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ARK. REAL ESTATE CO. *v.* ARK. STATE HWY. COMMISSION.

5-3031 371 S. W. 2d 1

Opinion delivered October 7, 1963

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

Dowell Anders, H. Clay Robinson, Bill Demmer and *Walter H. Laney,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal results from the fact that the Arkansas State Highway Commission named the wrong party as owner of a tract of land in an eminent domain proceeding. The said party erroneously named as landowner received the amount deposited in the Court, which amount the Highway Commission now seeks to recover. At the same time, the true owner of the land seeks to recover from the Arkansas State Highway Commission the value of the land taken in the eminent domain proceedings. From a judgment on the issues there is this direct appeal and cross appeal.

On April 6, 1959 the Arkansas State Highway Commission (hereinafter called "Highway Commission") filed this eminent domain proceeding involving a num-

ber of parcels, one of which was Tract No. 62 containing 31.7 acres. The complaint alleged that the value of the said Tract No. 62 was $9,400.00; and that amount was deposited in the Registry of the Court so that immediate possession could be taken. The complaint of the Highway Commission named the appellant, Arkansas Real Estate Company, Inc. (hereinafter called "Real Estate Company") as the owner of said tract; the Real Estate Company by answer admitted its ownership of the tract and claimed a greater amount as damages; and by order of the Circuit Court on August 3, 1959, the Real Estate Company received the said amount of $9,400.00 from the Registry of the Court.

Then on August 10, 1959, the appellees, W. H. Laney, *et al.,* intervened in the said eminent domain proceedings, asserted their ownership and actual possession of the 31.7 acres, and claimed damages for said taking. With the status of affairs in the condition recited, this eminent domain case remained in abeyance in the Circuit Court until the Supreme Court decided the case of *Laney* v. *Arkansas Real Estate Company,* 234 Ark. 187, 350 S. W. 2d 911 (opinion of November 20, 1961), which held that the Laneys were the owners of the 31.7 acres here involved, as well as other lands. The Laneys called the said opinion of this Court to the attention of the Circuit Court in the present eminent domain proceedings and, as a result, recovered judgment against the Highway Commission for the $9,400.00, which was the amount the Highway Commission had stated to be the value of the 31.7 acres. From that judgment in favor of the Laneys, the Highway Commission brings the present appeal.

In this same eminent domain proceeding, the Highway Commission, after the judgment in favor of the Laneys, sought and obtained judgment against the Real Estate Company for the $9,400.00 which the Real Estate Company had withdrawn from the Registry of the Court on August 3, 1959, as aforesaid; and from that judgment against it, the Real Estate Company prosecutes the present appeal.

I. *The Judgment In Favor Of The Laneys And Against The Highway Commission.* The affirmance of this judgment is a reasonably simple matter. The Arkansas Constitution (Art. 2 §22) says: ". . . private property shall not be taken, appropriated, or damaged for public use, without just compensation therefor." The eminent domain statute under which the Highway Commission proceeded was Ark. Stat. Ann. §76-533 *et seq.* (Repl. 1957). But the Highway Commission did not list the Laneys as the owners of the said land; so we have a situation—insofar as the Laneys are concerned—in which the Highway Commission admits the taking of the Laney land and admits the damages to be $9,400.00. The Laneys cannot be held responsible for the failure of the Highway Commission to name the correct owner of the title and party in possession of the land. It was through no fault of the Laneys that an erroneously named owner received the money from the Highway Commission seven days before the Laneys intervened in the case. The Laneys have been guilty of no laches, negligence, or delay, and are entitled to the protection of the Constitution for the value of their land taken and damaged. There is nothing in *Ark. State Highway Comm.* v. *Kincannon,* 193 Ark. 450, 100 S. W. 2d 969, in conflict with our present holding. The Circuit Court was correct in awarding the Laneys the judgment[1] rendered in their favor.

II. *The Judgment In Favor Of The Highway Commission Against The Real Estate Company.* The decision on this issue is not so easy, because the Highway Commission alleged in the original complaint that the Real Estate Company was the owner of the 31.7 acres, and the Highway Commission consented and agreed that the Real Estate Company could withdraw the $9,400.00 deposited in the Registry of the Court, and this withdrawal was done by Circuit Court Order. The Real Estate Company claims: (a) that the eminent domain proceeding was a matter *in rem;* (b) that the Highway Commission is bound by its allegations as to ownership; and (c) that

[1] The judgment in favor of the Laneys was signed and entered on September 7, 1962, and the record was filed in this Court well within the time allowed by the Circuit Court.

the payment of the money from the Registry of the Court is *res judicata.*[2] To support its arguments the Real Estate Company relies heavily on the language of this Court in *Bentonville RR. Co.* v. *Stroud,* 45 Ark. 278. In that case, the Railroad Company instituted eminent domain proceedings and, on appeal, sought to make the belated claim that the named defendants had not established their title. In rejecting such belated claim of the Railroad Company we said:

"The company alone can start the proceeding, and when it does so it must proceed against the owner *(Mansf. Dig., Sec. 5458),* and it selects the parties to be proceeded against at its peril, because, by starting the proceeding against them, it admits that they are the owners. *S. & M. R'y.* v. *Rhea, 44 Ark. 264.*"

Assuming, without deciding, that the quoted language in the Bentonville case would apply to a situation like the one here in which the deposit was withdrawn in advance of any trial,[3] nevertheless there is another and complete distinction between the Bentonville case and the one at bar; and that distinction lies in the fact that the State and its agencies may recover voluntary payments when it is shown that they were made in error. See *Vick School Dist.* v. *New,* 208 Ark. 874, 187 S. W. 2d 948. See also 40 Am. Jur. p. 822, "Payment" §157; and 70 C.J.S. p. 346, "Payment" §139. When an individual or private corporation makes a voluntary payment, such cannot ordinarily be recovered. But that rule—of inability to recover a voluntary payment—does not apply to the State and its agencies. Our holding in *Vick School Dist.* v. *New, supra,* is a complete answer to the Real Estate Company's reliance on the holding in *Bentonville RR. Co.* v. *Stroud, supra.* Even if the $9,400.00 had been

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[2] In its brief the Real Estate Company has cited a number of cases and texts, some of which are: *U.S.* v. *Dunnington, et al.,* 146 U.S. 338, 36 L. ed. 996, 13 S. Ct. 79; 18 Am. Jur. p. 1009; and Nichols on Eminent Domain, Vol. 2, p. 14, and Vol. 6, p. 7.

[3] The statute on withdrawal of deposit before final trial is Ark. Stat. Ann. § 76-537 (Repl. 1957). Some of our recent cases involving that statute are: *Ark. Hy. Comm.* v. *Rich,* 235 Ark. 858, 362 S. W. 2d 429; and *Adams* v. *Ark. Hy. Comm.,* 235 Ark. 837, 363 S. W. 2d 134.

paid by the Highway Commission to the Real Estate Company without eminent domain proceedings, the Highway Commission could have recovered the payment when it was shown, as here, that the Real Estate Company was not the owner of the land involved at the time the money was received by it and that the State paid the money through error.

The judgment of the Circuit Court in favor of the Highway Commission against the Real Estate Company is in all things affirmed. As for the costs: the Laneys will recover their costs against the Highway Commission; and the Highway Commission will recover its costs against the Real Estate Company.

OSBORNE *v.* STATE.

5068 371 S. W. 2. 518

Opinion delivered October 7, 1963.

Elton A. Rieves, III, for appellant.

Bruce Bennett, Attorney General, by *Leslie Evitts,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. The appellant was found guilty of forgery and uttering and was sentenced by the jury to ten years imprisonment upon each of the two counts. The court directed that the sentences be served consecutively.

There is no real issue about the sufficiency of the evidence. It was shown that the accused had used a forged check, purportedly drawn by a Louisiana lumber company, to buy clothing and liquor at a place of business in West Memphis. After Osborne left the store the proprietor became suspicious and succeeded in having Osborne arrested within an hour. Osborne confessed not only to this offense but also to a number of other forgeries committed in neighboring states.

That portion of the confession relating to the other offenses was objected to, but it was admissible. In a charge of forgery and uttering the State has the burden of proving guilty knowledge on the part of the accused, for it is not an offense for a person to pass a forged check in the belief that it is genuine. Upon the issue of guilty knowledge the fact that the defendant has uttered other forged checks is directly relevant. It tends to show that he knew the particular instrument in question to have been forged, since it is unlikely that an innocent person would come into possession of a number of bogus checks. *Wilson* v. *State,* 184 Ark. 119, 41 S. W. 2d 764. Hence proof of the other forgeries was competent, and it makes no difference that the evidence was in the form of a confession rather than of testimony by third persons.

The State was allowed to show that on the day of the offense in question Osborne also passed a similar check in another West Memphis store, purchasing a pistol and making a down payment upon a shotgun. Counsel properly and candidly admits that such proof of a similar transaction was admissible, but it is argued that the jury may have been inflamed by the fact that Osborne used the check in the purchase of lethal weapons. This argument is without merit. The State, in

showing a similar offense, was entitled to prove that the accused had received value for the forged instrument. That value happened to be in the form of firearms, but the record does not indicate that the witness referred to the weapons in other than a matter-of-fact way. Firearms are for sale throughout the state, for use in hunting, trapshooting, and other lawful pursuits. The State was properly permitted to prove all the details of what was actually a fairly commonplace transaction.

Counsel vigorously maintains that the punishment is so severe that it should be reduced by this court. It is true that in a number of the older cases, including one as recent as *Carson* v. *State,* 206 Ark. 80, 173 S. W. 2d 122, we have assumed the power to mitigate the punishment imposed by the trial courts. The right to exercise clemency is, however, vested not in the courts but in the chief executive. Ark. Const., Art. 6, § 18. Our latest cases have uniformly followed the rule, which we think to be sound, that the sentence is to be fixed by the jury rather than by this court. If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, we are not at liberty to reduce it even though we may think it to be unduly harsh. *Miller* v. *State,* 230 Ark. 352, 322 S. W. 2d 685; *McCall* v. *State,* 230 Ark. 425, 323 S. W. 2d 421.

It is contended that one of the court's instructions was not as specific as it might have been. We need not examine this contention in detail, for the only supporting assignment of error in the motion for a new trial is a blanket assertion that the jury were misinstructed. This was an assignment in gross, specifying no particular instruction as being incorrect. Inasmuch as a number of the instructions were unquestionably correct the assignment was insufficient to present any question for review. *Black* v. *Hogsett,* 145 Ark. 178, 224 S. W. 439; *Armstrong* v. *State,* 171 Ark. 1136, 287 S. W. 590.

Affirmed.

(Supplemental opinion on rehearing delivered Nov. 4, 1963, p. 170.)

5-3042 371 S. W. 2d 9

Opinion delivered October 7, 1963.

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Huey & Rothwell, for appellant.

Williamson, Williamson & Ball, for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case. Appellant, John T. Mann, appeals from a judgment of the circuit court which affirmed an order of the Commission. The Commission's order affirmed a former order awarding claimant $25 per week for a 25% permanent partial disability to the body as a whole. A brief summary of the pertinent facts will suffice to understand the issue to be decided.

Appellant (claimant) is a married man, 48 years old, who farms part time and at other times works for appellee (Potlatch Forests, Inc.) in the timber and lumber business. While in the course of his employment with appellee on October 30, 1956, claimant suffered a compensable injury to his back and in due course was awarded $25 per week pending a determination of his healing period.

In an opinion dated July 1, 1959 the Commission, after a hearing, made the following findings and conclusions; (a) claimant's healing period ended June 5, 1959, leaving him with a 25% permanent partial disability to the body as a whole; (b) claimant is entitled

to $25 per week for 112½ weeks dating from June 6, 1959; and (c) if claimant decides to undergo surgery and further medical attention it will be at his own expense because he has declined to accept such treatment from appellee, but has decided to accept the award above mentioned.

In August, 1961 appellee made the last payment to appellant pursuant to the above mentioned order. Shortly thereafter claimant initiated a claim for additional benefits, contending that he had developed a worsened condition and that he was temporarily totally disabled, or that his permanent partial disability was greater than 25% to the body as a whole. Appellee answering the claim, said (a) the Commission's order of July 1, 1959 concluded the rights of the claimant; (b) the condition of claimant had not worsened; and (c) if it had worsened it was the result of claimant's refusal to accept medical treatment.

At the hearing before the full Commission the only issue presented was whether appellant's disability (as a result of his original injury) was greater than that found by the Commission in its order of July 1, 1959—25% permanent partial disability to the body as a whole. A determination of the above mentioned issue involved a fact question, depending on competent testimony. That the conclusion of the Commission must be upheld if it is supported by substantial evidence is too well established to require citations. As previously stated, the Commission found that there had been no increase in appellant's disability.

We believe it would serve no useful purpose to set out fully the testimony of the several witnesses. It must be conceded that appellant and his wife and Dr. Carruthers — all — testified definitely that appellant's disability was (at the time of the hearing) greater than it was on July 1, 1959. It must also be conceded that the testimony of all the other doctors was to the effect that appellant's disability has increased since July 1, 1959. It is, however, undisputed that Drs. Padberg and Agar testified that appellant's increased disability was due

to pulmonary emphysema and not to his original injury. In the testimony of Dr. Carruthers pulmonary emphysema is not even mentioned. We gather from appellant's argument that he does not dispute the facts just pointed out. He does, however, ably and forcefully rely for a reversal on the point presently discussed.

Appellant's contention is to the effect that the testimony of Drs. Padberg and Agar should be discarded because they gave no consideration to claimant's age, occupation, etc. In support, appellant relies on what we recently said in *Glass* v. *Edens,* 233 Ark. 786, 346 S. W. 2d 685. There, in a somewhat similar situation, we said:

"... consideration should have been given, along with medical evidence, to the appellant's age, education, experience, and other matters affecting wage loss."

We believe appellant has misconstrued our holding in the *Glass* case or has misapplied it to the facts in this case. First, conceding for the purpose of this opinion that the testimony of Drs. Padberg and Agar does not positively show they took into consideration appellant's age, occupation, etc., that fact would be of no avail to him. [It is noted, however, that Dr. Padberg did take into consideration claimant's age, occupation, etc.] The *Glass* opinion places the duty on the Commission, and not the doctor, to consider the elements mentioned above. In the cited case we said: "Apparently, they also considered only medical evidence and this we consider error." The word "they" obviously refers to the Commissioners and not the doctors. In the next place, appellant is in no position to contend the Commission failed to take into consideration his age, occupation, etc. The record shows that the Commission was made aware of our holding in the *Glass* case, and we cannot say it did not follow that holding here in arriving at appellant's disability.

Finding substantial competent evidence to sustain the order of the Commission, we hereby affirm the same.

Affirmed.

Opinion delivered October 7, 1963

Jack Holt, Sr. and *John P. Streepey,* for appellant.

S. Hubert Mayes and *S. Hubert Mayes, Jr.,* for appellee.

Sam Robinson, Associate Justice. Appellant, J. N. McMurtry, a meat cutter, went to work for appellee, Marshall Model Market No. 48, on a trial basis. He was to work two weeks at a salary of $80.00 per week, and if at the expiration of that time his services were satisfactory to the appellee, and appellant wanted to continue on the job, the salary would be raised to $85.00 per week.

On Saturday, April 28, 1962, the last day of the two week period, appellant lifted a box containing about two dozen frying size chickens. He states that at that time he suffered a burning pain in his stomach, but that it never occurred to him that he was injured. He rubbed his side for a few minutes; the pain went away; he never gave it any more thought, and continued to work for about three hours, until closing time. He stated there was no bulge in his side and that he did not mention the incident to anyone. He further testified that the next day, Sunday, he just stayed around the house; when he would get up his side would hurt.

On Monday morning he did not return to work for appellee, but went to work for Mr. Blagg, who operates

the Quality Meat House. He did, however, call appellee and offer to go out and help that morning if he was needed. Mr. Marshall said that it was not necessary, that he had someone else coming. Appellant said nothing to appellee at that time about having received an injury.

Later in the day, at Mr. Blagg's place of business, appellant attempted to lift a quarter of beef weighing between 100 and 120 pounds and felt a sharp pain in his side. He told Mr. Blagg about it and called his doctor; however, he could not get an appointment with the doctor until the following Thursday. When he did see the doctor the diagnosis was hernia. After the visit to the doctor's office on Thursday, McMurtry went to Marshall's place of business and claimed that he had been injured on the preceding Saturday afternoon while lifting the box of chickens.

Later appellant filed a claim with the Workmen's Compensation Commission contending that he had received the rupture Saturday afternoon, April 28, 1962, while working for appellee. After a full hearing, the Commission denied compensation and McMurtry has appealed.

The Compensation Commission denied compensation on two grounds. First, "The Commission is of the opinion that claimant has not sustained the burden of proof that is upon him to establish that he was, in fact, injured while working for respondent employer."

The Commission was also of the opinion that the claimant did not comply with the requirements of the statute regarding claims for disability due to hernia. The statute provides: "In all cases of claims for hernia it shall be shown to the satisfaction of the Commission: (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall; (2) That there was severe pain in the hernial region; (3) That such pain caused the employee to cease work immediately; (4) That notice of the occurrence was given to the employer within forty-eight (48) hours

thereafter; (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within forty-eight (48) hours after such occurrence; . . .".

According to the undisputed evidence, two of the requirements were not met. First, there was not such pain that caused the employee to cease work immediately. He continued to work for three hours—to the end of the working day. Second, notice was not given to the employer within forty-eight hours after the injury is alleged to have occurred. Of course, an employee might receive an injury causing a hernia and not actually know that he had received the hernia until more than 48 hours after having been injured. In this kind of situation, although he might be required to report the injury, he would not be required to report the hernia within the 48 hour period. *Prince Poultry Co.* v. *Stevens,* 235 Ark. 1034, 363 S. W. 2d 929; *Williams Mfg. Co.* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380.

But since the Commission found as a fact that the appellant failed to prove by a preponderance of the evidence that he received any injury at all while working for Marshall, we need not dispose of the case on the question of whether appellant met the requirements of the statute regarding a claim for compensation due to hernia.

The only evidence that he received an injury while working for Marshall is the testimony of appellant himself. There is no corroborating testimony, direct or circumstantial. Since he is a party, the Commission is not bound to accept his uncorroborated testimony. *Cousins* v. *Cooper,* 232 Ark. 605, 339 S. W. 2d 316; *Horn* v. *Horn,* 232 Ark. 723, 339 S. W. 2d 852. Appellant appeared before the Compensation Commission and testified on direct and cross examination; the Commission had an opportunity to observe him and his demeanor. In addition, there is circumstantial evidence that goes to the merits of the case. In the first place, although appellant claims that he received an injury that caused a rupture

on Saturday afternoon, three hours before closing time, he said not a word about it to anyone, made no complaint about suffering any pain, and finished out the days work. Furthermore, he called appellee the following Monday and offered to go out and help if he was needed. At that time he said nothing about having been injured, and, in fact, went to work at another place still claiming no injury until such time that he attempted to lift the heavy quarter of beef at Mr. Blagg's place. Mr. Blagg had no workmen's compensation insurance and appellee does have it.

We cannot say that the Commission's finding is not supported by substantial evidence, and according to many decisions of this court, the judgment will, therefore, be affirmed.

Opinion delivered October 14, 1963.

Penix & Penix, for appellant.

Bruce Bennett, Attorney General, By *Richard B. Adkisson,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. This appeal results from the refusal of the Craighead Circuit Court to dismiss forgery charges against appellants on grounds of double jeopardy. The facts, briefly, are as follows:

Appellants, James D. Cody and Gardner Lee Muse, were arrested and incarcerated in the Craighead County Jail on November 17, 1962. An information charging them with forgery was filed ten days later in the Circuit Court. Neither defendant was able to make bond,

and they have remained in custody since their arrest. Five months later the court was advised that appellants were indigent and unable to retain counsel; the court, on April 17, 1963, appointed counsel to defend appellants on the charge, and the next day, April 18, the trial began. The jury was selected, impaneled and sworn, and the state proceeded to call five witnesses, including merchants, whose testimony dealt with the claimed forgery, and officers, who testified to a confession by Muse and certain oral statements by Cody. Defense counsel moved for a mistrial after the Muse confession was read, because the confession included incriminating statements relative to Cody. The jury was instructed that the evidence should not be considered as to Cody, and the motion for mistrial was overruled. At the conclusion of the testimony of these five witnesses, the state rested. Charles Muse, a brother of defendant Muse, was placed on the stand, evidently for the purpose of testifying to mental incompetency on the part of his brother, dating back to a harrowing war experience, but when Charles was asked, "Where has your brother been in the years since World War II?" the Prosecuting Attorney objected, and the court sustained the objection. Appellant, Gardner Muse, then testified, stating, *inter alia,* that he was drunk and had been in that condition for two days at the time the checks were written; that he had no recollection of writing same, and subsequently mentioned that he had taken a number of shock treatments. At the conclusion of his testimony, the trial was recessed over the weekend. When the court reconvened on Monday morning, the trial judge in chambers made the following statement:

"On Thursday, April 18, 1963, at about 4:45 P.M. this Court was recessed until this morning. At the time of the recess the defendant, Gardner Lee Muse was on the stand. The defendant Muse had entered a general plea of not guilty to the crime of forgery upon which he is being tried. Prior to the commencement of the trial no notice had been given or indication made that insanity would be a defense. During the course of exami-

nation of witnesses, the testimony drifted toward the defendant's actions tending to lead to a showing of the possibility of insanity. Certain rulings were made by the Court relative to the issue of insanity and of the competency of testimony relating thereto. During the adjournment of this case, the Court has had an opportunity to further consider the matter and the law pertaining thereto and now makes this ruling: under the general plea of not guilty, this defendant has the right to avail himself of any defenses which the testimony adduced in this cause tends to establish including that of insanity. Any ruling heretofore made by the Court in conflict herewith shall be superseded by this ruling. If any of the parties wish to recall any of the witnesses for further examination in view of this ruling, they will be permitted to do so."

The state, through the Assistant Prosecuting Attorney, then moved the court to declare a mistrial in the case, and order Muse committed to the Arkansas State Hospital for observation and examination. This motion was made on the basis of; Ark. Stat. Ann. § 43-1301 (Supp. 1961), the pertinent portion of which provides:

"If the trial had already begun when the issue of insanity is raised, and the court deems it necessary for the proper administration of justice that a mistrial be declared, it shall be the duty of the judge to declare such mistrial, and then to proceed as herein provided. * * *"

Defense counsel objected, and the court denied the motion, stating:

"If after proceeding with the evidence it is shown that there is a possibility of insanity, then the Court under the statute can exercise its discretion as to declaring a mistrial and have him sent to the State Hospital for observation, or in the alternative, may have him examined by two local doctors. At this time the Court finds nothing in the record to justify a mistrial for observation of the defendant."

Charles Muse, the brother of appellant, was then recalled to the stand, and testified that the mental condition of his brother had radically changed after the war. He related a number of incidents which tended to show a highly nervous and incompetent condition, and further testified that his brother had, in 1960, been a patient in the Psychiatric Ward at Kennedy Hospital, where he had received a number of shock treatments, and had also been committed to the Mississippi State Hospital twice. Following the testimony of this witness, the court called a short recess, and in chambers made the following statement to counsel:

"Gentlemen, in view of the trend of the testimony that has been adduced from this particular witness, the brother of the defendant, and a close associate, the court deems it necessary for the proper administration of justice to declare a mistrial and commit the defendant to the State Hospital for observation."

Defense counsel strenuously objected, and likewise vigorously objected and noted exceptions when the court announced that it was declaring a mistrial also as to Cody, counsel announcing that he would plead double jeopardy as to both defendants. The court entered its order directing that Muse and Cody be delivered to the State Hospital for Nervous Diseases for the purpose of observation and examination, and directed that all proceedings in the case be held in abeyance pending the completion of such examinations. Appellants filed their motion seeking dismissal of the cause on grounds of former jeopardy, and the court entered its order overruling such motion, and granting an appeal.

Before discussing appellants' contentions, we might first make mention of one of the arguments advanced by the state. In the instant case the Prosecuting Attorney, after the court had announced that it was declaring a mistrial as to Cody, called attention to the fact that this defendant had already moved for a mistrial himself, and the Prosecutor stated: "At this time the state joins in the motion * * * that a mistrial be granted in this

case." Counsel for appellants then asked to withdraw the motion. It is difficult to determine from the record what action was taken by the court in this respect; in fact, the record does not reveal that any order or statement was made by the court relative to this request. It does not appear, however, that the court's order declaring a mistrial was in any wise based on defendant's earlier motion. Of course, this motion had already been passed upon and was not at issue when the insanity of Muse was suggested by the evidence.

The Attorney General argues that Cody, by his earlier request for mistrial, "waived his constitutional right of jeopardy notwithstanding the trial court originally denied the motion * * *." We do not agree with this argument. The situation is closely akin to the Florida case of *State* v. *Himes,* 15 So. 2d 613. In that case, the defendant moved for a mistrial on grounds of the admission of improper testimony (as was here done), and the motion was overruled by the trial judge. Thereafter, the state after it appeared that it would be unable to establish a case, joined in the motion, and the defendant attempted to withdraw his motion, which the court denied, such denial being based upon the fact that the state had already acquiesced in the motion. The Supreme Court of Florida reversed the trial court, holding that the defendant should have been permitted to withdraw his motion. Here, too, even if the court had based the mistrial on appellants' earlier motion (which evidently was not the case), we would reverse, and hold that the motion for withdrawal should have been granted.

Appellants devote the first point in their brief to the fact that the order overruling the motion to dismiss is appealable, and, among other cases, cite *Jones* v. *State,* 230 Ark. 18, 320 S. W. 2d 645. However, the appealability of the order is not at issue since no motion has been made by the state to dismiss the appeal, the Attorney General apparently conceding that the order is appealable, and that *Jones* v. *State* is sufficient authority for that conclusion. While it is true that the second trial has not been set, and it is within the realm of possibility that a

second trial would never be held, the proceedings need not advance to that extent before the issue of double jeopardy can be passed upon. In the Jones case, we said:

"When the jury is finally sworn to try the case[1] (§43-2109 Ark. Stats.), jeopardy has attached to the accused; and when, without the consent of the defendant, express or implied, the jury is discharged before the case is completed, *then*[2] the constitutional right against double jeopardy may be invoked, except only in cases of 'Overruling necessity.' "

Of course, it would be pointless to send a case back for re-trial, necessitating the additional expense to the county, and depriving the defendants of their freedom for months longer, if we feel that the contention of double jeopardy contains merit and would eventually be upheld under the facts presented. As stated in *Jones* v. *State, supra:*

"If the defendant's claim against double jeopardy contains merit, then the Constitution requires that he should be freed; and the denial of his freedom is the point at issue. Furthermore, having concluded—as we have—that the appellant's plea of former jeopardy was well founded, it would certainly be putting form above substance for us to hold that he could not prevail at this time on his motion to discharge; but that he would have to suffer a long and expensive trial before he could bring to this Court the issue of former jeopardy. Justice demands that an accused have his rights tested and determined speedily. As the Constitution says in Article 2, §13: 'Every person is entitled . . . to obtain justice . . . promptly and without delay.' "

The quoted language is appropriate in the case before us since we have concluded that the appellants' plea of former jeopardy is well founded.

Appellants vigorously argue that Section 43-1301 (heretofore referred to) is unconstitutional in that it, in effect, subjects a defendant to double jeopardy and is

[1] Referring to the original trial.

[2] Emphasis supplied.

thus in conflict with Article 2, Section 8, of the Constitution of the State of Arkansas. We do not agree with this contention. This court has rendered several opinions which hold that the defense of double jeopardy may not be invoked if the court has discharged the jury and declared a mistrial because of "overruling necessity." *McDaniel* v. *State,* 228 Ark. 1122, 313 S. W. 2d 77; *Franklin* v. *State,* 149 Ark. 546, 233 S. W. 688, and cases cited therein. This is in line with the general rule which is found in 22 C.J.S., Section 259, Page 674.

"The manifest necessity permitting the discharge of a jury without rendering a verdict and without justifying a plea of double jeopardy may arise from various causes or circumstances; but the circumstances must be forceful and compelling, and must be in the nature of a cause or emergency over which neither court nor attorney has control, or which could not have been averted by diligence and care."

In construing the statute under attack (43-1301) we must do so in view of, and in conformity with, the previous holdings of this court relative to "overruling necessity," wherein we have stated, that, in such cases, the constitutional prohibition is not violated. Under our decisions, we think the statute is perfectly valid, and the court may declare a mistrial when the issue of insanity suddenly enters the case, *provided* that the circumstances are compelling or give rise to an emergency over which neither court nor attorney could have any control or which *could not have been averted by diligence and care.* For instance, if a defendant first showed signs of insanity during the trial,[3] or if background facts, which

[3] In *U. S.* v. *Haskell,* Pa., 26 F. Cas. No. 15, 321, the members of a jury reported to the court that one of their fellow jurors, from his actions and conduct, was apparently insane; the jury rendered a verdict of guilty, but when the jury was polled, this juryman, evidently quite agitated, and declaring that he was not "quite collected," answered, "Not guilty." From his personal observation of the juror and the reports made from other jurors, the court declared a mistrial and discharged the jury. The next day, the defense contended that the discharge of the jury amounted to an acquittal (raising the double jeopardy argument) which contention was denied. On appeal, the Circuit Court of Appeals held that this was a case of necessity, and that the trial court had not abused its discretion in discharging the jury under the circumstances.

could not have been earlier determined, indicated insanity, or if the prisoner had been represented by counsel who had advised court officials that no issue of insanity would be raised, the court might well be justified in declaring a mistrial because of "overruling necessity." But the facts in the present case do not conform to those examples.

As far as Cody is concerned, the record reflects neither a plea of insanity nor a single line of evidence that would suggest this appellant to be insane. Even if the mistrial had been justified as to Defendant Muse, there was nothing to prevent the continuation of the trial as to Cody. It is apparent that there was no compelling reason, nor emergency, which made necessary the order of mistrial as to this appellant.

Turning to Muse, the transcript reflects that prosecuting officials had been in possession of the record sheet from the Department of Justice for several months,[4] and this sheet lists "S. H. Whitfield, Miss., Gardner Lee Muse, February 6, 1961, patient." From the colloquy between counsel, it appears that the sheet also reflected, "S. Hospital, Whitfield, Miss." While it is true that the record does not reflect the nature of the illness, or the report made by the hospital, we think the mentioned notation was sufficient to suggest to law enforcement officials that further inquiry should be made, particularly since the Arkansas institution for nervous diseases is likewise known as the State Hospital. A letter, telegram, or phone call to the State Hospital at Whitfield would doubtless have enabled these officials to have obtained pertinent information.

As heretofore pointed out, these prisoners had been in jail for five months before an attorney was appointed to represent them. If the Circuit Court had been advised that two indigent prisoners were in the jail, and in need of counsel, that court could have appointed an attorney

[4] This record, commonly called "rap sheet," is compiled through finger-printing, and sets out all arrests, convictions, or entrance into any jail or institution where the finger-prints of a subject are taken upon admission.

who would have then had an opportunity to confer with the clients, ascertain their backgrounds, and apply for an appropriate order before the case was set. [Ark. Stat. Ann. § 43-1304 (Supp. 1961).]

Under the circumstances herein, there was but little opportunity for appointed counsel to acquaint himself with Muse's past history, since he was appointed one day, and the trial commenced the next.

We hold that Section 43-1301 is valid, and when the issue of insanity is raised after the trial has commenced, the court may, where necessary for the proper administration of justice, declare a mistrial and commit a defendant to the State Hospital for observation. However, by "necessary," we mean "overruling necessity," as the term has been used herein.

In the instant case, we find no "overruling necessity," and this view is strengthened by the fact that the court's action in declaring a mistrial meant that these defendants would remain in jail for a number of months longer, and it would now appear that they have been in custody for about ten months. Article 2, Section 10, of our State Constitution, provides that "The accused shall enjoy the right to a speedy and public trial * * *." Appellants vigorously objected and excepted when the court entered its order. We think the objection was well taken, and the court should have granted the motion filed by appellants seeking dismissal of this case against them.

In accordance with the reasoning herein expressed, the court's order overruling the motion to dismiss on grounds of double jeopardy is reversed, cancelled, and set aside, and this cause is remanded to the Circuit Court with directions to enter an order dismissing Case No. 8255 against these appellants.

It is so ordered.

McFaddin, J., dissents; Robinson, J., concurs.

ED. F. MCFADDIN, Associate Justice (dissenting). I respectfully but vigorously dissent from the Majority Opinion; and here, in headnote style, are the reasons for my dissent:

I. The plea of former jeopardy, or double jeopardy, is premature in this case and should not be sustained. Former jeopardy can only be pleaded when the State attempts to bring the defendants to trial again.

II. Since the plea of former jeopardy is premature in this case, there is no occasion for this Court to now consider any of the other matters urged by the appellants.

III. But, if the other matters are considered, I am firmly of the opinion that the Trial Court did not abuse its discretion in ordering a mistrial.

Now, I elaborate:

On April 18, 1963, the defendants were jointly placed on trial for forgery. In the course of that trial one of the defendants introduced evidence of insanity; and there was evidence that the other defendant was intoxicated at the time of the alleged offense. On April 22, 1963, the second day of the trial, because the insanity matter was brought into the case, the Trial Court declared a mistrial and sent both of the defendants to the State Hospital for examination under the provisions of Ark. Stat. Ann. §43-1301 (Supp. 1961). Then on April 25, 1963, the defendants moved that the charges against them be dismissed on the grounds: (a) that Ark. Stat. Ann. §43-1301 was unconstitutional; and (b) that the defendants had been placed in jeopardy "and to subject them to another trial would cause them to be placed in double jeopardy."

The Court overruled the motion to dismiss; and from that order there is this appeal. The Majority is now holding that the Trial Court should have dismissed all charges against these defendants, for here is the concluding language of the Majority Opinion:

"In accordance with the reasoning herein expressed, the court's order overruling the motion to dismiss on grounds of double jeopardy is reversed, cancelled, and set aside, and this cause is remanded to the Circuit Court with directions to enter an order dismissing Case No. 8255 against these appellants. It is so ordered."

Just because the trial was not completed, the defendants are now to be discharged as free of the charged offense, when there is testimony that one of them was insane and that the other defendant was intoxicated.[1] The Majority reasons to its said conclusion on the theory of *former jeopardy,* or *double jeopardy,* as it is sometimes called. I have always understood that the plea of former jeopardy was a plea that was made by a defendant when he was brought to trial *the second time,* and related to the fact that he had been placed in jeopardy in a previous trial.[2]

The point I emphasize is, that it is not until an attempt may be made to bring these defendants to trial a second time that the plea of former jeopardy can be made. In the case at bar there is no definite showing that the State will ever endeavor to try either of these defendants on the charge for which this mistrial was declared. The result of the examination at the State Hospital, or any one of a number of subsequently occurring events, may convince the Prosecuting Attorney of the futility of further prosecution; but, at all events, former jeopardy cannot be pleaded until the State attempts a second trial; so I think the plea of former jeopardy is premature in the present state of this record. I would dismiss the present appeal of the appellants.

The Majority seeks to justify the plea of double jeopardy in the present case by quoting some, but not all, of the language in *Jones* v. *State,* 230 Ark. 18, 320

[1] Muse, in his confession and in his testimony, stated both he and Cody were intoxicated. Cody did not testify.

[2] For a discussion of former or double jeopardy see 15 Am. Jur. p. 38 *et seq.*, "Criminal Law" §359 *et seq.;* and see also 22 C.J.S. p. 614 *et seq.*, "Criminal Law" §238 *et seq.;* and on when the plea of former jeopardy can be made, see 22 C.J.S. p. 1244 *et seq.*, "Criminal Law" §440 *et seq.*

S. W. 2d 645. A brief review of the Jones case will show the great difference in the factual situation between that case and the case at bar. In the Jones case, Jones was placed on trial, and a mistrial declared on October 9, 1957, over Jones' opposition.[3] He did not attempt to appeal from such mistrial. Later, on April 1, 1958, when the Prosecuting Attorney called the case against Jones for setting for trial, Jones then (six months after the first trial and when he was about to be retried) pleaded former jeopardy. The Trial Court denied the plea of former jeopardy and Jones appealed from the refusal of that plea made in April 1958. We held that the refusal of the plea of former jeopardy in April 1958 was appealable, saying, as quoted in the Majority Opinion, that the plea of former jeopardy should be decided[4] before the defendant was forced into a long trial. It was in regard to the appeal in April 1958, in advance of the complete retrial, that the language was used in the Jones case which is quoted in the Majority Opinion in the case at bar. The point that I am making is that it is not until an attempt is made to bring the defendant to trial a second time that the plea of *former jeopardy* can be made.

We have an Arkansas case that sheds considerable light on the situation. It is the case of *Carson* v. *State,* 198 Ark. 102, 128 S. W. 2d 373. In that case Carson was charged with first degree murder, and when brought to trial in September 1938 he pleaded insanity, and the jury returned a verdict that he was insane at the time of the trial. The Trial Court decided that the question should not have been submitted to the jury; so the Trial Court, on its own motion, *declared a mistrial* and sent the defendant to the State Hospital for examination. Now

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[3] The Jones opinion recites, on page 20 of the Arkansas Report: "The Court declared a mistrial on October 9, 1957; but did not rule on the jeopardy plea at that time. Then, on April 1, 1958, the following occurred in Court: . . ."

[4] This was in accordance with the general rule, as contained in 14 Am. Jur. p. 958, "Criminal Law" §382: "The better practice seems to be to try and determine a plea of former jeopardy before commencing the trial on the merits for, if the plea is sustained, the defendant goes free and there can be no trial."

notice that even after the jury brought in its verdict, the Court set the verdict aside and declared a mistrial and sent the defendant to the State Hospital. Two months later, when the hospital reported the defendant sane, the defendant was again brought to trial and he pleaded double jeopardy, and pointed out that a jury had been impanelled, a jury verdict rendered, the jury verdict set aside, the Court had declared a mistrial, and had committed the defendant. This Court said the plea of double jeopardy could not be sustained; and here is the wording of the Majority Opinion:

"It is finally argued that the court erred in refusing his plea of former jeopardy. At the first trial, the court submitted three issues: (1) Whether appellant was guilty of some degree of murder; (2) whether he was insane at the time the crime was alleged to have been committed; and (3) whether he was insane at the time of trial. The jury found him insane at the time of trial and nothing more, and thereafter the court declared a mistrial. This was not sufficient to support the plea of former jeopardy. The rule is stated in 15 Am. Jur., p. 51, as follows: 'One found by the jury to be insane at time of trial cannot plead former jeopardy when arraigned a second time on the same charge, although the jury at the same time returned a verdict of guilty which was set aside by the court.' Our statute, §3881 of Pope's Digest, is persuasive to this same effect."

In keeping with the holding of this Court in the case of *Carson* v. *State, supra,* I maintain: (a) that not only could the plea of double jeopardy not be made at the time that it was made in the case at bar; but (b) that it would not be a good plea at any time under the facts in this case. I submit the Carson case as full authority for my position.

Finally, I maintain that the Trial Court did not abuse its discretion in the case at bar in declaring the mistrial and in ordering the defendants committed to the State Hospital for examination; and I entirely dissent from that part of the Majority Opinion which says that there was no "overruling necessity."

For each and all of the reasons herein stated I respectfully but vigorously dissent from the Majority holding in the case at bar.

SAM ROBINSON, Associate Justice (concurring). This is an appeal from an order of the trial court overruling a motion made by appellants to dismiss the charge against them. Appellants alleged in the motion that they had been put in jeopardy on a previous occasion and to put them on trial again would place them in jeopardy the second time in violation of Article 2, Sec. 10 of the Constitution of the State of Arkansas.

The principle announced in *Jones* v. *State,* 230 Ark. 18, 320 S. W. 2d 645, is squarely in point with the case at bar, and is authority for the proposition that an appeal will lie from an order overruling a motion to dismiss where it is alleged in the motion that if the defendant was again put on trial it would amount to double jeopardy.

On November 17, 1962, the appellants were arrested on a charge of forgery. They were placed in the county jail and have been there since that time. On November 27, 1962, the prosecuting attorney filed in circuit court a felony information charging the defendants with forgery. They were indigent and unable to employ a lawyer. Article 2, Sec. 10 of the Constitution provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . .". Ark. Stats. 43-1203 provides that if a defendant is unable to employ counsel, it shall be the duty of the trial court to appoint a lawyer to conduct the defense.

Article 2, Sec. 8 of the Constitution provides: ". . . No person, for the same offense, shall be twice put in jeopardy of life or liberty . . .". Jeopardy attaches when a jury is sworn to try the case. In *Whitmore* v. *State,* 43 Ark. 271, the court said: "This court has, heretofore, drawn the line where jeopardy begins at the

swearing in of the jury to try the issue. And this is in accordance with the overwhelming weight of authority and with the best considered cases. If, after that, the jury is discharged without an obvious necessity and without the defendant's consent, express or implied, he cannot be again placed upon trial for the same offense, where life or liberty is involved."

In construing the double jeopardy provision of the Constitution we have held, however, as pointed out by the majority, the constitutional interdiction against double jeopardy is not applicable where a jury has been discharged because of an "overruling necessity". There does not appear to have been such a necessity in the case at bar. The same information that developed during the trial regarding the mental condition of the defendant could very easily have been obtained by the prosecution months before the case came on for trial.

FINE *v.* CITY OF VAN BUREN.

5-3080 371 S. W. 2d 132

Opinion delivered October 14, 1963.

Batchelor & Batchelor and *Rains & Rains,* for appellant.

Conrad Ockenfels Pugh, Townsend & Townsend, for appellee.

CARLETON HARRIS, Chief Justice. Van Buren, Arkansas, is a city of the first class. On August 7, 1962, Ordinance No. 6-1962, authorizing an issue of $702,200.00 in sewer revenue bonds, was approved by the voters of Van Buren, and on November 12, 1962, Ordinance No. 11-1962 was passed,[1] which established the rates to be charged for sewer service. On January 3, 1963, appellants filed with the City Clerk of Van Buren a petition to initiate an ordinance (No. 2A) which would have the effect, *inter alia,* of repealing Ordinance No. 6-1962 and Ordinance No. 11-1962. This initiated petition was filed more than 90 days prior to the next general or regular election in the City of Van Buren (which will be held November 5, 1963). No action was taken by the City Clerk or the city officials on the petition, and on February 5, 1963, appellee, the City of Van Buren, filed, in the Crawford County Chancery Court, a petition for a declaratory judgment, praying that the Court enter a judgment holding the initiated petition invalid. Appellants filed a demurrer, which was overruled, and thereafter, an answer was filed. On hearing, the court entered its declaratory judgment in which it found that the City of Van Buren had never passed an ordinance fixing the time in which initiative petitions might be filed, and further finding that the initiated petition herein discussed, was "invalid, in that it was filed more than 90 days before the next general or regular election in said city, contrary to the Constitution of the State of Arkansas; and the Initiated Petition and the Initiated Ordinance it contains are therefore set aside and held for naught, * * *." While the question of whether the city had the right to invoke the declaratory judgment procedure as a matter of determining the validity of the initiated petition is argued pro and con by the parties hereto, under the view that we take, it becomes unneces-

[1] This ordinance was later approved at a referendum election.

sary to dispose of this matter. Rather, our discussion will be limited to the main issue set forth in Item 5 of the stipulation, which reads as follows:

"It is hereby stipulated and agreed that the sole and only question to be presented to the Court herein, other than said demurrer,[2] is the question of whether a Petition to Initiate a City Ordinance in the City of Van Buren, Arkansas, can be filed more than 90 days prior to the General Election at which it is to be voted upon, the Petition to Initiate City Ordinance herein to be determined having been filed January 3, 1963, and the next City General Election in the City of Van Buren, Arkansas, after said filing being November 5, 1963, and more than 90 days after the filing of said Initiated Petition."

The Arkansas Constitution, Amendment 7, Section 1, under the heading, "Local Petitions," provides:

"Municipalities may provide for the exercise of the initiative and referendum as to their local legislation.

"General laws shall be enacted providing for the exercise of the initiative and referendum as to counties * * * In municipalities and counties the time for filing an initiative petition shall not be fixed at less than sixty days nor more than ninety days before the election at which it is to be voted upon; for a referendum petition at not less than thirty days nor more than ninety days after the passage of such measure by a municipal council; * * *."

With the exception of one case, all cases herein cited by counsel deal with the question of whether petitions were filed "too late" rather than "too early," and in some cases, the point here raised was not at issue. The exception referred to is *Southern Cities Distributing Co.* v. *Carter,* 184 Ark. 4, 41 S. W. 2d 1085. This case was relied on in large measure in our most recent opinion on the subject herein discussed, which, incidentally, is not

[2] This refers to the question of whether the declaratory judgment law can properly be invoked.

cited in the briefs. That case, decided October 22, 1962, is *Armstrong, County Clerk* v. *Sturch,* 235 Ark. 571, 361 S. W. 2d 77. There, petitions were filed with the clerk on July 23, 1962, which was more than 90 days before the general election (November 6, 1962). Appellant strongly argued the same contention that is relied upon by appellees in the instant litigation. In deciding that the petitions were timely filed we called attention to *Southern Cities Distributing Co., supra,* stating:

"Our holding in *Southern Cities Distributing Company* v. *Carter,* 184 Ark. 4, 41 S. W. 2d 1085, bears some similarity to the issue at hand. There, a referendum petition was filed to refer a municipal ordinance, and was filed less than 30 days after the enactment of the ordinance. This court held that the latter fact did not invalidate the petition, under the provisions of Amendment No. 7 to the Constitution, stating:

'The amendment provides the time for filing a referendum petition at "not less than thirty (30) days nor more than ninety (90) days after the passage of such measure by a municipal council." This does not mean, of course, that the petition for a referendum cannot be filed less than 30 days after the passage of the measure sought to be referred, but only that the city must allow at least 30 days after the passage of the measure for the filing of a referendum petition thereon, and cannot allow more than 90 days. * * * It is true the referendum petitions were filed * * * less than 30 days after the adoption of such measure, but they remained on file and were on file after 30 days after the passage of the gas rate resolution, and were passed upon and certified by the city clerk on the thirty-first day after the passage of the resolution as containing sufficient signatures of qualified electors to authorize the referendum petitioned for. The referendum petitions, although they could not have been required to be filed in less than 30 days after the passage of the measure sought to be re-referred, were in no wise invalidated by having been sooner filed.'

"We think the same reasoning applies to the filing of an initiative petition under Amendment No. 7, and the language 'In municipalities and counties the time for filing an initiative petition shall not be fixed at less than sixty (60) days nor more than ninety (90) days before the election at which it is to be voted upon' simply means that the legislature[3] may not *require* that the petitions be filed earlier. It will be noted that the amendment itself *does not* definitely fix the time, but appears rather as a directive to the legislative body, circumscribing and limiting its authority in the matter.

"Of course, viewing the matter from a practical standpoint, appellants, or the general public, have not in any manner been misinformed or misled because the petitions were filed on July 23rd rather than August 8th. As stated in *Southern Cities Distributing Company* v. *Carter, supra,* the petitions remained on file with the proper officer.' "

We are committed to a liberal construction of this amendment, bearing in mind the purpose of its adoption and the object it sought to accomplish. *Leigh and Thomas* v. *Hall, Secretary of State,* 232 Ark. 558, 339 S. W. 2d 104. In other words, as held in that case (and cases cited therein), the acts of the electors "should not be thwarted by strict or technical construction."

One other matter should be mentioned. In concluding their brief in this court, appellants pray that they "be permitted to correct typographical error in said initiative ordinance." This is the only mention made in appellant's brief, and appellee does not mention it at all in its brief. The transcript reflects that, with their answers appellants filed Exhibit "A" which they stated "is a true and correct representation of the petitions herein filed, except that it is possible the date for final payment of said bond issue may show 1967 instead of 1987, but if so, this is a matter of clerical and typographical error correctable under the Constitution of the State of Arkansas, and deny that should said proposed initi-

[3] More properly, the city legislative authority.

ated ordinance become an ordinance of the City of Van Buren, Arkansas, that it would, in any wise, be invalid, but that should any provision thereof be considered invalid that the severability clause therein would protect the remainder thereof." There is no prayer asking the trial court to make this correction; however, in its judgment, the court made the following finding:

"That the copy of the Initiated Ordinance attached to the answer of the defendants as Exhibit A is not like the original, in that Section 3 of said ordinance as copied recites that the bonds should mature serially from 1963 to 1987, whereas the original petition through typographical error recited the maturity dates to be 1963 to 1967."

The basis for the court's finding is not shown since no evidence was taken, and the matter (of the error) is not included in the stipulation.

We are without authority to grant relief which was not sought in the court below. *Porter* v. *Morris,* 131 Ark. 382, 199 S. W. 106.

It follows, from what has been said that the declaratory judgment rendered by the court is reversed, set aside, and held for naught, and this cause is remanded to the Crawford County Chancery Court with directions to dismiss the complaint, and, for good cause shown, an immediate mandate is ordered.

WALKER *v.* STATE.

5069 371 S. W. 2d 135

Opinion delivered October 14, 1963.

W. Harold Flowers, for appellant.

Bruce Bennett, Atty. General, by *Jack L. Lessenberry,* Asst. Atty. Gen., for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant, George Edward Walker, was charged with, and convicted of, involuntary manslaughter; and brings this appeal. The motion for new trial contains a total of nineteen assignments, which we group and discuss in suitable topic headings.

I. *Sufficiency Of The Evidence.* On the night in question Walker and another man, named M. J. Hunter, Jr., were in a truck proceeding west on 13th Street in Pine Bluff. The truck approached U. S. Highway No. 79, failed to stop at the stop sign, smashed into an automobile being driven on Highway No. 79, overturned the automobile, and injured Miss Suzy Glover, a passenger in the automobile. Miss Glover died in a short time as a result of said injuries. There was substantial evidence from which the jury could have found—and did find by its verdict of guilty—that the defendant Walker was the driver of the truck that caused the death of Miss Glover, and that Walker was intoxicated at said time. Certainly

the evidence is sufficient to support the verdict. *Fitzhugh* v. *State,* 207 Ark. 117, 179 S. W. 2d 173; *Lewis and Wren* v. *State,* 220 Ark. 914, 251 S. W. 2d 490; and *Stacy and Rusher* v. *State,* 228 Ark. 260, 306 S. W. 2d 852.

II. *Severance Granted Hunter And Refusal To Quash The Information As To Walker.* M. J. Hunter, Jr. was in the truck with the defendant, Walker, at the time of the collision, and the State named both Walker and M. J. Hunter, Jr. in the information. Hunter sought, and obtained, a severance; and Walker complains of the ruling of the Court granting the said severance and the refusal to quash the information against Walker because of the severance. There was no error in the Court's ruling. Since both Hunter and Walker were in the truck at the time of the collision, both could be charged with the homicide, under the cases previously cited. When Hunter sought a severance it was within the discretion of the Trial Court to grant or refuse it. Ark. Stat. Ann. §43-1802 (1947). There was no abuse by the Court of its discretion. *Bennett and Holiman* v. *State,* 201 Ark. 237, 144 S. W. 2d 476; *Finley* v. *State,* 233 Ark. 232, 343 S. W. 2d 787. There was no reason to quash the information against Walker merely because of the severance.

III. *Refusal To Excuse A Juror.* On *voir dire* Paul Lucus, a member of the regular panel, stated that he was an officer in a service club in Pine Bluff; that Mr. Glover, father of the deceased, Miss Suzy Glover, had been a member of the club; that the club held its luncheons at the Hotel Pines; that Mr. Glover refused to attend the luncheons at the hotel, since the defendant Walker worked at the hotel; that a committee was appointed to see what could be done about Mr. Glover's complaint; that Mr. Glover subsequently resigned from the club. Mr. Lucus stated that he knew nothing about the facts of the homicide. The following occurred when Mr. Lucus was being interrogated on *voir dire:*

"THE COURT: Have you formed or expressed any opinion as to the defendant's guilt or innocence?

"MR. LUCUS: No, sir.

"THE COURT: Any bias or prejudice for or against him?

"MR. LUCUS: No, sir."

The Court then asked Mr. Lucus if he could try the case solely on the law and the evidence; and Mr. Lucus answered in the affirmative. The Court held Mr. Lucus to be a qualified juror, and he served on the jury. There was no error in the ruling of the Court holding Mr. Lucus to be a qualified juror. The fact that he had the activities stated did not *ipso facto* disqualify him. The fact that a juror has done business with one of the litigating parties does not *ipso facto* disqualify him as a prospective juror. *Rumping* v. *Ark. Nat'l Bank,* 121 Ark. 202, 180 S. W. 749; *Decker* v. *Laws,* 74 Ark. 286, 85 S. W. 425. The vital question for the Trial Court to determine was whether the venireman would and could try the case solely on the law and the evidence and render a fair and impartial verdict. The Trial Court so held as regards Mr. Lucus; and we see no error committed.

There is another, and in itself, a sufficient reason for holding against the appellant regarding the juror Lucus; and such reason is because there is no evidence of any kind in the record to show that the defendant exhausted his peremptory challenges and was thereby forced to accept Mr. Lucus as a juror. Our cases hold that a defendant cannot complain of the overruling of a challenge for cause unless the defendant exhausted his peremptory challenges and was forced to accept the questioned juror. *Mabry* v. *State,* 50 Ark. 492, 8 S. W. 823; *Holt* v. *State,* 91 Ark. 576, 121 S. W. 1072; *Shoop* v. *State,* 209 Ark. 498, 190 S. W. 2d 988. The defendant's motion for new trial contained the following allegation:

"Because the Court erred in denying defendant's motion on *voir dire* examination for the Court to excuse the prospective juror, Paul Lucus, for cause when the defendant had already exhausted his peremptory challenges."

The quoted allegation in the motion for new trial—about exhausting peremptory challenges—is not sustained by

the record. There is no evidence of any kind in the record to show that the defendant exhausted his peremptory challenges; and a mere allegation in the motion for new trial does not constitute evidence. *Shinn* v. *Tucker,* 37 Ark. 580.

IV. *Statements Defendant Made To Arresting Officer.* After the collision between the truck and the car, the defendant walked across the street and sat down near a filling station. When the investigating officer arrived at the scene, he noticed the defendant had a contusion on his forehead and asked him how he got the wound. The defendant told the officer that he (the defendant) was driving the truck that was involved in the collision. Thereupon, the officer took the defendant to the hospital for dressing of the defendant's wound; and the defendant, in the presence of others, repeated the statement that he was driving the truck at the time of the collision. It is claimed that the officer failed to advise the defendant that anything he said could be used against him; so it is urged that the statement of the defendant to the officer was a confession and was under duress. But when the defendant took the witness stand in the trial of the case, he admitted that he told the Prosecuting Attorney on several prior occasions that he (the defendant) was driving the truck at the time, and so admitted on the witness stand. Thus, any statement that the defendant made to the officer under the circumstances above mentioned was rendered entirely harmless by the other testimony in the case. The defendant explained that the reason he admitted driving the car was because M. J. Hunter, Jr. did not have a driver's license, and the defendant and Hunter had agreed when they started on their trip, that in case any trouble should develop, the defendant would admit being the driver. This explanation by the defendant rendered harmless any ruling of the Court regarding the testimony of the officer, even if the said testimony might have otherwise been objectionable—a matter we need not decide. The evidence showed that Hunter and the defendant had, just before the collision, consumed a considerable quantity of gin,

beer, and whiskey; so that they hardly knew which one was driving the car; but disinterested witnesses testified that immediately after the collision the defendant was in the driver's seat. Under the circumstances heretofore cited, the defendant could have been convicted of involuntary manslaughter, even if he had not been driving the vehicle.

CONCLUSION. We have examined the other assignments and find no error. Affirmed.

Justices ROBINSON and JOHNSON concur, being of the opinion that the Trial Court should have excused the venireman Lucas, but that the failure of the record to show the exhausting of challenges made such ruling harmless.

URBAN RENEWAL AGENCY OF HARRISON *v.* HEFLEY.

5-3056 371 S. W. 2d 141

Opinion delivered October 14, 1963.

W. S. Walker and *Bill F. Doshier,* for appellant.

John H. Shouse, J. Loyd Shouse and *Eugene W. Moore,* for appellee.

George Rose Smith, J. By this eminent domain proceeding the appellant is acquiring four tracts of land in Harrison. The jury valued the tracts at a total of $78,000, which was somewhat higher than their worth as fixed by the condemnor's witnesses and somewhat lower than that fixed by witnesses for the owners.

Near the end of the trial the condemnor offered in evidence a county court order, entered in 1930, which purported to create a highway right-of-way across one of the tracts. The purpose of the offer was to show that the value of the tract was reduced by reason of the existence of the easement. The trial court excluded the proffered exhibit on the ground that no such easement had been mentioned in the pleadings.

This ruling was correct. Written pleadings are required so that each party may know what issues are to be tried and may thus be in a position to enter the trial with his proof in readiness. *Bachus* v. *Bachus,* 216 Ark. 802, 227 S. W. 2d 439. A failure to plead a material matter is prejudicial to the opposing party if it puts him at an unnecessary disadvantage in the presentation of his case.

That was the situation here. County court orders such as this one are entitled to a presumption of validity. *Bollinger* v. *Ark. State Highway Comm.,* 229 Ark. 53, 315

S. W. 2d 889. Nevertheless we know that in a great many instances the order can be successfully attacked by the landowner. One common defect, mentioned in the *Bollinger* opinion and in counsel's objections below, is the county court's not having been legally in session upon the date of the entry of the order. Another is the fact, referred to in many of our decisions, that the enabling statute is defective in failing to provide for notice to the landowner, so that the order becomes valid only when actual notice is given, as by an entry upon the land. See *Miller County* v. *Beasley,* 203 Ark. 370, 156 S. W. 2d 791; *Ark. State Highway Comn.* v. *Dobbs,* 232 Ark. 541, 340 S. W. 2d 283; *Ark. State Highway Comn.* v. *Cook,* 233 Ark. 534, 345 S. W. 2d 632.

It is fair to suppose that the owners of the tract now in question may have been able to produce proof that the county court order was void. They were caught by surprise, however, because the existence of the asserted right-of-way was not mentioned in the condemnor's pleadings. To the contrary, the complaint alleged, that the tract was owned by Hefley and his wife, and the parties stipulated that the allegations of ownership were correct. There was nothing in the pleadings to warn the Hefleys that the condemnor was relying upon the easement supposedly created in 1930. It would not be fair to permit the plaintiff to profit by the *prima facie* validity of the county court order without affording the landowners an opportunity to challenge it. We think the trial court acted within its sound discretion in refusing to allow the order to be received in evidence.

The appellant's other arguments have to do with the admissibility of evidence. Counsel summarizes fourteen instances in which it is said that improper proof was introduced by the landowners. In six of these instances, however, there was no objection to the testimony. In four others there was a motion to strike all of the particular witness's testimony. In each of these four cases at least part of the witness's evidence was admissible; so the motion to strike was correctly denied. *St. Louis, I. M. & S. Ry.* v. *Taylor,* 87 Ark. 331, 112 S. W. 745.

We find no prejudicial error in the other four instances. The witness Saunders, a real estate dealer, was familiar with one of the tracts, but at first he did not know exactly what part of it was being taken. To meet this difficulty his testimony was interrupted to allow another witness to explain that a certain number of acres were being taken. It was then proper for Saunders to state a per acre value for the land.

The testimony of Carr, another real estate dealer, is challenged on the ground that he gave no basis for his expert opinion. As we pointed out in *Ark. State Highway Comm.* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436, that opinion was admissible on direct examination. Counsel might have attempted to discredit the witness by showing through cross examination that he had no reasonable basis for his conclusions, but no such effort was made.

Hosea Hefley, in giving his opinion about the value of one tract, was allowed to detail the materials that had gone into the construction of a building upon the property. He did not try to set forth the cost of the materials. This proof was perhaps more detailed than it needed to be, but there was no real objection to the witness's being permitted to describe the improvements in this way and thereby to explain factors that he had considered in forming his opinion about the fair value of the property.

We find no merit in the other objections that were made to the testimony.

Affirmed.

Opinion delivered October 14, 1963.

John G. Moore, for appellant.

Gordon & Gordon, for appellee.

PAUL WARD, Associate Justice. Appellant, Robert M. Swift, owned 190 acres of land on which he operated a dairy. On March 4, 1960 he and appellee, Leroy Lovegrove, Jr., entered into a written agreement (hereafter referred to as a contract) wherein appellant purported to sell and appellee purported to purchase the land, including the dairy cows and equipment. The contract, not drawn by an attorney, is crude and indefinite in its terms.

The parties however agree as to the following: (a) The price of the land was $16,500 and the price of the cows and equipment was $12,500; (b) appellee made a down payment of $2,000 and then made four other payments of $200 each; (c) there was no definite agreement as to when the balance would be paid, but appellee was to get credit for one-half of the profits from the operation of the dairy to be applied on the balance of the purchase price; and, (d) appellee was to pay one-half of the expense incident to the dairy operation. It is not disputed that the parties operated under this arrangement for only three or four months after which time it was terminated. The cause and circumstance of such termination are the issues in this litigation.

The contention of appellee (as set out in his complaint filed in the circuit court) is (a) that an essential part of the contract and agreement was for appellant to keep a record of the dairy profits and to give him (appellee) credit each month on the purchase price but that appellant failed and refused to do so, and (b) that on July 1, 1960 it was mutually agreed to rescind the entire contract and for appellant to refund to appellee the sum of $2,800. On the other hand, it is the contention of appellant that he made no such agreement, that appellee refused to carry out his part of the contract, and therefore he was due the balance of the purchase price.

The above conflicting contentions were presented to the trial judge, sitting as a jury. After hearing the testimony of both parties and their wives, the trial court, after making extensive findings of fact and law, found the issues in favor of appellee and rendered judgment in his favor for $2,800. Among other things the court found appellee had advanced $2,800 and that there was an agreement to rescind the contract. The court further found that the parties had entered into a partnership operation or joint adventure as to the dairy operation, and that "the contract as drawn is more in the nature of a memorandum of mutual undertakings of the parties, and without oral interpretation and explanation, is ambiguous".

The judgment of the trial court must be affirmed. It is not contended by appellant that there is no substantial evidence to support the court's findings. It is contended, however, by appellant that the trial court had no right to find there was a rescission and that there was a partnership arrangement because it had no right to vary a written contract. Appellant cannot be sustained in either contention.

We have many times recognized the right of parties to a contract to vary it or rescind it by mutual consent. See: *Elkins* v. *Aliceville,* 170 Ark. 195, 279 S. W. 379; *First National Bank of Belleville, Illinois* v. *Tate,* 178 Ark. 1098, 13 S. W. 2d 587; and, *Scottish Union and Na-*

tional Insurance Company v. *Wilson,* 183 Ark. 860, 39 S. W. 2d 303. It is equally well settled that an ambiguous contract is subject to interpretation, and "its meaning is a question of fact for the jury and should be submitted to a jury." The above quote is taken from the case of *The Travelers Indemnity Co.* v. *Hyde,* 232 Ark. 1020, 342 S. W. 2d 295. In this case the trial court sat in the capacity of a jury.

We find no merit in appellant's final contention that the trial court erred in refusing to grant a new trial on the ground of newly discovered evidence. Appellant's motion was based solely on an affidavit made by appellee's brother. The trial court was correct in refusing appellant's motion for reasons hereafter mentioned. In the case of *Missouri Pacific Transportation Company* v. *Simon,* 200 Ark. 430, 140 S. W. 2d 129, four specific requirements for granting a new trial on newly discovered evidence are set forth. A casual reading of the affidavit reveals that none of the requirements was met in this case. It suffices here to quote what the trial court said about the one requirement of diligence:

"No diligence has been shown to show any effort to obtain the testimony of Robert Lovegrove, by subpoena or by deposition. That prior and at the time of trial, defendant, Swift, had full knowledge of any information available to him so far as Robert Lovegrove was concerned."

Since no error has been shown, the judgment of the trial court is affirmed.

ARK. STATE HIGHWAY COMM. *v.* CARPENTER.

5-3028 371 S. W. 2d 535

Opinion delivered October 14, 1963.

[Rehearing denied Nov. 11, 1963.]

[redacted]

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

Donald Poe, for appellee.

SAM ROBINSON, Associate Justice. This is an eminent domain proceeding in which the Arkansas Highway Commission condemned a portion of two tracts of land. It is alleged that the tract owned by appellees, C. A. and Lessie Slagle, was damaged in the sum of $850.00, and the tract owned by appellees, Allen and Joella Carpenter, was damaged in the sum of $100.00. There was a judgment for the Slagles in the sum of $3,163.00, and a judgment for the Carpenters in the sum of $2,900.00. The Highway Commission has appealed.

For reversal the appellant contends that the court erred in refusing to strike the testimony of the landowners' value witness, alleging that he did not use a proper basis for determining the before and after value.

The appellees' witness who testified to the value of the property was Donald M. Roderick, a real estate

dealer in Ft. Smith, Arkansas. After having stated on direct examination his opinion as to the market value before and after the taking, Mr. Roderick was asked by counsel on cross-examination exactly how he arrived at the market value after the taking. He testified that he considered loss of land taken, replacing a fence, loss of trees, replacement of shrubs and flowers, moving the house back from the right of way line, cost for replumbing and rewiring the house after it was moved, and finally the cost for a motel or hotel for a family to stay until the workmen could get the house back in livable condition after it is moved from its present location.

All the items mentioned above, with the exception of the cost required to live in a motel, are factors to be properly considered in arriving at the before and after value. We have said that there is no set formula or pattern that must be followed in arriving at before and after value. *Springfield* v. *Housing Authority of the City of Little Rock,* 227 Ark. 1023, 304 S. W. 2d 938; *Ft. Smith & Van Buren District* v. *Scott,* 103 Ark. 405, 147 S. W. 440. Consideration may be given to every element which a purchaser, willing but not obligated to buy, would consider. *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706; *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792. The profits of a business, however, cannot be considered in arriving at the value. *Arkansas State Highway Commission* v. *Wilmans,* 236 Ark. 945, 370 S. W. 2d 802 (September 30, 1963).

Certainly, all the items mentioned by Mr. Roderick, with the exception of the cost of staying at a motel, are factors to aid in determining the difference in the before and after value of the property; these figures would likely be used by a buyer to determine market value. In *Arkansas State Highway Commission* v. *Ptak,* 236 Ark. 105, 364 S. W. 2d 794, we quoted as follows from *Arkansas State Highway Commission* v. *Speck,* 230 Ark. 712, 324 S. W. 2d 796; "Evidence of the cost of improvements for restoration purposes and relocation costs is proper." But, we also said: "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."

The testimony as to the cost of staying in a motel while the house is put back in livable condition cannot be considered as a factor in determining market value; but in making his objection to Mr. Roderick's testimony, counsel asked that all Roderick's testimony be stricken, and did not specifically point out that the cost of hotel or motel accommodations should not be considered in determining market value. The court was correct in overruling the motion to strike all of the testimony of Mr. Roderick. As recently as September 30, 1963, in *Arkansas State Highway Commission* v. *Wilmans, supra,* we said that a motion to exclude all the testimony of a witness is properly overruled if a part of it is competent.

Appellant makes the same objection to Mr. Roderick's testimony with respect to the Carpenter property, but what we have said regarding the witness' testimony about the Slagle land applies in a like manner to the damages sustained by the Carpenters.

Affirmed.

PAUL WARD, Associate Justice (dissenting). For the many reasons hereafter set out, I am unable to agree with the majority opinion.

A quick glance at the wide divergency of estimates made by different parties in this litigation emphasizes the need for strict compliance with established rules in condemnation cases wherein the taxpayers pay the bills. Appellees, Slagle, asked for $10,000 damage for the right-of-way taken by the state; their own expert witness valued the property at only $12,840 before the taking; the state's appraisers estimated their damage at $850; and the jury gave them $3,163. There is a well established rule in this state applicable to a case of this kind. In my opinion this rule was not followed in this case.

The Rule. Where there is a partial taking of a landowner's real property (as here) the following rule applies: (a) Determines the market value of the property before the taking; (b) determine the market value of the property after the taking, and (c) the difference is the amount of damages to which the owner is entitled.

Authority for the Rule. In the early case of *St. Louis, Arkansas and Texas Railroad* v. *Anderson,* (1882), 39 Ark. 167, the rule was clearly stated to be:

"The true measure of damages is the difference between the market value of the whole tract before the taking and the market value of what remains to him after such taking . . ."

To my knowledge this case has never been overruled or modified but it has been cited with approval in at least eleven of this Court's decisions, and the rule has been restated in many other decisions of this Court.

Not only has said rule been recognized and adhered to by this Court during all these years but it is recognized by all texts examined by me. Orgel, Valuation Under Eminent Domain, (1st ed. 1936), sets out three formulas —each adopted by different courts. At page 158 he defines the third formula: "Difference between the Fair Market Value of the Property before and after the Taking". The same formula is reiterated in Orgel's 2d ed. at page 236. The same rule is also recognized by Nichols, Eminent Domain, (3rd ed. 1962) Vol. 4 at page 509, and Jahr, Eminent Domain, (1957) at page 136. All these authorities recognize and point out that some states adopt a *second* method which is described as "Value of the Part Taken Plus Damages to the Remainder". Our Court, of course has not heretofore seen fit to adopt this *second* formula.

Is there a difference between the two methods described above? It hardly seems necessary to answer this question. If there is no difference then it would appear that the above mentioned authorities and also this Court have been wasting their time. There are, of course, several differences, but it will suffice to point out only one.

States that do not allow a reduction of special benefits accruing to the landowner from his damages suffered could well afford, perhaps, to adopt the *second* formula—value of land taken plus damages to the rest of the land. Arkansas, however, is not such a state. See: *Ark. State Highway Comm.* v. *Snowden,* 233 Ark. 565, 345 S. W. 2d 917, and cases cited therein. An example of two from the case under consideration will illustrate the point in issue: The expert witness gave as one element of damages that appellant would have to rebuild a fence which was torn down. It is possible that the fence was not an asset and that its absence did not detract from the market value of the farm. The same thing could also be said about the trees, or most any other item.

Did the Court apply the Rule? I take it that the majority admit the before and after rule was the applicable rule in this case, and we must assume they agree there is a difference between the rule and the *second* rule mentioned above. The only question then is, was the rule, in effect, applied in regard to the expert testimony given by Roderick. I agree that, in form, the rule was followed in the testimony given by Roderick on direct examination. He stated that, in his opinion, the property was worth $12,840 before the taking and $9,640 after the taking. From there on it was just a matter of arithmetic to determine that Slagles should receive $3,200 as damages. However, on cross-examination, Roderick, in my opinion, showed that he followed (to the letter) the *second* rule and not the before and after rule. The reason there can be no doubt in my mind is that the several items of damages (proper in the *second* rule) amounted exactly to $3,200. After detailing the several items, he said: "I have it all figured out as to costs which does total $3,200."

One reason for writing this dissent is the hope that it might in some way help prevent confusing the rule which we have sanctioned so many times with a rule which we have never sanctioned. I think the trial attorney and judges are entitled to that for future guidance.

The Proper Objection. I cannot at all agree with the majority in holding appellant's objection bad because part of Roderick's testimony was true. If the *method* used by Roderick in arriving at $3,200 damages is incorrect, then all the testimony goes out. When the wrong figure is subtracted from a given figure the result cannot be right.

I am not impressed with the idea that Roderick could not arrive at the fair market value of the land after the taking ($9,640) without considering all the elements of damages. He didn't have any such aids when he arrived at the figure of $12,840—the value before the taking.

ARK. STATE HIGHWAY COMM. *v.* BOWMAN.

5-3029 371 S. W. 2d 138

Opinion delivered October 14, 1963.

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

Donald Poe, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from eminent domain proceedings in Scott County to condemn land for highway purposes along Highway 270 near Wye City. On July 21, 1961, appellant Arkansas

State Highway Commission filed a complaint and declaration of taking and deposited the sum of $400.00 for Tract 42 belonging to appellees Tyrus and Deen Bowman, $1,250.00 for Tract 44 (appellees W. G. and Nova Sullivan), $350.00 for Tract 46 (appellees Garrett and Edna Shaddon), and $450.00 for Tract 47 (appellee R. D. Rose). The Scott Circuit Court entered an order giving appellant possession of the property as of July 21, 1961. On May 11, 1962, at pre-trial conference the court combined the above tracts for trial. Trial was held on June 13, 1962. After deliberation, the jury found that just compensation for Tract 42 was $2,500.00, for Tract 44 was $3,000.00, for Tract 46 was $1,750.00, and for Tract 47 was $1,300.00. From judgments on the verdicts, appellant has appealed.

This is a companion case to *Arkansas State Highway Commission* v. *Carpenter et al.,* also handed down today. These cases were tried and appealed in the same week, they involved the same highway, same attorneys and many of the same witnesses. The points relied upon for reversal are substantially the same, as are the briefs. The records, of course, are not identical, and we must therefore determine this case on its own merits.

Appellant contends that the trial court committed reversible error in overruling the Highway Commission's motion to strike the testimony of the landowner's value witness, Donald Roderick, because the witness did not determine the just compensation due for the property on a before and after basis.

The witness testified on direct examination as to his opinion of just compensation for the partial taking of appellees' property on a before and after basis. However, on cross-examination appellant's attorney elicited the following testimony from the witness:

"Q. Now, Don, let me ask you this: You placed a value of $17,500 on the property before the taking. You have enumerated these elements of damage and have subtracted them from the $17,500 to get your after figure, is that correct?

A. Well, I have taken various things into consideration in doing that.

Q. But is that essentially what you have done?

A. No sir.

Q. How have you arrived at this figure then?

A. The element of damage, you mean?

Q. The after figure, what the property is worth after the taking?

A. I have had to estimate in various ways—I don't know some of the things.

Q. Now you have enumerated these items that you've given me here. Have you subtracted those items from the before figure to get your after figure?

A. Yes sir."

This testimony, standing alone, without considering it together with all of the witness' testimony, does appear to be somewhat contradictory. However, in order to avoid any confusion, the trial court immediately gave the following admonition to the jury:

"Now, Ladies and Gentlemen, in so far as any of these items like replacement of fence—these various specific items of damage which Mr. Roderick has enumerated, you understand, as I told you in the beginning, they in themselves—not any one of them or the sum total constitutes the measure of the just compensation to be arrived at in this case and they are only admitted to you as an aid in determining what the difference before and after would be and you are not to consider them at all unless you find that they are reasonable and where applicable are necessary and are to be considered under all the circumstances in the case. Now I want to caution you to base your verdict solely upon what you find the difference to be between the value—the market value of the land before the taking and the market value after the taking."

Appellant forcefully contends that the witness' testimony indicates that he determined the before value, estimated the damage to the property and subtracted that figure from the before value to arrive at his after value. Appellant's contention is not substantiated by the record. Recapitulation of the witness' damage figures compared with his before and after values, contained in appellant's brief, clearly show that there is no such close correlation between the figures as would justify such a conclusion.

Appellant moved to strike all the testimony of this witness. This court has long held a motion to exclude all of the testimony of a witness was properly overruled if a part of it was competent. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *St. Louis, I. M. & S. R. Co.* v. *Taylor,* 87 Ark. 331, 112 S. W. 745; *Nichols* v. *State,* 92 Ark. 421, 122 S. W. 1003. Without detailing the testimony further, appellant admitted the qualification of appellees' expert, who in the past has done appraisal work for the State Highway Department. Suffice it to say, some of this witness' testimony was competent. This being true, we find no error in the trial court's ruling.

Appellant further contends that the jury verdict on the Rose property, Tract 47, was excessive and beyond its power. Appellee Rose did not testify in his own behalf as to the value of his property. Appellees' value witness testified that the damage sustained by the Rose property was $1,000.00, whereas appellant's witnesses assessed the damages at $650.00 and $400.00. The verdict is $300.00 above any testimony, and is therefore excessive on its face as there is no evidence to support the verdict in that amount. See *Dodd & Co.* v. *Read,* 81 Ark. 13, 98 S. W. 703; *Southern National Ins. Co.* v. *Williams,* 224 Ark. 938, 277 S. W. 2d 487.

The judgments in favor of appellees Bowman, Sullivan and Shaddon are affirmed. The judgment in favor of appellee Rose is affirmed upon condition that a remittitur in the sum of $300.00 be entered within seventeen

calendar days; otherwise the judgment will be reversed and the cause remanded for a new trial.

Ward, J., concurs.

PAUL WARD, Associate Justice (concurring). I am not dissenting in this case as I did in the companion case, *Arkansas State Highway Commission* v. *Joella Carpenter, et al.* (No. 3028), because the factual situations in the two cases are not the same.

I am concurring for the following reasons. First, conceding that the before and after rule *was followed,* it is immaterial that some of the elements of damages were incorrect. Second, if the before and after rule *was not applied,* then none of the elements of damages was pertinent and the rule announced in *Taylor* v. *McClintock* has no application.

WHEELER, ADM'X *v.* DELCO BEN.

5-3060 371 S. W. 2d 130

Opinion delivered October 14, 1963.

Russell & Hurley, for appellant.

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

FRANK HOLT, Associate Justice. The appellant, Mrs. C. C. Wheeler, brought this action individually and as administratrix of her husband's estate to recover damages resulting from his death in a traffic mishap. The issues were submitted to a jury which resolved them in favor of appellant and assessed damages at $2,500.00. From this judgment appellant brings this appeal.

For reversal appellant relies on three points. The first two points we discuss together since they relate to a hypothetical question. Appellant contends that the hypothetical question was improper in that it was not based on facts then nor later in evidence and not within the knowledge of the physician.

While appellee's counsel was propounding the hypothetical question appellant's counsel objected, stating: "Mr. Lindsey says there is no evidence of contusion to the chest area and I beg to differ there is evidence." Thereupon appellee's counsel stated: "Let me rephrase that and eliminate that . . ." Since no objection was made to the hypothetical question when rephrased, we find no merit in this contention. We cannot consider an objection to a hypothetical question when raised for the first time on appeal. *Southwestern Gas & Electric Co.* v. *Halter,* 200 Ark. 244, 138 S. W. 2d 793; *Chapman* v. *Finkbeiner, Inc.,* 230 Ark. 655, 324 S. W. 2d 348. A review of the testimony in this case convinces us that it fairly supports the content of the hypothetical question. Therefore, a renewal of the objection to the hypothetical question would be of no avail to the appellant in this case. Also, the remedy was available upon the cross-examination to supply any missing facts considered essential in the question. *Shaver* v. *Parsons Feed & Farm Supply, Inc.,* 230 Ark. 357, 322 S. W. 2d 690.

The appellant next contends that it was error for the Court to permit the introduction of two photographs into evidence without the proper foundation being laid. One of these photographs purported to depict the damage to the front end of the vehicle driven by appellee and the other photograph represented the rear end of decedent's vehicle following the collision. The appellant objects to the validity of these photographs because the witness did not take the pictures nor was he present when they were taken. He testified, however, that he observed the condition of the vehicle following the accident and that the pictures fairly represented the condition and damages following the accident. The driver of the third vehicle involved in the accident also verified the accuracy of the photograph of the damages to decedent's vehicle. The test of whether photographs are admissible into evidence depends upon the fairness and correctness of the portrayal of the subject. *Lee* v. *Crittenden County,* 216 Ark. 480, 226 S. W. 2d 79; *Ark. State Highway Comm.* v. *Webster,* 236 Ark. 491, 367 S. W. 2d 233. We think the test was met in this case. Further, the admissibility of photographs addresses itself to the sound discretion of the Trial Judge. We do not disturb his ruling unless there is an abuse of discretion. *McGeorge Contracting Company* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566. Certainly there was no abuse of discretion in the case at bar.

We must affirm the judgment in this case for the further reason that the alleged errors were rendered harmless by the verdict of the jury. In *Thomas Cox & Sons Machinery Company* v. *Forshee,* 96 Ark. 156, 131 S. W. 454, we said: "* * * It is the settled rule of this Court that a reversal will not be granted for errors which are not prejudicial to the rights of the complaining party." Also, see *Browne-Brun Wholesale Gro. Co.* v. *Hinton,* 179 Ark. 831, 18 S. W. 2d 369; *Sutton* v. *Nowlin & Sons Company,* 232 Ark. 223, 335 S. W. 2d 292. In the case at bar the purpose of the hypothetical question was to establish that death resulted from natural causes rather than the accident. The pictures were also offered

to bolster this contention. Since the jury rendered a verdict in favor of appellant on the issues on which recovery was sought, the errors argued by the appellant were eliminated and rendered harmless by its verdict.

Affirmed.

Opinion delivered October 21, 1963.

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

Lyle Williams and *Henry Ginger,* for appellee.

CARLETON HARRIS, Chief Justice. The question in this litigation is whether laundry and dry cleaning machinery and equipment are manufacturing or processing equipment and machinery within the meaning of the Arkansas Compensating (Use) Tax Act as set out in Ark. Stat. Ann. § 84-3106(d) (Repl. 1960)[1] as amended by Act 140 of 1961 [Ark. Stat. Ann. § 84-3106 (d) (Suppl. 1961)].

Appellant, Pellerin Laundry Machinery Sales Company, Inc., of Louisiana, contends that the heavy machinery it sold to Arkansas customers prior to April 1, 1961, is exempt under the following language from Subsection (d) of Section 84-3106:

"There are hereby specifically exempted from the taxes levied in this act: * * * Tangible personal

[1] Act 487 of 1949.

property used by manufacturers or processors or distributors, including ginners of cotton, and including the artificial drying of rice, for further processing, compounding or manufacturing; * * *"

The contention is then made that sales subsequent to April 1, 1961, are exempt from the tax under the following exemptions set out in Act 140 of 1961:

"(D) MANUFACTURERS AND PROCESSORS. Tangible personal property in the form of raw materials or component parts for further processing, manufacturing, or assembling when such goods, wares and merchandise goes into and becomes a recognizable, integral or component part of a manufactured or processed part of a manufactured or processed article or end-product for sale either within or without the State of Arkansas.

"Manufacturing or processing machinery, replacement parts, materials, and supplies used directly in the manufacturing or processing operation provided; such materials, machinery, supplies, and equipment are not available within this State by reason of not being manufactured or produced within Arkansas; or are not available from instate sellers' or suppliers' stocks in trade within this State. It is the intent of this subsection to exempt only such equipment, machinery, materials, or supplies that constitute the primary facility engaged in the direct production, processing or manufacturing of articles of commerce at industrial and processing plants in Arkansas and which are not available from the seller's regularly maintained stock in this State.

"The terms 'manufacturing' and 'processing' as used herein, refer to and include those operations commonly understood within their ordinary meaning and shall include mining, quarrying, refining, and the production of natural resources, cotton ginning, and rice drying."

Willis Pellerin of New Orleans, President of the aforementioned company, which has its principal place of business in New Orleans, testified that his company had been in the business of selling laundry machinery

since around the first of May, 1956.[2] An exhibit was offered depicting the washing machines, which are not suitable for home use, but are designed for commercial type laundry operations. The machines weigh from 567 to 1,450 pounds. Mr. Pellerin described the advantages of the machines and stated that they were suitable for chemical procedures that would produce sterile washing. He described bacteriological tests made and stated that "washing is more than simply rubbing clothes together. It is a processing procedure that has the objective of going beyond cleaning clothes only." Pictures of other machines were exhibited[3] which the witness stated could be used for several purposes in addition to the laundry business. Though he mentioned some other uses for the various machines, all are primarily used in laundry establishments, and appellant in this argument (that the equipment is exempt from the payment of the tax) makes no effort to distinguish, or separate, those machines used solely for laundry purposes, and those occasionally sold for other use.[4] The contention that these machines are "processing" machinery is set forth in Mr. Pellerin's testimony as follows:

"The process is actually one of taking a clean material-soiled material or shirt and making it clean through the process of washing, drying and ironing. The ironing is in fact a re-shaping of the garment to return it to the original condition that it was when it was completed by the manufacturer. * * *

"The principle of ironing is nothing more than shaping, a reshaping. Remember when you wash material you

[2] Pellerin, Inc., manufactures nothing, but purchases such equipment for resale to industrial type plants. Pellerin Milnor Corporation manufactures industrial type washing machines and is one of the suppliers of Pellerin Laundry. This type of machinery is not manufactured or sold in Arkansas.

[3] Among others, extraction machines, and ironers, the latter weighing as much as 32,000 pounds, and selling for $26,000 to $30,000.

[4] For instance, the witness mentioned that fifteen pressing machines are being used at the Jack Winters Manufacturing Co. in Marianna and ten at the garment plant in Lepanto. Also, Pellerin stated that extraction machines can be used by potato chip manufacturers for the purpose of removing "surplus water prior to frying after the potatoes have been cut." Further, according to the witness, extractors have been sold to the sugar industry for the purpose of refining sugar. No Arkansas sales for the last two purposes were mentioned.

lose even the fibers, and the fibers go in all directions reflecting light in every direction. You get a very rough looking appearance. When you put the damp garment on a pressing machine, the first thing that occurs is stringing and in the process of restringing that garment, the fibers are all laid in one direction giving light reflection that gives you the flat finish that you like on your collars and cuffs for example. * * *''

Pellerin stated, ''You get a much better, closer, tighter finish with a garment that has been processed commercially, a more acceptable, a more desirable product.'' He testified that the principal customers of his company were ''laundries, followed by the dry cleaners, followed by motels and hotels, institutions, and linen supply and diaper plants, etc.''

After the Commissioner of Revenues, following a hearing, held that the Pellerin Company was not entitled to the exemption claimed,[5] appellant instituted suit in the Chancery Court, contending that all equipment it sold to Arkansas consumers was manufacturing or processing machinery and equipment, and that such machinery was exempt from the tax here in question. From an adverse decree by that court, appellant brings this appeal.

Appellant's argument seems to be that the process of laundering a dirty shirt is actually a re-manufacturing process. In its brief, the company argues that it is not logical for the commissioner to exempt from the tax, equipment which is purchased for use in a shirt manufacturing plant, but refuse such exemption for machinery which is purchased by a laundry ''to re-manufacture a soiled and wrinkled shirt into its former clean and wearable shape.''

Appellant states that ''the laundry and dry cleaning plant transforms one form of garment, not ordinarily usable by the ordinary customer, into a clean, correctly shaped garment which can be worn and used by the ordi-

[5] On January 23, 1962, an agreement was entered into to the effect that all assessments, as well as compensating (use) taxes on future sales would be paid under protest, and all of said sums would be refunded if Pellerin's claim of an exemption should be sustained by the court.

nary customer." Since the soiled or dirty garment is given "new form," appellant contends that the reshaped appearance is the result of a manufacturing operation. We completely disagree. In the first place, in determining whether a particular operation constitutes manufacturing or processing within the terms of an exemption statute, the courts of various jurisdictions have tended to follow the popular meaning of the words in question, and we also follow this rule. See *Morley* v. *E. E. Barber Construction Company,* 220 Ark. 485, 248 S. W. 2d 689 (1952).[6] Neither do the three other Arkansas cases on the subject afford appellant's argument any support.[7] Certainly, the popular conception of manufacturing or processing does not come to mind when a shirt is laundered or a suit is cleaned. Rather, we view the manufacturer as one who produces or fabricates the shirt, or suit of clothes, such as the makers of Arrow shirts, or the Hart, Schaffner and Marx Company. These companies, and other clothing manufacturing concerns, sell a *product;* the laundry and dry cleaning establishment sells a *service.*

Appellant emphasizes the word, "processing," but in interpreting the pertinent statutes, we do not consider "manufacturing" and "processing" as two distinct operations. It will be noted in reading a portion of the statute that the terms are defined together, and reference is made to the ordinary meaning of the words. From the statute:

"The terms 'manufacturing' and 'processing' as used herein, refer to and include those operations com-

[6] In the same case, we held that a tax exemption must be strictly construed "and to doubt is to deny exemption."

[7] These cases are *Morley* v. *Brown & Root, Inc.,* 219 Ark. 82, 239 S. W. 2d 1012 (1951) (relating to certain equipment which was purchased for the construction of Bull Shoals Dam, such as locomotives, tracks, conveyors, cranes, bull dozers, etc.); *Teague* v. *Scurlock,* 223 Ark. 271, 265 S. W. 2d 528 (1954), (wherein the court declined to hold that commercial poultry feed was used by growers in processing or manufacturing broilers); *Scurlock* v. *Henderson,* 223 Ark. 727, 268 S. W. 2d 619 (1954), (wherein it was argued that ginning machinery was used in the processing or manufacturing of cotton). The court held that cotton becomes a commercial commodity when it is ginned and is not ready for processing or manufacturing until after the ginning process.

monly understood within their ordinary meaning and shall include mining, quarrying, refining, and the production of natural resources, cotton ginning, and rice drying.''

As stated in *Scurlock, Comm. of Rev.* v. *Henderson,* 223 Ark. 727, 268 S. W. 2d 619,

'' 'Considering the meaning of the word ''manufacturing'' in connection with our consideration of the meaning of ''processing,'' it must be plain that the word ''processing'' has reference only to some stage or process of manufacturing. * * *' ''

In fact, this court held as far back as 1914, in *State ex rel.* v. *Frank,* 114 Ark. 47, 169 S. W. 333, that a laundry was not a manufacturing establishment. While the question in that litigation did not relate to tax exemptions, the court did have occasion to state whether a laundry was a manufacturing concern. In an opinion by the late beloved Justice Frank Smith, it was said:

''The question has several times been before the courts of various States as to whether a laundry was a manufacturing establishment or not, and so far as we are advised it has been uniformly held that it is not. In the case of *Downing* v. *Lewis, et al.,* 76 N. W. 900, 56 Neb. 386, it was contended the sale of a laundry and an agreement entered into between the parties with reference thereto violated the anti-trust law of that State which prohibited any combinations or agreements where persons are engaged in the manufacture or sale of any article of commerce or consumption, or for any persons so engaged to enter into any combination or agreement relating to the price of any article or product of such manufacture, and the court there decided that a laundry was not a manufacturing establishment, and in so deciding that question it was there said: 'It seems perfectly plain that a laundry, the business of which is to wash and iron linen, and other articles of wearing apparel and domestic use, which have become soiled in the service for which they were fabricated, is not a manufacturing establishment, within the meaning of the section quoted. In

the common understanding, the function of a laundry is to make clothes clean, rather than to make clean clothes.'

"In *Commonwealth* v. *Keystone Laundry Co.*, 52 Atl. 326, where a law of the State of Pennsylvania which exempted from taxation so much of the capital stock of a manufacturing corporation as was invested in the carrying on of manufacturing was under construction, a laundry company claimed the exemption of that act. It was held that the laundry company was not a manufacturing company, even though it manufactured soaps and dyes as incidental to its business; the court there used the following language: 'Its principal business, as properly stated by the court below, is washing and ironing, and in carrying on the business it needs soaps and dyes, and even if it does manufacture these two articles for its own use, instead of buying them, such manufacture does not make the "washing and ironing" concern a manufacturing plant and business as defined by statute, lexicon or judicial utterance.' "

In *Muir* v. *Samuel* (Ky.), 62 S. W. 481, the Kentucky Court of Appeals said:

"The validity of this claim depends upon the question as to whether the laundry is a manufacturing establishment under the statute. The only business of a laundry is to transform soiled into clean linen. It is true that this is done largely by means of machinery, and requires the use of an engine and boilers, and other appliances ordinarily used in manufacturing establishments; but, after all, nothing new is produced."

It follows, from what has been said, that we find no merit in appellant's contention that laundry and dry cleaning machinery are manufacturing or processing equipment within the meaning of the Arkansas statutes herein discussed.

Affirmed.

5-3036 371 S. W. 2d 511

Opinion delivered October 21, 1963.

[redacted]

Spitzberg, Bonner, Mitchell & Hays, by *Steel Hays* and *Allan W. Horne,* for appellant.

Lookadoo, Gooch & Lookadoo, by *J. Hugh Lookadoo* and *Agnes F. Ashby,* for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation involves (a) the will of Sam Miller; and (b) his marital status. Sam Miller departed this life, a citizen and resident of Clark County, Arkansas, in 1958, at the age of 78 years. In due time his will was admitted to probate by the Clark Probate Court, and his son, Marvin Miller, named as executor, proceeded to act under the will. Within the period permitted by law (Ark. Stat. Ann. § 62-2114 [1947]) the appellants objected to the will and questioned the marital status of the deceased, Sam Miller. The probate court ruled against the appellants on all points; and this appeal ensued.

Until 1919 or 1920, Sam Miller lived in Kentucky, and was married to the appellant, Dinah Miller in 1901. Three children are the issue of that marriage, being the appellants herein, Casper Miller, Frances Miller Speak,

and Mary Miller Barraco.[1] In 1919 or 1920 Sam Miller left his wife and three children in Kentucky and moved to Arkansas; and on July 11, 1920, he married Ethel Dodd in Garland County, Arkansas; and four children are the issue of that marriage, one of whom is the appellee, Marvin Miller, executor of the will of the deceased, Sam Miller. Mrs. Ethel Dodd Miller departed this life a few years ago; and Mr. Miller did not thereafter remarry. From 1922 until his death in 1958 Sam Miller lived in Gurdon, Clark County, Arkansas. His will was executed October 23, 1958; and he died on November 28, 1958. We proceed to consider the two issues on this appeal.

I. *The Validity of the Will of Sam Miller.* In the will Mr. Miller left his entire estate to his four children who were the issue of his second marriage. He named his Kentucky children in the will by using this language:

"I am not unmindful of the fact that I have three children by a previous marriage, namely Casper Miller, Frances Miller, who is now married to someone I do not know, and Mary Miller, who is also married to someone I do not know. I direct that they shall have nothing from my estate."

The Kentucky children do not claim as pretermitted heirs: rather, their claim is based on the assertion that Mr. Miller was under the complete influence and domination of his son, Marvin Miller, and that the will was the result of duress exercised by Marvin Miller on his father. The evidence entirely fails to substantiate such attack on the validity of the will. It was shown that Mr. Miller had executed a will in 1957 in which he did not name the Kentucky children; that when he showed this will to his son, Marvin Miller, to discuss with him the duties of an executor, Marvin Miller pointed out that the Kentucky children, not being named in the 1957 will, would take as pretermitted heirs. Mr. Miller thereupon contacted his attorney and the 1958 will was prepared. Mr. Miller took the 1958 will from his attorney and went,

[1] We will sometimes hereinafter refer to the appellants, who are children of Mrs. Dinah Miller, as "the Kentucky children."

alone and unassisted, to the First National Bank in Gurdon; and there, in the Bank, called on Mr. Willard Tarpley and Mrs. Joe Davis to attest his will. These parties called as witnesses testified that Mr. Miller signed the will in their presence, and asked them to be attesting witnesses, and they signed the will as such witnesses in his presence and in the presence of each other. Each witness testified that Mr. Miller knew what he was doing and that he was not accompanied by any person. There is no evidence of any duress exerted by Marvin Miller on Mr. Sam Miller: the positive evidence is entirely to the contrary. The Probate Court was correct in sustaining the validity of the will of Mr. Miller.

II. *The Dower Claim of Mrs. Dinah Miller.* Mrs. Dinah Miller claimed that she and Sam Miller were lawfully married in Kentucky in 1901; that they were never legally divorced; and that she was entitled to dower. It was stipulated that Sam Miller and Dinah Miller were married in Rockcastle County, Kentucky, on April 26, 1901; that there was no record of any divorce proceedings between Sam Miller and Dinah Miller in the court records of Rockcastle, Harlan, or Bell County, Kentucky, or in the court records of Garland or Clark County, Arkansas, or in Windsor, Ontario, Canada. Mrs. Dinah Miller testified that she and Sam Miller were lawfully married in Kentucky; that they lived together as husband and wife for nineteen years and had three children (being the Kentucky children previously named); that they all the time lived in the State of Kentucky; that in 1920 Sam Miller went to Hot Springs, Arkansas, for treatment of an illness and remained there about a month; that when he returned to Kentucky the marital relationship was resumed; that he stayed at home about a month; that they had a general store and a farm of about 112 acres; that she joined with Sam Miller in a deed and other instrument in disposing of these properties; that he left and deserted her in 1920 and never came back; that she remained in Kentucky until 1923; that he never contributed anything to her support after 1920; and that she never received any notice of any kind that Sam Miller had instituted any divorce proceedings

against her in any place. Mrs. Dinah Miller was corroborated by some of the other parties as to the fact that Sam Miller left in 1920, and was also corroborated on some other points.

The big question in this case is whether the appellant, Mrs. Dinah Miller, has offered sufficient proof to overcome the presumption of the validity of Sam Miller's marriage to Ethel Dodd in Garland County, Arkansas, on July 11, 1920. The marriage certificate, with the return of the officiating minister thereon, and the recording by the County Clerk, was duly introduced in evidence. With the marriage to Ethel Dodd in 1920 being established, there is a presumption that it was a valid marriage, and the burden was and is on Mrs. Dinah Miller to prove that marriage to be void if Mrs. Dinah Miller is to receive any dower interest in the estate of Sam Miller. She attempted to prove the invalidity of the 1920 marriage to Ethel Dodd by proving (a) her own valid marriage to Sam Miller in Kentucky in 1901; and (b) the complete negation of any divorce granted Sam Miller from her or to her from him. The Trial Court held that Mrs. Dinah Miller had failed to offer sufficient proof to overcome the presumption of the validity of the second marriage; and the correctness of that holding is the issue on this appeal.

We have several cases bearing on the question presented, some of which are: *Estes* v. *Merrill,* 121 Ark. 361, 181 S. W. 136; *Lathan* v. *Lathan,* 175 Ark. 1037, 1 S. W. 2d 67; *Spears* v. *Spears,* 178 Ark. 720, 12 S. W. 2d 875; *Gray* v. *Gray,* 199 Ark. 152, 133 S. W. 2d 874; and *Shaw* v. *Brewer,* 234 Ark. 898, 356 S. W. 2d 17. Throughout all of our cases the rule is reiterated (as stated in *Gray* v. *Gray, supra*):

"The law is well settled that, where a second marriage is established in form according to law, a presumption arises in favor of its validity as against a former marriage, even though the husband or wife (as the case may be) of the former marriage is living at the time the second marriage is brought into question. It has been said by this court that the presumption of validity at-

tending the second marriage is not overcome by the presumption of law in favor of the continuance of the first marital relation, coupled with the testimony of the former spouse that he or she has not obtained a divorce."

In *Lathan* v. *Lathan, supra,* Justice McHaney reviewed our earlier cases and showed the strength of the rule by this quotation from *Estes* v. *Merrill, supra*:

" 'So strong is the presumption and the law is so positive in requiring the party who asserts the illegality of a marriage to take the burden of proving it, that such requirement obtains, even though it involves the proving of a negative, and although it is shown that one of the parties had contracted a previous marriage, and the existence of the wife or husband of the former marriage at the time of the second marriage is established by proof, it is not sufficient to overcome the presumption of the validity of the second marriage, the law presuming rather that the first marriage has been dissolved by divorce, in order to sustain the second marriage.' "

In *Spears* v. *Spears, supra,* Justice Mehaffy indicated how great a burden was placed on the party attacking the second marriage. There, as here, the first wife claimed the subsequent marriages were invalid and that she had introduced sufficient proof to overcome the presumption of the validity of the subsequent marriages; and Justice Mehaffy said:

"However, the proof does not show that Spears did not obtain a divorce in some county in Florida besides the one whose records were searched; it does not show that he did not get a divorce somewhere in Tennessee in some county other than Shelby or Tipton, and the proof does not show that he did not get a divorce in some county in Arkansas. While the law requires a residence in a State for a certain length of time, it is not required that the party bringing the suit reside in the county where he brings the suit for this length of time. One might reside in Jefferson County, Arkansas, a year or more, and then establish a residence in Cleveland County, or some other county in Arkansas, where he

could obtain a divorce, and then move his residence back to Pine Bluff. . . .

"We think the presumption that the marriages of Spears were innocent is also strengthened by the conduct of appellee and her people. . . . Her conduct, as well as the conduct of her people, is a very strong circumstance tending to show that she had no claim on Spears, and it supports the presumption that Spears' conduct was not unlawful, but that he had obtained a divorce somewhere, and that his marriages in Pine Bluff were lawful."

Applying the rule of the foregoing cases[2] to the case at bar leads us to the conclusion that the Chancery decree was correct. Sam Miller left Kentucky in 1919 or 1920. His mother continued to live with Mrs. Dinah Miller for a short time. Later, in about 1922 or 1923, Sam Miller's mother moved from Kentucky to Gurdon, Arkansas, and lived there with Sam Miller until her death several years later; and her body was returned to Kentucky for burial. It was stipulated that Mrs. Dinah Miller knew of the whereabouts of Sam Miller and his family since 1922; and it was further stipulated that the character, veracity, and integrity of Sam Miller was good. In 1944 some of his Kentucky children came to Gurdon, Arkansas, to visit him, and he subsequently corresponded with them. They knew of his marriage to Ethel Dodd Miller, and met and knew some of the children of that marriage. Yet the record fails to show that Mrs. Dinah Miller ever made any claim on Sam Miller in any way from the so-called desertion in 1920 until after his death. From 1920 to 1958—for 38 years—Sam Miller claimed he was legally married to Ethel Dodd Miller, and during all those 38 years neither Mrs. Dinah Miller, nor anyone for her, saw fit to question such marriage. Mrs. Dinah Miller had signed a deed or other instrument with Sam Miller in 1920 disposing of the lands in Kentucky; but no copy of that instrument was

[2] Our cases are in accordance with the holdings generally. See 35 Am. Jur. p. 322, "Marriage" § 216; and see annotation, "Presumption as to validity of second marriage," in 14 A.L.R. 2d p. 7.

introduced by her to show the capacity in which she signed; that is, as wife or divorced wife.

It was stipulated that the court records in certain of the counties in Kentucky, as previously named, showed no divorce proceedings between Sam Miller and Dinah Miller; but that stipulation did not negative the possibility of divorce in any of the other counties in Kentucky. In *Johnson* v. *Johnson,* 12 Bush 485 (1877), and in *Tudor* v. *Tudor,* 101 Ky. 530 (1897), the Supreme Court of Kentucky held that the defendant in an action for divorce, by failing to plead or object to the jurisdiction on account of the suit not being in the county of the residence of the female defendant, waives the jurisdiction of venue, and the court will have complete jurisdiction to hear and determine the case on its merits. One or the other of these early Kentucky cases has been cited with approval in many subsequent Kentucky cases, some of which are: *Gorin* v. *Gorin* (1942), 292 Ky. 562, 167 S. W. 2d 52; *Smith* v. *Smith* (Ky. 1951), 242 S. W. 2d 860; and *Jones* v. *Jones* (Ky. 1959), 320 S. W. 2d 124. We mention this to show that the mere fact that no divorce proceedings were in three of the counties in Kentucky did not negative in any way the possibility of divorce proceedings in other counties in Kentucky. Of course, any divorce granted would have to be a valid divorce *Orsburn* v. *Graves,* 213 Ark. 727, 210 S. W. 2d 496; but if Sam Miller and Mrs. Dinah Miller had a divorce proceeding in any county in Kentucky and she did not raise any question of jurisdiction or venue, then the divorce would be valid. The burden resting on Mrs. Dinah Miller to show the entire absence of any legal divorce was not discharged by the stipulations and proof in this case.

It would unduly prolong this opinion to further detail the evidence. We conclude that the Chancery decree was correct and it is in all things affirmed.

Opinion delivered October 21, 1963.

Lowe, Moore & Webber, for appellant.

Bruce Bennett, Attorney General, by *Jack L. Lessenberry,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. This is an appeal from a judgment upon a verdict finding the appellant guilty of second degree murder and fixing his punishment at imprisonment for eighteen years. Counsel for the accused present a number of contentions for reversal.

Audie Brock, the appellant, and John Morgan O'Neal, Jr., the deceased, lived about half a mile apart on the same road. On September 5, 1962, Brock and a helper were attempting to clean out a culvert in front of O'Neal's property. When a dispute arose about the disposal of the trash Brock went home and returned with a loaded shotgun. Upon a renewal of the argument Brock shot and killed O'Neal while the latter was standing in his front door. O'Neal also had a weapon, but

whether Brock acted in self-defense was a disputed question of fact for the jury.

According to the testimony Brock fired one time only. There was some proof, however, that as many as a dozen buckshot were found in O'Neal's body and in the door facing. One of the jurors, W. C. Storey, worked in a hardware store. Counsel for the accused, in a supplemental motion for a new trial, offered to prove by Storey himself that during a recess in the trial Storey had obtained and taken to the jury room a printed card indicating that shotgun shells of a certain brand contain only nine buckshot. It is argued that the jury may have concluded, to Brock's prejudice, that Brock testified falsely when he said he fired only once.

The application for a new trial was properly denied, because the only testimony offered—that of Storey—was incompetent. In a criminal case a juror cannot be examined to establish a ground for a new trial except to show that the verdict was reached by lot. Ark. Stat. Ann. § 43-2204 (1947); *Post* v. *State,* 182 Ark. 66, 30 S. W. 2d 838. The policy of the statute, which affords the jurors the protection of secrecy in their deliberations and also gives stability to verdicts, needs no defense.

Counsel seek to avoid the effect of the statute by urging us to follow certain cases from other jurisdictions, holding that it is permissible to impeach a verdict by proving misconduct that occurred outside the jury room. In the first place, the cited cases were decided at common law and did not involve a prohibitory statute like ours. Secondly, the important point is not that Storey obtained the card at his place of business but that the matter was discussed by the jurors. Hence whatever misconduct there may have been occurred in the jury room; so even under the cases cited Storey's testimony was not admissible.

Both a regular panel and a special panel of veniremen had been prepared by the jury commissioners. In supplementing the regular panel the trial judge had the special list opened and selected seven of the twenty-five

veniremen. These seven were not the first seven on the list; they were numbers 6, 8, 10, 15, 17, 19, and 24. When this method of selection was later questioned by counsel for Brock the court explained that he had chosen the ones who in his opinion would most likely be available for service. Later on, when it became necessary to supplement the panel again, the court passed over the names of two men, one because he lived in a remote section of the county and the other because he was over sixty-five and had twice claimed his exemption. It is now insisted that the court's failure to have the veniremen summoned in strict numerical order entitles the accused to a new trial.

We find no prejudicial error. The statute does not affirmatively direct that the special panel be summoned in exact numerical order. Ark. Stat. Ann. § 39-221 (Repl. 1962). In *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643, we recognized the trial judge's wide discretion in the matter and pointed out that he may properly avoid unnecessary delay or unnecessary expense. Hence it is often proper for the trial judge, for good cause, to pass over the name of a particular venireman. On the other hand, we do not approve the procedure, followed below, by which the trial judge selected seven veniremen without regard to numerical order and for reasons known only to the judge himself. It does not appear, however, that the accused was compelled to accept any juror who was not qualified and impartial. Inasmuch as it is not shown that Brock's right of peremptory challenge was exhausted he is not in a position to complain of the method that was used. *Rogers* v. *State,* 133 Ark. 85, 201 S. W. 845.

The court's instructions are attacked upon a number of grounds, but we think they correctly stated the law. The jury were properly told that if the killing had been proved beyond a reasonable doubt the burden of proving circumstances of mitigation devolved upon the accused. *Hogue* v. *State,* 194 Ark. 1089, 110 S. W. 2d 11. The case at bar is unlike *Mode* v. *State,* 231 Ark. 477, 330 S. W. 2d 88, for here the court did not require that the defense

be proved by a preponderance of the evidence. The concluding portion of the court's charge on self-defense is challenged, but its language was substantially similar to that approved in *McKinney* v. *State*, 140 Ark. 529, 215 S. W. 723. The other attacks upon the instructions are not sufficiently meritorious to require discussion.

Affirmed.

HARDY *v.* ROSS.

5-3068 371 S. W. 2d 522

Opinion delivered October 21, 1963.

Arnold & Hamilton, for appellant.

James A. Ross, for appellee.

PAUL WARD, Associate Justice. This appeal, involving the probation of a will, presents a unique legal question in this state. The pertinent facts are not in dispute.

On September 8, 1910 Ruth Harris, eighteen years of age and unmarried, executed her will leaving the bulk of her property (real and personal) to her mother. Soon thereafter she became mentally incompetent and remained in that condition the rest of her life. Upon the death of Ruth in 1960 her will was admitted to probate over the objections of appellants who would have inherited part of the property had there been no valid will.

Appellees are the heirs of Ruth's mother and, if the will is sustained, will get the property, amounting to some $20,000 in realty and some $40,000 in personalty.

The ground on which appellants objected to probation of the will and on which they seek a reversal is set out below.

In 1910 (when the will was executed) a woman who was under 21 years of age had no power to execute a will conveying real property. The applicable statute on that date was Ark. Stat. Ann. § 60-102 (1947)—enacted in 1835. About eleven years before Ruth Harris died the law was changed by statute to provide that "any person of sound mind eighteen years of age or older may make a will". This statute was passed in 1949 and is now Ark. Stat. Ann. § 60-401 (Supp. 1961). It appears to be conceded by the parties (and we so hold) that if the 1835 statute governs the validity of the will this case must be reversed, but that it must be affirmed if the 1949 statute governs.

It seems to be the contention of appellants that the statute in effect when a will is executed always governs its validity. To sustain their position appellants point out that § 60-401 (a section of Act 140 of 1949) was held not to be retroactive in the case of *Adams* v. *Hart,* 228 Ark. 687, 309 S. W. 2d 719. That opinion, where this Court was concerned with jurisdiction of heirship, said that Act 140 is not retroactive. On the other hand appellees appear to contend that, in determining the validity of a will, the applicable statute in force when the testator dies is always controlling. In support of their position appellees quote from *Wilson* v. *Greer,* 50 Okla. 387, 151 Pac. 629, 129 ALR 864:

"A will is ambulatory during the life of its maker. It is, in effect, reiterated as his testament at each moment of his life after its execution, including the last moment, and is governed by the law existing at the time it takes effect, which is at the time of the testator's death."

They also quote from *Wakefield, Ex'r.* v. *Phelps, Appt.*, 129 ALR 864, 37 N. H. 295, this statement:

"A will does not take effect, nor are there any rights acquired under it, until the death of the testator; and its construction and validity depend upon the law as it then stands."

They also quote to the same effect statements found in 57 Am. Jur. *Wills* § 61 and 68 C. J. *Wills* § 252.

After careful consideration of the scant authority we have been able to find bearing on the issue here presented, we have reached the conclusion that the governing statute (the one in force when the will is executed or the one in force when the testator dies) depends upon the factual situation of each particular case.

In reaching the above conclusion we approve the reasoning used and the result reached in the case of *Hoffman* v. *Hoffman, et al.*, 26 Ala. 535 (1855). The basic facts in the cited case were: Jacob Hoffman executed his will in 1848 with *two* attesting witnesses when the law in effect at that time required *three* witnesses. Before Hoffman died the law had been changed to require only *two* witnesses. The Supreme Court, in holding the will valid under the law in effect at the date of death of the testator, made the following statements:

"The Legislature unquestionably have the power to prescribe rules for the execution of wills, before a right has been vested in the devisee, legatee, or heir, by the death of the testator; and it was, therefore, entirely competent for them to fix the number of witnesses which were essential to the validity of any will, whether made before or after the passage of the statute; and in this aspect, the question is one of statutory construction simply.

* * *

"If the statute had increased the number, and thus superadded a condition, we should then say, as the Court of King's Bench said in relation to the statute of Car.

II, that it applied only to wills made after its passage; but when its object is, not to abridge, but to enlarge the privileges of the testator, and to give effect to his will, then it falls within the principle by which devises, made in words which, by Legislative construction alone, include lands subsequently acquired, are extended to wills made before the law took effect."

In line with the above, the rule is well stated in 57 Am. Jur. *Wills* § 230:

"Since no rights in property disposed of by will vest in others prior to the death of the testator, changes in the statutory requirements in respect of the method of the execution of a will may be made applicable to the will, previously executed, of a testator living when the amendatory statute became effective, without violating constitutional provisions protecting vested rights."

We are in complete agreement with the statement contained in the first quotation from the *Hoffman* case above and when applied to the facts in the case under consideration we find it unnecessary to hold (as suggested by appellants) that § 60-401 operates retrospectively to amend § 60-102. Rather, we are merely applying § 60-401 to a situation that arose only when Ruth Harris died—*i.e.* after said section was enacted. The above situation is one where it is proper to apply the statute in force when the testator dies.

The last quotation from the *Hoffman* case above refers to a situation where it would be proper to apply the statute in force when the will was executed. If a will is executed in compliance with all requirements of the statute then in effect it obviously would be unreasonable and against the public interest for such will to be invalidated by a subsequent statute. In no event should such result be sanctioned unless the subsequent statute specifically provides that all preexisting wills (made in accordance with the former statute) are void. Any other conclusion would make the validity of all existing wills subject to the whim of every convening legislature.

In conformity with what we have previously said, we conclude that Ruth Harris' will was valid under the provisions of said § 60-401, and that the trial court correctly admitted said will to probate.

Affirmed.

MOSS *v.* EL DORADO DRILLING CO.

5-3070 371 S. W. 2d 528

Opinion delivered October 21, 1963.

[Rehearing denied Nov. 26, 1963.]

Brown, Compton & Prewitt, for appellant.

Shackleford & Shackleford, for appellee.

SAM ROBINSON, Associate Justice. On November 25, 1960, appellant, Jerry Moss, while working as a roughneck (laborer in drilling oil wells) for the El Dorado Drilling Company, received an injury to his back. He was awarded workmen's compensation benefits for loss of time to April 3, 1961. Further compensation was

denied by the Workmen's Compensation Commission on the ground that he had fully recovered from the injury sustained. Moss has appealed contending that he is still disabled. The issue is whether there is substantial evidence to sustain the finding of the Commission. Incidentally, in its opinion the Workmen's Compensation Commission states: ". . . The Full Commission finds that the Referee's Opinion is supported by substantial evidence and should be and is hereby affirmed." We take this occasion to point out that it is the duty of the Commission to make a finding according to a preponderance of the evidence, and not whether there is any substantial evidence to support the finding of the Referee. *Chicago Mill & Lumber Co.* v. *Fulcher,* 221 Ark. 903, 256 S. W. 2d 723; *Stout Construction Co.* v. *Wells,* 214 Ark. 741, 217 S. W. 2d 841.

Appellant is 28 years of age, is married, and has two children. From the evidence it appears that he has been working and making his own living since he was 15 years of age. He worked as a roughneck in the oil fields in 1949. In 1951 he joined the Army and served therein for four years. After his discharge from the Army in 1955, he again went to work in the oil fields and worked as a roughneck until he was injured on November 25, 1960, while working for appellee.

The occupation of roughneck is hard work; it requires heavy lifting, twisting, turning, bending, and climbing oil derricks. On the day he was injured, Moss was working up in a derrick about 55 feet from the ground. Some of the pipe used in connection with the drilling operation was standing upright within the framework of the derrick. A large pulley block struck the side of the derrick causing the pipe to fall. Around his waist appellant had a safety belt which was secured to the derrick by a rope. The pipe fell against this safety rope giving appellant a violent jerk and threw him against the derrick. The safety rope, one end fastened to the derrick and the other to appellant's safety belt, was supporting the heavy pipe. Other roughnecks

climbed the derrick, released appellant, and lowered him to the ground by means of an elevator. The accident occurred about 5:45 a.m. Although suffering pain in his back, appellant stayed on the job on the ground until the end of the shift which ended about 45 minutes later, at 6:30 a.m.

Just as soon as he got home, Moss phoned his employer and told him that he thought he should go to a doctor. The employer referred him to Dr. A. D. Cathey. He went to see the doctor about 7 o'clock a.m. that same morning. Dr. Cathey treated him for several days, but at the end of that time appellant did not feel that he was any better. He then went to see Dr. G. D. Murphy, who treated him until January 11, 1961, at which time Dr. Murphy wrote to the insurance carrier as follows: "The above captioned individual has failed to respond to treatment given him for back injury. It is my recommendation that he see an orthopedist in Little Rock, Arkansas for consultation and evaluation. I would like to make an appointment for him to see Dr. Elvin Shuffield in Little Rock at an early date."

Appellant was then referred to Dr. Shuffield in Little Rock. He treated appellant at various times, and finally, on March 27, Dr. Shuffield wrote to Dr. Murphy and among other things stated: "He [appellant, Moss] was discharged from the Arkansas Baptist Hospital on February 24, 1961, at which time the shape of his spine was found to be good. His muscle spasm was gone, and he had a very good range of motion. I do not think there is any doubt but what this man does have a congenital malformation of the lumbosacral spine. I think he has had a temporary period of total disability because of aggravation of a pre-existing condition. I think that has now improved to where he should be given a trial of work, to see for sure whether or not he is going to have any permanent disability. If you can get close to this man and re-assure him that he is not badly hurt, I think it will go farther toward helping him than anything I know of. He seems to have the utmost confidence in

you, and what you have done for him, but I believe we are going to have a real problem in getting this man back to heavy construction work. I am of the opinion that his back is structurally weak from the congenital malformation, and his back is such that it will be easily injured, and when it is injured it will be slow in making recovery."

Just three or four days after the date of Dr. Shuffield's letter recommending that appellant "be given a trial of work to see for sure whether or not he is going to have any permanent disability", Dr. Murphy "discharged the patient as cured" on March 31, 1961. Dr. Shuffield did not say the man had recovered, he merely recommended that Dr. Murphy should endeavor to get him to return to work to see whether his back would stand up to the job.

The insurance carrier cut off the compensation as of April 3, 1961. Moss went back to appellee drilling company for which he was working at the time he received the injury, but appellee company would not put him back to work because the driller considered that he had not recovered sufficiently to do the work of a roughneck.

Since compensation had been stopped and appellant had a wife and two children he had to do something, so he moved in with his brother-in-law in Haynesville, Louisiana, and applied to the Wheelis Drilling Company for a job without mentioning his disability. He was put to work as a roughneck. Later, the Wheelis people said that if they had known about his disability they would not have put him to work. The very first day he worked for Wheelis, and the first time he attempted to lift anything heavy, as he was required to do as a roughneck, his back gave way and he could no longer continue on the job.

At the time of the hearing before the Referee, appellant was again referred to Dr. Shuffield for an examination. Dr. Shuffield reported: "It is my opinion that

this man apparently has had a new injury while lifting a muffler on April 29, 1961, while working for Wheelis Drilling Company. At this time I do not find any evidence of any permanent partial disability, and I think this man is capable of doing his work. However, in view of the congenital malformation of the lumbosacral spine, I do not think he should try to do any extremely heavy lifting, because his spine is notorious for being the type that will not hold up under heavy work. I recommend that he contact the Vocational Rehabilitation program, and try to learn some trade where he can make a living without having to do heavy lifting and straining."

It will be noticed that Dr. Shuffield states his opinion to be that appellant is able to do "his work". "His work" is that of a roughneck in the oil fields—a job which requires hard manual labor such as the lifting of heavy objects; and yet, Dr. Shuffield also states that he does not think the man should "do any extremely heavy lifting" because of the congenital malformation of his lumbosacral spine. It does not appear that the congenital malformation of appellant's spine had disabled him in any manner whatever prior to the time his back was injured while working on the derrick November 25, 1960.

Appellant was 28 years of age at the time he was injured; he had been making his living by hard manual labor since he was 15; he had served four years in the Army, and it is a matter of common knowledge that the training and duties of a soldier are not too easy on the back. Moreover, he had worked as a roughneck in the oil fields regularly for about five years at the time he was injured. There is not a scintilla of evidence that he ever had any trouble with his back prior to the injury. All the evidence is to the contrary.

After appellant received his second injury—the one he received the first day he worked for Wheelis, April 29, 1961—he went to Dr. George Byram of Haynesville, Louisiana. After examining appellant and making X-ray studies of his back, Dr. Byram referred him to "The

Orthopedic Clinic'' at Shreveport. Dr. Byram reports that in his opinion, appellant has a back injury secondary to a possible premature return to work following the first injury and to a congenital defect in the lumbar spine.

Dr. Carson R. Reed, Jr. of the Orthopedic Clinic reported: ''It is thought that he [appellant] had not recovered from his initial injury when he again aggravated his lumbarsacral region by lifting.'' Dr. Reed further stated that appellant was totally disabled for heavy work at that time, May 25, 1961. In December, 1961, Dr. J. B. Wharton of El Dorado reported that in his opinion the original injury received by appellant in November, 1960, was the greatest cause of the aggravation of the pre-existing deformity of the lumbar spine.

We do not believe that Dr. Murphy's opinion that appellant had made a complete recovery on March 31, 1961, as shown by his report to the insurance company, can be said to be substantial evidence to sustain the finding of the Commission in view of all the other evidence in the case. It will be recalled that Dr. Murphy had referred appellant to Dr. Shuffield, and only three days before Dr. Murphy states that the appellant had fully recovered, Dr. Shuffield had suggested to Dr. Murphy that he endeavor to get appellant to work on a trial basis to see whether he had recovered.

True, at a later date, in July, 1961, Dr. Shuffield gave a statement to the effect that in his opinion appellant was able to do ''his work'', but in the same breath Dr. Shuffield says he should not attempt to do heavy work. The only work appellant knew how to do was heavy work; he had done that kind of work all his life. It *was* ''his work''.

Now as to the applicable law. The fact that appellant has a congenital malformation of the spine—a weak back—is not in itself a valid defense to his claim for compensation, since such condition was aggravated by the injury he received on November 25, 1960, according

to the undisputed testimony, for which injury he was paid four months compensation. *Quality Excelsior Coal Co.* v. *Maestri,* 215 Ark. 501, 221 S. W. 2d 38; *Starrett* v. *Namour,* 219 Ark. 463, 242 S. W. 2d 963; *Bryant Stave and Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436; *Hamilton* v. *Kelley-Nelson Const. Co.,* 228 Ark. 612, 309 S. W. 2d 323.

Next we come to the question of whether the disability is to be attributed to the first injury where there was a second injury, as in the case at bar. In *Aluminum Co. of America* v. *Williams,* 232 Ark. 216, 335 S. W. 2d 315, this court quoted with approval from 99 C.J.S. 607, as follows: " 'If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury received, such further disability is compensable. Thus, where an employee suffers a compensable injury and thereafter returns to work and as a result thereof his injury is aggravated and accelerated so that he is further disabled than before, he is entitled to compensation for his entire disability.' " And the court further quoted from Larson on Workmen's Compensation Law, Vol. 1, § 13.00: " 'When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own negligence or misconduct.' " And from 58 Am. Jur. 775: " 'A subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury.' "

In 99 C.J.S. 605, it is said under the heading of "Dual Contributing Causes": "To authorize a recovery of compensation, it is not sufficient to show that the injury resulted from one of two causes, but the claimant must show that the proximate cause was one for which the employer would be liable; and as between two accidents, the question whether a disability should be attrib-

uted to the first or second, depends on the circumstances of the case."

It is firmly established by the great weight of authority that if the second injury is a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury. See annotation 102 A.L.R. 790, and the many cases cited therein.

In *Quinn* v. *Henry Becker & Son,* 21 A. 2d 617, the court said: "Where a primary industrial accident causes a fracture which does not unite or results in poor boney union and therefore a weakened condition exists so that a secondary or subsequent event causes the disability to be prolonged, the original accident is responsible for the ultimate resultant condition."

In *Kennedy* v. *Alaska Industrial Board,* 138 F. Supp. 209, the employee received an injury to his back while working in San Francisco in 1949. Subsequently, he worked for several different concerns. On April 14, 1952, while employed by Sullens & Hoss Timber Company at Rocky Bay, Alaska, the applicant and another man were lifting a part of a planer weighing approximately 400 pounds when applicant felt something snap in his low back. An operation followed with a spinal fusion. There, it was held that disability was due to the injury he received while working for the Koenig Lumber Company in San Francisco three years previously.

There is no question about appellant receiving an injury to his back on November 25, 1960 while working in the due course of his employment as a roughneck for appellee, El Dorado Drilling Company. There is no question about appellee being disabled by reason of such injury to March 31, 1961. There is no question about appellant hurting his back again on April 29, 1961 when he was helping lift a muffler while working for Wheelis. The only question is whether the disability suffered while working for Wheelis was a new injury, or was it an aggravation of the injury he received while working for

appellee, El Dorado Drilling Company. All the circumstantial evidence and the testimony of appellant, along with the testimony of Dr. Byram, Dr. Reed, and Dr. Wharton, tends to prove that the disability of the claimant is due to the first injury. As heretofore pointed out, there is no substantial evidence to the contrary.

The judgment is reversed with directions to the Circuit Court to refer the matter back to the Workmen's Compensation Commission for further proceedings not inconsistent herewith.

FITZHUGH *v.* ELLIOTT.

5-3073 371 S. W. 2d 533

Opinion delivered October 21, 1963.

Cole & Scott, for appellant.

Wootton, Land & Matthews, for appellee.

JIM JOHNSON, Associate Justice. This is a tort action for damages resulting from automobile collisions. On December 13, 1960, between 6:00 and 6:30 P.M., appellee J. Kathryn Elliott was driving a Ford car east on Page Avenue in Malvern, and turned north (left) into Olive Street. At the same time appellants were driving west. Appellant Marvin Holst, driving a Hudson car, was followed by appellant Rebecca Fitzhugh, driving a Buick. In the intersection appellee's car collided with appellant

Holst's car, which, being knocked back, collided with appellant Fitzhugh's car. Suit was filed February 15, 1961, and after answer, cross-complaint and amendments, the matter came to trial before the Hot Spring Circuit Court on August 20, 1962. After deliberation, the jury returned the following verdicts:

"We the jury, find the damages of the parties as being:

J. Kathryn Elliott	$1,500.00
Rebecca Fitzhugh	300.00

E. D. Yates, Foreman

"We the jury, find that the negligence which was a proximate cause of Mrs. Elliott's damages to be:

J. Kathryn Elliott	20%
Marvin Holst	40%
Rebecca Fitzhugh	40%
Total	100%

E. D. Yates, Foreman.

"We the jury, find that the negligence which was a proximate cause of Mrs. Fitzhugh's damages to be:

J. Kathryn Elliott	20%
Marvin Holst	40%
Rebecca Fitzhugh	40%
Total	100%

E. D. Yates, Foreman"

Appellant Fitzhugh moved the court to set aside the verdict against her, alleging that there was no evidence in the record to support a finding of negligence on her part, and the court reserved judgment on that verdict. On November 20, 1962, another motion to set aside the verdict and motion for new trial was filed on behalf of both appellants. After oral argument November 23, 1962, the court set aside the verdict against appellant Fitzhugh on appellee's cross-complaint, finding that there was no evidence in the record to support a finding that the in-

juries complained of in the cross-complaint were proximately caused by any negligence on the part of appellant Fitzhugh. The motion to set aside the verdict against appellant Holst was denied, as was the motion for new trial. The court gave appellee judgment against appellant Holst for $1,200.00, and gave appellant Fitzhugh judgment against appellee for $180.00. From the judgment comes this appeal. There is no cross-appeal from the directed verdict eliminating appellant Fitzhugh's liability.

For reversal appellants rely upon three points, two of which question the correctness of certain instructions and urge that the trial court erred as to the manner of submission and the verdict forms used. While it is true that the instructions could have been better worded and the verdict forms more detailed, we cannot under the peculiar facts in this case say that the action of the court with respect to these two points constituted reversible error. Appellant's third point urged for reversal causes us considerable concern. This point questions the correctness of the trial court's refusal to grant a new trial after having directed a verdict in favor of Mrs. Fitzhugh on Mrs. Elliott's cross-complaint.

The jury determined negligence of the parties to this action, apportioning the negligence among them so that it totaled 100%, which was proper. The trial court in its judgment reduced Mrs. Elliott's recovery on her cross-complaint by 20%, her negligence as determined by the jury, and reduced Mrs. Fitzhugh's recovery on her complaint by 40%, her negligence as determined by the jury. This is the proper procedure [under Ark. Stat. Ann. §27-1730.2 (Repl. 1962), *Peugh* v. *Oliger,* 233 Ark. 283, 345 S. W. 2d 610; *Walton* v. *Tull,* 234 Ark. 882, 356 S. W. 2d 20] in a case where negligence has been apportioned on the basis of 100%. In the case at bar, after the jury apportioned the negligence of Mrs. Elliott at 20%, Holst at 40% and Mrs. Fitzhugh at 40%, the court by directed verdict eliminated Mrs. Fitzhugh's liability of 40% in the cross-action of Mrs. Elliott. The court then

reduced Mrs. Elliott's damages of $1,500.00, as determined by the jury, by 20%, her own negligence, and rendered judgment against Holst for the entire $1,200.00. The practical result is that although the jury had found Holst to be only 40% negligent, the court granted judgment against him for 80% of the damages.

The general principle applicable here is set out in 53 Am. Jur., Trial, §1094, p. 758:

"While the practice of amending verdicts in matters of form is one of long standing, based on principles of the soundest public policy in the furtherance of justice, it is strictly limited to cases where the jury have expressed their meaning in an informal manner. The court has no power to supply substantial omissions, and the amendment in all cases must be such as to make the verdict conform to the real intent of the jury. The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. After the amendment the verdict must be not what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment."

In the present case, the jury made no informal expression whatever. It returned a formal verdict which the court, some months after the jury had been discharged, set aside in part. The setting aside of one part of the jury's finding of a single fact, *i.e.*, apportionment of negligence of the parties, leaves us with no clue as to what the jury's actual intent would have been had Mrs. Fitzhugh's negligence not been considered by them. Further, as we have seen, the court's action had the effect of doubling the liability of appellant Holst. The trial court's authority to set aside the jury verdict rendered against Mrs. Fitzhugh is manifest. However, we know of no authority, nor have we been shown authority, which would permit a court to modify a jury verdict on a question of liability and substitute its own. It is our

view that the additur in the present case increasing the verdict of the jury without the consent of the party prejudiced, if permitted to stand, would effectively deny that party the constitutional guaranty of trial by jury. It follows, therefore, that the judgment is reversed and the cause is remanded for a new trial.

HATCHETT *v.* ROBINSON.

5-3052 371 S. W. 2d 618

Opinion delivered October 21, 1963.

[Rehearing denied Nov. 18, 1963.]

U. A. Gentry, for appellant.

Opie Rogers and *N. J. Henley,* for appellee.

FRANK HOLT, Associate Justice. The appellants, M. V. Hatchett and Dorothy Dixon Hatchett, d/b/a Southern Ozarks Realty Company, brought this action to recover a real estate brokers commission from the appellees, Sam M. Robinson and wife, Leva Robinson. The jury returned a verdict in favor of the appellees from which verdict and judgment comes this appeal. For reversal appellants rely upon five (5) points, each of which relate to the refusal or the giving of instructions. In reversing this case we deem it necessary to discuss only two of these points.

The appellees were the owners of forty-five (45) acres of land near the City of Clinton, Arkansas. On July 10, 1956, the appellees, by written contract, gave to the appellants, as real estate brokers, exclusive listing of their property for the purpose of procuring a purchaser at a price of $13,000.00 with $5,000.00 required as down payment and the balance, with interest at six per cent (6%), to be paid at $75.00 per month. The contract provided for the payment of a commission of ten per cent (10%) of this sale price. It further provided for a like commission if sold "at any other price and on any other terms" acceptable to the appellees. The contract was an exclusive listing for a period of twelve (12) months from its date and to continue thereafter until thirty (30) days notice in writing was received by appellants. The contract also provided that if the listed property was sold to a purchaser procured by or through appellants after termination of the contract the full commission would be due the appellants. Appellants inserted an advertisement in a newspaper, the Commercial Appeal of Memphis, Tennessee, concerning various tracts of land they were authorized to sell and on July 11, 1957, Mr. and Mrs. H. G. McMillen, who lived in Tipton, Tennessee, wrote the appellants concerning lands in Van Buren County. As a result of correspondence between the McMillens and appellants, the McMillens came to Van Buren County on May 22, 1958 for the purpose of inspecting and purchasing property. On this date the appellants showed the McMillens the appellees' property and upon inspection the McMillens indicated they wanted to purchase this property provided they could dispose of their property in Tennessee.

After they returned to Tennessee additional correspondence ensued between appellants and the McMillens and in the last letter from the McMillens, on August 4, 1958, they advised appellants they were unable to sell their property but did have some prospects. In March, 1959, appellants wrote the McMillens but received no response. From August, 1958, until August 9, 1962 nothing further was heard from the McMillens. On this latter

date the McMillens appeared at the appellees' home and visited briefly. Upon their leaving Mrs. Robinson called appellants and advised them the McMillens were on their way to appellants' office to see them. The appellees contend that the subject of the sale of the property was not renewed nor discussed during this visit with the McMillens. The appellants contend that when the McMillens came by their office the subject was discussed. Further, when Mrs. Robinson called she importuned appellants to "do your best". Mrs. McMillen testified that at this time they had not been able to sell their property in Tennessee and, therefore, were not interested in purchasing the Robinson property. She testified that she and her husband, now deceased, were on a vacation and did not renew a discussion of their purchase of the property with either appellees or appellants. On September 8, 1962, or a month later, they came to the Robinson home and inquired if the property was still for sale as they were interested again since they had found a buyer for their property in Tennessee. The Robinsons, appellees, advised they would sell them their property for $11,500.00 cash, whereupon the McMillens inquired whether they should deal with the appellants. To this the Robinsons replied that they considered the exclusive listing terminated as of two years previously. This is denied by appellants. The McMillens agreed to the purchase for $11,500.00 cash without contacting the appellants. The McMillens left town that day. The next day the appellees called the appellants and asked that they come to the appellees' home. When the appellants arrived they were advised by the appellees of the transaction with the McMillens and they wanted to have an understanding about the commission. Upon appellants' refusal to agree to a reduction in their commission the appellees proceeded to close the sale on September 12, 1962 without the proffered assistance of appellants. The appellants had shown the property to other prospective customers and at the reduced sale price of $12,000.00.

Upon appellees' refusal to pay the appellants a commission of ten per cent (10%) on the sale price of this

property, the present action was instituted. The appellees took the position that the appellants did not procure the McMillens as purchasers and further that the contract was modified by oral agreement from an exclusive to an open listing.

On appeal appellants assign as error the giving of Defendants' Instruction No. 3 which reads as follows:

"Gentlemen of the jury, the plaintiffs seek to recover a commission from the defendants based upon an exclusive listing contract for the sale of the real property belonging to the defendants. The plaintiffs allege that they procured a purchaser for said lands by virtue of the authority given them by the listing contract, and are, therefore, entitled to their commission as set forth in the contract. In this connection, you are further instructed that before you would be warranted in finding for the plaintiffs, M. V. Hatchett and Dorothy Dixon Hatchett, you must find from a preponderance of the evidence that the plaintiffs procured a purchaser for the real estate involved in this cause who was ready, able and willing to buy the lands so listed upon the terms stipulated in the contract, and unless you so find, your verdict should be for the defendants, Sam M. Robinson and Leva Robinson."

Proper specific objection was made to this instruction by appellants. The instruction was both abstract and confusing in that it tells the jury a purchaser must be found ready, able and willing to buy when it is undisputed that the property was paid for in cash by purchasers who were originally discovered by appellants through their advertising and later contacts and showing of the property. We said in the case of *Sharp* v. *West,* 176 Ark. 616, 3 S. W. 2d 692, that: "* * * There could be no better evidence of one's being ready, able and willing to buy than the fact that he did actually buy."

The instruction also provided that the purchasers procured must be ready, able and willing to buy *upon the terms stipulated in the contract* or the verdict should

be for the defendants. The contract provides for the payment of a commission if sold on the stated terms of $13,000.00 [$5,000.00 down payment and balance at 6% interest payable $75.00 per month]. It also provides for payment of a commission "if sold at any other price and on any other terms" acceptable to appellees. The property sold for $11,500.00 cash. We think the Instruction should have made adequate reference to "other terms".

In the case of *Stiewel* v. *Lally,* 89 Ark. 195, 115 S. W. 1134, we said:

"There are authorities holding that, even where the owner, in order to make a sale to a purchaser brought by the agent, is compelled to vary the original price or terms, the agent is entitled to commission on the sale. [Citing cases] * * * We find nothing in the law as stated by the authorities which declares that the procuring agent shall be denied his compensation on account of a modification of the original terms as proposed to the agent."

Consequently the giving of this Instruction was erroneous and constituted reversible error.

The appellants further contend that the Court erred in giving Defendants' Instruction No. 4 which reads as follows:

"The defendants, Sam M. Robinson and Leva Robinson, contend as a matter of defense to plaintiffs' complaint that prior to the sale of said lands by defendants, it was agreed by and between plaintiffs and defendants that the exclusive listing contract, upon which plaintiffs action is based was modified by oral agreement to the extent that said listing would cease to be an exclusive one, and that same would continue as an open listing with the right in defendants to sell the land in question to anyone not procured by plaintiffs without liability to plaintiffs for a brokers commission. In this connection, you are further told that under the law that parties to any contract may modify it by an oral agreement. If you find from a preponderance of the evidence that

plaintiffs and defendants orally agreed to modify the original listing contract by changing the exclusive listing to an open listing agreement which would permit defendants to sell and dispose of their property to one not procured by plaintiffs, without liability to plaintiffs for a commission, your verdict should be for the defendants."

This instruction is abstract in that it instructs on matters not in the evidence. Proper specific objection was made to this instruction and it should not have been given under the facts in this case.

It is true that parties to a written agreement may orally modify the terms by *mutual* agreement or *consent* of the contracting parties. *Haering Oil Company* v. *Beasley,* 221 Ark. 607, 254 S. W. 2d 951. If there was a mutual agreement between the parties in the case at bar there is no evidence of such in the record before us. Mrs. Robinson testified that in a conversation with Mrs. Hatchett over the telephone she withdrew the exclusive listing and left it an open listing two years prior to the date of the sale of the property. Mrs. Hatchett denies this. Treating the testimony most favorably to the appellees, Mrs. Robinson does not state that Mrs. Hatchett *agreed* to the withdrawal of the exclusive listing. In effect, she states that she *advised* Mrs. Hatchett they were going to list the property with other agents.

The judgment is reversed and the cause remanded.

5-2987 372 S. W. 2d 234

Opinion delivered October 28, 1963.

[Rehearing denied December 2, 1963.]

[redacted]

Thomas B. Tinnon, for appellant.

Nell Powell Wright, for appellee.

CARLETON HARRIS, Chief Justice. The facts in this case are somewhat complicated. Appellant, H. W. Reed[1] has at all times pertinent hereto been the owner of some 6,000 acres of land in Baxter County. Carl W. Lee, one of the appellees herein, is a real estate broker, living in Bentonville, Arkansas. Reed did not actually list the 6,000 acres with Lee, but did authorize the latter to sell it. Reed also had for sale 532 head of cattle. During the months of June and July, 1961, Lee and another realtor, Omar Head, of Amarillo, Texas, (also an appellee herein) arranged a transaction by which Reed would exchange his Baxter County property for a Texas Hotel owned by Grey Investment Company of Eastland, Texas, (third appellee herein). Don Pierson was President of Grey. However, Reed, a resident of Alvarado, California, desired to dispose of his non-California investments, and he, therefore, would only agree to the trade if the hotel

[1] Mabel C. Reed, wife of H. W. Reed, is also an appellant, but has been treated throughout the litigation as only a nominal party, since no special pleadings have been filed on her behalf, nor any defense raised distinctive from that of her husband. We, accordingly, hereafter will use only the singular term, "appellant."

could also be sold. Head arranged a trade of the hotel for 2.4 acres in Amarillo, Texas, owned by J. W. Bragg of Amarillo, together with a monetary payment on the part of Bragg.

On August 7, 1961, two contracts were prepared in Head's office in Amarillo, both being dated August 8, since the 7th was a Sunday. Under the first contract, Reed agreed to trade his Baxter County land for Grey's hotel. The contract recited that the parties had deposited $5,000.00 with realtors Lee and Head, and further provided that these brokers would receive a total commission of $10,000.00 for their services. The provision reciting that $5,000.00 had been deposited was admittedly erroneous. Under the second contract, Reed agreed to trade the newly acquired hotel to Bragg in exchange for Bragg's 2.4 acres of land, and the sum of $130,000.00, payable in monthly payments of $780.00 each. This contract was executed by both Reed and Bragg at the time, but there is a notation on the agreement, "contingent on trade with Don Pierson." The contract between Reed and Pierson was not executed at that time; in fact, Pierson was not present, but was represented at the meeting by Head. Reed then flew back to California, taking both contracts with him.

The next day, August 8, Reed consulted his attorney, James R. Slaybaugh, lawyer of Hayward, California, and directed him to delete the erroneous recital about the $5,000.00 payment to Lee and Head,[2] and further instructed Slaybaugh to prepare a Supplemental Commission Agreement (hereinafter called S.C.A.), which provided that the $10,000.00 commission to be paid to Lee and Head (heretofore referred to) would only be paid when the 2.4 acres involved in the contract with Bragg had been sold at a net of $50,000 to Reed, such sale to be made within two years. Slaybaugh then inserted in the Reed-Grey contract a reference to the S.C.A. and mailed this contract and the S.C.A., both signed by Reed, to Head, directing that Head retain signed copies and re-

[2] Slaybaugh overlooked making this deletion.

turn copies of the contracts if acceptable. In chronological order the following events then transpired:

August 10: Head called Reed with reference to the S.G.A., stating that it was unacceptable and tried to get Reed to change the agreement. Reed refused to do so. It does not appear from the conversation, however, that either party considered that the S.C.A. had been definitely or finally rejected.

August 15: Because Reed had asserted that he did not have the cash money to pay the commission at the outset, Lee called Reed and suggested that $5,000.00 of the commission might be obtained from a sale of the cattle. Reed agreed.

August 16: Reed telegraphed Lee wherein he confirmed the conversation by which he agreed to pay $5,000.00 if the cattle should be sold for $85,000.00.

August 20: Lee obtained a firm offer from Norman Gibson, Weatherford, Texas, of $85,000.00 for the cattle.

August 24: Lee, Head, and Pierson signed the Reed-Grey contract.[3]

August 25: Lee contracted Clayton Little, an attorney of Bentonville, Arkansas, who called Slaybaugh relative to Lee's concern over the recitation that the brokers had already received $5,000.00. Lee desired to either receive the $5,000.00 or obtain an acknowledgment from Reed that the amount had not been paid.

August 28: Little again called Slaybaugh, and according to his (Little) testimony, told Slaybaugh that Lee had obtained the offer of $85,000.00 from Gibson for the cattle and further advised that the S.C.A. was acceptable to appellees, Lee and Head, "that we had everything completed on this end." Slaybaugh, subsequently, in a deposition, denied that he had been advised that

[3] The contract recited that Reed should pay Head and Lee "as per supplemental agreement" and that Pierson should pay to the brokers $10,000.00. The contract also contained the erroneous provision that brokers had already received $5,000.00 from Reed. Lee stated that he signed the contract because Pierson would not sign otherwise.

either the Reed-Grey contract or the S.C.A. had been accepted or executed. According to his testimony, the conversation related only to clarifying the S.C.A., and its effect upon the commission terms of the Reed-Grey contract. As he stated, "All this suggested to me that there had been no action taken by his clients at that time." In the deposition, Slaybaugh denied that he was an agent for Reed or had any authority to act for appellant in the matter.

August 29: Reed wired Little, Lee, and Pierson, withdrawing his offer to sell the Baxter County lands.

August 30: Lee and Head instituted suit against appellant, seeking judgment for $15,000.00 ($10,000.00 for the real estate transactions and $5,000.00 for the sale of the cattle).

September 20: Grey Investment Company, through its president, Don Pierson, instituted suit against appellant in the Baxter County Chancery Court, asking specific performance.

Following the filing of an answer and certain motions, the causes were consolidated for trial, and heard by the Chancellor. Thereafter, the Court made the following findings:

That the contract between Grey Investment Company and H. W. Reed was executed by all parties prior to the attempted cancellation by Appellant Reed through telegram from Reed's attorney, dated August 29, 1961; that Grey Investment Company was entitled to specific performance of the contract; that Head and Lee had agreed to the terms of the S.C.A., and their agreement was communicated to Slaybaugh prior to the attempted cancellation of the original contract; that the S.C.A. had been modified by communication between Reed on the one hand, and Head and Lee on the other, to the extent that these appellees would receive $5,000.00 of the commission at the time of the exchange of the Baxter County property for the hotel property, and that the remaining $5,000.00 of the commission would be due

upon the sale of the 2.4 acres of land in Amarillo, Texas, such sale to be made within a two-year period, and in an amount which would net Reed $50,000.00 after payment of the commission.

The court further found that Head and Lee were entitled to judgment for $5,000.00 already earned under the terms of the contract, but that they were not entitled to a commission for the sale of the cattle, inasmuch as Reed's agreement to pay the first $5,000.00 due (because of the sale of the Baxter County lands) was conditioned on Head and Lee securing a buyer for the cattle at the stipulated price; that these appellees did obtain such a buyer. From the decree entered embodying these findings, and directing Reed to immediately perform the contract dated August 8, 1961, appellant brings this appeal.

Appellant asserts that appellees did not agree to, or accept, the contract prior to the telegram that he caused to be sent on August 29, and, in his argument, Reed states that up until the time of the trial, no written communication, or signed copy of the Grey contract, or the S.C.A., was ever received by him. It is true that Lee and Head did not sign the S.C.A. and send it on to Reed, but they explained that this would have been futile, since the telegram was received from Slaybaugh (for Reed), revoking the offer to sell or exchange. Under the circumstances this explanation appears logical. For that matter, the terms of the S.C.A. were orally varied from time to time by the parties. Reed testified that on August 15 he had agreed that, if the cattle were sold, he would pay $5,000.00 "of it." He explained the "it" as relating to the Grey real estate transaction:

"Of the Ten Thousand Dollars on the real estate, on the supplemental agreement, right, instead of them waiting for that $10,000.00 they would get $5,000.00 immediately and the other five if and when they sold the land in Amarillo.

Q. Then as far as you were concerned if he sold the cattle at Eighty-Five Thousand Dollars ($85,000.00) it was a completed deal then?

A. That is right, if they accepted the supplemental agreement as revised to $5,000.00."

Pierson, Lee, and Head all testified that Pierson executed the contract on the 24th of August. Of course, Reed had already signed the contract with Grey Investment Company, along with the supplemental agreement, following his return to California, after viewing the property. Let it be borne in mind that there was no dispute between Reed and Pierson; the Pierson, or Grey Investment Company, contract was only being held up because Reed had demanded that his terms be met under the S.C.A. before the Pierson contract would become effective. In other words, the closing of all agreements was simply dependent upon Lee and Head accepting the S.C.A. The only additional requirement made by Reed (that the cattle would have to be sold if he paid the $5,000 immediately), of course, did not relate to the Grey Investment Company contract at all. Accordingly, the pertinent question in this litigation is whether Lee and Head accepted the S.C.A. Here, the testimony was in conflict. Clayton Little testified that Lee came to his office on August 25 and asked him (Little) to contact Mr. Slaybaugh, and tell the latter that Pierson had signed the contract, but that Lee was concerned over the fact that the contract recited that Reed had already paid $5,000 to this appellee. In calling Slaybaugh, Little also testified that he told the California attorney that Lee had a firm offer for the sale of the cattle. On August 28, Little again called Slaybaugh and told him that the supplemental agreement was acceptable to both Lee and Head, "and that he had at that time had the firm offer or completed the cattle sale contract for $85,000.00 and I again told Mr. Slaybaugh that now that everything was worked out I still wanted him to go ahead and send the $5,000.00 as called for in the contract or to send us a wire acknowledging that it hadn't been sent—that we had everything completed on this end."

Little said that Slaybaugh stated that he would convey the information received from Little to Reed.

Reed testified that he called Slaybaugh and asked if he had "heard anything," and that his lawyer replied, "No, nothing except that this other Attorney * * * had called him asking him about this Five Thousand Dollars ($5,000.00), to delete that and at that time he explained it was supposed to have been deleted at the time * * *." Reed stated that he then decided that "the deal is not going to go through" and he dictated the telegram advising that he was revoking the offer to sell. Slaybaugh testified that his conversation with Little related entirely to clarification of the supplemental agreement (the matter of the $5,000, heretofore mentioned). This was a question of fact, and the Chancellor accepted the testimony of Little.

Actually, Reed's testimony in court indicates that the telegram was not actually meant to be a final and absolute revocation of the offer. The record reveals the following during the examination of Reed:

"Q. Did you receive any communication or any indication from anyone even after you sent that telegram prior to the time that you were served with notice of this lawsuit that anyone wanted to go ahead with the transaction?

A. Not one word, if anything I thought this telegram would get some kind of answer and *some kind of action*[4] but I never heard one word and I thought it was water under the bridge until three or four weeks later, I don't know, at the time it was served and I got this special delivery letter and I think it was the latter part of September."

Appellant argues that Slaybaugh was not an agent for Reed, and that, even if Little actually notified Slaybaugh of the acceptance of the agreement, same was not binding upon Reed since appellant himself did not receive such notice from appellees or their attorney. The

[4] Emphasis supplied.

question of whether Slaybaugh was an agent of Reed, as that term is generally used, is not important in this litigation. Certainly, he was an agent to the extent of having authority to communicate to Reed any information given him relative to the acceptance of the contract by appellees. Such authority would be unquestioned since Reed had Slaybaugh act for him, in communicating his desires relative to the contracts from the beginning to the conclusion (Slaybaugh even sending the telegram of revocation).

One fact stands out; after all is said and done, Reed, on August 29, was in a position to receive everything that he had sought during the course of the negotiations, *i.e.*, he was disposing of his Arkansas property; he was disposing of the Eastland Hotel property in Texas; a sale had been obtained for his cattle, which he demanded as a prerequisite to paying the $5,000.00 to the brokers immediately; he did not owe the additional $5,000.00 until the Bragg property was disposed of.[5]

As stated at the outset, the facts in this litigation are complicated, and are very much in dispute. The Chancellor, after hearing all of the evidence made the findings previously set out. The rule that we will not disturb the Chancellor's findings unless they are clearly against the preponderance of the evidence, is so well established as to require no citation of authority. There are some facts, presented on each side, which tend to support the position of each. We think a preponderance lies with appellees, but, in any event, we certainly cannot say that the Chancellor's findings are against a preponderance of the evidence.

Affirmed.

[5] Under the terms of the supplemental agreement, Reed was to receive $50,000.00 net for this property, and Head and Lee were given two years to make the sale.

WALTHOUR *v.* FINLEY.

5-3061 372 S. W. 2d 390

Opinion delivered October 28, 1963.

[Rehearing denied December 9, 1963.]

[redacted]

H. B. Stubblefield, for appellant.

Warren & Bullion, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves a sales commission claimed by Don Finley, a licensed real estate broker, from J. D. Walthour, a landowner. Judgment of the Circuit Court was in favor of Finley, and Walthour prosecutes this appeal.

Appellant, J. D. Walthour, as Trustee, held title to a tract of 223.47 acres in Pulaski County owned by a partnership of which Walthour was a member. On September 12, 1960, appellee Finley showed the land to Mr. Brinson; and when he showed an interest in making the purchase, Finley called[1] Walthour at the latter's home

[1] Here is Finley's testimony as to the telephone conversation:

"A. I told Mr. Walthour I- - my name was Don Finley. I was a real estate broker, and asked him if the property was for sale. He said that it was. I asked him if it was listed with anyone. He said it was not.

and a meeting was arranged. Finley, Brinson, and Wilkins went to Walthour's home, as Walthour was not able to go to his office because of a disabling incapacity. At that meeting Brinson and Walthour agreed on the price of $1,000.00 per acre. According to Finley this was the conversation and agreement for Finley's commission:

". . . Mr. Walthour stated that a thousand dollars an acre was the least that he would take. At that time I again told Mr. Walthour that I was a broker, Mr. Brinson the buyer, and Mr. Wilkins was advising Mr. Brinson, and I also asked him if the property was listed with anyone and he said it wasn't. I asked him if it was committed to anyone and he said it wasn't. He said he, as Trustee, had the right to sell it and asked if I expected the full commission. I told him I did. He said that was all right and would it be asking—

"Q. * * * let me ask you this. Did he agree at that time to pay you the full commission?

