *Porter* v. *Time Stores, Inc.,* 227 Ark. 286, 298 S. W. 2d 51; *Farmers Mutual Ins. Company* v. *Watt, et ux.,* 229 Ark. 622, 317 S. W. 2d 285; and, *Anderson* v. *Stallings,* 234 Ark. 680, 354 S. W. 2d 21."

Affirmed.

BELL *v.* HOWARD COUNTY TRAINING SCHOOL.

5-3027 368 S. W. 2d 266

Opinion delivered June 3, 1963.

[redacted]

John B. Hainen, for appellant.

Don Steel, for appellee.

CARLETON HARRIS, Chief Justice. At the beginning of school in the fall of 1962, fifty students, who had previously attended Howard County Training School District No. 38, a school district located in two counties, and appellee herein, situated at Tollett in Howard County, transferred to Sevier County High School, District No. 1, located at Lockesburg in Sevier County. Hereinafter, at times, these schools will be referred to as Tollett

and Lockesburg. Thirty-five of the fifty children live in still another school district, Mineral Springs School District No. 3, likewise a district in two counties, administered in Howard County. All of the fifty children live in Sevier County, and were transferred upon the individual applications of respective parents or patrons with the approval of Sevier County High School District No. 1 and the Sevier County Board of Education. Tollett School, through its Board of Directors, instituted suit against the directors of Lockesburg, appellants herein, alleging, *inter alia,* that such transfer of students could not be made without the approval of the Howard County Board of Education, and that this board had not given its approval. Appellee alleged that it would suffer irreparable damage in state aid for its school district unless appellants were enjoined from permitting the fifty students, residents of Howard County Training School District No. 38 from attending Sevier County High School District No. 1, and injunctive relief was sought. On trial, the court entered its decree restraining and enjoining appellants from permitting the aforementioned fifty students to attend the Lockesburg School. From such decree, comes this appeal.

The first question in this litigation is whether the fifty students were legally transferred from Tollett to Lockesburg. All facts were stipulated, except that appellants offered some additional evidence by parents of affected students. Part of this evidence was to the effect that the school at Lockesburg was not convenient for the particular students (whose parents testified), and other parents were of the view that their children were better satisfied, and would receive a better education at the Lockesburg School. Portions of the stipulation, which we deem pertinent to a determination of the litigation, not already mentioned in the statement of the case, are as follows:

"On June 1, 1949, the Sevier County Board of Education with the approval of the Howard County Board of Education and with the approval of Howard County Training School District No. 38 authorized and directed

the territory that was formerly Paraloma School District No. 54 in Sevier County to become annexed to Howard County Training School District No. 38, and on the same date the Sevier County Board of Education with the approval of the Howard County Board of Education and with the approval of Howard County Training School No. 38 authorized and directed the annexation of the territory that was formerly Graves Chapel School District No. 60 in Sevier County to Howard County Training School District No. 38. Both of the above mentioned transfers were approved by the State Department of Education. * * *

"Since June 1, 1949, students of what was formerly the Paraloma School District No. 54 and Graves Chapel School District No. 60 have been attending Howard County Training School District No. 38, however, some patrons expressed the desire to attend Sevier County High School District No. 1 located at Lockesburg, Arkansas, and in connection therewith presented petitions to the Sevier County Board of Education to transfer to the Lockesburg School in the years of 1959, 1960 and 1961. For these years the students were refused permanent enrollment to the Lockesburg School. * * *

"Howard County Training School No. 38, because of the annexation orders mentioned above, embraces territory in Howard and Sevier County.

"There are a greater number of inhabitants and students residing in the Howard County portion of Howard County School District No. 38 than in the Sevier County portion of said District, and the Howard County Board of Education administers Howard County School District No. 38. * * *

"Neither the Howard County Training School District No. 38 School Board nor the Howard County Board of Education approved the transfer of said students.

"Mineral Springs School District No. 3 where 35 of the 50 involved students reside is a School District embracing territory in both Howard and Sevier County. There are a larger number of inhabitants and students

residing in the Howard County portion of Mineral Springs School District No. 3 than in the Sevier County portion of said District, and said School District is administered by the Howard County Board of Education."

Neither the stipulation nor the oral evidence reflects whether the thirty-five pupils in the last named district, were ever properly transferred from the Mineral Springs District to Howard County Training School District No. 38.

Our statutes authorize a transfer of children from one school district to another. Section 80-1517, Ark. Stats. (1960 Replacement) provides:

"The county board of education shall have power, upon the petition of any person residing in any particular school district, to transfer the children or wards of such person to a district in the same county, or to a district in an adjoining county for school purposes. * * *"

Section 80-1518, Ark. Stats. (1960 Replacement) further sets out:

"From and after the passage of this Act no County Board of Education shall make an order transferring any school child or children from one district to another until and unless consent of the Board of Directors of the district to which such child or children are sought to be transferred has been secured in writing, such written consent to be filed in the office of the County Clerk of the county from which such child or children are to be transferred."

Appellants argue that the paramount authority for any transfer rests within the receiving district, and since the receiving district, in this case, approved the transfer of these children, same is valid. Appellants further rely upon the provisions of Section 80-1527, Ark. Stats. (1960 Replacement), a portion of the "Pupil Assignment Act,"[1] and the apparent purpose of offering the testi-

[1] This act was held valid in the case of *Dove* v. *Parham*, 176 F. Supp. 242.

mony of various parents was to come within the provisions of that act.[2]

While we concur that a child cannot be transferred to another district without the consent of the Board of Directors of the receiving district, we do not agree that the paramount authority rests with the Board of the receiving district; rather, a valid transfer requires the "consent" of both the "sender" and the "receiver." The transfer must be made by the County Board of Education in which the "sending" district is located (§ 80-1517), or in the case of adjoining districts, by mutual agreement between the two local Boards of Education ("sending" and "receiving").[3]

Pertinent portions of § 80-414 (1960 Replacement) read as follows:

"Districts may be formed embracing territory in two (2) or more counties on order of the County Board of Education in each county where a part of the district will be situated, and changes of boundaries of school districts in such situations may be made in the following manner: When copies of a petition of a majority of the qualified electors in each district affected, praying for the formation of such a district, are presented to the County Board of Education concerned, the County Board of Education of the county in which lives the largest number of inhabitants of the territory affected shall, within five (5) days, give notice to the county and district boards affected of a hearing to be held not less than ten (10) days nor more than thirty (30) days from the date of said notice, to be held at some designated time and place in the proposed district. The County Board of Education, or their duly constituted representatives, of each coun-

[2] Section 80-1527 deals with factors considered in assignment of pupils, and *inter alia*, provides that the local board of education shall consider "the availability of transportation facilities; * * * the psychological qualification of the pupil for the type of teaching and associations involved; * * * the choice and interests of the pupil."

[3] Section 80-1528 (1960 Replacement) provides: "A local Board of Education may, by mutual agreement, provide for the admission to any school of pupils residing in adjoining districts whether in the same or different counties, and for transfer of school funds or other payments by one Board to another for or on account of such attendance."

ty in which territory of the proposed district is situated, shall attend such hearing and shall consider such facts as they may deem pertinent for consideration in the formation of the proposed district. Within five (5) days after said hearing the County Board of Education of each county in which territory of the proposed district is situated, if in the judgment of said boards such a district should be formed, shall issue an order transferring the territory affected in their respective counties, to the proposed district. Said order shall be filed with the county supervisor of each respective county and with the county supervisor of the county in which is situated the largest number of inhabitants of the territory affected. Such district thus formed, for all school purposes, shall be thereafter a part of the county in which is situated the largest number of inhabitants of the territory affected. * * *"

It is stipulated in this litigation that "there are a greater number of inhabitants and students residing in the Howard County portion of Howard County School District No. 38 than in the Sevier County portion of said district, and the Howard County Board of Education administers Howard County School District No. 38." It is also admitted that neither the Howard County Board of Education nor the Howard County Training School District No. 38 school board approved the transfer of these students. Thus, the pupils were not transferred in accordance with the provisions of either § 80-1517 or § 80-1528. It follows that the transfer was not properly made.

A similar dispute arose in *Gillham School Dist. No. 47 of Sevier and Polk Counties* v. *Millard,* 203 Ark. 1121, 160 S. W. 2d 215. There School District No. 47 included territory in both Sevier and Polk Counties, with the larger number of its inhabitants residing in Sevier County. The County Board of Education, or County Court, of Polk County transferred a number of students from District No. 47 to District No. 79, which embraced territory in only Polk County. This Court, in holding

that the action of the Polk County authority in making such transfer was illegal, said:

"The trial court found, and the undisputed facts sustain the finding, that a majority of the inhabitants of district No. 47 reside in Sevier County. Section 11486[4] provides in part that 'for all school purposes such district situated in two or more counties, shall be a part of the county in which is situated the largest number of inhabitants of the territory affected.' District No. 47, under the statute, is a Sevier County district for all school purposes, and its domicile is in Sevier County. * * * That part of Polk County embraced in District No. 47 being in Sevier County for all school purposes, it follows that Sevier County authorities and not Polk County authorities have and had the right to transfer students or pupils out of District No. 47 into District No. 79 upon proper application. Polk County officials had no authority or jurisdiction to transfer students or pupils out of the Sevier County district to District No. 79, and the order doing so being void is subject to collateral attack."

The Pupil Assignment Act can be of no aid to appellants for § 80-1527 only authorizes a county board of education[5] to assign or transfer students to other schools *"within its jurisdiction."* Here, the transfers were made by Sevier County High School District No. 1 and the Sevier County Board of Education. Neither had jurisdiction over pupils of Howard County School District No. 38 and the purported transfer was consequently not properly made.

However, the omission in the stipulation as to whether the Mineral Springs children were originally properly transferred to Howard County Training School District No. 38, necessitates a remand of this cause for further proceedings relative to the status of the thirty-five children who live in the Mineral Springs district. It is not clear whether this point was presented to

[4] This section is the same as the present § 80-414.

[5] Also referred to as "local boards of education." See § 80-1526.

the trial court, but appellants, in their brief, strenuously argue that no showing has been made that any of these thirty-five children have ever been transferred to the Tollett District, and that a "majority of the involved children do not live within the Tollett District, have never lived in the Tollett District and are not in any way a part of the Tollett District."

While, as stated, the transfer of the fifty children to Sevier County High School District No. 1 was not legally made, still if these children were never legally transferred from Mineral Springs to the Tollett School, the board of the latter district cannot be heard to complain. The Howard County Board of Education is not a party to this lawsuit, nor is the board of Mineral Springs School District No. 3. These boards have made no complaint—have sought no relief—unless these thirty-five children have been previously properly transferred from the Mineral Springs District to Howard County Training School District No. 38, appellee has no standing to question the action of the Sevier County Board of Education and Sevier County High School District No. 1.

As to the fifteen children (formerly in the Paraloma and Graves Chapel School Districts which were annexed to Howard County Training School District No. 38) the decree is affirmed, but the cause is remanded to the Sevier County Chancery Court with directions to conduct further proceedings for the purpose of determining whether the thirty-five students who reside in Mineral Springs School District No. 3 were legally transferred from that district to Howard County School District No. 38, and upon making such determination, to enter a decree consistent with this opinion.

It is so ordered.

BENNETT, ATTY. GENERAL *v.* N.A.A.C.P.

5-2575 370 S. W. 2d 79

Opinion delivered June 3, 1963.

[Rehearing denied September 9, 1963.]

[redacted]

Bruce Bennett, Atty. General, by *Jack L. Lessenberry,* Asst. Atty. General and *John T. Jernigan,* Prosecuting Attorney, for appellant.

George Howard, Jr., Robert L. Carter and *Maria L. Marcus,* New York, N.Y., for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal poses the question of the constitutionality of four Acts adopted at the Second Extraordinary Session[1] of the 1958 General Assembly of Arkansas. The Acts adopted at that session, and here involved, are: Act No. 12, which

[1] The session convened on August 26, 1958, pursuant to a Proclamation of the Governor, which called the session "To consider and, if so advised, enact laws for the following purposes: 1. To regulate the administration and financing of public school and education, and to make appropriation for such purposes. 2. To make appropriation to pay the expenses and per diem of this Extraordinary Session of the General Assembly."

empowered the county judge of any county to require certain organizations engaged in specified activities connected with the schools to furnish stated and required information; Act No. 13, which empowered the Attorney General of Arkansas to obtain access to the files, records, correspondence, etc. of certain organizations; Act No. 14, which added additional definitions to the crime of barratry and prescribed penalties; and Act No. 16, which added additional definitions to the crime of maintenance and prescribed penalties. The full text of each of these Acts may be found in Pages 2023 *et seq.* of Volume 2 of the printed Acts of the 1959 General Assembly.

The National Association for the Advancement of Colored People, joined with some of its officers, filed this suit in the Pulaski Chancery Court, seeking a declaratory judgment to the effect that each of the four Acts was unconstitutional.[2] The defendants in this suit were the Attorney General of Arkansas, the Prosecuting Attorney of the District of which Pulaski County is a part, and the County Judge of Pulaski County. Upon issues joined, the cause was heard *ore tenus,* and the Chancery decree was that Acts 12, 14 and 16 were unconstitutional, and that Act No. 13 was valid. The correctness of that decree is challenged by both direct and cross appeal.[3]

I. *A Justiciable Issue.* At the outset, the Attorney General insists that this is not a proper case for a declaratory judgment because there is no effort being made

[2] The prayer of the complaint was, *inter alia,* for ". . . a judgment or decree declaring Acts Nos. 12, 13, 14, and 16 of the 1958 Second Extraordinary Session of the General Assembly to be unconstitutional, in that these measures deny to plaintiffs, the classes they represent, contributors, and lawyers engaged in acting in good faith, the equal protection and due process guaranteed by the 14th Amendment to the Constitution of the United States."

[3] We have delayed our decision in this case because of the pendency in the Supreme Court of the United States of the case of *NAACP* v. *Robert Y. Button, Attorney General of Virginia,* which involved a barratry statute of Virginia similar to our Acts 14 and 16. The Supreme Court of the United States decided the case of *National Association for the Advancement of Colored People* v. *Button, Attorney General of Virginia,* on January 14, 1963. See 371 U.S. 415, 9 L. ed. 2d 405, 83 S. Ct. 328.

by anyone to proceed against the plaintiffs (appellees) under any of these Acts. This insistence fails to meet the issue. The NAACP first filed suit in the United States District Court for the Western Division of the Eastern District of Arkansas and challenged the four Acts here involved. A three-Judge Federal Court held, on October 8, 1959, that the NAACP should first proceed in the Arkansas Courts.[4] The NAACP and the other plaintiffs then filed this present suit for declaratory judgment in the Pulaski Chancery Court, and we hold—as did the Chancellor—that a justiciable controversy is presented.

II. *Acts Nos. 12, 14 and 16.* The Chancery Court held each of these Acts to be unconstitutional; and we quote the Chancellor's opinion on each of these Acts:

"ACT NO. 12.

"Act No. 12 has for its stated purpose the maintaining of law, peace and order in the administration of public schools. Briefly it provides that whenever any organization (which includes civic, fraternal, political, mutual benefit, medical, trade or other kind) engaged in 'activities designed to hinder, harass and interfere with powers and duties of the State of Arkansas to control and operate its public schools' the County Judge may 'request' that the organization file with the County Clerk certain information, under oath, revealing the name, members, officers and purposes of the organization. Assumedly an objectionable feature of the Act is the requirement that a list of the members must be made public, thus depriving the members of their asserted right to privacy. . . .

"Regardless of how laudable its purpose, Act No. 12 is too broad in its scope to meet constitutional requirements. Under its plain language, any organization which questions the State's 'power or duty' in the opera-

[4] The memorandum opinion of the three-Judge Federal Court is in the transcript before us; and the Judges on that Court were Circuit Judge John B. Sanborn, and District Judges John E. Miller and J. Smith Henley.

tion of the public schools must comply with its provisions and subject its members to publication of their names. It is fundamental that every citizen has the legal and inherent right to access to the Courts to question in a lawful and peaceable manner any action of the State in the exercise of any of its powers and duties. This applies to the action of the State, not only with regards to the public schools, but to any other activity in which it may exercise its powers and duties. The effect of Act No. 12 is to subject any organization whose members desire to seek a ruling of the Court on the legality or constitutionality of the action of the State towards the public schools or with relation to the public schools to publicity which to some constitutes harassment. Any act of the Legislature which has as its purpose or effect the denial of the right of the citizen to free and untrammeled access to the Courts or which seeks by intimidation, vexation or otherwise, to discourage the exercise of that right is plainly unconstitutional. No obstacle can be legally placed between the citizen and his Court. Article 2, Section 13 of the Arkansas Constitution provides:

'Every person is entitled to a certain remedy in the laws 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.'

"By the above language the framers of our Constitution have stated specifically that justice may be obtained without purchase and without vexation, freely and promptly. This right of the citizen cannot be infringed by legislative act. *St. Louis Iron Mtn. Railway* v. *Williams,* 49 Ark. 492; *Riggs Co.* v. *Martin,* 5 Ark. 506. "There is yet another ground upon which this Act must fail. Although under Section 2 the term 'organization' is given a wide definition, under the provisions of Section 3 of the Act only those organizations are required to comply with the terms of that Act which are subject to the 'request' of the County Judge. Thus, the dis-

cretionary act of the County Judge is necessary to bring into play the provisions of the Act against any organization. The applications of the law must not depend upon the uncontrolled discretion of any public official or else there will be an unconstitutional delegation of power prohibited by Article 4, Section 1 of the Arkansas Constitution. The Arkansas Supreme Court has construed that constitutional provision to prohibit the Legislature from delegating to any public official the power to select those against whom state laws shall apply. To avoid the proscription against unconstitutional discrimination the law must apply to all persons within a named class equally and without favor or exception. It must be so complete in all of its terms and provisions when it leaves the legislative branch of the government, that nothing is left to the judgment of any appointee or delegate of the Legislature. *State* v. *Davis,* 178 Ark. 153; 11 Am. Jur. Sec. 215, p. 924.

"For the above reasons, it is the opinion of this Court that Act No. 12 is unconstitutional and invalid . . ."[5]

"ACTS NO. 14 AND 16

"Acts 14 and 16 will be considered together because they deal with subjects so inter-related that it is almost impossible to consider one without the other.

"The subject of these two Acts are 'Champerty', 'Maintenance' and 'Barratry'.

"Act No. 14 purports to define the crime of barratry and includes nine separate sections of definitions.

"Sub-section B of Section 1 is so vague, indefinite, uncertain, yet inclusive, that it would make difficult or impossible life in a society in relation to access to the judiciary and particularly is this true under a constitu-

[5] The Attorney General argues in this Court that any issue about Act No. 12 is moot because—says the Attorney General—Act No. 12 "was entirely superseded by Act No. 225 of 1959." We find no language in said Act No. 225 which expressly or impliedly repeals Act No. 12; so we consider such argument about repeal to be beside the point at issue here.

tional form of government. Acts which may 'tend to breach the peace' are so numerous as to beg description. Our form of government guarantees to all of us the right of free and uninhibited access to the judiciary, and this certainly implies that we must not be so fearful of every day and common acts that this access to the judiciary is actually fettered because of fear. This definition tends to impair freedom of thought and action with relationship of access to the judiciary.

"The proposed definition in Sub-section C of Section 1 makes the single act of proposing that a fellow man litigate, regardless of intention or the merits of the proposed litigation, or regardless of the good intentions of the proposer, a felonious act in this society punishable by heavy fine and imprisonment. It is well established in our law today in this State that a labor union cannot sue or be sued in its own name, but must do so through the individuals or representations of the individuals within that group. It would appear to this Court that if this provision could conceivably be held valid, that this would effectively bar labor unions and other unincorporated associations from access to the judiciary; and, as previously stated, under our Constitution this cannot be done.

"Sub-section D of Section 1 is equally as invalid as are sub-sections B and C aforesaid, and for the same reasons, and in addition the Court would observe that the practice of law would be an extremely hazardous profession to pursue in face of the serious penalties imposed by the Act.

"Sub-sections F, G, H, and I of Section 1 do not make complete sentences or complete thoughts and for that reason define nothing.

"Act No. 16 deals with the common law crimes of maintenance and champerty, as therein greatly enlarged to include the giving, receiving, accepting of assistance or inducements to commence or prosecute any proceeding in any Court or before an administrative agency.

"Once again we call attention to the situation that unincorporated associations would find themselves inhibited, as well as many well intentioned and highly motivated people, in assisting indigent people in defending themselves against criminal charges or in prosecuting or defending civil actions. This definition goes considerably beyond, not only proprietary but constitutional limitations, and clearly violates the 14th Amendment to the Constitution of the United States and Article 2, Section 8 of the Arkansas Constitution.

"Sections 3 and 4 of Act 16 would seemingly destroy and certainly impair the power or right to make contracts between attorney and client.

"Section 5 of Act 16 provides penalties for filing false affidavits as required in Sections 3 and 4; and among other things imposes a heavier and more severe penalty upon non-resident attorneys than it does upon resident attorneys. For this reason the Act is discriminatory and violates the equal protection clause of both the Constitution of Arkansas and the United States.

"Section 6 would require a person to appear before a grand jury and would require testimony to be given regardless of whether such testimony or evidence would tend to incriminate him. This would seem to this Court to violate the Fifth Amendment to the United States Constitution and would also clearly violate Article 2, Section 8 of the Arkansas Constitution.

"Paragraph 7 purports to exempt certain types of litigation from the provisions of Act 16; and in the opinion of this Court constitutes an unlawful classification within a class without reasonable relation and is therefore discriminatory.

"It is the opinion of this Court that both Act No. 14 and Act No. 16 are unconstitutional and invalid."

We have quoted the opinion of the learned Chancellor to show the care and study he gave to the issues. There is no need for us to accept or reject the reasoning of the learned Chancellor, because our Acts Nos.

12, 14, and 16 were borrowed from the State of Virginia; and the Courts of that State, along with the Supreme Court of the United States, have finally destroyed the validity of these Acts. The Special Session of the General Assembly of Virginia in 1956 adopted five Chapters, from which we borrowed the language of our Acts Nos. 12, 14, and 16. In the case of *National Association for the Advancement of Colored People* v. *Robert Y. Button, Attorney General of Virginia,* 371 U.S. 415, 9 L. ed. 2d 405, 83 S. Ct. 328, Mr. Justice Brennan, in the Majority Opinion, stated that the Circuit Court of the City of Richmond held most of Chapters 31, 32, and 35 unconstitutional; and that the Supreme Court of Appeals of Virgina, in *NAACP* v. *Harrison,* 116 S. E. 2d 55, held Chapter 36 unconstitutional. So there was left only Chapter 33 on barratry and maintenance. The Supreme Court of the United States in the said Button case held the Virginia Chapter 33 to be unconstitutional; and in his concurring opinion in the Button case, Mr. Justice Douglas lists our Act as being modeled from the Virginia Act. We think the Supreme Court of the United States in the Button case has swept the foundations from under the Acts here involved; so we hold Acts Nos. 12, 14, and 16 to be unconstitutional.

III. *Act No. 13.* The Chancery Court held this Act No. 13 to be constitutional; but we hold that the Act is unconstitutional under the authority of the decision of the Supreme Court of the United States in *Bates* v. *City of Little Rock,* 361 U.S. 516, 4 L. ed. 2d 480, 80 S. Ct. 412. The Act No. 13 provides that if the Attorney General of Arkansas should have reason to believe that any organization was attempting to defraud the State of Arkansas of its taxes, the Attorney General might procure an *ex parte* order from any Chancery Court and have access to all of the files, records, correspondence, and other data of said organization.

When we consider the caption to the Act, the session at which it was adopted, and the circumstances that led to the calling of that session, we are convinced that the Supreme Court of the United States would hold

that the Act was aimed at the NAACP and required a compulsory disclosure of information which was proscribed by the decision of the Supreme Court of the United States in *Bates* v. *City of Little Rock, supra.* The whole tenor of the decision in the case of *NAACP* v. *Button* leads us to the inevitable conclusion that this Act No. 13 would be promptly declared unconstitutional in line with *Bates* v. *City of Little Rock, supra,* and *NAACP* v. *Button, supra.*

It follows that all four of the Acts here involved are hereby declared to be unconstitutional.

HOLT, J., disqualified and not participating.

JOHNSON, J. and BOYD TACKETT, Special J., dissent.

BOYD TACKETT, Special J. (dissenting). Act 12 of the Second Extraordinary Session of the Sixty-First General Assembly of the State of Arkansas, as Amended by Act 225 of the 1959 Legislature, Ark. Stat. 80-1910-14, provides in substance that a County Judge of any county of this state, who believes that any organization operating in the county is engaged in activities designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public schools shall afford a public hearing, after notice is given to the involved organization, to make a determination as to whether such organization operating within the involved county is engaged in such aforementioned activities; and that, upon a determination by the County Judge, after such notice and hearing that the organization is engaged in activities detrimental to the powers and duties of the State of Arkansas to control and operate its public schools, he shall order the organization to file with the office of the County Clerk, within a period of seven days after such order is made, the following: (1) official name of the organization and its list of members, (2) the office, place of business, headquarters or usual meeting place of the organization, (3) the officers, agents, servants, employees, or representatives of the organization, (4) the purpose of the organization, and (5) a statement disclosing whether the organization is subordinate to a parent organization, and, if so, the name of the parent organization. The legislation further provides that the organization shall furnish the required information; and the information thus filed becomes public information. A penalty is provided for violation of the legislative provisions.

Act 13 of the Second Extraordinary Session of the Sixty-first General Assembly of the State of Arkansas, *Ark. Stat.* 84-4012-15, provides, in substance, that if the Attorney General of the State of Arkansas should have reason to believe that any organization within the State has evaded, attempted to evade, or has defrauded the

State of Arkansas of taxes due it under the laws of the State of Arkansas, he may, upon procurement of an order of authorization *ex parte* from any Chancery Court, scrutinize and obtain copies of the records of the organization and obtain any evidence from the organization revealing evasion of the state taxes or violation of any of the laws of the State of Arkansas. The legislation requires the involved organization to make available to the Attorney General the involved records; a penalty is provided for violation; and the procured evidence becomes admissible in all courts.

Concerning Act 12, as amended, and Act 13, our United States Supreme Court, during the month of October, 1928, *State of New York, ex rel* v. *Zimmerman, et al.* 278 U. S. 63, held similar New York legislation to be Constitutional. The New York Statute—supposedly directed at the Ku Klux Klan—provided that organizations which required an oath prerequisite of membership, other than Labor Unions and Benevolent Orders, file with the Secretary of State of New York a sworn copy of its Constitution, rules, roster of members, officers, etc.

Our 1928 United States Supreme Court, in this *New York* v. *Zimmerman case,* held that the contention of being deprived of liberty of membership in the organization was without merit; that liberty, and other personal rights, must yield to the rightful exertion of police power; that the state might prescribe and apply to organizations any reasonable regulation calculated to define the purposes and activities within limits consistent with the rights of others and the public welfare; that the state was entitled to be informed of the nature and purpose of the organization, the membership, and by whom its activities were conducted; that the required information would operate as an effective or substantial deterrent from violations of public and private right to which the organization might be tempted if such disclosure were not required; that the requirement was not arbitrary or oppressive, but reasonable and likely to be of real effect; and that the power to require the dis-

closures included authority to prevent individual members of an association who had failed to comply from attending meetings or retaining membership with knowledge of its default. Our United States Supreme Court, in that instance, concluded that the "due process clause" of our Constitution was not violated.

However, on the 30th day of June, 1958, our United States Supreme Court did a complete about-face, turned a flip-flop, and, in the case of *NAACP* v. *Alabama,* 357 U. S. 499, ruled that a requirement for disclosure of NAACP membership was Unconstitutional.

Our 1958 United States Supreme Court purported to distinguish the Alabama case from the New York case by taking judicial knowledge that the Ku Klux Klan was engaged in unlawful intimidation and violence, but that, in effect, the NAACP could do no wrong.

Our United States Supreme Court has often stated that where individual freedom ends and state power begins is a delicate decision, and that a restraint upon individual liberties must be justified by clear public interest, *U. S.* v. *Carolene Production Company,* 304 U. S. 144, and *Thomas* v. *Collins,* 323 U. S. 516. There is certainly clear public interest in our schools and in our taxation. Our United States Supreme Court permits every individual freedom, guaranteed by our Constitution, except those afforded the NAACP, to be regulated and subjected to discipline and control. Yes, our United States Supreme Court permits chambers of commerce, labor unions, benevolent orders, charity organizations, and all other such organizations, even our churches, to be subjected to regulations, control and discipline—all except the NAACP.

We know that the Ku Klux Klan was originally formulated to provide unity strength with which to combat carpet bag rule and return our government to the local people. Even so, the Ku Klux Klan was misused and the true purpose of the organization was abused to the detriment of the people, resulting in disorder, breach of peace, violence and other unlawful activities.

Business people provide unity strength with such organizations as chambers of commerce; laboring people achieve unity strength through labor union; and the Negro people have achieved unity strength through the NAACP organization formulated to better the Negro race. Even so, often the true purposes of the chambers of commerce, labor unions, benevolent orders, charity organizations, churches, and even the NAACP are abused. We know that the NAACP has in some instances engaged in stirring up strife, creating resentment and hatred, and has violated laws for the purpose of supplying the United States Supreme Court with fodder for litigation. I am not a Ku Klux Klan sympathizer, and I do not disapprove of the original true purposes of the NAACP, but I do not believe in allowing the rights of the NAACP to exceed the rights of other such organizations. I am of the considered opinion that the individual freedom of NAACP members should be subjected to the same rules and regulations as members of other worthy organizations, including church members.

The majority of this court recites statements of the trial judge that Act 12 is too broad in its scope to meet Constitutional requirements; that the Act precludes organizations from questioning the state's power or duty in the operation of its public schools; and that the Act requires the identity of members of the organization who care to question the power or duty of the state in the aforementioned respect. I shall admit that our present United States Supreme Court will, no doubt, declare any legislation Unconstitutional which purports to regulate or restrict the NAACP and its members as other organizations and their members are regulated and restricted. Prior to the United States Supreme Court assuming the role of guardian for the NAACP—right or wrong—Act 12 was Constitutional; and I don't believe that our State Supreme Court should throw in the towel merely because we know that the United States Supreme Court will declare the legislation Unconstitutional.

I can find no verbiage in Act 12 precluding any organization from questioning the state's power or duty

in the operation of the public schools. For the identity of members of the organizations questioning the state's power or duty to be made known was consistently approved by the courts until the United States Supreme Court recently assumed the obligation of favoring the NAACP and its members with greater privileges than any other organization in this county. I can find no verbiage in Act 12, as amended, denying the right of any citizen to free and untrammeled access to the courts, or discouraging the exercise of that right, as concluded by the trial judge. I can not reconcile the conclusion of the trial judge that Act 12, as amended, constitutes legislative delegation of authority to the county judges, contrary to Article 4, Section 1, of the Arkansas Constitution. Our legislature has many times delegated investigative and judicial authority to county judges, and our Supreme Court has ruled such legislation Constitutional. It will be noted that the trial judge in this instance ruled Act 13 to be Constitutional while ruling Act 12, as amended, to be Unconstitutional, even though Act 13 delegates similar investigative, enforcement and judicial authority to the Attorney General as Act 12, as amended, delegates to the County Judge. The County Judge, by virtue of the provisions of Act 12, as amended, is authorized to make a judicial determination, after notice and hearing, as to whether an organization is engaged in activities detrimental to the powers and duties of the state of Arkansas to control and operate its public schools. The Attorney General, by virtue of the provisions of Act 13, is authorized to investigate any organization, and, upon procurement of an *ex parte* order from any Chancery Court, scrutinize the records and activities of the organization, determine whether the organization is evading state taxes or violating laws of the state, and make the evidence obtained available to the courts.

Most legislation delegates enforcement authority, and I respectfully state that there is no way to justify holding Act 13 Constitutional while, at the same time, holding Act 12, as amended, Unconstitutional. Either would be declared Constitutional except for the recent role of the United States Supreme Court in champion-

ing the NAACP. The provisions of Act 12, as amended, do not afford discrimination as indicated by the trial judge—the legislation applies to all organizations and all persons without favor or exception. All of us know that were the NAACP excluded from the provisions of Act 12, as amended, and Act 13, the United States Supreme Court would find no difficulty in finding the legislation Constitutional. There just must not be any legislation which will in any wise regulate the NAACP if the present United States Supreme Court can be expected to find same Constitutional.

Act 14 of the Second Extraordinary Session of the Sixty-first General Assembly of the State of Arkansas, Ark. Stat. 41-703-6, prohibits any person who has no direct interest from engaging in, exciting and stirring up suits and quarrels between individuals, between an individual and the state, or between an individual and any legal entity; prohibits any person committing a breach of the peace for the purpose of creating litigation; prohibits proposing that another person institute and prosecute a suit against another person, the state, the nation, or any other legal entity; prohibits encouraging, aiding and abetting commission of breach of the peace for litigation purposes; prohibits financing litigation in which the financier has no interest; and prohibits the institution, prosecution, or maintenance of litigation by a person who has no direct or substantial interest in the relief sought.

Act 16 of the Second Extraordinary Session of the Sixty-first General Assembly of the State of Arkansas, Ark. Stat. 41-707-13, prohibits solicitation or donation of finances, and prohibits receiving or accepting financial assistance for the purpose of encouraging or maintaining litigation. The Act does not prohibit regular employment of an attorney upon a fixed fee or contingent basis. The Act provides that a party-litigant, the court or agency in which the proceeding is pending, may require a party-litigant to execute and file with the court an affidavit that he has not received or conspired to receive assistance as an inducement to prosecute or maintain the action. The Act also provides that a party-litigant, the

court, or agency in which the proceeding is pending, may require an involved attorney to execute and file with the court an affidavit to the effect that he is not receiving and will not receive a fee for his services in an action from a source other than his client. The act provides penalties for violation of the Act.

Act 16 provides that no person shall be exempt from attending, testifying, or producing evidence before a Grand Jury, before any court, or in any cause based upon or growing out of an alleged violation of the Act; but that such person shall not be prosecuted or subjected to any penalty concerning any matter about which he is required to testify, produce evidence, or the like. The Act exempts attorneys who are parties to contingent fee contracts with their clients, and wherein the involved litigation concerns title to property, tax matters, common carrier rates, public utilities, criminal prosecutions, and wherein the involved attorney is participating through finances of legal aid societies. The Act prohibits and punishes champerty, maintenance, and barratry, and precludes the solicitation of or stirring up of litigation by those who are not real parties in interest to the subject matter of the litigation.

Barratry, maintenance, and champerty have been prohibited by common law and state statutes for many years; and the evils of barratry, maintenance, and champerty have been condemned by our courts over the years, and also condemned by Canons Rules of Professional Ethics governing attorneys, litigants, and litigation. There is no justification for excluding the NAACP, its attorneys and litigants from barratry, maintenance, and champerty.

Permission to practice law, for instance, is a wonderful privilege, affording a great range of power. A person privileged to practice law holds within his palm the destiny of lives, liberties, and an untold amount of property of others. Attorney activities should be closely regulated. The United States Supreme Court does not question such statements concerning any other than the NAACP.

In the recent case of *NAACP* v. *Button,* 371 U. S. 415, seven of the plaintiffs in the Virginia Public School suits testified that they were unaware of their status as plaintiffs, and ignorant of the nature and purpose of the suits to which they were parties. They did not even know their attorneys; and, of course, the NAACP attorneys did not know them. Even though the NAACP was openly practicing barratry, maintenance, and champerty with ignorant people, the United States Supreme Court condoned such actions.

All attorneys have been taught, and most are firm believers, that his services should not be controlled or exploited by any agency, personal or corporate, which interferes or intervenes between client and lawyer; that a lawyer's qualifications and responsibilities are individual; that a lawyer should avoid all relations which direct the performance of his duties by or in the interest of such intermediary; that his relationship to his client should be personal and that his responsibility should be directly to his client—not through a litigation peddler or canvasser. Solicitation of legal business by the NAACP violates Chapter 33 of Canons Rules of Professional Ethics. In order to permit the NAACP to indulge in barratry, maintenance, and champerty—a privilege not afforded any other organization — the United States Supreme Court in the Button case ruled Virginia legislation prohibiting such practice as Unconstitutional.

No this legislation does not curtail access to our courts. It affords justifiable restrictions to the evil practice of barratry, maintenance, and champerty—nothing more. The NAACP just does not desire such restrictions.

Precluding a person without true interest from engaging in stirring up litigation, precluding commission of breach of the peace for the purpose of creating litigation, and precluding a financier from engaging in litigation in which he has no interest, does not impair freedom of thought and action relating to access of the judiciary. I can see no wrong in the court having

benefit of the true litigants. In fact, the court is entitled to know the true parties to the litigation.

There is no reason why our legislation should preclude unincorporated organizations, such as labor unions, NAACP, and others, from participating in litigation in the names of the involved organizations, and thereby afford the courts knowledge of the true party litigants.

All attorneys should be strenuously regulated for the reasons aforementioned, and for attorneys to be required to abide by professional ethics, court rules and regulations, should not constitute a hazardous operation. Surely, members of the medical profession should not be allowed to run rampant without regulation while they are engaged in activities that control the destiny of people's lives; and, for them to be so regulated as they are, does not place them in a hazardous profession. The legislation does not preclude assistance to indigent people in need of representation in litigation. In fact, the legislation permits legal aid societies to assist such litigants.

The legislation does not impair the power or right to employ an attorney. The legislation merely prohibits people without an interest from financing litigation. While the legislation requires the organization's officers and members to testify concerning the records and activities of the organization, such testimony can not incriminate the witnesses for the simple reason that the legislation provides that no such person shall be prosecuted or subjected to any penalty concerning any matter about which he is required to testify.

Actually, the evidence introduced in the trial court in support of contentions of the NAACP that this legislation will violate the Constitutional guaranties of the NAACP and its members is based purely upon speculation and conjecture. The involved legislation has not been enforced; and, therefore, no one knows whether there would be violations of the Constitutional guaranties of the NAACP. Even so, we might as well face the issue head-on and ignore the possibility that there is no justiciable issue, because we realize that the United

States Supreme Court will take judicial knowledge, regardless of the evidence, that the legislation is Unconstitutional.

The majority of this Court states, in effect, that because the Supreme Court of Virginia has acceded to the wishes of the United States Supreme Court and declared some of the involved legislation Unconstitutional, and that, because the majority of this court is of the considered opinion that the involved legislation will be declared Unconstitutional by the United States Supreme Court, the Arkansas Supreme Court may as well concede. This line of reasoning is as logical as advising the freedom loving people of Cuba that they may as well join the Communist Party because Castro is going to rule anyway. There is a possibility that our United States Supreme Court will in time return to sound judicial activities, render decisions based upon law and evidence, desist from legislation by judicial ediction, and treat the NAACP as all other such organizations are treated. That will not be possible if we voluntarily join the United States Supreme Court during its present recklessness. I do not believe that we should surrender and, thereby, accelerate the reckless disregard of our present United States Supreme Court for our fundamental democratic principles.

This being my first participation as Justice of an appellate court, I sincerely regret that I can not join in the majority opinion of this court. While I fully appreciate the position of the majority of this court, I must respectfully dissent to the majority opinion. No doubt the majority is influenced by the fact that they have been slapped in the face by recent decisions of the United States Supreme Court to such an extent as to cause them to yield to the United States Supreme Court without further ado. I just cannot condone that philosophy. I realize that the United States Supreme Court will declare the involved legislation Unconstitutional, but I do not believe that we should assist.