"A. Yes.

"Q. In the presence of Mr. Brinson and Mr. Wilkins?

"A. Yes, he did."

Finley testified that Mr. Walthour directed that Finley, Brinson, and Wilkins go to Mr. J. H. Larrison, who was handling such matters for Mr. Walthour during his incapacity. The three went to Larrison's office, where a contract of purchase was signed by Brinson on behalf of Brinson Development Company, Inc.; and in keeping with the contract the Brinson Development Company, Inc. purchased the properties for $223,347.00. Upon completion of the purchase, Finley demanded of Walthour the regular 10% commission of $22,334.70,

I asked him if it was committed to anyone, and he said it wasn't. Then I told him I would like to sell the property if the price was right, and he suggested to see him at 11:00 o'clock that morning.

"Q. All right, sir. Did you tell him you had a person there, in mind, that would be a prospective purchaser?

"A. Yes, I told him that he would be out at 11:00 o'clock—that was all right."

which Walthour refused to pay; and this action was filed. The case was tried by the Circuit Judge, a jury being waived; and from the judgment in favor of Finley, Walthour prosecutes this appeal.

I. *Sufficiency Of The Evidence.* The substantial evidence is entirely sufficient to support the finding by the Trial Court that Mr. Walthour agreed to pay Finley the full commission, and that the said commission is 10% of the sale. Finley was corroborated by Wilkins as to the contract, and substantially corroborated by Brinson as to the conversation at Walthour's home, as previously copied. A contract to pay a commission to a real estate broker does not have to be in writing. *McCurry* v. *Hawkins,* 83 Ark. 202, 103 S. W. 600; *Vanemburg* v. *Duffey,* 177 Ark. 663, 7 S. W. 2d 336. When a real estate broker, acting under the contract brings buyer and seller together and the parties agree on a sale, and the sale is consummated, then the real estate broker is entitled to the agreed commission. *Belyeu* v. *Hudson,* 179 Ark. 657, 17 S. W. 2d 865; *Sharp* v. *West,* 176 Ark. 616, 3 S. W. 2d 692; *Fike* v. *Newlin,* 225 Ark. 369, 282 S. W. 2d 604.

The evidence was conflicting as to what Mr. Walthour said; and subsequent statements by Finley were offered in an effort to show that he had agreed to receive only $9,000.00 as the commission; but the weighing of all such testimony was for the trier of the facts. The finding of the Trial Court in a case like this one has the force and effect of a jury verdict; and we leave undisturbed such finding as to the contract and the commission.[2]

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[2]The Circuit Court judgment as to these specific findings reads: "At the request of the plaintiff, the complaint of the Plaintiff is amended to conform to the proof in the case. A preponderance of the evidence and the applicable law justify the following findings and conclusions:

"1. The plaintiff and defendant entered into a contract for the commission claimed by plaintiff.

"2. The plea of *res judicata* does not afford the defendant any relief in this case. . . .

"6. That defendant may have, through the listing and the subsequent agreement with Finley, subjected himself to liability for two commissions, but payment to Walthour-Flake would not discharge the obligation of defendant to Finley.

II. *Res Judicata.* The more serious issue is whether Finley has been defeated of his commission because of Walthour's plea of *res judicata;* and we proceed to that point. Walthour completed the sale to Brinson Development Company, Inc. on January 17, 1961, for a total consideration of $223,347.00; and on January 24, 1961, there was filed in the Pulaski Chancery Court Case No. 116925 styled Bill of Interpleader. The only plaintiff was "Walthour-Flake Company, Inc."; and the only defendants were "Don Finley and Ferguson & Company, Inc." The Bill of Interpleader alleged that Walthour-Flake Company, Inc. was a corporation engaged as a real estate broker; that it had recently concluded a sale of the 223.47 acres (here involved) to Brinson Development Company, Inc.; that Walthour-Flake Company, Inc. had received the commission for making the sale; and that of the total commission received, Walthour-Flake Company, Inc. owed the sum of $9,000.00 to either Don Finley or to Ferguson & Company, Inc., another real estate broker. The Bill interpleaded $9,000.00 and called on the named defendants to establish their respective claims for the interpleaded fund.[3]

It will be observed that the Bill of Interpleader did not mention the name of J. D. Walthour, nor did it state for whom Walthour-Flake Company, Inc. acted as a broker in making the sale of the 223.47 acres. Summons was served on Don Finley; and in due time he filed answer in said interpleader suit, which answer stated:

"7. The fact that the Agent of the defendant performed certain acts in connection with clearing title to the property involved, could not mitigate against plaintiff since the obligation to furnish the purchaser a merchantable title rested on the seller.

"8. The proof fails to show that the plaintiff Finley ever entered into any agreement for a division of the commission between himself and anyone else.

"9. That the proof fails to establish any agreement on the part of Finley to split his commission with anyone.

"From a consideration of all of the evidence, the pleadings, the briefs and the arguments, the Court is of the opinion that the plaintiff should have and recover from the defendant the sum of $22,334.70."

[3] The prayer of the Bill was in part:

"WHEREFORE, plaintiff prays a proper and immediate order of this Court enjoining and restraining each and both of defendants herein, their agents and employees, from instituting or prosecuting any suit or proceeding in any other Court to assert any claim against plain-

"1. Defendant, a duly licensed real estate broker, acted as real estate broker for the owner of the property described in said Bill of Interpleader, and during the month of January, 1961, consummated a sale to Brinson Development Company, Inc. That, at the time of the negotiation of the sale, the owner of the property, J. D. Walthour, agreed to pay the defendant, Don Finley, a commission of $22,300.00, which is usual and customary as a commission on the sale of rural properties. At no time prior to the sale of the property was the defendant, Don Finley, informed or aware of the fact that Walthour-Flake Company, Inc. had any interest in said property. Defendant, Don Finley, has no privity of contract with Walthour-Flake Company, Inc., but has a legitimate claim against the owner of the property for the full commission of $22,300.00 as his proper brokerage fee. The defendant denies that Walthour-Flake Company, Inc. has any legal right to file a Bill of Interpleader against the defendant and thus inject itself into the transaction in the place of or in the stead of the owner to whom defendant looks for the payment of his brokerage fee. Defendant asserts that the act of the plaintiff herein in seeking to interplead $9,000.00 which it received from a source unknown to the defendant, is contrary to law and that said Bill of Interpleader should be dismissed as to this defendant."

On February 3, 1961, Finley sent to J. D. Walthour a registered letter reading:

"Dear Mr. Walthour: Will you please send by return mail the check for the full commission on the sale of the 223.47 acres as we agreed. The amount of the check is $22,347.00. Yours sincerely, (signed) Don R. Finley."

In the interpleader suit Ferguson & Company, Inc. asserted the right to the $9,000.00 interpleaded by Wal-

tiff growing out of the real estate sale described herein; that defendants and each of them be required to interplead and settle among themselves their rights to said funds deposited in the registry of this Court by plaintiff; that plaintiff be fully and forever released and discharged from all liability on account of and in connection with claims for commissions from the sale of said 223 acre tract of land; . . ."

thour-Flake Company, Inc.; and on February 16, 1961, the Pulaski Chancery Court entered a decree in the said interpleader suit awarding the $9,000.00 to Ferguson, after having recited that Don Finley made no claim against Walthour-Flake and there was, therefore, no adverse claimant to the $9,000.00 interpleaded by Walthour-Flake Company, Inc.

It is this interpleader suit and the decree therein that is now pleaded by J. D. Walthour as *res judicata* in the present action brought by Don Finley against J. D. Walthour. The rules as to when one suit or action is *res judicata* in a subsequent suit or action have been recognized and declared in many of our cases, some of which are: *Geisreiter* v. *Sevier,* 33 Ark. 522; *Fogel* v. *Butler,* 96 Ark. 87, 131 S. W. 211; *Cleveland-McLeod Lbr. Co.* v. *McLeod,* 96 Ark. 405, 131 S. W. 878; *Williamson* v. *Grider,* 97 Ark. 588, 135 S. W. 361; *Biederman* v. *Parker,* 105 Ark. 86, 150 S. W. 397; *Mo. Pac.* v. *McGuire,* 205 Ark. 658, 169 S. W. 2d 872; *Hatch* v. *Scott,* 210 Ark. 665, 197 S. W. 2d 559; *C. & L. Elec. Coop.* v. *Kincaid,* 221 Ark. 450, 256 S. W. 2d 337; *Seaboard* v. *Wright,* 223 Ark. 351, 266 S. W. 2d 70; *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S. W. 2d 949; *Baumgartner* v. *Rogers,* 233 Ark. 387, 345 S. W. 2d 476; *Selig* v. *Barnett,* 233 Ark. 900, 350 S. W. 2d 176.

In *Mo. Pac.* v. *McGuire, supra* and in *Selig* v. *Barnett, supra,* we briefly stated the general rule of *res judicata:*

"Briefly stated, (the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.")

In *Biederman* v. *Parker, supra,* we said:

"It is well settled that a judgment is only conclusive between the parties or their privies. *Avera* v. *Rice,* 64

Ark. 330; *Treadwell* v. *Pitts,* 64 Ark. 447; *Doss* v. *Long Prairie Levee Dist.,* 96 Ark. 454."

In *Fogel* v. *Butler, supra,* we quoted an earlier case:

" 'To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear, by the record, or by extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit.' "

In *Hatch* v. *Scott, supra,* we said:

"In *Smith* v. *McNeal,* 109 U. S. 426, (3 S. Ct. 319, 27 L. Ed. 986), the court, quoting from *Hughes* v. *U. S.,* 4 Wall. 232, 18 L. Ed. 303, said: 'In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases . . .' "

In *C. & L. Rural Elec. Coop.* v. *Kincaid, supra,* we said:

"As to the defense of *res judicata,* we think it without merit and can have no application here for the reason that the parties are not the same as in the McEntire suit and the issues and subject matter in the present case are entirely different. It is well settled that *res judicata* only applies to parties and their privies."

When we apply the law from these cases, as above quoted, to the facts in the case before us, it is clearly apparent that the rule of *res judicata* was not a valid defense by Walthour. There was no identity of parties. The Interpleader suit was by Walthour-Flake Company, Inc. against Don Finley, whereas the present action is between J. D. Walthour and Don Finley. It was shown in the present case that Walthour-Flake Company, Inc. is an Arkansas corporation, with certain named stockholders. The fact that J. D. Walthour owned stock in Walthour-Flake Company, Inc. did not, in itself, make J. D. Walthour identical with or a privy to a suit brought by Walthour-Flake Company, Inc. J. D. Walthour was

not a party to the Bill of Interpleader filed by Walthour-Flake Company, Inc. The name of J. D. Walthour did not appear in the Bill, nor did the Bill state for whom Walthour-Flake Company, Inc. had acted as a broker in making the sale of the 223.47 acres. There was no identity of subject matter between the interpleader suit and the present action. In the interpleader suit the sum of $9,000.00 was deposited by Walthour-Flake Company, Inc.; and Don Finley and Ferguson & Company, Inc. were required to establish claims to the said fund. Finley frankly answered that he had engaged in no dealings with Walthour-Flake Company, Inc. and had no claim to any amount which that corporation held; he stated that his claim was against J. D. Walthour; he proceeded to prosecute that claim in the present action; and the decree in the interpleader suit is not *res judicata* against the present action.

Finding no error, the judgment is affirmed.

TUMLISON *v.* HARVILLE.

5-3021 372 S. W. 2d 385

Opinion delivered October 28, 1963.

[Rehearing denied December 9, 1963.]

J. R. Wilson, for appellant.

No brief filed for appellee.

George Rose Smith, J. This is a suit by the appellant to cancel certain deeds as clouds upon the plaintiff's title to a forty-acre tract, to quiet the plaintiff's title to the land, and to recover double damages from the plaintiff's grantors. At the close of the plaintiff's proof the chancellor sustained a demurrer to the evidence, finding that Tumlison had parted with his title in 1938 and therefore was not in a position to maintain the suit. Whether the chancellor's reasoning was correct is not argued in the appellant's brief and hence is not an issue here. *Fitzhugh* v. *Leonard,* 179 Ark. 816, 19 S. W. 2d 1010.

Tumlison testified that he bought the land from Riley and Mears in 1930, received a deed from them in 1934, and had possession from 1930 until 1938. In the latter part of 1938, after Tumlison had moved off the land, he found that H. C. Harville had taken possession. Tumlison says that he made an oral agreement with Harville by which Harville was to buy the land for $650, with the money to be paid when Harville became able to pay it. In the meantime Harville was to remain in possession and keep the taxes paid.

Harville died in 1945 without having paid anything upon the purchase price. What became of the title after Harville's death is not clearly shown by the proof. Tumlison has not been in possession since 1938. A number of conveyances have been made by persons who seem to derive title either from Tumlison's grantors or from Harville, but it is not shown that any claimant has been in adverse possession for a sufficient length of time to acquire the title.

Counsel for the appellees have not filed a brief, but they have insisted by motion that the decree should be

affirmed for noncompliance with Rule 9. It is true that the appellant's abstract and brief do not conform as well as they should to our rules. The abstract contains much argumentative matter and is not supported by page references to the record. Six points for reversal are listed, but the brief is not correspondingly subdivided, as required by Rule 9 (f). We hardly think, however, that the deficiencies are so serious as to require a summary affirmance; so we shall consider the appellant's principal arguments upon their merits.

It appears that Tumlison's grantors, after having conveyed the land to him, executed a second deed purporting to convey the property to someone else. It is now contended that Tumlison is entitled to double damages from the surviving grantor, under the statutes making it a criminal offense for one to sell the same land to two different persons and providing for double damages to the defrauded grantee. Ark. Stat. Ann. §§ 41-1933 and -1934 (1947).

The trouble is that there is no proof that this asserted conduct on the part of Tumlison's grantors has in fact damaged him. It is true that Tumlison has been out of possession since 1938, but he admits that he voluntarily relinquished possession to Harville. We find nothing in the appellant's abstract of the record to indicate that his own title has been adversely affected by any later deed that his grantors may have executed. As a condition to the recovery of double damages a plaintiff must first show that he has been damaged. Here that proof is wanting.

It appears that one of the appellees has an abstract of title to the tract in dispute. In the course of the trial the chancellor denied the plaintiff's request that this defendant be compelled to produce this abstract and make it available for examination by plaintiff's counsel.

We find no error in this ruling. Although there was no formal motion for discovery under the statute, we may assume that the principles embodied in our discovery

act are controlling. That statute contemplates that a party may, for good cause, be afforded an opportunity to examine documents which themselves constitute evidence, Ark. Stat. Ann. § 28-356 (Repl. 1962), or which may reasonably be expected to lead to the discovery of evidence. § 28-348 (b). Here the abstract of title falls only in the latter class.

The trial court has wide discretion in determining whether there is good cause for the discovery of documents. *Dunaway* v. *Troutt,* 232 Ark. 615, 339 S. W. 2d 613. We think the requirement of good cause was not met in this instance. There is no suggestion that the abstract of title contains any information that is not a matter of public record. No doubt the owner of the abstract paid for having it made. The only suggested cause for the requested discovery is that it would save plaintiff and his attorney either the trouble of searching the public records or the expense of obtaining an abstract of their own. In the absence of any legal or contractual duty binding the defendant to submit the abstract to the plaintiff, and no such duty is shown, the chancellor did not abuse his discretion in refusing to compel the defendant to permit his private property to be used in the preparation of his adversary's case.

Complaint is made of the chancellor's refusal to require various defendants to answer interrogatories attached to the plaintiff's pleadings. More than seventy such interrogatories were filed. Counsel for the defendants filed objections to a number of the inquiries, as they were entitled to do. Ark. Stat. Ann. § 28-355 (Repl. 1962). The chancellor considered the matter with care and filed an opinion directing that only certain interrogatories be answered. Since the abstract of the record tells us nothing about the interrogatories that were not to be answered we are not in a position to say that the chancellor was wrong in ruling as he did.

It may be that Tumlison has suffered an injustice at the hands of the appellees, but if so the wrong occurred many years ago. As we said in *Cunningham* v. *Brum-*

back, 23 Ark. 336: "The law wisely holds that there shall come a time when even the wrongful possessor shall have peace; and that it is better that ancient wrongs should go unredressed than that ancient strife should be renewed."

Affirmed.

JOHNSON, J., not participating.

ROGERS *v.* CITY OF PINE BLUFF.

5-3085 372 S. W. 2d 620

Opinion delivered October 28, 1963.

[Rehearing denied December 16, 1963.]

Griffin Smith, for appellant.

George N. Holmes and *John Harris Jones,* for appellee.

PAUL WARD, Associate Justice. This appeal comes from an order of the circuit court approving the annexa-

tion of certain lands to the City of Pine Bluff. The lands consist of 7.52 square miles which lie east, south and west of and are contiguous to said city.

The annexation proceedings were commenced with the filing of a petition by the City on November 20, 1961 and subsequent steps taken, all pursuant to Ark. Stat. Ann. § 19-307 (Repl. 1956) and related sections. There is no contention here that all procedural steps pursuant to all applicable statutes were not taken by the City and the county.

The only point relied on by appellants for a reversal is that "the territory sought to be annexed is unreasonably large". In support, and as a basis of their contention, appellants rely heavily upon our holdings and announcements in the cases of *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891 and *Cantrell* v. *Vaughn,* 228 Ark. 202, 306 S. W. 2d 863. It appears to be appellants' contention that the trial court failed to follow the fundamental rules applicable to annexation cases as laid down in the *Vestal* case. There it was said:

". . . city limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owners, (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purposes, as for the extension of its streets, or sewer, gas or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses . . ."

Applying the above general rules to the testimony introduced at the trial court we think this case must be affirmed. The record shows that the lands proposed for

annexation are divided into four separate areas. Area 1 lies east of the city; Area 2 is southeast of the city; Area 3 lies south and west of the city; and, Area 4 lies northwest of the city. Appellants, in support of their position, contend that "A substantial portion of the proposed annexation represents property not settled nor adaptable for settlement"; and that "The city did not demonstrate ability to furnish services to an area of this magnitude." With these contentions of appellants in mind, we can more easily understand the weight and relevancy of the testimony by relating it to each separate Area.

Area 1. One witness stated that eight new industries would be brought into the city with annexation—naming them; a realtor said one acre was sold for $2,400 and that he has lands listed for $2,000 per acre. The city planner said 25% is industrial. No landowner is objecting.

Area 2. One witness said 50% was built up—part in modern homes; the city engineer said there were 2,152 people on 1,000 acres, and that a drainage bottleneck affects the present city limits. No landowner is objecting to annexation.

Area 3. A realtor said this area has no value for agricultural purposes; that the Chamber of Commerce paid $1,000 per acre for a development site—and it is one of three industrial sites available for the city; many new homes are being built; the population is 2,642 for 1,405 acres; it will be provided with sewer facilities—one of the worst problems at present. There is a new school, and building lots sell for $1,250 to $2,000 each. For farm purposes the land is not worth more than $100 per acre but is worth many times that price for building and industrial purposes.

Area 4. This area is known as Dew Drop, and appellants say it is a "self-sufficient, unitary community which has worked out its own destiny—that it is economically, geographically and politically an entity", and

that it has practically no affinity to Pine Bluff. There is, however, testimony to the contrary. One witness who lives there said it was a part of Pine Bluff. There was testimony (by appellants) that part of the Area was known as College Heights to Pine Bluff; that some get mail addressed to Pine Bluff and some have telephone, gas, and electricity from Pine Bluff distribution centers; they use the Pine Bluff telephone exchange with no toll charges; and, most of the people are employed in Pine Bluff.

It would serve no useful purpose to detail more of the voluminous testimony. Suffice to say there was testimony to the effect that Pine Bluff was financially able to furnish the annexed areas all necessary utilities as well as fire and police protection, and that it would do so.

In the *Vestal* case, *supra,* it was also pointed out that annexation should be ordered: "In all cases, however, where actual unity is practicable, legal unity should be ordered as promising the greatest aggregate of municipal benefits." In this connection it is pertinent to note the trial court made the finding:

" 'That the territory sought to be annexed is already part of the Pine Bluff community in practice. All that remained to be done was annexation. The territory . . . is an outgrowth of the City of Pine Bluff and after annexation will make up a homogeneous city.' "

Other interesting and pertinent findings of facts, set out below, were made by the trial court:

"The property values in the territory sought to be annexed show that the lands are valuable for city use or for adaptability for prospective town use rather than for use or adaptability for use for agricultural purposes.

"The population in the area sought to be annexed is approximately 7,500. In what has been described in the testimony as area four or the Dew Drop area over 2,000 people now live which is more people than live in the county seats of Rison, Star City or Arkansas City.

"The territory sought to be annexed is needed for proper town purposes, the extension of streets, sewer system, gas and water and to provide residences and the City's need for business expansion. Pine Bluff is expanding and expanding rather rapidly.

"The area sought to be annexed is very much in need of police regulation."

We have uniformly held that the order of the circuit court (in annexation cases) will be upheld if it is supported by substantial evidence. See: *Burton* v. *City of Fort Smith,* 214 Ark. 516, 216 S. W. 2d 884: *Mann* v. *City of Hot Springs,* 234 Ark. 9, 350 S. W. 2d 317; and the *Cantrell* case, *supra,* relied on by appellants. Also, the burden was on appellants to show the lands should not be annexed. *Dodson, et al.* v. *Mayor and Town Council, Fort Smith,* 33 Ark. 508.

Since we are unable to say the order and findings of the trial court were not supported by substantial evidence, the same are affirmed.

Affirmed.

HARRIS, C. J., and JOHNSON, J., not participating.

TAYLOR *v.* GOODWIN.

5-3087 371 S. W. 2d 617

Opinion delivered October 28, 1963.

Aurelle Burnside, for appellant.

Spencer & Spencer, for appellee.

SAM ROBINSON, Associate Justice. The trial court held that the cause of action alleged in this case is barred by statutes of limitation; dismissed the complaint, and the plaintiff has appealed.

In 1944 appellant and Arthur McCree, husband and wife, acquired as an estate by the entirety, the parcel of land involved herein. On February 15, 1950 the McCrees were divorced, but there was no order affecting the property. In September, 1950, the property was mortgaged to the Springhill Bank & Trust Company. The mortgage was signed by Arthur McCree and is purported to have been signed by appellant, Erline McCree (now Erline McCree Taylor). The mortgage was foreclosed by a decree of the chancery court December 23, 1954. Pursuant to the terms of the decree, Rush Hooten, Commissioner, sold the property at a commissioner's sale on February 3, 1955. F. H. Goodwin was the purchaser, and he in turn conveyed to appellee, Kary Haynie Goodwin.

On December 22, 1959, appellant filed a suit against appellee to set aside the sale of February 3, 1955, alleging that she had not signed the mortgage; that her name had been forged thereto. On February 16, 1961 appellant took a non-suit and the case was dismissed without prejudice. On February 15, 1962, within one year from the taking of the non-suit but more than five years after the judicial sale, appellant filed the present suit to set aside the sale held on February 3, 1955 under the terms of the foreclosure decree. Summons was issued but was returned marked "Non est (Kary Goodwin in Mississippi)".

On January 18, 1963, appellee Goodwin filed a motion to dismiss the complaint alleging that the present

suit had not been commenced within one year from the taking of the non-suit because the defendant, appellee, was a non-resident of the state and no warning order had been issued. On January 22, 1963, appellant had a warning order issued and it was published. Later, it was stipulated that appellee Goodwin moved from Arkansas and became a resident of Mississippi about January 1, 1958. On February 3, 1963, appellant had another summons issued. It was served on appellee February 4, 1963, which, of course, was more than one year after the non-suit.

Ark. Stats. 37-108 provides: "All actions against the purchaser, his heirs or assigns, for the recovery of (lands sold by any collector of the revenue for the non-payment of taxes, and for) [*sic*] lands sold at judicial sales shall be brought within five [5] years after the date of such sale, and not thereafter; saving to minors and persons of unsound mind, and persons beyond seas, the period of three [3] years after such disability shall have been removed."

The original suit was filed within five years from the date of the judicial sale, but the five year period expired February 3, 1960. The non-suit was taken February 16, 1961; appellant had one year from that time to again commence action. Ark. Stats. 37-222. The complaint in the present action was filed on February 15, 1962, within the year, but no warning order was issued until January 24, 1963. The defendant was a non-resident and had not been a resident of Arkansas since 1958. Where the defendant is a non-resident, suit is not commenced until the warning order is issued. *Burks* v. *Sims*, 230 Ark. 170, 321 S. W. 2d 767; *Boynton* v. *Chicago Mill & Lumber Co.*, 84 Ark. 203, 105 S. W. 77. Here, the warning order was not issued until more than one year had expired from the date of the non-suit.

Appellant argues that by filing the motion to dismiss on January 18, 1963, appellee entered her appearance. Even so, suit was only commenced at that time, *Burks* v.

Sims, supra; this was more than a year after the nonsuit had been taken.

Affirmed.

CURTIS *v.* PATRICK.

5-3088 371 S. W. 2d 622

Opinion delivered October 28, 1963.

E. L. Holloway, for appellant.

William B. Wharton and *Kirsch, Cathey & Brown,* for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from a suit to cancel a deed from a widow to her son. On August 5, 1961, appellee Lillie Patrick Summers executed a warranty deed to one of her sons, appellee Herschel M. Patrick. On June 9, 1962, appellant Dorothy Patrick Curtis, a daughter, filed suit in Clay Chancery Court seeking to have the deed set aside as a cloud on her title, alleging that the property had been owned by the late N. T. Patrick individually, not by N. T. Patrick and Lillie Patrick (Summers) as tenants by the entirety, that Lillie Patrick Summers was entitled to her dower and homestead only, and contending that legal title to the property was in the four children of N. T. Patrick. At trial on December 3, 1962, the chancellor found that the lands here involved were sold to the State following nonpayment of 1917 taxes and were not re-

deemed within two years; that on September 21, 1939, the State conveyed the property to N. T. Patrick and Lillie Patrick by deed recorded January 10, 1940; that in January 1940 N. T. Patrick and Lillie Patrick and their family took possession of the property and remained in possession until the death of N. T. Patrick about November 21, 1941; that on October 17, 1941, the trustee for the Big Gum Drainage District executed a quit-claim deed to the property to N. T. Patrick, title of the trustee being based on foreclosure proceedings for collection of delinquent drainage district taxes; that N. T. Patrick and Lillie Patrick, his wife, acquired the lands by virtue of the State deed of September 21, 1939, with any title acquired by N. T. Patrick from the drainage district inuring to the benefit of both N. T. Patrick and Lillie Patrick; that upon the death of N. T. Patrick in November 1941, Lillie Patrick acquired title to the property in fee simple, free of any claims of N. T. Patrick's heirs at law; that following the death of N. T. Patrick, Lillie Patrick conveyed the property to Herschel Patrick, retaining a life estate; that title should be quieted in Lillie Patrick Summers and Herschel M. Patrick and that appellant's complaint should be dismissed. From the decree dismissing the complaint, appellant has appealed, contending that the trial court erred in holding that the State deed created an estate of entirety and denying appellant's allegation that the property was that of N. T. Patrick by virtue of the drainage district quitclaim deed.

The Commissioner of State Lands deeded the property to "N. T. Patrick and Lillie Patrick", without referring to them as tenants by the entirety or as husband and wife, on September 21, 1939. Appellees' request for admissions established that the parties were husband and wife on that date. In *Parrish* v. *Parrish,* 151 Ark. 161, 235 S. W. 792, this court stated:

"It is also contended by counsel for the defendant that the deed in question did not convey an estate by the entirety to Joseph E. Parrish and Emma Parrish

because they are not mentioned in the deed as husband and wife.

"We do not think that this makes any difference. The complaint alleges that the parties were husband and wife at the time the deed was executed, and it is the conveyance of the property to the husband and wife jointly which creates the estate by the entirety."

Thus failure to use the magic words "husband and wife" or "tenants by the entirety" will not defeat a tenancy by the entirety where property is conveyed to two parties who are in fact husband and wife. The State deed created an estate by the entirety in the Patricks in September 1939.

On October 17, 1941, the trustee for the drainage district executed a quitclaim deed to N. T. Patrick which recited that "[t]he consideration herein paid, is in full satisfaction of all delinquent Big Gum Drainage District taxes, penalty, interest, attorney fees and costs adjudged against the above described land." Subsequently N. T. Patrick and Lillie Patrick executed a mortgage on the property to the trustees for part of the consideration of the quitclaim deed. Appellant has made no showing that N. T. Patrick and Lillie Patrick were disseised of title prior to execution of the quitclaim deed. Without determining the validity of the drainage district foreclosure decrees, the common law rule applicable here has been implemented by a long series of decisions, the earliest of which is probably *Moore* v. *Woodall,* 40 Ark. 42, and reiterated as recently as *Vesper* v. *Woolsey,* 231 Ark. 782, 332 S. W. 2d 602, as follows:

. . . "We have repeatedly held that the acquirement of a tax title by a tenant in common operates as a redemption for the benefit of all tenants."

N. T. Patrick and Lillie Patrick acquired title to this property as tenants by the entirety in 1939, went into possession of the property in 1940, and remained there until after N. T. Patrick's death. "The rule seems thoroughly settled that a husband or wife cannot obtain

a tax title . . . in opposition to the other when they are in joint possession.'' *Herrin* v. *Henry,* 75 Ark. 273, 87 S. W. 430.

Affirmed.

AUSTIN *v.* AUSTIN.

5-2975 372 S. W. 2d 231

Opinion delivered October 28, 1963.

[Rehearing denied December 2, 1963.]

Jeptha A. Evans, for appellant.

Donald Poe, for appellee.

FRANK HOLT, Associate Justice. The appellant, Oliver E. Austin, and the appellee, Hiram S. (Butler) Austin, are brothers. The appellant seeks to cancel a deed from their widowed father, M. G. (Mike) Austin, to the ap-

pellee on the contention that this deed was never delivered. The Chancellor held there was a valid delivery of this deed and quieted and confirmed title in appellee to the lands in question. On appeal the sole question presented to us for determination is whether the father, M. G. (Mike) Austin, delivered the questioned deed of August 27, 1953 to his son, Hiram S. (Butler) Austin.

On August 27, 1953, the appellant brought his father into Booneville in order that the father could make deeds to appellant and appellee, thus dividing certain lands between them. Accordingly, a scrivener prepared two deeds on this date. The Trial Court found that Oliver was present when these deeds were prepared, executed and acknowledged, and that he assisted in the preparation of both of them.

The deeds were delivered to the father as he left the scrivener's office with Oliver. Shortly thereafter, according to Oliver, his father undertook to show him and Butler the deeds, whereupon Butler took his deed and refused to return it to his father and also took possession of Oliver's deed. It is undisputed that Butler was not present when the two deeds were made. Butler testified that his first knowledge of them was acquired a few days after the date of the deeds when his father came to him in his room at his father's house and delivered the deed to him as a reward for leaving his employment in 1950 and staying with and caring for him; that his father was emotional and cried when expressing gratitude for his filial love and attentions; that his father also handed him Oliver's deed which he deposited in the house with other papers and effects of the family; that his father never requested him to return the deed nor did Oliver ever ask for his deed.

On October 29, 1953, or two months after the date of the deed in question, the father executed and had recorded another deed to Oliver which granted to him some of the lands described in the deed to Butler dated August 27, 1953. The October deed also reserved a life estate in the father as grantor. The August deeds did not.

In the October deed the father recited he had not intended to deliver the August deed to his son Butler. There was also language in the October deed that he made a mistake in the August deed in not reserving a life estate in himself as grantor and that the August deed contained land intended for Oliver. The request by the father to make this new deed was relayed by Oliver to the attorneys who drafted the deed and brought it to the father who properly acknowledged and executed it. Butler had no knowledge of the execution of the October deed until after it was executed and recorded. Butler recorded his August deed on December 28, 1953. Butler continued to live with his father and care for him until the father's death on May 28, 1954.

As stated, the issue in this case is whether the father actually delivered the August 27th deed to his son Butler. If he did, the lands therein described belong to Butler; if not, then this deed should be cancelled as a cloud on Oliver's title derived from the October deed.

It is undisputed in this case that Oliver had actual notice and knowledge of his father's deed, dated August 27, 1953, to Butler when Oliver, as a grantee, took the later deed, dated October 29, 1953. Butler was unaware of the execution of the deeds on August 27th and October 29th until after they were made. Since Oliver had notice of a prior unrecorded deed to his brother at the time the October deed to him was executed and recorded, Oliver was in the same legal position as if Butler's deed were actually recorded. *Skelly Oil Company* v. *Johnson,* 209 Ark. 1107, 194 S. W. 2d 425; *Halbrook* v. *Lewis,* 204 Ark. 579, 163 S. W. 2d 171. It follows that when Butler recorded his deed, since Oliver had notice of its existence, a presumption of delivery by the grantor, the father, arose and the burden was upon Oliver to disprove the delivery. The Trial Court held that Oliver did not offer sufficient competent proof to discharge this burden and we agree.

Butler testified positively that his father delivered his August deed to him; that neither his father nor any-

one else ever made a demand upon him for the return of his August 27th deed. Butler maintained that no one was present when his father delivered his deed to him along with Oliver's. Oliver disputed this. He testified that he was present when his father said to both of them, "I'm going to show you boys the deeds, what I have done"; that Butler took the deeds and refused to return them. The appellant offered evidence to the effect that the father, as grantor, had said that he had made a mistake in the August deeds and he did not intend to deliver the deed to Butler. These statements to these witnesses were not made in the presence of Butler, the grantee, and the Court properly excluded such as being hearsay. With reference to the veracity of these witnesses we agree with the Trial Judge when he stated:

"The witnesses who testified are of the highest credibility and there can be no question but that Mike Austin told each of them exactly what each testified Mike told him, but the fact remains that it is hearsay and not competent evidence."

The Court also held inadmissible the language in the October deed to the effect that the grantor had made a mistake and did not intend to deliver the August deed. The Trial Court properly excluded consideration of this language as being hearsay evidence and "surplusage and extraneous material, not a part of the conveyance itself and is incompetent as evidence in this case to show that there was no delivery of the deed to Butler Austin."

The declarations of a grantor, in the absence of his grantee, are inadmissible to defeat the title which he has previously conveyed to his grantee. *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. 2d 402. We consider this case to be controlling in the case at bar. There we said:

"* * * Neither the testimony of the witnesses as to the declarations of their mother, Mary E. Mason, relative to her execution of the first deed to her daughter, Gertrude Balding, nor her subsequent recital in the deed to her daughter, Olive E. Miles, which was not made in the presence of Gertrude Balding, are admissible in

evidence to defeat the deed to her. It is well settled in this State that the acts and declarations of the grantor or of a person in possession of a tract of land are admissible to show the character and extent of his possession, but not to contradict his deed to another. It has always been held by this court that the declarations of a grantor against the title of his grantee, made in the latter's absence, are not admissible in evidence to defeat the title of the grantee."

We also agree with the Trial Court that the statements and declarations of the grantor, subsequent to his August deeds and contemporaneous with the October deed, do not comprise any part of the *res gestae* and, therefore, are inadmissible. We consider the proffered evidence in the case at bar to be more in the form of a narrative of a past transaction and not so closely connected with the execution of the deeds as to constitute a part of the *res gestae*. *Public Utilities Corporation of Arkansas* v. *Cordell,* 184 Ark. 878, 43 S. W. 2d 746; *Toney* v. *Raines,* 224 Ark. 692, 275 S. W. 2d 771; *Williams* v. *Martin,* 226 Ark. 431, 290 S. W. 2d 442.

The Chancellor had the opportunity to observe the witnesses as to their demeanor, their visible reaction to the questions propounded to them, and the consistency or inconsistency of their testimony. From this vantage point he could evaluate their testimony. We do not disturb the findings of the Chancellor on appeal unless they are against the preponderance of the evidence. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517; *Hill* v. *Barnard,* 216 Ark. 29, 224 S. W. 2d 31. We cannot say the Court's findings are against the preponderance of the competent evidence.

Affirmed.

LEWELLEN *v.* WILLIAM T. COLLINS SHOWS.

5-3075 371 S. W. 2d 833

Opinion delivered November 4, 1963.

[redacted]

Wade & McAllister, for appellant.

Greenhaw & Greenhaw, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case, which involves a carnival worker. Rufus V. Lewellen, alias Ernest Welch, was given employment on September 2, 1961, at Lincoln, Nebraska, by Glen Joplin, general manager of appellee, William T. Collins Shows. He was assigned by Joplin to work on the "scrambler ride." The carnival, from Lincoln, moved to Fayetteville, Arkansas, for its next showing, to be held at the fairgrounds. Lewellen arrived in Fayetteville on Saturday, September 9, in the late afternoon, and was injured some time between 11:00 p.m. and early Sunday morning, September 10. Claimant contended that he was injured while in the course of his employment, and was entitled to compensation. The claim was controverted and, though allowed by the referee, was disallowed by the full commission, which found that claimant had failed to establish that his injury arose out of and in the course of his employment. On appeal to the Washington County Circuit Court, the Commission was affirmed, and appellant has appealed to this court.

No intricate questions of law are involved in this appeal, and we are only concerned with whether the finding of the commission was supported by substantial evidence.

Lewellen testified that before leaving Lincoln on Friday morning, Joplin saw a mattress lying on the ground and told claimant to pick it up and put it in a particular truck, carrying other carnival equipment, and upon arriving in Fayetteville, to take the mattress out of the truck and put it under Joplin's house trailer. He traveled to Fayetteville "on his own," riding part of the way with a man called "Slim," who did not work for the carnival; "I think he worked for someone that has a tent there." After arriving in Fayetteville, he helped put up the "cook tent" (not owned by the carnival, but privately operated). Lewellen said that he saw Joplin, who told him to get the mattress and "put it under my tent, in my trailer." According to claimant, he did not perform this task right then, but ate supper before 10:00 o'clock at Byrd's Diner, stood around for a while and then decided to "turn in." He then went to the truck to get the mattress for Joplin, endeavored to pull it out of the truck, but his foot slipped, and he fell, severely injuring his shoulder.[1]

"Well, when I come to I was laying, kind of sticking up in the air, and I was down there—oh, my face was down there on the ground, and it seemed like a bright light off and on. All of a sudden the ride we'd been working on, Scrambler, I could see that just whirling around and round, seemed like there was little girls, little kids was swinging way off, and I was—I went to jump up, I went to raise up and I fell back. Then I went to begging for help, crying, screaming."

The witness estimated that it was close to midnight when he fell.

Gordon McNeese testified that he was an employee of Leonard Guest at the "cook" tent, but was not an employee of William T. Collins Shows; that Lewellen volunteered to help put up the "cook house" tent, and worked for about an hour and a half, but was not paid for such work.

[1] Dr. Coy C. Kaylor testified that Lewellen "had a collapsed lung on the right, and an acromioclavicular separation, fracture of the twelfth dorsal vertebra."

James Edward Dykes, an employee of the Collins shows, testified that he saw Lewellen early Saturday night, and that claimant had been drinking; that he saw him again around midnight and Lewellen was drunk. The witness then stated that he went to sleep (in a bed which he set up by the side of his truck) between 12:30 and 1:00 in the morning, and was awakened by someone "moaning that they'd hurt their arm and their back; they'd fell out of the truck. And I was tired and sleepy; I just told them to shut up and go on to sleep." Dykes said that the next morning he saw Lewellen at the "cook house" and the latter told him "that he was asleep; he was having a dream that some small kids was going to get on one of the rides; and he was getting off to put them on; and he fell out of the truck."

Glenn Joplin, general manager of William T. Collins Shows, testified that after he had assigned Lewellen to the "Scrambler Ride,"[2] no other duties or additional work was given claimant. He stated that before he left Lincoln, he instructed all employees of the carnival, who were not truck drivers, to report at 8:00 o'clock on Sunday morning in Fayetteville; that from the time of leaving Lincoln on Friday morning until Sunday morning at 8:00, there were no duties whatsoever for Lewellen to perform. Joplin testified that he saw claimant at his (Joplin's) trailer on Saturday between 6:00 and 7:00 P.M., when claimant came to him, wanting money. He stated that Lewellen was not on duty, and would have been "fired" if on duty, since he could smell liquor on Lewellen at that time. He denied telling claimant to get a mattress, or, in fact, directing Lewellen to do anything from the time he left Lincoln. The witness stated that Sunday morning about 8:00 o'clock, "he told me that he had been dreaming the night before and had dreamed about getting up, and walking out of the truck; he walked out, and he hurt hisself and wanted to know then if there was any way that I could work it in on the insurance to take him to the hospital. And I told him at that time that I had no insurance to cover him while he was off duty,

[2] The duties of Lewellen here consisted of helping people on and off the ride, and helping to tear down and set up the ride.

but if he wanted to go to the hospital my nephew was fixing to go to town, and if he wanted to go to the hospital I would let my nephew take him up there, which he did."

Joplin testified that the transportation of the carnival employees, except truck drivers, was their own "worry;" further, that he had no connection with the "cook house," which was operated entirely by Leonard Guest; that Lewellen had no business on the truck from which claimant told the superintendent that he had fallen.[3]

Robert Callan testified that he took Lewellen to the hospital, and that on the trip, he asked claimant how he was injured, and "he said he was sleeping at the back of the truck and had become excited and fell out."

As stated at the outset, the sole question before this court is whether there was substantial evidence to support the finding of the commission. It is readily apparent that such evidence existed. For instance,

1. Joplin denied that he told the appellant to get the mattress off the truck.

2. Joplin testified that there were no duties for appellant to perform from Friday morning, September 8, until 8:00 o'clock Sunday morning, September 10.

3. Dykes testified that appellant stated that he fell out of the truck in his sleep.

4. Callan stated that appellant told him that he had been sleeping in the back of the truck, had been drinking, and apparently became excited and fell out.[4]

The commission's finding that appellant's injury did not occur during the course of his employment was supported by the evidence offered by appellees, which the commission had a right to believe.

Affirmed.

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[3] This truck contained floorings for Dodger (small cars), one of the rides of the carnival, with which Lewellen had no connection nor duties.

[4] The commission did not find that Lewellen was intoxicated.

5-3066 371 S. W. 2d 830

Opinion delivered November 4, 1963.

[redacted]

J. E. Simpson, for appellant.

Lewis E. Epley and *H. Paul Jackson,* for appellee.

ED. F. MCFADDIN, Associate Justice. The appellees, Mr. and Mrs. Baker, on the claim of false representations, sought to rescind their purchase of realty, and also to recover damages, from the appellants, Mr. and Mrs. Croley. In the complaint and in the trial in the Chancery Court there were a number of claimed misrepresentations relating to a variety of matters; but the Chancellor found that all of the alleged misrepresentations had been waived except the one as to the water supply for the house; and on that basis, alone, rescission and damages were awarded. On this appeal the only question relates to the representations regarding the water supply for the house.

Mr. and Mrs. Croley owned a farm of 80 acres in Carroll County which they listed for sale with the Strout Realty Company. In the listing which the landowners

gave the said real estate broker there was this statement as regards the water situation for the house:[1] "Number of wells, one; Depth, 125 feet; Dug or drilled, drilled; Pumping equipment, electric pressure." The real estate broker advertised the property for sale, and the advertisement[2] said, as regards the water situation for the house: "Well for water; . . ." Mr. and Mrs. Baker lived in Texas; he is an electronics engineer and she is a writer of books for children. The Bakers saw the advertisement of the Croley property, and on November 22, 1960, the Bakers visited the Strout Realty Company office in Eureka Springs, and Mrs. Andrews-Porter, an agent of the Strout Realty Company, showed the Croley property to the Bakers. Here is Mrs. Baker's testimony as to what Mrs. Andrews-Porter said to her about the water for the house:

"Q. Did Mrs. Porter tell you there was plenty of water in the well, or did Mrs. Porter tell you what you testified this morning?

"A. She said to try it and we tried it and there was no reason to believe there wasn't.

"Q. You testified this morning you asked Mrs. Porter how much water was in the well and she said she didn't know but to try it?

"A. We tried it and there seemed to be plenty of water in the well.

"Q. All right. Then she didn't misrepresent that to you, did she?

"A. She didn't know—"

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[1] As regards the water for the rest of the place, there was a spring for cattle, etc.; but that is not now before us. We confine the discussion entirely to the water supply for the house.

[2] The full advertisement showed a picture of the house on the land and said: "80 ACRES—$7900. 80 acres; half tillable and best for cattle, berries, 80 acres pasture to graze 20 head of cattle. Well for water; fencing and some cross-fencing for stock security. Nice variety of fruit trees for home use. Split-level home in excellent condition throughout; features 6 rooms, 3 bedrooms, bath, fireplace, hardwood flooring, porch, electricity and garage. View of town from large, shaded lawn with flowers and shrubs. Sheds. 5 mile drive to town with mail and milk routes passing. School bus near too. $2000 down makes this one yours. Full price, $7900. STROUT, Eureka Springs, Ark."

Miss Barbara Hussey accompanied the Bakers on their inspection of the Croley house; and she testified as to what was said about the water situation in the house:

"Q. . . . What inspection did they make concerning the water pump, related equipment?

"A. Mr. Baker asked her about the water supply, and where the water supply might come from and she took us outside the porch to a little shelter and I don't know whether there was a lock on it, I don't recall, however, the roof was raised on it, and the pressure system was shown to Mr. and Mrs. Baker and myself, and consisted of a pump set in concrete, as she said must be over the well; and there was a small pressure tank, related hoses leading to it. And she also pointed out the large spring holding tank up just from the house. I don't recall whether she pointed it out. I know we went up and looked at it later on. Mr. Baker looked for some time at the pump, and asked about it. He turned the switch on. We tried the facilities in the house. There was water."

And on cross-examination Miss Hussey stated:

"Q. Now, as to the—as to the water supply, did she go any farther beyond the fact that she said when she was asked if there was plenty of water she said that she didn't know, you would have to try it and see?

"A. That's as far as she went."

Mrs. Andrews-Porter, the agent for the Strout Realty Company, testified as to the inquiry and representations regarding the water situation for the house:

"Q. Did they ask you at that time anything about the water on the property?

"A. Specifically what water?

"Q. The well water.

"A. The well.

"Q. The water that was used in the house?

"A. They asked about the well, and I said the well was pure, as far as I know, it's all right. We went in and they turned on the spigot and water ran out. They flushed the stool and they seemed to be well pleased with the way it operated and that was all that was said about it."

Mr. Baker did not testify in the case; and the testimony of Mrs. Baker, Miss Hussey, and Mrs. Andrews-Porter, as above copied, together with the said listing and advertisement, constitute the entire representations concerning the water situation for the house. It was shown that the Bakers moved into the house on May 29, 1961; that the water supply in the house first became inadequate on June 28th; that work was done on the well then and again on July 25th; that the well "went dry" some thirteen times between June and October; that an engineer, Mr. Roy Downs, tested the well and said it would produce only 11.4 gallons per hour or 273.6 gallons for 24 hours. Mr. Downs, called as a witness by appellees, testified:

"A. The average amount used for a family of 4 would be somewhere around 250 or 300 gallons.

"Q. In a 24 hour period?

"A. In a 24 hour period.

"Q. If that is true, Mr. Downs, . . . and this well produced 11.4 gallons per hour, would not that yield, in 24 hours period 273.6 gallons? . . .

"A. Yes."

Another witness, John Hadden, called by the appellees, testified:

"Q. John, you don't know how deep that well is, do you?

"A. No, sir, I sure don't.

"Q. And you don't know how far off the bottom of that well that jet is?

"A. That's what I said, Mr. Simpson, what McKinney reported back to me.

"Q. That's all you know is what somebody else reported?

"A. That's all I know."

We have given the evidence in some detail to demonstrate that *there is no testimony that the well was other than as represented.* Wherein was there a false representation as regards the water situation in the house? We fail to find any; and there must be a false representation in order to support a decree for rescission. In *Hunt* v. *Davis,* 98 Ark. 44, 135 S. W. 458, Mr. Justice Frauenthal stated the burden resting on one who sought a rescission of a contract on the claim of false representations:

"In order to charge the seller with fraud, it must be shown that he has made an active attempt to deceive the buyer relative to some matter material to the contract, either by statements which he knows to be false or by acts, conduct or representations which suppress the truth and induce in the buyer a false impression. Representations which are considered fraudulent in law must be of a nature that are material to the contract, and 'must be made by one who either knows them to be false or else, not knowing, asserts them to be true, and made with the intent to have the other party act upon them to his injury, and such must be their effect.' *Louisiana Molasses Co., Ltd.* v. *Fort Smith Gro. Co.,* 73 Ark. 542. If a representation is made by the seller which he knows to be false, it will constitute fraud, but a representation will also be fraudulent, even if he had no knowledge whatever, if it is made of a matter as truth of personal knowledge."

To the same effect, see *Whaley* v. *Niven,* 175 Ark. 839, 1 S. W. 2d 3; and *Fausett* v. *Bullard,* 217 Ark. 176, 229 S. W. 2d 490.

We have several recent cases involving rescission of a contract because of inadequate water. We discuss these to point out the differentiation in the factual situations between the adjudicated cases and the case at bar. In *Massey* v. *Tyra,* 217 Ark. 970, 234 S. W. 2d 759, we allowed rescission for misrepresentation of the water

supply for a house; but in that case there were definite misrepresentations, for the opinion recites:

"This was what Tyra was looking for, but before closing the deal he asked specifically about the water and made it clear that he would not purchase unless the water supply was sufficient for stock raising as well as for the home and restaurant. Wheeler told him there were two good springs on the land, suitable for watering stock, and that the 358-foot well near the house produced an ample water supply."

In *Clay* v. *Brand,* 236 Ark. 236, 365 S. W. 2d 256, recission was awarded for misrepresentation about the water supply; and here is what the opinion recites:

"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."

In *Blythe* v. *Coney,* 228 Ark. 824, 310 S. W. 2d 485, a new house was sold in a section of the city wherein it later developed that there was, and would be for the foreseeable future, an entirely insufficient supply of water from the city water mains. The opinion gives these facts:

"In September, appellants checked with the city water department and were informed that they could not expect any change in the water supply in the near future. There is persuasive evidence that after Mr. Coney and Mr. Woodall were advised of the information obtained at the city water department, appellants were led to believe that Mr. Coney and Mr. Woodall would get them another house with a sufficient supply of water. After the parties failed to get together on a settlement, this suit was filed by appellants to set aside the contract of purchase."

We granted rescission, saying:

"We think the assumption of the parties in this instance that there was a sufficient water supply to the

house constituted a mutual mistake of a material fact under the circumstances, and appellants have the right to rescind the contract."

The facts in all of the cited and discussed cases are at great variance from those in the case at bar: because, here, there was no misrepresentation of the water situation of the house, there was no concealment; there was no evasion; and it was never shown that the appellants had experienced any trouble with the water supply. The appellees failed to make sufficient inquiry. The Chancery decree awarding rescission and damages, is reversed and the cause remanded, with directions to dismiss the complaint of the plaintiffs.

CALDWELL *v.* VESTAL.

5-3057 371 S. W. 2d 836

Opinion delivered November 4, 1963.

McMath, Leatherman, Woods & Youngdahl, for appellant.

Barber, Henry, Thurman & McCaskill, for appellee.

GEORGE ROSE SMITH, J. This workmen's compensation case involves an employer's liability for the expense

of a surgical operation performed upon an injured employee. The operation was a success, and we know now that it was necessary; but it was performed by a surgeon engaged by the employee against the wishes of the insurance carrier and at a time when the physician selected by the insurer thought surgery to be inadvisable. The commission's refusal to charge the employer with the expense of the operation was upheld by the circuit court.

There is no dispute in the material facts. Caldwell, the claimant, suffered a compensable back injury on August 23, 1960. He was unable to work for about a week, during which he was treated by a general practitioner. After the claimant returned to his job he continued to suffer pain, although he did not lose any more time from his work until he entered the hospital about fourteen months later.

Caldwell first saw a specialist on January 18, 1961, when the insurer sent him to Dr. Nixon, an orthopedic surgeon. In the course of visits extending over about two months Dr. Nixon prescribed an elevated shoe to compensate for a congenital difference in the length of Caldwell's legs.

On August 8, 1961, the claimant on his own initiative consulted Dr. Murphy, the orthopedic surgeon who was later to perform the operation in controversy. Dr. Murphy concluded that Caldwell had a disc problem and should have a myelogram. A myelogram is described as a diagnostic procedure in which an opaque dye is injected into the spinal canal so that X-ray pictures can be taken. In September Dr. Murphy sent the insurance company a bill for his services, but the insurer refused to pay it, explaining that medical attention was being provided by other doctors. Later on a representative of the insurer also told Caldwell himself that the company would not pay for the operation that Dr. Murphy had in mind.

Later in August the claimant, without authorization from the insurer, was treated unsuccessfully by a chiropractor.

On October 18, at the direction of the insurer, Caldwell went to Dr. Hundley, another orthopedic surgeon. Dr. Hundley diagnosed Caldwell's trouble as a degenerative disc and accordingly began a course of conservative daily therapy, involving exercise, heat application, and sonic treatments. On October 27, after nine days, the patient appeared to be greatly improved.

On Sunday, October 29, Caldwell's condition suddenly became much worse; he suffered severe pain in his back and partial paralysis. His wife called Dr. Murphy, who arranged for Caldwell's admission to a hospital. On Monday Dr. Murphy did a myelogram, which indicated that the patient was suffering not from a degenerative disc but from a more serious condition known as an extruded disc. This extruded disc had been forced from its position between two vertebrae and was lying in the spinal canal. On Tuesday morning Dr. Murphy operated, removing the extruded disc and fusing the two vertebrae that it had cushioned. After a convalescence of several months Caldwell was able to return to work with entire freedom from pain. His recovery was complete except for some stiffness that was occasioned by the bone fusion and that resulted in a slight permanent partial disability.

It is shown by undisputed evidence that the operation not only was necessary but also was successful. It is true that Dr. Nixon and Dr. Hundley, concededly qualified orthopedic surgeons selected by the insurer, testified that they would have continued conservative therapy for a while longer before considering a myelogram or surgery. But their preference for conservative measures was based upon their belief that Caldwell was suffering from a degenerative disc, for which conservative therapy is effective. Such treatment, however, is of no avail in the case of an extruded disc. Surgery alone can then give relief from pain and protection against the possibility of further complications. Thus the only real difference between the position taken by the insurer's doctors and that taken by Dr. Murphy is that the latter resorted to surgery earlier than the former thought such action to

be advisable. In this conflict of opinion hindsight proves conclusively that Dr. Murphy's decision was actually right. As the court observed in *Laws* v. *Industrial Comm.*, 116 Utah 432, 211 P. 2d 194, surgery has rendered certain that which was previously uncertain.

Our statute requires an employer to provide promptly for an injured employee such medical and surgical service "as may be necessary" during the period of six months after the injury and for such additional time as the commission may require. Ark. Stat. Ann. § 81-1311 (Repl. 1960). (We should add that the six-month limitation is not in issue here, for the insurer recognized its continuing obligation to provide medical care, as, for example, by sending Caldwell to Dr. Hundley more than a year after the injury occurred.)

There is much discussion in the briefs about the right of an injured employee to make his own free selection of a doctor. We do not reach this issue. Even if we should concede, without deciding, that the insurance carrier has the right in the first instance to select the physician, it does not unavoidably follow that Caldwell's later choice of Dr. Murphy exempts the appellees from the expense of the operation.

It was the employer's duty to provide this injured employee with necessary surgery. It has now been demonstrated with certainty that the operation was necessary. In fact, if the surgeons selected by the insurer had realized that the patient was suffering from an extruded disc they too would doubtless have recommended the procedures that Dr. Murphy adopted. The appellees ought not to be in a position to profit by their physicians' erroneous diagnosis, and this is true even though the error was made in complete good faith by doctors whose ability and standing are not questioned in the least.

Our holding is not intended to, and does not, give an injured workman unrestricted freedom to reject the medical care offered by his employer. Counsel for the appellant concede that Caldwell acted at his peril in overriding the insurer's warning that the proposed operation would

be at the claimant's own expense. If the operation had disclosed a degenerative disc, for which conservative treatment was indicated, the surgical expense would not have been the employer's responsibility. (Similarly, there is no contention that the appellees should pay for the claimant's unauthorized and unavailing visits to the chiropractor.) It develops, however, that it was Dr. Hundley's treatment that was in a sense unnecessary, in that it could not correct the condition that really existed, while the surgical operation was the right and necessary step. In this situation there is no sound basis for exempting the employer from liability upon the present claim. See *Atlas Powder Co.* v. *Grimes,* 200 Tenn. 206, 292 S. W. 2d 13.

The appellees also rely heavily upon this sentence in our compensation act: "The Commission may order a change of physicians at the expense of the employer when, in its discretion, such change is deemed necessary or desirable." Ark. Stat. Ann. § 81-1311 (Repl. 1960). We believe that this provision was inserted in the statute to anticipate any possible doubt about the power of the commission to order a change of physicians. It should not be regarded as establishing an exclusive method of procedure, for, as a practical matter, an injured employee ordinarily has no lawyer and is not in a position to apply to the commission for a change of physicians. To construe the statute as narrowly as the appellees would have us do would convert this provision from a remedial measure designed to help the workman into a punitive measure designed to hurt him.

The judgment must be reversed, and the cause will be remanded, through the circuit court, to the commission for the entry of an award against the appellees for the reasonable expense of the surgical operation and for the claimant's disability during his period of convalescence. The award should also provide compensation for any permanent partial disability that the commission finds to exist.

Reversed.

McFaddin, J., concurs; Robinson, J., dissents.

ED. F. MCFADDIN, Associate Justice (concurring). The purpose of this concurrence is to emphasize my firm view that neither the employer nor the insurance carrier has the right to require an injured employee to be treated by a particular physician selected by the employer or insurance carrier, if the injured employee desires some other physician. I maintain that an injured employee has the right to select a physician of his own choosing. The statute (Ark. Stat. Ann. § 81-3111 [Repl. 1960]) says: "The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing service . . . as may be necessary . . ." The important word in the statute is "provide": that means to "supply," or to "furnish." The statute does not deprive the injured employee of the great American free enterprise right to select the doctor who is to treat him. The relationship of physician and patient is a personal one; and our Workmen's Compensation Statute was not designed to usher in any phase of "state medicine."

I realize that this concurrence may be *dicta* in the present case; but nevertheless I think it wise to state my views on this matter at this time.

SAM ROBINSON, Associate Justice (dissenting). It might be well to keep in mind undisputed facts in this case. The employee was injured August 23, 1960; he went to see Dr. Napper (presumably a doctor of his own choice) for about a week and then returned to work; he continued working every day and did not again go to a doctor until he went to Dr. Nixon about five months later on January 18, 1961. Dr. Nixon saw him again on February 20, March 14, and October 6; a total of four times in about 10 months. All during this period the employee was working every day.

In the meantime, the employee had visited Dr. Murphy on August 8, 1961. At that time Dr. Murphy reported: "Mr. Caldwell is a 31 year old white male who,

in my opinion, has a disc problem. . . . It is possible that surgery will have to be resorted to, but, of course, this depends on the symptoms and the wishes of the patient. At this time the patient has a disability in the neighborhood of 15% as related to the body as a whole. Whether or not this will improve will depend on future evaluations.'' The employee had been injured for about a year and had a disability of only 15%. The employee's visit to Dr. Murphy was more than six months after the injury occurred and the doctor was promptly notified that the employee was not authorized to engage the doctor's services and that he must not look to the employer for his fee.

Following the visit to Dr. Murphy on August 8, the employee went to Drs. Kuhl and Kuhl, chiropractors, on August 18, 1961. During all this time the employee was working daily. After his fourth visit to Dr. Nixon over a period of about 10 months, the doctor recommended that he be referred to Drs. Watson, Adametz & Porter, neurosurgeons. On October 18, the employee went to see Dr. Hundley, an eminent orthopedic surgeon, who recognized at once that the man had disc trouble and that an operation might be necessary, but thought it advisable to first try conservative treatment. Just 12 days later, at a time when the employee had led Dr. Hundley to believe he was improving with the conservative treatment, he went to see Dr. Murphy, who performed an operation the very next day.

If the employer is liable for Dr. Murphy's fee for operating on the employee, such liability must be based on Ark. Stat. Ann. § 81-1311 (Repl. 1960) which provides: ''The employer shall promptly provide for an injured employee such medical, surgical, hospital and nursing service, and medicine, crutches, artificial limbs and other apparatus as may be necessary during the period of six [6] months after the injury, or for such time in excess thereof as the Commission, in its discretion, may require. If the employer fails to provide the services or things mentioned in the foregoing sentence within a reasonable time after knowledge of the injury, the Commission may direct that the injured employee obtain such service or

thing at the expense of the employer, and any emergency treatment afforded the injured employee shall be at the expense of the employer."

In my opinion, the above statute does not make the employer liable for Dr. Murphy's fee for the operation, and there is no other statute or law making the employer liable under the facts in this case. Before the employer would be liable for Dr. Murphy's fee for the operation, the treatment would have to be given within six months after the injury occurred, or such treatment must have been authorized by the Commission, or it must have been emergency treatment. None of these requirements existed. The treatment was not given within six months after the injury occurred; the treatment was not authorized by the Commission, and there was no emergency.

According to the undisputed evidence, the treatment did not occur within six months after the injury, and the Commission did not authorize it. That leaves the question of whether an emergency existed. The Commission held, in effect, that there was no emergency; there is more than substantial evidence to support that finding. The injury had occurred 14 months previously and the employee had worked every day for more than 13 months immediately preceding the operation.

It appears that the majority bases the decision in this case on a finding made by this court—not by the Workmen's Compensation Commission—that Dr. Murphy had correctly diagnosed the case and that Dr. Nixon and Dr. Hundley had made an incorrect diagnosis. Even if the record justified such a conclusion—and in my opinion it does not—under the law the employer would not be liable because the treatment was given more than six months after the injury occurred, the Commission did not authorize the treatment, and no emergency existed.

The record does not justify a finding that any of the doctors were mistaken in the diagnosis. The last time the employee saw Dr. Nixon was on October 6, 1961. The doctor suggested that he be transferred to Drs. Watson, Adametz & Porter for a neurological evaluation and

treatment. These doctors are neurosurgeons who perform disc operations. There is weighty medical authority to the effect that only neurosurgeons should do this type of operation. It is shown by evidence that the Veterans Administration will permit only neurosurgeons to do this operation, and this is also the policy of Campbell's Clinic, Mayo's Clinic, and Johns Hopkins Hospital.

Definitely, the record shows that Dr. Hundley did not incorrectly diagnose the case. In fact, Dr. Hundley stated in his diagnosis: "It is felt that this patient very definitely presents organic evidence of an injury to his lower back which may consist of a mild herniation of the nucleus pulposus and certainly the great probability of this mildly degenerative disc at L5-S1. I have advised him to continue with his regular work, report daily for physical therapy and carry out the exercise in which he was instructed today." Dr. Hundley's diagnosis was made the first day he saw the man, October 18, 1961.

Of course no emergency was involved, the employee had been injured approximately 14 months before Dr. Hundley saw him, and furthermore, he was off from work for only a few days following the injury and had worked every day for more than 13 months at the time Dr. Hundley saw him. In these circumstances, the doctor thought conservative treatment was in order.

In Gray's Attorneys' Textbook of Medicine, Vol. 1, Page 304, in speaking of herniated nucleus pulposus (intervertebral disc) it is said: "Love (22) concludes all such diagnostic procedures and operations for removal of a nucleus pulposus to be of major significance. He recommends against operations except in cases of long standing with major symptoms, such as those who have spent perhaps six months in bed. Barr, Hampton and Mixter (14) point out that visualization by x-ray is an exacting procedure. They insist that treatment for sciatica should long be attempted before resorting to operation."

Perhaps the majority opinion holding the employer liable for the surgeon's fee is based entirely on the theory that Dr. Hundley had diagnosed the case as being

one of a herniated disc, but when the operation was performed an extruded disc was found. For all practical purposes, where the condition of the disc is causing trouble there is no valid distinction between an extruded disc, a ruptured disc, and a degenerated disc. Prior to the operation the doctors do not appear to have laid any stress on the distinction. Even after the operation Dr. Murphy used all three terms in describing the employee's condition. In a letter written by him to the insurance carrier regarding the employee following the operation, Dr. Murphy said: "The following morning surgery was done. An *extruded* disc was noted at this level. . . . I have conscientiously examined him, diagnosed his condition as a *herniated* disc, confirmed this with a myelogram, and rendered what I regard as competent treatment." (our emphasis). In his testimony Dr. Murphy stated: "Now disc problems are not static. They are dynamic. There is a constant changing, depending upon whether or not the disc *deterioration* or *degeneration* continues to take place or remains static. Here we have an excellent example of injury caused by a known accident, causing the *degeneration* . . ." (our emphasis).

The distinction between an extruded, herniated, or degenerated disc appears to be a nice perception seized upon after the operation to make it appear that qualified orthopedic surgeons furnished by the employer had not correctly diagnosed the case. Just because appellee voluntarily furnished able and competent doctors after the six month period does not mean that the employee was at liberty to engage at the employer's expense, a doctor unacceptable to the employer; one who had been notified that the employer would not pay his fee.

I might add that there is no question about the right of the employee to select his own doctor. Of course he has such a right, but there is no law that gives him the right to engage a surgeon to perform an expensive operation more than six months after the injury solely on his own initiative, and require his employer to pay the bill.

For the reason that I do not believe the law requires the employer to pay the surgeon's fee in the circumstances of this case, I respectfully dissent.

5-3058 372 S. W. 2d 240

Opinion delivered November 4, 1963.

[Rehearing denied December 2, 1963.]

[redacted]

Harper, Harper, Young & Durden, for appellant.

Jack Yates, White & Martin, for appellee.

PAUL WARD, Associate Justice. The Workmen's Compensation Commission, in four separate cases, found appellees, Gerald Gordon, Robert Hyde, O. A. Richardson and James D. Wilson, *totally* and *permanently* disabled from silicosis contracted while working in a coal mine belonging to appellant—Peerless Coal Company. The award was affirmed by the circuit court, and this appeal follows. The four claims were consolidated for hearing at all stages on a joint record, and they are jointly here on appeal.

Appellant relies on two principal grounds for a reversal. *One,* the Commission's awards are not supported by substantial competent evidence. *Two,* the Commission acted without jurisdiction and in excess of its powers. For reasons hereafter set out we are unable to sustain appellant on either ground.

ONE

The Commission held that all four of the claimants are *totally* and *permanently* disabled with silicosis and that each was last injuriously exposed to the hazards of the disease within the last three years while employed in appellant's mine. We do not understand appellant seriously challenges the finding that appellees are totally and permanently disabled, nor do we think it could do so. As to three of the claimants the evidence is beyond question, and, as to the other one, we find substantial evidence to support the finding of the Commission as to the extent of his disability.

Appellant does, however, ably and forcefully argue that there is no competent evidence to show its mine was ever a silica hazard. In support of this contention appellant introduced into evidence the results of three scientific tests performed in 1961. Rather than attempt to set out in detail the facts revealed by these tests, it may be conceded for the purpose of this opinion, that they show the silica content of the air taken from the mine to be harmless—that it would not induce silicosis. It appears to be appellant's contention that such scientific evidence overcomes the testimony introduced on behalf of claimants. In fact appellant contends there is no evidence to show there was (in the mine) silica dust capable of causing silicosis. This being true, says appellant, there is no substantial evidence in the record to sustain the finding of the Commission. For reasons presently set out, we are not convinced by the above argument.

In the first place we point out that the tests performed by appellant did not necessarily prove there was never at any time harmful silica dust in the mine. The air tested was taken in 1961 under conditions controlled by agents of appellant; it was near the entrance, and the ground had been dampened. These conditions bear little semblance to those under which appellees worked. It is undisputed that appellees worked for many years, often in a heavy dust, hundreds of feet underground. In the record there is testimony which, we think, amounts to substantial evidence to support the finding by the Com-

mission that there was silica dust present in the mine sufficient to create a silica hazard. A few instances of such testimony are briefly set out below.

(a) The State Board of Health's laboratory examined rock samples taken from subject mine in 1952 and found them to contain over 40% silicates.

(b) In the subject mine there is a layer of rock under the strata of coal. This rock is frequently blasted, causing a dense dust deep in the mine. It was often necessary to drill into the rock preparatory to blasting, and this also caused an accumulation of dust. To prevent an excess of rock dust, water was passed through the drill but sometimes the water hose broke while the drilling continued. At times the dust was so thick it was difficult to see clearly more than a few feet. Frequently it was necessary to put sand on the iron tracks used by the coal cars. Appellant admits silica is present in many rocks.

(c) The doctors first testified that claimants had silicosis, but later they admitted they were influenced by the knowledge that claimants had worked many years in coal mines. Apparently, had the doctors not had this information, they would have or might have diagnosed the disease as emphysema—a similar disease but one not covered by the act. In other words, it appears to us that the doctors were merely taking into consideration the case history of the patient as a usual aid to diagnosis.

(d) Finally, x-rays of claimants' lungs indicated the presence of silica.

For a reversal, appellant relies on the case of *Collier-Dunlap Coal Company* v. *Dickerson,* 218 Ark. 885, 239 S. W. 2d 9, pointing out what we there said:

"To affirm this case we would have to take judicial knowledge that the hazard of silicosis existed in appellant's mine. This Court will not take judicial knowledge of such alleged fact."

and further:

"If the rock, coal, or other elements in appellant's mine give off silica dust causing the hazard of silicosis to exist, then such fact can be proved without great difficulty. Without such fact being proved the evidence is not sufficient to warrant the making of an award."

In the cited case, however, we pointed out facts which differ from the facts in the case under consideration. We said: "There is no evidence in the record showing that any silica dust was ever in appellant's mine. In fact there is no evidence on the point one way or the other." We think, as previously pointed out, there is no such lack of evidence in the record in the case under consideration.

We are not convinced by appellant's contention that the case here is distinguishable from the case of *Peerless Coal Company* v. *Jones,* 219 Ark. 181, 240 S. W. 2d 647. There we sustained appellee's claim based on silicosis on even less direct proof than we have here. It is true that in the cited case there were no negative tests made of the air in the mines, but, as previously indicated, the tests in this case were not such as to preclude the possibility of silica dust in the mine at other times and locations.

From all the above we must conclude the record contains substantial evidence to sustain the Commission's findings. Also, as stated in the *Jones* case, *supra:*

"We have many times held that the Workmen's Compensation Law should be broadly and liberally construed, and that doubtful cases should be resolved in favor of the claimant."

TWO

We see no merit in appellant's argument that the Commission acted without jurisdiction because claimants did not give appellant notice according to Ark. Stat. Ann. § 81-1314 (c) (1) (Repl. 1960) which provides:

"(1) Except as herein otherwise provided procedure with respect to notice of disability or death, as to the filing of claims and determination of claims shall be the same as in cases of accidental injury or death. Writ-

ten notice shall be given to the employer of an occupational disease by the employee, or someone on his behalf, within ninety (90) days after the first distinct manifestation thereof, and in the case of death from such an occupational disease, written notices of death shall also be given to the employer within ninety (90) days thereafter."

Appellant says the record shows claimants failed to give it notice within the 90 days specified above. Conceding, for the purpose of this opinion, no proper notice was given, that fact does not bar appellees claim, because no objection was raised by appellant at or before the first hearing on their claims. See: *Gunn Distributing Company* v. *Talbert,* 230 Ark. 442, 323 S. W. 2d 434. It is true that the above case construed Ark. Stat. Ann. § 81-1317 which provides for notice in usual accidental injury cases. It reads: "Notice of injury or death for which compensation is payable shall be given within sixty [60] days after the date of such injury or death (1) to the Commission and (2) to the employer." We know of no sound reason why the rule (regarding waiver of notice) applicable to occupational diseases should be different from that applicable to accidental injuries. In both instances the statute provides that notice *shall* be given. The only real differences are that § 81-1317 requires that notice be given within sixty days to both the Commission and the employer while § 81-1314 (c) (1) requires ninety days notice be given only to the employer. If, as held in the *Talbert* case, *supra,* notice can be waived in accidental injury cases we think it can, in the same manner, be waived in occupational disease cases.

In conformity with what has been said above, we affirm the judgments of the trial court from which comes this appeal.

Affirmed.

5-3092 372 S. W. 2d 395

Opinion delivered November 4, 1963.

[Rehearing denied December 9, 1963.]

Robert J. Brown, for appellant.

Acchione & King, for appellee.

SAM ROBINSON, Associate Justice. On December 19, 1957, William B. Moore was admitted, as a patient, to the Arkansas Baptist Hospital. In consideration of the services to be rendered by the hospital to Moore, appellant, Stewart K. Prosser, agreed in writing to pay for such services. When Moore left the hospital on December 24, there was a balance of $87.65 owed for services rendered. The account was not paid.

On June 2, 1959, in an effort to collect, the hospital filed this suit in the North Little Rock Municipal Court. Both Moore and Prosser were named as defendants. On motion of appellant Prosser, the case was transferred to the Municipal Court of Jacksonville. It does not appear from the record that either of the defendants filed an answer, and it does not appear that Moore was served with summons. In fact, the summons was returned by the Sheriff to the Municipal Court marked "*non est*" as to Moore.

On April 24, 1961, the cause came on for trial and judgment was rendered in favor of the hospital against the defendant Prosser. The judgment recites that both Prosser and Moore appeared in person and were repre-

sented by counsel; hence, the fact that Moore was not served with summons is of no consequence. *Nichols* v. *Arkansas Trust Co.,* 207 Ark. 174, 179 S. W. 2d 857; *Purnell* v. *Nichols,* 173 Ark. 496; 292 S. W. 2d 686; *Austin* v. *Hemphill,* 170 Ark. 945, 282 S. W. 1.

On August 11, 1961, the judgment of April 24 was set aside by the Municipal Court on motion of Prosser, and another judgment was entered against both Moore and Prosser. There was an appeal by Prosser to the Circuit Court, but it does not appear that Moore appealed. The trial in Circuit Court resulted in a judgment in favor of the hospital against Prosser, and he has appealed to this court.

It is appellant Prosser's contention that he merely signed the agreement to pay the hospital as security for Moore and that it was the duty of the hospital, as provided by Ark. Stat. Ann. § 34-333 (Repl. 1960), to commence suit against the alleged principal debtor, Moore, and prosecute such suit to a conclusion. It appears from the record before us that the hospital did the very thing that appellant contends it should have done. The record shows that not only did the hospital name Moore as a party defendant in this case, but actually secured a judgment against him in the Jacksonville Municipal Court.

Affirmed.

HARRIS, C. J., disqualified and not participating.

5-3071 371 S. W. 2d 841

Opinion delivered November 4, 1963.

Phillip H. Loh, for appellant.

Thomas B. Tinnon, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from the Perry Chancery Court's dismissal of a complaint for divorce. The parties, appellant Guy Napier and appellee Mary Napier, were married at Hartwell, Georgia, on September 27, 1960, and later moved to Mountain Home, where they purchased a home. Sometime in 1962 appellant moved to Perry County, appellee continuing to occupy the home in Mountain Home with their child who was born June 12, 1961. On November 16, 1962, appellant filed suit for divorce, alleging that appellant was a resident of Perry County, appellee a resident of Baxter County; that the parties had been separated since June 1962; that appellee treated him with contempt, neglect, hatred and abuse, systematically and continually, making his condition intolerable; that appellant had purchased a home in Mountain Home which was presently occupied by appellee; and prayed for determination of their interests in the real property and for a divorce. Appellee answered, admitting the marriage, the child and that her residence was Baxter County, denied all the other allegations, affirmatively alleged that appellant had deserted appellee and their child, without means of support or maintenance, and

prayed for dismissal of appellant's complaint. Appellee cross-complained for support, child support, attorney fees and costs, which appellant answered and denied.

A hearing on appellee's petition for temporary child support and attorney fees was held on December 3, 1962, at which time appellant was ordered to pay $25.00 per week child support and $50.00 attorney's fee *pendente lite*. The suit came to trial February 5, 1963, following which, by order filed April 23, 1963, the Chancellor found that appellant failed to prove grounds for divorce, dismissed appellant's complaint, and further ordered appellant to continue to pay $25.00 per week child support and awarded an additional fee of $100.00 to appellee's attorney. From the decree comes this appeal.

For reversal appellant urges that the preponderance of the evidence established that appellee had been guilty of personal indignities such as to create in appellant grounds for divorce, and the trial court erred in failing to so find.

At final hearing, appellant had the testimony of three witnesses, one to corroborate his residence and two, himself and another (his mother), to testify concerning his grounds for divorce. In defense of the marriage, appellee was the only witness. The Chancellor had the opportunity to see, hear, and question these witnesses, which he did. *Dearien* v. *Lancaster,* 221 Ark. 98, 252 S. W. 2d 72. We do not feel that it would be helpful to detail the testimony, because on virtually every point the testimony was in conflict and frequently unconvincing for either party. As we have said so many times, the State is always a party to a marriage, *Dunn* v. *Dunn,* 222 Ark. 85, 257 S. W. 2d 283; *Whitford* v. *Whitford,* 100 Ark. 63, 139 S. W. 653; *Hill* v. *Rowles,* 223 Ark. 115, 264 S. W. 2d 638; *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502; and this is one contract that should not be dissolved capriciously. Trying this case *de novo* on the record before us, we cannot say that the Chancellor's conclusions that appellant failed to prove grounds for divorce are against the preponderance of the evidence. *Snyder* v. *Snyder,* 233 Ark. 188, 343 S. W. 2d 420.

Appellee's attorney is hereby allowed $150.00 for his services in this court, which shall be taxed as costs.

Affirmed.

CHENEY, COMMISSIONER *v.* GEORGIA-PACIFIC PAPER CORP.

5-3090—3091 371 S. W. 2d 843

Opinion delivered November 4, 1963.

Lyle Williams, A. W. Nisbet and *Henry Ginger,* for appellant.

Paul Sullins and *Griffin Smith, Gaughan & Laney* and *Bridges, Young* and *Matthews,* for appellee.

FRANK HOLT, Associate Justice. The main question presented in these consolidated cases is whether the use

tax exemption provided by statute is applicable to the purchase of turbine generators which are being used by both appellees, Georgia-Pacific Paper Corporation and International Paper Company, in their respective operations of manufacturing or producing paper products. Georgia-Pacific Paper Corporation claims additional exemptions on its purchase of such items as anion resin, a sewer cleaning ball, miscellaneous conveyors, two small turbines, a towmotor and carrier, and recorder chart rolls. The appellant, the Commissioner of Revenues, levied an assessment in the sum of $30,935.84 against Georgia-Pacific Paper Corporation based upon the turbine generator plus the other enumerated items. The use tax assessment levied against International Paper Company was upon the turbine generator only in the amount of $27,063.69, or three per cent (3%) of the recent purchase price of $1,908,549.04. The penalties were waived. The assessment against the International Paper Company was paid under protest and action was brought against appellant to recover this sum paid under protest on the basis the turbine generator is exempt from the use tax. Appellee, Georgia-Pacific Paper Corporation, sought an injunction to restrain the Commissioner of Revenues from further proceedings to collect the tax assessed against it and sought a Declaratory Judgment to establish that the above named items are primary facilities used directly in their manufacturing or processing operation and therefore, exempt pursuant to Ark. Stat. Ann. § 84-3106 (Supp. 1961). This statute provides in pertinent part as follows:

"84-3106. Exemptions.—There are hereby specifically exempted from the taxes levied in this Act [§§ 84-3101—84-3128]: * * *

Manufacturing or processing machinery, replacement parts, materials, and supplies used directly in the manufacturing or processing operation provided; such materials, machinery, supplies, and equipment are not available within this State by reason of not being manufactured or produced within Arkansas; or are not available from instate sellers' or suppliers' stocks in trade

within this State. It is the intent of this subsection to exempt only such equipment, machinery, materials, or supplies that constitute the primary facility engaged in the direct production, processing or manufacturing of articles of commerce at industrial and processing plants in Arkansas and which are not available from the seller's regularly maintained stock in this State.

The terms 'manufacturing' and 'processing' as used herein, refer to and include those operations commonly understood within their ordinary meaning and shall include mining, quarrying, refining, and the production of natural resources, cotton ginning, and rice drying. Hand tools, buildings, transportation equipment, expendable items, office machines and supplies, and all other materials which are incidental or useful in connection with the manufacturing or processing operations and not directly used in the primary production processing or manufacturing are not included or classified as exempt."

The appellant controverted the claimed exemptions. The cases were consolidated for trial by agreement.

In the case of Georgia-Pacific Paper Corporation, the Chancellor found that "the items on which the tax is sought are all directly used in the manufacturing or processing operation, within the meaning of the exemption." As to International Paper Company, the Court found "that the 20,000 K.W. steam turbine generator as employed in the Pine Bluff Mill of the plaintiff is a primary facility used directly in the processing and manufacturing operation of making wood, pulp and paper * * * that it is exempt from * * *" the use tax.

On appeal appellant relies for reversal upon four points which are aptly encompassed by appellant's statement that:

"The question as to all of the above mentioned articles is whether or not such are directly used in manufacturing or processing within the meaning of the compensating tax exemption statute, Ark. Stat., Sec. 84-3106 (D) (Pocket Supp.) * * *"

There appears to be no dispute about the fact that these items were unavailable for purchase in Arkansas.

The appellant does, however, strenuously dispute that the evidence presented by the appellee was sufficient to bring the questioned items within the purview of the statue. We agree with appellant that the burden is on appellees to clearly show they are entitled to the exemption from the use tax. There is no implied exemption from a tax and a claimant must clearly establish an exemption, since taxation is the rule and exemption the exception. *Biscoe* v. *Coulter,* 18 Ark. 423; *Scurlock* v. *Henderson,* 223 Ark. 727, 268 S. W. 2d 619. With this rule of law in mind, we now proceed to review the pertinent facts as adduced by the testimony in the cases at bar.

In the Georgia-Pacific Paper Corporation plant the logs are debarked in a "barking drum." The debarked logs are moved to a knife clipping machine where they are cut into small chips. The wood chips are placed in a silo for storage. They are withdrawn as needed and loaded into "digesters" where a cooking liquor compound is mixed with the chips. The "digester" is closed and then steam pressure at 160 pounds is admitted from the turbine generator. The chips are cooked for three hours at 100 pounds pressure. This dissolves the bonding material that holds the cellulose together in the wood. When the cooking is complete, then the cellulose fibers known as pulp remain. The pulp is then further washed and screened in the assembly line process. The wood fiber or pulp, in a suspension of water, is delivered to the paper making machines. These machines have continuous fine mesh bronze wire which holds the cellulose on the wire while permitting the water to drain through this mesh. The fibers form a mat on top of this mesh screen. It is pressed to further remove moisture and then goes into and around a series of heated cylindrical driers. These driers operate under 40 to 60 pounds of steam pressure received from the turbine generator. The purpose is to further dry the product, the mat of fibers, into a finished sheet of unbleached paper such as paper for newsprint and telephone directories. A further process is required to produce bleached pulp

from which is made a heavier, stronger product such as milk cartons and drinking cups.

There are several boilers which utilize as fuel the waste material such as the bark, the chipper residue and the concentrated spent cooking liquor from the "digesters." This fuel is used to generate steam in the boilers at 850 pounds pressure. The steam is then funneled to the turbine at this high pressure. As the steam passes through the turbine, turning parts of it, the energy is gradually spent or the steam pressure reduced. At the reduced level of 160 pounds pressure some of the steam is extracted and supplied to the "digesters" for the cooking of the pulp. The balance of the steam continues on through the turbine until the pressure level is further reduced to 60 pounds. At this point some of the steam is further withdrawn and funneled to that portion of this assembly line process where it is used in drying, evaporation in the tubular heat exchangers and various other applications. As the turbine is turning because of the steam pressure, thus reducing the pressure, it drives the generator which generates the electricity. Thus it provided the motive power for the various machines, pumps and other equipment in the paper making process. Therefore, the turbine generator performs a dual function. It utilizes the steam to generate electrical energy and in so doing it reduces the steam pressure and emits it at certain levels to component parts of the paper manufacturing process where it is used for various purposes, such as cooking, drying and heating.

The turbine generator in the plant of International Paper Company performs basically the same functions. The steam pressure enters the turbine from the boilers at 1,250 pounds where it is reduced and discharged to component parts in the mill at pressure levels of 400, 140 and 60 pounds. This machine was built according to specifications to fit a particular need. Thirty-two per cent (32%) of the steam entering the turbine is consumed in generating electricity. The balance of sixty-eight per cent (68%) is processed to proper pressure levels by the turbine and thence flows directly to various

applications in the paper making process. Only approximately one-half (½) of one per cent (1%) of the electricity generated by the turbine is used in the mill for such needs as lighting and air conditioning.

The tenor of the appellees' evidence was that in modern paper mills the turbine generator is a facility of primary importance in fulfilling the unique requirements of a continuous and unitary mechanical operation. It is undisputed that the use of steam turbine generators creates a balance between two forms of energy in the paper making process,—steam for cooking, heating, evaporation and drying—electricity for motive power. Although appellant presents a forceful and persuasive argument, we think the Chancellor was correct in his findings that these turbine generators, as employed and used by appellees, are clearly primary facilities used directly in the processing and manufacturing of paper products and, therefore, exempt from the use tax. Certainly it cannot be said his findings are against the clear preponderance of the evidence.

Appellant contends that the function of the turbine generator is a separate and distinct process and is completed before the manufacturing of the paper actually begins. Appellant relies on *Scurlock* v. *Henderson, supra,* where it was held that ginning cotton is not a manufacturing process. We do not consider this case in point. When cotton is ginned it is still raw cotton without the seed. In the case at bar the entire process, including the turbine generator, converts a raw material into a finished product which is taxed when it enters commerce. It is significant that at the next legislative session following the *Henderson* decision the statute was amended to exempt cotton ginning.

There is compelling evidence in this case by recognized authorities that a steam turbine generator is such a necessary facility to a modern paper mill that one would not be constructed without such machinery. Each of these turbine generators is located in the very heart of the manufacturing process and performs much the

same function as the mainspring of a watch. Appellant quotes from Black's Law Dictionary (4th Ed.) that:

"Primary is defined as 'First; principal; chief; leading.' Primary Purpose is defined as 'That which is first in intention; which is fundamental'."

Applying this definition it seems apparent to us that the steam turbine generator is a primary facility in the paper manufacturing process. If the turbine generator were removed the manufacturing operation would cease.

Other jurisdictions have construed turbine generators to be machines used "directly" in a manufacturing process and thus exempt. *Allis-Chalmers Mfg. Co.* v. *Iowa State Tax Comm.,* (Iowa) 92 N. W. 2d 129; *City of Ames* v. *State Tax Commission,* (Iowa) 71 N. W. 2d 15; *Niagara Mohawk Power Corp.* v. *Wanamaker,* (N. Y.) 144 NYS (2) 458; *Youngstown Building Material and Fuel Co.* v. *Bowers,* (Ohio) 149 N. E. 2d 1. In the *Allis-Chalmers* case it was said:

"This turbine generator not only makes the electricity but furnishes steam which passes through it for * * * processing."

Under any fair construction of our statute, giving the word "direct" a reasonable meaning in the cases at bar, we think the turbine generators are being directly used as primary facilities in the manufacture of paper products. To hold otherwise would be too narrow a construction and an unreasonable refinement.

In construing the legislative intent we not only look to the language of the statute but to the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the contemporaneous legislative history or other appropriate matters that throw light on the intent of the legislature. *Arkansas State Highway Comm.* v. *Mabry,* 229 Ark. 261, 315 S. W. 2d 900. In *Morley* v. *Brown & Root, Inc.,* 219 Ark. 82, 239 S. W. 2d 1012, we said:

"There can be little doubt that the desire of the Legislature to encourage new industries to locate in the

State prompted the passage of this exemption section, and it is proper to view and interpret the section in that light."

We think it is manifest that our legislature clearly intended to exempt such machinery as these turbine generators when they are an integral part of the plant, employed and used in a manufacturing process such as in the cases at bar.

We have carefully reviewed the statutory rules of construction and the cases cited by appellant. Although ably presented, we do not consider them to be controlling in the cases at bar.

Appellee, Georgia-Pacific Paper Corporation, contends that certain miscellaneous items are also exempt from the use tax. Among these items are two small turbines. They are usable in driving fans that create the draft for the boiler and in pumping "feed water" to it. These turbines are used to drive some of the auxiliary equipment in the boilers and cause them to function. It appears that these small turbines are not readily adaptable to interchange or relocation between mills. We consider these turbines to be such an integral part of the functional system of the paper manufacturing process that they are also exempt for the reason we have heretofore given.

Appellant contends that the remaining items are excluded, or not clearly exempted by the terms in the last paragraph of § 84-3106 (D) [Ark. Stat. Ann. (Supp. 1961)] which reads as follows:

"* * * Hand tools, buildings, transportation equipment, expendable items, office machines and supplies, and all other materials which are incidental or useful in connection with the manufacturing or processing operations and not directly used in the primary production processing or manufacturing are not included or classified as exempt."

Anion resin is a material to soften water and remove impurities from it before it goes into the boiler.

This tends to prevent "scaling up" of the boilers. The sewer cleaning ball is a rubber ball with fins which is placed in the water lines at the water wells and washed through the lines for a distance of approximately five or six miles to the plant. These balls are used to clear any accumulated debris from the lines. The miscellaneous conveyors are used in moving waste material from a storage bin at the lumber mill into a mechanism that feeds a pneumatic conveyor which blows the waste material over to the paper mill. The waste material is then used as fuel for the boilers. The towmotor and carrier item is used to transport material between processes in the plants. The recorder chart rolls are information devices which are used to record the functioning of plug making equipment. They are information devices only.

As stated, this court has consistently held that the burden is on the taxpayer to establish clearly that the legislature intended the claimed exemption since taxation is the rule and exemption the exception. An exemption cannot be implied. *Biscoe* v. *Coulter, supra; Scurlock* v. *Henderson, supra; McCarroll* v. *Mitchell,* 198 Ark. 435, 129 S. W. 2d 611; *Wiseman* v. *Ark. Wholesale Grocers' Assn.,* 192 Ark. 313, 90 S. W. 2d 987, and *Hilger* v. *Harding College, Inc.,* 231 Ark. 686, 331 S. W. 2d 851. We do not think the appellee, Georgia-Pacific Paper Corporation, has sufficiently met the burden of proof required of it as to these miscellaneous items being exempt. However, we do not mean to say that under all circumstances such items could never be exempt.

In the case of the Georgia-Pacific Paper Corporation, the decree is affirmed as to the turbine generator and the two small turbines; the decree is reversed as to the remaining items [anion resin, sewer cleaning ball, miscellaneous conveyors, towmotor and carrier, and recorder chart rolls] and the cause remanded with directions to enter a decree not inconsistent with this opinion.

The decree is affirmed as to International Paper Company.

This being an equity case, we adjudge all costs against the appellant.

In the opinion of Justice ROBINSON the balance of these miscellaneous items comes within the purview of the statute and are, therefore, exempt from the use tax.

HARRIS, C. J., not participating.

OSBORNE *v.* STATE.

5068 371 S. W. 2d 518

Supplemental opinion on rehearing delivered November 4, 1963.

GEORGE ROSE SMITH, J., on rehearing. One assignment in the appellant's motion for a new trial was that "the jury was misinstructed by the court over defendant's objections." In our original opinion we held this assignment to be too general in its language to support a contention that a particular instruction was erroneous.

In a petition for rehearing counsel point out that there was only one objection to the instructions, that being a specific objection to Instruction No. 8. Hence, it is argued, the assignment of error—that the jury was misinstructed *over the defendant's objection*—could only

have referred to Instruction No. 8, for no other part of the charge was given over the defendant's objections. We think this reasoning to be sound, and we accordingly consider the point upon its merits.

Instruction No. 8 was directed to the State's proof that the accused had passed other forged checks. The instruction told the jury that this proof would not justify a finding of guilty upon the two offenses that were being tried, but the proof might nevertheless be considered with respect to the matter of guilty knowledge or the existence of a common plan. In objecting to the instruction counsel specifically asked the court to tell the jury not to consider the other offenses in fixing any punishment that might be imposed. This request was denied.

We think the request should have been granted. Under our habitual criminal statute prior convictions may be a basis for increasing the punishment for the offense on trial, Ark. Stat. Ann. § 43-2328 (Supp. 1961), but in the absence of a conviction the jury ought not to consider some other offense as a reason for increased punishment. As we said in *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804: "If the accused has committed other crimes, each may be examined separately in a court of law, and punishment may be imposed for those established with the required certainty." See also *Ingram* v. *State,* 39 Ala. 247.

There should be no doubt in the minds of the jurors about the purposes for which they may properly consider the proof of other offenses. "When proof of other crimes is admitted, the court must instruct the jury as to the limited purpose of its admission, *and that they must confine its use to that purpose.* The failure to so instruct the jury is reversible error if prejudicial." Wharton's Criminal Evidence (12th Ed.), § 248 (italics added). This is essentially the position we took in *Norris* v. *State,* 170 Ark. 484, 280 S. W. 398, for there the instruction that was approved not only explained the purpose of the proof of other offenses but went on to tell the jury

that "you should consider such evidence for this purpose and for this purpose alone."

In the present case the court stopped short after telling the jury that the proof of other offenses would not justify a verdict of guilty but might be considered upon the issue of guilty knowledge and common plan. Thus the instruction told the jury not to consider the evidence for one purpose, allowed the jury to consider it for another purpose, and said nothing one way or the other with respect to a third purpose—the assessment of punishment. In this situation the jurors might very well have supposed that it was proper for them to take the other offenses into account in fixing the sentence; certainly there was nothing to prevent them from taking that view.

An error is presumed to be prejudicial unless the contrary affirmatively appears. *Crosby* v. *State,* 154 Ark. 20, 241 S. W. 380. In view of the fact that here the jury imposed the maximum sentence of twenty years imprisonment for the forgery and uttering of a check for $87.63, for which restitution appears to have been made, we certainly cannot say that it affirmatively appears that the prior offenses were not taken into account in the assessment of the punishment.

When an erroneous ruling has nothing to do with the issue of guilt or innocence and relates only to the punishment, it may be corrected by reducing the sentence to the minimum provided by law. *Webb* v. *State,* 154 Ark. 67, 242 S. W. 380. Hence, unless the Attorney General files a request within seventeen days for the cause to be remanded for a new trial, the sentence upon each count will be reduced to the minimum of two years, Ark. Stat. Ann. § 41-1805 (1947), to be served consecutively, and as so modified the judgment will be affirmed.

The petition for rehearing is granted.

HARRIS, C. J., would deny the petition.

Original opinion delivered October 7, 1963, p. 5.

5-3101 372 S. W. 2d 220

Opinion delivered November 11, 1963.

Bethel & Pearce, for appellant.

Hardin, Barton & Hardin, for appellee.

Carleton Harris, Chief Justice. Appellant, J. W. McLeod, is an individual d/b/a Line Service Company in Lamar, Missouri. Since 1951, he has been engaged in the business of clearing rights of way and keeping them clear of brush thereafter for companies which build and use transmission lines, such as electric power and telephone companies. Darrell E. Meyer, appellee herein, was employed by appellant as an area manager in 1960, and the parties entered into a written contract of employment. This contract, *inter alia,* contained the following provision:

"Employee agrees that he will not for a period of five years after the termination of his employment with the company for any reason, either on his part or on the part of the company, engage in any way directly or indi-

rectly as an owner, agent, or employee in any business competitive with the company's business nor solicit or in any manner work for or assist any competitive business in the states of Missouri, Kansas, Oklahoma and Arkansas."

Meyer's employment was terminated by appellant as of November 25, 1962. Subsequently, appellee instituted suit in the Chancery Court of Sebastian County (Fort Smith District) against appellant wherein he sought to recover salary and expenses alleged to be due under the contract, and also sought a declaratory judgment invalidating the contractual provision which denied Meyer, after termination of employment, the right to participate or engage in a similar trade or business for a period of five years in the four states heretofore mentioned.

Appellant filed an answer, admitting that appellee was due the sum of $825.06 for salary and expenses, and also a counter claim, seeking an order directing Meyer to deliver to appellant a certain automobile and other property which McLeod contended belonged to him. Appellant contended that the aforementioned restraint agreement was fair and reasonable, and the court was asked to enjoin and restrain appellee from violating this provision of the contract. After the filing of certain other pleadings, the cause proceeded to trial. On March 6, 1963, the court entered its decree, finding, *inter alia,* that Meyer should recover from McLeod the sum of $1,224.81 as salary and expenses due; that the contract provided that upon termination of employment the automobile should be immediately returned to appellant;[1] that the provision wherein Meyer agreed not to engage in a competitive business (set out in Paragraph One) for a period of five years in the four states mentioned, "is unreasonable in that it encompasses too large an area and an unreasonable length of time, and is therefore void." From the decree so entered, appellant brings this

[1] This automobile had been attached, and was being held by the Sheriff of Sebastian County. The court ordered appellee to bear the costs of storage to date of judgment, and ordered appellant to bear the cost from the date of judgment until same was satisfied.

appeal. While the notice of appeal recites that the entire decree is being appealed from, the appeal actually relates only to the Chancellor's action in declaring the aforementioned provision in the employment contract unreasonable and void. Appellant asserts that the employment contract was reasonable, and insists that the court should have ordered specific performance of the agreement by appellee.

There are no statutes in Arkansas governing contractual restraint provisions as to area or length of time, though the question has been raised in several cases before this court. These provisions are sometimes found in two types of contracts. One type is where an established business is sold, and the seller agrees not to enter into the same business for a certain period of time, or in a particular area.[2] The other type relates to contracts between employers and employees, as in the present instance. An analysis of Arkansas cases reveal that our court has been more prone to uphold restrictive clauses under the former type of agreement than under the latter. In *American Excelsior Laundry Co.* v. *Derrisseaux,* 204 Ark. 843, 165 S. W. 2d 598, we pointed out the distinction between the two types of agreement. However, our cases hold (in each category) that whether a restraint provision is reasonable or unreasonable (and thus valid or invalid), is a matter to be determined under the particular circumstances involved.

Appellant, in his brief, relies mainly on our holding in *Orkin Exterminating Co. of Arkansas* v. *Murrell,* 212 Ark. 449, 206 S. W. 2d 185. There, Murrell agreed that he would not directly or indirectly, "for himself or in behalf of any other person or corporation" engage in the exterminating, fumigating, or termite control service during the term of his employment or for one year following the termination of the agreement in an area embracing part of the state of Arkansas. Murrell, under his assigned duties, had access to all records, customers'

[2] See *Bloom* v. *Home Insurance Agency,* 91 Ark. 367, 121 S. W. 293 (1909); *Hampton* v. *Caldwell,* 95 Ark. 387, 129 S. W. 816; *Wakenight* v. *Spear & Rogers,* 147 Ark. 342, 227 S. W. 419; *McClure* v. *Young,* 193 Ark. 188, 98 S. W. 2d 877.

listings, and credit ratings. Trade secrets, were involved, as Orkin maintained a research department wherein the nature and habits of insects and rodents were ascertained, and chemicals and compounds were prepared to be used in their destruction without danger to human beings or damage to furniture, woodwork, etc. Chemicals were mixed and formulae reported. The contract bound the parties to continue the employer-employee relationship for a specified period of time. Murrell subsequently resigned and entered the pest control business for himself in violation of his agreement. This court held that the contract between the parties was reasonable and enforceable.

The circumstances in the instant case are quite dissimilar to the above recited facts. For instance, Murrell voluntarily resigned to enter competitive business. Here, Meyer was fired. Further, under the Orkin contract, Murrell received the protection of a definite period of employment, while employment in the case before us could be terminated at any time upon 30 days notice. Moreover, Murrell did, by virtue of his position and the nature of his employment, receive valuable trade secrets, as well as customer listings and individual credit ratings, but these circumstances do not exist in the instant litigation. In the first place, as heretofore set out, only a limited number of concerns could use the service offered by appellant. Certainly, any individual by simply looking in the telephone directory, could locate the names of electric companies, telephone companies, or telegraph companies, and then easily ascertain the person in charge of the clearing of foliage between power lines, and in rights of way. Of course, in his work, Meyer learned the difference between light, medium, and heavy foliage, and it was necessary that he learn about spans of brush and how to measure density, but there was no special or secret process used in making this determination. The knowledge of how to bid for a job was gained by Meyer, but the information acquired here would hardly seem to come under the classification of "secret formulas;" rather, it was simply the knowledge which one acquires by experience. Actually, it does not appear that any se-

cret formula was used at all by appellant. Chemicals used were sold on the open market, and in some instances the customers furnished their own chemicals. The substance would be mixed with water or diesel oil, and these mixtures were prepared by the foreman of the particular crew doing the work, rather than by appellee.

It is permissible for one to use the experience and knowledge gained during a period of employment. The experience and knowledge thus acquired as an employee does not become the property of the employer. *Witmer* v. *Arkansas Dailies, Inc.,* 202 Ark. 470, 151 S. W. 2d 971.

Be that as it may, the main difference between the facts in *Orkin* and the case before us, and the circumstances that are most persuasive to the conclusion reached, relate to the period of time and the area covered in the restraint clause. In *Orkin* the contract provided that Murrell would not engage in the pest control business for *one* year following termination of his employment, and the area covered was a part of one state. Here, the contract provided that Meyer would not engage in a competitive business for *five* years, and the area covered is four states. This case bears some similarity to *American Excelsior Laundry Co.* v. *Derrisseaux, supra.* In that case, Derrisseaux entered into a contract with the laundry company to solicit laundry and dry-cleaning for appellant's plant, and agreed that he would not at any time within five years after the termination of the agreement, engage in the laundry and dry-cleaning business in the territory assigned to him under his contract. The term of employment was at will. Derrisseaux worked under the contract for a little over three months and then quit, engaging in business for himself, soliciting and delivering laundry and dry-cleaning over the same route. The laundry company instituted suit, and on trial, the court held the restraint provision of the contract void. On appeal, we affirmed the trial court. It might be mentioned, as far as area is concerned, that case involved only a rural route territory out of Pine Bluff. In *McCumber* v. *Federated Mutual Implement & Hdw. Ins. Co.,* 230 Ark. 13, 320 S. W. 2d 637, we held that a

contract restraining competition for two years in a nine-county area was void as an unreasonable restraint of trade.

It is suggested by appellant, that if the court feels that the restriction of 5 years is too long a period, "there would be no reason why the protection of the decree could not be for a shorter period of time." We do not agree, for courts will not vary the terms of a written agreement. To do so, would simply be to make a new contract between the parties, and we have consistently held that this will not be done. *Refrigeration Discount Corp.* v. *Haskew,* 194 Ark. 549, 108 S. W. 2d 908; *Roth* v. *Prewitt,* 225 Ark. 467, 283 S. W. 2d 155.

It is apparent, under the facts in this case, that the restraint clause is much broader than that in *Derrisseaux* or *McCumber,* and we agree with the chancellor that the provision in question is "unreasonable in that it encompasses too large an area and an unreasonable length of time, and is therefore void."

Affirmed.

SAMPLE *v.* SAMPLE.

5-2998 372 S. W. 2d 609

Opinion delivered November 11, 1963.

[Amended on Denial of Rehearing Dec. 23, 1963.]

J. R. Wilson and *R. H. Peace,* for appellant.

Mahony & Yocum and *Crumpler & O'Connor,* for appellee.

ED. F. MCFADDIN, Associate Justice. On March 15, 1962 the plaintiffs filed suit[1] in the Union Chancery Court against the defendants, who number more than a score of persons. The plaintiffs (appellants here) are Mrs. Betty Joe Sample Anderson, Mrs. Josephine Sample, and Mrs. Pattie Jane Purifoy Peek. Some of the defendants filed motions to quash service, and others of the defendants filed demurrers. The Trial Court sustained all of the motions and demurrers and dismissed the plaintiffs' complaint when they refused to plead further. From such final decree dismissing the complaint there is this appeal. The demurrer issue is determinative, because if no cause of action was stated, then the complaint was properly dismissed, even if service had been valid (a matter we need not consider in view of the conclusions that we reach.)

The complaint alleged that J. F. Sample died intestate in Union County, Arkansas, on September 1, 1904, survived by a widow and ten children as his heirs at law; that one of the heirs at law was a son, Claude Sample, who inherited an undivided one tenth interest in the estate of J. F. Sample; that Claude Sample died intestate on September 24, 1923, survived by the plaintiff, Mrs. Josephine Sample, as his widow, and by the plaintiff, Mrs. Betty Joe Sample Anderson, as an heir at law; that

[1] Later an amended and substituted complaint was filed and an amendment thereto. We consider all of the plaintiffs' pleading under the generic word, "complaint." The amended and substituted complaint consists of 136 pages in the transcript.

another child and heir at law of J. F. Sample was Mrs. Grace Sample Purifoy, who also inherited one tenth of the estate of J. F. Sample; that Mrs. Purifoy also died intestate; that the plaintiff, Mrs. Pattie Jane Purifoy Peek is a daughter and one of the heirs at law of her mother, Mrs. Grace Sample Purifoy and, as such, is entitled to a portion of the J. F. Sample estate. The plaintiffs sought to recover their claimed interests in the J. F. Sample estate and to hold certain defendants liable. Since there are three plaintiffs, we consider separately the allegations of each as contained in all of the pleadings of the plaintiffs.

I. *The Allegations Of Mrs. Betty Joe Sample Anderson.* This plaintiff claimed that upon the death of J. F. Sample in 1904, his widow, Mrs. Fannie E. Sample became administratrix of his estate; that Claude Sample (being one of the ten heirs of J. F. Sample and being the father of the plaintiff) died intestate in 1923; that a guardian was duly appointed for this plaintiff; that on one of the bonds executed by the said guardian, Clark Sample and C. H. Murphy were sureties; that this plaintiff is entitled to an accounting in this chancery action and is entitled to a judgment against Claude Sample and the heirs of C. H. Murphy, the said sureties on the said guardianship bond. In the complaint there is this positive allegation: "One of the plaintiffs, Betty Joe Sample, now Anderson, would show the court that there has been no final settlement filed in the matter of guardianship of Betty Joe Sample, minor."

Because of the above quoted allegation the complaint fails to state a cause of action in equity against the sureties on the guardianship bond. In *Waldrop* v. *Cooper,* 192 Ark. 1017, 96 S. W. 2d 19, we held that until the guardian's liability has been established *by an order of the probate court,* an action could not be maintained against the sureties on the bond. Here is the language:

"We agree with the trial court that the complaint failed to state a cause of action cognizable in equity.

The guardianship is still pending in the probate court, with no final settlement and no discharge of the guardian. No liability of the guardian has ever been established by an order of the probate court, and no order to pay over money found to be due on any final settlement has been alleged to be in default. Until this is done there is no liability against the bond. It was so held in *Vance, Guardian* v. *Beattie,* 35 Ark. 93, where it was said: 'Before final settlement of the accounts of Malone as guardian, and an order of the probate court for him, or his administrator, to pay over to appellant as his successor in the guardianship, some balance found due his wards on such settlement, appellant has no legal cause of action on the bond of Malone.' Citing *Sebastian* v. *Bryan,* 21 Ark. 447; *Norton* v. *Miller,* 25 Ark. 108. See also *Smith* v. *Smithson,* 48 Ark. 261, 3 S. W. 49. As said in *State* v. *Buck,* 63 Ark. 218, 37 S. W. 881: 'Until this settlement was made, and the balance due from the guardian ascertained by the court, the appellant had no cause of action that she could enforce, either at law or in equity against the sureties on her guardian's bond.' See, also, *Wallace* v. *Swepston,* 74 Ark. 520, 86 S. W. 398, 109 Am. St. Rep. 94."

Mrs. Betty Joe Sample Anderson also alleged that in 1961 she executed a deed to certain property which is now owned by the First Baptist Church of El Dorado; and that the Church took the deed with full knowledge of the claim of these plaintiffs as to their legal interest in the property. There is no allegation that the Church, or anyone connected with it, defrauded the plaintiff in any way, or was guilty of any unfair practice. There are no specific allegations of any facts showing fraud by anyone in connection with the deed that the plaintiff executed. In *McIlroy* v. *Buckner,* 35 Ark. 555, Mr. Justice Eakin, speaking for this Court, said:

"It is not sufficient to plead fraud generally, or merely to characterize actions as fraudulent. The facts and circumstances constituting the fraud should be set forth. There should be some concealment, misrepresentation, craft, finesse, or abuse of confidence, by which

another is misled, to his detriment; and these or some of them, must be alleged and proved. Mere epithets, or adverbs characterizing conduct, which, in itself, may be innocent, amount to nothing. This has been repeatedly ruled by this court."

To the same effect, see also: *Burns* v. *Burns,* 199 Ark. 673, 135 S. W. 2d 670; *Ledwidge* v. *Taylor,* 200 Ark. 447, 139 S. W. 2d 238; and *Jansen* v. *Blissenbach,* 210 Ark. 22, 193 S. W. 2d 814.

The complaint failed to state a cause of action as regards the conveyance of the property now held by the Church: so as to Mrs. Betty Joe Sample Anderson, the Trial Court was correct in sustaining the demurrers to her complaint.

II. *The Allegations Of Mrs. Josephine Sample.* This plaintiff claimed that Claude Sample inherited an undivided one tenth interest in the estate of J. F. Sample; that Claude Sample died intestate on September 24, 1923; that this plaintiff is entitled to her dower interest in the estate of Claude Sample and is entitled to an accounting against various defendants who might have received some part of the estate of J. F. Sample. But the complaint further alleged that there appears of record in Book 61 at page 486 in the Deed Records of Union County, Arkansas, a warranty deed with relinquishment of dower, dated April 9, 1918, whereby Claude R. Sample and Josephine Sample, his wife, for the consideration of $1,000.00, conveyed to Mrs. F. E. Sample all the grantors' interest in the estate of J. F. Sample in Union County, Arkansas. The only allegations seeking to void this deed are these: that the acknowledgment appears to be defective in that it fails to comply with statutory requirements; that "The plaintiffs would show the court that this purported deed is void; . . ."; and "The plaintiffs would show the court that there is no evidence of any money having been paid to Claud R. Sample or Josephine Sample for this alleged deed."

As to the defective acknowledgment: we have had many curative acts since 1918 curing defective acknowl-

edgments. In Ark. Stat. Ann. §49-213 (1947), there is the Act No. 422 of 1941; and prior curative acts are listed in the annotation to such statute. So the vague allegation of "defective acknowledgment" was subject to demurrer. As to the allegation, ". . . that this purported deed is void . . .": this allegation was a mere conclusion; and was subject to demurrer. See *Wood* v. *Drainage Dist.,* 110 Ark. 416, 161 S. W. 1057. As to the allegation that the deed was without consideration: in the absence of any sufficient allegation of facts as to mental incapacity, fraud, duress, etc. (and no sufficient allegations of such a nature were contained in the pleadings), then evidence could not have been introduced to show a total absence of consideration. See *Davis* v. *Jernigan,* 71 Ark. 494, 76 S. W. 554; *Mewes* v. *Mewes,* 116 Ark. 155, 172 S. W. 853; and *Mo. Pac. Rd. Co.* v. *Swafford,* 186 Ark. 631, 55 S. W. 2d 85.

The Chancery Court was correct in ruling that the complaint of Mrs. Josephine Sample failed to state a cause of action.

III. *The Allegations Of Mrs. Pattie Jane Purifoy Peek.* This plaintiff claimed that her mother, Mrs. Grace Sample Purifoy, inherited a one-tenth interest in the estate of J. F. Sample; that Mrs. Purifoy also died intestate, and that this plaintiff as one of the heirs at law of her mother was entitled to an interest in the estate of J. F. Sample. This plaintiff further alleged that her father, L. L. Purifoy, was in 1924 duly appointed her guardian by the Probate Court of Union County, Arkansas, and on January 5, 1924, made the regular statutory guardian's bond with C. H. Murphy as surety thereon; that the said guardian executed various oil and gas leases, and various other conveyances, with special bonds in each instance, as required by statute, and with various sureties; and that this plaintiff was entitled to an accounting in this chancery action against the estate of her said guardian and the estate of each and all of the sureties on the various bonds, as well as against the heirs of any of the sureties that may be dead.

The complaint had this specific allegation: "The record shows that there was no settlement made of the Purifoy guardianship . . ." This allegation in the complaint is fatal to the alleged cause of action of Mrs. Pattie Jane Purifoy Peek because, as we have already shown in considering the allegations made by Mrs. Betty Joe Sample Anderson, until there has been a settlement of the guardianship proceedings in the Probate Court, there can be no suit in law or in equity to charge the guardian or the sureties on his bond. It is therefore clear that the allegations made by Mrs. Pattie Jane Purifoy Peek fail to state a cause of action; and the Chancery Court was correct in sustaining the demurrer to her pleadings.

CONCLUSION. After considering every angle of the case we reach the conclusion that the Chancellor was correct in sustaining the demurrers and dismissing the complaint; and it therefore becomes unnecessary for us to consider the matter of the quashing of service. The decree is in all things affirmed.

WATKINS *v.* JOHNSON.

5-3102 372 S. W. 2d 243

Opinion delivered November 11, 1963.

Parker Parker, for appellant.

Smith, Williams, Friday & Bowen and *Ben Allen. Williams & Gardner, Elmer Conklin, Jr., Martin, Logan, Moyers, Martin* and *Conway, J. K. Schooler, White & Young, Ray Thornton, C. E. Blackburn, John F. Curran & M. Darwin Kirk,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is second appeal in this case. The opinions on first appeal may be found in *Watkins* v. *Johnson,* 234 Ark. 929, 235 Ark. (Adv. Sh.) 85, 356 S. W. 2d 655. The relationship of the parties, the rival claims, and the issues, are all stated in the opinion on the first appeal wherein we reversed the Trial Court and remanded the cause for further proceedings on the issues of co-tenancy and limitations, as regards an undivided one-sixth interest in the 120 acres of land involved.[1]

When our mandate was filed in the Trial Court as a result of the first appeal, the Watkins heirs filed an amendment to their complaint, which amendment prayed, *inter alia:*

". . . that if the Court finds that the deeds from Plaintiffs to W. H. Johnson are valid, that this Court find and decree that they are co-tenants with W. H. Johnson, his heirs and assigns and that all of said Defendants be ordered to account to Plaintiffs for one-sixth (1/6th) interest of rents and profits from said lands; that this Court decree that Plaintiffs are owners in fee simple in one-sixth (1/6th) of the lands herein described. Plaintiffs pray for all their cost and for all other proper relief in Law and Equity to which these Plaintiffs are entitled."

A voluminous record is before us. The Trial Court made definite findings of fact and conclusions of law, a summation of which is: (a) that the deeds from the Watkins

[1] This result was true because appellants, claiming to be the five heirs of L. L. Watkins, had each signed a deed to W. H. Johnson stating that such deed conveyed the grantor's "undivided one-sixth interest" in the property; and the total of the five deeds, under the appellant's theory, would be five-sixths of the entire fee. Since those deeds were beyond attack (as held in the first appeal), there remained only an undivided one-sixth interest for further litigation, as here involved. It is conceded in the briefs that each deed conveyed only an undivided one-sixth interest in the lands, and we so treat the case; but our investigation of the original deeds in the record now before us shows other language in some of the deeds which other language might convey all of the grantors' interest, regardless of the fraction stated. Furthermore, in the deed of E. G. Watkins to W. H. Johnson, the description is: "All of our undivided interest in and to the following lands" (describing them); no fractional interest being stated in that deed. But throughout this opinion we treat the case as though each deed to W. H. Johnson conveyed only a one-sixth interest in the land.

heirs to W. H. Johnson were valid; and (b) that even if W. H. Johnson might have been a co-tenant with the Watkins heirs for the one-sixth interest in the dispute,[2] nevertheless the Watkins heirs are barred *by limitations* from a recovery against the present owner, A. W. Johnson.

I. *Forgery.* The evidence shows that in the period from 1910 to 1924, W. H. Johnson, the maternal uncle of the children of Lewis L. Watkins, received a deed from all of the Watkins heirs and went into possession of the lands. The Trial Court found these deeds to be valid; and that finding is correct. The original deeds are before us: we have examined them, and we conclude that the Trial Court was correct in sustaining the deeds as valid.

II. *Statute Of Limitation.* Even conceding that W. H. Johnson became a co-tenant with the said Watkins heirs for the 1/6 interest in dispute, nevertheless the Watkins heirs are barred by limitation against the present owner, A. W. Johnson. On August 5, 1943, W. H. Johnson sold the lands here involved, and other lands, to his son, A. W. Johnson, for a valid consideration recited to be $5,000.00. A general warranty deed from W. H. Johnson to A. W. Johnson was recorded on August 5, 1943, describing the entire 120 acres here involved. The evidence further establishes: that A. W. Johnson took possession of all of said lands in 1943 and has been in possession thereof ever since; that the lands were and at all times have continued to be fenced, with part in crops and part in pasture; that A. W. Johnson has paid taxes each year on the lands, and has had tenants on the lands at all times since 1943; and that A. W. Johnson has been in open, notorious, hostile, adverse, exclusive, and continuous possession of the entire 120 acres at all times since August 5, 1943, and has pleaded the 7-year

[2] It will be recalled from the opinion on the first appeal that Lewis L. Watkins had five children; that his widow, Jennie, married Mr. Woods; and that Oliver Woods was a child of that marriage. No explanation is offered as to why it was thought by W. H. Johnson that Oliver Woods had a 1/6th interest in the 120 acres of land here involved, since such lands were owned by Lewis L. Watkins; but the explanation may be found in the fact that this 120 acres of land was listed as an asset of Oliver Woods' mother, Mrs. Jennie Woods, as disclosed by the inventory of her estate, which is in the record.

statute of limitation (Ark. Stat. Ann. §37-101 [Repl. 1962]) against the Watkins heirs in this case.

The plea of limitation is supported by abundant evidence and is determinative of the present appeal. In a long line of cases we have held when a co-tenant executes a deed to a stranger to the title, describing the entire land, and such grantee enters into exclusive possession under such deed, then such deed constitutes color of title, and such entry commences the running of limitation in favor of the grantee and against all the other co-tenants of the grantor. *Parsons* v. *Sharpe,* 102 Ark. 611, 145 S. W. 537; *Jackson* v. *Cole,* 146 Ark. 565, 226 S. W. 513; *Landman* v. *Fincher,* 196 Ark. 609, 119 S. W. 2d 521; *Ulrich* v. *Coleman,* 218 Ark. 236, 235 S. W. 2d 868. Even though A. W. Johnson was a first cousin of the Watkins children, nevertheless A. W. Johnson was a "stranger to the title" when he received the deed from W. H. Johnson in 1943, because he was not a privy of the Watkins heirs. *Rye* v. *Bauman,* 231 Ark. 278, 329 S. W. 2d 161; 83 C.J.S. page 109; Succession of *Baker* (La.), 55 So. 714. The appellants did not file the present action until 1960; so from 1943 to 1960 A. W. Johnson had far more than seven years of unquestioned adverse possession of the land.

The decree of the Chancery Court in favor of A. W. Johnson is in all things affirmed.

FITZGERALD *v.* ALLYN.

5-3110 372 S. W. 2d 228

Opinion delivered November 11, 1963.

Trantham & Knauts, for appellant.

Frierson, Walker & Snellgrove, for appellee.

ED. F. MCFADDIN, Associate Justice. Don R. Fitzgerald died as the result of injuries he sustained in an automobile mishap on the night of December 16, 1962. He was a guest in the car being driven by Bobby Joe Allyn, appellee. The appellants, being the parents[1] of Don R. Fitzgerald, brought this action for damages against Bobby Joe Allyn, alleging that he was guilty of willful and wanton negligence in the driving of the automobile and that such willful and wanton negligence caused the death of Don R. Fitzgerald. Trial to a jury resulted in a verdict and judgment for the appellee; and on this appeal appellants urge these points:

1. The jury's finding is against the uncontradicted evidence and every legitimate inference deducible therefrom.

2. There is no substantial evidence to support the jury's verdict.

3. The verdict is against incontrovertible physical facts and is radically wrong.

We consider all three of these points together, as they all go to the appellants' contention that the undisputed evidence shows that Bobby Joe Allyn was guilty of willful and wanton negligence.

[1] Originally the brothers and sisters of Don R. Fitzgerald were joined as plaintiffs; but, without objection, the Court dismissed as to them, so that only Mr. and Mrs. C. C. Fitzgerald (father and mother of Don R. Fitzgerald) remained as plaintiffs.

The evidence established: that Don R. Fitzgerald was 29 years of age and lived alone in Clay County, Arkansas; that on the night of December 16, 1962 he went to a tavern in Missouri several miles from his home and consumed some beer; that when midnight closing hour arrived Fitzgerald asked the defendant, Bobby Joe Allyn (aged 25), who had also been drinking beer, to drive Fitzgerald to his home in Allyn's car; that with a 6-pack of beer the two left the tavern in Allyn's car and drove to Fitzgerald's home several miles away; that when they arrived at Fitzgerald's home he decided he wanted to go to a tourist court a few miles away, and Allyn drove him there; that Fitzgerald then decided he would return to his home, and Allyn started with him on the return drive; that enroute the car had a flat tire and the two men changed the tire; that they then reentered the car and while proceeding to Fitzgerald's home, Allyn drove the car into a bridge abutment with such force and speed as to turn the car around; and that Fitzgerald was killed in the collision with the bridge. Shortly after the collision Allyn voluntarily submitted to an alcoholic blood level test, which disclosed that Allyn was intoxicated.

The plaintiffs insisted, *inter alia,* that Allyn was guilty of willful and wanton negligence in that he was driving while intoxicated and was driving in a reckless manner and at an excessive speed. The defendant insisted, *inter alia:* (a) that he was not guilty of willful and wanton negligence; (b) that Fitzgerald assumed the risk of defendant's driving; (c) that Fitzgerald was guilty of contributory negligence; and (d) that the parties were on a joint mission. The status of Fitzgerald as a guest in the Allyn car appears to have been conceded, so that the burden was on the plaintiffs to establish that the defendant was guilty of willful and wanton negligence in the operation of the vehicle. Ark. Stat. Ann. §75-913 and §75-915 (Repl. 1957).

The case was tried to a jury and the Court instructed on all applicable phases of the law, and submitted the case to the jury on a series of interrogatories designed

to obtain answers on the various issues developed. The plaintiffs offered no objection to any of the instructions or interrogatories submitted. The first interrogatory was: "Do you find from a preponderance of the evidence that Bobby Allyn was guilty of willful and wanton misconduct in the operation of his vehicle which proximately caused the death of Don Fitzgerald." The jury answered this interrogatory in the negative;[2] and based on such answer the Trial Court rendered judgment for the defendant. From such judgment there is this appeal in which appellants claim the jury's negative answer is against the undisputed evidence.

We hold that a jury question was made as to whether the defendant, Allyn, was guilty of willful and wanton negligence in the operation of the automobile. Even though it was conceded that Allyn had been drinking beer to an excess and was driving the car, we cannot hold that such facts establish willful and wanton negligence as a matter of law. Allyn was in sufficient possession of his faculties to drive his car a number of miles from the tavern to the Fitzgerald home, then to the tourist court, then to work with Fitzgerald in changing a tire—all of which occurred before the fatal collision. Furthermore, the evidence showed that immediately prior to the collision Fitzgerald told Allyn he believed there was another flat tire; and that Allyn was in the process of pulling his car to the shoulder when he hit the bridge abutment. The highway was 21 feet wide, whereas the bridge was only 18 feet wide; there were no reflectors to indicate that the abutment narrowed the traffic area; and Allyn testified that he was never travelling in excess of 55 miles per hour at any time.

To prevail on this appeal the appellants must establish that the Trial Court should have instructed the jury that Allyn was guilty of willful and wanton negligence as a matter of law even under the facts as here developed; and we are convinced that the question of willful and wanton negligence was a jury question in this case.

[2] This answer in the negative made it unnecessary for the jury to answer any of the other interrogatories.

See *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226; *Poole* v. *James,* 231 Ark. 810, 332 S. W. 2d 833; *Cooper* v. *Calico,* 214 Ark. 853, 218 S. W. 2d 723; *Froman* v. *Kelley,* 196 Ark. 808, 120 S. W. 2d 164; and *Stobaugh* v. *Hubbard,* 234 Ark. 917, 355 S. W. 2d 283.

There is another and additional reason, sufficient in itself, why there must be an affirmance of this case. Such reason is because the appellants did not request an instructed verdict on the issue of willful and wanton negligence, nor did they otherwise register in the Trial Court their dissatisfaction with the submission of the issue to the jury: there was neither a motion for new trial nor a motion *non obstante veredicto. Rock-Ola Mfg. Corp.* v. *Farr,* 226 Ark. 279, 290 S. W. 2d 2; and *Granite Mt. Rest Home* v. *Schwarz,* 236 Ark. 46, 364 S. W. 2d 306.

Affirmed.

RATLIFF *v.* RATLIFF, ADM'X.

5-3050 372 S. W. 2d 216

Opinion delivered November 11, 1963.

Paul Jameson and *O. E. Williams,* for appellant.

James R. Hale and *Glen Wing,* for appellee.

George Rose Smith, J. The appellee, as administratrix of the estate of her husband, Charles Ratliff, inventoried as an asset of the estate a savings account in a Prairie Grove bank. The appellants, Ratliff's son and daughter, excepted to the inventory, contending that the bank account had been a joint account with survivorship which did not become part of the estate. The only question here is whether the probate court was right in holding that Ratliff did not take the necessary steps to create a right of survivorship.

Ratliff opened an account in this bank many years ago, at least as far back as 1929. At that time the bank did not use signature cards, relying instead upon its employees' familiarity with every depositor's signature.

On October 21, 1961, Ratliff went to the bank, made a deposit of $970.25, and directed the assistant cashier, Mrs. Broyles, to add the names of Ratliff's son and daughter to the account. The bank had on hand two forms of printed signature cards that might have been used. One by its language would have created a joint account with survivorship. The other would merely have given the son and daughter the right to check against the account, with any balance in the account at Ratliff's death becoming part of his estate.

Mrs. Broyles did not use a signature card at all. There was a ledger sheet for the account, showing the date and amount of each deposit and withdrawal, together with the resulting new balance. Mrs. Broyles wrote above Ratliff's name at the top of the ledger sheet, "Mrs. N. Edith Matthews or Herbert L. Ratliff." She also inserted a typewritten notation, "Names added by Mr. Ratliff 10-21-61." There is some indication, but no direct proof, that the two new names were also written in the passbook for the account.

Ratliff died in 1962, survived by his widow and the two children (and perhaps by a third heir, the adopted child of a deceased son. See case note, 15 Ark. L. Rev. 194). The estate was valued at $13,064.73, the principal assets being a homestead worth $7,500 and this $3,909.01 bank account.

Apart from the transaction between Ratliff and Mrs. Broyles there is evidence indicating that Ratliff thought his two children would be entitled to the account at his death. First, he did not tell them about having added their names to the account, which suggests that he did not mean for them to have any control over the account until his own death. Secondly, six weeks after the account was changed Ratliff wrote out a statement, perhaps intended as a will, in which he mentioned his other property but, significantly, made no reference to the savings account. In view of all the proof we may assume for the purpose of this opinion that when Ratliff went to the bank on October 21, 1961, he intended to change the account to a joint one with a right of survivorship in his children. That intention, however, was not fully disclosed, for, according to the testimony, Ratliff merely instructed Mrs. Broyles to add the two names to the account.

At common law the action taken on October 21 would not, according to the great majority of the courts. have created survivorship rights in the appellants. The various common law theories are discussed in Professor Brown's work on Personal Property, § 65. We are not now concerned with the common law, however, for in Arkansas the field has been covered by statute:

"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 . . . shall be held for the exclusive use of the person[s] so named, and may be paid to either during the lifetime of both, or to the survivor after the death of one of them; . . ." Ark. Stat. Ann. § 67-521 (Repl. 1957).

The statute explicitly and unmistakenly requires that the deposit be made "in form to be paid to either, or the survivor." Admittedly that requirement was not

observed here. The problem is whether the omission may be supplied by extrinsic facts showing that the depositor really intended to create a joint account with survivorship.

We think the trial court was right in holding that Ratliff did not take the minimum action essential to the creation of a right of survivorship. We need not hold, as the New York courts do under a similar statute, that there must be a strict and literal compliance with the wording of the act. *In re Fonda's Estate,* 206 App. Div. 61, 200 N.Y.S. 881. We do hold that there must be a substantial compliance.

Our earlier cases point to this conclusion. We lay aside the matter of joint accounts between husbands and wives, for such an account is a tenancy by the entirety, with a right of survivorship that is not derived from the statute. *Black* v. *Black,* 199 Ark. 609, 135 S. W. 2d 837. In other situations when we have found a right of survivorship the opinion has almost always recited facts showing that the statute was complied with, in that the account was payable to either depositor or the survivor. *Pye* v. *Higgason,* 210 Ark. 347, 195 S. W. 2d 632; *Vincent* v. *Vincent,* 224 Ark. 449, 274 S. W. 2d 772; *Tesch* v. *Miller,* 227 Ark. 74, 296 S. W. 2d 392. The facts were not fully stated in *Von Tungeen* v. *Chapman,* 233 Ark. 219, 343 S. W. 2d 782. We referred only to the *prima facie* intent indicated by the signature card, but the record in that case shows that the signature card created an account "in the joint names of the undersigned as joint tenants with the right of survivorship and not as tenants in common." So there was substantial compliance with the statute.

The appellants insist that Ratliff's intention should be of controlling importance. This matter of the depositor's intention was thoroughly considered in *Park* v. *McClemens,* 231 Ark. 983, 334 S. W. 2d 709. The case involved four bank accounts. Three of them were evidenced by signature cards conforming to the statute and creating a *prima facie* case for a right of survivorship. The proof showed, however, that the depositor, Mrs.

Witten, had not really meant to create such a right. We therefore held that the *prima facie* case for survivorship had been overcome.

The fourth account in the *Park* case was like the one now before us, in that it was not in form payable to either depositor or the survivor. With reference to that account we added language which, if it were not for the possibility that it was dictum, would be absolutely controlling in the case at bar: "We point out also that in any event (and regardless of the intention of Mrs. Witten) the Chancellor's finding must be affirmed in regard to the $2,159.59 Savings Account No. 4931 in the Texarkana National Bank, because there is no language on the signature card creating a joint account with the right of survivorship."

Dictum or not, this is a correct interpretation of the statute. A joint account with survivorship is similar to a will in that both are statutory devices by which property may be disposed of at death. In each case certain minimum formal action in the exercise of the statutory privilege has been required by the legislature, doubtless to avoid the dangers of perjury and the uncertainties of parol evidence after death has sealed the lips of the person principally concerned. The chief safeguard with respect to a joint bank account is the requirement that it be in form payable to either depositor or to the survivor. In the case at hand that essential condition to a right of survivorship is absent. Unless we are to strike an important clause from the statute, which we are not at liberty to do, we must conclude that Ratliff failed to take the necessary steps to create a joint account with the right of survivorship.

Affirmed.

ROBINSON and JOHNSON, JJ., dissent.

SAM ROBINSON, Associate Justice (dissenting). The majority concedes that the evidence in this case proves that in setting up the joint bank account it was the inten-

tion of the depositor, Charles Ratliff, that his son and daughter should have the right of survivorship in the account; that a joint tenancy was intended. But the majority holds that the depositor did not take the steps necessary to accomplish his intention. I do not agree. I think the intention of the depositor should prevail.

Here, the evidence is overwhelming that it was the intention of the depositor to make his son and daughter owners of the account as joint tenants. The majority does not contend that the evidence shows otherwise, but say, in effect, that it was admitted that the account was not set up in proper form to constitute a joint tenancy. In my opinion, the record in this case does not show such admission. In fact, appellants stoutly contend that the account as set up by their father is sufficient to constitute a joint tenancy under the provisions of our statute, Ark. Stats. 67-521. The account was set up in form to be paid to either the father, or the son or daughter, or the survivor of them. The bank would have honored a check drawn by either of them, or the survivor, as was done in *Black* v. *Black,* 199 Ark. 609, 135 S. W. 2d 837, and *Park* v. *McClemens,* 231 Ark. 983, 334 S. W. 2d 709.

What more was necessary? The statute makes no other requirement in order to make an account a joint tenancy. If there is some particular form that a depositor has to fill out to make an account a joint tenancy, the majority should spell out what that form is. The statute provides for none. This court has held heretofore that the filling out of a form, furnished by the bank for the very purpose of providing for survivorship, was not sufficient to bring the account within the purview of the statute, where there was parole evidence proving that it was not the intention of the depositor to create a joint tenancy in the account. *Park* v. *McClemens, supra.* There, it was held that the intention of the depositor controlled, and not the printed matter on the signature card that was furnished by the bank. To the same effect is *Powell* v. *Powell,* 222 Ark. 918, 263 S. W. 2d 708.

Now this court is holding that there is no right of survivorship when the evidence proves overwhelmingly

that it was the intention of the depositor to create the right of survivorship in the money. The majority points out that under the common law the account would not be owned as a joint tenancy, but it is also pointed out that we are not dealing with a joint tenancy created by the common law, but one provided for by statute.

It was the intention of the depositor, and as I read the record, it was the understanding of the bank that the account was payable to appellants, or their father, or the survivor. Mr. Delford Rieff, president of the bank testified:

"Q. Let's go back to my original question then: Just state from the ledger sheet who would have been permitted to make withdrawals on that account on and after October 21, 1961?

A. Mr. Ratliff, Edith Matthews or Herbert Ratliff." In these circumstances the account became a joint tenancy. The statute makes it a joint tenancy. The statute uses words of art "joint tenancy". Such words are to be construed in their technical meaning. It is said in 50 Am. Jur. 265: "Technical words and phrases which have acquired a peculiar and appropriate meaning in law, cannot be presumed to have been used by the legislature in a loose popular sense, but, to the contrary, have been presumed and assumed to have been used according to its legal meaning, and will ordinarily be interpreted, not in its popular, but in its fixed legal sense and with regard to the limitations which the law attaches to them." Thus, when the legislature provided for a joint tenancy in the account, it automatically provided that one who owns as a joint tenant has the right of survivorship.

In 14 Am. Jur. 79, it is said: "An estate in joint tenancy is one held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and having as its distinguishing feature the right of survivorship . . .". In *Ferrell* v. *Holland,* 205 Ark. 523, 169 S. W. 2d 643, it was pointed out that there can be a joint tenancy in almost any kind of personal property,

and that survivorship is one of the essential results of joint tenancy. In 48 C.J.S. Joint Tenancy § 1, p. 910, it is said: "Survivorship is the distinctive characteristic of an estate in joint tenancy."

In 50 Am. Jur. 272, it is said: "When the meaning of a law is evident, to go elsewhere in search of conjecture in order to restrict or extend the act would be an attempt to elude it, a method which, if once admitted, would be exceedingly dangerous, since there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless."

Our statute, Ark. Stats. 67-521, adopted in 1937, providing for joint tenancy in bank accounts, was apparently adopted from the State of Missouri. (Mo. Rev. Stats., Vol. 3, Sec. 362.470, adopted by the State of Missouri in 1915.) The Arkansas and Missouri statutes are identical, word for word. The Missouri court has held that a signature card signed by a depositor constitutes a *prima facie* showing of joint tenancy in the account, but such *prima facie* case is subject to rebuttal. *Kaimann's Estate,* 229 S. W. 2d 527 (1950). We have held the same thing. In *Von Tungeen* v. *Chapman,* 233 Ark. 219, 343 S. W. 2d 782, the court said: "Reviewing the evidence on trial *de novo* here, we find the record utterly bare of evidence to overcome the *prima facie* intent which we hold the signature card creates as to the existence of a joint tenancy."

The Missouri case of *Princeton State Bank* v. *Wayman,* 271 S. W. 2d 600 (1954), is directly in point with the case at bar. In that case no signature card or other writing was used evidencing the kind of joint account that was established. The Missouri court held that the Missouri statute 362.470, identical with our statute 67-521, providing for joint tenancy, applied because it was shown by the evidence that it was the intention of the depositor that the account be held as a joint tenancy. There, the court said: "It is the intention that controls." The court further said that there was no statutory presumption, but that the burden was on those seeking to

establish joint tenancy to prove their contention by a preponderance of the evidence, and that the evidence in that case proved the joint tenancy. Here, the majority apparently concedes that appellants made such proof.

Since I believe that the intention of the depositor should control, I respectfully dissent.

MR. JUSTICE JOHNSON joins in this dissent.

BOWLING *v.* BOWLING.

5-3103 372 S. W. 2d 239

Opinion delivered November 11, 1963.

J. G. Moore, for appellant.

Felver A. Rowell, Jr., for appellee.

PAUL WARD, Associate Justice. A brief statement of the background facts will be useful in understanding the one issue presented on this appeal.

First Suit.

The parties hereto were married in 1944. In August, 1960 Mr. Bowling filed suit for divorce in Van Buren

County, and Mrs. Bowling filed a cross-complaint in which she also asked for a divorce. After a hearing the court refused to give either party a divorce. However, at the request of both parties, the court ordered two parcels of land (owned by the entirety) sold and the proceeds divided equally between them. Nothing was said by the parties or the court about other property, real or personal, belonging to Mr. Bowling. So, the case is *res judicata* only as to the two parcels of land mentioned in the decree—being the property held by the entirety. No appeal was taken by either party.

Second Suit.

Following the Van Buren County divorce action appellant herein (Mrs. Bowling) moved her residence to Conway County where, on January 25, 1963, she filed suit for a divorce. In the complaint it was alleged that the parties have a home on six acres of land in Van Buren County worth about $9,000. The prayer was that she be granted a divorce; that she be given the use of the homestead during her natural life, or that it be sold and the proceeds be divided equally between her and appellee; and, that she be given all other legal and equitable relief to which she is entitled whether prayed for or not. To this complaint appellee entered a general denial. At the conclusion of the trial the court entered a decree granting a divorce to appellant, but refused to make any order respecting her property rights. To reverse the above decree appellant now prosecutes this appeal.

In our opinion the trial court committed error. Ark. Stat. Ann. § 34-1214 (Repl. 1962) provides, among other things:

". . . the wife so granted a divorce . . . shall be entitled to one-third (⅓) of the husband's personal property absolutely, and one-third (⅓) of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form . . ."

It is undisputed that appellee owned the six acre homestead, and it was not positively shown in either suit that he does not own other property. Since appellee does not claim appellant has released her interest in any of his property, it was imperative that appellant be given one-third (absolutely) of all personal property and one-third (for life) of all real property still owned by appellee. We make it clear, however, that appellant gets no part of appellee's interest in the property sold in the first suit or in the proceeds thereof. In *Myers* v. *Myers*, 226 Ark. 632, 639, 294 S. W. 2d 67, 72 (on rehearing) we said:

"When a divorce is awarded to the wife the statute affirmatively *requires* that she be granted a third of the husband's personal property absolutely and a third of his real property for life." Citing Ark. Stat. § 34-1214. (Emphasis added.)

In the cited case we also said, referring to *Hegwood* v. *Hegwood,* 133 Ark. 160, 202 S. W. 35:

"The decree for divorce draws to the court the power to ascertain the description of the property owned by the husband for the purpose of awarding to the divorced wife her share thereof."

On remand the trial court will have power, if appellant still so desires, to give her the right to occupy the homestead during her natural life. If appellant does not so desire, then the trial court must give her a third interest for life in the said six acres of land.

The decree of the trial court is reversed, and it is accordingly remanded for further proceedings in conformity with this opinion.

Reversed, and remanded with directions.

ARK. STATE HIGHWAY COMM. *v.* HOOD.

5-3062 372 S. W. 2d 387

Opinion delivered November 11, 1963.

[Rehearing Denied Dec. 9, 1963.]

Dowell Anders, George O. Green and *Bill B. Demmer,* for appellant.

John W. Goodson, for appellee.

SAM ROBINSON, Associate Justice. This is a case wherein the appellant, Arkansas State Highway Commission, condemned for highway purposes 6.1 acres of land belonging to appellees, Marvin D. Hood and wife. The Commission deposited $2,250.00 in the registry of the court as just compensation. Twenty-seven acres were in the original tract. After the taking 2½ acres were separated by the right-of-way from that part remaining. The case was tried before the court sitting as a jury. There was an award of $12,500.00. The Highway Commission has appealed.

Appellee Hood is engaged in the nursery business and the land involved in this litigation was used to grow nursery stock. On appeal, appellant contends that the

court erred in permitting the introduction of evidence showing the value of the nursery stock independent of the land on which it was growing.

It is firmly established that the measure of damages in this kind of case is the difference in the fair market value of the land before and after the taking. *Arkansas State Highway Commission* v. *Fox,* 230 Ark. 287, 322 S. W. 2d 81; *Arkansas State Highway Commission* v. *Kennedy,* 233 Ark. 844, 349 S. W. 2d 132. In arriving at the before and after value it is proper to take into consideration all those things pertaining to the land that a seller or purchaser would consider in arriving at the market value. *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706; *Arkansas State Highway Commission* v. *Carpenter,* 237 Ark. 46, 371 S. W. 2d 535 (October 14, 1963). An exception to this rule is that profits from a business conducted on the property cannot be considered. *Arkansas State Highway Commission* v. *Wilmans,* 236 Ark. 945, 370 S. W. 2d 802 (September 30, 1963).

Here, appellee introduced considerable evidence going to show the number, kind, and value of the various plants growing on the land condemned. There is evidence to the effect that the nursery stock itself was worth $13,370.00, and that the witness for appellee, P. M. Brown, took that value into consideration in arriving at the market value of the land. But it is clear from the witness' testimony that he did not merely add his estimated value of the nursery stock to his estimated value of the naked land in arriving at the market value of the land with the plants in place. The witness testified that he did consider the value of the plants, but that was only one of the things considered in arriving at the market value.

The court had the correct conception of the law, and applied to the facts the proper rule of law for determining damages to be awarded the landowner. In the course of the trial the court said: "All right, let's talk just a moment now about the law. Mr. Goodson, I rather believe the general rule to be this: I think the Court should

know what's on that property. Then I think the Court would be interested in knowing the fair market value of the lands taken, which value can be calculated on the basis of the bare land plus whatever was growing there on the date the land was taken. That is, not what each plant would bring if sold to John Doe, Richard Roe, or Jim Smith, but what a willing buyer interested in this kind of business could walk out there and see all of this, and what he would be willing to give, not being obligated to buy." The court further said: "The best authority was in *Corpus Juris,* a general statement, which statement is made without exception 'it is proper to consider' and I am quoting; 'the valuation of crops, trees, grass, etc., growing on the land, but they cannot be valued separately and apart from the value of the land' that is the end of the quotation. Now, of course, I feel that it might be a factor in considering the over-all subject of land values. A man might, for example, an expert, might want to check his findings against such an element as that, but as a single method of determining the land values, this authority which I think is absolutely in point, says that it is not permitted to follow that procedure."

Appellant concedes that what the court said is a correct declaration of the law, but contends that the court did not apply that conception of the law in deciding the case. We do not find anything in the record which indicates that the court did not follow the correct principle.

Of course, a castle costing a million dollars, built in the desert 100 miles from the nearest habitation may add very little, if anything, to the value of the desert land. But if the land was being taken in a condemnation proceeding the landowner would be entitled to show that a very fine castle was located thereon. Actually, it is conceivable that in some instances structures on the condemned property may cause it to have less market value than if the structures were not there.

Here, it is shown that the highest value of the land was for its use as a nursery; that there were more than

11,000 nursery plants on the property. The jury, or in this case the court, had the right to take into consideration the value of the plants in arriving at the fair market value of the land with the plants located thereon. That is, the price that someone wanting to buy a plant nursery would pay for the land on which the plants were growing. *Shelby County* v. *Adams* (1932), 15 Tenn. App. 66.

Appellant contends also that in reaching a decision in this case the trial court took into consideration testimony that had been excluded on motion of appellant. The witness, Glen Rose, had testified that $50,000.00 for appellee's nursery business was reasonable. Mr. Rose further testified: "You are taking so much of the deeper soil that if it was my nursery I would move off it and start over." Counsel for the Highway Commission made the following objection: "If the Court please, I think at this time I am going to have to object to Mr. Rose's testimony and move that it be stricken because he testified that this $50,000.00 represents Mr. Hood's business. We submit to the Court that that is not a proper area of his appraisal in determining land values, and that if his appraisal is based on this over-all value of $50,000.00, saying as he states it in the record, that that was Mr. Hood's business; it was a going business, and he based his estimation on that, and we move that his testimony be stricken as not being proper, immaterial, irrelevant." The court sustained the objection. Later, in a memorandum of the findings the court said: "The Highway Department moved to strike Mr. Rose's testimony and that motion was sustained; however, their objection went to the attempt of plaintiff to extract an opinion from Rose as to fair market value. Rose could not qualify in this respect and the Court so ruled. His knowledge of this nursery, together with his many years of experience in the business in the same locale certainly qualified him with respect to his other testimony."

That part of the witness Rose's testimony objected to by appellant, which objection was sustained, dealt with the $50,000.00 valuation of the business. In stating that he would move off and start over, Rose was only

emphasizing his opinion of the damages to the property caused by the taking, and his testimony in that respect had no connection with the estimated value of the business.

All in all it appears that there was a fair trial without error. The judgment is affirmed.

TWIN CITY AMUSEMENT CO., INC. *v.* SALATER.

5-3093 372 S. W. 2d 224

Opinion delivered November 11, 1963.

Harry C. Robinson, for appellant.

Chowning, Mitchell, Hamilton & Burrow, for appellee.

JIM JOHNSON, Associate Justice. This is a suit for damages resulting from rock throwing following a rock and roll concert. Appellant, Twin City Amusement Company, Inc., leased Barton Coliseum and adjoining parking areas from the Arkansas Livestock Show Association for the night of April 21, 1961, for the purpose of holding a rock and roll concert. Tickets were sold to the public and both Negroes and Whites attended. Mrs. Joe Felton of Little Rock took a carfull of young teenagers to the concert, including one of her own children. She parked on the Livestock Show grounds near the Coli-

seum. After the show, she was proceeding toward an exit gate with the five or six children in her station wagon when she was forced to stop in a line of vehicles waiting to leave the show grounds. At that point (about two blocks from the gate and three blocks from the Coliseum entrance) two colored youths approached her car and demanded that one or more of the boys sing a rock and roll song and tried to pull the boys out of the station wagon or get into the vehicles themselves. Mrs. Felton and the children screamed and honked to attract help. In the car following Mrs. Felton were several teenagers, including appellee Isaac Salater who was driving his family's automobile. These young men voluntarily went to Mrs. Felton's aid, and a fight ensued with the colored boys. The white boys tried to end the fight, got back into appellees' automobile, locked the doors and closed the windows, but the colored boys began throwing rocks and swinging rocks tied in bandanas, breaking the window and otherwise damaging the car and cutting Isaac deeply across the scalp. Isaac maneuvered his car out of the line of traffic, across a field to an exit gate and reported the incident to a fireman directing traffic, who in turn called the police stationed at the main gate.

Appellee Peter Salater, father of Isaac Salater, filed suit against Twin City Amusement Company, Inc., on April 10, 1962, in Pulaski Circuit Court for damages to his car and for injuries to his son, alleging that such damages and injuries resulted from the negligence of appellant. At trial on February 19, 1963, the jury returned a verdict for Peter Salater for $303.00 for automobile damage and medical expenses, and $750.00 for Isaac's pain and suffering. From the judgment on the verdict comes this appeal. For reversal, appellant contends that the trial court erred in not directing a verdict for appellant because there was no substantial evidence of any negligent act on the part of appellant which proximately resulted in injury to appellees.

The record reveals that appellant's lease was the standard form of lease used by the Coliseum (*i.e.*, the Ar-

kansas Livestock Show Association) which provided that the lessor supply, among other things, firemen and policemen for the protection of the public, parking lot attendants, ticket sellers, etc., and the number of such employees was decided by the lessor; the lessor also retained control of the concession stands and reserved the right to expel anyone out of line. For this particular concert, the Coliseum hired ten off-duty police officers and some firemen. In addition there were on-duty policemen present. The testimony is in conflict as to whether there were any disturbances during the performance, the consensus of the testimony is that any threatened disturbance that might have occurred was quickly broken up by officers in the Coliseum. The record is silent as to whether any officers were assigned or were present in the parking areas after the concert other than at the gate and outside the Coliseum entrance.

This appears to be a case of first impression on this type of suit in Arkansas. We have reviewed a number of cases from other jurisdictions, among them *Hawkins* v. *Maine & New Hampshire Theaters Co.,* 132 Me. 1, 164 A. 628; *Whitfield* v. *Cox,* 189 Va. 219, 52 S. E. 2d 72; *Worcester* v. *Theatrical Enterprises Corporation,* 28 Cal. App. 2d 116, 82 P. 2d 68; *Hart* v. *Hercules Theatre Corp.,* 258 App. Div. 537, 17 N. Y. S. 2d 441; *Dickinson* v. *Eden Theatre Co.,* 360 Mo. 941, 231 S. W. 2d 609; *Nash* v. *Stanley Warner Management Corp.* (D. C.), 165 A. 2d 238; *Gross* v. *Wiley,* (Or.), 373 P. 2d 421, and *Stevenson* v. *Kansas City,* 187 Kan. 705, 360 P. 2d 1; as well as various encyclopedias and an excellent annotation, 29 A.L.R. 2d 911, entitled "Liability of owner or operator of theater or other amusement for assault on patron by another patron." We find the duty owed by a proprietor of a place of amusement to his patrons in a case such as this succinctly set out in Restatement, Torts, § 348, as follows:

"A . . . possessor of land who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the land for such purpose for bodily harm caused to them by the

accidental, negligent or intentionally harmful acts of third persons or animals if the possessor by the exercise of reasonable care could have

(a) discovered that such acts were being done or were about to be done, and

(b) protected the members of the public by

(i) controlling the conduct of the third persons, or

(ii) giving a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive . . .''

Restatement, Comment c, following § 348, *supra,* observes that while such a proprietor is not an insurer, he has a duty to police his premises and employ enough servants to afford reasonable protection.

This was a sudden, unexpected and unforeseeable affray. Appellees would, in effect, require appellant to be an insurer of their safety, whereas appellant is in fact required only to exercise reasonable care. A statement in *Stevenson* v. *Kansas City, supra,* is apt:

''To foresee that plaintiff while attending the wrestling matches would be assaulted at the hour of 11:00 p.m. at the particular spot on the particular ramp on the way to the particular rest room in the Memorial Building in Kansas City would indeed require imaginative foresight and such is not the type of foreseeability required under our law. Only the standard of the reasonable and prudent man, . . . is required.''

While it might be desirable and very much in the interests of society to prohibit the type of ''entertainment'' offered in the instant case by requiring the exercise of the highest degree of care by the proprietor, however such a rule could not be imposed without adversely affecting all places of amusement and public gathering. As was said in the *Stevenson* case, *supra:*

''To apply such a high degree of vigilance would make a public amusement impossible because of the ex-

pense of guards, time for searching customers to discover possible weapons, etc.''