Therefore, I respectfully dissent.

JIM JOHNSON, Associate Justice (dissenting). I do not agree with the majority opinion. On the merits I would concur with the conclusions reached in the dissenting opinion of Mr. Justice BOYD TACKETT. However, in my view it was error to reach the merits since there is absolutely no justiciable issue presented so as to invoke the applicability of Act 274 of 1953 [Ark. Stat. Ann. § 34-2501 (Repl. 1962) *et seq.*] popularly known as the Arkansas Declaratory Judgment Act. I reach this conclusion notwithstanding the magnanimity of the three-Judge Federal Court's [Western Division of the Eastern District of Arkansas] deference to this court in its opinion of October 8, 1959.

On February 5, 1960 appellees filed suit in Pulaski Chancery Court against the Attorney General and certain Pulaski County officials praying for a declaratory judgment declaring Acts 12, 13, 14 and 16 of the Second Extra-ordinary Session of the Sixty-first (1958) General Assembly [codified, respectively, as Ark. Stat. Ann. §§ 80-1910, 84-4012 (Repl. 1960), §§ 41-703, 41-707 (Supp. 1961)] unconstitutional and further praying that appellants be enjoined from attempting to enforce the statutes. After trial of the issues presented the Chancellor, on May 15, 1961, rendered a Memorandum Opinion holding Acts 12, 14 and 16 unconstitutional and Act 13 valid. This appeal and appellees' cross-appeal are the result of that ruling.

For reversal appellants strenuously urge that the trial court erred by granting a declaratory judgment. It is contended that proceedings for a declaratory judgment, are only appropriate where there is a justiciable determinable controversy. Our rule relative to the contention is set forth in the recent case of *Andres* v. *First Arkansas Development Finance Corp.*, 230 Ark. 594, 324 S. W. 2d 97, as follows:

"Our declaratory judgment act . . . was not intended to allow any question to be presented by any person: the matters must be justiciable. In Anderson on 'Declara-

tory Judgments' 2d Ed. § 187, the general rule is stated as to declaratory judgments:

"Since purpose of the declaratory relief is to liquidate uncertainties and interpretations which might result in future litigation it may be maintained when these purposes may be subserved. 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. It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent or uncertain. A declaratory judgment will not be granted unless the danger or dilemma of the plaintiff is present, not contingent on the happening of hypothetical future events; the prejudice to his position must be actual and genuine and not merely possible, speculative, contingent, or remote."

This logical limitation adopted by our court generally prevails elsewhere. See 26 C. J. S., Declaratory Judgments § 24 *et seq.*

In the face of this rule the burden was on appellees to prove that there was a justiciable issue and hence a fit subject for declaratory judgment relief. See Am. Jur. Declaratory Judgments, §§ 69-70, Evidence and Trial Issues of Fact. See also 10 R. C. L., p. 897.

It is undisputed that no attempt has been made to apply the acts here complained of against appellees yet appellees contend that the mere fact that Acts 12, 13, 14 and 16 are on the books have adversely affected them in that there had been a loss of memberships and contributions. The principal witness for appellees, through whom it sought to prove appellees' assertions, was Clarence A. Laws of New Orleans, Louisiana, Field Secretary for the National Association for the Advancement of Colored People. Laws testified to the effect that the Arkansas memberships in his association had been declining since 1956. However, the record shows that the membership increased somewhat in the year 1958, the same years those acts were passed. In fact, the entire context of Laws' testimony, as well as the testimony of appellees' other witnesses, upon whom they relied to prove a justiciable issue, shows beyond question that it is entirely speculative as to what caused the drop in membership and the alleged loss of contributions. Therefore, from the record before us, it is impossible for me to conclude that appellees sustained the burden of proving that a justiciable issue existed. The majority opinion to the contrary effectively opens the gate for every special interest group in Arkansas to demand the entire time of the courts of this state in passing upon all statutes which might, in their wildest imagination, affect their special interest. This, of course, is clearly contrary to the intent of the Declaratory Judgment Act and such an abuse as exists in the case at bar should not bear the stamp of approval of this court.

For the reason stated, I would reverse and dismiss.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. *v.* ROWELL.

5-3013 368 S. W. 2d 272

Opinion delivered June 3, 1963.

Barber, Henry, Thurman & McCaskill, and *John Harris Jones,* for appellant.

Jay W. Dickey, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellant insists that there was no sufficient evidence offered by appellee to take this case to the jury. In 1949 appellant, Mutual Benefit Health & Accident Association of Omaha, Nebraska (hereinafter called "Mutual"), for value received, issued to the appellee, Hendrix Rowell, then 41 years of age and a practicing attorney, two policies of insurance, the pertinent provisions of which will be subsequently discussed; and Mr. Rowell regularly paid all premiums due on the policies and was at all times well and active until June 1958. One morning when he attempted to arise from his bed his right leg and arm gave way because of numbness, which gradually disappeared in the course of the day; but the next morning the same thing occurred.

Mr. Rowell consulted several neurosurgeons, and was advised that he had hardening of the arteries and arteriosclerosis of the brain; that nothing was mentally wrong; that if he continued his work as a lawyer the stress and strain could cause paralysis or death; that he should retire from the law practice and all other business activities; that he should get plenty of sleep and rest;

that he should not drive an automobile, but could take rides with a driver; and that he was to have regular monthly examinations. All of this was in June 1958; and Mr. Rowell assiduously followed the instructions and directions of his physicians. He filed claim with Mutual on the two policies herein on the basis of total permanent disability, and each month sent a doctor's report; and Mutual made regular monthly payments of $500.00 on the two policies. These payments began on July 23, 1958, and continued regularly each month until April 23, 1961, when all payments were discontinued.

In September 1961 Mr. Rowell filed the present action for the monthly payments delinquent since April 1961. The defenses of Mutual were: (a) that Mr. Rowell's disability was due to "mental infirmity," which was excepted from the policy coverage; and (b) that Mr. Rowell was not "continuously confined indoors," which was a policy requirement. Trial of the case to a jury resulted in a verdict and judgment for Mr. Rowell for past due payments, penalty, and interest; and Mutual brings this appeal, urging the points now to be discussed.

I. MENTAL INFIRMITY

Mutual insists that it was entitled to an instructed verdict because as it says—all the evidence shows that Mr. Rowell's disability was due to "mental infirmity." The insuring clause of each policy contained this language:

"(b) the term, such sickness, as used in this policy, shall mean sickness, the cause of which originates while this policy is in force and more than thirty days after the Policy Date . . . but shall not include . . . mental infirmity . . ."

The Trial Court gave its Instruction No. 1, which is not here claimed to be erroneous, and which reads:

"It is stipulated that Hendrix Rowell, plaintiff in this case, is totally disabled to practice law. You shall find for the plaintiff, Hendrix Rowell, unless you further find, as defined by these instructions, that his dis-

ability is the result of mental infirmity or that he was not continuously confined, according to other instructions defining said continuous confinement, or was not regularly attended by a licensed physician, as defined by these instructions."[1]

Mutual insists that the hardening of the arteries of the brain was a "mental infirmity"; and to sustain its argument on this point, Mutual cites and relies on, *inter alia,* the following cases: *Grabove* v. *Mutual Benefit* (Ala.), 1 So. 2d 297; *Moss* v. *Mutual Benefit* (Utah), 56 P. 2d 1351; and *Lyle* v. *Reliance Life Ins. Co.,* 197 Ark. 737, 124 S. W. 2d 958. We find these cases to contain factual situations entirely dissimilar from those in the case at bar, and we consider them of no application. Even though the burden of proof in this case was on Mutual to establish, by a preponderance of the evidence, its claim of mental infirmity, nevertheless, here is some of the evidence on behalf of Mr. Rowell which we think had direct bearing on this matter of "mental infirmity." Dr. R. E. Semmes, a recognized neurosurgeon, testified that he examined Mr. Rowell in 1958 and at subsequent times:

"There was no evidence of tumor, clots and so forth. In the absence of any pressure signs to indicate obstructive hydrocephalus, that would be called the dilution of the brain to get larger, the destruction was from degeneration, we can conclude the atrophy was on the basis of loss of circulation of the brain, a diminished circulation; that this in turn was probably due to hardening of the arteries . . . On examination there was a fine tremor of the right hand. There was no neurological

[1] In addition, the Trial Court further instructed, as regards mental infirmity, in Instructions 5 and 8, as follows:

"5. The Court further instructs you that as to the defense of mental infirmity the burden is upon the defendant to prove by a preponderance of the evidence that Hendrix Rowell was suffering from mental infirmity . . .

"8. The Court instructs the jury that the term 'mental infirmity' as used in the policies sued on in this case, means a mental weakness. If you find from a preponderance of the evidence in this case that the plaintiff's disability or inability to practice his profession is due to 'mental infirmity,' then the Court instructs you that your verdict shall be for the defendant."

deficit. There was some local vessel involvement in his right leg but no true imbalance. Cranial nerves were all intact. Examination of the eye-grounds showed arteriosclerosis of the retinal vessels but no pressure signs. There was no motor or sensory loss nor significant reflex changes . . .

"Q. Did you prescribe any type of exercise for Mr. Rowell?

A. No specific.

Q. Did you make any suggestion whether he should get outside and to visit?

A. As a general rule everyone needs exercise otherwise the joints and muscles . . . you . . . it is both . . . you must get a certain amount of interest with which to keep your physiology going.

Q. Therapeutic?

A. His attitude, his vision, hearing and without all those, (interrupted)

Q. This therapeutic value of exercising and sunshine is beneficial to a person?

A. That is essential . . .

Q. By this arteriosclerosis or hardening of the arteries at any time is there a possibility of a stroke for different sides of your body, different portions of your body?

A. Lack of circulation interferes with any organ and the brain, of course, controls your mental processes and emotional system and your movements and feelings and sight and hearing and judgment and just about everything else."

Whether by skilled cross examination Dr. Semmes' testimony was weakened was a question for the jury to decide. Furthermore, we mention that Mr. Rowell testified in the trial, both on direct and cross examination, and the jury was able to observe him. His testimony began before lunch, was interrupted by the lunch hour, and

was resumed in the afternoon; and, exclusive of exhibits, occupies 67 pages in the transcript. Thus, the jury had ample opportunity to see whether Mr. Rowell was "mentally infirm." Certainly a jury question was made; and the jury could well have concluded—as we do—that hardening of the arteries is a physical infirmity, since some of the arteries are a part of the physical body; that when the arteries in the brain harden and a mental atrophy resulted it was the result of a physical infirmity and not a mental infirmity. We find no merit in appellant's argument on "mental infirmity."

II. *Continuous Confinement.* Each of the policies sued on contain substantially this language as essential to the establishment of Mutual's liability:

". . . If the Insured, because of such sickness, shall be continuously confined within doors and regularly attended therein by a legally qualified physician . . ."

In addition to the Instruction No. 1, previously quoted, the Trial Court instructed the jury on this matter of continuous confinement in Instructions Nos. 4, 10, and 13, as follows:

"4. If you find from the testimony in this case that the plaintiff Rowell was advised by a reputable physician or physicians to take a reasonable amount of exercise and to subject himself to fresh air and sunshine, for the best interest of the treatment of plaintiff's condition from which he suffered, and further advised him to take automobile trips; and if you further find that the plaintiff transacted a limited amount of personal business, and, in good faith relying upon the advice of his physician or physicians, did take short walks and automobile trips, and took a moderate amount of exercise, and subjected himself to fresh air and sunshine, then you are told that this is in compliance with the provisions of the policy providing that the plaintiff must be continuously confined indoors, and you may take this into consideration, along with other evidence, in arriving at your verdict. . . .[2]

[2] Mutual objected specifically to this Instruction No. 4; and those objections will be discussed in Topic III, *infra.*

"10. The Court instructs you that if you find from the evidence that the plaintiff has not been continuously confined within doors, as explained in these instructions, or if so confined has not been regularly treated at the place of confinement by a legally qualified physician, then your verdict shall be for the defendant . . .

"13. The Court further instructs you that the burden is upon the plaintiff to prove by a preponderance of the evidence that he has been continuously confined within doors and that he has been under the professional care of a physician therein at such place of confinement as explained in these instructions. If you find that the plaintiff has not met this burden of proof, your verdict shall be for the defendant."

In March 1961 Mutual employed special investigators to trail Mr. Rowell and watch his every movement, in an effort to see if he was "continuously confined within doors"; and such investigators testified for Mutual in this case. But the testimony of Mr. Rowell and his physicians, as to their prescriptions and advice to him, were sufficient to make a jury question on this matter of continuous confinement within doors. In *Occidental Life Ins. Co.* v. *Sammons,* 224 Ark. 31, 271 S. W. 2d 922, we had before us a case in which the continuous confinement clause required the insured to be "absolutely unable to leave the house and yard situated immediately around the house . . ."; and that the insured should not leave such confines "except to be transported to the office of the physician or surgeon or the hospital or sanitarium . . ." In resisting Sammons' claim, the insurance company showed that he had regularly followed the practice of leaving his house and yard for the purpose of taking rides, walking for recreation, and visiting with friends at various places, but that all such activities were engaged in upon the advice of his physician; that from November 11, 1950 to December 30, 1950 he worked and earned $180.00 compensation, but that the work which he did was done upon the advice of his physician. After citing many of our leading cases, we held that Sammons had not violated the confinement clause of the policy:

"In giving a 'liberal' construction to a house confinement clause in a policy, the Arkansas Court is following the majority view of the Courts in the United States. Some states give 'literal' construction but the great majority of cases have expressly or impliedly rejected the 'literal' construction doctrine and have adopted a 'liberal' view similar to that of the Arkansas Court. These cases are collected in an annotated form in 29 A.L.R. 2d 1408, in which cases from twenty-seven states are cited following the 'liberal' construction view."

We have previously quoted a portion of Dr. Semmes' testimony as to the fact that certain exercise was of a therapeutic value. Dr. Semmes further testified as to his advice to Rowell:

"I thought he ought to keep himself active and get fresh air and a certain amount of exercise and occupy himself as far as he could without running any risks, and to follow the medical indications for hardening of the arteries."

Dr. George Talbot was Mr. Rowell's local physician in Pine Bluff and, along with Mr. Rowell, made monthly reports to Mutual, which original reports are in the record before us and are quite enlightening. Mutual knew all along that Mr. Rowell was going to Dr. Talbot's office and following his instructions. Dr. Talbot testified:

"Q. Did you recommend that Mr. Rowell take exercise and walk from time to time?

A. I did, to be out of his house and move around.

Q. It is therapeutically beneficial to him to get exercise and sunshine?

A. There was no reason to limit him physically, there was no reason to confine him to the house, naturally he would be better off to be out and around.

Q. As Dr. Semmes advised him to get exercise you would go along with that?

A. I did.

Q. If he told him to take occasional trips in a car you would go along with that, it is on the records you sent into Mutual of Omaha, didn't you?

A. I did."

Without reciting all of the evidence as to Mr. Rowell's activities, it is sufficient to say that, under our holding in *Occidental Life Ins. Co.* v. *Sammons, supra,* a question was made for the jury as to whether Mr. Rowell was "confined continuously indoors" within the policy coverage. The appellant cites, and strongly relies on our case of *Michigan Life Ins. Co.* v. *Hayes,* 231 Ark. 614, 332 S. W. 2d 593, and claims that the Hayes case in effect overrules or materially limits the Sammons case. In the Hayes case the confinement clause was practically the same as in the Sammons case; but the activities of Dr. Hayes were of such a vast and continuous nature that we held that, even on a physician's advice and prescription, we could not say that a totally disabled person could engage in all of those activities and still claim to be within the language of the confinement clause. We said that the Sammons case went as far in the "liberal construction" as we cared to go, and that the activities in the Hayes case went beyond the pale of activities allowed by the Sammons case. Here is our language:

"To state our position, we simply say that this Court is unwilling to further extend or further liberalize the interpretation given the confinement clause in the *Sammons* case, *i.e.,* that case represents the ultimate peak of liberal construction which we have approved—or will approve in future cases. Of course, appellee asserts that this case calls for no more liberal construction than the *Sammons* case. As stated, we disagree with this assertion; but if it be correct — then we are modifying our previous interpretation."

In the case at bar, the activities of Mr. Rowell, under the advice and direction of his physicians, were not nearly as extensive as those sanctioned in the Sammons case, so we hold, here, that a question was made for the jury under the Sammons case, and that the activities

here are not to the extent of those in the Hayes case. There was ample evidence to sustain the jury's verdict.

III. *Mutual's Objections To Instruction No. 4.* In Topic II, *supra,* we copied Instruction No. 4, and noted that Mutual objected specifically to said instruction. We now discuss the point. Mutual claimed that certain expressions in the instruction were indefinite and therefore the entire instruction should have been refused.[3] The appellant seeks a reversal because of its specific objections; but the answer is clear: the Instruction No. 4 was not inherently erroneous; and if the appellant considered the Instruction No. 4 to be "indefinite" in the particulars mentioned, the burden was on the appellant to offer an instruction which eliminated the so-called indefinite words, or to offer instructions which defined the words or expressions which appellant considered to be indefinite. *McGee* v. *Smitherman,* 69 Ark. 632, 65 S. W. 461; *Western Coal Co.* v. *Jones,* 75 Ark. 76, 87 S. W. 440; and *Queen of Ark. Co.* v. *Malone,* 111 Ark. 229, 163 S. W. 771. Appellant offered no instructions to define the expressions claimed to be indefinite.

[3] Here are Mutual's said objections:

"To which action of the Court in giving to the jury plaintiff's written requested Instruction No. 4, the defendant at the time objected specifically in line three the use of the words 'reasonable amount of exercise' are indefinite. 'Reasonable amount of exercise' might mean going to a gymnasium and exercising as long as he didn't play handball or something like that. Line six directs, it says, 'further advised him to take automobile trips': that is indefinite, it leaves up to speculation on the part of the jury as to what kind of trip and how far he might go; he might take an automobile trip to California and back. The next line, 'transacted a limited amount of personal business,' I object to that on the ground that if he is totally disabled he couldn't transact any personal business. Then on the question of 'moderate amount of exercise' again as used in the tenth line, I object to that on the ground that it is indefinite and doesn't give the jury any basis upon which to determine the facts. I object to it specifically on the ground that the doctor or any doctor does not have any right to rewrite the insurance contract."

CONCLUSION

The judgment of the Circuit Court is in all things affirmed; and the sum of $2,000.00 is awarded the appellee as additional attorneys' fee for services in this Court.

HARRIS, C. J., not participating.

BASS *v.* FARRELL.

5-2962 370 S. W. 2d 54

Opinion delivered June 3, 1963.

[Rehearing denied September 9, 1963.]

Macon & Moorhead, for appellant.

James B. Sharp and *Moncrief & Moncrief,* for appellee.

GEORGE ROSE SMITH, J. This is the third appearance in this court of a chain of litigation that has been in progress between the appellant Bass and the appellee Willey and others for some eighteen years. The dispute is over the ownership of a tract of land, originally formed by accretion, that now lies at some distance north of the Arkansas River, in Arkansas County. This appeal is from a decree finding that the appellant Bass has no claim to the land in controversy (and thus, by implication, recognizing the ownership of the appellees, who derive their title from C. F. Willey, now deceased).

The earlier phases of this litigation bear upon the present appeal and must be briefly reviewed. In 1946 C. F. Willey, in a suit to enjoin Bass from cutting timber, obtained a default decree finding that Willey was the owner of Section 1, Township 8 South, Range 4 West, and "all accretions adjoining or contiguous thereto."

In 1947 Bass was cited for contempt, for an asserted violation of the court's injunction. Bass defended the contempt citation by attempting to prove that the 1946 decree was a nullity. It was Bass's theory then, and it is his theory today, that long ago—perhaps as far back as the 1880's—the tract that had been originally surveyed by the Government as Section 1 was completely eroded away by a gradual northward movement of the Arkansas River, which eventually crossed all of Section 1 and ate away not only that section but also most of Section 36, Township 7 South, Range 4 West, lying just north of Section 1 and being later owned by Bass.

Bass has attempted throughout the litigation to prove that the river, after having reached its line of maximum progress to the north, then gradually retreated southward and re-created land that re-emerged not as Section 1, which had become nonexistent, but as an accretion to Section 36 and to other lands that Bass now owns along the line of the river's farthest advance to the north. Upon this hypothesis Bass contended that the 1946 default decree, in referring to Section 1 and its accretions, actually described no land at all, so that the decree was void.

The chancellor rejected Bass's attack upon the 1946 decree. Upon the first appeal we affirmed the chancellor's action but confined our decision to a single point, holding that Bass was estopped to deny the existence of Section 1 for the reason that Bass himself had recognized the existence of the section by having purportedly conveyed it to Willey in 1930. *Bass* v. *Willey,* 216 Ark. 553, 226 S. W. 2d 980.

Soon after our decision upon the first appeal Willey again instituted contempt proceedings against Bass. By filing a counterclaim Bass became the real plaintiff in

the case; that is still his position. He contends that even though he is estopped to question the existence of Section 1 the estoppel does not extend to the accretions thereto, because those accretions were not mentioned in the 1930 deed that gave rise to the estoppel. Hence Bass insists that he be permitted to prove that the tract now in dispute accreted not to Section 1 but to the more northerly land owned by Bass.

This contention was at first rejected by the chancellor, upon a plea of *res judicata.* On the second appeal we reversed that decree, holding in essence that whether this tract accreted to Section 1 or to Bass's lands was an issue of fact upon which Bass had never had his day in court. *Bass* v. *Willey,* 227 Ark. 1025, 304 S. W. 2d 943.

On remand the parties built up an extensive record, with many exhibits, in their efforts to trace the wanderings of the Arkansas River since this area was surveyed by the Government in 1819. It is still Bass's contention that Section 1 was eaten away long ago by the northward movement of the river, that when the river retreated southward even past its 1819 channel the land in dispute was formed as an accretion to lands now owned by Bass, and that the estoppel stemming from Bass's 1930 conveyance of Section 1 does not preclude him from asserting that the tract in controversy was never an accretion to Section 1. The chancellor, by the decree now on review, dismissed Bass's claim to the land.

The facts are not simple. That they may be more easily understood we are inserting in this opinion, as Figure 1, a greatly simplified reproduction of one of the principal exhibits in the record.

Both Section 1 and Section 36, as surveyed by the United States in 1819, are shown in heavy lines. The irregular shape of these small fractional sections was due to the fact that in 1819 they were bounded on the west by the Arkansas River and on all other sides by Spanish land grants that had been made before the Louisiana Purchase. The tract in dispute, marked by the corners

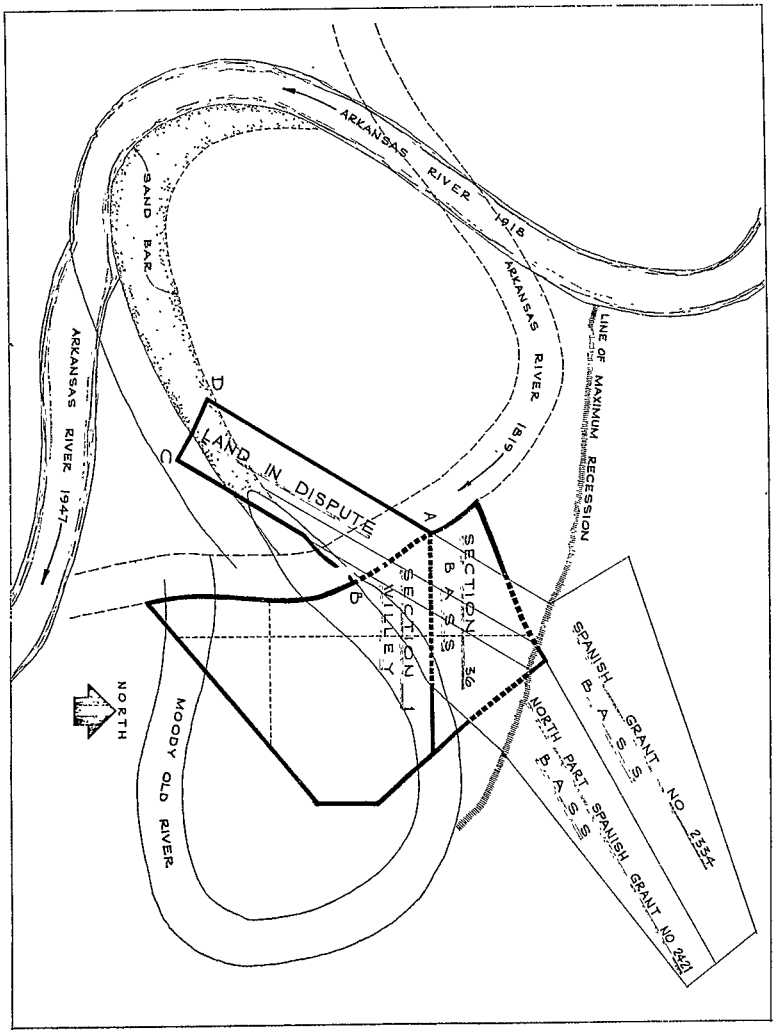
ARKANSAS RIVER 1918
ARKANSAS RIVER 1919
LINE OF MAXIMUM RECESSION
SAND BAR
ARKANSAS RIVER 1947
D
C
LAND IN DISPUTE
A
B
SECTION 36
BASS
SECTION 1
VALLEY
SPANISH GRANT NO 2334
BASS
NORTH PART SPANISH GRANT NO 2421
BASS
NORTH
MOODY OLD RIVER

FIGURE 1

ABCD, is also shown in heavy lines. It should be added that although the common boundary between Section 36 and Section 1 appears to extend all the way to the western border of the land in dispute, the testimony indicates that the northwest corner of Section 1 is actually about 180 feet east of the western edge of the land in dispute, so that the land in dispute is contiguous to Section 36 for a distance of about 180 feet.

Deferring for the moment the appellant's arguments with respect to the 180 feet of contiguity just mentioned, we are of the opinion that Bass has not succeeded in escaping the estoppel that came into being in 1930 when he undertook to convey Section 1 to Willey. Even though that deed made no express reference to accretions, we held in *Towell* v. *Etter,* 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53, in the opinion on rehearing, that a conveyance of a tract of land by its legal description carries the accretions thereto unless they are specifically excepted. Hence it is not possible to limit Bass's estoppel to the original boundaries of Section 1, for the reference in his deed to Section 1 must be taken to be a reference to the accretions as well.

Moreover, the 1946 default decree confirmed Willey's title to Section 1 and "all accretions adjoining or contiguous thereto." As a result of Bass's estoppel Section 1 must be deemed to have existed, as far as the litigants and the court were concerned. We must attach some meaning to the explicit decretal reference to accretions. Unless that reference was meant to encompass the greater part of the tract in dispute (all except the west 180 feet), we are unable to see that this language in the decree had any significance at all.

As we have said, the testimony indicates that the northwest corner of Section 1 is really about 180 feet east of point A on the western border of the land in dispute. This leaves a corridor through which the tract in controversy may be connected with Bass's land in Section 36. The appellant forcefully argues that, under the rule governing the apportionment of accretions, he should be awarded a strip 180 feet wide along the west side of the

tract in dispute, upon the theory that this strip was an accretion to Bass's Spanish Grant No. 2334.

The basic rule for apportioning accretions is well understood. It is first necessary to determine what proportionate part of the old bank was owned by each riparian proprietor. The new bank is then divided in the same way by assigning to each proprietor his proportionate share. The division is completed by drawing lines to connect the points so fixed upon the new bank with the corresponding points of ownership upon the old bank. *Hamilton* v. *Horan,* 193 Ark. 85, 97 S. W. 2d 637.

Bass relies upon the apportionment shown in Figure 1, which is based upon one of Bass's exhibits. This particular apportionment was made in 1918 by a surveyor named Keaton. What Keaton did was to treat the Line of Maximum Recession (the line of the river's greatest northward progress) as the old bank. The 1918 bank of the river, in between its two points of intersection with the Line of Maximum Recession, was treated as the new bank. Keaton then followed the basic rule of apportionment in dividing the new bank and in drawing his lines. It will be seen from the lines of apportionment on Figure 1 that most of the land in dispute was considered to be an accretion to Spanish Grant No. 2334 and to the small triangle of Section 36 that lay north of the Line of Maximum Recession.

There are two fatal defects in the appellant's argument. In the first place, there is no sound reason why Keaton's 1918 apportionment should be accepted as controlling today. The record does not show why Keaton undertook the apportionment. Perhaps his purpose was to fix the boundary between the land now in dispute and the land lying immediately to the west (referred to as the Anderson-Tully Company property). The fact that Keaton's line is still the boundary between these two tracts suggests that his purpose was to fix that boundary.

There is no showing, however, that Keaton's apportionment was accepted by or even known to the own-

ers of the land now in question. If the apportionment had become binding upon those landowners, either by agreement or by court action, then of course title would have vested and the division would have become a new starting point for the apportionment of future accretions. There is no such proof. The river seems to have been changing its course continually ever since 1819. An apportionment made at any particular time would not divide the accretions in the same way as another apportionment made several decades later. There is no reason today to go back to the particular point in history when Keaton made his survey and to declare that the conclusions he reached somehow became binding for all time upon the owners of the tract now in dispute.

The second flaw in Bass's argument is equally serious. The Keaton apportionment, in order to be an equitable division of the accretions, must rest upon the assumption that this whole segment of the river constituted a fairly straight line as it gradually moved northward, until it finally flowed in a direct course along the Line of Maximum Recession, etching out that escarpment before beginning its retreat to the south.

We are convinced by the record that this is not what actually happened. Instead, the Line of Maximum Recession was eroded over a period of many years by the northernmost tip of a loop in the river that traveled from west to east. This loop was part of the main channel until it was cut off by an avulsion in 1926 and became an oxbow lake, shown upon Figure 1 as Moody Old River.

On this point the most convincing proof in the record is a number of aerial photographs, the earliest one having been taken in 1930. In these photographs there are plainly discernible lines of erosion, *on the upstream side only,* that exactly parallel the curving sides of the loop that is now Moody Old River. It is hardly possible for one to study these pictures without becoming convinced that this loop in the stream, which may have had its origin in the bend that appears in Figure 1 as the 1819 channel, did in fact travel downstream, from west to east.

This conclusion is entirely reasonable. It is a matter of common knowledge that a bank is eroded by the pressure of the current against the shoreline. This pressure is naturally apt to be greater on the downstream sides of the loop, causing the oxbow to travel in that direction. Apparently this phenomenon is perfectly well understood, for textbooks upon the subject merely observe as a matter of accepted fact that individual meander loops tend to shift downstream. See Schultz & Cleaves, Geology in Engineering (1955), p. 151; P. R. Van Frank, Random Notes on Improvement of Rivers (1933), p. 124.

The general rule of apportionment, involving the drawing of lines from the old bank to the new, is not to be followed inflexibly, even to the point of injustice. It will not be applied, for example, if there are such irregularities in the shoreline as to make the resulting division inequitable. *Malone* v. *Mobbs,* 102 Ark. 542, 146 S. W. 143, Ann. Cas. 1914A, 479.

Keaton's apportionment is untenable, because it involves the mistaken assumption that these accretions were formed as the river moved from the north to the south. But if, as we think to have been the case, the loop really moved from west to east, then the accretions formed in that direction, and for the purpose of an apportionment the old bank would be the trailing edge of the loop at some selected point in its progress. In that event the lines of apportionment would necessarily run in an easterly or southeasterly direction, so that the land in dispute could not be considered as an accretion to Bass's lands to the northeast.

As the real plaintiff, Bass had the burden of recovering upon the strength of his own title. The chancellor was right in concluding that that burden was not met.

Affirmed.

HARRIS, C. J., not participating.

HARTSOOK *v.* OWENS.

5-3033 370 S. W. 2d 69

Opinion delivered June 3, 1963.

[Rehearing denied September 9, 1963.]

George E. Pike, for appellant.

Wilbur Botts, for appellee.

GEORGE ROSE SMITH, J. Guy Hartsook died intestate on July 13, 1961. In November his half-brother, the appellee, filed a claim against the estate in the amount of $1,050.00, based upon a check that had purportedly been given by the decedent to the appellee on December 20, 1960. The administratrix disallowed the claim, but upon trial of the matter in the probate court the claim was allowed. This appeal is from the order of allowance.

It is first contended that the check became a nullity as a result of the appellee's failure to cash it within six months after its date. This contention is based upon the statutes that relieve a bank of the duty of cashing checks more than six months old. Ark. Stat. Ann. § 67-534 (Repl. 1957); Ibid. § 85-4-404 (Add. 1961). These statutes were adopted for the protection of the bank and plainly do not have the effect of extinguishing a valid obligation merely because it is more than six months

past due. Such a holding would create an extremely short statute of limitations where none was intended by the legislature.

The close question in the case is whether the weight of the evidence is contrary to the court's finding that the check in question bears the genuine signature of Guy Hartsook.

Owens identified the check and testified at some length, but much of his testimony was objected to as being in violation of the dead man's statute and cannot be considered. Ark. Const., Schedule, § 2. The claimant's principal witness was his grown daughter, who testified positively that she was present when the check was prepared, signed, and delivered in her parents' home. The check itself bears a notation that it was given for the payee's part in certain farm machinery.

The appellant called the president of the decedent's bank as a handwriting expert, but his testimony is hardly favorable to either side. At first, after having compared the 1960 check with an earlier one written in 1949 and with a still older signature card, the witness stated that he doubted if the signature upon the check in issue was genuine. On cross-examination, however, the witness readily admitted that a person's signature changes with age. After having been shown a postcard assertedly signed by the decedent in 1961, this witness indicated that the signature on the questioned check bore a greater resemblance to the nearly contemporaneous postcard signature than to the much older specimens of Hartsook's handwriting. The court observed that in his opinion the signatures upon the decedent's more recent checks would be entitled to great weight. It is not without significance that the administratrix failed to produce any such fresh evidence.

The rest of the appellant's proof is circumstantial, tending to show that Hartsook and Owens had not farmed together since about 1952, that their purchases of farm machinery had been made separately, and that therefore the obligation recited upon the face of the instrument probably did not exist.

The case has given us much anxiety, but after studying the record we are unable to say that the trial court's finding is against the preponderance of the testimony. The probate judge had the great advantage of seeing the witnesses as they testified. He was thus in a much better position than we are to decide whether Owens's daughter was telling the truth and whether Owens himself was attempting to commit a deliberate fraud against his brother's estate. The appellant's circumstantial proof does not succeed in making it difficult for us to believe that the transaction in question, between brothers, really took place. With the conflicting evidence evenly balanced it is our duty to leave the trial court's findings undisturbed. *Brewer* v. *Yancey,* 169 Ark. 816, 277 S. W. 11.

Affirmed.

PACE *v.* HICKEY.

5-3048 370 S. W. 2d 66

Opinion delivered June 3, 1963.

[Rehearing denied September 9, 1963.]

John B. Driver and *Roy E. Danuser,* for appellant.

Appellee's Brief stricken.

George Rose Smith, J. This is an election contest. In the 1962 general election the appellant, the Democratic nominee for the office of Sheriff of Marion County, was opposed by the appellee, a write-in candidate. The appellee was certified to have been the winner by a vote of 969 to 961. This is an appeal from a judgment upholding that certification. We are presented with only two questions, both involving the use of printed stickers in behalf of the write-in candidate.

All the facts were stipulated. Before the election the appellee arranged for the printing and distribution throughout the county of stickers bearing his name, for use by the electors. The appellee received 969 votes to the appellant's 961, but 539 of the appellee's votes were cast by the pasting of stickers to the ballots. On 100 or more of these votes the X-mark, indicating the elector's choice, had been placed on the sticker by someone other than the elector and at some time before the elector entered the polling place and affixed the sticker to his ballot.

It is first contended that no vote cast by means of a sticker should be counted, for the reason that the statute refers only to "write-in votes," and a printed sticker does not satisfy the requirement that the name be written. Ark. Stat. Ann. § 3-826 (Repl. 1956). This identical contention was rejected in *Bennett* v. *Miller,* 186 Ark. 413, 53 S. W. 2d 853, under a statute permitting the elector to "write the name of any person for whom he may wish to vote." In holding that the law permitted the use of stickers we said:

"We do not think the word 'write' is there used in a technical sense, but that such name might be placed on the ballot in any convenient way, such as the use of a rubber stamp or a sticker as was done in this case. As said by this court in *Ashby* v. *Patrick,* 181 Ark. 859, 28 S. W. 2d 55: 'If the ballot voted on was such as not to mislead the electors but to give them an opportunity to express their will, it was sufficient.' So here the ballot did not have the names of any persons who were candidates for directors. It was left to the electors to vote for whom

they pleased by 'writing' their names on the ballots. If they chose to use stickers with the names of the persons they desired to vote for printed thereon we can see no valid objection thereto, and there is no provision of statute violated."

Bennett v. *Miller* was decided in 1932, more than thirty years ago. If we misconceived the intent of the statute the lawmakers have had many opportunities in the intervening years to set the matter right. No such action has been taken. To the contrary, when the present statute was enacted in 1949 the legislature contented itself with a reference to "write-in votes." We are unwilling in effect to modify the statute by overruling the *Bennett* case. The contestant's broad objection to the use of stickers cannot be sustained.

The appellant's other argument is directed against the one hundred or more write-in votes involving stickers already marked with an X when the voter entered the polling place. Counsel rely on *Edwards* v. *Williams,* 234 Ark. 1113, 356 S. W. 2d 629, where it was held that an election judge could not be allowed to take a ballot out to be marked by a disabled voter in her car, because the statute provides that no person shall be permitted to carry a ballot outside the polling place. Ark. Stat. Ann. § 3-834 (Repl. 1956).

All the stickers in the case at bar were marked with an X; so we are not confronted with an attempt to cast a write-in vote without the use of an X. The only question is whether the X may be placed on the sticker before the voter enters the polling place. We hold that it may be. The use of printed stickers is permissible, as we have seen. This means that the write-in candidate's name may be printed on the sticker before the voter reaches the polls. This being true, there is no good reason for saying that the X-mark, if one is actually necessary, cannot also be put on the sticker in advance. What the statute requires is that the voter mark his ballot inside the polling place. Here the marking of the ballots was accomplished by the affixation of stickers. As long as that substantive step was taken inside the polling

place it made no difference, under either the letter or the spirit of the statute, when or where the making of the X-mark took place.

The appellant has moved to strike a portion of the appellee's brief, which attributes seriously wrongful conduct to the appellant's counsel and to the special county judge who heard the case in the first instance. These accusations appear in the appellee's brief as assertions of fact, but they are wholly unsupported by any proof in the record. Their inclusion in the brief is a clear-cut violation of Rule 6 of this court and an inexcusable breach of the obligation of professional courtesy that we expect on the part of members of the bar. All copies of this brief will be stricken in their entirety from the files of the court.

Affirmed.

HARRIS, C. J., concurs. JOHNSON, J., dissents. HOLT, J., not participating.

CARLETON HARRIS, Chief Justice (concurring). I am concurring, rather than dissenting, because I feel that appellee and his supporters had a right to rely on the *Bennett* v. *Miller* decision mentioned in the present majority opinion. In the *Bennett* opinion, the court said:

"We think it makes no difference how the electors placed the names of the persons they desired to vote for on the ballots in the absence of fraud. They might have been written with pen and ink, pencil, typewritten, or by stickers and the result would be the same, as in either case it expressed the wish of the individual elector."

I strongly disagree with the thought therein expressed and with the holding in the case. To me, the word, "write," means "lettering by hand," (though the term probably now, by usage, includes typing). However, I find no definition of the term, "writing," that includes "sticking" or "pasting."

Election contests are difficult cases, and a contestant in an election case carries a great burden in endeavoring to establish fraud in any such suit. I feel that this court should go as far as legally possible in its decisions to minimize the possibility of fraud in future elections—and here, we are only required to say that "write" means just that—*"write"*.

I believe that the use of stickers makes fraud easier to perpetrate. If a voter does not care to vote for anyone in particular race, he will make no mark on the ballot at all, and there is nothing to prevent an unscrupulous judge or clerk at an election from reaching into his pocket and placing a paste-on vote on such a ballot. It would be indeed difficult to establish that this paste-on vote was placed on the ballot by someone other than the voter —but, if we stay with the statute, the way is clear to eventually determine whether the voter cast that vote, *i.e.,* through an examination of the handwriting.

However, there is, in my view, an even better reason for holding paste-on votes invalid, *viz.,* the use of the stickers destroys the secrecy of the ballot. Most people like to maintain secrecy in casting their votes; they desire to express themselves at the polls without fear of losing someone's good will, or business. Frequently, the voter may be friendly to both candidates, or both may be good customers, and he desires to maintain that friendship, or business, after the election. *He is entitled to cast his vote, free from duress, and without fear of retaliation.* In most instances, at a general election, there would probably only be a single race where a "write-in" candidate would go to the trouble and expense of preparing stickers in advance. (This has been the case in previous elections where such stickers were used.) When the voter approaches the polls, he is likely besieged—and beseeched— by those offering the stickers. Let it be borne in mind that the offer of a sticker is entirely different from merely offering campaign literature, for a voter ostensibly could have but one purpose in taking a sticker—that purpose being to use it after he enters the polling booth. If he refuses to take a stick-

er, he is immediately marked by the person offering it—and bystanders—as a voter who will cast his vote for the man whose name is already printed on the ballot. If, on the other hand, he takes the sticker, bystanders mark him as one who intends to cast his vote for the "write-in" candidate—else he would not have taken the sticker. Actually, the voter might accept the sticker as a matter of avoiding embarrassment—but he is still labeled by those viewing the incident as a supporter of the write-in candidate. In addition, the voter's use of the sticker can certainly be detected after he enters the polling booth, and prepares to cast his vote. One needs only to glance around to identify those who are pasting stickers on the ballots. The secrecy of the ballot is thus utterly and completely destroyed. To prohibit the use of stickers takes no right away from the voter. He still has the privilege of casting his vote for his candidate by simply writing in the name.

The majority feel that it is up to the Legislature to prohibit the use of stickers. Inasmuch as, in my view, this court made the original mistake in interpreting the word, "write," I deem it proper that we should make the correction. We have only the one decision which approves the use of stickers. This opinion was rendered under a different statute, and in a school election case where no names were printed on the ballot. To my way of thinking, we now have the opportunity to correct a serious mistake. When the majority opinion is handed down, precedent will be firmly established. The fact that the court once erred is no reason to err again.

I would affirm this particular case for the reason set forth in the opening paragraph, *i.e.,* appellee was entitled to rely upon the *Bennett* decision. However, I think that the court should now plainly state that the *Bennett* decision cannot be relied upon in the future; that "paste-on" votes will no longer be considered valid votes, and that the word, "write-in" means exactly what it is taken to mean in common usage.

JIM JOHNSON, Associate Justice (dissenting). Words cannot adequately express my extreme disagreement with that part of the majority opinion which holds valid the 100 or more votes admittedly marked by someone other than the elector and outside of the polling place.

My conscience will not permit me to be a party to an opinion placing the stamp of approval of this court upon such conduct.

For the reasons stated I respectfully dissent with all the vigor at my command.

WYATT *v.* O'NEAL.

5-2969 370 S. W. 2d 129

Opinion delivered June 3, 1963.

[Rehearing denied September 16, 1963.]

Victor Nutt, for appellant.

Caldwell T. Bennett, Yingling, Henry & Boyett, for appellee.

PAUL WARD, Associate Justice. This litigation grows out of a series of business transactions in connection with the hatchery business. Appellant Wayne Wyatt,

who owned equipment and facilities for such business, evidently was encountering financial difficulties early in 1958. In February of that year he executed two chattel mortgages on the above mentioned personal property for about $5,000, and he also executed a loan agreement with appellee wherein the latter was to loan him several thousand dollars. One of the mortgages above mentioned was made directly to appellee and he acquired the other one by assignment.

Appellee filed two separate complaints against appellants to collect certain notes and to foreclose certain securities. Said suits were docketed as number 5485 and 5501. The issues involved can be best indicated by setting out the substance of each complaint.

In suit number 5485 it was alleged that appellants were indebted to appellee in the total sum of $7,000 (plus interest) on four separate written notes: One note for $2,000 was made to G. V. Coker, dated February 10, 1958, and assigned to appellee; note for $1,750 made to appellee, dated December 5, 1958; note for $2,000 made to appellee, dated November 24, 1958; note for $1,250 made to appellee, dated December 15, 1958. It was also alleged that the payment of said notes was secured by chattel mortgages.

In suit number 5501, between the same parties, appellee asked judgment against appellants in the sum of $5,000 (plus interest) based on four notes signed by appellants as follows: note dated February 26, 1958 for $2,000; note dated March 12, 1958 for $1,000; note dated March 15, 1958 for $1,000; and, note dated March 26, 1958 for $1,000. The above notes were secured by a mortgage on what was called the Steprock Gin property.

In answer to the above complaints appellants admitted signing a $2,000 note, denied signing certain notes, and stated they had no knowledge concerning other notes. Mrs. Wyatt, in a separate answer, stated that she was a tenant in common with her husband of certain personal property (listed in the chattel mortgages) and that she had never encumbered any of it.

Mr. Wyatt, in a twenty page cross-complaint, asks for $8,027.81 for breach of a "confidential contract" and $7,083 for loss of equity in certain property.

By proper order of the trial court the two causes of action were consolidated for purpose of trial, and the issues were tried under docket number 5501.

After an extensive hearing the trial court refused to allow appellant (Wyatt) anything on his cross-complaint, and entered a decree in favor of appellee in the sum of $5,000 (with $1,790 interest) against appellants, impressing a lien on the "Steprock Property", and in the sum of $7,000 (with $1,781 interest) secured by the Coker mortgage. From the decree appellants prosecute this appeal, relying on the points hereafter discussed for a reversal.

One. Appellants state

"That there is no evidence upon which to substantiate the finding of the lower court that Appellants were not entitled to any damages for breach of contract by Appellee."

Appellants apparently overlook the fact that the burden was on them to prove the terms of a contract, that it was broken by appellee, and the amount of damages resulting from such breach. The testimony relative to the above items is involved and conflicting, and it would serve no useful purpose to set it out in full. The chancellor heard the testimony and specifically found appellants failed to establish their claim. In arguing this point appellants have not called our attention to any testimony which indicates the chancellor's finding is not supported by the weight of the evidence.

Two. We find no merit in the contention

"That Appellee was not entitled to judgment for the sum of $5,000.00 on the Coker mortgage because of the Clean Hands Doctrine."

To support that contention appellants say:

". . . the purpose of Appellee's purchase of the Coker mortgage was to secure a preferred position for

Appellee over the Quaker Oats Company mortgage. This was to be accomplished by the purchase of the valid $2,000.00 mortgage which Appellant admits is a just debt and is due Appellee, and by making supposed advances thereunder in the same amount as was secured by other property, referred to as the Steprock property, whereupon Appellee promised to release the Steprock mortgage."

Appellants say that appellee gave them checks on the First National Bank of Heber Springs, that they endorsed them and returned the money to appellee. This is emphatically denied by appellee. We can hardly agree with appellants that it "was peculiar that it was necessary for appellee to go to Heber Springs and discuss the business with the president of the bank . . .", absent a showing of what was discussed. On the other hand, the bank president testified that, according to their records, Wayne Wyatt got the money on the checks. In the absence of more convincing evidence to the contrary, we must sustain the chancellor in concluding, in effect, that appellee came into court with "clean hands". In fact it would appear that Wyatt and appellee are pretty well on the same level in respect to the condition of their hands.

Three. We do not agree with appellants' argument that

"Appellee is estopped by his pleadings to assert a secured claim for $2,000.00 represented by promissory note or otherwise."

This argument is based upon two exhibits purporting to be pleadings in a suit between different parties and in a different court. The exhibits show that appellee (represented by a different attorney) claimed a certain $2,000 note (signed by appellants) was unsecured. It is their conclusion, therefore, that appellee is estopped in this case to assert the note is secured. We think a sufficient answer is that some twenty notes were executed by appellants to appellee and that there is no positive evidence to identify the note in question.

Finding no reversible error, the decree of the trial court is affirmed.

KETCHUM *v.* ROBINSON.

5-2999 368 S. W. 2d 278

Opinion delivered June 3, 1963.

Spencer & Spencer, for appellant.

Brown, Compton & Prewett, for appellee.

PAUL WARD, Associate Justice. This litigation concerns the ownership of an undivided one-eighth interest in the mineral rights in forty acres of land described as the northeast quarter of the southwest quarter of Section 4, Township 17 south, Range 12 west. Set out below is a brief explanation of how the issue of ownership arose.

Appellant, Ellen P. Ketchum, is the daughter of H. R. Ketchum (hereafter referred to as Ketchum) and appellee, Ada Robinson, is the wife of J. F. Robinson (hereafter referred to as Robinson). In 1922 Ketchum, who lived in Tulsa, and Robinson, who lived in El Dorado, entered into an oral agreement whereby Ketchum was to furnish the money and Robinson was to obtain oil and gas interests, each to have half of the resulting profits. As per agreement, the leases were taken in the name of (or were transferred to) Ketchum who was then to assign to Robinson his proper share. When this

joint enterprise terminated about 1924 or 1925, Robinson prepared for Ketchum's signature an instrument purporting to convey to Robinson his share of the interests. Ketchum signed the instrument (apparently) relying on its being fair and just. However, according to the record, Ketchum had previously deeded all his interest in this particular forty to appellee.

In 1937 Ketchum (evidently believing he had been deceived into deeding to Robinson more than his share of the mineral interests) filed in the clerk's office a declaration of interest in several parcels of land, including the forty in question. Soon thereafter he filed a complaint in chancery court, alleging fraud, to recover part of the interests he had previously conveyed to Robinson. It is noted, however, that the questioned forty was *not* included in said complaint. That suit resulted in a default decree in favor of Ketchum, but again the questioned forty was *not* included in the decree. Ketchum admits (in this case) that he knew of the omission at the time. Consequently the result of the 1937 decree was to leave the record title of the questioned oil interest in appellee.

In 1951 Ketchum conveyed an oil interest in the questioned forty to appellant (his daughter) and that interest is the subject of the present litigation.

When oil and gas was discovered on the questioned forty, the production company filed an interpleader in chancery court, setting out the conflict of interest between appellant and appellee (together with other matters not pertinent to this appeal), asking for authorization to pay royalties into court for distribution to the persons found to be entitled thereto. The issue was joined by proper pleadings and submitted to the trial court upon certain exhibits and the testimony of only one witness—H. R. Ketchum.

The trial court entered a decree in favor of appellee, after making the following findings of fact: Ketchum kept no records of his dealings with Robinson and so could only testify from memory; the interest in the forty

acres involved was acquired by Robinson about twenty months before he formed a partnership with Ketchum; the interest in the forty was conveyed to Ketchum on November 21, 1922 by Robinson and on the same day it was conveyed by Ketchum to appellee; and, the declaration of interest (in the said forty) filed by Ketchum was a self serving instrument. Some of the above findings are not challenged and all of them, we think, are in accord with the weight of the evidence.

Appellant presents a forceful argument to the effect that the questioned forty was part of the partnership assets; that Ketchum and Robinson were to share equally; that Robinson deceived Ketchum into deeding away the interest in the said forty; that it was merely an oversight on the part of Ketchum in leaving the forty out of the 1937 suit; and, that, in the face of all these things, Robinson was under a duty to explain his innocence, but failed to do so. In support, appellant cites extensively from 31 C.J.S. *Suppression or Withholding of Evidence* § 156 and from *Smith* v. *Wheat,* 183 Ark. 169, 35 S. W. 2d 335, to the general effect that the unexplained failure or refusal of a party to produce evidence exclusively within his knowledge gives rise to an inference unfavorable to such party. In our opinion the above announced principle has no application, and certainly is not controlling, under the facts of this case. In the 1937 suit, insofar as this particular forty is concerned, neither Robinson or appellee was under any obligation to defend the title because it was not involved. Nor do we think there was any obligation on appellee, in the present case, to divulge information to help appellant. Appellee held a clear record title to all the questioned mineral interest and the burden was on appellant (not appellee) to show it should be set aside. In the opinion of the trial court, appellant has not met that burden, and we agree. In fact there is no proof or contention that Robinson induced Ketchum to execute the deed to appellee on November 21, 1922.

The trial court also found that if appellant and her father had any interest in the property involved they

waited too long to assert it. We find it unnecessary to discuss that particular finding, but this does not necessarily mean we disagree with it.

Affirmed.

SWIFT *v.* BARKER.

5-3016 370 S. W. 2d 71

Opinion delivered June 3, 1963.

[Rehearing denied September 9, 1963.]

McMath, Leatherman, Woods & Youngdahl, for appellant.

Cockrill, Laser, McGehee & Sharp, for appellee.

SAM ROBINSON, Associate Justice. This case grows out of the collision of an automobile and a pickup truck at the intersection of Eighth and Maple Streets in North Little Rock. Appellant, Swift, was driving his pickup west on Eighth Street, and appellee, Barker, was driving his car north on Maple when the vehicles collided at the intersection. Swift sued Barker alleging personal injuries and property damage. The case was tried to a jury and from a verdict and judgment in favor of Barker, Swift, the plaintiff, has appealed.

First, appellant contends that there is no substantial evidence to support the verdict for the defendant. Contributory negligence was one of the defenses relied on by appellee. The jury could have found from the evidence that the appellee got into the intersection first.

The collision occurred at the northeast quarter of the intersection, and it will be recalled that appellant was going west and appellee was going north. Furthermore, the jury could have found from the evidence that appellant was negligent in failing to keep a lookout for other users of the streets, and in failing to make any effort to stop, and thereby avoid the collision. Appellee did attempt to stop, as shown by the fact that there were about 12 feet of skid marks behind his car; but there were no skid marks behind appellant's pickup. Moreover, the evidence is pretty clear that appellant ran into the side of appellee's car. There is evidence that there was no damage at all to the front of appellee's automobile.

This court said in *Spink* v. *Mourton,* 235 Ark. 919, 362 S. W. 2d 665, (Dec. 17, 1962): "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.' "

Appellant also contends that the court was in error in giving the last part of appellee's instruction No. 1. The instruction reads as follows: "You are instructed that under the laws of the State of Arkansas it was the duty of plaintiff Robert L. Swift and the defendant James Barker to exercise ordinary care in the operation of their vehicles to avoid injury to themselves and to others, and a failure to exercise such care would be negligence. You are further instructed that ordinary care requires every person who operates a motor vehicle upon a public highway to keep a lookout for other vehicles, and to have his own vehicle under such control as will enable him to check its speed or to stop it absolutely if necessary to avoid injury where danger is apparent or

reasonably to be anticipated. Danger may always be expected or anticipated at intersections and every driver must keep a lookout and approach same with his vehicle under control. *A failure to keep a lookout or to keep one's car under control is not negligence within itself, but if you find that there was a failure in this regard by either party then you may consider such failure along with all the other facts and circumstances in the case in determining if that party was negligent.*" Only a general objection was made.

While we do not approve that part of the instruction which tells the jury that "A failure to keep a lookout or to keep one's car under control is not negligence within itself . . ." we think that in the circumstances of this case, appellant should have made a specific objection in order to call the trial court's attention to the alleged error. The first part of the instruction is good, and there is no contention that it is bad. The court said in *Chicago R. I. & Pac. Ry. Co.* v. *Glascock,* 187 Ark. 343, 59 S. W. 2d 602: "It is next contended that the court erred in giving appellees' requested instruction No. 1, objected to, which was written in three different paragraphs. No specific objection was made to any of them, but only a general objection was made to the instruction as a whole. At least two of the clauses are correct statements of the law, and conceding, not deciding, the other incorrect, since the instruction was not wholly wrong, the defect should have been reached by a specific objection and not a general one. No error was committed in giving it. *Darden* v. *State,* 73 Ark. 315, 84 S. W. 507; *St. Louis I. M. & So. Ry. Co.* v. *Barnett,* 65 Ark. 255, 45 S. W. 550."

But the thing in particular that impresses us with the necessity for a specific objection in the case at bar is the fact that appellant asked for, and the court gave, an instruction containing almost the identical language objected to by appellant in appellee's instruction No. 1. In appellant's requested instruction No. 5, given by the court, certain statutes are quoted and then the instruction reads: "A violation of the above statutes, if estab-

lished by a preponderance of the evidence is not negligent within itself but is evidence of negligence . . ." Assuming, without deciding, that there is a valid reason why the language in question would be objectionable in the instruction requested by appellee, but not objectionable in the instruction requested by appellant, we think the distinction should have been called to the attention of the court by specific objection.

Appellant also argues that the court erred in giving appellee's instruction No. 5, which reads: "You are instructed that if you find and believe from the evidence in this case that James Barker lawfully entered the intersection of Eighth and Maple Streets before the vehicle operated by Robert Swift entered the intersection, then you are instructed that Barker was entitled to proceed through the intersection unmolested and this would be true, even though you might find that Barker failed to stop before entering Eighth Street. Notwithstanding the fact that Eighth Street is a through street, if Barker was lawfully in the intersection, then it was Swift's duty to yield the right-of-way to Barker."

The instruction is not inherently erroneous, and no specific objection was made.

Affirmed.

STILLMAN *v.* JIM WALTER CORP.

5-3026 368 S. W. 2d 270

Opinion delivered June 3, 1963.

McMath, Leatherman, Woods & Youngdahl and *John P. Sizemore,* for appellant.

Wright, Lindsey, Jennings, Lester & Shults, for appellee.

SAM ROBINSON, Associate Justice. On August 13, 1959, appellant, Roy Stillman, and appellee, Jim Walter Corporation, entered into a written contract, Jim Walter Corporation being designated as "contractor" and appellant, Roy Stillman, designated as "sub-contractor", whereby the Jim Walter Corporation engaged Stillman to build houses for a specified consideration, the amount of the consideration depending on the type of house constructed. Stillman was to furnish only the labor.

Item 5 of the contract provides: "Sub-Contractor shall furnish Contractor a Certificate of Workmen's Compensation coverage on Sub-Contractor and all employees of Sub-Contractor or, in the absence of such Certificate, all payments hereunder shall be subject to a 3% deduction and Contractor will furnish such Workmen's Compensation coverage."

Subsequently, Stillman was injured on the job. His medical expenses were paid by the insurance carrier, but when it was determined that he needed an operation due to the condition of his back, no further payments were made. Stillman filed a claim with the Workmen's Compensation Commission. The matter was heard and the Commission denied compensation on the ground that under the terms of the contract of employment Stillman was an independent contractor, not an employee, and therefore he could not collect under the workmen's compensation law for his injury. The Commission never reached the issue of whether the claimant was injured

in the course of his employment, nor the extent of his injuries.

The parties had entered into a valid agreement whereby for the consideration of 3% of the contract price payable to Stillman for building the houses, Walter agreed to furnish workmen's compensation coverage for Stillman and his employees. With Stillman's consent, the 3% was deducted and the coverage furnished. If Stillman had suffered the loss of a leg, or other very serious injury through the negligence of agents or servants of the Jim Walter Corporation, the employer or insurance carrier could have claimed that recovery could be had only according to the terms of the workmen's compensation law; that Stillman was estopped to contend otherwise.

Regardless of whether Stillman was, in fact, an independent contractor or an employee, under the facts in this case, the Jim Walter Corporation is estopped to say that he is not entitled to workmen's compensation. *Carpenter* v. *Madden,* 90 So. 2d 508 (1956). And, in *Garner* v. *Southern Pulpwood Ins. Co.,* 149 So. 2d 157 (1963), the court pointed out that in the Carpenter case the employer was bound to furnish workmen's compensation coverage because he had obligated himself to do so, and had collected money purportedly to pay for compensation insurance. That is the exact situation in the case at bar.

Here, after the injury occurred, the employer and the insurance carrier attempted to rescind the coverage. Ark. Stat. Ann. § 81-1305 (Repl. 1960) provides: ". . . The primary obligation to pay compensation is upon the employer and the procurement of a policy of insurance by an employer to cover the obligation in respect to this act shall not relieve him of such obligation." The contract to furnish insurance was between the Jim Walter Corporation and Stillman. The Corporation was bound by its contract, and had no right to repudiate its obligation regardless of the attitude of the insurance carrier. It was the employer's contract, not the insurance company's.

In support of its position that the employer is not estopped to deny liability for workmen's compensation, appellee cites *Smith* v. *West Lake Quarry & Material Co.,* 231 Ark. 294, 329 S. W. 2d 167. We did touch on the question to some extent in that case; however, there, the employer made no deduction from the worker's earnings for workmen's compensation; there was no contract to furnish workmen's compensation, and apparently no insurance coverage was provided. In the cases of *Farrell-Cooper Lumber Co.* v. *Mason,* 216 Ark. 797, 227 S. W. 2d 445, and *Ozan Lumber Co.* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341, we said that the fact that workmen's compensation coverage was provided could be considered in determining whether an employer-employee relationship existed. The cases did not turn on the question of estoppel. And, it was specifically pointed out in the Ozan Lumber Company case that in the circumstances of that case it was not necessary to decide whether the procurement of insurance in itself was sufficient to establish the relationship of master and servant. There, the court said: "It is unnecessary to decide whether the procurement of such insurance [workmen's compensation insurance] is sufficient in itself to establish the relationship of master and servant."

In view of the written contract, supported by a valuable consideration which was paid, obligating appellee to furnish workmen's compensation coverage on Stillman and the other workers, we do not reach the question of whether the mere deduction of the 3%, plus the actual procurement of coverage by the employer, estopped the Jim Walter Corporation from denying that Stillman and the other men working with him were employees. In recent years, however, several courts have dealt with the proposition of whether the payment of an insurance premium for coverage under the workmen's compensation law on a particular person estops the employer and insurance carrier from denying that such person on whom the insurance is paid is an employee. The weight of authority appears to be that in circumstances of that kind, the doctrine of estoppel is applicable. *Hall* v. *Spurlock,* 310 S. W. 2d 259; *Ham* v. *Mullins Lumber Co.,* 7

S. E. 2d 712; *Nash* v. *Meguschar*, 89 N. E. 2d 227; *Herndon* v. *Slayton*, 83 So. 2d 726; *Hano* v. *Kinchen*, 122 So. 2d 889; *Southern Underwriters* v. *Jones*, 125 S. W. 2d 393; *Smith Coal Co.* v. *Feltner*, 260 S. W. 2d 398.

Reversed and remanded for the determination of the questions of whether Stillman was injured in the course of his employment, and, if so, the extent of his injuries.

MITCHELL *v.* MITCHELL.

5-2946 368 S. W. 2d 284

Opinion delivered June 3, 1963.

Phillip H. Loh, for appellant.

Felver A. Rowell, Jr., for appellee.

JIM JOHNSON, Associate Justice. Appellant E. E. Mitchell, Jr., filed a petition for a declaratory judgment in Conway Chancery Court, seeking to regain possession of certain farm lands being managed by appellee William M. Mitchell and to recover certain payments made to the Federal Land Bank by appellant.

The parties are two of the four sons of E. E. Mitchell who died in 1942 leaving real property in trust for ten years, then to vest in the sons for life with the remainder in the sons' bodily heirs. (This court upheld the validity of the will in *Mitchell* v. *Mitchell,* 208 Ark. 478, 187 S. W. 2d 163.) When the trust terminated in 1952, the four brothers entered into an agreement entitled "Partition and Trust Agreement" which divided up their interest in the real property (life estate) among the four. Part of the property so partitioned was Paw Paw Bend farm. Appellee received the south half, appellant the north half. Paragraph 10 of the partition agreement attempted to provide that the entire farm was to be operated as a unit for the lifetime of appellee. Since 1952 appellee has managed the farm as a unit, collected and paid over to appellant all the rents from his lands after deducting taxes and certain mortgage payments. At the time the agreement was made there was a Federal Land Bank mortgage outstanding on the entire farm, and when appellee started managing the farm he gratuitously applied approximately $3,000 from certain insurance proceeds toward reduction of the mortgage, which took care of the land bank payments for approximately two years. Thereafter appellee either deducted one-half of the mortgage payment from appellant's rental income before remitting to appellant, or else requested a check from appellant, for half of the annual payment. Appellant contends that he was induced to enter into a verbal operating agreement with appellee in consideration of appellee's paying appellant 50% of the annual crop rents on the entire farm and appellee's assuming the payments on the Federal Land Bank loan. Appellee contends that appellant was to receive only the farm rents from appellant's land and that after appellee's initial $3,000 payment, the parties were to be jointly responsible for the mortgage payments.

Appellant further contends, *inter alia,* that paragraph 10 of the partition agreement is inconsistent with paragraph 9, which provides that each life tenant may have exclusive control of his interest in the lands to the exclusion of the others, and that paragraph 10 is there-

fore null and void, and that he is entitled to possession of his land as well as reimbursement for the Federal Land Bank payments charged to him. Appellee answered, *inter alia,* denying that appellant was entitled to reimbursement or return of the land. Appellee filed an amended answer which was in the nature of a counterclaim.

At trial on July 25, 1962, the chancellor found that appellant was entitled to possession of his lands, which should be delivered to him after the crop year of 1962; that appellant was not entitled to recover any sums paid or charged to appellant for Federal Land Bank payments; that appellee was not entitled to recover on his counterclaim; and that appellee was not liable to appellant for any rents or profits from either lands belonging to appellant or appellee. Appellant has appealed from this decree urging that the court erred in refusing to grant appellant judgment for all land bank payments charged to him by appellee.

Appellee has cross-appealed and argues two points for reversal: (1) the court erred in holding that paragraph 10 of the Partition and Trust Agreement did not bind appellant to the operation of the Paw Paw Bend farm as a unit for the lifetime of appellee; and (2) the court erred in holding that if appellant was entitled to rescind paragraph 10 of the Partition and Trust Agreement, he was not entitled to receive the benefits of the improvements made by appellee in reliance thereon.

We shall consider first the land bank payments. Appellee testified that he charged appellant with one-half of the payments in the years 1952, and 1955 through 1961, and that appellant had expressed no dissatisfaction with their operating agreement until a representative of Winthrop Rockefeller offered to rent appellant's land for a good cash rental. Appellant testified that he made 50% of the land bank payment because, "I had no choice in the matter. I'm fifty miles away from here and he's practically on top of it and all I could do was take his figures on it." The evidence reflected that frequently appellee deducted the land bank payment from

the crop rents before remitting to appellant. At times, however, appellant mailed his check for half of the payment to appellee, as shown by two letter exhibits:

"May 3, 1956. Dear Emmett [appellant]: Received notice from the Land Bank for farm payment due the 1st of June. Your one-half is $300.00 and please send me a check for this amount by the first of the month . . . Come to see us when it is convenient."

"Little Rock, Nov. 22, 1957. Dear Bill [appellee]: Thanks for the rent check and I am enclosing check in the amount of $305.80 on loan payment. Drop by when you are down here around the Marion and we will have a coffee here."

It is clear that appellant's action in voluntarily making the payment as reflected by his letter spoke louder than words to the chancellor, and the court's finding that appellant was not entitled to refund of sums paid by him or charged to him for land bank payments is not against the preponderance of the evidence. See *Scott* v. *Vuurens,* 236 Ark. 731, opinion delivered May 27, 1963.

For reversal on cross-appeal, appellee contends that the trial court erred in holding that paragraph 10 of the Partition and Trust Agreement did not bind appellant to the operation of the Paw Paw Bend farm as a unit for the lifetime of appellee.

The partition and trust agreement was entered into by the four Mitchell brothers in 1952, apparently to avoid future contention among them, and allots each brother certain real property for life. In the preamble to the agreement it is stated:

"WHEREAS, except as to said personal property and certain unreserved land, the said James C. Mitchell, Shelby H. Mitchell, William M. Mitchell and E. E. Mitchell, Jr., desire that possession of such entailed lands be partitioned among them, *to the end that each life tenant may take exclusive possession of his interest therein,* . . ." [Our emphasis.]

Paragraph 7 provides for the exchange of quitclaim deeds, to implement the partition. Paragraph 9 reads as follows:

"This agreement is executed for the sole and only purpose as hereinabove set forth, *to the end that each life tenant may have individual control of his interest in the lands of the estate, to the exclusion of the others, and anything to the contrary herein contained notwithstanding,* this agreement shall not be construed as an attempt on the part of the said life tenants to sell, convey or otherwise alienate any expectancy in the estate of E. E. Mitchell, deceased, in contravention of any condition of said will." [Our emphasis.]

The last clause, paragraph 10, without reciting additional consideration, purports to contain an agreement between appellant and appellee to the exclusion of the other parties to the contract. In paragraph 10, despite the strong language stating the exclusive purpose of the contract, two of the four parties to the agreement attempted to agree between themselves that the terms of the partition agreement would not be applicable to them as regards their property; that as a result of such attempted agreement, their shares were to be considered as one during the lifetime of appellee.

It is familiar law that construction of a contract which entirely neutralizes one provision should not be adopted if the contract can be construed to give effect to all the provisions. *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S. W. 2d 611. Here, however, the whole purpose of the partition agreement was "to the end that each life tenant may take exclusive possession of his interest therein." This cannot be reconciled with an attempted agreement in the same instrument to the contrary and brings into motion the rule that a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent may be disregarded. 12 Am. Jur., Contracts, § 243. The chancellor did not err in so holding.

Appellee's second point urged for reversal on cross-appeal is that the trial court erred in holding that if

appellant was entitled to rescind paragraph 10 of the partition and trust agreement, he was not entitled to receive the benefits of the improvements made by appellee in reliance thereon.

The specific relief sought by this point seems to be urged here for the first time. *Little Rock Ry. & Electric Co.* v. *North Little Rock,* 76 Ark. 48, 88 S. W. 826. It is true that in appellee's amended answer he alleged that he had expended approximately $8,000.00 since 1952 for road building, drainage, levee repair and flood control. However, appellee's prayer, which was in the nature of a counterclaim, was as follows: "[A]nd the defendant [appellee] prays that if in the accountings it is found that said defendant has not operated said farm in good manner that he be given credit on any sums owed to the defendant for this $8,000.00 improvements." There has been no finding that appellee has not operated the farm in a good manner. It is admitted that during the entire time of appellee's management of the property, even though he was from time to time in possession of rent money belonging to appellant, appellee never attempted to charge appellant with any part of these alleged improvements. The proof on these improvements is rather vague and raises some question as to their value to appellant. On this point, we are unwilling on trial *de novo* to say that the learned chancellor's finding that appellee was not entitled to recover on his counterclaim was against the preponderance of the evidence. See *Dearien* v. *Lancaster,* 221 Ark. 98, 252 S. W. 2d 72.

Affirmed on appeal and cross-appeal.

MINCHEW *v.* TULLIS.

5-2997 368 S. W. 2d 282

Opinion delivered June 3, 1963.

[redacted]

Smith & Smith and *Coleman, Gantt* and *Ramsay* and *John G. Lile,* for appellant.

Clifton Bond, for appellee.

JIM JOHNSON, Associate Justice. This appeal involves the interpretation and construction of the words "application made to the court" as contained in Ark. Stat. Ann. § 62-2125 (Supp. 1961), Time limit for probate and administration.

J. M. Minchew, a widower, had a will prepared and executed on July 5, 1946. After making nominal bequests to his living daughter, Dollie Minchew Tullis (the survivor of two daughters who married brothers), and his grandson (son of the deceased daughter), he left the residue of his property to his two sons, J. C. Minchew and Willie V. Minchew, who lived and worked on the farm with their father, who were also named as executors in the will.

J. M. Minchew died on March 7, 1954, in Desha County. On March 10th a petition for probate was filed by the sons, together with the will, a proof of will executed by one of the attesting witnesses, and an affidavit

of proof of signature of the other attesting witness who was a nonresident. The cause was placed on the Desha Probate docket as number 949. No further action was taken in the case until October 11, 1955, when the proceedings were removed from the active docket by order of the probate judge, with the provision that it might be reinstated upon request of any interested party to the probate clerk.

On May 21, 1957, Willie V. and J. C. Minchew petitioned the court to restore the case to the active docket, which was done by court order. (Willie V. Minchew died thereafter on October 25, 1961.)

On November 28, 1961, appellee Ezra Tullis, Jr., grandson of the deceased J. M. Minchew, filed objections to the admission of the will to probate, alleging failure of appellant, J. C. Minchew, to make application for probate of the will and a grant of administration within five years from the death of the decedent.

Appellant petitioned the court on December 6, 1961, for a hearing date on the petition to probate J. M. Minchew's will.

On March 22, 1962, trial was held before the Hon. Lawrence E. Dawson, Judge of the Probate Court of Jefferson County, Second Division, on exchange, in the Probate Court of Desha County, McGehee District. By agreement of counsel the matter was heard on the one issue of whether appellant had complied with Ark. Stat. Ann. § 62-2125 (Supp. 1961). It was further agreed that if appellant prevailed in the trial court, appellee could proceed with the trial of other issues or he could take an appeal on this one issue. The opposite was true, if appellee prevailed.

The opinion of the court was rendered on March 30, 1962, holding that the will was barred from admission to probate by the five year statute of limitation, Ark. Stat. Ann. § 62-2125 (Supp. 1961), since no application for the admission of the will to probate had been made to the probate court within five years from the death of the de-

cedent. An order was entered in accordance with the opinion on October 4, 1962. This appeal followed.

For reversal appellant maintains that the probate court erred in ruling that appellant had not made application to the court in the time and manner required by Ark. Stat. Ann. § 62-2125, when appellant filed a petition for probate, along with the will, three days after the death of the testator.

Ark. Stat. Ann. § 62-2125 (Sup. 1961) reads as follows:

"Time limit for probate and administration. No will shall be admitted to probate and no administration shall be granted unless *application is made to the court* for the same *within five years from the death of the decedent;* this section shall not affect the availability of appropriate equitable relief against a person who has fraudulently concealed or participated in the concealment of a will." [Italics ours.]

Appellee cites *Sims* v. *Schavey,* 234 Ark. 166, 351 S. W. 2d 145, in support of the trial court's ruling that probate was here barred by the five-year limitation. In the *Sims* case we held that our five year statute on probation of wills applied to foreign wills as well as to wills of this state, in order to make secure the title to property. The *Sims* case, however, does not deal with the specific question here involved, which is conceded to be the interpretation and construction of the words "application made to the court" as contained in § 62-2125, *supra.*

Since the enactment of the Probate Code in 1949, there have been no cases decided which dealt with the meaning of the term "application made to the court" as contained in this statute (§ 62-2125, *supra*). Appellant contends that "application made to the court" is synonymous to "petition is filed", whereas appellee contends that "application made to the court" is virtually synonymous to "probate of a will", although appellee does concede that the statute does not state that a will must be *admitted to probate* within the five years. The trial court in its opinion found, in essence, that a personal appear-

ance before the probate court is necessary to constitute "application to the court". Appellee asserts that at least a hearing must be set on a petition for probate before "application" has been "made to the court", although recognizing that the Probate Code allows the court to hear a petition for probate immediately upon filing or at such time and place as the court may direct.

We consider the Probate Code particularly thorough and perspicuous legislation. Examination of an earlier section of the Code leaves no doubt about the meaning of an "application made to the court";

"Application to court by verified petition.—Every *application to the court,* unless otherwise provided, *shall be by petition, signed* and verified by or on behalf of the petitioner. This requirement shall be mandatory but not jurisdictional, and non-compliance therewith shall not alone be ground for appeal." Ark. Stat. Ann. § 62-2010 (Supp. 1961). [Emphasis ours.]

The above language clearly and unambiguously sets out the requirement for making "application to the probate court." Willie V. Minchew and J. C. Minchew filed their verified petition three days after the death of the testator. In so doing they complied with the provisions of Ark. Stat. Ann. § 62-2125. Nowhere in the Probate Code is more required than that the application be filed. To rule that, in addition, a personal appearance before the probate judge is required would be to read into the statute more than is stated. For cases to the same effect from other jurisdictions, see *Dungan* v. *Superior Court,* 149 Cal. 98, 84 Pac. 767; *Price* v. *Marshall,* 255 Ala. 447, 52 So. 2d 149; *Peter* v. *Peter,* 343 Ill. 493, 175 N. E. 846.

Reversed.

5-2994 370 S. W. 2d 91

Opinion delivered June 3, 1963.

[Rehearing denied September 9, 1963.]

[redacted]

E. J. Butler, for appellant.

Brockman & Brockman, Levine & Williams, for appellee.

FRANK HOLT, Associate Justice. The appellee brought this action as a foreclosure suit and, also, to have adjudicated the terms of their Guaranty Agreement. On September 1, 1960, the appellees, Herbert Collins, Trustee, Paul M. Leird, C. Hamilton Moses, John Collins and John Collins, Executor of the Estate of H. G. Galloway, deceased, hereinafter referred to as Guarantors, filed a foreclosure suit on two Deeds of Trust executed by W. D. May and Dorothy E. May, his wife, hereinafter referred to as May. These Deeds of Trust secured two notes by May and any sums for which the Guarantors might become liable on their Guaranty of May's note of $29,662.36 to the National Bank of Eastern Arkansas, hereinafter referred to as Bank. The Guarantors made the Bank a party defendant and asked the Court to determine their liability as Guarantors, if any, to the Bank under the terms of the Guaranty Agreement. The Bank filed an answer and

cross complaint seeking judgment against the Guarantors, jointly and severally, for $2,265.52 as a deficiency owed it under the terms of the Guaranty Agreement. May filed an answer admitting an original indebtedness of $29,662.36 to the Bank and alleged that said indebtedness was fully paid and satisfied of record June 29, 1960. May denied any indebtedness to Guarantors and in a cross complaint claimed damages for alleged collusion between the Guarantors and the Bank.

Upon a trial of these issues the Chancellor entered a decree in favor of the Guarantors against May and the Bank and dismissed their respective cross complaints. From this decree the Bank brings an appeal and for reversal urges that the Court erred (1) in finding that reasonableness of attorney's fees and court costs incurred by the Bank in its foreclosure of the May debt was not before the Court and (2) the Court erred in not entering judgment for the Bank against Guarantors for the deficiency in the amount of $2,265.52 and by not requiring said amount to be paid out of the proceeds of the foreclosure of May's Deed of Trust to Guarantors securing a contemplated deficiency under the Guaranty. We consider these points together.