Nothing in the evidence suggests that more servants were necessary to provide reasonable security at the time and place here in question, or that more servants could have prevented the affray. Certainly a proprietor is not required to have an attendant, guard or usher for every patron.

In the absence of facts which would have charged appellant with the discovery contemplated in Restatement, Torts, § 348, *supra,* there was nothing to submit to the jury. Since the case has been fully developed, we must therefore reverse and dismiss.

McFaddin, J., dissents; Robinson, J., not participating.

Ed. F. McFaddin, Associate Justice (dissenting). I dissent: I am of the view that a question of fact was made for the jury as to whether the appellant, under the existing conditions, exercised reasonable care to protect its patrons from assault while on the premises. That the Salater boy was a patron and was injured by an assault while on the premises, is thoroughly established. The Salater boy went to the aid of a white lady and her children and thereby incurred the ire of some Negro rowdies, who injured the Salater boy.

The Twin City Amusement Company leased from the Arkansas Livestock Association for a ''rock and roll show'' on the night of April 21, 1961, the Barton Coliseum building and streets adjacent thereto. The duty of the appellant as the operator of the entertainment is clear. In 52 Am. Jur. p. 291, ''Theaters, Shows, Exhibitions, Etc.'' §47, the rule as to the degree of care required of the appellant in this case is stated:

''It is the general rule, of almost universal acceptance, that an owner or proprietor of a theater or public amusement is bound to exercise a degree of ordinary and reasonable care for the safety and protection of his patrons—the degree of care that would be exercised by

an ordinarily careful and prudent man in the same position and circumstance."

In §52 of the same article the holdings are summarized:

"Liability for Assault of Patron; Acts or Conduct of Third Persons.—One who invites the public to his theater or public amusement owes to all persons who accept the invitation the duty of reasonable care to protect them from assault, abuse, or injury at his hands or those of his servants, employees, or agents. And he is liable to a patron for assault, abuse, or injury suffered by reason of a breach of this duty, even where the assailant was a police officer employed to protect the premises and keep order therein, where the acts complained of were done by the officer in his private, and not his official, capacity. He is also under duty to protect patrons from injury resulting from the acts or conduct of other patrons and third persons, and is chargeable with liability for injuries suffered by reason of such acts or conduct. Thus, it has been held that the owner or proprietor of a bathing resort is bound to protect his patrons from injury caused by the conduct of other patrons or his own employees. And the manager of a place of public amusement who sells to a patron intoxicating liquors until he becomes drunk and disorderly, knowing that in such condition he may assault others without cause or provocation, is bound to protect other patrons, and for failure to do so is liable to another patron who is assaulted and injured by the drunken patron."[1]

The Twin City Amusement Company could not delegate to the Livestock Association or any other person or group of persons the duties that the Twin City Amusement Company owed to its patrons, as above stated. The duties were absolute. The evidence showed that the purpose of the entertainment was a "rock and roll show" at which both white people and Negroes were in attendance. The Salater boy testified:

[1] Annotations on various points in the above quotation may be found in 3 L.R.N.S. 1132, 85 A.S.R. 449, 5 Ann. Cas. 926, 29 A.L.R. 2d 911, and 67 A.L.R. 2d 965.

"Q. Was beer generally available to the patrons?

"A. Yes, sir, . . .

"Q. Did you witness any fights or disturbances during the course of the show?

"A. Yes, sir, I did.

"Q. Could you estimate how many and what type fights they were?

"A. There were about three or four fights that I saw.

"Q. Were they between individuals or groups - -

"A. They were between individuals. One time they had to stop the band, the music.

"Q. Who stopped the band?

"A. The announcer, or the police went up and told the announcer to stop the band. . . .

"Q. What was occurring at the time the police officer stopped the band from playing?

"A. Well, there was a big fight in the stands. A guy in the stands was throwing a guy to the floor."

In the face of the foregoing quoted testimony it can hardly be said that there was nothing to put the Twin City Amusement Company on notice of possible danger to patrons in leaving the grounds. In *Citizens Coach Co.* v. *Wright,* 228 Ark. 1143, 313 S. W. 2d 949, we held a carrier liable for failure to protect a passenger, saying:

"Therefore, because of the testimony previously recited, and other in the record, we conclude that the evidence was sufficient to take the case to the jury and to support a verdict for some amount."

Here, there was evidence of disorder in the course of the evening; and certainly, with such disorder going on in the meeting, it could be reasonably anticipated that some disorder would take place after the show was over. Yet, with such condition existing, there is no testimony that

any particular precautions were taken to protect the patrons. To my way of thinking the affair was unusual and called for more than usual precautions. Under the facts and circumstances then existing, did the Twin City Amusement Company take reasonable precautions to protect the patrons against assault? In 52 Am. Jur. p. 324, "Theaters, Shows, Exhibitions, Etc." §78, the rule as to who answers that question is stated:

"The general rules and principles which control as to what questions are for determination by the jury and what questions are for the court, and the application of those rules and principles in actions of negligence generally, are controlling in actions to charge owners or proprietors of theaters or public amusements with liability for injuries to invitees. Thus, it is ordinarily a question of fact for the jury to determine, on the facts and circumstances shown in the particular case, the question of negligence or want of due care of the owner or proprietor sought to be charged, even though the injury to a patron was received in a rare, unusual, and unexpected accident."

Reasonable men might differ as to whether reasonable precautions were taken by the Twin City Amusement Company in the case at bar. A Pulaski County Jury by its verdict in effect held that reasonable care was not exercised by the Twin City Amusement Company to protect the patrons against assault by other patrons. I would leave that verdict undisturbed; and, therefore, I dissent.

VAUGHN *v.* CHANDLER.

5-3096 372 S. W. 2d 213

Opinion delivered November 11, 1963.

[redacted]

Douglas Bradley, for appellant.

Frierson, Walker & Snellgrove, for appellee.

FRANK HOLT, Associate Justice. The appellants and appellees are adjoining landowners. The appellants brought this action to settle a boundary line dispute between them. In resolving the issues and the conflicting testimony in favor of the appellees, the Court found:

"* * * The driveway presently used by the defendants is situated upon the boundary line between the parties as established and recognized by the respective owners of the tracts for a long period of years, considerably exceeding seven years prior to the bringing of this present action; that the lands owned by the plaintiffs lie entirely to the South of the present existing fence and the lands of the defendants lie immediately and adjacent to the North; that neither party is entitled to question the boundary as established by the said fence."

On appeal the appellants contend that they are the record owners of the disputed strip of lands, including the major portion of the driveway, and that the appellees "had the burden to show title to the disputed strip either by adverse possession, agreed boundary, or estoppel, which burden they failed to meet."

The appellants acquired their title by a metes and bounds description in 1935 but did not occupy it until 1955 when they built a house and moved on their property. They have lived there since that time. The appellees acquired their property in 1947 and have occupied it since then. The common boundary line extends for a distance of 1,593 feet. It begins at an undisputed eastern point and runs west to Wood Street for this distance. The appellants' property lies to the south and the appellees' is on the north of the disputed line. The western portion of appellants' and appellees' adjacent properties abuts on Wood Street, and both their homes face on this street. This litigation was precipitated by a dispute over the use of a driveway which leaves Wood Street and enters on the west end of the two adjacent tracts. The driveway runs east curving to the north to reach appellees' house. Appellees have continuously used this driveway since 1947 as a means of ingress and egress to their property. Along and south of the 1,593 foot survey line, which appellants contend is the true boundary line, there was an existing fence for a distance of 1,295.7 feet at the time this litigation arose. This is the first segment of the disputed strip of land. The appellees claim this existing fence, instead of the survey line, is the true boundary line. Appellants contend this fence encroaches upon their property as much as 14 feet at its western terminus as it gradually deviates to the south along the survey line. From the point where this existing fence ends and westward to the street for a distance of 297.3 feet along the survey line is the second segment in dispute. When this litigation arose appellees extended the existing fence westward approximately 297.3 feet, or the balance of the survey line, to the street where it is 20 to 25 feet south of the survey line. Appellants claim this new fence encroaches upon their lands to this extent. The driveway is entirely included in this alleged encroachment.

As to the first segment, or the 1,295.7 feet, the appellants contend that prior to 1957 another fence existed which was on the survey line and that appellees surreptitiously moved this original fence at night to its presen-

location. The appellees deny this and testified, as did numerous witnesses in their behalf, that the existing fence along this first segment of 1,295.7 feet is situated on the boundary or division line between the parties as established and recognized before and since 1947 when appellees purchased their property. There appears to have been no dispute between appellants and appellees about the boundary line along this 1,295.7 feet until 1957 although the appellants have owned their property since 1935 and appellees since 1947.

After a careful review of the evidence in this case we have determined that the 1,295.7 foot strip of land was occupied adversely by the appellee for more than seven (7) years in the belief that the existing fence represented the true boundary. For adverse possession to be hostile it is not necessary that the possessor have a conscious feeling of ill will or enmity toward his neighbor. *Moeller* v. *Graves,* 236 Ark. 583. Further, we think there was sufficient evidence of acquiescence to sustain the Chancellor's finding that this boundary line was "established and recognized by the respective owners for a long period of years." In *Stewart* v. *Bittle*, 236 Ark. 716, we quoted from *Tull* v. *Ashcraft*, 231 Ark. 928, 333 S. W. 2d 490, as follows:

"* * * 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."

It is also unnecessary that a prior dispute exist about a boundary or division line in order to establish such by long acquiescence. *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18.

With reference to the second segment of the disputed boundary line, or the balance consisting of 297.3 feet as surveyed by the appellants, the appellees' evidence was to the effect that when they moved on their property in 1947 the appellant Vaughn voluntarily pointed out to

appellee Chandler their common boundary or division line; that appellees relied upon and regarded this as an agreed boundary and they built the new fence on this agreed boundary when this litigation arose; that this new fence of approximately 300 feet, which was built in 1962, is merely an extension westward of the old existing fence to the street. Also, in 1955 appellant had a survey made resulting in stakes being placed in and along the disputed driveway. Appellee, Mrs. Chandler, testified that appellant [quoting from appellants' brief] "told me to tell Hoyt [Chandler] not to worry about those survey stakes being over the line because if he came over on us Mr. Barkley would come over on his line on the south." According to appellants' testimony, when they purchased their property in 1935 this driveway existed and led off the street to a garage that was then situated on what is now appellees' property. Several witnesses testified that this driveway on the disputed strip of land had existed and served the property now occupied by appellees before and since their purchase. Evidence was also adduced on behalf of appellees that an old fence once existed on the same location where this new fence now stands. It is undisputed that the appellees used this driveway continuously and without any question or dispute with the appellants from 1947 until 1955.

We also agree with the Chancellor in his findings when applied to this second segment of the disputed boundary line. We think there was ample evidence of an agreed division line. The appellees testified there was an agreed boundary, which appellants denied, and the Chancellor chose to believe the appellees. In *Stewart* v. *Bittle, supra,* we quoted from *Deidrech* v. *Simmons,* 75 Ark. 400, 87 S. W. 649, as follows:

"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."

Also, in *Moeller* v. *Graves, supra,* we said:

"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. (Citing cases)"

Furthermore, in the case at bar we construe the evidence to be sufficient to indicate that the appellees used this driveway for a period of more than seven (7) years in the belief that they owned it and that it was situated on their property. As previously stated, it is not necessary that the possessor of the land have a conscious feeling of ill will or enmity toward his neighbor in order to constitute adverse possession. *Moeller* v. *Graves, supra.*

The evidence adduced by the appellants and appellees in the case at bar is sharply in conflict and the Chancellor resolved these factual issues in favor of appellees. We do not disturb the findings of the Trial Court unless against the preponderance of the evidence. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517; *Hill* v. *Barnard,* 216 Ark. 29, 224 S. W. 2d 31; and *Stricklin* v. *Mitchell,* 234 Ark. 31, 350 S. W. 2d 319. We cannot say that the findings by the Chancellor in the case at bar are against the clear preponderance of the evidence.

Affirmed.

5-3108 372 S. W. 2d 622

Opinion delivered November 18, 1963.

[Rehearing denied Dec. 23, 1963.]

James R. Hale, for appellant.

John W. Cloer, for appellee.

CARLETON HARRIS, Chief Justice. This litigation relates to the proper construction of a deed. J. H. Fletcher and Ella Grimes Fletcher were husband and wife. Both had been previously married, and had children by the prior marriages. No children were born of the union of Mr. and Mrs. Fletcher. On August 26, 1905, Mrs. Ada Bevers and Joseph D. Bevers,[1] her husband, conveyed certain property in the town of Springdale to Mrs. Ella G. Fletcher, the granting clause providing: "do hereby grant, bargain, sell and convey unto the said Mrs. Ella G. Fletcher, her heirs and assigns, the following described lands, situated in Washington County, State of

[1] The connection, or relationship, between the Bevers and Fletchers is never shown in the record.

Arkansas, to-wit: (here follows description of property conveyed, which consisted of four lots in Block 9 in Springdale)."

The habendum clause provides as follows:

"To have and to hold the said lands and appurtenances thereto belonging unto the said Ella G. Fletcher and unto her heirs and assigns forever, and I the said Ada Beavers hereby covenant that I am lawfully seized of said land and that I will forever warrant and defend the title to said land against all legal claims whatever, And, I, the said Joseph D. Bevers, husband, in consideration of said sum of money do hereby release, relinquish and convey unto the said Ella G. Fletcher, all my right, title, dower, and right of homestead in and to said lands."

Immediately following the description of the conveyed lands in the deed, there appears a clause, which is the subject of this litigation. That clause provides:

"The conditions of this deed is as follows, to-wit: at the 'deth' [sic] *of the said Ella G. Fletcher, the title of the above said property to revert back to John H. Fletcher or his heirs."*[2]

J. H. Fletcher died in 1931. On August 15, 1962, Ella G. Fletcher passed away. Mrs. Fletcher left a will, in which, after making several specific bequests (not here involved), she left all of the remainder of her property, real and personal, (the general residuary paragraph), to her grandchildren, Mildred Clarkson, and John Lynn Fletcher. These two parties are the appellees herein. John F. Mullins and Eula Osborne are grandchildren of J. H. Fletcher, and are the appellants in this case. This action was commenced in the Washington Chancery Court by Mildred Clarkson, individually, and as executrix of the estate of Ella Grimes Fletcher, and John Lynn Fletcher, wherein a construction of the italicized clause was sought, the complaint containing the prayer that appellees be held to be the

[2] Emphasis supplied.

owners in fee of the lands and that the provision in question be declared void and of no effect, and repugnant to the grant of the lands to Ella Grimes Fletcher. After the filing of an answer, the case proceeded to trial, and at the conclusion of the evidence, the court rendered a lengthy opinion in which it held that the deed was not effective to confer any interest of any nature to John H. Fletcher or his heirs, but rather that the deed conveyed a fee simple title to Ella Grimes Fletcher. The court then entered its decree, holding that "said provision in said deed is declared void for uncertainty, and is of no effect, and is repugnant to the grant of the lands in fee simple to Ella G. Fletcher, and that a fee simple title was vested in Ella G. Fletcher at the time of the execution of said deed by Mrs. Ada Bevers and Joseph D. Bevers, her husband to said Ella G. Fletcher, and plaintiffs[3] are the owners of said lands above described as sole devisees of said Ella G. Fletcher, deceased." From this decree, appellants bring this appeal.

We have reached the conclusion that the court erred in its findings. While we have no cases in Arkansas with a similar factual background, our principles of construction is well expressed in *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215. There, this court, referring to the case of *Luther* v. *Patman,* 200 Ark. 853, 141 S. W. 2d 42, stated:

"In that case Mr. Justice Humphreys, speaking for an undivided court, quoted with approval the statement of the law from 16 Am. Jur. § 237, p. 570, to the following effect: That the modern and now widely accepted rule to determine the estate conveyed by a deed with inconsistent clauses has for its cardinal principle the proposition that if the intention of the parties is apparent from examination of the deed 'from its four corners' without regard to its technical and formal divisions, it will be given effect even though, in doing so, technical rules of construction will be violated."

The above quotation states the rule which has been adhered to by this court for a long number of years, and

[3] Appellees herein.

it is by following this rule, *i.e.,* viewing the instrument here in question, "from its four corners," that we have concluded that the decree must be reversed.

Certainly, the clause was inserted for a purpose. The grantors meant to do "something," else there would have been no occasion to insert the provision in question. We think it absolutely clear, from the language employed, that the grantors had only one thing in mind, and that was to convey to Ella Grimes Fletcher a life estate in the property, with remainder in fee in John H. Fletcher or his heirs. It is true that the words used are technically incorrect, but when the entire instrument is scrutinized, we think the intent of the Bevers is unquestionably established. The learned Chancellor was evidently of the opinion that the provision in question was void because of the use of the language, "revert back," John H. Fletcher having no prior interest in the lands, and he held that a remainder interest was not created in the instrument, but that the deed conveyed a fee simple title to Ella Grimes Fletcher. A case bearing great similarity to the instant litigation is *Petty* v. *Griffith, et al* (Mo.), 165 S. W. 2d 412. There, the validity of certain deeds was questioned. The nature of the instruments is best explained in the language of the court:

"The first deed ('Exhibit 1') is dated January 3, 1923, and recites that Lucina B. Franklin is the party of the first part and that Bell Ford Griffith is the party of the second part. It says: 'That the said party of the first part, in consideration of the sum of One Dollar and Love and affection * * * to her paid * * * does by these presents Grant Bargain and Sell, Convey and Confirm, unto the said party of the second part, her heirs and assigns, the following described * * * land.' Following the description is this paragraph: 'The intention of grantor herein being to convey to the said Belle Ford Griffith, grantee herein, a life estate only, and at her death to revert to G. M. Beal of Fremont County, Iowa, and his legal heirs.'

"The clause defining the estate granted (the habendum clause) recites that the grant is 'unto the party of

the second part, her heirs and assigns, forever.' The deed recites the covenants usually contained in a warranty deed.

"The second deed ('Exhibit 2'), conveying a different tract of land, is exactly like the first deed except for slight differences in the paragraph following the description. That paragraph in the second deed says: 'The intention of Grantor being to convey to the said Belle Ford Griffith, grantee herein, a life estate only, and at her death to revert to G. M. Beal of Fremont County, Iowa, and his legal heirs only.' "

It will be noted that the only difference in those deeds and the one here in question is that, following the description, the term, "life estate," is used, although both the granting and habendum clauses, purportedly convey a fee simple title (as here), and the disputed clause also uses the term, "revert to G. M. Beal of Fremont County, Iowa, and his legal heirs" (here, "to revert back to John H. Fletcher or his heirs"). There, it was contended that Beal was a "stranger," the same contention being made as to J. H. Fletcher in this case. There, too, the trial court reached the conclusion that the fee simple title was in Belle Ford Griffith, and that the heirs of G. M. Beal had no interest whatever in the land by reason of these deeds. The Supreme Court of Missouri, in a comprehensive opinion, reversed the trial court judgment, and the reasoning used by the court is quite, apropos to the case at bar, since the same arguments were there advanced by the appellees as present appellees present for our consideration. Since the facts in the Missouri case are so very similar, and the reasoning employed by the Missouri court completely expresses our own views, we quote from the opinion of the Missouri Supreme Court as follows:

"Did Lucina Franklin, by these deeds, convey her fee simple title in the land to Belle Ford Griffith? Or, did she convey Belle Ford Griffith a life estate only and convey the remainder in fee simple to the heirs of G. B. Beal?

"The trial court concluded that the fee simple title was in Belle Ford Griffith and that the heirs of G. B. Beal had no interest whatever in the land by reason of these deeds. Belle Ford Griffith's argument in support of the trial court's decree is that the deeds constituted an absolute conveyance of the fee simple title to her and that the clause following the descriptions, not being in the clause in which the estate granted is usually defined, is repugnant, contradictory of the words of conveyance contained in the deeds and is, therefore, void. She says that G. B. Beal and his heirs had no interest in the land and consequently there could be no such thing as the title reverting to them. As to Beal and his heirs, she says there were no words of conveyance and, therefore, they are not parties to the deeds but strangers and the most that can be said for their claims is that the clauses following the descriptions indicated that the grantor intended to convey them some interest but failed to do so.

"We agree with the respondent that the deeds use the language and terminology usually employed in conveying a fee simple title and that absent the clauses following the descriptions these deeds do constitute an absolute conveyance of the fee simple title. [Citing cases.] We also agree with the respondent that the title could not "revert" to G. B. Beal and his heirs. The word "revert" to those skilled in conveyancing usually means that the instrument contains a clause so limiting the estate conveyed that there is a possibility of its terminating and reverting to the grantor; it is a reversionary interest, a defeasible fee simple estate, which could not exist here because G. B. Beal and his heirs were neither grantors nor owners and there are no words of defeasance in the deeds. [Citing authority.] Nor could there be any title or interest in G. B. Beal and his heirs by reservation or exception because the one reserves to the grantor some new interest out of the thing granted, while the other excludes from the operation of the grant some existing part of the estate, neither of which is attempted in this instance. [Citing authority.]

"We do not agree with the respondent that Beal and his heirs are not grantees in the deeds and, therefore, strangers. * * *

"It does not necessarily follow from the fact that one is not mentioned in the places or clauses of a deed in which grantees are usually named or indicated that he may not be or become a grantee. It is immaterial in what part of the conveyance the grantees' names appear as long as the parties' intention is clearly and plainly manifest as to who they are and the estate they are to receive. [Citations.] The rule as to the repugnant designation of parties is that 'All the language of a grant should be considered and effect given to it unless so repugnant or meaningless that it cannot be done, in which case the repugnant or meaningless portion may be rejected.'

"Neither do we agree with the respondents' contention that the clause following the descriptions is necessarily contradictory of the estate previously conveyed and, therefore, void for repugnancy. If repugnancy or irreconcilable conflict exists, of course, the clause in which estates are usually defined and granted would prevail over a subsequently conflicting clause. But, as the case is with the grantees so it is as to repugnancy in other respects, even if various clauses do conflict, yet if the intention of the parties may be gathered from the whole instrument, rather than from particular segregated clauses, that intention will prevail and be given effect if possible and if it is not contrary to some positive rule of law. [Citations.] 'In accordance with the modern rule, which is to ascertain the grantor's intention from all the terms of a deed in all cases where it is possible so to do and to consider all the clauses together without undue reference to their location in the deed, where two clauses are inconsistent, the paramount rule is that the deed must be construed so as to give effect to the intention of the parties as collected from the whole instrument. The primary or dominant intent expressed in the instrument, when ascertained, will control.' "

It follows that the Chancellor erred in his ruling.

The litigation is thus disposed of, *i.e.,* we reach our determination solely and entirely from the language used in the deed itself; however, it is interesting to note that Mrs. Fletcher apparently felt that she was only possessed of a life estate in the property. In the first place, wishing to construct a bungalow upon a tract in the northwest corner of the property conveyed in the deed, Mrs. Fletcher, many years ago, purchased this particular tract from the children and grandchild of J. H. Fletcher, paying to them the sum of $300 for the property. Joe Yingst, caretaker at the First Methodist Church for the past seven years, testified that the church is located right east of the Fletcher "home place," and he went to the Fletcher home once a week for five or six years before her death to wind a clock; that Mrs. Fletcher told him that the Methodist people wanted to buy a strip across her lot for a parking lot, but that "she couldn't sell it." Yingst was not acquainted with appellants, and apparently had no interest in the case. He also testified that she said, "she guessed the church was counting the days so they could buy the property from the heirs."

Mrs. Sadie Croft, 83 years of age, testified that she had known Ella Fletcher from 1914 until the time of her death; that she and Mrs. Fletcher were close friends and visited back and forth. Mrs. Croft stated that Mrs. Fletcher told her of the efforts of the Methodist church to buy the property mentioned, and "she said she couldn't sell it because it belonged to the Fletcher estate. * * * She said they kept wanting to buy it but she couldn't sell it." A few other instances appear in the record which indicate that Mrs. Fletcher considered she only held a life interest, but as heretofore stated, our conclusions are based solely upon the provisions in the deed, which we consider to be clear and unambiguous.

In accordance with the reasoning herein set forth, we are of the opinion that Mrs. Fletcher only held ab-

solute title to the tract,[4] heretofore referred to, wherein she purchased, for $300.00, the interest of the daughters and granddaughter of J. H. Fletcher. Appellees have no valid claim to the balance of the property in litigation.

The decree is reversed, and the cause remanded to the Washington Chancery Court with directions to enter a decree not inconsistent with this opinion.

[4] More particularly described as follows: "Beginning at the Northwest corner of Block Number nine (9) in the Original Town of Springdale (Old Town) as designated on the plat of said Town, now on file in the office of the Circuit Clerk of said County of Washington, State of Arkansas, and running thence east 60 feet, thence south 108 feet and 9 inches, thence west 60 feet, thence north 108 feet and 9 inches to the place of beginning."

COULTER *v.* CLEMONS.

5-3024 372 S. W. 2d 396

Opinion delivered November 18, 1963.

Gentry & Gentry, for appellant.

L. B. Smead and *L. Weems Trussell,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a suit to quiet title brought by the appellants, Murray Whitfield Coulter and George Prothro Coulter, against the appel-

lees, Julia Clemons *et al.* Other parties were added by cross complaint and third party procedures. The appellants claimed title to the real estate here involved by mesne conveyances from those who owned the lands prior to the 1932 tax sale for the 1931 taxes. The appellees claimed by statutory possession acquired under the deed issued because of such tax sale. The decree of the Chancery Court in favor of the appellees was reached largely because of the finding that the appellants were claiming under a forged deed; and that issue of forgery becomes the most important point on this appeal.

Before discussing the forgery matter, however, we give other background information. The appellants, in seeking to quiet their title, claimed: (a) that the lands here involved were originally owned by Harris Brothers, who became bankrupt in 1931; (b) that the 1932 tax sale was void for failure of the Clerk to affix his certificate before the date of sale; (c) that there was no valid statute curing such defect;[1] (d) that the trustee in bankruptcy conveyed the lands to E. W. Prothro in 1933; (e) that E. W. Prothro conveyed the lands to the appellants in 1933; and (f) that the appellants were minors in 1933 and within proper time brought this suit—not to redeem the lands from taxes but—to quiet their title to the lands under the claim that their predecessors in title were the owners of the lands.

The appellees claim under a deed from the State Land Commissioner in 1935, the lands having forfeited to the State in 1932 for the delinquent taxes of 1931; and appellees claim: (a) that, regardless of the validity of the tax sale, the appellees under the tax deed have paid taxes on the lands (admitted to be wild and unimproved) for more than fifteen years; (b) that such payments make good title; (c) that the deed from E. W. Prothro to the appellants is a forgery; and (d) that the appellants have no title to the lands and therefore cannot maintain this suit.

[1] On this point see *Coulter* v. *Anthony*, 228 Ark. 192, 308 S. W. 2d 445, which case is discussed on another point in Topic II, *infra*.

The alleged deed from E. W. Prothro to appellants was dated August 28, 1933, and recorded August 3, 1940 —A lapse of almost seven years between date of execution and date of recordation. At the time of the date of the deed the appellants were children, aged one and three years respectively, and were nephews of E. W. Prothro. The appellants brought this suit within the permissible time after arriving at full age. The suit was filed on April 16, 1952, and remained untried until 1962 because of other litigation later to be mentioned. Trial in the Chancery Court in 1962 resulted in a holding that the deed from E. W. Prothro to the appellants was a forgery; and this appeal challenges the correctness of that holding. The appellants raise three points:

"1. The Court erred in holding that the deed of E. W. Prothro, dated August 28, 1933, conveying the lands to appellants, was a forgery and that by reason thereof appellants had no title to the lands involved.

"2. The testimony of E. W. Prothro in the form of a deposition introduced as evidence by appellees is binding upon them, and the court erred in not so holding.

"3. The Court erred in holding that appellants had not shown title in themselves and in dismissing appellants' complaint for want of equity."

1. *Forgery.* It was established that the Trustee in Bankruptcy of Harris Brothers executed a deed dated August 17, 1933, conveying the land here involved to E. W. Prothro; that the deed was actually delivered on August 23, 1933 to E. H. Coulter, Sr., a brother-in-law of E. W. Prothro, and the deed was recorded the same day delivered; that E. H. Coulter, Sr. is the father of the appellants, Murray Whitfield Coulter and George Prothro Coulter; that E. H. Coulter, Sr. was an attorney and had represented E. W. Prothro previously; that the challenged deed here involved was dated August 28, 1933 but was not recorded until August 3, 1940, a lapse of almost seven years; and that the challenged deed here involved purported to have been acknowledged by E. W. Prothro before T. P. Oliver, a Notary Public.

T. P. Oliver testified that he never signed the said acknowledgment on the deed and that his signature thereon was a forgery. Furthermore, Mrs. T. P. Oliver, the wife of T. P. Oliver, testified that she was the chief operator for the Southwestern Bell Telephone Company in El Dorado; that she and T. P. Oliver had been married 32 years; that she was well familiar with the signature of T. P. Oliver; and that the signature of T. P. Oliver on the acknowledgment of the questioned deed was not the signature of T. P. Oliver. The Olivers were entirely disinterested witnesses.

Other instruments admittedly signed by E. W. Prothro were introduced in evidence in order to establish his genuine signature. Some of these were: (a) a deed from E. W. Prothro to O. E. McGugan, dated January 1, 1934; and (b) a deed from E. W. Prothro to Lionel Robertson, dated January 23, 1934. Thus, contemporaneous instruments were in evidence containing the admittedly genuine signature of E. W. Prothro. Then C. W. Talbot, President of the First National Bank of Fordyce, and with 43 years experience in handwriting, testified that the purported signature of E. W. Prothro on the questioned deed (that is, from E. W. Prothro to Murray Whitfield Coulter and George Prothro Coulter) was not written by the same person who had signed the McGugan and the Robertson deeds, as previously set forth. Here is Mr. Talbot's positive testimony on the point as abstracted by the appellants:

"I am now handed a photostatic copy of a deed purporting to have been executed by E. W. Prothro to George Prothro Coulter and Murray Whitfield Coulter, dated August 28, 1933, and filed for record in Calhoun County on August 3, 1940, which deed I have examined previously and it is my opinion, based upon my experience since 1920, and from a careful examination of these deeds that the signature of E. W. Prothro on the deed to George Prothro Coulter and Murray Whitfield Coulter is not the same handwriting as the signature of E. W. Prothro on the McGugan and Robertson deeds."

Other admittedly genuine signatures of E. W. Prothro were in evidence: one was his signature on a deed from Prothro to Johnson Brothers in August 1933; and the other was a signature of Prothro on an indemnity bond executed at the same time, which indemnity bond was signed by E. W. Prothro as principal, and E. H. Coulter as surety. The Chancery Court compared Prothro's signature on the deed here in question, as against the admitted signatures in the Johnson transaction. The only evidence against the forgery was that of E. W. Prothro,[2] which came into the record in the manner discussed in Topic II, *infra*. E. W. Prothro testified that he signed the deed to the appellants on the date shown and delivered the deed to his sister, who was the mother of the appellants; that the appellants were small children at the time; and the deed was a gift to them.

The appellees had the burden of proving the forgery by a preponderance of the evidence. *Thompson* v. *Kinard,* 168 Ark. 1057, 272 S. W. 668; *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524; *Ledbetter* v. *Smith,* 202 Ark. 144, 149 S. W. 2d 564. Did the testimony of E. W. Prothro outweigh the testimony of Mr. and Mrs. Oliver and C. L. Talbot, and the admittedly genuine signatures as against the questioned signature? The thought and study which the learned Chancellor gave to this question of forgery and to the entire case is exemplified by the opinion which he delivered and which is in the transcript. On the evidence as we have outlined it—and the record contains no other for the appellants—the Chancery Court concluded that the alleged deed from E. W. Prothro to the appellants was a forgery; and we cannot say that such finding is contrary to the preponderance of the evidence. Therefore, we affirm the finding that the deed

[2] The fact that E. W. Prothro testified that he signed the deed does not completely foreclose the appellees on this issue of forgery, because his testimony is the same as that of any other party in the case. We can easily imagine a situation wherein a son was charged with forging his father's name to a check. The testimony of the father —to the effect that he had signed the check himself—would not conclusively establish that there had been no forgery. In 23 Am. Jur. p. 679, "Forgery" § 8, there is a discussion of forgery by the use of one's own name with intent to deceive; and there are annotations on this point in 41 A.L.R. 229, 46 A.L.R. 1522, and 51 A.L.R. 568.

from E. W. Prothro to the appellants was a forgery, and that the appellants are without title.

II. *The Testimony Of E. W. Prothro As Binding On Appellees.* The appellants insist that the appellees brought into the trial of this case the testimony of E. W. Prothro and are, therefore, bound by his testimony to the effect that he signed the questioned deed to the appellants. The answer to this contention necessitates a mention of previous litigation between these appellants. We have reference to the case of *Coulter* v. *Anthony,*[3] 228 Ark. 192, 308 S. W. 2d 445, decided by us on November 4, 1957, and *certiorari* denied by the Supreme Court of the United States on November 17, 1958, 358 U. S. 73; 3 L. Ed. (U.S.) 118; 79 S. Ct. 153. The said Coulter-Anthony case (involving the same tax sale as here) was No. 1557 in the Calhoun Chancery Court; and E. W. Prothro was a party defendant, being brought in by cross complaint just as in the present case. He gave a deposition in answer to interrogatories propounded to him by the opposite side (just as here), and his deposition was offered in that case under Sub-section (d) of Section 1 of the Discovery Statutes of 1953.

The present case in the Calhoun Chancery Court was No. 1559; and by agreement, the deposition of E. W. Prothro in Case No. 1557 was used by the present appellees, since Prothro was a party adverse to them in this case. Here is what transpired in the Lower Court when the deposition of E. W. Prothro was offered:

"L. WEEMS TRUSSELL: If the Court please, at this time I would like to offer in evidence the Interrogatories propounded to Dr. Ernest Prothro, who was an adverse party in Case No. 1557 and who was made an adverse party in this Case No. 1559. This instrument is now offered by the defendants without being bound by the testimony of E. W. Prothro, who is an adverse party, and is offered under Section 1, Act 335 of 1953. . . .

[3] There is another case by these appellants, styled *Coulter* v. *O'Kelly,* 226 Ark. 836, 296 S. W. 2d 753, but it has no direct bearing on the present litigation.

"U. A. GENTRY: We would like to interpose our objections to the introduction of these two depositions or the testimony given by these two witnesses found in the record of *Coulter* v. *Anthony,* Case No. 1557, not because it is testimony given in that case but because it is evidence that goes to fraud, or an undertaking to prove some fraud on the Bankruptcy Court or by Officers of the Bankruptcy Court in acquiring this property that is in litigation today. That has nothing to do with this case. . . ."

Later, and just before the close of all the testimony, the following occurred:

"MR. GENTRY: If the Court please, Mr. Trussell has offered all the rebuttal testimony I wanted to offer in the deposition of Dr. Prothro. We would make that our testimony.

"MR. TRUSSELL: Since I have offered it, do you agree that I am offering it as an adverse party or do you prefer to offer it?

"MR. GENTRY: We want it in the record, after they introduced their testimony about the validity of the deed.

"MR. TRUSSELL: Very well, your Honor, that is all.

"MR. GENTRY: That is all we have."

We have copied the pertinent excerpts from the proceedings of this trial to show just how the deposition of E. W. Prothro came into the record, and to establish that it was offered by the appellees as the testimony of an adverse party. Act No. 335 of 1953 (now found in Ark. Stat. Ann. § 28-348 *et seq.* [Repl. 1962]) provides that the introduction of a deposition of a person makes such deponent the witness of the person introducing the deposition ". . . but this shall not apply to the use by an adverse party of his deposition. . . ." Therefore, the appellees had the right to offer the deposition of E. W. Prothro without being bound by his answers. The appellees so stated when they offered the deposition, and

the appellants did not make any claim in the Trial Court that the appellees would be bound by the answers of Prothro. We find no merit in the claim of the appellants that the appellees were bound by the testimony of E. W. Prothro.

III. *The Appellants Claim That Their Title Should Be Quieted.* This point was practically eliminated when we affirmed—in Point I, *supra*—the Chancery finding that the appellants were claiming under a forged deed. A forged deed does not pass title. *Bird* v. *Jones,* 37 Ark. 195; *Wilson* v. *Biles,* 171 Ark. 912, 287 S. W. 373; *McCarley* v. *Carter,* 187 Ark. 282, 59 S. W. 2d 596. Therefore, with the deed from E. W. Prothro to appellants held to be a forgery, the appellants have shown no title in themselves. From 1935 to the trial of this cause the appellees, under color of title, had paid the taxes on the lands, admitted to be wild and unimproved (Ark. Stat. Ann. § 37-102 [Repl. 1962]); so the appellants had no title to be quieted.

The decree is affirmed.

[redacted]

BENSON *v.* BENSON.

5-3081 372 S. W. 2d 263

Opinion delivered November 18, 1963.

[redacted]

W. C. Medley, for appellant.

Brown, Compton & Prewett, for appellee.

George Rose Smith, J. The appellee, Wallace H. Benson, was granted a divorce in the court below. This appeal questions only that part of the decree that awarded him the custody of the couple's three children, a boy and two girls, aged ten, eight, and six. It is contended that it would be to the children's best interest for them to be in their mother's care.

Wallace Benson and Attie Lou Strickland were married in 1951, both being in their teens. They had grown up in Calhoun county, but during the eleven years of their married life they lived in Camden, where Wallace worked for a paper company. In June of 1961 Wallace's older brother, Gervis Benson, came up from Texas to make his home with them, paying nothing for his room and board.

Each spouse blames the other for their separation late in May, 1962. Attie Lou stayed with a friend in Camden for a few days. On June 4 Attie Lou took the three children and accompanied her brother-in-law, Gervis, to Dallas, Texas. They say that they consulted an attorney, who advised Attie Lou to seek a divorce in Mexico. Attie Lou and Gervis immediately went to Mexico, where Attie Lou obtained a divorce the next day, June 5. The two were married in Mexico on June 6 and returned to Dallas, where they rented an apartment and lived together as man and wife. The appellee did not learn the whereabouts of his wife and children until about two months after they left Camden.

The controlling consideration is the best interest of the children; custody is not awarded or withheld with any thought of rewarding or punishing either parent. *Tidwell* v. *Tidwell,* 224 Ark. 819, 276 S. W. 2d 697. Here the chancellor, in announcing his decision, recognized the reluctance of the courts to take young children from their mother, but he considered this to be an exceptional case in which that action was called for. We cannot say that he was wrong.

The environment that the children would have in Dallas leaves much to be desired. Attie Lou is employed

at a cafeteria, where her working hours are from 9:00 a.m. until 1:00 p.m. and from 4:30 p.m. until 9:00 p.m. Hence for the greater part of the time that the children are not at school they would be in the care of a maid or baby sitter.

Gervis Benson is hardly the ideal person to act as a foster father to the children. Gervis's own father testified that Gervis had been addicted to drinking for ten years and was getting worse every year. Gervis's mother also appeared as a witness for the appellee and testified that Gervis had been dishonorably discharged by the Navy for peddling dope. (Gervis says that his discharge was the result of his having been court-martialed for intoxication.) The county sheriff testified that Gervis had been jailed twelve or fifteen times for drunkenness and fighting. It will be remembered that Gervis, after having enjoyed his brother Wallace's hospitality for a year, ran away with Wallace's wife and children and took up what was actually an adulterous relationship with the woman, since the Mexican divorce was unquestionably void. It is fairly open to doubt whether a relationship so originating is likely to be permanent.

By comparison the outlook for the children in Calhoun county is a bright one. There they will live with their father in the home of his parents, who are fairly young to be grandparents and in fact have a son of their own who is a year younger than the oldest of Wallace and Attie Lou's three children. Wallace is still employed at Camden, a few miles from his parents' residence, but he will be at home after working hours. We cannot say whether or not Wallace seriously mistreated his wife during their marriage; upon this issue the evidence is in hopeless conflict. It is reasonably certain, however, that even if he was at fault Wallace will be a better influence in the lives of his children than Gervis would be.

In a case of this kind the chancellor's opportunity to reach the right decision is immeasurably better than ours. He has the advantage of seeing everyone concerned at first-hand and is thus in a position to give all the testi-

mony its proper weight. This case presents a close question, upon which strong arguments can be made on both sides, but we cannot say with confidence that the chancellor was wrong in awarding the custody of the children to their father.

Affirmed.

HARDIN *v.* HARDIN.

5-3041 372 S. W. 2d 260

Opinion delivered November 18, 1963.

Cecil Grooms, for appellant.

T. A. French, for appellee.

PAUL WARD, Associate Justice. This appeal comes from an order dismissing appellant's petition to set aside a divorce decree on the ground that it was procured by fraud practiced on the court. The proceeding is unusual in that the divorce decree was granted to appellant on her own petition. The only record we have before us on appeal is appellant's petition (to set aside the divorce decree) and the order of dismissal.

On August 28, 1962 appellant (Cyntha Hardin) filed in chancery court her four page petition. In substance and in all essential parts the complaint contains the allegations set out below.

Appellant (Cyntha Hardin) was married to appellee (Claud Hardin) January 2, 1934; to this union five children were born; there were frequent quarrels and on September 25, 1945 appellee drove her away from home; she went to the home of her daughter (by a former marriage) to live; on October 6, 1945 the chancery court, on her own petition, granted her a divorce, giving custody of their children to appellee; during the latter part of October, 1945 she returned to appellee's home, with appellee's consent, to live and to look after the children; and she there lived with appellee as man and wife until February 15, 1960 when he ran her away from his home. In the petition appellant further states she did not learn, until January 1, 1962, that appellee perpetrated a fraud upon her and the court—which fraud (she alleges) caused her to secure the divorce. The perpetration of the fraud, she says, consisted of the following: With knowledge and the connivance of appellee a certain man came by where she was living on October 4, 1945, at about 7:30 p.m., for the alleged purpose of taking her to Rector to see her husband; that on the way this man stopped the car and forced her to get out to make love; that while they were "scuffling or wrestling" her husband (with his son-in-law) came by and saw them; that they took her to a lawyer in Rector where she signed a paper; that she thought the paper was to give a divorce to her husband but it was in fact a petition for her to secure a divorce from him. In the petition appellant says she is uneducated and did not understand what she signed, and that everything mentioned above was prearranged by appellee for the purpose of getting rid of her without having to give her a portion of her property.

In our opinion the trial court was correct in sustaining appellee's motion to dismiss the above petition. Appellant very properly admits that her petition was based

on Ark. Stat. Ann. § 29-506 (Repl. 1962). This section, in all parts pertinent to the facts in this case, provides:

"The court in which a judgment or final order has been rendered or made, shall have power, after the expiration of the term, to vacate or modify such judgment or order.

* * *

"Fourth, For fraud practiced by the successful party in the obtaining of the judgment or order."

Few of our statutes have better withstood the test of time or have been more uniformly interpreted than the section above quoted. Without any change in wording it appears in the Civil Code (as § 571), Gantt's Digest (as § 3596), in Kirby's Digest (as § 4431), in Crawford & Moses' Digest (as § 6290), in Pope's Digest (as § 8246), and, of course, in Ark. Stat. Ann. as § 29-506. The statute has been considered by this Court with reference to each of the above designations, and each interpretation has been consistent and harmonious. In no case has it been construed in language with more clarity than in an opinion written by Justice Butler in *Hendrickson* v. *Farmers' Bank & Trust Company,* 189 Ark. 423, 73 S. W. 2d 725. It was there said:

"The fraud for which a decree will be cancelled must consist in its procurement and not merely in the original cause of action. It is not sufficient to show that the court reached its conclusion upon false or incompetent evidence, or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, in issue in the proceeding before the court which resulted in the decree assailed. *James* v. *Gibson,* 73 Ark. 440, 84 S. W. 485; *Johnson* v. *Johnson,* 169 Ark. 1151, 277 S. W. 535; *Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20."

The above quotation was adopted in an opinion written by the late Minor W. Millwee found in *Alexander* v.

Alexander, 217 Ark. 230, 229 S. W. 2d 234. In the case of *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517, we said:

"The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed."

The above quotation was adopted in *Jamieson* v. *Jamieson,* 223 Ark. 845, 268 S. W. 2d 881, and also in *Crosswell* v. *Linder,* 226 Ark. 853, 294 S. W. 2d 493. In the case of *Nevil C. Withrow Co., Inc.* v. *Heber Springs School District,* 229 Ark. 939, 320 S. W. 2d 95, we quoted with approval from the *Alexander* case, *supra,* the following:

" 'The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, . . . It must be a fraud practiced upon the court in the procurement of the judgment itself.' "

We can find nothing in the petition in this case that could be construed under the above decision, as a fraud on the court. There is an allegation in the petition that ". . . the conduct of the defendant as above described constituted fraud practiced on this court in procuring the decree of divorce . . ." This statement relative to what constitutes fraud is a conclusion of law. In the case of *Sibley* v. *Manufacturers Furniture Co.,* 220 Ark. 234, 247 S. W. 2d 20, we said:

"While the complaint alleges that the procurement of the default judgment was a fraud upon the court, that is a conclusion of law not admitted by the demurrer."

As heretofore noted the alleged fraud (referred to in § 29-506) must be "extrinsic of [that is, apart from] the matter tried in the cause . . ." We find no such fraud here. The fraud or deception which appellant complains of seems to be: (a) she was trapped into a compromising position with the man who took her riding, and

(b) she thought she was signing a paper to give her husband a divorce when in fact it was to give her a divorce. Both situations were subject to explanation in a divorce proceeding and both were a part of the matter which was tried or could have been tried in the divorce suit. At no time does appellant say she did not know the divorce was granted when it was granted, and the petition clearly indicates she did know.

We are not free to give a liberal interpretation to the statute simply to try to correct what might be considered an injustice done appellant. One of the earliest cases to construe the statute which is now § 29-506 was *Izard County* v. *Huddleston,* 39 Ark. 107. In that case we said:

"The statute to vacate judgments by this proceeding is in derogation not only of the common law, but of the very important policy of holding judgments final after the close of the term. Citizens must have some confidence in the judgments of our judicial tribunals, as settlements of their controversies, and there should be some end to them. Unless a case be clearly within the spirit and policy of the act, the judgment should not be disturbed."

To the same effect see also *Weller* v. *Studebaker Bros. Mfg. Co.,* 93 Ark. 462, 471, 125 S. W. 129.

It follows from the above that the order of the trial court must be and it is hereby affirmed.

Affirmed.

5-3111 372 S. W. 2d 264

Opinion delivered November 18, 1963.

Daily & Woods, Kerr, Conn & Davis, Oklahoma City, Okla., for appellant.

Hardin, Barton & Hardin, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a summary judgment denying a petition for writ of habeas corpus.

Appellant Rachel Merrill Frazier and appellee D. B. Merrill were divorced in Oklahoma by a decree dated September 11, 1961, which apparently divided custody of their two minor sons, D. B. Merrill, Jr., age eight, and Steven Ray Merrill, age five, between the father and mother. A copy of this decree is not in the record. Thereafter appellant moved to Kansas, taking the boys with her, and there refused to deliver custody of the boys to appellee or even permit him visitation rights. Appellee immediately returned to Oklahoma and on petition, the

Oklahoma court amended its original decree giving appellee complete and exclusive custody of the boys. Appellee then returned to Kansas and filed a petition for a writ of habeas corpus. The decree of the Kansas court, entered June 8, 1962, recites that the parties had stipulated that the court had jurisdiction, that appellee should have custody of the older son two months during the summer, and of the younger son one month, that appellee must file a $1,000 performance bond, and that appellee would have all orders of the Oklahoma court subsequent to the divorce decree of September 11, 1961, set aside.

Prior to the granting of this Kansas decree, appellee had the Oklahoma amended decree set aside. Upon obtaining custody of the boys, after posting the bond, appellee returned with them to Oklahoma. Thereafter he filed a new motion in the Oklahoma court to amend the divorce decree, alleging, *inter alia:*

"That the said order [setting aside all orders in this cause which were made subsequent to the date of the divorce decree of September 11, 1961] was made at the request of this defendant [appellee] because of the fact that at that time another action was pending in the courts of Wichita, Kansas, regarding the custody of said children and that the plaintiff [appellant here] had violated the orders of this court and had taken said children to Wichita, Kansas, and there refused to deliver custody of said children to this defendant as per order of this court; that the defendant was then required to bring action in courts in Wichita, Kansas, for custody of said children and that the attorneys for the plaintiff refused to have any hearing until such time as the orders of this court made subsequent to the divorce decree be set aside; therefore, this defendant [appellee] had said order set aside because of the coercion and demands of the attorneys for the plaintiff in Wichita, Kansas; . . ."

and prayed for exclusive custody of the children. On August 13, 1962, the Oklahoma court again amended its original divorce decree and again granted appellee exclusive custody of the children. No appeal was taken from this decree. Some time thereafter appellee and the boys moved to Fort Smith. On November 27, 1962, appellant

petitioned for a writ of habeas corpus in Sebastian Chancery Court. At trial on December 6, 1962, the Chancellor found that the Order Amending Decree of the Oklahoma court of August 13, 1962, is a valid decree and entitled to full faith and credit; that appellant made no allegation of changed circumstances affecting the welfare of the children since the date of the Oklahoma Order Amending Decree, or that there existed any material facts unknown to the Oklahoma court on the date of its order, and that no material question of fact existed and thereupon granted appellee's motion for summary judgment and denied appellant's petition for writ of habeas corpus. From the decree appellant has appealed, contending that the Oklahoma order is void on its face and therefore subject to collateral attack.

The Oklahoma statute which authorizes a court to modify or change child custody orders in divorce cases provides, as follows:

"12 O. S. 1961 § 1277. Care and custody of children. —A petition or a cross-petition for a divorce, legal separation or annulment must state whether or not the parties have minor children of the marriage. If there are such children, the court shall make provisions for guardianship, custody, support and education of the minor children, and may modify or change any order in this respect, whenever circumstances render such change proper either before or after final judgment in the action."

Appellant argues skillfully that since there was no allegation of material change of condition or circumstances in appellee's motion to amend the Oklahoma decree nor found in the order of the Oklahoma court, that court was without authority to change custody. Appellee contends that the exact words need not be specifically set out.

The Order Amending Decree reads as follows:

"The above defendant [appellee] having filed his motion requesting the court to amend decree heretofore made by this court regarding the custody of Steen Ray Merrill and D. B. Merrill, Jr., minor children of the par-

ties hereto and the plaintiff [appellant] having been served with notice of said motion and of the hearing of said motion on this date and she having failed to answer, protest, or appear, and being three times called in open court and failing to answer and the court having examined the file in said cause finds that said plaintiff has been properly and legally notified of this hearing; and the court proceeds to hear the evidence offered by the defendant and upon due consideration thereof finds that the children are in the custody of this court and that they are personally present in court; the court further finds that all of the allegations contained in defendant's motion are true and that it is for the best interest of the children that the defendant, D. B. Merrill, be granted the exclusive and perpetual custody and control of said minor children.

"It is therefore ordered by the court that the orders heretofore made by this court be amended and the defendant D. B. Merrill is hereby awarded the exclusive and perpetual care, custody and control of Steen Ray Merrill and D. B. Merrill, Jr., and the minor children of the parties hereto.

"Dated this 13th day of August, 1962."

It is well-established that a judgment of a court of record of a sister state is entitled to full faith and credit and may not be collaterally attacked unless the judgment is void on its face. U. S. Const. art. IV, § 1.

It was said by the Oklahoma Supreme Court in *Welch* v. *Focht,* 67 Okl. 275, 171 P. 730, that:

"There is also practical unanimity among the authorities that a judgment of a court of general jurisdiction cannot be collaterally attacked, unless the record affirmatively shows want of jurisdiction, and every fact not negatived by the record is presumed in support of the judgment of a court of general jurisdiction, and *where the record of the court is silent upon the subject, it must be presumed in support of the proceedings that the court inquired into and found the existence of facts*

authorizing it to render the judgment which it did." [Emphasis ours.]

In *McDougal* v. *Rice,* 79 Okla. 303, 193 P. 415, after quoting the paragraph above, the court goes on to say:

"In *Welch* v. *Focht, supra,* the following was quoted with approval of this court from Van Fleet on Collateral Attack, wherein it was said:

" 'There is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. * * * When the allegations are sufficient to inform the defendant what relief the plaintiff demands, the court having power to grant it in a proper case, jurisdiction exists, and the defendant must defend himself. * * * Allegations immaterial and wholly insufficient in law may be sufficient to 'set the judicial mind in motion,' and to give a wrongful but actual jurisdiction, which will shield the proceedings from collateral attack.'

"Then the opinion continues:

" 'And the learned author sums up the whole matter by saying that in his opinion the true and logical rule is that, if there is any petition at all invoking the action of the court, a judgment based thereon cannot be assailed collaterally because of insufficiency in the pleading. This, too, is the rule adhered to by the Supreme Court of the United States.' " (Cases cited.)

It is true that neither the motion nor the order contain the specific words "changed conditions or circumstances," nevertheless we are impelled to the conclusion that the motion contained sufficient allegations to challenge the attention of the court and set the judicial mind in motion, and such silence of the order upon the

subject is presumed in support of the proceedings that the court inquired into and found the existence of facts authorizing it to render the judgment that it did. This being true, the Sebastian Chancery Court properly accorded full faith and credit to the Oklahoma Order Amending Decree.

Affirmed.

DESALVO *v.* WILLIAMS.

5-3100 372 S. W. 2d 268

Opinion delivered November 18, 1963.

Francis T. Donovan and *Guy H. Jones,* for appellant.

George F. Hartje, Jr., for appellee.

SAM ROBINSON, Associate Justice. This is a property line dispute between adjoining landowners concerning a strip of land about 10 feet wide and 900 feet in depth. In 1947 the appellees, Walter and Thelma Williams, bought their property, about 2½ acres, measuring 125 feet across the front and about 900 feet in depth. There was a nice dwelling house on the property with a driveway running from the highway on the north, in front of the property, up to the west side of the house. About 15 feet to the west of the house there was a wire fence running north and south the entire 900 foot depth of the property. Without objection Mr. Williams testified that James Fugatt, from whom he purchased, told him that

it was his fence; that he had built it, and that it was on the line or did not miss it much.

Fugatt had purchased the property from Cleve Berry, who also owned the adjoining property to the west. From the time of the purchase from Fugatt, Mr. and Mrs. Williams claimed to own up to the fence. The fence appeared to be the division line between the two properties, and during the entire 15 years that Berry owned the property on the west, following the purchase of their property by Mr. and Mrs. Williams, Berry never said or did anything to indicate that he did not consider that the fence was the line. In fact, in 1947 he asked the Williams for permission to put another strand of barbed wire on the fence, thereby acquiescing in the fence as the line. A property line can be established by long acquiescence. *Stewart* v. *Bittle*, 236 Ark. 716, 370 S. W. 2d 132; *Weston* v. *Hilliard*, 232 Ark. 535, 338 S. W. 2d 926; *Tull* v. *Ashcraft*, 231 Ark. 928, 333 S. W. 2d 490.

Moreover, Mr. and Mrs. Williams have been in adverse possession of the strip of land for more than seven years. Mrs. Williams testified:

"Q. Have you and husband held this property up to the fence?

A. Yes, sir. We have tried to keep it up.

Q. Have you claimed the property up to the fence?

A. Yes, sir.

Q. When you say you have tried to keep it up, what have you done?

A. Well, we have tried to keep the driveway built up and we have tried to keep trees and shrubbery set out. We've not got—I've always tried to keep it clean, you know, because it is such a fire hazard down there the side from Mr. Berry's. And—

Q. Go ahead.

A. That's you know we didn't want our house to catch afire. If his land caught afire."

Floyd Williams, son of appellee, Walter Williams, testified that his father had mowed the land east of the fence and kept it up.

In October, 1962, appellants, James DeSalvo and his wife, purchased from Berry two 2½ acre tracts west of the Williams' property. One of the tracts joins Williams. Subsequent to the time of purchase, the DeSalvos had the property surveyed. According to the survey, the line between the Williams' property and the DeSalvo land appears to be about the middle of the Williams' driveway leading from the street to the Williams' garage, which was built in 1961 and adjoins their house. The survey line is about 10 feet east of the fence which was there when the Williams' bought the property in 1947. The survey line runs through the middle of the Williams' garage.

At the time the DeSalvos bought from Berry, the fence was in place only two or three feet west of the Williams' garage. Any reasonable person would have considered that the fence was the line. Certainly no person would have thought the property line ran through the Williams' garage, and yet that is what the appellants now claim.

Berry still owns other property adjoining the DeSalvos on the west, and to make up for the 10 foot strip in controversy, Berry offered to give the DeSalvos 10 feet of land of the same kind and value as the land in dispute, but the DeSalvos refuse the offer.

We cannot say the Chancellor's decree is against the preponderance of the evidence.

Affirmed.

BOWEN *v.* HOOKER.

5-3106 372 S. W. 2d 257

Opinion delivered November 18, 1963.

[redacted]

J. E. Still, for appellant.

Boyd Tackett, LeRoy Autrey, for appellee.

FRANK HOLT, Associate Justice. The dispute in this case concerns a one acre tract of land on which is located a cemetery known as the "Bowen Graveyard." The appellees, as the heirs and relatives of loved ones buried in this cemetery, brought this suit as a class action to establish the right to use "Bowen Graveyard" as a public cemetery. The appellants denied that a public cemetery existed and, also, any interference to appellees or the public as to existing graves.

Appellants bring this appeal from a decree favorable to the position of appellees as to a part of this one

acre. For reversal appellants contend that (1) they are the owners of the legal title to this portion by virtue of a 1946 deed and (2) that appellees have abandoned any right to use it for burial purposes.

In 1913 A. M. Bowen and his wife, parents of appellant W. Ray Bowen, conveyed by warranty deed to the Trustees of the Pisgah Methodist Church one acre of land on which existed a cemetery "* * * known as the Bowen Graveyard." In 1946 the Trustees of the Pisgah Methodist Church conveyed by quitclaim deed to the appellants this same one acre tract of land "* * * known as the Bowen Graveyard." In 1947 this cemetery was the subject of an action instituted in Pike County Chancery Court against appellants with reference to appellees' rights of ingress and egress. There was no formal decree rendered in the case. The docket notation recites that appellants were required to allow appellees access "* * * to cemetery until such time as a road can be constructed * * *."

From 1915 until 1962 a fence enclosed the east half of this one acre tract. It is undisputed that the fence was maintained in this same location from 1915 until 1962 when the fence was removed by appellants from the south boundary of this enclosed portion. The south fence was moved northward and relocated. As a result, the new south boundary fence then enclosed about one-half of the area previously enclosed by fence. All of the graves were contained in this newly constricted area of one-fourth acre. Before relocation of the fence by appellants the south portion of the fenced area was utilized to some extent by use of the trees for shade during funeral services. This south portion, where no graves are found, received some care and attention from appellees and the community. There have been no burials in the cemetery since 1950. Several witnesses testified that since the north portion was almost filled to capacity they desired and expected to be buried in this south portion of the cemetery and, thus, near their loved ones.

In rendering his opinion, the Chancellor divided the one acre into three parts. Tract No. 1: The area now

enclosed by fence, or that portion containing the graves [approximately one-fourth acre]. Tract No. 2: That part of the area from which appellants removed the fence and containing no graves but previously enclosed with Tract No. 1 [approximately one-fourth acre]. This is the "disputed area" which is the basis for this appeal. Tract No. 3: The remaining part of the one acre tract which was never enclosed [approximately one-half acre]. The Chancellor found that the appellees have no right or interest in Tract No. 3 and awarded it to appellants since it is undisputed that it was never enclosed nor used for cemetery purposes and that since 1915 until the present time it has been used by the appellants, or their predecessors in title, for agricultural purposes. The court further found that the area represented by tracts one and two is a public cemetery and that any legal title which appellants hold from the Church was subject to the easement that accrues from a public cemetery and that appellees have never abandoned their rights to such cemetery. Accordingly, the Chancellor ordered the appellants to remove the new fence and relocate it where it existed originally so that the enclosure, as restored, would contain approximately one-half acre. The appellants were also enjoined from interfering with the appellees' and the public's right to use "Bowen Graveyard" as a cemetery. On appeal the appellants question only the court's disposition of Tract No. 2. There is no cross-appeal by appellees.

We do not agree with appellants' contention that they are the owners in fee simple absolute of this disputed portion of land, Tract No. 2, by virtue of a 1946 quitclaim deed. A purchaser of land is charged with notice that such has been dedicated to public use for cemetery purposes where there are visible signs and suitable markings to call his attention to the existence of such a cemetery and he takes it subject to such public rights. In *Roundtree* v. *Hutchinson,* (Wash.) 107 P. 345, the court said:

"It is true that there are no reservations in the deeds of appellant's chain of title, but both he and his

grantor, Wooley, had notice of the existence of the burying ground, and purchased subject to the rights the public had acquired in the property."

Also see *United Cemeteries* v. *Strother,* (Mo.) 61 S. W. 2d 907 and *Heiligman* v. *Chambers,* (Okla.) 338 P. 2d 144.

In the case at bar, however, in addition to appellants' knowledge of the existence of the cemetery, it is to be noted that the warranty deed by appellant's father in 1913 clearly stated that the conveyance of the property in question was for cemetery purposes and described it as the "Bowen Graveyard." Also, in 1946 the quitclaim deed from the Pisgah Methodist Church Trustees to the appellants referred to the one acre being conveyed as the "Bowen Graveyard." It cannot be said that appellants purchased this property without knowledge of the existence of this cemetery.

From our review of the cases in other jurisdictions, since we find none applicable in our own, we think the rule that a purchaser of land takes it subject to any dedication and use for cemetery purposes is best stated in the case of *State* v. *Forest Lawn Lot Owners Association,* (Tex.) 254 S. W. 2d 87. There the court said:

"* * * The substance of what is said by the courts in all the cited cases is that property once dedicated to cemetery purposes and in use as a burial ground for the dead *may not be sold,* either voluntarily or through judicial proceedings, *in such manner as to interfere with the uses and purposes to which it has been dedicated and devoted.*" [Emphasis added.]

See also 10 Am. Jur., Cemeteries, § 6, p. 490; 14 C. J. S., Cemeteries, § 25, p. 84; 130 A.L.R. 264 and 75 A.L.R. 2d 599.

We think the Chancellor was correct in his holding that appellants' legal title is subject to the appellees' and the public's use of the Bowen Cemetery.

Appellants next contend that since no graves exist in the south half of the originally enclosed portion the

appellees have abandoned it for cemetery purposes. We do not agree. It is undisputed that this portion was enclosed by fence from 1915 until the appellants removed the fence therefrom in 1962 and that such portion has been used for auxiliary purposes in conducting burial ceremonies. Further, the evidence indicates some maintenance by appellees and that relatives and loved ones of those interred in the north portion desire burial in Tract No. 2, the area in dispute. The appellants attempt to refute this proposed future use since there have been no burials in the cemetery since 1950.

The general rule is that a cemetery is never abandoned nor loses its character and identity as such until the bodies reposing there are removed by friends or relatives or by proper public authority and mere disuse or the lack of continued interments does not constitute abandonment. It continues subject to use as a cemetery so long as the burials there awaken sacred memories in the minds of the living. 10 Am. Jur., Cemeteries, § 36, p. 512; 14 C.J.S. § 22, p. 82. Also see *Wooldridge* v. *Smith,* (Mo.) 147 S. W. 1019 and *Currier* v. *Woodlawn Cemetery,* (N. Y.) 90 N. E. 2d 18.

In *Morgan et al.* v. *Collins School House,* (Miss.) 133 So. 675, the court said:

"* * * The custom of ages has been for people to bury their relatives together or in the same cemetery as far as reasonably possible and giving a privilege to bury should be understood as carrying this right."

Although there are no graves in Tract No. 2, the south portion, we think that from the facts in this case it is unquestionably a part of the cemetery as a whole.

In *County Board of Commissioners for Clarendon County* v. *Holladay, et al.,* (S. C.) 189 S. E. 885, the court had before it the question as to whether the cemetery was confined to that area actually occupied by graves. In that case the court said:

"* * * A cemetery includes not only lots for depositing the bodies of the dead, but also avenues, walks and grounds for shrubbery and ornamental purposes.

All must be regarded alike as consecrated to a public and sacred use."

We think that the south portion, Tract No. 2, was dedicated and consecrated to the sacred use of a public cemetery.

We agree with the Chancellor that the entire area enclosed by the fence from 1915 until 1962, Tracts No. 1 and No. 2, constituted a public cemetery and that the appellees are entitled to the unrestricted use thereof as such.

Affirmed.

5-3072 372 S. W. 2d 616

Opinion delivered November 26, 1963.

[redacted]

McKnight & Blackburn and *Marcus Fietz,* for appellant.

Shaver & Shaver, for appellee.

CARLETON HARRIS, Chief Justice. This is a child custody case. Billy D. Thompson and Frances Juanita Thompson were married in October, 1951. Two children were born of the marriage, Billie Juanita Thompson (born in 1952), and Jimmy D. Thompson (born in 1955). Billy Thompson has served in the Air Force for a long number of years, and both children, except for a period of about five months,[1] have lived with their maternal grandparents, Mr. and Mrs. Sam Blake, residents of Birdeye. Frances obtained a divorce from Billy in April, 1960, and was awarded custody of the children, the husband being directed to pay $100.00 per month for child support. This order has been complied with. Just prior to the divorce, Frances and Billy had entered into a sepa-

[1] During this period, Billy was stationed at Bossier City, La., and Frances and the eldest child lived with him during this time.

ration agreement (March, 1960) under which the father agreed to pay the $100.00 per month, and the agreement further provided that should Frances die before the children reached their majority, Agnes Thompson (now Bornhoft) mother of Billy, would have the custody of the children. After the divorce, Frances obtained a job in Wynne, and continued to live with her parents, together with the children.

In May, 1962, Billy D. Thompson, who is still in military service, and his mother, Agnes Bornhoft, instituted suit, asking that the custody of the children be taken from Frances and awarded to Agnes Bornhoft. Appellee moved to dismiss the cause in so far as Mrs. Bornhoft was concerned, contending that the suit must be brought in the name of the father. In response, appellant contended that the suit was a new action, independent of the original divorce decree, and that Mrs. Bornhoft had a right to bring the action. Counsel for appellant then withdrew the father, Billy D. Thompson as a plaintiff, and the complaint was dismissed as to him. The court proceeded to hear the custody matter with Mrs. Bornhoft as the plaintiff. After hearing a number of witnesses, the court rendered its opinion, finding that Mrs. Bornhoft was not a fit person to have custody of the children; further, that the mother, Frances Juanita Thompson, was likewise unfit to have the custody of the children. The court further found "that for almost the entire life of both children they have lived in the home of their maternal grandparents and that both the grandmother and the grandfather indicated a willingness from the stand to take the children and maintain them in their home and under the facts and circumstances as developed by the testimony the children in the opinion of the Chancellor will be much better cared for by these two elderly people. The father will continue to make payment of $100.00 per month which will be paid to the maternal grandparents and they shall have the exclusive custody of said children pending the further orders of this court." The court then entered its decree, dismissing the petition of Mrs. Bornhoft for custody, and placed the children in the custody of the Blakes. From the de-

cree so entered, appellant brings this appeal. It might first be mentioned that appellee contends that, though the suit was filed as a separate action, it actually is an effort to modify the original decree, and that Mrs. Bornhoft, the grandmother, is not a proper party to bring the action; that the effort to modify the decree can only be properly brought by the father. It is not necessary that this question be discussed in order to reach a determination in this litigation.

The court found that Mrs. Bornhoft "is not such a person with whom the two children should be permanently placed," and likewise found that the mother was not a fit and proper person to have the custody of her children. No good point would be served in detailing the testimony upon which the Chancellor based these conclusions. Each side called several witnesses, and the good qualities, as well as the bad, were presented to the court during the evidence. Mrs. Bornhoft vigorously contends that the evidence does not support the court's finding relative to her unfitness to have custody of the children,[2] but there was evidence which supported this conclusion, and we have said that we will not reverse the finding of the Chancellor unless such finding is against the preponderance of the evidence. *Dierks Lumber and Coal Co.* v. *Horne,* 216 Ark. 155, 224 S. W. 2d 540; *Rogers* v. *Moss,* 216 Ark. 838, 227 S. W. 2d 630. The parties and the witnesses were all observed by the Chancellor, who thus had the opportunity to note their demeanor on the stand, their manner of answering the questions, and he was, accordingly, in much better position to judge the truthfulness or untruthfulness of the statements made by the parties and witnesses. We are unable to say that his finding that Mrs. Bornhoft was not a proper person to have custody of the children, is against the preponderance of the evidence. Having made this finding, it is

[2] Mrs. Bornhoft also points to the separation agreement (mentioned in Paragraph 1 of this opinion), wherein Billy and Frances agreed that if Frances should die before the children reached their majority, Mrs. Bornhoft "would have custody of the children." Of course, Frances has not died, but irrespective of that fact, the agreement is meaningless. We have held that agreements between litigants as to the custody of children are not binding upon the court. *Bishop* v. *Lucas,* 220 Ark. 871, 251 S. W. 2d 126.

doubtful that Mrs. Bornhoft actually has the right to question the disposition of the children as ordered by the court. This is not a matter wherein the father of the children is dead, mentally incompetent, an inmate of the penitentiary, or for any other reason unable to seek the relief of the courts. Nor is it a matter where the father has abandoned the children,[3] and thus created the necessity for other close relatives to interest themselves on behalf of the minors. Here, the father voluntarily withdrew as a party to this litigation, though he testified in behalf of his mother. He has not questioned this decree, nor has the mother of the children questioned it.

However, assuming, without deciding, that Mrs. Bornhoft is a proper party to question the court's order in placing the children with the maternal grandparents, we proceed to discuss appellant's contention that this order was erroneous. This contention is largely based upon the fact that Mr. and Mrs. Blake were not parties to the action. Appellant relies upon language appearing in the case of *West* v. *Griffin,* 207 Ark. 367, 180 S. W. 2d 839. There, custody of the minor child was vested in the paternal grandparents, who were not parties to the action (the father of the children being the party), by the trial court. This court, on appeal by the mother, reversed the trial court and awarded the custody to the mother, finding that she was a proper person to have the custody. The language appearing in the opinion relied upon by appellant is as follows:

"It will be remembered that this is not a case in which the court reaffirmed its order awarding custody of the child. That order was modified in the decree from which is this appeal and the child's custody was awarded to persons who were not parties to the original proceeding and are not parties to this proceeding. We think this was error."

This statement was *dictum* since the opinion makes clear that this was not the basis of our determination.

[3] As of the time of this trial, Billy Thompson had consistently complied with the order of the court to pay the $100.00 per month for the support of the children.

Rather, we found that there was no evidence which indicated that the mother had abandoned the child, or that she had, at any time, ceased to be interested in its welfare. We likewise stated in *West:*

"This is not a case where a child has been permitted to remain in certain surroundings for a period of time long enough to become so accustomed to its surroundings as to make it unwise to remove it. We do not have here the situation that was shown in the case of *French* v. *Graves,* 205 Ark. 409, 168 S. W. 2d 1108, because this child had been with the grandparents only two or three weeks at the time of the rendition of the decree from which is this appeal."

As previously pointed out, in the case presently before us, the children have lived with the Blakes, with the exception of a few months, for the entire period of their lives. In *Powell* v. *Woolfolk,* 233 Ark. 893, 349 S. W. 2d 657, we awarded the physical custody of the children to paternal grandparents, who were not parties to the case, the actual order entered by the trial court reciting that the father was given custody; however, the father was not in a position to take care of the children, and they were actually placed in the possession of the grandparents. In the opinion we pointed out that these grandparents were present in person before the court, and subjected themselves to the jurisdiction thereof. Here, also, the grandparents were present in court, agreed to take the children, and subjected themselves to any further orders that the trial court might see fit to enter.

Of course, in matters relating to the custody of minor children, we have said many times, so many, in fact, as to require no citation of authority, that the welfare of the children is the primary consideration. In the South Carolina case of *Koon* v. *Koon,* 28 S. E. 2d 89, the same contention was made by appellant, but rejected by the South Carolina Supreme Court. From the opinion:

"Claude Koon raises the legal point that the judgment appealed from was beyond the scope of the issues raised by the pleadings. It is urged that the real contro-

versy was and is between him and his wife with reference to the custody of the child; that the maternal grandparents were not even parties to the proceeding; that the paternal grandparents defaulted; and that the court erred in not awarding custody to him.

"The controlling reason for committing the custody of the child to the grandparents, as shown by the order, was because this was in accord with the child's highest good. This was entirely within the power and discretion of the County Judge under the facts in this case."

It follows, from what has been said, that we are unable to conclude that the Chancellor's findings were against the preponderance of the evidence, or that he exceeded his authority or power in granting custody to the Blakes. Of course, the father can always petition the court for a modification of the present decree if circumstances indicate that a change should be made.

Affirmed.

BREITENBERG *v.* PARKER.

5-3114 372 S. W. 2d 828

Opinion delivered November 26, 1963.

Wootton, Land & Matthews, for appellant.

Fred E. Briner and *Holt, Park & Holt,* for appellee.

Ed. F. McFaddin, Associate Justice. This litigation results from a traffic mishap in which appellee, E. R. Parker, sustained physical injuries and property damages. On April 6, 1961, Mr. Parker, accompanied by two companions, was driving his car in a heavy line of traffic in Hot Springs, and E. J. Breitenberg was driving his car immediately behind the Parker vehicle. The car in front of Parker stopped suddenly; Parker stopped suddenly; Breitenberg's car struck the rear of the Parker car, damaging the vehicle and inflicting a whiplash injury on Parker; and this litigation resulted. The jury awarded Parker a verdict of $20,000.00; and Breitenberg appealed,[1] claiming three points:

"1. The Appellee Parker improperly asked a question about the issuance of a traffic ticket to the Appellant Breitenberg and to Appellant Breitenberg's prejudice.

"2. The Trial Court erred in failing to grant Appellant's Motion for a New Trial on the basis that the jury did not have time to consider the evidence.

"3. The verdict of the jury was excessive."

I. *Improper Question.* When Mr. Parker was testifying the following occurred:

"Q. Now when you left the scene—Do you know whether the city policeman gave Mr. Breitenberg a ticket or not?

"A. I didn't see it.

[1] While the cause was pending in this Court on appeal the death of E. J. Breitenberg was reported to this Court; and on motion of appellant the cause was revived and Jacob L. King, as executor of the estate of E. J. Breitenberg, was substituted as appellant; but we style the case as it was styled when first filed in this Court.

"MR. WOOTTEN: Your Honor, we object to any such question as that.

THE COURT: Sustained. The jury will disregard the question even though it was answered in the form that it was."

Appellant says that the question about whether Breitenberg received a ticket for traffic violation was improper under Ark. Stat. Ann. § 75-1011 (Repl. 1957), and requires a reversal under such cases as *Garver* v. *Utyesonich,* 235 Ark. 33, 356 S. W. 2d 744; *Harbor* v. *Campbell,* 235 Ark. 492, 360 S. W. 2d 758; and *Girard* v. *Kuklinski,* 235 Ark. 337, 360 S. W. 2d 115. We agree that the propounded question was improper; but the Trial Court promptly admonished the jury to disregard the question and the answer. The appellant seemed satisfied with the Court's ruling, and neither moved for a mistrial nor made any other evidence of disagreement with the ruling. In these circumstances, we hold that any prejudice arising from the question was removed by the ruling of the Trial Court. See *Horton* v. *Smith,* 219 Ark. 918, 245 S. W. 2d 386.

II. *Brief Time That The Jury Deliberated.* The trial of this cause began on October 25th, and the verdict was returned on October 26th. On November 8, 1962, Breitenberg filed a motion for new trial, supported by the affidavit[2] of counsel to the effect that less than fifteen minutes transpired from the time the jury left the

[2] The pertinent portion of said affidavit reads as follows: "That from the time the jury left the jury box until it returned to the court room to announce its verdict, a total of some minute or two less than fifteen minutes was consumed. That a foreman was elected by the jury, as evidenced by the jury verdict and that a minute or two must have elapsed to allow the jury to leave the box and get to the jury room and a comparable amount of time for the jury to return from the jury room to the court room. That at the time it was announced by the bailiff that the jury had reached a verdict and wanted to return, that two to three minutes was consumed in getting all of the court attaches together and back in the court room and following this time, the jury returned. That there was less than ten minutes time in which the jury had to elect a foreman, discuss the evidence, vote and arrive at a verdict, and therefore improper consideration to the evidence and law was given. That this affidavit is made in support of the defendant's motion to set aside the jury verdict and to render a new trial in the cause."

box to consider its verdict until the time the jury returned to announce the verdict; and the appellant urges that this was too short a time to allow the jury to deliberate. When the jury came in with the verdict the appellant knew at that time how long the jury had been out, yet did not ask that the jury be sent back to reconsider the verdict or make any objection to the brevity of jury consideration until November 8th, which was long after the trial. If there had been any objection to be registered, it should have been registered before the jury was allowed to separate.

We find no merit to this point urged by appellant. We have no statute in Arkansas which prescribes a length of time that a jury should consider its verdict; but the general rule from the vast number of cases on the point is well stated in 89 C.J.S. p. 93, "Trial" § 462c:

"While the verdict should be the result of sound judgment, dispassionate consideration, and conscientious reflection, and the jury should, if necessary, deliberate patiently and long on the issues which have been submitted to them, where the law does not positively prescribe the length of time a jury shall consider their verdict, they may render a valid verdict . . . on very brief deliberation after retiring, especially where the evidence is not complicated, or the facts are clearly drawn. The trial court may at its discretion, cause the jury to reconsider the case if their decision is so hasty as to indicate a flippant disregard of their duties."

Appellant's counsel cite us to no Arkansas case involving this question of speed of deliberation of the jury, and our search has failed to disclose any such case; but there are many cases from other jurisdictions, all to the effect that the losing party has no ground for a new trial on the basis that the jury verdict was reached in a very short time. Some such cases are: *Beach* v. *Commonwealth* (Ky.), 246 S. W. 2d 587; *O'Connell* v. *Ford* (R. I.), 191 A. 501; *Urquhart* v. *Durham* (N. C.), 72 S. E. 630; *Carrara* v. *Noonan* (R. I.), 31 A. 2d 424; *Patillo* v. *Thompson* (Ga. App.), 128 S. E. 2d 656; *Gaskill* v. *Cook* (Mo.), 315 S. W. 2d 747; and *Rustigian* v. *Molloy* (R. I.),

186 A. 2d 724. We like the language of the Kentucky Court in *Beach* v. *Commonwealth, supra:*

"The fact that the jury returned a verdict in about eight minutes after having the case submitted to them does not indicate to us that Beach did not receive a fair trial when the issues of fact were so clearly drawn. It is true that a verdict should be the result of dispassionate consideration and the jury, if necessary, should deliberate patiently until they reach a proper conclusion concerning the issues submitted to them. Yet where the law does not positively prescribe the length of time a jury shall spend in deliberation, the courts will not apply an arbitrary rule based upon the limits of time."

III. *Excessiveness Of The Verdict.* Finally, appellant urges that the verdict of $20,000.00 is grossly excessive and we are cited to a number of our cases wherein verdicts have been reduced, some of which are: *Coca-Cola Bottling Co.* v. *Shipp,* 174 Ark. 130, 297 S. W. 856; *Oviatt* v. *Garretson,* 205 Ark. 792, 171 S. W. 2d 287; *So. Natl. Ins. Co.* v. *Williams,* 224 Ark. 938, 277 S. W. 2d 487; and *Ward Body Works* v. *Smallwood,* 227 Ark. 314, 298 S. W. 2d 332. The rule, as to the province of this Court in regard to reducing verdicts, is well stated in *Ark. Amusement Corp.* v. *Ward,* 204 Ark. 130, 161 S. W. 2d 178:

"A verdict will be set aside by an appellate court as excessive where there is no evidence on which the amount allowed could properly have been awarded; where the verdict must of necessity be for a smaller sum than that awarded; where the testimony most favorable to the successful party will not sustain the inference of fact on which the damages are estimated; where the amount awarded is so excessive as to lead to the conclusion that the verdict was the result of passion, prejudice * * * or of some error or mistake of principle, or to warrant conclusion that the jury were not governed by the evidence * * *."

Every case involving the issue of excessiveness must be examined on its own facts; and before this Court can

constitutionally reduce a verdict we must give the evidence in favor of the verdict its highest probative force and then determine whether there is any substantial evidence to sustain the verdict. That Mr. Parker received a whiplash injury in the collision is thoroughly established: there was testimony that the Parker car was entirely stopped; that Breitenberg's car struck the Parker car with sufficient force to drive it fifteen feet forward and into the rear of the preceding car; that when Mr. Parker emerged from his car he was holding his head; that the investigating officer found Mr. Parker in such condition that he advised one of the other occupants of the Parker car to drive Mr. Parker to his home in Benton; and that this was done.

Mr. Parker was a well, active man, 63 years of age, before receiving his injuries. That he suffered tremendously from the injuries received in April 1961 until the time of the trial in October 1962 is thoroughly established: he has consulted numerous doctors, taken various kinds of pain easing medicines, worn a neck brace, and spent considerable amounts visiting clinics in Memphis and New Orleans for treatment of his whiplash injury; and he was still receiving treatment at the time of the trial. Dr. Walter Carruthers testified that he had been treating Mr. Parker for many months: that Mr. Parker had suffered excruciating pain; that x-rays revealed that prior to the whiplash Mr. Parker had some arthritic degeneration of the joint spaces between the fifth and sixth cervical vertebrae, common to men of Mr. Parker's age, even though such condition was unknown to Mr. Parker and had never caused him any pain or inconvenience; that a whiplash injury is a snapping of the neck when a person gets his head thrown forward and back or from side to side; that as a result of the whiplash injury Mr. Parker is disabled permanently and to at least 25%. Dr. Thompson, called by appellants, testified that a whiplash injury can produce pain in a previously non-symptomatic case; that prior to receiving the whiplash injury Mr. Parker had a degenerative disk condition between the fifth and sixth cervical vertebrae;

that the whiplash aggravated that condition and caused pain; and that because of the whiplash injury Mr. Parker would have some permanent aggravation of his pre-existing condition.

There is evidence in the record concerning the damages to Mr. Parker's car, and also concerning the expenses he has incurred in being treated for his injury; but we have detailed sufficient of the evidence to demonstrate that we cannot say that the verdict is so grossly excessive as to require a remittitur.

Affirmed.

HOLT, J., not participating.

PARNELL, INC. *v.* GILLER.

5-3076 372 S. W. 2d 627

Opinion delivered November 26, 1963.

Joe B. Hurley, Keith, Clegg and *Eckert,* for appellant.

Brown, Compton & Prewett, Richard H. Mays, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellee Giller, the lessor, to require the appellant Parnell, the

lessee, to account for royalties assertedly due under a rather unusual lease providing for the commercial production of salt water from the lessor's land. Parnell sells the brine to a chemical company, which extracts bromine from it. The contract between Parnell and the chemical company requires Parnell to deliver the raw salt water (by pipeline) to the purchaser's plant and to dispose of the spent brine (by returning it to the earth) after it has been processed.

The royalty payable to the lessor is computed upon the market value of the salt water at the well. The question in the case is whether the lessee, in calculating the market value, is entitled to deduct its expenses in piping the salt water to the chemical company and in disposing of the spent brine. The chancellor allowed the deduction of the pipeline expense but denied the deduction of the disposal expense. Both sides have appealed.

We have concluded that both deductions must be allowed under this provision in the lease: "The royalty to be paid by Lessee is: On brine produced from said land and sold off the premises or used off the premises in the manufacture of bromine or other product therefrom, the market value at the well of one-eighth (1/8) of the brine so sold or used; provided, that on brine sold at the wells the royalty shall be one-eighth (1/8) of the amount realized from such sale."

This lease was evidently patterned after a common form of oil and gas lease. In construing a similar clause in a gas lease we held, in *Clear Creek Oil & Gas Co.* v. *Bushmaier,* 165 Ark. 303, 264 S. W. 830, that where the gas was used off the premises the lessee was entitled to deduct its transportation and distribution expense in determining the market value of the gas at the well. In principle that case controls this one.

Here the parties agreed upon two different methods for computing the royalty, depending upon whether the brine was sold on or off the premises. The appellee is manifestly in error in contending that the lessee is entitled to no deductions whatever when the brine is sold off

the premises, for if that view were accepted there would be no difference at all in the two methods of computation. We must give effect to the parties' purpose in distinguishing the two situations.

As a transportation cost the pipeline expense falls within the letter of the *Bushmaier* case. The expense of disposing of the used brine falls within its reasoning. Both services were demanded by the chemical company as a condition to its willingness to enter into the contract of purchase. It is not reasonable to suppose that the buyer would have agreed to pay as much as it did for the brine if the performance of these necessary steps had been its own responsibility. Hence, as in the *Bushmaier* case, these charges must be taken into account in fixing the market value at the well.

The appellee earnestly argues that it ought not to be charged with either expense, because both charges are within the exclusive control of the lessee and are therefore subject to being unfairly or even fraudulently inflated. The parties, however, undoubtedly contemplated the lessee's control in the matter, for it is the lessee that has the power to arrange sales off the premises. There is no proof that any excessive charge has been made. Should that situation arise the law may be expected to provide a remedy.

Finally, it is contended that if these deductions are permitted the way will be open for the lessee to charge all sorts of ordinary overhead and business expenses in the computation of market value. The answer is that the two items in dispute are not general business expenses of the lessee. They are services that are essential to and peculiar to the marketing of the product itself. They are services that might equally well have been undertaken by the purchaser. They are services that were considered by the purchaser in its determination of what it was willing to pay for the product. In the circumstances it cannot be doubted that the cost of the services should be credited to the lessee in fixing the market value of the raw salt water at the well.

The decree is reversed on direct appeal and affirmed on cross appeal; the cause is remanded for further proceedings.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). I would affirm the Chancery decree on all points. As to the cost of transporting the raw brine from the well to the point of sale, I agree with the Majority that the case at bar is ruled by *Clear Creek Oil & Gas Co.* v. *Bushmaier,* 165 Ark. 303, 264 S. W. 830. But I disagree with the Majority as to charging against the landowner the cost of the disposal of the refuse fluid after the brine has been extracted at the plant of the purchaser. The cost of the disposal of the said refuse fluid was a business expense, to be paid by Parnell from the 7/8ths working interest, just like advertising, salaries, telephone, and such other items are business expenses and not to be charged against the royalty interest.

The present case was tried on a stipulation as to the facts, which showed:

1. That Giller executed the lease to Kin-Ark Oil Company.

2. That Kin-Ark Oil Company assigned the lease to Parnell.

3. That Jett Drilling Company entered into a contract with Arkansas Chemicals, Inc., in which contract Jett agreed:

"Article 3—Delivery and Disposal. (a) SELLER shall deliver Raw Brine via pipeline to the storage facilities of the plant of BUYER upon request of BUYER. (b) SELLER shall receive all of BUYER'S Spent Brine at the plant of BUYER via BUYER'S effluent pipeline and dispose of it in a manner which will not adversely affect the Raw Brine being supplied to BUYER."

4. That Jett Drilling Company assigned its rights under the contract to Parnell; so Parnell is now operating with Arkansas Chemicals, Inc. under the above quoted provision.

In the stipulation there is no showing that this disposal clause above copied was necessary to the sale of the raw brine. There is no showing that it is the usual and customary clause in such an instrument. Until Parnell made some such showing, I think the expense of the disposal of the refuse fluid should be held to be a business expense, and the landowner should not be required to pay from his ⅛th royalty a portion of a business expense incurred by the holder of the ⅞ths working interest.

Since the Bushmaier case, involving gas, was used as a precedent on the first point—transportation of the raw brine to the point of sale—I have searched various oil and gas cases for one with a factual situation similar to the one here; but my search has been fruitless. In Summers on Oil & Gas Permanent Ed. Vol. 3A, § 589 *et seq.*, there is a discussion of Royalties; and in § 590 there is a discussion of the expenses of removing water and other foreign substances from crude oil; but the cited cases contain language different from that in the lease here involved. There is an annotation in 73 A. L. R. 2d 1056 entitled, "Expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return." The annotation states that each case depends on the particular terms of the lease involved (*e.g.,* "net costs" is distinguishable from "costs"); and the annotation says of operational expenses:

"Notwithstanding the fact that a lessor's royalty is ordinarily to be paid or rendered free of all the expenses of operating the lease, that is, the expenses of exploring and drilling and bringing the products to the surface and delivering the same into tanks or pipelines, a particular lease may of course entitle the lessee or operator to deduct such expenses."

Under the lease and the sales agreement with Arkansas Chemicals, Inc., here involved, the *disposal* of the refuse fluid after the brine has been removed at the Purchaser's plant appears to me to be an operational or business expense that should be borne by appellant as the operator or the owner of the ⅞ths working interest. The

Bushmaier case limits the expenses that may be charged against the landowner to *transportation* and *distribution*;[1] but here, the Court is allowing the lessee to add another expense, that is, *a disposal expense.* The disposal clause here involved should certainly be construed most strongly against Parnell, who accepted and operated under the Arkansas Chemicals, Inc. agreement, rather than against Giller, who had no part whatsoever in framing the Arkansas Chemicals, Inc. agreement, and who never operated under it.

I would affirm the Chancery decree in its entirety.

[1] Here is the language: "The prices prevailing at the nearest place where the product can be sold, less transportation and distributing charges, show the value of such product at the place of delivery as nearly as it is possible to show such value."

ARMCO STEEL CORP. *v.* FORD CONSTRUCTION CO.

5-3125 372 S. W. 2d 630

Opinion delivered November 26, 1963.

John E. Coates, for appellant.

Brown, Compton & Prewett, Rose, Meek, House, Barron, Nash & Williamson, for appellee.

PAUL WARD, Associate Justice. In August, 1960 the El Dorado Waterworks and Sewer Commission let a contract to the Ford Construction Company to construct a sanitary sewerage plant at a total cost of $204,468. Pursuant to Ark. Stat. Ann. § 14-604 (Repl. 1956) the construction company furnished a bond with United States Fidelity and Guaranty Company. Hereafter the latter will be referred to as U. S. F. & G. The construction company will be referred to as Ford, and the Commission will be referred to as El Dorado.

El Dorado employed Max Mehlburger and Associates, engineers of Little Rock to prepare plans and specifications for the proposed sewerage plant. Said plans and specifications were completed prior to June 12, 1960. On that date the Armco Steel Corporation (hereafter called Armco), domiciled in Ohio, purchased two sets of said plans and specifications preparatory to selling Ford certain piping and equipment to be used in constructing said sewerage plant. Later Ford and Armco entered into a contract (or purchase order) wherein the latter agreed to furnish certain definitely described articles for the price of $37,195.33. Included in these articles was a sizeable quantity of 21 inch metal piping. The 21 inch pipe was to be laid or buried in a levee between two lagoons. This litigation stems from disagreements in some way connected with a portion of this 21 inch piping.

Summarily stated, here is how the disagreements arose. Work began on the project in the early part of 1961, and by mid-September 1961 some of the 21 inch pipe had been laid in the levee. In early October 1961 tests made by Ford revealed leaks had developed in about 25 joints. Later, inspections were made by different parties but no way was found to stop the leaks, and on December 30, 1961 Mehlburger and El Dorado ordered Ford to remove the pipe and replace it with other piping.

In an attempt to adjust matters between Ford and Armco, the latter offered to take back the rejected pipe and cancel the balance of $5,955.78 owed by Ford. Upon Ford's refusal to accept this offer of settlement, renewed efforts to reach a settlement without resorting to court

action were made over a period of several months. Again, no settlement was reached and this litigation followed. Armco sued Ford (and U. S. F. & G) for the balance due on merchandise ordered and delivered, and Ford counter-claimed for alleged damages.

For clarity and convenience we, at this point, divide our discussion into two separate parts, based upon the above pleadings. *One:* Armco recovered a judgment against Ford and U. S. F. & G. for the balance due on merchandise. The trial court refused to allow Armco statutory penalty and attorney's fee, and this is urged to be reversible error. *Two:* Ford recovered a judgment against Armco (on the cross complaint) for damages allegedly resulting from Armco's breach of warranty.

One. Penalty and Attorney's Fee. Armco alleged Ford owed a balance of $5,955.78 on account, Ford admitted signing the purchase order but denied the materials were delivered and accepted. Ford also claimed a credit of $1,778.19 for pipe returned and $230 for another item. Armco filed a reply, conceding the above named credits, leaving a balance of $3,947.59. Thereupon, when appellees offered to confess judgment for the above amount the court instructed the jury to return a verdict for Armco against Ford and U. S. F. & G. for $3,947.59. Armco then moved the court to assess the statutory 12% penalty and attorney's fee against U. S. F. & G. under the provisions of Ark. Stat. Ann. § 66-3238 (Supp. 1961). The motion was denied by the trial court. This action by the trial court is here assigned as error.

We do not agree with appellant. As pointed out above, as soon as Armco reduced its claim to the correct amount Ford and U. S. F. & G. promptly confessed judgment for that amount. In the *Great So. F. Ins. Co.* v. *Burns & Billington,* 118 Ark. 22, 31, 175 S. W. 1161, the plaintiff amended its complaint to reduce its claim but the insurance company *did not* then confess judgment but went to trial. The judgment was for the amended amount, and we held the penalty attached. This Court, however, made the following announcement which is decisive against Armco:

"If the insurance company had desired to avoid the penalty and attorneys' fee provided for by the statute, it should have offered to confess judgment for the amount sued for in the amended complaint."

Although the above quote may be classified as dictum, yet it is a clear statement of the rule consistently followed by the court. See: *National Fire Insurance Company* v. *Kight*, 185 Ark. 386, 47 S. W. 2d 576; *Broadway* v. *The Home Insurance Co.*, 203 Ark. 126, 155 S. W. 2d 889. The first case construed C. & M. Digest § 6155 and the latter case construed Pope's Digest § 7670, both sections being the same as Ark. Stat. Ann. § 66-3238 (Supp. 1961) the section relied on here by appellant.

We conclude, therefore, that the trial court correctly refused to assess the statutory 12% penalty and attorney's fee.

Two. Damages. In connection with appellee's answer to Armco's complaint, Ford alleged a counter-claim against Armco in the amount of $38,176.03. Ford's claim was based on four counts: (1) breach of contract, (2) breach of warranty, (3) negligence, and (4) fraud. Generally speaking, all counts were based on the contention by Ford that the materials furnished by Armco failed to meet required specifications. After denying all four counts, Armco affirmatively pleaded the following provision in the purchase contract:

"There are no understandings, terms or conditions not fully expressed herein. There is no implied warranty or condition except an implied warranty of title to and freedom from encumbrance of the products sold hereunder and in respect of products bought by description that they are of merchantable quality. Seller's liability hereunder shall be limited to the obligation to replace material proven to have been defective in quality of workmanship at the time of delivery, or allow credit therefor at its option. In no event shall Seller be liable for consequential damages or for claims for labor."

On appeal, appellant urges three separate grounds for a reversal. *A.* The trial court erred in refusing to

direct a verdict. *B.* Error in giving a certain instruction on measure of damages. *C.* Error in refusing a certain instruction. After a lengthy trial, the jury returned a verdict in favor of Ford in the amount of $26,176.03 on the first three counts, the last count (on fraud) was abandoned by Ford.

A. Appellant's contention that the trial court erred in refusing to direct a verdict in its favor at the close of all the testimony is based principally on a question of law which is ably and exhaustively argued in its brief. In this argument no stress is placed on the sufficiency or insufficiency of the evidence. In our discussion hereafter, and without expressing any opinion as to the merits of the other two counts, we consider only the second count which is based on an implied warranty. Referring back to section "6" of the purchase order copied above, it appears clear to us that it contains an implied warranty on the part of Armco. The pertinent language is:

"There is no implied warranty . . . except an implied warranty . . . of products bought by description that they are of merchantable quality."

There is, and could be, no contention that the subject merchandise here was not "bought by description." We see no reasonable ground for a dispute over the meaning of the words "merchantable quality." In the context here used they could only mean pipe fit to be placed underground for years of service in a sewer system. During the trial several disputed questions of fact arose, such as: were the pipes properly inspected? was Ford diligent in reporting defects to Armco? was an inspector present when the pipes were installed? etc. We deem it unnecessary to consider these questions of fact for the reason that the jury has passed upon them under instructions not objected to by appellant, and they are also not questioned by appellant in arguing the point now under discussion.

First, appellant argues that Ford cannot recover because the proof shows he did not comply with para-

graph "5" of the contract or purchase order signed by both parties. It reads:

"Claims by the buyer must be made promptly upon receipt of shipments and seller given an opportunity to investigate."

To the same effect Armco relies on a clause in paragraph "6" which reads:

"Seller's liability hereunder shall be limited to the obligation to replace material proven to have been defective in quality of workmanship at time of delivery . . ." We are unable to agree with this position taken by appellant. The records show that when the pipe was delivered to Ford at El Dorado it was heavily coated with tar or asphalt so that Ford had no way of detecting whether the pipe was welded or riveted or whether it would be watertight. The only way Ford (or Mehlburger) could have discovered defects such as leaks in the pipes was to put them in place (with the joints coupled together) and subject them to water pressure. When this was done it became clearly evident that the pipes were not watertight and were not therefore of "merchantable quality."

However, the principal ground relied on by appellant is based on the last sentence in paragraph "6" which reads:

"In no event shall Seller be liable for consequential damages . . ."

Appellant presents an able argument and an exhaustive array of authorities from other jurisdictions to the effect that Armco had a legal right to contract against liabilities for "consequential damages." However, we find it unnecessary to pass upon the effect of the cited authorities or whether they should be followed by this Court. The reason is that, before appellant would be entitled to an instructed verdict, it must also show that *all* damages resulting from defective materials furnished, were "consequential damages"—that is, damages not recoverable under the implied warranty of fitness for

the purpose intended. After careful consideration we have concluded there is evidence in the record to show Ford did suffer *some amount* of damages resulting from Armco's breach of warranty regardless of whether such damages are termed consequential damages, direct damages, or foreseeable damages. It is not denied that the pipe leaked or that Ford suffered a financial loss in trying to correct the defective pipe and in removing the same. It was up to the jury to say whether Ford acted reasonably in failing to detect the defects in the pipe before it was installed. It seems therefore that the real question for decision is whether "consequential damages" necessarily includes all damages including direct and foreseeable damages. We hold the quoted words are not so inclusive, as many authorities indicate. Black's Law Dictionary (4th ed.) defines "consequential damages" as

"Such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act."

In the case of *Despatch Oven Co.* v. *Rauenhorst,* 40 N. W. 2d 73, 79 (Minn. 1949) they had this to say:

"The 'consequential damages' referred to in the clause in question are such damages as do not arise directly according to the usual course of things from the breach of the contract itself, but are rather those which are the consequence of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made." (Citing cases.) In the case of *General Talking Pictures* v. *Shea,* 187 Ark. 568, 61 S. W. 2d 430, we said that if a disclaimer is effective at all, it will not extend by implication to liabilities which it does not by its express terms cover. There is, of course, no contention of Armco here that its disclaimer covered any particular items of damages. In 17 C.J.S. *Contracts* § 262 it is stated:

"Contracts of this nature are not favored by the law; they are strictly construed against the party rely-

ing on them, and clear and explicit language in the contract is required to absolve a person from such liability." 5 Corbin, Contracts § 1011, in discussing Causation and Foreseeability, states:

"Another form in which the present rule is often stated is that damages are recoverable only for injuries that are the natural result of the breach. This seems to have no meaning other than that there was reason to foresee such injury."

We cannot escape the conclusion in this case that Armco, skilled in the business of producing and furnishing sewer pipes, could have reasonably foreseen that a leaky pipe would cause damage. It is bound to have known a leaky pipe would not be usable, that it would have to be removed, and that this would be expensive to Ford. In this connection, the statement found in *Main* v. *Dearing,* 73 Ark. 470, 84 S. W. 640 is applicable, where the Court, in speaking of merchandise furnished for sale, quoted: "The purchaser cannot be supposed to buy goods to lay them on a dunghill." It would be unreasonable to hold in a situation like the one here presented that Armco could warrant its product to be usable in one breath and then in the next breath disclaim all liability if it is unusable. It is our conclusion that appellant was subject to liability in some amount for a breach of its implied warranty and, therefore, was not entitled to a directed verdict in its favor on Ford's counter-claim.

(b) *Measure of Damages.* The jury returned a verdict in favor of Ford in the amount of $26,176.03. It is the contention of appellant that an instruction (requested by Ford) given by the court constituted reversible error in that it contained the wrong measure of damages. The instruction in question reads:

"If you find for Ford on its counter-claim for breach of warranty and if you further find from a preponderance of the evidence that the material in question was of a substantially different description or kind than the material ordered by Ford, and that the difference was not readily discernible upon delivery, or that the material

was inherently incapable of being made watertight by reasonable and practical means after delivery, or that Ford tendered the material in question to Armco after it was unable to stop the leakage, and Armco refused to accept it or to replace it with suitable material, then and in either of those events your verdict for Ford will be for such sum as you find from a preponderance of the evidence Ford would have received from the City of El Dorado for furnishing and installing the material in question had it been allowed to remain in the levee, and also for such expense reasonably incurred by Ford in attempting to make the material watertight, and the cost and expense reasonably incurred by Ford in removing the material from the levee and in redressing and shaping the levee after removal."

An analysis of the above instruction reveals that it permitted the jury to find four separate elements of damage, viz: 1—amount due from El Dorado for installing the pipe; 2—the expense of trying to make the pipe watertight; 3—the cost of removing the pipe; and, 4—cost of leveling the ground. The only element of damages in the instruction which appellant objects to is number 1 above. Appellant points out that this item amounts to $17,925—2,390 (feet of rejected pipe) multiplied by $7.50 (the price per foot El Dorado contracted to pay).

This, argues appellant, is allowing Ford to receive a gross profit where he was entitled to receive only a net profit. To sustain this contention appellant cites the case of *Border City Ice & Coal Co.* v. *Adams,* 69 Ark. 219, 62 S. W. 591. Conceding, for the purpose of this opinion, appellant to be right on the question of law, we think there is no reversible error in this case because it is not shown that Ford is actually receiving more than his net profit under the contract. Included in the amount of $17,925 is the cost of the pipe and the expense of installing it. That being true, no reversible error has been shown.

(c) Finally, appellant says it was reversible error for the court to refuse to give its instruction to the effect that Ford was bound by all the terms of the con-

tract it signed whether Ford read the entire contract or not. This requested instruction refers to certain testimony indicating Ford did not read §§ 5 and 6 in the contract between appellant and Ford. Even though appellant technically may have been entitled to the above instruction it was harmless error for the court to refuse to give the same, and appellant has not been prejudiced. None of the questioned provisions of the contract were excluded from the record or from the consideration of the jury.

Finding no error, the judgment appealed from is in all parts affirmed.

Affirmed.

ROBINSON, J. concurs.

BEGGS *v.* STALNAKER.

5-3120 372 S. W. 2d 600

Opinion delivered November 26, 1963.

Pope, Pratt & Shamburger, By: *Richard L. Pratt* and *Joseph L. Buffalo, Jr.,* for appellant.

Howell, Price & Worsham, for appellee.

JIM JOHNSON, Associate Justice. This suit involves personal injuries and property damage sustained by a driver and personal injuries sustained by a passenger in a car hit from the rear by a truck.

On June 17, 1962, appellee Lucille Smith was driving east on East Broadway Street in North Little Rock when she and the two cars ahead of hers stopped to permit another car to turn left off the street. Her mother, appellee Bertie Stalnaker, was a passenger. Appellant Carl Beggs, who was driving a dump truck, apparently had brake failure, was unable to stop and ran into the rear of appellees' stopped automobile, damaging the automobile and injuring appellees. Appellees filed separate suits against appellant which were consolidated for trial. Trial was held April 11, 1963. The jury returned a verdict of $5,000.00 for appellee Stalnaker and $22,500.00 for appellee Smith. From judgments on the verdicts, appellant has appealed, urging that the trial court erred in refusing to direct a verdict for appellant, errors in instructions, and that the verdicts were grossly excessive.

Appellant moved for a directed verdict, contending that appellees produced absolutely no evidence of any negligence on the part of appellant. (Appellant's principal contention was that this was an unavoidable accident.)

Testimony by and on behalf of appellees established that the collision did occur, the damage to the automobile by testimony on before-and-after valuations of the car, the nature and extent of appellees' injuries, diag-

nosis and prognosis. Virtually the only testimony offered by appellees relative to the truck was appellee Smith's statements that, "I looked in the rear view mirror and about a block behind us this truck went through the intersection traveling at a normal rate of speed," that there was no car to her right, also no traffic in the right hand lane (indicating that the truck could have turned right and avoided hitting the automobile), and, "Well, the truck hit us and the gravel spilled all over the street and it broke all the motor supports in my car and broke the seat track where mother was sitting and just pushed the motor clear up into the front end where it caused the radiator to burst . . ."

In a similar case this court held:

"It is insisted by the appellee that this proof falls short of establishing negligence, since the mechanical defect might have arisen suddenly and without fault on Rorke's part. Even so it was not necessary for the plaintiff to anticipate and disprove this possible explanation. By statute every motor vehicle must be equipped with adequate brakes. Ark. Stats. 1947, § 75-724. It has often been held that proof of the violation of such a safety measure is evidence of negligence. *Union Securities Co.* v. *Taylor,* 185 Ark. 737, 48 S. W. 2d 1100; *Kendrick* v. *Rankin,* 219 Ark. 736, 244 S. W. 2d 495. The appellant's testimony constituted substantial evidence to the effect that the statute had been violated; it was for the jury to say whether the defendant was guilty of negligence." *Brand* v. *Rorke,* 225 Ark. 309, 280 S. W. 2d 906.

In addition to appellees' testimony, there was some testimony adduced on behalf of appellant which tended to strengthen appellees' case. Considering all the evidence, with every reasonable inference arising therefrom, in the light most favorable to appellees, as we do to determine whether a jury question was presented, *Harrison* v. *State Farm Mutual Insurance Co.,* 230 Ark. 630, 326 S. W. 2d 803, we find that the trial court made no error in refusing to direct a verdict for appellant.

Appellant asserts that three of the court's instructions to the jury were prejudicially erroneous. The first two recite the law requiring fitness of vehicles and brakes, and the third had to do with an element of damages. These three instructions were contended to be wrong not particularly because they were erroneous statements of the law but because there was no evidence in the case to justify the giving of such instructions. We do not agree. It is our view that two of the instructions complained of were absolutely necessary in order to fairly present appellees' theory of the case to the jury for its consideration, and the third, though close, was supported by some competent evidence in the record.

Next appellant urges that the trial court erred as a matter of law by refusing to instruct the jury that in assessing damages to appellees' automobile, the cost of repairs should be considered as evidence. The general rule is that the measure of damages for injury to an automobile is the difference between the market value of the automobile immediately before and after the collision. *Payne* v. *Mosley*, 204 Ark. 510, 162 S. W. 2d 889, *Kane* v. *Carper-Dover Mercantile Co.*, 206 Ark. 674, 177 S. W. 2d 41. Two of appellees' witnesses, used car dealers familiar with that particular car, testified on the market value of that car immediately before and immediately after the collision. It is true that, in the absence of such competent proof as to the amount of damages, the difference in market value before and after the collision may be established by proof of the total amount paid for repairs necessitated by the collision. *Golenternek* v. *Kurth*, 213 Ark. 643, 212 S. W. 2d 14, 3 A. L. R. 2d 593. In the instant case there was no repair bill in evidence, and although appellee Smith testified as to what she had so far paid for repairs, she also testified that repairs were not completed. In our opinion, the jury was presented with the best evidence available, that is, competent appraisals, and the trial court did not err in refusing to instruct the jury that they should consider the cost of repairs in assessing the property damage.

Appellant's last point urged for reversal is that the verdicts are grossly excessive and are not supported by the evidence.

The jury returned a verdict of $5,000.00 for appellee Stalnaker. Mrs. Stalnaker, who is 76, was injured in the knee as well as receiving a strained neck. Immediately after the accident Mrs. Stalnaker was taken to the hospital where x-rays were taken and her leg bandaged, after which she was sent home. The following day her neck started hurting and became so painful that she went to an orthopedist the following day. His examination revealed that any attempt to turn her head left caused extreme complaint of pain and spasm of the muscle in the cervical spine; further, that she could not bow or bend her head backward. The doctor diagnosed the condition as a strain of the neck and prescribed special physiotherapy treatment at his office. She made 23 or 26 trips to the doctor's office over a period of three or four months. The doctor testified that her injuries were very painful, that "all those areas of involvement are associated with pain." At the time of trial Mrs. Stalnaker testified that, "My neck bothers me quite a bit;" that she was 75 at the time of the accident and had never had anything wrong with her neck before the accident; that she was getting along pretty good, except when the weather declares otherwise, "then at night [she] can't sleep good."

The jury returned a verdict of $22,500.00 in favor of appellee Smith, which included property damage. Two witnesses testified on the fair market value of appellee's car before and after the accident, which placed the diminution in value at $1,275.00 to $1,300.00.

Mrs. Smith testified that immediately after the collision she couldn't focus her eyes and that her neck hurt some but not a lot at that time. Nothing was done for it at the hospital and she went home with her mother. Two days later (when she could get an appointment), after suffering extreme pain, she went to an orthopedist. He testified that when he saw her she was holding her head up with her hands, that he made one lateral x-ray

but was afraid to make a comprehensive x-ray study at that time because the necessary twisting or bending of her neck might aggravate a possible fracture or dislocation. Her injuries were diagnosed as a sprain of her neck and strain of her back. She was hospitalized as soon as possible and placed in head traction for almost four weeks, with medication and, when able, physiotherapy which was continued during the next seven months. The doctor testified that he thought her back had recovered and that he didn't think she had any permanent disability to her back. However, when asked if her neck had recovered, the doctor testified, "No, sir. I don't think it ever will recover," and estimated Mrs. Smith's permanent partial disability at twenty or twenty-five percent. The doctor also testified that he did not anticipate surgery, that she probably will require sporadic treatment, and that, "All I know, these people learn to live with themselves like they do with arthritis. They learn to live with their pain." Mrs. Smith was off work several months, at time of trial was still not working regularly on a full-time basis, still had to wear a cervical collar several days a week, and was not able to indulge in her avocations of fishing and driving.

"Under our well established rule the amount of recovery in these personal injury cases is for the jury's fair determination and when supported by substantial testimony we do not disturb the verdict unless it is shown to have been influenced by prejudice and so grossly excessive as to shock the conscience of the court." *Grandbush* v. *Grimmett,* 227 Ark. 197, 297 S. W. 2d 647.

From the testimony above and other testimony contained in the record not detailed here, we certainly cannot say that the amounts of the jury verdicts for Mrs. Stalnaker and Mrs. Smith are so grossly excessive as to shock the conscience of the court.

Affirmed.

Opinion delivered November 26, 1963.

Sam Montgomery, for appellant.

Bruce Bennett, Attorney General, by *Richard B. Adkisson,* Asst. Attorney General, for appellee.

FRANK HOLT, Associate Justice. The appellant was charged with the offense of permitting gambling. The trial court, sitting as a jury, found the defendant guilty and fixed his punishment at a fine of one hundred dollars and costs and thirty days imprisonment, from which judgment comes this appeal.

For reversal appellant adamantly urges only the point that:

"The trial Court erred in not sustaining the motion of the defendant to quash and strike the testimony that

was given by police officers who went upon the private property of the AMVET POST NO. 60, and made an arrest without a search warrant in violation of the Fourth Amendment to the Constitution of the United States of America,[1] and in violation of Article 2, Section 15 of the Constitution of the State of Arkansas."[2]

We proceed to review the evidence in this case. Based upon "several reports that there was gambling going on down there" at this club two officers, dressed in plain clothes and in accordance with a pre-arranged understanding with their superiors of the North Little Rock Police Department, appeared at the club room door about midnight of March 16, 1962 and sought admission. They had no search warrant. Upon the doorkeeper's inquiry if they were members, one of the officers represented that he knew the drummer in the band. The officers were admitted upon the payment of one dollar with the remark: "Go on in and have a good time." They ordered mixed drinks and after a few minutes one of the officers inquired of the barmaid where his fellow officer had gone. She directed him to another room in the club where he saw his fellow officer and two other men playing cards with money and chips being used in the game. Based upon this observation five individuals, including the appellant, were placed under arrest and charged with violating the gambling laws. The officers seized as evidence the cards, chips and money which were made exhibits to their testimony at the trial of the case.

There were approximately fifty to sixty persons on the premises of the club, including several teenagers, where the officers observed the serving of mixed drinks and the gambling activity. Edward Boerner, Jr., aged

[1] "[Unreasonable searches and seizures.]—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] "§15. Unreasonable searches and seizures.—The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

nineteen (19), testified that on this occasion he sought and gained admittance without being a member. The officers did not identify themselves until they made the arrests and seized the evidence of gambling. When queried as to why they did not secure a search warrant, one of the officers testified that from their information they considered it unnecessary in order to gain admittance.

The record reflects that only two individuals, appellant and one other, appeared to be members of this club. There is no other evidence that those present were admitted under rights of membership. According to the officers the appellant said that "he was the operator and he had quite a bit of money involved in it and was going to get his money out of it." Also, it "was the only way he had to make a living." Based upon this evidence the appellant seeks to invoke the aid of our Federal and State Constitutions on the premise that this action of the police officers was an invasion of his privacy and, therefore, an unreasonable search and seizure.

We do not agree with appellant. We do not think that his constitutional rights as guaranteed by our Federal and State Constitutions were violated. From the evidence in this case it appears to us that the premises were not of a private nature. On the contrary, they were of such a nature that the general public, including teenagers, was indiscriminately admitted. The Constitutional guarantee against unreasonable search and seizure does not apply to entry into a public place. The right of these officers to be present on these premises and to perform their duty is succinctly expressed and approved by us in *Albright* v. *Muncrief,* 206 Ark. 319, 176 S. W. 2d 426, where we said:

"This court, in *Van Hook* v. *Helena,* 170 Ark. 1083, 282 S. W. 673, after quoting with approval from *Boyd* v. *United States,* 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, said: 'The protection of the search and seizure clause of the Constitution does not extend to the entry of an officer into a public place to make an arrest upon probable cause that an unlawful act is being committed

there. The protection applies, not to all premises or property, but only to dwelling houses or other such private places.' ''

Also, in the instant case no search was required and, therefore, the provisions of our Federal and State Constitutions are not applicable. The evidence secured by the police officers was open to the eye and hand. It was unnecessary to conduct a search. 47 Am. Jur., Search and Seizure, § 20, p. 516; 79 C.J.S., Searches and Seizures, § 9, p. 788 and § 69, p. 850; 89 A. L. R. 2d p. 773; *Ellison* v. *United States,* 206 F. 2d 476 (1953). There was no exploratory search by the officers seeking to uncover and find any papers and effects of the appellant which were hidden or concealed from their view. Officers of the law are not required to close their eyes and ignore such illegal activities after they are lawfully on the premises. *McDonald* v. *United States,* 166 F. 2d 957 (1947); *Bonn* v. *State,* (Alas. 1963) 372 P. 2d 785.

The appellant relies for reversal upon the recent decision of *Mapp* v. *Ohio,* 367 U. S. 643 (1961). In that case the appellant's house was involved instead of a public place; the officers forcibly gained entrance against Miss Mapp's protest; the officers conducted an exploratory search of her residence in an effort to discover if a suspect was hiding there. In searching her residence they incidentally found secreted there pornographic material. The Supreme Court of the United States reversed her conviction of possession of such holding that the search and seizure by the local officers was unreasonable and, thus, in violation of her constitutional rights. We recognize the force and effect of the *Mapp* case, however, the fact situation in the instant case does not call for its application. Therefore, there is not presented to us the "proper question" to re-examine our former decisions as announced by our caveat in *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816, and reiterated in *Stewart* v. *State,* 233 Ark. 230, 343 S. W. 2d 568 and *Burke* v. *State,* 235 Ark. 882, 362 S. W. 2d 695.

As was said in *Carroll* v. *United States,* 267 U. S. 132, our Federal Constitution "does not denounce all searches

or seizures, but only such as are unreasonable. * * * The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in the manner which will conserve public interests as well as the interests and rights of individual citizens." See also 47 Am. Jur., Search and Seizure, § 52, p. 532; *Van Hook* v. *Helena, supra; State* v. *Blood,* (Kan. 1963) 378 P. 2d 548; *Commonwealth* v. *Tanchyn,* (Penn. 1963) 188 A. 2d 824.

When we view the Fourth Amendment of our Federal Constitution and Article 2, § 15 of our State Constitution [which is essentially in the same language] in this light we are of the opinion there was no invasion of appellant's privacy in the case at bar.

Affirmed.

McFaddin, J., concurs.

Ed. F. McFaddin, Associate Justice (concurring). I agree with all that is stated in the Majority Opinion; and the purpose of this concurrence is to add another reason why I think this case should be affirmed, even in the face of the strong insistence of appellant that the club was a "private place."

The evidence shows that the entry into the club was obtained by permission. The officers told the man at the door that they knew the drummer in the band (which the evidence shows that they did), and then the officers paid the man at the door a dollar as admission fee and he told them: "Go in and have a good time." So the officers gained entrance by permission, without misrepresentation; therefore, they were not trespassers.

In 79 C.J.S. page 831, "Searches and Seizures" § 66, cases from various jurisdictions are cited to sustain this text:

"The constitutional provisions against unreasonable searches and seizures do not prohibit a search without a search warrant that does not constitute a trespass. Hence, the obtaining of information by the eye, where it is not aided by a trespass, does not constitute an unlawful search, since no search is involved, and the use

of a flashlight or searchlight in aid of vision does not render it illegal. The constitutional guaranty does not prohibit a seizure, without a search warrant, where the articles sought are disclosed to any one of the senses; . . ."

Therefore, even if the club had been a private club, my point is that the officers gained entrance by permission and were not trespassers and the constitutional provisions, against unreasonable search and seizure, afford the appellant no shield in this case.

Opinion delivered December 2, 1963.

Thorp Thomas, for appellant.

Bruce Bennett, Attorney General, by *Jack L. Lessenberry,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. This action relates to contempt of court. The facts are as follows:

Harold Hall, an attorney of Pulaski County, represented one Early Tolbert, Jr., in certain cases before the court, and on July 17 of this year, Tolbert entered a plea of guilty to the crime of robbery, and was sentenced to 21 years of imprisonment by the Pulaski County Circuit Court (First Division). In open court, Mr. Hall asked the court if he (Hall) could deliver the defendant to the State Penitentiary. The court thereupon refused the request, and the commitment was turned over to the office of the Sheriff. Subsequently, Hall contacted Sam Hallum, a deputy sheriff, and obtained his permission to deliver the prisoner to the penitentiary. Hallum testified, "I did it without taking a second thought. I worked with Harold on the Police Department." Upon learning of Hall's action,[1] the Circuit Court issued an attachment di-

[1] The record does not disclose how the matter was brought to the judge's attention.

recting the Sheriff to take Hall into custody and have him appear before the Circuit Court of Pulaski County on the 19th day of July at 10:00 A.M. to answer to contempt of court.[2] At the appointed time, Hall appeared, with counsel in his behalf, was informed of the nature of the charge filed, entered his plea of not guilty, and the court then proceeded to make its statement, and hear witnesses.[3] The court announced,

"In open court, Mr. Hall asked me if he could deliver this defendant to the State Penitentiary. I told him no, he could not, that I didn't think the defendant was entitled to any consideration and that this Court did not want that done."

Hall admitted that the court had used "words to that effect. * * * I understood you denied my request." When interrogated as to how he obtained the prisoner, Hall replied that he went to the Sheriff's office, talked to Deputy Sam Hallum, and advised the deputy that "I had asked the Court for permission to take him and the Court denied me permission. I asked if I could take him down the next morning." With Hallum's permission, Hall delivered the prisoner to the penitentiary.

At the conclusion of the hearing, the court fined Hall $50.00 for contempt. Counsel requested time to prepare the record for *certiorari,* and the request was granted. Pursuant thereto, the record has been lodged here, and we are asked to review the proceedings of the trial court and to declare the judgment void.

Respondent, the State, first presents the question of whether proper procedural steps have been followed to bring this matter to the court's attention, but we by-

[2] Bond was set at $100.00, which was made by Hall.

[3] Another attorney was cited, together with Hall, and the charge against the former was heard at the same time. The proof reflected that this attorney had three clients at the penitentiary that he desired to see, and accordingly went with Hall and the prisoner, the two attorneys sharing expenses. The evidence showed that this lawyer had never represented Tolbert, had never seen him in court, never conversed with him, and had nothing to do with making arrangements to deliver the prisoner to the penitentiary. The charge against this attorney was dismissed at the end of the hearing.

pass that proposition, and proceed to decide the matter on its merits.

Petitioner states,

"There is but one question presented in this case. Did the Court have jurisdiction to punish a person for an alleged contempt committed outside the presence and hearing of the Court without first being informed with reasonable certainty of the facts constituting the offense; without affidavits calling the Court's attention to the matter and in derogation of the statute involved.

"The answer to the above question is obvious. It could not."

As authority for this position, petitioner primarily relies upon *York* v. *State,* 89 Ark. 72, 115 S. W. 948. We do not agree that the *York* case is controlling.

There, an injunction was issued by the Chancery Court restraining J. B. York and his brother, Robert York, from holding a stockholders' meeting (Bluff City Lumber Company). Subsequently, the court commanded the defendants to appear before the court and show cause why they should not be punished for contempt for refusing to obey the injunction. No affidavit, information, or statement of facts was presented to the court as a foundation for the issuance of the citation for contempt. York and his brother appeared before the court and requested time to file a response and prepare their defense. The court denied this request, and proceeded to take testimony as to the contempt charged, found the defendants guilty, and assessed the punishment of J. B. York at a fine of $10,000 and his brother, Robert York, at a fine of $5,000. The matter was presented to this court through petitions for a writ of *certiorari.* We quashed the two judgments for the fines, but the statute there involved is entirely different from the statute here under consideration. The *York* opinion quotes the statute, Section 3989 of Kirby's Digest, which is identical to Ark. Stat. Ann. § 32-401 (Repl. 1962). The statute reads as follows:

"Disobedience of an injunction may be punished by the court, or by the judge thereof, or any circuit judge in vacation, as a contempt. An attachment may be issued by the court or judge, upon the production of evidence by affidavit of the breach of the injunction, against the party committing the same. And unless he purges the contempt, if in vacation, the judge may commit him to jail until the sitting of the court, or take a bond with security for his appearance to answer for the contempt at the next term of the court, and in the meantime to obey the injunction."

The present case does not relate to violation of a civil injunction, and the statute involved is Ark. Stat. Ann. § 34-903 (Repl. 1962), which reads as follows:

"Contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defense."

This statute (Section 722 of Kirby's Digest, which is identical to Section 34-903) is discussed in *CarlLee* v. *State,* 102 Ark. 122, 143 S. W. 909, and the distinction, herein noted, pointed out. The court then stated:

"Under our system of procedure, the accused is entitled to be informed with reasonable certainty of the facts constituting the offense with which he is charged and an opportunity to make defense thereto—his day in court."

Here, the accused was informed of the basis of the alleged contempt in the attachment; was further advised of the facts constituting the charge at the outset of the hearing, and was given the opportunity to make his defense, which he proceeded to present. Unlike *York,* no request was made for a continuance for the purpose of additional time in which to prepare the defense; petitioner was present with counsel, entered his plea of not guilty, and the order recites, "by agreement the case is submitted to the court." Section 34-903 was fully com-

plied with. Certainly, petitioner suffered no prejudice in any manner under the procedure followed.

We think logic unquestionably supports the position taken. As stated in the *CarlLee* case,

"The spectacle of a court of record and general jurisdiction being without power to initiate a proceeding to punish for contempt * * * without an affidavit of some third person first made setting out the charge, would be pitiful in the extreme, and was not contemplated by our statutes and under our Constitution. The court would thus be rendered impotent, powerless to protect its authority and enforce its mandates and retain the respect and confidence of the people, for whose benefit it was organized and exists, except by the grace of some third person."

Petitioner also asserts that there was really no order by the court prohibiting him from transporting the prisoner to the penitentiary, and therefore no violation of Ark. Stat. Ann. § 34-901 (Repl. 1962). This section sets out the acts which constitute contempt, and petitioner, in making this assertion, has reference to Provision 3 of the section, which states that the court may punish persons guilty of "wilful disobedience of any process or order, lawfully issued or made by it." It is true that the court entered no written order, but to accept petitioner's argument, would simply be to place form before substance. If Hall had made the request of Judge Kirby on the streets, or in the corridors of the Courthouse, a different situation would be presented, and petitioner's argument might well contain merit. But here, the request and denial took place in open court. Hall apparently recognized the fact that he should obtain the court's approval before taking the prisoner to the penitentiary; it is clear that he distinctly understood that his request was refused. The refusal, in practical effect, was entirely the same as if the court had stated, or written, "You are hereby ordered not to deliver Tolbert to the penitentiary."

For the reasons herein set forth, the petition is denied.

KUESTER *v.* KUESTER.

5-3128 372 S. W. 2d 606

Opinion delivered December 2, 1963.

[Rehearing denied Jan. 13, 1964.]

[redacted]

B. W. Thomas and *Earl Mazander,* for appellant.

Roy Mitchell, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a suit involving property rights between a couple previously divorced. Mr. Harvey L. Kuester and Mrs. Eileen Kuester were married in 1944; and in September 1958 the Garland Chancery Court awarded Mrs. Kuester a divorce, but expressly retained jurisdiction for the determination of the property rights. In February 1959 the Court determined the property rights of the parties; and as to one tract owned by them as tenants by entirety (and hereinafter referred to as the "entirety property"), the decree recited:

"That the real property owned by Plaintiff and Defendant as an estate by the entirety, situated in Garland County, Arkansas, and fully described above, shall be offered for private sale, for a price of not less than $7,500.00; *that out of the proceeds of such private sale, the sum of $4,000.00 shall be paid to Mrs. Martha Kuester of Chicago, Cook County, Illinois, prior to division of the net proceeds;* . . . (Emphasis supplied.)

No one could be found who would pay $7,500.00 for the entirety property; and in September 1962 Mrs. Eileen Kuester filed a petition[1] in the same cause alleging: that $6,000.00 was the best offer obtainable for the entirety property; that it should be sold for that amount; that

[1] The petition also concerned a deed for grave spaces; but that matter has been agreeably settled between the parties.

Mrs. Martha Kuester was deceased; that the $4,000.00 stated in the 1959 decree as going to Mrs. Martha Kuester was a gift and had lapsed; and that the price of $6,000.00 received from the entirety property should be divided equally between Harvey L. Kuester and Eileen Kuester. Harvey Kuester, by proper pleadings, agreed to the sale of the entirety property for $6,000.00, but claimed the $4,000.00 (recited in the decree of February 1959 for Mrs. Martha Kuester) was not a gift but was repayment of a loan; and that such amount should go to the estate of Mrs. Martha Kuester, deceased.

The Chancery Court agreed with Harvey Kuester on the $4,000.00 item and ordered the entirety property sold for $6,000.00, with $4,000.00 to go to the estate or legal heirs of Mrs. Martha Kuester. Mrs. Eileen Kuester has appealed regarding the $4,000.00 item and urges three points, being:

"(1) The lower court erred in ordering the payment of any monies to Mrs. Martha Kuester, not a party to this suit, from the proceeds of the sale of an estate of the entirety.

"(2) The lower court erred in not holding that the payment of Four Thousand Dollars to Martha Kuester was a gift or a promise to make a gift; and lapsed on her death of Donee.

"(3) The lower court erred in holding that the payment of any monies to Martha Kuester or the estate of Martha Kuester was a binding obligation of Appellant, and does not do equity between the parties."

We consolidate the three points for consideration. Only the parties, Mrs. Eileen Kuester and Mr. Harvey Kuester, testified in the hearing from which comes this appeal. Mrs. Eileen Kuester admitted that in 1945 she and her then husband, Harvey Kuester, received $4,000.00 from Mrs. Martha Kuester, mother of Harvey Kuester; that the money was used on the purchase price of a home in Chicago; that when Harvey and Eileen Kuester moved to Hot Springs they sold the Chicago property and used the proceeds to apply on the purchase

of the entirety property here involved. Mrs. Eileen Kuester testified that she never signed any note to Mrs. Martha Kuester for $4,000.00 and never paid Mrs. Martha Kuester any interest; but admitted that she did not know whether Harvey Kuester had paid interest on the amount of $4,000.00.

Harvey Kuester testified that the $4,000.00 was a loan to Harvey and Eileen Kuester from Mrs. Martha Kuester; that no note was executed to evidence the amount; but for a number of years he paid his mother interest each year on the borrowed money. He testified:

"Q. Now the $4,000.00 that was agreed—at the time the decree was entered, you agreed to the entry of the decree in regard to settlement at that time, did you not?

"A. Yes, sir.

"Q. Was the $4,000.00 mentioned in that decree—the $4,000.00 which you testified you borrowed from your mother?

"A. Yes, sir.

"Q. It was not a gift?

"A. No, sir, we were in no position to make any gifts of $4,000.00—never.

"Q. Was your mother in a position to make a gift of $4,000.00?

"A. No, sir.

"Q. Was she a widow?

"A. She was a widow for 18 years.

"Q. Did she have any income?

"A. About $43.00 a month Social Security, and I believe $30.00 a month from my sister's flat, and at that time she supported her sister."

Primarily it was a question of which party to believe: the Chancellor saw them and we cannot say that he was in error. That the parties received $4,000.00 from

Mrs. Martha Kuester is admitted. There is nothing in the 1959 decree which said the $4,000.00 was a gift to Mrs. Martha Kuester. In 1959 Mrs. Eileen Kuester agreed that Mrs. Martha Kuester was to receive $4,000.00; and that decree gave Mrs. Martha Kuester a vested interest in the $4,000.00. Mrs. Eileen Kuester has not established by sufficient testimony that the $4,000.00 due Mrs. Martha Kuester should be cancelled.

The fact, that Mrs. Martha Kuester's estate was not a party to this case, was not urged in the Trial Court and, therefore, cannot be raised here for the first time. If Mrs. Eileen Kuester had thought Mrs. Martha Kuester's estate or heirs to be necessary parties, she should have asked the Trial Court to make them parties. She may yet protect herself on this point by making a timely application to the Trial Court provided the $4,000.00 has not already been disbursed.

Affirmed.

McNeal *v.* Civil Serv. Comm. of City of Little Rock.

5-3129 372 S. W. 2d 614

Opinion delivered December 2, 1963.

Martin, Dodds & Kidd and *Griffin Smith,* for appellant.

Joseph C. Kemp and *Jack Young,* for appellee.

George Rose Smith, J. In February of 1962 the appellant, a civil service employee in the Little Rock health department, was arrested upon a charge of operating a gambling house. Rule 21 of the Little Rock Civil Service Commission provides that a city employee may be discharged for behavior unbecoming to a gentleman or of such a nature as to bring disgrace or disrepute upon a municipal department or any of its members. Before the criminal case was tried the city's public health director instituted this proceeding against McNeal, under the civil service law. After a hearing the civil service commission ordered that McNeal be dismissed. That order was affirmed by the circuit court. McNeal now contends that his offense was not serious enough to amount to a violation of Rule 21 and that the commission should not have acted until the criminal charge had been disposed of.

It was not necessary for the commission to await the outcome of the criminal case. A criminal charge must be proved beyond a reasonable doubt, but in a civil proceeding a mere preponderance of the evidence is sufficient. Hence even if McNeal had been acquitted in the criminal case the civil service commission might nevertheless have found that he had committed the offense in question. *Horn* v. *Cole,* 203 Ark. 361, 156 S. W. 2d 787.

In a proceeding of this kind we review the evidence *de novo,* as in chancery. *City of Little Rock* v. *Tucker,* 234 Ark. 35, 350 S. W. 2d 531. McNeal was charged below with having operated a pinball machine as a gambling device. He owned several amusement machines that were on location at the Snack Shack, a combined beer tavern and pool hall run by his wife. A plain-clothes policeman testified that in the course of his duty he entered this establishment one evening and succeeded in accumulating

twenty free games upon a pinball machine, for which he requested payment from a woman behind the counter. The woman asked him to wait a minute, saying that she didn't make the payoffs on the machine. In a few minutes McNeal appeared, pressed a button to clear the free games from the machine, and handed the officer a dollar. McNeal was arrested and admitted to two other officers that he had made the payoff, saying that he did so because his wife was busy. On the witness stand McNeal conceded that he gave someone a dollar, but he denied having known what the payment was for. When all the circumstances are considered we think the decided weight of the evidence shows that McNeal knowingly took part in the operation of a gambling device. In fact, there is no real contention to the contrary.

We have no hesitancy in declaring that McNeal's conduct violated the city's Rule 21. His behavior was unbecoming to a gentleman; it was of such a nature as to bring him into disrepute as a municipal employee. It must be realized upon reflection that in our system of self-government it is essential that those in the public service demonstrate a high sense of morality. Public employment must be regarded as something more than a mere opportunity to earn a selfish livelihood. If those privileged to be in the public service do not display that basic integrity that the government itself must have, how can the people be expected to maintain their confidence in the system?

The suggestion here, that a public employee must be allowed to engage in professional gambling activities during his off-duty hours, is so greatly opposed to sound principle that we do not think it deserves extended discussion.

Affirmed.

5-3082 372 S. W. 2d 593

Opinion delivered December 2, 1963.

[redacted]

Alston Jennings, Sol J. Russell, C. Byron Smith, Jr. and *Reed W. Thompson,* for appellant.

L. A. Hardin, Carl Langston, for appellee.

PAUL WARD, Associate Justice. This is the fourth appeal to this Court involving some phase of the Ward M. Black Estate. A brief reference to the three former appeals and some of the pertinent background facts will help to clarify the issues presented on this appeal.

Ward M. Black died November 19, 1958. At the time of his death he owned a drug store, valued at about $75,000, located at 4200 Asher Avenue in Little Rock. He left other property (real and personal) valued at about $30,000. The deceased left no children or other

lineal heirs, and his closest of kin (disclosed by anyone at that time) was a brother, Walter L. Black. Walter died in August 1962 leaving, as his only heir, one son (Walter L. Black, Jr.) who is the appellant on this appeal. Walter L. Black, Jr. was appointed administrator of the estate of Ward M. Black soon after his death. About ten months thereafter a purported will of Ward M. Black was found in which he gave the drug store to Cecil E. Morton, a clerk in the drug store and of no kin to the deceased. The rest of his estate was given, in varying amounts, to his brother (Walter L. Black), to two sisters-in-law, and to two cousins (one of whom is Clio Thompson). Clio Thompson, as executrix, offered the purported will for probate on October 1, 1959.

First Appeal. When the court admitted the purported will to probate over the objections of Walter L. Black he prosecuted an appeal to this Court. The issue was whether the purported will was a forgery. We reversed the trial court, and remanded the cause for further development. *Black* v. *Morton,* 233 Ark. 197, 343 S. W. 2d 437—decided February 27, 1961. *Second Appeal.* After another trial the court again admitted the purported will to probate as a valid will. On appeal the issue was the same as on the first appeal, and we held the purported will to be a forgery. *Black* v. *Morton,* 234 Ark. 360, 352 S. W. 2d 177—decided December 18, 1961. On the *third appeal* we affirmed an order of the probate court allowing a fee of $2,500 for the attorneys representing Clio Thompson as administratrix of the estate of Ward M. Black. *Black* v. *Thompson,* 235 Ark. 725, 361 S. W. 2d 753—decided November 19, 1962. It is noted here that the same attorneys who represented Cecil E. Morton on the first and second appeals also represented Clio Thompson on the third appeal and are representing the appellees on this appeal.

Present Litigation. As before stated, on December 18, 1961 we held the purported will of Ward M. Black to be a forgery. As things appeared at that time it seemed in order, of course, to close the estate of Ward M. Black. In such event it would have been the duty of Clio

Thompson to make a final accounting and deliver the assets of the estate over to Walter L. Black, Jr. However, as it now appears, certain persons (including Clio Thompson) received information (possibly the latter part of 1961 or the early part of 1962) that Ward M. Black not only had a living brother, Walter L. Black, but also had a living brother, William Edward Black.

At any rate, on August 30, 1962 Clio Thompson, as administratrix of the estate of Ward M. Black, deceased (and others) filed a "Petition for Determination of Heirship" to the estate of the deceased. In this petition it was stated:

(a) She (Clio Thompson) was appointed administratrix in June 1960 and has served constantly since that date; (b) Ward M. Black died intestate on November 19, 1958; (c) since her appointment as administratrix she has conducted an extensive and prolonged search for the heirs to the estate of Ward M. Black; (d) she has finally located the widow and three children of William Edward Black [died March 20, 1962] who was a brother of Ward M. Black and Walter L. Black; (e) the said widow's name is Nannie Black, and the names of the said three children are Floyd Black, Leroy Black (sons) and Mrs. Clifford J. Wilson (daughter).

The above petition was signed and sworn to by Clio Thompson, by the above named widow and by the children of William Edward Black, deceased.

The prime issue presented to the trial court was whether William Edward Black was a brother of Ward M. Black. If they were brothers, then it must be conceded that one-half of the estate goes to appellant and that the other one-half goes to appellees as their interests appear—otherwise, all the estate goes to appellant. After an extensive hearing, the trial court held, in effect, that William Edward Black and Ward M. Black were brothers. From the above holding, appellant prosecutes this appeal.

Appellees, by the introduction of census reports, court records, photographs, a family bible, and oral tes-

timony, presented to the court the following history of a Black family.

(a) Matthew Anson Black, in the early 1800s, moved from Georgia to northwest Arkansas—he was married to Lucinda Lowery. (b) Of this union there were born a daughter, *Mary Jane Black,* a son, *Thomas Jefferson Black,* (and four other children). (c) The said Thomas Jefferson Black and *Mary Jane Cooper* were married October 2, 1873—of this union was born one son, *William Edward Black;* they were divorced in 1877, and on April 24, 1884 Thomas Jefferson Black married *Fannie Ross;* to this union were born *Ward M. Black* and Walter L. Black.

Appellant makes no serious effort to disprove the above facts as they relate to a Black family. He does, however, strenuously urge that there is no satisfactory proof that the Thomas Jefferson Black who was the father of William Edward Black is one and the same person who was the father of Ward M. Black and Walter L. Black. In addition, appellant points out certain facts and circumstances which, he says destroy the credibility of appellees' testimony. Briefly, some of these are: (a) Clio Thompson made no mention of a brother, William Edward, when she named the heirs of the deceased at any time during 1960 and 1961 although she was a cousin of the deceased; (b) Clio Thompson said she didn't mention the possibility of another heir (William Edward) until May 1962 although the record shows they were working on the family tree in January and February 1962; (c) Appellees' own testimony shows that Mary Jane Cooper was only thirteen or fourteen years old when she married Thomas Jefferson Black; (d) Although William Edward Black was living in northwest Arkansas during all the extensive litigation over this estate, he never made any claim thereto.

Not overlooking the above suspicious facts and circumstances, we cannot say they are of such force as to conclusively disprove the purported relationship between William Edward Black and the deceased.

It may be conceded that some of these facts (and other facts not mentioned) justify a suspicion as to the good faith of Clio Thompson in her efforts to locate the heirs of the deceased and in her efforts to sustain the validity of the purported will, yet we are unwilling to say they are conclusive proof of her bad faith. It may be pointed out that she was at all times acting on the advice of her attorneys; that she was under no special duty to determine heirship if she thought the purported will was valid, but this duty did arise when the purported will was declared invalid by this Court. It may also be pointed out that appellant (as administrator) had the same duty imposed on him. In all events there is no contention that appellee heirs have been guilty of any misconduct or bad faith and (if they are in fact heirs of the deceased) they should not be penalized for the real or fancied misconduct of someone else.

In addition to the documentary evidence referred to previously, the court heard oral testimony tending to show William Edward Black and the deceased were in fact brothers.

Clio Thompson testified that her mother was Roxie Ann Ross who was a sister to Annie Ross who married Thomas Jefferson Black; that she lived within a mile of them and knew them well; that Ward M. Black and Walter L. Black were sons of Thomas Jefferson and Fannie Black; that Thomas Jefferson Black was the son of Matthew Anson and Lucinda Lowery Black; that Thomas Jefferson Black told her he was once married to Mary Jane Cooper and that they had a son named William Edward Black. Appellant admits the force of this testimony but contends it should not be considered because of her conduct and manifest interest. There is, however, other testimony to support the testimony of Clio Thompson. *Anna Hill,* a disinterested witness 74 years of age, testified that her mother was Mary Jane Cooper; that William Edward Black was her half brother; that her mother was married to Thomas Black. Also, corroborating testimony was given by two nephews of Thomas Jefferson Black.

In view of the above and of other testimony and documents found in the record, we are unwilling to say the finding of the trial court was against the weight of the evidence. There are other points urged by appellant which we now consider.

Excluded testimony. We see no reversible error in the court's exclusion of certain testimony. Appellant was allowed to question appellees' attorneys to some extent in an effort to disclose the "background" leading up to the filing of the petition for determination of heirship, but the court refused the inquiry to the extent desired by appellant. In our opinion the court's action was proper. The inquiry was irrelevant to the real issue of whether William Edward Black and the deceased were brothers.

Administratrix fee. The trial court allowed Clio Thompson a fee of $2,500 as administratrix of the Ward M. Black estate. Appellant contends she is not entitled to any fee because of her alleged bad faith, or in any event, she is not entitled to the amount of $2,500. We are unable to agree with appellant on either count. This Court, on the third appeal, refused to condemn her motives, and we find nothing in this record to compel us to change our minds. It is true that she has apparently been very active in trying to establish the heirship of the appellees but she was acting in conformity with Ark. Stat. Ann. § 62-2914 (Supp. 1961) although she stood to gain nothing from her activities. Neither are we convinced that she is not entitled to the full amount of $2,500. She was not only charged with the duties ordinarily required of a personal representative but she was charged with running the drug store and renting the houses and farmland. In the case of *Saad, Executor* v. *Arkansas Trust Co.,* 225 Ark. 33, 280 S. W. 2d 894, we approved a fee of $5,000 to an executor where the estate was only fifty percent larger than the one here involved. In that case we quoted with approval the following from the case of *Jacoway* v. *Hall,* 67 Ark. 340, 55 S. W. 12,

"Being familiar with the services rendered, the judge, in fixing the allowance could act upon his own

knowledge of their value, and we would not overturn his findings thereon, unless clearly erroneous."

We cannot here say the trial court was clearly in error in allowing the fee of $2,500.

Accounting. We have carefully examined the record and find nothing to show that Clio Thompson, as administratrix, failed to account for all of the assets of the estate that were delivered into her possession. The assets were checked out to her on a list, which detailed each item. The list, signed by her, by the appellant and by the co-administrator, showed a total value of $400 for all the articles. This alone seems to effectively refute the contention that Clio Thompson appropriated valuable jewelry to her own use.

Appellant's claim. Appellant filed a petition to be reimbursed for expenses incurred in defending against the forged will. The statement of costs and expenses was as follows:

Charges of various investigators	$ 349.32
Charges in connection with examination and testimony of handwriting expert	1,070.00
Transcripts for appeals	828.00
Briefs on appeals	827.70
Deposition costs	440.55
Clerk and Sheriff costs	116.60
Travel expense	180.90
Long Distance telephone	55.05
Attorney Fees	15,000.00
Total	$18,868.12

The court refused to allow the claim or any part of it. In doing so, we think the court erred. Appellees do not appear to deny that appellant paid out all the items of expense above tabulated except the last item of $15,000. As to this item they state: "A probate court has no power or jurisdiction to pay an attorney who renders services to an heir on a private contract." We agree that appellant had no right to make a contract for legal

services which was binding on the court. That is the effect of the holding in *Gilleylen* v. *Hallman,* 141 Ark. 52, 216 S. W. 15, and it is also the effect of Ark. Stat. Ann. § 62-2208 a. and e. (Supp. 1961). However, it does not follow that the court, in this instance, does not now have power and jurisdiction to approve appellant's claim. Not only did the trial court have such power under the statute above mentioned, but we think it also had the power under the general doctrine of unjust enrichment. This rule was succinctly stated in *American University* v. *Forbes,* 183 A. 860, 88 N. H. 17, to the effect that a person shall not be allowed to profit or enrich himself unjustly at the expense of another. In this case, as it is now abundantly evident to everyone, the heirs of William Edward Black would not be in court today and they would not have received one penny from the estate of Ward M. Black had not appellant retained competent legal assistance and had he not made costly preparations in contesting the probation of the fraudulent will. Therefore, we think the trial court should have allowed appellant's claim in full to be paid out of the assets of the estate. Upon remand the trial court is directed to enter an order in accordance with what we have just said. Otherwise, the decree of the trial court is affirmed.

Affirmed in part and reversed in part with directions.

JOHNSON *v.* JOHNSON.

5-3131 372 S. W. 2d 598

Opinion delivered December 2, 1963.

Richard W. Hobbs, for appellant.

Lookadoo, Gooch & Lookadoo, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Lewis P. Johnson, age about 50 years, is now and has been for a long time, engaged in the florist business in Hot Springs. Appellee, Virginia Kathleen Sturgis Johnson, age 40, has been a lifelong resident of Arkadelphia. In the Fall of 1962 the parties considered marriage. Virginia's father opposed the marriage; he did not think that in the circumstances she was capable of looking after her property. She had considerable assets in a trust that was being administered by trustees, but she also had about $40,000.00 in a savings account. Mr. Sturgis, in an effort to prevent the marriage, had himself appointed guardian of his daughter, but he did not succeed in stopping the marriage. Appellant and appellee were married November 21, 1962. A short time thereafter, Mr. Sturgis had the guardianship dissolved.

About 30 days after the marriage, for the consideration of $32,500.00, paid from her savings account, appellee bought a home in Hot Springs. At her instance, both she and her husband were named as grantees in the deed. Appellee also bought about $8,000.00 worth of furnishings for the house. The parties then went on a trip to California. While on this trip Virginia learned that she was the victim of a cruel hoax; that appellant had married her merely for financial reasons.

To her horror appellee discovered that appellant had perpetrated a grievous fraud; that the man who had taken her as his wife, professing his love and affection,

was not in love with her at all, but was actually in love with a man; she found love letters the men had written to each other. Upon making this discovery she left appellant promptly, while on the wedding trip, and filed this suit in less than 60 days after the date of the wedding, alleging the indignities that had been heaped upon her. She proved her cause of action. Although appellant contested the action he did not testify. Appellee was granted a divorce, and the decree provides that appellant's name be stricken from the deed to the above mentioned real property.

On appeal appellant makes no contention that the trial court made an error in granting the divorce, but claims that he should be allowed to keep an interest in the property the appellee so generously placed in his name. He contends that since the property had been conveyed to both parties, resulting in an estate by the entirety, the chancery court could only cause the land to be sold and the proceeds divided, and relies on Ark. Stats. 34-1215. This statute is applicable where a valid estate by the entirety has been created. It has no application in a case of this kind where one of the parties fraudulently caused his name to be added to the deed. The court said in *Tuyls* v. *Tuyls,* 171 N. E. 2d 779 (1961): "Equity and good conscience require that a person shall not profit by his own wrong, and if it appears that the property came to the marriage by the sole efforts of the innocent mate and that the rights of third parties have not intervened, he or she may be entitled to its return without regard to who holds legal title." In the case at bar it does not appear that any third party is affected by the decree.

Appellant is in the same position he would have been if appellee had owned the property in her name and had executed a deed setting up an estate by the entirety, which she could have done under the provisions of Ark. Stats. 50-413, as construed in *Ebrite* v. *Brookhyser,* 219 Ark. 676, 244 S. W. 2d 625. Certainly such a deed could be set aside on the grounds of fraud, there being no doubt that deeds can be set aside for that reason. We said in

Hanson Motor Co. v. *Young,* 223 Ark. 191, 265 S. W. 2d 501: "Whether fraud existed in procuring a person to sign or become a party to a written instrument is ordinarily a fact question for the jury. *Winter Park Tel. Co.* v. *Strong,* 130 Fla. 755, 179 So. 289. While fraud is never presumed, the law requires good faith in every business transaction, and does not allow one party to intentionally deceive another by concealment or false representations. *Sanders* v. *Berry,* 139 Ark. 447, 214 S. W. 58. The duty of disclosure also arises where one person is in position to have and to exercise influence over another who reposes confidence in him whether a fiduciary relationship in the strict sense of the term exists between them or not. 23 Am. Jur., Fraud and Deceit, § 81. In *Stewart* v. *Clark,* 195 Ark. 943, 115 S. W. 2d 887, this court held that an act done or omitted which may be construed as fraud because of its detrimental effect, may justify the setting aside of a contract or deed irrespective of moral guilt." And, in *Jackson* v. *Smith,* 226 Ark. 10, 287 S. W. 2d 571, we said: "That the deed from Mrs. Collins and Mrs. Jackson to Mr. Smith and Mr. Norvell is within the 'family settlement' rule is too clear to admit of doubt. *Pfaff* v. *Clement,* 213 Ark. 852, 213 S. W. 2d 356, is complete authority for such conclusions. But even as a 'family settlement', the deed cannot be upheld if the evidence shows that either fraud or imposition was practiced."

Appellant cites several cases touching on the authority of the chancery courts of this state to dissolve an estate by the entirety, but none of the cases are in point; they do not deal with a situation where an estate by the entirety has been brought about by fraud practiced by one of the parties.

Affirmed.

5-3084 373 S. W. 2d 580

Opinion delivered December 2, 1963.

[Rehearing denied Jan. 13, 1964.]

Mahony & Yocum, for appellant.

Spencer & Spencer, for appellee.

JIM JOHNSON, Associate Justice. This suit is for personal injuries resulting from a collision between an automobile and a truck. On December 11, 1959, appellee William F. Humphreys was one of two passengers in a car driven by Jimmy Clemons en route from Hampton to Calion. Clemons' car collided with the side of a tractor-trailer driven by appellant Augusta Reed, an employee of appellant C. F. Wright. Clemons was killed and the two passengers injured. Appellee filed suit against appellants in Calhoun Circuit Court. Judgment was given on a jury verdict of $4,000.00 for appellee, from which appellee appealed, *Humphreys* v. *Reed,* 234 Ark. 861, 355 S. W. 2d 281, and on March 19, 1962, this court reversed and remanded the cause for a new trial.

On October 31, 1962, after a new trial, the jury returned a verdict for appellee for $30,000.00. In this case appellants have appealed from the judgment on the verdict.

The first point urged for reversal is that the trial court erred in excluding opinion testimony of the Arkansas State Police officer who investigated the collision

During direct examination, after testifying at length about the physical facts he found at the scene of the collision, the officer was asked, "From the physical facts that you found in your investigation, did you form an opinion as to the point of impact?" Appellee objected, and court sustained the objection, excluding this opinion testimony.

We have had occasion to review admissibility of opinion testimony several times recently. *Conway* v. *Hudspeth,* 229 Ark. 735, 318 S. W. 2d 137; *Henshaw* v. *Henderson,* 235 Ark. 130, 359 S. W. 2d 436; *Waters* v. *Coleman,* 235 Ark. 559, 361 S. W. 2d 268. In each of these cases this court applied the rule contained in *Mo. Pac. R. Co.* v. *Barry,* 172 Ark. 729, 290 S. W. 942, that, "The subject-matter of these questions did not call for the opinion of experts. The facts of the occurrence were not beyond the knowledge and experience of any ordinary man to understand and draw conclusions from them, when detailed by eye-witnesses. Therefore the expert testimony was not competent, and the court did not err in so holding."