On June 23, 1954, May executed a note to the Bank and a chattel mortgage to secure his loan of $29,662.36. On July 5, 1954 the Guarantors executed and delivered to the Bank a Guaranty Agreement to the effect that the Guarantors, jointly and severally, would guarantee prompt payment of the May note to the Bank. Paragraph (4) of the Guaranty reads as follows:

"PROVIDED HOWEVER, before recourse against the Guarantors, the Bank shall first have mailed to them at Little Rock not less than ten days preceding a notice of default, and, if the default be not made good, shall thereafter foreclose the said mortgage(s) and the pledge or assignment of American Radio and Television, Inc., indebtedness, and of the life insurance if any, and shall apply the net proceeds, after all reasonable costs and expenses, upon the indebtedness which is hereby guaran-

teed, and the Guarantors shall thereupon pay upon demand any balance remaining."

May defaulted on his note and after protracted litigation, beginning in 1958, May was decreed liable on his note, which was upheld by this Court in the case of *May* v. *National Bank of Eastern Arkansas,* 231 Ark. 558, 331 S. W. 2d 697. On June 29, 1960, the Bank collected its judgment in full. This judgment consisted of the sum of $20,055.21 which represented the balance of the original principal indebtedness plus the accrued interest to the date of collection. The judgment also included $1,745.52, which was 10% of the judgment when first rendered plus interest thereon until the date of collection, as an attorney's fee. The judgment and decree in that case was, accordingly, marked paid in full by the Bank on June 29, 1960.

Thereafter the attorney for the Bank rendered his statement for $4,011.04 to the Bank for his legal services in this extended and successful litigation against May. The Bank paid this fee. The Bank now contends that after applying the $1,745.52 as a credit to the $4,011.04 fee, there is left a deficiency in the payment of the indebtedness of May to the Bank in the amount of $2,265.52 and that it is entitled to recover this amount as a deficiency from its Guarantors since the Bank had recovered from May all the law would permit under the express terms of May's note to the Bank. The Bank made demand upon the Guarantors for this sum on the basis such deficiency should be construed as reasonable costs and expenses and within the meaning of Paragraph (4). We agree with the observation of the Trial Court in its written opinion that the charges made by the attorney to his client, the Bank, was fair and reasonable. We must also agree with the Court that the balance of the attorney's fee paid to him by the Bank in the sum of $2,262.52 is not an enforceable item of the Guaranty Agreement. We do not think the parties intended such a deficiency to be included in their agreement. We agree with the following pertinent language in the learned Trial Court's written opinion:

"It is the opinion of the Court that the parties had in mind the deficiency that would arise by reason of the failure of the assets to bring sufficient amount at the foreclosure sale to pay the debt, interest and costs of the Bank and that the guarantors should make up such deficiency. However, the alleged deficiency in the case at bar did not arise nor was demand made upon guarantors for the payment thereof until after a judgment had been satisfied by the Bank. It does not appear in this record but in the record of the case of No. 31765 [which was appealed to this Court and affirmed in *May* v. *National Bank of Eastern Arkansas, supra*] that the Bank had a supplemental agreement with W. D. May whereby May would pay the Bank eight per cent. Both the Bank and May recognized that the guarantors would not guarantee more than six per cent. However, the Bank in that case did not ask for eight per cent on the note foreclosed but contented itself with six per cent interest. Had the Bank asserted its claim of eight per cent per annum interest for the period of five years and eleven months of its dealings with May, as it had a right to do, it would have amounted to considerably more than the $2,265.52 of excess attorney's fees claimed here. The precedent in cause No. 31765 — which was prepared by the Bank's counsel and submitted to opposing counsel before being signed by the Court — specifically waived its eight per cent per annum interest and asked only for six per cent interest."

In determining the intent of the parties we think it is significant that May's note to the Bank, which the Guaranty Agreement secured, specifically provided for attorney's fee as authorized by law in the event the services of an attorney became necessary to collect the note. The Bank saw fit to expressly include this provision in the note in its dealing with May. If the Bank had intended or expected to hold the Guarantors liable for an attorney's fee or any excess attorney's fee, other than by the terms of the note, we think the Guaranty Agreement, executed within two weeks after the note, would have so expressly provided instead of using the broad and sweeping language of Paragraph (4).

A guarantor is entitled to a strict construction of his undertaking and cannot be held liable beyond the strict terms of his contract. *City of Helena* v. *Arkansas Utilities Co.,* 208 Ark. 442, 186 S. W. 2d 783. In this case the Court said:

"* * * A guaranty has been defined as a collateral undertaking by one person to answer for payment of a debt of another. 38 C.J.S., Guaranty, § 1, p. 1129. A guarantor is entitled to have his undertaking strictly construed. 38 C.J.S., Guaranty, § 38, pp. 1182, 1183. A guarantor cannot be held liable beyond the strict terms of his contract."

In 24 Am. Jur., Guaranty, § 71, p. 158 (Supp. 1962) we find:

"A guarantor, like a surety, is a favorite of the law, and his liability is not to be extended by implication beyond the express limits or terms of the instrument, or its plain intent."

Further, § 73, p. 922, reads as follows:

"* * * Like a surety, a guarantor is liable only in the event and to the extent that his principal is liable."

The judgment on the May indebtedness to the Bank was satisfied of record by the Bank in these words: "This Judgment and decree having been paid in full it is hereby satisfied and cancelled 6-29-60." Upon payment in full of this judgment we think the discharge of May, the principal debtor, relieved the Guarantors from any further liability in this case. In 24 Am. Jur., Guaranty, § 74, p. 923, we find this language:

"If there is no debt or principal obligation the payment of which is guaranteed, there can be no contract of guaranty; and hence, if the obligation of the debtor has been paid or otherwise satisfied, the guarantor's obligation is terminated."

We hold that the liability of the Guarantors in this case is co-extensive with and does not exceed that of the principal and when the principal debtor was fully re-

leased and discharged from his indebtedness by the Bank, thereupon, the liability of the Guarantors was extinguished also.

May contends that the Court erred in refusing to allow him credit for various insurance premiums charged to him by the Guarantors. Upon a review of the record we are of the opinion that under the terms of their agreement the Guarantors had a right to advance the insurance premiums on the mortgaged property. Therefore, we find no merit in this contention.

Finding no error, the decree is affirmed in all respects.

George Rose Smith and Johnson, JJ., dissent.

George Rose Smith, J. (dissenting). There seem to be only two real questions upon the bank's appeal.

First, was the obligation of the guarantors more extensive than that of the principal debtors? I think it was. The preamble to the guaranty agreement recites that "the undersigned [guarantors] are desirous of guaranteeing the Bank against loss as a result of such indebtedness." Paragraph 4 compels the bank to give the guarantors ten days notice before filing a foreclosure suit. If the existing default is not made good within that time, and it becomes necessary for the Bank to foreclose, the guarantors make themselves liable for all reasonable costs and expenses of the suit. The principal debtors did not undertake either to guarantee the bank against loss or to become liable for the expenses (other than costs) of litigation. Hence the guarantor's obligation was unquestionably greater than that of May and his wife.

This reasoning also answers the suggestion that the duty of the guarantors was fully discharged when the Mays paid the judgment against them. In a foreclosure suit the greater part of the creditor's expense is apt to be incurred not in the mere obtaining of a judgment but in the collection of that judgment. It was not until the bank had collected the principal debt from the mortgagors that it was in a position to determine the full amount

of the expenses for which the guarantors were liable under their contract.

Secondly, in Paragraph 4 of the guaranty agreement was the phrase "reasonable costs and expenses" intended to include attorney's fees? I think so. The parties were talking about litigation and certainly knew that attorney's fees are an unavoidable expense to be incurred by a bank in bringing a foreclosure suit. The guarantors had obtained the indulgence they sought by promising to guarantee the bank against loss.

In the absence of special circumstances this phrase, costs and expenses, has been uniformly interpreted to include counsel fees. As the Utah court pointed out in *Davidson* v. *Munsey,* 29 Utah 181, 80 Pac. 743, the term "costs" has a well-understood meaning; so the use of the additional word "expenses" must mean something other than recoverable court costs. Attorney's fees are an unavoidable incident to a lawsuit and therefore fall within the costs and expenses of the litigation that is being contemplated and provided for. Among many other cases holding that "costs and expenses" include attorney's fees are *In re Keystone Realty Holding Co.,* 3rd Cir., 117 F. 2d 1003; *Fumiko Mitsuuchi* v. *Security-First Natl. Bank,* 103 Cal. App. 2d 214, 229 P. 2d 376; *State to the use of Mills* v. *Birkins,* 32 Del. Ch. 39, 78 A. 2d 868; *Burrage* v. *Bristol County,* 210 Mass. 299, 96 N. E. 719; and *In re Loudenslager's Estate,* 113 N. J. Eq. 418, 167 Atl. 194. I think the majority opinion to be contrary not only to the intention of the parties but also to the great weight of authority.

JOHNSON, J., joins in this dissent.

5-3001 368 S. W. 2d 280

Opinion delivered June 3, 1963.

James P. Baker, Jr. and *Rose, Meek, House, Barron, Nash & Williamson,* for appellant.

John L. Anderson, for appellee.

FRANK HOLT, Associate Justice. In this probate proceeding the appellant, Leandre Green, contests the validity of his father's will. The Probate Court held the will was valid and admitted it to probate from which judgment appellant brings this appeal.

The testator, Ceasar Green, reputed to be 104 years of age, died in June, 1962. The will in question was executed by him on February 9, 1962. At the testator's request two reputable businessmen in the County came to his house where one of them wrote the will upon the testator's insistence after they had advised him to secure the services of a lawyer. As he requested, the will provided that his daughter, Roena Green Smith, appellee, would be the principal beneficiary of his estate. The will mentioned and made a nominal bequest to his other heirs, including his son, the appellant. The testator then signed this will by his mark, his name being written near the mark by the individual who wrote the will. This scrivener failed to write his own name as a witness to the testator's name and mark; neither did the scrivener affix his signature as an attesting witness to the will. Two wit-

nesses properly attested the will and, as such, have executed the Proof of Will. The testator's name was subscribed to the will in this form:

"His
Ceasar X Green
Mark

WITNESS:

J. B. Lambert

Leslie Smith"

The appellant contends that the testator's signature is not in compliance with Ark. Stat. Ann. § 60-403 (Supp. 1961) which is as follows:

"Execution.—The execution of a will, other than holographic, *must be by the signature* of the testator *and* of at least *two witnesses* as follows:

a. TESTATOR. The testator shall declare to the attesting witnesses that the instrument is his will and either

(1) Himself sign; or

(2) Acknowledge his signature already made; or

(3) *Sign by mark,* his name being written near it *and witnessed by a person who writes his own name as witness to the signature;* or

(4) At his discretion and in his presence have someone else sign his name for him, (the person so signing shall write his own name and state that he signed the testator's name at the request of the testator); and

(5) *In any of the above cases* the signature must be done in the presence of *two or more attesting witnesses.*

b. WITNESSES. The attesting witnesses must sign at the request and in the presence of the testator. [Acts 1949, No. 140, § 19, p. 304.]"

Appellee contends that either or both of the attesting witnesses can, in addition to executing the Proof of Will, serve the purpose of being a witness to the testator's mark since they observed him make his mark. We

cannot agree. Sub-section (3) plainly provides that a testator's signature by mark must be witnessed by a person who writes his own name as a witness to that signature. Sub-section (5) which follows, and is in addition to the requirement of (3), provides significantly that in case sub-section (3) is followed, such act "must be done in the presence of two or more attesting witnesses." In other words, there are four methods for a testator to sign his will and, as we construe this statute, when we consider it as a whole and sub-section (5) in particular, there must be at least two attesting witnesses in addition to the requirements of either of these four methods. We interpret the provisions of sub-sections (3) and (5) of this statute to be mandatory in requiring a minimum of three subscribing witnesses to make the will in question valid. As we said in *Ash* v. *Morgan,* 232 Ark. 602, 339 S. W. 2d 309:

"It is essential to due execution of a will that it be signed or subscribed by the number of witnesses required by the law governing the particular will being made, and subscription by fewer renders the transaction a nullity."

Nor can the parol evidence of the scrivener in this case supply the deficiency of the required additional witness' signature. The statute requires the written signature of such a witness.

Appellant contends that another will by his father, dated in 1958, should be admitted to probate. It is immaterial whether this be done inasmuch as the sole beneficiary named in it, the testator's wife, pre-deceased him. Thus, insofar as this will is concerned, the decedent's estate descends and is to be distributed to his heirs as if he had died intestate.

It becomes unnecessary for us to consider the other point advanced by appellant, namely the testator's lack of mental capacity, since the will in question was not executed in compliance with the quoted statute.

The judgment is, therefore, reversed and the cause remanded with directions to enter a judgment not inconsistent with this opinion. Reversed.

HUCHINGSON *v.* REPUBLIC FINANCE CO., INC.

5-3038 370 S. W. 2d 185

Opinion delivered September 9, 1963.

[redacted]

Ben M. McCray, for appellant.

Hall, Purcell & Boswell, for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves a conflict of laws, the question being whether a certain contract (hereinafter discussed) is governed by the law of Arkansas or by the law of Iowa.

According to a stipulation entered into between the parties, Carl J. Cardamon, an agent of Builders' Supply Company of Des Moines, Iowa, on May 11, 1960, contacted the appellants, Gordon Huchingson and wife, Amanda E. Huchingson, at their residence near Benton, Arkansas, and proposed to install aluminum siding on the Huchingson home. A contract was prepared authorizing Builders' Supply to do this work for the total sum of $1,600.00, $400.00 to be paid upon the completion of the work, and the balance of $1,200 to be paid in 36 monthly installments of $41.85 each. The contract provided "carrying charges," in the amount of $306.60. Appellants and Cardamon executed the contract in Saline County, and Hilary DiPaglia, a partner of Builders' Supply Company, subsequently "approved and accepted" the contract in Des Moines, Iowa. At the time they executed the contract in Saline County, appellants also executed their note in the amount of $1,506.60 (principal

and "carrying charges"), together with interest at the rate of 7% per annum after maturity, said note being payable at Des Moines. Within a day or two, work was commenced on the house, and shortly completed.[1] Builders' Supply Company endorsed the note without recourse to Republic Finance Co., Inc., of Des Moines, and when payment was refused by appellants on the ground of usury, suit was instituted in the Saline Circuit Court. After the filing of an answer, in which the defense of usury was pleaded, the case was submitted for trial to the Circuit Court on the pleadings, exhibits, and a stipulation entered into between the parties which included the admitted fact that the contract and note are usurious under both Iowa and Arkansas law. In its "finding of fact" the court stated:

"This Court believes that the law requires that if there can be any basis for sustaining a note that such note be sustained. In this situation if the note under consideration be an Arkansas note then it is usurious and null and void. The situation exists though in which if the note be construed under the law of Iowa then, relying upon the representations of the attorney for the plaintiff in his brief, if the note be considered to have been finally executed in Iowa the provisions for payment of interest alone are null and void and the note should be paid in its principal sum."

It then found "that the final execution of the note was in the State of Iowa and that the plaintiff is entitled to recover the sum of $1,200.00, and that the provisions for interest on such note shall be cancelled and shall be held for naught."

From the judgment so entered, appellants bring this appeal.

Paragraph Seven of the stipulation concisely sets forth the question we are called upon to determine. That paragraph reads as follows:

[1] While not shown by the record, appellants evidently paid the $400.00 upon completion of the work.

"That the sole question to be determined by this Court in this action is whether the contract and note constitute an Arkansas contract or an Iowa contract, as it is conceded by the plaintiff that the contract and note are usurious under both Arkansas and Iowa law, and if found to be an Arkansas contract, judgment should be for the defendants, but if the Court construes the note and contract to be Iowa contracts then judgment should be for the plaintiff with the provision that the accrued interest on the note shall be paid into the Iowa School Fund."[1A]

We have reached the conclusion that the judgment must be reversed. While in *Cooper* v. *Cherokee Village Development Company,* 236 Ark. 37, 364 S. W. 2d 158, we stated, "This court has consistently inclined toward the law of the state that will make the contract valid, rather than void," this statement is only applicable where ostensibly the law of either state could apply, or where there is doubt as to which properly does apply. Under the facts in the instant case, we have no hesitancy in declaring that the contract before us was an Arkansas contract, and is controlled by the law of this state.

In the first place, the contract was entered into, and the note executed by appellants, and Cardamon, the agent of the company, in Benton, Arkansas, and the work was to be performed in Arkansas. It is true that the instrument was subsequently "approved and accepted" by one of the partners of the Builders' Supply Company in Des Moines, but it does not appear that this approval was necessary to effectuate the contract. This is made

[1A] Under the law in Iowa, the effect of usury on the collection of a note is that the principal sum only can be collected by the holder of the note, and the interest is paid into the Iowa school fund. However, in *Crebbin* v. *Deloney,* 70 Ark. 493, 69 S. W. 312, a similar provision of Missouri law was involved, but we affirmed as to the principal only, stating:

"But the decree as to the penalty,—that is, the forfeiture of the interest to the school fund of Howard county,—is reversed and set aside. We have no law authorizing such a decree, and, while that might be a proper decree, under the Missouri law, in the state of Missouri, yet the law of Missouri imposing such penalty has no extraterritorial force. and will not be enforced here upon the principle of comity."

clear by the provisions of Paragraph One of the stipulation, which sets out that "a day or two" after the contract was executed by the Huchingsons and Cardamon at Benton, "work was immediately commenced and carried on to completion." From the record, the company agent had apparent authority to execute the contract, and there is nothing in the contract itself which provides that same must be approved in the home office before becoming effective. In fact, one of the provisions states: "This order is not cancellable and it is agreed that if the undersigned designated as 'Owner' does not perform same on their part that Builders' Supply Co., will have incurred damages as a result thereof and the undersigned 'Owner' hereby agrees that liquidated or ascertained damages in the sum of thirty (30%) per cent of the contract price shall be due and payable to said Builders' Supply Co."

We daresay that if appellants had, within a few hours after signing this contract, changed their minds about entering into the agreement, the company would have relied upon, and sought enforcement, of the quoted provision. It appears to us, both from the language of the contract, and the action of the company in commencing work almost immediately following the execution of same at Benton, that the agreement was complete when executed in Saline County, Arkansas, on May 11, 1960, and Iowa law has no substantial connection with the transaction.

The only circumstance that favors appellee is the fact that the monthly payments shall be made in Des Moines. Of course, in reaching our conclusions, the contract and note must be considered together. If the only instrument involved were a promissory note, payable in Iowa, appellee's position might well be maintained. But when the note is only a part of the overall agreement, we consider the situation vastly different. To hold that the mere fact that the note was payable in Iowa made the agreement subject to Iowa law, when all other essential elements of the contract were entered into, and were to be performed in Arkansas, would be to henceforth

furnish a loop-hole whereby an unscrupulous individual, or company, from a state which permitted liberal interest rates, could enter into contracts in this state, and simply by making the note payable in his, or its, own state, safely evade the usury laws of this jurisdiction.

Arkansas has a strong public policy on this subject, as indicated by the fact that the penalty against a seller or lender exacting usury is indeed heavy,[2] and this court, particularly for the last 10 years, has been zealous in guarding against any attempt to evade our constitutional provisions relative to usury.[3]

For the reasons herein set forth, we are of the view that the trial court erred in holding that the contract was to be governed by Iowa law, and the judgment, therefore, should be, and is, reversed.

It is so ordered.

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[2] The debt is cancelled.

[3] See *Heidelberg Southern Sales Co.* v. *Tudor*, 229 Ark. 500, 316 S. W. 2d 716; *Winston* v. *Personal Finance Company of Pine Bluff, Inc.*, 220 Ark. 580, 249 S. W. 2d 315; *Commercial Credit Corp.* v. *Kitchens*, 231 Ark. 104, 328 S. W. 2d 355; *Holland* v. *Doan*, 228 Ark. 340, 307 S. W. 2d 538; *Brooks* v. *Burgess*, 228 Ark. 150, 306 S. W. 2d 104; *Strickler* v. *State Auto Finance Co.*, 220 Ark. 565, 249 S. W. 2d 307; *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S. W. 2d 973, and cases cited therein.

STATE OF ARK. EX REL. *v.* CATE.

5-3030 371 S. W. 2d 541

Opinion delivered September 9, 1963.

[Rehearing denied October 14, 1963.]

Sexton & Morgan, for appellant.

Gean, Gean & Gean, Charles R. Starbird, and *Lonnie Batchelor,* for appellee.

ED. F. MCFADDIN, Associate Justice. This case arose as a taxpayer's suit brought by appellant, Peevy, under Act No. 193 of 1945 (Ark. Stat. Ann. § 17-304 *et seq.* [Repl. 1956]); and challenging the sale of county property to appellee, Cate. Drawn into the suit was the applicability of Act No. 481 of 1949 (Ark. Stat. Ann. § 17-1501 *et seq.* [Repl. 1956]) regarding county hospital property. From a decree affording the taxpayer only partial relief, both sides have appealed: so the entire controversy is before us for trial *de novo* on the record.

For many years Crawford County had owned twenty acres, commonly called "the county farm property,"[1] but later called "the county infirmary." In the 1932 depression, the Works Progress Administration erected a stone building on the property, and Crawford County used the building and property for the intended statutory purpose of a county poor farm. By 1960 the building had become dilapidated, and Old Age Assistance grants had relieved many people from being inmates of the county poor farm; so there remained only one occupant of the property. The use to be made of the county poor farm or county infirmary became a problem to Crawford County. It would have cost the County over $80,000.00 to equip the property for use as a suitable rest home. At the regular January 1961 meeting of the Quorum Court of Crawford County, a motion was adopted "that

[1]Ark. Stat. Ann. § 83-301 *et seq.* (Repl. 1960) are the statutes concerning county poor houses.

the County Judge be given authority to appoint a board to dispose of the County Infirmary as the board sees fit."

The County Judge proceeded under Act No. 481 of 1949 (Ark. Stat. Ann. § 17-1501 *et seq.* [1947]) to accomplish the motion of the Quorum Court; and on February 15, 1961, there were appointed under the said Act eight persons as the Board of Governors of said "County Infirmary and grounds." This Board met on the same day and gave serious consideration to the problem of the County Infirmary;[2] and finally adopted a motion that the County Infirmary be placed on a long term lease to Clyde R. Cate (one of the appellees herein) for operation as a rest home. On March 14, 1961, a lease was executed by the said Board of Governors and by the County Judge and County Court, whereby Clyde R. Cate became the lessee of said County Infirmary. We briefly abstract the pertinent provisions of the lease, since its validity is one of the issues in this litigation: (a) the entire tract of twenty acres, with building, was leased to Clyde R. Cate for 25 years, with option to the lessee to renew for a like period; (b) the rental the County was to receive was $1.00 per year; (c) lessee agreed to expend enough money in improving and equipping the property to have and maintain a rest home that would meet State and national regulations; (d) lessee agreed to keep at all times, free of expense to Crawford County, one patient as sent by the County Judge. The lease also provided that the lessee had an option to purchase all of the leased property at any time during the life of the lease by paying Crawford County the sum of $7,500.00; and, in addition, if any of the twenty acres should be taken by eminent domain proceedings during the life of the lease, then the lessee would receive all such amounts paid in the eminent domain proceedings.[3]

Mr. Cate entered into possession of the leased property and immediately commenced spending substantial

[2] The minutes of that meeting are before us, and the testimony of some of the Board members. We are impressed with the high type public service the members were attempting to render. That they acted in good faith, is readily apparent.

[3] This option to purchase and the right to receive the proceeds of the eminent domain matters constitute problems later to be discussed.

sums in making the necessary and required improvements. At the time of the trial below it was testified, without substantial contradiction, that Mr. Cate had expended between $28,000.00 and $30,000.00, had an A-1 rated rest home with a capability of accommodating 23 patients, and plans to enlarge the rest home to accommodate 60 patients.

With the lease of the rest home thus accomplished in March 1961, the matter might well have ended; but then commenced the course of events which directly caused this litigation. These events were evidently triggered by the realization of Mr. Cate that his option to purchase the property (as contained in his lease) might be null and void. On July 15, 1961, the County Court entered an order that the entire 20 acres (legally described), known as the "County Infirmary Property," would be sold to the highest bidder "subject to the terms of the said lease" held by Cates. This sale was a proceeding under Act No. 193 of 1945 (Ark. Stat. Ann. § 17-304 *et seq.* [Repl. 1956]); and every step prescribed by said Act was carefully followed.[4] The sale was advertised, and only one bid was submitted; and that was the bid of Clyde R. Cate for $7,500.00. That bid was accepted, and the deed made and approved, as required by the law, and delivered to Mr. Cate on August 4, 1961: so everything seemed to be concluded.

Then on August 14, 1962, appellant Clyde Peevy, as a citizen and taxpayer for the benefit of Crawford County, filed the present suit in the Chancery Court as a proceeding under Act No. 193 of 1945 (Ark. Stat. Ann. § 17-304 [Repl. 1956]), alleging that the sale of the property to Clyde R. Cate was invalid, and praying for a return of the property to Crawford County free of all mortgages and conveyances executed by Cate. Various lienholders and grantees from Cate were made defend-

[4] It is claimed by appellants that the spirit of the law was entirely flouted in that the publication was in a little known newspaper; that the assessor signed his appraisal of the property without seeing it; and that various other matters occurred which showed that the spirit of the Act was not fulfilled; but all of these go to the matter of good faith and not to the "letter of the law" compliance.

ants.[5] The defense of all the defendants was the absolute validity of the sale of the property by the County to Cate, and the good faith of all parties.[6] The cause was heard *ore tenus* by the Chancery Court and resulted in a decree:

(a) Holding void the option given Cate in the lease to purchase the property for $7,500.00;

(b) Holding that the effect of making the sale of the property subject to the Cate lease was to stifle bidding;

(c) Holding that at the time of the sale of the property it was worth $10,000.00 instead of $7,500.00, and that the effect of the stifling of the bidding was to defeat the County of $2,500.00; and

(d) Holding that the County was entitled to receive for the property an additional $2,500.00.

The learned Chancellor delivered a splendid opinion which clearly shows the many intricate problems arising in this case, and the earnest and sincere desire on the part of the Chancellor to accomplish substantial justice and equity.

From that decree both sides have appealed. Peevy, as appellant, insists that the entire property (less the 4.85 acres acquired by the State Highway Commission) should be returned to Crawford County, free of all mortgages and conveyances; and he cites and strongly relies on Ark. Stat. Ann. § 17-309 (Repl. 1956), which says that when county property is sold in violation of the Act, the sale shall be null and void, and a citizen and taxpayer may bring a suit in the Chancery Court within two years; "and in the event such property is recovered for the county in such action the purchaser shall not be entitled to a refund of the consideration paid by him for such

[5] Cate had received $4,000.00 from the State Highway Commission for 4.85 acres taken for highway purposes, and personal judgment against Cate was prayed for that amount. Cate had sold one small tract for $500.00 to Joe Smith, who had executed a mortgage on the tract and built a home; and a return of that tract, free of the mortgage, was prayed. Cate had mortgaged the property for funds used to make improvements, and a cancellation of all such mortgaged was prayed.

[6] The Cates prayed that if the complaint of the plaintiffs be not dismissed, then the Cates "recover judgment for all improvements and taxes paid by them . . . and for all other just and equitable relief." The prayers of the other defendants were couched in somewhat similar language.

sale." Peevy relies strongly on our case, *State for the use of Miller County* v. *Eason,* 219 Ark. 36, 240 S. W. 2d 36. On the other hand, the appellees (Mr. and Mrs. Cate, Mr. and Mrs. Smith, and the Smith's mortgagee, First Federal Savings & Loan Association) maintain that the Act No. 193 of 1945 was literally followed; and that the Chancellor should not have rendered judgment against Cate for $2,500.00.

I. *The Lease Contract.* The first question to be decided is whether the lease of the County Infirmary property to Cate was valid or void. We have concluded that the County properly proceeded under the provisions of Ark. Stat. Ann. § 17-1501 *et seq.* (Repl. 1956); but we have concluded that the provision giving Cate an option to purchase the property was void, as was also the provision giving Cate the right to any money received in the eminent domain proceeding. The reason these two provisions are void is because such provisions constitute a disposition of the County property without compliance with Ark. Stat. Ann. § 17-304 *et seq.* (Repl. 1956).

The next question is whether said void provisions rendered void the entire lease to Cate, or whether Cate could claim that the lease was valid with these two provisions stricken. We conclude that Cate could legally so claim; and our authority for such conclusion is the case of *Storthz* v. *Sanger,* 108 Ark. 154, 156 S. W. 1020, which was also a chancery case. In the Storthz case, the guardian of an insane person executed a lease of real estate, which instrument gave the lessee an option to purchase the property on stated terms. Even though the lease was approved by the Probate Court, we held such option to purchase to be void, saying: "There appears nowhere in the statutes of this State any authority in the probate court to authorize the execution of such a contract . . ."—*i.e.,* option to the lessee to buy. But we further held:

"The invalidity of that part of the contract did not, however, deprive the lessor of the other benefits arising under it, and the heirs of the lessor were not put to an election either to ratify the contract as a whole, including the option to purchase, or to let the lessee occupy the

premises for the balance of the term free of rent. In other words, the lessees had rights under the contract notwithstanding the invalidity of one feature, and it was not within the power of the heirs of the lessor to repudiate the contract; therefore, they were not put to an election, either to affirm or repudiate it as a whole." Under the authority of said case, we conclude that Clyde R. Cate could validly hold the lease here involved, with the void provisions stricken. The Chancery Court so held; and we affirm that portion of the decree.

II. *Stifling of Bidding.* We come next to the question as to whether the sale of the property was in full compliance with Ark. Stat. Ann. § 17-304 *et seq.* (Repl. 1956); and we find that the letter of the law was fulfilled, just as we emphasized in *State, use of Miller County* v. *Eason,* 219 Ark. 36, 240 S. W. 2d 36:

(a) an order was entered in the County Court, setting forth the description of the property to be sold, giving the reason for the sale, and directing the County Assessor to appraise the property and certify same to the County Court;

(b) the County Assessor filed with the County Clerk his certificate of appraisal;

(c) the notice of sale was advertised in a newspaper for the time required by law, and Cate made a sealed bid of $7,500.00;[7]

(d) the bid was for more than three-fourths of the said appraised value;

(e) a majority of the Board of Approval approved the sale to Cate; and

(f) the County Court entered its order approving the sale and giving details.

As we say, the requirements were followed to the "letter of the law." It is true that in the present proceeding the plaintiff (appellant) challenged the appraisal, the publication, and other matters; but we need

[7] This was the only bid received.

not consider such challenges because there is one point which shows that bidding was stifled; and that is the fact that the County Court order and notice stated: "Said property will be offered for sale, and sold subject to a certain lease of Crawford County with Clyde Cate and Vian Cate, husband and wife, for a term of 25 to 50 years." It must be remembered that the lease on its face gave Cate a lease for 25 to 50 years at $1.00 per year and the care of one patient, *and that Cate had an option to buy the property at any time for $7,500.00, and in the interim Cate would receive all proceeds of any eminent domain money.* Even though we are now holding such italicized clause to be void, nevertheless the italicized clause at the time of the sale had not been determined to be void; and any prospective purchaser other than Cate would be "buying a lawsuit" regarding such provisions. It is clearly apparent that the effect of making the sale subject to the Cate lease was to arrange matters in such a way that no one except Cate would be in a position to make a substantial bid for the property; and the fact, that Cate alone offered a bid, is proof of such statement. The said arrangement constituted stifling of bidding. "Any act of auctioneer, seller, or purchaser which diminishes competition and stifles or chills the sale, vitiates the sale."[8] 7 C.J.S. p. 1255. In *Hinton* v. *Elliott,* 187 Ark. 907, 63 S. W. 2d 633, the property was ordered sold by the Commissioner "in the manner and form as provided by law for the sale of lands under attachment." We held that such language in the order of sale, coupled with the inadequacy of the price, was sufficient to amply justify the Court in refusing to confirm the sale.

It cannot be successfully claimed that when the County Court approved the sale of the property to Cate that stifling of bidding and all other defects and irregularities were cured, because the present proceeding is a

[8] On stifling of bidding see: Am. Jur. Vol. 30 A. p. 957, "Judicial Sales" § 98; 50 C.J.S. p. 674, "Judicial Sales" § 54; 5 Am. Jur. p. 463, "Auctions" § 26; 7 C.J.S. p. 1255, "Auctions and Auctioneers" § 7. See also *Preske* v. *Carroll* (Md.), 16 A. 2d 291. In *Dumas* v. *Owen,* 210 Ark. 505, 196 S. W. 2d 987, we had occasion to consider stifling of bidding in judicial sales. See also generally *Mulkey* v. *White,* 219 Ark. 441, 242 S. W. 2d 836.

taxpayer's suit in chancery, under the provisions of Ark. Stat. Ann. § 17-304 *et seq.* (Repl. 1956), and, under that statute, the taxpayer may urge *any defect* in the sale proceedings. So we hold that bidding was stifled in this sale; and the significant point is that the Sheriff (who was a member of the County Board of Approval under Ark. Stat. Ann. § 17-308 [Repl. 1916]) refused to approve the sale. Here is what he testified, with no objections registered to such testimony:

"Q. As a member of the Board of Approval and as bearing upon your refusal to approve the sale, what did you consider the fair market value of the property to be at the time it was sold?

"A. One of the Hospital Board members and myself—

"Q. No, sir, just tell me what you considered?

"A. Ten Thousand dollars."

The Chancery Court held that the bidding was stifled, and that the property was worth Ten Thousand Dollars; and we affirm that portion of the decree.

III. *The Disposition To Be Made Of This Case.* We come, next, to this severe problem which confronted the learned Chancellor, and which confronts us on this appeal. The appellants vehemently urge that under Act 193 of 1945 (Ark. Stat. Ann. § 17-309 [Repl. 1956]) the property should be returned to Crawford County free of any claim of any of the appellees. It is true that the said statute says that any sale contrary to the provisions of the Act is void, "and in the event such property is recovered for the county in such action the purchaser shall not be entitled to a refund of the consideration paid by him for such sale." The answer to the appellant's contention is that this particular sale was not contrary to the provisions of the Act, but was subject to attack for a different reason. Hence, the sale was merely voidable, and equity could mould a remedy to fit the case. *Hester* v. *Bourland,* 80 Ark. 145, 95 S. W. 992; *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230; *Young* v. *Young,* 207 Ark. 36, 178 S. W. 2d 994.

Equity, in its power to mould the remedy to repair the wrong, may impose conditions on whatever relief it grants or refuses. In 19 Am. Jur. 51, "Equity" § 22, cases from many jurisdictions are cited to sustain this text:

"A court of equity has power to make its granting of relief dependent upon the performance of conditions by a party litigant, if the conditions are such as are imposed in the exercise of a sound discretion and of a character calculated to satisfy the dictates of conscience. The court may thus protect and give effect to the rights of one party while awarding relief to the other. The court is not restrained by strict legal rights."

In *Central Kentucky Co.* v. *Comm.,* 290 U. S. 264, 54 S. Ct. 154, 78 L. Ed. 307, Mr. Justice Stone used this language:

"The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. It may refuse its aid to him who seeks relief from an illegal tax or assessment unless he will do equity by paying that which is conceded to be due. *State Railroad Tax Cases,* 92 U. S. 575; *Cummings* v. *National Bank,* 101 U. S. 153; *Peoples National Bank* v. *Marye,* 191 U. S. 272, 287; see *Norwood* v. *Baker,* 172 U. S. 269, 294. It may withhold from a plaintiff the complete relief to which he would otherwise be entitled if the defendant is willing to give in its stead such substituted relief as, under the special circumstances of the case, satisfies the requirements of equity and good conscience."

Our Court, in *Quality Excelsior Coal Co.* v. *Reeves,* 206 Ark. 713, 177 S. W. 2d 728, said:

"*Conditions Imposed on Relief to Plaintiff.* Having found that the cause is cognizable in a court of equity, and that relief may be granted by injunction, it follows as a corollary that the court may impose conditions on the relief to be granted the plaintiff, or may grant other relief in lieu of injunction. One of the peculiar attributes of a court of equity is the power to mould the relief to

fit the particular case. There are salient facts in this case that call for the exercise of this equitable power."

With the foregoing authorities in mind, we consider the situation confronting the Chancery Court. At the outset it must be remembered that even if the *sale* should be set aside, nevertheless the *lease* would remain as valid, less the option and the provisions about the eminent domain money, as heretofore mentioned: so the County would not recover *possession* of the property. Then there are other matters that complicate the situation. Mr. Cate and his wife had mortgaged this and other property to obtain the needed funds and had expended in excess of $28,000.00 in improving the property, equipping the rest home, and securing an A-1 rating for it. Twenty-three persons are occupying the rest home because of State or federal aid. Whether Cate, or his mortgagee, could claim a lien to the extent of the improvements—under the theory of unjust enrichment—is itself an unanswered question.

Furthermore, Cate sold a small parcel of the property to Mr. and Mrs. Smith, who borrowed money from a building and loan association and built a home on the purchased parcel. To completely set aside the sale of all the property would be to put the Smiths and their mortgagee in an almost helpless position. In addition, the State Highway Commission, in eminent domain proceedings in the Circuit Court, has taken 4.8 acres of the property. To completely set aside the sale would leave open the question as to the validity, if any, of the condemnation proceedings, and the payment of the proceeds to Cate. The condemnation proceedings were in November 1961; the sale to the Smiths was in December 1961; and the present suit was not filed until August 14, 1962. Of course, under the statute, the taxpayer had until July 1963; but, by delaying until August 14, 1962, the taxpayer allowed various situations to develop, as previously indicated, whereby to set aside the entire sale would work a grave inequity.

In such a complex factual and legal situation the learned Chancellor moulded the remedy to fit the wrong.

The Court found that the property was actually worth $10,000.00 at the time of the sale to Cate; that Cate paid only $7,500.00; that Cate should pay an additional $2,-500.00, with interest thereon at 6% per annum from July 1961 until paid and should pay all costs of this litigation;[9] that when all such should be done by Cate, then equity would be satisfied and the sale would not be set aside; but that if Cate should not pay the said amount within a reasonable time, then the sale of the property from the County to Cate would be set aside. We conclude that the Chancellor made a wise and equitable decision; and we affirm his decree and remand the cause to the Chancery Court to reinvest that Court with jurisdiction to again fix a reasonable time[10] within which Cate must comply with the decree, otherwise the Chancery Court will order a resale of the property on such terms and conditions as it sees fit. Costs of this appeal shall be paid by appellee.

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[9] There is authority for requiring the purchaser to increase his bid as a condition for obtaining a confirmation of the sale. See *State Nat'l Bank* v. *Neel,* 53 Ark. 110, 13 S. W. 700, and annotation in 105 A.L.R. 366 entitled: "Power of court as condition of confirmation of judicial sale to require successful bidder to increase his bid."

[10] The Chancery decree gave the defendants (appellees here) sixty days from October 25, 1962 to pay the additional $2,500.00 and interest. Since such time expired during this appeal, the Chancery Court may fix a new period.

STEVENSON *v.* STATE.

5075 370 S. W. 2d 445

Opinion delivered September 9, 1963.

[Rehearing denied October 7, 1963.]

Virgil R. Moncrief and *John W. Moncrief,* for appellant.

Bruce Bennett, Atty. General, By *Leslie Evitts,* Chief Asst. Atty. Gen., for appellee.

SAM ROBINSON, Associate Justice. Appellant, B. C. Stevenson, Jr., was charged in the Monroe Circuit Court with murder in the first degree in the killing of Curtis Diamond. Defendant was convicted of murder in the second degree and sentenced to 21 years in the penitentiary. He has appealed.

There is no question about the killing, and there is no doubt about the evidence being sufficient to sustain the verdict. The appellant relied on the theory of self defense as justification for the killing, but by its verdict the jury found that he was not acting in self defense at the time of the killing.

Kissiee Diamond, widow of the deceased, is the sister of appellant, Stevenson. By a former marriage she has a son, Marshall Johnson, age about 14. Curtis Diamond was, therefore, Marshall Johnson's stepfather. Diamond, contending that his stepson had wrongfully gone into a neighbor's watermelon patch, gave the boy a severe whipping with a belt, breaking the skin and causing bleeding in more than one place on the boy's body.

Sometime after the whipping, appellant, Stevenson, age about 24, heard about it. Later, a day or so after the whipping took place, appellant, along with his nephew, Marshall Johnson, and some others, went on a fish fry at an isolated lake. Appellant, Stevenson, carried a pistol, a .38 special. When he returned home about 3:30 in the afternoon, his brother-in-law, Diamond, was sitting on the front porch. Appellant pulled his pistol

and shot him down, hitting Diamond once in the chest, and twice in the back, killing him then and there.

On appeal appellant contends first that the court erred in not allowing the introduction in evidence of pictures of Marshall Johnson's body, taken a year after the whipping, showing scars alleged to have been caused by the punishment. The pictures were taken about six months before the trial. Johnson was a witness for the State, and exhibited his body to the jury. There is no showing that the scars in question were not visible at the time of the trial. The fact that his body was exhibited to the jury would indicate that the scars were visible; otherwise there would have been no point in letting the jury view his body. Whether the introduction in evidence of pictures of a given situation is allowed is largely in the discretion of the trial court. *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621; *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509; 226 S. W. 2d 556. Here, we do not find that there was an abuse of discretion by the trial court in not permitting in evidence pictures taken a year after the whipping was administered.

In his argument to the jury, the Prosecuting Attorney said: "B. C. Stevenson, Jr. and Will Stewart, Jr. were the only ones who actually witnessed this killing, besides the deceased, Curtis Diamond, and he is not here to testify." Appellant argues that the court erred in permitting the Prosecuting Attorney to call the jury's attention to the fact that the deceased could not be there to testify. We fail to see how the argument was in any way erroneous. Prosecuting Attorneys make this same argument in almost every case where only the defendant and the victim were witnesses. The statement that the deceased was not present to testify is merely calling the jury's attention to an obvious and uncontrovertible fact.

After deceased was shot, he ran into the house and fell dead in the kitchen floor. When officers arrived they found a knife near the body and another knife in the pocket of the deceased. The Sheriff had possession of the knives and also the pistol used by the defendant in the slaying. When he was testifying, he placed these

articles, which were in a bag, on the counsel table. In his motion for new trial the defendant alleged newly discovered evidence stating that he and his counsel first learned about the knives subsequent to the trial.

No diligence is alleged or shown; there is no indication whatever that the officers who found the knives attempted to keep that fact a secret, and there is no indication that they would not have freely discussed the facts with anyone. Moreover, the circumstances of the killing were such that evidence of the knives would not likely change the result in a new trial. It will be recalled that the deceased was shot once in the chest and twice in the back while he was on the front porch.

The court said in *St. Louis Southwestern Ry. Co.* v. *Goodwin*, 73 Ark. 528, 84 S. W. 728: "Motions for new trial on the ground of newly discovered evidence are addressed to the sound legal discretion of the trial court. They should show that reasonable diligence was used to discover the evidence. In this case affidavits were filed with the motion to the effect that appellant had used due diligence and done all in its power to discover the evidence, but do not state the acts done which affiants denominate reasonable diligence, . . ."

The court said in *Runnels* v. *State,* 28 Ark. 121; "Applications for new trials on the ground of newly discovered evidence are to be received with caution, and this in proportion to the magnitude of the offense. The application should be corroborated by the affidavits of other persons than the accused, and if possible, those of the newly discovered witnesses themselves, and it is not sufficient for the applicant to state that he did not know of the existence of the testimony in time to have brought it forward on the trial, but it must appear that he could not have ascertained it by reasonable diligence." See also *Campbell* v. *State,* 38 Ark. 498; *Robinson* v. *State,* 33 Ark. 180.

Finding no error, the judgment is affirmed.

Opinion delivered September 9, 1963.

John C. Watkins, for appellant.

Bruce Bennett, Atty. General, By *Jerry L. Patterson,* Asst. Atty. Gen., for appellee.

JIM JOHNSON, Associate Justice. This appeal involves a petition for writ of error coram nobis. Appellant Joe Dement was charged on two counts with the crimes of burglary and grand larceny. On November 27, 1962, he was arrested, information was filed against him, and he signed a confession of commission of the crimes. Appellant was arraigned December 3, 1962 and entered pleas of guilty as charged. On December 7th appellant was sentenced by the Greene County Circuit Court to two ten-year concurrent sentences in the penitentiary. On December 14th appellant's father caused to be filed a petition for writ of habeas corpus, alleging that appellant "entered a plea of guilty to criminal charges without benefit of advise of council [*sic*] prior to entering his plea to said charges." The writ of habeas corpus was granted that day, and on January 5, 1963, hearing was held on the petition for the writ of habeas corpus. At the request of appellant and with the assent of the State, the petition for writ of habeas corpus was treated by the court as a petition for writ of error coram nobis,

which was denied. Thereafter on January 7th appellant filed a petition for writ of error coram nobis and motion to vacate. On January 12th the trial court sustained the State's motion to dismiss the second petition and on that day entered the order of January 5th finding that the allegations of the petition were not sustained and the prayer of the petition was accordingly denied.

From such order appellant prosecutes this appeal.

It is well settled that under the Fourteenth Amendment of the United States Constitution and Article 2, Section 10 of the Constitution of Arkansas acceptance of a plea of guilty without first giving or offering the accused benefit of counsel constitutes a denial of due process of law. *Swagger* v. *State,* 227 Ark. 45, 296 S. W. 2d 204.

The trial court's order recites that the State admitted that appellant did not have counsel at the time he entered his plea of guilty.

On appeal, appellee argues that "[t]he State admits only to the fact that the appellant had no attorney at the time he entered a plea of guilty, not to allegations that he was denied or not informed of rights to be advised by counsel at any stage prior to his plea of guilty to the charges of burglary and grand larceny. Such allegations remain unsupported."

The record is silent as a tomb on the question of whether appellant was offered counsel and, if so, whether he in fact waived such counsel. In the recent decision of *Carnley* v. *Cochran,* 369 U. S. 506, 82 S. Ct. 884, the United States Supreme Court, in a non-capital felony case, set out this criterion:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver."

In the absence of such an affirmative showing, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Opinion delivered September 9, 1963.

A. M. Coates, for appellant.

Bruce Bennett, Atty. General, By *Jerry L. Patterson,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Associate Justice. The appellant was accused of the crimes of forgery and uttering in two separate informations which were consolidated for trial. The jury acquitted her in one case and convicted her in the other in which they assessed her punishment at two years in the State Penitentiary for forgery and another two years for uttering. From this jury verdict and the judgment of the Court the appellant brings this appeal.

The appellant alleges five assignments of error in her motion for a new trial. We group the first three assignments inasmuch as they question the sufficiency

of the evidence. On appeal all the evidence submitted at the trial must be viewed in the light most favorable to a jury verdict and if there is any substantial evidence to support the verdict it is our duty to sustain it. *Ashcraft* v. *State,* 208 Ark. 1089, 189 S. W. 2d 374; *Smith* v. *State,* 222 Ark. 650, 262 S. W. 2d 272.

The witness to whom it is alleged the defendant presented the questioned check testified that she had seen the defendant before and that she observed the appellant, Alma Rollie, endorse the name "Vera Mae Wilson" on the check when the appellant made a purchase, receiving therefor certain articles and the balance in cash; that the appellant was in the store some fifteen to twenty minutes; that approximately fifteen minutes after the appellant left the store and after it was learned that possibly the crime of forgery and uttering had been committed she went out on the street and discovered the appellant and brought her back in the store, the appellant still having in her possession the purchased articles and some cash. The individual whose name was signed as the drawer of the check testified that it was not her signature and she had issued no such check. Vera Mae Wilson, whose name appeared on the check as the drawee, testified that she had received no such check, was due no such check and that she did not endorse it. The State also offered other evidence which is unnecessary to detail here. The appellant denied the accusations and contended that she knew nothing about it, thus presenting a question of fact for the determination of the jury. The evidence adduced in this case is not only sufficient but more than ample to support the verdict.

The appellant contends that the Court committed error in refusing to permit John Moye, Jr., a witness for the defendant, to testify that based upon his twenty-eight years experience in the banking business and being familiar with comparison of signatures, that in his opinion, after studying the endorsement and appellant's known handwriting, the appellant did not endorse the check in question. The general rule is well stated in 20 Am. Jur., Evidence, § 842, p. 706 as follows:

"There is no test by which one can determine with precision how much experience or knowledge of handwriting a witness must have in order to qualify as an expert for comparison. This problem is, generally speaking, left to the discretion of the trial court whose ruling thereupon is not reviewable in the absence of an abuse of that discretion.

It is not essential to qualify one as an expert to testify to comparisons of handwritings that he have professional knowledge or that he has made such work a specialty. It is enough that he has been engaged in some business which calls for *frequent comparisons of handwritings* and that he has in fact been in the habit for a length of time of making such comparisons. Bank tellers and other bank officers and employees whose daily business and duties compel them to scrutinize and examine writings are competent experts respecting handwriting. * * *" [Emphasis added.]

In view of Mr. Moye's twenty-eight years of experience in the field of banking, during which time it appears he made frequent comparison of signatures, we perceive no reason why he would not be qualified to express his opinion on the subject of handwriting. However, in this case the appellant never offered sufficient proof to the Court that indicates she was prejudiced by the ruling of the Court. In answer to a question by appellant's counsel and the Court if he was "able to tell whether the endorsement "Vera Mae Wilson" on the check was in the same handwriting as the known handwriting of the appellant, Mr. Moye replied that he could not do so. Therefore, we think there was no abuse of discretion by the Trial Court in the ruling on this point.

The most serious question presented to us is the alleged error of the Court in not declaring a mistrial based upon the following occurrence which we must consider to be prejudicial and reversible error. After the jury retired to consider its verdict, one of the jurors left the jury room and came into the court room alone, the other eleven members of the panel remaining in the

jury room. The Bill of Exceptions contains the following statement by the Court:

"In the first place, Mr. Ladd asked the Court about the form of the verdict and said if they voted to find her guilty on two counts and not guilty on two counts would that mean the same as one four year sentence and the Court advised him that it would. Whereupon, said juror returned to the jury room and soon thereafter the jury returned its verdict. The motion is overruled."

Ark. Stat. Ann. § 43-2139 (1947) provides:

"*After the jury retires for deliberation,* if there is a disagreement between them as to any part of the evidence, or *if they desire to be informed on a point of law, they must* require the officer to conduct *them* into court. *Upon their* being brought into court, the information required *must be given* in the presence of, or after notice to, the counsel of the parties." [Emphasis added.]

This statute requires in unambiguous language that the entire jury and no less a number thereof must be present before the Court and counsel for the parties, or notice given to counsel, upon any proceeding affecting the rights of the defendant or the State as defined in this statute. Its provisions are mandatory. In the instant case it is undisputed that the entire membership of the jury was not in the presence of the Court nor the defendant or her counsel when this juror sought the advice of the Court in the manner so stated by the Trial Judge in his characteristic fairness.

In *Aydelotte* v. *State,* 177 Ark. 595, 281 S. W. 369, we said:

"The most serious question in this case is whether or not the court erred in telling the foreman of the jury in the hall of the courthouse, apart from his fellows, in answer to a question propounded to the judge by the foreman, that the jury could give less than one year for the lowest degree of homicide according to the instruction twice given to the jury. If this were all the record showed, it would undoubtedly be reversible error because contrary to § 3192, C. & M. Digest [Ark. Stat. 43-

2139] * * *. *The provisions of the above statute are mandatory, and where the facts call for an application of its provisions, unless the rulings of the court comply with the statute, they will constitute prejudicial error.''* [Emphasis added.]

However, in this case it was held that the manifest error was corrected by the Court when it repeated the communication in the presence of the entire jury and counsel in the court room before the verdict was received and after the Court ascertained if the occurrence had exerted any influence on their verdict. *Bell* v. *State,* 223 Ark. 304, 265 S. W. 2d 709; *Hopkins* v. *State,* 174 Ark. 391, 295 S. W. 36; *Hinson* v. *State,* 133 Ark. 149, 201 S. W. 811; *Wacaster* v. *State,* 172 Ark. 983, 291 S. W. 85.

The State contends the record or Bill of Exceptions does not disclose that any objection and exception was made by appellant to this procedure until after the jury was discharged and sentence was pronounced and, therefore, appellant is precluded from raising this point in her motion for a new trial. This is the general rule, however, there are exceptions. This point was specifically and thoroughly considered in the more recent case of *Bell* v. *State, supra.* In that case we held that the defendant did not waive an alleged error similar to the one in this case and, therefore, could properly raise it for the first time in a motion for a new trial.

Reversed and remanded.

ADEN *v.* STATE.

5078 370 S. W. 2d 187

Per Curiam Opinion delivered September 9, 1963

E. L. Hollaway, for appellant.

Bruce Bennett, Attorney General, for appellee.

Per curiam. The appellant, Joseph Franklin Aden, was convicted of a felony in the Randolph Circuit Court and on February 6, 1963, was sentenced to four years in the penitentiary. On April 8, 1963, a partial record was filed in this Court and an appeal granted and certiorari was issued to bring up the entire record.

The appellant has filed in this Court a motion that he be allowed to proceed *in forma pauperis.* The motion is duly verified and appellant's counsel certifies that he is serving without compensation. The appellant has complied with the requirements of the law so as to be allowed to proceed *in forma pauperis.* See *Thornsberry* v. *State,* 192 Ark. 435, 92 S. W. 2d 203; and, *McCulloch* v. *Ballentine,* 199 Ark. 654, 135 S. W. 2d 673; and see also Sec. 22-357 Ark. Stats., and Act No. 148 of 1953.

The Clerk of this Court is hereby ordered to forthwith direct a writ to the Clerk of the Randolph Circuit Court and to the Court Reporter of the Randolph Circuit Court who took down the testimony. The Reporter is directed to without delay transcribe and file the testimony with the Clerk of the Randolph Circuit Court; and the Clerk of the Randolph Circuit Court to complete without delay the entire transcript under the writ of certiorari issued to him in this case. The transcribing and filing of the testimony by the Court Reporter and the preparation of the transcript by the Clerk of the Court are to be furnished without expense; but this Court retains the right to hear resistance that may be made by any persons desiring to resist the pauper affidavit of the appellant.

Opinion delivered September 16, 1963.

D. B. Bartlett, Edward Patterson and *Mark E. Woolsey*, for appellant.

A. F. House and *Harry E. Meek,* for appellee.

CARLETON HARRIS, Chief Justice. Appellants, plaintiffs below, brought a taxpayers' suit in which they sought injunctive relief against appellees, Light and Water Commissioners in the City of Clarksville. Appellants urged that City Ordinance No. 387, under which appellees were acting, was invalid; that certain expenditures made by appellees from surplus funds acquired in

the utility operations, were unlawful; an accounting was sought from appellees, as well as a judgment against them, for particular payments hereinafter set out that had already been made, and the court was asked to enjoin and restrain the commissioners from making such further expenditures. After the filing of an answer and various amendments to the pleadings, the case proceeded to trial before the chancellor, who, after taking the cause under advisement, rendered his opinion. The court found that "the Clarksville Light and Water Company"[1] was an agency of the City of Clarksville, empowered to perform those duties specifically outlined in the ordinance, and further found that the commission had performed its duties in accordance with the expressed desire of the City Council. The court refused to grant a judgment or issue an injunction, as prayed, but did direct that in the future "the agency do and perform only those acts which are necessary to operate the utilities, pay the debts, and to build up a sound business operating reserve from the profits of the organization and when that reserve has been established that all profits of the organization be paid in to the City Treasurer as a part of the General Revenue." Except for the directive, all relief sought by appellants was denied. A decree was entered in accordance with the opinion, and from such decree, appellants bring this appeal. For reversal, three points are relied upon as follows:

I. Ordinance No. 387 is invalid and does not create a valid utility commission or constitute appellees a valid commission or agency of the city of Clarksville.

II. Purchase of corporate stock was illegal; and appellees should be required to place the money back into the treasury with interest.

III. Appellees should be required to pay back into the city treasury with interest the $1,000 placed by them in the Dairy Expansion Fund.

[1] This is a trade name adopted by the members of the agency created by Ordinance No. 387 of the City of Clarksville.

— I —

In 1949, the city of Clarksville, which operated its own light and power plant, and water works system (originally acquired through municipal improvement districts), enacted Ordinance No. 387, creating a commission to be known as the "Clarksville Light and Water Commission of the City of Clarksville, Arkansas." In brief, the ordinance sets forth that the commission shall be composed of three qualified resident electors of the city of Clarksville, and provides that the commissioners shall be appointed by the City Council. Section 2 places the commission in full charge and authority of the light and water plants "with the power to operate and maintain them and to exercise all power necessary or incident to the management, operation and control of the properties for the furnishing of water and electricity to the inhabitants of the City of Clarksville."[2] Section 3 authorizes the commission to enlarge the plants and extend such services as may become necessary in order to serve the residents of the city, but further provides that the commission shall not have the power to increase the rates, nor power to issue revenue bonds or notes, without the approval of the City Council. Section 4 sets out that "out of any surplus in revenue after making provision for the payment of bonds and interest and operation, the Commission shall set aside a reasonable sum for the maintenance of the plant and the depreciation account. Any sums remaining after providing for the funds herein defined shall be declared to be 'net revenue' and the Commission at its discretion may use such part of the net revenue as may be necessary or proper for the extension or enlargement of the two plants or their distribution systems, *and any funds not so used shall be held by the Commission as reserve fund, to be used by the Commission as it deems best.*"[3]

The italicized portion, in large measure, was the basis for the disbursements that gave rise to this litigation. Section 5 states that the commissioners shall have

[2] The commission also operates the sewer system.

[3] Emphasis supplied.

"wide discretion in the exercise of the powers conferred upon them, it being the purpose of this ordinance to grant such commission the powers ordinarily exercised by the board of directors of a corporation, * * *" and the section further provides the manner of removal of a commissioner for improper exercise of authority. Section 6 sets out that members of the commission shall not receive any compensation for services but shall be reimbursed for expenses incurred in the performance of duties.

The commission is presently composed of Leslie E. Bryant, Earl K. Johnston, and Wilson Jones.[4]

Appellants contend that the Chancellor erred in holding the ordinance valid, and they stoutly maintain that Act 95 of 1939 [Ark. Stat. Ann. §§ 19-4001 through 19-4033 (Repl. 1956)] should control. This act authorized the creation, in cities of the second class and incorporated towns, of a board to be known as "The Board of Public Utilities," and the statute provided that this board should have the sole and exclusive control of the maintenance, enlargement, and operations of electric light and water plants and sewerage systems owned by improvement districts, or where such districts had paid out and were under control of the city or town council. Appellants point out certain conflicts between provisions of this act and Ordinance 387, including the fact that the "Board of Public Utilities" requires 5 members and, further, that a Board of Public Utilities cannot be created until the plan is first approved by a majority of the voters in an election. Other differences are cited, but we do not consider a discussion of this phase of appellants' argument to be necessary since Act 95 does not make compulsory the operation of utility plants by this board. Section 19-4001 simply provides that such a board *may* be created. Here, the citizens of Clarksville apparently did not desire to create the Board of Public Utilities, and the authority to operate the utilities, therefore remained in the City Council. We agree with the Chancellor, that in passing Ordinance 387, the city created an agency to operate the

[4] Bryant was one of the original commissioners, named in the ordinance, and has been continually reappointed.

utilities heretofore mentioned. The city had the express statutory power to own and operate these utilities [Ark. Stat. Ann. § 20-316 (Repl. 1956)], and we have held that a City Council may designate agents to act, within the scope of their agency, on behalf of the city. *Jonesboro* v. *Montague,* 143 Ark. 13, 219 S. W. 309, *Gladson* v. *Wilson,* 196 Ark. 996, 120 S. W. 2d 732.

The Clarksville Light and Water Commission was not delegated power of a legislative nature, (which would have been unlawful) as shown by the fact that the ordinance provides that the commission shall not have power to increase rates, nor to issue revenue bonds or notes; the commission was only given executive and administrative functions in carrying out the provisions of the law which authorized the city to own and operate the utilities. In other words, the commission was simply acting for the City Council. As was stated in *City of Mayfield* v. *Phipps,* 263 S. W. (Ky.) 37:

"The electric light and water committee named under the ordinance passed by the council of the city of Mayfield was merely the arm of the city government acting in an administrative capacity. The acts and doings of the committee were in legal contemplation, at least the acts and doing of the council, when concurred in and approved by the council. It is generally conceded that powers of a purely ministerial, administrative, or executive nature may be delegated by a municipal council to a committee or to some appropriate officer, although it cannot delegate to such committee the power to decide upon legislative matters properly resting in the judgment and discretion of the council."

We hold that the commission is but an agency of the City Council, and City Ordinance No. 387 is valid.

— II —

The record indicates that the management of the municipal utilities (light, water, and sewer) by the three commissioners has been quite successful. The systems have increased greatly in value, and the growth in electric sales has shown a substantial increase even though the

municipal population actually decreased. The record reflects that various projects have received financial support from the commission, said financial contributions being made from the surplus acquired from the utility operations. For instance, the commissioners subscribed to a $1,000.00 interest in a Dairy Expansion Fund; the commissioners paid part of the cost of constructing a municipal swimming pool sponsored by the City Council, and, *inter alia,* made contributions to the following: The College of the Ozarks, the Clarksville Chamber of Commerce, the Poultry Association, the purchase of municipal fire trucks, Christmas lighting of the streets of Clarksville, and lights for the high school football field. A $5,000.00 expenditure was made by the commissioners for the purchase of stock in Johnson County Frozen Foods, Inc., and several thousand dollars were expended for engineering fees for a city airport, a road to a new shoe factory and construction of a sea wall.

While, obviously, most of these expenditures have no direct connection with the operation of a utility plant, the fact remains that practically all were for the general benefit of the Clarksville area, and all apparently received public approval. Such expenditures had been made for a long period of years; all of the larger disbursements were approved by the city council, and tacit approval was given to the rest; some of the projects were approved at public elections.

Only two specific expenditures are challenged on this appeal. One relates to the purchase of $5,000.00 worth of stock in Johnson County Frozen Foods, Inc. This corporation was created in an effort to stimulate the industrial development of the Clarksville community through aiding the local peach industry, which had suffered serious reverses, and the commissioners were approached by a committee, heading the industrial drive, and requested to purchase the aforementioned amount of stock. After being advised by the commissioners that the purchase would have to be approved by the City Council, the committee returned and delivered to the commission a written authorization signed by the Mayor and all members

of the City Council, approving and authorizing the expenditures. The stock purchase was thereupon consummated and the stock was acquired as the property of the city. Appellants point out that the Arkansas Constitution, Article 12, Section 5, prohibits any county, city, town or other municipal corporation from becoming a stockholder in any company, association, or corporation, nor can money be appropriated to any corporation, association or institution. Appellants are correct in this contention, but it must be borne in mind that the relief sought under this point is not prospective; in such event, appellants would likely prevail. Rather, this is a suit to compel appellees to repay to the city of Clarksville, from their own personal resources, the $5,000.00 of utility earnings already expended by the commissioners in the purchase of stock. In *Hendrix* v. *Morris,* 134 Ark. 358, 203 S. W. 1008, the school directors purchased a school bus, though at that time (1918) school districts had no authority to buy school buses. Suit was instituted to obtain a judgment against the directors for the amount of the purchase. In holding that the school directors were not liable, this court said:

"In *Hendrix* v. *Morris,* 127 Ark. 222, 225, we held that the directors of this district and the treasurer had no authority to expend the money of the district for such purposes, but it does not follow that the directors are individually liable for the money thus expended. While it is alleged and admitted that the directors had no authority to issue the warrants for the purpose mentioned, there is no allegation that they acted willfully or maliciously. This is essential in order to make the directors personally liable. Where school directors act in good faith, believing at that time that they have authority under the statute to expend the money for the purposes for which they issue warrants, they will not be held individually liable to the district for moneys so expended, even though they have no such authority.

" 'The general rule,' says 35 Cyc. p. 910, 'is that the officers of a school district cannot be held personally liable on a contract made on their part as such officers

and solely for the benefits of the district, unless guilty of fraud and misrepresentation, or unless they expressly contract to assume personal liability.'

"As is said by the Supreme Court of Minnesota, 'Were the rule otherwise, few persons of responsibility would be found willing to serve the public in that large capacity of offices, which requires a sacrifice of time and perhaps money, but affords neither honor nor profit to the incumbent.' "

In the instant litigation, there is neither allegation nor proof that the directors acted willfully or maliciously. Unquestionably, the record discloses that they acted in good faith. They were of the opinion that they had the authority under the ordinance to expend the money for the purpose mentioned, and though this particular expenditure was not approved by ordinance, the same men who held the offices of Mayor and Councilmen respectively, in writing, approved this action of the commissioners. It would be manifestly unjust, and utterly foreign to equitable principles, to render a personal judgment against these commissioners who are not accused of fraud or sharp dealing, and apparently acted sincerely for the best interests of their home town. Appellees have undoubtedly spent considerable time in serving on the commission, without pay, and solely in the line of civic duty. In fact, to hold these men personally liable for the stock purchased would simply be to require an agent to repay to the principal a sum of money which the principal ordered the agent to spend.

It might also be mentioned that the abstract reveals no evidence to the effect that the company is insolvent or that it has been placed in bankruptcy, and accordingly there is no evidence to measure the damage which the city of Clarksville might have sustained because of the purchase of this stock. In the Arizona case of *Henderson* v. *McCormick,* 215 Pac. 2d 608, the Supreme Court stated:

"The authorities universally uphold the rule that a taxpayer may maintain an action only when such taxpayer and taxpayers as a class have sustained or will sustain pecuniary loss."

While appellants cite the constitutional provision prohibiting a city from becoming a stockholder in a company, they have not called upon the city to dispose of such stock.

In accordance with the reasoning herein set forth, we are of the view that the commissioners only acted as agents for the city, and no personal liability attaches.

— III —

The Clarksville Chamber of Commerce instituted a plan for a Dairy Expansion Fund for the purpose of promoting the Dairy Industry in the community, and the commission made a $1,000.00 investment in the fund, for which it received a certificate. The reasoning employed under the preceding discussion is likewise applicable here, though it is not clear that this item was specifically approved by the members of the Council. Here, again, no effort has been made to compel the city to dispose of or "cash in" the certificate received.

As heretofore stated, the Chancellor, in interpreting the ordinance, issued a directive relating to future operations of the commission. This directive was as follows:

"All surplus funds derived from the operation of such utility systems which may remain, after making the disbursements therefrom and establishing reserves as hereinabove authorized, shall be paid by defendants into the general treasury of the City of Clarksville; all funds thus paid into the general treasury to be subject to the exclusive control of the municipal council.

"It is the intent of this directive that defendants shall not apply any of the public utility revenues toward any charitable or quasi-charitable purposes or toward any program designed to promote the industrial development of the City of Clarksville."

This action of the court was entirely proper and will result in future expenditures (not connected with the operation of the utilities) being made by the proper authority, the actual principal, *viz.*, the City of Clarksville, through its City Council. Of course, if the citizens

of that city desire to create a commission as set forth in the applicable legislative act,[5] Act 115 of 1957 [Ark. Stat. Ann. §§ 19-4061 through 19-4082 (Supp. 1961)], there is nothing to prevent such action.

Affirmed.

[5] Clarksville has now been a city of the first class for a number of years.

LOONEY *v.* SEARS ROEBUCK.

5-3035 371 S. W. 2d 6

Opinion delivered September 16, 1963.

[Rehearing denied October 28, 1963.]

Lester E. Dole, Jr., for appellant.

Gaughan & Laney, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case. The appellant, Mrs. Looney, was an employee of appellee, Sears Roebuck and Company, at Camden, and received an injury which arose out of and in the course of her employment. Compensation was awarded by the Commission; but on this appeal Mrs. Looney presents two issues: (a) that she was entitled to a greater percentage of disability than was awarded; and

(b) that the Commission should not have allowed Sears to take credit for certain wage payments.

I. *The Percentage Of Disability.* On May 4, 1957 Mrs. Looney received an injury which ultimately resulted in phlebitis in her left leg. A number of physicians testified, and from such testimony the Commission concluded that Mrs. Looney had suffered permanent partial disability of 30% to the body as a whole. Mrs. Looney insists that the preponderance of the evidence shows that her disability is at least 50% to the body as a whole. On appeal to this Court in a case like this one we are not concerned with the *preponderance of the evidence:* rather, we are concerned with whether there was *substantial evidence* to support the award made by the Workmen's Compensation Commission. See *Ark. Workmen's Comm.* v. *Sandy, infra.* A review of the evidence shows that there is substantial evidence to support the finding of the Commission. Dr. H. Reichard Kahle, an expert of New Orleans, Louisiana, stated that Mrs. Looney had a disability of 30% to the body as a whole; and such testimony is substantial evidence.

It is true that other physicians stated that Mrs. Looney had a greater percentage of disability than that stated by Dr. Kahle; but his testimony was substantial and the Commission had the right to follow his testimony, rather than that of some of the other experts. In *Ark. Workmen's Compensation Comm.* v. *Sandy,* 217 Ark. 821, 233 S. W. 2d 382, we said:

"This court has held that the degree of disability suffered by an injured employee is a factual question to be determined from the evidence in the case. *Caddo Quicksilver Corporation* v. *Barber,* 204 Ark. 985, 166 S. W. 2d 1; *Bookout* v. *Reynolds Mining Company,* 213 Ark. 198, 209 S. W. 2d 881. In the instant case, the medical testimony as to the extent of claimant's disability was conflicting, and the Commission evidently chose to accept the report of Dr. Cheairs. The courts are without authority to reverse the conclusion of the Commission in this regard. *Mechanics Lumber Company* v. *Roark,* 216 Ark. 242, 224 S. W. 2d 806. On the whole case, there is substan-

tial evidence to support the Commission's finding of fact, and the Circuit Court erred in setting aside the order of the Commission."

We find no merit in the first point urged by Mrs. Looney.

II. *Deductions Allowed Sears For Excess Of Wages Over Compensation.* This point has given us serious concern. Mrs. Looney received her original injury on May 4, 1957. She was absent from work until July 29, 1957, when she resumed work. During said absence, Sears paid her full wages, which amounted to $601.73 more than her workmen's compensation payments would have been. This excess of $601.73 is here involved. Mrs. Looney resumed work in July, 1957, and worked until December 10, 1958, when her illness necessitated further rest. Sears paid her full wages from December 10, 1958 until March 1, 1959, which wages were $690.22 more than her workmen's compensation payments would have been; and this excess of $690.22 is also here involved.

When Mrs. Looney wrote Sears in February 1959, offering to return to work, Sears advised her that her place had been filled, and that she was no longer employed. Thereafter, she received only workmen's compensation payments of $35.00 per week instead of wages. When the Workmen's Compensation Commission made the award to Mrs. Looney, the Commission allowed Sears to take credit against such award for the said $601.73 and the said $690.22 previously mentioned, and making a total credit of $1,291.95. Mrs. Looney insists that Sears is not entitled to deduct the said $1,291.95 from the amount of the workmen's compensation award due her; and we agree with Mrs. Looney on this point.

In allowing Sears to take credit for the $1,291.95, the Workmen's Compensation Commission was proceeding under the authority of *Lion Oil Co.* v. *Reeves,* 221 Ark. 5, 254 S. W. 2d 450. But the facts in the case at bar do not bring this case within the holding in *Lion Oil Co.* v. *Reeves.* In that case, Lion paid Reeves during his injury period certain amounts "aggregating full wages"; and

Lion was allowed to receive credit for the excess of the amount paid over what the workmen's compensation payments would have been for the period. The reason this Court allowed Lion such credit is found in this sentence in the opinion: "It is highly improbable that Reeves thought the excess payments he received were gratuities, and certainly the oil company was endeavoring to provide for the worker's current needs." In the case at bar, the excess of wages paid over workmen's compensation payments for the same period was specifically intended by Sears as a *gratuity*. Here is the testimony of Sears' witness and manager on this point:

"Q. Do you know why these overages were paid?

"A. Under company policy we normally, when someone is injured, pay them full salary for a period to see how they get along, in excess of the statutory requirements as we would in an illness case.

"Q. Then, if the person comes back to work, what disposition is made of the overage?

"A. None.

"Q. In other words, it is just a gratuity to them?

"A. Yes."

Since the excess of wages over compensation as received by Mrs. Looney, was intended by Sears as a *gratuity,* Sears cannot now be heard to claim otherwise in the teeth of the quoted testimony. It was not until Mrs. Looney offered to return to work in February 1959 that Sears ceased paying wages and started workmen's compensation payments of $35.00 per week, effective March 1, 1959. To allow Sears to now claim credit for the said excess of $1,291.95 would, in effect, be to allow Sears to recover payments it voluntarily made. The quoted testimony above clearly distinguishes the case at bar from that of *Lion Oil Co.* v. *Reeves.*

And for future guidance in such cases, we think it wise to now limit the holding of *Lion Oil Company* v. *Reeves* to its own particular facts. We hold that under

Ark. Stat. Ann. §81-1319(m) (Repl. 1960), it is only "advance payments of compensation" for which the employer is entitled to reimbursement; and we make a clear distinction between "payment of wages" and "advance payments of compensation." When an employer continues to pay salary or wages to an injured employee during any time of injury, and such payments are in excess of workmen's compensation benefits, then when a workmen's compensation award is subsequently made, the excess of the wages paid over the weekly compensation award cannot be deducted from the award. The policy of employers to pay an injured employee the prevailing wage scale while inactive during an injury period is in line with the modern concepts of employer-employee relation and is to be encouraged, but the employer cannot make such payments and later claim credit for the excess as against an award made.

It follows, therefore, that the Commission was in error in allowing Sears to deduct $1,291.95 from the disability payments to be made to Mrs. Looney; and for such error the judgment of the Circuit Court is reversed and the cause is remanded to the Circuit Court with directions to remand to the Commission to correct such error in the award and in the attorneys' fees calculated on it.

GRIFFIN *v.* SOUTHLAND RACING CORP.

5-3135 370 S. W. 2d 429

Opinion delivered September 16, 1963.

Nance & Nance and *A. J. Thomas, Jr.,* for appellant.

Hale & Fogleman, for appellee.

George Rose Smith, J. The appellee Southland owns a greyhound race track near West Memphis. The appellant Griffin buys, breeds, and sells racing dogs. The management of Southland decided that Griffin was not a desirable spectator at the track and refused to admit him to the premises. Griffin brought this suit to restrain Southland from denying him admittance to the track. This appeal is from an order sustaining a demurrer to Griffin's evidence and dismissing his complaint. In reviewing such an order we give the plaintiff's proof its strongest probative force. *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225.

Griffin owns a half interest in 120 shares of stock in the Southland corporation. He seeks admission to the track, however, not in the exercise of his rights as a stockholder but in the pursuit of his vocation, for he must observe dog races at firsthand to select the best animals for breeding.

In his complaint Griffin based his cause of action upon the fact that he held two free passes to the Southland track. One was a stockholder's pass issued by Southland, the other a tax-free season pass issued by the Arkansas Racing Commission. Each pass recites that it may be revoked by the issuer. Griffin's stockholder's pass was revoked by Southland before the trial below, but his tax-free pass has not been revoked by the Racing Commission.

The chancellor's decision was correct. If Griffin had based his complaint upon his willingness to pay the price

of admission to the track rather than upon his possession of the two passes it is clear that he could not have stated a cause of action. Apart from any possible issue of civil rights, which are not involved here, the controlling rules of law are firmly settled by many decisions in many jurisdictions. The proprietor of a privately owned place of amusement, such as a race track or a theater, is not under a common carrier's duty to render service to everyone who seeks it. It is uniformly held that the proprietor may refuse to admit, or may eject from his premises, persons he thinks to be undesirable. If the prospective patron has already bought his ticket he may be able to maintain an action for breach of contract, or if he is ejected with unnecessary force he may be able to maintain an action in tort. But, owing to the management's right to exclude anyone it pleases, the patron cannot obtain the aid of the courts in seeking to compel his admission to the premises. Many of the cases are reviewed in *Garifine* v. *Monmouth Park Jockey Club,* 29 N. J. 47, 148 A. 2d 1, and *Madden* v. *Queens County Jockey Club,* 296 N. Y. 249, 72 N. E. 2d 697, annotated in 1 A. L. R. 2d 1160.

Griffin's position is not strengthened by his possession of the unrevoked tax-free pass. The statute permits the Racing Commission to regulate the issuance of such courtesy passes, Ark. Stat. Ann. § 84-2835 (Repl. 1960), but in fact no regulations have been issued. Even though the passes are in form issued by the Commission the testimony shows that in reality the Commission leaves the whole matter to Southland, which distributes passes as it chooses. Griffin's pass was not actually issued to him in the first instance; he received it as a gift from someone else.

It is quite apparent that these passes are intended to serve no purpose except that of providing free admission to the track, as an inducement to public attendance at the races. There is no indication that any effort is made to keep the passes from coming into the hands of bookmakers, touts, pickpockets, and others unwelcome at the track. Thus the pass does not represent in any degree whatever an expressed desire on the part of the Commission that

a certain person is to be admitted to the track. The pass is simply a substitute for the price of admission—nothing more. It follows that since a prospective patron may be excluded by management even though he offers to pay the price of admission, he may be similarly excluded when he seeks entrance as the holder of a pass.

Affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice (dissenting). I do not agree with the majority view. This is an appeal from an order sustaining a demurrer to appellant's evidence. In such cases we are bound by the rule laid down in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 295. That case requires the trial court to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence when so considered fails to make a prima facie case.

The issue in determining whether a prima facie case has been established in this case, as I see it, is the issue of the right of Southland Racing Corporation to revoke the season pass held by appellant and not the issue of whether a proprietor of a privately owned place of amusement is under a duty to render services to everyone who seeks it. If that was the issue I would unhesitatingly agree with the majority opinion and the authorities therein cited to sustain their position. A careful reading of these authorities reveals, however, that they do not touch top, side or bottom the question of a pass or the revocation of a pass.

The operations of a greyhound race track in this state is a highly controlled and regulated privilege granted by the State of Arkansas and the Rules and Regulation of the Arkansas State Racing Commission. Arkansas Statutes Annotated, §84-2827(A) (Repl. 1960), reads:

"The Commission shall have full, complete and sole power and authority to promulgate rules, regulations and

orders, and prescribe conditions, under which Greyhound Racing shall be conducted by a franchise holder, but the power and authority so granted shall be exercised by the Commission in a reasonable manner, and the holder of any franchise, or any taxpayer, shall have redress to the Pulaski County Circuit Court for any wrong committed by the Commission in the exercise of the power and authority granted herein."

The law also gives the State Racing Commission the control and regulation of the issuance of all tax-free passes. Ark. Stat. Ann. §84-2835(B) (Repl. 1960).