The collision here in question was uncomplicated and there were photographs of the automobile, truck, and the scene of the accident, showing gouges and marks on and off the road, as well as testimony of witnesses who vividly described the conditions prevailing and the scene. The police officer's testimony conflicts in part with testimony of some of appellee's witnesses who arrived at the scene before the officer; however, virtually the only fact testified to by the officer not already clearly covered by testimony of witnesses for both appellee and appellants was the location of debris on the highway, which the officer testified about, in detail and at length. As was stated in the *Waters* case, *supra,* "The facts to be determined were not complicated. This was a relatively simple collision. Certainly there was no evidence to indicate that it was beyond the jury's ability to understand the facts and draw its own conclusions. The state of the record being thus, we find that the trial court erred in allowing appellee to resort to such expert opinion."

It follows, therefore, in the present case, that the trial court committed no error in excluding the police officer's opinion testimony. In so holding, we take this occasion to restate the rule so succinctly stated in *Cahill* v. *Bradford,* 172 Ark. 69, 287 S. W. 595, "Opinion evidence is not admissible when the fact is susceptible of being adequately exhibited to the jury in the ordinary way."

Appellants next urge that the trial court erred in refusing to give their Instruction No. 14, which reads as follows:

"The defendants have pleaded that the plaintiff and the driver of the car in which he was riding were engaged in a joint enterprise and because thereof, negligence of the driver, if any, is imputable to the plaintiff, that is, that the negligence of the driver, if any, would have the same effect as negligence of the plaintiff.

"If the plaintiff and the said Clemons, the driver of the automobile, were, at the time of the collision, using the automobile for a common purpose, that is, a mutual purpose, and if each had equal right over the management and operation of the automobile and equal right to govern and direct the movements and conduct of each other with respect to the purpose for which the automobile was being used, then the plaintiff would be responsible for negligence of the driver, if any, and such negligence would, in effect, be the negligence of the plaintiff."

Appellants, in their answer, pleaded that appellee and Clemons, the driver, were engaged in a joint enterprise. In a recent case, *Woodard* v. *Holliday,* 235 Ark. 744, 361 S. W. 2d 744, this court discussed joint enterprise, or joint venture, as follows:

"Prosser on Torts (2d Ed.), § 65, discussing the law of joint enterprises, states that:

" 'The prevailing view is that a joint enterprise requires something beyond the mere association of the parties for a common end, to show a mutual 'right of control' over the operation of the vehicle—or in other

words, an equal right in the passenger to be heard as to the manner in which it is driven. It is not the fact that he does or does not give directions which is important in itself, but rather the understanding between the parties that he has the right to have his wishes respected, to the same extent as the driver. In the absence of circumstances indicating such an understanding, it has been held that . . . fellow servants in the course of their employment, although they may have a common purpose in the ride, are not engaged in a joint enterprise.'

"Many cases have denied the existence of a joint enterprise where nothing was shown except that two fellow employees had been riding together upon a common mission in the course of their employment. [Cases cited.]

"In the case at hand the testimony does tend to establish the first requirement, a common purpose. But they do not show that Yount agreed that Woodard was entitled to an equal voice in the control of the car or that, if the two had been riding in Woodard's automobile, Yount would have had an equal voice in its control. (The latter situation is important, because any control that Woodard might have exercised as a superior employee would not satisfy the requirement of equality of control.) Joint control and joint responsibility should go hand in hand; neither should exist without the other. If the passenger shares the responsibility for the physical control of the vehicle then it is proper for him to share the liability for the driver's negligence. But if the responsibility of control is not shared then the liability ought not to be shared. In the case at bar the trial court's error lies in permitting the jury to infer the existence of the second requirement from proof of the first, which in effect amounted to doing away with the second requirement altogether."

The testimony here relative to the three men traveling together is contained in the direct examination of Randall Kitchens, the other passenger, and appellant. Kitchens testified as follows:

"Q. Do you know the plaintiff in this case, William F. Humphreys?

A. Yes, sir.

Q. Did you know Jimmy Clemons during his lifetime?

A. Yes, sir.

Q. On or about December 11, 1959, were you working with them at the Calion Lumber Company in Calion, Arkansas?

A. Yes, sir.

Q. On that morning did you see both of those boys?

A. Yes, sir.

Q. Where did you meet them?

A. At the Texaco station.

Q. Right down a block here from the courthouse?

A. Yes, sir.

Q. What time of the morning did you all get together?

A. About six-fifteen.

Q. Where were you going that morning?

A. To work at Calion.

Q. Were all of you working for Calion Lumber Company?

A. Yes, sir.

Q. What time did you have to be at work?

A. At seven o'clock.

Q. Whose car were you going down there in?

A. In Jimmy Clemons' car.

Q. And he picked you up at the Texaco station?

A. Yes, sir."

Appellee testified as follows:

"Q. On that morning did you meet Jimmy Clemons and Randall Kitchens, who just testified, to go to the job at Calion?

A. Yes, sir.

Q. Where did you meet them?

A. At the Texaco station on the corner, at the red light.

Q. You all got in Jimmy Clemons' car and went on down toward Calion?

A. Yes, sir."

Appellants forcefully contend that the trial court erred in refusing to give the above quoted instruction which they urge presented appellants' theory of the case. In support of this contention appellants quote from *Western Coal & Mining Co.* v. *Moore,* 96 Ark. 206, 131 S. W. 960, as follows:

"It is error to refuse a specific instruction clearly applying the law to the facts of the case . . . It was the theory of the defendant that the accident was caused by a lump of coal which projected over the side of the car, which struck the prop and knocked it out, thereby causing the rock to fall. *Evidence was adduced by it at the trial to sustain this contention,* and defendant had a right to have this theory of the case presented to the jury in concrete form." [Emphasis ours.]

As brought out in the *Woodard* case, *supra,* joint enterprise requires both (1) common purpose, and (2) equality of control. In the case at bar, review of the testimony clearly reflects common purpose, but there is a total failure of evidence on the matter of equality of control. Failing thus to produce evidence essential to the establishment of joint enterprise, appellants were not entitled to the instruction offered. Accordingly, the trial court was correct in refusing to give such an instruction. Instructions are to be given on the evidence, not on the pleadings.

We have examined very carefully the other instructions, offered or given, complained of by appellants and find no error.

Affirmed.

FISHER *v.* FISHER.

5-3123 372 S. W. 2d 612

Opinion delivered December 2, 1963.

Henry S. Wilson, for appellant.

Greer & Collier, for appellee.

FRANK HOLT, Associate Justice. The principal issue presented in this case is whether the appellee should have a reformation of the deed she received from the appellant. This deed was part of a property settlement between them preceding their divorce. Following the divorce appellant instituted this suit alleging that he and the appellee owned twenty-six acres as tenants by the entirety. He asked for partition thereof and for his proper share of the rents collected by the appellee. In her answer appellee denied his assertions. By cross-complaint she contends that she is the sole owner of the disputed property

by the terms of their property agreement and that this tract of land was omitted through mutual mistake or fraud from appellant's deed to her, therefore, the deed should be reformed to include this land. The appellant denied the allegations in the cross-complaint and then pleaded as a defense the statute of frauds and *res judicata*. Upon a trial of the issues the Chancellor decreed reformation of the deed so as to convey to appellee the disputed lands. From that decree appellant brings this appeal.

For reversal appellant contends that the decision of the trial court is not sustained by sufficient evidence.

At the time of their separation in November, 1959, the appellant and appellee owned as tenants by the entirety: (1) A twenty-six acre farm, or the land in controversy, (2) a lot approximately one hundred thirty-eight feet square on which their home was located, and (3) personal property. The real and personal property were both encumbered by mortgages. Following their separation there is evidence the appellant was anxious for a divorce. Appellant's and appellee's daughter and son-in-law, Mr. and Mrs. McCanless, visited him and his paramour several times. The appellant importuned the daughter and son-in-law to act as an intermediary concerning his desire for a divorce. According to appellee, the daughter and son-in-law represented to her that if she would secure a divorce appellant would be willing to give her everything except the truck to which she agreed. Her daughter and son-in-law corroborate appellee's testimony.

There was never any direct contact between appellant and appellee during the negotiations. Pursuant to this understanding Mrs. Fisher, who is unlettered, claimed she took deeds and other papers to her attorney and asked him to draw up the necessary papers conveying all property to her except the truck. She also employed him to secure her divorce. The lawyer drafted a deed and bill of sale which were forwarded to the appellant who returned them with his signature. There-

upon the appellee secured her divorce. Appellee did not know the contents of the deed until some two or three months later when she discovered the twenty-six acres were omitted in the metes and bounds description. The appellant then refused to sign a quitclaim deed to this property and testified that when he had the deed read to him, since he was also unlettered, he noticed that the twenty-six acres were not included and otherwise he would not have signed it.

The lawyer testified that he thought he had included everything in the deed according to the papers presented to him. The deed which appellant signed, containing only the homestead, recited as part of the consideration:

"Her [appellee's] assumption of any mortgage or Deed of Trust which may be outstanding against this property on this date."

This property and the twenty-six acres were encumbered by the same mortgage. The bill of sale signed by appellant lists several implements of machinery which could only be used by the appellee in farming operations. The decree of divorce provides: "There are no property rights to be determined herein."

From the record in this case it appears that the appellant was on good parental terms with his daughter and his son-in-law, Mr. and Mrs. McCanless, who acted as intermediaries. As stated, appellee's version of the agreement was corroborated by them.

On appeal we do not disturb the findings of the Chancellor unless they are against the preponderance of the evidence. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517. It is well settled that a court of equity has power to correct mistakes in a deed and conform it to the intentions of the parties based upon parol evidence of a clear, decisive and unequivocal nature. *Beneaux* v. *Sparks,* 144 Ark. 23, 221 S. W. 465; *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139; *Foster* v. *Richey,* 192 Ark. 683, 93 S. W. 2d 1258; *Gray* v. *Gray,* 233 Ark. 310, 344 S. W. 2d 329; *Crawford* v. *Vinyard,* 234 Ark. 1003, 356 S. W. 2d

8. We think there was ample evidence of a clear, cogent and decisive nature to sustain the Chancellor's decree.

The only other contention advanced by the appellant for reversal is that the court erred in refusing to sustain his plea of *res judicata* to appellee's cross-complaint. It is true that a judgment upon a question directly involved in litigation is conclusive as to that issue in another suit by the same party or parties. It must appear, however, on the face of the record or by extrinsic evidence that the precise question was raised and determined in the former suit. *Carrigan* v. *Carrigan,* 218 Ark. 398, 236 S. W. 2d 579; *Smith* v. *Smith,* (Minn. 1952) 51 N. W. 2d 276; *Orr* v. *Orr,* 206 Ark. 844, 177 S. W. 2d 915; *Fullerton* v. *Fullerton,* 230 Ark. 539, 323 S. W. 2d 926; 32 A.L.R. 2d 1135.

In the case at bar the divorce decree specifically recites: "There are no property rights to be determined herein." The appellant and the appellee are in agreement that there was a property settlement between them before the divorce. They disagree only as to the inclusion of the twenty-six acres. The daughter and son-in-law corroborated the appellee's version of this agreement which was perfected before the granting of the divorce as is indicated by the very terms of the decree. It cannot be said that upon the face of the record or by extrinsic evidence the property rights between appellant and appellee were raised and determined in the divorce action. The property rights between them were withheld from the court's consideration and were not adjudicated by the court.

We agree with the Chancellor in rejecting the appellant's plea of *res judicata.*

Affirmed.

Opinion delivered December 2, 1963.

Macom & Moorhead, Garner, Shaw & Kimbrough, for appellant.

Chambers & Chambers, Catlett & Henderson, for appellee.

BOYD TACKETT, Special Justice. Appellants are citizens and taxpayers of the State of Arkansas. Appellee Loyd Sadler is a Member of the General Assembly of the State of Arkansas and, also, is a Member of the State Board of Pardons and Paroles. Appellee Van Mosley is a Member of the General Assembly of the State of Arkansas and, also, is a Member of the Board of Southern

State College—a State supported institution. Appellants petitioned the Chancery Court of Pulaski County, Arkansas, under Article XVI, Section 13, of the Constitution of the State of Arkansas, to enjoin each Appellee from holding one or the other state office, and for an accounting of any funds unlawfully received by virtue of holding dual state offices. Appellants and appellees moved for a Summary Judgment in the case, and the Chancellor entered a Decree granting Appellees' Motion for Summary Judgment, ruling that the Chancery Court was without jurisdiction to hear and determine this cause—and, thus, this appeal.

By Separate Answer to the Complaint and Reply to Request for Admissions, Appellee Van Mosley alleged that he had received no pay for services or reimbursement of expenses incurred as a Member of the Board of Southern State College. Whether Appellee Loyd Sadler has received pay for services or reimbursement of expenses as a Member of the State Board of Pardons and Paroles is not revealed.

Article V, Section 10, of the Constitution of the State of Arkansas, reads, "No Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State." This Constitutional provision clearly precludes Appellee Loyd Sadler from serving as a Member of the State Board of Pardons and Paroles during the term for which he has been elected to serve as a Member of the General Assembly of the State of Arkansas, and clearly precludes Appellee Van Mosley from serving as a Member of the Board of Southern State College during the term he has been elected to serve as a Member of the General Assembly of the State of Arkansas; *Wood* v. *Miller,* 154 Ark. 318, 242 S. W. 573; *Collins* v. *McClendon,* 177 Ark. 44, 5 S. W. 2d 734; *Fulkerson* v. *Refunding Board of Arkansas,* 201 Ark. 957, 147 S. W. 2d 981; *Smith* v. *Faubus,* 230 Ark. 831, 327 S. W. 2d 562; *Jones* v. *Duckett,* 234 Ark. 990, 356 S. W. 2d 5.

Appellee Loyd Sadler is an illegal Member of the State Board of Pardons and Paroles, and Appellee Van Mosley is an illegal Member of the Board of Southern State College.

Article IV of the Constitution of the State of Arkansas specifically provides that the powers of our state government shall be divided into three departments—legislative, executive, and judicial—and provides that no person, or collection of persons within one of these departments shall exercise any power in either of the other departments.

The most controverted issue in this case is whether the Chancery Court had jurisdiction to determine this cause. This Court holds that the Chancery Court did have jurisdiction of this cause, and that the Chancellor erroneously ruled to the contrary.

Article XVI, Section 13, of the Constitution of Arkansas reads, "Any citizen of any county, city, or town, may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exaction whatever." The Chancery Court has jurisdiction of suits to prevent illegal exactions; and, therefore, Chancery Court has jurisdiction of this suit for Declaratory Judgment—the equity court does not lose jurisdiction by the holder of a civil office electing to perform the duties of the office without pay for services or reimbursement of expenses incurred.

Ark. Stat. 7-202 charges Members of State Boards with the management and control of the respective institutions of the State of Arkansas, affording the Members the necessary power and authority to operate the Boards in a businesslike manner, and directs the Members to take over all records, files, books, papers, furniture, fixtures, and contracts of the institutions.

Ark. Stat. 7-206 directs the Board Members to meet, organize, elect officers, and transact business on behalf of the institutions; and further provides that the Members of the Boards shall be entitled to the actual expenses

which they incurred in attending meetings. Other legislative statutes detail the powers, duties, and responsibilities of Members of the State Board of Pardons and Paroles and Members of other Boards of the various State institutions.

The Members of the State Boards have access to, and supervision over, considerable property, assets and funds belonging to the people of the State of Arkansas, accumulated through taxation. For illegal Members of such State Boards to be entitled to expenses in attending to such state business, in receiving expenses, or in being afforded authority to operate State institutions, constitutes an illegal exaction; and, therefore, any citizen of any county, city or town may, by virtue of Article XVI, Section 13, of the Constitution of the State of Arkansas, institute suit on behalf of himself and all other interested persons to protect the inhabitants of Arkansas against the enforcement of the illegal exactions.

This Chancery Court action was instituted pursuant to Article XVI, Section 13, of the Constitution of the State of Arkansas, and the Chancery Court had jurisdiction of this Constitutional proceeding. This Constitutional provision is self-executing, and imposes no terms or conditions upon the right of the citizens there conferred. *Samples* v. *Grady,* 207 Ark. 724, 182 S. W. 2d 875; 8 Ark. Law Review 129 (1954).

"Illegal Exaction" under the Arkansas Constitution means both direct and indirect illegal exactions, thus comprehending any attempted invalid spending or expenditure by any government official, *Quinn* v. *Reed,* 130 Ark. 116, 197 S. W. 15; *Farrell* v. *Oliver,* 146 Ark. 599, 226 S. W. 529.

"Illegal Exaction means far more than the mere collection of unlawfully levied taxes. With little limitation, almost any misuse or mishandling of public funds may be challenged by a taxpayer action. Even paying too much for cleaning public outhouses has been held by our courts as basis for a taxpayer's right to relief, *Dreyfus* v. *Boone,* 88 Ark. 353, 114 S. W. 718. Any arbitrary

or unlawful action exacting taxes or tax revenues may be restrained and annulled by a taxpayer affected by such procedure, *Bush* v. *Echols,* 178 Ark. 507, 10 S. W. 2d 906; *McClellan* v. *Stuckey,* 196 Ark. 816, 120 S. W. 2d 155; *Park* v. *Hardin,* 203 Ark. 1135, 160 S. W. 2d 501; *Brookfield* v. *Harahan Viaduct Improvement District,* 186 Ark. 599, 54 S. W. 2d 689.

The remotest effect upon the taxpayer concerning any unlawful act by a tax supported program or institution may be enjoined under Article XVI, Section 13, of the Constitution of the State of Arkansas, *Green* v. *Jones,* 164 Ark. 118, 261 S. W. 43. Equity jurisdiction has been expanded by the "illegal exaction" provision to afford taxpayers relief by Chancery Court injunction concerning any arbitrary or unlawful action of a public operation, *Ford* v. *Collison,* 128 Ark. 119, 193 S. W. 531; *Eddy* v. *Schuman,* 206 Ark. 849, 177 S. W. 2d 918. Any action wherein tax moneys are involved, colored with illegality, entitles the taxpayer to injunctive relief in a court of equity under Article XVI, Section 13, of the Constitution of the State of Arkansas.

We are not dealing in this instance with statutory or common law proceedings—we are dealing with a Constitutional provision affording injunctive relief to a taxpayer concerning illegal exactions. We are not concerned with an election contest for the purpose of determining the rightful office holder, which action would necessarily need be brought in the law court. We are concerned with the Constitutional right of appellants to enjoin appellees from illegally holding civil office wherein illegal exactions are involved.

Our Court thoroughly discussed "illegal exaction" in the case of *Arkansas Association of County Judges* v. *Green,* 232 Ark. 438, 338 S. W. 2d 672, wherein jurisdiction of the Chancery Court was questioned and illegal exaction was involved. This Court stated that the theory of an illegal exaction does not necessarily involve an illegal tax, citing the case of *Lee County* v. *Robertson,* 66 Ark. 82, 48 S. W. 901, wherein the Court was not dealing with illegal tax, but with the question of illegal

use or appropriation of county funds. This Court, in the case of *Lee County* v. *Robertson,* stated that the order of reappropriation was tantamount to an allowance and enforcement of an illegal exaction against every taxpayer of the county, and that each taxpayer was, therefore, individually interested in such order. In the case of *Ark. County Judges* v. *Green,* this Court noted that the Arkansas Supreme Court had many times construed Article XVI, Section 13, of the Arkansas Constitution, and had never limited its application to an illegal tax but had uniformly construed it to apply to an illegal exaction as defined in the *Lee County* v. *Robertson case,* further stating that the Constitutional provision had been and was being construed to mean that a misapplication by a public official of funds arising from taxation constitutes an exaction from the taxpayers and empowers any citizens to maintain a suit to prevent such misapplication of funds.

The case of *Arkansas County Judges Association* v. *Green* cited the case of *Ward* v. *Farrell,* 221 Ark. 636, 253 S. W. 2d 353, wherein this Court stated concerning the involved Constitutional provision:

"There is eminent authority for holding, even in the absence of an express provision of the Constitution, such as referred to above, that a remedy is afforded in equity to taxpayers to prevent misapplication of public funds on the theory that the taxpayers are the equitable owners of public funds and that their liability to replenish the funds exhausted by the misapplication entitle them to relief against such misapplication."

Appellees are illegally holding state civil office as Members of State Boards during the term for which they have been elected to the General Assembly of the State of Arkansas. They are empowered to manage, control and supervise a considerable amount of state property, assets, and funds while serving as illegal Members of the Boards. They are entitled to expenses of attending Board meetings. These activities constitute an illegal exaction affording injunctive relief by any citizens or taxpayers of the State of Arkansas.

Concerning the prayer of appellants for an accounting by appellees of any funds unlawfully received by virtue of holding dual offices, there is nothing in the record to justify a finding that appellants have acted with any fraudulent intent, or that they have even appreciated the possibility of their holding illegal offices. Under the circumstances, those appellants should not be required to account for funds received for services rendered and expenses incurred as Members of the involved State Boards.

The Decree of the Pulaski County Chancery Court is reversed and this cause is remanded, with directions that the Chancellor enter a Summary Judgment enjoining appellee Loyd Sadler from Membership on the State Board of Pardons and Paroles, and enjoining Appellee Van Mosley from Membership on the Board of Southern State College.

5-3054 372 S. W. 2d 588

Opinion delivered December 2, 1963.

[redacted]

Holt, Park & Holt, for appellant.

Bruce Bennett, Attorney General, by *Richard B. Adkisson,* Asst. Atty. General, for appellee.

JERRY WITT, Special Associate Justice. This is an appeal from that part of the judgment and order of the St. Francis County Circuit Court entered on the 8th day of February 1963, in the above entitled cause of action, which order declared of no force and effect, the Proclamation of the Governor of Arkansas, remitting, cancelling, and releasing a bond forfeiture, and for which forfeiture judgment was entered against Ted Hood in the St. Francis Circuit Court on the 24th day of February, 1958, in favor of the State of Arkansas in the sum of Two Thousand ($2,000.00) dollars and costs, and which judgment of forfeiture was affirmed by this Court on March 26, 1962.

The facts in this case are: Johnny Puckett was charged in the St. Francis Circuit Court with the crime of Forgery and Uttering. Appellant Ted Hood, d/b/a Ted Hood Bonding Company, made Puckett's appearance bond. The case was set for trial on February 24, 1958, but Puckett failed to appear. On February 28, 1958, the Court entered an order forfeiting the bond; appellant filed a motion to set aside the bond forfeiture, which was overruled; and summons was then issued for Hood to appear and show cause why judgment should not be rendered on the bond forfeiture. Appellant filed answer and asked for a jury trial, which was overruled; and judgment was rendered against him in the sum of Two Thousand ($2,000.00) dollars. There was an appeal to this Court; and on February 29, 1960, this Court reversed the Lower Court, and remanded the case for jury trial. (*Hood* v. *State,* 231 Ark. 772, 332 S. W. 2d 488.)

On remand, the case was tried to a jury on February 22, 1961, and a verdict was rendered against the appellant in favor of the State of Arkansas in the sum of Two Thousand ($2,000.00) dollars on the bond forfeiture. There was an appeal to this Court; and on March 26, 1962, this Court affirmed the judgment of the Lower Court. (*Hood* v. *State,* 234 Ark. 901, 356 S. W. 2d 28.) On August 4, 1962, the Governor issued a Proclamation remitting, extinguishing, cancelling, and releasing the forfeiture of the bond; and Hood pleaded that Proclamation as a release of the judgment against him. On February 8, 1963, the Circuit Court found that said Court had retained jurisdiction against appellant and the execution issued on the bond forfeiture and held that the Governor's Proclamation of August 4, 1962, had no force and effect and did not relieve appellant from the judgment against him on the bond forfeiture rendered by the Circuit Court on the jury verdict of February 22, 1961; and from that judgment of February 8, 1963, there is the present appeal.

The Lower Court, in reaching its conclusion with reference to the Governor's Proclamation, said this:

"After the jury returned that verdict, this Court entered the proper civil judgment, based upon that judgment . . . It is the opinion of this Court, with reference to the Proclamation of the Governor which was issued August 4, 1962, that it is ineffectual because, although the Constitution provides that the Governor has the right to set aside forfeitures, it is the opinion of this court that this is not a forfeiture . . . the forfeiture was had even before the hearing before the jury and even after the matter was submitted to the jury and they rendered a verdict thereon . . . and the Court refuses to set aside the judgment against the Ted Hood Bonding Company." The appellant, in his brief, assigns two points:

"(1) The lower court erred in holding that the Governor's Proclamation of August 4, 1962, remitting and cancelling the bond forfeiture in this cause, was of no force and effect.

"(2) Assessment of costs."

At the outset we copy certain pertinent provisions of the Governor's Proclamation here involved:

"Whereas, the Circuit Court of St. Francis County did, on February 28, 1958, order forfeited the bond made by Ted Hood . . . for the appearance of Johnny Puckett in a criminal action against him in the Circuit Court of St. Francis County; and . . .

"Whereas, execution has been issued for collection of said bond; and

"Whereas, extenuating circumstance in behalf of Ted Hood are: [mentioning four]; and . . .

"Whereas, it would be just and fair to remit, extinguish, cancel, and release the forfeiture of said bond hereinabove referred to:

"Now, Therefore, I, Orval E. Faubus, Governor of the State of Arkansas, by virtue of the power and authority vested in me under Article 6, Par. 18, of the Arkansas Constitution of 1874, do hereby remit, extinguish, cancel, and release the forfeiture of the aforesaid bond . . ."

Article 6, Section 18, Constitution of 1874, provides:

"In all criminal and penal cases, except those of treason and impeachment, the Governor shall have power to grant reprieves, commutation of sentences and pardons after convictions, and to remit fines and forfeitures under such rules and regulations as shall be prescribed by law."

Attorneys for the State do not raise the question of the right of the Governor to act, because of the failure to comply with Ark. Stat. Ann. § 43-2818 (1947), where it is provided that the Governor is prohibited from considering or granting any application for pardon or "remission of forfeiture of bail bond" until there is filed in his office a certificate of the County Clerk or the affidavit of two persons known to be credible, that the application for such pardon or remission of forfeiture has been published as hereinafter provided.

The attorneys for the State insist that the judgment on the forfeited bail bond is a *civil proceeding* and not a *criminal matter*. The Lower Court held that this was not a forfeiture; that the forfeiture was had before the jury trial and its verdict; in other words, a trial by the jury on the bond changed the nature of the proceeding and, being a civil judgment, could not be affected by the Governor's Proclamation. Attorneys for the State cite the case of *Tinkle* v. *State,* 230 Ark. 966, 328 S. W. 2d 111, and say that in the cited case the Court held:

". . . that the Governor had authority under the Constitutional provision to remit forfeited bail bonds prior to judgment in the collection thereof. Although there was some dicta to the effect that the same would be true of remittitur after judgment, the court did not so hold."

We agree that our Constitution limits the right of the Governor to grant reprieves and commutations in all criminal and penal cases except those of treason and impeachment, and that it does not extend to civil cases. We are now called upon in this case to decide the nature of the proceeding in the Lower Court; whether the judg-

ment on the forfeited bond, after trial by jury, is a civil or criminal proceeding. We hold that it was a criminal proceeding and the Governor's Proclamation had the effect of relieving the appellant from payment of said judgment. The case of *Tinkle* v. *State (supra)* was very similar, if not on all fours, with the case at bar, and we quote from it at length:

"The issue here is whether the Governor has authority to remit a forfeited bail bond. Thomas Gordan Tinkle, Jr. was charged in the criminal division of the Chickasawba District of the Mississippi County Circuit Court with the crime of burglary and grand larceny. When the case was called for trial, Tinkle failed to appear, and the court ordered that the bail bond be forfeited. Later, the Governor issued a proclamation purporting to remit such bond forfeiture. Appellants filed motion in circuit court to set aside the judgment in the sum of $5,000.00 rendered on the bond forfeiture, alleging that the forfeiture had been remitted by the Governor's Proclamation which was made a part of the motion. The trial court overruled the motion to set aside the judgment, and the principal, Tinkle, and bonding company, Carolina Casualty Company, have appealed.

"The State contends, first, that the Governor does not have the authority to remit a forfeited bail bond; second, that if the Governor does have such authority, procedure required by the statute was not followed and, therefore, the proclamation is invalid . . .

"Attorneys for the State argue that the procedure to force collection on the forfeited bail bond is a civil action and that, therefore, the whole proceeding arises out of a civil penalty or forfeiture, and that the Governor, therefore, can give no relief. *Hutton* v. *McCleskey,* 132 Ark. 391, 200 S. W. 1032, is cited as authority for that conclusion. But in that case the only issue was whether the Governor under the constitution could remit a penalty imposed on all who failed to assess their property for taxes in the manner prescribed by statute. It was certainly not a 'criminal or penal case' . . . The forfeiture in the case at bar was in a criminal case.

The bond was given to insure the defendant Tinkle's appearance under a criminal indictment. A majority of the states have a constitutional provision in which the power (to remit fines and forfeitures) is granted either to the Governor alone or in conjunction with other executives comprising a board. In none of these states have the courts ever held that the forfeiture mentioned in the Constitutional provision does not apply to a forfeited bail bond . . .

"The case of *State* v. *Dyches,* 28 Tex. 535, is directly in point. There the Texas Court held outright that under a constitutional provision similar to ours the Governor had the power to remit a forfeited bail bond. See also: *Williams* v. *Shelbourne,* 102 Ky. 579, 44 S. W. 110; . . .

"In *Harbin* v. *State,* 78 Iowa 268, 43 N. W. 210, the defendant Harbin failed to appear and an action on the bail bond was instituted and judgment rendered thereon. Almost a year after judgment, the Governor issued a proclamation remitting $600.00 of the $795.00 forfeiture, providing the balance plus costs, was paid . . . The judgment was not satisfied of record and execution was issued. A proceeding was instituted to stay the collection of the judgment. The court said: 'Had the Governor authority, after the bond was prosecuted to judgment, to remit any part thereof? The power of the Governor to make such remission after the entry of the breach of the conditions of the bond by the justice, and before judgment, is not questioned in this case; the point in argument being that, after judgment there is no forfeiture within the meaning of the law, but a judgment over which the Governor has no control or right of remission. The question involves a construction of Section 16, Article 4, of the Constitution, the essential part of which is that the Governor "shall have the power to remit fines and forfeiture under such regulations as may be prescribed by law" [same as ours] . . . The case deals with the question of the claim being so changed that it is no longer a forfeiture within the meaning of the law as to the authority of the Governor to remit.'

After discussing the argument of whether the Governor had authority to remit after judgment, and deciding in the affirmative, the court further said: 'The principle is of so much importance as to have a foundation in Constitutional enactment. It hardly needs argument or citation of facts to show that reasons might exist for this beneficent act on the part of the Governor, as well after judgment on a forfeiture as before . . . and we think it the spirit of the law that this large discretion with which the Governor is invested extends to the time of payment of the forfeiture, whether after judgment or before.' "

The case of *Harbin* v. *State,* 78 Iowa 268, was cited by this court in *Tinkle* v. *State* as authority for holding that the Governor had authority to remit the forfeiture *whether after judgment or before.* In said case, the point in argument was, that after judgment there is *no* forfeiture, but a judgment, "civil" (italics ours) over which the Governor has no control or right of remission. In 77 A.L.R. 2d, p. 989, there is this language:

"The judicial procedure for effecting the forfeiture of a bail bond, as reflected in a number of the cases herein, frequently includes two distinct steps. Under this method an order of forfeiture is entered soon after the time at which the principal was in default for appearance. This is generally regarded as in the nature of an interlocutory decree, and an absolute judgment is then entered only after notice to the surety and an opportunity to show cause why final judgment should not be entered. Consideration is frequently given in the cases to whether, when the Governor purports to exercise the power of remission, the prior entry of a final judgment should determine the existence, or at least the scope, of such a power . . . the courts have generally held that a constitutional or statutory grant of power to the Governor to remit 'fines and forfeitures' includes that of remission of a final judgment of forfeiture entered upon a bail bond."

In the case at bar, the origin was in a criminal proceeding: Pucket was charged with a crime (Forgery and Uttering), he made bond; when the case was called for

trial he failed to appear and a forfeiture was taken on his bond; and later a trial by jury was had on the bond forfeiture and verdict rendered against Ted Hood, the bondsman. The trial by a jury on the bond did not change the character of the proceeding from a criminal to a civil case: it had its origin in a criminal proceeding, and it made no difference whether the judgment was rendered after a trial by a jury or from an interlocutory order by the court. Being a criminal proceeding, the Governor had the authority, under the Constitution, to issue his proclamation remitting, extinguishing, cancelling, and releasing the forfeiture of the bond and the judgment rendered thereon by the Lower Court, and said Proclamation also had the same effect as to the costs in the case.

The judgment of the Lower Court is reversed and said forfeiture is set aside.

Justice HOLT not participating.

Justice MCFADDIN dissenting.

ED. F. MCFADDIN, Associate Justice (dissenting). The Majority Opinion in the present case follows the Majority Opinion in *Tinkle* v. *State,* 230 Ark. 966, 328 S. W. 2d 111. In fact, the Tinkle case would probably have to be overruled in order to reach any other conclusion except that reached by the Majority in the present case.

But I dissented in the case of *Tinkle* v. *State,* and I dissent in the present case: because I am thoroughly convinced that my dissent in *Tinkle* v. *State* was and is correct, and I persevere in that view by dissenting in the present case in the hope that at some time *Tinkle* v. *State* will be overruled.

5-3127 372 S. W. 2d 816

Opinion delivered December 9, 1963.

Dinning & Dinning, for appellant.

David Solomon, for appellee.

CARLETON HARRIS, Chief Justice. This litigation relates to the changing of the beneficiary in several insurance policies by a subsequent will. W. L. Clements, a resident of Phillips County, owned considerable real property in Desha and Phillips Counties, and seven insurance policies payable to his estate. One of these policies had been issued by the Mutual Life Insurance Company of New York in the amount of $25,000.00, and the other six policies, each in the amount of $10,000.00, had been issued by the Equitable Life Assurance Society of the United States.

Approximately two weeks before his death,[1] Mr. Clements made a holographic will, the provisions pertinent to this litigation, reading as follows:

"I hereby will to my wife Sarah Clements a $25,000.00 insurance policy made payable to my estate with the Mutual Life of N. Y. and written by Jim Hudson, Policy in my Lock box at the Phillips Nat. Bank where all papers are.

"I hereby will to my nieces and nephew all real estate in Desha County and Phillips County, Ark. namely Katherine Clements now of Memphis, Tenn., Mrs. Roy Turner of Lexa, and Lawrence Clements of Barton together with $60,000.00 worth of Insurance with the Equitable Life Insurance Co. with instructions that all my debts and taxes be paid. And all the property be held together for 5 years and rented to my present tenant for that period of time if he wants it on present terms less the clause on clearing in his present contract."

No children were born to the marriage between Mr. and Mrs. Clements.

Petition was filed in the Probate Court of Phillips County for the probating of this instrument, and the will was duly admitted to probate, Lawrence Clements and Harry Neblett being named executors, as provided in the will. When the inventory was filed, no mention was made of the insurance policies, and appellant filed her exceptions, and subsequently, on May 5, 1961, filed her petition for statutory allowances and assignment of dower, alleging that she was the surviving widow of W. L. Clements; that she had renounced under the will,[2] and was entitled to one-half of the gross value of all property owned by her husband at the time of his death, including one-half of all insurance proceeds payable to

[1] Mr. Clements died on November 1, 1959, less than a year after his marriage to appellant.

[2] Ark. Stat. Ann. § 60-501 (Repl. 1961) provides: "When a married man dies testate as to any part of his estate, or when a married woman dies leaving as her last will one executed prior to her marriage, the surviving spouse shall have the right to elect to take against the will and to take such part of the property as he or she would have taken had the deceased spouse died intestate."

his estate. After the filing of various pleadings, counsel entered into a stipulation, as to pertinent facts, and the Probate Court rendered its decision on the basis of the stipulation,[3] no oral testimony being heard. Thereafter, the court entered its findings as follows:

"That the proceeds of the six (6) policies of insurance issued by The Equitable Life Assurance Society of the United States on the Life of W. L. Clements are not assets in the hands of the Executors, since the Testator, W. L. Clements, changed the beneficiaries thereof by his Last Will and Testament, and such proceeds are the property of Katherine Clements, Mrs. Roy Turner and Lawrence Clements as beneficiaries thereof. That the widow, Sarah H. Clements, had no vested interest in the six (6) policies of insurance issued by Equitable Life Assurance Society of the United States. That the proceeds of the insurance policy issued by The Mutual Life Insurance Company of New York on the life of W. L. Clements are not an asset of the Estate of W. L. Clements, since the Testator changed the beneficiary by his Last Will and Testament, and such proceeds are the property of Sarah H. Clements, as such beneficiary, and that the Executors should deliver to her such proceeds they now hold. That the widow, Sarah H. Clements, is entitled to one-half (½) of the personal property of the Estate as dower and shall not be charged with any claims or costs of administration * * *"

"* * * that Sarah H. Clements, as widow of W. L. Clements, is allotted as dower one-half (½) of the real property owned by W. L. Clements at the time of his death, subject to one-half (½) of the mortgage indebtedness on said lands, * * *"

From the order entered, appellant brings this appeal. For reversal, appellant argues two points, as follows:

[3] This, *inter alia,* reflects that all taxes and claims filed against the estate have been paid, and the estate is solvent.

I.

"The proceeds of the seven (7) policies of insurance, payable to the estate of the decedent, passed to his executors as assets of the estate subject to the dower interest of the appellant as provided under Sections 60-501, Arkansas Statutes.

II.

"The devise to the appellees 'of all real estate in Desha County and Phillips County, Arkansas, together with $60,000.00 of insurance with the Equitable Life Assurance Society of the United States with instructions that all my debts and taxes be paid' constituted a contingent devise of property conditioned upon the payment of the debts and taxes."

We proceed to a discussion of these points in the order listed.

I.

In all of the policies of insurance here involved, Clements reserved the right to change the beneficiary, and this right existed at the time of his death. We think this point is controlled by *Pedron* v. *Olds,* 193 Ark. 1026, 105 S. W. 2d 70. That case involved a controversy between the wife and daughter of the insured, relative to the proceeds of insurance policies in which the wife was named as beneficiary; subsequently, however, the insured executed a will, designating his daughter as beneficiary. In holding with the daughter, this court said, "Did the will have the effect of changing the beneficiary? The lower court decided that it did.

"It is conceded by both parties that the beneficiary named in the policies had no vested interest, because under the provisions of the policies, he had the undoubted right to change the beneficiary in the manner therein provided. Under such circumstances, it is generally held that the beneficiary has no vested interest in the insurance during the lifetime of the insured, and such is our own holding. We do not appear to have heretofore de-

cided the exact question here presented, that is, whether the insured may change the beneficiary, where the power to change is given in the policy, without the consent of the beneficiary, by a testamentary provision, or must he pursue the method prescribed in the policy. The cases from other jurisdictions are in hopeless conflict, but it seems to us that the better rule is with the cases that hold that the insured may change his beneficiary by valid will. * * *"

"* * * There are numerous cases holding that a policy may be assigned by the insured without the consent of the beneficiary where there is no vested interest in the beneficiary, and if the insured quits paying the premiums and the policy lapses, the beneficiary loses his interest therein along with the insured, and we can perceive no valid reason why, under similar conditions, a testamentary provision may not have the effect of changing the beneficiary. In the case before us, the beneficiary had no vested interest during the lifetime of the insured, and neither did the legatee under the will. Both provisions became effective on his death. The provision in the will conflicted with the provision in the policy designating appellant as beneficiary, and this being the insured's last expression on the subject, it ought to control."

This holding was reiterated in *Eickelkamp* v. *Carl,* 193 Ark. 1155, 104 S. W. 2d 814. Eickelkamp held a life insurance policy which named his wife as beneficiary. This policy, likewise, contained the usual provision that the insured could change his beneficiary by giving written notice to the company at its home office, and the change would become effective upon the company's endorsement of the change on the policy. Thereafter, Eickelkamp and his wife were involved in an automobile collision while on a journey. Mrs. Eickelkamp died about noon, and Mr. Eickelkamp passed away some five or six hours later. At some time during that period, Eickelkamp was advised of his wife's death. He then summoned two nurses and the secretary of the hospital, and executed a will shortly before he died, in which he

changed the name of the beneficiary in the life insurance policy from his wife to her father. Suit was instituted by the father of Eickelkamp, sole heir of the deceased, who would, of course, recover the proceeds of the insurance policy if it were payable to his son's estate. We held that the change of beneficiary by will was valid, relying upon *Pedron* v. *Olds, supra.*

The Arkansas cases cited by appellant are not cases involving change of a beneficiary, or where the widow was taking against the will. Appellant cites a Missouri case, *Plummer* v. *Metropolitan Life Insurance Company,* 229 Mo. App. 638, 81 S. W. 2d 453, which does involve the change of a beneficiary in an insurance policy by testamentary provision. The Missouri court held that the provision in the will changing the beneficiary in the policy was valid, and the beneficiaries named in the will were entitled to receive the proceeds as against the beneficiary named in the policy, but held that the proceeds were subject to prior payment of the decedent's debts. Appellant asserts that this is the better reasoning, but we can only say that cases from other jurisdictions are rarely relied upon when the question has already been passed upon by this court. We, therefore, hold that the provisions in the will, designating the particular beneficiaries for certain policies, had the effect of changing the beneficiary named in the insurance policies (the estate), *i.e.,* the effect was the same (between the parties) as though Clements had written to the insurance companies and followed their required procedure in changing beneficiaries. It follows, therefore, that the Chancellor was correct in holding that the proceeds of these policies did not pass to the executors as assets of the estate, and accordingly, were not subject to the dower interest of the appellant.

II.

Learned counsel for appellant vigorously contend that the devise to appellees of all real estate in Desha and Phillips Counties, together with the $60,000.00 worth of insurance, constituted only a contingent devise of the property, conditioned upon the payment of the debts and

taxes. It is asserted that the only debt that was outstanding at the time of Clements' death was a certain indebtedness to the Equitable Assurance Society, originally in the sum of $60,000.00, and secured by mortgage, executed in November, 1958, on real estate located in Desha County.[4] Appellant states:

"It is not a mere coincidence that the $60,000.00 insurance proceeds were the same amount as the mortgage indebtedness. It is not a coincidence that the insurance policies were written by the Equitable Assurance Society of the United States and the mortgage was made to the same company."

Thus, appellant asserts that Clements intended for the mortgage indebtedness to be paid from the $60,000.00, and that any other construction does violence to the intention of the testator.

Of course, the wishes of the testator, as expressed in his will, are rarely carried out where the widow elects to take against the will. It may well be that Clements intended that the indebtedness to the Equitable be paid out of the $60,000.00, with the beneficiaries named taking the balance. But, it is also evident that Clements did not intend for his wife to take any of his real property. When Mrs. Clements elected to take against the will, it became impossible for the testator's wishes to be followed. The election by appellee, of course, meant that, as to her, the husband had died intestate—*i.e.*, "there was no will." She cannot be deprived of statutory rights because of provisions in the instrument adverse to her interest—but neither can her rights be enlarged because of subsequent provisions favorable to her interest. To use an old expression, "She cannot have her cake and eat it, too." This not only seems the proper logic to employ, but is likewise supported by authority. While there are apparently no Arkansas cases dealing with this exact situation, the question has been passed upon by courts

[4] A number of claims were filed against the estate, and, offhand, it would appear that some of these claims represent debts incurred before the death of Clements; however, this cannot be definitely determined from the record, and is immaterial in this litigation.

of other states. In *Ashelford* v. *Chapman, et al.* 105 Pac. 534 [Kansas], the testator left a will, devising all real estate he owned in Kansas to his children, but also provided for his wife in the will. Clause 9 of the instrument was as follows:

"It is my further will that in the event at my decease I am indebted to any person or persons for the purchase price of all or any part of the real estate owned by me, or for any lien created upon any of said real estate, for the payment of the purchase price of said real estate or any part thereof, that all my children shall equally contribute out of their share or shares of my estate given and bequeathed, granted and devised to them under this, my will, an amount sufficient to pay off all of said indebtedness."

The widow renounced provisions for her benefit contained in the will, electing to take under the law, but then sought to enforce the cited clause against the children, contending that her dower should be set apart free from any liens. The Supreme Court stated:

"If provision be made for the widow in her husband's will, she shall be cited to appear and make her election whether she will accept such provision, or take what she is entitled to under the law of descents and distributions, but she shall not be entitled to both. * * * The widow's portion cannot be affected by any will of her husband, if she object thereto and relinquish all right conferred upon her by the will. [Citing statute] * * * From these statutes it is plain that a widow provided for by her husband's will, to which she has not previously consented, has the choice of two rights, one under the statute of descents and distributions, and one under the will; but she cannot have both, except, of course, in cases where such is the purpose of the will. She may take either, but the election of one is a relinquishment of the other. Her choice is between will and no will. If she take under the law, there is no will so far as her rights are concerned. Her share is carved out of the estate according to the law of descents and distributions precisely as if no will had been made. Then the

will operates upon the residue. *The will of what remains after she has been satisfied may create rights, and may impose obligations, but she is a stranger to them.*[5a] Her election in effect partitions the estate into two separate and independent domains; one governed exclusively by the statute of descents and distributions, and one governed exclusively by the will. She occupies one, the beneficiaries of the will occupy the other, and there are no reciprocal relations between them. The beneficiaries of the will owe her no duty under the will, because she renounced all rights under the will, became an alien to it, and betook herself to her own peculiar demesne. *She cannot invade their territory, and demand of them anything secured or enjoined by the will, because she satisfied every claim she possesses when she elected to take according to law.*"[5b]

Similarly, in the New York case, *In Re Campbell's Estate,* 13 N.Y.S. 2d 773, it was held that the testator's widow, who renounced a legacy to her of interest in a lodging house by electing to take dower in the testator's estate, could not enforce a condition in the will which bequeathed half of the testator's lodging house business to his son, with the provision that the son should conduct the entire lodging house business for the benefit of other members of the testator's family, so long as they desired, without charge. As the court stated,

"The condition written by the testator in his will was limited to testamentary benefits and solely to the members of his family who accepted such testamentary benefits. The widow by her rejection of the legacy is, therefore, excluded from the right to enforce the condition."

In Volume 97, C.J.S., Section 1288(b), Pages 136 and 137, we find:

"Generally, the widow's renunciation of her husband's will precludes her from claiming or accepting any benefits thereunder, * * * and the provisions

5a, 5b Emphasis supplied.

made for her in the will lapse, or become immaterial, becoming in effect, obliterated from the will, * * *.

"The rule precluding the widow from claiming benefits under the will has been applied to such benefits as a charge for her support, a provision for a home or its occupation, for income, and annuity, or for her funeral expenses. Renunciation operates as an extinguishment of trust provisions solely for the benefit of the person renouncing, and nullifies the interest of the surviving spouse as an income beneficiary of a trust created for her and others; and it also extinguishes a grant of a general power of appointment which otherwise might be exercised by the person renouncing to the benefit of his own estate.

"Moreover, a widow, who has renounced the will, may not, in order to increase her distributive share, compel persons taking under the will to comply with provisions therein, or an executor to make a sale of property or to serve for a nominal fee; and where a lease is made to the widow to effectuate provisions in the will for her benefit, by renunciation of the will she loses all rights both under will and under lease."

Since, as far as Mrs. Clements is concerned, her husband died intestate, it follows that she is entitled to her dower interest in the lands (though devised to others), but, at the same time, she is charged with one-half of the indebtedness. In *Harris* v. *Mosley,* 195 Ark. 62, 111 S. W. 2d 563 we held that where land was mortgaged when appellant (the widow) married deceased, (as here) her dower rights in the land were subject to the rights of the mortgagee and those holding under him.

The litigation is thus disposed of, but another interesting question is presented in that the stipulation reflects that the real property on which the mortgage existed was sold by agreement of the appellant and appellees. The mortgage debt was deducted from the sales price, and the balance of the funds divided, one-half to Mrs. Clements, and the remaining one-half to the appellees. The mortgage debt was not probated as a

claim against estate and Mrs. Clements apparently made no objection to the sale, but rather, voluntarily joined in the execution and delivery of the deed. Appellees are of the opinion that, by this action, appellant waived any rights she might have in attempting to secure the payment of the mortgage from the general assets of the estate. In view of what has heretofore been said, a discussion of this point is unnecessary.

Finding no error, the judgment is affirmed.

COONS *v.* LAWLER.

5-3069 372 S. W. 2d 826

Opinion delivered December 9, 1963.

Q. Byrum Hurst, for appellant.

Wood, Chesnutt & Smith, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a boundary line dispute between adjacent landowners, and the precise question is whether appellant Coons acquired title by adverse possession to the strip in dispute.

On April 15, 1953, appellant Coons purchased a tract on Lake Hamilton, lying south of and adjoining the property owned by appellee, Mary Lawler; and some time later (just when is disputed) Coons planted a row of willow trees for a distance of approximately 200 feet on appellee's property and being 20 feet north of the line stated in Coons' deed. This seems to have been deliberately done, with full realization that the row of willow trees was 20 feet north of the correct boundary.

On June 30, 1961, appellant Coons filed the present suit against Mary Lawler, claiming: that for more than seven years he had been in adverse possession of all the 20-foot strip up to the said row of willow trees and had acquired title to the said 20-foot strip by sufficient acts of adverse possession; and that Mary Lawler should be restrained from interfering with Coons' ownership of said 20-foot strip. By answer and cross complaint, Mary Lawler pleaded record ownership of the 20-foot strip in issue; denied Coons' claim of title by adverse possession; prayed that her title to the disputed 20-foot strip be quieted; and prayed that Coons be required to remove a boathouse he had constructed in front of her property and bordering on Lake Hamilton. The cause was heard by the Chancery Court on evidence *ore tenus;* and from a decree in favor of Mary Lawler, Coons brings this appeal and urges two points, being:

"I. The plaintiff held actual open, notorious, continuous, hostile, and exclusive possession of the land in question for a period of seven years prior to the time this action was instituted without a break in the continuity of possession.

"II. The lower court decision was against the weight of the evidence."

Both of these points go to the sufficiency of Coons' evidence to support his claim of adverse possession, and to the sufficiency of such possession; so we consider the two points together. Coons testified that as soon as he purchased his property in 1953 he planted the said row of willow trees; had a light pole erected on the 20-foot strip; and had used the 20-foot strip for a trailer park for more than seven years. Some of his witnesses supported some of the claimed acts of adverse possession done by him at various times since 1953. Such testimony related to: construction of a septic tank in 1954 or 1955; filling in a low place on the strip in 1953 or 1954; parking trailers on the property at irregular intervals; and building the boat dock at some date not definitely shown. Mary Lawler established by testimony of herself and

others: that she was the record owner of the title to the 20-foot strip in dispute; that in 1957 and 1958 her tenant had a garden on the disputed strip; that there were no trailers on the disputed strip in 1957 or 1958; and that when Mary Lawler's true line was surveyed in 1960 there was only one trailer that extended over her line and that for a distance of three or four feet. Several witnesses called by Mary Lawler testified that there were no willow trees on the disputed strip in 1957.

Thus, there was not only a sharply disputed fact question as to whether Coons had exercised acts of adverse possession for the required statutory period of seven years, and also there was the legal question as to whether Coons had acquired title by adverse possession, even if he had done all of the acts he sought to establish. On either point the Chancery decree was correct. If the Chancellor believed Mary Lawler and her witnesses, then Coons had not exercised any acts of adverse possession for the required period of seven years; and we cannot say that the Chancery decree is against the preponderance of the evidence on this factual issue.

As to the legal question: even if Coons did all that he and his witnesses claimed, nevertheless such acts fall short of that adverse possession required for a trespasser's claim to ripen into a title. Our statute allowing seven years adverse possession to ripen into title is Ark. Stat. Ann. § 37-101 (Repl. 1962); and such adverse possession[1] must be actual, notorious, exclusive, continuous, and hostile. Some of our cases explaining and applying these requirements are these: *Dowdle* v. *Wheeler,* 76 Ark. 529, 89 S. W. 1002; *Sanderson* v. *Thomas,* 192 Ark. 302, 90 S. W. 2d 965; *DeMers* v. *Graupner,* 186 Ark. 214, 53 S. W. 2d 8; *Crawford* v. *Davis,* 147 Ark. 126, 227 S. W. 5; *Brown* v. *Bocquin,* 57 Ark. 97, 20 S. W. 813; *Sharp* v. *Johnson,* 22 Ark. 79; and *Fulcher* v. *Dierks,* 164 Ark. 261, 261 S. W. 645. To prevail on a claim of adverse posses-

[1] One of the best considered cases on the essential acts necessary to create title by adverse possession, and in which most of the Arkansas cases are listed, is *Dierks* v. *Vaughn,* 131 F. Sup. 219, affirmed 221 F. 2d 695. See also Jones "Arkansas Titles" (Original Vol. and Annotated Supplement) § 1497 *et seq.*

sion not under color of title (and Coons does not claim color of title), one must show actual or pedal possession to the extent of the claimed boundaries. *Griffin* v. *Isgrig,* 227 Ark. 931, 302 S. W. 2d 777; *Sturgis* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236.

The decree in favor of Mary Lawler is in all things affirmed.

KENNEDY *v.* COUILLARD.

5-3077 372 S. W. 2d 825

Opinion delivered December 9, 1963.

Batchelor & Batchelor, for appellant.

Jeptha A. Evans, for appellee.

GEORGE ROSE SMITH, J. The appellant William B. Kennedy and the appellee Vada Kennedy Couillard were divorced in 1955. They had owned a 41.80-acre tract of land as tenants by the entirety. During the negotiations in the divorce case the couple purportedly executed a warranty deed conveying the land to Kennedy's parents, who later reconveyed it to him. This is a suit by Mrs. Couillard to cancel both conveyances, on the ground that her signature upon the first deed was a forgery. The only question we need consider is whether the chancellor was right in holding that the deed was in fact forged.

There were two hearings in the court below. At the first one Mrs. Couillard denied having signed the deed in question. Dr. Orlando Stephenson, testifying as a handwriting expert, explained his reasons for thinking the deed to be a forgery. Mrs. Couillard's testimony was contradicted by Kennedy and his mother, who both said that they saw Mrs. Couillard sign the deed. After the hearing the chancellor gave a written opinion in which he discounted the conflicting testimony of the interested parties and concluded that he should accept the disinterested opinion of Dr. Stephenson, which was then the only expert testimony in the record.

Before a decree was entered the case was reopened for a second hearing. The notary who took the acknowledgments, appearing as a witness for Kennedy, identified her own signature as genuine, but she was unable to remember after seven years whether Mrs. Couillard had signed the deed in her presence. Kennedy also introduced the testimony of another handwriting expert, Earl Davenport, who was of the opinion that the questioned signature was genuine. After the second hearing the chancellor announced that the additional testimony had not affected his earlier conclusions. We think the court was in error, for the supplemental proof destroyed whatever value Dr. Stephenson's opinion may have had and tipped the scales decidedly in favor of the appellants.

Dr. Stephenson's testimony, standing alone, was undeniably convincing. He based his opinion solely upon a comparison of the disputed signature with 19 specimen signatures that the former Mrs. Kennedy (now Mrs. Couillard) had written upon a single sheet of paper. The witness pointed out that in the challenged signature there was a break in the name Vada, where the pen had been lifted from the paper, but there was no such break in any of the 19 specimens. Moreover, in all of the 19 specimens there was an upward flourish of the pen at the end of each name (Vada and Kennedy), but there was no similar flourish in those names as they appeared in the deed. Upon this reasoning Dr. Stephenson concluded that the signature in dispute was a forgery.

Now it happened that on May 17, 1955, the day on which the deed in controversy was apparently executed, Vada Kennedy signed three other documents: A waiver of service, an agreement to take depositions, and an application for the purchase of traveler's checks. These three signatures are contemporary and admittedly genuine. Davenport, the appellants' handwriting expert, demonstrated with much force the great similarity between the three authentic signatures and the one upon the questioned deed. Among other things, all four contain the break in the name Vada that is absent in the 19 specimens. Again, all four lack the flourishes that characterize every one of the 19 specimens. In fact, Davenport pointed out certain inconsistencies in the various flourishes that led him to believe that they did not represent the writer's normal penmanship and had been deliberately inserted in the 19 specimens prepared for comparison purposes.

It has frequently been held, for obvious reasons, that specimen signatures written solely for use at the trial are not an admissible basis for comparison. Jones on Evidence (2d Ed.), § 1294. But even if these 19 specimens should be considered admissible they have no persuasive force. Their dissimilarity to the three genuine signatures of May 17, 1955, is too marked to be overlooked. Yet Dr. Stephenson's conclusions were based upon no other comparison. If he is right in saying that the signature upon the deed under attack is a forgery, then we should have to conclude upon exactly the same reasoning that the three authentic contemporary signatures were also forgeries.

Dr. Stephenson's testimony is now shown to prove nothing except the fact that the 19 specimen signatures contain characteristics that distinguish them from the signature in issue. With his testimony eliminated the appellee is left with only her denial of having signed the deed—a denial that is somewhat weakened by the fact that she apparently thought it best to disguise her true signature before submitting it for comparison. The appellee's testimony is contradicted by her former hus-

band, by the latter's mother, by the expert Davenport, and to some extent by the notary public. We are compelled to conclude that the appellee did not sustain the burden of proving her case by a preponderance of the evidence.

Reversed.

HANEL *v.* SPRINGLE, ADM'R.

5-3130 372 S. W. 2d 822

Opinion delivered December 9, 1963.

Lee Ward and *Howard A. Mayes,* for appellant.

William B. Wharton, Kirsch, Cathey & Brown, for appellee.

PAUL WARD, Associate Justice. This appeal comes from an order of the Probate Court admitting to probate the will of John P. Hanel who died at the age of 64 years. The will was offered for probate by the deceased's sister, Charlotte Springle, and it is being contested by appellant who is the deceased's brother.

John P. Hanel, who had worked as a farm hand for more than 40 years for Miss Lillian Howell and her sister, Miss Nettie Howell, had accumulated real and

personal property to the extent of approximately $30,000. He left no direct descendants; but he did leave three surviving sisters and the appellant, a brother. At the time of his death the deceased lived in the home of the Howell sisters.

In April, 1962 when Hanel became ill it was arranged for him to go to the hospital. Before leaving home, he signed the paper which was later probated as his will. After his death in January, 1963 this paper was found among his private papers in the Howell home, and it reads as set out below.

"After expenses are paid, cash to be divided to my sisters, Lottie, Josephine and Marie and Bonds 9 (1000) H, 6 (1000), 1 (500) G. Bonds, 1 (1000), 1 (500) E. Bonds, also $2,000.00 postal savings. Divide my land to my three sisters.

"My car and cattle go to Howells.

/s/ John P. Hanel"

"Witness

/s/ Nettie Howell

/s/ Lillian W. Howell"

Urging a reversal, appellant relies on the three separate grounds hereafter set out and discussed.

One. It is first argued: "There is no proof that John P. Hanel wanted to make a will in April, 1962, when the proffered instrument was prepared." After hearing all the testimony the trial court found that the deceased ". . . intended the aforesaid instrument to be his last will and testament." We think the evidence clearly supports that finding. The unquestioned and uncontradicted testimony of Lillian Howell, 71 years old, and Nettie Howell, 69 years old, was to the following effect: while Hanel was packing his bag to go to the hospital Nettie asked him if he had made a will. His reply was that he had started to do so several times but never had. Following that, he got a list of all his assets and gave the list to Nettie as she wrote out the instrument in question.

When he was asked about his brother, Rudolph, he replied: "Rudolph has got all of my money that I want him to have. If I gave him any, he would drink it up." Nettie and John (deceased) both used the word "will" during the discussion preceding the signing by the deceased and the sisters.

In the complete absence of any suggestion or contention that the deceased intended to do otherwise than to execute a will, we must conclude that the trial court's finding is supported by the weight of the evidence.

Two. We can see no merit in appellant's contention that "The proffered instrument contains no testamentary provisions." It is true, of course, that the instrument contains no such words as "devise" and "bequeath" which are often found in many wills, but, as we have often pointed out, such formalities are not necessary to the validity of a will. In the early case of *Arendt* v. *Arendt,* 80 Ark. 204, 96 S. W. 982, this Court in approving a will in the form of a letter written by the deceased to his wife, said:

"This will is in the form of a letter from William Arendt to his wife. But, to quote the language of a distinguished author, 'the law has not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.' "

See also the case of *Cartwright* v. *Cartwright,* 158 Ark. 278, 250 S. W. 11, where we again held a letter to be a will, using this language: "If the offered instrument is testamentary in effect, its particular form is unimportant . . . ."

See also 57 Am. Jur. *Wills* § 7 (1948), where we find:

"The question whether or not a particular writing is testamentary depends on the dispositions which it makes, and not on the form of the instrument, the use of legal or conventional terms, or the name by which it is designated."

In the instrument under consideration the deceased did not use the conventional words "give and bequeath to my sisters", but instead he used the words "to be divided to my sisters". The latter wording leaves no doubt in our minds that the deceased meant for his sisters to have his property.

Three. Finally, it is insisted that "The proffered instrument was not executed with the formalities required by Arkansas law for a will". This contention is based on the language used in Ark. Stat. Ann. § 60-403b (Supp. 1961) and the testimony of the Howell sisters. The above sub-section reads: "The attesting witnesses must sign at the request and in the presence of the testator".

It is admitted that the two Howell sisters signed the instrument in the presence of the deceased but it is contended that they did not sign "at the request of the testator". It is true that when each of the sisters was asked if the deceased specifically requested her to sign the instrument, the answer was that he did not. Although it appears from the above that, technically, there was a non-compliance with the provisions of the statute, we are convinced there was a substantial compliance under the facts and circumstances of this case. There can be no doubt that the deceased understood he was making a will. He was asked if he wanted to make a will, and his actions showed that he did; he was ill and was leaving for the hospital at the time; he was asked if he wanted to leave any property to his brother, and he explained why he did not; and, when he signed the instrument the two sisters were in the room with him and he saw and permitted them to sign as witnesses.

It would be a strict, if not indeed a dangerous, construction of the statute to require proof that the testator

must make a specific request of each witness to sign his name to a will to make it valid. If the strict construction of the statute here advocated by appellant were approved, it could, in all probability, invalidate many wills heretofore drawn by competent and careful attorneys. The purpose of the law relative to the execution of wills is and should be to protect testamentary conveyances against fraud and deception and not to impede them by technicalities. In the case of *Anthony* v. *College of the Ozarks,* 207 Ark. 212, 180 S. W. 2d 321, in construing the same statute here involved, we said (quoting *Rogers et al* v. *Diamond,* 13 Ark. 474):

" 'The policy of the statute is to guard against frauds in the execution of wills, so often made under circumstances when the testator is liable to be imposed upon, or unduly influenced . . . .

* * * * *

The fact of publication, therefore, is to be inferred or not, from all the circumstances attending the execution of the will.' "

Also, in this early case of *Rogers et al* v. *Diamond, supra,* 487, this Court, in construing this same portion of the statute said:

". . . each of the attesting witnesses must sign his name as a witness, at the request of the testator, *but such request might be inferred* from the attendant circumstances in proof by signs or gestures as well as words . . . ." (Emphasis added.)

The above quoted statement was approved in *McDaniel, ad.* v. *Crosby, et al.,* 19 Ark. 533, and also in *Leister* v. *Chitwood,* 216 Ark. 418, 423-424, 225 S. W. 2d 936.

In our opinion, the facts and circumstances revealed above amply sustain the action of the trial court in admitting subject instrument to probate as the last will and testament of John P. Hanel.

Affirmed.

Opinion delivered December 9, 1963.

Crouch, Blair & Cypert, for appellant.

Thomas Pearson, James R. Hale, for appellee.

SAM ROBINSON, Associate Justice. Appellant, John J. Carroll, is in the business of selling poultry and livestock equipment. He also sells and erects "Coldbath" all steel poultry buildings. On June 14, 1960, appellee, W. K. Jones, purchased from appellant a prefabricated Coldbath chicken house, 40′ x 330′. Under the terms of the contract of purchase, hereinafter referred to as the original contract, Carroll was to put the building together on Jones' farm, along with certain poultry equipment. The total contract price was $12,560.00.

After the building was constructed by Carroll and put in operation by Jones, it fell down. At the time Jones had about 7,000 hens in the building, along with poultry equipment, such as nests, water troughs, etc. The hens actually belonged to the Nutrena Company. Jones was

feeding and looking after them for the consideration of $600.00 per month. After the building collapsed the Nutrena Company removed from the premises the chickens that were not killed. Jones' contract with the Nutrena Company was thereby terminated.

Later, Carroll and Jones entered into an agreement whereby Carroll agreed to reconstruct the building. The agreement providing for the reconstruction of the building is as follows: "This agreement made and entered into on this 13th day of February, 1961, by and between John J. Carroll Company, Party of the First Part, and W. K. Jones, Party of the Second Part, is as follows: First Party hereby agrees to reconstruct present metal chicken house to the best of their ability, replacing or repairing all water fountains and automatic feeders and reinstall all wiring and electrical system using present electrical wiring. First Party will use Thrifto Pane plastic in replacing the plastic now in use. Party of the First Part has ninety days to reconstruct said building to the satisfaction of the Party of the Second Part. When job is completed the Party of the First Part will hire an independent engineer to test the strength of the trusses and other parts of the framework as to durability. Each truss is to have 5600 pounds vertical strength. The party of the first part will pay the party of the second part $1,000.00 for damages in loss of contract with Nutrena. After the terms of this agreement have been complied with this will complete full settlement between parties."

Subsequently, Jones filed this suit against Carroll for breach of the original contract, alleging that the contract was partly in writing and partly oral. The Complaint alleges: "At all times mentioned herein the defendant knew the purpose for which said building was to be constructed and used, and as a part of said contract the defendant represented and warranted to the plaintiff that said plans and specifications would be reasonably satisfactory; that all of the materials to be used in the erection and construction of said building would be reasonably satisfactory; that all of the materials to be

used in the erection and construction of said building would be reasonably satisfactory and suitable for the purposes for which they were to be used; and that said building would in all respects be erected and constructed in a reasonably suitable and satisfactory manner." Jones further alleged that Carroll had breached the contract and as a consequence thereof he had been damaged in the sum of $6,221.28. Later the Complaint was amended and there was an allegation of damages in the sum of $11,221.28.

Defendant denied all the allegations of the Complaint and alleged: "That in consideration of any claim for damages on the part of the plaintiff resulting from any equipment or material furnished by the defendant or any construction undertaken by the defendant, the defendant furnished to the plaintiff $1,000.00 in new brooder stoves and equipment, in addition to performing reconstruction work on the building described in the plaintiff's complaint for which the defendant received no pay and which he was under no obligation to do, but did as a consideration on this settlement." Carroll also cross-complained and asked judgment in the sum of $2,183.35 as the unpaid balance on the original contract, and for $1,000.00 alleged to have been paid in the settlement agreement.

Upon a trial to a jury there was a verdict in the sum of $4,000.00 in favor of Jones; a judgment was rendered accordingly. Carroll has appealed.

First appellant contends that the second agreement whereby Carroll undertook to reconstruct the building superseded the original contract, and therefore, Jones can not recover damages sustained by reason of the breach of the original contract by Carroll. Perhaps paragraph 2 of appellant's answer can be construed as setting up the defense of a supplemental agreement superseding the original contract, but the answer is not entirely clear on this point. The terms of the alleged settlement agreement are not set out in the answer, nor is the agreement, which is in writing, made a part of the answer as an exhibit. The answer, in itself, can not be said to be

sufficient to apprise the plaintiff that the defendant was relying on a settlement agreement as a rescission of the original contract.

The original contract was introduced in evidence by the plaintiff. Counsel for the defendant—appellant—specifically stated that he had no objection to its introduction. Appellee Jones was examined extensively both on direct and cross-examination regarding the original contract, including the details of how it was made and how it was breached. Moreover, other than the doubtful language contained in the answer, there is nothing in the record to indicate that appellant was relying on the supplemental agreement as a defense to the suit on the original contract. The case was tried on the question of whether there was a breach of the original contract, and without objection submitted to the jury on that theory.

In connection with this point appellant relies on *Whipple* v. *Baker,* 85 Ark. 439, 108 S. W. 830, but that case is clearly distinguishable from the case at bar. There, it was abundantly clear that, as a complete defense, the defendant relied on a settlement agreement which had been performed with the exception of the payment of a $47.00 item. The court said that the failure to pay the $47.00 did not authorize the appellee to treat the settlement agreement as null and void. Whipple had performed the other parts of the settlement agreement by dismissing a suit, releasing an attachment, cancelling a lease, and allowing Baker the use of a store for a reasonable time, all of which was done prior to the commencement of the suit then before the court. In the case at bar there was no substantial compliance by Carroll with the settlement agreement.

Carroll agreed to reconstruct the building to the satisfaction of Jones. This was not done. When the building was put up the second time there was danger of it falling again, and at his own expense, Jones had to put two rows of posts in the building from end to end. In addition, there were 120 some odd leaks in the roof. There is evidence that it would cost $5,000.00 to repair the roof to the point where it could be warranted not to

leak. The settlement agreement further provides that "when job is completed the party of the first part will hire an independent engineer to test the strength of the trusses and other parts of the framework as to durability. Each truss is to have 5600 pounds of vertical strength". No test was made as provided in the agreement. It is claimed that a test was made somewhere else on some other building, but this is not as the contract agreement provided or contemplated. In fact, it appears that if a test had been made on the building after the reconstruction, but before Jones put in the extra posts, it would have again collapsed.

The agreement further provides that "party of the first part will pay the party of the second part $1,000.00 for damages in loss of contract with Nutrena". The $1,000.00 was not paid. Carroll did, however, furnish additional equipment to the extent of about $700.00. Moreover, according to the terms of the settlement agreement, it was not to become a complete settlement between the parties until it was complied with. It was never complied with. On this point appellant also relies on the cases of *Swinton* v. *Cuffman,* 139 Ark. 121, 213 S. W. 409, and *Hill-Ingham Lumber Co.* v. *Neal,* 89 Ark. 385, 117 S. W. 247. Both cases are clearly distinguishable on the facts.

Appellant argues that the trial court erred in giving Instruction No. 7, as follows: "You are told that if you find the plaintiff is entitled to recover, by preponderance of the evidence, and that the contract was breached which was entered into on or about the 14th day of June, 1960, or the agreement of the 13th of February, 1961, and that the defendant did not comply with said terms to the satisfaction of the party of the second part as defined by the instructions of the Court in the preceding instruction, you are told that the plaintiff will be entitled to be reimbursed for: (1) Loss of earnings, if any, directly resulting from the breach of the contract. (2) Any repairs made or which you find to be necessary to be made in the future growing out of the breach of the contract. (3) Any damages, if any, to the equipment in the building growing out of a breach of the contract. (4) The

reasonable rental value of the building or any delay, if any, in the completion of construction of said building, growing out of the breach of the agreement, if any."

In support of his argument on this point appellant cites *Plunkett* v. *Meredith,* 72 Ark. 3, 77 S. W. 600; *Graham* v. *Jonesboro L. C. and E. R. Co.,* 111 Ark. 598, 164 S. W. 729; *Northern Const. Co.* v. *Johnson,* 132 Ark. 528, 201 S. W. 510; *Mitchell & Pumphrey* v. *Caplinger,* 97 Ark. 278, 133 S. W. 1032; *Leifer Mfg. Co.* v. *Gross,* 93 Ark. 277, 124 S. W. 1039. None of these cases cited by appellant is in conflict with the holding in *Hooks Smelting Co.* v. *Planters' Compress Co.,* 72 Ark. 275, 79 S. W. 1052, which is the bellwether case in this state on the question of the measure of damages for breach of contract.

The rule of law applicable here on the measure of damages was announced in the old classic case of *Hadley* v. *Baxendale,* 9 Exch. 341. In the Hooks case, Mr. Justice Riddick pointed out that the first rule laid down in *Hadley* v. *Baxendale* is "that damages which may fairly and reasonably be considered as naturally arising from the breach of the contract, according to the usual course of things, are always recoverable". Judge Riddick went on to say that this rule has never been questioned or doubted. In 15 Am. Jur. 442, it is said: "In accordance with the general principle governing the allowance of damages, a party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to be placed, in so far as this can be done by money, in the same position he would have occupied if the contract had been performed." Dozens of cases are cited in support of the text. Moreover, the Uniform Sales Act regarding a breach of warranty is to the same effect. Ark. Stats. 68-1469, paragraph 6.

Carroll is in the business of selling poultry equipment, including the selling and construction of poultry buildings. It can be fairly inferred from the evidence that he is thoroughly familiar with the needs of those producing poultry, and the natural consequences that would follow the collapse of an all metal building con-

taining about 7,000 hens which the owner of the building was feeding for someone else.

Appellee Jones testified that he sustained damages in the total sum of over $15,000.00. On the proposition of loss of earnings, an exhibit was introduced as part of his testimony which shows that he lost $4,700.00 by reason of losing the Nutrena contract. There is evidence that such loss grew out of the collapse of the building. He had been receiving about $600.00 per month from Nutrena before the building fell down. The exhibit shows in detail the expense incurred in repairing the building after it was reconstructed to keep it from falling down the second time; it shows that reasonable rent on the building for two months while it was being reconstructed was $600.00, and it shows in detail the damages to the poultry equipment caused by the falling of the building. We cannot say as a matter of law that any of the items of damages mentioned was not the direct and natural result of the breach of contract.

The trial court refused to give appellant's Instruction No. 3, as follows: "You are instructed that if you find by a preponderance of the evidence that the plaintiff failed to pay the defendant a part of the purchase price of the equipment and building, then you will find the defendant entitled to recover from the plaintiff on his counterclaim that portion of the original purchase price which remains unpaid." The instruction did not take into consideration the evidence of the defendant having breached the contract, and the theory of breach of contract on which the case was tried; hence, there was no error in the court's refusal to give it.

Appellant also argues that the trial court erred in admitting testimony given by Jones regarding the damages he sustained. Jones had prepared a list specifically detailing the damages and the amount of each item. It was stipulated by the parties that he would testify to these items as shown by the exhibit, and the exhibit was introduced in evidence. Appellant objected to it on the ground that it was not relevant or competent, not as to the manner in which the evidence was introduced. The

evidence of the damages appellee sustained was entirely relevant, competent and material. It was, therefore, admissible.

Appellant also complains of the court not having submitted to the jury a form of verdict pertaining to the balance owed by appellee on the original contract, as alleged in the cross-complaint. When the court properly refused to give appellant's instruction No. 3, and appellant failed to ask for a valid instruction in lieu thereof, the jury was left in the dark as to the circumstances in which a verdict could be rendered on the counterclaim. It could have been confusing to the jury to have a form of verdict regarding a counterclaim without having been instructed by the court on the law applicable to such claim. In the circumstances the appellant should have reduced to writing the form of verdict requested. This was not done.

Appellant argues other points, but what we have said covers all the issues raised on appeal.

We find no error. The judgment is affirmed.

GRAVES *v.* WIMPY.

5-3126 372 S. W. 2d 812

Opinion delivered December 9, 1963.

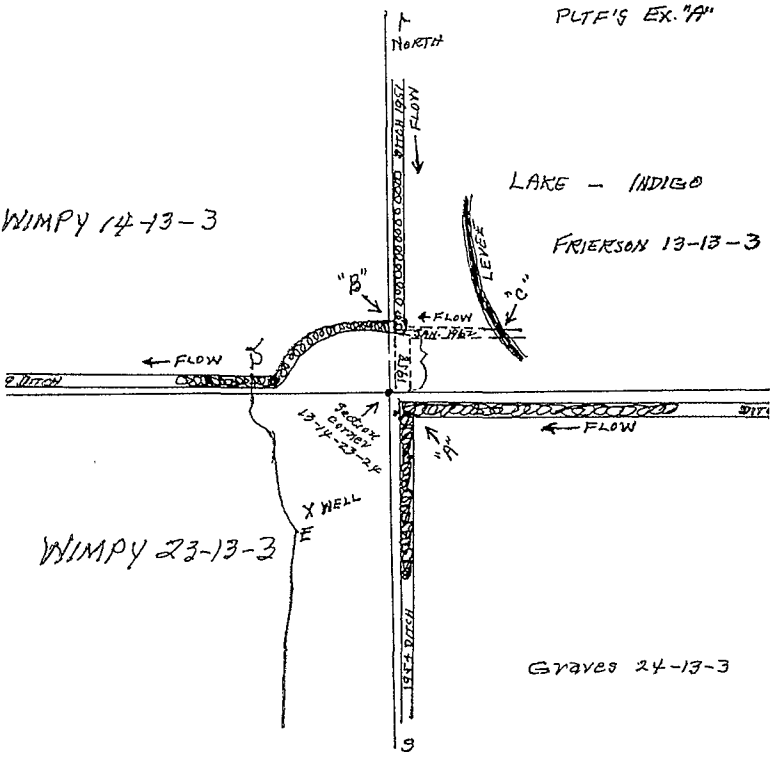
McDaniel, Ward & Mooney, for appellant.

Penix & Penix, for appellee.

FRANK HOLT, Associate Justice. The appellant and appellee are rice farmers and adjoining landowners. The appellant constructed a dam across a drainage ditch which was serving both appellant and appellee. Appellant claims this was necessary to prevent indigo-laden waters from flowing into this drainage ditch and damaging his rice crops. This dam diverted the flow of water upon appellee's lands. Appellee cut the dam thus permitting the flow of water to again enter the jointly used drainage ditch. Appellant brought this action to require appellee to restore the breached dam; to enjoin him from such future conduct; and for the recovery of damages to his rice crops. The appellee responded that the ditch is a joint or community ditch; that the appellant should be enjoined from maintaining the dam resulting in the overflow of appellee's lands; and, also, sought recovery for damages to his crops.

The Chancellor held that appellant had no right to dam up this drainage ditch and denied damages to both parties. From that decree appellant brings this appeal.

For reversal appellant first contends that the decree of the trial court is against the preponderance of the competent evidence. Since appellant's Exhibit "A" is agreed to be a reasonably accurate portrayal of the reference points involved in this case we reproduce it for use in our discussion of the facts.



The appellee, Wimpy, has owned his property since 1949 and the appellant, Graves, has owned his 320 acres since 1952. As indicated by the reproduced exhibit, the appellant and appellee have a common boundary line running north and south. To the north of appellant Mr. Frierson is an adjoining landowner. Appellee's property extends northward and is contiguous to the Frierson property. On the Frierson property is an artificial lake which is infested with indigo. This is a noxious weed which is injurious to rice farming. In 1959 and in January 1962 Frierson drained his lake. The drainage flowed from Point "C" to Point "B" and thence to Point "A" into the drainage ditch used jointly by appellant and appellee. Appellant registered his complaint in 1960 and in July 1962 appellant dammed up the common drainage ditch at Point "A" to prevent the further drainage or flow of this indigo-infested water from the lake, or from "B" to "A", into this ditch. This caused

the waters to be diverted upon appellee's lands. In December 1962 appellee opened up this dam resulting in this lawsuit.

Shortly after appellant acquired his property in 1952 he dynamited a ditch at about Point "A" on appellee's property for the purpose of releasing or draining water from appellant's land, thus making his land tillable. According to the appellant, he and the appellee "got together" and dug the present ditch in 1954 from Point "A" southward for approximately a mile along their common boundary. Appellant admits they did not know the exact location of their boundary line at that time, although he now claims the joint ditch is on his property except the southern part thereof. When this joint ditch was first constructed it was turned ninety degrees at the south end and then dug westward for one-half mile entirely across appellee's lands to link up with the Mattix drainage ditch which was a part of the drainage system in this area that had existed for many years. In 1955 appellee widened this joint ditch, except the northern portion of it, for approximately three-quarters of a mile. In 1958 this one-mile-long joint drainage ditch between appellant and appellee was reworked. Appellant and appellee each applied for and received a subsidy from the federal government for this ditching program. However, the signed applications for the cost-sharing of the ditch work did not include ditch work north of Point "A".

Mr. Ratliff, local office manager for the U. S. Soil Conservation Service since 1949, testified that he knew both parties to this suit and that they made separate applications to his office for a government subsidy in reworking this joint ditch on a cost-sharing basis. These applications were approved and the subsidies were paid. According to the government regulations the cost-sharing is conditioned upon proper maintenance by the recipient of the work subsidized. He testified that he was familiar with the "practices" according to these regulations and that the appellant and appellee agreed to them.

Mr. Neff, a local engineer for the U. S. Soil Conservation Service since 1940, studied the lands in the area

and designed the reworking of this ditch for the purpose of providing drainage for a total of 560 acres. This area included drainage from some of the lands of appellant, appellee, Frierson and his lake. The size of the reworked ditch was determined by the size of this drainage area [560 acres] and fall of the land.

When the contractor completed the reworking of the ditch northward to Point "A" then appellee, at his own expense, had the contractor to continue from Point "A" northward to Point "B" for a distance of approximately sixty feet along the boundary between appellee and Mr. Frierson. Appellant contends that he never gave appellee permission to connect onto their joint ditch at Point "A" and registered repeated objections which is denied by appellee.

It is well settled that a decree of the Chancery Court will not be reversed on appeal unless contrary to the preponderance of the evidence. *Hill* v. *Barnard,* 216 Ark. 29, 224 S. W. 2d 31. Upon a review of the evidence in the case at bar we find it ample to support the Chancellor's finding.

The parties, by their joint action, established a ditch in 1954 at which time it appears neither of them knew the exact location of their common boundary line. In 1955 the appellee widened a large portion of this ditch. In 1958 appellant and appellee each applied for and accepted a Soil Conservation subsidy payment according to the terms of which they agreed to carry out the Soil Conservation "practices" or program. The drainage area being served by this "practice" was 560 acres which included lands of appellant, appellee, Frierson and his lake.

We think that appellant and appellee each have a right, in the nature of a license, to the unobstructed use of this community ditch. We recognized such a right in the early case of *Wynn* v. *Garland,* 19 Ark. 23 (1857). In that case the owners of unsurveyed adjoining lands orally agreed to dig ditches for the purpose of draining their lands and constructed a main ditch as a boundary

line between them. Later the lands were surveyed by the government and one of the parties closed the ditch in violation of the oral agreement and threw up an embankment so as to back the water upon the land of the other party. We held that the oral agreement between the parties was in the nature of a license which, having been accepted and acted upon, could not be disregarded and there was no right for either to close the ditch. See, also, *Schuman* v. *Stevenson,* 215 Ark. 102, 219 S. W. 2d 429, which cites the Wynn case and reaffirms its principles.

In the case at bar it is undisputed that the ditch southward from Point "A" was jointly constructed and used by the appellant and appellee from 1954 until 1962 as a part of the drainage system. The construction and maintenance of this common ditch necessitated the expenditure of labor and capital by both. This improvement of the drainage system in this area was accepted and acted upon by both parties in their farming operations.

There is, also, compelling testimony in this case that there was a natural flow to the south from Point "B" to Point "A" and that there had been a ditch or slough carrying water southward in this general vicinity for many years. We think it is significant that, according to appellant's Exhibit "A", the natural flow in the 1951 ditch is southward to Point "B". The artificial ditch from Point "B" to Point "A" is in substantially the same location as the natural drainage and, thus, did not materially change the natural course of the water. *Boone* v. *Wilson,* 125 Ark. 364, 188 S. W. 1160. At common law the waters of a natural stream cannot be obstructed by a lower proprietor so as to cause it to flow in another direction to the detriment of landowners above and about him. *Monteith* v. *Honey,* 135 Ark. 407, 205 S. W. 812.

We also think that appellant is estopped from having any right to erect the dam in question since the ditch to the north of it has been used by the appellee as part of a drainage system for four years. The appellant cites *Vesper* v. *Woolsey,* 231 Ark. 782, 332 S. W. 2d 602, to the effect that in the absence of "intervening equity"

laches will not apply to shorten the statutory period of limitations. We think there were intervening equities in this case. By agreement the joint ditch between appellant and appellee was constructed in 1954, reworked by appellee in 1955, and reworked in 1958 through the efforts of both of them. Also, that portion of the drainage ditch in controversy, from Point "A" to Point "B", was constructed by appellee at his own expense in 1958 and used continuously by him as a part of a drainage system until appellant constructed the dam four years later. In *Stewart* v. *Pelt,* 198 Ark. 776, 131 S. W. 2d 644, we quoted with approval as follows:

"Since laches is generally regarded as being not delay alone, but rather delay working a disadvantage to another, it is evident that there is and can be no fixed or determinate rule for the application of the doctrine, no exact time, to an hour, a minute, or a year, within which a party's claim to relief, or assertion of a right, is barred by lapse of time, but each case must depend on its own peculiar circumstances. In other words, the question is addressed to the sound discretion of the court. Nor in determining whether a claim is stale is the court confined to the statutory period, but may refuse relief in cases where the delay is less or greater than that named in the statute."

See, also, *Sanders* v. *Flenniken,* 180 Ark. 303, 21 S. W. 2d 847; 30 C.J.S., Equity, § 112.

Under the facts in the instant case we think that appellant's delay in asserting any right he might have had now operates as a species of estoppel against the assertion of any such right.

The appellant next urges for reversal that the trial court erred in admitting the testimony of Mr. Neff and Mr. Ratliff and the exhibits to their testimony. The testimony of Mr. Neff and Ratliff as experienced employees of the Soil Conservation Service related to their knowledge of the "practices" or program of that government agency and the business records and publications

of their offices. Ark. Stat. Ann. § 28-930 (Repl. 1962) provides:

"Federal departmental or agency documents admissible.—Books, records, reports, minutes of proceedings, and other documents of any department or agency of the United States kept, maintained or made in the performance of duties prescribed by law, or parts thereof or excerpts therefrom, shall be admissible in the courts of this State to prove the Act, transaction, event, or occurrence which the memorandum, report, record or other document records, reflects or shows. Provided, the contents of the books, records, reports, minutes of proceedings, and other documents are material and relevant. [Acts 1949, No. 293, § 3, p. 862.]"

We think that without the testimony of Neff and Ratliff the evidence is sufficient to sustain the Chancellor's decree. However, we consider that their testimony and the exhibits thereto are material and relevant to the issue in the case at bar and are, therefore, properly admissible.

Affirmed.

JOHNSON, J., dissents.

5-3049 373 S. W. 2d 145

Opinion delivered December 16, 1963.

[Rehearing denied Feb. 3, 1964.]

[redacted]

J. R. Wilson, for appellant.

Warson, Ess, Marshall & Engas, Kansas City, Mo., *Wootton, Land & Matthews, Thomas D. Walbert, Elbert Cook,* for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Sam Lofton was severely injured on November 24, 1958, while cutting timber, and made claim for benefits under the Workmen's Compensation Act, against both Guyce Bryan and Dierks Forests, Inc., contending that Lofton was either an employee of Dierks, or an employee of Bryan as a sub-contractor of Dierks, and operating without compensation insurance. Dierks defended on the ground that Bryan was an independent contractor, and that the company was not liable for that reason, and Bryan asserted that the Commission did not have jurisdiction since he (Bryan) did not employ five or more employees. The referee found that claimant sustained an injury during the course of his employment; that Bryan was an independent contractor, and Dierks Forests, Inc., therefore, was not liable or responsible for the injury suffered; that Bryan, at no time, had more

than four persons employed, and the Commission, therefore, was without jurisdiction. The claim was dismissed, and on appeal to the full Commission (at which time some additional evidence was taken) was likewise denied. Thereafter, the Circuit Court of Garland County affirmed the Commission, and claimant has appealed to this court.

There is no evidence that Bryan had more than four employees, and appellant argues that Dierks is liable for compensation because (a) Lofton was an employee of Dierks or (b) Bryan was a sub-contractor without insurance, and this fact renders Dierks liable for compensation. Ark. Stat. Ann. § 81-1306 (Repl. 1960). See also *Brothers* v. *Dierks Lbr. & Coal Co.,* 217 Ark. 632, 232 S. W. 2d 646.

The evidence reflects that on November 20, 1958, Bryan and Dierks Forests, Inc., entered into a written contract, wherein Bryan agreed to cut, fell, saw, split, and deliver at a designated place, all pulpwood on certain lands owned by Dierks in Perry County (designated in the contract) and to complete performance by December 15, 1958. After reciting that the contractor represented that he was engaged in the business of cutting and hauling pulpwood as an independent occupation, and had his own tools and equipment necessary to carry on such business, the contract provided:

"The Contractors will (either personally or through employees, agents or sub-contractors) perform this contract at their own expense by their own means and according to their own methods, and free from any control or right of control of Dierks as to the manner or method of performing this contract and shall not be required to render personal services, and neither the Contractors nor their employees or agents shall or may be required by Dierks to render any definite hours of work or labor in the performance of this contract, but on the contrary the Contractors may perform this contract at their own pleasure as to time and by whatever means and methods of performance they determine, and Dierks shall and

may only look to the result of said work and require that it be in conformity with and completed within the period of this contract."

Dierks agreed to pay Bryan $7.00 per cord for all merchantable pulpwood, and Bryan agreed to "pay, prior to delinquency, all Federal and State Social Security, Old Age Benefit, Unemployment, and similar taxes as are or may be imposed, and to indemnify and protect Dierks from all claims and liability on account thereof."

The proof reflects that these provisions were fully carried out by the parties. Bryan testified that he did enter into an independent contract with Dierks, and was performing such contract at the time Lofton was injured. He stated that he performed the work in his own manner, determined the days that he would work, hired his own employees, including Lofton, controlled the entire operation himself, and never received any instructions from Dierks as to how the work should be carried out. He owned all of his own tools and equipment, including two power saws, an International tractor and trailer, and a pick-up truck.

Sam Lofton, claimant, testified that he lived at Crossett, and was working for Bryan at the time of his injury. He stated that he had been employed by Bryan, receiving wages of $1.50 per hour, for about five weeks before the accident. The claimant said that he left Crossett, at the request of Bryan, about the first week in November for the purpose of working on the job herein discussed. Lofton testified that Bryan paid him each week in cash, but he knew nothing about Bryan's arrangements with Dierks. "He said he was going to get a contract from Dierks Forests Division to cut paper wood and he wanted somebody to cut it."

Lowell Lofton, 24 years of age, son of claimant, testified that he (young Lofton) was employed by Bryan, and had been working with the contractor in Crossett before going on the job where the injury occurred. He stated that after the Dierks job was completed, he went back to Crossett, still working for Bryan. "Well, when

I went to work I went to work for Guyce. I didn't know who else I was working for." This was all the evidence introduced on the part of the claimant as far as the nature of his employment was concerned. The balance of appellant's evidence dealt with the injury sustained by him.

Appellant relies in large measure upon the recent holding of this court in *Clemons* v. *Bearden Lumber Co.*, Law Reporter, Volume 236, Page 636, 370 S. W. 2d 47, wherein we held that an asserted relationship of independent contractor did not exist, but the facts in that case are far different from those in the instant litigation.

In *Clemons,* although the company contended that the deductions were made for the convenience of the independent contractor, the record reflects that the company "held out" for Social Security and other payroll deductions; the men working for the alleged independent contractor were all paid by company check, in exactly the same manner as other Bearden Lumber Company employees; deductions were taken from paychecks for insurance just as though the workers were regular mill employees; and the company had the right to discharge Clemons at any time. The evidence further reflected that the company supervisor went out to the job frequently and gave certain instructions. None of these facts are present in the instant case, and the other cases cited by appellant are likewise clearly distinguishable. The entire proof offered on behalf of claimant has been heretofore summarized, and even Lofton was unable to testify to any facts that support the argument here presented by appellant. Actually, we find no evidence at all which indicates either that Lofton was an employee of Dierks, or that Bryan was a subcontractor, rather than an independent contractor. It follows that the findings of the Commission were supported by substantial evidence.

Affirmed.

JOHNSON, J., not participating.

Supplemental opinion on Denial of Petition for Rehearing p. 642.

5-3104 373 S. W. 2d 129

Opinion delivered December 16, 1963.

[redacted]

Hall, Purcell & Boswell, for appellant.

Fred E. Briner, for appellee.

ED. F. MCFADDIN, Associate Justice. From a decree awarding the appellee specific performance, the appellant brings this appeal. On May 31, 1961, appellant Berry and wife[1] entered into a written contract with appellee Crawford,[1] by the terms of which Berry agreed to sell and Crawford agreed to buy a certain lot in Saline County; and Crawford agreed to make a payment of $1,000.00 and interest on May 31, 1962. Other pertinent provisions of the contract will be later mentioned.

On July 24, 1962, Berry filed the present suit, alleging that Crawford had failed to make the required payment when due, and prayed that all rights of Crawford under the said contract be declared forfeited. By way of answer and cross complaint, Crawford alleged that he was and had been at all times ready, able, and willing to

[1] Mr. Berry's wife was a party to the contract (evidently having dower interest), and is a party to the litigation. Mr. Crawford was doing business as "Crawford Realty Company" and is so styled in the pleadings; but for brevity and clarity we refer to the parties in the singular simply as "Berry" and "Crawford."

make the required payment, and had so notified Berry; and that Crawford was entitled to specific performance of the contract. The cause was heard *ore tenus* in the Chancery Court and resulted in a decree awarding Crawford specific performance. From that decree Berry brings this appeal, and urges these points.

"I. The Court erred in its construction of the contract in question.

"A. The Court should not have ignored the express stipulation in the contract that time was of the essence.

"B. The Court erred in not treating the contract in question as an option to purchase.

"C. Appellee was not entitled to the remedy of specific performance."

The instrument involved was entitled "Contract," with Berry as the seller and Crawford as the buyer. It was not merely an option contract, but a definite contract wherein one party agreed to buy and the other party agreed to sell. The contract stated: "The buyer agrees to pay to the seller for said lands the sum of One Thousand and 00/100 Dollars," etc.; and, "The seller agrees that when all of the above mentioned purchase price has been fully paid with interest . . . to execute and deliver to the buyer a deed for the said land . . ." The contract was a printed form prepared for use in installment payments, providing for interest on each installment "at the rate of five per cent per annum from date until maturity and interest at the rate of ten per cent per annum from maturity until paid, . . ." The 5% had been scratched out and 6% had been substituted, but no change had been made in the language that the amount bore interest at 10% from maturity until paid. The contract also had this pertinent provision: "It is agreed that if the buyer should fail or refuse to pay any one of said installments when due as above stated, . . . or fail to comply with any provision of this contract, then the seller shall have the right and option to declare all installments immediately due and payable and

if payment in full is not made on demand[2] then all obligations on the part of the seller shall cease and the buyer shall lose all rights under this contract . . . and it is distinctly understood and agreed *that time is of the essence of this contract*[2] and the moving consideration for its execution by the seller."

Crawford did not tender his check for the $1,000.00 and interest to Berry until June 13, 1962, which was fourteen days after the due date of May 31, 1962. Berry refused to accept the payment and filed this suit on July 24, 1962 asking the Court to declare all rights of Crawford to be forfeited. At the trial Crawford testified: that about thirty days before May 31, 1962, he met Berry in the post office at Benton and told Berry that he (Crawford) did not remember exactly the due date of the contract; that Berry replied, "I think it is in thirty days or something like that . . . "; that Crawford told Berry, "Get your papers together when you get ready for your money and come by . . ."; and that Berry made no objection to such remark. Berry did not take the stand in rebuttal to deny the aforesaid conversation. Crawford learned on June 12, 1962 that Berry was claiming a forfeiture and promptly sent Berry a check, which was returned with the statement that Crawford's rights under the contract had been terminated for failure to make the payment promptly on May 31, 1962.

We have sketched the material portions of the evidence; and we conclude that the Chancery Court was correct in (a) refusing to declare the forfeiture claimed by Berry; and (b) awarding Crawford specific performance. Berry sought the aid of the Chancery Court to have a forfeiture declared, but he did not come into equity with clean hands. In the first place, the contract specifically provided that Berry would have to make *a demand* on Crawford *after the due date;* and Berry never made any such demand—rather, he sat silently by and sought equity's aid to declare a forfeiture when he himself had not complied with the provisions for forfeiture. In *Williams* v. *Shaver,* 100 Ark. 565, 140 S. W. 740, we

[2] Emphasis supplied.

said: "It is well recognized that the right of forfeiture is a harsh remedy and liable to produce great hardships. For this reason it has been uniformly held that before a forfeiture will be declared the law will require that a strict compliance with every important prerequisite must be shown, even in such contracts where forfeiture is provided for by express terms."

Furthermore, by the conversation in the post office, previously mentioned, Berry had led Crawford to believe that Berry would "bring the papers" when Berry wanted his money. Instead, Berry sat mute and claimed a forfeiture. He lulled Crawford into a feeling of security and thereby waived the right to declare a forfeiture without notice, even if the contract had been a mere option contract, which it was not, as previously mentioned. In *Cordell* v. *Enis,* 162 Ark. 41, 257 S. W. 375, we said: "Equity abhors forfeitures and will seize upon slight circumstances indicating a waiver, to avoid or prevent them."

Berry insists that the words in the contract, "time is of the essence," are so strong as to support Berry in his claimed forfeiture; and cites and relies on such cases as *Ind. & Ark. Lbr. Co.* v. *Pharr,* 82 Ark. 573, 102 S. W. 686. As we have previously stated, the rights of Crawford under this contract were more than that of the holder of a mere option; and the case at bar falls within the scope of the language found in *Friar* v. *Baldridge,* 91 Ark. 133, 120 S. W. 989:

"Parties may enter into a valid contract relative to the sale of land whereby they may provide that time of payment shall be of the essence of the contract, so that the failure to promptly pay will work a forfeiture, *Ish* v. *Morgan,* 48 Ark. 413; *Quertermous* v. *Hatfield,* 54 Ark. 16; *Block* v. *Smith,* 61 Ark. 266. But the final effect of such an agreement will depend on the actual intention of the parties, as evinced by their acts and conduct; and such a breach of the contract as would work a forfeiture may be waived or acquiesced in. The law will strictly enforce the agreement of the parties as they have made it; but, in order to find out the scope and true effect of

such agreement, it will not only look into the written contract which is evidence of their agreement, but it will also look into their acts and conduct in the carrying out of the agreement, in order to fully determine their true intent. It is a well settled principle that equity abhors a forfeiture, and that it will relieve against a forfeiture when the same has either expressly or by conduct been waived. The following equitable principle formulated by Mr. Pomeroy has been repeatedly approved by this court: 'If there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving against it, if necessary.' 1 Pomeroy Eq. Jur. 452; *Little Rock Granite Co.* v. *Shall,* 59 Ark. 405; *Morris* v. *Green,* 75 Ark. 410; *Banks* v. *Bowman,* 83 Ark. 425; *Braddock* v. *England,* 87 Ark. 393.''[3]

We agree that the Chancery Court was correct in refusing Berry's prayer for a feiture and also in awarding Crawford specific performance. Affirmed.

[3] For some more recent cases on "time is of the essence," see: *White* v. *Page,* 216 Ark. 632, 226 S. W. 2d 973; *Moffatt* v. *Wyman,* 222 Ark. 247, 258 S. W. 2d 533; *Vernon* v. *McEntire,* 232 Ark. 741, 339 S. W. 2d 855; and *McClain* v. *Alexander,* 235 Ark. 64, 357 S. W. 2d 1.

OXFORD *v.* OXFORD.

5-3134 373 S. W. 2d 707

Opinion delivered December 16, 1963.

[Rehearing denied Jan. 20, 1964.]

Roy Finch & Thorp Thomas, for appellant.

Shouse & Jackson, for appellee.

George Rose Smith, J. In this case the chancellor granted the appellee husband a divorce on the ground of three years separation. For reversal the appellant contends that the court should have denied the appellee's application for divorce and should instead have awarded the appellant that relief upon her counterclaim.

The appellant is right in her insistence that the proof does not sustain the decree. The statute requires that the parties live "separate and apart," without cohabitation, for three consecutive years. Ark. Stat. Ann. § 34-1202 (Repl. 1962). Oxford testified that he and his wife had not had marital relations for more than three years before the suit was filed in 1962. He conceded, however, that they lived together under the same roof, occupying separate rooms, until about two and a half years before the date of the trial. Under our ruling in *Brimson* v. *Brimson,* 227 Ark. 1045, 304 S. W. 2d 935, this evidence is insufficient to establish three years separation within the meaning of the statute, for it cannot be said that the couple lived separate and apart from each other.

Despite this failure of proof the appellee argues that the decree should nevertheless be affirmed upon the alternative ground of desertion, which was also alleged in

the complaint. Again, however, the proof is deficient. At the trial the appellee directed his testimony to the issue of three years separation and made no real effort to make out a case of desertion. He gave no details whatever concerning his wife's departure, merely stating that "she ain't been home in two and a half years." The appellant denied having left her husband without cause; so there is no basis upon which a finding of willful desertion could be made.

The appellant contends that the chancellor should have granted her a divorce upon one of the three grounds asserted in her counterclaim. First, she charged her husband with habitual drunkenness. She and witnesses in her behalf testified that Oxford frequently drank intoxicants. He and his witnesses minimized the extent of his drinking. We need not determine where the weight of the evidence lies, for the appellant's proof falls decidedly short of showing that Oxford was a *habitual drunkard* as we have defined the term. *O'Kane* v. *O'Kane,* 103 Ark. 382, 147 S. W. 73, 40 L.R.A. (n.s.) 655.

Secondly, the appellant charged nonsupport, which under our statute is the husband's willful failure to provide his wife with the common necessaries of life. Ark. Stat. Ann. § 34-1202 (Repl. 1962). During most of the couple's ten years together Mrs. Oxford either operated a dairy business at the family farm or found employment away from home. In this way she earned money for herself and her two sons by a prior marriage. These facts alone do not establish the allegation of nonsupport. There is no definite testimony by Mrs. Oxford, and no corroborating proof at all, to indicate any specific instance in which Oxford willfully failed to provide his wife with the necessaries of life.

The third ground relied upon is personal indignities. Each spouse accused the other of infidelity and of other conduct amounting to indignities. After studying the record we are convinced that Mrs. Oxford was at least as much at fault as her husband, perhaps more so. Moreover, it does not appear that the conduct of which Mrs. Oxford now complains was the real cause for her de-

cision to leave the family home in August or September of 1961. Neither spouse related any of the details attending Mrs. Oxford's departure, but in view of her own statement that marital relations occurred within a month before their final separation it is quite apparent that the earlier incidents did not bring about the failure of the marriage. We are inclined to think that the couple, separated in age by more than thirty years, had simply grown tired of one another.

We conclude that neither party established a cause of action. With respect to the three years separation, however, the suit may be merely premature; so, in accordance with our practice in such a situation, it will be dismissed without prejudice. *Trimble* v. *Trimble*, 65 Ark. 87, 44 S. W. 1040.

Reversed and dismissed.

CANUTE *v.* BURNETT.

5-3138 373 S. W. 2d 143

Opinion delivered December 16, 1963.

Eugene Coffelt, for appellant.

Little & Enfield, for appellee.

PAUL WARD, Associate Justice. Appellee, George Burnett, brought suit to collect a commission of $6,500 from appellant, Edward L. Canute. The suit was based on the contention by appellee that he produced a purchaser ready, able, and willing to pay appellant an agreed price for his property. A jury trial resulted in a verdict in favor of appellee in the amount sued for, and appellant here seeks a reversal.

For a reversal, appellant says he relies on four points, but, in his argument, he abandons all points except two — (a) "The demurrer should have been sustained", and (b) "The court should have instructed a verdict for defendant".

The essential allegations of the complaint were, in substance, as follows:

Plaintiff (appellee) was a real estate broker at all pertinent times; the defendant (appellant) owned the Star Motel at Rogers; Gilbert and Virginia Klevgaard owned the Magnolia Inn at Fort Smith; plaintiff, as a licensed real estate agent, worked up an exchange of the two properties on terms contained in a written contract dated March 6, 1961, a copy of which is attached to the complaint and is marked Exhibit "A"; in said contract appellant agreed to pay appellee a commission of $6,500 if he (appellant) should default on the contract; and, later appellant did default on the contract and refuses to pay the specified commission although demand has been made on him.

The essential portions of Exhibit "A" attached to the complaint are set out below:

Edward L. Canute is *first party* and Gilbert Klevgaard is *second party*; each party owns the property previously mentioned; first party and second party agree

to exchange properties on certain specified terms regarding title, exchange of abstracts, taxes, and assumption of certain indebtedness; each party deposited $1,000 as earnest money; and, a commission fee of $6,500 for appellee was agreed on. Also contained in the contract is the following sentence: *"If either party shall default on this Exchange Contract, the defaulting party agrees to pay the agent the full commission of both parties"*. (Emphasis added.)

The above contract was signed by "Edward L. Canute, Party of First part"; by "Virginia Klevgaard, Party of Second part"; "Gilbert Klevgaard, Party of Second part" and by "George Burnett, Agent".

(a) It is first contended by appellant that the complaint failed to state a cause of action because the contract was not enforceable. It was not enforceable, says appellant, because his wife did not sign it. There is no merit in this contention. This is not an action for specific performance to force appellant to convey his motel to Klevgaard but it is an action to compel appellant to pay appellee the commission he would have received had appellant not broken the exchange agreement. That being true no enforceable contract was necessary, and, consequently it is immaterial that appellant's wife did not sign the contract. In *Fike* v. *Newlin,* 225 Ark. 369, 282 S. W. 2d 604, wherein the facts were similar to those of this case, the Court said:

"It is immaterial that the contract for the exchange of the properties was not signed by Mr. Fike or Mrs. Hinton, as a real estate broker earns his commission by producing a buyer ready, willing, and able to take the property on the terms fixed by the seller."

See also: *Boyles* v. *Knox,* 211 Ark. 426, 200 S. W. 2d 966, where we said:

"However, if it be conceded that the agreement . . . was not sufficiently definite in its terms to sustain an action for specific performance, this would not preclude appellee from recovering a commission, if he, in fact, produced a buyer who was ready, willing and able to

take the property on terms which were satisfactory to appellants at the time the agreement was made."

We do not agree with the argument that appellee could not collect a commission because there was no contractual privity between him and appellant. The case of *Acme Brick Company* v. *Hamilton,* 218 Ark. 742, 238 S. W. 2d 658, is relied on by appellant. However, the material facts in that case are not the same as in the case under consideration. Here, privity is clearly shown by the following: both parties signed the contract, and appellant agreed to pay appellee upon default.

(b) It is here contended the court should have directed a verdict at the close of the testimony because appellee admitted he knew the contract was not to be complete or binding unless and until appellant's wife signed it. In support appellant quotes appellee's testimony as follows:

"Mr. Canute advised me that he was not going through with the deal because Mrs. Canute would not sign the *contract*. . . ." (Emphasis added.)

The record, however, reflects that appellee used the word "deed" instead of the word *contract* in the above quotation. We find nothing in the record which indicates appellant's signature on the contract was not to be binding on him unless his wife signed it.

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

Affirmed.

ROBINSON, J., not participating.

5-3139 373 S. W. 2d 141

Opinion delivered December 16, 1963.

M. V. Moody, for appellant.

McMillen, Teague & Bramhall, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Edith Epps, filed this personal injury suit in the Pulaski Circuit Court alleging that she received bodily injuries when she stepped in a hole in the sidewalk which adjoins appellee's property on Main Street in Little Rock. Appellee, Remmel, answered denying the allegations of the complaint. Later, defendant filed a motion for a summary judgment. The trial court granted the motion, rendered a judgment in favor of the defendant, Remmel, and the plaintiff, Epps, has appealed.

One of the grounds for the granting of a summary judgment is that there is no genuine issue as to a material fact. Ark. Stat. Anno. § 29-211 (Repl. 1962).

Ark. Stat. Anno. § 19-3806 (Repl. 1956) gives cities of the first class the power to require by ordinance, resolution, or order, that owners of property abutting on its streets build, maintain and repair sidewalks. It is said that Little Rock has such an ordinance, and to give appellant the benefit of any doubt on that point, in this case, we will assume that there is such an ordinance.

The allegations in the complaint that must be considered in determining whether the trial court was correct in rendering a summary judgment are as follows:

"Plaintiff alleges that at the time of the accident hereinafter described the sidewalk hereinbefore mentioned was out of repair and in an unsafe and dangerous condition for the passage of pedestrians over it.

"That on the 19th day of December, 1961, about 9:30 o'clock A.M. plaintiff was walking along said sidewalk in front of the property of defendant, and stepped and fell into a hole in said sidewalk and violently fell on said street, as a result of which she sustained the injuries hereinafter set out.

"That the negligence of the defendant consisted of the following: Carelessly and negligently and unlawfully leaving the holes in said sidewalk open and unprotected; that defendant knew or should have known the dangerous condition to the sidewalk; that defendant maintained a nuisance and a menace to those lawfully in and about the said street, and compelled to use said sidewalk; in failing and neglecting to cause the street to be made reasonably safe for persons passing along such street before the occurrence of the slipping and falling of plaintiff.

"That at all times hereinafter mentioned the said Main Street was and still is a public street in common use by the residents of said city and others. That the Arkansas Stats; 1947, provides that the owners of property shall rebuild, maintain and repair foot pavements pursuant to Section No. 19-3806-7."

In support of his motion for a summary judgment, appellee property owner filed an affidavit stating in

substance: That he inherited the property; that it was held in trust for him until he became 35 years of age in 1951, at which time the property was conveyed to him; that the sidewalk in front of the property is in the same condition as it was when he inherited the property; that he has not at any time had any demand or request from the city to do any maintenance or repairs on the sidewalk, and that he has done none. Appellant filed no response to the affidavit.

Assuming for the purposes of this decision that a city ordinance requires the property owner to repair the sidewalk adjoining his property and appellant failed to comply with the ordinance, still there would be no liability by the appellee property owner to the appellant solely by reason of his failure to make the repairs. It is said in Restatement, Torts, § 288, p. 761: "Such ordinances [requiring adjoining property owners to repair sidewalks] are construed as creating a duty enforceable only by the municipality and do not subject such owners to liability for bodily harm caused to a wayfarer by their violations of the ordinances. See also, *Major* v. *Fraser,* 368 P. 2d 369; *Sternitzke* v. *Donahue's Jewelers,* 83 N. W. 2d 96; *Woods* v. *City of Palatka,* 63 So. 2d 636; *Vissman* v. *Koby,* 309 S. W. 2d 345; *Schaefer* v. *Lenahan,* 146 P. 2d 929. There is an exhaustive annotation on the subject in 88 A. L. R. 2d 340, citing dozens of cases supporting this rule.

Of course, if appellant had affirmatively done something to the sidewalk, thereby causing a dangerous or hazardous condition, there could be liability as was pointed out in *Arkansas Fuel Co.* v. *Downs,* 205 Ark. 281, 168 S. W. 2d 419. But, in the case at bar, appellee shows by his affidavit that nothing of that kind occurred, and appellant did not raise an issue on that point by filing a counter-affidavit.

If appellant contends that the condition of the sidewalk was caused by an affirmative act of the property owner, appellee's affidavit should have been controverted. By way of illustration, it is stated by Barron and Holtzoff, Federal Practice and Procedure, 1231 (we

have adopted Rule 56 of Federal Practice and Procedure, Ark. Stat. Anno. § 29-211 [Repl. 1962]): "To take a simple example, if in an action on a promissory note, the defendant in his answer denies the making of the note; the plaintiff makes a motion for a summary judgment, accompanying it by an affidavit of a person who swears that he saw the defendant sign the note; and the defendant does not file an opposing affidavit, summary judgment should be rendered for the plaintiff. On the other hand, if the defendant files an affidavit to the effect that his purported signature is a forgery or that it was affixed by a person who was not authorized to do so, a genuine issue as to a material fact is created, and the case must go to trial." The court said in *United States* v. *Dollar,* 100 F. Supp. 881: "The motion [for summary judgment] requires the opposition to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact."

From the record in this case it does not appear that there is a genuine issue of a material fact, and when the established law is applied to the facts as shown by the record, there can be no recovery. The trial court was, therefore, correct in sustaining the motion for a summary judgment.

Affirmed.

SCOTT *v.* SLAUGHTER.

5-3142 373 S. W. 2d 577

Opinion delivered December 16, 1963.

[Rehearing denied Jan. 20, 1964.]

Daggett & Daggett, for appellant.

John D. Thweatt, Cooper Thweatt, for appellee.

JIM JOHNSON, Associate Justice. This appeal involves the respective riparian rights of appellant L. W. Scott, the upper proprietor, and appellee H. H. Slaughter, the lower proprietor, in the waters of Roc Roe Bayou.

Appellant is the owner of approximately 1,440 acres of land lying immediately north of a tract of approximately 960 acres of land owned by appellee in Prairie and Monroe Counties.

Roc Roe Bayou heads at Roc Roe Lake near the north boundary of appellant's land and courses in a southerly direction through the lands of both appellant and appellee. Except for its own fairly insignificant watershed, Roc Roe Bayou is fed by the waters of White River which fills Roc Roe Lake and from there enters Roc Roc Bayou. In addition to the White River waters, Roc Roe Bayou is fed by a tributary, Honey Creek, which enters Roc Roe Bayou from the northwest at a point on appellant's land about a mile from the bayou's head and about one-half mile north and upstream from appellee's north property line. The bayou then meanders southerly

some twenty miles to a point near the community of Roe, Arkansas, where it empties back into White River.

Without obstruction the waters of White River running through Roc Roe Lake would enter Roc Roe Bayou when the river reached a stage of 17 feet on the Clarendon gauge. Honey Creek has a rather large watershed of some 18,500 acres. The waters from this creek empty into Roc Roe Bayou.

Appellant has constructed three dams on the portion of Roc Roe Bayou which traverses his land. We here refer to them as the north, middle and south dams. The middle dam was constructed across the bayou at a point about 100 feet north of and upstream from the confluence of Honey Creek with Roc Roe Bayou. This dam was constructed with a spillway which permitted all river water above a stage of 19 feet on the Clarendon gauge to pass over the dam except the comparatively slight amount of water necessary to raise the level of the water behind the dam to the river level. The north dam is a low water dam and was constructed at the entrance of the White River waters into Roc Roe Bayou at the point where Roc Roe Bayou connects to Roc Roe Lake. This dam is also constructed to a height which permits the river waters to flow over it when a stage of 19 feet is reached on the Clarendon gauge. Its purpose is to trap and impound the river water between the north dam and the middle dam so as to prevent the northward drainage of the impounded waters when the water level of White River, and in turn Roc Roe Lake, is below 19 feet.

The south dam is several feet lower than the middle dam and was constructed across the bayou at a point on appellant's land about one-half mile south and downstream from the confluence of Honey Creek and about 150 feet from the north boundary line of appellee's lands.

Roc Roe Bayou as well as Honey Creek are somewhat intermittent streams and run dry during periods of little rainfall.

Both appellant and appellee operate commercial hunting and fishing facilities on their respective prem-

ises. Appellee does not now impound water on his premises. This action was brought by appellee contending that appellant's impoundments constitute an unreasonable use of the water, depriving him of waters which otherwise would have flowed through his lands, and prayed that a mandatory injunction issue requiring removal of the dams and that he be given judgment for damages.

Trial upon the merits resulted in a finding for appellee. This decree was vague as to specific relief but was clear as to the principal points in controversy. The court found that appellant's use of the water was unreasonable and directed the removal or lowering of the dams. All claims for damages were denied. From such decree comes this appeal. Appellee does not cross appeal from that part of the decree denying damages.

For reversal appellant urges that the trial court erred in holding that appellant's use of the water was unreasonable.

Prior to the decision of this court in *Harris* v. *Brooks,* 225 Ark. 436, 283 S. W. 2d 129, there was considerable confusion as to the law in this jurisdiction relative to the right to use water. In that case the court determined that the *Reasonable Use Theory* should control. This theory was explained as follows:

"This theory appears to be based on the necessity and desirability of deriving greater benefits from the use of our abundant supply of water. It recognizes that there is no sound reason for maintaining our lakes and streams at a normal level when the water can be beneficially used without causing unreasonable damage to other riparian owners. The progress of civilization, particularly in regard to manufacturing, irrigation, and recreation, has forced the realization that a strict adherence to the uninterrupted flow doctrine placed an unwarranted limitation on the use of water, and consequently the courts developed what we now call the reasonable use theory. This theory is of course subject to different interpretations and limitations. In 56 Am. Jur., page 728, it is

stated that "The rights of riparian proprietors on both navigable and unnavigable streams are to a great extent mutual, common, or correlative. The use of the stream or water by each proprietor is therefore limited to what is reasonable, having due regard for the rights of others above, below, or on the opposite shore. In general, the special rights of a riparian owner are such as are necessary for the use and enjoyment of his abutting property and the business lawfully conducted thereon, qualified only by the correlative rights of other riparian owners, and by certain rights of the public, and they are to be so exercised as not to injure others in the enjoyment of their rights.' It has been stated that each riparian owner has an equal right to make a reasonable use of waters subject to the equal rights of other owners to make the reasonable use (*U. S.* v. *Willow River Power Co.,* 324 U. S. 499, 65 S. C. 761, 89 L. Ed. 1101). The purpose of the law is to secure to each riparian owner equality in the use of water as near as may be by requiring each to exercise his right reasonably and with due regard to the rights of others similarly situated. (*Meng* v. *Coffey,* 67 Neb. 500, 93 N. W. 713, 108 Am. St. Rep. 697)."

While this court unhesitatingly embraced the reasonable use theory in the *Harris* case, *supra,* it took occasion to caution "that we are not necessarily adopting all the interpretations given it [the reasonable use theory] by the decisions of other states, and that our own interpretation will be developed in the future as occasions arise." However, the following general rules and principles were declared to be the law in this state:

"(a) The right to use water for strictly domestic purposes—such as for household use—is superior to many other uses of water—such as for fishing, recreation and irrigation.

"(b) Other than the use mentioned above, all other lawful uses of water are equal.

"Some of the lawful uses of water recognized by this state are: fishing, swimming, recreation, and irrigation.

"(c) When one lawful use of water is destroyed by another lawful use the latter must yield, or it may be enjoined.

"(d) When one lawful use of water interferes with or detracts from another lawful use, then a question arises as to whether, under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each."

From a careful review of the voluminous record presented in the present not uncomplicated case we have determined that an equitable application here of the rules set out above demands that appellant's north and middle dams be lowered to a level which will permit the waters from White River and/or Roc Roe Lake, after filling the reservoir created by the dams, to pass over such dams or spillways when the Clarendon gauge shows a stage in excess of 17 feet. As to the south dam, it is virtually undisputed that it only requires a trace of rain to fill the reservoir behind this dam and that once full all water falling in the Honey Creek watershed passes over the spillway and through appellee's land—add to this the increased flow which will result from lowering the north and middle dams—the conclusion cannot be escaped that the south dam need not be lowered.

To the extent here stated, it follows that the trial court's decree is modified and affirmed. Accordingly the cause will be remanded for the entry of orders consistent with this opinion.

McFaddin, J., not participating.

CECIL *v.* HEADLEY.

5-3097 373 S. W. 2d 136

Opinion delivered December 16, 1963.

Shaver, Tackett & Jones, Larey & Larey, for appellant.

Shaw & Shaw, Ben Core, for appellee.

FRANK HOLT, Associate Justice. The appellees brought this action against the appellant for the recovery of damages caused by a fire allegedly started by appellant on his property and permitted by him to get out of control and spread to appellees' lands. There are several appellees owning the lands which together aggregate 475 acres. Liability was denied by the appellant and upon a jury trial the appellees were awarded damages totaling $5,-466.00. On appeal appellant relies for reversal upon five points.

The first point appellant urges for reversal is that Ark. Stat. Ann. § 50-104 (1947)[1] is not applicable to the case at bar because it has been superseded by sub-section seven (7.) of Ark. Stat. Ann. § 41-507.[2]

Appellant contends that from the interrogatories propounded to and as answered by the jury his liability was plainly fixed under the provisions of Ark. Stat. Ann. § 50-104, or a non-existent statute. It is appellees' contention, however, that under their pleadings, the facts in the case, and the interrogatories submitted by agreement

[1] "Actions for damages by fire—Notice of setting fire—Effect.—If any person shall set on fire any grass or other combustible material within his inclosures, so as to damage any other person, such person shall make satisfaction in single damages to the party injured, to be recovered by civil action, in any court having jurisdiction of the amount sued for; but if any such person shall, before setting out fire, notify those persons whose farms are joining said place which he proposes to burn that he is going to fire such grass or other combustible matter, and shall use all due caution to prevent such fire from getting out, to the injury of any other person, he shall not be liable to pay damages as provided in this section. [Act Feb. 3, 1875, No. 48, § 5, p. 128; C. & M. Dig., § 10323; Pope's Dig. § 1298.]"

[2] "Forest fires—Allowing fire to escape—Burning brush or debris—Camp fires—Destroying fire warning notices—Duties of state forestry commission — Burning new ground — Penalties.—* * * 7. Anyone desiring to burn any new ground, field, grass lands or woodlands adjoining woodlands or grasslands of another, shall if such lands lie within the boundaries of a forest protection unit, a National Forest or any other area that has organized fire protection, report to the protection agency the time that he intends to burn his lands and the location of the same before he starts his fire. Failure to do this shall constitute a misdemeanor. [Acts 1935, No. 85, § 1, p. 209; Pope's Dig., § 3049.]"

to the jury that the appellant was liable under Ark. Stat. Ann. § 50-104, the common law, and, also, Ark. Stat. Ann. § 41-507 et seq. Accepting as true the contention of appellant that his liability was fixed by the jury under the provisions of Ark. Stat. Ann. § 50-104, we do not agree with him that this 1875 Act was repealed or superseded by the 1935 Act [Ark. Stat. Ann. § 41-507-514]. This later act deals primarily with the preservation of the forests of our state by virtue of its criminal liability provisions, although it provides for double damages by civil action. *Armstrong* v. *Lloyd,* 230 Ark. 226, 321 S. W. 2d 380; *Lamb* v. *Hibbard,* 228 Ark. 270, 306 S. W. 2d 859. This act contains numerous conditions which constitute misdemeanor or felony violations. Although the 1935 Act provides for criminal liabilities and double damages and the 1875 Act provides only for civil remedies, there is no conflict or repugnancy between these two acts. In 1946, or eleven years after the enactment of Ark. Stat. Ann. § 41-507-514, we recognized the 1875 Act [Ark. Stat. Ann. § 50-104] as being a valid and subsisting act. *Swearengen* v. *Johns,* 210 Ark. 119, 194 S. W. 2d 445.

The appellant next contends that the court erred in permitting appellant's conviction under Ark. Stat. Ann. § 41-507 to be considered on the issue of liability to all the plaintiffs. The appellant had been charged and convicted of a misdemeanor under this statute with only appellee Gilley being the prosecuting witness. *Cecil* v. *State,* 234 Ark. 129, 350 S. W. 2d 614. Appellant contends that evidence of this undisputed conviction should be limited to appellee Gilley only and should not be considered on the issue of liability to the remaining appellees. Ark. Stat. Ann. § 41-511 provides:

"Conviction *prima facie* evidence in civil action.—Conviction for violation of [this act] * * * shall be *prima facie* evidence of responsibility in civil action to recover damages * * *."

The court permitted evidence of appellant's conviction to be admitted without restriction and gave the Court's Instruction No. 9 which reads as follows:

"A conviction for violation of allowing fire to escape or to spread to the lands of any person other than the builder of the fire shall be *prima facie* evidence of responsibility to recover damages."

Another portion of this act, Ark. Stat. Ann. § 41-510, provides:

"Damages to be recovered in civil action.—Persons, firms or corporations starting or being responsible for fires that occasion damage to *any other person* shall make satisfaction in double damage to the party injured. Damages are to be recovered by civil action." [Emphasis supplied.]

We think that it was the intention of the Legislature that where the same fire is the basis for a criminal conviction and then the basis for a later suit for civil damages, such conviction is admissible in civil actions not only in behalf of the prosecuting witness in the criminal case, but also in behalf of "any other person" suffering damages from the same fire. In this case the same fire was the basis for the criminal conviction as well as the multiple suits for civil damages.

The appellant further urges for reversal that the Court's Instructions No. 12[3] and 12A[4] erroneously deal

[3] "You are instructed, if any person shall set on fire any grass or other combustible material within his enclosures, so as to damage any other person, such person shall make satisfaction in single damages to the party injured, to be recovered by civil action in any court having jurisdiction of the amount sued for; but if any such person shall, before setting out fire, notify those persons whose farms are joining said place which he proposes to burn that he is going to fire such grass or other combustible matter, and shall use all due caution to prevent such fire from getting out, to the injury of any other person, he shall not be liable to pay damages. So if you find from a preponderance of the evidence that the defendant, Belton Cecil, set on fire any grass or other combustible material within his enclosure without giving notice thereof, before setting the fire, to persons whose farms joined the defendant's where he proposed to burn, that he, Belton Cecil, was going to fire such grass or other combustible material, or that Belton Cecil failed to use all due caution to prevent such fire from getting out, to the injury of these plaintiffs, and that either or both of such failures, if you so find, caused damages to one, some or all of these plaintiffs, then your verdict will be against the defendant Belton Cecil and in favor of such plaintiffs as you so find were damaged, if any."

[4] "The statute requires both the giving of the notice and the use of due caution in preventing the fire from spreading. If the notice is not given as required by law, the use of due caution in preventing the fire from spreading becomes unavailing as a defense to the action."

with the joining and non-joining landowners as being in the same class. The 475 acres involved in this litigation form a block of lands located in four sections. It includes forested lands, cut-over lands, brush lands, and grass lands. Only a part of the damaged property adjoins appellant's land, however, all of the property involved is contiguous. There is ample authority to the effect that it is not necessary that property abut or have a common boundary line to come within the meaning of a statute when the words "joining" or "adjoining" are used. We construed the word "adjoining" in the case of *City of Little Rock* v. *Katzenstein,* 52 Ark. 107, 12 S. W. 198 (1889). There it was contended that a lot was not "adjoining" because it did not abut upon or have a common boundary with a street. The court there said:

"* * * property adjoining the locality to be affected is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally."

See, also, *Matthews* v. *Kimball,* 70 Ark. 451, 66 S. W. 651; *Board of Improvement Dist. No. 5* v. *Offenhauser,* 84 Ark. 257, 105 S. W. 265; *Freeze* v. *Improvement Dist. No. 16 of City of Jonesboro,* 126 Ark. 172, 189 S. W. 660.

In the case at bar we are of the opinion that there was such a unity of the tracts of land, a part of which adjoins appellant's land, that it could be reasonably foreseen such lands would be affected or damaged by this particular fire set by the appellant. Further, Ark. Stat. Ann. § 50-104 clearly provides in the first sentence that:

"If any person shall set on fire any grass or other combustible material within his inclosures, so as to damage *any other person,* such person shall make satisfaction in single damages to the party injured, * * *". [Emphasis supplied.]

It is the latter part of this statute which provides for notice to adjoining landowners and, by this language, we do not construe the statute to limit liability only to ad-

joining landowners. To hold otherwise would be an unreasonable construction of this statute.

Further, it appears that there was no specific objection on this point made to these instructions. It is well settled that where a specific objection is not made in the Trial Court to an instruction not inherently erroneous we cannot first consider it on appeal. *Stockton* v. *Baker,* 213 Ark. 918, 213 S. W. 2d 896; *Vogler* v. *O'Neal,* 226 Ark. 1007, 295 S. W. 2d 629; *Holimon* v. *Rice,* 208 Ark. 279, 185 S. W. 2d 927.

Appellant also contends that:

"It was error for the Court to rule on testimony and to formally instruct the jury that the damages for loss of personal property are to be based on the value of the use of the personal property to the owner."[5]

The appellant specifically complains about the admissibility of appellee Ward's testimony as to the value of certain items of his personal property destroyed by the fire. Ward first placed their value at $1,000.00 to him and on cross-examination he could only justify their value at $145.00. The personal items were a radio, four bedsteads, ice box, table, heater, cook stove, phonograph, pants and shirts. Appellant contends that the market value or replacement cost is the true test. We find no merit in appellant's contention. The measure of damages for marketable chattels possessed for purposes of sale is their value as determined by the market price, but the measure of damages for chattels possessed for the comfort and well-being of their owner is not based on value in a secondhand market but on the value of their use to the owner who suffers from their deprivation. *Featherston* v. *Hartford Fire Ins. Co.,* (Ark. 1957) 146 F. Supp. 535; *Kimball* v. *Goldman,* 117 Ark. 446, 174 S. W.

[5] Court's Instruction No. 17: "Should you find for the plaintiffs, the Court instructs you that the values of the articles of personal property that were destroyed were the reasonable values of the use of the property to the plaintiffs, and you will not necessarily accept values as fixed by the owners of the property; and it will be proper for you to consider the reasonableness of the values as testified to by the plaintiffs, the purchase price of each article of property, when it was purchased, the use to which it has been put, and the condition of the property at the time it was destroyed."

1185; *Phillips* v. *Graves,* 219 Ark. 806, 245 S. W. 2d 394; *Farm Bureau Mutual Ins. Co. of Ark.,* v. *Cusick,* 235 Ark. 27, 356 S. W. 2d 740.

There is, also, another answer to this contention. Appellee Ward sought recovery of $3,044.00 for his total damages. On appeal the appellant only questions the value as to the personal items. Since the jury awarded $1,500.00, or $1,544.00 less than sought, it cannot be said that the prejudicial error resulted. There was sufficient evidence of damages to items other than personal property to constitute the basis for the jury's total award and, thus, any error was rendered harmless.

The appellant further urges for reversal that:

"The instructions, when read as a whole, are conflicting, confusing, and repetitious."

We find no merit in this contention. The Court's Instruction No. 1 provides in pertinent part as follows:

"If, in these instructions any rule, direction or idea be stated to you in varying ways, any emphasis thereon is not intended by me, and none must be inferred by you. For that reason you are not to single out any certain instruction against the others, but you are to consider all of the instructions, and regard each in the light of the other."

We have carefully reviewed appellant's contention and we are of the opinion that upon consideration of the instructions as a whole and each in the light of the other the instructions fairly and adequately enunciated the law in the case at bar. *Wright* v. *Rochner,* 233 Ark. 50, 342 S. W. 2d 483.

The appellees urge on cross-appeal that as a matter of law they were entitled to double damages and the Trial Court was in error in not awarding double damages notwithstanding the jury's verdict. We cannot agree. Upon a review of this record we do not find that the appellees specifically sought double damages in their pleadings. *Oil Fields Corp.* v. *Cubage,* 180 Ark. 1018, 24 S. W. 2d 328. This statute [Ark. Stat. Ann. § 41-510]

providing for double damages, being penal in nature, must be strictly construed and no one can invoke its benefits who does not bring himself strictly within its terms. *Missouri Pacific R. Co. et al* v. *Lester,* 219 Ark. 413, 242 S. W. 2d 714; *Lamb* v. *Hibbard,* 228 Ark. 270, 306 S. W. 2d 859.

The judgment is affirmed both on direct and cross-appeal.

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

5-3059 373 S. W. 2d 148

Opinion delivered December 16, 1963.

Joel B. Dickinson, Baton Rouge, La., *Conley Byrd,* for appellant.

Mehaffy, Smith, Williams, Friday & Bowen, and *D. D. Panich,* for appellee.

E. DeMatt Henderson, Special Associate Justice. This appeal is a sequel to the case of *Aldridge & Stroud, Inc.* v. *American-Canadian Oil & Drilling Corp.,* 235 Ark. 8, 357 S. W. 2d 8, and reference is made to such former opinion for certain of the basic facts involved in this appeal. Upon the remand required by that decision, Mr. D. D. Panich and the law firm of Mehaffy, Smith & Williams (who jointly will be designated The Attorneys) petitioned the Chancery Court for allowance of attorneys' fees and expenses incident to their representation of appellant, American-Canadian. William T. Foran

and Mrs. Kay Van, the parties whose claims to the oil properties were sustained in our former opinion, resisted such petition by respectively filing a Response and a Brief in Opposition; and appellant filed an extensive answer denying the propriety of any fee.

Following hearings held on July 9 and November 27, 1962, the Chancellor on December 13, 1962 entered a comprehensive decree which again fully adjudicated the rights of the nine separate parties to this complex litigation; and in addition granted The Attorneys' petition and fixed their fee at $30,000.00 for services rendered appellant, and awarded Aldridge & Stroud judgment on its note (which our former decision held valid) in the sum of $89,842.50, based upon principal of $75,000 plus accrued interest and an award of $7,500 for attorneys' fees. Only American-Canadian has appealed and for reversal urges that The Attorneys should be denied any fees because they represented conflicting interests in appearing as solicitors for both appellant, as the maker of the note, and Aldridge & Stroud, as its holder, and further that the award of attorneys' fees to Aldridge & Stroud was violative of public policy. Appellant does not *now* question the amount of either of the fees awarded, but asserts it was error to award any fees.

The primary question for determination is whether The Attorneys did, either in fact or as a matter of law, represent conflicting interests by acting in their dual capacity as attorneys for appellant and Aldridge & Stroud, for if such were the case we would unhesitatingly hold that they thereby forfeited all rights to any compensation. No rule of law is more firmly established than that—"A fiduciary relationship exists between attorney and client, and the confidence which the relationship begets between the parties makes it necessary for the attorney to act in utmost good faith." *Norfleet* v. *Stewart,* 180 Ark. 161, 20 S. W. (2) 868. This high fiduciary relationship positively precludes attorneys from representing conflicting interests as was well stated in *Silbiger* v. *Prudence Bonds Corporation,* 180 Fed. (2) 917, where Judge Learned Hand observed:

"Certainly by the beginning of the Seventeenth Century it had become a commonplace that an attorney must not represent opposed interests; and the usual consequence has been that he is debarred from receiving any fee from either, no matter how successful his labors. Nor will the court hear him urge, or let him prove, that in fact the conflict of his loyalties has had no influence upon his conduct; the prohibition is absolute and the consequence is a forfeiture of all pay."

This Court in *Norfleet, supra,* quoted with approval from *Baker* v. *Humphrey,* 101 U. S. 494, where it was said, "Courts of Justice can best serve both the public and the profession alike by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients." Being mindful of these commendable and indeed essential rules and the duty of courts firmly to enforce them we have reached the conclusion that in this case The Attorneys did not represent conflicting interests.

There are undoubtedly situations where the active practicing attorney may properly appear for more than a single client without in any manner being placed in a position of divided loyalty, or be exposed to the temptation to conciliate rather than vigorously espouse the rights of the clients he represents. This is particularly true of litigation not strictly *inter partes* such as probate proceedings, corporate reorganizations, bills of interpleader, and indeed litigation of this very type which was so accurately characterized in our former opinion as a "free-for-all receivership." In *Deupree* v. *Garnett,* 277 P. 2d 168 the Oklahoma court quoted with approval from 7 CJS, Attorney and Client, Section 47, as follows: "However, it is not inconsistent with the status or office of attorney that he represents different interests which are not actually adverse in the sense that they conflict or are hostile. Mere possibility that different interests represented by an attorney might develop a conflict is not sufficient to disqualify him."

This Court has twice recognized that in actions on notes an attorney does not, *as a matter of law,* represent conflicting interest by acting for both the holder and the maker of a note who admits the validity of the obligation. In the early case of *Wassell* v. *Reardon,* 11 Ark. 705, the defendant maker gave to plaintiff's attorney a power to confess judgment and the resulting judgment was upheld. Again in *Houpt* v. *Bohl,* 71 Ark. 330, 75 S. W. 470. the defendants authorized plaintiffs' attorney to waive service of summons and enter their appearance and consent to judgment which this Court then sustained. So it cannot be held, as a matter of law, that The Attorneys in this case had a conflict of interest simply because they represented both appellant as maker and Aldridge & Stroud as holder of the note.

In determining whether, in fact, there was a conflict of interest we have tested the dual representation against the conduct prescribed by the Canons of Professional Ethics of The American Bar Association, which we adopted April 24, 1939, the applicable Canon being No. 6 which specifies:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Adapting this Canon to the situation under review, the question is presented:

Did The Attorneys represent conflicting interests when as attorneys for Aldridge & Stroud it was their duty to contend that the note it held was valid, while their duty as attorneys for American-Canadian required them to oppose such contention?

To decide this important question it is necessary to refer to certain facts reflected by the record filed herein on the former appeal. If we could not do so the present appeal would necessarily have to be summarily dismissed

without any consideration of the merits of appellant's contentions. Aside from formal portions and matters not relating to the question of conflict of interest, the transcript filed with this present appeal contains only The Attorneys Petition for Fee, the appellant's Answer denying liability, and the Response to said Answer, none of such pleadings being verified; and the decree of the learned Chancellor which recites that the lower court considered in reaching its decision not only the pleadings and trial briefs filed but also "the evidence adduced on behalf of the parties." Appellant not having included such evidence in the present record before us, we would be required to affirm under the well established rule that requires affirmance in such a situation, unless there be error reflected on the face of the record, and, as we have determined, no such apparent error appears.

While routinely all appeals are assigned different numbers by our Clerk, the decree now appealed from was entered in the same numbered case below; that portion of the decrees allowing the Aldridge-Stroud intervention was in obedience to our mandate in the former appeal; and on this present appeal in this same cause we need not close our eyes to what was filed in this Court in the prior appeal since "the former transcript is still before us, and the Court takes notice of its contents." *Gans* v. *Holland* 37 Ark. 483; *Stueart Wholesale Grocery* v. *N. Sauer Milling Co.* 201 Ark. 1185, reported only in 143 S. W. (2) 546. Rules of Supreme Court No. XVI.

We thus can proceed to examine the true relationship which existed between appellant and Aldridge & Stroud in the proceeding below in which The Attorneys represented both these parties. The Attorneys representation of appellant continued even after Mr. Panich received a letter of discharge dated July 9, 1960, which was promptly reported to the Court, and at the start of the actual trial of September 13, 1960, it was announced in open court, with appellant's President present, that the late Mr. J. Hugh Wharton was also now associated with The Attorneys as counsel for appellant. It is interesting to note that Mr. Wharton filed briefs on the first

appeal for *both* appellant and the intervenor, Mrs. Kay Van, who claimed and was awarded an interest in appellant's properties and noting his dual employment in his brief stated: "There was no conflict of interest between American-Canadian and Mrs. Kay Van, as a matter of fact it was understood that the corporation was justly indebted to Mrs. Van and wanted her to recover her moneys." Mr. Wharton, appellant's former attorney, succinctly stated The Attorneys position here.

It is clear that at all stages appellant has concurred in and actively supported the contention Aldridge & Stroud made in its Intervention that the note it held was a just claim. In a deposition taken February 25, 1960, when questioned by attorneys desiring to invalidate the note, appellant's President, Mr. T. E. Robertson, testified that the execution of the note was duly authorized by appropriate corporate action, was supported by a true consideration, and constituted a valid, binding and enforceable obligation; and in this he was corroborated by the deposition of appellant's Secretary. At the trial on October 25, 1960, when called to the stand and examined closely by several adversary attorneys also desiring to upset the note, Robertson reaffirmed his position that the note was valid in every respect.

The only persons who at any time asserted any contentions opposed to those of Aldridge & Stroud were the various other parties no longer involved in this litigation, such as Crabtree, Foran, Nielson, Mrs. Van and Mrs. Roberts, whose interests in defeating the note and thereby enhancing the value of their claims were real, and whose opposition was genuine and vigorous. These rival claimants to appellant's property all asserted that the note was invalid; but they, *and only they,* opposed the allowance of the Intervention of Aldridge & Stroud, while appellant supported it.

Indeed, these rival claimants even intimated that appellant's President had joined forces with Mr. Stroud, a director of appellant, and President of Aldridge & Stroud, to create a fictitious indebtedness to their detriment. The Chancellor tacitly agreed and disallowed the

note for want of consideration and on the former appeal we reversed on the basis of appellant's own testimony "that the note and assignment were legal and valid in every respect" as contended by Aldridge & Stroud.

Appellant relies principally upon *Strong* v. *International Building, Loan & Investment Union* (1889) 183 Ill. 97, 55 N. E. 675, and asserts in its brief that such case deals "with this same problem;" but there is vital distinction between that case and the one at bar. In *Strong* the attorney for the court appointed receiver also represented the Union in receivership, and the Illinois court pointed out that Strong admitted in his testimony, "that the Union was *antagonistic* to the receivership." This, of course, created a true case of conflicting interests and denial of any fee was proper.

In this case at no time since Aldridge & Stroud first presented their claim through an Intervention filed by The Attorneys on July 11, 1957, did appellant become antagonistic to the allowance of such claim; but in stark contrast The Attorneys bottomed their case upon appellant's support of their contentions. As distinguished from the assertion of adverse contentions The Attorneys two clients testified in harmony. With such harmony, mutuality and unity characterizing the positions of their two clients we have no difficulty in deciding that The Attorneys never encountered any conflict in the duties owed to either.

The record further reveals sufficient facts to justify affirmance upon the ground that appellant by long acquiescence, with knowledge of the dual employment, waived any right to object (see 52 A.L.R. (2) at 1268); but we prefer to base our affirmance of the fee award for their representation of appellant upon the specific holding that The Attorneys did not represent conflicting interests since it never became their duty on behalf of Aldridge & Stroud to contend for that which duty to appellant required them to oppose.

Appellant also asserts that the trial court erred in awarding attorneys' fee in favor of Aldridge & Stroud

as authorized by the terms of its note. The basis for this contention as stated by appellant is that since the attorney represented conflicting interests it would be "against public policy for them to be awarded a fee to be paid from the pocket of American-Canadian."

What we have held with regard to the alleged conflict of interest leaves for consideration only the question as to whether the allowance of a fee to the note holder in this instance violates some "public policy." In their brief appellant states: "Counsel for appellant have been unable to find a case in point, but sound logic would dictate that the law should be such . . ."

The maker was involved in a New York bankruptcy proceeding, had no assets other than the properties involved in this suit, and the only conceivable way the holder could hope to collect was to perfect its claim to a lien upon the properties in the "free-for-all receivership" in the Chancery Court. To do this Aldridge & Stroud had to employ attorneys, and we have held that the selection of the attorneys involved was proper. Although the attorneys had the cooperation of the maker they did not have smooth sailing. Other claimants to the properties aggressively opposed their claim, the Chancellor denied it, and they finally prevailed only by successfully prosecuting an appeal to this Court.

Our holding in the first opinion that the note and its supporting assignment or mortgage were enforceable obligations becomes the law of the case. *Meyers* v. *Meyers,* 214 Ark., 273, 216 S. W. (2d) 54. The provision of the note for an award of attorneys' fees not exceeding ten per cent, cannot be seprated from its other provisions and is now enforceable in Arkansas. Ark. Stats. Ann. 68-910. We can perceive of no public policy which precludes Aldridge & Stroud from obtaining the benefit of this provision contained in a note which the law of the case holds valid, when the realities of the case required they be represented by attorneys to enforce their claim.

Appellant does not question the amount awarded; and in our opinion cannot on this appeal for the first time question the validity of the award. When the case was remanded with directions to allow the note as a valid claim the only action required of the Chancellor was to compute the amount of the Aldridge & Stroud judgment and then enter an appropriate decree. It is apparent that appellant did not question before the Chancellor the inclusion of an attorney's fee in such computations.

When following remand The Attorneys petitioned for a fee for services rendered to appellant it promptly filed a detailed and extensive answer and protest; but in such lengthy pleading no objection is made, even indirectly, to the inclusion of an attorney's fee in the Aldridge & Stroud judgment. Nor was any pleading ever filed directly objecting to an attorney's fee to Aldridge & Stroud. The proceedings at the two hearings held prior to the entrance of the questioned decree are not shown. All that the record before us contains relating to the Aldridge & Stroud judgment is (a) the intervention with its prayer for attorney's fees, (b) the mandate which issued upon the former appeal, (c) and the decree now under review. The record is thus completely silent as to any objection to the $7,500.00 fee having been made at any time before the lower court.

Conversely the record does strongly indicate that appellant actually consented and initially agreed to the attorney's fee included in the Aldridge & Stroud judgment.

Appellant has designated as part of the record on appeal the Chancellor's docket entry made contemporaneously with entrance of the decree, and such appears at page 26-A of the transcript and reads, "Decree as per precept filed this day *by consent of all parties, except*, American-Canadian Oil & Drilling Corp. excepts to any amount of attorney fee to Mehaffy, Smith & Williams and D. D. Panich over and above the amount of $15,000.00. And notice of appeal given as to the balance of the fee in the sum of $15,000.00." (Italics added). The first notice of appeal filed January 4, 1963 corroborates

the docket entry and did not question the Aldridge & Stroud judgment. By an amended notice of appeal, timely filed by different attorneys, appellant appealed generally from the decree of December 13, 1962 and in the designation of points to be relied upon *for the first time* assert error in the inclusion of attorneys' fees in the Aldridge & Stroud judgment. In view of the cases concerning the efficacy of docket entries, we cannot conclusively say that the Aldridge & Stroud judgment was entered by consent, in which case it would not be appealable, since the decree itself does not so recite. *Herrod* v. *Larkins,* 183 Ark. 509, 36 S. W. (2d) 667; *City of Monticello* v. *Kimbro,* 206 Ark. 503, 176 S. W. (2d) 152; *Pittsburg & St. Louis R.R. Co.* v. *Johnson,* 93 N.E. 683.

We do conclude that there being nothing in the record filed in this Court to show that the issue of the allowance of attorneys' fees to Aldridge & Stroud was raised in, or considered by, the trial court, this Court Constitutionally vested only with appellate and supervisory jurisdiction cannot consider such issue for the first time on appeal. *Missouri Pacific R.R. Co.* v. *Myers Commission Co.,* 196 Ark. 976, 120 S. W. (2) 693.

The decree of the lower court is affirmed.

WARD, J. not participating.

GEORGE ROSE SMITH, J., dissents in part.

GEORGE ROSE SMITH, J., (dissenting in part). With respect to the main issue, the $30,000 fee, I agree that there was no conflict of interest in The Attorneys' representation of both American-Canadian and Aldridge & Stroud in their common fight against third persons. But I do think that a conflict of interest was foreseeable, and in fact has arisen, with respect to the $7,500 fee that is being allowed for the services of The Attorneys in handling the claim of one of their clients, Aldridge & Stroud, against another client, American-Canadian.

It will be remembered that Aldridge & Stroud held American-Canadian's note for $75,000. The note bound the maker to pay a 10 percent attorney's fee if a suit for collection became necessary. Such a provision does

not mean, however, that the court must award the full 10 percent in every instance. Only a reasonable fee is to be allowed. *Citizens Nat. Bank* v. *Waugh,* 4th Cir., 78 F. 2d 325, annotated in 100 A.L.R. 939. Our statute is in harmony with this rule, for it validates such a stipulation for an attorney's fee, not to exceed 10 percent, "for services actually rendered." Ark. Stat. Ann. § 68-910 (Repl. 1957).

The requirement that the fee be reasonable creates a true dilemma in this case. One horn: If American-Canadian made no defense whatever to the claim of Aldridge & Stroud, so that there was actually no dispute between these parties, then American-Canadian may fairly question the reasonableness of a $7,500 attorney's fee for taking what amounted to a default judgment in a friendly suit. The other horn: If American-Canadian resisted the claim, so that the fee was unquestionably earned, then that very resistance demonstrates that an actual controversy existed between the two litigants.

I do not mean that a fee of $7,500 was not earned. The claim of Aldridge & Stroud was contested by other creditors of American-Canadian, so that The Attorneys were confronted with a serious lawsuit. But American-Canadian is certainly in a position to assert that, after having made no resistance itself to the claim, it ought not to be compelled to pay a fee that was brought about only by the opposition of third persons. Hence the issue that has been dormant all along and now becomes active is this: Which of The Attorneys' clients is to be compelled to pay this fee? I am unable to agree with the majority's conclusion that in this situation no conflict between the clients is discernible.

Opinion delivered December 23, 1963.

Riddick Riffel, for appellant.

Luke Arnett, for appellee.

CARLETON HARRIS, Chief Justice. The question presented on this appeal is whether appellant, Arkansas Motor Club, Inc., is liable for Unemployment Compensation Tax. Appellant is engaged in selling motor club memberships to the general public within this state. These sales are made through salesmen. On June 13, 1960, after a hearing, the Arkansas Commissioner of Labor held that the salesmen of appellant were employed under an oral contract for a one-year term, which could be terminated by either party; that the only source of revenue for appellant was the sale of membership certificates; that these salesmen are "outside salesmen of the company, performing an integral and imperative part of the corporative business and are not independent contractors and are employees of the Arkansas Motor Club within the meaning and pursuant to the statutory provisions of the Arkansas Employment Security Act." The Commissioner further found that the salesmen were not

insurance salesmen, but sold only automobile club memberships and "the fact that an insurance policy is issued in connection with the automobile association membership does not make them insurance agents within the meaning of Section 2 (i) (6) (P) of the Arkansas Employment Security Act."

The Commissioner held that appellant was the employer of the salesmen involved, and was liable for Unemployment Compensation Tax on the commission paid to these employees.

An appeal was taken to the Board of Review, and that body affirmed the Determination of Coverage as entered by the Labor Commissioner. On appeal to the Circuit Court of Pulaski County (Third Division), the ruling of the Board of Review was affirmed. Thereafter, appellant has perfected its appeal to this court.

For reversal, appellant argues first, that the salesmen of Arkansas Motor Club, Inc., are free and clear of the control and direction of appellant, and are therefore independent contractors and exempt from the operation of the act.[1] It is also contended that memberships in the club are contracts of insurance, and the salesmen are insurance agents whose services are performed for remuneration solely by way of commissions; the act, therefore, is not applicable.[2]

Since we have concluded that the salesmen for appellant are insurance agents or solicitors, a discussion of the first alleged ground for reversal is unnecessary, and we by-pass the question of whether these salesmen are independent contractors.

The record reflects that the motor club has an office in Little Rock, with an office manager, who is under the control and direction of the club's officers who live in Atlanta, Georgia. The club enters into oral agreements

[1] Ark. Stat. Anno. § 81-1103 (Repl. 1960) (i) (2) (A) and (5) (C) exempt independent contractors, (C) providing that independent contractors shall be deemed employers and not employees.

[2] Sub-section (i) (6) (P) exempts insurance agents or insurance solicitors "if all such services performed by such individual for such person, or employing unit, is performed for remuneration solely by way of commission."

with individuals whereby the latter agrees to sell club memberships. Some of these agents work on a full time basis, and others sell the memberships in addition to regular employment held elsewhere. Each agent is assigned a particular territory to work, though he is also privileged to sell memberships in territory not assigned to him. In that event, the seller of the membership receives the initial commission, but the commission on the renewal premium is turned over to the agent to whom the territory had been assigned. Agents receive no salary, no travel expenses,[3] and are paid entirely on a commission basis, *i.e.,* they receive a certain percentage of the premium for each membership sold. The benefits provided by the purchase of a membership to the holder will be subsequently discussed.

Chapter 16, Ark. Stat. Ann. (Repl. 1957) relates to "Automobile Clubs or Associations."[4] Section 75-1601 defines an "Automobile Club or Association" as:

"(a) any person, firm, association, copartnership, corporation, company or other organization, which from and after the effective date of this act undertakes for consideration paid by or on behalf of its members to defray all or a part of the expenses of such member or members with reference to motor club service as defined in Section 2 [§ 75-1602] of this act, or which issued a certificate which provides for the payment of such benefits to such member or members in services, cash, by furnishing bail, or otherwise, and (b) every person, firm, association, copartnership, corporation or company which prior to the effective date of this act has undertaken for a consideration to pay money or render services to its members, or which has issued any form of contract or certificate or membership card which, under the terms thereof, provides for the payment in money, service, or otherwise for motor club service as defined in Section 2 [§ 75-1602] of this act."