"The issuance of all tax free passes shall be under the regulations or orders of the Commission."

A season pass contains the following language:

"1963 Season Pass Southland Greyhound Park,
West Memphis, Ark.

Under the auspices and with the compliments of the Arkansas State Racing Commission.

/s/ J. Orville Cheney Issued to:
Secretary _____

Form 5."

The reverse side of a season pass reads as follows:

"This ticket entitles person to whom issued admission to the track any night during 1963 season. It is not good for admission to the Kennel Club. Arkansas State Racing Commission reserves the right to revoke this courtesy without notice when deemed necessary."

The rules and regulations of the Arkansas State Racing Commission, of which we take judicial notice, *Kansas City Southern R. Co.* v. *State,* 90 Ark. 343, 119 S. W. 288, expressly state for what causes a franchise holder such as appellees can remove a patron from its premises.

"Rules Governing Greyhound Racing, §125-F:

"Employees or patrons who are careless of the safety of themselves and others, negligent, insubordinate,

dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such manner and handle their personal matters while on the premises of said Greyhound Track in such a way that the franchise holder or Commission will not be subject to criticism or loss of good will, will be prohibited or removed from the premises of any Greyhound Track and denied wagering privileges."

Appellant introduced evidence showing that he possessed a season pass which was issued by the State Racing Commission; that the pass had not been revoked by the Commission; that Southland Racing Corporation summarily refused without cause to admit appellant to their premises; and continues to deny this privilege to appellant; that he is a breeder, buyer and seller of greyhound dogs, that in pursuit of his vocation he must observe dog races; that he is being irreparably injured by the denial of his admission to the track to carry on his lawful business. All of which considered together in the light of the law and the rules governing passes as set out above, in my view clearly makes a prima facie case under the rule of *Werbe* v. *Holt, supra.*

For the reasons stated, I respectfully dissent.

5073 370 S. W. 2d 425

Opinion delivered September 16, 1963.

Lee Ward, for appellant.

Bruce Bennett, Attorney General, by *Russell J. Wools,* Assistant Attorney General, for appellee.

PAUL WARD, Associate Justice. Appellant, William D. Ward, was sentenced to a term of three years in the state penitentiary for the crime of fondling a male child under the age of 14 years in violation of Ark. Stat. Ann. §41-1128 (Supp. 1961). On appeal appellant contends the case should be reversed because of three alleged errors. *One,* the jury was invited to let the court fix the punishment. *Two,* the argument of the prosecuting attorney was prejudicial. *Three,* the court should not have permitted

the introduction of testimony pertaining to prior and unrelated incidents. These alleged errors will be discussed in the order above mentioned.

One. Instruction No. 5 given, along with other instructions, when the case was submitted to the jury, reads:

"You are further instructed that if you find the defendant guilty as charged but are unable to agree upon the punishment to be imposed, you may return a verdict of guilty and leave the punishment to be fixed by the court."

Ark. Stat. Ann. §43-2306 (1947), in pertinent part and in substance provides, that when "a jury finds a verdict of guilty, and fails to agree on the punishment to be inflicted . . . the court shall assess and declare the punishment. . . ." The question then arises: When should the jurors be told they can leave to the court the responsibility of fixing the punishment—before they retire or after they find they cannot agree? The giving of a similar instruction as it was given here has been approved by us previously. See: *Knighton* v. *State,* 210 Ark. 248, 195 S. W. 2d 47; *Keese and Pilgreen* v. *State,* 223 Ark. 261, 265 S. W. 2d 542; *Downs* v. *State,* 231 Ark. 466, 330 S. W. 2d 281. In the case of *Underwood* v. *State,* 205 Ark. 864, 874, 171 S. W. 2d 304, the court seemingly indicated a preference for the procedure followed in the case under consideration—before the jury retired.

Appellant, obviously aware of the above decisions, contends however that the statute clearly indicates it is the province of the jury to first honestly endeavor to fix the punishment before they are informed they can leave the responsibility to the court. The reason given by appellant for his position is that it is human nature for a person to avoid making difficult decisions when he knows it is not necessary to do so. This line of reasoning seems to find some support in the recent case of *Edens* v. *State,* (January 14, 1963), 235 Ark. 996, 363 S. W. 2d 923, where, in commenting on the decision in the Underwood case, we said:

"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."

Thus, it appears, we have not previously announced any required rule in this regard to guide the trial courts. So, after careful consideration, we now hold that the jury should not be told initially they can let the court impose the punishment but should be told only *after* they report they have reached a verdict of guilty but are unable to agree on the punishment to be imposed. We do not reverse the trial court for failing to follow this procedure in this instance because it was not aware of what we later said in the *Edens* case, supra.

Two. Appellant strenuously insists the jury was prejudiced by the allegedly heated argument of the prosecuting attorney, which argument we have carefully read although it is not fully abstracted. Since we have concluded that the case must be reversed and remanded because of the error later discussed, we deem it unnecessary to comment on all the objections raised by appellant to the argument.

As stated in *Hall* v. *State,* 161 Ark. 453, 257 S. W. 61, and in many other decisions of this Court, we, recognizing that jurors are men of good sense and sound judgment, have always held that a wide range must be given to the argument of counsel and much discretion must be left to the trial court. In particular, appellant here refers to certain remarks of the prosecuting attorney to the effect that he and his deputy would receive no extra pay if appellant were convicted, and that appellant's attorney (once a deputy prosecuting attorney) would have prosecuted the appellant had the same facts been presented to him. We think the jurors were capable of assessing such arguments for what they were worth—that they had no bearing on the guilt or innocence of appellant. Consequently no reversible error has been shown.

Three. Finally it is contended the case must be reversed because the jury was allowed to consider evidence

intended to prove appellant had engaged in similar unnatural sex activities with other young boys on former occasions.

The statute under which appellant was convicted provides, in all pertinent parts, that it shall be unlawful for any person with lascivious intent to place his hands on the sexual part of a male under the age of 14 years. The succeeding section fixes the punishment for violation at one to five years in the penitentiary.

Appellant, age 36, went to the Beasley home at about 9:30 a.m. to install telephones. Mrs. Beasley, who was out temporarily, had left her son Tommy, age 11 (together with his brother Terry, age 8), at the house to point out the locations for the phones. Tommy stated positively that appellant fondled him two or three times on that occasion. He was corroborated in part by Terry. Appellant denied emphatically and categorically that he in any way mistreated Tommy. There was no other direct testimony to show appellant's guilt or innocence of the offense for which he was being tried. This situation obviously presented a clear-cut issue of credibility to the jury.

On behalf of appellant it was shown that he had a good reputation; that he had been post commander of the American Legion, and was now its service officer; that he belonged to the Masonic Lodge; and, that he had once served as Chapter Dad of the local DeMolay organization. On the other hand the state, evidently hoping to convince the jury that Tommy and Terry Beasley (and not appellant) had told the truth, offered testimony tending to convince the jury that appellant had, on two former occasions, indulged in similar unnatural sex relations with other boys.

We have concluded that the testimony relative to one of the incidents was clearly inadmissible and prejudicial, and calls for a reversal. Over appellant's objections and exceptions a witness was permitted to testify that some four or five years previously, during a conclave of the DeMolay organization in a gymnasium at Piggott, he saw appellant engage in some acts which he thought were

unbecoming; that appellant had one of the smaller boys kinda armed up, had his arm around him nudging him toward the south door, and he presumed he was loving the boy up a little bit—this didn't continue very long—the boy's father was present. Regarding the same occasion, another witness gave similar testimony, but neither witness saw anything approaching a violation of the statute.

We think the above testimony was most prejudicial, and we have no way of knowing to what extent it influenced the jury. It is reasonable to suppose the jury gave considerable weight to the testimony because it was given by two witnesses who, apparently, stood high in the community. One was with the Weights Division of the State Police and lived in Piggott all his life; the other was a grain broker and a member of the International Supreme Council of the Order of DeMolay, and he was also an Executive Officer of this State.

It is difficult to think of a more dangerous precedent than to sanction the type of testimony above described. It would tend to establish guilt based on suspicion alone. The jury may have attached the most lascivious motives to what could have been perfectly innocent and meaningless acts of appellant.

In respect to the other incident a different situation obtains. There, the testimony was definite and left nothing to the imagination. However, since the case may be retried, we deem it advisable to discuss a contention made by appellant here and which may be made at another trial.

In substance, appellant contends that testimony of other similar offenses is admissible only to show intent, and, that since no question of intent is presented in this case, all the testimony (regarding the previous incidents) was inadmissible. We agree that the issue of intent (on the part of appellant) is not an issue here. To sustain his point appellant relies almost entirely on what we said and held in the case of *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804. We said there that "our cases very plainly

support the common-sense conclusion that proof of other offenses is competent when it actually sheds light on the defendant's intent; otherwise it must be excluded." The statement was correct as applied to the particular facts of that case, and the opinion shows it was to be so limited. It appears, however, in the *Alford* case and in other decisions of this Court that a different rule applies to unnatural sex cases such as in the case under consideration. In the *Alford* case we recognized this distinction in using the following language:

" * * * where the charge involves unnatural sexual acts, proof of prior similar offenses has been received. *Hummel* v. *State,* 210 Ark. 471, 196 S. W. 2d 594; *Roach* v. *State,* 222 Ark. 738, 262 S. W. 2d 647. Such evidence shows not that the accused is a criminal, but that he has '*a depraved sexual instinct*' . . ." (Emphasis added.)

In the *Hummel* case, *supra,* where the Court was concerned with an unnatural sex crime, testimony, relative to similar previous acts, was introduced over defendant's objection. There, on appeal, we approved the following instruction:

"You are instructed that evidence introduced by the state in this case, of a similar offense occurring prior to the offense charged in the indictment, was admitted solely for the purpose of showing the defendant's *intent, motive, habits and practices,* and you may consider it for this purpose and this purpose only. * * *" (Emphasis added.)

In our opinion the distinction above pointed out is based on sound reasoning. If it can be shown that a person has a depraved sexual instinct or that he has the habit of indulging in unnatural sex activities such fact would tend to corroborate other testimony that he committed the unnatural offense for which he is being tried.

Likewise, we believe such testimony should not be excluded solely on the ground that it is too remote in this particular case. The question of remoteness of the incidents has not been raised by appellant on this appeal, but it could be raised on a second trial. The *general* rule is that such testimony must not be *too remote.* However, as

pointed out above, a case of this kind is not, in all respects, governed by the *general* rule. So, once it is established that a mature person has developed the proclivity to indulge in unnatural sex acts, we are not prepared or willing to say it would be erased by the lapse of 4 or 5 years.

For reasons above set out the judgment is reversed, and the cause is remanded.

Reversed and remanded.

McFaddin, J., concurs; Robinson, J., dissents.

Ed. F. McFaddin, Associate Justice (concurring). I concur in the reversal. Not only was the evidence as to the gymnasium incident inadmissible, as the Majority holds; but I am of the opinion that the evidence as to the other incident (as referred to in the final paragraph of the Majority Opinion) was also inadmissible. That incident occurred more than five years before the offense for which the appellant was here being tried; and I think testimony of an incident more than five years away is too remote, and is inadmissible.

Sam Robinson, Associate Justice (dissenting). Of course we all make errors, and in my humble opinion the majority is making a most serious error in reversing this case. Those committing crimes through the commission of unnatural sex acts are perhaps the most dangerous of criminals. It frequently happens that such persons commit the more serious crime of murder to avoid disclosure of their sexual proclivities. One can hardly read the daily papers on any day without seeing the account of a murder committed in connection with a sex crime. Such cases have been before this court several times. *Smith* v. *State,* 205 Ark. 1075, 172 S. W. 2d 248; *Leggett* v. *State,* 227 Ark. 393, 299 S. W. 2d 59. But frequently the killer is never apprehended. He has evaded detection by killing the victim of his lust—the only witness who could identify him.

The majority concedes that evidence of other unnatural sex offenses committed by the defendant is admissible in a case of this kind, but the majority then proceeds to reverse the judgment because the State introduced evidence of what could be considered an unnatural sexual act committed by the defendant. If the defendant put his arms around the little boy and "hugged him up" in an improper manner, this would be an unnatural sexual act, and according to the rule of evidence recognized as valid by the majority, evidence of such act could be properly introduced. On the other hand, if the placing of his arms around the child was merely a friendly gesture, certainly evidence of such act would in no way be prejudicial to the defendant. It would be just like proving that he shook hands with the little boy. In these circumstances the trial court thought the evidence was admissible for what it was worth.

If the defendant's act was improper, it was admissible. If, on the other hand, it was not improper, there could be no prejudice to him. Whether the defendant's conduct indicated depraved sexual desires or merely a friendly gesture was to be argued by the lawyers in the case, but in any event, the evidence was admissible to show the jury what happened.

For the reasons set out herein, I respectfully dissent.

WILLIAMSON *v.* RAINWATER.

5-3039 370 S. W. 2d 443

Opinion delivered September 16, 1963.

McDaniel, Ward & Mooney, for appellant.

Ponder & Lingo, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Mrs. Willie B. Williamson, filed this suit alleging that she owns lands in Section 5, Township 15 North, Range 1 East, in Lawrence County; that appellee, R. S. Rainwater, owns adjoining lands in Section 4; that Rainwater intended to dig a drainage ditch on appellant's property and asked that he be enjoined. The Chancellor held that appellant failed to meet the burden of proving by a preponderance of the evidence that the ditch, when dug, would be on her property. The complaint was, therefore, dismissed.

In his answer, appellee alleged, among other things, that Mrs. Williamson's husband, now deceased, an owner by the entirety, had built a fence on the line appellee maintains is the correct one, and that all parties recognized such fence as being the dividing line. The ditch is located east of the fence—on Rainwater's side of the fence.

Appellant argues that the preponderance of the evidence shows that the true section line is about 50 feet east of the location of the fence. But even so, if the fence was recognized for a long time by the parties in interest as the dividing line between the properties, according to many decisions of this court, the fence will be recognized by the courts as the dividing line. *Deidrich* v. *Simmons,* 75 Ark. 400, 87 S. W. 649; *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18; *Batson* v. *Harlow,* 215 Ark. 476, 221 S. W. 2d 17; *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S. W. 2d 490; *Weston* v. *Hilliard,* 232 Ark. 535; 338 S. W. 2d 926; *Stewart* v. *Bittle,* Law Reporter, May 27, 1963.

Mr. Williamson built the fence about 1946. It was constructed on or only a few feet from a line, marked by blazed trees, established by appellee, Rainwater, several years previously when he purchased Section 4. There is

no doubt that both Mr. Williamson and Mr. Rainwater acquiesced in the theory that the fence was on the true line. In the first place, Mr. Williamson built the fence. It is not likely that he would have left 50 feet of his land outside his fence. He may have built the fence a few feet from what he considered the section line in order to give him control of the fence, but surely he would not have intentionally left 50 feet of his land outside the fence. There does not appear to be any topographical reason for putting the fence at one place rather than the other.

In 1953 Mr. Rainwater started clearing his land with a bulldozer and cleared right up to the fence. Mr. Williamson was present and made no complaint. In fact, in the absence of Mr. Rainwater, he pointed out the fence as being the line to the operator of the bulldozer. Later, Mr. Williamson and Mr. Rainwater walked over the property and the only suggestion made by Mr. Williamson was that a tree that had fallen on the fence should be removed to preserve the fence. Subsequently, Mr. Williamson had some of his land cleared right up to the fence and no further.

It cannot be said that the preponderance of the evidence shows that appellant has ever at any time had possession of any of the land east of the fence. In the circumstances we think the fence was established as the dividing line by the acquiescence of the parties.

Affirmed.

5-2982 370 S. W. 2d 438

Opinion delivered September 16, 1963.

[redacted]

Willis V. Lewis, for appellant.

Wright, Lindsey, Jennings, Lester & Shults, for appellee.

JIM JOHNSON, Associate Justice. This action arises out of a contract for the construction of a fallout shelter entered into on October 10, 1961, between appellees Richard N. Freeling and Marie H. Freeling, his wife, and appellants Economy Swimming Pool Co., Inc., and George P. Bilheimer, Jr. Appellants agreed, *inter alia,* that the shelter would be constructed with materials of good quality and that all work would be done in a good workmanlike manner and "that the contractor [appellants] will be responsible for any water seepage into the vestibule or shelter and will repair same."

Appellees made a down payment in the amount of $500.00 on the contract, and work was begun on October 17, 1961. On October 26, 1961, appellees complained that the excavation was not of sufficient depth and that proper footings for the shelter had not been provided according to the plans and specifications. As the work progressed, appellees made frequent and additional complaints and employed a structural engineer to inspect the construction and advise appellees as to the quality of the

work and whether it was in accordance with the plans and specifications.

Water seepage was one of the major problems. One wall of the fiberglass shelter bulged, which had to be corrected by appellants. The concrete was honeycombed. The overhead concrete slab was not resting on the columns designed to support it. Finally, one wall of the shelter caved in.

After working for over three months on this relatively small job, appellants on January 20, 1962, padlocked the shelter and put a fence around the top of it. A few days later appellants removed the air filter and air motor from the premises.

On February 13, 1962, appellees filed suit in the Pulaski Chancery Court alleging breach of contract by appellants and seeking rescission of the contract, recovery of the $500.00 down payment and damages to the premises of appellees. They also sought to have the liens against their property discharged by appellants.

This case was tried on September 12, 1962, and after hearing evidence on behalf of all parties, the Chancellor found in favor of appellees on the issue of the return of the $500.00 down payment and the discharge of the materialmen's liens, but did not award appellees any sum for damages to their property. The Chancellor also denied appellants' cross-complaint for the total sum mentioned in the contract. From the decree appellants prosecute this appeal. Appellees have not cross-appealed.

For reversal appellants contend that they were prevented from performing the contract by the fault of appellees and that appellants are entitled to recover the profits which would have been made had appellees carried out their contract.

From the record, it is true that some delays were occasioned by appellees' concern and determination to receive that which they had contracted for. From the whole case, however, it can hardly be said that the delays were not justified.

On the question of appellants' entitlement to profits, there is no showing whatever that appellants would have made a profit on this job.

The structure here in question was sold to appellees to be used by them and their family in the event of nuclear attack. Soon after construction started, appellees employed the services of Mr. Sanford Wilbourne, a highly qualified structural engineer, to periodically check on the progress of the construction of the fallout shelter. This was an understandable precaution, since the record reveals that Mr. Freeling has been totally blind for some years, a fact not mentioned in his brief. Mr. Wilbourne testified that at the time he first saw the shelter in the fall of 1961 there were two problems, one structural and the other waterproofing. He testified that at that time he believed the structural defects could be corrected, but the waterproofing could never be solved because the concrete was porous—"honeycombed." Later, when he saw the bulge in the wall, he warned appellees not to let anyone enter the shelter because, in his opinion, "it was dangerous to be inside it just under ordinary circumstances." He further considered that the later cave-in of the wall was caused by outside water pressure as well as the weight of the concrete and steel dome resting on the fiberglass shelter instead of on the concrete columns. From his last examination of the shelter in the spring of 1962, about the time work was halted, his expert opinion was that the shelter could not possibly be made structurally sound.

Appellants' own construction superintendent testified that after he had been on the job for a month and three days the whole northeast corner of the shelter fell in and that it would continue to give trouble from hydrostatic (water) pressure. He admitted that he had never been able to correct the water problem; that during that time they had gotten the shelter dry one time and it had stayed dry only overnight.

Appellant Bilheimer himself admitted that he was contemplating suit against the manufacturer of the fiberglass shelter because he had found from experience that

the shelter would not withstand the hydrostatic pressure and that, if used according to the plans provided, would not do the job in this area.

It seems to be basic contract law—apparently so basic that there is little case law on the point—that where there is a material breach of contract, substantial nonperformance and entire or substantial failure of consideration, the injured party is entitled to rescission of the contract and restitution and recovery back of money paid. *United States* v. *Haynes School Dist. No. 8,* 102 F. Supp. 843 (E.D. Ark. 1951); 17A C. J. S., Contracts, §420, p. 515; *Farrell* v. *Third National Bank,* 20 Tenn. App. 540, 101 S. W. 2d 158; 12 Am. Jur., Contracts, §440, p. 1020; 5 Williston on Contracts, 4046, §1455; Restatement, Contracts, §384(1), (1932); *id.,* §347; *Fish* v. *Valley National Bank,* 64 Ariz. 164, 167 P. 2d 107; *Barber* v. *Rochester,* 52 Wash. 2d 691, 328 P. 2d 711; *Texas Co.* v. *Northup,* 154 Va. 428, 153 S. E. 659.

From the testimony above reviewed and other testimony of the same character and nature contained in the record, on trial de novo, we are impelled to the conclusion that the learned Chancellor's finding that the contract was breached and that appellees were entitled to rescission, restitution and discharge of the materialmen's liens was not against the preponderance of the evidence. *Scott* v. *Vuurens,* 236 Ark. 731, 368 S. W. 2d 80.

Affirmed.

JARRETT *v.* MATHENEY.

5-2983 370 S. W. 2d 440

Opinion delivered September 16, 1963.

[redacted]

Kameaster Hodges, for appellant.

Pickens, Pickens & Boyce, for appellee.

FRANK HOLT, Associate Justice. This is an action resulting from an intersection collision between a car being operated by the appellant, Katie Jarrett, and owned by her husband, Bobby Jarrett, and a car belonging to and being driven by the appellee, LeRoy Matheney. The appellee instituted suit against appellants to recover damages; the appellants filed an answer denying the allegations and by counterclaim sought damages from the appellee. A trial resulted in a jury verdict for the plaintiff-appellee, assessing his negligence at twenty-five per cent (25%) and that of appellant, Katie Jarrett, at seventy-five per cent (75%). A judgment was accordingly entered, from which comes this appeal.

The collision occurred at a "T" intersection. Mrs. Jarrett was driving from west to east across the top of the "T" and Mr. Matheney was approaching the intersection from the south going north to make a left turn

at the intersection. These were gravel, country roads. Mrs. Jarrett adduced evidence to the effect that Mathency "cut the corner" or "hugged the curve" as he turned left into the intersection and collided with her vehicle. The appellee, Matheney, and his witnesses denied this and maintained that he was in his proper lane of traffic and stopped at the intersection when Mrs. Jarrett's vehicle collided with his. The left front of Matheney's vehicle and the right front of the Jarrett vehicle were damaged. According to the physical evidence, the collision occurred while both cars were in the intersection.

For reversal appellants assign as error the Court's giving Instruction No. 8-A[1] which reads as follows:

"When two vehicles enter an intersection from different directions at the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. However, a vehicle which has entered an intersection first, while in the exercise of reasonable care for his own safety and the safety of others, has the right-of-way over another vehicle approaching the intersection but not having entered it."

It is the appellants' contention that: "The Court should have omitted an instruction on intersection right-of-way because appellee cut the corner." We think this contention is not well taken inasmuch as this was disputed by appellee. According to Matheney's evidence, he had stopped his automobile at the intersection and was in his proper position on the road preparing to turn to his left into the intersection and that while in this position the appellant's vehicle collided with his. As stated, Mrs. Jarrett's evidence was in direct contradiction.

This conflicting evidence presented a question for the jury to resolve which it did in favor of the plaintiff. We must view the evidence in this case in the light most

[1] The Court also gave Instruction No. 8 which reads: "The following traffic rules are provided by the Statutes of the State of Arkansas, and, if violated, such violation may be considered by the jury as evidence of negligence. In this connection, you are told that a violation of a traffic statute is not, of itself, negligence, but you may consider it as evidence of negligence."

favorable to the appellee. *Menser* v. *Danner,* 219 Ark. 130, 240 S. W. 2d 652.

In objecting to the Court giving Instruction No. 8-A the appellants rely upon *East* v. *Woodruff,* 209 Ark. 1046, 193 S. W. 2d 664. We do not think that case is authority for the objection appellants made. It was there undisputed that a vehicle entered the intersection improperly and, further, the collision occurred outside the intersection.

The appellants next contend for reversal that "the Court should have modified the instruction on intersection right-of-way to apply it only when a vehicle lawfully entered the intersection from the right or lawfully first entered the intersection." The Court refused to modify Instruction No. 8-A[2] to read as follows:

"When two vehicles enter an intersection from different directions at the same time, the driver of the vehicle on the left shall yield the right-of-way to any vehicle lawfully entering on the right. However, a vehicle which has lawfully entered an intersection first while in the exercise of reasonable care for his own safety and the safety of others has the right-of-way over another vehicle approaching the intersection but not having entered it."

Appellants argue that "if there is any factual issue whether the appellee cut the corner the appellants are entitled to have the Court tell the jury that the first in the intersection rule does not apply if they find he cut the corner." Appellants argue further that "the instruction as given by the Court preempts the right-of-way to the first entrant even though the 'corner cutting' statute was

[2] Following this Instruction the Court gave defendant's Instruction No. 3 which reads as follows: "(1) Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway. [Ark. Stat. Ann. §75-607 (Repl. 1957).] (2) The driver of a vehicle intending to turn at an intersection shall do so as follows: Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center thereof and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center of the roadway being entered. [Ark. Stat. Ann. §75-615 (b) (Repl. 1957).] (3) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety. [Ark. Stat. Ann. §75-618 (a) (Repl. 1957).]"

violated, if the violation of the statute is consistent with due care, which the jury may very well find to be true."

Appellants urge that the rule in *East* v. *Woodruff, supra,* requires giving the instruction as modified. We cannot agree. We think Instruction 8-A as given was a correct declaration of the law under the evidence in this case and that the Court was correct in refusing to modify the said instruction.

We consider the case of *Brown* v. *Parker,* 217 Ark. 700, 233 S. W. 2d 64, controlling in the case at bar. In this case there was a conflict in the evidence as to priority of entry into the intersection. There the Court gave this instruction:

"You are instructed that if you find and believe from the evidence in this case that Carl Parker entered the intersection of South 21st and Dodson before the car operated by Mrs. Charles Brown entered the intersection, then you are instructed that Parker was entitled to proceed through the intersection unmolested *and this would be true, even though you might find that Parker failed to stop before entering* Dodson Avenue. Notwithstanding the fact that Dodson Avenue is a through street, if Parker was in the intersection, then it was her duty to yield the right-of-way to Parker. If you find that she failed to yield the right-of-way to Parker when she was under duty to do so, and that such failure on her part was negligence and that such negligence was the sole and proximate cause of the accident or accidents, then in that event you cannot return a verdict against Parker in this case." [Emphasis added.]

In *Temple* v. *Walker,* 127 Ark. 279, 192 S. W. 200, we held the Court was in error in instructing the jury that the defendant would be liable if he violated a City Ordinance and such act was the proximate cause of the accident, regardless of whether the defendant was guilty of negligence in the operation of his automobile. There we said:

"In the recent case of *Bain* v. *Fort Smith Light & Traction Co.,* 116 Ark. 125, 172 S. W. 843, we had occasion

to consider the question of negligence as predicated upon a violation of a city ordinance regulating traffic in its streets, and the leading cases upon the subject are cited there. It was there held that such ordinances are admissible in evidence to be considered in the determination of the question of negligence resulting in an injury which would have been averted had the ordinance been observed; *but that the observance or non-observance of the ordinance is not determinative of the question of negligence.*" [Emphasis added.]

In the case at bar there is substantial evidence that Mr. Matheney was stopped at the intersection in his proper lane of traffic when the collision occurred. Who was negligent, under the conflicting evidence in this case, was a question of fact for the jury and we must view this determination in the light most favorable to the appellee. *Menser* v. *Danner, supra.* In this case we find the following succinct statement:

"The sum and substance of the court's instructions to the jury in regard to the right-of-way at the intersection was that, if Mrs. Danner was in the intersection first, and there was no negligence on her part in getting there first, then she had the right-of-way, *which is the law of this State. Brown* v. *Parker,* 217 Ark. 700, 233 S. W. 2d 64." [Emphasis ours.]

We think such statement is applicable to the case at bar when we consider the Court's Instruction No. 8, 8-A, and Defendant's Instruction No. 3, all of which the Court gave to the jury. These instructions comprise a fair and correct statement of the law and sufficiently covered the points raised by appellants. The issue in this case, under the conflicting evidence, is not whether there was an illegal or unlawful entry into the intersection, but whether there was negligence which was the proximate cause of the accident.

Finding no error the judgment is, therefore, affirmed.

UNITED STATES OF AMERICA *v.* PIONEER AMERICAN INS. CO.

5-2732 370 S. W. 2d 445

Opinion delivered September 16, 1963.

Chas. M. Conway and *Robert E. Johnson,* for appellant.

Bethell & Pearce, for appellee.

PER CURIAM. This is the same case as *U. S.* v. *Pioneer American Insurance Company* (No. 5-2732), 235 Ark. (Adv.) 267, 357 S. W. 2d 653. On June 4, 1962 we held that the attorney's fee was superior to the federal tax lien. The United States Supreme Court granted *certiorari,* and on June 10, 1963 held that the federal tax lien was superior to the attorney's fee (see *U. S.* v. *Pioneer American Ins. Co.,* 374 U. S. 84, 83 S. Ct. 1651, 10 L. Ed. 770). Our judgment of June 4, 1962 was reversed and the cause remanded to us. The mandate of the United States Supreme Court has been duly received; and in accordance with the said mandate we now set aside our judgment of June 4, 1962, and reverse the decree of the Chancery Court, and remand this cause to the Chancery Court for further proceedings not inconsistent with the said opinion of the United States Supreme Court in this cause.

RANSOM *v.* WEISHARR.

5-2973 370 S. W. 2d 598

Opinion delivered September 23, 1963

[redacted]

Kaneaster Hodges, for appellant.

Wayne Boyce and *Fred M. Pickens, Jr.,* for appellee.

CARLETON HARRIS, Chief Justice. On September 26, 1961, appellant, Clarence Ransom, was struck and injured by an automobile operated by Fred F. Weisharr, appellee herein, who, with his wife, was enroute from Hot Springs, Arkansas, to his home in St. Louis, Missouri. Ransom was an employee of a highway contractor who was repairing a portion of Highway 67, between Tuckerman and Swifton. The incident occurred while appellant was in the act of crossing the highway, after delivering a check to a fellow employee. Ransom was injured, and instituted suit for damages; after the filing of an answer, the case proceeded to trial. The jury re-

turned a verdict in favor of Weisharr, and from the judgment entered thereon, appellant brings this appeal. For reversal, appellant lists six alleged errors, which we herewith proceed to discuss.

The first alleged error relates to the court's action in admitting, over objection, the testimony of Captain Melvin DeLong of the Arkansas State Police. The officer was permitted, as an expert, to give his opinion of the speed of the Weisharr vehicle at the time of the mishap, such opinion being based on an experiment that DeLong had conducted on the morning of the trial prior to its commencement. It was the opinion of DeLong that Weisharr was traveling at a speed of 27½ miles an hour at the time of the occurrence. The speed of the Weisharr vehicle was, of course, pertinent to the question of negligence, and had been mentioned by several witnesses for appellant. Kenneth Brown testified that Weisharr was traveling at "high speed"; Jimmy Rorex testified that the speed was between 40 and 50 miles per hour. Hugh Burris stated that the Weisharr automobile was traveling 55 or 60 miles per hour when it passed him, approximately "a half quarter" from where the injury occurred. Posted signs fixed the speed in the area where the highway was being re-surfaced at 35 miles per hour.

The captain first described the method used, and the factors involved, to determine, from the skid marks, the speed of an automobile.

"There are a number of factors involved in determining speed from skid marks. The 3 major ones that are involved in all calculations: the original speed of a vehicle, the surface over which it traveled and whether that surface is on an incline or a decline. A factor that is known as a drag factor or co-efficient friction, means the amount of drag that the surface puts on a tire that is sliding over it. It has to be calculated on each individual surface and it has to be calculated either on an incline or decline or whether it is wet or dry.

* * *

"Q. Briefly, what are the factors which you take into consideration in making such a test in order to be able to state your opinion as to the speed of a vehicle?

A. There are a number of factors on the car itself. The brakes, for instance, the tires whether they are smooth tread or a good tread, how large the volume of the car or the frontage volume as it presents to any wind resistance, the inflation of the tires, whether they are low inflated or high inflated; that is some of the major ones."

From the record, on *voir dire*:

"Q. Captain DeLong, are you familiar with the degree of inflation of the tires on the Mercury that was involved in this accident?

A. No, Sir.

Q. You are not?

A. No, Sir.

Q. Do you know what kind of tires they were?

A. No, Sir.

Q. Do you know what the state of the tread was on those tires?

A. No, Sir.

Q. Have you ever examined the brakes on that automobile?

A. No, Sir.

Q. Do you know the condition of the brakes on the automobile at that time?

A. Yes, Sir.

Q. Not having examined those brakes?

A. Yes, Sir.

Q. How do you know?

A. The brakes on an automobile are designed to do one thing, to lock the wheels.

Q. You have not examined the brakes?

A. No, Sir.

Q. Have you ever seen the automobile?

A. No, Sir.

Q. You didn't perform the experiment with the Mercury automobile involved in this, did you?

A. No, Sir."

The officer then testified (on direct continued):

"The tests that were made this morning were made on a surface that was described as identical to the surface at the location of the accident at the time of the accident. These tests were made to determine the drag factor or the amount of drag that the surface would exert on an automobile tire sliding over it. The drag factor on that particular surface was .62; that means that it was 62 per cent perfect for stopping an automobile. Now, the car involved slid 40 feet and 7 inches to a stop. Now taking the two known factors, the drag factor and the distance the car slid to a stop and then the calculations that comes out the minimum speed that this car would have to be traveling to slide 41 feet and stop over this surface would be twenty-seven and a half miles an hour."

Captain DeLong subsequently testified that he had conducted one experiment at the place where the accident occurred, but this experiment was of no value because the surface of the road was no longer the same as at the time of the mishap, *i.e.*, it was formerly old concrete, but was now (the day of the trial) new asphalt. The experiment, upon which the captain based his opinion, was made about three-fourths of a mile south of Swifton, and on a surface that DeLong had been told was identical to the condition of the surface at the scene of the accident in September.[1]

We are of the view that the court erred in permitting the officer's testimony to go to the jury for the reason that there are too many unknown facts, which according to the testimony of DeLong himself, influence a result, and which should be considered by an expert in reaching his opinion.

[1] The evidence does not definitely reflect the identity of the party who gave this information to Captain DeLong.

For instance, it will be observed from the officer's testimony (heretofore quoted), that DeLong mentioned the brakes as a factor—but admittedly, he knew nothing about the brakes on the Mercury automobile operated by Weisharr. He mentioned the condition of the tires, *i.e.*, whether possessing a good tread or smooth—but he did not know the condition of the tires on appellee's car. The officer also included inflation of the tires (whether low inflated or high inflated) as being another major factor—but he knew nothing about the amount of air in the tires on the Mercury. Captain DeLong also testified that the load carried by the vehicle influences the distance it will take for the car to stop. When asked if he knew the load in the Mercury automobile, he replied, "One passenger, Sir," and stated that his experiment was based on that assumption.[2] The officer stated that he had been told that the car contained one passenger, but *this information was in error. Actually, the car contained two passengers.*[3] In addition, he never did see the Weisharr automobile at all, nor did he observe the surface of the road on September 26, 1961, but first viewed it on the day of the trial, eight months later.

Of course, an opinion based on an experiment is admissible, provided that such experiment is conducted

[2] While it is not mentioned in the briefs, it would seem logical that even the weight of the passengers would have some bearing. For instance, there should be a difference if an automobile is carrying a man weighing 275 pounds rather than a boy weighing 60 pounds.

[3] It will also be noted in DeLong's testimony, heretofore quoted, that the officer, in giving his opinion of the speed of the Weisharr car as 27½ miles per hour, used the term "minimum speed," which is somewhat confusing; subsequently, DeLong stated that, even considering all of the variable elements as against the driver, his speed estimate would not increase by more than two to five miles per hour. He was then asked, "What happens to those different variables that are unknown when calculating speed?" He replied, "About as many of them are pro for the driver as they are against it, they cancel each other out; but in the final calculation of the thing they all show up in the skid mark, the degree of air in the tires, the tread of tires all shows up in the skid mark; it determines how far the car will slide to a stop. You see a highly inflated tire will slide farther than a low inflated one, and the brake on an automobile is just designed to do one thing and that is lock that wheel." The witness, in stating, "as many of them are pro for the driver as against," was evidently referring to averages. This is, of course, somewhat speculative, and also seems inconsistent with his earlier testimony in which he described tire inflation, tread, etc., as "major" factors. While the captain stated that such elements as the degree of air in the tires and tread of the tires show up in the skid mark, the fact remains that he was unable to testify about either since he did not see the marks left by the Weisharr car.

under circumstances similar to those existing at the time of the occurrence which is the subject of the litigation. It is not necessary that conditions be identical to those existing at that time, but the experiments are admissible if there is a substantial similarity. *Dritt* v. *Morris,* 235 Ark. 40, 357 S. W. 2d 13. It is apparent from the preceding discussion that the factors, which DeLong himself mentioned as pertinent to a proper experiment, were undetermined at the time of the experiment, and the admission of the *evidence, therefore, constituted reversible error.*

This conclusion is in accord with our recent holding in *Henshaw* v. *Henderson,* 235 Ark. 130, 359 S. W. 2d 436. In that case, we reversed a judgment obtained by appellee by reason of the court's error in permitting a State Policeman to give his opinion as to the speed of appellant at the time of a collision. This opinion was based, in part, upon an experiment that the State Policeman, Glen Minton, had conducted. From the opinion:

"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.

"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."

Actually, the circumstances in that case were much more favorable to the admission of the evidence since Minton did view the scene, together with the wrecked automobile; still, because his opinion was based in part upon the improper experiment, the testimony was held inadmissible. Here, DeLong knew nothing personally about the accident, the appearance of the skid marks, or any of the circumstances existing at that time.

We will make brief mention of some other alleged errors, since the same questions might again arise at a re-trial of the cause. Appellant requested an instruction relative to the respective rights of pedestrians and motorists upon public highways. It is true that both have a right to the use of the highway, but the instruction offered by appellant was erroneous, in that it told the jury that "the rights and *duties*[4] of drivers of automobiles and pedestrians on the public highways are equal and reciprocal." This instruction is not correct since their duties are not entirely the same.

Appellant requested an instruction in the wording of the statute [Ark. Stat. Ann. § 75-661 and § 75-725 (Repl. 1957)] which relates to the duty of the operator of a motor vehicle to give a reasonable warning of his approach, and to equip his car with a horn which can be heard, under normal conditions, for a distance of not less than 200 feet. While it is not error to instruct in the language of the statute, same is not absolutely necessary. The first part of the instruction was covered in the court's other instructions, and there was no evidence at all relative to the type of horn on the vehicle.

Appellant asserts two errors in connection with the court's instruction, 8(b); however, the record does not

[4] Emphasis supplied.

reflect that any objection was made to the instruction, and we are accordingly unable to consider these alleged errors.

Finally, appellant asserts that the court erred in refusing to admit certain photographs that appellant offered in evidence. These photographs were taken about two weeks after the accident, and do not depict the scene as it existed at the time of the mishap. We have held in several instances that the admission of photographs is a matter which rests largely within the discretion of the trial court, and we will not reverse the holding of that court unless it appears that there has been an abuse of discretion. *Powers* v. *Long,* 221 Ark. 400, 253 S. W. 2d 359, and cases cited therein. We are unable to say, in this instance, that there was such an abuse.