[3] The sole exception relates to special meetings, usually held twice a year, which are called for the purpose of explaining new matters, changes in contracts, etc. The agents are not required to attend, but in case of attendance, are reimbursed for travel expense, including hotel and meals while attending the meetings.

[4] Act 377 of 1955.

Section 75-1602 defines the various services which may be included in membership. Section 75-1603 gives the Insurance Commissioner complete authority to grant certificates of authorization to automobile clubs; to revoke certificates, and to prescribe rules and regulations reasonably necessary for the conduct of the business of the clubs. Section 75-1604 places all automobile clubs and associations operating in this state under the authority, supervision, and control of the Insurance Commissioner. Section 75-1605 requires, *inter alia,* the posting of a bond with the Commissioner, the payment of an annual license fee by the club or association, appointment of an agent for service of process, or, in lieu thereof, the Insurance Commissioner, and the club is required to file a copy of the proposed form of membership application, membership certificate, bylaws, contracts for service and advertising material. Section 75-1606 reads as follows:

"Before any agent or representative shall or may represent any automobile club or association in this state, he or she shall first apply to the Insurance Commissioner for a license and the Insurance Commissioner shall have full power and authority to issue such license upon proof satisfactory to him that such person is capable of soliciting automobile club or association memberships, and is of good moral character and recommended by the club or association in behalf of which such membership solicitations are to be made. Provided no such license shall be issued by the Insurance Commissioner until the applicant has paid to the Insurance Commissioner two dollars ($2.00) as annual license fee. The Insurance Commissioner may reject the application of any person who does not meet the requirements herein set out."

Section 75-1608 sets out that,

"* * * such clubs and associations shall not be subject to any other laws respecting insurance companies of any class, kind or character, except as to the conduct of hearings by the Insurance Commissioner and appeals therefrom."

Thus, we see that these motor clubs are under the supervision and regulation of the Commissioner of Insur-

ance. Of course, this fact, within itself, is not determinative of the status of the salesmen, but is a pertinent circumstance to be considered.

The purchaser of a membership receives a card which sets forth, *inter alia,* the following benefits: The club agrees to provide an appearance bond up to $200.00 in certain types of motor vehicle violations; a bail bond up to $5,000.00 in the event of an automobile accident (excepting particular charges); attorneys' fees up to $25.00 when a member is charged with violation of any motor vehicle law; attorneys' fees up to $150.00 if a member is charged with manslaughter, and an additional attorneys fee up to $250.00 if the judgment is appealed to a court of last resort.[5] In addition, the member receives a certificate of accident insurance, issued by the Inter-Ocean Insurance Company, which provides benefits of $10,000.00 for loss of life in a railroad accident, $2,500.00 for loss of life in a bus, street car, steamship, or subway accident, and $1,000.00 for the loss of life in "Automobile, Pedestrian, Taxi, School Bus, Truck, Airplane Accidents." Benefits are also provided for loss of sight, both hands, both feet, one hand and one foot, one hand and sight of one eye, one foot and sight of one eye, either hand, either foot, or sight of either eye. Section 3 of the insurance contract provides certain hospital benefits, including operating room, x-ray pictures, oxygen tent, and other benefits of a similar nature. Section 4 provides certain benefits for non-disabling injuries. Actually, it appears that the payments set out in the certificate are among the main benefits obtained through the purchase of memberships.

While there is no definition of the term "insurance" in several states, our Arkansas Insurance Code[6] provides a concise definition of that term. Ark. Stat. Ann. § 66-2002 (Supp. 1961) defines the term as follows:

" 'Insurance' is a contract whereby one undertakes to indemnify another or pay a specified amount or provide a designated benefit upon determinable contingencies."

[5] Towing service and emergency road service, not provided in the regular membership, are available if additional premium is paid.

[6] Act 148 of 1959.

It is obvious that the benefits heretofore mentioned come clearly within this definition of insurance. Certainly, there is a contract, in which the Arkansas Motor Club, for a pecuniary consideration, promises to provide specific benefits previously set forth to the holder of the membership. Both the card and the certificate contain provisions wherein the club undertakes to indemnify the member, "or pay a specified amount," or "provide a designated benefit upon determinable contingencies." Of course, the certificate is actually "straight-out" insurance, but even the services mentioned on the membership card, *viz,* bail bond service, legal service, etc., are benefits provided under the contract which accrue upon the happening of a determinable contingency, and are therefore insurance benefits. Other courts have so held. In *National Auto Service Corp.* v. *State,* 55 S. W. 2d 209, the Court of Civil Appeals of Texas held that a membership certificate which provided that, for annual dues, the corporation would repair accidental damage to a member's automobile in a specified amount, was an insurance contract, even though the certificate contained the following clause:

"It must be clearly understood that this is not insurance, as the corporation never pays its members any money, as indemnity, except to repair any damage to member's automobile at the corporation's authorized repair shop as hereinabove provided."

The court then said:

"What constitutes insurance has been defined by statute in many states, and has been frequently defined by the courts. Its essential elements as relate to property are that it provides, for a consideration, indemnity against loss or damage to property in which the assured has an interest which may result from some uncertain or unforeseen contingency."

In *Texas Association of Qualified Drivers, Inc.* v. *State,* 361 S. W. 2d 580, the proof reflected that appellant was organized as an association of automobile drivers, and association memberships were solicited and sold. The benefit received by members was a reimburse-

ment (up to specified amounts) for attorneys' fees incurred by members when involved in certain moving traffic violations. The court said:

"The sole question for decision is whether the reimbursement to members for attorneys' fees incurred by them as above set forth constitutes insurance. * * *

"There is no statutory general definition of the word 'insurance' in Texas. However, insurance has been defined by the Appellate Courts of Texas as ' "An undertaking by one party to protect the other party from loss arising from named risks, for the consideration and upon the terms and under the conditions recited." Whether or not a contract is one of insurance is to be determined by its purpose, effect, contents, and import, and not necessarily by the terminology used, and even though it contains declarations to the contrary.' (Citing *National Auto Service Corporation* v. *State, supra.*) It has also been defined as 'a contract by which one party for a consideration assumes particular risks of the other party and promises to pay him or someone named by him a certain or ascertainable sum of money on a specified contingency.' (Citing case.)

"Here the purpose of the contract made by appellant with its members for a stated consideration was to indemnify or reimburse the holder of a membership certificate for payments incurred by the member for attorneys' fees in the defense of a moving traffic violation in which the member was involved under certain conditions and within the limitations set forth in the certificate. Under the above definitions of insurance it is clear that the contract between appellant and its members constitutes an insurance contract."

In *Continental Auto Club, Inc.* v. *Navarre, Commissioner of Insurance*, 60 N. W. 2d 180, membership in an automobile club entitled members to attorneys' services to the extent of dollar limitation designated for various types of service, and bail for club members under certain conditions was also provided. The Supreme Court of Michigan, though there was no statutory definition of

insurance in that state, held "that by engaging in the business of furnishing its members under its contract, the benefits hereinbefore recited, the plaintiff club was and is in fact engaging in the business of insurance." Other cases could be cited, but actually, our own statutory definition of "insurance" is sufficient to determine the matter.

In accordance with the views herein expressed, the judgment is reversed and the cause remanded to the Circuit Court with directions to enter an order which will result in the Commissioner of Labor setting aside his Determination of Coverage, and entering, in lieu thereof, an order not inconsistent with this opinion.

HASTINGS *v.* ROSE COURTS.

5-3074 373 S. W. 2d 583

Opinion delivered December 23, 1963.

[Rehearing denied Jan. 20, 1964.]

House, Holmes, Butler & Jewell, by *Philip E. Dixon,* for appellant.

Moses, McClellan, Arnold, Owen & McDermott, by *Wayne Owen* and *Bonner, Mitchell & Hays,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a boundary line dispute involving property in Lots 1 and 2 of Rapley Estate in Pulaski County. Rose Courts, Inc., an Arkansas corporation, owns the east portion of Lot 2; and Harry L. Hastings and wife[1] own the west portion of Lot 1. Running north and south between Lots 1 and 2 there was and is an unopened avenue 40 feet wide, east to west, and the lots of the litigants herein abut on said unopened avenue. Rose Courts brought this suit against Hastings to have the Chancery Court establish the true location of the unopened 40-foot avenue, and also to enjoin Hastings from alleged trespass on Rose Court's property west of the unopened avenue. Rose Courts claimed that the unopened avenue was about 84 feet east of where Hastings claimed it to be. Hastings claimed: (a) that previous litigation was *res judicata* against Rose Courts; and (b) if *res judicata* were not sustained, the unopened avenue was 84 feet west of where Rose Courts claimed it to be. Neither side claimed title in any way to the unopened avenue.

The litigation has a considerable historic background. In 1872 the Pulaski Probate Court directed the administrator of the Estate of Charles Rapley to file a plat of portions of Sections 10, 11, and 14. This plat was filed and showed said Lots numbered 1 to 8 of Rapley Estate, each lot[2] containing approximately 9 acres; and the plat showed an unopened (and unnamed) avenue 40 feet wide east to west, running north and south, and separating Lots 1, 4, 5, and 8 on the east side of the avenue from Lots 2, 3, 6, and 7 on the west side of the avenue. The plat did not show definitely whether the property

[1] The original defendants were Harry L. Hastings and wife, and in the course of the litigation they transferred their title to the Hastings Realty Company, an Arkansas corporation. We continue to refer to all of the defendants as "Hastings."

[2] In some instances, they are referred to as "lots" and in others as "blocks"; but the interchange of these words is not a material matter in this litigation.

line immediately west of the Rapley Estate was the Quapaw Line or the line of Cox's Quapaw Addition, which addition is 170 feet east to west and several hundred feet north and south. This failure of the plat to establish the said west line of Rapley Estate was probably the origin of the litigation herein to be mentioned. Except for the matter of *res judicata,* subsequently to be discussed in detail, the issue could be simply stated: if the west line of the Rapley Estate bordered the Quapaw Line, then the 40-foot avenue here involved should be as contended by Hastings; but if the west line of the Rapley Estate bordered Cox's Quapaw Addition, then the 40-foot avenue should be as contended by Rose. In other words, a strip of about 84 feet is involved in the present litigation, depending on who is right about the location of the unopened avenue.

A voluminous record was made in the Trial Court with scores of exhibits consisting of plats, surveys, court orders, deeds, and other instruments. A number of engineers and surveyors testified, and some even repudiated their own previously made plats as to location of the 40-foot avenue. Such repudiation tended to place the issue in grave doubt as to the actual location of the 40-foot strip.[3] The Trial Court denied Hastings' plea of *res judicata* and fixed the 40-foot avenue at the place urged by Rose Courts; and from that decree Hastings has appealed, urging two points:

"1. The Trial Court erred in not holding the present action barred by reason of Pulaski Chancery Cases No. 82474, No. 90142, and No. 101718, based on the law of *res judicata.*

"2. The Court erred in not locating the forty foot avenue as shown on the C. T. Brandt Survey of December 11, 1947."

We do not reach appellants' second point because we are convinced that Hastings' plea of *res judicata* should have been sustained; and we now give the situa-

[3] On this see *Raper* v. *Morrow,* 222 Ark. 414, 259 S. W. 2d 499, subsequently discussed.

tions which show the applicability of such plea. First, we give the line of title of each litigant from the various deeds, all duly recorded:

(a) Rose Courts, the present appellee, received its deed from Arkansas Courts, dated June 27, 1950; Arkansas Courts received its deed from Arkansas Real Estate Company, Inc., dated December 9, 1949; and Arkansas Real Estate Company, Inc. received its deed from Little Rock Investment Company dated April 4, 1947.

(b) Harry L. Hastings and wife received their deed from C. C. McCord, dated May 10, 1955; and C. C. McCord received his deed from the State of Arkansas, dated December 27, 1935.

Certain cases in the Pulaski Chancery Court need to be identified:

(a) Case No. 82474 was by C. C. McCord, as plaintiff, against Arkansas Real Estate Company, Inc., as defendant. The decree rendered in February 1949 recited that McCord's title to the west 156.3 feet of Lot 1 Rapley Estate (that would be along the unopened avenue) was quieted, and that the boundary line between Lot 1 and Lot 4 (to the south of Lot 1) Rapley Estate "is shown by Exhibit 8 herein, same being a plat of the survey made by C. T. Brandt December 11, 1947." It will be observed that McCord owned his portion of Lot 1 until May 1955, and that Arkansas Real Estate Company, Inc. owned its portion of Lot 2 until December 1949, and that the parties to the present litigation claim through the respective parties in said Case No. 82474.

(b) Case No. 90142 in the Pulaski Chancery Court was dismissed by voluntary non-suit and is unimportant.

(c) Case No. 101718 in the Pulaski Chancery Court was styled, *Arkansas Real Estate Company, Inc.,* as plaintiff, v. *C. C. McCord and wife,* defendants, and filed January 18, 1955. In that case the Arkansas Real Estate Company, Inc. claimed ownership of the west 84 feet of Block 1, Rapley Estate (same being a portion of the Hastings property). It will be observed that Arkansas

Real Estate Company, Inc. conveyed its title to Lot 2 in 1949 to Arkansas Courts, yet in 1955 Arkansas Real Estate Company, Inc. was claiming against McCord 84 feet from Lot 1, Rapley Estate. Against such claim in Case No. 101718, McCord pleaded that the decree in Case No. 82474 was *res judicata* against Arkansas Real Estate Company, Inc.; and by decree of July 28, 1955, McCord's plea of *res judicata* was sustained.

(d) Case No. 107579 in the Pulaski Chancery Court is the present case; and Hastings has pleaded the earlier cases as *res judicata.*

Mr. R. M. Traylor, President of Rose Courts, and also President of both of the predecessor corporations, Arkansas Courts, and Arkansas Real Estate Company, Inc., was called as a witness by Rose Courts in this case; and Mr. Traylor admitted on cross examination that the 84 feet involved in the present suit was the same 84 feet that was involved[4] in Case No. 101718. It is true that on re-direct examination Mr. Traylor claimed he did not know what his attorneys had alleged in the previous

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[4] Here is Mr. Traylor's testimony:

"Q. Mr. Traylor, you have testified in regard to a conversation had between you and Mr. Hastings subsequent or shortly after Mr. Hastings' purchase of the west part of Lot 1 or Block 1 of Rapley Estate?

"A. I did, sir.

"Q. And you testified that shortly thereafter you filed a lawsuit against Mr. Hastings?

"A. Well, I think it was after that. It was along about that same time. I don't remember how many days or weeks or months it was, but it was leading up to it after Hastings bought the property and *it came to a head about this 84 feet of ours that he is claiming.* (Emphasis supplied.)

"Q. Was not that 84 feet that you are talking about exactly the same 84 feet that is involved in this lawsuit here now?

"A. That 84 feet that is involved in this lawsuit?

"Q. Yes.

"A. What is the number of this lawsuit? Do you mean the present lawsuit?

"Q. Yes, sir.

"A. What is the number of that lawsuit, not that 82474 that you had awhile ago, is it?

"Q. No, No. 107579.

"A. *Of course, it would be.* (Emphasis supplied.)

"MR. MITCHELL: Wait a minute.

"A. There is a suit about where this street goes and if you prevail you would come 84 feet over into our property, or 85, whatever it is."

cases; but Mr. Traylor's admission must stand against Rose Courts, of which he is President. Such admission by Mr. Traylor is sufficient extrinsic evidence to identify the land in the previous litigation with the land in the present litigation and to establish Hastings' plea of *res judicata.* It is true that Arkansas Real Estate Company, Inc. had conveyed by deed to Arkansas Courts before the decree in Case No. 101718, but nevertheless the plea of *res judicata* was successfully used in Case No. 101718, with Case No. 82474 as the support for such plea; and Traylor's admission that the land in Case No. 101718 was the same as that claimed by Rose Courts in the present case establishes that the land in the present suit is the same as the land involved in Case No. 82474. Such extrinsic evidence supports the plea of *res judicata.*

The Latin words, "*res judicata,*" literally translated into English mean "a thing adjudged"; and freely translated into English mean "the matter has been decided." In *Mo. Pac. RR. Co.* v. *McGuire,* 205 Ark. 658, 169 S. W. 2d 872, we quoted the language from American Jurisprudence to explain *res judicata:*

" 'Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.' "

In *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. 2d 610, Mr. Justice Humphreys, speaking for the Court, said:

"The test in determining a plea of *res judicata* is not alone whether the matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issues and might have been litigated in the former suit. *Gosnell Special School Dist. No. 6* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; *Cole Furniture Co.* v. *Jackson,* 174 Ark. 527, 295 S. W. 970; *Prewett* v. *Waterworks Imp. Dist. No. 1,* 176 Ark. 1166, 5 S. W. 2d 735."

We have given the line of title of Hastings and Rose Court to show that Hastings is in privity with McCord, and Rose Court is in privity with Arkansas Real Estate Company. In *Mo. Pac.* v. *McGuire, supra,* we said:

"And in 30 Am. Jur. 957, in discussing who are privies within the rule of *res judicata,* it is stated: 'In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject-matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title.' See *Meyers* v. *Eichenbaum,* 202 Ark. 438, 150 S. W. 2d 958, and cases and authorities there cited."

In *Cook* v. *American Cyanamid Co.,* 227 Ark. 268, 297 S. W. 2d 933, we said:

"The contention that the parties are not identical under the doctrine of *res judicata* is without merit. See *Collum* v. *Hervey,* 176 Ark. 714, 3 S. W. 2d 993, to the effect that a grantee, under the doctrine of *res judicata,* stands in the relation of privy to the grantor."

In *Carrigan* v. *Carrigan,* 218 Ark. 398, 236 S. W. 2d 579, we quoted the language of the United States Supreme Court in *Russell* v. *Place,* 94 U. S. 606, which language had been approved by Mr. Justice Battle in *McCombs* v. *Wall,* 66 Ark. 336, 50 S. W. 876, which language is:

" 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to give this operation to the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed,

without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.' "

Here, as we have previously shown, Mr. Traylor's testimony was the extrinsic evidence which clearly showed that the 84-foot strip here in issue was the same strip in issue in Case No. 82474, and that in Case No. 101718 the plea of *res judicata* was successfully urged in favor of McCord (predecessor in title to Hastings) as to the said 84-foot strip. In *Morrow* v. *Raper,* 222 Ark. 414, 259 S. W. 2d 499, Mr. Justice Millwee said:

"There is no contention by plaintiff that the 1946 judgment was obtained by fraud or collusion. The only contention is that the surveyors made a mistake in establishing the boundary line in that suit. The fact, if true, that the question of the boundary line may have been erroneously determined in the former suit does not impair the conclusiveness of a valid judgment rendered by a court of competent jurisdiction, which has not been set aside or corrected on appeal. *Tri-County Highway Improvement Dist.* v. *Vincennes Bridge Co.,* 170 Ark. 22, 278 S. W. 627; *Strauss* v. *Missouri State Life Ins. Co.,* 188 Ark. 286, 66 S. W. 2d 299; 30 Am. Jur., Judgments, § 156; 50 C.J.S. Judgments, § 704."

In *Timmons* v. *Brannan,* 225 Ark. 220, 280 S. W. 2d 393, there had been a previous case to establish the boundary line between the parties; then later Timmons attempted to show that there was a street (called Ridge Street) between the properties of Brannan and Timmons, but we held the first case to be *res judicata,* saying:

" 'The test in determining the plea of *res judicata* is not alone whether the matters presented in the subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily

within the issue and might have been litigated in the former suit.' The test is not whether the matters in the second suit were *actually* litigated in the former suit between the parties, but whether such matters were *necessarily within the issues and might have been litigated in the former suit.*"

Appellee cites and strongly relies on *Fawcett* v. *Rhyne,* 187 Ark. 940, 63 S. W. 2d 349, and *McCombs* v. *Wall,* 66 Ark. 336, 50 S. W. 876; but neither of these cases is ruling in the case at bar. In *Fawcett* v. *Rhyne* we held that the adjudication concerning one parcel in a larger tract was not *res judicata* in regard to another parcel, in the larger tract, not included in the previous case. In *McCombs* v. *Wall* we held that there was nothing, either in the record or in extrinsic evidence, to identify the land involved in the second case as having been in the original case, and thus *res judicata* was not established. The two cases relied on by the appellee are correct, but the law enunciated in those cases is not applicable to the case at bar because, here, there is extrinsic evidence that the tract now involved was also involved in the previous litigation.

Finally,[5] we mention *Rose* v. *Jacobs,* 231 Ark. 286, 329 S. W. 2d 170, wherein we quoted with approval from 50 C.J.S. 293, "Judgments" § 763:

" 'Since the identity of parties is not a mere matter of form, but of substance, the rule of *res judicata* should not be defeated by minor differences of parties. Thus, where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal to the conclusive effect of the prior judgment, and a substantial identity is sufficient. * * * This rule, that there must be a substantial identity of parties as

[5] In addition to the cases heretofore cited, we have a number of other cases on *res judicata* which are germane to the points here discussed. Some such cases are: *Watson* v. *Suddoth,* 218 Ark. 960, 239 S. W. 2d 602, *certiorari* denied U. S. Supreme Court, 342 U. S. 885, 96 L. Ed. 664, 72 S. Ct. 174; *Langford* v. *Griffin,* 179 Ark. 574, 17 S. W. 2d 296; *Jones Lmbr. Co.* v. *Wisarkana Lmbr. Co.,* 125 Ark. 65, 187 S. W. 1068; *Cleveland-McLeod* v. *McLeod,* 96 Ark. 405, 131 S. W. 405; *Sauls* v. *Sherrick,* 121 Ark. 594, 182 S. W. 269; *Gordon* v. *Clark,* 149 Ark. 173, 232 S. W. 19; *Lillie* v. *Nunnally,* 211 Ark. 202, 199 S. W. 2d 751; and *Barton* v. *Meeks,* 209 Ark. 903, 193 S. W. 2d 138.

well as of the subject matter, is based on the fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the United States has been embodied in the Federal Constitution, and in the constitutions of the several states. *It has also been held that the true reason for holding an issue res judicata is not necessarily the identity or privity of the parties, but the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy, and that a plaintiff who deliberately selects his forum is bound by an adverse judgment therein in a second suit involving the same issues, even though defendant in the second suit was not a party, nor in privity with a party, in the first suit.' "*

So we conclude that Hastings' plea of *res judicata* should be sustained; and it follows that the Chancery decree is reversed and the cause remanded, with directions to sustain Hastings' plea of *res judicata* and to dismiss the complaint of Rose Courts.

George Rose Smith, Ward & Johnson, JJ., dissent.

George Rose Smith, J., (dissenting). Today's decision is demonstrably unjust. In that the Hastings Realty Company is acquiring a strip of land to which it has no title whatever. On the merits only five witnesses with engineering or surveying experience testified. All five of them fixed the disputed boundary line in accordance with the contentions of the appellee and the findings of the chancellor. Not one syllable of testimony to the contrary was offered by Hastings. That the strip actually lies within the tract described in the appellee's deed is, on the record before us, an undisputed fact.

Yet Hastings emerges as the owner of the land. This result comes about through an application of the doctrine of *res judicata.* Despite the majority's protracted discussion of elementary principles of law, as far as I can see the rule of *res judicata* actually has nothing at all to do with this case.

Two earlier chancery cases are involved. The first, No. 82474, cannot possibly be conclusive of the present litigation and is not found to be so by the majority. That case did not concern the point now in controversy. There the only issue was the true location of the *southern* boundary of Lot 1. That issue had nothing to do with the true location of the western boundary of Lot 1, now in dispute. It happened that in Case No. 82474 there was filed a surveyor's plat, prepared with reference to the *southern* boundary, that erroneously located the *western* boundary in accordance with Hastings' present contention. But that error was wholly extraneous to the controversy then before the chancery court, did not lead to a binding decision fixing the *western* boundary line, and is not so interpreted by the majority in the case at bar.

After the decision in the first chancery case Arkansas Real Estate Company conveyed its interest in Lot 2 to this appellee, Rose Courts. Thereafter the second chancery case, No. 101718, was decided. That litigation did involve the boundary now in dispute; but the point is that the appellee, Rose Courts, was not a party to the case nor was it represented by a party. The plaintiff was Arkansas Real Estate Company, which had already conveyed Lot 2 to Rose Courts. Yet that is the decision that the majority hold to be *res judicata.*

Even after having studied the majority opinion I do not understand how it is that a grantee is bound by litigation brought by its grantor *after* the property has been conveyed to the grantee. This bewildering result seems to be reached solely because Traylor, the president of Rose Courts, happened to testify (inadvertently, as the majority seem to realize) that the land now in controversy is the same tract as that involved in the second chancery case.

Although this single statement in a record of several hundred pages is seized upon as the main support for today's decision, as far as I can see not even this statement justifies the result that is being declared. If this scrap of Traylor's testimony is treated as a statement of fact—an assertion of the true location of the western

boundary—then it is not only clearly inadvertent but also flatly contrary to, and overcome by, the wealth of engineering testimony that establishes the location of the boundary beyond question. On the other hand, if Traylor's statement is somehow looked upon as creating an estoppel against the corporation of which he is merely an officer, the short answer is that there can be no estoppel because there has been no reliance, no change of position, on the part of Hastings in consequence of this isolated bit of testimony.

I think the majority decision to be a serious miscarriage of justice.

WARD and JOHNSON, JJ., join in this dissent.

ROGERS *v.* STATE.

5081 373 S. W. 2d 705

Opinion delivered December 23, 1963.

[Rehearing denied Jan. 27, 1964.]

Eugene W. Moore, for appellant.

Bruce Bennett, Attorney General, by *Jerry L. Patterson* and *Beryl F. Anthony, Jr.,* Assistant Attorneys General, for appellee.

GEORGE ROSE SMITH, J. This appeal is from a verdict and judgment finding the appellant guilty of rape and sentencing him to imprisonment for life.

We find the evidence sufficient to support the verdict. At the time of the offense, March 10, 1963, the prosecutrix was twelve years old. The accused, a mature divorced man, had been keeping company for several months with the child's mother, a widow. On the day in question Rogers asked the child to stay with his own mother, who was ill, while he did some carpentry work at a house nearby. The two left the child's home in his car, but he did not drive to his mother's house. Instead, he parked the car on a lonely side road and, according to the prosecuting witness, committed two acts of rape.

In the meantime the child's mother had gone in her own car to bring her daughter home. After a short search the mother discovered the defendant's parked car. The prosecutrix, crying, at once fled to her mother and related what had taken place. The child was taken to Dr. McCoy, whose examination disclosed that her private parts were inflamed and contained what "looked like a typical male ejectory excretion." (The doctor was not asked whether he had prepared slides so that his findings might be confirmed by laboratory tests.) It was Dr. McCoy's opinion that the prosecutrix had recently had sexual intercourse.

The evidence that we have narrated is substantially undisputed. Rogers testified that he had been drinking for three or four days before the Sunday in question. He remembered having driven away from the home of the prosecuting witness with the intention of going to his mother's house, but he professed to have no recollection of anything that happened immediately thereafter.

Even without the persuasive testimony of Dr. McCoy the evidence given by the prosecuting witness is sufficient to support the conviction, there being no requirement that her testimony be corroborated. *Hodges* v. *State,* 210 Ark. 672, 197 S. W. 2d 52; *Stevens* v. *State,*

231 Ark. 734, 332 S. W. 2d 482. We find nothing in the record to indicate that the trial court was in error in holding this child to be a competent witness. *Needham* v. *State,* 215 Ark. 935, 224 S. W. 2d 785.

The principal argument made by the appellant's present counsel, who did not try the case, concerns an objection made to certain testimony given by Dr. Kirby. This physician examined the child on the day following the offense and, like Dr. McCoy, found evidence of irritation. He also took saline washings for laboratory examination. His testimony then continues in this manner:

"Now, being coroner I was called on Monday morning at the laboratory at the Boone County Hospital where the saline solutions were taken and where they had a slide which they said was given to them by Dr. McCoy—

"[Defense counsel]: We object. Hearsay.

"The Court: Sustained.

"Q. From your examination there, and what you were able to wash out and find, in your opinion, there had been male sperm, or there was nothing but male sperm in her?

"A. These washings were sent to Mr. [sic] Mae Nettleship, and she told me—

"[Defense counsel]: We object.

"The Court: Sustained.

"Q. From what you saw was there male sperm in there?

"A. I didn't see any sperm, but that was a day later.

"Q. Did you see the slide left by Dr. McCoy?

"A. I did, the one Dr. McCoy identified as the slide.

"Q. In your opinion was that sperm?

"A. It was.

"[Defense counsel]: We object.

"The Court: Overruled.

"[Defense counsel]: Exceptions."

It is now contended that the State did not lay a proper foundation for Dr. Kirby's comment upon the slide prepared by Dr. McCoy. That is, inasmuch as Dr. McCoy did not testify that he prepared the slide and delivered it to the hospital laboratory, Dr. Kirby's reference to the slide as "the one Dr. McCoy identified" necessarily involved a resort to hearsay.

There are two fatal weaknesses in this contention. First, there was no objection to the statement that Dr. McCoy had identified the slide. In fact, the only objection that the court overruled was to the next question and answer: "Q. In your opinion was that sperm? A. It was." The objection was apparently based upon the fact that the doctor was being allowed to express an opinion. Upon that basis the objection was properly overruled, for the witness had qualified as an expert. If counsel intended to rely upon the hearsay rule as well, that rule should have been brought to the court's attention.

We considered a similar argument in *Conway* v. *Hudspeth,* 229 Ark. 735, 318 S. W. 2d 137. There the objection in the trial court was apparently made in reliance upon the hearsay rule. On that basis it was correctly overruled. In rejecting the same contention that is now before us, that no proper foundation had been laid, we said:

"It is now insisted that no proper foundation for Steen's rebuttal was laid . . . In fairness to the trial court this contention cannot be sustained. The only objection to Steen's rebuttal was this: 'If the court please, the statement to him by J. Lee Hensley is not admissible.' The court ruled that the evidence was competent for the sole purpose of going to Hensley's credibility, and the objection was pursued no further. We think the court reasonably understood the objection as being based upon the hearsay rule, and upon that understanding the ruling was correct. If counsel thought that

no proper foundation had been laid, the point should have been brought specifically to the court's attention. Had that course been followed the omission now complained of might readily have been supplied in the trial court."

Secondly, the only pertinent assignment in the appellant's motion for a new trial is this: "The court erred in permitting Dr. H. V. Kirby to interpose irrelevant answers to questions after the court had ruled the same not admissible." This objection goes only to the matter of relevancy; there is no complaint that part of Dr. Kirby's testimony may have been based upon hearsay. When the motion for a new trial assigns only one specific reason for an objection to certain testimony a different reason cannot be urged upon appeal. *Burrow* v. *Hot Springs,* 85 Ark. 396, 108 S. W. 823.

We find no prejudicial error in the record.

Affirmed.

EX PARTE BURTON.

5-3208 373 S. W. 2d 409

Opinion delivered December 23, 1963.

G. Thomas Eisele, for Petitioner.

George Rose Smith, J. This is an original petition filed by Marion Burton, a practicing attorney, for a writ of certiorari to quash two orders entered by the Honorable Wiley W. Bean. The first order committed Burton to jail for an asserted contempt of court. The second order suspended Burton's license to practice law in the Fifth Judicial District until he should exculpate himself from certain supposed wrongdoing.

Although this proceeding is in form *ex parte,* a copy of Burton's petition was served upon Judge Bean, who has filed a response defending the validity of his orders. Thus the proceeding is not uncontested. The parties have filed, as exhibits to their pleadings, such parts of the record made at the trial level as they have thought necessary for an understanding of the case.

In October of 1963 there was pending in the Conway Circuit Court, presided over by Judge Bean, a libel suit brought by C. C. Brewer, the county clerk, against Gene Wirges, the editor of a newspaper at Morrilton. Apparently one of the issues concerned the manner in which the paper had reported the details of an election contest filed by Harding Byrd, an unsuccessful candidate for the office of school director.

At the trial of the libel suit Burton, who was not an attorney of record in the case, was called as a witness for the defendant Wirges. Burton had represented Byrd in the election contest. Burton testified at some length about his investigation of the case, the preparation and filing of the complaint, and the alleged irregularities in the election procedure. In the course of his testimony Burton indicated that Byrd was expected to pay the court costs in the case, but it was not anticipated that he would pay an attorney's fee to Burton, who was employed by the Republican party and looked to that organization for his compensation.

Judge Bean seems to have concluded that Burton's conduct in the election case may have amounted to champerty or maintenance. After the libel suit was submitted to the jury Judge Bean went to his chambers and sent for Burton. Also present were the attorneys for Brewer, the county sheriff, a deputy prosecuting attorney, and a few others not identified in the record before us. Burton was given no notice of any kind about the nature or purpose of the proceeding. At first he was wholly without counsel. Later on his present attorney, who had represented Wirges, was invited to come into the room, but Judge Bean refused to allow this lawyer to take part in the hearing, directing him "to sit there and listen."

At the beginning of the interrogation Burton was sworn, without protest. Judge Bean stated that he wanted to ask a few questions to clarify his understanding of Burton's testimony in the libel case. After answering some preliminary questions Burton requested that he be told the purpose of the proceeding. This request was repeated two or three times in the course of the hearing, but the only answer given by Judge Bean was that he was attempting to see if his notes were accurate. Burton pointed out that his testimony was a matter of record and spoke for itself. At one point Judge Bean indicated that the deputy prosecuting attorney was present in an official capacity. Finally Burton, after his protests had proved to be unavailing, stated that in view of the nature of the proceeding he thought he should refuse to answer any further questions. The examination then closed in this manner:

"The Court: All right. For the record, then, Mr. Sheriff, take him to jail and keep him there until the Court orders you to release him or until he makes up his mind that he will answer the questions. Now, would you like to go further with the proceeding?

"Mr. Burton: No, sir.

"The Court: Go on to jail."

Burton seems to have remained in the county jail for several hours. He was then recalled by Judge Bean, who said that he had decided to let Burton go home. The judge added, however, that he could not let Burton continue to practice in his district until the matter was cleared up. A day or so later an order was entered suspending Burton's license to practice in the district until "such time as a hearing may be had exculpating the said Marion B. Burton from wrongdoing as an attorney at the Bar."

We declare without hesitation that both the order committing Burton to jail and the order suspending him from practice were void for want of jurisdiction.

It is not contended, and could not reasonably be contended, that the pendency of the libel suit justified the attempt to catechize Burton. The two proceedings were completely separate. In no event could information elicited from Burton have been of use in the libel case.

What took place in Judge Bean's chambers was not in fact a judicial proceeding. No permissible judicial inquiry was before the court. Under our constitution and laws a judge cannot, by virtue of his office, resolve himself into a court of inquiry for the investigation of real or supposed misconduct that may have come to his attention in his courtroom or upon the street. *Ketcham* v. *Commonwealth,* 204 Ky. 168, 263 S. W. 725; *Manning* v. *Ketcham,* 6th Cir., 58 F. 2d 948. No one's liberty would be secure if our people might abruptly be called before a judge, as Burton was here, with the alternative of answering questions or going to jail.

A court's power to punish for contempt does not exist in a vacuum. It cannot be exercised simply because a judge is on the bench or in chambers. The power is merely incidental and auxiliary to the judicial authority conferred by law upon the court. When there is a total lack of jurisdiction, as there was here, there can be no punishment for a refusal to submit to interrogation. *Joyce* v. *Hickey,* 337 Mass. 118, 147 N. E. 2d 187. There is no hint that Burton, even in trying circumstances, dis-

played any disrespect toward Judge Bean; to the contrary, he seems to have acted with commendable dignity and composure.

The purported disbarment order is similarly void. A lawyer's right to practice his profession is a valuable privilege, conferred in the first instance by this court and not to be taken from him without notice and a hearing as provided by law. Even when, a century ago, the circuit courts had the authority to admit attorneys to practice, such a court could not disbar a lawyer summarily. *Beene* v. *State,* 22 Ark. 149. There is still less justification for that procedure today.

The writ of certiorari is granted; both the orders are declared to have been unauthorized and void.

BOYD *v.* BROWN.

5-3163 373 S. W. 2d 711

Opinion delivered December 23, 1963.

[Rehearing denied Jan. 27, 1964.]

Davis & Davis, Memphis, Tenn., for appellant.

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

PAUL WARD, Associate Justice. The trial court ruled that appellant, James Harris Boyd, had no right to share equally with his half brother and his three half sisters in certain real estate—hence this appeal. The factual background is summarized below.

James Thomas Boyd and his wife, Mary Etta, were the parents of one son and three daughters, named respectively: William Bentley Boyd, Clara Lillian Rowe, Etta Blanche Eifling, and Minnie Lucy Brown. We will at times hereafter refer to these as the four heirs. Appellant was the son of the said James Thomas Boyd by a former wife. James Thomas Boyd died in 1949 and his wife, Mary Etta, died later, intestate, in possession of the real property here involved. Other pertinent facts are revealed by the following summary of the pleadings.

Petition: Minnie Lucy Brown filed a complaint against her brother and two sisters alleging that they were equal owners of four parcels of land in Lonoke (each parcel specifically described); that the lands were not susceptible of division in kind; that they should be sold and the money equally divided between the four heirs. *Order:* The court ordered the lands to be sold and the proceeds to be divided between the four heirs. *Intervention:* Appellant set out the relationship mentioned above; that the property was an ancestral estate of James Thomas Boyd; that he (appellant) was entitled to an undivided one-fifth interest; that James Thomas Boyd deeded the property to Mary Etta Boyd in 1932 for a consideration of $1,000, no part of which was paid; that James Thomas Boyd willed all his property to Mary Etta with the understanding she would give appellant one-fifth; and that the four heirs were estopped to deny his one-fifth interest. The *prayer* was to have the land sold and the proceeds divided equally between the five parties. *Response:* The four heirs denied all allegations of intervenor; admitted Mary Etta bought the lands from James Thomas Boyd for $1,000 which

amount was paid; admitted the will but said none of subject lands were included; admitted paying appellant one-fifth of proceeds of an insurance policy on the life of Mary Etta payable to James Thomas Boyd.

After a hearing on the above issues the court resolved all issues against appellant, who now prosecutes this appeal for a reversal on four separate grounds.

First, appellant says the court erred in refusing certain testimony proffered by him. "Q. Mr. Boyd, your father, did he ever say anything to you—?" The court sustained an objection to the proffered testimony. Obviously, no reversible error is shown. Appellant did not set out what his testimony would have been if he had been allowed to testify. No principle of procedure is better established by our decisions than the rule that an objection to the exclusion of testimony cannot be considered on appeal in the absence of a showing what the testimony would have been. See: *Wallace* v. *Riales,* 218 Ark. 70, 234 S. W. 2d 199, and *Weston* v. *Hilliard,* 232 Ark. 535, 338 S. W. 2d 926.

Second, we see no reversible error in the court's refusal to allow appellant's witness to testify as an expert regarding the market value of the subject real property. Regardless of the qualifications of the witness as an expert, any such testimony was immaterial since it was not shown that appellant had any interest in the land.

Third, appellant contends the court erred in not disposing of the property as provided by law for the division of an ancestral estate. There can be no merit in this contention because there was no testimony to show the land belonged to James Thomas Boyd at the time of his death.

Finally, we cannot agree with appellant's contention that the four heirs were estopped to deny he had a one-fifth interest in the subject lands. This contention is based on the fact that appellant was given one fifth of the personal estate of Mary Etta Boyd, deceased. This could have been merely an act of generosity on the part

of the four heirs or it could have been because (as contended by the four heirs) a life insurance policy on Mary Etta's life was payable to appellant's father. In either case, this circumstance in no way amounts to an admission on the part of the four heirs that appellant owned a one-fifth interest in the subject real estate.

Although the point is not raised or argued by appellant, it might be contended that the rule in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, is applicable here because no testimony was introduced by the four heirs in response to the testimony introduced by the intervenor. Even so, the case must be affirmed since appellant's testimony wholly failed to make out a *prima facie* case in his favor.

Affirmed.

McGEHEE HATCHERY *v.* GUNTER.

5-3122 373 S. W. 2d 401

Opinion delivered December 23, 1963.

Ganaway & Ganaway, for appellant.

House, Holmes, Butler & Jewell, for appellee.

SAM ROBINSON, Associate Justice. Appellant, McGehee Hatchery Company, is engaged in the business of hatching eggs on a large scale at McGehee, Arkansas. Appellee, Keno R. Gunter, who lived in Mississippi, sold newly hatched chickens for appellant; his salary was $285.00 per month. At the same time, Gunter also worked for other concerns who were engaged in some angle of the chicken business. On January 22, 1958, Gunter was severely injured in an automobile accident in Mississippi. At the time, he was on business for appellant, McGehee Hatchery, and also on business for the Warren Produce Company of Greenville, Mississippi. Gunter was awarded workmen's compensation in Mississippi as an employee of the Warren Produce Company. Later, he filed a claim with the Arkansas Workmen's Compensation Commission for benefits as an employee of the McGehee Hatchery Company. The Arkansas Commission denied the claim on the ground that payment of benefits in Mississippi barred Gunter from receiving benefits under the Arkansas law. The claimant appealed to the circuit court and there the court reversed the Commission. The McGehee Hatchery Company then appealed to this court. We affirmed the judgment of the trial court with the modification that there could be no duplicate cash award for hospital and medical expenses. *McGehee Hatchery Co.* v. *Gunter,* 234 Ark. 113, 350 S. W. 2d 608. The case went back for a hearing on the merits before the Workmen's Compensation Commission. The Commission awarded compensation. The trial court affirmed the action of the Commission, and McGehee Hatchery Company has appealed.

Appellant now contends that Gunter was not its employee at the time he was injured; that he was an independent contractor. When the case was here the first time it was not suggested that Gunter was not an employee. In that case we said: ". . . [Gunter] was also employed as a traveling salesman by the appellant, an Arkansas concern, at a salary of $285.00 a month." But we need not decide whether the above language constitutes the law of the case, because in the case at bar there is substantial evidence to sustain the finding of the

Commission that Gunter was an employee and not an independent contractor. In fact, there is very little, if any, evidence to the contrary. No written contract showing Gunter to be an independent contractor was introduced in evidence, and no one testified that there was an oral contract to that effect. Actually, Mr. Floyd, president of the McGehee Hatchery, testified that Gunter was an employee. Gunter was paid a regular salary of $285.00 per month; social security and income taxes were deducted from his salary. However, workmen's compensation insurance premiums were not paid on claimant, but the failure to pay such premiums was not for the reason that appellant company did not consider that Gunter was its employee, but was due to the insurance agent having told appellant not to pay premiums on Gunter because he lived in another state.

Appellant argues that the fact that the appellant company did not tell Gunter when and where to sell chickens is strong evidence that he was an independent contractor. Even so, such evidence in itself is not sufficient to overturn the finding of the Commission based on substantial evidence that an employer-employee relationship existed.

Agricultural farm labor does not come within the purview of the Arkansas workmen's compensation law. Ark. Stat. Ann. § 81-1302(c) (Repl. 1960). In this case the Commission made a finding that the McGehee Hatchery is engaged in agriculture within the meaning of the statute, and is, therefore, not subject to the workmen's compensation law. But, the Commission held that the hatchery had waived its exemption under the provisions of Ark. Stat. Ann. § 81-1307 (Repl. 1960). The Commission based its finding that appellant was engaged in agriculture on the case of *Franklin* v. *McCoy,* 234 Ark. 558, 353 S. W. 2d 166. Our decision in that case was founded squarely on the facts of that particular case. There, the employer had been engaged in farming for many years, raising cotton, hay, peanuts, popcorn, soybeans, hogs, cattle and chickens. But in 1959, at the time the employee was injured, only chickens were being

raised. We said: "In view of the foregoing we are unwilling to say that the legislature . . . meant that raising chickens (in the manner previously set out) is not an agricultural farm activity."

We do not construe the Franklin case as broadly as construed by the Workmen's Compensation Commission in the case at bar. It would appear from the evidence in this case that the McGehee Hatchery is not engaged in agriculture within the meaning of the workmen's compensation law. But we do not turn our decision on that point because the evidence is sufficient to support the finding of the Commission that the appellant waived the exemption even if it was exempt.

As heretofore pointed out, the Workmen's Compensation Commission held that appellant was engaged in agriculture, and therefore did not come under the provisions of the Workmen's Compensation Act, but that appellant could and did waive such exemption. Appellant argues that to effect such waiver there must have been a strict compliance with the act, and that there was no such compliance by appellant because notices of the waiver of exemption were not posted in accordance with the act. Ark. Stat. Ann. § 81-1307 (Repl. 1960) provides: "Any employer carrying on any exempted or excepted employment may at any time waive such exemptions or exceptions as to any employee or all employees engaged in such employment as he may elect by giving notice of waiver of such exemptions or exceptions as provided in section 8."

Ark. Stat. Ann. § 81-1308 (Repl. 1960) provides: "Notice of waiver of exclusion or exemption heretofore referred to shall be given in accordance with the following provisions: (a) Every employer who waives such exclusion or exemption shall post and keep posted in and about his place of business typewritten or printed notices to such effect in accordance with a form to be prescribed by the Commission and he shall file a duplicate of such notice with the Commission. (b) Such notice shall be given at least thirty [30] days prior to any injury; provided, however, that if the injury occurs less than thirty

[30] days after the date of employment, such notice, if given at the time of employment, shall be sufficient notice."

The Workmen's Compensation Act is highly remedial and is entitled to a liberal construction. *Williams Mfg. Co.* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380. The act should be accorded a broad construction and doubtful cases should be resolved in favor of compensation. *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Triebsch* v. *Athletic Min. & Smelting Co.,* 218 Ark. 379, 237 S. W. 2d 26.

No doubt appellant considered that it was subject to the provisions of the act and accordingly secured insurance coverage for protection. In all probability, neither the McGehee Hatchery Company nor its insurance carrier ever considered that the company was exempt under the act until the decision in *Franklin* v. *McCoy, supra,* rendered on the 29th day of January, 1962, some four years after the date Gunter was injured. For its own protection and for the protection of its employees, the appellant had secured a policy of workmen's compensation insurance and filed the policy with the Workmen's Compensation Commission. For all intent and purposes the company had secured itself against the hazards of being subject to the common law of torts; and then months after the employee was injured, it is claimed that there is no liability under the workmen's compensation law on the part of the employer because the employer did not strictly comply with the statute in posting notices. In this case, apparently, except for the workmen's compensation law, there would be no liability on the part of the employer.

In 136 A.L.R. 900, it is said: "Workmen's compensation acts generally contain provisions governing the acceptance of them by employers as to whom the acts are not mandatory. No general rule can be laid down other than that a substantial compliance with these provisions is usually required. The question as to whether there has been a sufficient compliance depends upon the facts of the individual cases."

No doubt appellant elected to operate under the act. Certainly appellant would not have bought and paid for a policy of insurance and then deliberately failed to post a simple notice whereby there could be recovery on the policy. Moreover, when the case was here the first time, the employer made no contention that it was not operating under the act. The requirement of the posting of the notice was for the benefit of the employee, to let him know that the company had waived the exemption, and that the employee was, therefore, bound by the provisions of the workmen's compensation law. But here the employer claims that there is no liability on his part because he failed to give the employee a notice that was required by law for the benefit of the employee. Of course the employer did not need to notify himself for his own benefit that he had waived the exemption.

In similar cases it has been held that the employer is estopped to deny that he is operating under the act. In the case of *L. E. Marks* v. *Moore,* 64 S. W. 2d 426, the court held that although the employer had failed to comply with all requirements to come under the compensation act, he was estopped to deny that he had elected to and was operating under the act at the time the employee was injured. To the same effect is *Yeomans* v. *Anheuser-Busch, Inc.,* 198 S. C. 65, 15 S. E. 2d 833, 136 A.L.R. 894. In that case the record did not show that notice was not given, but the decision did not turn on that point. The court said: "We agree with the trial judge that if it [notice] was not given, default of the employer cannot be taken advantage of by the latter and his carrier to defeat the claim of an employee." And, in *Ham* v. *Mullins Lumber Co.,* 7 S. E. 2d 712, the court said: "Defendants also contended that decedent was not given notice of his employer's election, and consequently was not covered by the Act. That contention has already been disposed of in this order. However, even if it were true that such notice was not given, defendants could not plead as a defense to the claim of decedent's heirs after his death their own failure to perform their duty to him under the law. It appears to me that in good

morals, justice and law they could not do so, and that they would be estopped from so doing."

Appellant also argues that even if it waived the exemption as to certain employees, it did not do so as to appellee because no premium was paid to the insurance carrier on him. Since it is being held that appellant cannot take advantage of its own failure to post notices that were for the benefit of the employee, the employee's right to benefits is not affected by the employer's failure to pay premiums.

Affirmed.

EX PARTE BARTON.

5-3211 373 S. W. 2d 411

Opinion delivered December 23, 1963.

Andrew Henry, attorney for appellant.

Response by Bar Rules Committee, by E. B. Dillon, Jr., Little Rock, for appellee.

SAM ROBINSON, Associate Justice. The petitioner is a lawyer whose license to practice law was suspended on the 22nd day of October, 1962, by an order of the Pulaski Circuit Court, the Honorable Charles Light, Judge of the Second Judicial District, presiding on exchange; the suspension was for a period of three years. The petitioner is now asking this court to revoke the suspension and restore her license to practice at this time, more than a year having expired since the date of the suspension.

The disbarment proceeding was prosecuted in the Circuit Court by the Bar Rules Committee of this court,

and the committee is resisting the petition for revocation of the suspension. The charge in the disbarment proceeding was that the petitioner had converted to her own use about $2,500.00 belonging to a client. The client has long since been paid in full; in fact, payment was made prior to the issuance of the order of suspension.

No doubt petitioner committed a grievous offense in using her client's money at all, even though she may have intended to use it only for a short time. The Bar Rules Committee has done its full duty in prosecuting the disbarment proceeding and in resisting the petition for reinstatement, and we want to take this opportunity to thank the fine lawyers on that committee for their devotion to duty and their diligence in performing the work of the committee.

The question before the court at this time is not the guilt or innocence of the petitioner, but whether it would be better for everyone concerned to restore petitioner's license at this time, or that it be restored only after the full three year period has expired. The wrongful act committed by petitioner was not of such magnitude as to call for a complete disbarment, but it appeared that it would not be best for the public to allow petitioner to go unpunished. The idea of punishment is not to wreak vengeance upon the wrongdoer, but to reform the wayward and deter others. The spirit of revenge has no place in our procedure.

Through the proceedings in this case it has now been conclusively demonstrated that a lawyer's misapplication of a client's money will not be tolerated. The attorney has been severely punished. We cannot see where further punishment would benefit the petitioner or the public. Furthermore, we think this is a situation where the application of the quality of mercy will not be misplaced.

The petition is granted. Petitioner's license to practice law is hereby restored.

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

ED. F. MCFADDIN, Associate Justice (dissenting). I do not agree with the Majority Opinion which grants the Petition for Reinstatement at this time.

On October 22, 1962, the Circuit Court entered an order suspending for a period of three years the petitioner's right to practice law. If the Petitioner thought the said order too severe, she should have appealed the order to this Court. In the absence of a direct appeal, I cannot indulge the presumption that the Circuit Court judgment was incorrect.

The Petitioner has waited a little over a year (one-third of the suspension period), and now asks this Court to grant her a reinstatement. The Majority, in exercising "the quality of mercy", is proceeding either on the theory that the Petitioner, having served one-third of the period of the judgment suspension, is now entitled to parole for the remaining two years; or on the theory that the original judgment was too severe. On either theory I do not agree with the Majority. The right to practice law should not be considered on the same basis as that of paroles and pardons. Neither should we indulge the presumption that the original judgment was too severe when—as here—the Bar Rules Committee is resisting the petition in this Court, and the Petitioner has not presented us with any statement from the Trial Judge that he favors reinstatement at this time. Furthermore, the Petitioner is not supported by the recommendation of any members of the Bar.

Therefore, I would deny the Petition for Reinstatement at this time.

HARRIS, C.J. and GEORGE ROSE SMITH, J. join in this dissent.

CODDINGTON *v.* SAFEGUARD INS. CO.

5-3157 373 S. W. 2d 413

Opinion delivered December 23, 1963.

Peter G. Estes, for appellant.

Greenhaw & Greenhaw, Fulk, Lofton, Wood, Lovett & Parham, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from an order sustaining demurrers filed by appellees Safeguard Insurance Co. of New York and McCartney-Lewis-Faucette, Inc., resulting in the dismissal of ap-

pellant Juanita Coddington's complaint. The original complaint was filed in Washington Circuit Court on March 22, 1962, by Juanita Coddington and her late husband, M. A. Coddington. For simplicity we shall refer to them as appellants. The complaint alleged substantially as follows:

That appellants were husband and wife and citizens of Washington County and were owners of a certain dwelling house located in the City of Fayetteville.

That appellee Safeguard Insurance Co. of New York is a capital stock company operating in the State of Arkansas as an insurer of buildings and that appellee McCartney-Lewis-Faucette, Inc., is a corporation authorized to do business in the State of Arkansas and is engaged in the sale of fire and casualty insurance with its principal place of business in Fayetteville.

That on or about the month of July, 1960, and for many years prior thereto, appellants had owned the dwelling house herein mentioned which was covered and had been covered by a fire insurance policy issued by appellee Safeguard Insurance Company in the sum of $3,000.00, the same being sold to them by appellee McCartney-Lewis-Faucette, Inc.

That during the month of July, 1960, the dwelling house was completely destroyed by fire while the said insurance policy No. 335712 was in force and effect; that for many years prior thereto and up until a few months prior to the aforesaid fire, appellants had occupied the house as their resident but had moved therefrom and had within one week thereafter notified appellee McCartney-Lewis-Faucette, Inc. of their vacating the property, and that the policy was thereafter renewed by a renewal notice.

That appellants had been assured by appellee McCartney-Lewis-Faucette, Inc., that their property was fully covered in the sum of $3,000.00 and that they had relied upon said representation and paid their premium to appellee therefor, and notwithstanding the Valued Policy Law of the State of Arkansas, the agent, servant

and employee of appellee Safeguard Insurance Company by misrepresentation, fraud and deceit induced appellants to accept the sum of $2,000.00 for their complete loss of their building by fire, instead of paying them the sum of $3,000.00 as required by the terms of their policy;

That if their building was not covered by said policy of insurance as was represented to them by appellee McCartney-Lewis-Faucette, Inc., then said failure to coverage was due to the negligent issuance and handling of their insurance policy through no fault on their part.

Appellants prayed that the release executed by them be cancelled and declared void by the court and that they have judgment against appellees for the sum of $1,000.00, together with the statutory penalty and attorney fees.

An amendment to appellants' complaint was filed on October 18, 1962, which alleged in addition to those things pleaded and prayed for in the original complaint that appellee McCartney-Lewis-Faucette, Inc., was at the time of the issuance of the policy in question and the renewal thereof, a general agent of appellee Safeguard Insurance Company, having power to issue policies of insurance and transact other business of the company; did, in fact, issue the policy of insurance in question and have power to waive any of the terms of said policy allowed to be waived by law;

That within one week after appellants had vacated the premises here in question, they notified appellee McCartney-Lewis-Faucette, Inc., that they had vacated the property and appellee's agents made no objection to the vacancy and in fact while said property was vacant and being so notified of the vacancy renewed said policy of insurance, and that the course of action of appellee Safeguard Insurance Company, by its authorized agent, McCartney-Lewis-Faucette, Inc., led appellants honestly to believe that the occupancy clause in said policy had been waived and by reason thereof appellees were estopped from invoking the provision in the policy involving occupancy;

That appellees had by misrepresentation, fraud, deceit and contrary to the Valued Policy Statutes of the State of Arkansas induced appellants to accept the sum of $2,000.00 for the loss of their building by fire and induced them to sign releases and other documents, without knowing the contents thereof, and by reason thereof releases and other documents having to do with the settlement should be cancelled and further prayed that appellees be held to have waived the clause in the policy pertaining to occupancy; be estopped from enforcing the clause in the insurance contract; and that the attempted settlement be cancelled and declared void.

Appellees had filed their separate demurrers to appellants' complaint in April, 1962.

On June 13, 1963, the trial court concluded as follows:

"[T]hat the demurrers should be sustained for the reason that the complaint of the plaintiff alleges fraud but it does not allege facts sufficient to constitute fraud to bring the case under an exception to the general rule which requires that any payment made in accord and satisfaction be returned prior to the institution of suit. The general pleading of fraud is not enough but the facts must be plead to support the fraudulent acts alleged which are an exception to the general rule. Some of the exceptions to the general rule are set out in 178 Ark. 1110, *Texas Co.* v. *Williams,* and 114 Ark. 559, *Pekin Cooperage Co.* v. *Gibbs,* and consist of the following specific acts:

"1. Mental incapacity to execute release.

"2. Fraudulent representation as to the contents of written instrument.

"3. Trick or subterfuge where papers were substituted at time of signing.

"4. Illiteracy or infirmity.

"5. Minority.

"The only allegation of fact in the complaint sets out that the plaintiff signed the release and proof of loss without reading it and that the release was contrary to the stated value of policy requirement (66-3901)."

Following this order sustaining the demurrer, appellants declined to plead further, and on July 17, 1963, their complaint was dismissed with prejudice. From that order comes this appeal.

For reversal appellants contend that a compromise settlement made contrary to the Valued Policy Statute is not an accord and satisfaction, is contrary to law, against public policy and void from its inception as distinguished from voidable and is an exception to the general rule which requires that payments made in accord and satisfaction be returned prior to the institution of suit.

As stated by Mr. Justice Hart speaking for this court in *Sharp* v. *Drainage District No. 7,* 164 Ark. 306, 261 S. W. 923, "The allegations of the bill, which are confessed by the demurrer, control in this case. Contrary to the common-law rule, under our Code every reasonable intendment and presumption is to be made in favor of a pleading, and a complaint will not be set aside on demurrer unless it is so fatally defective that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever. *Ferrell* v. *Elkins,* 159 Ark. 31, 251 S. W. 380."

Applying the above stated rule to the complaint here in question it appears that appellees have admitted the existence of the fire insurance contract between appellants and Safeguard Insurance Company in the amount of $3,000.00; that appellee McCartney-Lewis-Faucette, Inc. was the general agent of appellee Safeguard Insurance Company; that the dwelling covered by the policy in question was completely destroyed by fire; that appellants were induced to accept the sum of $2,000.00 for their loss instead of the face value of the policy; that appellees made no objections to the vacancy of the property and in fact, after being so notified of

the vacancy, renewed the policy of insurance in question, which action on the part of appellees led appellants honestly to believe that the occupancy clause had been waived, and admit all other proper allegations contained in the complaint and amendment to complaint.

On appeal appellants, with commendable candor, concede that they failed to make sufficient allegations of fraud in their complaint to withstand a demurrer on that point. However, they insist that the trial court in sustaining the demurrers failed to consider that the alleged compromise settlement and release were contrary to the Valued Policy Statute of Arkansas.

With the admissions by demurrer and the concession by appellants, we are squarely confronted with the question of whether, in the light of our Valued Policy Law, the trial court erred in sustaining appellees' demurrers. Section 66-515 of Arkansas Statutes, entitled "Total Loss by Fire.—Recovery of Full Amount" is the original Valued Policy Statute passed in 1889. This act was amended by Ark. Stat. Ann. § 66-3901 (Supp. 1961), passed by the 1959 Legislature, which is as follows:

"Valued Policy Law.—A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be a liquidated demand and against the company taking such risk, for the full amount stated in such policy, or the full amount upon which the company charges, collects or receives a premium; provided, the provisions of this section shall not apply to personal property."

Our research reveals that this court has never had occasion to pass directly on the validity of a settlement between insurer and insured contrary to the Valued Policy Statute. We have, however, in at least two cases held that a provision in a fire insurance policy in conflict with the valued policy statute was void. See *London and Globe Ins. Co.* v. *Payton,* 128 Ark. 528, 194 S. W. 503; *Tedford* v. *Security State Fire Ins. Co.,* 224 Ark. 1047, 278 S. W. 2d 89.

Both appellants and appellees direct our attention to an excellent discussion on problems arising under valued policy statutes in 12 Arkansas Law Review 184. On page 193 of this article there is cited a Washington case which seems to be on all fours with the case at bar. The case is *Grandview Inland Fruit Company* v. *Hartford Fire Insurance Company,* 189 Wash. 590, 66 P. 2d 827. There is also a comprehensive annotation of this case in 109 A.L.R. 1477. In the Washington case as here the insured agreed and did accept in full compromise settlement of his claim under a fire policy one thousand dollars less than the face amount of the policy. There was, as here, a total loss of the building and, as in Arkansas, the State of Washington has a Valued Policy Statute.

The trial court in Washington held that the insured was entitled to recover despite the compromise for less than the face amount of the policy, and in affirming that judgment, the Supreme Court of that state used the following language with which we agree and adopt as our own. "Under the valued policy statute . . . whenever an insured building is totally destroyed, the amount of insurance written in the policy shall be taken conclusively to be the amount of the loss. This statute is a part of the public policy of this state, which was not waived by the appellant in its agreement with the respondent to accept less than the face of the policy." . . .

"The purpose of statutes of the character of the valued policy statute would be defeated if their effect could be avoided by contract. While generally, parties may waive their contractual or statutory rights by agreement to waive, yet an agreement to waive rights involving a question of public policy would be void. It would be contrary to the public policy of this state declared by the valued policy statute, to enforce the compromise in the case at bar. There was not a valid accord and satisfaction. To deny a recovery to the appellant would, in effect, be a holding that one could bind himself by contract not to avail himself of a right which the law has allowed to him on the grounds of public policy.

While one may decline to take advantage of a privilege given to him by such a statute, he may not bind himself by or be held to a contract which denies to him a right which the law has allowed to him on grounds of public policy."

Having thus determined that the compromise settlement in the case at bar was contrary to public policy and therefore void *ab initio,* we reach the sole remaining question of whether the trial court erred in sustaining the demurrers in the absence of a return or tender by appellants of the amount paid them in connection with their execution of the settlement or release.

Mr. Justice Frank Smith speaking for this court in *Pekin Cooperage Co.* v. *Gibbs,* 114 Ark. 559, 170 S. W. 574, answered that question for us when he cited with approval 1 Cyc., page 339, as follows:

"As a general rule one who seeks to avoid the effect of accord and satisfaction on the ground of fraud, mistake, or for any other reason (it is apprehended) must restore or offer to restore whatever he has received by virtue of the transaction. The rule, however, is subject to some limitations and exceptions. It does not apply where the agreement is absolutely void, . . ."

It follows, from what has been said, that the trial court erred in sustaining the demurrer to the complaint, and for that error the judgment must be reversed, and the case will be remanded for further proceedings according to law.

MISSOURI PACIFIC RAILROAD CO. *v.* STROUPE.

5-3150 373 S. W. 2d 709

Opinion delivered December 23, 1963.

[Rehearing denied Jan. 27, 1964.]

William J. Smith and *William H. Sutton,* for appellant.

Jack Yates, for appellee.

FRANK HOLT, Associate Justice. This is an action by the appellee against the appellant for recovery of damages and statutory penalty resulting from the loss of a cow. This action is predicated upon the appellant's failure to construct suitable and safe stock guards as required by statute.[1] Upon a jury trial the appellee was awarded

[1] Ark. Stat. Ann. (Repl. 1957).

"73-623. Stock guards required when railroad passes through inclosure—Notice.—It shall be the duty of all railroad companies organized under the laws of this State or any other State, which have constructed or may hereafter construct a railroad which may pass through or upon any inclosed lands of another, whether such lands were inclosed at the time of the construction of such railroad or were inclosed thereafter, upon receiving ten [10] days' notice in writing from the owner or agent of said lands to construct suitable and safe stock guards on either side of said inclosure where said railroad enters said inclosure, and to keep the same in good repair. * * *"

"73-624. Penalty for failure to maintain stock guard.—Any railroad company failing to comply with the requirements of the preceding section shall be liable to the person or persons aggrieved thereby for the actual damages caused to said person or persons by reason of the failure of any railroad company to properly construct, keep and maintain in good repair said stock guards; and in addition to the actual damages, said railroad company shall be liable for a penalty of not less than twenty-five dollars [$25.00] nor more than one hundred dollars [$100.00] for each and every offense; and said penalty may be collected, together with said actual damages, by a civil suit in any court having jurisdiction thereof."

$225.00. On appeal the appellant urges for reversal that under the facts in this case there was no duty upon the Railroad Company to construct and maintain stock guards at the crossing in question.

The appellee owns and operates a dairy farm. His home and barn are situated on thirteen acres on the east side of the railroad tracks. On the west side of the tracks he owns ninety-five acres of pasture land. According to the appellee a public crossing, at or near his farm, was the only way he had of getting his cattle from one side of the tracks to the other. The appellee maintained that he had given proper notice to appellant to restore the cattle guards removed by it in 1957. Appellee testified that on the west side of the railroad his property comes up to the railroad right-of-way where the roadway crosses in an east-west direction. Appellee's wife testified that each day she drove the herd of cattle back and forth across the railroad tracks at this highway crossing and that she had to open a big gate on each side of the tracks. She testified that on this particular day as she was herding the cattle across the tracks some of them strayed up the tracks at the crossing and one of the cows, heavy with calf, fell off the side of the tracks and into a ditch where it died. She testified that she did not know why the cow slipped and fell. The foregoing constituted appellee's pertinent evidence as to an enclosure.

It is our duty as a matter of law to determine the sufficiency of evidence. *St. Louis Southwestern Ry. Co. et al.* v. *Braswell,* 198 Ark. 143, 127 S. W. 2d 637.

Viewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee, as we must do on appeal, *Capital Trans. Co.* v. *Howard,* 217 Ark. 333, 229 S. W. 2d 998, we do not find any substantial evidence that meets the proof required by this statute upon which appellee bottoms his claim. This statute reflects that it is the duty of appellant, upon proper notice, "to construct suitable and safe stock guards on either side of said inclosure *where said railroad enters said inclosure.*" [Emphasis added.] Construing the evidence in the light most favorable to

the appellee it is to the effect that he owned land on both sides of the railroad tracks and that it was necessary to drive his cattle across the tracks at a "public crossing."[2]

In *Missouri Pacific Railroad Co.* v. *Miller,* 185 Ark. 937, 50 S. W. 2d 618, we said:

"* * * The remedy under the statute referred to is exclusive to the *owners of inclosures,* but has no application to damages sustained by others on account of the negligent and careless maintenance of a cattle guard." [Emphasis added.]

Also, see *Chicago, R. I. & P. R. Co.* v. *Fitzhugh,* 82 Ark. 179, 100 S. W. 1149.

This statute does not place any duty upon the railroad to construct stock guards at a public crossing or road. The duty is to construct guards where the railroad enters one's enclosure. There is no substantial evidence presented in the case at bar that appellee is the owner of an enclosure bisected by the railroad. Further, since this statute is in derogation of the common law and penal in nature, we must strictly construe it. *St. Louis Iron Mountain & So. Ry. Co.* v. *Hood,* 67 Ark. 357, 55 S. W. 134.

Inasmuch as it is necessary to reverse the case on the point discussed, we do not reach the other points appellant relies upon for reversal.

The judgment is reversed and the cause remanded.

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[2] Statutes on "public crossings" are: Ark. Stat. Ann. § 73-1601 *et seq.* and § 76-113 (Repl. 1957). However, such statutes do not appear applicable to the case at bar.

5-3099 374 S. W. 2d 166

Opinion delivered January 13, 1964.

[Rehearing denied Feb. 3, 1964.]

[redacted]

Williamson, Williamson & Ball, for appellant.

Huey & Rothwell, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Sylvester Smith was employed by Potlatch Forests, Inc., and contends that on September 19, 1961, he sustained a compensable injury, which resulted in the loss of his right eye. Appellant company controverted the claim, contending that the injury did not arise out of, and in the course of, his employment. The referee heard the evidence, concluded that the claim was compensable, and entered an order accordingly. The company appealed to the full commission, and that body found that a preponderance of the evidence sustained appellant's contention that Smith's injury did not arise out of, and in the course of, his employment. The referee's opinion was therefore reversed, and the claim for compensation denied and dismissed. There-

after, claimant appealed to the Bradley Circuit Court, and the court reversed the finding of the Commission and remanded the case back for orders consistent with the award of the referee. From the judgment so entered, the company brings this appeal.

The only question before this court is whether there was any substantial evidence to support the finding of the Commission. Preliminarily, we might dispose of one of the arguments advanced by appellee. It is pointed out that the referee, who originally tried this case, heard all of the witnesses in person, both for claimant and the company, and, on appeal, no additional testimony was presented to the Commission. Appellee states that the referee, therefore,

"* * * was the sole and exclusive judge of the weight of the evidence and the credibility of the witnesses. In case of contradictions or inconsistencies he had the right to accept the testimony of the witnesses he believed to be most worthy of credit and reject the testimony of those he believed less worthy of credit, or accept, any part he believed true and reject any part he believed untrue. He was in position to take into consideration all the surrounding circumstances of each witness, and of particular importance, the manner and demeanor of each witness on the witness stand. * * *"

This contention must be rejected. As recently as October 21 of last year, we had occasion, in *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 371 S. W. 2d 528, to comment upon this contention, stating,

"We take this occasion to point out that it is the duty of the Commission to make a finding according to a preponderance of the evidence, and not whether there is any substantial evidence to support the finding of the Referee."

Cases are then cited in support of the statement. Thus, as stated at the outset, we can only concern ourselves with whether the finding of the full Commission was supported by any substantial evidence.

Claimant's case was primarily dependent upon the testimony of Smith himself. Appellee testified that he commenced work for Bradley Lumber Company in 1952, and had been working for that company and its successor, Potlatch, since that time.[1] He stated that on September 19, he worked from 6:00 A.M. until 2:30 P.M. His duties consisted of pulling lumber off "the green chain." At 2:30, he "punched out," but waited around on the dock for about ten minutes to determine whether all night shift workers appeared, it being his purpose to put in extra time by work on the night shift if any workers were absent. During this period, he sat and smoked a cigarette. After observing that all of the night crew had reported in, he got up and started toward his parked car, walking underneath the conveyor belt. After walking ten or fifteen feet, his foot struck a stick, which "flew up" and hit him in the eye. Subsequently, he stated, "I remember my feet hitting the stick and something flew up and hit me in the eye is all I can say." The witness said he could not see out of his eye, but that he did not have any pain at that time. He could feel something "running" out of the eye, and wiped it with his handkerchief, but walked right on to his car and drove home. Smith testified that when the foreign object hit him in the eye, he sat down a few minutes, and then walked on, no pain occurring until after he reached his home. Appellee stated that he was able to drive his car normally, and that it took him about five or six minutes to drive from the plant to his house. Claimant's wife took him to the hospital about 3:00 P.M. Around 4:00 o'clock, Smith reported the accident to Herbert Bliss, yard foreman.

Smith's wife, Velma, testified that her husband drove up to the house, but didn't get out of the car. When she inquired as to the reason, he complained of his eye, and she then "taken him out of the car and carried him in the house." Velma then drove her husband to the hospital. This testimony was corroborated by Rosa Benson, a neighbor.

Gilbert Block, a resident of Warren, testified that he (Block) had an artificial right eye, having lost the

[1] No prior claims were indicated from his work record.

sight of his eye while working on his automobile, "and a piece of steel flew off and hit me and went through it." Block stated that he did not feel any pain in the eye until four days after it happened, "after Dr. Lanford took it out."

Smith's eye was treated by Dr. James W. Marsh of Warren, who stated that he understood Smith to say that "something flew out of the clock (time clock) and hit him. But I am not at all sure of this because he was in pain and does not speak very clearly, and I didn't question him on the history." Dr. Marsh found "a laceration of the center of his cornea which was transverse with a slight ellipse. It had penetrated all the way through his cornea and had dislodged the lens to some extent so that the lens was partially protruding through this laceration. There was fluid escaping from the inside of the eye." The iris was not struck by the object. In reply to a question as to whether he had any opinion concerning whether the object which caused the eye injury came from the ground level, the doctor replied, "I don't think it could have." As the basis for this conclusion, Marsh stated that "the object hit him in the central cornea and went through the cornea and through the lens with no injury at all to the iris. And the angle of an object coming up from ground level from near him would have been such that to have penetrated both the central cornea and the lens would have caused some injury to the iris." The doctor was of the view that the object came from approximately eye level, rather than from the ground. He likewise was of the opinion that the injury was not caused by a stick. The physician also testified that, in his judgment, initial pain would have been marked and severe, and probably would have continued from the time of the occurrence until Smith was taken to the hospital.

Dr. Marsh, after rendering emergency treatment, immediately made arrangements for Dr. W. R. Nixon, a Pine Bluff ophthalmologist, to see the patient. The history taken by Dr. Nixon reflected that Smith had stepped on a stick which "flipped up" and struck claim-

ant in the right eye. Smith was complaining of intense pain, and, most of the time, kept both eyes shut, particularly the right one. The doctor testified that at the time he saw appellee, he (Nixon) wondered about the injury being caused by any object from the ground. "Because when something flips up, hitting the eye, it would strike at an angle. Unless he was looking down at the ground it was rather difficult for it to go through the eye without perforating the iris." The doctor stated, "I wouldn't necessarily say it hit at eye level. He could have been lying on his back and it dropped in his eye." Nixon was of the opinion that the object "would have to be reasonably sharp or thrown with extreme force to penetrate the eye, one or the other, or both. A blunt object hitting the eye would require a great deal of force to penetrate the eye. They are a lot tougher than we think. For instance, a beebee gun so often hits the eye and bounces off. They cause a hemorrhage and damage, but bounce. * * * Another thing, this thing apparently hit between his lids, and the eye has a rapid blink reflex. It has to hit with pretty good speed to hit the eye without damaging the lids." The doctor was of the opinion that the injury described by Smith would have caused severe pain for at least a few minutes, probably "five to ten minutes." Thereafter, he stated that the eye certainly wouldn't feel normal; there would be a certain amount of discomfort.

"I would think that, after looking at him, that the man was unable to see immediately from the injury out of that eye. Of course he has the other eye. He has been a two-eyed man and suddenly becomes a one-eyed man for all purposes. I am sure he has a loss of depth perception, plus peripheral vision. He could still drive. He would certainly be doing something a little bit difficult because he has had a sudden and abrupt change that he has never had to cope with before."

Efforts were first made to save the sight of the eye, but subsequently, it became necessary to remove it. The testimony of these witnesses comprises the case for appellee.

On behalf of appellant, Arthur Weaver, a fellow employee of Smith, testified that on September 19, at 2:30, he was in the outhouse located across from the "green chain." He heard the 2:30 siren blow, and came out a minute later. Weaver stated that he saw Smith, who was walking between the conveyor belt and the parking lot (having already passed under the belt), heading toward the lot. From subsequent measurements, Weaver testified that when he first saw Smith, the latter was "27 long steps" east of the conveyor belt,[2] and twenty-four steps away from the witness. He said that Smith was walking toward his car, smoking a cigarette, with both hands down beside him. Smith was walking in his usual manner "in a kind of frisky way, the way his pants dangled on him when he walked."

Clifton Roberts, another employee of Potlatch, testified that on the date Smith was injured, he (Roberts) "punched out" with the others at 2:30 P.M., and walked directly toward the parking lot. While walking beneath the conveyor belt, he observed appellee about twenty-five steps away, not quite half way between the belt and the parking lot. According to the witness, Smith "was just walking along normal," was not holding his eye, and there was no indication that anything was wrong with the claimant. Roberts testified that he saw Smith back his car out from where it was parked, and drive away.

Charlie Brown, another employee, testified that he left work at 2:30, and went straight to the parking lot; that he knew where Smith usually parked his car, and that Smith's car had already been moved from its usual location when the witness arrived at the parking lot. Subsequently, he passed Smith's house, and noticed that claimant's car was not there. A block or so later, he observed the Smith car "headed north towards home." Linton Marks, another employee, rode with Brown, and testified to substantially the same facts, *viz,* that Smith's car was not in its usual parking place when he reached

[2] This meant that Smith had already passed under the conveyor belt, and had walked that distance from it.

the parking lot; that claimant's car was not at his home when they passed, and that subsequently they observed Smith, approaching approximately a hundred yards away.

Kirby McClendon, employed by Potlatch as a personnel worker, testified that Smith and his wife reported the injury to him between 4:00 and 4:30 P.M. (apparently after seeing Bliss). Smith told the witness that he stepped on a stick which flew up and hit him in the eye, the accident occurring under the lumber conveyor belt. McClendon, Herbert Bliss, and Pete Denson, assistant yard foreman, all testified to various contradictions and discrepancies in Smith's account, and that of his wife. For instance, Bliss stated that claimant said that "he started out and walked right across the ramp and got across the ramp to the corner and said he set down there and set there fifteen minutes and smoked a cigarette and he got up from there, walked across the railway track, under the conveyor belt and about nine spaces I believe Sylvester spaced it off himself, he said he felt something under his foot and it flew up and hit him in the eye or something hit him in the eye, said at that time it hurt him so bad he fell down on his knees and caught his eye with his hands, stayed there a little bit and got up and went on to the car with his hand over his eye and got in the car and drove home." Further, that Smith stated that his eye hurt "bad" and in wiping it, "he got some bloody water on his hand." The foreman also stated that he checked the area for sticks, and found but one.

Appellee asserts that the Commission committed an error of law in its finding, contending that the claimant is entitled to an award of compensation if there is any substantial evidence to justify the claim. Appellee is mistaken in this statement. It is true that our Compensation Act should be broadly and liberally construed, but it is also true that the burden of proof is placed upon the claimant to establish that his disability was occasioned by an injury received in the course of his employment. *Pruitt* v. *Moon,* 230 Ark. 986, 328 S. W. 2d 71.

The commission determines litigation from what it deems to be the preponderance of the evidence, and we affirm if there is any substantial evidence to support the Commission's ruling. *Chicago Mill and Lbr. Co.* v. *Fulcher,* 221 Ark. 903, 256 S. W. 2d 723; *Moss* v. *El Dorado Drilling Co,. supra.* Of course, it is established that Smith injured his eye. It is likewise established that the injury occurred between 2:30 and 3:00 P.M. on September 19, but we are unable to say that the Commission's finding (to the effect that the injury did not occur on the premises) is not supported by substantial evidence. Actually, it is apparent that the Commission did not place credence in Smith's testimony, and there is no requirement that that body must accept, at face value, the testimony of a claimant—or for that matter, the testimony of any person. A similar situation existed in the case of *Ray* v. *D. H. Garner Construction Co.,* 236 Ark. 654, 370 S. W. 2d 73. In that case, Ray testified to a back injury. Admittedly, he had suffered such an injury (as here, Smith admittedly had suffered an injury). Ray testified that this injury happened on the job, and detailed the circumstances relative to the occurrence. No one was able to verify that the injury happened in the course of employment (as here). However, in *Ray,* two doctors testified that, in their opinion, Ray incurred the injury to his back from the incident described by him, rather than from a subsequent injury which occurred off the job. Dr. Horace Murphy testified that the history recited by appellant was entirely consistent with his testimony. However, the Commission denied the claim, obviously because it did not believe appellant's testimony. It is apparent that a similar situation exists in the instant case, *i.e.,* the Commission was not persuaded by claimant's version of the manner in which the injury occurred. And there are facts which support the position taken.

According to the testimony of Weaver and Roberts, both observed Smith *after* the stated time of the accident, *i.e.,* he had already passed the place where he alleged the injury to have been received. Both testified that Smith was proceeding toward his car in his usual manner, giv-

ing no indication that anything out of the ordinary had happened to him. Bear in mind the testimony of Roberts who testified, that, after checking out, he proceeded immediateley toward his own car in the parking lot. It would have been impossible for Roberts to have seen Smith walking toward his car if the latter, as he testified, had waited around for at least ten minutes before leaving. This witness also observed claimant, apparently acting in a normal manner, driving his car from the premises. Witnesses Brown and Marx testified that they (separately) walked to Brown's truck, and that Smith's car was not in its regular parking place. This evidence corroborated the testimony of Weaver and Roberts that Smith had, instead of staying around the plant, immediately left the premises. Claimant admitted that he had parked his car, on coming to work, at his usual parking place.

As stated, there was a direct conflict in the evidence. If the testimony of these four witnesses was correct—then Smith's testimony was incorrect. If Smith's statements relative to the injury were true—then, the evidence of these four witnesses was false. There is nothing in the record which indicates that these co-workers had any reason to deliberately prevaricate as to what they had observed. In addition, the evidence of both doctors tends to contradict Smith's version.

At any rate, even though we might feel that the Commission had reached the wrong result, we are without authority to upset the finding, unless there is no substantial evidence to support the order. *Fagan Electric Co.* v. *Green,* 228 Ark. 477, 308 S. W. 2d 810. Undoubtedly, there was evidence in behalf of both Smith and the company, which could be considered substantial evidence—but the Commission is the trier of the facts, and a determination of the weight of the testimony falls within its province.

In accordance with the reasoning herein set out, the judgment of the Circuit Court is reversed, and the cause is remanded with instructions to affirm the order of the Commission.

ROBINSON and JOHNSON, JJ., dissent.

JIM JOHNSON, Associate Justice (dissenting). I do not agree with the majority opinion. In my view there is no dispute in this case about the facts. Appellee clocked out from work at 2:30 p.m.; he waited around the area for approximately ten minutes; walked under the conveyor belt towards the parking lot; was struck in the eye by some object; the doctors both testified the material around this area would be a producing cause of the injury they found if appellee were struck in the eye; appellee arrived at home at 2:45 p.m.; two of appellant's own witnesses observed him in his car driving home; appellee was taken immediately to the hospital and it was stipulated he was seen by Dr. James W. Marsh, M. D. at 3:00 p.m.

". . . The Appellee stated he did not know what hit him in the eye. The Appellee told both these doctors that the incident occurred at the mill. It is not to be expected that an ordinary individual, immediately after suffering the traumatic loss of an eye, would think to fabricate a story as to how it happened upon first examination by a physician within twenty or thirty minutes subsequent to the incident. It is reasonable to conclude that an ordinary individual, knowing that the physician's successful treatment of an injury might well depend on his knowing the cause therefor, would tell the physician the truth concerning the cause . . . It is also apparent, that in the tragedy of the moment, an ordinary person does not cooly reflect on a fictitious tale as to where an incident occurred." [Referee's opinion.]

Appellee lost the sight of his eye;—all this took place between 2:30 p.m. and 3:00 p.m.

The time element alone in this case demands an affirmance of the judgment of the Circuit Court. Couple this with the fact that against the positive testimony of appellee's witnesses, the self-insured appellant even with the apparent full cooperation of its employees couldn't produce one witness who would testify that the accident

did not occur at the time or place or in the manner alleged by appellee.

For the reasons stated, I respectfully dissent.

Mr. Justice ROBINSON joins in this dissent.

HOGG *v.* DARDEN.

5-3132 374 S. W. 2d 184

Opinion delivered January 13, 1964.

Bernard Whetstone, for appellant.

Shaver, Tackett & Jones, for appellee.

ED. F. MCFADDIN, Associate Justice. We are here concerned with the *voir dire* examination of the jury panel. Appellants, Mrs. Elizabeth Hogg, and her husband, filed this action against George A. Darden and his son, alleging that in a traffic mishap Mr. and Mrs. Hogg sustained injuries and damages all because of the fault and negligence of the defendants. Upon issues joined the cause was tried to a jury and a verdict rendered for the defendants (appellees here). The appel-

lants seek a new trial because of the rulings of the Tria Court in regard to the *voir dire* examination of the jury panel, and urge two points:

"I. The Court erred in denying plaintiff's counsel's request that the Court refrain from interrogating the panel regarding liability insurance and not permitting counsel to do this himself.

"II. The Court erred in not permitting the requested question regarding defendant's apparent ability to pay."

Prior to the *voir dire* examination, appellants' attorney filed the following written request with the Trial Court:

"NOW COMES Plaintiff and requests of the Court in chambers immediately in advance of trial, that he be permitted to ask each of the members of the jury panel, separately and individually, each of the following questions:

"1. Do you or any member of your immediate family work for, own any stock in, or have any direct or indirect interest whatever in any casualty insurance company?

"2. If you believe from the testimony and the instructions given to you by the Court that plaintiff in this case is entitled to a judgment in a substantial amount and if you also at the same time believe that either or both of the defendants may not be financially able to pay the amounts to which you think plaintiff is entitled, will you be freely willing to go ahead and render judgment in the full amount to which you think plaintiff entitled, without any reduction on account of defendant's apparent inability to pay, and just let us worry about collecting the judgment?

"The Court having previously given indication to plaintiff that the Court feels (a) that plaintiff's counsel is not entitled to interrogate each prospective juror on the jury panel *voir dire* separately and individually and (b) that one or more of the foregoing questions might not

be proper, and plaintiff's counsel preferring to have these matters ruled upon in advance and out of the presence of jury and without colloquy in the presence of jury, now respectfully requests that the Court make his ruling out of the presence of the jury in advance of *voir dire* and it is the further request of plaintiff that these questions not be propounded to the jury by the Court."

The written request was heard by the Court away from the jury; and the Court ruled as to Request No. 1:

"The Court holds that Request No. 1 is a proper question and can be asked if counsel for the plaintiff thinks he needs to ask it. But the Court reserves the right to use his discretion in whether this question is asked each individual juror of the jury panel, which in this case consists of twenty-four members, and if he propounds this question to twenty-four members, twenty-four different times, the Court certainly reserves the right, in its discretion, to stop the propounding of the question individually to each member of the jury panel, if it appears not to serve any useful purpose in testing the interest on *voir dire* of any member of the jury panel."

As to Request No. 2, the Court ruled:

"The Court finds that it is not a proper question in the form in which it is asked. The content of that question may be inquired of the jury."

As to so much of the request, which sought to have the Court agree *not* to ask any questions, the Court ruled:

"As far as the request saying that the Court is requested not to ask certain questions, the Court overrules that part of the request, and the Court will ask whatever questions the Court feels is proper to ask the jury panel."

The records reflects that after the Court made the foregoing rulings *outside of the hearing of the jury* the following occurred, *in open Court on voir dire examination of the jury panel:*

"Thereupon the Court and counsel went into open Court and after the jury panel was sworn to answer questions touching on their qualifications as jurors in the above styled case, the Court interrogated said panel as to knowledge of the collision involved, knowledge of the suit about to be tried, acquaintanceship and relationship to parties and their attorneys, whether any member of the jury panel had been a party either as plaintiff or as defendant in a suit growing out of an automobile collision, if any of them were agents, employees, or in any other capacity represented any insurance company or companies writing automobile casualty liability insurance, or if any of them owned any stock in or had any financial interest in any insurance company or companies writing automobile casualty liability insurance, whether any of them knew any reason at all that would keep them from trying this case in accordance with the evidence presented and the instructions of law given to them by the Court, and if each of them would, if selected to serve on the jury, try this case and decide the same solely on the evidence introduced and on instructions of the Court without sympathy for our prejudice against either party . . .

"*The Court then inquired of counsel if either of them had any additional questions to ask the jury and both replied that they did not have any questions to ask of the jury panel.*[1] The Court then told the jury panel to be seated while the Clerk prepared the list of eighteen names. The list of the first eighteen names being prepared by the Clerk, counsel for both parties exercised three peremptory challenges and the twelve remaining members were seated as jurors, sworn, and served as the jury that tried this case."

The failure of appellants' counsel to ask any question of the jury on *voir dire* in open Court—as shown by the italicized portion of the above—is the decisive matter on this appeal. It has long been recognized in this State that "litigants in civil cases, as well as in criminal cases, have the right to examine the jurors separately

[1] Emphasis supplied.

in order to determine whether such jurors are subject to challenge for cause, or to elicit information on which to base the right of peremptory challenge, subject of course to the right of the Court to control the extent of such examination, acting in its sound discretion." (*Baldwin* v. *Hunnicutt,* 192 Ark. 441, 93 S. W. 2d 131.) In *Mo. Pac. Transp. Co.* v. *Johnson,* 197 Ark. 1129, 126 S. W. 2d 931, the above quoted language was reaffirmed, with the additional holding that Section 16 of Initiated Act No. 3 (as found in Ark. Stat. Ann. § 39-226 [1962 Repl.]) did not take away such right of the litigant to interrogate the individual juror,[2] subject always to the right of the Trial Court to control "the extent of the examination of each separate juror."

The record in the case at bar clearly shows that the Trial Court was thoroughly familiar with the law. As to the questioning of each juror regarding connection with insurance companies, the Court advised the appellants' counsel that the question "is a proper question and can be asked if counsel for plaintiff thinks he needs to ask it." That ruling gave the plaintiffs the right which they had requested; so appellants cannot now say that such right was denied them. The Court properly reserved the power to control the extent of the questioning; and that ruling was in accordance with our cases,

[2] In 11 Ark. Law Rev. p. 117 there is an article by Hon. R. A. Leflar entitled: "The Criminal Procedure Reforms of 1936—Twenty Years After"; and, as regards Section 16 of the Initiated Act, the author says on Page 126:

"Selection of Jurors. Prior to adoption of the Initiated Act, interrogation of prospective jurors was almost always left to counsel, who commonly asked the same questions at length of each juror, thereby taking up a vast amount of time. Often the selection of jurors took more time than all the rest of the trial. Some lawyers tried to expedite the process but others, practically uncontrolled by the judge, asked apparently irrelevant as well as relevant questions almost interminably. Section 16 of the act provided that in all cases, both civil and criminal, the judge shall examine prospective jurors upon their statutory qualifications, leaving further questions to be asked, in the judge's discretion, by either the judge or the lawyers in the case. This permits many questions to be asked of the jury panel as a group, rather than individually, but it does not eliminate the right of counsel to have jurors questioned individually upon matters of disqualification which may have a personal basis, nor does it justify an arbitrary refusal by the judge to allow counsel to examine the panel or its members. The practice as it stands now conforms with the American Bar Association recommendations on the topic."

as previously quoted. The point is that when the hearing was resumed in the presence of the jury, appellants' counsel did not see fit to ask any question; so the claimed right was recognized but remained unexercised. The failure to make examination constitutes a waiver. *Charles* v. *State,* 198 Ark. 1154, 133 S. W. 2d 26. See also 5 C.J.S. 1014, "Juries" § 252. We find no error in the ruling of the Trial Court as regards the right of appellants to interrogate the jurors personally.[3]

As regards the second request of appellants, the Court advised the counsel in chambers that the question was not properly framed; but appellants' counsel did not see fit to reframe the question or propound any question like it in the *voir dire* examination; so no right was denied the appellants. Affirmed.

[3] We have had occasion in comparatively recent cases to discuss the matter of how to examine the jury panel on *voir dire* as to insurance connections. See *DeLong* v. *Green,* 229 Ark. 100, 313 S. W. 2d 370; and *Malone* v. *Riley,* 230 Ark. 238, 321 S. W. 2d 743.

McHENRY *v.* LITTLETON.

5-3109 374 S. W. 2d 171

Opinion delivered January 13, 1964.

G. E. Smuggs, for appellant.

Spencer & Spencer, for appellee.

George Rose Smith, J. This is a suit by the appellant to foreclose a mortgage upon forty acres owned by the appellees, husband and wife. The mortgage was executed in 1948 to secure a $300 note, plus future advances. There were a number of such advances and a number of payments upon the debt between the date of the mortgage and the filing of this suit in 1961. There were, however, no payments whatever during a period of more than five years, from October 22, 1954, to January 22, 1960. The chancellor held that as a result of this intermission the five-year statute had barred all the account except one note, for $295, executed less than five years before the 1960 part payment. Among other arguments for reversal the appellant insists that there was a written acknowledgment of the debt in 1960.

Before reaching this main issue we must consider the appellees' contention that the $200 payment that was made on October 22, 1954, was in fact a payment in full of the entire debt with the exception of the one subsequent note that the chancellor found to be enforceable. On this point both the appellees testified that in 1954 they thought their debt amounted to only $200, so that their payment in that sum satisfied their liability in full.

This testimony was not accepted by the chancellor and is against the decided weight of the evidence. McHenry, the lender, kept carbon copies of his typewritten letters to Littleton; their authenticity is not open to question. These letters convince us that the Littletons could not have believed their debt to be only $200 in 1954. In May of 1953 McHenry had written Littleton that the account stood at $587.64 plus interest. Later that month there was an additional advance of $200. In September of 1954, less than a month before the $200 payment, McHenry wrote Littleton and referred to the debt as being $787.64 plus interest. Moreover, in 1957, long after the

$200 payment, McHenry wrote that the "additional loan" made in January of 1956 (the $295 note upheld by the chancellor) had increased his investment beyond the value of the forty acres. Finally, in 1960, when, according to the Littletons, only the $295 note was outstanding, Littleton's wife wrote for him a letter offering to pay $500.00 on my account immediately if you will accept it. I cannot pay it all now." In view of this unimpeached written evidence we find it impossible to believe that the Littletons had any reason to think that the $200 payment in 1954 would be accepted as a full satisfaction.

On the main issue we find that the debt, even though barred, was revived by written acknowledgment. On January 13, 1960, McHenry, apparently realizing that the validity of the account was in jeopardy, wrote a letter to Littleton in which he said: "This is notice to you to get in touch with me right soon so that we can make some arrangements about your debt on you[r] property. It will be necessary that we at least make a new mortgage and make some small payment at least on your mortgage debt."

In response to this letter the Littletons sent McHenry a $25 money order on January 22, 1960. In the accompanying letter the Littletons (the wife writing for her husband) said: "Please find enclosed p.o.m.o. for $25.00 on my account. I am hoping to be able to pay the account in full in the near future. I thought when I talked with [you] last that I would soon be able to pay you every penny on my account at once, but have been disappointed." Again, in September of 1960 Littleton, as we have already said, offered by letter to pay $500 on the account and added: "I cannot pay it all now."

Under our holding in *Morris* v. *Carr,* 77 Ark. 228, 91 S. W. 187, these letters were sufficient acknowledgments to revive the debt. In the *Morris* case the debtor, in reply to an inquiry by the creditor, merely stated that "I will use the money another year." In finding that this letter constituted an acknowledgment of the debt we pointed out that such an acknowledgment need not affirmatively express an intention to pay the debt. It is

enough if the debtor unequivocally recognizes the indebtedness as a subsisting obligation and makes no statement repelling the presumption that he intends to pay. In the case at bar the Littletons' letters fall well within the principles announced in the *Morris* case and thus had the effect of reviving the debtors' liability.

The appellees insist, however, that under the rule stated in *Opp* v. *Wack,* 52 Ark. 288, 12 S. W. 565, 5 L.R.A. 743, where there are two or more obligations due to the creditor the written acknowledgment must identify the one or ones to which the promise to pay attaches. The answer is that, although McHenry held several of the Littleton notes, the parties always regarded the indebtedness as a single account, secured by a single mortgage. It was frequently so referred to in their correspondence. Hence when Littleton recognized his obligation to pay "every penny on my account" he must be taken to have meant the account as a whole.

Reversed and remanded.

J. PAUL SMITH CO. *v.* TIPTON.

5-3148 374 S. W. 2d 176

Opinion delivered January 13, 1964.

Shaw, Jones & Shaw, for appellant.

Sexton & Morgan, J. Marvin Holman, for appellee.

PAUL WARD, Associate Justice. This litigation grows out of a collision between a 1954 Ford passenger car and a large trailer truck. Of the five people in the car, two were killed and the other three were injured. Of the three injured, one seeks no damages and is not a party herein. The basic facts are not complicated but the pleadings are somewhat involved and will be fully set out to clarify the several issues.

Facts. The accident occurred at about 3:30 a.m. on May 12, 1962 on U. S. Highway No. 64, a few miles west of Clarksville—near a motel called the "64 Hub". The car was owned and driven by Billy Joe Woolsey, aged 35. In the car were: Ronnie Tipton, aged 15, who was killed; Johnnie Lee Roughley, aged 18, who was killed; James C. Campbell, aged 18, and Tommy Crowder, aged 16, who is not a party litigant. The trailer truck which was hit from the rear was owned by appellant, J. Paul Smith Company [hereafter called Company], and it was

being driven by appellant, Pete George. For brevity, we may hereafter refer to the occupants of the car as the driver and the boys.

The driver and the boys got together about 9 or 10 p.m. the day before preparatory to going on a frog hunt that night. After the hunt was over and as they were returning home at about 3:15 a.m., traveling east, the car hit the rear end of the trailer truck as it was entering upon or was already on the highway. The truck had been parked at the motel on the previous afternoon on the south side of the highway—headed north. It was dark, and when the truck was pulling out onto the highway (according to appellees) or after it had proceeded some 100 to 200 feet east along the highway (according to appellants) the collision occurred. Whether another car (traveling west) contributed to the cause of the collision is a disputed question. Appellants, however, do not challenge the sufficiency of the evidence to support a finding of negligence on their part.

Pleadings. The parents of Tipton and Roughley, and the mother of Campbell sued the Company and Pete George (hereafter referred to as appellants) for negligently driving the truck upon the highway. They also sued Woolsey, charging him with wanton and wilful negligence in driving the car. Woolsey entered a general denial and also cross complained against appellants. Appellants denied all allegations of negligence in the complaint and the cross complaint, and, in addition, pleaded (a) that the boys were on a joint venture with Woolsey and consequently his negligence was imputed to them; and, (b) that the boys were guilty of contributory negligence. Appellees denied the allegations in appellants' cross complaint. Woolsey, who was an original defendant, received no award from the jury, and he has not appealed.

Trial. At the close of all the testimony interrogatories were submitted to the jury with the results indicated:

No. 1. Appellant, Pete George, was guilty of negligence as charged which was the proximate cause of the injuries—his negligence was 80%.

No. 2. Woolsey was negligent in operating his car which was the proximate cause of the injuries—negligence was 20%.

No. 4. The boys were not on a joint enterprise with Woolsey.

Nos. 6, 7, and 8. Campbell, Tipton, and Roughley assumed the risk of riding with Woolsey.

No. 9. Judgments:

Campbell	$20,000
Tipton	12,500
Roughley	12,500

No. 10. No judgment for Woolsey.

For a reversal, appellants ably and earnestly rely on the eight separate points hereafter discussed.

One. Appellants here make the novel and interesting contention that the boys should not be allowed to recover because they "assumed the risk of the harm that might come to them through the negligent acts of Billy Joe Woolsey in the operation of the vehicle in which they were riding". This contention is based partly on the fact (as found by the jury) that Woolsey was 20% negligent and that his negligence was a proximate cause of the injuries. It is also contended that under the well established "assumption of the risk" rule they could recover nothing, and that this rule was not affected in any way by our comparative negligence statute—Ark. Stat. Ann. § 27-1730.1 (Repl. 1962). This argument, appellants say, is supported by the case of *Bugh* v. *Webb,* 231 Ark. 27, 328 S. W. 2d 379. We are not convinced by appellants' argument. We think the *Webb* case relied on by appellants is not in point for the reasons hereafter pointed out. In that case [at page 34 of the Arkansas Reports] we said:

"The rule which we think is most applicable in the case under consideration is set forth in 15 A.L.R., Second,

Page 1180, Section 9, under the heading 'Assumption of Risk'. It is there stated that the necessary elements of assumption of risk by guests are clearly defined as follows: 'First, there must be a hazard or danger inconsistent with the safety of the guest; second, the guest must have knowledge and appreciation of the hazards; and third, there must be acquiescence or willingness on the part of the guest to proceed in the face of danger.' "

We then pointed out (1) that drag racing was hazardous; (2) that Webb was aware of the hazard; and, (3) that he had an opportunity to protest but failed to do so. The above mentioned set of facts is just the opposite of the facts in the case under consideration—(1) driving on the highway is not drag racing; (2) the boys did not know the truck would be negligently driven onto the highway; and, (3) they had no reasonable opportunity (14 seconds) to protest. In the *Webb* case the Court made it plain, we think, that the result would have been different if any of the enumerated facts had been lacking.

To adopt the rule which appellants appear to espouse would lead to an illogical and unjust result. It would allow Woolsey (the negligent driver) to recover, but it would deny recovery to the boys who had no control over the car.

We are unable to understand how our comparative negligence statute in any way operates to modify or repeal the doctrine of assumption of the risk as it applies to the case under consideration and as it has been uniformly construed by the courts in this and other jurisdictions—that is, a person does not assume the risk of the negligence of a third party and does not assume a risk of which he is not aware. The rule, as applied to cases of this nature is very well stated in 61 C.J.S. *Motor Vehicles* § 486, where appears this statement:

"A guest's assumption of risk, in case of a motor vehicle collision, applies only as between the guest and his host, and does not bar recovery from a third person for injuries to which the third person's negligence prox-

imately contributed, unless the acts of the host, in which the guest acquiesces, operate as the cause of the collision."

There are many authorities and decisions in substantial agreement with the above statement. See: 4 Blashfield, *Cyclopedia of Automobile Law and Practice,* § 2511; *Keowen* v. *Amite Sand & Gravel Co.,* (La. 1941 4 So. 2d 79; and *Guile* v. *Greenberg,* 192 Minn. 548, 257 N. W. 649.

Two. On August 29, 1962, the complaint herein to recover for the death of Ronnie Tipton and Johnnie Lee Roughley was filed by Ronnie's parents (as next of kin) and by Johnnie's mother (as next of kin). The trial began on Feb. 14, 1963, and later that same day it was learned that Harlan Tipton had just been appointed *administrator* of the estate of his son (Ronnie) and that the mother of Johnnie had been appointed *administratrix* of his estate. When the above information was revealed to appellants they promptly moved the court to dismiss the complaint insofar as it applied to the deceased boys. The motion was founded on Ark. Stat. Ann. § 27-907 (Repl. 1962), enacted in 1957. It suffices here to point out that it requires these two mentioned actions to be "brought by and in the name of the personal representatives" of the deceased boys. We think the trial court was correct in refusing appellants' motion to dismiss. As soon as the erroneous procedure was called to appellees' attention they, with permission of the court, amended the complaint by proper interlineations.

We are unable to see how appellants were in any way prejudiced, and they did not ask for a continuance on that ground. Under the liberal method of procedure provided for in Ark. Stat. Ann. § 27-1160 (Repl. 1962) we think the trial court not only had the power to permit the amendment but that he would have been derelict in his duty had he not done so. This section, among other things, provides:

"The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the

name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or when the amendment does not *change substantially* the claim or defense, by conforming the pleading or proceeding to the facts proved." (Emphasis added.)

It cannot be contended here that the substitution of parties plaintiff changed "substantially the claim or defense" of either party. This Court apparently has recognized a difference between *bringing* an action and *maintaining* an action in court. In *St. Louis M. & S. E. Rd. Co.* v. *Garner,* 76 Ark. 555, 89 S. W. 550, it was said: "The plaintiff (appellee) had no right to *bring* or *maintain* this action, there being a personal representative of the deceased". (Emphasis added.) In the case before us the next of kin did not try to *maintain* the action after the appointment of the personal represenatives was called to the attention of the court.

Three. We find no reversible error in the court's instruction telling the jury it had the right to "take into consideration . . . any loss of earnings sustained or which may be sustained in the future as a result of said injury". This particular instruction was given with reference to appellee James C. Campbell, who was 18 years old at the time of the collision. Appellants also objected to similar instructions, though worded differently, with reference to the two deceased boys. There, the court told the jury they could take into consideration the value of the services the boys would have rendered their parents until they should reach the age of majority, and the amounts they would have contributed after reaching the age of majority. Appellants cite *Missouri and Arkansas Railway Co.,* v. *Treece,* 210 Ark. 63, 194 S. W. 2d 203, as holding that, in this situation, the verdict of the jury must be based upon *reasonable inferences from established facts* and not on conjecture or speculation. Just how much the jury allowed in each case cannot be known because of the form of the verdicts, which was not objected to by appellants. It has been held that a person can recover for impairment of earning capacity even though he was not employed at the time. See: *Germ*

v. *City and County of San Francisco,* 222 P. 2d 122 (Cal. 1950). It has been held that a housewife who stays at home can recover. See: *LeMay* v. *Minn. St. Ry. Co.,* 71 N. W. 2d 826 (Minn. 1955), and to the same effect is the case of *Fort Smith Gas Co.* v. *Lewis,* 202 Ark. 427, 150 S. W. 2d 622. Examination of many of our own cases reveals that we have been liberal as to the amounts of evidence required to justify an instruction for loss of earnings. See: *Wis. & Ark. Lbr. Co.* v. *Standridge,* 132 Ark. 535, 201 S. W. 295.

In the case of Campbell, 18 years old when injured, it was shown he had been attending a school for mechanics to prepare for work in the future and it also appears that he was going to "work in peaches" during the season. In his case there can be no doubt his earning capacity has been diminished as a result of his extensive injuries. As to the deceased boys: The record shows that Ronnie, aged 15, did work around the house, waxed floors, mowed the lawn, and helped with flowers. The record shows that Johnnie, aged 18, was a good boy, worked around the house, ran errands and helped to look after the younger child. From these facts we think the jury could very *reasonably infer* that to supply all of these services would have cost money. Just how much value should have been placed on these services, or was placed on them by the jury, is of course speculation. For that reason alone, no reversible error has been shown.

Four. After careful study of the record we find no substantial evidence to justify submitting to the jury the question of contributory negligence on the part of any one of the boys. There was testimony that each boy drank a can of beer sometime during the trip, and there was also testimony they didn't drink any beer. At any rate there is no evidence as to when beer was drunk or that it contributed to the accident. Also, Crowder said he heard *one* of the boys tell Woolsey to "step on it" —"or something like that", but there is no evidence to show which boy made that statement. Moreover, if the identity of the boy were known, his negligence (if any) could not be imputed to the other boys since (as found

by the jury) they were not on a joint enterprise and therefore no boy had any control over any other boy. It might be urged, however, that each boy was negligent in not protesting Woolsey's accelerated speed when he was told to "step on it". The answer is that (according to Crowley's testimony) *one* boy did promptly tell Woolsey to "watch out". But again, that *one* boy is not identified. From all this we are led to conclude that any finding of negligence on the part of any one of the boys would have to be based entirely on speculation.

Five. Over appellants' objections the court gave the following instructions:

"You are instructed that vehicles being operated on a through highway have the right of way over other vehicles attempting to enter or cross such through highway. You are further instructed that such right of way extends to the entire passage across the through highway, and that the driver of a vehicle attempting to enter or cross such through highway does not discharge his duty by merely stopping before entering the through highway."

"You are instructed that the driver of a vehicle upon a through highway has the right of way and is not required to slow down at a private driveway or bring his vehicle under such control as to be able to stop, but is entitled to assume that other drivers attempting to enter or cross such through highway will obey the law and yield the right of way to him."

Appellants apparently admit these instructions accurately state the law as set out in our statutes, but object that the instructions do not impose on both drivers (the driver of the truck and the driver of the car) the same duty to exercise due care. We find no merit in this objection for the reason that other instructions (not challenged here) cover the matter of due care. The purpose of the instructions was to aid the jury in determining which of the two drivers was at fault, or most at fault, for the collision.

Six. The trial court refused to give appellants' instruction No. 60 which reads:

"You are instructed that if you find from a preponderance of the evidence in this case that the plaintiff's decedents and plaintiff, James C. Campbell, had been drinking intoxicants, or were drinking intoxicants with the driver of the vehicle in which they were riding, then you are instructed that the plaintiff's decedents and the plaintiff, James Campbell, *were on a joint venture with the driver of the vehicle* in which they were riding and the negligence, if any, on the part of the driver of the vehicle in which they were riding is imputed to them." (Emphasis supplied.)

Appellants, recalling the testimony relative to the five cans of beer previously referred to, rely on our opinions in *Mo. Pac. Tpn. Co.* v. *Howard,* 201 Ark. 6, 143 S. W. 2d 538, and *Wilson* v. *Holloway,* 212 Ark. 878, 208 S. W. 2d 178, to justify the instruction. We cannot agree with appellants that the above decisions justify giving the instruction under the facts in this case. In the *Howard* case there was testimony that the people in the car were "driving around on pleasure bent"; that they had been drinking both beer and whiskey; and that the owner of the car and another member of the party attempted to dance, "but were too inebriated to do so". In the *Wilson* case the issue of whether the parties were on a joint enterprise was left to the jury. The vice in the proffered instruction is that it binds the jury to reach a definite result regardless of when, where, or how much intoxicants were drunk. In those respects, nothing was left to the discretion of the jurors.

Seven. Trooper Bob Pritchard, Arkansas State Police, was placed on the stand by appellees to testify relative to the location of the debris (resulting from the collision) and relative to how long it would take to drive a car between two points at a specified rate of speed. Appellants say the court erred in allowing the witness to virtually "reconstruct" the collision which we said in two recent decisions constituted reversible error. The decisions referred to are *Henshaw* v. *Henderson, Special*

Adm'r, 235 Ark. 130, 359 S. W. 2d 436, and *Waters* v. *Coleman,* 235 Ark. 559, 361 S. W. 2d 268. We are unable to agree with appellants that Pritchard's testimony in this case amounted to or even approached recreating the collision. The testimony objected to is set out hereafter.

"Q. At my request, did you run a test of a vehicle driving sixty miles an hour, the time it took a vehicle at sixty miles an hour to come from that point to the place on the highway where you found the debris and where the skid marks terminated?

"A. Yes sir.

"Q. Now, from the sign midway up the hill west of Little Spadra Creek to the place on Highway 64 at the Hub where you located the debris and where the skid marks terminated, driving at sixty miles an hour, what was the elapsed time it takes a vehicle to travel from that sign to that place?

"A. Sixteen seconds.

"Q. Sixteen seconds?"

From the above it is obvious that the witness was not called on to reconstruct anything, to express any mysterious conclusions, to comment on the evidence, nor did the accuracy of his answers depend on the weather, the make or condition of the car, or the condition of the road—some of the controlling factors in the cases cited above.

Eight. Finally it is argued that the verdicts are excessive. At first it was thought by appellants that one verdict exceeded the amount sued for, but this is satisfactorily explained as a typographical error. We find nothing in the record that indicates any of the verdicts is excessive, considering all the elements the jury had a right to consider. As to *Campbell:* He sued for $47,930.10 and recovered $20,000. He received serious and permanent injuries; suffered great pain and will continue to do so; he incurred hospital bills of more than $1,200; his leg will be permanently disabled to some

extent, and his earning capacity has been and likely hereafter will be impaired. All this, we think, justified the jury in returning a verdict of $20,000. As to the *deceased boys,* there has not been and never will be devised a definite and satisfactory rule by which to determine the amount of money required to compensate parents for mental anguish. Ronnie Tipton and Johnnie Lee Roughley were normal boys with normal parent-child relationships. There can be no doubt from the testimony that their parents' grief was deep and genuine. The depth of grief of the mother of Johnnie was so great that she was unable to sleep at night and she often arose from the bed and walked some four miles to the cemetery where he was buried. Ronnie Tipton was an only child. We are unwilling to say the judgment of $12,500 in each case was excessive.

Finding no error we hereby affirm on direct appeal the judgment of the trial court.

Cross Appeal. As previously set out the jury returned a verdict in favor of Campbell in the amount of $20,000, and verdicts in the amount of $12,500 in each of the other cases involving the two deceased boys. Thereupon the trial court reduced the amount of each verdict by 20% and entered judgment accordingly. Undoubtedly the trial court was guided by the fact that the jury found (as previously set out) that Woolsey was 20% negligent (in causing the accident) and by the fact that the boys assumed the risk of riding with Woolsey (as found by the jury).

Appellees acknowledge that this Court has never before considered the exact point here raised, but they contend that the principles we announced in the case of *Lockhart* v. *Ross,* 191 Ark. 743, 87 S. W. 2d 73, logically lead to a reversal of the court's action in reducing the judgments. *The Lockhart* decision does to some extent confirm appellees' contention herein. It is a definite announcement, under the facts of that case, that a passenger in a car (as Campbell) is not liable in damages to third parties (as appellants) because of the negligence of the driver of the car (as Woolsey) where the passen-

ger was not on a joint enterprise with the driver (as was the relationship in this case). It would seem to follow from the above, therefore, that the boys in this case should not be penalized (by a reduction of the judgments against appellants) because of the negligence of Woolsey.

However, since we are not bound by any decision under the facts of this case, we feel at liberty to consider certain other features which lead us to a different conclusion than that urged by appellees. In the first place, in the *Lockhart* case, the question of assumption of the risk was not involved. If it had been, we can not be sure what effect it would have had on the court's decision. From the standpoint of logic and justice much can be said to sustain the action of the trial court in reducing the judgments here involved. To simplify the point at issue we will consider only the case of Campbell. The verdict of the jury has established the fact that appellants' negligence was only 80% the cause of his injuries and that Woolsey's negligence was 20% the cause. It is further established by the jury that Woolsey's negligence was assumed by Campbell. Under these established facts we cannot escape the conclusion that the more logical and equitable rule calls for each party to be responsible in proportion to his own degree of negligence. Under the court's holding appellants will pay their proportional part, while the part for which Woolsey was responsible was voluntarily waived by Campbell. So, as between Campbell and appellants, it seems more reasonable that he should bear the loss of 20% of the judgment. What we have said relative to Campbell is applicable, of course, to the other occupants of the car.

It is therefore our conclusion that the judgment of the trial court on cross appeal should be, and it is hereby, affirmed.

Affirmed.

McFaddin, J., concurs.

ED. F. MCFADDIN Associate Justice (concurring). I concur in the final result reached by the Majority in this case, but I have pursued a slightly different method of reasoning to arrive at such conclusion; and, for whatever benefit it may be to the litigants and the Bar generally, I now state my method of reasoning.

In Point Four the Majority Opinion says: "After careful study of the record we find no substantial evidence to justify submitting to the jury the question of contributory negligence on the part of any one of the boys." I think that this issue of the contributory negligence of the boys should have been submitted to the jury in the interrogatories requested by the appellants. The appellants pleaded the defense of contributory negligence on the part of the boys; there was evidence that the boys and the driver of the car (Woolsey) had been drinking together; there was evidence that one of the boys urged Woolsey to see how fast the car would go; there was evidence that Woolsey then began driving the car 85 miles per hour; there was no evidence that any of the boys ever protested such speed; and there was evidence that the car was going at a very rapid rate of speed at the time it hit the trailer. These items of evidence, I think, were sufficient to require the Court to submit to the jury the question of whether the boys were guilty of contributory negligence; so I differ with the reasoning of the Majority on this point.

However, I arrive at the same conclusion that the Majority has reached, because I think that any error in failing to submit to the jury the issue of the contributory negligence of the boys was cured when the Trial Court reduced the verdicts by 20%, which was the amount of the contributory negligence of Woolsey. Certainly the occupants of the car could not have been guilty of a greater degree of contributory negligence than was the driver; so in reducing the verdicts the Trial Court cured the error in failing to submit to the jury the issue of the contributory negligence of the boys.

The jury verdict for Campbell was $20,000.00; the Trial Court reduced this 20% and rendered judgment for Campbell for $16,000.00. The jury verdict for the Tiptons was $12,500.00; the Trial Court reduced this 20% and the judgment was for $10,000.00. The jury verdict for Mrs. Roughley was $12,500.00; the Trial Court reduced this 20% and the judgment was for $10,000.00. Thus the Trial Court reduced the verdicts by 20% which was the percentage of contributory negligence the jury found to be attributed to Woolsey, the driver of the car. The appellees are in no good position to claim that this reduction of 20% was excessive, since it was at their insistence that the issue of contributory negligence of the occupants of the car was not submitted to the jury. Therefore, my conclusion is that there should be affirmance of the case on direct appeal and cross appeal.

JONES *v.* COMER.

5-3116 374 S. W. 2d 465

Opinion delivered January 13, 1964.

[Rehearing denied Feb. 17, 1964.]

Franklin Wilder, Charles R. Garner, for appellant.

Warner, Warner, Ragon & Smith, for appellee.

SAM ROBINSON, Associate Justice. Appellants, Eugene Jones, Charles Williams and Betty Williams, and Richard Wilson James, Jr., were the parents of three young boys who drowned in a pond located on land owned by appellees near the city limits of Ft. Smith. The trial court granted defendants' motion for a summary judgment and plaintiffs have appealed. The only issue is the action of the trial court in granting the motion for summary judgment.

Ark. Stat. Ann. § 29-211 (Repl. 1962) provides: "(b) . . . A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) . . . The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleading, depositions, and admissions on file, together with the affidavits, if any, 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. . . ."

In the very recent case of *Epps* v. *Remmel*, 237 Ark. 391, 373 S. W. 2d 141, decided by this court December 16, 1963, we pointed out that if in a hearing on a motion for summary judgment it is shown by uncontroverted affidavits that there is no genuine issue of fact, it becomes the duty of the trial court to dispose of the case accordingly.

The plaintiffs allege that the defendants owned the property on which the pond is located, and it is further alleged in the complaint: "Situate upon said described property and in the Northeast corner thereof is an old pond, lake or body of water approximately 150 feet long by 100 feet wide and 15 feet deep, upon which an old boat or part thereof was located together in the near proximity with a large tree with a hanging cable or rope

used by the decedents and other children to swing upon, play with, wade in, swim in and otherwise enjoy because same was attracted to them. All of said lands being unfenced, unenclosed and easily accessible to the public and more particularly to the three decedents.

"Plaintiffs further state that the situated land, lake, swinging tree, playground and other areas as mentioned and allowed to be mentioned is a dangerous instrumentality that is attractive to children. That same had been made attractive to children and was an open invitation to children to come upon the premises. That all of same was in such an attractive character that the defendants, and each of them, knew or as reasonable, prudent persons, should have known, would invite the attention of children and draw them to it, particularly to their sported and playful natures; and defendants and each of them, allowed said condition and situation to exist, well knowing same to be attractive and dangerous to the public and more particularly to the three deceased minors.

"As a direct and proximate result of the conditions existing as aforesaid, the three deceased minor children on April 7th, 1962, went upon the described premises at or around 4:00 P.M. on said date and were drowned, thereby causing the damages as hereinafter complained of."

The defendants filed an answer denying the allegations of the complaint and alleging the affirmative defense of contributory negligence. On authority of Ark. Stat. Anno. § 28-355 (Repl. 1962), defendants then propounded interrogatories to plaintiffs, requesting: "State the names and addresses of all persons known to you or your Attorneys having any knowledge or information of any facts relevant or pertinent to any of the allegations of fact contained in paragraphs 8, 9, 10, 11, 12 and 13 of your complaint."

In response, plaintiffs filed a list of their witnesses. The defendants then served notice on plaintiffs that discovery depositions would be taken from the witnesses named by the plaintiffs in the response to the interroga-

tories. Depositions were taken, counsel for both sides being present. Also affidavits of other witnesses were filed. Later, defendants filed a motion for a summary judgment alleging, in effect, that according to the uncontroverted evidence, as shown by the depositions and affidavits, there was no genuine issue of a material fact; that according to the undisputed evidence there was no liability on the part of the defendants, and that, as a matter of law, defendants were entitled to a judgment in their favor. The court granted the motion and entered a judgment for the defendants. The plaintiffs have appealed.

Two of the boys that drowned were nine years of age and one was eight years of age. Two of the boys had bicycles. Late in the afternoon on April 7, 1962, the boys disappeared from their homes. About 8 o'clock p.m. on that same day a cap belonging to one of the boys was found floating in the pond on appellees' property. The property is located about one-half mile from where the boys lived. A further search was made by police and firemen and the bodies of the three young boys were recovered from the pond. The bicycles belonging to the boys were found the following day on the west side of appellees' property.

The property owned by appellees was formerly used as a golf course and the pond was part of the course. It is about 150 feet long by 100 feet wide and about 15 feet deep. One of the bodies was located about eight feet from the west shore of the pond, near the north end. The other two bodies were recovered from a little farther out in the pond. On the northeast shore of the pond there was an old boat partly in and partly out of the water. About 150 or 200 feet north of the pond there was an old bag swing hanging from a limb of a tree.

There is no indication whatever that appellants contend that there is any liability on the part of the defendants except the theory that the defendants maintained an attractive nuisance. If appellants cannot recover on the attractive nuisance doctrine there can be no recovery under the allegations in the complaint. There is no showing, by affidavit or otherwise, that there is an issue of a

material fact. If appellant had knowledge of facts that would make applicable the attractive nuisance doctrine, such facts should have been shown by counter-affidavit. In *Epps* v. *Remmel,* supra, we quoted from *U.S.* v. *Dollar,* 100 F. Supp. 881: "The motion [for summary judgment] requires the opposition to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact."

The weight of authority in this country is that ponds, lakes, streams, reservoirs, and other bodies of water do not constitute an attractive nuisance in the absence of any unusual element of danger. See 8 A.L.R. 2d 1298, § 42, which cites a long list of cases from many states supporting this rule. We have subscribed to the foregoing rule. *Carmichael* v. *Little Rock Housing Authority,* 227 Ark. 470, 299 S. W. 2d 198.

Appellants rely on *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 60 Ark. 545, 31 S. W. 154. That case is clearly distinguishable from the case at bar. There, a six year old child was scalded by walking into a pit containing hot water, the water being covered with pieces of bark to such an extent that the water could not be seen. Clearly the boiling water covered with bark created an extremely dangerous situation that was very unusual and amounted to a trap for a six year old child.

The proposition of ponds, lakes, streams, etc. being excluded from the attractive nuisance doctrine is thoroughly discussed in the Carmichael case, and there is no doubt about this court's holding on that point. But we pointed out in that case that if the pond or other body of water constituted a trap, or there was some other hidden inherent danger, the attractive nuisance doctrine would apply. Here, however, there is nothing about the pond in question that could be said to be a trap or hidden danger within the meaning of those terms as expressed in the Carmichael case, unless it could be said that the bag swing located at least 150 feet north of the pond or the old boat could come within that category.

There is nothing that indicates that the old boat could, in any way, have contributed to the tragedy. It was partly on the bank on the opposite shore from the shore near which the bodies were found, and, of course, the bag swing being at least 150 feet north of the pond could not have been involved. Even if it could be said that the bag swing and old boat were instrumental in attracting the children to the pond to play, still that would not be sufficient to make applicable the attractive nuisance doctrine. In the Carmichael case it was found that: "The pond is unenclosed and children from the heavily populated area congregate there in the shade of the trees and on the large rock to watch and throw rocks at the fish. Parents in the vicinity caution their children against playing around the pond but have difficulty keeping them away."

In harmony with the Carmichael case, where it was held that the attractive nuisance doctrine was inapplicable although it was shown that children congregated in the shade of trees and on a large rock at the pond to throw rocks at the fish, there is a long line of cases, such as *National Metal Edge Box Co.* v. *Agostini,* 258 F. 109 (Five year old boy drowned attempting to get stick from hole in ice.); *Cox* v. *Alabama Water Co.,* 112 So. 352 (Slime had accumulated on sides of reservoir creating danger. Eight year old boy fell and drowned.); *Melandez* v. *Los Angeles,* 68 P. 2d 971 (Children playing on raft and boards. One child fell off and drowned.); *Denver Tramway Corp.* v. *Callahan,* 150 P. 2d 798 (Eleven year old child tried to cross pond by cable and drowned.); *Harriman* v. *Afton,* 281 N. W. 183 (Thirteen year old child fell off raft into pond and drowned.); *McKenna* v. *Shreveport,* 133 So. 524 (Ten year old boy fell off raft and drowned.); *Cooper* v. *Overton,* 52 S. W. 183 (Ten year old boy fell off plank and drowned.); *Lomas* v. *West Palm Beach Water Co.,* 57 So. 2d 881 (Fact pond had white sand banks did not render owner of pond liable for drowning of child.); *Newby* v. *West Palm Beach Water Co.,* 47 So. 2d 527 (Pond had a white spray with rainbow effect.); *Smith* v. *Chicago & E.I.R. Co.,* 95 N. E. 2d 95 (Nineteen month old girl slipped off

partially submerged timber and drowned.); *Ameker* v. *Quinn-Robbins Co.,* 323 P. 2d 1073 (Three year old child fell off raft and drowned. Fact that rafts, logs, or other objects were floating on pond did not constitute attractive nuisance.).

According to the testimony given by plaintiffs' witnesses in the discovery depositions and other affidavits filed in the case, no counter-affidavits being filed, there is no issue of a material fact. The facts do not bring the case within the attractive nuisance doctrine and the trial court, therefore, correctly granted appellants' motion for a summary judgment.

Affirmed.

JOHNSON, J., dissents.

HAKE *v.* ARK. STATE MEDICAL BOARD.

5-3086 374 S. W. 2d 173

Opinion delivered January 13, 1964.

Brown, Compton & Prewett, for appellant.

Warren & Bullion, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from order revoking a license to practice medicine. On June 11, 1962, appellant Orin Joseph Hake was sent a letter by appellee's secretary advising appellant that a complaint had been filed with appellee, the Arkansas State Medical Board, relative to an alleged malpractice and requesting appellant to appear before that board on June 14th. The letter stated in part that, "no formal action will be taken against you at this meeting. The Board simply wishes to discuss this complaint with you and determine if there is sufficient evidence for proceedings to be instituted against you for revocation of your license." Appellant appeared at this meeting. Thereafter a formal complaint was filed against appellant and an order to show cause and an order of suspension were issued, with hearing set for July 26, 1962, before the appellee board. Appellant appeared at this reported hearing with counsel and at a later hearing on November 15, 1962. On November 21, 1962, an order revoking appellant's license to practice medicine and surgery in the State of Arkansas was served upon appellant. Appellant then petitioned Pulaski Circuit Court for a writ of certiorari, which was granted. Upon review, the Circuit Court on April 12, 1963, affirmed the action of the board, from which appellant has prosecuted this appeal.

For reversal appellant urges that the circuit court erred in affirming the Medical Board's action in revoking appellant's license to practice medicine in the State of Arkansas.

The Medical Practice Act, at Ark. Stat. Ann. § 72-613 (Repl. 1957), sets out fifteen grounds for revocation, suspension or refusal to issue licenses. More than one of these grounds were included in the serious and somewhat sensational charges against appellant. Section 72-614 provides for the filing of complaints, hearing and appeal. The last of this section reads as follows:

"All evidence considered by the Board shall be reduced to writing and available for the purpose of appeal or certiorari to any of the parties of said hearing. Nothing herein shall be construed so as to deprive any

person of his rights without full, fair and impartial hearing."

The Order of Revocation recites:

"As a result of the observation of the respondent, conversations with him, and oral examination of him, as well as the evidence adduced at the hearing, the Board is unanimously of the opinion that Orin Joseph Hake is mentally and emotionally incompetent to practice medicine; that the safety of the people of the community in which he practices will be endangered by his continuing to practice medicine. The Board further finds that said Orin Joseph Hake has been guilty of grossly negligent and incompetent malpractice and that his license to practice medicine in the State of Arkansas should be cancelled and revoked."

The concensus of appellant's argument is that there is absolutely no evidence in the record to substantiate the findings and rulings of the board. Appellee urges that the board, as an administrative body, and as is also provided in the Medical Practice Act in § 75-615, ". . . shall not be bound by strict or technical rules of evidence . . ."; that the board's finding of mental and emotional incompetency is the medical opinion of the nine doctor-members which they are competent, as doctors, to make. We cannot say that either argument as such is completely without merit. We fully understand the justice of informal hearings on complaints to determine whether a formal complaint should be filed, and that the power to suspend a doctor's license pending hearing on a formal complaint is necessary for the safety of the community where a doctor practices. However, we are equally cognizant that the right to practice medicine is a valuable property right not to be treated lightly.

In *Bockman* v. *Ark. State Medical Board,* 229 Ark. 143, 313 S. W. 2d 826, this court stated:

"The appellant contends that the board's findings of fact are not sustained by any substantial competence evidence. Upon this point it is our rule in proceedings like this one that the board's action will not be set aside

on certiorari unless there is an entire absence of evidence to sustain the findings, in which case the board's action will be deemed arbitrary. *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041; *Eclectic State Med. Bd.* v. *Beatty,* 203 Ark. 294, 156 S. W. 2d 246."

In *Kuhl* v. *Ark. Bd. of Chiropractic Examiners,* 236 Ark. 58, 364 S. W. 2d 790, after quoting the above language of the *Bockman* case, the court added:

"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, . . ."

In *McKay* v. *State Board,* 103 Colo. 305, 86 P. 2d 232, a similar case, the Colorado Supreme Court said:

". . . the law which the board acted contemplates a review of the board's action by a court presumably not expert in medical matters, with authority in the court to determine whether the board regularly pursued its authority or abused its discretion. Without testimony by an expert the court cannot determine the limits of proper treatment in good faith of one possessing ordinary skill nor can it assume that the board members out of their own individual knowledge and skill correctly fixed the limits within which one might prescribe in these particular cases and be within the bounds of ordinary care and skill so that good faith might be presumed, and beyond which good faith and ordinary skill could not both be successfully asserted. Such matters being only within the knowledge of experts must be shown by testimony of experts appearing in the record."

. . .

". . . It does not appear in the evidence that such treatment for a patient in her condition was not proper, judged by sound and recognized medical standards. The board says that in its opinion it was not, but until there was competent evidence to support it, the board was not authorized to form such an opinion and exceeded its authority in so doing."

In the case at bar, the record furnished no factual standard for the board's conclusions and no standard for this court to determine wheher the acts charged amounted to malpractice and no standard for the board's opinion as to appellant's mental and emotional incompetency to practice medicine. From the record before us, it seems that the findings and opinion of the board are based on testimony or conversation or other matters which arose or were presented at the first informal and unreported hearing. (A minute scraping of the record might yield some scintilla of evidence to substantiate some of the findings of the board, but this would hardly be compatible with the provisions of the Medical Practice Act which assures that no person will be deprived of his rights without full, fair and impartial hearing.) We have uniformly held that while administrative tribunals are not bound by strict or technical rules of evidence, there must be evidence in the record to sustain the findings of the administrative board. In addition, the Medical Practice Act specifically provides that "[a]ll evidence considered by the Board shall be reduced to writing and available for the purpose of appeal or certiorari to any of the parties of said hearing." There is a virtual absence of evidence in the record to sustain the board's findings, as well as no expert testimony to provide a standard for the board's medical opinions. The valuable property rights here involved cannot be taken from appellant upon such questionable compliance with due process. Accordingly the case must be reversed. However, the health and welfare of an entire community demands that the cause be remanded. Therefore this cause will be remanded, through the circuit court, to the board, to the end that the board may have a new hearing upon evidence competent before such an administrative body consistent with this opinion, pending which appellant's license to practice medicine in the State of Arkansas shall remain suspended pursuant to the board's original order of suspension of June 25, 1962.

McFaddin, J., concurs.

ZULLO *v.* ALCOATINGS, INC.

5-3160 374 S. W. 2d 188

Opinion delivered January 13, 1964.

Earl J. Mazander & B. W. Thomas, for appellant.

R. Scott Campbell, for appellee.

FRANK HOLT, Associate Justice. This is an action by the appellee to collect $580.95 on an open account for roofing materials. In appellant's answer he admitted the purchases and by cross complaint sought $2,025.00 in damages as the "proximate result of the material not being as represented and guaranteed * * *" by the appellee. The court, sitting as a jury, found the issues in favor of the appellee. The appellant, on appeal, relies upon two points for reversal. We combine them for discussion on sufficiency of evidence since both points, in effect, contend that the evidence was insufficient to sustain the findings of the court as trier of the facts.

Appellant ordered and purchased roofing materials from appellee through a Maurice Bowman who was appellant's tenant. Appellant testified that, upon Bowman's recommendation, he employed and paid a certain individual to apply the roofing materials and that Bowman supervised the application. Within a short period of time after the application of the product on the roof,

leaking occurred which damaged the interior and furnishings of appellant's apartment building. Additional roofing material was ordered and applied to no avail and within a few months it became necessary to install a "complete new roof". Appellant contends Mr. Bowman told him he was appellee's agent and that he relied on Bowman's unconditional representation and guarantee that the roofing material would keep his roof from leaking for ten years and, therefore, appellee is bound by its agent's representations. The law is well settled that neither an agency nor the scope of an agency can be established by the declarations or actions of a purported agent. *Smith* v. *Pleasant,* 200 Ark. 1190, 139 S. W. 2d 377; *Wright* v. *Harris,* 222 Ark. 661, 262 S. W. 2d 142.

Further, it is a well established rule of law as to principal and agent that the nature and extent of an agent's authority, when the evidence is in conflict, is a question of fact for the jury. *Bradley Advertising, Inc.,* v. *Froug Stores, Inc.,* 193 Ark. 639, 101 S. W. 2d 789. The appellee denied Bowman was its agent. Appellee adduced evidence that Bowman, as its salesman, was only authorized to make such guarantees as were conditionally expressed on its brochures, invoices, and in the printed instructions furnished with the product.

The invoice received by appellant reads *inter alia:*

"No representations, agreements or promise of the salesman (not shown on this invoice) whether verbal or in writing, shall be valid, except when confirmed in writing by an officer of the company."

There is no evidence that appellee was ever aware of or confirmed in any manner Bowman's unconditional representation. The brochure and the material replacement guarantee,[1] in substance, provides for replacement

[1] "Should FOUR SEASONS be applied according to our simple printed instructions and fail to give you ROOFING, METAL or MASONRY PROTECTION for Ten Years from invoice date, except in case of earthquakes and other acts of God, and the account discharged per terms of order, we hereby agree to furnish NO CHARGE sufficient additional FOUR SEASONS TO KEEP your roofing, metal or masonry surface in a waterproof condition for the full duration of the TEN YEAR GUARANTEE PERIOD."

of the material for a period of ten years to keep a roof in waterproof condition when applied according to instructions. According to appellee's chief chemist the roofing material is waterproof when properly applied. It is significant in this case that no witness testified the Four Seasons Fibred Aluminum Coating roofing material was applied according to requirements.

On innumerable occasions we have held that in determining the sufficiency of the evidence to support a verdict all of the evidence must be viewed, with every reasonable inference derived therefrom, in the light most favorable to the appellee. *Harkrider* v. *Cox,* 232 Ark. 165, 334 S. W. 2d 875. Further, it is well settled law in this state that the findings of the trial court, as trier of the facts, have the verity and binding effect of a jury verdict and will be sustained if there is any substantial evidence since it is not within our province to determine where the preponderance lies. *International Harvester Co.* v. *Layton,* 148 Ark. 156, 229 S. W. 22. In the case at bar the evidence was in conflict. The appellee denied Bowman's authority to make any representations or guarantees other than those contained in the terms of the replacement guarantee which required proper application of the roofing material. It cannot be said there is no substantial evidence to sustain the findings of the trial court sitting as a jury.

The judgment is affirmed.

5-3169 374 S. W. 2d 361

Opinion delivered January 20, 1964.

[redacted]

Bob Scott, Walter Davidson, for appellant.

Dickson, Putman, Millwee and *Davis,* for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves an interpretation of Ark. Stat. Ann. § 28-348, Sub-section (d), (Repl. 1962). The section, overall, deals with the taking of discovery depositions. The sub-section refers to the use of the depositions during the trial of a case, and reads as follows:

"At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose."

Appellant, Wayne Mabry, a minor, was involved in an automobile collision with Dwight Nickell on January 16, 1962, on U. S. Highway 71, approximately one mile south of Lowell, Arkansas. Mabry was traveling north, and Nickell, traveling south, was immediately behind a south-bound truck, owned by appellee, Standard Rendering Company, hereinafter called Standard, and driven by appellee, G. W. Ross, Jr. As the two south-bound vehicles approached a hill, Ross (according to appellants' contention) signaled to Nickell[1] that all was clear, as far as approaching traffic was concerned, and Nickell went around and collided with the approaching Mabry vehicle on the southern portion of the crest of the hill. Thereafter, Wayne Mabry, and Major Mabry, his father, both in his own right, and as Father and Next Friend of Wayne, instituted suit against Standard, G. W. Ross, Jr., and Dwight Nickell. The complaint alleged, *inter alia,* that Ross was a servant and employee of Standard, acting within the scope of his employment on the occasion mentioned.[2] Negligence charged against appellees was based on the allegation that immediately before the collision, Ross signaled Nickell that it was proper and safe for Nickell to go around his (Ross') truck; and that Ross, with the exercise of ordinary care under the circumstances, should have known that it was unsafe for Nickell to pass. The complaint charged Nickell with negligence in failing to keep a proper lookout; failing to yield the right of way to Mabry's automobile; failing to maintain proper control of his automobile; and in relying upon

[1] Appellants contend that Ross gave this signal by blinking rapidly his left hand turn signal at the rear of the truck.

[2] This fact was subsequently admitted by the company in answering "Request for Admission of Facts."

the directions of Ross, by passing at a point where Nickell's view was inadequate to assure safe passage. Judgment was sought against the defendants, jointly and severally for the total sum of $6,876.85. Standard and Ross filed their answer, denying each and every material allegation, and further alleged that if appellants had been damaged, such damages were the result of the negligence of appellant, Wayne Mabry. A counter-claim was filed against Major Mabry, wherein it was alleged that the latter was guilty of negligence sufficient to bar his recovery by reason of knowingly entrusting his vehicle to a dangerous and incompetent driver, Wayne Mabry, and that Wayne Mabry, at the time of the collision, was acting as agent, servant, and employee of Major Mabry. In the alternative, appellees pleaded "* * * that if Wayne Mabry was a bailee of the automobile owned by Major Mabry, then the damages to said automobile were the proximate result of the negligence of Wayne Mabry, and that the defendants, G. W. Ross, Jr., and Standard Rendering Co., are entitled to contribution from Wayne Mabry for any judgment rendered against them in favor of the plaintiff, Major Mabry."

A cross-complaint was filed against Nickell, wherein appellees asserted that any injuries and damages sustained by appellants were the proximate result of the negligence of Nickell, and that Ross and Standard should have contribution over and against Nickell for any judgment which might be returned against appellees. Nickell then filed an answer and cross-complaint against appellees wherein he stated that he was following immediately behind the truck operated by Ross in behalf of Standard, and that Ross signaled to him that he could safely pass the truck which Ross was operating; that in so doing, the Nickell automobile collided with the Mabry automobile. By counter-claim against appellants, he also alleged negligence on the part of Mabry, asserting that the latter was traveling at an excessive and reckless rate of speed. The pleading set forth injuries and damages allegedly sustained by Nickell, and he sought judgment against Mabry and his father, and Ross and Standard, jointly

and severally, in the sum of $4,743.78. Appellants filed a reply to the counter-claim, denying all material allegations. Thereafter, by stipulation of the parties, the depositions of G. W. Ross, Jr., and Dwight Nickell were taken with all attorneys being present. When the case proceeded to trial, appellants attempted to introduce the depositions of Ross and Nickell as evidence in chief for the purpose of making a *prima facie* case against appellees, but the trial court, in separate rulings, excluded both depositions on the ground that Ross and Nickell were present in the court room, and therefore available to testify. Objections and exceptions were duly noted to this ruling. Because of the adverse ruling, appellants then called Ross and Nickell as witnesses. The testimony of Ross was substantially the same as that given in his deposition, and appellants make no contention of reversible error because of the exclusion of his deposition. However, the testimony of Nickell is asserted to be materially different from his deposition, and the oral testimony of this defendant did not make out a *prima facie* case of negligence on the part of Ross and Standard. There was no other witness presented to testify with regard to the alleged signal given by Ross to Nickell (to pass his truck), and Ross denied giving a signal. Thereupon, appellants rested, and the court sustained a motion for directed verdict for the appellees. The case proceeded on the remaining issues, and at the conclusion of the testimony, the court granted motions for directed verdicts in favor of appellees on the cross-complaint filed by Nickell, and in favor of appellants on the counter-claim filed by Nickell. The final issue was submitted to the jury, and it found for appellants against Nickell, awarding a judgment in the sum of $3,200.00. This judgment was entered on May 3, 1963. On May 15, Nickel filed a motion to quash the judgment, and prayed that all proceedings in the cause be dismissed against him for the reason

"* * * * that the said defendant is and was at the time of the bringing of this cause under and incapacitated by virtue of a legal Guardianship; that the fact of the existence of the aforesaid Guardianship did not become known until subsequent to the entry and rendering of the judg-

ment herein and that a copy, duly certified, of the Letters of Guardianship are attached and made a part hereof as though set out word for word."

On June 4, the court found that Nickell had been legally adjudged incompetent by the Probate Court of Washington County in 1957; that his brother had been appointed and qualified as guardian, and was still acting as legal guardian; that on the date of the trial "Dwight Nickell was not competent to the degree required by law to testify or to legally have a judgment returned against him, and the motion to quash the judgment against Dwight Nickell should be sustained." The court then entered its order quashing and setting aside the judgment in favor of the Mabrys against Nickell, and further ordered that appellant's cause of action against this defendant be continued, subject to further orders of the court.

Appellents have appealed from the judgment of the Circuit Court rendered on May 3, insofar only as the judgment finds for Ross and Standard. The sole question before this court is whether the trial court erred in excluding the deposition of Dwight Nickell.

Before proceeding to discuss this issue, we might first point out that the reason given by the trial court for excluding the depositions of both Nickell and Ross was erroneous. The ruling of the court was based upon the fact that these persons were present in court and available for testimony. We have held that the presence of the party in court is no reason for exclusion of the deposition . In *Superior Forwarding Company* v. *Sikes,* 233 Ark. 932, 349 S. W. 2d 818, this court said:

"Next, appellants contend that the trial court erred in permitting the use of a deposition of Fred Russell, who was a party defendant. He was present in the courtroom and plaintiff had previously taken his discovery deposition. Ark. Stats. § 28-348 provides that the deposition of a party may be used by an adverse party for any purpose. Here Fred Russell was an adverse party to the plaintiff. Hence, it was perfectly proper to use his deposition."

See also Volume 4, Moore's Federal Practice (Second Edition) Section 26.29, and *Cleary* v. *Indiana Beach, Inc.,* 275 F. 2d 543.

Appellees point out that the deposition was not offered as substantive evidence in the controversy between appellants and Nickell, but rather was offered as evidence in the separate controversy between the Mabrys and appellees. Appellees state:

"* * * Had Appellants brought two separate suits, as they could have done, against Appellees and Nickell, it is clear that Nickell would have been simply a witness in the separate suit against Appellees, and his deposition would not have been admissible since he was not 'unavailable.' Appellees submit that the joinder statutes which are designed for economy of time and expense should not be used to permit a misapplication of the rules concerning use of deposition."

It is strongly argued that in the controversy between the Mabrys on the one hand, and Ross and Standard on the other, Nickell is not an adverse party to appellants. Appellees rely mainly upon the case of *Napier* v. *Bossard,* 102 F. 2d 467 (Second Cir. 1939), a case decided under New York law, but this case is not persuasive for the reason that the New York statute, at that time, did not contain the pertinent provisions of our statute, *viz,* "* * * any part or all of a deposition * * * may be used against *any*[3a] party who was present or represented at the taking of the deposition" and "* * * may be used by an adverse party for *any*[3b] purpose."

Appellees also contend that the purpose of the deposition was limited to discovery, and that no effort was made to frame questions in admissible form as a matter of preserving testimony. The stipulation for the taking of Nickell's deposition does not so state, and the concluding sentence provides, "The right to except to all evidence adduced for incompetency, irrelevency and immateriality, is hereby expressly reserved." Of course, there was no agreement in advance that the deposition

[3a, 3b] Emphasis supplied.

would be used as evidence, as this would have bound all parties to testimony that they had not heard, but it certainly appears that the reservation of the right to except to introduction as contained in the quoted sentence would have been a meaningless gesture unless it had been contemplated that the deposition, or portions thereof, might be introduced.

Be that as it may, it is clear that our statute provides that the deposition may be used "against any party" and "for any purpose." To hold with appellees, it would be necessary to completely disregard the literal meaning of the quoted phrases. As pointed out by appellants, we would have to write into Sub-section (d) "The additional requirement that the deposition of a party may be used only 'against that party' contrary to its express language that it may be used 'against any party.' "

Accordingly, we reach the real question, *i.e.*, "Were appellants and Nickell adverse parties?" In *Mahoney* v. *Founders' Insurance Company,* 12 Cal. Rptr. 114, the District Court of Appeals for the Second District of California, declared that ". . . adverse parties are those who, by the pleadings, are arrayed on opposite sides."

In the citation from Moore's Federal Practice, previously mentioned, the author states, " 'Adverse party' as used in this rule is a term of art, and means a party whose interest in the case is adverse to that of another party, . . ." We are persuaded that appellants and Nickell come within the definition of "Adverse parties." The Mabrys instituted suit against Nickell, and Nickell filed a counter-claim against the Mabrys. Appellants obtained a judgment against Nickell. In fact, all parties appear to have been adverse to each other. The Mabrys sued appellees and Nickell. Appellees counter-claimed against appellant, Major Mabry, and cross-complained against Nickell; Nickell counter-claimed against appellants, and cross-complained against appellees. Having reached the conclusion that the Mabrys and Nickell were adverse parties, it follows that the court erred in not admitting the Nickell deposition. Of course, appellees

will have the opportunity to refute and rebut the evidence contained in the Nickell deposition, and may even subpeona Nickell for this purpose, if it develops that he is competent to testify when, and if, the case is re-tried.

This last brings us to the final argument advanced by appellees. They contend that the ruling of the trial court should be upheld because Nickell was not competent, to the degree required by law, to testify. The court entered its finding that Nickell was not competent to testify on the date of the trial; however, no finding was made as to Nickell's competency on the date of the taking of the deposition. The mere fact Nickell had been adjudged incompetent in 1957, and had never, by court order, been restored to competency, does not, within itself, establish that Nickell was incapable of testifying at the time of the taking of the deposition. Ark. Stat. Ann. § 28-601 (Repl. 1962) provides that certain persons shall be incompetent to testify. Among those declared incompetent to give testimony are the following:

"Persons who are of unsound mind at the time of being produced as witnesses, provided, however, that no person shall be denied the right to testify who is in possession of his or her mental faculties during a lucid interval, and provided further that it shall be within the sound discretion of the Trial Court to permit any person to testify who understands the obligation of an oath and who has sufficient understanding, and the fact that such person has been adjudged of unsound mind shall only affect his or her credibility as a witness, and the court shall so instruct the jury."

See also *Parker* v. *Walrath,* 232 Ark. 585, 339 S. W. 2d 121. Whether Nickell was competent to give the deposition is a matter that will have to be determined in future proceedings.

Because of the error, heretofore set out, the judgment is reversed, and the cause remanded to the Benton County Circuit Court with directions to proceed in a manner not inconsistent with this opinion.

5-3112 374 S. W. 2d 357

Opinion delivered January 20, 1964.

[redacted]

James K. Young, U. A. Gentry, for appellant.

John T. Jernigan, Prosecuting Attorney, By *John W. Barron,* Deputy Prosecuting Attorney, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellant is Grace Chronister, administratrix of the estate of W. J. Chronister, deceased; and the appellee is Katheryn B. Custer, Business Manager and Administrator of the Pulaski County Hospital; and this appeal involves a claim allowed by the Probate Court of Pulaski County in favor of the appellee against the Chronister estate. In proper time the appellee filed the following claim:

"I, Kathryn Custer, Business Manager and Administrator of the Pulaski County Hospital, Little Rock, Arkansas, on behalf of the County of Pulaski in the State of Arkansas, do solemnly swear that the County of Pulaski is entitled to claim the sum of $320.00 against the Estate of W. J. Chronister, and that the said claim arises as follows:

"That the deceased, W. J. Chronister, was appointed guardian of the person and estate of Eunice Vaughn, Incompetent, in the Probate Court of Pope County, Arkansas, and that the said guardianship has now been

terminated. That the said W. J. Chronister filed in the said guardianship proceedings an accounting stating certain assets of the said Eunice Vaughn, and stating, among other things, that no assets existed other than those shown in the said accounting. That the County of Pulaski filed a claim in the said guardianship proceeding praying that it be allowed to claim against the estate for money expended by the said County for the care and custody of the said incompetent in the Pulaski County Hospital, which claim was allowed. That since the time of the termination of the said guardianship the said incompetent has remained in Pulaski County Hospital, and that the County of Pulaski is entitled to claim against any assets of the said incompetent for her care, custody and maintenance. That on March 21, 1961, it was learned that after the termination of the guardianship of the incompetent, Eunice Vaughn, four checks in the total amount of $320.00 were received by W. J. Chronister and cashed by him, as shown by Exhibit 'A' attached hereto; that the County of Pulaski is entitled to be compensated for the care and custody of the said Eunice Vaughn, and that the said money so received by W. J. Chronister should have been paid to the County of Pulaski for use on behalf of the said incompetent or the guardianship in Pope County reopened and a supplemental accounting filed therein, neither of which was done. "Wherefore Katheryn Custer prays that her claim on behalf of Pulaski County be allowed in the amount of $320.00, and that this Court order payments of the above sum to the Pulaski County Hospital. /s/ Katheryn Custer."

From the allowance of the claim there is this appeal presenting several points of which we discuss only two, since they are decisive.

I. The Chronister Estate was not indebted to Pulaski County. Eunice Vaughn was indebted to Pulaski County, but the Chronister estate was not so indebted; so the claim filed by Katheryn Custer for Pulaski County was entirely improper. The Chronister estate might or might not have been indebted to Eunice Vaughn, that could only have been determined if a claim had been

filed for Eunice Vaughn. But Pulaski County could not file a claim, such as this one, against the Chronister estate as though the claim were a garnishment proceeding. The estate of Eunice Vaughn filed no claim against the Chronister estate, nor did the estate of Eunice Vaughn make any assignment of any claim to Pulaski County. Since the Chronister estate did not owe anything to Pulaski County, and since no assignment of the claim of Eunice Vaughn to Pulaski County was shown, it necessarily follows that the Court was in error in allowing the claim of Pulaski County against the Chronister estate.

II. The holding in *Jones* v. *Arkansas Farmers' Assn.*, 232 Ark. 186, 334 S. W. 2d 887, affords the appellee no support. Before the administratrix of the Chronister estate denied the Pulaski County claim, the statute of non-claims had run against any claim that the estate of Eunice Vaughn might have filed. It was therefore insisted below, and is urged here, that such failure of a more prompt denial amounted to a waiver by the administratrix of the Chronister estate to resist the present claim: that is, the failure to deny the present claim before the statute of non-claims ran against any claim that Eunice Vaughn might have urged, constituted a waiver of the right to resist the present claim. We see no merit in appellee's position. In the Jones case it was pointed out that a party waives objection to the *form* in which a claim is filed if the disapprovel of the claim be not made until after the statute of non-claims had run. That case does not stand for the proposition that if a claim is filed in behalf of *the wrong claimant* then the estate against which the claim is filed becomes liable merely because such claim was not denied until after the expiration of the time in which the proper claimant could have filed a claim.

Since the claim cannot be considered as a claim filed in behalf of Eunice Vaughn, and since the Chronister estate is not indebted to Pulaski County, the claim here allowed must be denied. The judgment is reversed and the cause remanded with directions to disallow the claim here involved.

SPITZER *v.* BARNHILL

5-3133 374 S. W. 2d 811

Opinion delivered January 20, 1964.

[Rehearing denied Feb. 24, 1964.]

Bruce Ivy, Frierson, Walker & Snellgrove, for appellant.

E. L. Holloway, for appellee.

GEORGE ROSE SMITH, J. In this case the question which has given us the greatest concern is whether a chancery court, after having taken jurisdiction of a suit to restrain a tort defendant from denuding himself of his property, must then, as a matter of giving complete relief, retain jurisdiction and hear the common-law tort action on its merits.

On April 29, 1963, a collision occurred near Corning, assertedly as a result of drunken driving on the part of the appellee Roy C. Barnhill. The appellant was seriously injured, her husband was killed, and others in the car were also injured. As a result of the accident civil actions for damages totaling $217,000 were later filed against Barnhill. He was also charged with manslaughter and other criminal offenses.

At the time of the collision either Barnhill alone or he and his wife owned a combined restaurant and service

station north of Corning. Within a few days Barnhill, while still in the hospital, sent for Clifford Cole, a gasoline and oil dealer, and began negotiating a sale of the property. On May 10, eleven days after the collision, the Barnhills and the Coles entered into a contract by which the Coles bought the property for $30,000.

When the appellant learned that Barnhill was apparently disposing of his assets she filed the present suit to enjoin him from transferring his property except in the normal course of business. At the inception of the case the chancellor issued a temporary restraining order in accordance with the prayer of the complaint. Later on the appellant ammended her complaint to assert also her cause of action in tort for her husband's death and for her own injuries.

A preliminary hearing was held on the question whether the restraining order should be continued in force. The chancellor decided that the order ought to be dissolved, though he permitted it to remain in effect pending this appeal under Ark. Stat. Ann. § 27-2102 (Repl. 1962).

The first issue is whether the chancellor was right in holding that the proof failed to show that Barnhill was insolvent and had made conveyances in fraud of his creditors. We think the chancellor abused his discretion in directing that the restraining order be dissolved.

It appears that of the original $30,000 purchase price Barnhill at first received $18,000 in cash and a note and mortgage for $10,500. The other $1,500, which was to be payment for the personal property and fixtures, was put in escrow in a bank pending compliance with the Bulk Sales Law. On May 25, the same day that Barnhill was served with a summons in the present case, he converted the $10,500 note into cash by means of a $2,000 discount agreement with the Coles.

Barnhill at once denuded himself of all the proceeds of sale. He paid a number of outstanding debts. He used $2,400 in prepaying for several years the premiums upon

a life insurance policy in which his wife was named as beneficiary. He paid off a $6,000 mortgage to his father. He made prepayments totaling $860 upon the mortgage on his house. He spent more than $1,500 upon hospital and medical bills owed by his mother-in-law. When, after all his disbursements, he still had some $12,000 in cash, he gave it to his wife. He admits that since then he has obtained money from her when he needs it. In our opinion the decided weight of the proof shows that, at the time of the hearing upon the matter of continuing the restraining order in force, Barnhill's financial condition had already deteriorated beyond the point of insolvency. The chancellor's decision to dissolve the restraining order was an abuse of discretion that must be set aside.

The remaining issue is the serious one in the case. Upon terminating the preliminary restraining order the chancellor directed that the cause be transferred to the circuit court for trial of the tort action. The appellant, citing *Horstmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729, maintains that we should now require the chancellor to retain jurisdiction of the tort claim and hear the case upon its merits in equity.

The opinion in the *Horstmann* case undeniably supports the appellant's position. There the plaintiff brought suit in the chancery court to set aside fraudulent conveyances and to recover damages for personal injuries. The defendants challenged the jurisdiction of equity. In upholding the chancellor's action in hearing and determining the tort claim we relied upon this statute: "In suits to set aside fraudulent conveyances and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief." Ark. Stat. Ann. § 68-1308 (Repl. 1957). We reasoned that under this statute it was the duty of the chancellor to hear the tort action in order to afford complete relief in one proceeding.

Upon reconsidering the matter we are convinced that our conclusion in the *Horstmann* case was wrong. Before the adoption of the statute in question it was necessary for a plaintiff to obtain a judgment at law before he could bring suit in equity to avoid a fraudulent conveyance. We think it clear that the statute was concerned only with the avoidance of fraudulent conveyances and was intended only to permit the plaintiff to obtain that relief (described in the act as "the proper relief") in a single suit. If the legislature had intended to bring about such a drastic change in our law as that of permitting personal injury actions to be tried in equity as a matter of right, we think that intention would have been stated in language too plain to be misunderstood. It certainly was not so stated.

This question was considered in *Jones* v. *Jones,* 79 Miss. 261, 30 So. 651. There the plaintiff attempted to maintain in equity a suit for personal injuries, relying upon statutes that permitted a creditor to attack a fraudulent conveyance without having first obtained a judgment at law. In summarily rejecting this novel contention the court said: "It was never the contemplation of the statutes invoked by appellant to authorize chancery courts to take cognizance of a suit for unliquidated damages arising out of a tort before there has been any judgment at law ascertaining the damages, the defendant being within the jurisdiction of the court." See also *Dowling* v. *Garner,* 195 Ala. 493, 70 So. 150. It is our conclusion that upon this point the holding in the *Horstmann* case must be disapproved.

The decree is reversed and the cause remanded with directions that the restraining order be reinstated and that the tort action be transferred to law.

McFaddin, J., dissents.

ED. F. MCFADDIN, Associate Justice, (dissenting in part). The Majority of this Court is holding that the Chancery Court abused its discretion in dissolving the temporary restraining order. I agree with that portion of the Opinion. But the Majority is holding that the Chancery Court should transfer the tort action to the law court. Here is the directive in the Majority Opinion: "The decree is reversed and the cause remanded with directions that the restraining order be reinstated and that the tort action be transferred to law."

I dissent from so much of the Majority Opinion in this case as directs that the tort action be transferred to law. I think that when equity takes jurisdiction for one purpose it should grant full and complete relief, rather than have a restraining order pending in the equity court, to hang there until a damage suit is disposed of in the circuit court and judgment obtained, and then the Judgment brought back to the chancery court to see what can be done about alleged fraudulent conveyances. I have always understood that when equity takes jurisdiction for one purpose, it takes jurisdiction for all purposes. The Majority Opinion in the present case admits that our own case of *Horstmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729, holds in accordance with the views that I am now expressing; and the present Majority is now overruling a portion of *Horstmann* v. *LaFargue.*

I dissent from so much of the Majority Opinion as overrules any part of *Horstmann* v. *LaFargue.* It is a landmark case, having been decided by this Court on November 17, 1919, and cited and followed in a number of cases since that date. Back in 1919 when *Horstmann* v. *LaFargue* was decided, this Court consisted of Chief Justice Edgar A. McCulloch, and Associates Justices Carroll D. Wood, Jesse C. Hart, Frank G. Smith, and Thomas H. Humphreys; and *Horstmann* v. *LaFargue* was a unanimous decision of that Court. LaFargue filed suit in the Chancery Court against Henry Horstmann, Sr., Henry Horstmann, Jr., and the wife of the latter, to recover damages from Henry Horstmann, Jr. for

personal injuries, and to uncover real estate mortgaged by Henry Horstmann, Jr. in fraud of his creditors. Jurisdiction of the Chancery Court in such a case was questioned by Horstmann, Jr., both on the theory that a claim for damages was not within the jurisdiction of chancery, and on the further claim that a tort-claim-plaintiff was not a creditor. This Court, in a unanimous Opinion delivered by Justice Frank G. Smith, held that under the statute (which is now Ark. Stat. Ann. § 68-1308 [Repl. 1957])[1] a person holding a tort claim against a defendant was a creditor of such defendant and could sue the defendant in equity to reduce the tort claim to judgment and to uncover hidden assets of such defendant, if it be shown that the defendant was insolvent and that the remedy at law was inadequate and incomplete. The Court further held that the plaintiff's allegation, that the defendant was insolvent, was admitted unless the defendant denied such allegation. The Opinion reviewed many of our cases and gave the history and effect of the statute that is now Ark. Stat. Ann. § 68-1308 (Repl. 1957). It is a scholarly opinion.

The case of *Horstmann* v. *LaFargue* is a definite holding that a plaintiff may file a personal injury suit for damages in the Chancery Court provided (a) the plaintiff alleges that the defendant is insolvent; (b) that the defendant has secreted his property with intent to hinder, delay, and defraud the plaintiff; and (c) that the plaintiff's remedy at law is inadequate and incomplete. *Horstmann* v. *LaFargue* has been cited a number of times on the jurisdiction of equity to render a judgment for damages where equitable relief is sought on other grounds. Some of such cases are: *Sims* v. *Hammons,* 152 Ark. 616, 239 S. W. 19; *Protho* v. *Williams,* 147 Ark. 535, 229 S. W. 38; *Everist* v. *Wood, Judge,* 204 Ark. 124, 161 S. W. 2d 18; and *Eirmann* v. *Beck,* 221 Ark. 138, 252 S. W. 2d 388.

[1] The said statute reads: "In suits to set aside fraudulent conveyances, and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief."

In 73 A. L. R. 2d p. 749, there is an annotation entitled: "Right of tort claimant, prior to judgment, to attack conveyance or transfer as fraudulent"; and the holdings from nearly a score of jurisdictions (including Arkansas) are cited to sustain this text: "In most of the courts where the question has been raised it has been held that a tort claimant whose injury occurred prior to a conveyance by the person causing the injury may maintain an action to set aside such conveyance as fraudulent even though he has not obtained a judgment on his claim." The rule is further stated in this language: "In some cases a tort claimant, having reason to believe that the tort feasor is about to convey or has conveyed property for the purpose of hindering or delaying payment of the claim, has in the same action been permitted to sue for damages for the tort and to restrain or set aside the conveyance."

The case of *Horstmann* v. *LaFargue* is also a direct holding: (a) that a tort claimant is a creditor; (b) that the defendant's failure to deny insolvency is an admission of such status; (c) that equity has jurisdiction to reduce the tort claim to judgment and to impound assets of an insolvent debtor about to be secreted from the creditors where the remedy at law is inadequate and incomplete; and (d) that equity, having taken jurisdiction for one purpose, will retain it for all purposes.

I have already listed some of the cases in which *Horstmann* v. *LaFargue* has been cited and followed, but I desire to particularly call attention to what this Court said in *Cleveland* v. *Biggers,* 163 Ark. 377, 260 S. W. 432, which was decided on March 17, 1924 (over six years after *Horstmann* v. *LaFargue*), and after the Bench and Bar of Arkansas had considered the case of *Horstmann* v. *LaFargue.* Here is what the Court said in *Cleveland* v. *Biggers*:

"The action of the court in sustaining the demurrer and dismissing the complaint is defended upon the ground that, as a suit for damages, relief could be granted only in a suit at law. The case of *Horstmann* v. *LaFargue,* 140 Ark. 558, is against that view. In that

case a suit for personal injuries was brought in equity, and in the same suit it was asked that certain alleged fraudulent conveyances be uncovered. The jurisdiction of the court was challenged upon the ground that a suit for unliquidated damages could be maintained only at law; but we held that, inasmuch as it was necessary for the plaintiff to go into equity to uncover the fraudulent conveyances, all the matters in issue should be adjudged and complete relief afforded. This subject was there thoroughly considered, and need not be again reviewed.

"So here the plaintiffs asked the relief of uncovering certain alleged fraudulent conveyances, which could be obtained only in a court of equity, and the court would therefore have had jurisdiction to afford complete relief, by way of granting damages, if plaintiffs had elected to pursue that remedy."

In the present Opinion the Majority says: "If the legislature had intended to bring about such a drastic change in our law as that of permitting personal injury actions to be tried in equity as a matter of right, we think that intention would have been stated in language too plain to be misunderstood. It certainly was not so stated." I make the point that in 1919 this Court held that a personal injury action could be tried in equity under the conditions stated in *Horstmann* v. *LaFargue;* and that since 1919 there have been innumerable sessions of the Arkansas Legislature; and if anyone had thought that *Horstmann* v. *LaFargue* was incorrect, the statute relied on by this Court in *Horstmann* v. *LaFargue* could have been amended by the Legislature. All through the years, from 1919 to the present time, *Horstmann* v. *LaFargue* has been the law of Arkansas, and is so stated in the annotation previously herein cited; and the Legislature has never changed the statute on which *Horstmann* v. *LaFargue* was based. Now, after a lapse of more than forty years, this Court is overruling a portion of *Horstmann* v. *LaFargue.* I stand by the Opinion of this Court in 1919, and I would leave *Horstmann* v. *LaFargue* unchanged. Therefore, I dissent.

5-3115 374 S. W. 2d 359

Opinion delivered January 20, 1964.

Rhine & Rhine, Lee Ward, for appellant.

W. B. Howard, for appellee.

PAUL WARD, Associate Justice. The bonds of matrimony between the parties hereto were dissolved first by a decree in the State of Georgia and again by a decree in this State. It is from the latter decree that comes this appeal. The material facts involved are hereafter summarized.

Appellant (George Thomas Carr) and appellee (Orine Carr) were both domiciled in Greene County, Arkansas when they were married on August 2, 1952. To this union a daughter (Norma Jean) and a son (Bruce Edward) were born. About the time the parties were married appellant joined the armed forces where he has remained until this date. At present he is a sergeant in the U. S. Air Forces, stationed at Turner Air Force Base located in Albany, Georgia, where he has been since early in 1959. During the intervening years of his service appellant was stationed at other places as his duties required. During all this time he and Orine lived together as husband and wife. There is, however, no contention by appellant that they established a domicile at any place before he was assigned to the Albany base in 1959.

About the middle of 1959 appellee and the children joined appellant at Albany and stayed until appellant brought them back to her parents in Arkansas in December, 1960. Apparently the reason for appellant's action was that Orine did not want to stay "alone" in the apartment while her husband was away several weeks on a military assignment. At least, appellant did not at that time tell Orine their marital relations had ended.

On December 28, 1961 appellant filed suit for divorce in Georgia and proceeded to secure constructive service on his wife. On January 13, 1962, while appellant was visiting in Arkansas, he told his wife about the suit in Georgia and on the same day she received a newspaper containing a publication of official notice of the suit in Georgia. Also on the same day (January 13, 1962) Orine filed suit for divorce in the Greene County (Arkansas) Chancery Court, and procured personal service on appellant. In addition to a divorce Orine asked for alimony, custody of the children, and child support. On January 31, 1962 appellant entered a general denial. Later, by proper pleadings, appellant introduced a duly authenticated copy of the divorce decree, dated March 19, 1962, which had been granted by the court in Georgia, contending that the Arkansas Court must give full faith and credit to such decree. Based on the above contention appellant moved the trial court to dismiss appellee's complaint. Responding, appellee alleged her husband was not a domiciliary of Georgia at any time prior to the rendition of the decree in that State and that, consequently, said decree was not entitled to full faith and credit by the courts of Arkansas. The trial court refused to dismiss appellee's complaint, and the cause proceeded to a trial.

Upon the testimony presented the trial court found, among other things, that appellant was not a domiciliary of Georgia as appellant claims, that the said decree was not entitled to full faith and credit in Arkansas, and that the Greene County Chancery Court had jurisdiction of the cause of action. The court then granted a divorce to appellee, gave her an alimony allotment and

custody of the children, and ordered appellant to pay a specified amount each month for the support of the children.

Appellant concedes the power and jurisdiction of the trial court to grant alimony, child custody, and child support, and its decree in those respects is not here questioned and is not an issue on this appeal.

The Only Issue Is Moot. The only issue on direct appeal is stated by appellant in these words:

"The only issue raised by appellant in this appeal is that the trial court erred in holding that the divorce decree obtained by him in the State of Georgia was not entitled to full faith and credit in the courts of Arkansas for the reason that he was not a bona fide resident of the State of Georgia."

In view of the fact that all matters relating to alimony, custody and support have been settled to the satisfaction of both parties, we cannot escape the conclusion that the question appellant here raises is moot, and its solution can be of only academic concern to him. So far as we are informed appellant's only interest is to be sure he has an absolute divorce good in all states. If we affirm the trial court appellant has such a divorce by virtue of the Arkansas decree. If we reverse the trial court then appellant is fully protected by the Georgia decree. The situation here is very similar to that described in *Alton* v. *Alton*, 347 U. S. 610, 74 Sup. Ct. 736; 98 L. Ed. 987, where a similar issue was held to be moot.

Shortly before the date of the decree appellant filed a motion to dismiss appellee's cause of action based on certain letters written by appellee's attorney to Air Force officers in Albany, Georgia. Thereupon appellee filed a motion to strike appellant's motion. The trial court refused both motions. On cross-appeal appellee contends the trial court committed reversible error in overruling her motion. On oral argument appellee's attorney, with commendable candor, absolved his client from any complicity in connection with the letters he

wrote. In view of the disposition we made of the direct appeal, we find that this issue is also moot, and the cross-appeal is likewise dismissed.

We hereby reinvest authority in the trial court, if it sees fit to do so, to remove from the files of this case the said motion of appellant to dismiss, and also to allow appellee's attorney an additional fee not to exceed $100.

Appeal and cross-appeal dismissed.

NICHOLS *v.* FREEMAN.

5-3155 374 S. W. 2d 353

Opinion delivered January 20, 1964.

V. D. Willis and J. Loyd Shouse, for appellant.

Shaw, Jones & Shaw, Eugene Moore, for appellee.

SAM ROBINSON, Associate Justice. This is a personal injury case in which the trial court directed a verdict for the defendant. Later, the appellant, Nichols, filed a motion for a new trial and, among other assignments of error, alleged newly discovered evidence. The trial court overruled the motion for new trial. Appellant then filed a notice of appeal stating that he appealed from the order overruling the motion for new trial. After appellant lodged his appeal in this court the appellee filed a motion to dismiss the appeal on the grounds that appellant had not appealed from the origi-

nal judgment, and that the order overruling the motion for a new trial on the ground of newly discovered evidence was not an appealable order.

In response to the motion to dismiss, the appellant stated, in effect, that he was only appealing from the order overruling the motion for a new trial. This is an appealable order. *Moore* v. *Henderson,* 74 Ark. 181, 85 S. W. 237. We, therefore, overruled the motion to dismiss, but limited the issue to be considered to the sole question of whether the trial court was in error in overruling the motion for new trial which alleged newly discovered evidence. The only issue now before the court is the action of the trial court in overruling the motion for new trial which alleged newly discovered evidence.

At the time appellant was injured he and appellee were on a fishing trip. They were riding in appellee's pickup truck; the appellee was driving and appellant was sitting next to the right-hand door, As they rounded a curve the door came open, appellant fell out and was injured. In his complaint appellant alleged that appellee was negligent in the following manner: "(a) Defendant carelessly and negligently permitted the screws in the striker plate to become loose and drop down causing the right-hand door to swing open, throwing this plaintiff out onto the highway. (b) In carelessly and negligently failing to inform this plaintiff of said defect."

During the trial of the case it developed that the door did come open, but appellee denied that he knew the striker plate was loose. As an exhibit to his motion for a new trial, appellant filed an affidavit made subsequent to the trial in which appellee stated, in effect, that he was confused in the trial court when he testified that he did not know the striker plate was loose; that he was referring to the truck owned at the time of the trial; that he had traded the truck from which appellant had fallen; that, in fact, he *did* know that the striker plate was loose on the truck in which he and appellant were riding when the door came open and appellant fell out; that he had previously had trouble with the striker plate coming loose on that truck, and on one occasion the door

had come open and his son had fallen out, and on another occasion due to the same trouble, his wife had fallen from the truck. Also subsequent to the trial, appellee's wife made an affidavit to the same effect in support of the motion. After fully considering the motion, the trial court overruled it. In a written opinion the trial court said: "Now on this 2nd day of August, 1963, is submitted to the Court the Motion of the Plaintiff for a new trial of this cause, upon the ground of alleged newly discovered evidence. Said motion for new trial is supported by the Affidavits of the defendant, Earnest Freeman and his wife, Mrs. Ethel Freeman, in which they state in substance that the defendant had had some prior trouble with the latch on the truck involved in the accident, and had had two previous accidents as a result of a defective latch on the door. The defendant further states in his affidavit that he was mistaken in the identity of the truck being referred to in his testimony at the trial; that he thought the attorney was referring to the truck he now has, instead of the one involved in the accident. The defendant was called by the Plaintiff as his witness at the trial, and according to the Court Reporter's notes the plaintiff's attorney asked the defendant the following question: "Had you had any difficulty with the doors on this truck in which you and he were riding that morning?" and the defendant's answer was 'I don't recall on this one, but I have had a lot of striker plate trouble. I have bought several sets and put them on trucks'. On Cross Examination, the defendant witness was asked by defense attorney the following questions, and responded as follows: 'Q. Mr. Freeman, this door had never come open before, had it? A. Well, I don't recall on that truck, that it had ever come open before. Q. Well, had the door ever come open before this? A. No sir, I don't recall it had. Q. If it had, you would have recalled it, would you, Mr. Freeman? A. Well, possibly, I would.' It is difficult to understand how the defendant could have been mistaken as to the identity of the truck referred to.

"Section 27-1901 of the Ark. Stats. provides that a new trial may be granted upon newly discovered evidence

material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. The primary issue before the Court is whether or not the evidence the plaintiff seeks to offer could have with reasonable diligence been produced at the trial. Our Supreme Court has held in innumerable cases that a new trial will not be granted for newly discovered evidence, unless the applicant has shown reasonable diligence. In this case, the proposed newly discovered evidence could have been procured through discovery depositions, or interrogatories, or even by further interrogatories propounded to the defendant in the trial of the case. The testimony of the witness seems to be clear enough that the witness understood that reference was being made to the truck involved in the accident, but if there was any doubt on that question, the facts could have been elicited by further questioning.

'It is the opinion of the Court that plaintiff has failed to measure up to the requirements of the law to be entitled to a new trial on the ground of newly discovered evidence, and that the Motion should be and the same is hereby overruled . . . .''

We have said many times that the granting of a new trial on the grounds of newly discovered evidence is largely in the discretion of the trial court. Here, we cannot say that the court abused its discretion. *Missouri Pacific Transportation Co.* v. *Simon,* 200 Ark. 430, 140 S. W. 2d 129; *Missouri Pacific Transportation Co.* v. *George,* 200 Ark. 560, 140 S. W. 2d 680; *Ark. Amusement Corp.* v. *Ward,* 204 Ark. 130, 161 S. W. 2d 178; *Beatty* v. *Pilcher,* 218 Ark. 152, 235 S. W. 2d 40.

Affirmed.

ANDREWS *v.* VICTOR METAL PRODUCTS.

5-3137 374 S. W. 2d 816

Opinion delivered January 20, 1964.

[Rehearing denied Feb. 24, 1964.]

[redacted]

Frank Lady and *H. M. Ellis,* for appellant.

Pickens, Pickens & Boyce, for appellee.

JIM JOHNSON, Associate Justice. This is an action for damages allegedly resulting from a firing in violation of the terms of a labor contract. The action was brought by a former employee against the employer.

On March 12, 1959, appellant Clara Andrews was discharged by her employer, appellee Victor Metal Products Corporation. Appellant applied for unemployment benefits, which were denied. Appeals were taken under the Employment Security Act up through the Jackson Circuit Court. That court found that the record compiled in the appellate process contained substantial evidence to support the administrative findings of appellant's disqualification for unemployment benefits. A judgment was entered denying appellant such benefits. No appeal was taken from that judgment. That case was number 2040 in the Jackson Circuit Court.

Sometime after the commencement of the action for unemployment compensation, appellant filed the present suit against appellee in Jackson Circuit Court for damages for breach of her employment contract. At the time appellant was fired, appellee had an agreement with

A. F. L. Local 230, Aluminum Workers International Union, of which appellant was a member in good standing. The contract provided in part as follows:

"Article II. Section 2. The company has the right to discharge or suspend any employee for cause, including failure to comply with published or posted plant rules and the terms of this agreement. Such employee and president of the Local Union shall be advised in writing by the Company within 24 hours of such discharge (excluding Saturday and Sunday) of the reason for such discharge or suspension; and the employee shall have the right to question if the discharge or suspension was for cause or violation of such plant rules or the terms of this agreement by appeal in writing within three working days through the grievance procedure established herein, including arbitration."

Appellant contends that she received no written notice of the termination as provided in the company-union contract, and that she was thus prevented from following the grievance procedures. In response to request for admissions, appellee specifically admitted that, "Victor Metal Products Corporation never at any time between March 12, 1959, and September 15, 1960, advised Clara Andrews in writing of the reason for her discharge because of the fact that she was present at the discharge and informed personally and had knowledge. Advice was given in writing after claim for Employment Security Benefits was filed."

Appellee answered appellant's complaint by general denial and entered a plea of res judicata. In support of such plea the judgment rendered in Jackson Circuit Court case No. 2040 was made a part of the record. On January 23, 1962, the trial court sustained appellee's plea of res judicata and dismissed appellant's complaint. An appeal to this court followed. With only a partial record of the proceedings in Jackson Circuit case no. 2040 before us on that appeal, we, on October 15, 1962, reversed the trial court's judgment and remanded the cause for further proceedings. See *Andrews* v. *Victor Metal Products Corp.*, 235 Ark. 568, 361 S. W. 2d 19.

Upon remand appellee, at a hearing before the Circuit Court on February 22, 1963, presented a motion for summary judgment and introduced into evidence the entire transcript as well as the trial briefs in Jackson Circuit case no. 2040. Thereupon the trial court again dismissed appellant's complaint, stating, "That the issues in the cause having been previously tried by this court in Circuit case no. 2040, plaintiff is estopped to bring this action." From this second dismissal, appellant prosecutes the present appeal.

For reversal appellant urges two points which are closely related, if not identical, which are: (1) the issues in this cause have not been previously tried by the Jackson Circuit Court in case no. 2040, and (2) appellant is not estopped to bring this action.

With the complete record in the Jackson Circuit case no. 2040 before us on the present appeal, it appears that that case was tried according to the terms of the Employment Security Act, Ark. Stat. Ann. §§ 81-1101-81-1122 (Repl. 1960). Section 81-1105 sets forth the conditions of eligibility for unemployment compensation; Section 81-1106 sets forth the conditions of disqualification among which is subsection (b) (1) which reads as follows:

"If he is discharged from his last work for misconduct in connection with the work. Such disqualification shall be for eight (8) weeks of unemployment as defined in subsection (i) of this section."

The record reveals that appellant was fired from her employment and thereafter filed a claim for unemployment benefits under the provisions of Ark. Stat. Ann. § 81-1107 (Repl. 1960). The Employment Security Division local office made a determination that appellant was disqualified for compensation under the provisions of § 81-1107 (b) (1) in that appellant was discharged for insubordination. Under the provisions of § 81-1107 (d) (2) an appeal was taken from the decision of the agency to an Appeals Referee. The Referee affirmed the determination of the agency and from such affirmance

an appeal was taken, under the provisions of § 81-1107 (d) (3), to the Board of Review. The Board of Review upon a hearing affirmed the findings of the Appeals Referee and from such affirmance appellant, under the provisions of § 81-1107 (d) (7), appealed to the Jackson Circuit Court. The only jurisdiction the circuit court had in regard to judicial review of the decision of the Board of Review is set forth in § 81-1107 (d) (7):

"In any proceeding under this subsection the findings of the Board of Review as to the facts, if supported by evidence and in the absence of fraud, will be conclusive and the jurisdiction of said court shall be confined to questions of law."

The circuit court, in making its ruling in case no. 2040, advised the attorneys of record by letter as follows:

"It is the opinion of the court that the contract between the Petitioner [appellant] and Victor Metals in no way binds or affects the State of Arkansas. The decision of the Board of Review is affirmed by this court."

Appellee earnestly contends that the central and determinative issue in Jackson Circuit case no. 2040 was whether appellant was legally discharged under the terms of the union contract when the company failed to give the written notice which the contract called for. It is true that appellant included argument on the violation of the terms of the contract in her brief submitted to the circuit court, however, there is no indication from the record that the labor contract had nor, under the particular facts in that case, could have had (*Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. 2d 610) any bearing whatever on the decision reached by the Agency, the Appeals Referee, the Board of Review, or the Circuit Court. In our view the sole question involved in Jackson Circuit case no. 2040 was, simply, whether appellant was eligible for unemployment compensation benefits under the provisions of the Employment Security Act.

This being so, we find that Jackson Circuit case no. 2040 is not res judicata to the present common law action

which grew out of a contractual relationship between appellant and appellee. See generally, *Clark* v. *Whitney,* 194 Ark. 858, 109 S. W. 2d 930.

Reversed and remanded.

HUGHES *v.* HOOKER BROS.

5-3167 374 S. W. 2d 355

Opinion delivered January 20, 1964.

Griffin Smith, for appellant.

William R. Butler, for appellee.

FRANK HOLT, Associate Justice. The appellants brought this action seeking an accounting and a declaratory judgment. They sought to recover deductions made by appellee from appellants' earnings for Workmen's Compensation Insurance coverage. In dismissing the action the Chancery Court rendered a decree finding that the appellants were independent contractors and that they

had elected, by written contract, to contribute the disputed deductions as their pro rata share of premiums for a policy of Workmen's Compensation Insurance. From that decree appellants bring this appeal.

It is appellants' contention that the only issue is whether "the deduction of sums from wages for defraying the cost of compensation coverage for the person from whom the deduction has been made creates, as a matter of law, the relationship of employer-employee, regardless of any other factor."

In support thereof appellants invoke Ark. Stat. Ann. § 81-1305 (Repl. 1960) which requires every employer to secure compensation insurance for his employees and § 81-1320 which provides that no agreement is valid that requires an employee to pay any portion of the insurance cost. Therefore, such agreed insurance deductions are by operation of law illegal and should be refunded.

In the case at bar the appellants are truckers who signed a written agreement with the appellee to haul rocks from the quarry to the job site at $2.35 per ton, furnish their own trucks, gas, oil, maintenance, and auto insurance. The contract specifically provided that the appellants were independent contractors and that the appellee had no control over their hauling activities. The contract further provided that the appellee would carry a policy of Workmen's Compensation Insurance for the benefit of appellants and that sufficient deductions would be made from appellants' earnings to pay their pro rata share of the cost thereof. The appellants admit for the purpose of this appeal that if one item in the contract—the Workmen's Compensation Insurance deduction—were omitted, the contract would, in fact, establish an independent contractor relationship.

The appellants aver that the Chancellor erroneously took the position that they "must prove by evidence that they were employees." We agree with the Chancellor. The burden of proof is upon the claimant to prove that he is an employee and acting within the scope of his employment in order to bring himself within the pro-

visions of the Workmen's Compensation Act. *Farmer* v. *L. H. Knight Co.,* 220 Ark. 333, 248 S. W. 2d 111. Also, a tax deduction or the payment of Workmen's Compensation Insurance on a workman by the employer may be considered in determining the status of employer-employee. *Smith* v. *West Lake Quarry & Material Co.,* 231 Ark. 294, 329 S. W. 2d 167; *Farrell-Cooper Lbr. Co.,* v. *Mason,* 216 Ark. 797, 227 S. W. 2d 444, and *Ozan Lumber Co.,* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341. But here it cannot be said that the appellants proved themselves to be employees by a preponderance of the evidence.

The appellants further contend that the agreed deductions from their earnings for Workmen's Compensation Insurance Coverage estop the appellee from denying an employer-employee relationship. In support of this contention the appellants rely upon our recent case of *Stillman* v. *Jim Walter Corp.,* 236 Ark. 808, 368 S. W. 2d 270, where agreed deductions were made for the payment of Workmen's Compensation Insurance. There the employer asserted as a defense to a workman's claim for benefits that an independent contractor status existed and, therefore, the claimant could not recover because he was not an employee. The case did not turn on the doctrine of estoppel as we found it unnecessary to reach that question. We held that since the appellee had contracted to furnish insurance coverage to the appellant, the appellee was bound by its contractural obligation and had no right to repudiate it regardless of the attitude of the insurance carrier. In the case at bar it is admitted that in at least one instance benefits were paid under this policy. If the benefits had been denied then the contractural obligation, as in the *Stillman* case, would be enforceable.

The Workman's Compensation Act is designed for the benefit of the employer-employee relationship. It places a mandatory duty upon the employer to comply with it to insure the security of the employee. However, this Act does not prohibit employers and independent contractors from securing, by agreement, Workmen's Compensation Insurance. We think it is desirable and

implements the policy and purpose of the humanitarian objectives of the Act. Such offends neither the spirit nor the letter of the law.

The decree is affirmed.

BERRY *v.* GORDON.

5-3045 376 S. W. 2d 279

Opinion delivered January 20, 1964.

Macon & Moorehead, Garner, Shaw & Kimbrough, for appellant.

Catlett & Henderson, Bruce Bennett, Atty. General, *Mehaffy, Smith, Williams, Friday & Bowen,* By *Wm. J. Smith* and *Geo. E. Pike, Jr.* for appellee.

Boyd Tackett, Special Justice. Appellant William M. (Bill) Berry is a citizen and taxpayer of the State of Arkansas. At the time the Chancery Court action was instituted and when the cause was concluded in the trial court, Appellee Nathan Gordon was Lieutenant Governor of the State of Arkansas, Appellee L. A. Clayton, was Treasurer of the State of Arkansas, and Appellee John P. Bethel was Speaker of the House of the Arkansas State Legislature.

Appellant petitioned the Chancery Court of Pulaski County, Arkansas, in a taxpayer action, under Article XVI, Section 13, of the Constitution of the State of Arkansas, to enjoin and restrain appellees from paying out or receving public funds over and above their regular salaries—challenging the Constitutionality of Act 399 of the Arkansas Legislative Acts of 1961—and seeking an account of public funds paid out or received by appellees over and above their regular salaries.

The parties stipulated that appellees paid out or received payments under Act 399 of the Arkansas Legislative Acts of 1961, and that expenses authorized by other legislation had been paid out and received by one or more of the appellees. Appellant and appellees moved for a Summary Judgment in the case. The matter was submitted to the trial court upon the pleadings, depositions, stipulations, and briefs of the parties. The Chancellor granted the Motion of Appellees for Summary Judgment and dismissed the Complaint of appellant upon the grounds that Act 399 of the Arkansas Legislative Acts of 1961 was not unconstitutional on its face, and that appellant had failed to introduce any evidence to show that the amounts received were unreasonable, arbitrary, used for unofficial purposes, or that the payments constituted an increase in salary rather than reim-

bursement or payment of expenses legally incurred—thus, this appeal.

The title of Act 399 of the Arkansas Legislative Acts of 1961 reads as follows: "An Act to Make an Appropriation to Defray Expenses in Connection with Public Relations Activities of Certain Constitutional Officers of the Executive Department of the State of Arkansas." SECTION 1 of the Act concerns the alleged need of some state officials to receive funds for public relations purposes, arising from the necessity of maintaining satisfactory public relations with official guests from neighboring states and the Federal Government. The Act declares as its purpose the promotion of the common good of the State of Arkansas by providing funds which will enable the state officials to continue beneficial public relations activities without personal financial hardship. SECTION 2 of the Act appropriates funds—payable from the Constitutional and Fiscal Agencies Fund—to defray expenses in connection with public relations of the following Constitutional Officers of the Executive Department the sum of One Thousand Eight Hundred (1,800) Dollars each for the fiscal year 1961-1962, and the sum of $1,800 each for the fiscal year 1962-1963: Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Land Commissioner, and Speaker of the House. SECTION 3 of the Act provides that, on the 1st day of each calendar month in each of the foregoing fiscal years, the Auditor of State shall issue a warrant drawn in favor of each of the named officials in the amount of one-twelfth of the appropriation allocated to each such official, authorizing and directing the State Treasurer to pay said warrants from funds appropriated. SECTION 4 of the Act repeals all laws and parts of laws in conflict with Act 399.

Appellant insists that Act 399 is in conflict with Amendment 5 and Section 6 of Amendment 6 of the Constitution of the State of Arkansas. Amendment 5 of the Arkansas Constitution provides that each Member of the General Assembly receive a designated sum per day during the first sixty days of any regular session of the

State Legislature, a designated sum per day during the first fifteen days of an extraordinary session of the Legislature, and expenses for travel to and from the Seat of Government to attend regular and extraordinary sessions. The Amendment further provides that the terms of all Members of the General Assembly begin on the day of their election, and that they shall receive no compensation, perquisite, or allowance whatever, except as provided by the Amendment. Section 6 of Amendment 6 of the Arkansas Constitution provides that the Lieutenant Governor shall receive for his services an annual salary of Two Thousand (2,000) Dollars, and shall not receive or be entitled to any other compensation, fee or perquisite for any duty or service he may be required to perform by the Constitution or by law.

Concerning salary and expense entitlements of the Speaker of the House, we need to ascertain any changes made to Amendment 5 of the Arkansas Constitution by subsequent Amendments of our Constitution. Amendment 15 of the Arkansas Constitution provides for annual salaries to certain State and District officers, payable in monthly installments, and provides for salaries and expenses of the General Assembly Membership. Paragraph 3 of Amendment 15 provides that each Member of the General Assembly receive a designated sum each two-year period, the designated salary of the Speaker of the House of Representatives being one hundred dollars more each two-year period than the salary of the other Members of the General Asembly; provides an additional designated sum per day for Members of the General Assembly, including the Speaker, that they be required to attend an extraordinary session; and provides travel expenses to and from the Seat of Government to attend the regular and extraordinary sessions of the General Assembly. Amendment 15 repealed provisions of the Constitution of the State of Arkansas in conflict with the Amendment; and this Amendment does not contain a clause precluding the Speaker of the House or other Members of the General Assembly from receiving additional expenses.

Next we have Section 3 of Amendment 37 of the Arkansas Constitution, providing that each Member of the General Assembly receive a designated salary for each two-year period, the designated salary of the Speaker of the House of Representatives being One Hundred Fifty (150) Dollars more each two-year period than the salary of the other Members of the General Assembly; providing an additional designated sum per day for Members of the General Assembly, including the Speaker, that they be required to attend an extraordinary session; and providing expenses for travel to and from the Seat of Government to attend regular and extraordinary sessions of the General Assembly. Amendment 37 repealed all provisions of the Constitution of the State of Arkansas in conflict with the Amendment; and this Amendment does not contain a clause precluding the Speaker of the House or other Members of the General Assembly from receiving additional expenses.

Further concerning entitlements of the Speaker of the House, Amendment 48 of the Arkansas Constitution —the current Constitutional authority at the involved time—provides that each Member of the General Assembly receive a designated salary per annum, the designated annual salary of the Speaker of the House being One Hundred Fifty (150) Dollars more than the designated salary of the other Members of the General Assembly; provides an additional designated sum per day for Members of the General Assembly that the General Assembly be in regular session; provides an additional designated sum per day for Members of the General Assembly that they be required to attend an extraordinary session; and provides expenses for travel to and from the Seat of Government to attend regular and extraordinary sessions of the General Assembly. Amendment 48 repealed all provisions of the Constitution of the State of Arkansas in conflict with the Amendment; and this Amendment does not contain a clause precluding the Speaker of the House or other Members of the General Assembly from receiving additional expenses.

Concerning salary and expense entitlements of the Lieutenant Governor, we need ascertain any changes made to Section 6 of Amendment 6 of the Arkansas Constitution by any subsequent Amendments of our Constitution. Section 2 of Amendment 37 of the Arkansas Constitution—the current Constitutional authority at the involved time—provides annual salaries for officers of the executive department of the State of Arkansas, payable in monthly installments, including the annual salary of the Lieutenant Governor in the amount of $2,500. As beforementioned, Amendment 37 repealed all provisions of the Constitution of the State of Arkansas in conflict with the Amendment; and this Amendment does not contain a clause precluding the Lieutenant Governor from receiving additional expenses.

Concerning salary and expense entitlements of the State Treasurer, we need ascertain pertinent provisions of the Arkansas Constitution. (Appellant does not question by this litigation the entitlements of the other state officials named in Act 399 of the Arkansas Legislative Acts of 1961—Secretary of State, Auditor of State, Attorney General, or Land Commissioner—to receive expenses in addition to their salaries.) It should be noted that Section 23 of Article 19 of our Constitution provides that no officer of the state, nor any county, city, or town, shall receive, directly or indirectly, for salary, fees, and perquisites, more than $5,000 net profit per annum in par funds, and that any and all sums in excess of this amount shall be paid into the state, county, city, or town treasury, as shall hereafter be directed by appropriate legislation.

Constitutional Amendment 15, repealing Constitutional provisions in conflict, concerning salaries to most state officers, the Circuit Judges, the Chancellors, and Members of the General Assembly, afforded the Governor a salary of more than $5,000 per year, and provided fixed salaries for other state officers, Circuit Judges, Chancellors, and Members of the General Assembly.

It should further be noted that Constitutional Amendment 37 provides annual salaries to state officials

as follows: Governor-$10,000, Lieutenant Governor-$2,500, Secretary of State-$5,000, Treasurer of State-$5,000, Auditor of State-$5,000, Attorney General-$6,000, and Commissioner of Lands-$5,000; provides salaries and expenses to Members of the General Assembly as hereinbefore noted, and provides annual salaries and expenses for Circuit Judges and Chancellors a sum of not less than $4,800 nor more than $7,200.

We must determine (1) whether the provision of Constitutional Amendment 5 precluding the Speaker of the House from receiving compensation, perquisites, or allowance, in addition to his entitlements under current Constitutional provisions in effect, has been repealed or continues in force; (2) whether the provision of Section 6 of Constitutional Amendment 6 precluding the Lieutenant Governor from receiving compensation, fee, or perquisite, in addition to his entitlements, under the current Constitutional provisions in effect, has been repealed or continues in force; and (3) whether the current Constitutional provisions in effect preclude the Treasurer of State from receiving public relations or other expenses in addition to his salary entitlements.

The two familiar rules or classifications applicable in determining whether or not provisions of the Constitution have been repealed are set forth in the case of *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649:

"One is that, where the provisions of two statutes are in irreconcilable conflict with each other, there is an implied repeal by the latter one which governs the subject matter so far as relates to the conflicting provisions, and to that extent only.

"The other one is that a repeal by implication is accomplished where the Legislature takes up the whole subject anew and covers the entire ground of the subject matter of a former statute and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new.

"Where there are two Acts on the same subject, the rule is to give effect to both, if possible, but, if the two

are repugnant in any of their provisions, the latter Act, without any repealing clauses, operates to the extent of the repugnancy as a repeal of the first; and, even where two acts are not in express terms repugnant, yet, if the latter Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act."

The rules of construction governing Constitutional Amendments are the same as the rules governing the construction of statutes—*Bailey* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176. It is a rule of universal application that the Constitution must be considered as a whole, and that, to get at the meaning of any part of it, we must read it in the light of other provisions relating to the same subject. *Chesshir* v. *Copeland,* 182 Ark. 425, 32 S. W. 2d 301. The Constitution is to be construed according to the sense of the terms used and the intention of its authors. *Rankin* v. *Jones,* 224 Ark. 1001, 278 S. W. 2d 646.

Upon applying these applicable rules to determine whether the early Constitutional provisions have been repealed, considering all of the Constitutional provisions and Amendments as a whole, it is clear, *concerning expense entitlements of the Speaker of the House,* that Paragraph 3 of Constitutional Amendment 15 repealed Constitutional Amendment 5, except the beginning date of terms of Members of the General Assembly, which was repealed by Section 6 of Constitutional Amendment 23; that Section 3 of Constitutional Amendment 37 repealed Paragraph 3 of Constitutional Amendment 15; and that Constitutional Amendment 48 repealed Section 3 of Constitutional Amendment 37. Constitutional Amendment 48 is full and complete and covers the pertinent subject matter of Constitutional Amendment 5, Paragraph 3 of Constitutional Amendment 15, and Section 3 of Constitutional Amendment 37. It embraces new provisions, plainly showing that it was intended as a substitute for the former pertinent Constitutional Amendments. There were three Constitutional Amend-

ments covering the subject matter of Constitutional Amendment 5 from 1913 until the adoption of Constitutional Amendment 48 in 1958—a period of 45 years—and had there been a desire to continue the pertinent prohibition contained in Constitutional Amendment 5, same would have been included in these Constitutional Amendments.

Applying these applicable rules, it is clear, *concerning expense entitlements of the Lieutenant Governor,* that Section 2 of Constitutional Amendment 37 fully and completely covers the provisions of Section 6 of Constitutional Amendment 6, and replaces and repeals such Constitutional provisions. Constitutional Amendment 6 was adopted in 1914. Thirty-two years later, the same subject matter of Section 6 thereof was covered by Section 2 of the Constitutional Amendment 37; and, had there been an intent to continue the involved prohibition in effect, same would have been included in the latter Constitutional Amendment, as did Section 3 of Constitutional Amendment 37 cover expense entitlements of Circuit Judges and Chancellors. Subsequent to the adoption of Section 6 of Constitutional Amendment 6 and prior to the adoption of Section 2 of Constitutional Amendment 37, our Supreme Court decided the case of *Ashton* v. *Ferguson,* 164 Ark. 254, 261 S. W. 624, which invalidated certain expense payments because of the prohibition of Constitutional Amendment 5. Thereafter, Section 2 of Constitutional Amendment 37 was adopted, removing the restrictions upon the payment of expenses to the Lieutenant Governor.

Further applying these applicable rules, it is clear, *concerning expense entitlements of the Treasurer of State,* that Section 23 of Article 19 of the Constitution of the State of Arkansas, precluding state officers from receiving salary, fees, and perquisites, of more than $5,000 per year, was modified by Constitutional Amendment 15, and was definitely repealed, concerning entitlements of the executive officers of the state, by Section 2 of Constitutional Amendment 37. The entire subject of Section 23 of Article 19 of the State Constitution and

Constitutional Amendment 15, concerning entitlements of the executive officers, is fully covered and repealed by Constitutional Amendment 37.

Our state Constitution is not a grant of power, but constitutes a limitation, and, if there be no limitation of power, impliedly or specifically expressed, the Legislature, in the exercise of its sovereign right, may authorize such appropriations as it deems necessary. *Newton* v. *Edwards,* 203 Ark. 18, 155 S. W. 2d 591; *Smart* v. *Gates,* 234 Ark. 858, 355 S. W. 2d 184; *Hooker* v. *Parker,* 235 Ark. 218, 357 S. W. 2d 534. Courts are without jurisdiction to review the discretion of the Legislature in the exercise of the power it possesses *Russell* v. *Cone,* 168 Ark. 989, 272 S. W. 678.

There is no Constitutional prohibition precluding the Lieutenant Governor, the Secretary of State, the Treasurer of State, the Auditor of State, the Attorney General, or the Land Commissioner, from receiving expenses for the purposes set forth in Act 399 in addition to their authorized salaries; and the Speaker of the House is not prohibited from receiving expenses in addition to his entitlements enumerated in Constitutional Amendment 48. Act 399 of the Arkansas Legislative Acts of 1961, with the omission of Paragraph 3 thereof, is not unconstitutional, and the discretion exercised by the Legislature in this instance should not concern this court.

The cases of *Tipton* v. *Parker,* 71 Ark. 193, 74 S. W. 298; *Dickinson* v. *Johnson,* 117 Ark. 582, 176 S. W. 116; and *Ashton* v. *Ferguson,* supra, which appellant insists control this case, lend no assistance. All three cases were decided prior to the adoption of the Constitutional Amendments repealing the provisions of Constitutional Amendment 5 and Section 6 of Constitutional Amendment 6 precluding the Speaker of the House and the Lieutenant Governor from receiving expenses. The Tipton case merely held that the Senate had no authority under a Senate Resolution, not concurred in by the House, to extend powers and duties of a Senate Committee beyond duration of the legislative session and to fix compensation of members of the committee. The

Dickinson case held that the Legislature, by concurrent resolutions, could not authorize investigating committees to perform duties beyond the duration of the legislative session, and afford compensation and expenses to the committee membership; that such legislative authorization would have required the enactment of a Bill. The Ashton case simply ruled that Members of the Legislature were not entitled to allowances prohibited by the Constitutional provisions in effect at that time. Those Constitutional provisions have been repealed.

The cases of *White* v. *Williams,* 187 Ark. 113, 59 S. W. 2d 23, and *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380, cited by appellant, offer no assistance because those cases concern a Sheriff and a Prosecuting Attorney receiving funds prohibited by Section 23 of Constitutional Article 19, which Constitutional prohibition is not involved in this instance. Because Section 4 of Constitutional Amendment 37 limits Circuit Judges and Chancellors to salary and expenses of not more than $7,200 per year, the case of *Gipson* v. *Maner,* 225 Ark. 976, 287 S. W. 2d 467, cited by appellant, is not in point for the reason that the current Constitutional Amendments in effect do not prohibit the Speaker of the House, the Lieutenant Governor, and the Treasurer of State from receiving expenses in addition to their salaries.

We must be concerned with whether the Speaker of the House is entitled to public relations expenditures in light of the title of Act 399 announcing the Act as an appropriation to defray public relations expenses of Constitutional Officers, and in view of Section 2 of the Act which appropriates expenses of certain Constitutional Officers of the Executive Department, including the Speaker of the House. Of course, the Speaker of the House is not a Constitutional officer and is not a member of the Executive Department. While the title of an Act may be considered in arriving at the legislative intent, it is no part of the Act and is not controlling in its construction. *Glover* v. *Henry,* 231 Ark. 111, 328 S. W. 2d 382. The drafters of the Act erroneously referred to the Speaker of the House in the caption and in Section

2 thereof as a Member of the Executive Department. However, that error does not affect the status of the Speaker of the House as a Member of the General Assembly, and in no manner affects the issue of whether the State Officials set forth in Act 399 are entitled to public relations expenditures. *Bailey, Lieutenant Governor* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176.

Any fair construction of Act 399 of the Legislative Acts of 1961 leads us to the conclusion that the Legislature intended to afford reimbursement of public relations expenditures incurred by certain state officials, as provided in Section 1 of the Act. Section 3 would authorize monthly payments of public relations expenditures by the state officers whether or not they had incurred such expenditures. Therefore, we conclude that Section 3 of Act 399 must be stricken. Otherwise, such reimbursement would violate our Constitution. In view of the expressed intent of the Legislature to provide these state officials with limited public relations expenditures, the officials are not entitled to reimbursement of expenditures not expended. That Section, when severed, does not affect the intent of the Legislature. Every presumption must be indulged in favor of the constitutionality of an Act of the Legislature. *Beaty* v. *Humphrey,* 195 Ark. 1008, 115 S. W. 2d 295.

In the case of *Bailey* v. *Abington,* supra, this Court held that in construing legislation and Constitutional provisions, it is the duty of the courts to ascertain and give effect to the intent of the framers and to the people who adopted it, even though the true intention, though obvious, has not been expressed by the language employed when given its literal meaning; that the courts are confined to the real purpose and intention of the language rather than to the literal verbiage employed; that the reason, spirit, and intention of the legislation or Constitutional provision shall prevail over its letter; that this rule of construction is especially applicable where adherence to the letter would result in absurdity or injustice, or would lead to contradiction, or would defeat the plain purpose of the law; and that to afford

such construction, courts must restrict, modify, enlarge, and/or transpose the expressed terms.

We note that Act 399 of the Arkansas Legislative Acts of 1961 has expired. The evidence does not reveal whether the public officials spent more or less for public relations than allowed them by Act 399. While the officials afforded public relations expenditures by virtue of Act 399 are not entitled to reimbursement of expenditures not expended, they are not required to make an accounting at this time because the Attorney General, on the 8th day of June, 1953, issued an Opinion to the Auditor of State, concerning Act 467 of the Arkansas Legislative Acts of 1953—the same legislation as Act 399 of 1961, except that the Speaker of the House was not named in the former Act as an officer entitled to public relations expenditures. Section 3 of each Act being word for word the same—wherein the Attorney General advised the Auditor of the State that the legislation constituted no Constitutional objection and that it was the duty of the Auditor of State to comply with the Act. There has been no other Attorney General Opinion or court determination contrary to the Attorney General's Opinion of 1953. The Attorney General's Opinion relieves appellees from the burden of making an accounting. *State* v. *Fidelity & Deposit Company of Maryland,* 187 Ark. 4, 58 S. W. 2d 696; *State, ex rel. Attorney General* v. *Broadway,* 192 Ark. 634; *State ex rel. Smith* v. *Leonard,* 192 Ark. 834, 95 S. W. 2d 86. Then, too, there is nothing in the record remotely indicating that either appellee has acted in the premises except with honesty and sincerity.

The Decree of the Pulaski County Chancery Court is affirmed, subject to modification severing Section 3 of Act 399 of the Arkansas Legislative Acts of 1961; and this cause is remanded with directions that the Chancellor modify his Decree by striking Section 3 of Act 399.

HOLT, J., not participating.

(Supplemental opinion on denial of petition for rehearing delivered March 23, 1964, p. 865.)

5-3170 374 S. W. 2d 468

Opinion delivered January 27, 1964.

[redacted]

Rieves & Smith, for appellee.

R. Dale Hopper and *Everard Weisburd,* for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves two questions of first impression. Thurman L. Adams, employed as a service station attendant for Parrish Esso Service Center at West Memphis, was injured in the early hours of May 6, 1960, admittedly in the course of his employment. The injury occurred when a gust of wind, on the service station lot, lifted appellee into the air, carried him approximately seventy-five feet, and dropped him on the concrete apron. The Commission held that the claimant sustained an accidental injury which arose out of and in the course of his employment, but held in abeyance for future determination the entering of an award because of inconclusive proof relative to claimant's temporary total, temporary partial, and permanent partial disability. The findings of

the Commission were appealed to the Crittenden County Circuit Court, and that court affirmed the order entered by the Commission. From the judgment of the Circuit Court comes this appeal.

Two questions alone are involved in the litigation, and appellants rely on two points for reversal of the judgment as follows:

I

"Appellee's claim was not filed within the time prescribed by law and was, therefore, barred by the statute of limitations.

II

"Appellee's injury did not arise out of and in the course of his employment but instead was caused solely by an act of God, which was unrelated to his employment."

I

Ark. Stat. Ann. § 81-1318 (a) (1) (Repl. 1960) provides:

"A claim for compensation for disability on account of an injury (other than a occupational disease and occupational infection) shall be barred unless filed with the Commission within two (2) years from the date of the accident."

The following stipulation was entered into by the parties:

"1. That R. Dale Hopper, one of claimant's attorneys would testify at the hearing on this claim that between the hours of Five (5:00) p.m. and Five Thirty (5:30) p.m. Friday, May 4, 1962, he deposited in the U. S. Mails at the Post Office, of West Memphis, Arkansas, a letter constituting a claim for Workmen's Compensation Benefits in behalf of claimant, said letter being properly addressed to the Workmen's Compensation Commission at Little Rock, Arkansas, and having proper postage affixed.

"2. That Donald Hall, Postmaster of the West Memphis Post Office would testify at the hearing that mail addressed to a Little Rock, Arkansas, address and deposited in the West Memphis Post Office with proper postage affixed thereon between the hours of Five (5:00) p.m. and Five Thirty (5:30) p.m. on Friday, May 4, 1962, would in the ordinary course of mails, reach the Little Rock Post Office in time for delivery the following morning Saturday, May 5, 1962.

"3. That said claim was not actually received by the Workmen's Compensation until Monday, May 7, 1962."

Further,

"It is stipulated and agreed by and between counsel for each party herein that the Arkansas Workmen's Compensation Commission's office, Little Rock, Arkansas, is always closed for business on Saturday and Sunday of each week of the year and that the same was closed on Saturday and Sunday, May 5 and May 6, 1962."

Counsel for both sides cite several Arkansas decisions on the question of limitation, but as the Commission pointed out, most of these decisions concern interpretations of law in contract and in tort. In fact, only one Arkansas case cited,[1] relative to limitations, is a Compensation case, and in that case, the claimant did not file his claim for compensation for more than a year after the time provided by statute. The Commission, in holding that Sunday was not a day to be counted, relied in large measure on the New Jersey case of *Potter v. Brady Transfer and Storage Company*, 91 A. 2d 111. In that case the claimant filed his claim on a Monday, whereas the time period under the statute of limitations expired on the preceding day, Sunday. The court, in holding that the claim had been filed in time, did so on the basis that Sunday was, by law, a legal holiday, and the Sunday statute and limitations statute were therefore in conflict. The enactment of the statute

[1] 214 Ark. 416, 216 S. W. 2d 796.

declaring Sunday a legal holiday preceded the passage of the limitations statute, and the court said: "Whenever the Legislature fixes a time period, it should be assumed that it is enacting the law in the light of those other statutes."

We need not discuss our approval or disapproval of the view held by the Workmen's Compensation Commission (in excluding Sunday in computing the time limit); rather our opinion that the claim was filed in time is based on the fact that such claim would have arrived at the Commission office for filing on Saturday, except for the fact that the office was closed on that day. In the case of *Mary Gail Coal Co.* v. *Rhodes,* 284 S. W. 2d 97, the Kentucky Court of Appeals passed upon this same question, stating that there was, under Kentucky law, no legal basis for declaring Saturday a holiday.

"Aside from this, although Saturday is observed as a day of rest by the state offices in Frankfort, one may certainly assume it is a common understanding of the public at large that Saturday is not a recognized legal holiday.

"As is customary, appellee's attorney chose the United States mail as the medium to deliver the application for compensation to the Board. Under normal circumstances this instrument would have arrived on time and have been seasonably filed, but instructions from the Board itself intervened and caused the lapse of the limitation period. As has been mentioned, appellee had no notice the postmaster had been instructed not to deliver registered and special delivery mail to the Board on Saturday and we believe a claimant, in asserting an alleged legitimate claim for compensation, should not be held subject to the adverse consequences of an expedient postal delivery arrangement of which he had no knowledge. January 15, 1954, did not fall on Sunday or a legal holiday, and the application sent by mail could have been delivered on that date in the usual course. What could have ordinarily been done, should

be considered done, and the application should have been marked 'filed on January 16, 1954'."

Likewise, Saturday is not a legal holiday in this state, and we agree with the language of the Kentucky court that "one may certainly assume it is a common understanding of the public at large that Saturday is not a recognized legal holiday." Appellants place great emphasis upon the meaning of the word "file," contending that an instrument or claim cannot be considered filed until it is received by the proper officer, and that the date of mailing a notice or claim is actually immaterial. We consider appellants' interpretation as highly technical, and we take occasion to point out the language used by this court (quoting a Mississippi case) in *S. E. Prince Poultry Company* v. *Stevens,* 235 Ark., 1034, 1038, 363 S. W. 2d 929, as being quite apropos to the case at bar.

" 'These Compensation Acts are entitled to and have universally received a liberal construction from the courts. The humanitarian objects of such laws should not, in the administration thereof, be defeated by overemphasis on technicalities—by putting form above substance.' "

To hold in accord with the position taken by appellants, could well result in working an unjust and undue hardship upon claimants in particular cases. For instance, some offices in the state and over the country close, not only on Christmas Day, but (dependent upon the date of Christmas) for several days thereafter. Should one be penalized because the instrument or claim would normally reach the proper officer on one of these days, but is not delivered because of the fact that the office is closed? For that matter, mail is sometimes delivered to the wrong office, particularly where several departments are housed in the same building, and is not re-delivered to the proper department for a day or two thereafter. Should a claimant lose all rights, because of such an occurrence over which he has no control? The answer is obvious, and we decline to hold that the claim was not filed in time.

II

While appellants concede that appellee's injury arose during the course of his employment, they vigorously contend that the accident did not arise out of the employment, *i.e., because* of the employment, but that the injury sustained was the sole result of an act of God, unrelated to the employment itself. Counsel for both appellants, and appellee present excellent briefs, and it is pointed out that there is not a single reported case in the United States where an individual was injured solely by the forces of a tornado or windstorm as in the case at bar. Appellants quote the general rule as stated by Schneider in the "Workmen's Compensation Text," Volume 6 (Perm. Edition), Page 78.

"The general rule with respect to injuries and deaths due to tornadoes, hurricanes, and other forms of windstorms is, if an employee, by reason of his employment, is exposed to a risk of being injured by storm 'which is greater than the risk to which the public in that vicinity is subject, or if his employment necessarily accentuated the natural hazard from the storm, which increased hazard contributed to the injury,' it is an 'injury arising out of the employment, although unexpected and unusual.' The test has been said to be 'not whether the injury was caused by an act of God,' but 'whether the one injured was by his employment specially endangered by the act of God.' "

While most of the courts appear to accept this rule, the various jurisdictions have certainly reached different conclusions in applying the rule, and decisions from different states are frequently conflicting, in some instances where the facts are hardly distinguishable. Appellants insist, however, that in all of the cases, the injury complained of was not attributable *solely* to the elements (as here), but there were always other factors which, when connected with claimant's duties, contributed to the injury. For instance, in one case, a smoke stack crumpled and fell upon an individual; in another, a building loaded with cottonseed hulls collapsed and injured a workman, the load being the contributing fac-

tor in the building's inability to withstand the onslaught of the storm. Numerous other cases to the same effect are cited. On the other hand, as pointed out by appellee, some courts have not even required that the employees show that he was, because of his employment, exposed to a greater risk than the risk to which the general public in that vicinity was exposed. It has been sufficient in those cases that the employee merely establish that he was in the location where the injury occurred solely because of his employment.[2] It is not necessary that we pass on this contention raised by appellee, and we do not pass on it, inasmuch as the Commission's decision was based on the fact that Adams, because of performing his duties was, exposed to a more dangerous situation (as to the storm) than that of the general public in the vicinity, and we think there was substantial evidence to support that view.

Let us look to the circumstances surrounding the instant case. Adams testified that he was employed as night manager of the station, and at the time in question was the only person working on the shift which started at 9:00 o'clock in the evening and ended at 7:00 o'clock the next morning. Claimant stated that it was raining, with thunder and lightning, at the time he went to work, and the weather remained "fairly rough" until the early hours of the morning. Though it continued to rain, the wind died down considerably for about an hour and a half before the accident. Adams testified that the electricity at the station failed at about 3:30 A.M., due to lightning striking a transformer about a block east of the station. Adams then called the Police Department, and requested that the power company be contacted so that he could get his lights back on at the station. According to claimant, electricity controlled the gas pumps, lights, tire machine, battery charger, drink boxes and practically all facilities of the station. The witness

[2] An interesting article by Samuel B. Horowitz, entitled "Workmen's Compensation: Half Century of Judicial Developments," appears in 41 Neb. L. Rev. No. 1 (Dec. 1961 Ed.). In Section 3 of the article, "Acts of God, Positional and Local Risks," the author discusses the "increased risk" concept and the "actual risk" test wherein the sole question is whether the employment exposed the employee to the risk.

stated that he decided that, while it was not raining, he would go out and "fasten up and secure up" out on the front, so that if it started raining hard again, he could stay in the office until the lights were back on.

"I went out to the islands[3] and anchored everything and walked out to my price signs which was out against the highway and pushed one concrete block up on the legs of it that were used to keep or prevent the wind from blowing it over, as much as possible."

Adams was wearing a rain suit and overshoes, and was using a flashlight to find his way around. Claimant stated that as he was engaged in weighting down the price sign, he noticed the power company truck a short distance down the highway.[4]

"I was raising up and I said, 'Now I can tell him where those wires are down, to where I can get my lights back on that much quicker, because he couldn't see the light wires down. '* * * Just as I raised up and decided to tell him where the wires were at, I heard this storm.

* * * I had time to turn and go in the process of taking one step and that's the last I know of until I found myself on the concrete."

It developed that Adams had been blown about seventy-five feet, and the witness stated that he heard the wind, and then had a sensation of falling.[5]

The Commission, in finding that the claim was compensable, stated:

"The uncontradicted proof in this case is the claimant, in the performance of his duties for his employer, had left the service station building and had gone outside to secure everything before the weather worsened;

[3] The location of the gasoline pumps.

[4] At another point in his testimony, Adams stated that he saw the truck proceeding on the highway while sitting in the office and before he went outside.

[5] According to the witness, as a result of the storm, "there was one of the glasses broken out and the oil racks out there just blown all over everywhere, the price sign was blown down and as to the other damage, Sir, honestly I don't know."

and while in the performance of these duties, was injured by an act of God, a windstrom. * * *

"In our view, the claimant here sustained an accidental injury which arose out of and in the course of his employment. The fact that he left the safety of the service station to go outside in the performance of his duties, and was there performing such duties when he was injured, placed him at that moment in a more dangerous situation insofar as the "Act of God" was concerned than that to which the general public in that vicinity was subjected; for the general public was not required to go outside at such a time but could remain in places of safety."

We think there was substantial evidence to support the finding of the Commission. Certainly, there was a duty upon Adams, as an employee, to protect the property of his employer, and the protection that Adams was seeking to afford, could not have been done without leaving the building. The acts being performed were as much a part of his duties as though he had been waiting on a customer when the wind struck. There is absolutely no evidence that Adams was *not* engaged in the work that he testified to at the time the injury was sustained. It was within the province of the Commission to determine whether Adams' testimony was worthy of belief. The Commission decided that question in the affirmative, and we hold that the testimony of claimant constituted substantial evidence.

Affirmed.

Opinion delivered January 27, 1964.

[Rehearing denied March 9, 1964.]

Guy H. Jones and *Francis T. Donovan,* for appellant.

Bruce Bennett, Attorney General, By *Jerry L. Patterson,* Asst. Atty. General, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellants are George Williams, Henry Turney, Jess Holeman, and Marvin Stripling. They were jointly charged, tried, and convicted of the crimes of burglary and grand larceny

(Ark. Stat. Ann. § 41-1001 and § 41-3907 [1947]); and they prosecute this appeal. Henry Turney filed a separate motion for new trial containing eleven assignments, and the other three appellants filed a joint motion for new trial containing fourteen assignments. In addition, Williams filed a separate pleading entitled, "Motion to Set Aside the Verdict as to George Frank Williams," and this pleading contained two assignments. The appellants have grouped all their assignments in eighteen points which are presented in their joint brief; and we will group the various points in suitable topic headings.

The information charged—and the State's evidence was designed to establish—that on the 18th of February, 1962, the four named appellants committed the crimes of burglary and grand larceny by feloniously, etc. breaking and entering the building of Roy Nelson, Jr. in Lonoke County, Arkansas, and taking away hot water tanks, tools, plumbing equipment, a rifle, a chain saw, and various other items in excess of the value of $35.00. The appellants were arrested in Faulkner County on February 19, 1962; and the articles mentioned in the information were found and returned to the owner, Roy Nelson, Jr. The legality of alleged confessions and the way the officers obtained the property constitute some of the issues on this appeal, as well as other rulings in the course of the trial.

I. *Alleged Error In Admitting Testimony Relating To Matters Which Occurred Four Days Before The Crimes Were Alleged To Have Been Committed.* State Police Officer Bill Brashers testified that on February 14, 1962, he arrested Marvin Stripling in Lonoke County for driving a car without a driver's license; that Stripling was driving a *white Ford pick-up truck;* and that Stripling said the truck belonged to Henry Turney, who lived in Faulkner County, Arkansas. Brashers testified that he checked out the license number and found that the truck was registered in Turney's name. Lonoke City Officer Bobby Joe Davis testified that Brashers brought Stripling to the Lonoke City Hall; that Stripling called Turney in Conway, who came to Lonoke and posted bond

for Stripling; and that Stripling and Turney left in the said white Ford pick-up truck.

Objections were made to all of this testimony because it related to events four days before the crimes here charged; but this testimony was admissible as links designed to connect Turney and Stripling with the crimes here charged, since it was testified that the *said white Ford pick-up truck* was the same one that was used to haul away the articles from Nelson's house on February 18th and some of the stolen property was found in the same truck, as will subsequently be mentioned. The evidence was that Turney and Stripling were together in the car that was subsequently used to carry away the stolen articles; and this evidence was for the purposes of showing identification and complicity in the crimes here charged. The evidence detailed circumstances tending to connect the owner and driver of the truck with the crimes charged; so the appellants' objections on this point are without merit.

II. *The Appellants Claim That The Alleged Confessions By Stripling And Holeman Should Not Have Been Admitted In Evidence.* Roy Nelson testified that on Saturday, February 17th, he was constructing a dwelling seven miles from Lonoke and worked until about 8 P.M.; that when he went back to work on Sunday morning, February 18th, he discovered that someone had stolen all of the material supplies, parts tools, etc., from the house, including hot water heaters, bathroom fixtures, doors, plywood, etc.; that he could see from the vehicle tire tracks on the ground where the vehicle and attached trailer had entered and left the premises; and that he immediately contacted the Sheriff of Lonoke County and gave him a list of the articles stolen of a value in excess of $2,000.00. Sheriff Minton of Lonoke County testified that after observing the tracks and other matters at the Nelson house, he suspected that the said *white Ford pick-up truck* which Stripling had been driving on February 14th was the vehicle that had been used in the commission of the burglary and grand larceny. Minton further testified that he and State Policemen Caldwell and Mullinix

obtained from a Justice of the Peace in Lonoke County "John Doe" warrants for the arrest of the occupants of the said truck; that they went to Conway where the truck was located at the home of appellant Holeman; and that Stripling and Holeman were arrested and taken to Lonoke and incarcerated. The officers testified that Holeman and Stripling confessed their parts in the crimes.

In advance of the jury trial the appellants moved to exclude the confessions of Holeman and Stripling as illegally extorted and as obtained under force and duress. At the said advance hearing Holeman and Stripling testified as to the alleged beatings, etc. administered to them to force the confessions. The Trial Court held that the issue of the voluntariness of the confessions was for the jury; and at the trial the officers just as stoutly denied all such mistreatment of the prisoners and claimed that the confessions were voluntarily given. We cannot say that there was error in the ruling of the Trial Court in submitting to the jury the issue of the voluntariness of the confessions. See *Jones* v. *State,* 213 Ark. 863, 213 S. W. 2d 974; and *Moore* v. *State,* 229 Ark. 335, 315 S. W. 2d 907. The issue of the voluntariness of the confessions was submitted to the jury under instructions not here claimed to be erroneous. The question of whether the arrests were made by the State Police Officer, who could make arrests in Faulkner County, or by Sheriff Minton of Lonoke County, who could not make arrests in Faulkner County, was a fact issue; and no error is claimed as to the instruction on this matter.

III. *Appellants Claim A Violation Of Their Constitutional Rights*[1] *Against Unreasonable Search and*

[1] The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Art. 2, § 15 of the Arkansas Constitution provides:

"The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable

Seizure. This point is most vigorously urged; and this is the most difficult question in the case. In advance of the jury trial the appellants presented their motion to suppress all evidence obtained by search and seizure and claimed that there were no valid search warrants. We recognize the holding of the Supreme Court of the United States in *Mapp* v. *Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933. Under that case, evidence illegally obtained is not admissible in the State courts, regardless of the previous holding of the State courts on the point. The question here is whether the the facts in this case bring it within the holding of *Mapp* v. *Ohio.*[2]

The testimony of Officer Caldwell detailed the course of events. The officers first arrested Holeman about 10 P.M. February 18th, and then arrested Stripling about thirty minutes later. When Holeman was arrested the officers started to search his house, but Mrs. Holeman refused them entrance until a search warrant could be shown her. The officers relayed the information back to Conway and claimed that they obtained a search warrant from the Municipal Court in Conway. We are convinced from the evidence that the said search warrant so obtained was entirely void and worthless in every respect. It would serve no useful purpose to detail all of

cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

[2] There are many annotations and law review articles concerning *Mapp* v. *Ohio,* which was decided June 19, 1961. We list only a few: "Federal constitution as affecting admissibility of evidence obtained by illegal search and seizure," in 84 A.L.R. 2d 959; "Constitutional Law, Searches and Seizures," 15 Ark. Law Rev. 445; "Search and Seizure—The Exclusionary Rule and the Question of Standing," in 17 Ark. Law Rev. 176; "Mapp v. Ohio: Pandora's Problems for the Prosecutor," in 111 U. of Pa. Law Rev. 4; "Midnight Welfare Searches and the Social Security Act," in 72 Yale Law Journal 1347. Distinct from the Mapp case there are a number of other pertinent and informative articles, some of which are: "Propriety or lawfulness of seizure, not incident to arrest, of papers, documents, letters, books and records not described in search warrant," in 79 A.L.R. 2d 1005; "Lawfulness of nonconsensual search and seizure without warrant prior to arrest," in 89 A.LR. 2d 715; and "Search and Seizure: a No-Man's Land in the Criminal Law," in 49 Cal. Law Rev. 474. Some of our more recent cases involving search and seizure are: *Clubb* v. *State,* 203 Ark. 688, 326 S. W. 2d 816; *Stewart* v. *State,* 233 Ark. 230, 343 S. W. 2d 568; *Burke* v. *State,* 235 Ark. 882, 362 S. W. 2d 695; and *Gerard* v. *State,* 237 Ark. 287, 372 S. W. 2d 635 (Opinion delivered November 26, 1963).

the evidence that impels us to such conclusion. The fact is that we proceed is this case as though there had been no search warrant of any kind.

As aforesaid, Mrs. Holeman refused to allow a search of the house without a warrant. Armed with the said warrant the officers searched the Holeman house, but they found nothing; so such search, though illegal, obtained no evidence; and thus the search of the Holeman house passes out of the case. If any evidence had been obtained in the Holeman house we would promptly hold that such was illegally obtained.

There was the *white Ford pick-up truck* parked in front of Holeman's house; and in the truck the officers found a hand drill, some tools, and other miscellaneous articles, all of which were later identified by Nelson as having been stolen from him. Were these articles obtained from the truck in violation of the appellants' constitutional rights against unreasonable search and seizure? There was no entry into a house, building, or dwelling, in order to see these articles in the truck parked out in the open. In 79 C.J.S. p 831, "Searches and Seizures" § 66, cases from various jurisdictions are cited to sustain this text: "The constitutional provisions against unreasonable searches and seizures do not prohibit a search without a search warrant that does not constitute a trespass. Hence the obtaining of information by the eye, where it is not aided by a trespass, does not constitute an unlawful search, since no search is involved, and the use of a flashlight or searchlight in aid of vision does not render it illegal. The constitutional guaranty does not prohibit a seizure without a search warrant where the articles sought are disclosed to any one of the senses . . ." Thus the articles in the truck, parked out in the open, were seen by the officers and taken; and the constitutional provisions against unreasonable search and seizure afford the appellants no shield against the articles that were in the truck and so seized.

After the confessions of Stripling and Holeman, as heretofore mentioned, warrants were obtained for the

arrest of Williams and Turney; and in the early morning of February 19th they were arrested. According to the State's evidence, Turney told the officers that the stolen property was stored in a trailer near the settlement of Greenbrier in Faulkner County, several miles from Conway. Turney and Williams accompanied the officers to Greenbrier and pointed out the house trailer, and Turney unlocked the door to the trailer; and nearly all of the stolen property was found in the said house trailer. Turney and Williams assisted the officers in taking the articles out of the trailer and loading them into a truck so the articles could be returned to Nelson, the owner. Were the appellants' constitutional protections against unreasonable search and seizure violated by the officers thus obtaining the articles from the trailer and detailing the evidence concerning same? Here, there was evidence, not only of waiver and consent, but also of active participation in the search; so there is no merit to the contention of the defendants that their rights against unreasonable search and seizure were violated insofar as concerns the articles in the trailer. In 79 C.J.S. p. 816 *et seq.*, "Searches and Seizures" § 62, there is a discussion of waiver and consent; and the holdings from the various jurisdictions—including the United States Supreme Court—are summarized:

"The constitutional immunity from unreasonable searches and seizures may be waived, as by a voluntary invitation or consent to a search or seizure. Thus individuals may waive their immunity to illegal searches of their persons, possessions, or dwelling houses, as well as to the illegal search of their premises, places of business, and searches and seizures of books, papers, or records. Hence, one who has thus consented to a search cannot thereafter complain of irregularities in the search warrant, or question its sufficiency or the manner of its issuance, since an invitation or consent to the search dispenses with the necessity of a search warrant altogether."[3]

[3] To the same general effect see 47 Am. Jur. p. 547, "Searches and Seizures" § 71.

The State's evidence further showed that after the articles from the house trailer had been recovered, as above mentioned, the officers asked Turney if there were any more stolen articles; and Turney said there was a hot water tank and sink at the home of his father-in-law a short distance away from the house trailer. The party of Turney, Williams, and the officers, proceeded to that house. Turney and Williams went inside and brought out the hot water tank and sink, which were placed in the truck to be returned to Nelson. The officers asked Turney if any other stolen property was in the house; and Turney turned on the light and told the officers they were welcome to look. They went in and found nothing except the connection to the sink, which was returned to Nelson with the other property.[4]

Were the appellants' constitutional protections against unreasonable search and seizure violated by the entrance into the home of the father-in-law and the obtaining of the hot water tank and sink and connection to the sink? According to the State's evidence, Turney and Williams voluntarily brought the hot water tank and sink from the house before the officers entered the house, so as to these articles there was no entry of the building by the officers. It is only as regards the connection to the sink that the officers entered the house of the father-in-law, who was not shown to have been present or anywhere in the vicinity or in any wise connected with any part of the case. Only the appellants are objecting to the actions of the officers. What we have said in regard to waiver and consent in the search of the trailer applies with equal force to the articles found in the house of Turney's father-in-law; so the defendants' constitutional rights against unreasonable search and seizure were not violated.

IV. *Refusal To Exclude Sheriff Minton From The Court Room.* The motions for new trial contain these two assignments:

[4] To complete the narrative it is proper to add that all of the stolen property was returned to Nelson on February 19th and he identified and inventoried it and receipted the officers for it. Nelson also testified as to admissions in the nature of confessions that some of the appellants made to him; but it is unnecessary to detail all such testimony.

"2. A motion to suppress all evidence illegally obtained, and motion to quash information based on said illegally obtained evidence, was filed by the defendants herein. A hearing on said motion was had preceding the trial. The hearing was on an afternoon the trial began the next morning. At the hearing the Rule was asked for, but the Court permitted the Sheriff of Lonoke County to stay in the Court Room and hear all of the defendants testify as to their illegal arrests, and the unlawful and illegal search and seizure of their premises. The Sheriff was also permitted to remain in the Courtroom the next morning, after both the State and the Defense had asked for the Rule. He remained there until the Jury was selected and during the opening statements of the Prosecuting Attorney and defense counsel, and the Court excluded him from the room at that point. This was error and in violation of Arkansas law which requires the exclusion of witnesses, when the rule is asked for.

"4. The trial court erred in refusing to exclude a witness for the State, Sheriff Warren Minton, upon the hearing of the motions to suppress evidence, after the rule was asked by defendants, and then permitting Sheriff Warren Minton to testify in the trial of these cases."

These assignments relate to a ruling at the preliminary hearing on the motion to suppress the evidence, as well as to a ruling made at the time of the jury trial. We find no merit in these assignments. The hearing before the Court on the motion to suppress the evidence was on a day in advance of the jury trial, and, of course, before the jury was selecte.d At the said hearing to suppress the appellants asked for "the rule"; and this occurred:

"THE COURT: I will let you have the rule. What witness do you want to call? The sheriff will have to remain to wait on the court, so what witness do you want to call.

"MR. JONES: We object to any witness remaining in the court room.

"THE COURT: I will permit the sheriff to remain.

"MR. JONES: Note our exceptions to the presence of any witness that will testify.

"THE COURT: All witnesses that are going to testify please stand and raise your right hand and be sworn in. The rule has been asked for so you will have to retire from the court room. Who is your first witness, Mr. Jones?"

Sheriff Minton was not called as a witness by the State or the appellants at the said hearing on the motion to suppress the evidence, so he was not a witness at that hearing, and thus the appellants were not deprived of any of their rights by the fact that the Sheriff waited on the Court at the hearing on the motion to suppress the evidence.

The Court denied the motion to suppress, and the next day the case came for trial. A jury was selected, and the following occurred at the beginning of the trial:

"MR. JONES: Let the record show that the state has asked for the rule and witnesses for the State and the defendants are to retire to the witness rooms and Sheriff Minton will be a material witness in this cause and he is to remain in the court room after the rule has been asked for and let the record now reflect at this time we enter our objections on behalf of the defendants for the witness, Sheriff Minton to remain in the court room.

"THE COURT: Lonoke County has only one sheriff and this court has got to have a sheriff to wait on it, to wait on the Court in the calling of witnesses and to keep order in the Court and your motion will be overruled and you may save your exceptions.

"MR. JONES: Note our exceptions.

"MR. DONOVAN: Note the defendants' exceptions."

Then when Sheriff Minton was called as a witness the defendants objected to the Court allowing him to testify, and the following occurred:

"THE COURT: Let the record show I first overruled the motion because the Court stated that it needed some officer to wait on the court, but before any testimony was taken I changed that ruling and Mr. Minton was excluded from the Court room and he heard no testimony from any of the witnesses and the other testimony that he did hear was before the court in the absence of the jury and the jury did not hear any of that testimony as it was before the Court. I will overrule your motion.

"MR. DONOVAN: Note our exceptions."

The appellants insist that under Act No. 243 of 1955 they had an absolute right to have Sheriff Minton excluded from the trial. Said Act reads:

"AN ACT to Amend Arkansas Statute (1947) § 28-702 Authorizing the Exclusion of Witnesses in Criminal Actions.

"Be It Enacted by the General Assembly of the State of Arkansas:

"SECTION 1. If the accused or his attorney requests it, the judge shall exclude from the court room any witness, including but not limited to the officers of the court, officers of the law and experts not at the time under examination, so that they may not hear the testimony of other witnesses."[5]

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[5] Since we have not heretofore discussed Act No. 243 of 1955, it is proper to point out:

(a) That the Act is carried into Ark. Stats. as § 43-2021 (Supp. 1963).

(b) The Act does not purport to amend Ark. Stat. Ann. § 43-615 (1947) which relates to exclusion of witnesses at preliminary hearings.

(c) The caption of the Act No. 243 purports to apply only to criminal trials.

(d) Even though Ark. Stat. Ann. § 28-702 (Repl. 1962) is a part of the Code of *Civil* Procedure, nevertheless Ark. Stat. Ann. § 43-2004 (1947) provides that the rules of civil procedure apply generally in trial of criminal cases.

(e) Whether the language in *Clubb* v. *State*, 230 Ark. 688, 326 S. W. 2d 816, was a comment on the effect of Act No. 243 of 1955 is not necessary for decision here.

(f) Generally, see 8 Ark. Law Review 506 and 9 Ark. Law Review 402.

It is fairly evident from the statement made by the Trial Judge, as last quoted above, that shortly after the ruling that Sheriff Minton could remain in the court room the attention of the Court was called to the said Act No. 243 of 1955, and the Court then immediately excluded Sheriff Minton from the court room so that the Sheriff heard none of the testimony. We therefore see that the Sheriff was excluded and heard none of the testimony, and so no error was committed prejudicial to the appellants.

V. *Other Rulings Claimed As Error.* The appellants assigned as error a number of other rulings of the Trial Court, such as: alleged prejudicial remarks of the Prosecuting Attorney in the argument; refusal to exclude testimony of the witness Bryant; allowing certain officials to testify; remarks of the Trial Judge; and other rulings. To list and discuss all of these assignments would unduly extend this Opinion and serve no useful purpose. It is sufficient to say that we have examined each and all of the assignments and find no reversible error shown in the record.

Affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice (dissenting). I do not agree with the majority opinion. In my view the majority has, this day effectively emasculated Act 243 of 1955 [Ark. Stat. Ann. § 43-2021 (Supp. 1963)].

From the time of the adoption of the Civil Code until the year 1955, the applicable law on invoking the "Rule" to exclude witnesses from the court room in criminal cases was found in § 658 of the Civil Code [Ark. Stat. Ann. § 28-702 (Repl. 1962)], which reads as follows:

"If either party requires it, the judge *may* exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of the other witness." [Emphasis ours.]

Under § 658 of the Civil Code, this court held on numerous occasions that the matter of putting any witness under the "Rule" addressed itself to the sound discretion of the trial court. These decisions were sound, in that the statute in question employed the word "may". and certainly the employment of "may" clearly left the matter to the sound discretion of the trial judge. Under the cited section of the Civil Code, this court also held that it was not an abuse of discretion to refuse to place officers of the law under the "Rule". Again, because of the peculiar terminology of the statute in question, those decisions were sound.

However, in 1955, with the enactment of Act 243, the Legislature radically changed the law with reference to the exclusion of witnesses under the "Rule" in criminal cases. Section 1 of that Act reads as follows:

"If the accused or his attorney requests it, the judge *shall* exclude from the court room any witness, including *but not limited to the officers of the court, officers of the law* and experts not at the time under examination, so that they may not hear the testimony of other witnesses. [Emphasis ours.]

By the use of the word "shall" in the quoted statute, the Legislature unmistakably declared that the matter of whether witnesses would or would not be excluded from the court room no longer was left to the discretion of the trial court, but that upon demand of the defendant or his counsel, such exclusion became mandatory.

At the beginning of the trial of this case, the appellant sought to suppress certain evidence on the grounds (a) that some of the evidence was obtained by illegal search and seizure, and (b) that certain confessions had been obtained in violation of the defendants' constitutional rights. A lengthy hearing was held on this motion, and at the beginning of this hearing the appellants unequivocally demanded that Sheriff Minton be excluded from the hearing. They duly saved their exceptions to the court's refusal to honor their demand. In the course of that hearing there was testimony from

a number of witnesses, including the testimony of some of the appellants. Their testimony was concerned with the circumstances under which certain searches were conducted and seizures made, as well as the circumstances under which certain alleged confessions were obtained. While the State called no witnesses in this hearing, a large part of the State's case in chief, as well as that of the defendants, was concerned with whether any evidence had been obtained as the result of illegal searches and seizures, or any confession obtained by compulsion. Thus, the sheriff, who was to be a principal State witness, was enabled to learn in great detail the contentions of the defendants with reference to these two vital issues.

The basic error in refusing to exclude Sheriff Minton and allowing him to hear the testimony in question is because it was in direct violation of Act 243 of 1955. This Act was undoubtedly passed to prevent perjury and, more importantly, the opportunity to commit perjury. The policy of the law is to remove the opportunity for perjury and thereby to completely eliminate any question as to whether any witness altered his testimony to meet that of any other witness. There is no satisfactory way to determine what any particular individual may do when armed with knowledge of what other witnesses say. The primary purpose of the "Rule" is to prevent collusive testimony and to elicit the truth from each witness by preventing his being influenced by the testimony of others.

It is not the province of this court or of the trial court to determine questions of policy upon which the Legislature has spoken in such unmistakable terms when there is a valid ground for the exercise of legislative power. This court has not attempted to say that the statute in question is unconstitutional. Obviously, such is not the case. It is impossible to say whether the trial court's action in allowing the officer of the law to hear the testimony did the appellants any actual damage. However, a substantial right of the appellants was violated. It will not do to speculate as to whether they were

or were not prejudiced thereby. If it be said that the sheriff in this case was an honorable man who would not stoop to perjury, my reply is that given by this court on several previous occasions: The answer is, "twill be recorded for a precedent and many an error by the same example will rush into the state. It cannot be."

The efficacy of the "Rule" as an instrumentality designed to ferret out truth was first demonstrated in the Apocryphal Scriptures in the story of Susanna and the Elders, where Daniel was impelled by the Lord to separate the lustful elders as they testified in pursuit of their iniquitous desire to besmirch the honor and take the life of a virtuous woman. The result was the complete exoneration of Susanna. From that day until this, the "Rule" has been one of the brightest stars in the crown of justice. I could never vote for its abrogation. For the reason stated, I respectfully dissent.

REYNOLDS *v.* TEXARKANA CONSTRUCTION CO.

5-3144 374 S. W. 2d 818

Opinion delivered January 27, 1964.

[Rehearing denied Feb. 24, 1964.]

Sexton & Morgan, for appellant.

Shaw, Jones & Shaw, for appellee.

GEORGE ROSE SMITH, J. This is an action for breach of contract brought by the appellee, Texarkana Construction Company, Inc., a general contractor. Texarkana was the successful bidder upon a school construction job at Fort Smith. Before bidding for the job Texarkana had first obtained bids from several electrical contractors for the electrical work involved. The appellant Reynolds was the low bidder for the electrical subcontract. Texarkana relied upon Reynolds' figures in computing its own bid for the principal contract.

Before the principal bids were opened Reynolds discovered that he had made a serious error in bidding for the subcontract, in that he had overlooked the cost of the fixtures that were required. There is some dispute in the testimony, but the circuit court, sitting without a jury, was justified in finding that the Reynolds bid was not so low as to put Texarkana on notice that a mistake had been made, that Reynolds failed to withdraw his offer until two days after the principal bids were opened, and that after the bids were opened it was too late for Texarkana to avoid entering into the principal contract upon the terms stated in its own low bid. See *Bailey* v. *Carter,* 211 Ark. 369, 200 S. W. 2d 313.

Upon Reynolds' refusal to perform the subcontract Texarkana was compelled to employ another electrical contractor at a figure that was $4,997.20 in excess of the Reynolds bid. This appeal is from a judgment awarding Texarkana damages in the sum just stated.

Reynolds contends that he was not bound by his offer to undertake the subcontract, for the reason that he received no consideration for the offer and in fact withdrew it before having been notified of Texarkana's acceptance.

In this situation, despite the absence of a formal acceptance, the offer by Reynolds became binding under the principle of promissory estoppel. "A promise

which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'' Rest., Contracts, § 90. We approved this doctrine in *Peoples Nat. Bk. of Little Rock* v. *Linebarger Const. Co.,* 219 Ark. 11, 240 S. W. 2d 12, noted in 7 Ark. L. Rev. 61. We pointed out that the promise giving rise to the estoppel may be without consideration.

Upon facts similar to those before us the better rule is that the subcontractor is bound to perform upon the terms of his bid. *Drennan* v. *Star Paving Co.,* Calif., 333 P. 2d 757; *Northwestern Engineering Co.* v. *Ellerman,* 69 S. D. 397, 10 N. W. 2d 879. As the court observed in the *Ellerman* case, the contrary view, adopted in *James Baird Co.* v. *Gimbel Bros.,* 2d Cir., 64 F. 344, has been rather severely criticized. Justice demands that the loss resulting from the subcontractor's carelessness should fall upon him who was guilty of the error rather than upon the principal contractor who relied in good faith upon the offer that he received.

As a secondary argument Reynolds contends that his offer was revoked by a counteroffer made by Texarkana. The exact terms of the proposed subcontract had not been discussed by the parties when Reynolds submitted his bid. Later on, after Texarkana had obtained the principal contract, Texarkana sent Reynolds a mimeographed subcontract. Reynolds now says that the proffered agreement contained several clauses, such as a performance bond requirement and daily liquidated damages for delay, that he would never have agreed to. Hence, he insists, the proposal amounted to a counteroffer that constituted a rejection of his bid. *Smith* v. *School Dist. No. 89,* 187 Ark. 405, 59 S. W. 2d 1022.

The trial court may well have doubted whether Reynolds would actually have refused the subcontract if it had contained a price sufficient to assure him of a profit. In any event, however, we think the present contention

to be an afterthought that comes too late. Reynolds rejected the proposed subcontract upon the sole ground that he could not do the work for the price that was offered. His conduct in that respect constituted a waiver of the objections that are now leveled against Texarkana's proposal.

Affirmed.

JOHNSON, J., dissents.

RICH *v.* WALKER.

5-3166 374 S. W. 2d 476

Opinion delivered January 27, 1964.

Lewis D. Jones, for appellant.

Lewis E. Epley, Jr., Rex W. Perkins, Townsend & Townsend, for appellee.

SAM ROBINSON, Associate Justice. The City of Eureka Springs, by Resolution No. 58, authorized the issuance of $85,000 in revenue bonds to finance the improvement of the water and sewer systems. Appellants herein circulated and filed a petition asking that a referendum election be held on the question. The City Com-

mission refused to call an election, contending that the petition had not been legally circulated. Appellants then filed an action in chancery court asking that the City Commission be compelled to call the election. The court granted the petition and ordered that an election be held.

Pursuant to the order of the chancery court, the City Commission held the election. There were 446 votes in favor of Resolution No. 58, and 310 votes against it. Appellants then filed a petition in chancery court attacking the validity of the election. The city, appellee herein, demurred to the petition on the ground that the chancery court did not have jurisdiction of the subject matter. The chancellor sustained the demurrer and gave petitioners 15 days to plead further; petitioners failed to file any additional plea; appellees then filed a motion to dismiss the petition. The motion was granted, the petition was dismissed, and petitioners have appealed to this court.

The real issue in this case is whether the action filed by appellants is a suit to prevent an illegal exaction, or is it an election contest. Chancery courts have jurisdiction to enjoin an illegal exaction, even though such exaction is brought about by an election. *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S. W. 2d 26; *Ark-Mo. Power Corp.* v. *City of Rector,* 214 Ark. 649, 217 S. W. 2d 335. See also *Starnes* v. *Sadler,* 237 Ark. 325, 372 S. W. 2d 585, on the power of chancery courts to enjoin an illegal exaction.

Amendment No. 7 to the Constitution of Arkansas, regarding local petitions such as the one in the case at bar, gives the chancery court jurisdiction only to review the action of the county or city clerk in determining the sufficiency of the petitions. But chancery courts do not have jurisdiction to decide an election contest. *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. 2d 68; *Hester* v. *Bourland,* 80 Ark. 145, 95 S. W. 992; *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579; *Davis* v. *Wilson,* 183 Ark. 271, 35 S. W. 2d 1020.

This is an election contest. True, appellants contend that there was an insufficient ballot title, and an insufficient ballot title was held to render the election void in the Arkansas-Missouri Power Corp. case. But here, the ballot title was made a part of the petition and it shows on its face that the title was sufficient; that it fully informed the voters of the issue involved. Hence, the Arkansas-Missouri Power Corp. case is not applicable. The ballot title in the case at bar is as follows: "Resolution No. 58 authorizes the refunding of the outstanding balance of the City's water and sewer revenue bonds issued under date of January 1, 1954, in order to enable the City to issue parity bonds for the purpose of improving and extending the water and sewer systems and to increase the service mains of both systems, at an estimated cost to the City of $85,000, which will make the City eligible for a grant of a like amount from the Federal Public Works Acceleration Administration."

Appellants also argue that the election judges were improperly selected, but no facts are alleged which, if true, would sustain such allegation. A demurrer admits as true only those allegations that are well pleaded. *United Interchange, Inc.* v. *Rowe,* 230 Ark. 905, 327 S. W. 2d 547; *Jeffery, County Judge* v. *Trevathan,* 215 Ark. 311, 220 S. W. 2d 412.

Moreover, appellants made no contention prior to the election that the ballot title was insufficient or that the election judges had been illegally selected. The complaint also alleges that people, not naming such people, were allowed to vote who were not qualified electors; that the ballots were miscounted, but did not state in what manner they were miscounted; and that the defendants intimidated the voting public and misrepresented the facts to the people of the city, and deliberately destroyed the integrity of the ballots and the election. These allegations are in the nature of an election contest, although not specific enough to amount to more than conclusions of law. Other allegations, such as the defendants "did other things to destroy the integrity of the ballot" are also merely conclusions of law and

are not good against a demurrer. *City of Marianna* v. *Gray,* 220 Ark. 468, 248 S. W. 2d 379; *Seubold* v. *Ft. Smith Special School District,* 218 Ark. 560, 237 S. W. 2d 884; *Main* v. *Drainage District No. 2 of Monroe County,* 204 Ark. 506, 162 S. W. 2d 901.

In *Orr* v. *Carpenter,* 222 Ark. 716, 262 S. W. 2d 280, this court reaffirmed the following principle stated in *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257. There the court said: " 'It is the duty of the courts to uphold the law by sustaining elections thereunder that have resulted in full and fair expression of the public will, and, from the current of authority, the following may be stated as the approved rule: All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to affect an obstruction of the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provision affects an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission shall render it void.' "

Appellants also contend that if the allegations of the complaint amount to an election contest and state a cause of action at law, the cause should have been transferred to circuit court on authority of Ark. Stat. Anno. § 22-405 (Repl. 1962). It is true that ordinarily when the chancery court sustains a demurrer to the jurisdiction of the court the cause should be transferred to circuit court if the complaint states an action at law. But here, the chancery court, upon sustaining the demurrer, gave the appellants 15 days to plead further; no additional plea was filed, nor did appellants move for a transfer to the circuit court; and further, a demurrer would have been good in circuit court on account of the allegations of the complaint being merely conclusions of law.

Affirmed.

SOUTER *v.* CARRUTHERS.

5-3124 374 S. W. 2d 474

Opinion delivered January 27, 1964.

[redacted]

Smith, Williams, Friday & Bowen and *B. S. Clark,* for appellant.

Felver A. Rowell, Jr., for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a judgment for damages sustained as a result of floodwater inundating land. The judgment is against appellants Hubert H. Souter and The First National Bank in Little Rock, co-executors of the estate of H. Avery Souter, deceased, who during his lifetime was engaged in the contracting business. Appellees are owners of certain farm lands near Morrilton which are part of the Point Remove Levee and Drainage District of Conway County.

A levee was constructed several years ago pursuant to an agreement with the U. S. Corps of Engineers along Point Remove Creek and near the Arkansas River. A drainage ditch was also constructed by the Engineers and thus the flood protection and drainage sought by the District was accomplished.

A levee box consisting of two 66-inch drainage pipes or culverts and a flood control gate was built into the levee. The culverts are located at the base of the levee

and are utilized to control drainage from the lands involved. In 1961 it was determined that the culverts were defective and should be repaired. The Engineers agreed to perform the work and the necessary plans and specifications were prepared by that agency. Thereafter the Engineers awarded a contract to H. Avery Souter which was executed on October 25, 1960. Souter moved his equipment onto the job site and started the work immediately. The work was under the direct supervision and control of the Engineers.

The plans specified that the levee should be cut initially down to the culverts. The elevation of the levee is 310 feet above sea level and the culverts are at 282 feet. This excavation was completed and Souter then constructed two coffer dams, one on the river side of the levee, and the other on the land side. Due to continued rainfall Souter requested and received permission from the Engineers to discontinue the work. Before being allowed to do so he was directed by the Engineers to construct a temporary dam between the flood gate and the levee.

The cessation of work was in the spring of 1961 and thereafter two floods occurred, both of which involved Point Remove Creek and the Arkansas River. The first occurred in April and caused no damage other than to the temporary dam and this was soon repaired. The second flood in May washed over the dam, flooded appellees' land, and damaged certain growing crops. The water also caused a delay in planting soybean and cotton crops resulting in a below average yield.

Appellees filed their complaint alleging that Souter was negligent in leaving the levee in the above condition with no protection against overflow and in failing to refill the levee after receiving repeated warnings to do so.

Shortly after the complaint was filed, Souter died and the action was revived in the name of the co-executors of his estate.

This cause was tried before a jury and a verdict was returned for appellee Dr. H. C. Carruthers in the sum of $5,000.00, and for appellee Roy Carruthers in the sum of $3,000.00. Judgment was entered in accordance therewith, from which appellants prosecute this appeal.

For reversal, appellants, rely principally upon two points, which are: (1) that the contractor at all times followed the plans and specifications contained in the contract, received his instructions from the Engineers, and was under their direct supervision; and (2) Souter did not commit any independent acts of negligence.

This court has very recently decided cases involving this same problem. In *Southeast Construction Co., Inc.* v. *Ellis,* 233 Ark. 72, 342 S. W. 2d 485, we held that a contractor who performs in accordance with the terms of his contract with the governmental agency involved, and under the direct supervision of that agency, and is guilty of neither a negligent or wilful tort, is not liable for damages resulting from his performance. This proposition was reaffirmed in *Ben M. Hogan & Co.* v. *Fletcher,* 236 Ark. 951, 370 S. W. 2d 801.

Appellees seek to distinguish these cases by urging that the temporary dam was not a necessary part of the construction contract but was built solely for the convenience of the contractor. On this assumption they contend that the contractor did not build the dam of sufficient height and was negligent.

Under the circumstances here presented, we are unable to agree with appellees' position and assumption. There is no evidence that Souter failed to follow the plans and specifications contained in the contract. The contract required him to take necessary precautions to protect the entire structure at all times. The evidence is uncontradicted that the temporary dam was built not only for what flood protection it would afford during the necessary shutdown but also was essential to protect the work that had already been performed. Also, the dam was built on instructions from the Engineers and under

that agency's direct supervision. Moreover, the Engineers specified the height to which the temporary dam was built.

The facts in the instant case are similar to the facts in the *Ben M. Hogan & Co.* case, *supra,* decided subsequent to the judgment here appealed from. In that case a big ditch, usually full of water, lay between appellees' property and the highway. When Ben M. Hogan Co. started construction of the bridge or reconstruction of the road involved, the ditch was filled in. When this occurred, appellees' pasture would not drain and water began to stand there. We held that appellees were damaged when the big ditch was filled in accordance with the State Highway Department's plans and specifications, but the contractor was only doing what the Highway Department required of him. In the instant case, appellees' lands were damaged because a cut in the levee was made, but here again, the contractor was only doing what the Engineers required of him.

Several witnesses testified on behalf of appellees that they had on numerous occasions in past years seen the water of Point Remove Creek and the Arkansas River rise substantially higher than the coffer dams and temporary dam. Since the structures were built to the maximum height possible under the conditions existing, it is apparent that flooding could not have absolutely been avoided by dams constructed to any elevation short of the original height of the levee.

From all the evidence adduced, we are impelled to the conclusion that the real cause of the damage sustained by the land owners was the cut in the levee which was necessary to repair the defective culverts. This cut was made pursuant to the conditions and requirements of the contract, and the other work on the job was performed under the direct supervision and control of the U. S. Corps of Engineers. In the absence of proof of negligence on the part of the contractor in such performance, the judgment must be reversed and the cause dismissed.

5-3113 375 S. W. 2d 225

Opinion delivered January 27, 1964.

[Rehearing denied March 2, 1964.]

[redacted]

Wood, Chesnutt & Smith; Wright, Lindsey, Jennings, Lester & Shults, for appellant.

Wootton, Land & Matthews, for appellee.

FRANK HOLT, Associate Justice. The question presented in this case is whether the appellant effectively canceled the automobile insurance policy issued by it to the appellees. In a declaratory judgment proceeding the trial court, sitting as a jury, resolved the issue in favor of the appellees. The judgment recited, in pertinent part:

"That the attempted cancellation of the aforesaid policy by the defendant, Riverside Insurance Co. of America, on or about the 15th day of May, 1961, was not effective for the reason that the defendant did not tender to the plaintiffs the unearned or unused portion of the premium of $250.70 paid by the plaintiffs to the defendant as aforesaid and covering the period of time from November 11, 1960 to November 11, 1961, and that

up to the time of this decision [March 19, 1963] no tender has been made by the defendant, Riverside Insurance Co. of America to the plaintiffs of such unearned portion of the premium paid; * * * and that the plaintiffs are not bound by any transactions had by the defendant and the said Gordon Reader, d/b/a Reader's Insurance Agency, as to the return of the unused portion of the premium;".

On appeal appellant urges for reversal that "failure to tender return premium did not render ineffective cancellation as of May 25, 1961, and appellant insurance company had no insurance in force on August 20, 1961."

The essential facts in this case appear to be undisputed. Through the Reader Insurance Agency, the appellees purchased an automobile insurance policy from appellant, Riverside Insurance Company of America, on November 11, 1960 and paid in full the annual premium of $250.70. The relevant part of the cancellation clause of this contract of insurance provides:

"* * * If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation."

The appellees received a notice of cancellation dated May 15, 1961, advising that their insurance policy was canceled effective May 25, 1961. The cancellation notice reads, *inter alia*:

"If the premium has been paid, the excess of paid premium above the pro rata premium for the expired term, if not tendered to you herein, shall be made as soon as practicable after cancellation becomes effective, or upon demand."

Upon receipt of this notice of cancellation Mr. Parker called Mr. Reader, who had handled his insurance for about ten years, and was advised by him "forget about it, you are covered". Unknown to appellees, Reader

later issued an office credit memo in their favor, intending to replace appellees' insurance business with another company but through inadvertence did not do so. As advised by Reader, appellees forgot about the cancellation notice assuming continued coverage. They had no further knowledge of the status of their coverage by appellant until after August 20, 1961 when their automobile was involved in an accident resulting in appellees' claim of coverage and this action.

The initial premium from Reader to appellant and the unused return premium of $116.83 were both handled in Reader's monthly "account current" with appellant. The "account current" or the debits and credits of Reader's agency were adjusted at the end of each month. Therefore, in accordance with this bookkeeping procedure, it was not until the end of May that appellant credited Reader's account with a total of $410.84 which included appellees' unused premium of $116.83. It is undisputed that no money representing the return premium has ever been tendered or refunded to appellees.

It is appellant's contention that under the language of the contract the payment or tender of appellees' unearned premium is not a condition precedent to an effective cancellation of the insurance contract. In *Merrimack Mutual Fire Insurance Co.,* v. *Scott,* 219 Ark. 159, 240 S. W. 2d 666, we held that the purpose of a notice of cancellation is to enable the insured to secure other coverage and, therefore, strict compliance with the cancellation provisions of a policy is a prerequisite to the assertion of the right of cancellation.

It is true that the cancellation clause of the contract in the case at bar provides that payment or tender of an unearned premium is not a condition of cancellation. However, there is another provision which states that the "premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective". Further, the cancellation notice received by the insured appellees provides that any unused portion of the premium "*shall* be made as soon as practicable after cancellation be-

comes effectives". [Emphasis added] It was approximately three months from the time of receipt of this notice of cancellation until the accident from which arose this claim of coverage. Neither during this time nor since has there been a refund or a tender of the unused portion of appellees' premium. The phrase "as soon as practicable" in insurance contracts means a "reasonable time". *National Surety Corporation* v. *Diggs,* 272 S. W. 2d 604 (Texas 1954); *U. S. Insurance Co.,* v. *Brown,* 285 S. W. 2d 843 (Texas 1955); *Ellzey* v. *Hardware Mut. Ins. Co. of Minn.,* 40 So. 2d 24 (La. 1949). Under the facts in the case at bar we do not consider that appellant has complied with the provisions of its policy and its subsequent notice of cancellation. Certainly three months must be said to be more than a reasonable time for appellant to effect the plain and unambiguous provisions of its own policy and cancellation notice as to payment of the refund.

The appellant argues that upon appellees' receipt of the cancellation notice the cancellation became effective after ten days and thereafter a debtor-creditor relationship existed between appellant and appellees. We do not agree. Although the facts in *General Exchange Insurance Corp.,* v. *Coffelt,* 192 Ark. 468, 92 S. W. 2d 213, differ somewhat from the case at bar, we think the same principle was involved there as in the instant case. In that case the policy expressly provided that cancellation could be effected with or without a refund of the unearned premium. It also contained the provision that a refund must be made upon demand. A notice of cancellation was given and a demand for refund was made as provided in the policy. Before a refund was tendered an accident occurred upon which the insured appellee based his claim of coverage. We said that this delay of the refund rendered the cancellation ineffective because there was a promise to refund upon demand. There is, also, a promise in the instant case that a refund of the unearned premium must be made upon demand or it "*shall be made as soon as practicable* after cancellation becomes effective". [Emphasis added] We think that the failure to refund or make a tender of the unused

premium as soon as practicable or within a reasonable time, under the facts in the case at bar, resulted in the cancellation of the policy being ineffective. Therefore, since appellees' loss occurred during this period of delay they are entitled to a recovery.

Nor can it be said by appellant that crediting its agent by an adjustment of the running account between them at the end of the month was, in effect, payment to the insured. 29 Am. Jur., Insurance, § 396; *Kinney* v. *Caledonian Ins. Co.*, 148 Ill. App. 256; *Kinney* v. *Rochester German Ins. Co.,* 141 Ill. App. 543; *Indiana Ins. Co.* v. *Hartwell,* 100 Ind. 566.

Furthermore, we think the appellees were lulled into a false sense of security by appellant's agent assuring them of continued coverage in spite of appellant's cancellation notice. Appellees relied upon this assurance to their detriment. This, coupled with the fact that appellees have never received a return of their unearned premium from any source, estops the appellant from now contending the policy was canceled. See *U. S. Insurance Co.,* v. *Brown, supra.* We think the following language in that case is applicable:

"* * * where appellant did not tender the unearned premium to Johnson at the time of the alleged cancellation, or 'as soon as practicable' thereafter, or at any time, * * * appellant is also estopped to contend that the policy in question was cancelled."

In the case at bar the appellees paid the insurance premium for the entire term of the policy. This premium was accepted by the appellant and the unused portion was never refunded nor a tender thereof made to the insured appellees. Instead, the unused portion of appellees' premium was used in a bookkeeping transaction in the adjustment of accounts between appellant and its soliciting agent after appellant had given notice of cancellation to appellees promising a refund "as soon as practicable". The appellees were unaware of such a bookkeeping transaction. Although the payment or tender of the unearned premium is said not to be a condition of cancellation, there is the unconditional promise

by appellant that such refund shall be made as soon as practicable after cancellation becomes effective. Such provisions must be strictly construed and strictly performed. To permit appellees to thus have the benefits and at the same time repudiate the burden of its own agreement would not be in harmony with the fundamental principles of justice.

Appellees request that we award an attorney's fee for their services on this appeal. We think a fee of $150.00 is reasonable and it is so ordered.

Affirmed.

WARD and GEORGE ROSE SMITH, JJ., dissent.

PAUL WARD, Associate Justice (dissenting). I dissent because, in my view, the policy was cancelled when appellees received the notice of cancellation on May 15, 1961. The fact that Riverside did not "as soon as practicable" pay appellees the unearned premium in no way affected the cancellation, but only created the relationship of debtor and creditor between Riverside and appellees. My authority for the above statement is that portion of the policy which says: "payment or tender of unearned premium is not a condition of cancellation".

GEORGE ROSE SMITH, J., joins in this dissent.

5-3172 374 S. W. 2d 809

Opinion delivered February 3, 1964.

[redacted]

Little & Enfield, for appellant.

Lyle Williams, for appellee.

CARLETON HARRIS, Chief Justice. Only one question is involved on this appeal, *viz,* are appellant's purchases of incubators, in 1956, 1957 and 1958, for its commercial hatchery exempt from the Arkansas Compensating (Use) Tax? The Commissioner of Revenues assessed a tax of $1,250.19 against Peterson Produce Company, an Arkansas corporation with principal offices located in Decatur, Benton County, Arkansas, by reason of the purchase of hatchery equipment from outside the state. The company is engaged in a hatchery business at Decatur. The parties stipulated that all legal requirements by the State Revenue Department, concerning the assessment and

establishment of the tax, have been met, and all procedures for resisting such action by appellant have been timely and proper. Following the usual administrative steps, the company instituted suit to restrain collection of the tax as an illegal exaction. On trial, the Benton Chancery Court dismissed appellant's complaint, and from the decree entered, the company brings this appeal.

The tax exemption claimed by the Peterson Produce Company is based on Ark. Stat. Ann. § 84-3106 (d) (Repl. 1960), which sets out certain property that is exempt from the tax. The mentioned sub-section exempts,

"Tangible personal property used by manufacturers on processors or distributors, including ginners of cotton, and including the artificial drying of rice, for further processing, compounding or manufacturing; tangible personal property used for repair, replacement, or expansion of existing manufacturing or processing facilities, including the ginning of cotton, and including the artificial drying of rice or in creating new manufacturing or processing facilities; * * *"

The equipment purchased by the company, and upon which exemption is claimed, consists of incubators used for hatching eggs. These incubators are made up of two separate units, known as setting units and hatching units, and are used in the following manner:

Eggs set in trays are first placed in a setting unit, where they remain for eighteen days under automatically controlled conditions. Temperature in the setting unit is controlled electrically, and uniform temperature is maintained by fans circulating the air in the unit. Humidity is controlled. The units are ventilated to supply oxygen and remove gases given off by the eggs. Eggs in the unit are turned hourly by an electric motor. After the eighteen-day period in the setting unit, the eggs are transferred to a hatching unit where they remain until they have hatched or until it is apparent that the remaining eggs will not hatch. The operation of the hatching unit is similar to the operation of the setting unit;

temperature, humidity, and air are automatically controlled in the hatching unit. After hatching, the chicks are removed from the unit and transported to the place where they will be grown.

Appellant contends that it is a "processor" within the contemplation of the tax exemption provision, and that the Legislature, in enacting the exemption provision, intended to exempt incubators purchased from out of state sources for use by Arkansas hatcheries.

We do not agree. In the first place, we have held that under the statute involved, the word "processing" has reference only to some step or process of manufacturing. *Scurlock, Comm. of Rev.* v. *Henderson,* 223 Ark. 727, 268 S. W. 2d 619. *Pellerin Laundry Machinery Sales Co.* v. *Cheney, Commr.,* 237 Ark. 59, 371 S. W. 2d 524. In the latter case, we stated:

"Appellant emphasizes the word, 'processing,' but in interpreting the pertinent statutes, we do not consider 'manufacturing' and 'processing' as two distinct operations."

We agree with the learned Chancellor, who delivered an excellent opinion at the conclusion of the case, to the effect that one does not "manufacture" a baby chick, and the use of incubators is not a "processing" step therein. As he stated,

"Thus, by plaintiff's [appellant's] view, if he chose to hatch his eggs in the old-fashioned way, by having brooder hens sit on them, his purchase of hens from out of state would be exempt from use tax, because such hens were 'processing' the eggs into chicks. An incubator merely aids and abets the natural course of hatching, and is not a process in itself."

A similar question arose in the case of *Teague* v. *Scurlock, Commr. of Revenues,* 223 Ark. 271, 265 S. W. 2d 528. There, it was contended that feed, purchased for chicks and poults, was exempt. Teague bought day-old chicks and poults, and fed them only commercial poultry feed until such time as they reached a proper size

and weight for marketing. The grower contended that he was a manufacturer of chickens and turkeys, and the commercial feed purchased by him was a process in the "manufacturing" thereof. In denying the exemption, this court said,

"Without lengthening this opinion to state in detail appellant's arguments and our reasons for holding against them, it is sufficient to say that we hold that the statutory language of exemption, as hereinbefore copied, does not afford the appellant any relief, because his business is not such 'processing, compounding or manufacturing' of commercial feed into broilers as is contemplated by the language used in the Statute."

Appellant points out certain exemptions that have been added to the statute by the Legislature, following court decisions which had refused the exemption. For instance, the *Henderson* decision was handed down in 1954. In this decision, the court held that cotton ginners were not exempt. Thereafter, the 1955 Legislature amended the statute to specifically exempt "ginners of cotton." In 1957 the Legislature again amended the statute to exempt "the artificial drying of rice." Other instances of added exemptions by the General Assembly, following decisions of this court, are mentioned. Appellant argues thusly:

"These amendments to the statute by the Legislature, coming as they did after denials of exemptions had been made to specific processors, seem to be a clear pronouncement by the Legislature as to what was meant by the original exemption Act. This pronouncement made it clear that the Legislature did not intend to give the exemption statute the limited construction relied upon by appellee."

We do not agree with this logic, for, though other exemptions were added, the subject matter of this litigation (incubators) was not included. Had the Legislature intended to exempt incubators, purchased from out of state, it could have as well amended the law in that respect as in the instances already cited. Certainly, an

existing law is not presumed to be changed further than is declared in the amendatory act. To the contrary, the presumption is that the Legislature intended no changes other than those clearly expressed in the amendments. *Hendricks* v. *Hodges,* 122 Ark. 82, 182 S. W. 538. The point is discussed in 82 C.J.S., Section 384, Page 903, as follows:

"Where an amendment leaves certain portions of the original act unchanged, such portions rate continued in force, with the same meaning and effect they had before the amendment. So, where an amendatory act provides that an existing statute shall be amended to read as recited in the amendatory act, such portions of the existing law as are retained, either literally or substantially, are regarded as a continuation of the existing law, and not as a new enactment. The amendment of an act does not control the interpretation of another statute enacted prior to the amendment, nor does it change the meaning which the original statute acquired prior to the amendment."

Let it also be remembered that a tax exemption must be strictly construed, "and to doubt is to deny exemption." *Morley* v. *E. E. Barber Construction Co.,* 220 Ark. 485, 248 S. W. 2d 689; *Scurlock, Comm. of Rev.* v. *Henderson, supra.*

We think, under all our decisions, that appellant falls short in establishing that he is a "processor" within the meaning of the Arkansas Compensating (Use) Tax Law exemption provision.

Affirmed.

5-3250 374 S. W. 2d 828

Opinion delivered February 3, 1964.

Robert M. Smith, for appellant.

E. W. Brockman, Smith, Williams, Friday & Bowen, by *Herschel H. Friday* and *John C. Echols,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a test suit to determine the legality of the proceedings and election ballot involving the County Hospital Units in Desha County; and necessitates a study of Amendments 17 and 25 of the Arkansas Constitution, as well as the cases construing these amendments. On July 9, 1963, the County Court of Desha County made an order, the pertinent portions of which are:

"That there exists the necessity for the constructing and equipping of a hospital at McGehee and that plans, specifications and estimates of cost as may be necessary for reasonable understanding of the nature, extent and approximate cost thereof shall be prepared and filed in the office of the County Clerk of the County and shall there remain and be held subject to the inspection of any and all persons interested. That Stowers & Boyce, Architects, Little Rock, Arkansas be, and they are hereby appointed and employed to prepare and file such plans, specifications and estimates of cost.

"That there exists the necessity for the reconstructing, extending and equipping of the county hospital at

Dumas and that plans, specifications and estimates of cost as may be necessary for reasonable understanding of the nature, extent and approximate cost thereof shall be prepared and filed in the office of the County Clerk of the County and shall there remain and be held subject to the inspection of any and all persons interested. That Wittenberg, Delony & Davidson, Architects, Little Rock, Arkansas, be, and said firm is hereby, appointed and employed to prepare and file such plans, specifications and estimates of cost."

The said plans[1] and specifications were duly filed; and on August 5, 1963, the County Court entered an order, the pertinent portions of which are:

"That Wittenberg, Delony & Davidson, Architects, Little Rock, Arkansas, heretofore appointed by this court, filed in the office of the County Clerk of the County on the 10th day of July, 1963, plans, specifications and estimates of cost covering the constructing and equipping of a hospital at McGehee and that said plans, specifications and estimates of cost are now on file in the office of the County Clerk and are subject to the inspection of any and all persons interested. The estimated cost to the County of the proposed work is approximately $240,000, it being contemplated that the balance of the total estimated cost will be obtained from an agency or agencies of the Government of the United States of America. The Court has examined said plans, specifications and estimates and has determined that the work covered thereby would be in the best interest of the County and its citizens.

"That Stowers & Boyce, Architects, Little Rock, Arkansas, heretofore appointed by the Court, filed in the office of the County Clerk of the County on the 10th day of July, 1963, plans specifications and estimates of cost covering the reconstructing, extending and equipping the county hospital at Dumas and that said plans, specifications and estimates of cost are now on file in

[1] The County Court order also involved a jail at Arkansas City, and Court House reconstruction at Arkansas City. These two matters were defeated by the vote of the electors and are not before us.

the office of the County Clerk and are subject to the inspection of any and all persons interested. The estimated cost to the County of the proposed work is approximately $160,000, it being contemplated that the balance of the proposed work is approximately $160,000, it being contemplated that the balance of the total estimated cost will be obtained from an agency or agencies of the Government of the United States of America. The Court has examined said plans, specifications and estimates, and has determined that the work covered thereby would be in the best interest of the County and its citizens.

"That the proposed County Hospital units at McGehee and Dumas shall be parts of the single County Hospital to serve the citizens of the County and shall be operated and administered by the single County Hospital Board. As such, and in order to avoid unnecessary duplication of medical facilities, said Hospitals units shall be deemed to be one improvement within the meaning of Amendment No. 17 to the Constitution of the State of Arkansas and should be submitted as a single ballot question in the special election mentioned herein below.

"That the questions of constructing, reconstructing, extending and equipping said projects, heretofore in this Order specifically identified, and the levying of a building tax for the purpose of paying the principal of, interest on and Paying Agent's fees in connection with bonds of the County proposed to be issued under the provisions of Amendment No. 17 to the Constitution of the State of Arkansas, as amended by Amendment No. 25, to obtain the necessary funds for financing the said portion of the cost of said projects to be borne by the County shall be submitted to the qualified electors of Desha County, Arkansas at a special election which is hereby called to be held on the 10th day of September, 1963, and that said questions shall be placed on the ballot in substantially the following form:

"It is proposed to construct, equip and extend County Hospital facilities for the citizens of Desha County by constructing and equipping a hospital at McGehee at an estimated cost to the County of $240,000, and by re-

constructing, extending and equipping the Hospital at Dumas at an estimated cost to the County of $160,000 (it being contemplated that the balance of the total estimated cost of both said Hospital and facilities will be obtained from an agency or agencies of the Government of the United States of America), and to issue General Obligation Bonds of the County under Amendment No. 17 to the Constitution of the State of Arkansas, as amended by Amendment No. 25, to provide funds for the payment of the estimated cost of said Hospital units to be borne by the County, in accordance therewith there is hereby submitted to the voters of Desha County, Arkansas, the questions of voting for or against said construction, reconstruction, extension and equipment (called 'Construction'), and for or against the levying of a building tax to pay the principal of, interest on and Paying Agent's fees in connection with said bonds.

"Indicate how you wish to vote by marking the ballot with an 'X' in the box opposite the question:

"For Construction ..... ☐

"Against Construction ..... ☐

"For Building Tax ..... ☐

"Against Building Tax ..... ☐"

(Emphasis supplied.)

The election was duly held on September 10, 1963, with the ballot having the full matter before it, as italicized above; and the vote was in favor of the hospital issue and the building tax therefor. The appellant then filed this suit in the Chancery Court to enjoin the County Judge from further proceedings in the matter of the hospital; and the complaint alleged:

"That the purported approval of said questions in said manner was illegal and of no effect, being in violation of Amendment 17 to the Constitution of the State of Arkansas, as amended by Amendment No. 25, in that the voters were deprived of an opportunity to vote upon each contemplated improvement separately, as provided in said Amendments.

"That the purported approval of the equipping of the hospitals to be constructed and a tax to pay bonds, a portion of the proceeds of which will be used to equip, was illegal and of no effect, being withiout sanction under Amendment No. 17 to the Constitution of the State of Arkansas, as amended by Amendment No. 25. Said Amendments make no provision for equipping hospitals and, therefore, the proposal to equip is unauthorized and the inclusion of the proposal in the proceedings renders them illegal and void.

"That unless restrained and enjoined, the defendant will convene the Quorum Court of Desha County, Arkansas for the purpose of levying a continuing annual building tax to pay the principal, interest, and paying agent's fees of bonds of the County which will be issued to pay the County's portion of said costs, all in violation of the Constitution and laws of the State of Arkansas, and in violation of the right of plaintiff and others similarly situated, to be secure from unlawful and illegal exactions."

The defendant (County Judge) resisted the complaint, and, *inter alia,* prayed for a decree:

". . . declaring and holding that the election of September 10, 1963, and all proceedings prior to and in connection with the election were legal, valid and effective and that defendant is authorized by law to proceed to take the necessary action to secure the construction and equipping of the hospital buildings at McGehee and Dumas, to issue bonds to finance the County's portion of the costs thereof and to levy a continuing annual building tax to pay the principal of, interest on, and paying agent's fees for the bonds."

The cause was heard by the Chancery Court on an agreed statement of facts which incorporated most of the matters that we have already detailed, and also stated:

"The proposal approved by the voters of Desha County, Arkansas, in the election is for the constructing and equipping of a hospital in the city of McGehee,

Desha County, Arkansas, and for reconstructing, extending and equipping an existing hospital in the city of Dumas, Desha County, Arkansas. There will be no physical connection between the hospital to be constructed and equipped at McGehee and the hospital to be reconstructed, and extended and equipped at Dumas. The plans, specifications and estimates of cost for the two hospital buildings were prepared and submitted separately by different architectural firms. The question of construction and reconstruction of the two physically separate buildings was submitted to the voters of the County as a single proposal. The voters were required to approve or disapprove the construction and reconstruction of both buildings, there being no provision whereby a voter could vote for construction or reconstruction in one location and against construction or reconstruction in the other location. The proposal for the building tax to finance the County's proportion of the cost of both hospitals was also submitted as a single question, and there was no opportunity for a voter to vote for the building tax to finance the County's proportion of the cost of the hospital in one location and against the building tax to finance the County's proportion of the cost of the hospital at the other location.

"The proposal submitted to and approved by the voters in the election of September 10, 1963, includes the equipping of the hospital to be constructed at McGehee and the equipping of the hospital to be reconstructed and extended at Dumas. A portion of the proceeds of the bonds also will be used to pay the cost of equipping the hospitals.

"The reconstruction, extension and equipping of the hospital at Dumas and the construction and equipping of the hospital at McGehee are necessary for the hospitalization needs of Desha County and its citizens and the separate locations at Dumas and McGehee are necessary and in the public interest from the standpoint of the ready and near availability of adequate hospitalization facilities to all citizens of the County. One facility without the other would be inadequate and insufficient to

meet the hospitalization needs of the County and its citizens."

Trial in the Chancery Court resulted in a decree in favor of appellee and this appeal ensued, in which the appellant urges three points:

"I. The proposed action of appellee is prohibited by Amendment No. 10 to the Constitution and should be enjoined unless authorized by Amendment No. 17 to the Constitution as amended by Amendment No. 25.

"II. The proposed action of appellee is not authorized by Amendment No. 17 as amended by Amendment No. 25 because at the election purporting to authorize the proposed action of appellee the voters were deprived of the right to vote separately on each contemplated improvement.

"III. The proposed action of the appellee to equip the two hospitals is not authorized by Amendment No. 17 as amended by Amendment No. 25."

I. *Are The Two Hospital Units Separate Hospitals?* Appellant's first two points are discussed together under this topic. The appellee claims that he is acting under the power and authority of Amendments 17 and 25 to the Arkansas Constitution.[2] The real issue presented is whether the ballot should have allowed the voter to vote separately on the hospital project at McGehee and separately on the hospital project at Dumas. It is evident from the order and the ballot that the voter had to vote for or against the hospital project as a whole, and was not permitted by his ballot to vote for McGehee and against Dumas, or vice versa. The appellee particularly calls attention to Section 4 of Amendment 17, which reads:

"More than one building or improvement may be embodied in all such proceedings, except that separate plans, specifications and estimates for each building or

[2] Amendment No. 25 amended Section 1 of the original Amendment No. 17 so as to add "county hospital" to Section 1 of Amendment No. 17. See *Hughes* v. *Jackson*, 213 Ark. 243, 210 S.W. 2d 312; and *Garner* v. *Lowery*, 221 Ark. 571, 254 S. W. 2d 680.

extension shall be made and filed, and a description of each building sufficient to indicate to the electors with reasonable certainty what building or extension he is voting on, shall appear on the ballot, beneath which shall be the words, 'For Construction' and 'Against Construction', after each contemplated improvement . . ."

The appellant says that each "building" in the above quoted provision means exactly what it says; and that since one building is to be in Dumas and one is to be in McGehee, there should have been a separate vote on each one. But it must be remembered that only three building projects are listed and concerned in Amendments 17/25. These are: (a) court house; (b) county jail; and (c) county hospital. The language in Section 4 of Amendment 17 about "each building," means that the construction, etc., of a court house cannot be combined on the same ballot item with construction of a jail, or the construction, etc., of a jail combined on the same ballot item with the construction of a hospital, etc.; but the Amendment does not mean that if a hospital consists of two buildings, in the same town or in separate towns, each building must be listed and voted on separately. The case of *Kerwin* v. *Hillman,* 226 Ark. 708, 292 S. W. 2d 559, involved the building of a main hospital in Fordyce "with emergency units thereof in Sparkman and Carthage." It was there urged that the Amendments 17/25 contemplated the construction of a single hospital unit in one town, and did not contemplate or authorize the construction of emergency units located at points other than the place of the main hospital. We held that the separate emergency units at other places were proper and legal.

The County Court stated, in the case at bar, that the County Hospital of Desha County was to consist of two units, one at McGehee and one at Dumas, but both were to be under the same Hospital Board. By rules of judicial notice[3] we know: that Dumas is in the northern por-

[3] *Bonner* v. *Jackson,* 158 Ark. 526, 251 S. W. 1; *Forehand* v. *State,* 53 Ark. 46, 13 S. W. 728; *Hano* v. *Fayetteville,* 90 Ark. 292, 119 S. W. 287; *Board of Trustees* v. *Pulaski Co.,* 229 Ark. 370, 315 S. W. 2d 879; *Stephens* v. *City of Springdale,* 233 Ark. 865, 350 S. W. 2d 182.

tion of Desha County and had a population of 3,540 according to the 1960 U. S. Census; that McGehee is in the southern portion of Desha County and had a population of 4,448 according to the 1960 U. S. Census; and that these two towns are over twenty miles apart. The purpose of a county hospital is to provide for the county and not for any one portion. The County Court said that the feasible way to provide the people of Desha County with hospital facilities was to have a unit situated at Dumas and a unit situated at McGehee, but both under one Hospital Board. We find that this was proper under the facts of this case and in line with our holdings for the liberal interpretation to be given Amendments 17/25, some of which cases are: *Bond* v. *Kennedy,* 213 Ark. 758, 212 S. W. 2d 336; *Garner* v. *Lowery,* 221 Ark. 571, 254 S. W. 2d 680; and *Jeffery* v. *Fry,* 220 Ark. 738, 249 S. W. 2d 850. We hold that there is no merit in the first two points urged by the appellant.

II. *Hospital Equipment.* The appellant urges that the Amendments 17/25 provide for the "construction, reconstruction, or extension" of a county hospital, but that there is no provision for the *equipment* for a county hospital; and that, therefore, the equipping of the hospital is not within the purview of the Amendments; and on this point the appellant is supported by a brief *amici curiae.* We find no merit in this point argued by the appellant and the *amici curiae.* While not involving the Amendments 17/25, nevertheless this Court said in *Railey* v. *Magnolia,* 197 Ark. 1047, 125 S. W. 2d 278: "The building and equipping of a hospital is a single enterprise. . . ." A hospital is more than a mere building of four walls and a roof. Webster's Dictionary defines a hospital as: "An institution or place where sick or injured persons are given medical or surgical care." A bare and empty building could hardly fit that definition. We like the language of the Supreme Court of Alabama in *Noble* v. *First National Bank,* 1 So. 2d 289: "The definition of a hospital, established by the proof and uncontradicted, was as follows: 'An institution for the reception, care, and medical treatment of the sick or wounded; also the building used for that pur-

 [redacted]

pose.' '' Certainly the equipping of the hospital is an essential part of its construction.

Furthermore, in *McArthur* v. *Campbell,* 225 Ark. 175, 280 S. W. 2d 221, we held that the air conditioning of the Pulaski County Court House was a ''reconstruction or extension'' of the Court House, and said:

''There is authority for the equipping and furnishing of buildings authorized by Amendment No. 17. See *Atkinson* v. *Pine Bluff,* 190 Ark. 65, 76 S. W. 2d 982; *Lindsay* v. *White,* 212 Ark. 541, 206 S. W. 2d 762; *Railey* v. *City of Magnolia,* 197 Ark. 1047, 126 S. W. 2d 273; *Tunnah* v. *Moyer, Mayor,* 202 Ark. 821, 152 S. W. 2d 1007.''

The decree of the Chancery Court in this cause is in all things affirmed; and for good cause shown an immediate mandate is ordered.

[redacted]

ARK. STATE HWY. COMM. *v.* SUB-DIST. NO. 3 OF GRASSY LAKE AND TYRONZA DRAINAGE DIST. NO. 9

5-3117 376 S. W. 2d 259

Opinion delivered February 3, 1964.

[Rehearing denied March 30, 1964.]

[redacted]

Dowell Anders, Don Gillaspie and *Mark Woolsey,* for appellant.

C. M. Buck, Bruce Ivy and *James E. Hyatt, Jr.* for appellee.

George Rose Smith, J. These two condemnation suits, consolidated below, are actually test cases by which the parties seek a determination of this question: Does a drainage district, by reason of its uncollected assessment of benefits, have a property interest in lands within the district for which it is entitled to compensation, in a condemnation proceeding, in addition to the award made to the landowner? The trial court answered this question in the affirmative, holding that the district was entitled to recover a sum equal to the total amount of all the unpaid future drainage district assessments that had been levied by the district against the land being condemned. By direct appeal the Commission contends that it does not owe the district anything. By cross appeal, which we do not reach, the district contends that it should recover a sum equal to the uncollected portion of the benefits assessed against the land being condemned.

The lands in question, which the Commission is taking in fee simple, lie within several overlapping drainage districts. This appellee, a typical drainage district, was organized in 1924 under the Alternative Drainage District Law. Ark. Stat. Ann. §§ 21-501 et seq. (Repl. 1956). Benefits from the proposed improvement were assessed against lands within the district. § 21-513. Funds for the construction of the drainage system were raised by the issuance and sale of bonds, secured by a pledge of the assessed benefits. § 21-553. For the payment of the bonds taxes are levied in annual installments against the assessment of benefits. § 21-554. This particular district now has an outstanding bonded debt with annual maturities running until 1980. The trustee for the bondholders was made a party to this litigation.

In these test cases the parties selected two fact situations for the presentation of their problem to the courts. In the first case the Highway Commission, without notice to the drainage district, acquired a tract with-

in the district by purchasing the fee simple title from the landowner. The Commission then brought this condemnation action against the district, alleging, however, that the district had no compensable property interest apart from that already acquired by the Commission from the landowner.

In the second case, involving another tract, the Commission joined the landowner and the district as defendants in a condemnation suit. The case was first tried with respect to the landowner's interest alone. He received an award for the fee simple estate. It was stipulated that whatever rights the drainage district might have would be determined at a later date.

The trial court, as we have said, held in both cases that the district had a separate compensable property right in the lands. This was error. There is no tenable theory upon which it can be said that the Commission is taking from the district an independent property right that is separable from the landowner's fee simple estate.

Two possible theories come to mind. First, the district has a lien against the assessment of benefits—a lien which, upon the landowner's failure to pay his taxes, may be enforced against the land itself by means of a foreclosure suit. Ark. Stat. Ann. § 21-546 (Repl. 1956). Thus the district has a remedial right against the land that is, if not actually a lien, at least in the nature of a lien.

Such a remedial right is not an estate in the land. With respect to true liens, such as mortgages, the condemnation award takes the place of the land, so that the lienholder's remedy is to proceed against the award. Nichols, Eminent Domain (Rev. 3d Ed.), § 5.74. Here the district chose to forego any claim against the landowner's award and to insist instead that it has a distinct cause of action against the condemnor. It is clear, however, that if the district's claim is in the nature of a lien its sole remedy is against the award.

Secondly, in addition to its remedy in the event of a delinquency the district also has a substantive right to

levy taxes in the future against the assessed benefits. It might be argued that the destruction of this power of taxation is a taking of property for which compensation must be made.

We think it plain that the district's potential ability to collect the assessed benefits must necessarily be regarded as an element in the landowner's fee simple estate, for which payment has admittedly been made. To illustrate: We were told in the oral argument that many years ago Mississippi county, where this litigation arose, contained extensive swamp areas of little value. By the creation of levee and drainage districts those swamps have been converted into valuable farm lands. That transformation has been financed by the assessment of benefits against the lands. It is perfectly clear that the physical benefits conferred by the various improvement districts are reflected in the increased market value of the farm land. When the condemnor pays that increased market value, as it has done in these cases, it also pays for the benefits conferred by the districts. If the condemnor were compelled also to pay the districts for their potential power of taxation, the condemnor would be paying twice for the same enhancement of value. If by any chance—and we express no opinion on this point—the district has some sort of equitable claim arising from the fact that the assessment of benefits has not been paid in full, that controversy is between the district and the landowner and can be of no concern to the condemnor.

This drainage district earnestly argues that, as a matter of equity, if the potential tax liability of the condemned land should be extinguished without compensation to the district the result will be to increase the payments that will eventually have to be made by the other landowners in the district. No doubt this is true, but the situation is simply an unavoidable consequence of the State's sovereign immunity from taxation. In fact, this situation is commonplace. Almost every tract of land taken by eminent domain is subject to future taxation for public improvements already made, such as a levee, a drainage system, a courthouse, a municipal auditor-

ium, a schoolhouse, and so on. There can, as a practical matter, obviously be no requirement that the sovereign satisfy all these nebulous obligations as a condition to the acquisition of the land. (See *Public Water Supply Dist. No. 3* v. *U.S.*, 135 F. Supp. 887.) That some shift in the burden of taxation may take place is merely one of the risks that every taxpayer incurs.

A somewhat similar argument is that the value of the district's outstanding bonds might be destroyed if the State should elect to condemn *all* the land in a particular improvement district. Whether equity might provide a remedy in that situation is a question that we prefer to leave unexplored until it arises. In the case at bar the lands being taken represent such a tiny part of the total taxable property in the district that there is not even a hint that the security of the outstanding bonds has been impaired. We do not feel called upon to adopt an unsound rule of law, by affirming this decree, merely to hedge against a contingency so remote that it does not seem ever to have arisen or to be likely ever to arise in the future.

Reversed.

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

ED. F. MCFADDIN, Associate Justice (dissenting).

The appellant, Arkansas State Highway Commission (an agency of the State), will sometimes be referred to as "Highway Commission"; and appellee, Sub-District No. 3 of Grassy Lake and Tyronza Drainage District (duly created pursuant to law) will sometimes be referred to as "District." The brief of the appellant begins with the following clear statement:

"This case involves the determination of an important question of law, which has never before reached this Court. The outcome will directly affect the acquisition of a majority of the right of way for State highways in the future. Interstate Highway No. 55 traverses Mis-

sissippi County. The lands acquired for its construction were subject to benefits assessed by five drainage districts. Some of the property was purchased by warranty deed from the record holders of title to which deed the districts were not a party. In this situation, a separate lawsuit was filed against the districts in order to determine whether they had any compensable interest. The remaining property was condemned (the districts were parties defendant in the action), but the cases proceeded to judgment with the understanding between the Commission and the districts that their interest would be reserved and determined separately."

Directly involved are two tracts of land herein referred to as Tract No. 5 and Tract No. 11. The Highway Commission acquired title to Tract No. 5 by eminent domain proceedings, and acquired title to Tract No. 11 by direct warranty deed from the owner. This case was tried before the Circuit Judge without a jury on an agreed statement, from which we copy the following pertinent excerpts:

"1. This hearing shall adjudicate the interests of Sub-District No. 3 . . . in the property designated as Tract No. 5 . . . and Tract No. 11 . . .

"2. That Tract No. 5, consisting of 50.058 acres, was condemned by the Arkansas State Highway Commission (hereinafter referred to as the Commission) on the 15th day of April, 1959, for State highway purposes; that the interest condemned and taken by the Commission was a fee simple absolute interest of the landowner; that the District was a party to this action and was properly summoned, *but it was agreed and understood that the interest of the District was not to be, and was not, determined at the time of trial or settlement of the landowner's interest, and that the rights of all Drainage Districts were reserved and were to be determined at a later date,*[1] that a trial by jury was conducted in this case, and judgment was entered on the 31st day of May, 1960, against the Commission, ordering the Commission to pay to E. L. Taliaferro, *et al.,* record owners, the sum of

[1] Emphasis supplied.

$37,885.50 as just compensation for their interest, and the said judgment purported to vest full title in fee simple absolute in the Commission. . . .

"3. That the original benefit assessed to Tract No. 5 is in the amount of $1,992.98; that this benefit has never been reduced; that the present annual levy on the tract is 3.3 per cent of the benefit assessed, amounting to $65.77 per year . . .

"4. That Tract No. 11, consisting of 11.579 acres, was purchased by the Commission for State highway purposes by warranty deed from Mrs. R. J. Brown, Sr., Trustee, *et al.*, record holders of title, on the 10th day of January, 1959; and that the sum of $13,500.00 was paid to the record holders of title in exchange for a warranty deed purporting to convey a fee simple absolute interest to the Commission. . . .

"5. That the original benefit assessed to Tract No. 11 is in the amount of $115.75; that this benefit has never been reduced; that the present annual levy on the tract is 3.3 per cent of the benefit assessed, amounting to $3.82 per year. . . .

"8. That benefits were assessed on the lands in the District by Order of the County Court of Mississippi County on the 24th day of September, 1925, in the amount of $3,776,262.81; and that the total of assessed benefits on the property taken by the Commission from the District is $25,597.92; . . .

"10. That there was outstanding at the time of taking the sum of $1,363,000.00 in refunding bonds, issued by the District and secured by a 'pledge and mortgage' to Union Planters National Bank, as Trustee, . . .

"12. That the total area of the District is 162,229 acres, and the total area acquired by the Commission within the District is 1,341.319 acres. . . .

"14. That the interests claimed by the District in Tract No. 5 and Tract No. 11 are those that arise under the laws of the State of Arkansas, from an Order of the County Court dated the 23rd day of December, 1924,

other orders made by the County Court in compliance with Statutes, and from subsequent Orders of the County Court creating an annual levy against the assessed benefits as adjudged in the Order of 1924 referred to above."

The Trial Court was asked to answer certain questions, which said questions and answers as made are as follows:

"A. Does the District have such an interest in Tract No. 5 that it is a necessary party to a condemnation action under the eminent domain power of the Commission?" ANSWER: "Yes."

"B. Does the District have such an interest in Tract No. 5 that it is entitled to compensation for the taking of this interest by the Commission in a condemnation action under the eminent domain power?" ANSWER: "Yes."

"C. Does the District have such an interest in Tract No. 11 after its purchase in purported fee simple absolute from the record holder of title as to require the Commission to pay 'just compensation' for the taking of this interest in an eminent domain proceedings?" ANSWER: "Yes."

"D. If the District is entitled to compensation for the taking of its interest in these tracts, how is the amount to be calculated?" ANSWER: "By calculating the sum equal to the total annual levy for the life of the present outstanding bond issue."

The Trial Court rendered judgment for the District and against the Highway Commission for amounts as follows: for the taking of Tract No. 5, $1,223.20; and for the taking of Tract No. 11, $84.04. By this appeal the Highway Commission insists that the District is entitled to absolutely nothing, now or at any time in the future, for the taking of said Tracts Nos. 5 and 11. The Highway Commission claims that when it takes title to property for public use the same becomes exempt from taxation or payment of benefits already assessed. Furthermore, the Highway Commission claims that the assess-

ment of benefits constitutes only a *lien* and in no sense a title or interest in the land. Thus, the suit was to determine whether, under the stipulated facts, the Highway Commission would now or at any time in the future have to pay the District any amount whatsoever. As I see the case, there are presented two situations that necessitate separate consideration.

I.

LAND ACQUIRED BY DEED.

The Highway Commission acquired Tract No. 11 by deed direct from the landowner; and I insist that the Highway Commission must pay the future accruing assessments on the benefits the same as any other grantee would have to do who took a deed from the landowner. This conclusion is because of Ark. Stat. Ann. § 50-401 (1947), which reads as follows:

"All lands, tenements, and hereditaments may be aliened and possession thereof transferred by deed without livery of seizin, and the words, 'grant, bargain, and sell' shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns and from the claim and demand of all other persons whatever, unless limited by express words in such deed; *provided, that as between the grantor and grantee, neither the statutory nor general express covenant of warranty against incumbrances shall be held to cover any taxes or assessments of any improvement district of any kind, whether formed under general statutes authorizing the assessment of lands for local improvements of any kind, or whether such improvement district be formed by public or private act of the Legislature, but the lien for any such local assessment or tax shall run with the land and be assumed by the grantee, and the grantee shall pay any and all installments of such tax or assessment becoming due after the execution and delivery of*

the deed, unless otherwise expressly provided.'' (The italicized language was added by 1917 Act, later to be discussed.)

This statute is interesting and a study of it is enlightening. It originally appears in Revised Statutes, Chapter 31, Section 1, and also was Section 731 of Kirby's Digest. It read exactly as it now does down to the word ''provided.'' All the words after the word ''provided'' (and all italicized above) were added by Act No. 332 of 1917, which Act was captioned: ''An Act to Amend Section 731 of Kirby's Digest of the Statutes of Arkansas, for the Purpose of Providing for the Payment of Taxes, Assessments, and Liens against Real Estate as between Grantor and Grantee.'' Evidently after improvement districts became numerous in Arkansas someone realized that under what had been Section 731 of Kirby's Digest (Ark. Stat. Ann. § 50-401 [1947], down to the proviso) the lien of the improvement district was a judgment against each tract of land in the district and that such judgment would cloud the title to the land whenever a person desired to sell it. So the Legislature adopted Act No. 332 of 1917 so that as between grantor and grantee the unmatured payments on the assessment of benefits would not be a cloud on the title.

At all events, said Section 50-401 now clearly states: ''. . . *the lien for any such any local assessment or tax shall run with the land and be assumed by the grantee, and the grantee shall pay any and all installments of such tax or assessment becoming due after the execution and delivery of the deed, unless otherwise expressly provided.''* The State Highway Commission, by taking a deed from the landowner of the Tract No. 11, became a grantee and so is governed by the above statute, because we have no statute in Arkansas that exempts the Highway Commission from payment under the situation here existing.

The case of *Willis Creek Drainage Dist.* v. *Yazoo County,* 209 Miss. 849, 48 So. 2d 498, involved a situation practically the same as the one here, and the holding of the Supreme Court of Mississippi was in accordance

with the views that I am now expressing. The Willis Creek Drainage District was an improvement district, created under the laws of Mississippi, which gave the lien of assessed benefits practically the same force in that State as our statutes do in this State. (See Ark. Stat. Ann. § 21-542 [Repl. 1956].) The Willis Creek District had assessed its benefits and had issued bonds which were outstanding. Yazoo County purchased land from the owners at private sale for public purposes (*i.e.*, an aviation field); and then Yazoo County, claiming to be a subdivision of the State (just as the Highway Commission claims here), refused to pay the maturing assessments on the benefits. The District brought suit to have the land sold if the County refused to make the payment. The defense made by Yazoo County was that under the law of Mississippi all property owned by the State or its subdivisions was exempt from taxation. The Supreme Court of Mississippi held that the County must still pay the assessments on the benefits, saying that the provisions for examption was never "intended to abate an existing judgment lien as fixed by a final decree of the chancery court against lands subsequently purchased by the State or any of its subdivisions." The Mississippi statute said that the assessed benefits constituted a judgment, just as does our statute (Ark. Stat. Ann. § 21-542 [Repl. 1956]), and the Mississippi Court said: ". . . we are of the opinion that while a drainage district assessment is a species of taxation, and is taxation in the broad sense of that term, the assessment is not a tax within the meaning of Section 9697, supra; . . . and, moreover, we think that Section 4695, Code of 1942, Section 4450 of Hemingway's Code of 1917, declaring that the decree of the chancery court confirming an assessment of benefits made by the drainage commissioners 'shall have all the force of a judgment' constitutes an express statutory authority for holding that this land was purchased subject to a lien for the unpaid drainage assessments, and that the only way that the county could have discharged the lien was to have paid off the same."

As to exemption, the Court further said:

"While it is true that there is no statute which specifically imposes on the county the duty to pay a drainage assessment on land such as those involved in this suit, it is likewise true that there is no statute which would expressly, or by necessary implication, authorize a county to acquire by purchase lands in a drainage district and hold them as long as it may choose to do so without paying the yearly installment due on the betterments assessed against said land, and there is therefore involved the well settled rule that one claiming exemption from taxation has the burden of showing that the claim comes clearly within the exemption law, unaffected by other statutes which clearly render the property subject to a lien for the assessment in question."

I maintain that the decision of the Supreme Court of Mississippi is sound; and I am persuaded that we should apply that holding to the facts in this case, which are in all respects similar. The Highway Commission says that lands used for road purposes are public roads and are not liable for assessment of benefits; and in support thereof cites *Board of Imp.* v. *School Dist.,* 56 Ark. 354, 19 S. W. 969; *Waterworks Imp. Dist.* v. *Logan County,* 155 Ark. 257, 244 S. W. 4; and *Board of Comm.* v. *Arkansas County,* 179 Ark. 91, 14 S. W. 2d 226. These three cases specifically hold that public property cannot be assessed for benefits when the property is already used as public property; but these cases do not hold that the assessments cannot be collected when the benefits have already been assessed before the sovereign agency purchases the property. I readily agree that a district cannot levy an assessment of benefits against property that is already public when the assessment is being made. But when the improvement district assesses benefits against private property—as here—then the subsequent acquisition of the property by the public agency does not extinguish the assessment of benefits previously made. Our statute (§ 50-401) says that the grantee shall make the payments accruing after the date of the deed. The Highway Commission was the grantee in this deed and there is nothing in the statute that grants the Highway Commission any exemption.

If the Highway Commission desires to be relieved of future payments of improvement district assessments on any lands for which it may accept deeds, then the Highway Commission should ask the Legislature to provide a procedure for ascertaining the lump sum payment that the Highway Commission should pay. That is a matter which addresses itself to the legislative department. Under the law as it now stands the Highway Commission cannot become the grantee in a deed and still claim an exemption. Therefore I dissent from so much of the Majority Opinion as holds that the State Highway Commission is not required to pay the District anything, now or any time in the future, for maturing benefits on the land to which the Highway Commission received a deed.

II.

LAND ACQUIRED BY CONDEMNATION.

The Highway Commission acquired Tract No. 5 by condemnation; and I insist that the Highway Commission is liable to the District in this case for maturing benefits on such land. Such liability is clear to me because of the way this case was tried and *because of the stipulation.* It will be recalled that the Highway Commission elected to try the case against the landowner on the value of the land and then to try the case against the District separately. The stipulation recites: "... *it was agreed and understood that the interest of the District was not to be, and was not, determined at the time of trial or settlement of the landowner's interest, and that the rights of all drainage districts were reserved and were to be determined at a later date.*" The Highway Commission could have tried all of the cases at one time and then the jury could have determined the total value of the land and also the present cash value due the District for the unmatured assessments. But the Highway Commission stipulated that the interest of the District was not determined by the settlement of the landowner's interest. If the District was entitled to anything against the landowner originally, then it is entitled to that amount against the Highway Commission now

under the stipulation by which this present case was tried.

It was stipulated that this district was organized under the alternate drainage district law. The applicable statute (Ark. Stat. Ann. § 21-542 [Repl. 1956]) provides that when the assessment of benefits is filed, the county court shall ". . . enter upon its records an order, *which shall have all the force of a judgment,* providing that there shall be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement . . . which tax is to be paid by the real property in the district in the proportion to the amount of the assessment of benefits thereon, . . . *The tax so levied shall be a lien upon all the real property in the district from the time the same is levied by the county court . . . and shall continue until such assessment . . . shall have been paid.*" (Emphasis supplied.)

When the assessed benefits were approved and the order was entered by the county court, such order became "*a judgment*" and the benefits became a lien on the land which continued until paid. I do not claim that the District had any *title* to the land condemned, but I do claim that the District had a *judgment lien* on the land, like a mortgage, for the payment of benefits as they mature; and as such *lien claimant* the District is entitled to have its claim satisfied. In 18 Am. Jur. p. 868, "Eminent Domain", § 235, the text reads: "It is a general and well established rule that, when the mortgaged property is taken by eminent domain . . . the mortgagee's rights against the land follow the award, and he may have the mortgage debt satisfied out of that fund . . ."

In 45 A.L.R. 2d p. 522 there is an annotation entitled: Rights in respect of real estate taxes where property is taken in eminent domain"; and on Page 552 cases from several jurisdictions are cited to sustain this text: "The rights of a mortgagee, a judgment creditor, or an easement holder, in respect of taxes in a condemnation proceeding, have been considered in a few cases, in the majority of which it was held substantially that under the circumstances present such lienor had an enforceable

interest in the award." And on Page 555, in the same annotation, in discussing eminent domain proceedings, a number of federal and state cases are cited to sustain this text: "Taxes which have accrued or become a lien on real estate under the local law prior to its acquisition by the United States by eminent domain proceedings are payable out of the compensation fund." I maintain that the Highway Commission properly made the District a party defendant in the condemnation case and that the District was entitled to be paid out of any award made; but when the Highway Commission elected, as it did in this case, to try the landowner's rights in one case and then try the District's case separately, the Highway Commission necessarily became liable to the District for the amount of the District's lien.