Because of the court's error in admitting the testimony of Captain Melvin DeLong, the judgment is reversed and the cause remanded.

It is so ordered.

CITY OF EL DORADO *v.* KIDWELL.

5-3025 370 S. W. 2d 602

Opinion delivered September 23, 1963.

James Spencer, Jr., for appellant.

Brown, Compton & Prewett, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an eminent domain proceeding. The City of El Dorado filed action in the Circuit Court, seeking to take a strip of ground 10 feet wide for an out fall sewer line. The strip went through the appellees' lands for a considerable distance. In their answer to the condemnation proceeding, the appellees (Mr. and Mrs. Kidwell) stated:

"Further answering, the defendants state that the sewer line described in the Complaint is not for public purposes and will not be constructed by the City of El Dorado, but rather for the sole benefit of the owners and developers of what is known as the Tanglewood Addition, a new subdivision, and therefore there is no right of eminent domain in defendant's property."[1]

The Circuit Court proceeded to try the case on the issue joined; that is, whether the taking was for a public purpose. We have held that when the answer presents a defense cognizable in equity—as here—and yet both sides proceed to trial in the law court, then the transfer to equity is waived and, on appeal from the circuit court, we test the judgment on equitable principles. *Wilson* v. *White,* 82 Ark. 407, 102 S. W. 201, 12 Ann. Cas. 378; *Shane* v. *Dickson,* 111 Ark. 353, 163 S. W. 1140; *Hill* v. *Kavanaugh,* 118 Ark. 134, 176 S. W. 336. We apply the rules of these cases to the case at bar. After an extended hearing, the Circuit Court found that the complaint should be dismissed as without merit. From that judgment there is this appeal; and the City urges only one

[1] With this allegation in the answer, the proceedings in the cause should have been transferred to equity. We have repeatedly held that the only issue to be tried in the law court is the damages the landowner will sustain by the taking, and that when the question of the validity of the taking is presented, the cause should be transferred to equity. *Ozark Coal Co.* v. *Pa. Anthracite Rd. Co.,* 97 Ark. 495, 134 S. W. 634; *St. L. I. M. and S. R. Co.* v. *Faisst,* 99 Ark. 61, 137 S. W. 815; *Burton* v. *Ward,* 218 Ark. 253, 236 S. W. 2d 65.

point: "The undisputed testimony establishes the City's right to take the property involved."

The City proceeded under Ark. Stat. Ann. § 19-4101 *et seq.* (Repl. 1956) in filing this suit, and duly introduced the ordinance of the City Council, authorizing the City Attorney to file the eminent domain proceedings. By answer, the defendants (appellees) denied the necessity of the taking, and, in effect, claimed that such taking was not for a public purpose. In *Wollard* v. *State Highway Comm.,* 220 Ark. 731, 249 S. W. 2d 564, we said that the landowners "shouldered a heavy burden of proof in attempting to persuade the courts" that the taking was not for a public purpose. The burden was not on the City to prove the public purpose—the statute under which the City proceeded and the resolution of the City Council accomplished that purpose. Rather, the burden was on the landowner to prove that the taking was not for a public purpose; and with such burden understood, we examine the evidence.

The principal evidence of the landowner was directed to two points: (1) the proposed right of way would run diagonally through the landowners' property and interfere materially with the present and future use of the lands; and (2) a new addition was being developed and this sewer line would be for the private benefit of those developers and not for the benefit of the general public.

As to the first point, the City offered to vary the proposed right of way to lessen the appellees' damages; and the amount of the damages, with the change in location, is yet to be determined. So this first point is not a ground for denial of eminent domain. The second point is the real issue. It is true that a private developer is opening an addition; but already one or more residences have been constructed, and this proposed out fall line is shown to be the most feasible way for the City to handle the sewer problem. The Legislature has given the City the right of eminent domain for the purpose of acquiring rights of way for sewer lines; and the fact, that some individual developer of an addition will incidentally benefit by the sewer line, does not destroy the power of the

City to exercise eminent domain for a right of way for a suitable sewer line. *Cloth* v. *C. R. I. & P. R. Co.*, 97 Ark. 86, 132 S. W. 1005, Ann. Cas. 1912C 1115.

On a full review of the entire record, we conclude that the landowners did not discharge the "heavy burden" resting on them to prove that the taking was arbitrary or unlawful; so the judgment is reversed and the cause remanded for the entry of an order of condemnation and the assessing of the damages suffered by the appellees; and the costs of this appeal will be adjudged against the City, as the condemning party, since we test this case on equitable principles.

TALLEY *v.* STATE.

5050 370 S. W. 2d 604

Opinion delivered September 23, 1963.

[Rehearing denied October 21, 1963.]

N. L. Schoenfeld, for appellant.

Bruce Bennett, Attorney General, by *John P. Gill,* Asst. Atty. Gen., for appellee.

George Rose Smith, J. In September of 1960 the appellant shot and killed her seventeen-year-old granddaughter, Carolyn Talley. Tried for murder in the first degree the appellant was found guilty of murder in the second degree and was sentenced to imprisonment for five years. We discuss the more serious points raised in the motion for a new trial.

The evidence is amply sufficient to support the conviction. On the evening in question the appellant was acting as a baby sitter in the home of Mrs. Elaine Terry, in Hot Springs. In going to the Terry home the appellant was accompanied by another granddaughter, Julie Ann Talley, the younger sister of the deceased. Upon this occasion the accused carried a loaded pistol in her purse—for the purpose, she testified, of protecting herself if anyone should try to break into the Terry home.

There is a sharp conflict in the testimony about the homicide itself. At about 7:30 p.m. the appellant's daughter-in-law, who was separated from the appellant's son, drove up to the Terry home, accompanied by her daughter Carolyn. The appellant says that when the car appeared Julie Ann and one of the two Terry children ran into the house, in a state of alarm. The appellant took the pistol from her purse, turned out the lights, and latched the front screen door. According to the appellant, Carolyn came up on the porch, jerked at the screen door, and cursed the appellant, who was sitting just inside the door. Mrs. Talley insisted at the trial that she had no intention of harming her granddaughter, to whom she was devoted. She gave two versions of the shooting, one that the gun went off accidentally, the other that she tried to scare Carolyn by firing up into the air. The bullet entered the child's left eye and apparently caused her instant death.

A decidedly different account is given by Carolyn's mother. She states that she and her daughter happened to be driving in the neighborhood when they saw Julie Ann in the Terry yard. Carolyn had not seen her sister for some time and went to the front door for the purpose of having a visit with her. The younger Mrs. Talley tes-

tified that just before the shot was fired she heard her mother-in-law say: "I'll teach you not to come up here." The jury were at liberty to accept the State's proof as being the truth. That proof fully supports the verdict, for it puts the accused in the position of having deliberately shot a defenseless child with hardly even a semblance of provocation.

The older Terry child was thirteen and the younger one eleven when the homicide occurred. At the trial, more than a year later, they were both called as defense witnesses. On cross-examination the prosecuting attorney was permitted to test their credibility by questioning them about statements made by them to the investigating officers soon after the crime took place. This cross-examination was objected to, on the ground that the State had not shown that the children were competent witnesses at the time they were interrogated by the officers or that their parents were present.

The objection was without merit. By offering the children as witnesses the defense in effect represented to the court that they were competent to testify about what they had observed on the night of the homicide. The trial court properly refused to allow the accused to take advantage of the children's favorable testimony upon the theory that they were competent witnesses and at the same time disavow their unfavorable testimony upon the theory that they were not. The circumstances under which the children were questioned by the officers were pertinent, as tending to weaken the State's attack upon their credibility, but those circumstances did not render inadmissible the fact that they had made inconsistent statements out of court.

Complaint is made of the trial court's refusal to give two instructions requested by defense counsel. Even if we assume that proper exceptions were saved to the court's action we find no prejudicial error. The first requested instruction would have explained one's right to take life in the defense of a habitation. This charge was properly refused, because the evidence did not justify it. *McFarland* v. *State,* 165 Ark. 431, 264 S. W. 938. Accord-

ing to the appellant's testimony she was not attempting to defend the habitation, for she insists that she did not mean to shoot at Carolyn. And if the jury accepted the State's testimony, which indicated that the killing was deliberate, the cold-blooded attack upon an unarmed and helpless child could not possibly have been justified by any supposed necessity for defending the Terry home.

The other requested instruction would have given the jury the option of finding the accused guilty of involuntary manslaughter. The court elected to submit only the offenses of first degree murder, second degree murder, and voluntary manslaughter. In view of the verdict the error, if any, was harmless. As we said in *Newsome* v. *State,* 214 Ark. 48, 214 S. W. 2d 778, "Any supposed error for failure to charge as to involuntary manslaughter was rendered harmless by the fact that the jury convicted [the accused] of second degree murder."

Affirmed.

HOOTEN, CLERK *v.* CONKLIN.

5-3037 370 S. W. 2d 607

Opinion delivered September 23, 1963.

Robert C. Compton, for appellant.

Bernard Whetstone, for appellee.

George Rose Smith, J. The question here is whether a fund in the registry of the chancery court, deposited in the form of a cash bond, may be reached by a writ of garnishment after the chancellor has filed an opinion awarding a portion of the fund to the garnishment debtor.

Crabtree, the garnishment debtor, brought suit in the Union Chancery Court to impress a lien upon oil and gas interests owned by the appellant Hays, a nonresident of the state. To keep the suit from interfering with the payment of oil runs Hays deposited $6,500 in court, as a cash bond for the payment of any judgment Crabtree might obtain. The case was tried and taken under advisement by the chancellor. On October 31, 1962, the chancellor filed an opinion finding that Crabtree was entitled to recover $2,223.22, directing that this amount be paid to Crabtree from the fund in court, directing that the remainder of the fund be returned to Hays, and instructing counsel to prepare a judgment conforming to the opinion.

On November 7 the appellee Conklin, who had previously obtained a judgment against Crabtree in the Union Circuit Court, had a writ of garnishment served upon the appellant Hooten, who was the clerk of the chancery court and the custodian of the fund. On December 31 Crabtree and Hays filed in the chancery case a stipulation agreeing that Crabtree's complaint and Hays' counterclaim might be dismissed with prejudice. On the same day the chancellor entered the agreed order of dismissal. When Hooten, the garnishee, interposed that order as a defense to the garnishment proceeding, Conklin made Hays a party to that proceeding. Upon final hearing the circuit judge, sitting without a jury, held that despite the dismissal of the chancery case the garnishment creditor was entitled to have the sum of $2,223.22 paid to him from the fund in the chancery court. Hooten and Hays have appealed.

We think the court was right. There is no doubt that a fund in court is subject to garnishment, this procedure being authorized by statute. Ark. Stat. Ann. § 31-118 (Repl. 1962); *Green* v. *Robertson,* 80 Ark. 1, 96 S. W.

138; *McGill* v. *Robbins,* 231 Ark. 411, 329 S. W. 2d 540. As a general rule a fund in court becomes subject to garnishment upon the entry of a judgment ordering its payment to the garnishment debtor. *Dunsmoor* v. *Furstenfeldt,* 88 Cal. 522, 26 Pac. 518; *Orchard & Wilhelm Co.* v. *North,* 135 Neb. 39, 280 N. W. 272; *Gaither* v. *Ballew,* 49 N. C. 488, 69 Am. Dec. 763. In the case at bar there is no contention by the appellants that the filing of the chancellor's opinion was not equivalent to the entry of a judgment within the intent of the rule just stated.

When Hays, in 1958, deposited $6,500 in the registry of the court he also filed an instrument entitled "Bond," but this instrument was signed by Hays alone and did not even purport to bind anyone else as a surety. The instrument recited Hays' intention to prevent the oil runs from being impounded during the pendency of the suit, referred to the cash deposit that was being made, and concluded by declaring that if Hays should pay any judgment that might be rendered in favor of Crabtree "then this bond is void; otherwise it shall remain in full force and effect." It is argued that there was never any breach of the condition of the bond, that consequently Hays became entitled to the return of the entire deposit, and that therefore the attempted garnishment should be held to have been ineffective.

This argument is not persuasive. The instrument was not a true bond, which would have involved a surety who might reasonably expect that the principal would be given an opportunity to discharge his obligation before any claim would be asserted against the surety. Hays voluntarily chose to dispense with a surety. Instead, he made a cash deposit in the registry of the court. If it had become necessary for Crabtree to enforce the chancellor's award it could not in seriousness have been contended that Crabtree, before resorting to the cash deposit that had been made to provide for that very contingency, should first have given Hays an opportunity to pay the award from other resources he might have. The fund in court unquestionably stood as a guaranty of Hays'

primary liability rather than as a guaranty of the secondary liability of a nonexistent surety.

The chancellor, in drafting his opinion, not only made an award to Crabtree but also directed that the award be paid from the fund in court. This directive was not unauthorized, as the appellants suggest. To the contrary, it gave effect to the exact purpose for which the deposit was made. The award was in substance a judgment in Crabtree's favor and gave him an interest in the fund that was subject to garnishment. Thereafter Crabtree and Hays, by a stipulation that may have been a collusive attempt to deprive Conklin of his rights, attempted to undo the chancellor's action. In simple justice that attempt ought to fail.

Affirmed.

THOMPSON *v.* HELMS.

5-3020 370 S. W. 2d 609

Opinion delivered September 23, 1963.

Bernard Whetstone, for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. Roy Thompson, a student in the Smackover High School, was injured when a scaffold, on which he was standing, collapsed. At the time of the injury Roy, along with several other boys, was doing carpentry work as a part of the regular lesson assignment. Also, at the time of the injury the scaffold was being used by appellee (Clifton C. Helms) and his employees while engaged in making repairs on the Smackover High School auditorium.

In the complaint, filed by Roy's father as Next Friend, there appear (in substance) the following allegations: (a) In the summer of 1959 appellee entered into a contract with the school district to repair the auditorium, and that (as a part of the contract) appellee was to build the scaffold in question which was to be used by him in performing his contract; (b) On April 12, 1960 Roy was injured as previously stated; (c) The scaffold collapsed because appellee, in constructing the scaffold, was negligent in the following particulars, to-wit:—he used faulty lumber, the workmanship was poor, and he failed to inspect the scaffold periodically. To the above complaint appellee entered a general denial.

At the close of appellant's testimony the trial court sustained appellee's motion for an instructed verdict. In this we think the trial court was correct because we find no substantial evidence in the record from which the jury could have found in favor of appellant. This being true the trial court must be affirmed. See: *Smith* v. *McEachin,* 186 Ark. 1132, 57 S. W. 2d 1043; *Collett* v. *Loews,* 203 Ark. 756, 158 S. W. 2d 658; and *Stobaugh, Admx.* v. *Hubbard, Admr.,* 234 Ark. 917, 355 S. W. 2d 283.

Before he would be entitled to recover from appellee it was incumbent on appellant to show negligence on the part of appellee. We agree with appellant's argument that it will suffice to show appellee was negligent either (a) as a contractor or (b) as an individual. We think the evidence wholly fails in both respects.

Appellant (Roy) and one of his classmates testified, but there is not, and could not be, any contention that either of them testified to any negligence on the part of appellee. The only other testimony introduced was given by appellee who was called by appellant to testify.

(a) The scaffold in question was constructed (apparently) the latter part of 1959 or the early part of 1960, before appellant was injured on April 12, 1960. Appellee had a contract with the School District to make certain specified repairs on the auditorium for $8,200. There is no testimony that the construction of the scaffold was a part of the contract, but there was definite testimony to the contrary—that it was constructed by the school district which merely permitted appellee to use it in performing his contract work. It conclusively appears from the record that Roy and his classmates were at all times on the scaffold at the direction of the school authorities in pursuance of assigned class work. There is no evidence or contention that the boys were working for appellee or that they were under his control in any manner.

(b) It is admitted by appellee that he, along with several other people (including school officials and employees), helped construct the scaffold. The uncontradicted and definite evidence is that he (appellee) did not help in the capacity of a contractor and that he had no control over the other workers. The evidence shows one leg of the scaffold contained a large knot which *probably* caused it to break and the scaffold to collapse. There is however no evidence that appellee knew of or had anything to do with procuring or installing that particular piece of timber.

In the cases previously cited we pointed out that, in testing the substantiality of the evidence in a situation like this, all reasonable inferences deducible from the evidence should be viewed in the light most favorable to appellant. We have so viewed the evidence in this case and still find that the action of the trial court must be affirmed.

Affirmed.

Opinion delivered September 23, 1963.

Felver A. Rowell, Jr., for appellant.

Bruce Bennett, Atty. General, by *Leslie Evits,* Chief Asst. Atty. Gen., for appellee.

SAM ROBINSON, Associate Justice. Appellant was convicted of the crime of forgery, sentenced to five years in the penitentiary, and has appealed.

First, appellant argues that the trial court should have granted his motion for a mistrial because of the method used by the prosecuting attorney in cross-examining the defendant about the commission of other offenses. When the defendant takes the stand, as in the case at bar, he is subject to the same rules of evidence as other witnesses, and for the purpose of throwing light on his credibility, he may, in good faith, be asked about other crimes he may have committed and other convictions, but he cannot be asked if he has been charged, indicted, or accused of other crimes. *Sullivan* v. *State,* 171 Ark. 768, 286 S. W. 939; *Mathis* v. *State,* 191 Ark. 1053, 89 S. W. 2d 599; *Morrison* v. *State,* 191 Ark. 720, 87 S. W. 2d 50; *Kennedy* v. *Quinn,* 166 Ark. 509, 266 S. W. 462.

If the defendant denies that he has committed other crimes he cannot be impeached by showing that he has given false answers. *Montague* v. *State,* 213 Ark. 575, 211 S. W. 2d 879. Here, the defendant was asked on cross-examination about other convictions which he readily admitted, but he denied other crimes for which apparently there had been no trial or conviction. The prosecuting attorney asked the defendant specifically if he had cashed a check in Lucille Brent's Cafe. He answered "no". The prosecuting attorney then said: "I ask the Court's indulgence. I sent after some records and they will be here in just a minute."

The prosecuting attorney then proceeded to question the accused about other check writing offenses. The record is not exactly clear at this point as to whether the State's attorney was using the alleged records in such manner as to lead the jury to believe that he was examining the accused from official records of charges against him, but apparently this was being done. The attorney for appellant then stated that if other records were to be introduced, he would like to discuss the matter in chambers. Finally, the Court and counsel retired to chambers and there, in the course of the discussion, the prosecuting attorney said: "I, at the time of this objection, am doing nothing more or less than looking at old information sheets with which the man was charged, specific checks and the specific name . . .". The Court then asked: "Are these convictions according to the witness?" The prosecuting attorney replied: "They are charges." The Court sustained the defendant's objection, but did not grant the motion for a mistrial.

In view of the fact that the cause is being reversed on the question of the sufficiency of the evidence, we do not deem it necessary to rule on the above assignment of error any more than to point out that although it is proper for the State's attorney, in good faith, to ask the defendant on cross-examination about the commission of, or the conviction for, other offenses, he should not attempt to get before the jury in an indirect way, or other-

wise, the fact that the defendant has been charged, indicted, or accused of other crimes.

The appellant was charged by felony information with forging the name of James Odam to a check drawn on the Morrilton Security Bank in the sum of $38.00. Billy F. Davidson, Assistant Cashier of the First State Bank (not the Morrilton Security Bank on which the check was drawn) was called by the State as a witness regarding the alleged forged check. The name of James Odam appeared on the check as maker and the name James Payne appeared on the back of the check as endorser. The witness, Mr. Davidson, testified:

"Q. At this time I hand you a check dated October 19, 1962, and ask you if you can, how it came into your hands originally?

A. Well, that's the one thing I can't tell you, how it got into our bank. Presumably, someone cashed it at the window, but who, we don't know, but its possible it came to us on a deposit and they didn't put a stamp on it or write their name on it."

The witness then testified that the check was forwarded to the Morrilton Security Bank and was returned by that bank with the notation "Sig. Inf." written in pencil at the end of the name of the endorser on the back of the check. The witness further testified that the notation on the back of the check along side the endorsement means, in banking circles, that the signature does not correspond; that the known signature at the bank does not correspond with the signature on the check. He further testified: "We get them quite often, but not too often, occasionally." The witness then stated that they (the bank) wrote to James Payne, whose name appeared on the check as endorser. The State attempted to prove by the witness what James Payne said, but, of course, such evidence was excluded by the Court as hearsay.

The State produced as a witness Dr. Orlando W. Stephenson, who testified as an expert, and said, in effect, that the defendant—appellant Johnson, had written the check in question, but apparently, to reach that con-

clusion it required about 30 days work on the part of the witness in comparing the handwriting on the check with known specimens of Johnson's writing.

Other than the testimony of Dr. Stephenson, there is no competent evidence in the record that the defendant signed the name of James Odam on the check, and there is absolutely no evidence that James Odam's name was forged. In order to constitute the offense of forgery it is necessary that there be an intent to defraud. *Ferrell* v. *State,* 165 Ark. 541, 265 S. W. 62; *Rickman* v. *State,* 135 Ark. 298, 205 S. W. 711. Of course, if one has permission to sign another's name to the instrument in question, there could be no forgery.

Although the circumstantial evidence shows that there is such a person as James Odam who has a checking account at the Morrilton Security Bank, Odam was not called as a witness, and neither was anyone from the bank on which the check was drawn. The mere fact that one person signs another person's name on a check or other instrument does not necessarily mean that a forgery has been committed.

Whether Odam authorized someone else to sign his name could have been proved very easily by calling him as a witness. There is nothing in the record indicating that he was not available as a witness, and certainly someone could have been called from the bank on which the check was drawn and Odam's signature card could have been produced or its absence explained. It does not appear that Dr. Stephenson ever examined a signature of Odam known to be genuine. It might be asked why did the defendant not do these things. The answer is that the burden was on the State to prove the defendant guilty, the burden was not on the defendant to prove his innocence.

The evidence is not sufficient to support the verdict, but the case does not appear to have been fully developed; therefore, the cause is reversed and remanded for a new trial. *Poole* v. *State,* 234 Ark. 593, 353 S. W. 2d 359; *Anderson* v. *State,* 226 Ark. 498, 290 S. W. 2d 846; *Grigson* v. *State,* 221 Ark. 14, 251 S. W. 2d 1021.

Opinion delivered September 23, 1963.

Sam L. Anderson, for appellant.

Bruce Bennett, Attorney General, by *Richard B. Adkisson* and *John P. Gill,* Assistant Attorneys General, for appellee.

JIM JOHNSON, Associate Justice. Appellant Julian Perez was one of three men arrested for robbery of a Safeway Grocery Store. On February 11, 1963, he was charged with robbery by information, and trial was set in Garland Circuit Court for May 9, 1963. On the morning of May 9th, an article appeared in the local newspaper relating the facts of the robbery and stating that the other two men charged in the same robbery had pleaded guilty and been sentenced to six years in the penitentiary. In chambers before trial, appellant moved the court for a continuance because of the article and introduced the article into evidence. The motion for a continuance was denied.

At the conclusion of the trial that day, the jury found appellant guilty and sentenced him to six years in the penitentiary.

Appellant has appealed contending that the trial court erred in refusing to grant a continuance on the motion submitted on the morning of trial.

The applicable Arkansas Criminal Procedure statute on continuances is Ark. Stat. Ann. § 43-1705 (1947), which states:

"Postponement.—When an indictment is called for trial, or at any time previous thereto, the court, upon sufficient cause shown by either party, may direct the trial to be postponed to another day in the same term, or to another term."

The following section (§ 43-1706) provides that the civil procedure statutes (§§ 27-1402-27-1404) on postponement of trial in civil actions will apply to the postponement of prosecutions on behalf of defendants. These civil procedure statutes relate to postponement after amendment of pleadings, continuance for absence of evidence or witnesses, and payment of costs. Review of our case law reveals that other grounds frequently used are physical or mental condition of defendant, objections to the jury, want of time for preparation, absence of counsel, and surprise at trial.

In *Moore* v. *State,* 229 Ark. 335, 315 S. W. 2d 907, the trial court gave permission for television filming in the corridors during appellant's trial. A radio newscast the night before announced the planned televising, and appellant's attorney moved for a continuance to determine whether the radio announcement adversely affected his client. The motion was denied, and in upholding that ruling this court stated simply, "We fail to see how the radio announcement could be a cause for continuance. The statutes (Ark. Stats. § 43-1705 *et seq.*) and construing cases specify the essential content and showing that must be made in a motion for continuance; and no such content or showing was here made."

There is no doubt that the granting or refusing of a motion for continuance is addressed to the sound discretion of the trial court, *Martin* v. *State,* 194 Ark. 711, 109 S. W. 2d 676; *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527; *Gentry* v. *State,* 201 Ark. 729, 147 S. W. 2d

1; and will not be reversed unless the trial court abuses its discretion. *Burriss* v. *Wise,* 2 Ark. 33; *Smith* v. *State,* 200 Ark. 1152, 143 S. W. 2d 190; *Turner* v. *State,* 224 Ark. 505, 275 S. W. 2d 24. In *Shushan* v. *United States,* 117 F. 2d 110, 133 A. L. R. 1040, cert. den. 313 U. S. 574 (CA 5th La., 1941), the Court of Appeals held that the trial court had not abused its discretion in denying a continuance because of allegedly prejudicial newspaper publicity, pointing out that the trial judge was a resident of the vicinity and personally cognizant of the true situation. In an overwhelming number of cases appellate courts have refused to reverse the trial court for refusing continuances sought on the basis of excitement or prejudice. In *Finnegan* v. *United States,* 204 F. 2d 105 (8th Cir. 1953), the Court of Appeals went so far as to say that newspaper publicity tending to excite public prejudice against a defendant is not usually considered a sufficient reason for granting an application for continuance.

A number of well-reasoned cases have held that refusal to grant a continuance is not an abuse of discretion because *voir dire* examination is sufficient protection, giving the defendant ample opportunity to determine whether jurors have been prejudiced by newspaper articles about the crime or the defendant. *Bianchi* v. *United States,* 219 F. 2d 182 (8th Cir. 1962), cert. den. 349 U. S. 915, 75 S. Ct. 604, 99 L. Ed. 1249; *United States* v. *Hoffa,* 156 F. Supp. 495 (D. C. N. Y. 1961); *State* v. *Sheppard,* 100 Ohio App. 345, 128 N. E. 2d 471; *Wilcoxon* v. *State,* Okl. Cr., 343, P. 2d 194; *State* v. *Sanders,* (Mo.) 313 S. W. 2d 658; 39 A. L. R. 2d 1314. In the case at bar, appellant introduced no evidence or testimony to show prejudice, although the burden was upon him to do so. Further, on *voir dire,* the court examined the jury accordingly:

"The Court: There was an article in the paper, probably some of you read it and some of you did not. Have you read anything in the paper about two of these parties having disposed of their cases prior to this morning, and if you have, would that fact effect you in any way at arriving at a verdict based upon the evidence you hear from the witness stand and the law given to you by

the Court? In other words, anything that you may have read in the newspapers about the other parties involved —if you have read it—from that did you form any opinion as to the innocence or guilt of this defendant?"

The record reflects no affirmative or negative response to this part of the examination. The appellant had the opportunity to examine the panel further on this point if he was not satisfied, and he could and did excuse certain of the jurors. The statute (§ 43-1705, *supra*) calls for "sufficient cause" for postponement. This we have not been shown and we must therefore affirm the judgment of the trial court.

BLAYLACK *v.* STATE.

5086 370 S. W. 2d 615

Opinion delivered September 23, 1963.

Dale L. Bumpers, for appellant.

Bruce Bennett, Attorney General, by *John P. Gill,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Associate Justice. The appellant was charged by information with the crime of assault with intent to kill. Upon a jury trial he was found guilty of the lesser offense, assault with a deadly weapon, and his punishment assessed at one (1) year imprisonment and a fine of fifty dollars ($50.00). Upon rendering judgment, the Trial Court suspended nine (9) months of this sentence. From that judgment appellant brings this appeal urging four (4) assignments of error.

First it is urged by the appellant that the jury verdict was arrived at by lot. We do not agree. Upon the return of the verdict, counsel for the appellant polled the jury. One of the jurors, Mrs. Gibson, replied that she agreed to the verdict and it was the result of a compromise. At a subsequent proceeding Mrs. Gibson was called by the appellant to support his argument that the verdict was arrived at by lot. She testified that some of the jurors were of the opinion that the defendant was innocent of any offense and that some of them were of the opinion that he should be convicted of the crime of assault with intent to kill. The effect of her testimony was that the verdict was the result of compromise between the jurors and that she "voted for the verdict as rendered" and "the entire twelve [12] agreed." This was not a verdict by lot. A verdict by lot involves an element of chance. *Speer* v. *State,* 130 Ark. 457, 198 S. W. 113; *Arnold* v. *State,* 150 Ark. 27, 233 S. W. 818; *Patton* v. *State,* 189 Ark. 133, 70 S. W. 2d 1034.

In the case at bar the verdict was arrived at by the exercise of the free choice of the jurors and in the absence of any element of lot, chance, hazard or fortune. There was no evidence of any contrivance to determine appellant's guilt by any of these elements. A verdict reached by a jury through a compromise of their views is not a verdict by lot. It is a fair expression of their views. *Smith* v. *State,* 160 Ark. 178, 254 S. W. 463. Since this was not a verdict by lot, we hold it was not competent for the appellant to thus impeach the verdict of the

jury. The Court was correct in denying appellant's motion for a new trial on this point.[1]

Secondly, the appellant insists that the Trial Court erred in refusing his requested Instruction No. 4 which reads as follows:

"If you find that the defendant, Earl Blaylack, had reasonable cause to believe that the prosecuting witness, Raymond Foster, and those around him were approaching the defendant with the intent to take his life *or to commit an assault upon his person,* and that the defendant had done all that he could do to avoid difficulty without retreating, then you should find that the firing of the gun toward the said Raymond Foster and the others was justified and the defendant should be acquitted." [Emphasis ours.]

We discuss only one of the reasons why we find no merit in this contention. It is well settled in our State that it is not the duty of the Court to give an instruction on any point of appellant's theory of his case unless he offers a correct instruction to the Court. *Hays* v. *State,* 219 Ark. 301, 241 S. W. 2d 266. In the early case of *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900, we held that the plea of self-defense is available only if the assault upon the defendant is of such character as to be with murderous intent. Upon a review of the many cases since then, including a most recent case, *Seward* v. *State,* 228 Ark. 712, 310 S. W. 2d 239, we find throughout these cases, as a condition precedent to the plea of self-defense, that an assault upon the defendant must be of such a character that it is with murderous intent, or places the defendant in fear of his life, or great bodily harm. A mere assault is not sufficient to justify the plea of self-defense. See, also, *Bazzell* v. *State,* 222 Ark. 473, 261 S. W. 2d 541. According to the evidence on behalf of the appellant he was entitled to an instruction on

[1] Ark. Stat. Ann. § 43-2203 (1947) reads: "Grounds for new trial.— * * * Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors." Also, Ark. Stat. Ann. § 43-2204 (1947) reads: "Competency of juror.—A juror can not be examined to establish a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot. [Crim. Code, § 269; C. and M. Dig., § 3220; Pope's Dig., § 4060.]"

self-defense, however, the Court was correct in refusing defendant's requested instruction on self-defense as offered.

Thirdly, it is contended by the appellant that the verdict rendered against him by the jury was based upon insufficient evidence. We do not agree. In testing the legal sufficiency of evidence to support a verdict in the case at bar we must view it, on appeal, in the light most favorable to the State. *Allgood* v. *State,* 206 Ark. 699, 177 S. W. 2d 928; *Hadaway* v. *State,* 215 Ark. 658, 222 S. W. 2d 799.

Appellant and the prosecuting witness, Foster, were strangers. They met at a picnic and engaged in an argument on the subject of "drag racing" which terminated with a handshake. Appellant drove his car about fifty (50) yards down the road, stopped and engaged someone in conversation. According to the prosecuting witness, he thought he understood the appellant to curse him. Thereupon he went to the appellant and made inquiry of such without being armed. Again their meeting ended on a friendly basis. After walking away a short distance he again understood appellant to curse him and he turned around, tearing loose from a companion. As he was advancing, unarmed, toward the appellant he was shot by appellant while approximately eight (8) to ten (10) feet away from him. The appellant contends that the prosecuting witness was armed with an empty whiskey bottle upon his first approach and when he advanced upon him a second time he had a shiny object which appeared to be a knife in his right hand; that the prosecuting witness and those around him were advancing upon appellant in a threatening manner and he understood the prosecuting witness to say "I'm going to cut you all to pieces"; that he shot Foster when he failed to heed his warning to stop. Reviewing the conflicting versions in the light most favorable to the State, as we must do in this case on appeal, we hold there was sufficient evidence upon which the jury could base its verdict.

Fourthly, the appellant asserts that the Court erred in refusing to allow a witness in his behalf "to testify whether or not he was sitting in such a position as to be able to see whether the prosecuting witness, Raymond Foster, had anything in his hand as he approached the appellant." Upon reviewing this testimony we think that the witness was allowed to fully testify from what he knew of his own knowledge. However, since this point was not raised by the appellant in his motion for a new trial, we cannot consider it as an assignment of error upon appeal. *Lambdin* v. *State,* 150 Ark. 580, 234 S. W. 987.

Finding no error, the judgment is affirmed.

OUACHITA INDUSTRIES *v.* ANDERSON.

5-3023 370 S. W. 2d 811

Opinion delivered September 30, 1963

Spencer & Spencer, for appellant.

Brown, Compton & Prewett, for appellee.

ED. F. MCFADDIN, Associate Justice. We are here asked to determine whether the indorsement in question was an unqualified indorsement under the Uniform Negotiable Instruments Law.[1]

In 1954 Lloyd P. Cox and wife executed their note, which in due time was owned by appellee, W. S. Anderson; and he placed on it the following writing:

"State of Arkansas }
County of Garland } ss.

"For value received I hereby assign, transfer, set over and convey all of my interest in and to the note on

[1] The Uniform Negotiable Instruments Law was adopted in Arkansas by Act 81 of 1913. In 1961 the Arkansas Legislature, by Act No. 185, adopted the Uniform Commercial Code, now contained in Ark. Stat. Ann. §85-1-101 *et seq.* (Addendum 1961); and that Act provides that the Uniform Commercial Code would become effective in Arkansas at midnight December 31, 1961; but that all transactions validly entered into before the effective date, and all rights, duties, and interests flowing from them, would be governed by the laws prior to the adoption of the Uniform Commercial Code. So the present case is not affected by the Uniform Code: we decide this case under the Uniform Negotiable Instruments Law, hereinafter referred to as "UNIL."

the reverse side hereof together with the security therefor, to CRESWELL-KEITH, INC., AN ARKANSAS CORPORATION, TRUSTEE FOR CRESWELL-KEITH MINING TRUST.

"This the 12th day of January, 1957. /s/ W. S. Anderson."

Either by change of corporate name, or other procedure, the appellant, Ouachita Industries, Inc., became the owner of the note; and on February 14, 1961, filed the present suit against W. S. Anderson seeking to hold him liable as an unqualified indorser of the note because of the writing above copied. Anderson filed his demurrer, claiming that the said writing was not equivalent to an unqualified indorsement. The Trial Court sustained the demurrer and dismissed the complaint when the plaintiff refused to plead further.[2] On appeal, the appellant urges one point: "Under the Uniform Negotiable Instruments Law, Effective at the Time of the Indorse-

[2] The learned Chancellor delivered a written opinion, from which we copy:

"The Court further finds that the indorsement should be and is interpreted as a limited indorsement, rather than a general indorsement, in that the indorsement states: 'ALL OF MY INTEREST IN AND TO THE NOTE ON THE REVERSE SIDE HEREOF, TOGETHER WITH THE SECURITY THEREFOR, . . .'

"The Court further finds that the language as above quoted, under the decision of the Supreme Court of Arkansas as announced in *Spencer* v. *Halpern*, 62 Ark. 595 and cited in an opinion not reported, 65 Ark. Page 631, and also as announced in 8 Am. Jur. Sec. 46, does constitute a restrictive indorsement. The Court further finds that although the above cited case of *Spencer* v. *Halpern* was decided prior to the adoption by the Arkansas Legislature of the 'Uniform Negotiable Instruments Law,' such adoption did not change the law merchant. The text writers and the decisions of the courts of Arkansas seem to give full force to such language in the indorsement as 'without recourse' and 'all my right, title, and interest.' This principle of restrictive indorsement by the use of such terms as stated was also followed in the case of *Bennett* v. *Semmes*, 287 Fed. 745, as decided by Judge Trieber, District Judge, Eastern District of Arkansas. The opinion having been rendered on March 27, 1923, after the passage of the Uniform Negotiable Instruments Law adopted in Arkansas in 1913. It further appears from the authorities submitted to this Court that the sections of the Uniform Negotiable Instruments Law of Arkansas pertaining to restrictive indorsements, and particularly where the same language is used as was in this present indorsement, 'all my right, title and interest,' are in effect re-enactments of the well established law of the law merchant."

ment, the Indorsement as a Matter of Law was an Unqualified Indorsement."

The question under consideration turns on whether the holding of this Court in *Spencer* v. *Halpern* (1896), 62 Ark. 595, 37 S. W. 711, 36 L.R.A. 120, was changed by the passage of the Uniform Negotiable Instruments Law, which was Act No. 81 of 1913 (see Ark. Stat. Ann. §68-101 *et seq.* [Repl. 1957]). In *Spencer* v. *Halpern,* there was this indorsement: "For value received I hereby transfer my interest in the within note to Isaac Halpern. (Signed) Geo. Spencer." When the note was unpaid, Halpern sued Spencer on the indorsement; and Spencer pleaded that he was not liable because the indorsement was restricted. This Court held that by the quoted indorsement Spencer avoided the liability of an unqualified indorser under the law merchant. In the opinion, Justice Wood recognized that, under the law merchant, Spencer would be liable as an indorser unless the language he used was sufficient to restrict his liability; and Justice Wood recognized that Mr. Daniels (in his work on Negotiable Instruments) and many adjudicated cases held that such an indorsement as Spencer made was not sufficient to exempt Spencer from liability as an unqualified indorser. But Justice Wood quoted Tiedeman on Commercial Paper, §265:

" 'The declaration that the payee assigns or transfers all his *right, title and interest* in the paper would seem to limit in a most effective way the rights acquired by the transferee to those which the transferrer had therein, and thus prevent the writing from operating as an indorsement.' "

Justice Wood then continued:

"Why should we not let the contract mean and have the effect that is plainly expressed by the terms '*my interest*' in their ordinary acceptation? Had the payee intended to be bound as indorser, why use so many words? Had the transferee expected more than the '*interest*' of the transferrer, why did he accept the instrument transferring only his '*interest?*' We must accept

and interpret the completed contract as the parties made it. They have seen proper to express it at length, and have used unambiguous terms. Construing the terms *'my interest'* most strongly against the transferrer, we do not feel authorized to say they mean anything more than simply *'my interest.'* They are clearly terms *of limitation,* when used in an indorsement on a negotiable instrument. Compare *Reynolds* v. *Shaver,* 59 Ark. 299."