The Majority Opinion says that the amount of land here taken is small and that the benefits on such land bear a very small ratio to the total benefits in the District. But the doctrine of *de minimus*[2] cannot apply to a case involving lands and payment of benefits. See *Lumsden* v. *Erstine,* 205 Ark. 1004, 172 S. W. 2d 409; and *Reeves* v. *Jackson,* 207 Ark. 1089, 184 S. W. 2d 256. If the Highway Commission can take title to six acres of land in one case, then another agency of the sovereign can take title to six thousand acres.

The effect of the present Opinion is far reaching.[3] If the District in this case can be entirely ignored when the Highway Commission takes a deed to land or acquires title by eminent domain, then the same holding would apply if any other agency of the sovereign should do likewise. The Game and Fish Commission could

[2] The doctrine of *de minimus* comes from the Latin maxim, *de minimus non curat lex,* and is translated, "the law does not take notice of little things." See annotation in 44 A.L.R. 168.

[3] For the benefit of anyone interested in further study of the questions in this case, attention is called to the following: *Bacon* v. *Road Imp. Dist.,* 157 Ark. 309, 248 S. W. 267; *Drainage Dist.* v. *Exchange Trust Co.,* 175 Ark. 934, 2 S. W. 2d 32, 278 U.S. 421 and page 579, 73 L. Ed. 436 and page 517; *Ridgeway* v. *Lewis,* 203 Ark. 1063, 160 S. W. 2d 50; Annotation in 105 A.L.R. 1169 entitled: "Constitutionality of statutes relieving property subject to assessment for improvements from all or part of such assessments"; Annotation in 90 A.L.R. 1137 entitled: "Public property as subject to special assessment for improvement"; and *Adaman Mutual Water Co.* v. *United States,* 278 F. 2d 842.

acquire title to thousands of acres for a hunting or fishing preserve; and all the lands so acquired would be exempt from the collection of all future benefits in all improvement districts. The districts would be ruined, and the bond holders would be left to whistle for their money.

For the reasons herein stated, I dissent from the Majority Opinion. The Chief Justice and Justice HOLT join in this dissent.

LYMAN LAMB CO. *v.* UNION BANK OF BENTON.

5-3188 374 S. W. 2d 820

Opinion delivered February 3, 1964.

Patten & Brown, John M. Loftin, Smith, Williams, Friday & Bowen, by *George E. Pike, Jr.* for appellant.

Fred E. Briner, for appellee.

PAUL WARD, Associate Justice. We are herein concerned with priority of liens on a house and lot owned by Kelly Welch. The four appellants furnished materials and appellee furnished the money to construct the house, and both parties claim a first lien. The trial court ruled in favor of appellee bank, and appellants now seek a reversal on appeal.

The facts are not in dispute, and only one issue of law is relied on by appellants.

It is appellants' contention that the mortgage executed by Welch to appellee is not a "construction mortgage" as is required by Ark. Stat. Ann. § 51-605 (1947) as it has been interpreted by this Court. We agree with that contention.

Facts. On May 9, 1962 Welch and wife executed a note to appellee (Union Bank of Benton) for the amount of $2,500, and at the same time they also executed a mortgage on "Lot 40, Block 4 in Beautiful Lakeview sub-division, Saline County, Arkansas" to secure said note. Following the above description in the mortgage appear these typewritten words:

"This loan shall be used for the purpose of construction of a dwelling house on the above described property and shall cover and secure additional advances to be made by mortgagee to mortgagors in the total amount not to exceed $14,500."

The mortgage, except for the above quoted language, was in regular form, and it was filed on May 11, 1962. The $2,500 was paid to Welch on the day the note was executed. Following that date, and on May 25, 1962, one of appellants furnished certain materials—placed on the lot—and construction began. Following the last mentioned date, and on June 1, 1962, Welch executed another note for $2,500 to appellee bank and received the money. Thereafter Welch executed four other notes to appellee, each time receiving the money—to a total of $14,500. After the first material was furnished at the time previously mentioned all the appellants furnished other materials and labor. The unpaid balance amounts to approximately $2,600.

In the decree of foreclosure the bank was given a first or prior lien to secure the amount due from Welch, and the land and improvements were ordered sold by a commissioner. At the sale the property was bought by appellee. Later the sale to appellee was confirmed, and the court ordered the purchase price credited on the judgment which appellee had received against Welch.

Only Issue. It is conceded by appellants that appellee's mortgage is a first lien to the extent of $2,500. This is a concession by appellants that the previously quoted language in the mortgage constitutes a compliance with the statute and our decisions so as to make it a "construction loan"—the mortgage having been filed before any materials were furnished. However, appellants contend, and we agree, that appellee's mortgage did not constitute a prior or first lien as to subsequent advances because the bank was not obligated to make them. This obligation was a prerequisite to appellee's lien, as was clearly announced in *Planters Lumber Co.* v. *Jack Collier East Co.,* 234 Ark. 1091, 1096, 356 S. W. 2d 631. There, in construing § 51-605, we said: "The mortgagee must be bound to advance the money for the construction . . .", citing *Ashdown Hardware* v. *Hughes,* 223 Ark. 541, 267 S. W. 2d 294.

We find no language in the mortgage here which unequivocally binds the bank to make the additional loans to Welch. Rather, the contrary is indicated by certain language in the mortgage. This language appears:

"The sale [mortgage] is on condition that whereas we are justly indebted unto said mortgagee in the sum of . . . $2,500 evidenced by *one* promissory note of even date. . . ." (Emphasis added.)

We think the language in this mortgage falls far short of the standard (to bind the mortgagee) set in the case of *American Bank & Trust Company* v. *First National Bank of Paris,* 184 Ark. 689, 43 S. W. 2d 248, where, among other things, the Court said:

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

The word "unequivocal", according to Webster, means "clear," "not doubtful", "not ambiguous". We are not

willing to say the language in this mortgage unequivocally obligated appellee to make the subsequent loans.

It is conceded by appellants that appellee must have had notice of appellants' lien previous to making subsequent advances (*Superior Lumber Co.* v. *National Bank of Commerce,* 176 Ark. 300, 2 S. W. 2d 1093), but it was stipulated here that appellee knew materials were furnished to Welch before the second advance was made. As we interpreted § 51-607 and § 51-613 [Ark. Stat. Ann. (1947)] in the *Planters Lumber Co.* case, appellants' liens dated back to the time when the first material was furnished and all of appellants' liens were on an equality.

Somewhat incidentally it seems, appellants, claiming they had no notice, ask that, on reversal, the sale be set aside. We see no merit in this request. Regardless of whether appellants had a first or second lien, a sale was necessary. Appellee says one of appellants was at the sale and even made a bid. In all events, appellants certainly knew of the trial court's decree and its contents, and it provided for a sale of the land. Also, the record fails to show any objection by appellants when the sale to appellee was confirmed.

Accordingly, the decree of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

HARRIS, C.J., and ROBINSON, J., dissent.

5-3140 374 S. W. 2d 827

Opinion delivered February 3, 1964.

Frierson, Walker & Snellgrove, for appellant.

W. B. Howard, Jack Segars, for appellee.

SAM ROBINSON, Associate Justice. The City of Jonesboro filed this suit asking for a declaratory judgment to the effect that the east boundary line of the private property in Block 52 of Knight's Second Addition to the City of Jonesboro is 46 feet west of the quarter section line between the northeast quarter and the northwest quarter of Section 19, Township 14 North, Range 4 East; and that the 46 feet between such alleged property line and the quarter section line has been dedicated as a public street. The Chancellor held that the evidence failed to show that the 46 feet in question had been dedicated as a street. We agree.

The original plat of Knight's First and Second Addition to Jonesboro was filed for record in 1891. It shows the private property line on the east side of Block 52 as being 16 feet west of the quarter section line, which is the east boundary line of the addition. Apparently the 16 foot strip was left as an alley. Main Street, which Block 52 adjoins on the west, has a width of 60 feet as shown by the plat, and all the other streets in the addition have a width of 60 feet, except a 30 foot strip was left for streets at the north and south boundaries of the addition, and a 16 foot strip was left as a right of way at the west boundary the same as a 16 foot strip was left at the east boundary.

Appellant bases its claim that there are 46 feet between the quarter section line, which is the east boundary line of the addition involved, and the private property line in Block 52, on a plat filed in 1902 of Culberhouse's Subdivision of various lots in Knight's Second Addition, including Block 52. Unless the plat of Culberhouse's Subdivision is sufficient to show a dedication of land on the east side of Block 52, designated as Church Street in the plat, in addition to the 16 feet shown by the 1891 plat, appellant cannot prevail. The Culberhouse plat is not sufficient to show a dedication of more land on the east side of Block 52 for use as a street than is shown in the 1891 plat of Knight's First and Second Addition.

Apparently there are several errors in the Culberhouse plat. It contains no scale, and yet it appears to be drawn to the scale of one inch to 200 feet. It designates Church Street as adjoining Block 52 on the east, but does not give the width of the street. The plat shows Block 52 as being divided into six lots measuring 200 feet east and west, but if the scale of one inch to 200 feet is used, the lots would measure 220 feet.

According to the original plat of Knight's Additions, Block 52 is 220 feet east and west leaving 16 feet between the end of the block and the section line. This shows a distance of 236 feet from the quarter section line on the east of the addition to the east line of Main Street. Although the Culberhouse plat shows the lots as measuring only 200 feet east and west, there is no showing whether the 20 feet apparently taken from the lots in Blocks 52 was added to Church Street or to Main Street. In fact, from the lines on the Culberhouse plat, the 20 feet appears to have been added to Main Street. There is no way of determining the location of the property shown on the Culberhouse plat except by reference to the original plat, and there is no testimony in the record tieing the Culberhouse plat in with the original plat of Knight's Addition in such manner that it can be said that a preponderance of the evidence shows that any land has been dedicated to what is now called Church

Street other than the dedication shown in the original plat of Knight's First and Second Addition.

Affirmed.

HOLLAND *v.* MALVERN SAND & GRAVEL CO.

5-3159 374 S. W. 2d 822

Opinion delivered February 3, 1964.

Mathis & Arnold, Huie & Huie, by *Jerry Thomasson,* for appellant.

Smith, Williams, Friday & Bowen, by *William H. Sutton,* for appellee.

JIM JOHNSON, Associate Justice. This is a workmen's compensation case. Appellant Vernon Holland has sought medical and compensation benefits for a lung disease which he contended was either caused or aggravated by breathing rock dust during the time that he worked for appellee Malvern Sand & Gravel Company.

Appellant worked for Malvern Sand & Gravel Company on two separate occasions. His first employment covered a period of nine months from April 21, 1957 through December 20, 1957. He was unemployed for six months and then returned to work for appellee on May 30, 1958 and worked until July 7, 1959, a period of thirteen months. After July 7, 1959, appellant worked for other employers for a period of eighteen months until he became disabled in December of 1960.

Two hearings were held before referees, at the conclusion of which appellant's claim was denied on the grounds that the evidence failed to show a causal connection between the claimant's lung disease and his employment with appellee, as to the origination of appellant's condition or as to aggravation of an existing condition. It was also found that appellant's claim was barred because of the statute of limitations and late notice to the employer. No new evidence was presented when the case was appealed to the full commission and the full commission sustained the findings and conclusions of the referee. The circuit court affirmed the commission's holding, whereupon an appeal was taken to this court.

Appellant contends that there is no substantial evidence to support the findings of the commission.

The general principles applicable to the workmen's compensation law, its remedial nature requiring liberal construction, the function of the commission and the scope of review by this court have been repeatedly announced by the numerous decisions of this court in this field. And, the effective administration of this law to accomplish the intended purposes depends to a large extent upon a consistent adherence to these principles. The most important rule, carrying out the humane purpose of the act, is that the commission must follow a liberal approach and in a situation where one inference would support an award and another would defeat it, the inference supporting the award must be adopted. See *Stout Construction Company* v. *Wells,* 214 Ark. 741, 217 S. W. 2d 841. There are other established rules which have been

held to be necessary for the proper administration of the act, including the rule that a claimant has the burden of proving a causal connection between his condition and his employment, and the rule that this court must give the testimony its strongest probative force in favor of the action of the full commission. *Auto Salvage Co.* v. *Rogers,* 232 Ark. 1013, 342 S. W. 2d 85. To recover a claimant must either prove that his employment aggravated a pre-existing condition.

There is no question about the seriousness of this claimant's physical ailment.

The proof showed that during appellant's first nine month period of employment with appellee, his duties required him to work near a large conveyor belt system which fed into a rock crusher. Conditions were such that the fine rock dust would frequently cover his body and clothing. Dust conditions varied with wind direction and the type rock that was being crushed. Wet rock taken from the river, as compared to dry rock, creates little dust and it was estimated that half of the rock being crushed during appellant's employment was wet.

During the second period of appellant's employment his basic duties were changed. He was assigned to a different foreman and his primary responsibility called for him to work as a clean-up man around the railroad yard. Although he was required on occasions to work on the conveyor where the rock dust was heavy, the great majority of his working time was spent in other areas.

When appellant became disabled in December of 1960, Dr. Clyde Tracy felt that a diagnosis of silicosis was the most consistent with the claimant's symptoms. However, appellant admits that as a matter of law, he has no claim for an occupational disease grounded on silicosis, due to his limited exposure. See Ark. Stat. Ann. § 81-1314 (b) (2) (Repl. 1960).

Dr. Grimsley Graham stated that, in his opinion, appellant suffered from an advanced pulmonary disease which was more consistent with Boeck's Sarcoid. While

Dr. Tracy agreed that appellant's symptoms were compatible with a diagnosis of sarcoidosis, neither doctor was able to say with any degree of certainty exactly what was wrong with the claimant except that he suffered from some kind of lung disease.

Dr. Tracy testfied that if appellant had sarcoidosis, it would not be possible to determine what caused the disease or when its onset began. It might develop over a period of years before manifesting itself but might develop in a matter of a few weeks. He stated that there was no doubt that appellant had a lung disease now and that breathing rock dust would aggravate an existing lung condition. However, this testimony was offered in answer to an abstract question directed to Dr. Tracy. When, on cross-examination, he was asked the direct question as to whether appellant had a lung disease at the time he was employed by appellee he stated, "I do not know." Appellant, testifying in his own behalf, stated that he had experienced a shortness of breath before leaving his job with appellee. Neither doctor related this symptom to appellant's present disability. Although two competent physicians apparently contributed all of the knowledge available to them through medical science, the questions as to what disease the claimant had, what caused it, when it began, and whether it existed during or was aggravated by his employment with appellee remain unanswered in the evidence. This being true, it necessarily follows that, based upon the firmly established principles applicable to the workmen's compensation law, and based upon our thorough review of all of the evidence in this record, we have no choice but to conclude that the commission's findings are supported by the record and must be sustained.

Having reached the above conclusion, we find it unnecessary to consider whether appellant's claim was barred by the statute of limitations.

Affirmed.

ROBINSON, J., dissents.

Opinion delivered February 3, 1964.

No brief filed for Appellant.

Floyd L. Rees, for appellee.

FRANK HOLT, Associate Justice. This is a garnishment proceeding. The appellee and cross-appellant, Cora S. Faught, served a writ of garnishment upon the appellant, Clyde Bohner, in an effort to collect a judgment of $2,112.50 which she had secured against her former husband. The garnishee filed an answer denying any indebtedness to her former husband. The answer was signed by his attorneys and was unverified. Thereupon the appellee and cross-appellant filed a verified denial by her attorney to the garnishee's answer. The relevant part of the denial reads:

"That she has reason to believe the answer of the Garnishee in the above cause is untrue or insufficient and denies the correctness of said answer. * * *

WHEREFORE, the plaintiff denies the answer of the Garnishee, and prays judgment against the Garnishee, Clyde Bohner, in the sum of $2,112.50."

The issue, thus being joined, was submitted to the court sitting as a jury. The court found, *inter alia,* "that the true financial relationship between the garnishee and the defendant was not made known" until the date of the trial; that the defendant, Louis Faught, had been an employee of the garnishee for ten days when the garnishee's answer was filed and continued as such until the date of the trial, or a total of 115 days at $5.33 per day. The court accordingly entered judgment for the cross-appellant against the garnishee-appellant in the sum of $612.95 together with costs.

The appellant has abandoned his appeal. The cross-appellant contends for reversal, on appeal, that the court erred in not rendering judgment against the appellant-garnishee for $2,112.50 because the garnishee's answer to cross-appellant's interrogations was not full, direct and truthful and, further, was not signed under oath by the garnishee himself but by the unverified signatures of his attorneys.

The cross-appellant contends that the garnishee did not file an answer as required by Ark. Stat. Ann. § 31-506 (Repl. 1962). This statute reads:

"Answers to interrogatories.—Such garnishee shall on the return day named in such writ exhibit and file, under his oath, full, direct and true answers to all such allegations and interrogatories as may have been exhibited against him by the plaintiff."

It is undisputed that the garnishee's answer was not signed by him under oath and, also, that the signatures of his attorneys were unverified.

Thus, it is the position of the cross-appellant that the failure to strictly comply with Ark. Stat. Ann. § 31-506 is the same as if the garnishee had filed nothing and, therefore, pursuant to Ark. Stat. Ann. § 31-512 (Repl. 1962)[1] the court should have entered judgment

[1] "Refusal of garnishee to answer — Effect. — If any garnishee, after having been served with a writ of garnishment ten [10] days before the return day thereof, shall neglect or refuse to answer the interrogatories exhibited against him on or before the return day of such writ, the court or justice before whom such matter is pending shall enter judgment against such garnishee for the full amount specified in the plainitff's judgment against the original defendant, together with costs."

against the garnishee for $2,112.50 as sought in the writ of garnishment. We do not agree. Ark. Stat. Ann. § 31-508 (Repl. 1962) reads:

"Insufficiency of answer—Trial.—If the garnishee shall file his answer to the interrogatories exhibited, and the plaintiff shall deem such *answers untrue or insufficient,* he may deny such answer, and cause his denial to be entered on the record; and the court or justice, if neither party require a jury, shall proceed to try the facts *put in issue* by the answer of the garnishee and the denial of the plaintiff." [Emphasis supplied]

The cross-appellant controverted the garnishee's unverified answer and proceeded to try the facts put in issue by the garnishee's answer and her denial of the answer. She did not question the lack of verification of the garnishee's answer during any proceeding before the Trial Court. Consequently, she is deemed to have waived any such defect and it cannot now be raised on this appeal In *Queen of Arkansas Insurance Co.,* v. *Taylor,* 100 Ark. 9, 138 S. W. 990, we said:

"It is too late for appellant to complain here that the complaint in the action was not signed by counsel nor verified, after having, without objection thereto on that account, filed an answer and gone to trial in the case. It should by proper motion have had the complaint stricken out or signed by counsel and verified."
See, also, *Mason* v. *Hatchett,* 219 Ark. 631, 243 S. W. 2d 733.

In the case at bar there was no objection made to any defect as to the signature or verification of the garnishee's answer. The cross-appellant filed a denial to the garnishee's answer and put the issues before the court as a trier of the facts. Therefore, she is bound by the court's findings and the judgment rendered thereon since such is based upon substantial evidence.

Affirmed.

Supplemental Opinion on rehearing delivered February 3, 1964.

[redacted]

CARLETON HARRIS, Chief Justice. In the petition for rehearing appellant insists that this case is controlled by *Huffstettler* v. *Lion Oil Company,* 208 F. 2d 549. There it was held that the operator of a bulk plant who distributed Lion products to retailers who had *contracted* with Lion to sell that company's products, was not an independent contractor, but a subcontractor.

The decision in the Lion case was based on *Hobbs Western Co. v. Craig,* 209 Ark. 630, 192 S. W. 2d 116, and *Brothers* v. *Dierks,* 217 Ark. 632, 232 S. W. 2d 646. In the *Hobbs Western* case it was shown that Hobbs Western was getting out crossties for the Rock Island Railroad under a *contract,* and its was therefore held that one Lea, who was in turn getting out ties for Hobbs Western, was a subcontractor, not an independent contractor.

In *Brothers* v. *Dierks* it was shown that Dierks was getting out timber under a *contract* with the Federal Government, and therefore, the one that Dierks employed to remove the timber from the government land was a sub-contractor and not an independent contractor.

In the case at bar it is not shown that Dierks had any contract with a third person in connection with the timber, and therefore, it cannot be said that the one who is getting out the timber for Dierks is a subcontractor.

Petition for re-hearing is denied.

Original opinion delivered December 16, 1963, p. 376.

5-3184 375 S. W. 2d 222

Opinion delivered February 10, 1964.

Shaver, Tackett & Jones, for appellant.

Keith, Clegg & Eckert, for appellee.

CARLETON HARRIS, Chief Justice. This case relates to an employment practice that has become widespread in recent times, and which is sometimes referred to as "moon-lighting." Appellant, Elmer E. Ross, a resident of Little River County, has been employed regularly by Day & Zimmermann, Inc., Loan Star Ordnance Division, Texarkana, Texas, as an equipment mechanic, since November 15, 1951. In his employment, Ross worked eight hours per day. During the last eight years, his work day started at 7:00 o'clock A.M., and concluded at 3:30 o'clock P.M. About six years ago, he became a part-time night policeman for the City of Ashdown. Ross acted as a

relief or substitute policeman for the regular employee, Chester Pruitt. For four of the last six years, he has served in such capacity for the City of Ashdown two nights each week.

On August 4, 1962, Ross, while working as a night policeman for the city, stopped an automobile, in which five youths from Fort Smith were riding. The automobile was stopped because the driver had run a stop sign. During the investigation, appellant was shot by one of the occupants of the car, requiring medical and hospital expenditures, for which appellant seeks to recover from the appellee company. The City of Ashdown carried no Workmen's Compensation coverage.

At the time Ross was injured, there were in full force and effect, group accident, health, hospital, and life insurance policies issued by the appellee, the Equitable Life Assurance Society of the United States, in favor of Day and Zimmermann, Inc., Loan Star Ordnance Division, affording non-occupational accidental bodily injury, or non-occupational sickness insurance benefits to the employees of Day and Zimmermann. The insurance company refused to make any payment to Ross, contending that his injuries arose out of his employment with the City of Ashdown; that, therefore, he had suffered an occupational accident, which precluded Ross from receiving any benefits under said policies. Appellant instituted suit against the company, seeking judgment in the amount of $791.39, together with statutory penalty and reasonable attorney's fees. On hearing, the court, sitting as a jury, found that Ross' injury arose out of and in the course of his employment with the City of Ashdown, and was not a non-occupational accident. From the judgment entered, denying recovery, appellant brings this appeal. Only one point is relied upon for reversal, *viz,*

"The trial court erred in ruling that the accidental bodily injury of appellant was 'occupational,' precluding recovery under the involved policies of insurance."

The section relative to hospital expense, *inter alia,* provides:

"No payment shall be made under the provision hereof entitled 'Hospital Confinement Benefits.' * * *

"(b) due to accidental bodily injuries arising out of and in the course of an employee's employment."

The accident and health sections also provide that no benefits are payable "for disability due to accidental bodily injuries arising out of and in the course of the employee's employment."

Appellant contends that the "employment" referred to concerns solely the employee's employment with Day and Zimmermann, Inc., and the accident and health insurance coverage is due to be paid when the employee is injured at any time, except when injured on his job with Day and Zimmermann. Appellant states:

"Insurance benefits are afforded the employees of Day and Zimmermann, Inc., for non-occupational bodily injuries preventing the employee from performing any and all duties pertaining to his employment, precluding benefits due to disability arising out of and in the course of the employee's employment. The employment, to which the policy refers, can only mean the employment of the named employee with the named employer, Day and Zimmermann, Inc."

On the other hand, appellee asserts that the policies were intended to cover accidents or sickness arising from non-occupational sources, and that Ross, though not injured because of his employment with Day and Zimmermann, was injured by virtue of his employment with the City of Ashdown, and consequently, since such injury occurred during a time when he was carrying out the duties of employment, the policies do not afford coverage. That, then, is the question—what is meant by the phrase, "due to accidental bodily injuries arising out of and in the course of an employee's employment?" Does this refer to *any* employment engaged in by an insured, or does it only refer to the employee's duties with

the company which made the group insurance plan available for the benefit of its employees, *viz,* Day and Zimmermann?

We are of the opinion that the phrase has reference to the employment with Day and Zimmermann, for the wording of the policies strongly supports that interpretation. Day and Zimmermann, Inc., are mentioned as "the employer," and this company is given the right to terminate the policies on any premium due date, or, subject to appellee's approval, to modify, amend or change the provisions, terms and conditions of the accident, health, or hospital insurance. The life insurance coverage gives the employee the privilege of changing the beneficiary from time to time by filing a written request with the employer (Day and Zimmermann), but the change of beneficiary is ineffective until Day and Zimmermann enter the change upon the insurance records.

An "Information Manual," explaining the insurance plan, was prepared by Day and Zimmermann for distribution to the employees. This manual commences, "To our employees: as evidence of our interest in the welfare of you and your family, we have made available for your benefit a Contributory Group Insurance Plan, which consists of the following: * * *"

The various benefits to employees of the company are then explained in detail. At Page 14 of the manual, it is pointed out that "accidents" are not covered if intentionally self-inflicted, sustained while performing military service in time of war or riot, sustained while performing police duty as a member of any military or naval organization, or sustained outside of the United States or Canada. Certainly in setting out these exceptions to coverage under the policy, it would have been quite easy to have likewise provided that coverage was not afforded if bodily injuries were sustained while working at *any* employment, for *any* employer.

No helpful cases have been cited on the particular point involved, and we have found none dealing with the exact situation. Perhaps the case which comes closest

to the instant litigation is *Federal Life Insurance Company* v. *Hall,* 11 P. 2d 215, which was decided by the Supreme Court of Colorado in 1932. There, Hall's occupation was not mentioned in the policy, and no language used therein related to any given occupation. As here, the insurance did not cover death or loss while performing occupational duties. Hall was a rancher, had a herd of milch cows, sold cream, and butchered and sold his calves for veal. He raised chickens, and marketed from 350 to 500 turkeys per year. When not so occupied, he took such work as he could get. This included employment on the public highways, and acting as a salesman. For about fourteen months before his accident occurred, he had occasionally done rough carpenter work, actually acting as what might be termed a "carpenter's helper." He was killed while assisting in the erection of a shed for a neighbor, when the shed was hit by a tornado. In answer to the question contained in the proof of death, the occupation of the deceased, at the time of the injury, was listed as "carpenter and ranchman." As here, the company refused to pay because it contended that Hall was performing occupational duties at the time of his death. The Supreme Court disagreed, stating,

"If the words, 'occupational duties' were to be applied to every casual and temporary employment in which Hall engaged, this policy would be thus construed into a mere instrument for the furthering of a confidence game. The phrase was doubtless intended to apply to the insured's ordinary and usual occupation. There is nothing in this record to justify the conclusion that the carpenter trade was such. Hall's work in that line was apparently nothing more than the roughest and most ordinary sawing and nailing of boards. It might have been performed, and is every day performed, by unskilled farm boys. It has been repeatedly held that the term 'occupation,' as used in accident policies and applications therefor, refers to the insured's ordinary and usual business, neither to recreational activities nor to incidental nor temporary employment. * * *

"Hence 'occupational duties' refers to duties incident to insured's ordinary and usual occupation, not to duties incident to an unusual and temporary employment."

It is true that Hall had engaged in carpentry work for only fourteen months, while Ross had been holding the night policeman job (though only two nights per week) for several years, but that fact is hardly sufficient to distinguish the cases. Another difference is that Hall purchased the insurance himself, while Ross is contending for benefits under policies purchased by his regular employer—but this circumstance would seem to make Ross' position even stronger, since the policies definitely define his employer. The main similarity in the cases, and, we think, the most significant fact, is that neither Hall nor Ross was engaged in his "usual occupation" at the time of being injured. Hall's usual occupation was rancher, and Ross' usual occupation was equipment mechanic. For the reasons herein cited we are definitely of the view that the employment referred to by the policies can only have reference to the employment of Ross with Day and Zimmermann, Inc.

Even if it can be said that the policies are susceptible to the interpretation contended for by appellee, it must also be stated that they are certainly susceptible to the construction we have given. In such event, appellee still cannot prevail. As we stated in *National Life and Accident Insurance Co.* v. *Horace,* 206 Ark. 430, 175 S. W. 2d 984:

" 'If it be admitted that the policy is susceptible to this construction, it must also be admitted that this is not the only construction to which it is reasonably susceptible. The policy is ambiguous, to say the least of it, and the rule of construction followed by this court in many cases is to resolve ambiguous and doubtful language in favor of the insured, and against the insurer.' "

Likewise, in *Firemen's Insurance Company of Newark, N. J.* v. *Motley,* 222 Ark. 968, 264 S. W. 2d 418:

" 'Under well-settled principles, where the provisions of a policy are susceptible of two equally reasonable constructions, one favorable to the insurer and the other to the insured, the latter will be adopted. This is because the language is chosen by the insurer with the aid of experts employed for the purpose of writing the policy, and the insured has no voice in the matter. Therefore, where either of the two constructions may be adopted, it is fair that that which will sustain the claim and cover the loss will be chosen.' "

The judgment is reversed, and the cause is remanded with directions to render judgment in favor of appellant,[1] together with costs, statutory penalty, and a reasonable attorney's fee.

[1] It was stipulated at the trial that if Ross was entitled to anything at all under the policies, he was entitled to the amount sought in his complaint.

HOLLAND *v.* STATE.

5100 375 S. W. 2d 234

Opinion delivered February 10, 1964.

Carl Stewart, Mark Woolsey, John Wm. Murphy and *Hubert L. Burch,* for appellant.

Bruce Bennett, Attorney General, by *Beryl Anthony, Jr.,* Asst. Atty. Gen., for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant Ray Holland was charged, tried, and convicted of the offense of carnal abuse (Ark. Stat. Ann. § 41-3406 [1947]), and brings this appeal. The motion for new trial contains fourteen assignments, which we group and discuss in suitable topics.

I. *Grouping Of Counts.* On March 4, 1963, there were two informations filed against the appellant, both charging him with carnal abuse of Linda Kay Holland, a female under the age of 16 years. Information No. 1 contained two counts: one count charged that the offense of carnal abuse was committed by the defendant against the named prosecutrix "on or about the 15th day of November, A.D. 1962"; and the other count charged that the crime of carnal abuse was committed by the defendant against the named prosecutrix "on or about the 18th day of November, 1962." Information No. 2 contained one count and charged that the offense of carnal abuse was committed by the defendant against the named prosecutrix "on or about December 24, 1962." On May 29, 1963, the defendant was brought to trial, and the record reflects, ". . . both sides having agreed that the three counts could be consolidated for trial in one proceeding." At the beginning of the trial the defendant moved that the three acts charged be considered as one offense, ". . . since they all charge the commission of the same felony, to-wit, carnal abuse against the same person, to-wit, Linda Kay Holland, and the time element being from the 15th of November, 1962, through December 24, 1962. Therefore, there could only be one trial and one conviction upon them." The Trial Court overruled the said motion and held that each count charged a separate offense. When the prosecuting witness was asked the dates of the acts she could not give the calendar dates, and then the defendant's counsel again insisted that there was only one offense.

We find no injury done to the appellant in the Court's ruling on this point. The fact that a 14-year-old girl could not remember the calendar dates when she

was abused does not destroy the fact that she was abused on three separate occasions. She fixed the dates by reference to other matters and clearly testified that there were three separate offenses. The jury found the defendant guilty on each count and fixed his punishment at eight years imprisonment on each count; and the Court directed that the sentences should run concurrently; so the defendant will only have to serve the length of one sentence.

II. *Sufficiency Of The Evidence.* The prosecuting witness was 14 years of age at the time of the trial. Before she was permitted to testify the Court examined her to see if she understood the nature and effect of an oath, and ruled that she was a competent witness. We find no error committed by the Court in such ruling. *Crosby* v. *State,* 93 Ark. 156, 124 S. W. 781, 137 A.S.R. 80; *DeVoe* v. *State,* 193 Ark. 3, 97 S. W. 2d 75; *Reynolds* v. *State,* 220 Ark. 188, 246 S. W. 2d 724.

The prosecuting witness testified that on the three occasions the defendant came to her room at night while she was in bed, reached his hand under the cover, rubbed her breasts and private parts, and inserted his finger in her vagina; and on one such occasion he attempted to use his male organ. A doctor examined the little girl and testified that her hymen was ruptured, and that the insertion of a finger into her vagina could have caused the rupture. We have repeatedly held that in carnal abuse cases the prosecuting witness is not an accomplice and her testimony does not have to be corroborated; and her testimony, standing alone, is sufficient to support a conviction. See *Hawkins* v. *State,* 223 Ark. 519, 267 S. W. 2d 1, and cases therein cited.

If the defendant did what the little girl testified that he did, then he was guilty of carnal abuse. Such was directly held in *Watt* v. *State,* 222 Ark. 483, 261 S. W. 2d 544. The testimony of the little girl was stoutly disputed by appellant, and he was corroborated on many points by other witnesses; but it was for the jury to decide the factual issues. Our duty is to ascertain whether there

was sufficient substantial evidence to support the verdict; and the testimony of the little girl constituted such evidence.

III. *Errors Claimed To Have Been Committed By The Trial Court.* In his brief the appellant quotes, in extenso, some of the proceedings in the Trial Court, and claims error; but the appellant's motion for new trial is not sufficiently definite to present such matters to us. Here are some of the assignments in the motion for new trial:

"6. Because of improper examination of the prosecuting witness.

"9. Because the Court erred in permitting hearsay evidence.

"12. Because of improper statements made by the Prosecuting Attorney.

"13. Because the record herein reflects and shows that the defendant did not receive a fair and impartial trial as provided by the Constitution of the United States and by the Constitution of the State of Arkansas."

These assignments—and they are typical of some others in the motion for new trial—are not sufficiently definite to present any matter to us. *Payne* v. *State,* 224 Ark. 309, 272 S. W. 2d 829. In *Lomax* v. *State,* 165 Ark. 386, 264 S. W. 823, in discussing the indefinite nature of the assignments in the motion for new trial, we said:

"This court has frequently held that a motion for a new trial on the ground that the court erred in admitting evidence on the part of the defendant, without naming the witnesses or pointing out the evidence, is too general, and does not present any question for review on appeal. *Edmonds* v. *State,* 34 Ark. 720; *Western Union Tel. Co.* v. *Duke,* 108 Ark. 8, and cases cited; and *Black* v. *Hogsett,* 145 Ark. 178."

In *Armstrong* v. *State,* 171 Ark. 1136, 287 S. W. 590, we said of indefinite motions for new trial:

"These assignments are too general to properly raise the question as to the admissibility of the testimony pointed out in the exceptions made during the progress of the trial. *Lomax* v. *State,* 165 Ark. 386. It is not essential that the assignments in a motion for new trial be specific as to the grounds upon which the exceptions were based, but they must be sufficient to identify the particular witness and the testimony to which the assignment is directed. An assignment as general in its nature as those set forth in the motion for a new trial now before us does not apprise the trial court of the errors sought to be reviewed, and gives the court no opportunity to correct its errors, hence there can be no review here."

IV. *Other Assignments.* We have carefully examined all the other assignments contained in the motion for new trial and we find no reversible error committed by the Trial Court and assigned in the motion for new trial.

Affirmed.

GRIFFIN *v.* SOLOMON, EXECUTRIX.

5-3199 375 S. W. 2d 232

Opinion delivered February 10, 1964.

A. M. Coates, for appellant.

David Solomon, for appellee.

George Rose Smith, J. This suit was brought by B. M. Solomon (now deceased) and Michael Gradus to foreclose a real estate mortgage executed by Arthur Cotton, Jr. By intervention the four appellants, Arthur's brothers and sisters, contended that they were tenants in common with him, that they had not joined in the mortgage, and that it was not a lien against their undivided four-fifths interest. The chancellor held that the appellants were bound by the mortgage. On appeal, however, we reversed that decree, finding that the mortgage lien was effective only as to Arthur's one-fifth interest. *Griffin* v. *Solomon,* 235 Ark. 909, 362 S. W. 2d 707.

In taking their first appeal the appellants did not supersede the decree. The foreclosure sale was accordingly held while that appeal was pending. David Solomon, Jr., the attorney for the mortgagees, bid $4,300 for the land and directed that the commissioner's deed be made to J. A. Hale, which was done. After the reversal of the original decree the appellants asked that the sale be set aside and that the land be resold. They contend that the purported sale to Hale was merely a colorable transaction for the real benefit of the mortgagees and, further, that the land is actually worth about $8,000. This appeal is from a decree refusing to disturb the sale.

When property is sold under a decree that is erroneous but not void, the sale will be set aside upon a reversal of the decree if the purchaser was a party to the suit, and this is true even though the decree was not superseded. *Fishback* v. *Weaver,* 34 Ark. 569. On the other hand, the reversal does not affect the sale if the purchaser was a stranger to the case, paying a valuable consideration. *Ibid.; Moore* v. *Woodall,* 40 Ark. 42. The only importance of a supersedeas is that it enables the losing party to prevent the land from being sold to a stranger pending the appeal. *Orem* v. *Moore,* 224 Ark. 146, 272 S. W. 2d 60.

We are of the opinion that the sale to J. A. Hale was a colorable transaction, designed to keep the land in the Solomon family. B. M. Solomon testified that he

did not anticipate that Hale would reconvey the land to him and Gradus, the mortgagees. But B. M. Solomon admitted that he was in the position of preferring to receive $860 under the first sale rather than receive $1,600 as the true value of Arthur Cotton's one-fifth interest. His only explanation for his position was that "you might say I'm hard-headed."

Hale is an employee of Solomon & Goldsmith Cotton Company. He works under the direction and supervision of David Solomon, Jr., the attorney, who is the chief executive officer of the corporation. Solomon, who made the bid in Hale's name, admitted with candor that he himself actually furnished the money for the purchase and that it was an open unsecured loan, not even evidenced by a note. Thus it does not appear that Hale, who did not see fit to testify, is in a position to insist that he paid value for the property.

In a well-reasoned opinion the Supreme Court of Florida held that when an attorney in the case purchases at the sale he must be treated in the same way as a party, so that a reversal avoids the sale. *Johnson* v. *McKinnon,* 54 Fla. 221, 45 So. 23, 127 Am. S. R. 135, 13 L.R.A. (n.s.) 874, 14 Ann. Cas. 180. Hence if David Solomon, Jr., was actually the purchaser, as the proof suggests, the land should be resold. This course of action is not unjust.

In fairness we should add that Mr. Solomon, as counsel for the appellees, does not argue that the sale to Hale was genuine. He first contends that the chancellor could not set the sale aside after the lapse of the term. This argument is without merit, because the effectiveness of our mandate upon reversal is not dependent upon a continuation of the trial court's term. His second contention, that the appellants lost their rights by failing to supersede the decree, has already been answered.

Reversed.

5-3205 375 S. W. 2d 811

Opinion delivered February 10, 1964.
[Rehearing denied March 23, 1964.]

[redacted]

N. L. Schoenfeld, for appellant.

Arnold & Hamilton, for appellee.

PAUL WARD, Associate Justice. This litigation stems from a local option election in Ouachita County relating to the manufacture and sale of intoxicating beverages. There is no dispute as to the pertinent facts and the record contains no testimony.

Facts. The election, held on November 6, 1962, resulted in 4,604 votes against and 4,330 in favor of the manufacture and sale of intoxicating beverages. A recount showed different figures but did show 184 more votes against than in favor of the manufacture and sale of alcoholic beverages. In due time appellants (represented by their attorney) filed in the Ouachita County Court a petition contesting the result of said election. Also, in due time, appellees filed a response to which were attached interrogatories directed to appellants regarding certain allegations contained in their petition.

Trial was set for January 7, 1963, but, since appellants' attorney was a member of the legislature, the trial was reset [in accord with Ark. Stat. Ann. § 27-1401

(Repl. 1962)] for April 15, 1963. On April 14, 1963 appellants filed in the county court a motion for continuance on the ground that their attorney was in the hospital and would be unable to attend the trial.

On the 15th, in the absence of their attorney, appellants presented their motion for a continuance which motion appellees resisted and requested a trial on the merits. When appellants failed to proceed further, the County Judge, on April 15, 1963, (a) denied the motion for a continuance; (b) dismissed appellants' contest petition; and (c) directed the court clerk to make and enter his certificate certifying the result of the election in favor of appellees.

On May 16, 1963 appellants filed in circuit court a petition for a writ of certiorari alleging numerous reasons why that court should direct the county court to hear the contest petition on its merits. Attached to the petition for certiorari were copies of the pleadings and the order filed in the county court.

To appellants' petition for a writ of certiorari appellees filed a demurrer based on the assertions (among others) (a) that the petition contains no allegation of want of jurisdiction in the county court, and (b) that certiorari cannot be used as a substitute for appeal. The circuit court, after oral arguments by both sides, sustained the demurrer and dismissed appellants' petition. This appeal is from that order.

In our judgment the order of the trial court must be affirmed. Appellants' proper remedy was by appeal from the order of the county court. Certiorari will not take the place of an appeal [unless the right of appeal has been lost by no fault of the aggrieved party—which is not the case here] and lies only when the inferior court acted without jurisdiction or beyond its jurisdiction. This rule of procedure was clearly announced in the early case of *Merchants & Planters Bank* v. *Fitzgerald,* 61 Ark. 605, 33 S. W. 1064. Since the date of the above decision (1896) the rule has been affirmed by this Court

no less than fourteen times including the recent case of *Hyder* v. *Newcomb,* 234 Ark. 486, 352 S. W. 2d 826.

In the case under consideration there can be no doubt that the county court had jurisdiction to hear the contest. *Ward* v. *Boone,* 231 Ark. 655, 331 S. W. 2d 875. In any event appellants are in no position to contend otherwise because they chose that forum. It follows therefore that the county court also had jurisdiction to deny their motion for continuance. Whether or not the county court abused its discretion could not be re-examined by the circuit court on certiorari. *Hardin* v. *Norsworthy,* 204 Ark. 943, 165 S. W. 2d 609.

In view of what we have said above, we cannot escape the conclusion that the circuit court acted properly, and its judgment is affirmed.

Affirmed.

CITY OF LITTLE ROCK *v.* ANDRES.

5-3187 375 S. W. 2d 370

Opinion delivered February 10, 1964.

[Rehearing denied March 9, 1964.]

Joseph C. Kemp, by *John B. Plegge* and *Perry V. Whitmore,* for appellant.

Rose, Meek, House, Barron, Nash & Williamson, for appellee.

SAM ROBINSON, Associate Justice. This is a zoning case. The action was filed by appellees, Frederick U. Andres and his wife, Grace, to enjoin the Board of Directors of the City of Little Rock, its employees, commissioners and agencies, from preventing the plaintiffs from using their property at 2115 Broadway, Little Rock, for purposes designated as "F Commercial" by the Little Rock zoning ordinances. The Chancellor granted the relief prayed and the City of Little Rock has appealed.

The property involved is the home of appellees and is located in an area designated in the zoning ordinances of Little Rock as "C-2 Family District." Appellees contend that Broadway in general, and the block in which their property is located in particular, is no longer suitable as a family district. They, therefore, applied to the Little Rock Planning Commission to have the zoning on their property changed to commercial; the Planning Commission denied the request; appellees appealed to the Board of Directors of Little Rock and again the request was denied.

Appellees then filed this suit in the Pulaski Chancery Court, alleging that the refusal of the Little Rock authorities to rezone the property was arbitrary, and placed unreasonable limits on the use of the property; that a "C-2 Family District" bears no definite relation to the health, safety and general welfare of the inhabitants of the area; that the limitation placed on the use of the property deprives the plaintiffs of their property without due process of law in violation of the 14th Amendment to the Constitution of the United States and Article 2, Sec. 8 of the Constitution of Arkansas, and amounts to the taking of private property for public use without compensation in violation of Article 2, Sec. 2 of the Constitution of Arkansas.

The chancellor, in holding that the petition for rezoning should be granted, found as a fact that the action of the Planning Commission and the Board of Directors of Little Rock in refusing to change the zoning on the

property was arbitrary. If the authorities acted arbitrarily in denying the change in zoning, such action is a sufficient reason to grant the relief prayed. *City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883; *City of Little Rock* v. *Bentley,* 204 Ark. 727, 165 S. W. 2d 890.

If the chancellor's finding to the effect that the authorities were arbitrary in not changing the zoning is supported by a preponderance of the evidence, the decree must be affirmed. *City of Little Rock* v. *Garner,* 235 Ark. 362, 360 S. W. 2d 116; *City of Little Rock* v. *Henson,* 220 Ark. 663; 249 S. W. 2d 118; *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446.

Zoning ordinances are valid only by reason of the police power. Yokley Zoning Law and Practice, Vol. 1, p. 1; *City of Little Rock* v. *Sun Building & Developing Co.,* 199 Ark. 333, 134 S. W. 2d 582. Such ordinances are in derogation of common law and operate to deprive an owner of property of a use thereof which would otherwise be lawful, and should be strictly construed in favor of the property owner. *City of Little Rock* v. *Williams,* 206 Ark. 861, 177 S. W. 2d 924. On the theory and purposes of zoning the courts have said: "The proper purposes of zoning have been said to conserve the value of property and encourage the most appropriate use of land." *Griggs* v. *City of Paterson,* 39 A. 2d 231. One of the main purposes of zoning is the stabilization of property values in a neighborhood. *Libby* v. *Board of Zoning Appeals,* 118 A. 2d 894.

Prior to the erection of the Broadway Bridge across the Arkansas River about 40 years ago, there was no through traffic on Broadway; it was just another residential street. Many of the finest homes in the city were located on Broadway. After the building of the Broadway Bridge and the great development of automobile and truck traffic, Broadway became one of the principal thoroughfares of the nation. It became a link in U. S. Highways 65, 67, 70, 167 and State Highway 5. A large portion of automobile traffic going from the eastern part of the United States to the west, and vice versa, neces-

sarily used Broadway, especially so in the winter months. The traffic count reached 28,000 vehicles per day. (Since the construction of the freeway around Little Rock it is estimated that the count will drop to about 11,000 per day.)

Twenty-five blocks south of the Arkansas River Broadway intersects Roosevelt Road. All of the through highways of which Broadway is a part go either to the east or west on Roosevelt.

Years ago all of Broadway south of the river to about 13th Street became commercial property, and in all probability the commercial district would have continued south except for the case of *City of Little Rock* v. *Connerly,* 222 Ark. 196, 258 S. W. 2d 881. It now appears that we made a mistake in reversing the decree of the chancery court in granting Connerly the right to put a commercial establishment at 14th and Broadway. In that case, however, twenty property owners joined in an intervention protesting the change in zoning. In the case at bar no property owners have intervened.

For many years there has been a service station at the southeast corner of 14th and Broadway. A large shopping center has been established on the property between 24th and 25th Streets on the east side of Broadway, and there is a large service station on the northwest corner of 25th and Broadway.

As Broadway changed from a residential street to an important commercial thoroughfare, property adjoining the street became progressively undesirable as a family district. Those who built the fine homes originally have moved from the street to other sections of the city. Some of the old homes have become rooming houses; some of the owners of property on the street testified that they cannot get satisfactory tenants who will pay the rent; other houses are vacant and becoming uninhabitable; some have been condemned.

All of the property is worth very little as residential property compared with other property in other sections

of the city. It appears that a large part of the property has been offered for sale, but only a few buyers have been found, and those who have bought a residence on the street in recent years have done so because a very fine house could be bought at a very cheap price because it was located on Broadway. Mr. W. T. Shelton, one of only three people living on the street who gave testimony in opposition to rezoning, testified that he bought a house on Broadway in 1960 for $18,500. He was asked to describe it and he stated: "Brick, two story, palatial residence, very old. We have 1, 2, 3, 4, 5 rooms downstairs, 5 bedrooms and 2 baths upstairs, ornate. It is a mansion, built about 1910."

In 1959, Mr. Claibourne Patty, a lawyer, bought a very fine house at 2020 Broadway which had been kept in excellent repair. The former owner had moved to another section of the city, and most of his friends had likewise moved. Mr. Patty stated that the house was built in 1905 and was expensively constructed; that for a relatively modest price he bought a large and ornate house that is a better house than he could afford to buy in another section of the city.

It was shown by numerous witnesses, including Mr. Patty, that south Broadway is not a suitable street to live on if one is rearing children. The street is dangerous due to the traffic; there are no playgrounds; and the only white school serving that end of town has been changed to a school for colored.

Appellees have offered their property at 2115 Broadway, which they seek to rezone, for sale at $15,000 and cannot find a buyer. Mr. A. C. Read, the third person living on Broadway who testified against rezoning, is in the real estate business. He testified that appellees' lot would be worth $15,000 or $17,000 if rezoned, and that appellees were going to tear down a house located thereon that would cost $35,000 to replace. In other words, the appellees can not get $15,000 for the lot with the $35,000 house on it, but can get $15,000 or $17,000 for the lot without the house if it is zoned commercial.

No one can afford to build a house on a lot on Broadway because after construction the property would not be worth what it would cost to build a nice house. If a lot becomes vacant because the house is condemned or is destroyed by fire, it has no value unless the property can be rezoned as commercial. An apartment house could not be built and rented successfully because no parking is permitted on Broadway and one lot would not be large enough to take care of the required parking. According to the undisputed evidence property on Broadway would have a reasonable and satisfactory value as commercial property.

In the case of *Fentress* v. *Sicard,* 181 Ark. 173, 25 S. W. 2d 18, this court said that change is the order of the times and that progress and development should not be hindered or obstructed; that the transition from a residential district into a business district is recognized as appropriate where the value of surrounding property, as business property, would not detract from its value for residential purposes for which it has long since fallen into disuse so far as new and further development is concerned.

In all the circumstances we cannot say the finding of the chancellor that the city authorities acted arbitrarily in refusing to rezone appellees' property is contrary to the preponderance of the evidence.

Affirmed.

McFaddin and Ward, JJ., dissent.

ARK. STATE HIGHWAY COMM. *v.* STANLEY.

5-3146 375 S. W. 2d 229

Opinion delivered February 10, 1964.

[redacted]

Dowell Anders, William H. Donham, for appellant.

Milham & Cummins, Ben M. McCray and *Kenneth Coffelt,* for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from a re-trial of eminent domain proceedings for highway purposes. On June 15, 1960, appellant Arkansas State Highway Commission filed a complaint and declaration of taking in Saline Circuit Court, condemning 18.03 acres of land belonging to appellees Marshall and Dorothy Stanley, along the right-of-way of Interstate Highway 30. Appellant Highway Commission deposited $5,000.00 in the registry of the court as estimated just compensation for the property, which was later withdrawn by appellees. Appellees filed an answer praying judgment for the sum of $14,803,703.80. At trial, the jury returned a verdict of $150,000.00, which was reversed on appeal on grounds that "the verdict was not supported by substantial competent evidence," and remanded for a new trial.

The cause was again tried before a jury on February 21, 1963, and the jury returned a verdict for $35,000.00. From the judgment on the verdict, the Highway Commission has prosecuted this appeal, contending that the trial court erred in refusing to exclude the value opinions of two of appellees' witnesses. Appellees have cross-appealed, urging that the trial court erred in refusing to grant appellees' request for a drawn and struck jury of 24 qualified jurors from which eighteen shall be drawn and struck. We shall consider this point first.

At the second trial, when the parties announced ready for trial, when appellees requested a drawn and struck jury the following discourse ensued:

Mr. McCray: "The claimant, Stanley, requests a drawn and struck jury and objects to the refusal of the court to grant such request by refusing to select 24 qualified jurors from which the 18 shall be drawn and struck.

The Court: "Your request for a drawn and struck jury is granted, but I am saying that you are not prejudiced by not calling more than 18 at this time because there are more than 24 jurors present in the court room at this time.

Mr. Coffelt: "We want 24 qualified jurors from which to select the 18.

The Court: "They are qualified. This panel of jurors has been qualified since last September. Proceed."

The statutes applicable to drawn and struck juries are Ark. Stat. Ann. § 39-229 and § 39-231 (Repl. 1962) which read as follows:

"Each party shall have three [3] peremptory challenges, which may be made orally—but if either party shall desire a panel, the court shall cause the names of twenty-four [24] competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of eighteen [18] shall be drawn and entered on a list in the order in which they are drawn, and numbered. Each party shall be furnished with a copy of said list, from which each may strike the names of three [3] jurors and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve [12] names remaining on said original list shall constitute the jury." [§ 39-229].

"Before the drawing of the list above mentioned, the court shall decide all challenges for cause which are

presented, and if there are not twenty-four [24] competent jurors, bystanders shall be summoned as hereinbefore provided, until the requisite number of competent jurors is obtained, from which said list shall be drawn. Where there are several persons on the same side, the challenge of one [1] shall be the challenge of all under this subdivision." [§ 39-231, amended in part by § 39-220 and § 39-220.1].

This court has had several occasions to consider these statutes since their original enactment as a part of the Civil Code of 1868. They were, however, first passed upon by the United States Supreme Court in 1895, in a case arising in the United States Court for the Indian Territory. (In 1890 Congress legislated that "certain general laws of the State of Arkansas which are not locally inapplicable or in conflict with this act or of any law of Congress . . . are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide", including the above statutes.) The U. S. trial court refused to allow a drawn and struck jury. Speaking for the Supreme Court in *Gulf, C. & S. F. Railway Co.* v. *Shane,* 157 U. S. 348, 15 S. Ct. 641, 39 L.Ed. 727, Justice White stated, after quoting the statutes above:

"The action of the court below was in violation of this statute. It refused to make up the list of eighteen, as requested, and confined the right of peremptory challenge to the twelve jurymen called to be sworn, on the ground that such was the custom or rule of practice of the court. Manifestly, the 'rule' or custom of the court could not override the mandatory terms of the statute. That to thus empanel a jury in violation of law, and in such a way as to deprive a party of his right to peremptory challenge, constitutes reversible error is clear."

In *Young* v. *Morrison,* 159 Ark. 270, 251 S. W. 869, after quoting from the *Shane* case, *supra,* this court said that, "We concur with the Supreme Court of the United States in this interpretation of our statute, . . ." (but

went on to hold that in that case there had been substantial compliance with the statute). *Republic Mining & Mfg. Co.* v. *Elrod,* 208 Ark. 150, 185 S. W. 2d 99, deals decisively with the point here under consideration in the following language:

"These provisions of the statutes are mandatory, the language used is plain and unambiguous and requires that all challenges for cause shall first be disposed of and then the names of twenty-four competent jurors written upon separate pieces of paper and placed in the box, from which eighteen names shall be drawn, and from the list of these eighteen names furnished the parties, they shall strike their peremptory challenges. The trial court erred in refusing to place names of twenty-four competent jurors in the box in accordance with the plain statutory mandate."

In the case at bar the error of the trial court is patent.

On direct appeal the Highway Commission contends that the trial court erred in refusing to exclude opinions of value given by appellee Stanley and one of his witnesses. It would be of no value to detail the testimony objected to, which is lengthy. Suffice it to say that there was not such comprehensive proof of a substantial nature so as to bring appellees' evidence within the purview of *City of Little Rock* v. *Moreland,* 231 Ark. 996, 334 S. W. 2d 229. Moreover, much of the testimony here adduced is contrary to the standards set out in the first *Stanley* case, *Ark. State Highway Comm.* v. *Stanley,* 234 Ark. 428, 353 S. W. 2d 173. Owing to the necessity of a re-trial for the error previously indicated, we take this occasion to reiterate those principal standards:

"Even the opinion of an expert in the field of land valuation is not substantial evidence if he fails to show a fair or reasonable basis for his conclusion."

. . . " 'As a general rule, the market value of a tract of land cannot be determined simply by estimating the amount of stone or other mineral that it contains and

then multiplying that estimate by a fixed price per unit.' ''

. . . ''The ultimate question for the jury is the market value of the land, the price that would be agreed upon by a willing buyer and a willing seller in a transaction at arm's length. The mechanical process of assigning a retail value to every yard of mineral within the earth does not carry the jury beyond the realm of guesswork. That narrow formula fails to take into account vital considerations such as the cost of excavating the material, the cost of processing it, overhead expenses, the market for the finished product, and so on. In the case at bar the jury had almost no information about these matters. . . . The appellees' proof left the jury without the facts needed for an answer to this question.''

For the trial court's error in refusing appellees a full drawn and struck jury, the case is reversed and the cause is remanded for a new trial.

ROBINSON, J., not participating.

GUYNN *v.* GUYNN.

5-3146 375 S. W. 2d 656

Opinion delivered February 10, 1964.
[Rehearing denied March 16, 1964.]

House, Holmes, Butler & Jewel, Paul K. Roberts, Philip E. Dixon, for appellant.

Tom Haley, for appellee.

FRANK HOLT, Associate Justice. This is a partition proceeding in which the Chancellor awarded appellee's attorney a fee, taxing it as part of the costs. On appeal appellants contend for reversal that this litigation is an adversary proceeding and, therefore, the court erred in assessing an attorney's fee as costs.

The appellant, George Guynn, Sr., the appellee, Beth Guynn, and Hugh Guynn upon the death of their father in 1947 were his sole heirs at law. Thus, as tenants in common, each owned an undivided one-third interest in the five-acre homestead. In August, 1961, Hugh and his wife conveyed their one-third interest to appellee. In September, 1961, appellee conveyed to appellant, George Guynn, Sr., an undivided one-sixth interest in these lands. In June, 1962, the appellant, George Guynn, Sr., was judicially declared incompetent and committed to the Arkansas State Hospital. On August 13, 1962, the appellee filed this action for partition of these lands making the appellants, George Guynn, Sr., and his wife, Mabel, defendants.

Appellee alleged in her petition that said lands were not susceptible of division and should be sold and the proceeds divided as the appellants' and appellees' respective interests appeared; that appellee's deed conveying a one-sixth interest in the lands to the appellant, her brother, George, Sr., was secured through undue influence and should be canceled. A Guardian Ad Litem was appointed to defend the interest of appellant, George Guynn, Sr., then a patient at the Arkansas State Hospital. Answers and amended answers were filed by the appellants denying that the lands were not susceptible of division and, also, denying the appellee's contention as to their respective interests.

Upon trial the appellee presented one witness to the effect that the lands were not susceptible of division and should be sold. The appellants presented no witness and their proof was limited to cross-examination of appellee's witness. The appellee and appellants then stipulated that each owned an undivided one-half interest. Thus, the only issue remaining before the court was whether the lands were susceptible of division. The Chancellor rendered his decree to the effect that appellants and appellee each owned a one-half undivided interest as stipulated and appointed commissioners to determine if the lands should be partitioned or sold. There were no objections by the appellants to this decree. The commissioners unanimously recommended in their report that the lands were not susceptible to an equitable division in kind and that the property should be sold. Thereupon the court entered an order granting the parties fifteen days from January 28, 1963 to file written objections to the report of the commissioners. On March 19, 1963 the court rendered its decree finding no objections had been filed to the commissioners' report; that the lands should be sold as recommended and that the matter of assessing attorneys' fees and court costs should be held in abeyance pending sale of the property.

The sale was duly perfected as required by statute. On May 15, 1963 the Chancellor rendered an order of distribution of the sale price of $6,100.00, dividing it equally between appellants and appellee after assessing the costs, including an allowance of $250.00 for attorney's fee to appellee's attorney, thus, making appellants responsible for $125.00 of this fee. The appellants filed no objections to any of these numerous proceedings nor to the final order of distribution except that part allowing appellee's attorney a fee to be assessed as costs.

In urging that this allowance of an attorney's fee as costs is error appellants rely upon Ark. Stat. Ann.

§ 34-1825 (Repl. 1962) which is Act 386 of 1921.[1] In construing this statute we have held that in a partition suit no attorney's fee can be allowed as costs if it is an adversary proceeding. *Lewis* v. *Crawford,* 175 Ark. 1012, 1 S. W. 2d 26; *Warren* v. *Klappenbach,* 213 Ark. 227, 209 S. W. 2d 468; *Beasley* v. *Beasley,* 224 Ark. 1058, 278 S. W. 2d 100; *Reagan* v. *Rivers,* 233 Ark. 518, 345 S. W. 2d 601; *Hendrickson* v. *Duncan,* 236 Ark. 722, 370 S. W. 2d 131. We have, also, held that in a partition suit where the proceedings are not of an adversary nature a reasonable attorney's fee for the plaintiff's attorney should be assessed and taxed by the court as costs against all the parties according to their respective interest. *Ramey* v. *Bass,* 210 Ark. 1097, 198 S. W. 2d 835. There we held that "a contest over the payment of attorneys' fees would not of itself be sufficient to make the partition proceedings adversary." In the case at bar, after the stipulation, the allowance of the attorney's fee is the only real issue.

Where the services of the plaintiff's attorney in a partition suit result in a benefit to the whole subject matter of the litigation, or his services are accepted and acquiesced in by the parties benefiting therefrom, it is proper for the Chancellor to award an attorney's fee and tax such as costs in the action. *Ramey* v. *Bass, supra.* We think that appellants have benefited from the result reached in the sale of this land and, further, they acquiesced in the partition proceeding except as to the attorney's fee.

The appellants urge, however, that since a Guardian Ad Litem was appointed for George, Sr.,[2] and filed plead-

[1] "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." [Emphasis added.]

[2] On September 5, 1963 the Chancellor, upon petition of appellants, rendered an order finding appellant, George Guynn, Sr., was discharged from the Arkansas State Hospital on February 22, 1963 as being "mentally competent to manage his affairs." The Chancellor then authorized and directed the delivery of appellants' funds from the partition sale.

ings in this cause, although they merely adopted the answers of the appellants, this made the proceeding adversary. We do not agree. The appointment of the Guardian Ad Litem and the pleadings filed by him in behalf of his incompetent ward met the minimum requirements of the statute. The Guardian Ad Litem, in requiring strict proof, was meeting the formalities required of him. In *Ramey* v. *Bass, supra,* where we approved an attorney's fee, one of the interested parties was, also, an incompetent.

In the case at bar the court properly awarded an attorney's fee to appellee's attorney to be taxed as costs and paid by appellants and appellee according to their respective interests.

We are not unmindful that Act 386 of 1921 is now amended by Act 518 of 1963. However, it is unnecessary to reach a discussion of this amendatory Act under the facts in the instant case.

Affirmed.

5-3181 376 S. W. 2d 665

Opinion delivered February 17, 1964.

[Rehearing denied April 13, 1964.]

Smith, Sanderson, Stroud & McClerkin, and *Lowe, Moore & Webber,* for appellant.

G. W. Lookadoo, Shaver, Tackett & Jones, for appellee.

Carleton Harris, Chief Justice. Appellant, George Morehead, on May 1, 1962, was operating a caterpillar motor grader along a portion of what is known as the Boyd Road, located in Miller County. The grader was the property of appellant, McMillin-Burkett Construction Company, by whom Morehead was employed. The part of the Boyd Road pertinent to this cause was approximately ten or eleven miles in length, and was being used by gravel trucks to haul gravel from a pit near Genoa to U. S. Highway 71, where construction work was in progress. Accordingly, this portion of the Boyd Road was being subjected to heavy traffic, and Morehead was operating the motor grader up and down the heavily traveled portion as a matter of keeping the road in as good

condition as possible. Some thirty or thirty-five gravel trucks were being operated on the day in question.

At about 8:00 o'clock A.M., appellee, Henry Bearden, twenty years of age, was driving a loaded gravel truck, and proceeding on the Boyd Road toward its intersection with Highway 71. The truck was owned by his stepfather, Roy Byrd. Morehead, with his grader traveling toward the pit, was blading the road on his (Morehead's) left-hand side. Bearden, traveling on his right side of the road, collided almost head-on with the motor grader, the truck striking the right front part of the grader. Suit was instituted by Morehead and McMillin-Burkett, seeking to recover damages for alleged personal injuries, and damage to the grader, respectively. Bearden and Byrd answered, denying liability, and both likewise filed a cross-complaint against appellants, seeking, respectively, damages for alleged personal injuries, and damage to the truck. The parties waived trial by jury, and the cause was tried before the court, sitting as a jury. Thereafter, the court filed a memorandum opinion, finding, as follows:

"The Court finds without hesitation that there was an abundance of negligence on the part of both George M. Morehead and Henry Ellis Bearden. The evidence preponderantly shows the involved road to have been winding, rolling, rough and very dusty. On this stretch of approximately ten miles, thirty to thirty-five gravel trucks were operating back and forth from the pit. One can reasonably assume that there was also some public traffic on this road, it being of course open to the public and habitated. It is undisputed that when the road was dry this battery of trucks threw up dense clouds of dust which were bound to seriously hamper the vision of the drivers for some distance ahead. Under these conditions George M. Morehead was operating the grader on the wrong side of the road, in clear violation of a well-known rule of the road. An operator of his years experience should certainly be aware of the probable danger to himself and to others. This fact is especially true in view of

his operating the grader on the side of the road which belonged to traffic approaching him.

"Sheriff Birtcher estimated the road to be 18 feet wide at the point of impact, and Morehead estimated it to be approximately 20 feet in width. With the grader consuming approximately 10 feet of the traveled portion, at least the larger trucks would have fairly tight squeeze in passing him at points similar to the point of impact.

"When all of the above recited facts are considered as a whole, it is clearly convincing that Morehead was negligent and that his negligence was certainly a proximate cause of the involved impact.

"Henry Ellis Bearden, by his own testimony establishes his negligence. He was an experienced driver and had been on this particular haul for several weeks. Approaching him was a 10-yard trailer truck and which he says stirred up a terrific amount of dust. As an experienced driver he was bound to know that for some little distance after meeting and passing the other truck he would, for all practical purposes, be blinded to any reasonable vision ahead. In fact he stated that in situations of this kind a driver could tell he was in the road only by the feel of the wheel. In the face of this approaching hazard known to him he estimates his speed to have been approximately 40 miles per hour. Such speed in the face of blinding conditions violated not only the reasonable maximum speed law of the road, it furthermore violated the law requiring drivers to keep their vehicle under such control as to be able to check the speed or stop the vehicle when danger is reasonably to be expected. His approximation of speed is verified by the distance his truck traveled with the wheel assembly knocked out and by the severe damage done the heavy maintainer.

"It is the finding of the Court that both operators were culpably negligent and there is no difference in degree of negligence committed by the two drivers.

"George M. Morehead was the agent, servant and employee of McMillin-Burkett Construction Company

and acting within the course of his employment at the time of the impact. The same status existed between Roy Byrd and Henry Ellis Bearden. Therefore the negligence of each driver is chargeable respectively to their employer. None of the parties are entitled to recover in this case. Each of the litigants are chargeable with the Court costs initiated by them.

"Allegations of negligence are based on the facts that (1) the road was not kept watered by McMillin-Burkett, and (2) that no warning signs—such as flags, placards or lights—were utilized by the contractor to protect others against the operation of the road maintainer. These contentions are not helpful to Byrd and/or Bearden. Both had been on the haul several weeks and were aware (1) that sprinkling operations had been confined to stretches of road in front of houses and (2) that the maintainer was being used up and down the road to facilitate the haul. They are not in the category of some member of the traveling public who might traverse the road wholly unaware of the operations then being carried out. The actionable negligence in this case is shown to have been confined to Morehead and Bearden."

Judgment was then entered, denying recovery to all parties. From the judgment, appellants bring this appeal, and appellees have cross-appealed. Appellants content that the court erred in finding Morehead guilty of negligence, or, if guilty of negligence, to the same degree as Bearden, and like contentions are presented by appellees.

It is certain that, in holding Morehead guilty of negligence, the court reached one erroneous conclusion, hereafter italicized, namely, that appellant driver "was operating the grader on the wrong side of the road, and *in clear violation of a well-known rule of the road.*" Ark. Stat. Ann. § 75-423, Sub-section (d), Repl. 1957, provides as follows:

"The provisions of this act [Act 300 of 1937, regulating traffic on highways, including the so-called 'Rules of the Road'] shall not apply to persons, teams, motor ve-

hicles and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work."

Apparently this provision, or one substantially the same, is contained in the motor vehicle statutes of a large number of the states,[1] and several cases are found relative to some phase of the provision. In *McNabb* v. *DeLaunay,* 354 P. 2d 290, the Oregon Supreme Court had occasion to comment upon an almost identical statute, as follows:

"ORS 483.032(2) provides that certain enumerated sections of the motor vehicle code, including those generally referred to as the rules of the road, do not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work above, below, or upon a street or highway, but that they shall apply to such persons and vehicles when traveling to or from such work.

"Plaintiff contends that the above-mentioned statute does not apply to Perkins because he was, at the time of the accident, traveling from such work, and was not actually engaged therein.

"The uncontradicted evidence showed that Perkins had dumped a load of hot asphalt about 100 feet away from the point where he was making the turning maneuver. He testified that he moved down the road 100 feet to allow the roller and grader space in which to work. Turning his truck around was a necessary part of his work. * * * Perkins was well within the contemplated protection of the statute."

In *Sturgeon* v. *Clark,* 364 P. 2d 757 (New Mexico), the statute was mentioned, but the exemption not allowed, because the court found that the defendant was not actually engaged in work upon the surface of the highway at the time of the mishap, but was only driving from one point to another. The court said:

[1] Among others, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, and West Virginia.

"We are clear that the legislature incorporated § 64-15-4(b), N.M.S.A. 1953, into the statute in recognition of the fact that in constructing, repairing and maintaining highways there are circumstances under which men and equipment must be present on the surface of the highway without being held to comply with the rules of the road generally binding. However, while providing for performing necessary work without being in violation of statutes otherwise applicable, they were careful to restrict the exemption to situations where actual work was being performed on the surface. It is not for us to extend the application beyond the clear language used.

"Defendant relies on a number of cases from other jurisdictions, all of which we find easily distinguishable by virtue of the fact that they involved actual work on the surface of the highway. We make mention of only one. *Johnson* v. *Bergquist,* 184 Minn. 576, 239 N. W. 772, is a case where the equipment was standing on the highway with its motor running while the workmen were adjusting the grader blade preparatory to using it on the surface of the highway, when the accident occurred. The court held that under the facts, this constituted work on the surface so as to bring the case within an exemption like that in § 64-15-4(b), N.M.S.A. 1953. This case is as easily distinguished under its facts from the case sub judice as the others cited by defendant."[2]

Of course, here, Morehead was admittedly working on the surface of the road. In view of our statute, we think it clear that the mere fact that Morehead was op-

[2] Actually, some courts, even before the adoption of such a statute, held that the mere fact that a drag machine engaged in working the road was on the left-hand side, did not constitute negligence. The Georgia Court of Appeals, in the case of *Mathis* v. *Nelson,* 54 S.E. 2d 710 (1949), stated:

"It may often be necessary to work a road machine on the left side of the road, or even in such a position as to completely block the road and, if sufficient precautions were taken to warn approaching motorists, this act could not be deemed actionable. * * * While it might, as a necessary incident to the working of roads, be necessary to proceed otherwise than in the ordinary direction of traffic, there would be no such excuse for failing to have the tractor properly lighted at a time of day when it was still dark."

Subsequently, Georgia passed a statute similar to the Arkansas statute.

erating his grader upon the left-hand side of the road, was not, in itself, sufficient to make this appellant guilty of negligence.

It is not entirely clear from the trial court's opinion the extent to which Morehead's operation of the grader on the left-hand side, in (as was held) violation of a rule of the road, influenced the court in its findings. Certainly, it would appear to have influenced the findings to some degree, for it is emphasized by being mentioned twice. Minus this erroneous conclusion, we do not know whether the court would have still found Morehead guilty of negligence, or whether, if such a finding had been made, appellant would have been found negligent to the same degree (equally negligent with Bearden).

It follows that the judgment on direct appeal must be reversed.

As to the cross-appeal, we think unquestionably that the trial court's findings were supported by substantial evidence. Admittedly, in traveling toward Highway 71, Bearden, before striking the grader, met a trailer truck which threw up a big cloud of dust. Bearden stated:

"It throwed dust in my face, and the roads were dusty, and anyhow, I had to turn my windshield wipers on to clear the dust, and by the time the dust had cleared, I was right up on McMillin-Burkett's road maintainer. And the only thing I could think of then was miss the maintainer, and my right rear caught his right front."

Subsequently, he stated that he could not see to the front at all because "the dust had blinded me." Bearden testified that he was operating his loaded gravel truck at a speed of approximately 40 miles an hour when he met the other truck. From the testimony:

"Q. What did you do right after you passed the truck?

"A. Well, I had slowed—I mean, in other words, I took my foot off the foot feed to let it slow down where I could see.

"Q. But you didn't touch the brake until you saw the maintainer, did you?

"A. I had my foot on the brake, sir, but I . . .

"Q. Did you apply the brakes—let's put it this way. Did you apply your brakes before seeing the maintainer?

"A. No, sir, I did not.

"Q. I believe you testified here that it was so dusty that you couldn't even tell which side of the road you were driving on?

"A. Well, that is true, sir.

"Q. Is that true?

"A. In other words, I mean—

"Q. Could you even see whether you were on the road or not?

"A. Well, there's certain ways to tell by the feel of the wheel.

"Q. In other words, you were just as blind as though you were driving in the dark without lights, is that right?

"A. Yes, sir.

"Q. You couldn't even see the shoulders of the road —the ditches?

"A. No sir, I couldn't see them.

"Q. You took your foot off the gas and rested it on the brake pedal, but didn't apply the brakes until you saw the maintainer, is that correct?

"A. That is correct."

Of course, Bearden was familiar with the fact that the maintainer was being operated on the Boyd Road, and had earlier, on the morning of the collision, observed the grader somewhere between one and three miles from the scene of the collision.

As stated, we think there was substantial evidence to support the findings of the Circuit Court, and there is, accordingly, no merit in the cross-appeal.

The judgment is reversed, and the cause remanded for a new trial on all issues.

WOOD *v.* CITY OF EL DORADO.

5-3141 375 S. W. 2d 363

Opinion delivered February 17, 1964.

Crumpler & O'Connor, Brown, Compton & Prewett, for appellant.

J. V. Spencer, Jr., for appellee.

ED. F. MCFADDIN, Associate Justice. This suit involves some of the streets and driveways in Parkview Subdivision to the City of El Dorado. The plaintiffs below, and appellants here, are the original dedicator, Mrs. Marguerite Trull McWilliams, and other parties holding deeds which described some of the property shown as being dedicated streets. The defendant below was the City of El Dorado. Various property owners

claiming interests adverse to the plaintiffs intervened and resisted the complaint, claiming that intervenors' vested property rights would be adversely affected by granting relief to the plaintiffs, and also pleading laches, estoppel, and stale demand. They are listed as appellees here, along with the City of El Dorado.

The plaintiffs sought to have cancelled a plat and dedication of streets and ways that had been filed in 1942. The Trial Court denied any relief to the plaintiffs and this appeal ensued. It was shown that in 1942 Mrs. Marguerite Trull McWilliams (one of the plaintiffs), and other parties, owned as acreage certain property in the City of El Dorado, and decided to plat the property into lots and blocks and offer it for sale as Parkview Subdivision. The plat filed in May 1942 was duly recorded in the Deed Records of Union County; and an instrument of dedication was likewise recorded, dedicating to the public all the streets, alleys, and drives shown on the said plat.[1] The City of El Dorado, by proper action, accepted the deed of dedication on September 24, 1942. On October 25, 1943, an additional dedication was made by Marguerite Trull McWilliams, as the landowner, dedicating a street 40 feet wide through the center of Block "A". The original plat, along with the dedication of the 40-foot street, was shown in the abstracts of various parties who purchased property in the subdivision; and the intervenors claim, either by direct or mesne conveyances, from the original owners who filed the plat and made the dedication.

In January 1959 there was decided by this Court the case of *Wood* v. *Setliff,* 229 Ark. 1007, 320 S. W. 2d 655, involving some of the same streets and driveways in the Parkview Subdivision to El Dorado as here involved.[2] As a result of that case some of the present appellants realized that they were occupying property that was dedicated as public streets and ways according to the said

[1] In September 1943 a plat identical with the one previously mentioned was filed entitled, "Corrected Plat."

[2] There was a second case between Wood and Setliff, 232 Ark. 233, 335 S.W. 2d 305, decided in 1960, and involving this property.

plat of Parkview Subdivision. The present suit was filed on June 20, 1961, to have the original plat and also the so-called "corrected plat" of Parkview Subdivision, cancelled, as filed through mistake, so that the only dedication would be the 40-foot roadway through the center of Block "A". The effect of a decree for the plaintiffs would be to take from the public and return to the plaintiffs, as their interests might appear, a strip of property 70 feet wide and several hundred feet long lying west of Block "A", a strip of property 30 feet wide along the entire north side of Block "A", and also a strip of property 30 feet wide along the entire south side of Block "A".[3]

Whatever may have been the intentions, thoughts, and desires of the owners and dedicators in 1942, nevertheless the facts remain: (a) that a plat was filed in 1942 and a dedication made to the public of the streets and ways shown on the plat; (b) that there was an acceptance of the plat by the City of El Dorado; and (c) that there were sales of lots by the owners and dedicators by reference to the said plat. The law is well settled that, when a plat is filed and sale of lots made with reference to it, then the streets and ways shown on the plat become public property. *Brewer* v. *City of Pine Bluff,* 80 Ark. 489, 97 S. W. 1034; *Mebane* v. *City of Wynne,* 127 Ark. 364, 192 S. W. 221; and *Brown* v. *Land, Inc.,* 236 Ark. 15, 364 S. W. 2d 659.

Furthermore, there was a lapse of over eighteen years from the filing of the plat and deed of dedication in 1942 until the filing of the present suit in 1961, claiming a mistake to have been made by the owners and dedicators in 1942. In the meantime, many people had purchased property, relying on the filed plat and deed of dedication. Even if we assume to be true all of the claimed intentions, thoughts, and desires of the dedicators in 1942, still the fact remains that no one misled any of the dedicators. They filed the plat and deed of dedica-

[3] The plat shows dedication of a strip 50 feet wide, and lying on the east side of Block "A"; but we understand that this is practically conceded by appellants to have become public property.

tion in 1942, and third persons—the City, the intervenors, and others—have relied on the plat and deed of dedication. The plaintiffs cannot now be heard in their effort to overcome a unilateral mistake after all these years have passed.

It is urged that the City of El Dorado has not opened all of the streets shown on the plat and deed of dedication, and has thereby allowed some of the appellants to encroach on the streets; but, as stated in *Wood* v. *Setliff,* 229 Ark. 1007, 320 S. W. 2d 655: ". . . the title to the public streets and parkways was in the City of El Dorado and adverse possession could not be acquired against the City. *City of Magnolia* v. *Burton,* 213 Ark. 157, 209 S. W. 2d 684."

Finding no error, the decree is affirmed.

PITTMAN *v.* PITTMAN.

5-3206 375 S. W. 2d 361

Opinion delivered February 17, 1964.

George E. Pike, for appellant.

Bridges, Young and *Matthews,* for appellee.

GEORGE ROSE SMITH, J. It is a familiar rule that when a testator purports to leave A's property to B and by the same will also leaves other property to A, A cannot claim both his own property and the testamentary gift. He must elect to take one and relinquish the other. *McDonald* v. *Shaw,* 92 Ark. 15, 121 S. W. 935, 28 L.R.A. (n.s.) 657; *Collins* v. *Fincher,* 235 Ark. 587, 361 S. W. 2d 86. This is a suit brought by the appellee for a construction of her husband's will, the question being whether she is required to make such an election with respect to certain property mentioned in the fourth paragraph of the will. The chancellor held that no election was necessary.

The testator, Roy Pittman, had an interest in two tracts of land lying in LaGrue Bottoms in Arkansas county. Tract 1 was owned by Pittman and the appellee as tenants by the entirety, consisted of 440 acres, and was the site of a half-acre camp operated by Garland Simpson. Tract 2 was owned by Pittman and his brother Floyd as tenants in common, consisted of 80 acres, and was about three quarters of a mile west of Tract 1. Both tracts had formerly belonged to Storthz Brothers.

Paragraph 4 of the will is really two paragraphs, which read as follows:

"I give, devise and bequeath to my wife, Inona Pittman, for her life, my undivided one-half interest in lands owned by myself and my brother, Floyd Pittman, in LaGrue Bottoms, the lands were purchased from Storthz Brothers, and I give, devise and bequeath to my wife, Inona Pittman, the right to cut and sell the merchantable timber from said lands and to retain the purchase price therefor for herself, except I give, devise and bequeath to my nephew, Garland Simpson, a half acre out of said lands where the camp belonging to Garland Simpson is now located.

"I give, devise and bequeath my undivided one-half interest in and to the above described lands, being those lands purchased from Storthz Brothers and which I own together with my brother, Floyd Pittman, to my nephew, Floyd Lee Pittman and Howard Pittman [the appel-

lants], share and share alike, in fee simple absolutely, subject to the life estate in my wife and the rights given here thereunder and except the half acre above bequeathed to my nephew, Garland Simpson."

It is impossible to be certain whether the testator meant to refer to both tracts or only to Tract 2. On the one hand, he describes the land as being owned by him and his brother Floyd. This description applies only to Tract 2. If Paragraph 4 is construed to refer only to Tract 2 no election by the appellee is necessary, because the testator did not attempt to devise property that actually belonged to her.

On the other hand, the will recites that Garland Simpson's camp is located upon the land in question. Here the reference is to Tract 1, which is the site of Simpson's camp. If Paragraph 4 is construed to refer to both tracts the appellee must make her election, because in other paragraphs of the will she was given other property that was actually owned by her husband. She would have to decide whether to accept the other property and take only a life estate in Tract 1 or to give up the other property and claim Tract 1 as the surviving tenant by the entirety.

Where the will is susceptible of two interpretations the governing rule is to favor that construction which dispenses with the need for an election. "The first and fundamental rule, of which all the others are little more than corollaries, is: In order to create the necessity for an election, there must appear upon the face of the will itself . . . a clear, unmistakable intention, on the part of the testator . . . to dispose of property which is in fact not his own. This intention to dispose of property which in fact belongs to another, and is not within the donor's power of disposition, must appear from language of the instrument which is unequivocal, which leaves no doubt as to the donor's design; the necessity of an election can never exist from an uncertain or dubious interpretation of the clause of donation. It is the settled rule that no case for an election arises unless the gift to one beneficiary is irreconcilable with an estate,

interest, or right which another donee is called upon to relinquish; if both gifts can, upon any interpretation of which the language is reasonably susceptible, stand together, then an election is unnecessary." Pomeroy, Equity Jurisprudence (5th Ed.), § 472. "A will is not to be construed to dispose of property belonging to someone other than the testator if it is susceptible of any other construction." Page on Wills (Rev. Ed., 1962), § 47.13.

Here the testator was mistaken either in saying that he and his brother owned the land or in saying that it was the site of Garland Simpson's camp. One mistake seems to be as likely as the other. Thus Paragraph 4 is reasonably subject to two interpretations. In this situation, under the authorities cited, the chancellor was right in construing the language to be a reference to Tract 2 only, for that interpretation makes an election unnecessary.

Affirmed.

HARRIS, C.J., not participating.

HARVEY *v.* PETERS.

5-3213 375 S. W. 2d 654

Opinion delivered February 17, 1964.
[Rehearing denied March 16, 1964.]

Donald Poe, for appellant.

Warren & Bullion, for appellee.

PAUL WARD, Associate Justice. This appeal challenges the right of the Arkansas State Board of Pharmacy to deny Maurice Harvey (appellant) a 1963 Pharmacy Permit to operate a drug store in Waldron. The action of the board was sustained by the Pulaski County Circuit Court, and this appeal follows.

Appellant is the owner of said drug store which has been in continuous operation for more than fifty years. Since 1955 he has been a "Licensed Practical Druggist" but he is not now and never has been a "Licensed Registered Pharmacist". However, until recently appellant has employed a registered pharmacist in his store.

Appellant's permit to operate his drug store was refused by the board because of his failure to comply with Ark. Stat. Ann. § 72-1017.1 (Repl. 1957). This section, in material part, reads as follows:

"Hereafter no person shall operate a drug store or pharmacy or be issued a Registered Pharmacy Permit unless an Arkansas registered pharmacist is on duty in such drug store or pharmacy a minimum of forty (40) hours per week."

The facts are not in dispute, and the only issue involved (as stated by appellant) is the constitutionality of the above mentioned section.

Summarily stated, it is contended by appellant that § 72-1017.1 (§ 14 of Act 57 of 1955) is arbitrary and bears no relation to the public welfare, that it grants a monopoly to a select few, that it is unfair and discriminatory, and that it therefore violates the due process clauses of the United States and the State Constitutions. In support of the above it is ably and forcefully argued that appellant has had years of experience in running a drug store and filling prescriptions, that he is competent to do so without endangering the public welfare, and that the income from a small town drug store will not justify the expense of a licensed registered pharma-

cist. However, for reasons hereafter set out, we are unable to agree with appellant and must, therefore, affirm the judgment of the trial court.

Police Power. It has been universally and uniformly held that the legislature has the power, in the exercise of its police powers, to regulate the practice of Pharmacy for the health and general welfare of the public. 28 C.J.S. *Druggists* § 2 at page 500; 17A Am. Jur. *Drugs and Druggists* § 13 at page 517; and 54 A.L.R. 719. It is just as well established that such regulations must not be arbitrary, but must be reasonably necessary to protect the public health and welfare.

Legislative History. To properly appraise the issue here presented it will be helpful, we believe, to set out briefly what our own legislature has done to regulate the practice of Pharmacy, including its stated reasons therefor.

The first attempt by the legislature was Act 50 of 1891. The reason for regulation, as expressed in the first two paragraphs, is worthy of note:

"WHEREAS, In all civilized countries it has been found necessary to regulate the traffic in medicines and poisons, and to provide by law for the regulation of the delicate and responsible business of compounding and dispensing the powerful agents used in medicines and

"WHEREAS, The safety and welfare of the public are endangered by the sale of poisons by unqualified and ignorant persons. . . ."

Section 1 of the above act, Ark. Stats. Ann. § 72-1014 (Repl. 1957), made it "unlawful for any person not a registered pharmacist . . . to conduct any drug store, pharmacy or apothecary shop. . . ." Said Section 1 was amended by Act 72 of 1929 (See § 72-1014) to provide "that, any person or persons not registered pharmacists may own or conduct such a store if he or they keep constantly in their store a registered pharmacist". Although the legislature revised certain portions of the original Pharmacy Act by Act 535 of 1921, by Act 120

of 1939, and by Act 336 of 1949, it did not see fit to relax the requirement of a licensed registered pharmacist to operate a drug store until the passage of Act 57 of 1955, § 14 of which was hereinbefore quoted — § 72-1017.1. Neither did the legislature in 1959 by Act 92 see fit to modify § 14 of Act 57 of 1955.

Appellant is not a licensed registered pharmacist nor could he be under the terms of said Act 57 because he is not a graduate of "an accredited school or college of pharmacy . . ." as required by § 1 of said Act 57 (§ 72-1007.1).

Thus it appears that for sixty-four years (from 1891 to 1955) drugs could only be dispensed by a licensed registered pharmacist or by someone under his constant supervision. Since appellant does not question the constitutionality (the reasonableness) of the Acts of 1891 and 1929 which required the attendance of a registered pharmacist at all times, it is difficult to understand the logic of the contention that it is unreasonable and arbitrary to require his attendance only forty hours each week.

The argument is advanced that since appellant (a practical druggist) is qualified to fill prescriptions when the registered pharmacist (whose presence is required only forty hours each week) is not on duty, then he (appellant) is qualified to fill prescriptions at all times, and so does not need a registered pharmacist at any time. For several reasons we are not convinced by that argument. One, some amount of protection of the public welfare is better than no protection. Two, it is common knowledge that there is a greater variety of drugs on the market today than there was in 1891, and more skill and knowledge now are required to dispense them with safety. Three, although a registered pharmacist is not actually present in the store at all times, he could be accessible at all times. Fourth, the result of appellant's contention, if accepted by us, bodes evil for both him and the public welfare. The legislature would be left with two alternatives. One, it could require the presence of a registered pharmacist (in a drug store) at all times, and

this certainly would give appellant no relief. Two, it could allow all drugs to be compounded and dispensed by people with no technical training in a school or college of pharmacy. We do not believe this alternative would be in the best interest of the public welfare. Certainly, there is nothing in the record here to convince us otherwise. It is our conclusion, therefore, that the judgment of the trial court should be, and it is hereby affirmed.

Affirmed.

McFaddin, J., dissents.

ED. F. MCFADDIN, Associate Justice (dissenting). It is my considered conclusion that one of the main purposes of Act No. 57 of 1955 was to create the status of "Licensed Practical Druggists," and to put them on an equality basis with Registered Pharmacists. In other words, the said Act No. 57 was a "blanketing-in" of long time practical druggists, similar to the so-called "grandfather clauses" in other matters of legislation. There is no need to lengthen this dissent by detailing the various matters that impel me to such conclusion and by pointing out why I think Act No. 57 brings about such result. But it is because I believe that the said Act No. 57 was to place a Licensed Practical Druggist on the same equality basis as that of a Registered Pharmacist that I dissent from the Majority in the present case.

ARK. STATE HIGHWAY COMM. *v.* WEIR.

5-3154 376 S. W. 2d 257

Opinion delivered February 17, 1964, as amended on denial of petition for rehearing March 30, 1964.

Dowell Anders, Thomas B. Keys, for appellant.

Jeff Mobley and *William R. Bullock,* for appellee.

SAM ROBINSON, Associate Justice. The Arkansas State Highway Commission condemned for highway purposes 15.9 acres of appellees' dairy farm consisting of about 210 acres. The strip for the highway was taken diagonally across the farm, leaving about 133 acres on the north with no improvements, and about 62 acres on the south with all the improvements, consisting of a nice brick home, a grade A dairy barn, and other buildings necessary for the operation of a grade A dairy. It will be wholly impractical to regularly move cattle from one side of the highway to the other for milking purposes. The facilities on either side are not sufficient in themselves to successfully operate a dairy farm. The usefulness of the farm as a grade A dairy has, therefore, been destroyed.

Appellees have lived on the property and have operated a dairy thereon for about 35 years; they have reared a family and have sent several of the children through college on the proceeds from the dairy. Appellees contend, and introduced evidence to the effect that they have been damaged in an amount ranging from an estimated low of $26,570 to over $88,000. The Highway Commission introduced evidence to the effect that appellees had been damaged in a sum not exceeding $14,500. The jury returned a verdict in the sum of $30,000.

First, appellant contends that the court erred in not striking the testimony of Mr. Jackson Ross, an expert on real estate values, who testified for appellees. Mr. Ross first fixed a valuation of $94,205.70 on the farm before the taking by computing the profits over a seven year period. He testified to an after the taking value of $40,770, thus showing damages in the sum of $53,435.70; but on motion of appellant, Ross' testimony on this method of showing damages was stricken.

But be that as it may, Mr. Ross further testified that the farm was worth $320 per acre for the 210 acres, or $67,200 before the taking, and $40,770 after the taking, thus showing a difference in the before and after value of $26,130. The only testimony, admitted in evidence, showing damages equalling or exceeding the judgment of $30,000 is the testimony of appellees, who claim damages of $82,685. Appellant contends that the uncorroborated testimony of the owners is not sufficient to sustain the judgment, and as authority cites *Hot Spring County* v. *Prickett,* 229 Ark. 941, 319 S. W. 2d 213. But that case does not stand for the proposition that, as a matter of law, the uncorroborated testimony of a landowner is not sufficient to sustain an award for damages. In the Prickett case it was pointed out that the amount of damages claimed by the landowner, in that case, was a conclusion not supported by facts. It was also pointed out that because the landowner was an interested party, his testimony was not to be considered as being undisputed. *Cousins* v. *Cooper,* 232 Ark. 605, 339 S. W. 2d 316. This well known rule simply means that the courts do not have to accept as true the undisputed testimony of a party to the action. It does not mean that the courts must disregard the uncorroborated testimony of a party.

Here, the landowners testified in detail as to how they arrived at the amount of damages they claimed to have suffered—the long, successful operation of the farm as a grade A dairy, along with other details of the improvements, etc. According to that part of Mr. Ross' testimony admitted in evidence by the court, the landowners had been damaged something over $26,000, and the jury returned a verdict for only $30,000 although the landowners had testified to a great deal larger sum as the damages sustained.

Mr. Ross' testimony was competent; it is not absolutely necessary that the landowners' testimony be corroborated; and the evidence is sufficient to sustain the judgment.

Affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY CO.
v. FRIDDLE.

5-3196 375 S. W. 2d 373

Opinion delivered February 17, 1964.

Warner, Warner, Ragon & Smith, for appellant.

Harold C. Rains, Jr. for appellee.

JIM JOHNSON, Associate Justice. This is a suit for damages caused by a tortious burning of appellee's land. On April 21, 1962, sparks and fire from a train operated over the railroad track of appellant, St. Louis-San Francisco Railway Company, burned through appellant's right of way onto the land of appellee, J. A. Friddle. Approximately fifteen acres of appellee's 200-acre farm were burned over. Of the fifteen acres burned, six were on top of a mountain and fenced by appellee. The remaining nine acres were unfenced property on the side of the mountain. Appellee claimed damage to two acres of meadow, four acres of wooded pasture, four acres of pine seedlings and five acres of growing timber. In addition, appellee claimed that a portion of the fence burned and that he was forced to employ help to control and put out the fire. Suit was filed in Crawford Circuit Court seeking to collect $6,000.00 damages. The parties having stipulated that the fire was caused by the negli-

gent operation of the train, the only issue before the jury was the amount of damages, if any, to which appellee was entitled. At trial on July 8, 1963, the jury returned a verdict for appellee in the sum of $2,000.00. From judgment on the verdict, appellant has perfected this appeal.

For reversal, appellant urges that (1) the trial court erred in submitting its instruction number five to the jury, and that (2) the verdict of $2,000.00 was grossly excessive and without support of substantial evidence.

The court's instruction No. 5 reads as follows:

"You are instructed that the measure of damages in this case is the difference in the fair market value of the land immediately before and immediately after the burning. The burden is upon the property owner to establish the amount of his damages by a preponderance of the evidence."

Appellant concedes that, "When real property is permanently injured, the proper measure of damages is the diminution in the fair market value of the property by reason of that injury or, in other words, the difference between the value of the property before and after the injury. *Missouri Pacific R. Co., Thompson, Trustee v. Clements,* 225 Ark. 268, 281 S. W. 2d 936; *Benton Gravel Co. v. Wright,* 206 Ark. 930, 175 S. W. 2d 208; 15 Am. Jur., Damages § 109, p. 518; 25 C.J.S., Damages § 84, p. 603;" but contends here that before this rule is applied, the act complained of must effect a lasting change in the realty itself, urging that the permanency of the injury is the proper test to be applied, and that a temporary injury is not compensated on the basis of diminished market value, citing *Ross & Ross v. St. Louis I.M. & S.R. Co.,* 120 Ark. 264, 179 S. W. 353; 87 A.L.R. 1392.

All of appellee's testimony seemed to be directed toward showing the permanency of the injury, and his value testimony was directed toward proof of the market value of the property before and after the injury. Appellant made no objection to this testimony, nor did appellant request any instruction at all on the measure

of damages, and admitted having only objected generally to instruction No. 5 as given.

The state of the record being thus, the appellant cannot be heard to complain in the Supreme Court for the first time that the measure of damages which was adopted was not the correct rule. See generally, *Standard Oil Co. of Louisiana* v. *Goodwin,* 174 Ark. 603, 299 S. W. 2. This court cannot consider the specific objection here urged to the instruction by the appellant. If appellant desired that the instruction should cover the particular matters of which it now complains, it should have first drawn the attention of the trial court to these matters by specific objection. *St. Louis I.M. & S.R. Co. v. Carter,* 93 Ark. 589, 126 S. W. 99. Appellant having failed to offer any specific objection to the instruction in the trial court, under the general objection made to the instruction we can only consider such instruction to determine whether there are any inherent defects therein. *St. Louis San Francisco R. Co. v. Cox,* 171 Ark. 103, 283 S. W. 31. Since appellant permitted appellee to try this case upon the theory of the permanency of the damage without specific objection, we cannot say that instruction No. 5, which stated the rule conceded to be applicable to permanent damage, was inherently wrong.

The second point urged by appellant for reversal is that the verdict of $2,000.00 was grossly excessive and without support of substantial evidence. After stating his opinion on the before and after value of his property, appellee and his son testified in careful detail on the damages occasioned by this fire, without objections from appellant. Appellant's witnesses testified on their opinions of appellee's damages, estimating the loss on a per acre basis. The jury's function was to evaluate the witnesses and their testimony and arrive at a damage amount if they found that appellee was in fact damaged by the fire. Their verdict was less than appellee's opinion testimony on damages, and more than appellant's. After a careful review of the whole case, we find that the jury's verdict was supported by substantial evidence, was not influenced by prejudice and the

amount was not so grossly excessive as to shock the conscience of the court. *Beggs* v. *Stalnaker,* 237 Ark. 281, 372 S. W. 2d 600.

Affirmed.

UNITED STATES OF AMERICA *v.* MCGEHEE.

5-3149 375 S. W. 2d 365

Opinion delivered February 17, 1964.

Louis F. Oberdorfer, Lee A. Jackson, Joseph Kovner, J. Edward Schillingburg, Washington, D.C., *Charles M. Conway, E. A. Riddle,* for appellant.

Davis & Mills, Peter G. Estes, James R. Hale, Wade & McAllister, for appellee.

FRANK HOLT, Associate Justice. The question presented in this case relates to the priorities of various liens. The appellant, United States of America, and the appellees, hereinafter named, were made defendants in a foreclosure proceeding whereupon each of them filed cross-complaints to enforce their claims as lienholders. Upon the foreclosure sale, after payment of costs and the indebtedness to the plaintiff-mortgagee, Frank E. McGehee and The First Pyramid Life Ins. Co. of America, there remained a surplus of $9,119.10 which was insufficient for the payment of all the competing liens. The Chancellor found and awarded priority and payment of the liens among the appellees and appellant as indicated by us in words and figures as follows:

Claimant	Nature of Claim	Date Assessed	Date of Priority	Amount of Claim	Amount of Award
Shelton	Material & labor lien		8/25/60 (Date furnished)	$1,839.85	$1,839.85
Houston	Labor lien		3/10/61 (Date performed)	218.03	218.03
United States	Tax lien # 10,744	11/16/60	5/3/61 (Date filed)	1,499.99	1,499.99
Roberts	Material & labor lien		6/19/61 (Date furnished)	755.54	755.54
Gibson	Mortgage		6/21/61 (Date recorded)	9,293.33	3,911.56
State of Ark.	Tax lien		6/23/61 (Date filed)	885.97	885.97
United States	Tax lien # 11,824	5/26/61	8/9/61 (Date filed)	2,324.28	8.36
United States	Tax lien # 62-10-137	10/25/62	10/25/62 (Stipulation)	1,296.42	———

Only the United States of America appeals from this decree. Appellant's first contention for reversal is that its three tax liens are superior to the three state created material or labor liens (Shelton, Houston and Roberts) because they had not been reduced to a sum certain or judgment and, therefore, were not choate before the federal tax liens arose.

A federal lien is created by 26 U.S.C.A. § 6321.[1] A federal tax lien arises "at the time the assessment is

[1] "Lien for taxes If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

made". 26 U.S.C.A. § 6322.[2] As to when a state created lien arises, Ark. Stat. Ann. § 51-601 (1947) et seq, provides that upon the date of supplying material or labor one shall have a lien therefor; also, that an account of the amount due must be filed with the Circuit Clerk within ninety days; that an action for judgment must be commenced within fifteen months from the filing of the account and then the Circuit Court, upon a fair trial, must ascertain the amount of the indebtedness and render a judgment thereon.

The federal rule is that liens are choate when [1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established. *United States* v. *New Britain,* 347 U.S. 81. Under Arkansas law the general rule is well settled that a materialman's or laborer's lien attaches as of the date of furnishing material or performing labor and, thus, is in effect before being reduced to a judgment. Ark. Stat. Ann. § 51-601, et seq, *supra; Franks* v. *Wood,* 217 Ark. 10, 228 S. W. 2d 480. It is, therefore, appellees' contention that their liens take priority where they furnished material and labor before appellant filed its tax liens.

The collection of debts owing to the United States is a federal question and it is a matter of federal law when a state created lien has acquired sufficient substance and become so perfected as to defeat a federal tax lien. *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47; *Aquilino* v. *United States,* 363 U. S. 509. The reasoning is that this is necessary in order to achieve uniformity in the treatment of federal tax liens in relation to liens created by state law. As was stated in *United States* v. *New Britain, supra*:

"* * * Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined."

[2] "Period of lien Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

In the recent case of *United States* v. *Pioneer Ins. Co.,* 235 Ark. 267, 357 S. W. 2d 653, we held that the mortgagee's lien for an attorney's fee, provided for in the mortgage, was choate when the federal tax liens were filed after the mortgage was recorded, the mortgagor had defaulted, the foreclosure suit was instituted, and the property sold. However, these tax liens were filed before a judicial determination of the amount of a reasonable attorney's fee. On appeal, in *United States* v. *Pioneer Ins. Co.,* 374 U.S. 84 (1963), the United States Supreme Court, in reversing our decision, said:

"Clearly the identity of the lien holder and the property subject to the lien are definite here, but it is equally apparent that the amount of the lien for attorney's fees was undetermined and indefinite when the federal tax liens in question were filed. * * * the 'reasonable attorney's fee'—reasonable in relation to the service to be performed by the attorney—had not been reduced to a liquidated amount. The final amount was to be established by court decree and the Chancery Court set the fee considerably below the sum requested. * * * when a mortgagee has a lien for an attorney's fee which is uncertain in amount and yet to be incurred and paid, such a lien is inchoate and is subordinate to the intervening federal tax lien filed before the mortgagee's lien for attorney's fee matures."

This case follows the rule enunciated in earlier decisions relative to when a state created lien is choate or inchoate when competing with a federal lien. See, also, *W. T. Jones & Co.* v. *Foodco Realty, Inc.,* 318 F. 2d 881 (C. A. 4th Circuit, 1963).

In the case at bar two of the tests of choateness have been fulfilled, namely, the identity of the lienors and the property subject to the liens. The third test, however, has not been fulfilled because the amounts of the material and labor liens have not been determined with sufficient certainty. It is true that an amount for each lien was furnished when the accounts were filed, but Ark. Stat. Ann. § 51-621 provides that the amount of the lien is subject to a future judicial determination.

See, also, *United States* v. *Colotta,* 350 U.S. 808; *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010; *United States* v. *Vorreiter,* 355 U. S. 15; *United States* v. *Hulley,* 358 U. S. 66. Therefore, we must hold that neither of the three federal tax liens can be subordinated to any of the material and labor liens since none of the latter were choate by being reduced to a judgment or definitely established in amount at the time of the assessment of the federal liens. The status of these state created liens, before being reduced to a liquidated amount, serves "merely as a caveat of a more perfect lien to come". *New York* v. *Maclay,* 288 U. S. 290.

The appellant also contends for reversal that the Chancellor erred in granting the state tax lien priority over federal tax lien No. 11,824 which arose before the state tax had been assessed. It is appellant's contention that the Chancellor was in error in according to the state tax lien the status of a judgment-creditor under 26 U.S.C.A. § 6323 (a)[3] and, therefore, priority over federal tax lien # 11,824. This federal tax lien was assessed on May 26, 1961 and filed on August 9, 1961. The state tax lien was assessed on June 23, 1961 pursuant to Ark. Stat. Ann. § 84-1912 (Repl. 1960) which provides that a certificate of indebtedness filed by the Commissioner of Revenue with the Circuit Clerk, when entered on the judgment docket of the Circuit Court, has "the same force and effect as an entry on such judgment docket of a judgment rendered by the Circuit Court".

It is well settled that a state may make whatever provisions it desires for the internal administration of its own tax laws. *United States* v. *Waddill Co.,* 323 U. S. 353. However, as stated previously, the interpretation of federal statutes is a federal question. *United States* v. *Security Trust & Savings Bank, supra; United States* v. *Acri,* 348 U.S. 211.

In *United States* v. *Gilbert Associates,* 345 U.S. 361, the town of Walpole, New Hampshire assessed an ad

[3] "Invalidity of lien without notice.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—"

valorem tax and the state law provided that such an assessment had the same effect as a judgment. In holding that the assessment of this ad valorem tax did not make the city a "judgment creditor", the court said:

"A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a 'judgment creditor' should have the same application in all the states. In this instance, we think Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts. We do not think Congress had in mind the action of taxing authorities who may be acting judicially as in New Hampshire and some other states, where the end result is something 'in the nature of a judgment,' while in other states the taxing authorities act quasi-judicially and are considered administrative bodies."

Therefore, it is manifest that the State of Arkansas is not a "judgment creditor" within the meaning of 26 U.S.C.A. § 6323 (a) and it follows that its tax lien must be subordinated to federal tax lien # 11,824 which was assessed before the state tax lien was filed pursuant to Ark. Stat. Ann. § 84-1912 (Repl. 1960).

Applying the controlling principles we have discussed, the priority and payment *of the federal liens* from the $9,119.10 surplus should be as follows:

Claim	Date Assessed	Amount of Claim	Amount of Award
Federal tax lien # 10,744	11/16/60	$1,499.99	$1,499.99
Gibson mortgage[4]		3,911.56	3,911.56
Federal tax lien # 11,824	5/26/61	2,324.28	2,324.28
Arkansas tax lien	6/23/61	885.97	885.97
Federal tax lien[5] # 62-10-137		1,296.42	497.30
Material & labor liens	12/7/62 (Reduced to judgment)	2,813.42	———

[4] The appellant takes no issue with the priority assigned to the mortgagee-lienholder, Gibson. 26 U.S.C.A. § 6323 (a) and (c).

[5] No question is raised in this appeal regarding the Chancellor's action in subordinating the third federal tax lien, # 62-10-137, to the state tax lien. The taxes for which this lien was asserted were assessed after the state taxes had been assessed.

Thus, after the payment of the appellant's liens in this order, as contended by appellant, there remains the sum of $3,911.56 allocated for the payment of the Gibson mortgage and $885.97 allocated for the payment of the state tax lien, or a total of $4,797.53. In conformity with our applicable state law as previously discussed [and in accord with the stipulations of the parties, except for the state] the distribution of this balance should be as follows:

Claim		Amount of Claim	Amount of Award
Shelton Materials and labor furnished	8/25/60	$1,839.85	$1,839.85
Houston Labor performed	3/10/61	218.03	218.03
Roberts Materials and labor furnished	6/19/61	755.54	755.54
Gibson mortgage Date recorded	6/21/61	3,911.56	1,984.11
Arkansas tax lien Date filed	6/23/61	885.97	———

Reversed and remanded with directions to render a decree not inconsistent with this opinion.

5-3197 375 S. W. 2d 666

Opinion delivered February 24, 1964.

Parker Parker, for appellant.

Robert J. White, James K. Young, for appellee.

CARLETON HARRIS, Chief Justice. Guy T. Freeland, Louise Freeland, his wife, and Mike Freeland, a minor, by his father as next friend, appellees herein, instituted suit against Freddie Lee Howe, appellant herein, for alleged personal injuries and property damage sustained in a wreck on November 27, 1962. Howe answered, denying negligence, and filed his counter-claim, seeking damages for personal injuries and property damage. Appellees then answered, denying all allegations. On trial, the jury rendered judgment against appellant, fixing

damages to Freeland in the amount of $1,700, to Mrs. Freeland in the sum of $1,000, and to the minor son in the amount of $300, and found against appellant on his counter-claim. From the judgment so entered, comes this appeal.

For reversal, it is first asserted that the court erred in refusing to grant appellant's motion for a new trial because the jurors, while separated, were exposed to improper influence. The case was tried on April 19, and both appellees and appellant concluded all of their evidence on that date. Argument in the case was to be heard the following morning.

On the night of the 19th, three boys were killed, and two others injured, in an automobile accident on Illinois Bayou Bridge, near Dover. The automobile in which they had been riding was practically demolished. According to the evidence, which was presented on the motion for a new trial, this wreckage was picked up by Cogswell Motors, and, at the direction of the Sheriff, placed in front of the courthouse. The Sheriff stated that he wanted people to see it, thinking it would have a salutory influence upon drivers who viewed it. The officer testified that he knew court was in session, but did not know what case was being tried. In his motion for new trial, appellant asserted that excessive damages were awarded to appellees because of passion and prejudice, occasioned by the members of the jury having viewed the wreckage in front of the courthouse (as they individually entered the building to complete the trial of the instant cause), and because of inflammatory statements made by appellees' counsel (hereinafter discussed).

We find no merit in this contention. In the first place, the record reflects no objection by appellant prior to argument before the jury, nor was there any request for the court to do anything at all. It must be remembered that appellant had likewise filed a complaint against appellees, and the jury, at that time, had not found appellant guilty of negligence. As far as counsel

knew, a verdict might be returned for Howe. At any rate, under these circumstances, the court could have committed no error, because it was not asked to take any action.

Point No. Two for reversal is closely related to the aforementioned argument. Appellant asserts that, before the opening of court, counsel for each side met with the judge in his chambers, and the latter admonished the attorneys to stay in the record, and not make any improper statements during the argument; that during the argument of appellees' counsel to the jury, he asserted that the defendant (appellant) "should be taught a lesson as shown by the wreck now in front of the courthouse." Counsel for Howe set out in his motion that he objected to the statement as inflammatory, and opposing counsel was admonished by the court to stay within the record. Subsequently, according to appellant, appellees' counsel, in closing, again stated "that we did not want to have any more wrecks like the wreckage in front of the courthouse." Appellant contends that these statements inflamed the minds of the jurors, causing them to bring in an excessive verdict.

The Deputy Prosecuting Attorney for Pope County testified that he "dropped in" the courtroom, and heard part of the closing argument of appellees' counsel:

"The only thing I heard, Mr. Parker, was Mr. White made reference to prohibiting the terrible wrecks like we had had last night, that was the only statement I heard, that was the only time I was here approximately 5 minutes. I dropped in to hear what was going on."

The court reporter testified that he did not take down the closing arguments, but, as he recalled, counsel for appellees made some reference to the wrecked automobile. The court stated that appellees' counsel twice referred to the wreck, that each time the attorney for appellant objected, and that it (the court) admonished the jury to consider only the record in the case being tried. Appellant's counsel also testified, and admitted

that the jury was admonished by the court both times. The court did not recall warning the attorneys, while in chambers, that they should "stay in the record."

We find no reversible error. Admittedly, the court admonished the jury to consider only evidence in the record each time that counsel for appellant objected. This apparently satisfied counsel, since he did not complain that the court's admonition was insufficient, nor did he move for a mistrial. It was only after an adverse judgment had been rendered that the assertion was made that the court's admonition was insufficient. In *Adams* v. *Summers,* 222 Ark. 924, 263 S. W. 2d 711, a witness made a statement relative to insurance. Appellant objected, and the court promptly sustained the objection, and admonished the jury to disregard the remark. Subsequently, the court, a second time, had occasion to admonish the jury not to consider any statements with reference to insurance coverage. On appeal, the appellants contended that a mistrial should have been declared, but we pointed out that no request for a mistrial was made after the jury was admonished not to consider the matter. In *Ocker* v. *Nix,* 202 Ark. 1064, 155 S. W. 2d 58, we said:

"It is next said that the court erred in permitting one of counsel for appellee to make a prejudicial argument to the jury, and in not declaring a mistrial because thereof. We cannot agree. The court sustained appellant's objections to the remarks when made and instructed the jury not to consider them."

Numerous cases could be cited to the same effect.

Appellant next contends that the jury's verdict for $3,000 was excessive. We find no merit in this argument. Mr. Freeland testified that his left knee struck the dash at the time of the collision, and that he had been troubled with the knee since that time, periodically wearing an elastic bandage. Freeland, who is serving with the United States Army, stated that he is an instructor, and is required to stand on the "platform" six hours per day.

He testified that his automobile had a value of $1,200 before the collision, and that the fair market value of the car was about $200 after the collision. The witness stated that he had expended $144 for doctor bills, and $71.60 for drugs.

Dr. Douglas Lowrey testified that an examination and x-ray revealed a diagnosis of ligamentous sprain of the left knee, and that Freeland would have had pain and tenderness for a couple of weeks; that the injury would cause at least a moderate amount of discomfort if Freeland had to stand on his feet for a long time. The doctor stated that any type of prolonged activity which required Freeland to be on his feet would produce pain. Of course, the amount awarded to this appellee included damages for both personal injuries and damage to the automobile, and we do not know the amount given for each. Appellant asserts that Freeland received $800 from his (Freeland's) insurance company in payment of damage to the automobile, and that the appellee stated that the value of the car, after the wreck, was $200, leaving the actual damage to the automobile at $600. This argument was based upon an intervention purportedly filed by the Southwestern Insurance Company, stating that the company had paid Freeland $800 for damage to the car and was entitled to subrogation in that amount. However, this intervention was stricken by the court before the trial got under way, the court holding that the intervention had not been properly filed. For that matter, the mere fact that Freeland had received $800 from his insurance company, even if that fact properly appeared in the record, would not be adequate grounds to reduce the judgment. As stated, we do not know how the jury prorated the $1,700 awarded to Freeland for personal injuries and damage to the car. It is entirely possible that only $800 was awarded for property damage. In addition, the alleged amount could have been paid by the company to Freeland as a compromise figure.

Mrs. Freeland testified that she received an injured back, a whiplash injury to the neck, and that both knees

were bruised; in fact, she "was bruised all over." The witness stated that she had not been able to perform her ordinary household activities, and that her neck and back still bothered her (at the time of the trial); that she was still taking "pain pills" and nerve medicine. She said that she used the heating pad on her neck at night, and had pain in the left hip when walking.

Dr. Lowrey testified that he took x-rays of the chest, left shoulder, four separate views of the neck or cervical spine, and x-rays of both knees and of the lumbosacral spine (lower back). The doctor stated that Mrs. Freeland had received an acute cervical sprain, a sprain of the muscles of the left shoulder and back, and contusions on both knees, and that these injuries were painful. When asked how long the pain could reasonably be expected to continue, he replied:

"To continue with—without any letting up, I would say over a period of approximately three to six months time, but as far as continuously moderately severe pain, probably only two weeks to a month, and Mrs. Freeland did continue to have a moderately severe amount of pain, particularly in the neck and back for, in fact, about two or three months.

"Q. Now, you say that you expect her to have that pain for that length of time and then additional pain for six months or longer.

"A. Yes, sir, three to six months, I would say."

Dr. Lowrey further stated that complete recovery would occur, but he did not know how long it would take.

"I would estimate in Mrs. Freeland's case that within one to two years, there should be recovery to the point that she would not expect flare ups."

The testimony reflected that the child, Mike, five years of age, was bruised on the head, legs, and back, and complained of pain for about a month and a half.

We agree with the remarks of the trial judge when he overruled the motion to vacate the judgment and grant

a new trial. After noting that it was considered that the admonition of the court to the jury was sufficient, that no record was made of the incident, and no mistrial asked for, he stated:

"As an additional reason for refusing to vacate the judgment, it is not my opinion that the amount awarded by the jury, that is the $300.00 to the minor child, $1,-700.00 to Mr. Freeland and $1,000.00 to Mrs. Freeland, show the result of any passion or prejudice or excitement on the part of the jury. In my opinion the judgment was extremely reasonable."

Certainly we are unable to say that the amounts awarded were excessive.

Finally, appellant asserts that the court erred in refusing to give his Requested Instruction No. 1, as follows:

"The Jury is instructed that the driver of a motor vehicle shall not follow another vehicle [closer] than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the Highway and one following another vehicle too closely is evidence of negligence."

We find no evidence that would justify the giving of the instruction.[1] Appellant, at one point, stated that the Freeland automobile was back of the truck about 228 feet; at another point in his testimony, he stated that appellees' automobile was following about 150 feet back of the truck. Freeland stated positively that he was never closer to the rear of the truck than 150 feet, and there is no testimony to the contrary. Under that proof, we

[1] The accident occurred at approximately 8:00 P.M., November 27, 1962, at New Blaine, Arkansas. According to the evidence, appellant was traveling west, and as he rounded the curve at New Blaine, he was "run off" the road by a truck, traveling east, that had just traversed a 255-foot bridge, straddling the center line. Appellant pulled off the highway about two feet, and traveled for approximately 147 feet. Howe stated that in pulling back onto the highway, he was blinded by the lights from Freeland's car, which was just coming over the bridge. The collision occurred 17 feet from the end of the bridge.

do not think that the instruction sought by appellant was justified.

No reversible error appearing, the judgment is affirmed.

RUSSELL *v.* HILL.

5-3152 375 S. W. 2d 661

Opinion delivered February 24, 1964.

Russell & Hurley, for appellant.

O. W. Pete Wiggins, for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation involves an option deed. Walter Hill and his wife were plaintiffs below and are appellees here; and Tommy H. Russell and his wife were defendants below and are appellants here.

On an uncertain day[1] in April 1962 Walter Hill and wife executed an instrument, whereby Tommy H. Rus-

[1] The instrument states that it was prepared by Tommy H. Russell. It was recorded in the Office of the Circuit Clerk on April 4, 1962. Both the instrument and acknowledgment leave the day blank. We copy the full instrument:

"OPTION DEED.

"FOR AND IN CONSIDERATION of the sum of One Dollar, to me in hand paid, the receipt of which is hereby acknowledged, and the undertaking of Tommy H. Russell to pay Walter Hill and Shirley Hill the sum of $21,300 (Twenty-one thousand three hundred Dol-

sell acquired an option to purchase a lot for $21,300.00, provided the said amount was paid on or before April 1, 1963. On February 8, 1963, Hill and wife filed this suit to have the instrument declared void and removed as a cloud on their title. On February 28, 1963, Russell and wife filed their answer as follows:

"Come the defendants to Answer the Complaint in Equity to Cancel Deed and Quiet Title in Plaintiffs and by way of doing state:

"That they deny each and every material allegation contained in the complaint of the plaintiffs filed herein.

"WHEREFORE, defendants pray that this cause be dismissed, for their costs herein expended and for all other proper relief."

The cause was heard *ore tenus* by the Chancery Court. The plaintiffs claimed that no consideration of any kind was ever paid them; that the instrument was a mere offer to sell and, as such, could be withdrawn at any time; and plaintiffs cited and relied on such cases[2] as *Jones* v. *Lewis,* 89 Ark. 368, 117 S. W. 561; and *Lane* v. *Jackson,* 135 Ark. 384, 205 S. W. 650. The defendants claimed that the option deed was for a valuable consideration and could not be withdrawn. The only witness for the defendants was Russell; and he testified: (a)

lars), on or before the 1st day of April, 1963, we hereby grant, bargain, sell and convey unto the said Tommy H. Russell and to his heirs, successors and assigns, upon the conditions hereinafter written, the following described land, situated in Pulaski County, State of Arkansas, to-wit:

"Lot Seven (7), Block Four (4), Baums Re-subdivision to the City of North Little Rock, Arkansas.

"If said Tommy H. Russell shall fail to pay the sum hereinbefore named within the times above set forth, this conveyance shall be void, and all rights and liabilities of either party thereunder shall cease, and said land shall revert to us without any reconveyance from the said Tommy H. Russell. "And I, Shirley Hill, wife of said Walter Hill, hereby release and relinquish unto the said grantee all my right of dower in said land.

"WITNESS our hands this .....day of April, 1962.

"/s/ Walter Hill
"/s/ Shirley Hill."

[2] To these could be added *Duclos* v. *Turner,* 204 Ark. 1000, 166 S. W. 2d 251; and *Kelley* v. *Coldren,* 226 Ark. 266, 290 S. W. 2d 424.

that on January 6, 1961 the Hills had listed the property with Wallace Realty Company for sale at $21,300.00; (b) that the listing was for 120 days; (c) that the Hills cancelled the listing before the 120 days; (d) that Wallace Realty Company filed suit against the Hills for damages of $2,130.00 because of such cancellation; (e) that Russell was attorney for the Wallace Realty Company; (f) and that in March 1962 the said case of *Wallace Realty Company* v. *Hill* was dismissed in consideration of the Hills executing the option deed to Russell, as previously copied.[3] Thus, the effect of Russell's testimony was that there was a real and valuable consideration for the option deed and that the option could not be cancelled by the unilateral action of the Hills, as here attempted; and to sustain them the appellants cite such cases as *Hogan* v. *Richardson,* 166 Ark. 381, 266 S. W. 299; and *Kelly* v. *Keith,* 77 Ark. 31, 90 S. W. 150.

The Chancery decree was in favor of the plaintiffs both on the consideration issue and also because Russell had made no tender. The decree was entered on April 3, 1963, and contains, *inter alia,* this language:

"The Court further finds that the purported Option Deed was no more than an offer to sell and inasmuch as a nominal and not adequate consideration was mentioned in the said Deed, the Court further finds that the nominal consideration has never been paid. This Court having heard this portion of the case on March 27, 1963, this Decree having been prepared and presented to the Court on the date of the signing hereof, the Court finds that in addition thereto, that the defendants, and each of them, have failed to tender, offer or pay any money on or before the expiration of April 1, 1963, and that said Deed has also expired on the date of the signing of this Decree."

Thus the Chancery Court assigned two reasons for ruling against the appellants: (a) no consideration was

[3] The appellees insist that the Wallace Realty Company might have claimed that the dismissal of its lawsuit against the Hills was a valuable consideration for an option to Wallace Realty Company, but that Russell, as attorney for the Wallace Realty Company, cannot so claim.

paid by Russell for the option deed; and (b) Russell never made any tender of the $21,300.00 before the option deed expired on April 1, 1963. Regardless of this first point, we agree with the Chancery Court on the second point—*i.e.,* absence of tender; and therefore we affirm the Chancery Decree. The cases hold with practical unanimity that the optionee must make tender of the money within the time stated in the instrument. In 55 Am. Jur. p. 508 *et seq.,* "Vendor and Purchaser" § 39 *et seq.,* the holdings are summarized in this language: "To constitute a valid exercise of an option to purchase land and impose a duty on the vendor to convey, the terms and conditions of the option must be complied with by the purchaser . . . It is universally held, not only at law but also in equity, that the time named for the exercise of an option is to be regarded as of the essence of the option, whether so expressly stated or not. Unless an option is exercised within the time limited, the rights of the optionee expire without notice or declaration of forfeiture."

Thus whatever right—if any—Russell may have had under the option expired by the terms of the instrument before the entry of the decree, unless Hill did something that would excuse Russell from notice of acceptance of the option and tender of the purchase money. In this Court, Russell seeks to excuse himself from tender on the basis that the filing of this suit by Hill in February 1963 was a repudiation of the option and, as such, excused tender until after the conclusion of this litigation; and Russell cites and relies on such cases as *Read's Drug Store* v. *Hessig-Ellis,* 93 Ark. 497, 125 S. W. 434; and *Doup* v. *Almand,* 212 Ark. 687, 207 S. W. 2d 601; and to these could be added *Dickinson* v. *McKenzie,* 197 Ark. 746, 126 S. W. 2d 95. But we hold that these cases are not applicable here because of the factual situation existing in this case, as will be later shown.

In 55 Am. Jur. p. 510, "Vendor and Purchaser," § 40, the holdings are summarized:

"Under some circumstances the optionee's delay in exercising the option has been held to be excused by various acts and statements of the vendor, such as statements and representations calculated to cause delay, the vendor's absence or his evasive conduct, his failure to furnish necessary information, or to furnish the required title, or evidence or history thereof, the vendor's repudiation, or statements or acts of the vendor amounting to a waiver of exercise of the option at the time stated in the option."

In 157 A.L.R. p. 1311, there is an annotation entitled: "When optionee's delay in exercising option excused"; and in discussing repudiation the holdings are summarized:

"It is a general rule that where the exercise of an option contemplates tender of the purchase price as a part of the acceptance, repudiation of the contract by the optionor, in the face of readiness, willingness, and ability to conform on the part of the optionee, excuses tender during the time limited, and entitles the latter to all available remedies, including specific performance . . .

"It is to be observed, in cases involving option contracts which require a tender as part of an indication of acceptance, in order to exercise an option to purchase, that even though the optionee may be excused from making a timely tender by reason of repudiation of the contract by the optionor, he must, under the familiar rule of contracts relating to offer and acceptance, in order to establish any equitable contractual relations with the latter, indicate to him definitely an acceptance and willingness to proceed with the contemplated transaction."

The facts in the case at bar show that Hill did nothing to excuse a tender. He was anxious at all times to sell the property for $21,300.00; and so testified. He admitted signing the option deed, but claimed that there was no consideration, and that Russell was holding the option until April 1, 1963, on the hope of turning the property at a profit. Hill wanted the option terminated

so that he could speedily sell the property. Under such a factual situation what was the burden resting on Russell? To definitely accept the option and to make a tender within the time stated in the written instrument. When Russell filed his answer herein—as previously copied in full—he merely made a general denial. In his testimony he never at any time said that he had exercised, or intended to exercise, the option. The point was made in the Chancery Court that Russell had never made any tender. Hill repeatedly testified that he wanted to sell the property for $21,300.00, as stated in the option deed, but did not want to delay the matter. Yet in the face of all such testimony, Russell never stated that he wanted to exercise, or intended to exercise, the option and make the payment. Certainly he made no tender. So whatever right—if any—he may have originally held under the option, had expired before the entry of the decree.

Affirmed.

CLARKSVILLE MEAT CO. *v.* BROOKS.

5-3198 375 S. W. 2d 671

Opinion delivered February 24, 1964.

Shaw, Jones & Shaw, for appellant.

Donald Poe, for appellee.

George Rose Smith, J. This is a workmen's compensation case in which the appellee seeks an award for a broken leg. The referee and the full commission denied the claim on the ground that Brooks was a casual employee who was not injured in the course of his employer's business. Ark. Stat. Ann. § 81-1302 (b) (Repl. 1960). This appeal is from a judgment of the circuit court reversing the commission's decision.

Donald Meek, the employer, owns and operates the Clarksville Meat Company, an unincorporated meat-packing plant. In connection with the plant Meek maintains one or more horses which he uses to catch wild cattle that he has bought for slaughter. The horses are sometimes used for purposes not related to the meat-packing business, but the commission did not attach any importance to this fact.

Brooks is a part-time blacksmith. He does not have a smithy. Instead, he takes his tools and equipment to his patrons' premises and performs his work there. For some five years before his injury Brooks had shod Meek's horses three or four times a year. On September 29, 1961, while he was engaged in shoeing a horse at the packing plant, he was kicked by the animal and sustained the injury giving rise to his claim.

The commission specifically found that Brooks was an employee rather than an independent contractor, but the appellants insist that this finding is unsupported by any substantial evidence. The question is by no means free from difficulty, but we are unwilling to declare as a matter of law that Brooks was an independent contractor.

The governing test is whether Meek had the right to control Brooks with respect to his physical conduct in shoeing the horse. *Hobbs-Western Co.* v. *Carmical,* 192 Ark. 59, 91 S. W. 2d 605; Restatement, Second, Agency, § 2. At the time of the accident Meek was holding the horse, an unruly animal, while Brooks did his work. Brooks testified that he was under Meek's direction and control, that Meek told him what to do. Meek testified that he selected the kind of shoe to be used and instructed Brooks to use an extra nail owing to a defect in the horse's hoof. Meek also stated that Brooks was under his control, that he could have stopped Brooks if the latter had not followed his instructions. Moreover, Meek testified that through the years he had entered the payments to Brooks upon his books in some instances as labor and in some instances as miscellaneous expense. In the former case the entry became a part of the plant's total payroll and was taken into account in the computation of his insurance premiums (presumably for workmen's compensation coverage). In view of all this proof we are unable to say that there is no substantial evidence to support the commission's finding that Brooks was an employee.

The statute excludes from coverage an employee "whose employment is casual and not in the course of the trade, business, profession or occupation of his employer." § 81-1302 (b), *supra.* In construing this section we have held that an employee is not without the protection of the act unless both exceptions are found to exist. *Buxton* v. *Dean,* 218 Ark. 645, 238 S. W. 2d 487. Here that finding was made by the commission. It reasoned that Meek's business was not that of a blacksmith and hence that the shoeing of horses was merely incidental to his meat-packing business.

This narrow interpretation of the statute is a decidedly minority view that we are unwilling to embrace. The horse that kicked Brooks was unquestionably used in the business. There is no doubt that the animal had to be shod in order to maintain it in service. Professor

Larson has pointed out that under statutes similar to ours the overwhelming weight of authority holds that "maintenance, repair, painting, cleaning, and the like are 'in the course' of business because the business could not be carried on without them." Larson, Workmen's Compensation Law, § 51.23. Many of the cases were reviewed in *Sears, Roebuck & Co.* v. *Pixler,* 140 Fla. 677, 192 So. 617, where it was held that a plasterer who was hurt while replacing plaster in a retail store at night was acting in the course of the employer's business.

Our decision in *Aerial Crop Care* v. *Landry,* 235 Ark. 406, 360 S. W. 2d 185, is really to the same effect. There the employer was engaged in agricultural crop-dusting. The claimant was injured while working as a carpenter in the construction of a hangar. Thus the employer was no more engaged in the business of a carpenter than Meek was engaged in the business of a blacksmith. We held, however, that the section of the statute now in issue did not exclude the injured employee from the protection of the law. We adhere to that view.

Affirmed.

HILLEBRENNER *v.* ODOM.

5-3165 375 S. W. 2d 664

Opinion delivered February 24, 1964.

[redacted]

Tilghman E. Dixon, for appellant.

John T. Jernigan and *E. R. Parham, Jr.,* for appellee.

SAM ROBINSON, Associate Justice. On November 2, 1960, appellants, Nellie Schindler Hillebrenner and R. T. Hillebrenner, entered into an agreement with appellees, W. M. and Gladys Odom, whereby appellants purchased from appellees Lots 16, 17, 18, 19, 20, 21 and 22, Block 7, Riffel and Holders Addition to the City of Little Rock. The agreed purchase price was $65,000.00. As partial payment, appellants conveyed to appellees property in Dallas, Texas valued at $26,611.33. For the balance of $38,388.67, appellants executed and delivered their promissory note payable $150.00 per month, in addition to interest at the rate of 5% per annum. Located on the property are rental units consisting of duplexes, cabins, and a business building. Some house trailers were also on the property at the time of the sale, but it was understood by all parties that they did not go with the property.

Among other things, the contract of purchase provides: "Upon payment of the entire debt with interest when due, together with all taxes, assessments and insurance premiums due hereafter, SELLER will convey to BUYER the above described property by Warranty Deed and will furnish an Abstract of Title certified to the date of this AGREEMENT showing merchantable title."

On June 28, 1962, appellants filed this action alleging that the appellees had misrepresented the amount of rent the property would produce and had also misrepresented the condition of the buildings. They alleged that the buildings were in a deplorable condition necessitating the expenditure of about $3,000.00 in making repairs, and further, that under the provisions of a city ordinance the house trailers could not be kept on the

premises, and that appellees had moved them, thereby reducing the monthly income from rent.

Appellants further allege that the title was defective and stemmed from a State Tax Title, and that they have called upon the defendants to either correct said title and make it merchantable or to refund their money, which the defendants have failed and refused to do. Appellants prayed for judgment against appellees in the sum of $34,961.33.

The trial court held that the preponderance of the evidence did not show that appellees made any false representations in the sale of the property that called for a rescission of the contract. We agree with the chancellor on that point. The parties were dealing at arms length. Appellants had every opportunity to inspect the property and to make a determination of its value; they knew the house trailers did not go with the property, and, of course, they knew the trailers could be moved at any time. Further, one of the appellants, Mr. Hillebrenner, is a plumber by trade. He spent about two days at the property and was in just about as good a position as anyone to determine the condition of the property. It appears that appellants made a bad trade, but there was no fraud or deception practiced by appellees that would justify a rescission of the contract. The court said in *Rose* v. *Moore,* 196 Ark. 527, 118 S. W. 2d 870: "With the opportunity afforded Lange to investigate and inspect the farm, it must be presumed that he exercised and relied upon his own judgment in making the contract." And the court said in *Green* v. *Bush,* 203 Ark. 883, 159 S. W. 2d 458: "This is a suit to cancel a deed upon the grounds that its execution was procured by fraud; which is never presumed, but must be affirmatively proved."

Appellants further contend that although the contract of purchase provides that when the purchase price is paid in full appellees will furnish an abstract showing a merchantable title, the appellees do not have a merchantable title, and, therefore, cannot furnish an abstract showing title. Appellee offered to furnish title

insurance; the trial court thought this would be a sufficient compliance with the purchase agreement, and therefore rendered a decree for appellees.

Apparently, the only defect in the abstract of title to Lot 22 is that the patent from the U. S. Government is not shown. It appears, however, that appellees must depend on adverse possession to establish their title to the other lots. Their adverse possession does not show in the abstract of title that they propose to furnish appellants when the purchase price is paid in full. In all probability, a successful suit to quiet title will be necessary to cause the abstract to show a merchantable title.

In this case there is a contract to convey the property by warranty deed and to *furnish an abstract* showing a merchantable title, not a contract to *convey* a merchantable title. There is a distinction, as pointed out in *Lucas* v. *Meek,* 227 Ark. 677, 300 S. W. 2d 593. Perhaps it can be said that in at least two cases it has been held that adverse possession is sufficient to support a contract to furnish an abstract showing a merchantable title. *Smith* v. *Biddle,* 171 Ark. 644, 286 S. W. 801; *McWilliams* v. *Toups,* 202 Ark. 159, 150 S. W. 2d 34. But the decided weight of authority, with which we agree, is that a contract to furnish an abstract showing a merchantable title means just what it says, and the seller must furnish that kind of abstract.

In *Meek* v. *Green,* 166 Ark. 436, 266 S. W. 451, Judge Hart said: "This court has held that, where a contract for the purchase and sale of land calls for an abstract showing good title, the covenant will be construed to mean a good record title, and not such a title as may be shown to be good by oral proof, or affidavits and other writings not subject to registration. In short, it is not sufficient in such cases that the title is good in fact, that is, capable of being made good by the production of affidavits or other oral testimony, but it must be good of record. *Hinton* v. *Martin,* 151 Ark. 343; *Dalton* v. *Lybarger,* 152 Ark. 193; and *Bennett* v. *Farabough,* 154 Ark. 193." In 46 A.L.R. 2d 561 there is a long annotation on the effect of a contract calling for an abstract

showing a merchantable title. It is clearly shown by the cases cited in this annotation, as well as our own cases, that the great weight of authority is that such a provision in a contract of purchase will be enforced.

Since the institution of this suit, the monthly payments due under the terms of the purchase contract have been paid into the registry of the trial court. The purchase contract provides that the abstract shall be furnished after the purchase price has been paid. Here, where it is shown that the seller must take affirmative action in order to be able to furnish an abstract showing a merchantable title, equity will not enforce the monthly payments to the seller, but appellants shall continue to make such payments into the registry of the trial court, and appellees are given a reasonable time in which to furnish to appellants, for examination, an abstract showing a merchantable title. If and when such abstract is furnished, the money which has accumulated in the registry of the court, and the future monthly payments, shall be paid to appellees. *Lucas* v. *Meek,* 227 Ark. 677, 300 S. W. 2d 593.

The judgment is modified and remanded with directions to enter an order not inconsistent therewith.

HOLT, J., not participating.

STEPHENSON *v.* STEPHENSON.

5-3067 375 S. W. 2d 659

Opinion delivered February 24, 1964.

B. W. Thomas and *Earl Mazander,* for appellant.

Q. Byrum Hurst, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a final decree and a modified decree of divorce entered against the appellant, Joan Stephenson, and in favor of appellee J. H. Stephenson. These parties were married on September 11, 1954, and separated March 3, 1962. On July 2, 1962, appellee filed a complaint for divorce in Garland Chancery Court against appellant, alleging that appellant was guilty of indignities to appellee's person and seeking custody of the two young sons of the parties. A general denial was thereafter filed on behalf of appellant. After changing counsel, appellant filed a motion on September 18, 1962, requesting an order permitting appellant to file an amended and substituted answer and cross-complaint. This motion was granted and on October 2, 1962, appellant's amended and substituted answer and cross-complaint was filed, which specifically denied appellee's allegations and cross-complained, *inter alia,* for divorce, custody, child support and attorneys fees. On December 7, 1962, the case was tried before the chancellor, with the parties and a number of witnesses testifying in support of appellee's complaint and appellant's cross-complaint. On December 11, 1962, the court entered its final decree of divorce granting custody of the children to appellee except during June, July and August of each year, from which decree appellant has prosecuted this appeal. (On January 29, 1963, a modified decree was entered by the chancellor. The ruling appears to be identical with the original decree, with the additions (1) that appellee was ordered to return to appellant her personal belongings and personal property owned by her prior to the marriage, and (2) that each of the parties was given visitation rights two weekends each month while the children are in the other party's custody.)

Appellant urges six points for reversal which are argued collectively and resolve down to (1) that the

trial court erred in granting custody of the young boys to the father and (2) that the evidence did not support the findings and decree of the chancellor.

It is not usual for a chancellor or this court, for that matter, on trial de novo to award custody of young children to anyone other than their mother. However it is not unheard-of. See *Bornhoft* v. *Thompson,* 237 Ark. 256, 372 S. W. 2d 616. Arkansas Stat. Ann. § 34-1211 (Repl. 1962) says in part that, "Where a decree [of divorce] shall be entered, the court shall make such order touching the . . . care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." In custody matters the unyielding consideration is the welfare of the children. It matters not to this court which of the parties "wins" custody, so long as the children are the ultimate winners of good care and home. In the case at bar the chancellor found that appellee was entitled to a divorce on his complaint and that appellant was not entitled to a divorce on her cross-complaint, and awarded custody to appellee except during the months of June, July and August, during which time appellant should have their custody. During the hearing the perceptive chancellor had the opportunity to fully appraise the witnesses and their testimony. Appellant vigorously contends that the chancellor erred in awarding custody of the children to the father, but there was estimable evidence which supported the able chancellor's conclusion, and we have said, consistently and frequently, that we will not reverse the findings of the chancellor unless such findings are against the preponderance of the evidence. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517; *Austin* v. *Austin,* 237 Ark. 127, 372 S. W. 2d 231. As we said in *Bornhoft* v. *Thompson, supra*:

"The parties and the witnesses were all observed by the chancellor, who thus had the opportunity to note their demeanor on the stand, the manner of answering the questions, and he was, accordingly, in much better position to judge the truthfulness or untruthfulness of the statements made by the parties and witnesses. We

are unable to say that his finding . . . is against the preponderance of the evidence. . . .

". . . Of course, the father [mother, here] can always petition the court for a modification of the present decree if circumstances indicate that a change should be made."

Solicitors for appellant have petitioned for an allowance of attorneys' fee for their services rendered in this court, which is hereby granted, in the sum of $200.00.

Affirmed.

GEORGE ROSE SMITH, J., dissents.

ARK. COAL CO. *v.* STEELE.

5-3203 375 S. W. 2d 673

Opinion delivered February 24, 1964.

Dobbs, Pryor and *Dobbs,* for appellant.

Sam Sexton, Jr., Marvin Holman, for appellee.

FRANK HOLT, Associate Justice. This is a Workmen's Compensation case in which the claimant-appellee, Bill Steele, seeks total and permanent disability benefits as a result of silicosis. The Referee denied the claim and the Full Commission found the claimant became disabled on January 3, 1961 and awarded compensation for total and permanent disability. The Commission's award was affirmed by the Circuit Court.

On appeal appellants, Arkansas Coal Company and Commercial Standard Insurance Company, first contend for reversal that "the Full Commission, sitting as a reviewing body, was without authority to pass upon the credibility of witnesses without having heard any witness, and consequently were without authority to reverse the findings of the Referee; that the Circuit Court was without authority to pass upon the credibility of witnesses." In other words, it is appellants' contention that the Full Commission is without authority to reverse the findings of the Referee where an appeal is presented to the Commission solely on the transcript of the record made before the Referee. We do not agree. The authority of the Commission to review an appeal from the findings and award made by the Referee is vested in the Commission by Ark. Stat. Ann. § 81-1323 (b) (Repl. 1960). In pertinent part this statute reads:

"* * * the full Commission shall review the evidence or, if deemed advisable, hear the parties, their representatives and witnesses, and shall make awards, together with its rulings of law,".

In the very recent case of *Potlatch Forests, Inc.,* v. *Smith,* 237 Ark. 468, 374 S. W. 2d 166, we rejected the very argument the appellants advance in the case at bar. In that case we said:

"* * * It is pointed out that the referee, who originally tried this case, heard all of the witnesses in person, both for claimant and the company, and, on appeal, no additional testimony was presented to the Commission. Appellee states that the referee, therefore, '* * * was the sole and exclusive judge of the weight of the evidence and the credibility of the witnesses. * * * He was in position to take into consideration all the surrounding circumstances of each witness, and of particular importance, the manner and demeanor of each witness on the witness stand. * * *' This contention must be rejected. As recently as October 21 of this year, we had occasion, in *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 371 S. W. 2d 582, to comment upon this contention stating, 'We take this occasion to point out that it is the duty of the Commission to make a finding according to a preponderance of the evidence, and not whether there is any substantial evidence to support the finding of the Referee.' " Citing cases.

The function and duty of the Circuit Court upon an appeal from the Full Commission is explicitly prescribed by Ark. Stat. Ann. § 81-1325 (b). It provides, *inter alia,* that:

"* * * Upon the appeal to the circuit court no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the Commission, within its powers, shall be conclusive and binding upon said court. The court shall review only questions of law * * *."

See, also, *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82.

The appellants next contend that the findings of the Referee "should be affirmed on the basis of the evidence and the finding of the Referee as to credibility." As we have said, the findings of the Referee are not binding upon the Commission and it is the duty of the Full Commission to consider the entire record and determine the merits of the claim upon the preponderance of the evidence.

Appellants next urge that appellee's claim was not filed within the time prescribed by law. We find no merit in this contention. The claimant's regular physician, Dr. Kolb, testified that he first became certain about claimant's condition on January 3 or 4, 1961 when he determined that appellee was not suffering from a suspected lung cancer but was suffering from silicosis, complicated by emphysema, and that his condition was severe, permanently disabling and progressive. Notice to the appellant, Arkansas Coal Company, was given February 2, 1961 and the claim was filed on March 22, 1961. Thus, it must be said that the claimant complied with the statutory requirements upon being definitely advised as to his condition.

Appellants contend, however, that the claimant had knowledge of his condition beginning in 1959 and should be barred from now asserting his claim. In *Hixson Coal Co.*, v. *Furstenberg, Adm'x,* 225 Ark. 568, 284 S. W. 2d 120, we said:

"In silicosis, the injury may occur many years before the disease becomes manifest, as the accumulated effects of the deleterious substance are of a slow, insidious nature."

In silicosis cases the statute commences to run at the time of disablement and not from the time the claimant learns that he is suffering from the disease and disablement does not occur until the employee is unable to work and earn his usual wages. *Quality Excelsior Coal Co.* v. *Smith,* 233 Ark. 67, 342 S. W. 2d 480. The appellant-employer and appellee stipulated in the case at bar that the appellee continued to work at his usual occupation until March 26, 1960. Thus, it is clear the claim is not barred by the statute of limitations. Ark. Stat. Ann. § 81-1318.

The appellants next argue that "aside from the matter of credibility of witnesses, there is not sufficient substantial evidence in the record to support the award in favor of the claimant." The appellant-employer was engaged in the strip mining of coal. The appellee was

employed as a driller for the appellant from 1944 until March 26, 1960 when appellant ceased operations. Appellee testified that for a period of seven hours a day, five days a week during his entire employment at times he worked in dust so heavy it was necessary to rinse his mouth before he could take a drink of water and sometimes it was impossible to see a man from a distance of ten feet. No safety devices, such as dust masks, were furnished. A geologist testified that the sandstone formations where appellee worked were composed of 95-98% silica. The testimony of appellee and the geologist was uncontradicted. Appellee's disablement was corroborated by his regular physician who testified that appellee was totally and permanently disabled by reason of silicosis, complicated by emphysema. A physician, on behalf of appellants, examined the claimant and according to his report appellee has "some pulmonary fibrosis and emphysema which is probably related to chronic silica inhalation" and he "would clinically estimate his [appellee's] disability at 40%, perhaps as high as 60%,".

It is a familiar rule that the findings of the Workmen's Compensation Commission are entitled to the same verity as a jury verdict and if there is any substantial evidence to support the Commission's finding it is the duty of the Circuit Court and this court to affirm. This is one of the strongest rules recognized in our compensation cases. *Reynolds Metals Co.,* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489; *White* v. *First Electric Cooperative,* 230 Ark. 925, 327 S. W. 2d 720. It cannot be said in the case at bar that there is no substantial evidence to support the findings of the Full Commission.

Appellants argue that there is no evidence in the record to support the award of maximum compensation benefits to appellee. We cannot consider this contention when, as here, it is raised for the first time on appeal. According to the Full Commission, the appellants and appellee stipulated "that the claimant's average weekly wage was sufficient to entitle him to maximum Workman's Compensation benefits."

Affirmed.

Opinion delivered February 24, 1964.

[redacted]

Paul K. Roberts, for appellant.

Bruce Bennett, Attorney General, By *John P. Gill,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Associate Justice. This is a motion by the appellee, State of Arkansas, to dismiss the misdemeanor appeals of the appellants for failure to file their appeals within sixty days from the date of rendition of judgment. The appeals were filed seventy-five days from the date of the judgment.

Appellee relies upon Ark. Stat. Ann. § 43-2732 (1947) [Crim. Code, § 340 (1869)] which reads:

"Misdemeanors—When appeal granted—Condition. —The appeal shall be prayed during the term at which the judgment was rendered, and shall be granted upon the condition that the record is lodged in the clerk's office of the Supreme Court within sixty [60] days after the judgment."

In resisting appellee's motion the appellants rely upon Act 158 of 1963 which reads:

"SECTION 1. Section 1 of Act 218 of the Acts of 1909 (Arkansas Statutes 43-2701) is hereby amended to read as follows: 'No appeals to the Supreme Court in a criminal case shall be granted, nor writs of error issued, except within sixty (60) days after rendition of

the judgment of conviction in the case' except that the trial judge with his discretion may by order entered prior to the expiration of said sixty (60) days extend the time for not to exceed an additional sixty (60) days."

Pursuant to the provisions of this Act the appellants were granted a sixty day extension and within this time filed their appeals.

In reviewing the history of these Acts we find that the time limitation for appeal in all criminal cases was unquestionably the same until the 1963 Act. Thus, until now, there was no occasion for the present question to arise. We deem it necessary to clarify it by an opinion.

The Criminal Code (1869) § 327 provided that in felony cases the time for lodging an appeal with the supreme court was limited to sixty days after the rendition of judgment. Section 340 of the Criminal Code provided that the time for filing the appeal in misdemeanor cases was also limited to sixty days.

The next legislative expression on this subject was Act 218 of 1909. Section 1 of this Act [Ark. Stat. Ann. § 43-2701] limited the time to sixty days for an appeal to the supreme court in a "criminal case". This section makes no distinction between felonies and misdemeanors. Section 2 of this Act [Ark. Stat. Ann. § 43-2703] refers to "all criminal cases, both felonies and misdemeanors," which indicates the clear intention of the Legislature to encompass both types of offenses in dealing with this subject. Section 3 repealed all laws and parts thereof in conflict with the Act.

In addition to the fact that Act 218 of 1909 refers to both misdemeanors and felonies as being criminal cases, we have held that 'crimes' and 'misdemeanors' are synonymous terms. In the early case of *Rector* v. *The State,* 6 Ark. 187, we said:

"* * * A crime or misdemeanor is defined to be 'an act committed, or omitted, in violation of a public law, either forbidding or commanding it.' This general definition comprehends both crimes and misdemeanors,

which properly speaking are mere synonymous terms, though in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye, while smaller faults, and omissions of less consequence, are comprised under the gentler name of misdemeanors only."

See, also, Ark. Stat. Ann. § 41-101 (1947).

It follows, therefore, that Ark. Stat. Ann. § 43-2732 was supplanted by Act 218 of 1909 [Ark. Stat. Ann. § 43-2701] and that the amendatory Act 158 of 1963 [Ark. Stat. Ann. § 43-2701 (Supp. 1963)] now governs in all criminal cases, both felonies and misdemeanors, as to limitation of time in the filing of an appeal.

The motion to dismiss is denied.

5-3177 375 S. W. 2d 798

Opinion delivered March 2, 1964.

W. Q. Hall, for appellant.

No brief filed for appellee.

CARLETON HARRIS, Chief Justice. Eva Bebout, appellee herein, and M. L. Bebout, appellant herein, were married on August 18, 1946. They lived together until April or May of 1961, at which time appellant left the home. Thereafter, on May 16, 1961, appellee filed her petition for separate maintenance. A motion to quash was filed by appellant on June 5, 1961, and on November 27 of the same year a general denial was filed. Thereafter, on February 1, 1962, M. L. Bebout filed a cross-complaint, seeking a divorce on the grounds of general indignities. On February 5, a hearing was held on the question of temporary allowances, and appellant was directed to pay $50.00 per month temporary alimony to his wife, together with an attorneys' fee. On June 16, 1962, Mrs. Bebout filed an "Amended and Substituted Complaint" in which she alleged general indignities, and asked the court for an absolute divorce. On June 28, appellant filed an answer denying the allegations in the

substituted complaint, and on the same day, filed a suit for divorce in Las Vegas, Nevada. On July 9, 1962, the Madison County Chancery Court heard the cause on its merits. Mrs. Bebout testified, along with Donna Swift, a witness on her behalf. Appellant did not testify, nor was any evidence offered on his behalf, though the court considered the testimony that Bebout had given on February 5, same having been transcribed and introduced by appellee as an exhibit. At the conclusion of the trial, the court awarded appellee a divorce, and vested her with absolute title to the home place in Madison County, which had been held as an estate by the entirety.[1] The proof reflected also that appellant and appellee had sold a piece of property to third parties, and had taken a promissory note payable to themselves for the unpaid purchase price, together with a mortgage to secure same. The note and mortgage were held in escrow by the First National Bank of Huntsville. The court, likewise, held that, under the evidence, Mrs. Bebout was entitled to the proceeds of the note. No actual decree was entered for one year, same being signed on July 8, 1963, *nunc pro tunc* as of July 9, 1962. From the decree, appellant brings this appeal.

It is necessary that this case be reversed because of insufficient corroboration of the wife's testimony as to grounds for divorce. In fact, Mrs. Bebout's testimony itself was rather weak as to indignities suffered. She stated that, during their marriage, her husband did not fuss, quarrel, or find fault with her. She said that he simply told her that he no longer intended to live with her, and left. "I think he had another woman." However, the proof reflected that he was living with another couple, and there is no evidence to substantiate her assertion. On cross-examination, she did state that on an oc-

[1] Appellant had stated, in the hearing on February 5, that Mrs. Bebout had made the last $500 payment on the home place:

"Q. You let her make the payment then with the understanding that she was to get title to the place, is that it?

"A. Right.

"Q. Then if that was your understanding, if she did make the payment then she was entitled to the title because you were going to let it go back? You didn't care about it, is that right?

"A. That's right."

casion "he choked me and told me he was going to kill me and bury me * * *."

Donna Swift, the witness offered by appellee, was asked by counsel,

"Q. You have heard her testify. Do you know that what she has testified to is true?

"A. I think so, yes."