We find nothing in the Uniform Negotiable Instruments Law that does other than declare what the law merchant[3] had been on this matter of what is a qualified indorsement. Ark. Stat. Ann. §68-138 (Repl. 1957) (being §38 of the UNIL) reads in part: "A qualified indorsement constitutes the indorser a mere assignor[4] of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' *or any words of similar import."* (Emphasis supplied.) Ark. Stat. Ann. §68-163 (Repl. 1957) (being §63 of the UNIL) says: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, *unless he clearly indicates by appropriate words his intention to be bound in some other capacity."* (Emphasis supplied.) Ark. Stat. Ann. §68-166 (Repl. 1957) (being §66 of the UNIL) says: "Every indorser who indorses *without qualification,* warrants to all subsequent holders in due course: . . ." that payment will be made by him under circumstances stated in the section. (Emphasis supplied.) In *Spencer*

[3] In *Bennett* v. *Semmes,* 287 F. 745, Judge Trieber, United States District Judge for the Eastern District of Arkansas, said that the UNIL was a re-enactment in that case of what the law merchant had been; and in the case at bar, the UNIL was a re-enactment of what the law merchant was on the question here.

[4] The Supreme Court of Utah, in *Johnson* v. *Beickey,* 228 F. 189, clearly stated the distinction between assignment and indorsement:

" 'Assignment' and 'indorsement,' as applied to negotiable instruments, are not synonymous terms. An indorsement is not merely a transfer of title, but a new and substantive contract by which the indorser becomes a party to the instrument and liable, on certain conditions, for its payment. An assignment means a transfer of the title. It neither includes nor implies becoming in any way a party to the payment, or responsible for the insolvency or default of the maker."

Even though the Supreme Court of Utah holds against *Spencer* v. *Halpern,* the foregoing discussion of assignment and indorsement is clear and concise.

v. *Halpern, supra,* it was held that an indorsement such as the one here was an indorsement *with qualification* in that the words had a similar import to "without recourse"; and we fail to see wherein the holding in *Spencer* v. *Halpern* was changed by the adoption of the Uniform Negotiable Instruments Law in 1913.

We concede that a majority of the States hold that an indorsement, such as that in *Spencer* v. *Halpern,* and in the case at bar, is not sufficient to constitute a qualified indorsement;[5] but in 8 Am. Jur. p. 254, "Bills and Notes" §546, it is stated that the reasoning in *Spencer* v. *Halpern* is the better reasoning on this point. Here is the language in Am. Jur.; and we have italicized that portion of the text which cites *Spencer* v. *Halpern* in support thereof:

"Indorsement in Form of Assignment.—There is a direct conflict of authority upon the question whether one who transfers an instrument by words purporting only an assignment of the paper is to be held bound in accordance with the contract implied by law from an indorsement in blank. The majority of the courts considering the question have taken the view that the liability of an ordinary indorser is imposed upon one who makes an assignment upon the back of a negotiable instrument; such an assignment, according to this view, is not a qualified or a restrictive indorsement. Accordingly, one who writes and signs on the back of a negotiable instrument an assignment thereof is held liable as an indorser to the same extent as if he had merely indorsed his name without any other words. A reason given for this view is that the so-called 'assignor,' in expressing the assignment, is merely expressing one part of what the law implies from a general indorsement, and that if the person making the assignment wishes to avoid the liability of such an indorser, he should put that wish into words clearly indicating his intention. *The better reasoning, however, would seem to favor the view that the person making an assignment in express terms thereby signifies his intention to do nothing more than assume the liability*

[5] See annotations in 2 A.L.R. 216, and in 44 A.L.R. 1353.

of an assignor or restrictive indorser and that the assignment should not be held to import the contract of indorsement. In accordance with this view, it has been held that where the holder of commercial paper transfers merely his interest therein, he will not be liable upon the note in case of the maker's failure to pay at maturity.''

The above quotation in Am. Jur. was published in 1937; and certainly the author of the above quoted text had no idea that the Arkansas holding in *Spencer* v. *Halpern* was changed in any way by the 1913 adoption by Arkansas of the UNIL, or else there would not have been the citation of *Spencer* v. *Halpern* as supporting ''the better reasoned view.''

We therefore conclude that the holding in *Spencer* v. *Halpern* is governing in the case at bar; and that the Trial Court was correct in so holding.

Affirmed.

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

GEORGE ROSE SMITH, J. (dissenting). The question before the court in *Spencer* v. *Halpern,* relied upon by the majority, was not the same as that confronting us today. There the issue was whether an assignment purporting to convey all the transferror's interest in a note amounted to a qualified indorsement at common law. The court held the indorsement to be a qualified one.

In the case at hand we are not concerned with the common law. The statute has greatly sharpened the conception of a qualified indorsement by declaring explicitly that the transferror may use ''the words 'without recourse' or any words of similar import.'' Ark. Stat. Ann. § 68-138 (Repl. 1957). Hence in the case at hand the narrow question is whether the words of the indorsement, ''I hereby assign, transfer, set over and convey all my interest in and to the note,'' are of similar import to the statutory phrase ''without recourse.'' I think this ques-

tion should be answered in the negative, both upon reason and upon authority.

The transferror's real intent is not apt to be open to doubt when the indorsement is prepared by one skilled in the law of commercial paper, such as a banker or a lawyer, for then the draftsman will select whatever statutory language he needs to express his purpose. The ambiguous indorsements, for which today's decision will become a controlling precedent, are those prepared by laymen not well versed in the law of negotiable instruments.

The laity's unfamiliarity with this field of law, however, is not unlimited. Nearly everyone old enough to be dealing with checks and promissory notes knows perfectly well that he can protect himself against liability upon such an instrument by indorsing it "without recourse." Hence in the overwhelming majority of cases the parties, if they really mean to bring about the limited liability that is involved in a qualified indorsement, will accomplish that purpose by indorsing the instrument without recourse.

It follows as a corollary that the parties, whether learned in the law or not, will *not* resort to the cumbersome indorsement now before the court as a deliberate device for achieving a transfer without recourse. Thus it seems to me that as a matter of practical thinking and sound policy the majority are demonstrably mistaken in declaring that the language now before us expresses the same intention as the familiar phrase "without recourse." Nor does the majority's position have any particular equitable appeal. One who assigns a note or check ordinarily receives value; so there is no injustice in holding him liable upon the instrument if it proves to be worthless.

The authorities point to this same conclusion. The decision in *Spencer* v. *Halpern* followed what was the minority rule at common law and what is even more decidedly the minority rule under the N.I.L. The cases were carefully reviewed by the Supreme Court of Ne-

braska in an opinion that refers to the "decisive majority" of the courts that hold such an indorsement to be unqualified and to the "unanimity" that prevails under the N.I.L. *Baldwin-Heckes Co.* v. *Kammerlohr,* 123 Neb. 317, 242 N. W. 661. One may infer that the majority view was also favored by Dean J. S. Waterman, a genuine scholar in the law of Bills and Notes. See Waterman, The Assignment and Guaranty of Promissory Notes, 1 Ark. Law School Bulletin 25.

I think the rule of *Spencer* v. *Halpern* to be unsound. We are not compelled to follow that decision; it was a declaration of the common law rather than an interpretation of the statute. We have recognized the desirability of construing uniform laws in harmony with the decisions in other jurisdictions. *Grauman* v. *Jackson,* 216 Ark. 362, 225 S. W. 2d 678. There is every reason for us now to abandon the minority rule and align ourselves with the majority. It is especially regrettable that this opportunity is being lost, for the language of the Commercial Code, Ark. Stat. Ann. § 85-3-414 (Addendum 1961), is so similar to that of the N.I.L. that today's decision will doubtless apply to the new statute as well as to the old one.

HARRIS, C. J., joins in this dissent.

GRAVES & PARHAM *v.* STATE.

5079 and 5080 370 S. W. 2d 806

Opinion delivered September 30, 1963.

Skillman & Webb, for appellant.

Bruce Bennett, Attorney General, by *Russell J. Wools,* Asst. Atty. Gen., for appellee.

George Rose Smith, J. The two appellants, Deltha Ann Graves and Dan Parham, were separately charged with the crime of robbery. The cases were consolidated for trial and resulted in verdicts of guilty, with a sentence of seven years imprisonment in each case. On appeal the principal issue is the sufficiency of the evidence.

We view the testimony in the light most favorable to the verdicts. The State's principal witness was Leonard D. Bronk, the victim of the robbery. Bronk testified that he had been having dates with Deltha, who was separated from her husband. On the night of the crime Deltha telephoned Bronk, who arranged to pick her up at a service station in Memphis. The couple first drove to Deltha's apartment, which she said she had forgotten to lock. The jury might have believed, however, that this statement was merely a pretext and that the woman really went to the apartment to report to her husband and to the other defendant, Dan Parham, who were eating supper there.

Bronk testified that Mrs. Graves wanted to drive over to Marion, Arkansas. Between West Memphis and Marion the couple were overtaken by Graves and Parham, who tried to stop Bronk's car. He at first eluded them, but a little farther down the highway Deltha took the keys from the car, forcing Bronk to stop. Graves and Parham again caught up, alighted from their car, and came up to Bronk and Mrs. Graves.

According to Bronk, Graves demanded $25 from Bronk for his being out with Graves' wife, and Parham offered to fight Bronk on account of Bronk's having had

Parham arrested a few days earlier. Bronk had locked the doors of his car, but his assailants broke the windows and attacked Bronk, knocking him unconscious. When he recovered consciousness he found that $128 was missing from his wallet. The money had been in the form of a one-hundred-dollar bill, two tens, a five, and three ones. When Parham and Mr. and Mrs. Graves were arrested they had in their possession, along with other currency, bills that corresponded in denomination to those described by the prosecuting witness. When Mrs. Graves was taken into custody she attempted to hide a one-hundred-dollar bill in her shoe.

The three who were implicated in the robbery denied the State's testimony. They insisted that Parham and Graves had followed the Bronk car only because Bronk was forcing Deltha Graves to accompany him. According to the defendants, no assault or robbery occurred; Parham and Graves merely rescued Mrs. Graves from her abductor.

Upon the conflicting testimony the issues of fact were properly submitted to the jury. The appellants are in error in arguing that the State's failure to prove its case beyond a reasonable doubt entitles them to a reversal. The jury must be convinced of the accused's guilt beyond a reasonable doubt, but there is no requirement that the members of this court be similarly persuaded by the proof. Here the test is that of substantial evidence. If the verdict is supported by such proof we are not at liberty to disturb the conviction, even though we might think it to be against the weight of the evidence. *Fields* v. *State,* 154 Ark. 188, 241 S. W. 901.

Error is predicated upon the trial court's refusal to give this requested instruction: "In weighing the testimony of police officers, greater care should be used in weighing their testimony than that of an ordinary witness because they are in effect hired witnesses and have a natural and unavoidable tendency to procure and remember with partiality such evidence as would be against a defendant or defendants." This assignment of error is wholly without merit. The assertion that every police

officer is invariably a prejudiced witness is so plainly unfounded as not to require serious notice. Had the requested instruction been given the court would have fallen into error, not only because the charge involves a misstatement of fact but also because it would have amounted to a comment by the court upon the weight of the evidence.

It is also contended that the bills taken from the appellants and from Graves were improperly received in evidence and, further, that the prosecuting attorney was permitted to make an improper argument. These contentions do not appear to have merit, but we forego an extended discussion, for there was no objection to the introduction of the bills and no exception to the court's ruling upon the prosecutor's argument.

Affirmed.

SWEETSER CONSTRUCTION CO. *v.* NEWMAN BROTHERS, INC.

5-3046 371 S. W. 2d 515

Opinion delivered September 30, 1963.

[Rehearing denied November 4, 1963.]

Franklin Wilder and *E. J. Ball,* for appellant.

Greenhaw & Greenhaw, Pearson & Pearson, for appellee.

PAUL WARD, Associate Justice. In May 1960 the University of Arkansas entered into a written contract with B. Sweetser Construction Company (hereafter referred to as prime contractor) for the erection of a men's residence hall at Fayetteville, the total contract price being $1,426,363. The United States Fidelity and Guaranty Company (hereafter referred to as surety) executed a bond, pursuant to Ark. Stat. Ann. §§ 51-632 and 51-635 (Supp. 1961), conditioned that the prime contractor "shall faithfully perform his contract, and shall pay all indebtedness for labor and materials furnished or performed . . . in the erection" of the said building.

The building was to be constructed according to plans and specifications prepared by a named firm of architects. Among other things the plans and specifications called for a certain aluminum fabrication to be used in the installation of a certain stairway. This fabrication (hereafter called Item 7) was designated "Econo Rails and Posts", manufactured by Newman Brothers, Inc. located in Ohio — hereafter called appellee. The plans and specifications called for Item 7 or *its equal.*

Item 7 was in fact fabricated by appellee and used in the construction of the building, the price of the item being $1,200. The issue to be decided by this litigation is whether appellee is entitled to recover the above amount from appellants or either of them. The real issue which we will consider is, as defined by the trial court, whether the surety is obligated under the above statutes to pay appellee.

In order to understand and discuss the issue it is necessary to set out below certain material facts which are not in dispute.

On May 20, 1960 the prime contractor entered into a written contract with the Fort Smith Structural Steel Company wherein the latter agreed to furnish $102,000 worth of structural steel and other metals (consisting of

27 items) to be used in the building. Included therein was Item 7. About a week later the prime contractor issued a purchase order for the above items. Thereupon the Fort Smith Company placed an order for Item 7 with the United Iron and Steel Company of Oklahoma City. Then the latter company placed an order for Item 7 with appellee. On January 13, 1961 appellee shipped Item 7 to "Men's Residence Hall, University of Ark., Fayetteville, Ark." The invoice (apparently) was sent to "United Iron and Steel Co., P. O. Box 3885, Oklahoma City 6, Okla." The above quotations were taken from the invoice issued by appellee as shown in the record. Sometime in August, 1961 the prime contractor paid the Fort Smith Company $1,200 for Item 7 along with full payment for all other contract items. The Fort Smith Company paid the Oklahoma Company for Item 7, but the latter company has not paid appellee.

Appellee's complaint, asking for $1,200 from appellants, and appellant's general denial were presented to the trial court upon interrogatories and stipulations. Both sides moved for a summary judgment. The trial court sustained appellee's motion and appellees would sustain the court on the grounds that the statutes previously mentioned impose an absolute obligation on the surety to pay for Item 7 and that the law requires no privity between appellee and the prime contractor—especially since the contract called for a named item—Item 7.

We are unable to agree with the contentions of appellee under the facts in this case. Section 51-632 mentioned previously merely provides that the prime contractor in this instance had to furnish a bond in an amount equal to the contract price—$1,426,363. Section 51-635, previously mentioned, reads:

"(a) The bond required or authorized in this act [§§ 51-632—51-638] shall be executed by a solvent corporate surety company authorized to do business in the State of Arkansas, and shall be conditioned that the contractor shall faithfully *perform his contract, and shall pay all*

indebtedness for labor and materials furnished or performed in the repair, alteration or erection.

"(b) The bond required or authorized in the foregoing sections of this Act shall in itself be a full compliance with all other statutes of this State now or hereafter in effect relating to bond requirements on contracts for the repair, alteration or erection of any building structure or improvement, public or private, it being the intention of this Act to provide a uniform bonding procedure in conjunction with such contracts." (Emphasis added.)

We are wholly unable to hold that the above statute in this instance imposes an absolute duty on the surety to pay appellee since there is no showing of any privity between appellee and the prime contractor. If the surety is liable to appellee then it would seem to follow logically that the surety would also be liable to any person who might have furnished labor or material for the fabrication of Item 7 but had not been paid by appellee, and *ad infinitum.* Under such a construction of the statute it would be difficult for any surety company to determine the extent of its liability or when it would end.

We are impressed with the reasoning used and the conclusions reached in the case of *City of St. Louis, to Use of Stone Creek Brick Co.,* v. *Kaplan-McGowan Co., et al.,* 233 Mo. App. 789, 108 S. W. 2d 987. In that case appellee was hired as the prime contractor to build a hospital for the City of St. Louis. A surety company executed its bond pursuant to statute. In the course of construction appellee sublet the brick work to Parker and Sloss; the latter purchased the brick from one Stocke; and, Stocke purchased the brick from appellant—Stone Creek Brick Co. The subcontractor was paid in full but the Stone Creek Brick Co. was not paid. The court held the surety was not liable to Stone Creek Brick Co. on the ground that it was not in privy with the prime contractor. In that case the statute was more liberal for the supplier of materials than the statute involved in this case. Mo. Stat. § 2890 (1929) [Mo. Stat. § 3277 (1939)] requires the surety to pay for all materials furnished "in such work whether by subcontractor or other-

wise". In holding as it did, the Missouri Court of Appeals used language which we think is applicable and controlling in the case under consideration.

"As a matter of fact, the actual test to be applied in determining the right of a party such as plaintiff in this case to have recourse to the contractor's bond for the payment of his account is one of privity of contract between him and such contractor."

Quoting from *Board of Education of St. Louis* v. *Fidelity & Guaranty Co.,* 166 Mo. App. 410, 422, 149 S. W. 46, 49, the court further said:

" 'While the privity of contract is necessary it need not be directly with the original contract but it must spring out of it. That it is not derived directly from the original contractor does not destroy the privity. It may come through contract with the subcontractor, as, in mechanic's lien cases it frequently does. The contract and bond require the principal and surety to respond for claims for labor and material furnished under the contract, and whether that claim for labor and material comes directly from the original contractor or from a subcontractor, or from a laborer or materialman under the subcontractor, is immaterial, so long as its origin is called for in the original contract and grows out of the original contract.' "

The court then said:

"But it is at this point that privity of contract ends, and one who supplies material to a materialman, who in turn supplies the subcontractor, is to be relegated to the status of a stranger to the original contract, since such person's contract or undertaking is neither with the principal contractor, nor with one who, as in the case of a subcontractor, deals directly with the principal contractor. Such person's contract is therefore but indirect and collateral to the original contract, and for want of privity does not serve to bring such party within the purview of the principal contractor's bond."

In this opinion we do not mean to hold that a person who furnishes material to a subcontractor is not in

privy with the prime contractor, but just the contrary. In this connection the general rule is stated in 77 A.L.R. at page 148 as follows:

"It is generally held that persons supplying materials and labor to a subcontractor, rather than directly to the general contractor, may recover on a bond given pursuant to such a statute."

The statute referred to above was one, similar to our own statute, required by contractors in constructing public buildings.

In the case under consideration it is clear from the above statements that appellee was not in privy with the prime contractor. It is contended by appellee that the Fort Smith Company was a subcontractor. Conceding, without deciding, this to be true, it avails appellee nothing because appellee did not deal with that company but with the Oklahoma Company which has been paid in full.

Appellee cites the case, *Stewart-McGehee Construction Co.* v. *Brewster and Riley Feed Manufacturing Company,* 171 Ark. 197, 284 S. W. 53, in support of its contention that there need be no privity between the furnisher and the prime contractor. In that case, however, the claimant furnished the material to a subcontractor. Therefore the Court was correct, as previously pointed out, in holding the surety liable. Neither does the case of *Detroit Fidelity & Surety Company* v. *Yaffe Iron & Metal Co., Inc.,* 184 Ark. 1095, 44 S. W. 2d 1085, support appellee. There, the only issue to be decided by the Court was whether certain two and one-half inch water pipe furnished by claimant to the prime contractor should be classified as major equipment of the contractor or materials used in the construction. In holding in favor of the supplier of the pipe, the Court said the bond and the statute "must be construed liberally in order to effectuate the purpose of the Legislature . . ."

We find no merit in appellee's contention to the effect that the peculiar nature of Item 7 was sufficient to put the prime contractor on notice that appellee fur-

nished the same, and should therefore, in the interest of justice, be paid. It is pointed out the specifications did not call for an item to be made by appellee—it called for such item *or its equal.*

In view of what we have heretofore said, the judgment of the trial court is reversed and the cause of action is dismissed.

Reversed and dismissed.

ARK. HIGHWAY COMMISSION *v.* WILMANS.

5-3032 370 S. W. 2d 802

Opinion delivered September 30, 1963

Dowell Anders and *Thomas B. Keys,* for appellant.

Wayne Boyce and *Fred M. Pickens, Jr.,* for appellee.

SAM ROBINSON, Associate Justice. In the exercise of the right of eminent domain, the Arkansas State Highway Commission condemned for highway purposes, a strip of land 13 feet wide across the front of two tracts of land owned by appellee, Charles H. Wilmans, in Jackson County. The damages estimated by appraisers for the Highway Commission amounted to $6,275.00. We

will designate the separate parcels as the north and south tracts. In the north tract there are 132 feet facing the highway. On this property there were located two buildings, one containing a liquor store and the other a beer parlor. The south tract had no improvements. The jury returned a verdict for the property owner, appellee, in the sum of $19,500.00. The Highway Commission has appealed.

The principal issue on appeal is whether the trial court erred in refusing to strike the testimony of certain witnesses who testified for the property owner as to the value, the witnesses having testified that in arriving at an opinion of the damages suffered by the owner, they took into consideration the profits of about $10,000.00 annually the appellee earned from the operation of the liquor and beer business.

Testimony about the profits was developed in this manner: The attorney for the property owner questioned the witnesses about their knowledge of property values and then asked them the value of the property before the taking, the value after the taking, and the resulting damages.

One witness, Mr. Buffington, testified to a value of $2,000.00 on the south tract before the taking and a value of $1,500.00 after the taking, thereby showing damages by reason of the taking of the south tract of $500.00. He then testified that the value of the north tract was $40,000.00 before the taking and $9,367.60 after the taking, thereby showing damages of $30,632.40 by reason of the taking of the strip across the north tract. The witness was not asked any questions on direct examination about how he arrived at the valuation before and after the taking. On cross-examination, he was questioned about how he arrived at such valuations. It then developed that in reaching an opinion as to value he had taken into consideration the profits earned in the business located on the property. He also took into consideration the value of personal property located on the premises. Mr. Buffington testified:

"A. . . . In order to get a true value on that, actual value of the property, I went to Mr. Wilmans and got his figures on his volume of business for the last three years and according to that volume of business this property would make, bring back $40,000.00 in four years, which would make it in my opinion a fair value. Most investments would have to retire over a longer period of time but this particular type of business is hazardous in that the area could be voted dry and the value of this property, its best value was due to its location, it being the first business of this type on 67 Highway next to a dry area, a long stretch of dry area, so I felt like I would almost have to take that into consideration in valuing the property.

Q. Who operates this business?

A. Mr. Wilmans.

Q. And you say it would make a profit of $40,000.00 in four years?

A. It did an average for the last three years of a hundred and one thousand per year, three hundred and three thousand in a three year period through '61; ten percent of that would be just a little over $10,000.00 a year net. I took ten percent of the gross; I don't know what his profits were; but after talking to several people in this type of business they tell me that ten percent of your gross would be a mighty close figure to your net profit after taxes and insurance.

Q. Using this figure of a net profit of $10,000.00 you arrived at the value of $40,000.00 for the property?

A. No, I took that into consideration in evaluating the property. I took into consideration that, the profits made in this business, due to its good location would get a man's investment back in four years; to stretch it any further than that wouldn't be a good basis to figure it. I took that into consideration."

The attorney for the Highway Commission promptly moved to strike *all* of this witness' testimony because

he had stated that he took into consideration the profits of the business in arriving at the $40,000.00 value of the property before the taking. The motion to strike was overruled. It will be noticed that the motion was to strike *all* of the witness' testimony. His testimony regarding the valuation of the south tract did not take into consideration any profit. That property was unimproved; hence, the objection to using profits made in a business as a basis for the valuation of the property is not applicable to the south tract, and the witness' testimony concerning the south tract was admissible. The court was therefore correct in overruling the motion to strike *all* the testimony of Mr. Buffington. "A motion to exclude all the testimony of a witness is properly overruled if a part of it is competent." *Nichols* v. *State,* 92 Ark. 421, 122 S. W. 1003.

The situation is different in connection with the testimony of James Parish, a witness for appellee property owner, on valuation. He gave his opinion that the north tract was worth $35,000.00 before the taking and was worth $3,500.00 after the taking, resulting in damages to the north tract of $31,500.00. He was not asked on direct examination how he arrived at the before valuation of $35,000.00. When it was developed on cross-examination that he had taken into consideration the profits from the business in reaching that valuation, the attorney for appellant moved to strike his testimony regarding the $35,000.00 value. The motion was overruled. It should have been granted.

In *Arkansas State Highway Commission* v. *Addy,* 229 Ark. 768, 318 S. W. 2d 595, it was pointed out that witnesses who testified as experts on the value of the property and the damages, stated that they considered the profit derived from the operation of a business in reaching their appraised value. This court held that it was improper to consider profits of the business in arriving at the value of the land. The judgment was, accordingly, reversed.

In *Hot Spring County* v. *Crawford,* 229 Ark. 518, 316 S. W. 2d 834, the court said: ". . . A real estate appraiser testified that in determining damages to the Crawford land he capitalized this $4,000.00 net profit per annum and used the result as a factor in fixing the Crawfords' damages . . .". It was there held that the net profit of a business could not be considered as a factor in arriving at the damages to the land. To the same effect is *Hot Spring County* v. *Bowman,* 229 Ark. 790, 318 S. W. 2d 603. This view is sustained by the great weight of authority. In a note in 16 A.L.R. 2d 1113, the annotator says: "With remarkable unanimity the American jurisdictions hold that evidence of profits derived from a business conducted on property is too speculative, uncertain, and remote to be considered as a basis for computing or ascertaining the market value of the property in condemnation proceedings. The reason for this rule is that the profits of a business do not prove the value of the property upon which it is conducted, since they depend on other considerations, such as market conditions and the skill and knowledge of the proprietor of the business."

But appellee argues that the fact that appraisers for appellee considered the profits of the business in arriving at a valuation was brought out on cross-examination and that therefore the trial court did not err in overruling the motions to strike.

Appellee relies on the case of *Arkansas State Highway Commission* v. *Kennedy,* 234 Ark. 89, 350 S. W. 2d 526. There, it was developed on cross-examination by the highway attorney that an appraiser, a witness for the landowner, had considered what the Commission had paid for other lands in the community. The price paid for other condemned lands is not proper basis for valuation in a condemnation proceeding. In that case, however, the court instructed the jury not to consider that part of the witness' testimony regarding price paid to others. Moreover, the Kennedy case is distinguished from the case at bar by the fact that the witness for Kennedy did not testify as to any price paid by the High-

way Commission for other land. Such prices could have been a great deal less than the Highway Commission witness appraised the value of the land involved in the particular case on trial at the time. Certainly, in the case at bar, if the property owner had been operating his business at a loss of $10,000.00 per year instead of a profit in that amount, the fact that the appraisers took such loss into consideration would not have been prejudicial to appellant.

It is firmly established that profits from a business can not be used as a criterion for value of property in an action such as the one in the case at bar. Witnesses for appellant had not stated on direct examination how they arrived at the value they placed on the property. Appellant could not have complained because a witness gave no basis for his opinion as to value if there had been a failure to cross-examine on that point. The court said in *Arkansas State Highway Commission* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436: "Two of the witnesses, Bob Gelly and Joe Snelly, were real estate dealers in Crawford county. After having first stated that they were familiar with land values in the vicinity of the Johns property and that they had inspected this property, both these witnesses expressed their opinion as to the fair market value of the appellees' property before and after the taking. The appellant made an unsuccessful attempt to have this testimony stricken, on the ground that neither witness had stated the facts and reasons forming the basis for his opinion. . . . It was incumbent upon counsel for the appellant to support their motion to strike by showing that the landowner's expert witnesses had no reasonable basis for their opinions. Counsel actually made no effort in that direction, the motion to strike Snelly's testimony having been made without any cross-examination at all. Thus there was a complete failure to overcome the *prima facie* admissibility of the testimony that was challenged."

In the case at bar, the attorney for appellant did cross-examine and show that the witness had used an invalid basis in fixing value.

Reversed and remanded.

BEN M. HOGAN CO. *v.* FLETCHER.

5-3047 370 S. W. 2d 801

Opinion delivered September 30, 1963.

Crouch, Blair and *Cypert,* for appellant.

Murphy & Burch, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from a suit against a highway contractor for damage to real property. Appellees Adrian Fletcher and Marie Fletcher, his wife, sued appellant Ben M. Hogan & Company in Washington Circuit Court alleging that while appellant was reconstructing Highway 16 between Fayetteville and Elkins, appellant improperly constructed a ditch so that about two acres of appellees' land failed to drain, making it impossible to maintain fences or pasture cattle, and sought $15,000 damages. After appellant's answer, appellees filed an amendment to their complaint alleging that appellant was estopped to deny that it was appellant's negligence in the highway construction which caused the damage to appellees' land. Trial was held on December 17, 1962, and at the close of appellees' case, appellant moved for a directed verdict, which was denied. Appellant then rested, and the case

was submitted to the jury, which returned a verdict for appellees and assessed damages at $2,500.00.

From the judgment on the verdict, appellant has appealed, contending that appellees' suit was brought in negligence, and that there was no evidence to support the finding that appellant was negligent or that any negligence of appellant proximately caused appellees' damages.

Negligence has been frequently defined. 65 C.J.S., Negl., § 1, p. 305. In *Johnson* v. *Coleman,* 179 Ark. 1087, 20 S. W. 2d 186, this court succinctly defined it as "failure to exercise ordinary care." Proximate cause is defined as "cause from which a person of ordinary experience and sagacity could foresee that a given result would probably ensue." *Wisconsin & Arkansas Lumber Co.* v. *Scott,* 153 Ark. 65, 239 S. W. 391; *Alaska Lumber Co.* v. *Spurlin,* 183 Ark. 576, 37 S. W. 2d 82; 65 C.J.S., Negl., § 103, p. 648. However, "very often the question of proximate cause is confused with the preliminary question of whether there is any negligence at all." *O'Neill* v. *City of Port Jervis,* 253 N. Y. 423, 171 N. E. 694.

A careful review of the testimony adduced on behalf of appellees (all the testimony) reveals that prior to commencement of bridge and road construction, a big ditch lay between appellees' property and the highway; the ditch was usually or frequently full of water; either when bridge construction started or when appellant commenced the road reconstruction, which included raising the highway three to three and one-half feet, the ditch was apparently filled in the process of widening the road bed; after the ditch was filled, appellees' pasture would not drain and water began to stand there; after complaints from appellees, the State Highway Department Resident Engineer, as a favor to appellees, asked appellant or the bridge contractor to dig a ditch in front of appellees' property; the bridge contractor dug about 100 feet of ditch, as far as he could reach with a small dragline, which lowered the water some; appellant later bulldozed out the remaining 200 feet; appellees' property has failed to drain further.

There is no question about the fact that appellees have been damaged. In our view, the damage is the standing water, not the ditch appellant dug. Appellees were damaged when the original big ditch was filled in accordance with the State Highway Department's plans and specifications. However, the preliminary question is whether there is any negligence at all. There is no evidence that appellant was negligent in the road construction. In fact, the Resident Engineer, appellees' witness, testified that appellant constructed the highway in accordance with the plans and specifications of the State Highway Department, that appellant did everything the contract called for him to do, and he did it like it called for him to do. There is also no evidence in the record that appellant failed to exercise ordinary care (*i.e.,* was negligent) in his gratuitous ditch-digging at the request and direction of the Resident Engineer. In *Southeast Construction Co., Inc.* v. *Ellis,* 233 Ark. 72, 342 S. W. 2d 485, this court held that in the absence of negligence a contractor who performs in accordance with the terms of his contract with the State Highway Department, and under the direct supervision of the Resident Engineer, is not liable for damages resulting from his performance. In the case at bar, the ditch appellant dug was not a part of his contract with the State Highway Department, but it was a gratuitous undertaking, undertaken at the behest of the Resident Engineer, in an attempt to alleviate appellees' damage. Appellees failed to produce even a scintilla of evidence tending to show negligence on the part of appellant. Accordingly, appellant's motion for a directed verdict should have been granted as a matter of law.

Reversed and dismissed.

SNUFFY SMITH MOTORS *v.* UNIVERSAL C.I.T.

5-3051 370 S. W. 2d 808

Opinion delivered September 30, 1963.

McMath, Leatherman, Woods & Youngdahl, for appellant.

Wright, Lindsey, Jennings, Lester & Shults, for appellee.

FRANK HOLT, Associate Justice. This case involves the question of title to two automobiles. Upon a trial before the Circuit Judge, sitting as a jury, this issue was determined in favor of the appellee, Universal C.I.T. Credit Corporation. The appellant, Snuffy Smith Motors, Inc., contends, in effect, that the appellee is not in a position to claim title as an innocent purchaser.

The appellant, a corporation domiciled in Houston, Texas, is a wholesaler of Volkswagen automobiles which it imports from Germany. On or about April 8 or 9, 1960, appellant had delivered by truck seven (7) Volkswagens to Pat Berry Auto Sales in Benton, Arkansas, a customer of approximately one (1) year. An invoice was delivered with the shipment. On April 11, 1960, the appellant drew seven (7) drafts for $1,600.00 each on its

customer, Berry, and forwarded the "envelope drafts" with title documents enclosed in each to Berry's Benton bank for collection. The drafts were returned uncollected by the bank several times and each time they were sent through again. They were never paid and finally returned by the bank to the appellant. Also, on April 11, 1960, the date of the drafts, Pat Berry "floor planned" with appellee these seven (7) cars, which included the two (2) in question, by giving a chattel mortgage therefor. This chattel mortgage was accepted by appellee under an arrangement between appellee and Berry whereby appellee financed Berry's inventory of the seven (7) cars to the extent of $1,600.00 on each of these cars, or a total of $11,200.00. Appellee advanced a loan for this amount to Berry on this date. As each automobile was sold by Berry it was the custom for him to pay off the mortgage on the vehicle. This is known as a "floor plan" arrangement. It was customary for appellee to make a periodic check on its customers to determine if the inventory which they financed was in stock. On May 2, 1960 appellee discovered Berry had sold some cars without remitting, pursuant to their agreement. Thereupon appellee invoked the "jeopardy clause" in its chattel mortgage and picked up the balance of the cars it had "floor planned" for Berry, including the two Volkswagens in question, since Berry was unable to make payment for the vehicles he had sold. A few days later appellant learned of this and demanded, as owner, that appellee deliver up the two (2) cars in question, contending that since Berry had never paid appellant for the cars and the necessary title paper had never been delivered by appellant to Berry that appellant was the rightful owner and entitled to possession of these two (2) cars. Appellee refused to deliver possession, whereupon appellant instituted suit for conversion seeking $3,200.00 as the value of the two (2) cars.

In its answer appellee contended that appellant was estopped to assert title by its conduct in delivering possession of the cars to Berry with a written invoice or bill of sale and, further, appellee claimed that it was a *bona fide* purchaser. Upon a trial the appellant admitted de-

livering an invoice with the cars but denied delivering to Berry any bill of sale, title certificate, or certificate of origin. Claude Hill, a branch manager of appellee and an employee for thirteen (13) years, testified that he approved and initialed the chattel mortgage on the two (2) cars and the issuance of the loan thereon only after there being exhibited to him a bill of sale which he allowed Berry to retain as was the custom. He claimed it was his practice to require evidence of title before approving a loan.

Appellant insists that no bill of sale or evidence of title to the cars was ever delivered to anyone other than the forwarding of the title papers with the "envelope drafts" to the Benton bank. Berry corroborated appellant to the effect that he had never had in his possession a bill of sale or evidence of title to the cars and, therefore, none was ever exhibited to Hill by him or anyone else in connection with the loan. Further, that as a customer of appellee's he was customarily extended credit by merely giving a chattel mortgage without any supporting evidence of title; that he had blank chattel mortgages furnished by appellee which he, or his nineteen (19) year old nephew, would complete and bring to the Little Rock Office of appellee for approval and if his supply was exhausted, he would come to the Little Rock Office with the necessary information and there execute the necessary chattel mortgage without any evidence of title in either event; he denied that he had signed the particular chattel mortgage in question, although $11,200.00 was advanced to him on this mortgage; he asserted that his nephew handled most of such transactions and he had not authorized him to sign this particular chattel mortgage; he admitted that on one occasion his nephew had borrowed temporarily from the bank a title which had accompanied a draft. He also admitted that he had sold two (2) of the seven (7) Volkswagens to customers without delivery of the necessary title papers, advising them that they would be forthcoming. Appellant, Smith, testified that he had finally collected from Berry on five (5) of the seven (7) cars in

this shipment. No other witnesses appeared on behalf of either party.

We agree with the appellant that the only real question presented is whether appellee can claim as an innocent purchaser for value.[1] This question was before the Trial Judge, sitting as a jury, and the evidence adduced was in hopeless conflict. He exercised his right and duty in rendering a decision in this controversy and approved the version of the appellee. We have many times held that on appeal the findings of the Trial Judge, sitting as a jury, must be upheld where there is any substantial evidence to support his decision. *Peterson* v. *Garland County,* 188 Ark. 1167, 65 S. W. 2d 18. We are of the opinion that the decision of the Trial Judge in the case at bar is supported by substantial evidence.

It is undisputed in this case that appellant delivered possession of its cars to Berry together with an invoice which contained the name and address of appellant, the price, serial and motor numbers of the seven (7) automobiles and also showed Pat Berry Auto Sales, Benton, Arkansas, as the purchaser. In addition, we find these words as a part of this instrument:

"* * * I hereby certify that no credit has been extended to me for the purchase of this motor vehicle except as appears on the face of this agreement."

No extension of credit to Berry as a purchaser was indicated on this "invoice" which was prepared and furnished by appellant. The cars in question were in Berry's possession for almost a month, during which time appellant's drafts remained unpaid in spite of repeated efforts to collect them. The appellee had done business with Berry over a considerable length of time and this was the first time it had occasion to be wary of him. This was also the first trouble appellant had with Berry. Appellee acted promptly. Appellant did not. Berry admitted that thirty (30) or forty-five (45) days before repossession by appellee [or on a date previous to the

[1] In this case we do not consider the Certificate of Title Act applicable since this was a transaction between dealers. Ark. Stat. Ann. §75-153 (Repl. 1957); Ark. Stat. Ann. §75-132 (Repl. 1957).

chattel mortgage in question] he was informed that in the future evidence of title would have to be exhibited to appellee before approval of a loan. He maintained, however, that they finally excepted new cars and Volkswagens from this requirement. Appellant admitted that he knew Berry and other such dealers in his position necessarily had to "floor plan" their cars with lending institutions. It was only after repossession that appellee had any knowledge of appellant's retained interest in the cars. Where one of two innocent parties must suffer, we have held that the burden should be borne by the one whose conduct can be said to have induced the loss. *Commercial Credit Co.* v. *Hardin,* 175 Ark. 811, 300 S. W. 434. We think the appellee is least at fault as between it and appellant.

Also, we have held that a bill of sale is sufficient to pass title even in the absence of an assignment of the certificate of title. *House* v. *Hodges,* 227 Ark. 458, 299 S. W. 2d 201. There the Court said:

"* * * We find nothing in the Motor Vehicle Act which states that a *bona fide* sale of a vehicle cannot be made except by an immediate assignment of certificate of title. It is true that the purchaser cannot obtain a license, nor legally operate the vehicle without obtaining such certificate, and one so doing would be guilty of a misdemeanor, * * * The failure of appellee to obtain the certificate of title at the time he received the bill of sale does not deprive him of title, for the certificate of title *is not title itself* but only *evidence of title.* * * * Let it simply be added that our statute does not purport to make void, sales which are accomplished without compliance with each provision, where such sale is *bona fide.*"

It follows, in the case at bar, that a bill of sale was sufficient evidence of title upon which to predicate a valid and enforceable chattel mortgage.

Affirmed.