Subsequently, on cross-examination, Mrs. Swift was asked several questions relative to the property owned by the parties, and she answered,

"All I know is what she has told me. She and I are very good friends, and she has visited with me several times, and told me about these things, but —"

It really is not clear from Mrs. Swift's testimony as to exactly what she meant by, "All I know is what she has told me." It could relate to both the grounds for divorce and the matters concerning the rights of the parties in property they owned, or the statement could be taken as referring only to the properties. Actually, from her apparent lack of personal knowledge, it would appear that Mrs. Swift was not really acquainted with any of the facts. However, be that as it may, the testimony, "I *think*[2] so, yes" does not constitute sufficient corroboration to comply with legal requirements. Of course, actually, corroborating evidence, to carry the proper amount of weight, should detail the facts with which the witness is familiar, but even where the evidence is abbreviated, as here, the witness should be positive in her statements. In *Highsmith* v. *Highsmith,* 219 Ark. 123, 240 S. W. 2d 5, the corroborating witness stated that she *understood* appellant left her husband on the date of separation without cause, and that she was under the *impression* that he was good to her. A divorce was granted, and the case appealed to this court. In reversing that decree, we said:

"Our court has many times held in such cases that the testimony of the plaintiff must be corroborated. One

[2] Emphasis supplied.

case is *Sisk* v. *Sisk,* 99 Ark. 94, 136 S. W. 987, where the facts are similar to this case. A recent case (January 29, 1951) is *Stimmel* v. *Stimmel,* 218 Ark. 293, 235 S. W. 2d 959. Here the deposition of Zelma Pumphrey plainly shows that she knew very little about the material issues and that her statements were based on impressions or hearsay."

The pleadings were not amended to allege desertion, nor was there any corroborating evidence to that effect.

Since appellee has not sustained her cause of action as required under our decisions, it follows that the court erred in granting her a divorce. It may well be that the Chancellor, in disposing of property rights, reached the right conclusions, both from an equitable and legal standpoint, but we do not reach these questions, since the reversal of the Chancellor's finding as to the divorce means that the entire decree must fall.

Reversed.

WOOD *v.* COMBS.

5-3185 375 S. W. 2d 800

Opinion delivered March 2, 1964.

Wootton, Land & Matthews, for appellant.

Wood, Chesnutt & Smith, for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation stems from a traffic mishap on Grand Avenue in the City of Hot Springs. R. C. Combs was plaintiff below and is appellee here. Donald Wood and Ben M. Hogan & Co. were defendants below and are appellants here. Mr. Combs drove his car into the rear of a tractor-trailer unit owned by Ben M. Hogan & Co. and operated by Donald Wood. For his personal injuries and damages to his car Mr. Combs filed this action against Donald Wood and Ben M. Hogan & Co., both of whom denied liability. Trial to a jury resulted in a verdict and judgment for appellee Combs, and on this appeal appellants urge two points:

I. The Court erred in failing to direct a verdict for the defendants at the conclusion of the testimony in the case.

II. The Court erred in giving, in failing to give, and in modifying certain instructions.

I. *Refusal To Direct A Verdict.* This assignment necessitates a review of the evidence; and in so doing we must view the evidence in the light most favorable to the successful party, as is our well established rule in such cases.[1]

Ben M. Hogan & Co. had two tractor-trailer units, each 45 feet in length; and both of these units were engaged in transporting an asphalt plant through the City of Hot Springs on November 11, 1960. The first tractor-trailer unit drove entirely into Jim & Joe's Service Station property in Hot Springs for the purpose of being serviced. The second tractor-trailer unit was driven by appellant, Donald Wood. He attempted to drive into the same service station property, but because of the presence of the first unit, the trailer part of the tractor-trailer

[1] *Ark. P. & L.* v. *Connelly,* 185 Ark. 693, 49 S. W. 2d 387; *Mo. Pac.* v. *Hopper,* 208 Ark. 128, 185 S. W. 2d 88.

unit, driven by Donald Wood, was parked so that it extended out into Grand Avenue several feet in front of the said filling station. The appellee Combs was driving west on Grand Avenue on his proper side of the street and drove into the said parked tractor-trailer unit. Grand Avenue runs east and west through Hot Springs. It is a four-lane highway with a median divider so that on the north side there are two lanes going west and on the south side there are two lanes going east. Jim & Joe's Service Station is on the north side of Grand Avenue. Thus the parked trailer unit driven by Donald Wood was partially in the service station, partially on the driveway approach to the service station, and partially extending into Grand Avenue a distance of nine feet.[2]

On the morning in question Mr. Combs was driving his car west on Grand Avenue in the extreme north, or outside lane, and his speed was about 25 miles an hour. Just before he reached the entrance to Jim & Joe's Service Station, one or more cars overtook and passed Mr. Combs on his left, thus forcing him to remain in the north or outside lane. Then he discovered the empty end of the trailer unit extending out into Grand Avenue, directly in his path. At 25 miles an hour he was travelling approximately 37 feet per second. The trailer unit was a "lowboy";[3] and the rear end of the trailer extending out into Grand Avenue was empty and was only about three feet above the highway. Mr. Combs testified that he was keeping a lookout but was unable to stop before striking the trailer unit. It was stipulated that the ordinance of Hot Springs provided for parallel parking on Grand Avenue and also provided that no vehicle should be parked on a sidewalk or in front of a driveway.

Thus, with the tractor-trailer unit parked at an angle in Grand Avenue, and over what was the sidewalk, and

[2] There was some dispute as to the distance that the trailer extended into Grand Avenue. Plaintiff Combs said nine feet; another witness said six or eight feet; and another witness said four or four and one half feet; the jury could have found the greater distance of nine feet; and we must so consider it on this appeal.

[3] The word lowboy is defined in Webster's New 3rd International Dictionary as "lowboy vehicle" and one "having a bed only a few inches above the roadway."

in front of what was the driveway to Jim & Joe's Service Station, there was evidence that the defendants were violating the ordinance of Hot Springs; and the violation of a law or ordinance is evidence of negligence. *Terry Dairy Co.* v. *Nalley,* 146 Ark. 448, 225 S. W. 887; *Mays* v. *Ritchie Groc. Co.,* 177 Ark. 35, 5 S. W. 2d 728; *Ozan Lbr. Co.* v. *Tidwell,* 210 Ark. 942, 198 S. W. 2d 182.

The defendants offered testimony that Mr. Combs' visibility was impaired because his windshield was either frosted over on the outside or covered with moisture on the inside; but such evidence was disputed. The defendants also insisted below, and vigorously urge here, that for Mr. Combs to drive into a parked trailer was a far greater act of negligence than was the parking of the trailer; and on this point the appellants also insist that they were entitled to an instructed verdict. The comparative negligence statute applicable at the time of this case was Act No. 296 of 1957, which, in effect, provided that a plaintiff could not recover if his negligence was equal to or greater than the negligence of the defendant.

From what we have detailed of the evidence, it is clear that Mr. Combs made a case for the jury, unless this Court is prepared to hold, as a matter of law, that Mr. Combs' negligence exceeded the negligence of the defendants. After carefully reviewing the record we conclude that a question was made for the jury, both on the issue of the defendants' negligence and the plaintiff's contributory negligence. There are some cases in which we have held, as a matter of law, that the plaintiff's negligence—in that particular case—was greater than the negligence of the defendant; but the usual rule is that the matters of negligence and contributory negligence are issues for the jury. In *Ozan Lumber Co.* v. *Tidwell,* 210 Ark. 942, 198 S. W. 2d 182, we said:

"This court has consistently held that where fair-minded men might honestly differ as to conclusions to be drawn from facts, whether controverted or incontroverted, the question at issue should go to the jury. *St. L. I. M. & S. Ry. Co.* v. *Fuqua,* 114 Ark. 112, 169 S. W.

786; *Coca-Cola Bottling Co.* v. *Shipp,* 174 Ark. 130, 297 S. W. 856; *D. F. Jones Construction Co., Inc.,* v. *Lewis,* 193 Ark. 130, 98 S. W. 2d 874. Whether plaintiffs were guilty of contributory negligence in stopping their buggy unequipped with tail lights on the shoulder of a paved highway at night when the buggy was struck by the automobile of defendant was held to be a question for the jury, in the case of *Duckworth* v. *Stephens,* 182 Ark. 161, 30 S. W. 2d 840."

We have held in one or more cases that, under the facts in that particular case, a motorist who drove his car into a train standing still at a crossing was guilty of a greater amount of negligence than was the railroad company, as a matter of law. But we have also held that a question of fact was made for the jury on negligence and contributory negligence when a motorist drove his car into a train standing still on the crossing. These cases are reviewed in *Hawkins* v. *Mo. Pac.,* 217 Ark. 42, 228 S. W. 2d 642; and that case shows the line of delineation as to whether, under the facts and circumstances in each case, reasonable men might differ as to which party was guilty of the greater degree of negligence. In the case at bar we conclude a question was made for the jury.

II. *Instructions.* Appellants insist that the Trial Court ruled erroneously regarding each of five instructions. The assignments related to: (a) giving Court's Instruction No. 6; (b) refusing to give defendants' Instructions Nos. 10 and 13; and (c) modifying defendants' Instructions Nos. 12 and 14; but we find no error in any of the Court's rulings.

The Court's Instruction No. 6 reads:

"What do we mean by the term 'proximate cause'? It is a cause which in its natural and continuous sequence —unbroken by any new efficient intervening cause—produces an event, and without which the event would not have occurred. So, in order to warrant a finding that negligence is a proximate cause of a collision, it must appear from the evidence that the collision was a natural and probable consequence of the negligence and ought to

have been foreseen by a person of ordinary prudence as likely to occur under the circumstances."

The defendants' specific objection to this instruction was this:

". . . in the second paragraph thereof the affirmative statement is upon the finding that negligence is a proximate cause of a collision, when the finding should have been upon some act or omission of the parties constituting negligence, and for that reason is misleading to the Jury."

The Trial Court gave eleven instructions on its own motion, and these covered such matters as negligence, contributory negligence, ordinary care, proximate cause, preponderance of the evidence, burden of proof, the duty of the jury to weigh the evidence, etc. This Instruction No. 6 was one of such instructions, and when we consider Instruction No. 6 in its context with the other instructions, we find no merit to appellants' objection.

The Trial Court refused to give defendants' Instruction No. 10, which reads as follows:

"You are instructed that if you find from a preponderance of the evidence that at the time of the accident herein sued upon, parking was permitted upon Grand Avenue, and if you further find from a preponderance of the evidence that the portion of the defendant's truck extending out into Grand Avenue did not extend further out into the street than would a vehicle parked in the usual and customary manner at the curb, then you are instructed that as to the issues between plaintiff and defendant, it would be the same as if the vehicle had been parked on Grand Avenue in a normal and customary manner."

The Court was correct in refusing this instruction because it was argumentative and was a comment on the weight of the evidence. In the defendants' Instruction No. 9 the Court had told the jury there could be parallel parking on Grand Avenue; then in defendants' Instruction No. 11 the Court told the jury that no vehicle with a

width greater than eight feet could be on the highway except by special permit. To sandwich in this Instruction No. 10 between the two instructions would be in effect to tell the jury that if the trailer as parked extended out into Grand Avenue a distance of less than eight feet it would be the same as if it had been parked parallel. This was argumentative. If an automobile had been parked on Grand Avenue parallel to the curb, as required by the ordinance, the car would not have been in front of the driveway of the filling station as was this trailer. Furthermore, a parked car would have been higher than three feet and therefore more visible than was the empty portion of this lowboy.

The Court was also correct in refusing defendants' Instruction No. 13, which read:

"You are instructed that the Arkansas law provides as follows: 'No person shall drive any motor vehicle with any sign, poster or other non-transparent material upon the front windshield, side wings, side or rear windows of such vehicle other than a certificate or other paper required to be so displayed by law.' If you find from a preponderance of the evidence that all or a portion of the windshield of the car driven by the plaintiff was obscured by a non-transparent material such as ice or frost then the driving of the vehicle under these circumstances would be a violation of the above quoted statute, which may be taken into consideration by you, along with all of the other evidence in the case in determining whether or not the plaintiff, R. C. Combs, was guilty of negligence."

There was no evidence that the plaintiff had any "sign, poster, or other non-transparent material" on the windshield. What the defendants had reference to in this instruction, was the testimony by some of the defendants' witnesses that the windshield of Mr. Combs' car was either partially covered over by frost[4] on the outside, or

[4] In 42 A.L.R. 2d, page 13, there is an exhaustive annotation, entitled, "Liability for motor vehicle accident when vision of driver is obscured by smoke, dust, atmospheric condition, or unclean windshield."

was partially clouded by moisture on the inside. But the instruction as offered was framed from Ark. Stat. Ann. § 75-730 (Repl. 1957), which section does not relate to frost or moisture but to "stickers." See *Kirkley* v. *Portland Elec. Co.* (Ore.), 298 P. 237.

Defendants complain because the Court modified two of their instructions by deleting certain language in each one. These are rather lengthy and we will not burden this opinion by copying them. It is sufficient to say that we find that the Court was not in error. The jury had been instructed as to the duty of the appellee to keep a lookout and to drive with care and caution; and these matters having been covered in other instructions, the Court did not have to repeat such items.

Finding no error, the judgment is affirmed.

COMBS, COMMISSIONER OF INSURANCE *v.*

GLEN FALLS INSURANCE CO.

5-3278 375 S. W. 2d 809

Opinion delivered March 2, 1964.

[redacted]

Bruce Bennett, Attorney General, By *Jerry L. Patterson,* Asst. Atty. Gen., for appellant.

McMillen, Teague & Bramhall, Wright, Lindsey, Jennings, Lester & Shults, for appellee.

George Rose Smith, J. The appellees, two out-of-state insurance companies doing business in Arkansas, brought suit for a judgment declaring Act 527 of 1963 (Ark. Stat. Ann. § 66-2302 [Supp. 1963]) to be invalid on the ground that it was not enacted by a three-fourths vote in each house of the legislature. The defendants, the Insurance Commissioner and the Attorney General, contended that a simple majority vote, which is all the act actually received, was sufficient for its passage. The chancellor held that a three-fourths majority was required. He therefore declared the act to be invalid.

The main question is whether Act 527 increased the rate of privilege taxes levied against foreign insurance companies. If so, a three-fourths vote was required by Amendment 19 to the Arkansas Constitution. This amendment, adopted in 1934, provides that none of the rates for property, excise, privilege, or personal taxes then levied shall be increased by the General Assembly except by the vote of three-fourths of the members elected to each house.

In 1934, when the amendment was approved, the premium tax against foreign life and health and accident insurance companies was 2½%, and that against other foreign insurers was 2%. Pope's Digest, §§ 7965-66. These rates of taxation were continued in force through the years and were eventually embodied in § 69 of the Insurance Code—Act 148 of 1959.

On its face Act 527, now under attack, unquestionably increases the rates that were in effect in 1934. The act amends § 69 of the Insurance Code to provide that the premium tax shall be computed "at the following rates:" For life and disability companies "the tax rate" shall be

3%; for other insurance companies "the rate of tax" shall be 2½%. Thus the act, in language wholly free from ambiguity, increases each tax rate by one half of 1%.

The appellants, in contending that Act 527 does not involve an increase in the rate of taxation, rely upon other provisions in the act which in substance permit any insurer to pay its premium tax at the old rate if it has made capital investments in Arkansas equal to half the total reserves upon its Arkansas insurance. It is argued that the sole purpose of the act was to compel foreign companies to invest their money in this state and that the increase in the premium tax is actually a penalty to be exacted from those companies that are unwilling to make investments here.

The short answer to this contention is simply that this is not what the legislature said. The act makes no mention whatever of a penalty. To the contrary, it refers explicitly and repeatedly to rates of taxation. Furthermore, subsection 8 of section 1 declares that any foreign insurer may "at its option" elect either to pay the higher tax or to make the specified investments and pay the tax at the lower rate. Hence a company might, as a matter of right, choose not to make the local investments, but it would nevertheless be compelled to pay its premium tax at the increased rate. If we should sustain the appellants' position this provision in Amendment 19 might as well not have been adopted, for a simple majority of the legislature could increase the rate of any tax merely by affording the taxpayer some unacceptable alternative to paying the higher rate.

A secondary contention is that inasmuch as Act 527 contains a severability clause we should sustain the compulsory investment provisions even though the tax increase must be held to be invalid. In this view the sole effect of the act would be to require all out-of-state insurers to make the specified local investments.

This contention is unsound. A severability clause is frequently an aid to the courts in the construction of a

statute, but, in the oft-quoted words of Justice Brandeis, it is not "an inexorable command." *Dorchy* v. *Kansas,* 264 U. S. 286, 68 L. Ed. 686, 44 Sup. Ct. 323. While such a clause deserves reasonable consideration it should not be paid undue homage. Sutherland, Statutory Construction (3d Ed.), § 2408. For example, if an act should levy a new tax and create a new agency for its collection, no one could doubt that the invalidation of the tax would also do away with the collection agency, despite the presence of a severability clause. In *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45, we declared an entire act to be invalid, in the face of such a clause, because we concluded that if the legislature had known in advance that part of the act was unconstitutional it would not have enacted the rest. That is really the test.

It is evident that Act 527 was intended to put into effect a single indivisible proposal. Insurers were offered the choice of paying a higher premium tax or of making extensive investments in Arkansas. These alternatives are complementary and interdependent. To enforce the one without the other would be such a perversion of the legislative intent as to be equivalent to the enactment of a statute that the General Assembly did not itself see fit to adopt. We must conclude that the chancellor was right in holding the entire act to be void.

Affirmed.

STEWART *v.* STATE.

5102 375 S. W. 2d 804

Opinion delivered March 2, 1964.

[Rehearing denied March 30, 1964.]

Harold B. Anderson and *Edward V. Trimble,* for appellant.

Bruce Bennett, Attorney General, *By Beryl Anthony, Jr.,* Asst. Atty. Gen., for appellee.

PAUL WARD, Associate Justice. Appellant, Clarence Stewart, Jr., was charged with the crime of murder in the first degree in the perpetration of burglary against William N. Caldwell on January 8, 1959. He was tried in Pulaski County, found guilty as charged, and sentenced to die by electrocution. On appeal to this Court the judgment was affirmed on April 17, 1961. See *Stewart* v. *State,* 233 Ark. 458, 345 S. W. 2d 472. Certiorari to the United States Supreme Court was denied on December 4, 1961. See *Stewart* v. *State of Arkansas,* 368 U. S. 935, 82 S. Ct. 371, 7 L. Ed. 2d 197. Following that, appellant,

on February 5, 1962, filed a petition in the United States District Court for the Eastern District of Arkansas, Western Division, for a writ of habeas corpus. On the same date an order was issued by that court to the Superintendent of the Arkansas State Penitentiary requiring him to show cause why the writ should not be granted.

The ensuing trial resulted in the decision found in *Clarence Stewart, Jr.* v. *Lee Henslee, Superintendent of Arkansas State Penitentiary,* (decided June 12, 1962) 206 F. Supp. 137. In that opinion the court, after noting that the question of petitioner's guilt was not an issue, said:

"We come, then to the question of whether members of petitioner's race were deliberately and intentionally limited in the selection of petit jury panels." [Meaning, of course, in the state court.]

The District Court then proceeded to compare nine separate sets of facts and circumstances to the same number of somewhat similar sets of facts set forth in the case of *Luther Bailey* v. *Lee Henslee, Superintendent of the Arkansas State Penitentiary,* 287 F. 2d 936. The Judge then concluded:

"I have come reluctantly to the conclusion, however, that the differences between this record and Bailey are not sufficient to avoid the same result reached in Bailey, that is, a determination that the procedure followed in Stewart's trial in the method of jury selection does not measure up to the standards of the equal protection clause of the Fourteenth Amendment as interpreted by the United States Supreme Court."

The above decision was appealed by Henslee to the United States Court of Appeals, Eighth Circuit, where it was affirmed on January 11, 1963. See: *Lee Henslee, Superintendent of Arkansas State Penitentiary* v. *Clarence Stewart, Jr.,* 311 F. 2d 691 (1963). In affirming the District Court the Circuit Court of Appeals, in substance, found:

(a). There are four instances tending to show discrimination in this case and in the *Bailey* case. These are:

1. Absence of Negro names from the panel of alternates from 1952 to 1960.

2. During said period there were never more than 3 Negro names on any regular panel of 24.

3. Repetition of Negro names on the panels from 1953 to 1960.

4. Race identification on poll list from which jurors were selected.

(b). There are also four instances which indicate less discrimination in this case than was shown in the *Bailey* case. These related to the following:

1. Here there were 3 Negro names on the special panel of jurors.

2. Here there was no proof of discrimination in the Second and Third Divisions which try only civil cases.

3. Here there was no apparent partiality shown in the composition of the special panel.

4. Here there was more helpful testimony from two jury commissioners.

The Court then concluded (as in the *Bailey* case):

" 'The foregoing facts, 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, [and] that the State did not rebut it * * *.' "

The Court then gave the State of Arkansas 120 days (with the right to apply for additional time) to retry appellant.

In due time a trial was had in the Pulaski County Circuit Court, First Division, appellant was again found guilty, and again sentenced to die by electrocution.

On this the second appeal to this Court the sufficiency of the evidence is not questioned, so we proceed first to discuss the three principal points raised by appellant—

One. Discrimination in selection of the jury; *Two*. Discrimination in selecting the jury commissioners; and, *Three*. The Confession.

One. It is here once more insisted by appellant that "Members of petitioner's race were intentionally, deliberately, and systematically limited in the selection of petit jury panels". We have purposely set out in some detail the method by which the Federal District and Circuit Courts concluded, by comparison with the *Bailey* case, that in the first trial there was evidence of discrimination to the extent that appellant was denied his rights under the Fourteenth Amendment to the United States Constitution. It is of course understandable why the District and Circuit Courts did not attempt to lay down any single, simple rule to guide us here. We recognize, as did they, that the problem does not lend itself to a solution of this type. The result is that we are left to consider the facts "taken in the aggregate" and decide whether the Negro race has been discriminated against in the selection of the jury in this particular case. It is our conclusion that no such discrimination is revealed by the record before us.

The only testimony touching the question of discrimination was given by two jury commissioners who selected the names placed on the jury panel. Under oath they stated that race had nothing to do with selecting the jurors. In the absence of any attack on their credibility, we feel that we must take the position that they told the truth. It is in order then to examine the record to see if it contains any facts or circumstances which indicate the testimony of the jury commissioners should be discredited. Several such facts and circumstances were relied on in the *Stewart* opinion [311 F. 2d 691] and by appellant here to indicate discrimination.

We now examine some of them, for possible bearing on this case.

(a) From 1952 to 1960 there were no Negroes' names on the alternate panels and only three names (at any one time) on the regular panel. It is our opinion

that any implication or prejudice or discrimination deducible from the above facts is overcome by the fact that here eleven Negroes were chosen. Otherwise it is hard to see how the implication can ever be overcome.

(b) Here, as in the first *Stewart* case, the poll tax books indicated race, but here the undisputed testimony shows race designation was not used for the purpose of discrimination, and the number of Negroes selected supports that testimony.

(c) It is argued by appellant that the jury commissioners made no effort to acquaint themselves with members of the Negro race, which fact tends to indicate discrimination. Here, the jury commissioners said they knew "a large number of Negroes". This, in our opinion, is sufficient to dispel any implication of discrimination.

(d) Although it was said in the *Bailey* case, *supra,* that proportional race representation on juries was not required, appellant argues that systematic and continued selection of less than a proportionate representation of the Negro race shows discrimination. The implication being, of course, that such discrimination has been shown in this case. We do not agree. Any such implication based on past history is overcome by the undisputed testimony here—that is, the Negro race was proportionally represented. Even though such representation is not required, it does show the Negro race was not discriminated against in this case.

The burden was on appellant to prove discrimination in selecting the jury. See *Tarrance* v. *Florida,* 188 U. S. 519, 23 S. Ct. 402, 47 L. Ed. 572, and *Akins* v. *Texas,* 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692. In view of all we have heretofore said we hold appellant has not discharged that burden in this case.

Two. We see no merit in appellant's contention that his rights under the Fourteenth Amendment to the United States Constitution have been denied in that Negroes have been excluded from being jury commis-

sioners for the past fifty years. The question presented here is whether the jury panels, and not the jury commissioners, have been properly chosen. We are unwilling to accept the fatalistic concept urged by appellant which leaves no room for change and improvement. If the present is wholly dependent on the past, then there is no hope for the future. In the case of *Moore* v. *Henslee,* 276 F. 2d 876, this contention was fully and ably explored and found to be without merit—the Court saying it was not supported by either "precedent or logic".

Three. It is here contended appellant's confession was made without benefit of counsel and that it was coerced and involuntary. We are likewise unable to see any merit in this contention under the undisputed testimony. Appellant's confession was not made in open court, but was made to police officers soon after the crime was committed. The appropriate statute in this situation is Ark. Stat. Ann. § 43-2115 (1947), which reads:

"A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed."

In *Ezell* v. *State,* 217 Ark. 94, 229 S. W. 2d 32, the above section was interpreted to mean an extrajudicial confession of the defendant must be corroborated by proof of the *corpus delicti.* In *Mouser* v. *State,* 215 Ark. 131, 219 S. W. 2d 611, we held that a confession obtained outside of court along with further proof that the crime was actually committed will sustain a conviction. In the case before us there is abundant and uncontradicted proof to corroborate appellant's confession of guilt. Appellant admitted possession of the knife which was found at the body of the victim, and he led the officers to the areas where they found numerous articles, located at different places, which were taken from the victim. See: *Boone* v. *State,* 230 Ark. 821, 327 S. W. 2d 87, and *Hargett* v. *State,* 235 Ark. 189, 357 S. W. 2d 533.

The record, likewise, does not support appellant's contention "that his alleged confession was coerced and involuntary. . . ." There is no testimony that appellant

was in any way abused or threatened. On the other hand, the officers positively stated no force or threats were used. It further appears that the prosecuting attorney advised appellant that what he said might be used against him, and also advised him of his rights to refuse to talk and to be represented by counsel.

Other Points Raised. In addition to the principal points relied on by appellant, other points and issues were raised in the motion for a new trial and discussed in the brief. We have carefully considered each and every one of the points and issues and find no reversible error in any of them. We deem it sufficient to make brief mention of some of them.

Appellant asked for a continuance because of lack of time to prepare for trial. On the showing made, we think the trial court was justified in refusing the continuance on the ground that the evidence would be similar to that of the former trial, that one defense attorney was in both trials, that the time allowed for trial was limited, and that appellant had been in the State Hospital thirty days (for observation) during which time his attorneys could have conferred with him. We have consistently held that the matter of granting or denying a continuance in criminal cases rests in the sound discretion of the trial court. *Thompson* v. *State,* 26 Ark. 323; *Jackson* v. *State,* 54 Ark. 243, 15 S. W. 607; *Sullivan* v. *State,* 109 Ark. 407, 160 S. W. 239; and *Leach* v. *State,* 229 Ark. 802, 318 S. W. 2d 617.

We find no error in the trial court's permitting the introduction of certain photographs since the court explained they were introduced only to show the surroundings of the scene of the murder. This, also, was a matter resting in the sound discretion of the court. *Oliver* v. *State,* 225 Ark. 809, 286 S. W. 2d 17.

A police officer was permitted to state that a stain on the victim's coat appeared to be blood, and the admittance of this testimony is assigned as reversible error. We do not agree, even though the witness was not an

expert on such matters. See *Richardson and Shoop* v. *State,* 221 Ark. 567, 254 S. W. 2d 448.

Finding no reversible error, we conclude the judgment of the trial court should be, and it is hereby, affirmed.

Affirmed.

Holt, J., not participating.

HUFFMAN *v.* CITY OF HOT SPRINGS.

5-3145 375 S. W. 2d 795

Opinion delivered March 2, 1964.

Wootton, Land & Matthews, for appellant.

Robert D. Ridgeway, Earl J. Lane, for appellee.

SAM ROBINSON, Associate Justice. On March 12, 1962, appellant, Billy Huffman, was driving his automobile west on Alcorn Street in the City of Hot Springs.

When he reached Central Avenue he collided with an automobile owned by appellee, City of Hot Springs, and being driven by appellee, Bobby Digby, who, at the time, was a city policeman. Digby was answering a call to a corner on Central Avenue where someone had driven a car into the front of a store building. The City of Hot Springs and Digby filed this suit against Huffman, Digby alleging personal injuries and the City alleging damages to the automobile. The trial resulted in a judgment for the City in the sum of $142.00 for damages to the automobile, and Digby recovered a judgment in the sum of $9,000.00 for personal injuries. Huffman has appealed.

Appellant first argues that the trial court erred in sustaining a motion filed by appellees to strike a cross-complaint filed by appellant in which he asked for damages done to his automobile. The suit was filed by the City of Hot Springs and Digby on the 30th day of March, 1962. On the 17th day of April, appellant filed his answer but did not cross-complain. On May 25, a little over a month later, appellant filed a cross-complaint in which he asked judgment in the sum of $272.00 for damages to his automobile. About eight months later, on January 17, 1963, the cause came on for trial, and at that time the court sustained appellees' motion to strike the cross-complaint.

The trial court sustained the motion to strike the cross-complaint on the theory that Ark. Stat. Ann. § 27-1135 (Repl. 1962) requires the counterclaim be filed within 20 days from the date of the service of summons, and that here the claim was not filed for more than 30 days after the service of summons. As pointed out in *Easley* v. *Inglis,* 233 Ark. 589, 346 S. W. 2d 206, in this state, insofar as pleadings are concerned, there does not appear to be any valid distinction between a counterclaim and a cross-complaint.

Ark. Stat. Ann. § 27-1135 (Repl. 1962) provides: "A defendant to any complaint or cross-complaint must appear or plead either generally or specially the first day after expiration of the periods of time set forth below, as

the case may be: First. Where the summons has been served twenty (20) days in any county in the state; . . ."

Ark. Stat. Ann. § 27-1121 (Repl. 1962) provides: "The answer shall contain: . . . A statement of any new matter constituting a defense, counter-claim or set-off, in ordinary and concise language, without repetition. . . . In addition to the general denial above provided for, the defendant must set out in his answer as many grounds of defense [,] counter-claim or set-off, whether legal or equitable, as he shall have. . . ."

The construction placed on the statute by the trial court is too narrow. We have held that where a defendant answers without filing any preliminary pleading such as a demurrer or motion, the answer must be filed within 20 days from the service of summons. *Walden* v. *Metzler,* 227 Ark. 782, 301 S. W. 2d 439; *Pyle* v. *Amsler,* 227 Ark. 785, 301 S. W. 2d 441. Although those cases construed Acts 49 and 351 of 1955, the rule there announced is applicable to Act 53 of 1957, where, as here, the provisions added by the 1955 Act are not involved. *Interstate Fire Insurance Co.* v. *Tolbert,* 233 Ark. 249, 343 S. W. 2d 784. We have also held that the filing of a valid motion meets the requirements of the statute, and in cases of that kind a default judgment cannot be taken against the defendant although he has not actually filed an answer. *Stokenbury* v. *Stokenbury,* 228 Ark. 396, 307 S. W. 2d 894; *West* v. *Page,* 228 Ark. 13, 305 S. W. 2d 336; *Flippin* v. *McCabe,* 228 Ark. 495, 308 S. W. 2d 824.

If a defendant files a valid pleading within the prescribed time he has done all the statute requires. We pointed out in *Walden* v. *Metzler,* 227 Ark. 782, 301 S. W. 2d 439, that the purpose of the statute was to expedite litigation and prevent dilatory tactics. Of course after both parties are in court, the trial judge will not tolerate an unreasonable delay in disposing of the litigation. Here, the filing of the cross-complaint occasioned no delay whatever; it was filed on May 17 and the case did not come on for trial until about eight months later.

In many instances it would be wholly impractical to file a cross-complaint for personal injuries within the 20 day period in which the answer to the complaint must be filed. If the complaint is filed within a few days after the occurrence of the mishap giving rise to the cause of action, and this happens in many instances, the defendant may not know the extent of his injuries, or, for that matter, he may not know that he is injured at all.

Ark. Stat. Ann. § 27-1135 (Repl. 1962) provides that a defendant must either plead generally or specifically within a certain time. The filing of an answer meets the requirement of the statute, and there is no sound reason why a party should not be permitted to amend his pleading thereafter, provided, of course, such pleading is filed within a reasonable time. We have concluded that the motion to strike the cross-complaint should have been overruled.

During the course of the trial, the appellee, Digby, testified that he was not then working for the city; that he had been retired on pension because of the injuries he received in the collision in controversy. Appellant attempted to cross-examine Digby on the theory that he had been discharged by the city for misconduct. The trial court refused to permit counsel for appellant to cross-examine appellee Digby along that line. Counsel made it clear that he had reason to believe that appellee was discharged for misconduct. Counsel stated: "Your Honor, if allowed to ask the question we propose to ask on cross-examination, which is to ask the plaintiff, Bobby Digby, first; whether or not he is making any claim that his physical condition that he suffered as a result of this accident, whatever it may be, has any connection with his dismissal from the police force; and further, to ask the question whether or not he was discharged by the Civil Service Commission of the City of Hot Springs on the basis of misconduct. I believe the date of that being April 4, 1962. We think that both questions and anything from that that necessarily required questions are proper for several reasons. First, the question goes to the credibility. Second, it goes to the issue of damages

of what he may have lost, if anything, as a result of the accident. And further, if necessary, we would have the custodian of the records of the Civil Service Commission of Hot Springs testify, and those records will reflect that Bobby Digby was discharged on April 4, 1962, being subsequent to this accident, and that the Civil Service Commission records reflect that Bobby Digby was discharged after having been put on probation, and that the discharge was for misconduct on his part, which is clearly separate and apart and unrelated in any manner upon the accident upon which this lawsuit is based."

Counsel should have been permitted to cross-examine appellee Digby as suggested. Wide latitude is permissible in cross-examining a party, who is to be treated as any other witness, to elicit facts contradicting his testimony given on direct examination or impeaching his credibility as a witness. *Peterson* v. *Jackson,* 193 Ark. 880, 103 S. W. 2d 640. It is said in 98 C. J. S. 125: "The office of cross-examination is to test the truth of statements of a witness made on direct examination. Cross-examination serves as a safeguard to combat unreliable testimony, providing a means for discrediting a witness' testimony, and is in the nature of an attack on his truth or accuracy. The purpose of cross-examination, however, is not limited to bringing out a falsehood, since it is also a leading and searching inquiry of the witness for further disclosure touching the particular matters detailed by him in his direct examination, and it serves to sift, modify, or explain what has been said, in order to develop new or old facts in a view favorable to the cross-examiner. The object of cross-examination, therefore, is to weaken or disprove the case of one's adversary, and break down his testimony in chief, test the recollection, veracity, accuracy, honesty, and bias or prejudice of the witness, his source of information, his motives, interest, and memory, and exhibit the improbabilities of his testimony."

Appellant further complains of the trial court's refusal to give the jury an instruction to the effect that appellees could not recover if the collision was due to an

unavoidable accident. In this case such an instruction would have been abstract, because there is no allegation in the pleadings and no evidence of an unavoidable accident. It is just a simple case of negligence; each side contending that the other negligently ran the traffic light when it was red, thereby causing the collision. In the circumstances, the court was not required to give an instruction on an unavoidable accident.

Reversed and remanded for new trial.

ARK. STATE HIGHWAY COMM. *v.* JACKSON COUNTY GIN CO.

5-3182 376 S. W. 2d 553

Opinion delivered March 2, 1964.

[Rehearing denied April 6, 1964.]

Mark E. Woolsey and *Thomas B. Keys,* for appellant.

Wayne Boyce and *Fred M. Pickens, Jr.,* for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from eminent domain proceedings brought by appellant Arkansas State Highway Commission against appellees, Jackson County Gin Company and others, to acquire .08 acres of appellees' land for highway purposes. On May 26, 1961, appellant filed its complaint and declaration of taking in Jackson Circuit Court and deposited $450.00 in

the registry of the court as estimated just compensation. Trial was held on May 14, 1963. After deliberation the jury returned a verdict for appellees in the sum of $6,000.00. From judgment on the verdict, appellant has prosecuted this appeal urging four points for reversal.

The first point relied upon by appellant is that the court committed reversible error in permitting one of the former owners, Mr. R. S. Rainwater, and the manager for the present owner, Mr. Bob Gardner, to testify over the objection of appellant to an offer made by Mr. Rainwater to sell three gins to Mr. Buck Hurley and to testify that Mr. Rainwater had reduced the sales price $10,000.00 because of the condemnation.

Mr. Rainwater, one of the appellees who had owned 90% of the stock in the gin company, testified that he was negotiating with Mr. Buck Hurley to sell him three gins, including the Jackson County Gin, for "about two hundred forty thousand dollars." His testimony reveals that further negotiations were postponed, apparently, until after cotton season, during which period Mr. Hurley died; that negotiations were later resumed with other officers of the Hurley corporation and a sale of the gins was consummated. In the interim, however, appellant had filed this condemnation action. After appellant's objection, Mr. Rainwater's testimony continued as follows:

"Q. How much less than the full price did you get on the subsequent sale?

"A. Well, they felt, and I think it was their feeling and our feeling and the feeling of their counsel, that since this property had been condemned that we were the losers and they were buying it as is, don't you see; I mean that was their contention that the Highway Department was not condemning the property that belonged to them, it had already condemned the property that belonged to us. Therefore, if any damages, and what damages were sustained that belonged to us and they would have to buy it as it was, and we admitted to them and we told them they would have to move their scales which they understood

and they wanted us to arrive at a price so that it would enable them to do that and I took off $10,000.00 of what we had practically agreed on because we have got to move those scales and we have got to do a lot of other things there. And then they said this, that they would buy it as it was and we would let this suit continue as it was and the suit then would be between the Highway Department and against us. Now that was the agreement that we had in the sale of the property."

Mr. Bob Gardner, the managing head of the Hurley Enterprises, testified over appellant's objection that the tentative purchase price was reduced, and that the amount of the reduction was $10,000.00.

Appellant urges that the principle of *Arkansas State Highway Commission* v. *Elliott*, 234 Ark. 619, 353 S. W. 2d 526, should be controlling here. In that eminent domain case the landowner's lay witness was allowed to testify what he had offered to buy the property for from the landowner and also allowed to read into evidence a letter containing this offer. After discussion of the testimony and review of a number of authorities, this court unequivocally stated, "we hold that the evidence of an offer to purchase is not admissible to establish the fair market value of particular property." It is true as argued by appellees that the case at bar is distinguishable from the *Elliott* case on its facts, however the salutary rule laid down in *Elliott* must not be "distinguished" away, and we therefore reaffirm our holding that the evidence of an offer to purchase is not admissible to establish the fair market value of particular property.

For its second point appellant contends that the trial court committed reversible error in permitting evidence of moving costs to be introduced over appellant's objection. Under the rule of *Arkansas State Highway Commission* v. *Carpenter*, 237 Ark. 46, 371 S. W. 2d 535, moving costs could be considered a factor in arriving at the before and after value. The rule was stated thusly in *Carpenter*:

"We have said that there is no set formula or pattern that must be followed at arriving at before and after value. (Cases cited.) Consideration may be given to every element which a purchaser, willing but not obligated to buy, would consider."

Appellant next asserts that the trial court committed reversible error in not striking the testimony of Joe Stafford, one of appellees' value witnesses. While much of Mr. Stafford's testimony was clearly inadmissible, we are bound by the rule that a motion to exclude all of the testimony of a witness is properly overruled if a part of the testimony is competent. *Arkansas State Highway Commission* v. *Bowman,* 237 Ark. 51, 371 S. W. 2d 138; *Arkansas State Highway Commission* v. *Carpenter, supra.*

Appellant's last point questions the sufficiency of the evidence to support the judgment. Inasmuch as the case must be reversed and remanded for the error indicated, we do not reach this point in this appeal.

Reversed and remanded.

JAMES *v.* JAMES.

5-3193 375 S. W. 2d 793

Opinion delivered March 2, 1964.

Spencer & Spencer, for appellant.

Brown, Compton & Prewett, for appellee.

FRANK HOLT, Associate Justice. This appeal arises from the imposition of a fine and jail sentence for violation of a restraining order.

The appellee was granted a divorce from appellant in January, 1960. She was awarded custody of their four minor children with appellant having certain visitation rights. In August, 1960, in another proceeding, the appellee and appellant settled their property rights and she was given exclusive use and occupancy of the homestead. A temporary restraining order was dissolved, leaving the appellant free to visit his children in appellee's home. In January, 1963, the Chancellor granted appellee's petition for a temporary restraining order, later made permanent, which enjoined the appellant from molesting the appellee in any manner in her use and occupancy of the homestead and, in particular, enjoined the appellant from (1) going into or about the home or premises, (2) removing, mutilating or destroying any of the furniture, (3) calling appellee on the telephone, (4) writing letters or notes to appellee, and (5) attempting to contact or communicate with her in any way. Shortly thereafter, the appellant entered a local beauty shop where appellee was seated as a customer and without any warning or provocation he struck her with his fist, breaking the cartilage in her nose causing profuse bleeding and requiring medical attention. He, also, made verbal threats of future harm. Appellant was convicted of assault and

battery in a criminal proceeding. On that same day the Chancellor held him in contempt for violating the restraining order, assessing a jail sentence of 180 days and a fine of $1,000.00, suspending the jail sentence and $800.00 of the fine.

On appeal the appellant contends for reversal that assault and battery is a criminal offense which the Chancellor did not have jurisdiction to enjoin and did not enjoin. We do not agree. In *Pace* v. *State,* 177 Ark. 512, 7 S. W. 2d 29, we quoted with approval:

"The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."

The fact that an act enjoined also happens to be a criminal offense does not affect the power of a court of equity to enforce its order and the criminal aspects of an act neither give nor oust equity of jurisdiction. *Meyer* v. *Seifert,* 216 Ark. 293, 225 S. W. 2d 4; *Hickinbotham* v. *Corder,* 227 Ark. 713, 301 S. W. 2d 30. If it should be held that the imposition of a criminal penalty for violation of a law would deprive a court of equity of jurisdiction to enforce its orders then a person desiring to proceed or continue in violation of the law might be able to pay a maximum fine and, thus, make himself immune from a valid chancery court injunction. This is not and should not be the law. *Van Hovenberg* v. *Holman,* 201 Ark. 370, 144 S. W. 2d 718. In the case at bar the guilt or innocence of the appellant in the criminal court in no manner affected the jurisdiction of the chancery court to enforce its restraining order.

The appellant next argues that the punishment is excessive. We disagree. In addition to physically attacking the appellee, the appellant violated the court's restraining order in other particulars including calling her on the telephone and using threatening and abusive language. The court suspended the jail sentence and $800.00 of the $1,000.00 fine. The suspension of this

much of appellant's punishment is, in effect, a complete remission of that part of the punishment and is not subject to revocation. *Songer* v. *State,* 236 Ark. 20, 364 S. W. 2d 155; *Harrison* v. *Terry Dairy Products Co.,* 225 Ark. 953, 287 S. W. 2d 473; *Stewart* v. *State,* 221 Ark. 496, 254 S. W. 2d 55. Therefore, the net effect of appellant's punishment is the payment of a $200.00 fine which most certainly is not excessive under the facts in the case at bar. *Ex Parte, Dukes,* 155 Ark. 24, 243 S. W. 863; *Hickinbotham* v. *Williams,* 228 Ark. 46, 305 S. W. 2d 841.

The appellant also contends that the court erred in depriving him of all rights to visit or communicate with his children. We find no merit in this contention. The Chancellor's decree reads, in pertinent part:

"Further, that the rights of visitation with his children, heretofore granted to the defendant, be limited to such visitation as the children and the defendant may voluntarily agree upon. The defendant is not to go to the home of the plaintiff nor on or about the premises of the plaintiff's home in the exercise of the right of visitation to see the children."

The appellant insists that he have visitation rights with his children, ages 11, 12, 14 and 16, at the home of the appellee. Appellee has no objection to the right of appellant to see and be with his children other than in her home since, she contends, their difficulties stem from his presence there. We think the Chancellor's order respecting visitation with his children was proper. Of course, the appellant is not precluded from applying to the Chancellor for a modification of the decree if he feels it is not sufficiently specific with reference to his visitation rights elsewhere.

Affirmed.

5-3180 376 S. W. 2d 252

Opinion delivered March 9, 1964.

[redacted]

Parker Parker, for appellant.

Dobbs, Pryor and Dobbs, Batchelor & Batchelor, for appellee.

CARLETON HARRIS, Chief Justice. In July, 1959, W. E. Denniston and wife, appellees herein, hereinafter referred to in the singular as appellee Denniston, purchased from Charles Fite, d/b/a C. H. & F. Company, a house trailer on an installment contract. At that time Fite took out automobile insurance (including fire insurance) with

the Phoenix Insurance Company, hereinafter called Phoenix, one of the appellees herein, the policy being issued to Denniston. The agent for Phoenix, Francis Hiller, did not deal directly with Denniston, except to advise him of the collision features of the policy that had been issued. The fire insurance coverage was in the amount of $3,500. Mr. Denniston moved the trailer to the school grounds at Oark, where he was serving as superintendent of the school, and the trailer was placed upon concrete blocks, and connected to utilities. In June, 1960, Denniston signed an application for insurance with the Farmers Union Mutual Insurance Company, hereinafter called Farmers, advising the soliciting agent for the company, Lowell Whittington, that the trailer had a value of $6,000. Denniston applied for $4,000 insurance on the trailer, and $1,000 on the contents thereof. On June 15, Farmers issued its policy, providing, *inter alia,*

"This entire policy shall be void if whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

* * *

"This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved whether collectible or not."

The Phoenix policy contained a similar provision with reference to proration.

On January 17, 1961, the trailer and its contents were completely destroyed by fire. Both insurance companies were advised of the loss. Phoenix, at all times, has been ready to pay its prorata share of the loss. However, a dispute arose between Denniston and Farmers relating to the filing of a proof of loss, and, also, whether Farmers was liable for the entire amount of coverage it had issued under the Valued Policy Law. After cor-

respondence, mainly between counsel, for some period of time, Farmers, on May 18, 1961, instituted suit seeking a declaratory judgment to the effect that the policy was void, and should be cancelled as of June 10, 1960. The complaint alleged fraud in the procurement of the policy; that the Dennistons had refused to execute a sworn proof of loss as provided in the policy; that the Dennistons were contending that the trailer constituted real estate, and that the policy should be cancelled as of June 10, 1960, because of fraud. Farmers prayed that the court enter its declaratory judgment finding that it was not liable on the policy, and, in the alternative, that the trailer be declared personal property, and that Farmers be directed to pay only its prorata share of the loss with Phoenix. Fite filed an answer, setting up that he was the owner of the trailer, that it had been destroyed by fire, and that he was entitled to $2,798.88. Fite then filed a cross-complaint against Phoenix, seeking that amount.[1]

The Dennistons answered, denying all material allegations, and filed their cross-complaint against Farmers, seeking judgment in the full amount of the policy; seeking judgment against Phoenix in the amount of $3,500, and asking for statutory penalty and reasonable attorneys' fees against both companies. After the filing of other motions, the case proceeded to trial. At the conclusion thereof, the court entered its findings wherein it determined that the Dennistons were not guilty of fraud; that the completion of proof of loss forms was not required under the facts in the case; and that the Valued Policy Law was not applicable since the trailer was personal property. The court rendered judgment for the Dennistons in the amount of $4,546.67, plus 12% penalty, and an attorneys' fee of $450.00. Of this amount, it was held that Phoenix should pay $1,633.34, $162.00 of the attorneys' fee, plus 12% penalty, or a total of $1,991.34. Farmers was found liable to the extent of $1,913.33 as to the trailer, plus $1,000 on household goods, $288.00 of the attorneys' fee, and 12% penalty, or a total

[1] From the record, Phoenix has apparently paid the amount of the lien held by Fite.

of $3,550.93.[2] Judgment was entered in accordance with these findings, and from such judgment Farmers brings this appeal. The Dennistons have cross-appealed, contending that the court erred in declaring the trailer to be personal property, and asserting that they are entitled to the full coverage from Farmers. Phoenix cross-appeals as to the finding of the court that it is liable for penalty and attorneys' fees. For reversal, appellant relies upon several points, which we proceed to discuss.

It is asserted that the policy is void because of fraudulent misrepresentations by Denniston in his application for insurance. This contention is based on the assertion that Denniston gave a fraudulent answer as to the value of the property, did not reveal the fact that another insurance policy was in force, and fraudulently withheld other pertinent information. As to the first, Denniston testified that, upon purchasing the trailer, he was advised that it had an original value of $6,000, but had been damaged in a fire; that, however, the seller stated to him that it was subsequently restored to equally good condition, even though sold to this appellee for only $3,500. Under Denniston's testimony, he had a reasonable basis for believing the value given, and the soliciting agent for the company who viewed the property testified that, "I relied on Mr. Denniston. As far as I could tell, the home was worth what he said." As to having insurance with Phoenix, there was evidence that Denniston did not wilfully conceal that fact. In the first place, this policy was taken out by Fite with the Brown-Hiller Insurance Agency, and Hiller testified that he had no contact with Denniston except to advise by letter when the temporary collision coverage would expire. In the next place, no fraudulent answer was given on the application. Fourteen questions are listed in the application form, including the question, "Is there other insurance on any of this property? If so, how much and in what company?" This question, along with the other thirteen, is not an-

[2] Phoenix, having already paid the lien in full, and such amount exceeding its total liability, was given judgment against Farmers in the amount of $807.54. This amount is included in the total judgment against Farmers of $3,550.93.

swered at all. Complaint is also made that the company was not informed that the property was encumbered. This is question No. 7 on the form, and is not answered. In fact, *no* questions relative to the property are answered at all, and the application form contains nothing more than the identification of the insured item (trailer and contents), cash value, amount of insurance (applied for), the rate and premium charged, and the signatures of the assured and the agent. The company issued a policy on this application, so it would appear that appellant did not consider the answers important; otherwise, it would have returned the application with directions that it be completed. As we stated in *Mutual Reserve Fund Life Association* v. *Farmer,* 65 Ark. 581, 47 S. W. 850:

"The applicant made no answer to the question marked "D" but left the space for answers as to the name and address of the physician referred to blank. If that was thought to be important, the application for the policy should not have been accepted until the answers were made by the applicant. Certainly, we would not say, under the circumstances, by this failure to fill out the blank for the answer, the applicant was suppressing the truth, especially in view of his previous answers, indicating a want of knowledge on the subject."

Here, too, not only does it appear that the company considered the failure to answer the questions as unimportant, but a lack of knowledge on the part of Denniston is certainly indicated by the fact that no answers were given to any question. Clearly, there was substantial evidence to support the finding of the court that no fraud had been committed.

It is asserted that Denniston refused to furnish appellant proof of loss, and the contract is therefore void. Under the provisions of the policy, an executed proof of loss is required within 60 days after the loss occurs, unless the time be extended in writing by the company. Proof on the part of appellee Denniston was that on January 17, 1961, the date of the fire, counsel for this

appellee wrote a letter to appellant company, in which he advised of the fire, that the property loss was total, and requested proof of loss forms. Thereafter Carrol D. McCarty, adjuster for appellant company, went to Fort Smith, and learned of the existence of the Phoenix policy and of the encumbrance to Fite. McCarty conferred with John Bonds, representing Phoenix, and subsequently advised Denniston that he (McCarty) would be in Oark on a certain day. McCarty failed to appear on that occasion, and some days later returned, but was unable to locate Denniston. According to the adjuster, he left a letter and a proof of loss form with one of appellee's neighbors, requesting that same be turned over to Denniston. This apparently took place about two weeks after the fire. On February 3, Denniston directed a letter to appellant, stating:

"I am sorry you missed seeing me today, for I do not quite understand what you mean by personal property, as the loss according to my way of thinking would be almost countless. We lost a 13-year accumulation of property, from needles to a TV. The following list may or not be what you mean:"

The letter then listed numerous items of personal property together with the valuation that he placed upon them.

It appears from the record that no further action was taken by the company directly with Denniston for some period of time, and there is no evidence that counsel for Denniston ever received any proof of loss forms as requested in his letter of January 17. As shown by the evidence, counsel for appellant directed a letter to Denniston on April 5, advising the latter that the complete file had been turned over to him, and that the file did not contain a proof of loss as required by the policy. A proof of loss was enclosed with the letter, and it appears that Denniston received the proof of loss form. The record is somewhat confusing, containing, as it does, numerous letters between counsel. However, it is undisputed that counsel for Denniston requested proof of loss

forms on the day of the loss, and there is no evidence that these forms were furnished. Denniston denies that any proof of loss form was given to him by any neighbor, as stated by McCarty.[3] It likewise seems undisputed that the company took no further steps to place in the hands of Denniston or his attorney any proof of loss forms until April 5, which was, of course, more than sixty days after the loss had occurred. Counsel for appellant offered to extend the time, but we are of the opinion that Farmers, by its conduct, waived the requirement for proof of loss. For one thing, the company should have sent the forms to Denniston's counsel, as requested. For another, if the list (of personal property loss) contained in Denniston's letter was not satisfactory, the company should have immediately advised him of that fact rather than waiting until April 5. Finally, under date of March 13, Richard Hopkins, claim director for Farmers Union Mutual Insurance Company, directed a letter to Denniston's attorney, as follows:

"Dear Mr. Batchelor

Relative to your file No. 3411407364, W. E. Denniston, our letter of February 6, 1961, written by Mr. C. D. McCarty stated that our Company was ready to settle on the basis discussed by Mr. Bonds and Mr. McCarty. Since that date we have had no communication from you.

We would appreciate knowing if an attempt has been made by you to settle on this basis with the insured. We would like to dispose of the claim as soon as possible, and will be awaiting your reply."

This letter is certainly evidence that Farmers had already investigated the claim, had determined upon a

[3] Appellant contends that counsel for appellee, by letter of May 2, 1961, admitted that Denniston had received a proof of loss form in February. The date that such proof of loss was received is not made clear by the letter, *i.e.*, whether February or April, and, in fact, it is not entirely clear that counsel was referring to an actual company proof of loss form, since the letter states that Denniston had completed the proof of loss. Unquestionably, the only "proof of loss" sent to the company was the list of personal property contained in the letter of February. 3.

figure that it would pay, and was accordingly not insisting upon the proof of loss.

In *National Union Fire Ins. Co.* v. *Wright,* 163 Ark. 42, 257 S. W. 753, this court said:

"If an authorized agent, within the time specified for making proof of loss under the policy, enters into negotiations for the adjustment of the loss, or otherwise treats this requirement of the policy as having been complied with, or as waived, then the company cannot thereafter defend upon the ground that a proof of loss was not furnished."

See also *American Insurance Company* v. *Rector,* 172 Ark. 767, 290 S. W. 367. In *Conley* v. *Fidelity-Phenix Fire Ins. Co. of New York,* 102 F. Supp. 474, (U.S.D., W.D. Ark., Ft. Smith Division), it was said:

"However, a failure to give notice or furnish proof of loss is waived by any conduct on the part of the insurer or its authorized agent inconsistent with the intention to enforce a strict compliance with the insurance contract in such regard. A waiver of formal proof of loss may be inferred under a variety of circumstances, such as subjecting the insured to an examination under oath as to the facts of the fire, or by retaining without objection a claim made within the 60 day period, or by charging the insured with the crime of arson. Any conduct on the part of the company or its representatives prior to the expiration of the sixty day period which lulls the insured into a feeling of security in that regard is sufficient to establish a waiver."

It is asserted that the court erred in establishing the value of the trailer at $3,800.00, less depreciation. The court's finding was based upon the fact that the trailer had been purchased for $3,500.00, and Denniston had added a porch, and various utility connections, which were found to add $300.00 to the value. This point only relates to $300.00, and we are unable to say that there was no substantial evidence to support the finding.

Except for one further argument, concerning attorneys' fees, the remaining points relate to the cross-appeals.

The Dennistons contend that the court erred in holding that the house trailer was, within the meaning of the statute,[4] personal property. We do not agree. The proof reflected that the trailer was placed on school property by the consent of the school board. It was set on concrete blocks, though not cemented to them, and the wheels were still on the trailer, although lifted from the ground and the air removed from the tires. Utilities were connected to the trailer. In *Kearbey* v. *Douglas,* 215 Ark. 523, 221 S. W. 2d 426, we said:

"The basic principles observed by the courts in determining whether personal property becomes a fixture by annexation to the land are discussed in *Choate* v. *Kimball,* 56 Ark. 55, 19 S. W. 108, and Tiffany on Real Property (3d Ed., §§ 606-626. We have held that the intention of the person making the annexation is a consideration of primary importance, *Morgan Utilities, Inc.* v. *Kansas City Life Ins. Co.,* 183 Ark. 492, 37 S. W. 2d 90; but Tiffany rightly concludes that the courts apply an objective test and arrive at the annexer's intention by looking to his outward acts rather than to the inner workings of his mind. Tiffany, *supra,* § 608. It thus becomes necessary to examine the manifestations of intent that have been regarded as controlling."

A compelling reason for finding that the trailer did not lose its identity as personal property is the fact that it was placed on land belonging to the school district, rather than on land owned by appellee. Denniston did not even have a lease on the property, and it is apparent that he did not contemplate leaving it on school property thenceforth. In fact, his intention is best shown by his own testimony, wherein he stated,

[4] Ark. Stat. Ann. § 66-3901 (1963 Supp.) called "Valued Policy Law."

"Naturally I would take it away if I did not sell it or would not want to leave it there unless I would sell it."

In his discovery deposition, taken prior to the trial, Denniston stated that he intended to leave the trailer on the school ground "as long as I was there working." When asked if he intended to take it away when he left, appellant replied, "Well, naturally, I guess I would." It is evident that there was never any intention that the trailer should remain on the premises, except for a limited period of time, and the testimony referred to constituted substantial evidence to support the ruling of the trial court. Having reached the conclusion that the trailer was personal property, it becomes unnecessary to consider the Valued Policy Law as the statutory provisions do not apply to personal property.

We agree with appellant, and with Phoenix, that the court erred in holding that Denniston was entitled to recover the statutory penalty, and attorneys' fees, from these companies. As to Farmers, the complaint sought $5,000.00, and only $2,913.33 (less penalty) was recovered in the litigation. As to Phoenix, the complaint sought $3,500.00, but only $1,633.34 was recovered. We have held many times that a recovery of the amount sued for is a prerequisite to recovering penalty and attorneys' fees. *Southern Farm Bureau Casualty Ins. Co.* v. *Brigance,* 234 Ark. 172, 351 S. W. 2d 417; *Kansas City Fire & Marine Ins. Co.* v. *Baker,* 229 Ark. 130, 313 S. W. 2d 846, and cases cited therein.

In accordance with the views expressed herein, the judgment is modified to the extent that appellant and Phoenix are not liable for penalty and attorneys' fees. With this modification, the judgment, in all other respects, is affirmed.

RUSSELL *v.* COFFMAN.

5-3164 376 S. W. 2d 269

Opinion delivered March 9, 1964.

[redacted]

Williams & Gardner, Wright, Lindsey, Jennings, Lester & Shults, for appellant.

Gordon & Gordon, for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation results from a traffic mishap. Farris Coffman was plaintiff below and is appellee here. The defendants below and appellants here are Carl Russell, Coleman Dairy Company, Virgil Bewley, and Jones Truck Line. Coffman was driving west on Highway No. 64 in his pickup truck. Russell was driving east in the Coleman Dairy truck, and behind the Coleman Dairy truck Bewley was driving east in the Jones Truck Line tractor-trailer. The Jones Truck Line vehicle struck the rear of the Coleman Dairy truck and then jackknifed across the center line of the highway and struck the oncoming pickup truck of Farris Coffman, who was at all times in his proper lane on the highway. Coffman's truck was demolished and he received serious and painful injuries, for all of which he filed this action.[1] His complaint was

[1] Originally Coffman sued only Bewley and Jones Truck Line. They brought in Russell and Coleman Dairy as third party defendants; and then Coffman amended claiming relief against all of the four defendants. The jury verdict found Bewley and Jones Truck Line 65% negligent, and Russell and Coleman Dairy 35% negligent; and Coffman free of all negligence.

vigorously resisted by all four defendants, but jury trial resulted in a verdict and judgment in Coffman's favor for $25,000.00; and on this appeal the four appellants present these two points:

"I. The trial court committed prejudicial error in permitting the exhibition to the jury of Farris Coffman's kneecap and the exhibition to the Jury of colored slides of Coffman's kneecap taken in the operating room.

"II. The verdict for $25,000.00, exactly the amount for which recovery was sought, was excessive."

I. *Admission Of Evidence.* The collision occurred on January 10, 1962. Among other injuries Coffman received a severe injury to his left knee; and as the months passed the injury to the knee became more serious. Coffman's local physician, Dr. Wells, referred the patient to Dr. Kenneth Jones in Little Rock; and after considerable X-ray work and observation it was determined that Coffman had suffered a chondromalacia of the patella, which is an injury to the kneecap. His pain was constant and terrific; and it was finally found necessary to remove his kneecap. This was done on December 2, 1962, and after extended therapy and hospital treatment Mr. Coffman was again able to walk, but still used a cane.

At the trial Dr. Kenneth Jones, the orthopedic surgeon who performed the operation, testified in great detail about the injury to the kneecap, the necessity of the operation, and the therapy. That Dr. Kenneth Jones is an expert in his field was conceded at the trial. He showed two X-ray negatives to the jury, exhibited the scar on Mr. Coffman's knee, and then told of the operation. Dr. Jones testified that after the kneecap was removed and examined, the extensive chondromalacia of the surface of the kneecap was easily apparent. He had kept Mr. Coffman's kneecap in a preservative, and he exhibited this kneecap to the jury to explain the size of the kneecap and the injuries apparent to it. The defendants vigorously objected to the exhibition of this kneecap to the jury, and that is the point that is now urged on appeal.

After the kneecap was exhibited, Dr. Jones also exhibited two pictures[2] that he had taken of the kneecap immediately after it had been removed. The appellants insist that with the exhibition of the X-ray plates, the injured knee of Mr. Coffman, the pictures, and the detailed and lucid testimony of Dr. Jones, there was no need to exhibit the removed kneecap, and that such tended to inflame the jury and increase the verdict. On this point appellants cite such cases as *Anderson* v. *Seropian* (Calif.), 81 P. 521; *Rost* v. *Brooklyn Heights RR.*, 41 N.Y.S. 1069; *Evans* v. *Chicago RR.* (Minn.), 158 N.W. 335; and the quite recent case of *Harper* v. *Bolton* (S.C.), 124 S.E. 2d 54, in which the South Carolina Court said:

"The exhibition of injuries should not be permitted where such will not tend to throw any light on any issue in the case, nor should an exhibition be permitted where it is apparently designed merely to excite pity and commiseration . . .

"The exhibition of the enucleated eye of the respondent did not tend to throw any light on any issue in this case. We think the trial Judge committed error in permitting the introduction of the removed and preserved eye."

There is an exhaustive annotation in 66 A.L.R. 1334 entitled, "Propriety of permitting plaintiff in a personal injury action to exhibit his person to the jury"; and in Sections 12 and 13 of that annotation on page 1366 *et seq.*, there are listed cases in which enucleated eyes and amputated limbs and other separated parts of the body had been exhibited to the trial jury. There is no occasion for us to review all of these cases. In deciding the specific issue here before us, it is our conclusion that, under the facts and circumstances here existing, the Trial Court did not abuse its discretion in permitting the severed

[2] There is a dispute between counsel as to which side introduced the pictures of the removed kneecap; but the Trial Court found that it was one of the defendants' counsel who introduced the pictures. We attach little importance to this dispute for the reasons stated in the opinion.

kneecap of Mr. Coffman to be exhibited to the jury. What is a chondromalacia[3] of the patella and how extensive was the chondromalacia in this case? The average layman might know that "patella" means "kneecap"; but chondromalacia is a big word that doctors may understand but laymen do not. How large is a kneecap? Doctors know; but the average layman probably does not realize the size of a kneecap. The X-ray negatives throw little light on the subject. The pictures that Dr. Jones took of the amputated kneecap had in them nothing by which the size of the kneecap could be determined. Dr. Jones in his testimony used a plastic model which, of course, did not show the injury to this particular kneecap. But the most casual glance at this severed kneecap of Mr. Coffman revealed the injury; and thereby the jurors, in the first instance, and the Judges on appeal, are able to understand the testimony of Dr. Jones. It was not a matter of introducing the kneecap to inflame the jury, but rather to make the testimony of Dr. Jones more easily understood. After examining the kneecap and reviewing his testimony, we are thoroughly convinced that the Trial Court did not abuse its discretion in allowing this severed kneecap to be exhibited to the jury.

Furthermore, the defendants had filed a general denial; and under that denial, for aught the Court knew when the kneecap was introduced, the defendants might have introduced evidence designed to show that the entire operation was unnecessary. The fact that the defendants in presenting their case did not see fit to introduce any medical evidence to dispute Dr. Jones' testimony, does not establish that when the kneecap was exhibited in the plaintiff's case in chief, the defendants had at that time ever admitted the necessity of the opera-

[3] Maloy's Medical Dictionary for Lawyers defines chondromalacia as "a morbid or unnatural softness of the cartilages." Dr. Jones testified: "Chondromalacia means a softness of the articular cartilage of any articular surface: that is, the surface of the bone that goes to make up the gliding surface of a joint . . . It is something like the bearing in a motor wearing out or becoming roughened. The joint no longer works as a smooth, gliding surface."

tion; and the severed kneecap was evidence designed to establish that the operation was necessary.

II. *Excessiveness Of The Verdict.* The jury returned a verdict for Mr. Coffman for $25,000.00, and it is claimed that this amount is so grossly excessive as to shock the conscience of the Court; but we find no merit to this contention. It was shown that Mr. Coffman was 49 years of age and that a man of that age has a life expectancy of 22.12 years. Mr. Coffman was a cattle buyer by trade. A portion of his work was to attend auction sales to buy cattle and hogs for a packing company; and another portion of his work was to engage in "country and alley trading." This latter required him to jump onto trucks and look at cattle, to go out into the country and round up cattle, and to walk through pastures and fields. Even after his operation he could attend the livestock sales, because most of that work could be done while he was seated; but his ability to engage in "country and alley trading" was materially reduced on account of the removal of his kneecap. Mr. Coffman testified as to his earnings before his injury and before the trial, and as to his inability to engage in a portion of his work since his injury; and the doctors testified as to the permanency of his injury. Mr. Coffman had expended large amounts for doctor bills and hospital bills, and medicine; and he had experienced pain and suffering. It was furthermore testified that he still had, and probably would always have, chondromalacia of the lower end of the femur, the bone on which the kneecap functions. Obviously this femur bone cannot be removed. Whether arthritis will develop is something as to which the doctors have different views. That there will continue to be pain from the chondromalacia of the lower end of the femur is clearly shown. In addition to all these other injuries, Mr. Coffman suffered some fractured ribs and a whiplash injury. There is no need to detail all of his injuries: it is sufficient to say that the verdict for $25,000.00 is not so grossly excessive as to shock the conscience.

Affirmed.

Opinion delivered March 9, 1964.

[Rehearing denied March 30, 1964.]

F. C. Crow, for appellant.

Bruce Bennett, Attorney General, By *Richard B. Adkisson,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. The appellant, aged nineteen, was charged by information with having raped a girl under the age of sixteen. The jury found him guilty of the lesser offense of carnal abuse and fixed his punishment at three years imprisonment.

There is no real question about the sufficiency of the evidence. The accused admitted the act of intercourse but testified that it took place with the cooperation and consent of the prosecuting witness. According to the proof she was then only fifteen years old; so her consent would not be a defense to the charge of carnal abuse. Ark. Stat. Ann. § 41-3406 (1947); *Reed* v. *State,* 175 Ark. 1170 (mem.), 299 S. W. 757.

It is insisted that the trial court erred in allowing the mother of the prosecutrix to state her daughter's age, the objection being that the child's birth certificate

would be the best evidence. This identical contention was rejected in *Tugg* v. *State,* 206 Ark. 161, 174 S. W. 2d 374.

At the pretrial conference counsel for the accused asked for the names of the State's witnesses. The prosecuting attorney supplied all the names except that of Katy Thompson, whose name he could not recall. He explained, however, that she lived in a certain neighborhood, that A. W. Keith, a deputy sheriff, knew her name, and that he (the prosecutor) would furnish the name when he returned to his office. In fact, however, the prosecuting attorney overlooked the matter of communicating the requested information to the defense attorney before the trial. Even so there was no error in permitting Katy Thompson to testify, for the defense could have learned her identity simply by making a telephone call to the prosecuting attorney or to Keith. In the circumstances it cannot be said that the State unfairly produced a surprise witness.

The court was right in allowing Keith to relate an oral confession that was made to him by the accused. Under our holding in *Finn* v. *State,* 127 Ark. 204, 191 S. W. 899, this oral confession was not rendered inadmissible by the fact that a different confession, made several days later to a deputy prosecuting attorney, was reduced to writing. Moreover, on the witness stand Norton in substance conceded the truth of his admissions to Keith.

We find no merit in any of the appellant's assignments of error.

Affirmed.

5-3209 376 S. W. 2d 275

Opinion delivered March 9, 1964.

Wright, Lindsey, Jennings, Lester & Shults, By *Edward L. Wright, Jr.,* for appellant.

Rose, Meek, House, Barron, Nash & Williamson, By *George E. Campbell,* for appellee.

PAUL WARD, Associate Justice. This litigation has to do with the interpretation of two sections in the will of Miss Lela Owens. The material facts, which are undisputed, are set out hereafter.

At the time the will was executed on June 3, 1960 Miss Owens owned and lived in a house located at 1311 Izard Street in Little Rock—more definitely described in the will. In the THIRD paragraph of her will she devised and bequeathed "my home place at 1311 Izard St. . . ." to the Worthen Bank and Trust Company, in trust, for the use and benefit of her two nephews James and Johnny Ryles (to be turned over to them when the youngest reached 21 years of age). In the FIFTH paragraph of the will the testatrix provided that

"All of the rest and residue of my estate which I may own at my death, including the real estate owned by me . . . I direct to be converted into cash as quickly as can safely be done by my Executrix and delivered by her to the board of trustees of PHILANDER SMITH COLLEGE of Little Rock, Arkansas, for the specific purpose of creating a revolving loan fund to be known as the Lela Owens Student Loan Fund."

Other property was disposed of in the will but it is not involved in this litigation. The last paragraph appointed Lottie Beavers Green, who is the appellee herein, as executrix.

On August 17, 1961 Miss Owens purchased a house and lot located at 2200 Rice Street in Little Rock (more particularly described in the pleadings). On September 28, 1961 she sold her home at 1311 Izard Street to the City Housing Authority, receiving the full sales price therefor. At about the same time she moved to 2200 Rice Street where she lived and maintained her home until her death on July 21, 1962. The will was duly admitted to probate on July 24, 1962.

Due to the developments above mentioned the executrix filed a petition asking the probate court to interpret the will and to "direct her whether or not the property at 2200 Rice Street should be sold and the proceeds delivered to the Trustees of Philander Smith College, or whether said property passed to Worthen Bank & Trust Company in trust for the use and benefit of James Ryles and Johnny Lee Ryles."

The trial court, after finding the facts previously set out, found that the property located at 2200 Rice Street passed under the FIFTH paragraph of the will to the Board of Trustees of Philander Smith College. Thereupon the court directed the executrix to dispose of said property in accordance with the provisions of the will. From this order the bank has appealed, seeking a reversal on the two grounds hereafter discussed.

One. It is the contention of appellant that the words "my home place", used in the THIRD paragraph of the will, were sufficient to convey the property at 2200 Rice Street to the bank (in trust for James and Johnny Ryles). To sustain this contention appellant relies on the case of *Milton* v. *Milton,* 193 Miss. 563, 10 So. 2d 175. There the testator devised to his wife "my home place". After the will was executed but before the testator died he sold his (then) home place and bought another home to which he moved. The court there held that the words "my home place" applied to and conveyed the home where the testator lived at the time of his death. We think, however, the language used by the court in reaching its conclusion shows the cited case is not applicable or controlling when applied to the facts of the case under consideration. In part the court said:

"If, when a will is made, the testator owned property embraced therein which he afterwards disposes of, and acquires other property embraced within the same description, and owns it at his death, the will must be applied thereto, unless something therein indicates that the testator does not so intend."

In the cited case it is readily apparent that the words "my home place" described equally well both pieces of property. This is not true in the case under consideration here. In the will Miss Owens described the property as "my home place at 1311 Izard Street in Little Rock legally described as North 33 feet of West 110 feet of Lot 4, Block 233, City of Little Rock, Pulaski County, Arkansas . . ." This description patently does not describe the property at 2200 Rice Street.

The material facts in the case under consideration are very similar to those considered in *Dunlap* v. *Hart,* 274 Mo. 600, 204 S. W. 525, where the Court held, in effect, that where a testatrix devises specific real estate but sells the same and buys other real estate before the will takes effect the later acquired property passes by inheritance to her heirs. The above rule is applicable to the facts in this case, and we think it is sound and

reasonable. The testatrix here had an opportunity to change her will to apply to the property at 2200 Rice if she had wanted to do so.

Two. A second ground (related to the one above) relied on by appellant is that the court should not have applied the rule of ademption in this case. The meaning of the word "adeem" is to revoke. The word "ademption" means the act of revoking such as here, the revoking of a devise. It is ably contended by appellant that the rule of ademption should not be used to defeat the *evident intention* of the testatrix—that is (in this case) to put the home place in trust to support and educate her two nephews. Appellant cites cases from other jurisdictions in support of its position, but we find them unconvincing. In our opinion the issue here presented is controlled and must be resolved against appellant by our own decision in the case of *Mee* v. *Cusineau, Executrix,* 213 Ark. 61, 209 S. W. 2d 445. In that case we said:

"At § 341, 28 R.C.L. 345, appears statements of the law to the following effect. The distinctive characteristic of a specific legacy is its liability to ademption. If the identical thing bequeathed is not in existence, or has been disposed of so that it does not form a part of the testator's estate, at the time of his death, the legacy is extinguished or adeemed, and the legatee's rights are gone."

The Court then set out the basis for the above rule of law:

"The reason for this rule as stated in the numerous cases cited in the note to § 543, 68 C.J. 844, is that as the testator no longer owns the property specifically devised, there is no property for the devisee to take, and also that subsequent conveyance of the property by testator after having made a specific devise of it indicates conclusively a change of testimentary intent as to that property."

It is our opinion that the above reasoning is logical and practical, and that it should be followed for the sake of clarity and uniformity. It is applicable to the facts

of this case because the description of the Izard Street property is definite and could not be confused with the description of the Rice Street property. The Izard Street property was sold by Miss Owens almost a year before she died without having made any change in her will.

Accordingly, the order of the trial court is affirmed.

Affirmed.

ADEN *v.* STATE.

5078 376 S. W. 2d 277

Opinion delivered March 9, 1964.

E. L. Holloway, for appellant.

Bruce Bennett, Attorney General, By *Russell J. Wools,* Asst. Atty. Gen., for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a conviction for voluntary manslaughter. Appellant Joseph Franklin Aden lived on a farm supervised by the deceased, Willis Cole, and had worked for Cole. A day or two before Aden shot Cole, Aden had started picking cotton for a Mr. Collier. The evening of September 18, 1962, Cole with his nephew went to Aden's

house where Cole determined, with anger, that Aden was working for Collier and that Aden planned to move from Cole's farm the following weekend. Their conversation took place beside Cole's truck. Aden testified that as he started to run back into the house, Cole hit him on the back of the head with a blackjack or something and knocked him to one knee. Cole then drove off. Aden went into his house, picked up his shotgun and a shell and drove to his parents' home. Aden and his father testified that they examined his head and his mother insisted that he go to a doctor; that Aden and his father then drove to the nearest doctor, who was not at home; that Aden then decided to go home and pick up his wife and find another doctor; and that after passing Cole's truck on the highway, Aden went to a gas station where he was backing up to a pump to get gas and air for a low tire when Cole's truck pulled in. The testimony is in conflict as to whether Cole or Aden got out of his vehicle first with a gun, but there is little conflict in testimony that Cole shot first, either once or twice, before Aden shot. Aden's shot hit the truck's open door behind which Cole was standing, which in turn deflected the shot up into Cole's right arm pit and side. Cole died shortly thereafter still holding a cocked pistol.

On September 19th, an information was filed in Randolph Circuit Court against Aden, charging him with murder in the first degree. He was tried on December 6, 1962, and because the jury could not agree on a verdict, a mistrial was declared. Then the case was set for trial January 21, 1963. At the close of this trial, the jury found appellant guilty of the crime of voluntary manslaughter and fixed his punishment at four years in the penitentiary. From the order on this verdict, appellant has prosecuted this appeal. For reversal appellant urges that the trial court erred in excluding the testimony of John Hannaford, who would testify that on the day before the killing the deceased told him that he, Cole, was going to kill appellant if he did not move (from his premises).

At commencement of trial appellant requested that the rule be invoked and all witnesses excluded from the court room. On the second day of trial during a recess, appellant's counsel learned what John Hannaford could testify to and immediately had him subpoenaed, sworn and sent to the witness room. This witness had sat in the court room during most of the trial up to the time he was subpoenaed, and had also heard most or all of the first trial. When appellant called Mr. Hannaford to testify, the State objected on the ground that he had been present in the court room during most of the trial and his testimony should therefore be excluded. The trial court stated (in its Findings following a motion for new trial): "In view of the fact the witness had been in attendance during both trials and there was testimony in the record concerning threats or alleged threats by the deceased to do violence to the defendant, and the defendant testified that certain threats had been communicated to him, the court felt that in view of what had transpired, that the State's objection should be sustained and the offered testimony excluded. It was the thinking of the court that if the Rule and the exclusion of witnesses from the court room during the taking of the testimony meant anything, that the objection of the State should be sustained."

Harris v. *State,* 171 Ark. 658, 285 S. W. 367, deals directly with this situation. Among the number of authorities cited and quoted with approval therein is the following:

"In 14 Encyclopedia of Evidence, chapter 'Witnesses,' page 598, it is said: 'The better rule seems to be that a witness is not disqualified from testifying by reason only of his having disobeyed an order of exclusion, that his testimony ought not to be rejected and the party who called him deprived of his testimony where such party is himself without fault; but that such violation should only affect this witness' credibility, or subject him to punishment for contempt.' "

The applicable rule in the *Harris* case has been succinctly summarized as follows:

"Where counsel for accused did not know until a few minutes before offering testimony that witnesses would testify to certain facts, and for that reason they had not been called as witnesses and put under the rule, refusal to permit them to testify was an abuse of discretion, where they were offered before the close of testimony."

For the error indicated it is necessary to reverse this case and remand the cause for new trial.

Reversed and remanded.

HOOTEN *v.* DEJARNATT.

5-3173 376 S. W. 2d 272

Opinion delivered March 9, 1964.

Pope, Pratt & Shamburger, By *Don Ryan, Robert Ross,* for appellant.

Cockrill, Laser, McGehee & Sharp, for appellee.

FRANK HOLT, Associate Justice. The appellant, Moody C. Hooten, brought suit against the appellee, J. W. DeJarnatt, for personal injuries and property damages sustained by him as a result of the appellee driving his automobile into the rear of a tractor which appellant was driving upon a highway. The appellee responded by appropriate pleadings and sought recovery for personal injuries and property damage sustained by him. The issues were submitted to a jury which denied any recovery to either litigant. From a judgment on this verdict appellant brings this appeal. There is no cross-appeal.

The appellant first contends that the trial court erred by admitting in evidence the deposition of Mrs. Thigpen as to her near collision with the appellant preceding the collision between appellant and appellee. The appellant argues that this near collision is a collateral issue to the actual collision. After making certain deletions, the trial court admitted the deposition in evidence over the objection of appellant that none of the balance of her testimony was relevant. It appears that the near collision between Mrs. Thigpen and the appellant occurred approximately one-fourth mile from and one minute before the collision between the appellant and appellee. Mrs. Thigpen testified that as she topped an incline she suddenly saw appellant, proceeding in the same direction, driving his tractor on the paved portion of the highway, and that she was able to avoid a collision by coming to almost a complete stop before the oncoming traffic permitted passage; that no part of appellant's tractor was on the shoulder of the road; and that since it was dark she had her headlights on as did oncoming traffic. However, appellant testified that at all times he had the right front and right rear wheels of his tractor off the pavement riding the gravel shoulder of the road; and that it was not dark enough at the time of the actual collision to require the use of headlights.

We have held that where the sequence of events is not too remote in distance and time, then the preceding act or occurrence is admissible for the purpose of showing one continuing act or the probability that the circumstances of the preceding occurrence continued to exist at the time of the subsequent occurrence. Therefore, such preceding occurrence has some relation to the actual mishap. *Missouri Pacific Transportation Co.* v. *Mitchell,* 199 Ark. 1045, 137 S. W. 2d 242; *Wagnon* v. *Porchia,* 235 Ark. 731, 361 S. W. 2d 749; *Jelks* v. *Rogers,* 204 Ark. 877, 165 S. W. 2d 258; *Brooks* v. *Bale Chevrolet Co.,* 198 Ark. 17, 127 S. W. 2d 135. We think Mrs. Thigpen's testimony was clearly admissible for the purpose of showing one continuing act or as a circumstance which tended to show the probability of the conditions existing at the time of the collision.

Furthermore, another witness, Mrs. Kurkendall, was permitted to testify without objection that she had a near collision with appellant as she came upon him from the rear; that she didn't see any lighting on the tractor although it was dark enough to require the use of her lights and that all she was able to discern as she passed him was a form which appeared to be a man on a tractor. Since no objection was made to her testimony, the Thigpen incident being closer in time and distance to the actual collision, we perceive no prejudicial error could result from the admission in evidence of the Thigpen deposition.

The appellant next contends that the trial court erred in giving appellee's Instruction No. 4. This instruction related to the statutory requirement, Ark. Stat. Ann. § 75-702 (a) and § 75-709 (d) (Supp. 1963), that farm tractors must be equipped with headlights. It is undisputed that the appellant had no headlights on his tractor. Appellant argues that there was no evidence that the absence of these headlights was the proximate cause of the collision. We cannot agree. The collision occurred at approximately seven P.M. on March 29, 1962. There was evidence that it was misting rain and dark, that appellee and the drivers of other vehicles were using

their headlights. Appellee testified he did not see a red light on the rear of appellant's tractor at the time of the collision, although appellant presented evidence that the red light was in use. The diffusion of light from head lamps undoubtedly aids overtaking as well as approaching motorists and certainly would assist motorists under such driving conditions as existed at the time of this collision. There was a sixteen-foot shoulder at the site of the collision which head lamps could have made more readily discernible. This instruction was responsive to the evidence in this case and properly permitted the jury to determine if the absence of headlights was a proximate cause of the collision.

The appellant also questions the clarity of this instruction. We do not think it is susceptible to this objection. Further, the court gave appellant's Instruction No. 10 to the clear effect that the jury could not consider the violation of this statute or the absence of headlights as evidence of negligence unless the jury found by a preponderance of the evidence that such was a proximate cause of the collision.

Appellant next argues that the trial court erred in giving appellee's Instruction No. 5A which reads:

"No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law."

This instruction is based upon Ark. Stat. Ann. § 75-604 (a) (Supp. 1963) entitled "Minimum Speed Regulation". The appellant urges that this is an abstract statement of the law or is not responsive to any evidence since the collision involved only one tractor and one automobile with no other vehicles being involved. Appellant testified he was traveling approximately fourteen miles per hour. Appellee testified that his speed was approximately fifty miles per hour at the time he first observed appellant about twenty-five steps ahead of him. Appellant admitted that he was familiar with this road and knew it was heavily traveled. The appellee testified

that there was oncoming traffic at the time of the collision which made it impossible for him to go around the appellant. It is admitted by appellant that appellee would have had to cross the center line to pass him. There was evidence by two witnesses, Mrs. Thigpen and Mrs. Kurkendall, that preceding the collision they almost drove into the rear of appellant's tractor. As stated, the shoulder was sixteen feet wide at the scene of the accident. We think the instruction was proper.

The appellant next contends for reversal that the trial court erred in refusing to amend appellee's Instruction No. 7 as requested by appellant. This instruction defined the duty of a driver of a vehicle when confronted with an emergency not created by his negligence. Appellant requested the court to include in this instruction the duty of care when the emergency is created by the driver's own negligence. Appellant argues he "was entitled to have it made clear that this emergency rule would not apply if [appellee] was negligent in creating the emergency." This instruction clearly tells the jury in two places that the emergency rule is only available to a driver who is confronted with an emergency "not the result of his own negligence". It was unnecessary to reiterate by separate paragraph or additional words that the emergency rule is not available when the emergency is created by the driver's own negligence.

Finding no reversible error, the judgment is affirmed.

5-3228 376 S. W. 2d 555

Opinion delivered March 16, 1964.

Ben D. Lindsey, for appellant.

Shackleford & Shackleford, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves a judgment entered by the Union County Circuit Court against appellant, Pyramid Life Insurance Company, and in favor of Ralph L. Hamilton, appellee, in the amount of $110.75. The sole question on direct appeal is whether the company was liable for sick benefits under a policy that it had issued to Hamilton. The trial court, sitting as a jury, held against appellant, and from the judgment so entered comes this appeal. Appellee cross appeals, contending that the attorney's fee awarded counsel for Hamilton was insufficient.

We are unable to consider this appeal on its merits since Rule 9 (d) has not been complied with. On numerous occasions, this court has stated that we are not required to explore the transcript, but rather, that the duty rests upon an appellant to furnish this court such an abridgment of the record as will enable us to understand the matters presented. See *Vire* v. *Vire.* 236 Ark. 740, 368 S. W. 2d 265, and cases cited therein.

In the present case, there is no abstract of the judgment, pleadings, or testimony, and only one section of the policy is mentioned, this appearing in appellant's statement of the case. The transcript covers over 80 pages, and in situations of this kind, we have heretofore uniformly affirmed the trial court's decree or judgment.

Appellee, on cross-appeal, asserts that the fee allowed appellee's attorney in trial court ($100.00) was inadequate. Considering the amount of the judgment rendered, we cannot say that the trial court was in error in reaching this figure. For services rendered on this appeal, we feel that an additional $100.00 should be allowed.

It is so ordered.

Affirmed on both direct and cross-appeal.

PRIOLA *v.* PRIOLA.

5-3204 377 S. W. 2d 29

Opinion delivered March 16, 1964.

[Rehearing denied April 20, 1964.]

Edwin E. Dunaway, Jack Holt, Sr. and *John F. Park,* for appellant.

Rose, Meek, House, Barron & Nash, By *John H. Haley,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a will contest. The facts are stipulated, and the only question to be decided is whether this case is ruled by *Green* v. *Smith,* 236 Ark. 829, 368 S. W. 2d 280.

On May 23, 1961 Mrs. Nancy Priola undertook to execute a will. She could not write and she signed by mark. She had two living sons (Mark and Jack Priola) and also had the descendants of some of her deceased children. By her attempted will she left $5.00 to each of the descendants of her deceased children and left the entire remaining estate to her two living sons, Mark and Jack Priola. Mrs. Nancy Priola departed this life on March 10, 1963, and in due time her purported will was offered for probate, which was supported by Mark and Jack Priola, the appellants here, and resisted by the appellees, Joseph Priola *et al.*, who are the descendants of the deceased children of Mrs. Nancy Priola. The Probate Court rejected the will for probate, holding:

"The instrument proffered for probate in this cause, having been witnessed by only two persons who signed both as witnesses to the mark and as attesting witnesses to the Will, does not meet the requirements of Arkansas Statutes Annotated § 60-403, that a minimum of three subscribing witnesses is required to make the Will in question valid."

Jack and Mark Priola have appealed; and they state their point as follows:

"I. The Probate Court erred in holding that the will of Nancy Priola, deceased, was not executed in compliance with the provisions of Ark. Stat. § 60-403, and in rejecting said will for probate. (a) *Green* v. *Smith,* 236 Ark. 829, does not construe subsections (a) (3) and (a) (5) of § 60-403, Arkansas Statutes, as in the construction placed upon them by the trial court.

(b) Whether there be two or more witnesses to the execution of a will is optional.

(c) There is no disqualification in the statute of one who signs as a witness to the testator's mark, as one of the required attesting witnesses."

As aforesaid, Mrs. Priola was unable to write her name and she signed by mark. There were two witnesses to the mark; and the same two persons who witnessed

the mark also acted as attesting witnesses to the will. There were no other persons who signed as witnesses to the mark or the will. In short, each of the two persons acted in a dual capacity; that is, a witness to the mark and an attesting witness to the will; and such acting in dual capacity is exactly what we held could *not* be done in *Green* v. *Smith, supra.* There, in discussing the requirements of Ark. Stat. Ann. § 60-403 (Supp. 1963), we said:

"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."

Appellants cite and earnestly rely on *Bocquin* v. *Theurer,* 133 Ark. 488, 202 S. W. 845, wherein we held that a witness to the mark could also be an attesting witness to the will. But that case was decided in 1918 when the governing statutes were § 8012 and § 8013 Kirby's Digest of 1904, which sections later became § 14512 and § 14513 of Pope's Digest of 1937.[1] The pres-

[1] Sections 14512 and 14513 of Pope's Digest read: "§ 14512. Mode. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner,

"First. It must be subscribed by the testator at the end of the will, or by some person for him, at his request.

ent governing statute is Ark. Stat. Ann. § 60-403 (Supp. 1963), which is § 19 of Act No. 140 of 1949. It will be recalled that Act No. 140 of 1949 is the Probate Code.

When we compare § 14512 and § 14513 of Pope's Digest[1] (the previous statutes on the mode of executing a will) with § 19 of Act No. 140 of 1949 as found in Ark. Stat. Ann. § 60-403 (Supp. 1963) (the present statutes on the requirements for executing a will), the correctness of our holding in *Green* v. *Smith, supra,* becomes readily apparent. The old statute said in § 14513 Pope's Digest that the person who wrote the testator's name "shall write his own name as a witness to such will"; thus recognizing that the same person could write the testator's name and also be a *witness to such will.* But the new statute (§ 19 of Act No. 140 of 1949) says in Paragraph (5) that the person who writes the testator's name must do so "in the presence of two or more attesting witnesses"; and certainly such person who writes the testator's name cannot be an attesting witness to his own signature. In short, the attesting witness to the testator's mark cannot also act in the dual capacity of an attesting witness to the will. We affirm our holding in *Green* v. *Smith, supra.*

The Probate Judgment is affirmed.

HOLT, J., not participating.

Second. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

"Third. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his will and testament.

"Fourth. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

"Fifth. Where the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator or testatrix, such will may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of each testator or testatrix, notwithstanding there may be no attesting witnesses to such will; but no will without such subscribing witnesses shall be pleaded in bar of a will subscribed in due form as prescribed in this act.

"§ 14513. Signature of witness. Every person who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to such will, and state that he signed the testator's name at his request."

Opinion delivered March 16, 1964.

[redacted]

Russell & Hurley, for appellant.

W. J. Dungan, James F. Daugherty, for appellee.

GEORGE ROSE SMITH, J. This is a foreclosure suit brought by the appellant upon an installment note and mortgage that originally evidenced a debt of $3,830.40. According to the complaint the indebtedness had been reduced to $1,980.80 when this suit was filed in 1962. The chancellor found the transaction to be void for usury and upon that ground alone entered a decree for

the defendants, Ellis Knight and his wife. The appellant argues only the issue of usury, while the appellees urge several reasons for an affirmance of the decree.

The note was payable in 72 monthly installments of $53.20 each, which included both principal and interest. The chancellor, in holding the instrument to be usurious, apparently based his decision upon the fact that the appellant had exercised its option to accelerate the maturity of future payments and had filed suit for the full amount without making any deduction for the interest that had not yet accrued. This procedure, however, did not render the transaction usurious. In such a situation the court should merely refuse to permit the creditor to recover the unaccrued interest. *Eldred* v. *Hart,* 87 Ark. 534, 113 S. W. 213; *Sager* v. *American Investment Co.*, 170 Ark. 568, 280 S. W. 654.

The note was originally payable to Jim Walter Corporation, a Florida company which had contracted to build a house for the Knights for an agreed consideration of $2,945.00. Knight testified that the total expense for materials and labor should have been only about $1,600.00. Even so the appellees are in error in contending that this disparity rendered the note usurious. The corporation did not make a loan to the Knights. It simply agreed to build a house according to certain plans and specifications for the sum of $2,945.00. The fact that the builder's profit may have greatly exceeded 10 per cent of the contract price has no bearing upon the issue of usury, which is ordinarily defined as an excessive charge for the loan or forbearance of money.

It is also insisted that the note and mortgage are unenforceable because neither Jim Walter Corporation nor the appellant, both Florida corporations, was licensed to do business in Arkansas when the contracts were executed. We take judicial notice of records required to be kept by the Secretary of State. *Public Loan Corp.* v. *Stanberry,* 224 Ark. 258, 272 S. W. 2d 694. These records show that Jim Walter Corporation was licensed to do business here on September 30, 1957, which was

more than a year before the date of the construction contract and the note and mortgage. It is true that the appellant, apparently a finance company, was not then authorized to do business in Arkansas, but there is no proof that the company has done any business here. That the two corporations have the same officers and directors and the same postoffice address is not in itself sufficient to destroy their existence as separate entities. See *Rounds & Porter Lbr. Co.* v. *Burns,* 216 Ark. 288, 225 S. W. 2d 1.

The appellees' final contentions are that the note and mortgage are invalid for the reason that Knight's name was signed by his minor son and for the further reason that the mortgaged property is not correctly described. As to the signature, the Knights' attorneys have overlooked the fact that one of them made this announcement during the trial: "We ratified the boy's signing of the note. We ratified it. And we are not going to raise the question that he is not liable for that reason." As to the description, if it is defective the purchaser at the foreclosure sale may not acquire a good title, but that fact is not a basis for exempting the Knights from liability upon their obligation.

We find the Knights to be in default, but we cannot with certainty fix the amount new due. The cause will accordingly be remanded for further proceedings.

Reversed.

EDDINGTON *v.* CITY ELECTRIC CO.

5-3225 376 S. W. 2d 550

Opinion delivered March 16, 1964.

Elbert S. Johnson, for appellant.

Reid & Burge, for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case. Claimant, Floyd Eddington, was denied compensation by the full commission, and this finding was approved by the circuit court.

On appeal to this Court we are asked to resolve only one issue: Is the finding of the full commission (as approved by the circuit court) supported by substantial evidence? If it is so supported it is our duty to affirm the judgment of the trial court—as is established by decisions too numerous to require mention. What constitutes substantial evidence is a question of law. See: *Boyd Excelsior Fuel Company* v. *McKown,* 226 Ark. 174, 288 S. W. 2d 614, and *Cummings* v. *United Motor Exchange,* 236 Ark. 735, 368 S. W. 2d 82.

After a careful examination of the testimony and the applicable law we have reached the conclusion that there is no substantial evidence to support the finding of the commission in this case and that, consequently, the judgment of the trial court must be reversed. In support of that conclusion we set out hereafter at some length the pertinent testimony, after first giving the factual background.

The claimant (appellant), Floyd Eddington, is a married man 44 years old. He had been a pipe fitter for 15 years, and had worked for the City Electric Co.

(appellee) for about a year. As such employee he helped to install boilers and furnaces by putting the sections in place and adjusting the pipe connections. He was injured in June 1962 while helping install a boiler for the school at Luxora. Since the injury he has been able to do very little, if any, work. The decisive and difficult question is whether there was a causal connection between his injury and his later physical condition. We find no difficulty in concluding (from a study of the record) that claimant did suffer an injury and that his physical condition was thereafter impaired.

Lay Testimony. According to claimant: On Thursday, June 14, 1962 he and a Mr. Fair were engaged in installing a boiler of three sections—each weighing 500 to 600 pounds; it was hot (100 degrees in the shade) and humid, and they had to move each section quite a distance over muddy ground by use of a two wheel cart and then lift it in place; while they were lifting one of the heavy sections in place claimant hurt himself—said he was blind as a "bat" and his head was spinning; they took it easy the rest of the day. The following day (Friday) they worked but claimant said he felt bad, weak and used up. On the following Monday claimant went back to work, and while he and his helper (his brother, and also a pipe fitter) were installing some two inch pipe he blacked out, staggered and fell—hitting his head on the concrete floor; he was taken home and Dr. Godley was called. According to claimant Dr. Godley said the symptoms indicated heat prostration; the next morning he blacked out in the bathroom, and was then admitted to the hospital. Claimant said that on Monday the temperature was 102 degrees in the shade. He also said he had never previously had any physical ailments, except one minor injury about ten years previously when he lost no time at work.

The above testimony of claimant was corroborated by his helpers. Also, one Louis Carucci, a pipe fitter and an employee of appellee testified he had known claimant some ten years and that he never heard him complain about any physical ailments. He also stated

that claimant needed more help on the job he was doing, but that the company was busy on other jobs.

It is undisputed that claimant had seven or eight convulsive seizures after June 1962 and that he has not worked since the injury.

Medical Testimony. Claimant was first examined by Dr. Godley. In essence Dr. Godley testified: I cannot say positively that loss of body fluid produced by prolonged heavy work in the hot sun and the blow on his head were the primary cause of appellant's condition.

Q. "Then I will ask you if, in your opinion these were the precipitating or aggravating factors?

A. "Yes, sir. I think so."

"...I myself thought Mr. Eddington's difficulty started on the day that he fell and was precipitated by the heat and/or hitting his head on the ground and that since that time he has been ill and no positive diagnosis has been made."

He further stated that claimant is still suffering from convulsive seizures, and he has not been discharged as well and able to go back to work.

Dr. Phil Orphet, who lives in Memphis and practices internal medicine, examined claimant at the request of Dr. Godley. In essence Dr. Orphet testified that he made laboratory studies and found claimant's skull was not indented or fractured; his impression was that claimant had fainting and swooning spells, but the origin was unknown to him; that the loss of body fluids and sodium produced by prolonged heavy work in the hot sun might have been a precipitating factor to claimant's condition, but other things might have caused it; he could not say claimant was able to return to work; striking his head on the concrete floor could have caused a cerebral concussion—the brain tissue could be bruised even though the skull was not fractured; it is possible that a light concussion might cause a hemorrhage where there is a weakened blood vessel. He advised that claimant be ex-

amined by Dr. DeSaussure, a neurologist located in Memphis.

Dr. DeSaussure, who examined and X-rayed claimant, testified in essence: The Xray of the skull showed two or three suspicious areas—Xrays will not show damage to brain tissue; brain tumor was ruled out; he could not, from his examinations, determine the cause of claimant's condition; he feels that claimant could continue his line of work as a pipe fitter but didn't say when; it takes a fair degree of heat to damage the brain so as to cause convulsive seizures, but extreme heat can cause brain damage.

From the above it appears there is no positive medical evidence that claimant's present physical condition was not caused or aggravated by his injury. Giving the greatest possible weight to the doctors' testimony, it only proves they do not know what caused claimant's present physical condition. That being the situation we think this case is controlled by the case of *Hall* v. *Pittman Construction Co.,* 235 Ark. 104, 357 S. W. 2d 263, where we said:

"If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award."

Apply the above language to the facts in the case before us and a reversal is clearly indicated. The disability arose immediately after the accident, the accident occurred while claimant was working, and there is nothing to suggest any other explanation for claimant's disability —the medical testimony being negative. Similar also, is the case of *Clark* v. *Ottenheimer Brothers,* 229 Ark. 383, 314 S. W. 2d 497. There, in reversing the commission, we said:

"There was no evidence and no opinion to the effect that appellant's injury was not or could not have been

caused by the heavy lifting she did. None of the four doctors who treated her, including the one who operated on her and removed the disc, was ever asked if the injury could have been caused by the work she was doing, and none expressed an opinion about the matter one way or the other. On the other hand the first doctor who treated appellant gave this written statement: 'My opinion is the work she was doing at Ottenheimer Bros. was the causative factor to her troubles'."

In this case, it will be recalled, the first doctor (Dr. Godley) made a similar statement with reference to claimant.

We point out also that our Workmen's Compensation law should be liberally construed, and that doubtful cases should be resolved in favor of the claimant. See: *Boyd Excelsior Fuel Company* v. *McKown, supra,* and *Cummings* v. *United Motor Exchange, supra.*

In accord with the conclusions heretofore expressed, the judgment of the trial court is reversed, and the cause is remanded to the circuit court with directions to remand to the commission for further proceedings consistent with this opinion.

Reversed and remanded.

MASSEE *v.* SCHILLER.

5-3214 376 S. W. 2d 558

Opinion delivered March 16, 1964.

Ben Core and *John B. Hainen,* for appellant.

Shaw & Shaw, for appellee.

JIM JOHNSON, Associate Justice. This suit involves ownership of a 20-foot strip of land 1,020 feet in length along the south edge of a quarter-quarter section, part of which is used as a road. Appellants J. N. Massee and his wife, Jenness Massee, own a parcel of land in Polk County described as the SE-¼ of the SE-¼ of Section 36, which is immediately south of the property of appellees, Bruno Schiller and his wife Berta, who own most of the NE-¼ of the SE-¼ of Section 36. Between them is the strip of land here in dispute, the south 20 feet of the NE-¼ of the SE-¼. The west 498 feet of that strip is now being used as a road into appellants' property. During 1960 appellees built a fence on the south side of the eastern part of the strip (the eastern 822 feet), placing it approximately on the line dividing the NE-¼ from the SE-¼. This action apparently precipitated appellants' suit in Polk Chancery Court. Appellants filed suit on January 15, 1963, praying that the court quiet and confirm title to the south 20 feet of the NE-¼ of the SE-¼ of Section 36 in appellants; that appellees be ordered to remove the fence to the north side of the strip, and that appellees be restrained from relocating fencing on this property. Appellees answered, admitting that the strip had once been used in its entirety as a "passageway" or lane, but that the eastern 790 feet of the lane had been abandoned for more than seven years as a roadway and is under fence which separates the lands owned by the parties, and further that 520 feet of the lane is still being used by appellants for ingress and egress to their property, but that such use is with the permission and acquiescence of appellees, is only a roadway easement and is not adverse to appellees' fee simple title to the land over which the roadway easement

crosses. On oral motion, the court gave either party the right to have a survey made of the disputed area. Appellees then amended their answer, praying that the court quiet title to the 20-foot lane in them, subject only to the roadway easement which appellants are using across the west 498 feet of the lane; and further prayed that the court order boundary line fences to be located on the true boundary line at the expense of both parties equally. Trial of the cause was had before the chancellor on March 13, 1963. After testimony of the parties, former owners, surveyors and other witnesses, the court: (1) established the boundary line between the two quarter-quarter sections as the line indicated by the court-ordered survey which was on an old fenceline which divides these two forty-acre tracts of land, (2) found that appellants' claim of ownership of the east 822 feet of the lane "is without merit, as this old lane has long been abandoned and lies wholly upon the lands owned by" appellees, (3) found that appellants do have an easement for roadway purposes over the west 498 feet of the lane, which roadway was found to exist by prescription, and (4) found that appellees have no claim of ownership to anything south of the old established fence and survey line. The court then quieted title in the north tract in appellees, "subject to a roadway easement across the south side of the west 498 feet of that tract as the same is now located" and dismissed appellants' complaint. From the decree appellants have pursued this appeal.

Appellants claim ownership of the lane by adverse possession, and testimony relative to dominion and fences goes back before 1918 to a common owner, M. H. Howard. However, review of the testimony and pleadings reveals that at a later date a Dr. Douglas also owned both parcels of land at the same time. He acquired the north parcel in 1930, which he conveyed to appellees in 1933. This purchase of the north parcel by Dr. Douglas, who at the time owned the south parcel, annihilated any inferior interest or title such as adverse possession or easement the doctor might have acquired against the former

owners of the north parcel. See 31 C.J.S., *Estates,* §§ 123-131; 19 Am. Jur., *Estates,* § 135. When Dr. Douglas later conveyed the north parcel to appellees, he conveyed it absolutely, not reserving or excepting any part of the lane, and in so doing conveyed the property free of any prior adverse possession. The effect of the chancellor's findings was that adverse possession had not been established since the time of the doctor's conveyance to appellees. Nor does the evidence clearly show whether an easement for roadway purposes was established on the east 822 feet of the lane subsequent to Dr. Douglas' conveyance to appellees, but if there was such an easement, the evidence is virtually conclusive that it has long since (well over seven years) been abandoned and its use therefore properly reverted to the owners of the servient estate, the appellees. *Fulcher* v. *Dierks,* 164 Ark. 261, 261 S. W. 645; *Clinton Chamber of Commerce* v. *Jacobs,* 212 Ark. 776, 207 S. W. 2d 616. The evidence also clearly establishes, as admitted by appellees' answer, that appellants have an easement for road purposes across the west 498 feet of the lane for ingress and egress. On the whole case on trial de novo, we cannot say that the chancellor's findings are against the preponderance of the evidence. The decree is therefore affirmed.

BUSSELL *v.* MISSOURI PACIFIC RAILROAD CO.

5-3153 376 S. W. 2d 545

Opinion delivered March 16, 1964.

Williamson, Williamson & Ball, Coleman, Gantt & Ramsay, for appellant.

W. J. Smith, Robert V. Light, for appellee.

FRANK HOLT, Associate Justice. This case results from a railroad crossing accident. It occurred when a Missouri Pacific freight train and a tractor-trailer truck collided where the railroad tracks cross the "new Monticello by-pass" portion of State Highway No. 81 at a right angle. The driver of the tractor-trailer, Ben Edward Bussell, was killed, the truck was practically demolished and part of its cargo destroyed. The train engine, two freight cars and a portion of the railroad track were damaged. The appellant, Mrs. Helen Louise Bussell, widow of the deceased truck driver and administratrix of his estate, and the appellant, Burks Motor Freight Line, Inc., owner of the truck, brought suit against the appellees, Missouri Pacific Railroad Company and W. B. Keahey, the engineer of the train, for the recovery of damages. The appellees responded by a general denial and appellee Railroad Company by counterclaim sought to recover its property damages from appellant Burks only. Appellant Burks and appellee Railroad Company stipulated as to the amount of the actual property damages sustained by each of them.

Upon trial the jury denied any recovery to the appellants upon their joint complaint. It awarded $10,828.59 to the appellee Railroad Company upon its coun-

terclaim. On appeal the appellants do not question the sufficiency of the evidence nor assert any error in the presentation and reception of the evidence. The appellants rely for reversal upon alleged errors by the trial court in the giving of certain instructions on behalf of the appellees.

Appellants first contend that the court erred in giving appellees' Instruction No. 7 which defined "unavoidable accident". There is no contention that it is an incorrect statement of the law. The specific objection made is that there was no evidence presented in the case to justify giving such an instruction. Appellants argue the instruction was abstract and had the effect of misleading the jury. The jury was not misled inasmuch as it returned a verdict which, in effect, found the appellees were free from negligence and the appellants were guilty of 100% negligence. The giving of an erroneous instruction is harmless error where the jury was not misled or the jury rejects the theory of the instruction. *National Life & Accident Ins. Co.,* v. *Sherod,* 155 Ark. 381, 244 S. W. 436; *Wright* v. *Covey,* 233 Ark. 798, 349 S. W. 2d 344; 5A C.J.S., Appeal & Error, § 1773 (1) p. 1245. In *Sutton* v. *Nowlin & Sons,* 232 Ark. 223, 335 S. W. 2d 292, we said:

"* * * the verdict cancelled any error in the matter of the Comparative Negligence Instruction and rendered harmless the giving of the wrong Comparative Negligence Instruction".

It cannot be said that the appellants were prejudiced by the court giving this instruction, if erroneous, since the verdict rendered it harmless.

The appellants next contend that it was error to give appellees' requested Instruction No. 8. This instruction pertains to the duty of travelers approaching a known railroad crossing. The appellants specifically objected to this instruction as being a comment on the weight of the evidence and that it is incoherent, confusing, and misleading. A careful reading of this instruction convinces us that it is not susceptible to such objection. This

instruction merely recites the duty of a motorist approaching a railroad crossing, as we have so often defined. *St. Louis, I M & S R Co.,* v. *Coleman,* 97 Ark. 438, 135 S. W. 338; *Missouri Pacific R Co.,* v. *King,* 200 Ark. 1066, 143 S. W. 2d 55; *Missouri Pacific R Co.,* v. *Carruthers,* 204 Ark. 419, 162 S. W. 2d 912. The instruction generally was a correct statement of the law. In fairness to the trial court the appellants should have specifically pointed out in what manner they considered the instruction confusing and misleading. Thus, the court would have had an opportunity to make any correction if necessary. *Phoenix Insurance Co.,* v. *Flemming,* 65 Ark. 54, 44 S. W. 464; 53 Am. Jur., Trial, § 828, p. 608; *Ratton* v. *Busby,* 230 Ark. 667, 326 S. W. 2d 889; *Lemm* v. *Sparks,* 230 Ark. 105, 321 S. W. 2d 388.

The appellants argue that the words "position of peril" form an inappropriate term in Instruction No. 8. No such specific objection was made to the use of these words in Instruction No. 8. Furthermore, no objection whatsoever was made to the giving of appellees' Instruction No. 18 which defined "position of peril". We find no merit in any of appellants' arguments attacking this instruction.

Appellants next urge that it was error to give appellees' Instruction No. 9. This instruction, according to appellants, "attempts to state the general proposition that travelers approaching a railroad crossing may be assumed to act in response to the dictates of ordinary prudence and will stop before endangering themselves on the track in the path of the oncoming train". The objections appellants made to this instruction were the same as to Instruction No. 8, i.e., it tended to comment on the evidence and was incoherent, confusing and misleading. We do not agree. Again the appellants do not specifically point out just how this instruction comments on the weight of the evidence or is misleading. The appellants do not specify how the instruction inaccurately defines the law in respect to the duty of a motorist. This instruction is a cogent statement of the permissible scope of the presumption trainmen can make in the operation

of a train and is consistent with repeated declarations of this court. *Blytheville, L & A S R Co.,* v. *Gessell,* 158 Ark. 569, 250 S. W. 881; *Missouri Pacific R Co.,* v. *Davis,* 197 Ark. 830, 125 S. W. 2d 785; *Missouri Pacific R Co.,* v. *Merrell,* 200 Ark. 1061, 143 S. W. 2d 51. The instruction is a correct statement of the law. The contention by appellants that it is abstract comes too late as such objection was first raised on appeal. Further, there was evidence bearing on the issue as to when the engineer first saw the deceased approaching the crossing and when he first applied the train's brakes to avoid the collision.

Appellants next contend that it was reversible error for the court to give appellees' Instruction No. 12. This instruction advised the jury that the purpose of the statute which requires railroads to maintain signs at crossings is to provide a notice or warning to travelers using the highway that a railroad crossing exists and that if the warning boards at this crossing "gave notice of the existence of the crossing to travelers at a time when they could avoid entering a position of peril by the exercise of due care", then "a difference between the stautory specifications and the specifications to which these signs were built would not be evidence of negligence that was a proximate cause of this accident." Appellants object on the basis that the instruction is an incorrect statement of the law in the instant case; that the evidence shows these signs did not perform the purpose of warning travelers of the existence of the crossing; and that this instruction ignores Ark. Stat. Ann. § 73-717 (Repl. 1957) relating to warning boards required at railroad crossings. It is undisputed that a crossarm sign existed at a distance of approximately thirty-nine feet from either side of this crossing. These signs were lettered "RAILROAD CROSSING" in letters six inches high. However, the statute mentioned above provides the letters shall be at least nine inches high with the legend: RAILROAD CROSSING—LOOK OUT FOR THE CARS WHILE THE BELL RINGS OR THE WHISTLE SOUNDS.

It is well settled law that the violation of a safety statute is evidence of negligence. However, it is required that such negligence be a proximate cause of the injuries before the rule is applicable in a particular case. *Missouri Pacific R Co.,* v. *Price,* 182 Ark. 801, 33 S. W. 2d 366; 65 C.J.S. Negligence, § 105, p. 654. Furthermore, when we review this instruction together with appellants' Instruction No. 3 which is predicated upon Ark. Stat. Ann. § 73-717, we do not find them in conflict. Appellants' Instruction No. 3 told the jury that violation of this statute, "although not necessarily negligent, is evidence of negligence to be considered by you along with all the other facts and circumstances in the case." The sole purpose of these crossarm signs was to give notice of the crossing. The evidence is undisputed that the decedent had traveled this road and crossing almost every week for some eighteen months preceding this collision. Also, there existed five hundred twenty-eight feet from this crossing an oval sign warning of the railroad crossing.

Appellants also argue that this instruction is defective in that it is a comment upon the evidence, the word "travelers" is vague, the term "position of peril" is misleading. None of these objections were raised at the time of the trial and we cannot first consider them here on appeal. Appellants further argue that the instruction fails to take into account other signs and lighting conditions in the vicinity of the crossing. No such objection was made. If the appellants considered they were entitled to an instruction relating to the effect, if any, other signs and lighting conditions along the highway and at the railroad crossing might have had upon motorists, or the deceased in particular, they should have offered such an instruction and they did not do so.

The appellants also contend that the giving of appellees' Instruction No. 13 was reversible error. We do not agree. This instruction enunciated the burden of proof required of the appellants. The appellants specifically object on the basis that it is "repetitive and redundant" which "tends to give unnecessary and undue

emphasis'' upon appellants' burden of proof and ''tends to amount to a comment by the court upon the evidence required'' of the appellants. We do not agree. This instruction, *inter alia,* advises the jury not to guess, speculate or surmise in arriving at their verdict. This is a proper limitation upon the jury. In the case at bar all of appellants' instructions, twenty-one in number, were given covering appellants' theory of the case. The appellees offered twenty-one instructions and the court excluded four of them in giving the jury appellees' theory of the case. It cannot be said that repetition in the giving of some instructions can always be avoided. It is consistent repetition with undue emphasis that should be avoided. *Goodin* v. *Boyd-Sicard Coal Co.,* 197 Ark. 175, 122 S. W. 2d 548; *Furlow* v. *United Oil Mills,* 104 Ark. 489, 149 S. W. 69; *Hutcheson* v. *Clapp,* 216 Ark. 517, 226 S. W. 2d 546. Upon a review of the instructions as a whole, in the instant case, we do not find undue stress or emphasis to exist. We have reviewed the other arguments advanced by appellants under this point and find them without merit.

We next consider appellants' objection to appellees' Instruction No. 21 as modified and given by the court. This instruction pertains to a safety regulation promulgated by the Interstate Commerce Commission pursuant to its authority to make such regulations as provided in 49 U.S.C.A. § 304. Appellants' main objection to this instruction is that the ''violation of an ICC safety regulation cannot be evidence of negligence, since such regulation is, by its very nature, nonlegislative in character.'' Appellants contend that the giving of this instruction was reversible error. We cannot agree. In the very recent case of *Ratton* v. *Busby, supra,* we recognized that a regulation promulgated by an appropriate agency of the federal government effectively establishes a standard of conduct, the violation of which would be evidence of negligence. It is well settled that the rules and regulations of the Interstate Commerce Commission have the force and effect of law as though prescribed in terms by the statute. *Atchison, T. and S.F.R. Co.,* v. *Scarlett,* 300

U.S. 471; *Interstate Motor Lines, Inc.*, v. *Great Western Ry. Co.*, 161 F. 2d 968 (10 Cir., 1947); *New Amsterdam Cas. Co.*, v. *Novick Transfer Co.*, 274 F. 2d 916 (4 Cir., 1960); Restatement, Torts, § 285. Furthermore, the duty imposed by this regulation is less rigorous than that required by Ark. Stat. Ann. § 75-637 (a) 4. (Supp. 1963) which appears applicable in the instant case. The appellants also contend that this instruction was improper because of the absence of evidence that the deceased truck driver was aware of the existence of such a safety regulation. The president of the truck line testified, however, that preceding this collision booklets containing safety regulations, including this particular one, were distributed to each of the drivers employed by Burks for the drivers' information and compliance. We find no merit in any of the objections to this instruction as argued by the appellants.

Appellants further contend that the giving of appellees' Instructions Nos. 15, 19 and 20 was reversible error. Instruction No. 15 relates to the statutory duty of appellee Railroad Company concerning the blowing of its whistle or ringing its bell. Instruction No. 19 was a general observation on the duty of drivers of vehicles to exercise ordinary care for their safety and the safety of others. Instruction No. 20 related to the duty of the appellee Railroad Company to erect automatic warning devices at a grade crossing under abnormally dangerous circumstances. We have carefully examined appellants' general and specific objections to these instructions, as well as the others discussed, and find them without merit.

It becomes unnecessary for us to consider the appellees' contention that the evidence adduced in this case did not make a submissible issue for the jury inasmuch as we find no reversible error in the questioned instructions.

The judgment is affirmed.

Opinion delivered March 23, 1964.

[Rehearing denied April 20, 1964.]

[redacted]

Thomas L. Cashion and *George Howard, Jr.,* for appellant.

Bruce Bennett, Attorney General, By *Jack L. Lessenberry,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. On the night of February 16, 1963, a young woman resident of Monticello, a school teacher, 23 years of age, and her escort, Jerry Wilson, whom she had dated for some two years, parked in a lonely area in Drew County. The couple, on the evening in question, had previously met at a basketball game, following which they went to two restaurants, and, after leaving other friends, about midnight, drove to a country road, known as the old college road, and sometimes called "lovers' lane." According to the testimony of the young woman, they talked and listened to the radio for about an hour and a half, when they suddenly heard a voice on the man's side, telling them to get out of the car. Wilson got out, and she moved to the other side, and shut and locked the door. Another man on that side of the automobile demanded that the door be opened. As she asked Wilson what to do, the first man struck her companion over the head with the butt of a pistol, and she started the car and attempted to drive off; however, in the hurry, she was unable to locate the light switch, and the car went into a ditch at the side of the road; also, shots were being fired at her, and she felt a burning sensation at the back of her head. The two men, Negroes, knocked the glass out on the right side of the car, turned off the motor and radio, and dragged the prosecuting witness to their car, placed her in the back seat, and drove off. The smaller of the Negroes got in the back seat with her, and criminally assaulted her, the larger one driving the automobile at the time. The car was then stopped, and the larger Negro raped her. Thereafter, each one raped her a second time, on all occasions threatening her life if she did not cease resistance. Following the second attack by the larger Negro,

he again got into the driver's seat, the smaller one staying in the back with the victim, and after driving for a while, the car was stopped, and the larger man told her to take off all of her clothes.[1] Despite her pleadings, she was compelled to do so, and was then told to "start walking." After walking, completely naked, for some distance over a hard rock and gravel road, she finally came to a house occupied by a Negro couple, and screamed for help. The man and his wife permitted her to come in, and the husband told his wife to get some clothes to put on the victim, and they then took her to town. Within a few hours, appellants were arrested, and charged with the crime.

On February 25, counsel was appointed to represent the defendants, and thereafter, on motion of such counsel, appellants were committed to the State Hospital for observation. Subsequently, the Superintendent of the hospital submitted his report, finding that both appellants were "without psychosis;" further, that appellants were not mentally ill to the degree of legal irresponsibility at the time of the examination, and that they were "probably"[2] not mentally ill to the degree of legal irresponsibility at the time of the alleged commission of the offenses.

Thereafter, after the filing of several motions, which will be hereinafter discussed, the cases against appellants, by agreement of counsel for the state and the defendants, were consolidated for trial, and on April 9 the trial commenced, appellants pleading not guilty. The jury found both guilty of the crime of rape as charged, and the court thereafter entered its judgment, sentencing each to death.

After the trial, Harris obtained separate counsel, and a motion for new trial was filed. A similar motion

[1] At the time of the criminal assaults, the attackers had pulled down her undergarments.

[2] This word is used in conformity with the statute. The Superintendent of the hospital stated as to Harris, "however, he does have syphilis and treatment will need to be continued, for a total of twenty days. For the past seven days he has been receiving 600,000 units Procaine Penicillin G. intramuscularly daily and this should be continued for thirteen more days after April 2nd."

was filed on behalf of Trotter by the court-appointed attorney, who had represented the defendants during all proceedings. After a hearing, the court entered its order overruling both motions. Thereafter, the convictions were duly appealed to this court.

For reversal, appellant Harris relies upon four points, and appellant Trotter relies upon the same first three points. The alleged errors of the court are as follows:

"1. The Court abused its discretion in overruling appellant's motion for change of venue.

2. The Court erred in overruling appellant's motion to quash the jury panel and further erred in not granting a new trial after the submission of additional evidence on the contention that racial discrimination existed in the selection of jurors in Drew County.

3. The Court erred in permitting state witness to testify to alleged admissions made by appellant.

4. The Court abused its discretion in appointing one counsel to represent both appellants."[3]

Before discussing these points relied upon by appellants, and argued in their briefs, we first discuss the proof offered at the trial as a matter of determining whether there was substantial evidence to support the verdict. As is customary, the first three assignments of error in the motion for new trial assert that the verdict of the jury was contrary to the evidence, contrary to the law, and contrary to the law and the evidence. In addition to the testimony of the prosecuting witness, heretofore related, the following evidence appears in the record.

Jerry Wilson, a senior student at Arkansas A. & M. College, and the companion of the prosecuting witness on the occasion of the acts in question, testified that, after leaving other friends, he and the young woman drove out to the old college road and parked, talking and listening to the radio; that shortly after 1:00 A.M.

[3] Trotter does not include this point as grounds for reversal.

he heard a voice at the window, telling him to "Get out of that car," and he observed a Negro with a pistol standing at the window (later identified as Trotter). On opening the door to get out, the dome light of the car came on, and Wilson saw another Negro at the rear of the car that he subsequently identified as Harris; he gave Trotter his wallet and pocket change, and was ordered by that appellant to turn around. The witness testified that he was then hit in the back of the head, and knocked to the ground; that he heard a shot as the car suddenly drove away; that two other shots were fired, and he arose to his feet, and started toward the car which had gone into the ditch; that Harris grabbed him, but he managed to get free; that he broke away and ran to a house about a quarter of a mile back, and there telephoned the sheriff. Wilson had observed a 1953 or 1954 Plymouth with a light top and dark bottom parked a short distance back of where he had parked.

Sheriff Jack Towler of Drew County and other officers answered the call, but drove back into Monticello upon receiving information by radio that the young woman had been brought into town. Both the woman and Wilson were taken to the hospital; Wilson's head was dressed, and, after remaining at the hospital for about an hour, he left with the officers. They proceeded to the home of Trotter, and the witness noticed the car beside the house, and identified it as the one he had earlier seen on the road at the scene of the crime. After examining the automobile, Wilson went inside the house with the officers, and recognized Trotter as one of the attackers. Thereafter, around 8:00 o'clock in the morning, Wilson was taken to the jail to see Harris, who had in the meantime been arrested.

"We stood at the cell door. I saw this little Negro, which I know now as Harris, and he stood over by the bunk. I looked into the cell at him. I looked at this man and made the statement, 'do you remember me? Have you seen me before?' He looked right at me and remarked, 'yes I saw you last night.' "

When asked, during the trial, if he was positive in his identification of the two men that had attacked him, Wilson replied, "Yes Sir. I am absolutely positive. I have no feelings of doubt."

Dr. Paul Allen Wallick, a physician of Monticello, testified that he received a call to go to the hospital about 4:00 A.M.; that after arriving, he examined the young woman and Wilson. As to the woman, he stated:

"She was on the examining table. She was draped with a sheet. Underneath the sheet she had on a rather faded loose fitting dress without any underclothes. There was blood over her face and in her hair and down her neck and shoulders. And some on the dress. There was blood down her legs and around her genital area—female area and up on the abdomen. She had a perforating wound of the scalp, again in the area of the back of the head. One entrance was approximately an inch and a half from the exit. I'll put it this way. The two openings were about an inch and a half apart."

He stated that the head wound was caused by an object which "penetrated one side and exited on the other side." In describing his examination of her private parts, the doctor stated:

"There was a large amount of bright red blood in the pubic hair, down the thighs, down to and below the knees. There was bright red blood, which was still fresh, coming from the female opening. There was blood on the external portion of the female opening and also blood in the female canal—birth canal. She had a laceration or a tear of the hymeneal ring, which is commonly known as the virginal ring, which extended through the entire ring into the internal portion of the vaginal canal."

He stated that she had been penetrated, and further, that he found large blisters on the ball and toes of each foot.

As to Wilson, the witness stated that he found a ragged lesion of the scalp in the parieto-occipital area (back of the head). The doctor stated that he washed the

head area, shaved the hair from around the wound, applied a dressing, and gave the patient a shot of penicillin and tetanus toxoid.

Sheriff Towler verified that he had received the call from Wilson, and went to the place where the attack had occurred. There, he found an automobile in the ditch with the left front glass and the right vent glass broken; after receiving the radio report that the young woman had been taken into town, he immediately went into Monticello where he was informed that Trotter owned a car fitting the description that Wilson had given to him; he then proceeded to Trotter's house, saw a 1953 or 1954 Plymouth two-toned automobile parked there, checked the car, and noticed stains of some sort on the rear seat, and observed that the hood was still warm. The officer testified that he was then admitted to the house by Trotter, and saw stains of some kind on the shorts which Trotter was wearing. Trotter was married, but was living with his Mother. The sheriff stated that he advised Trotter of his constitutional rights, and that the suspect did not have to tell him anything. The officer then questioned Trotter as to his whereabouts during the night, and was told that the appellant had gone to Dermott, naming persons who had purportedly been with him. The officer next asked Trotter if he could explain the blood on his shorts, but no explanation was forthcoming. Towler noticed a speckled shirt, lying on the foot of the bed, which Trotter stated was the shirt that he had been wearing. The shirt had blood on the right sleeve, and on the tail. Appellant identified the clothes that he had been wearing, and the sheriff rolled them up and placed Trotter under arrest. He was taken to the jail, Trotter driving his own car. The sheriff next checked with the persons that Trotter had mentioned as making the trip to Dermott with him, and from one of them, obtained information that caused him to go to the home of Albert Harris. Harris' wife admitted the officers, and Harris was in bed. After being questioned relative to his whereabouts during the night, and what he had worn, Harris produced a pair of corduroy pants, and the sheriff dis-

covered a ladies' wrist watch in Harris' billfold which was found in the pocket of the trousers. Towler stated that he told appellant that, under the Constitution, he (Harris) did not have to say anything, but with that understanding, he would like to know about the watch. Harris then said that he obtained the watch from Orion Trotter, and further stated that, after returning from Dermott, he and Trotter drove out on the road in the country, stopped their car and walked down to the automobile, which was parked; that they got the boy out, and took the young woman and put her in Trotter's car. Harris stated that he was driving, and did not participate in any way in the rape.

After daylight, the car from which the woman had been dragged was examined, revealing shattered glass on the floor board and in the seat, and blood on the front cushion. An examination was made of Trotter's automobile, and blood stains were found in the rear seat of the car, and also blood on the left rear door panel. The back seat was taken out, and a red billfold discovered. The billfold contained a poll tax receipt with the name of the prosecuting witness on it, a deposit slip from one of the Monticello banks, and several receipts from stores.[4] Subsequently, the sheriff called the circuit judge, and obtained a court order to transfer the prisoners to the state penitentiary. Towler returned to the home of Trotter, and advised appellant's Mother that he was looking for a gun that was involved in the alleged crime. When told that he would have to get a search warrant, the officer started to leave for that purpose, but was then informed that there was a gun in the house, and that it belonged to her. She pulled up a mattress, and took out a brown paper sack which had a 38 caliber pistol in it. Towler noticed a hair hanging from the ejector, and with the permission of appellant's Mother, took the pistol with him. On closer inspection, he noticed that a part of the handle on the butt had been broken. On going back to the scene, and making the search with one of the

[4] At the trial, the prosecuting witness identified the ladies' wrist watch and red billfold as her property.

city officers, a piece of handle was found on the ground where the right vent of the car had been shattered. The gun, piece of handle, and various items of a woman's clothing which were subsequently found by the officers in the general area of the crime, together with two bullets which were recovered from the car operated by the woman, were taken to the crime laboratory in Little Rock for examination.

Captain Paul McDonald of the State Police, in charge of the crime laboratory, testified that the broken piece of pistol handle fit the handle of the pistol which had been sent in, and also, in explaining to the jury the ballistics test that was made, positively identified one of the bullets found in the car as being fired from the pistol.[5]

Dr. Robert R. Cole, resident physician at the University of Arkansas Medical Center, testified that he performed a benzidine test, and determined that the stains on the various articles of clothing were human blood. He was unable to type the blood stains, nor could he determine if the hair on the gun was the same as the sample received.

Artis Lee Jefferson testified that around 3:00 o'clock in the morning, he heard his dog barking.

"He was barking like he hadn't been barking before and I told my wife I was going to get up and look and see what was happening. About the time I got to the door somebody was bamming on the door. I never had heard anything like that before. There was a bunch of screaming and hollowing and crying for help and I didn't go to the door. So, finally the door opened and there was a lady with no clothes on. * * * I backed back in the room after I seen what kind of shape she was in. I told my wife to come."

Clemie Jefferson, the wife, verified the statements of her husband, stated that she gave the girl some clothes

[5] The captain stated that he was unable to make identification of the other bullet due to its battered condition.

to put on, and noted the bleeding on the head and private parts.

This summarizes the evidence offered at the trial, and it is quite apparent that it was ample to sustain the finding of the jury. We now proceed to a discussion of the points specifically relied upon by appellants for reversal.

I.

The Question of Change of Venue. Ark. Stat. Ann. § 43-1502 (1947) sets forth the manner in which a defendants shall apply for a change of venue. That section requires the affidavit of two credible persons, who are qualified electors, residents of the county, and not related to the defendant in any way, wherein the facts relied upon for change of venue are set forth. In *Hildreth* v. *State,* 214 Ark. 710, 217 S. W. 2d 622, though no affidavits were presented, we held that the trial court erred in refusing to hear testimony in support of a motion for a change of venue. There, it was said:

"The court's action in refusing to hear testimony was contrary to established principles. We have held that the trial court must be guided by the evidence and cannot rely upon its own knowledge of local conditions, for the judge must not also be a witness."

In the instant case, the court did hear testimony, which was offered by counsel for appellants, including that of the Chief of Police of Monticello, the Sheriff of Drew County, and Mrs. Frances Jaggers, the editor of the Monticello newspaper. The evidence reflected that there had been a lot of discussion about the case, and the Chief of Police stated that it had received quite a bit of publicity; however, the witness said that he had not heard any threats made, nor any expression as to the guilt or innocence of the men who had been charged. The sheriff testified that appellants were taken into custody before common knowledge of the crime spread over the city and county; that there was no gathering of crowds; that he had received no information that caused concern

as to their welfare. Mrs. Jaggers testified that an article appeared in her paper on February 21, dealing with the arrest, and a subsequent article relative to the appointment of counsel and the transfer of the prisoners to the State Hospital. She stated that no unusual number of people had talked to her about the case, and that she had heard no rumors or statements of violent feelings toward the defendants.

Counsel for Harris asserts that appointed counsel did not have sufficient opportunity to make an investigation as to public sentiment. We do not agree, since the record reflects that counsel was advised of his appointment to represent appellants on February 25, and the hearing on the request for change of venue was heard on April 5. It is also pointed out that the circuit judge entered an order on the same day that appellants were arrested, directing that the prisoners be transported to the State Penitentiary for safekeeping. We do not think this precautionary action by the circuit judge indicates that appellants could not obtain a fair trial in the county. In fact, it would appear that the order was issued before news of the crime became widespread. Certainly, it was prudent that such action be taken where such a violent crime had been committed. But the fact that the court was "playing safe," as far as the welfare of the prisoners was concerned, does not establish a feeling of hostility and vindictiveness among the residents of the community. An individual may lock the doors of his home at night, but this does not mean that he expects someone to unlawfully enter his house; rather, it is only a precautionary move to prevent the possibility of that happening. In the cases of *Perry and Coggins* v. *State of Arkansas,* 232 Ark. 959, 342 S. W. 2d 95, and *Lauderdale* v. *State,* 233 Ark. 96, 343 S. W. 2d 422, the defendants were charged with participation in the dynamiting of the Little Rock School Board Office, and other property, the violence being designed to harass the Little Rock School Board and certain city officials for their role in the integration of Negro pupils into the Little Rock school system. In the *Perry and Coggins* case, a

change of venue was sought, which included thirteen supporting affidavits, nine of the thirteen testifying at the hearing to the effect that the defendants could not receive a fair trial. The state filed counter affidavits from twenty-seven persons, twenty-one testifying to the contrary. In the *Lauderdale* case, both appellant and the state called witnesses in regard to the change of venue, twenty-three persons testifying. In each instance, the court declined to grant the motion, and we held that it had not been shown that the court abused its discretion in refusing to enter such an order.

Here, there is not one line of evidence in the record which indicates that appellants could not receive a fair trial in Drew County, and we certainly cannot say that the court abused its discretion in refusing to grant the motion.

II.

The Question of Racial Discrimination in the selection of Jurors in Drew County. Appellants vigorously argue that members of the Negro race have been systematically excluded, or their number limited, in the selection of the jury panel. A motion to quash the panel because of systematic exclusion of members of the Negro race was filed by the court-appointed counsel on April 2, and counsel examined the sheriff, Cecil T. Boone, one of the jury commissioners, and Audrey Withers, the circuit clerk, relative to this contention. This evidence reflected that approximately 4,000 poll tax receipts were issued in the county in 1962, of which approximately one-fourth was issued to Negroes. Examination disclosed that a poll tax book was furnished the jury commission, the book designating the race of the qualified electors. The clerk then testified as to the number of Negroes who had served on the jury at the various terms of court since 1957. The court denied the motion. Following the filing of the motion for a new trial, additional testimony was submitted on this same point. This evidence included the fact that the percentage of non-whites in Drew County was 33.9% of the total population.

Witnesses examined were the county clerk, Boone the circuit clerk, Ed Grubbs, a jury commissioner, Arnett Spencer, a Negro citizen of Drew County, Arthur Brown, a Negro citizen of Drew County, Joseph Sims, likewise a Negro citizen of Drew County, and the sheriff. By this evidence, appellants sought to show that only a small percentage of eligible Negroes had served since 1953; that the jury commissioners had made no special effort to acquaint themselves with qualified Negro electors; that several Negroes called for jury service had been called several times before, and that many of the Negroes were over the age of 65 years.

At the outset, let it be stated that we are definitely of the opinion that, under our rules of procedure, appellants are not in a position to complain that they were not tried by an impartial jury, *i.e.,* they did not exhaust their peremptory challenges. The record herein reveals that eight Negroes appeared on the jury lists; that two of these Negroes were excused by the court for cause, and three were excused by appellants' counsel through peremptory challenge after the state's attorney had accepted them; actually, three Negroes remained on the panel whose names were not called, because the jury had already been accepted[6] before their names were reached.

Under Arkansas law (Ark. Stat. Ann. § 43-1922 (1947)), a defendant in a capital case is given twelve peremptory challenges, and, in the instant case, appellants only used eight peremptory challenges. Throughout the years, no rule of procedure has been more consistently adhered to than the rule that a defendant cannot complain of the composition of the jury if he does not exhaust his challenges. In *Benton* v. *State,* 30 Ark. 32, decided in 1875, Chief Justice English pointed out that this rule had stood as a precept of criminal practice in this state, for a period of over 22 years. In a long line of cases, we have consistently upheld the rule to the present time. A cursory examination of our cases reveals

[6] The record does not reveal the position of any of the names on the panel.

over thirty-five criminal cases in which this rule has been cited and adhered to. *Wright* v. *State,* 35 Ark. 639; *McDaniel* v. *State,* 228 Ark. 1122, 313 S. W. 2d 77; *Glenn* v. *State,* 71 Ark. 86, 71 S. W. 254; *Keese & Pilgreen* v. *State,* 223 Ark. 261, 265 S. W. 2d 542; *Johnson* v. *State,* 97 Ark. 131, 133 S. W. 596;[7] *Morgan* v. *State,* 169 Ark. 579, 275 S. W. 918;[8] *Rutledge* v. *State,* 222 Ark. 504, 262 S. W. 2d 650; and *Kurck* v. *State,* 235 Ark. 688, 362 S. W. 2d 713.

The Federal rule appears to be the same. In *Jordan* v. *United States of America,* 295 F. 2d 355 (1961), Jordan was found guilty by a jury of the purchase and sale of narcotics. In seeking to reverse the judgment, he set up two grounds, one of which was the fact that the trial court erred in denying his motion to quash the jury panel. Jordan had been tried twice on these charges during the same jury term. In the first trial, the jury disagreed, and a mistrial was declared. Prior to his second trial, and during the same term, thirteen other defendants in narcotic cases had been tried and convicted. Government witnesses against Jordan had testified in some of the other trials. Jordan's motion to quash the jury panel alleged the mistrial, the number of other cases involving narcotic violations and heard by some members of the same jury panel, and the publicity given such trials, as reasons for the impossibility of a fair trial for him before the jury panel. At the second trial various

[7] In this case the court said: "In *York* v. *State,* 91 Ark. 582, a felony case, where the trial court had, without sufficient legal grounds, excused five jurors from the regular panel, and caused bystanders to be summoned to take their places, the defendant accepted the jury without exhausting his challenges, and this court ruled that the error of the trial court was not prejudicial. Quoting from a previous decision, this court held that an accused has the right to the service of no particular juror, and that 'when he has voluntarily taken his chance of acquittal at the hands of jurors whom he might have rejected, he must abide the issue.' *Mabry* v. *State,* 50 Ark. 492. We perceive no sound reason why the same rule should not prevail in capital cases."

[8] Here the defendant moved that the panel be discharged because all of the members resided in or near Pine Bluff, where the trial occurred, and appellant insisted that he could not obtain a fair trial in that city. The motion was denied, and Morgan asserted in this court that the overruling of the motion constituted error. Among other reasons for finding appellant's argument to be of no avail, this court pointed out that he did not exhaust the peremptory challenges allowed him by law in impanelling the jury.

questions were asked at the *voir dire* examination of the jurors. There were no challenges for cause and Jordan exercised only five of his ten peremptory challenges. The selected jury consisted of four new members of the panel, two from the old panel, who had sat on none of the previous narcotic cases, and six of the old panel, who had been on such cases. In holding the alleged error to be without merit, the United States Court of Appeals, Tenth Circuit, in an opinion by Judge Breitenstein, said:

"By his failure to exercise any challenge for cause, and by his use of only half of his peremptory challenges, the defendant has waived the right to complain that he was not tried by an impartial jury."

On January 22, 1962, the United States Supreme Court denied Certiorari. See also *Graham* v. *United States,* 257 F. 2 724.

In *People* v. *Ford,* 168 N. E. 2d 33 (Illinois), Ford was found guilty of murder, and sentenced to the penitentiary for a term of 99 years. Several alleged grounds for reversal were raised, which were found to be without merit by the Illinois Supreme Court. From the opinion:

"Further objecting to the jury, defendant argues that he was prejudiced by the fact that the first eight jurors accepted were Negroes, by improper remarks made by the State's Attorney during the *voir dire,* and by the length of the *voir dire* itself. It is true that the first eight jurors picked in this case were Negroes, and that after two of those jurors had expressed reluctance about serving upon an all colored jury and the defense counsel had asked that Negroes be excluded from the third jury panel, the court sustained the defendant's motion and thereafter only white jurors were accepted. We fail, however, to see how defendant was prejudiced by this action. Since the record does not indicate that he exhausted his peremptory challenges, he was as much responsible for picking the first eight jurors as was the People, the remaining jurors were selected in accordance with his own request. We have frequently stated that a defendant, having failed to use his peremptory chal-

lenges, is in no position to complain concerning jury selections."

These holdings seem to be in accordance with the general rule. In 50 C.J.S., Paragraph 256, Pages 1017 and 1018, we find:

"*Failure to exhaust peremptory challenges.* It is ordinarily held that, if a competent jury is obtained without exhausting the peremptory challenges of the objecting party, he cannot avail himself of any error or irregularity in the summoning or selection of the jury, or in the action of the court in *refusing to sustain a challenge to the array, or motion to quash the venire;*[9] or in excusing or not excusing jurors, or rejecting and discharging jurors if its own motion for insufficient cause."

However, in *Darcy* v. *Handy,* 351 U. S. 454 (1955), when counsel did not exhaust his peremptory challenges, the United States Supreme Court stated:

"The failure of petitioner's counsel to exhaust the means provided to prevent the drawing of an unfair trial jury from a community allegedly infected with hysteria and prejudice against petitioner while not dispositive, is significant."

While under our holdings, throughout the history of this court, the alleged point is without merit, nevertheless, because of the fact that numerous cases from various jurisdictions have been reversed due to alleged discrimination in the selection of the jury panel, and because of the holding in *Darcy* that the failure to exhaust peremptory challenges is, though significant, not conclusive, we discuss the various facts relied upon by appellants to establish discrimination.

First, appellants point out that Negroes comprise 33.9% of the population, and 25% of the qualified electors of Drew County, but that for the past twenty-one consecutive terms of court, only 6.3% of the persons

[9]Our emphasis.

called for jury service have been Negroes. In *Cassell* v. *Texas,* 339 U. S. 282, it was held that a jury is not required to have proportional representation of races in order to assure equal protection of the law. In fact, that case held that proportional racial limitation, as such, is forbidden. It is true that up until the February 1963 term of court, the number of Negroes selected for jury service had not exceeded five, and in most instances did not exceed three; however, at the term of court in question, eight Negroes were called for service. If proper representation was included in this panel, there certainly could be no prejudice to appellants because of discrimination in prior years. Under that argument, a proper panel could never be selected. Appellants vigorously argue that none of the commissioners testified that they made an effort to become acquainted with the Negro electors in Drew County. This is an effort to bring the case within an additional holding in *Cassell* v. *Texas, supra.* There, jury commissioners in Dallas stated that the reason they did not select Negroes for the grand jury list was because of the fact that they did not know any who were qualified. It was shown that in selecting persons for grand jury service, the commissioners had consistently limited the selection of Negroes to not more than one on each grand jury. The United States Supreme Court reversed because of discrimination.

Two of the commissioners testified in the instant case, and their testimony was to the effect that they selected Negroes that they knew to be qualified, but made no particular effort to learn of others who might be qualified. The third commissioner was not called by appellants to testify. Of course, because of population, the selection of eight jurors in Drew County, Arkansas, with a total population of slightly over 15,000, is hardly comparable to the selection of one juror in Dallas County, Texas, with a population of approximately 400,000, and we can find nothing in the *Cassell* case that indicates discrimination in the present case. In connection with this argument, appellants complain that the poll tax lists were used, which show the race of the elector. In

Avery v. *Georgia,* 345 U. S. 559, the Supreme Court said,

"Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate."

In *Smith* v. *Texas,* 311 U. S. 128, the same court stated that "discrimination can arise from commissioners who know no Negroes as well as from commissioners who know, but eliminate them." This presents somewhat of an enigma, for it is puzzling to determine how a jury commissioner, who is acquainted with but few, if any, Negroes, can go about finding qualified members of that race without the use of a list designating the race of those eligible to serve.[10] In other words, in making an effort to obtain qualified Negroes for the panel, his inquiry and investigation as to their qualifications to serve would seem to depend upon his first ascertaining that they were Negroes. Appellants assert that,

"While the jury commission has gone about to systematically include a few Negroes on the panel, they have done so in a manner as to further discriminate against the Negro by restricting the number to a few that it would be virtually impossible to actually get a Negro on a particular jury without the approval of the prosecutor, even though there may be Negroes on the panel inasmuch as the state has ten peremptory challenges in a capital case."

It is interesting to note that it is conceded that Negroes have been *systematically included,* but, according to this contention, there would have to be as many as eleven colored jurors on any regular panel in Arkansas, else there is discrimination. This contention was passed on adversely to appellants' reasoning in *Hall* v. *United States,* 168 F. 2d 161.

Complaint is made that some Negroes called for jury service had been called several times before. While

[10] Only electors are eligible to serve on a petit jury. Ark. Stat. Ann. § 39-208 (Repl. 1962). To qualify as an elector, one must, *inter alia,* pay a poll tax. Amend. 8, Art. 3, § 1, Ark. Const. of 1874. This case was tried before ratification of the 24th Amendment to the Federal Constitution.

the record is far from clear, we are unable to determine that more than two members of this panel had been called before, one on several different occasions. This would hardly seem sufficient repetition to indicate studied discrimination.

Finally, appellants mention that several who have served as jurors were 65 years of age or over. We know of no case which holds that elderly people, merely because of their age, are disqualified from jury service.[11] Under Arkansas law, Ark. Stat. Ann. § 39-104, (Repl. 1962), persons 65 years of age cannot be compelled to serve on a grand or petit jury, and the court is authorized to excuse those who may be selected for jury service who are over 60 years of age, but there is certainly no evidence in this record that any juror was compelled to serve. It is entirely logical that the commissioners would be more acquainted with the qualifications of elderly or middle aged Negroes, since these men would have had more opportunity to establish themselves in the community. In *Bailey* v. *Henslee*, 287 F. 2d 936, nine facts were mentioned which the court said, in the aggregate, led to the conclusion that a *prima facie* case of limitation of members of the Negro race in the petit jury panel had been established, and that the state did not rebut it. Even then, the court commented that "this case may be a close one." In the present case, it would not appear that over four of those factors are present to any degree, and we are not persuaded that discrimination is shown.

Question of State Testimony as to Admissions. This alleged error has reference to the testimony of the sheriff, wherein he stated that Harris admitted that appellants had placed the prosecuting witness in their car, and that he had driven same; also, the testimony of the sheriff that Harris stated that he obtained the watch from Trotter. The court instructed the jury at the time

[11] The situation here is vastly different from that in *Reece* v. *State of Georgia*, 76 S. Ct. 167, where only six names of Negroes appeared out of five hundred and thirty-four names on the grand jury list, and one lived outside the county, two were over 80 years of age, one was partially deaf, and one was in poor health. In the instant case, one juror, 66 years of age, was excused because of illness.

that this testimony could not be considered in determining Trotter's guilt or innocence. It is urged that these admissions were introduced into evidence before the jury, without first having been considered by the court in the absence of the jury, and prejudicial error was thus committed. It is true that, normally, testimony relative to the voluntariness of a confession is first taken in chambers, and if the court finds that the confession was not voluntarily made, the state is not permitted to introduce it. On the other hand, if there is a question as to the voluntariness, the matter is presented to the jury for their determination. This procedure is generally followed where written confessions are under examination, and where there is a contention that the confession was involuntarily made. The failure to first hear testimony in chambers does not, in itself, mean that reversible error has been committed. In *Davis* v. *State,* 182 Ark. 123, 30 S. W. 2d 830, we said:

"The practice in such cases has been defined in numerous decisions of this court. It is to this effect. When testimony in the nature of a confession is offered, the accused has the right to object to its admission, upon the ground that the alleged confession was not voluntarily made, in which event the trial court should hear testimony as to the circumstances under which the alleged confession was made, and should exclude the confession if it was not voluntarily made. If the testimony is conflicting on that question, the jury should be told to disregard the alleged confession unless they found that it was, in fact, voluntarily made, but, if it appeared to have been voluntarily made, to consider it in connection with all the other evidence in the case.

"No such request was made, nor were any instructions asked upon that question. Statements in the nature of a confession are not to be excluded for the reason only that they were made to an officer having the accused in custody, and, if Long voluntarily made these statements to, or in the presence of, the witness Hendricks, there is no reason why he should not have been allowed to testify concerning them."

Let it be remembered that there is no assertion that any statements were obtained by duress, threats, or promises. While it is true that the burden is on the state to establish the voluntariness of a confession or incriminating admissions,[12] the record reflects that the sheriff told Harris (as well as Trotter) that he did not have to make any statements, and informed him of his constitutional rights. This fact stands undisputed.

It is alleged that Harris was denied his constitutional rights in that he was aroused from bed between 3:00 and 4:00 o'clock in the morning, questioned while partly undressed, arrested without a warrant, and not taken immediately before a magistrate. It is uncontradicted that Harris' wife permitted the officers to enter the apartment, and no objection was offered to their presence during the investigation. Under our statutes, Harris' wife could not be called by the state to corroborate the invited entrance, but she could have been called by Harris to refute the proposition. Certainly, there was no occasion for the officers to wait until the daylight hours of the morning before questioning and arresting Harris, inasmuch as they had sufficient information to form a reasonable belief that he might well be a participant in the crime that had been committed. Ark. Stat. Ann. § 43-403 (1947) provides that a peace officer may make an arrest without a warrant where he has reasonable grounds for believing that the person arrested has committed a felony. The fact that one arrested is not taken immediately before a magistrate does not, of itself, invalidate a confession. *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77. Actually, it does not appear that the matters herein mentioned were objected to by appellant at the time.[13] Counsel did object on the basis that the testimony was inadmissible as to Trotter, and, as mentioned, the court so instructed the jury. Counsel subsequently, objected when it was indicated that the prosecuting attorney would interrogate the sheriff about

[12] The court properly and fully instructed the jury in this regard.

[13] In capital cases, exceptions to an adverse ruling need not be noted, but it is still necessary that an objection be made. *Fields* v. *State,* 235 Ark. 986, 363 S. W. 2d 905.

statements made by the prisoners as they were being returned from the penitentiary for trial. However, this objection did not go to the question of whether the statements were made voluntarily,[14] and, moreover, the state proceeded no further with the interrogation. We find no merit in this contention.

The Question as to the Appointment of One Attorney to Represent Both Appellants. Finally, it is urged that the court committed error in appointing only one attorney to represent both appellants. At the outset, it should be pointed out that no suggestion of prejudice to the rights of either appellant, because of this fact, was mentioned before or during the trial. This argument appears for the first time in Harris' motion for new trial. In general, where the interests of defendants are conflicting, or the duties of counsel are found to be conflicting in representing more than one defendant, it has been held that there is a deprivement of the constitutional right to the effective assistance of legal counsel. There are numerous cases on this subject, but all are finally determined on the basis of the rule stated. For instance, in *Glasser* v. *United States,* 315 U. S. 60, Glasser had retained counsel named Stewart. An attorney named McDonnel was appointed for Glasser's co-defendant, a man named Kretske. Subsequently, McDonnel informed the court that Kretske did not wish to be represented by him. The court suggested that perhaps Stewart could act as Kretske's attorney. The defendant, Glasser, objected, stating, "I would like to have my own lawyer representing me." A colloquy then insued between the court, McDonnel and Kretske, and Kretske advised that he had just spoken to Stewart, and that Stewart had said that he would accept the appointment. Glasser remained silent. It developed that a conflict of interest did appear, and Glasser, on appeal, pointed out that certain

[14] "The defendants specifically object to the testimony of the Sheriff regarding any statements made to him by the defendants, Trotter and Harris, for the reason that they had not been carried before a magistrate or charged with any crime, that making said statements while in custody without the benefit of counsel was in violation of their rights under Fifth Amendment and they had no way of knowing that said statements could be used to incriminate them."

testimony, inadmissible as to him, was allowed without objection by Stewart on his behalf, because of Stewart's desire to avoid prejudice to Kretske. The judgment was reversed. On the other hand, in *Farris* v. *Hunter,* 144 F. 2d 63, appellant charged that he was represented by counsel, appointed by the court, who also represented his co-defendant, and he stated that he had protested, contending there was a divergence of interest between the co-defendants, which rendered the same attorney incompetent to represent the two of them. The Circuit Court of Appeals for the Tenth Circuit, after obtaining a transcript of the testimony bearing upon this point, stated:

"In the light of the seriousness of this charge, we held the case in abeyance until a transcript of the testimony bearing upon this point in the court below could be transcribed and certified here for our consideration. From the record now before us, it is clear that the appellant did not contend in the trial court that he protested the appointment of Roberts' attorney to also represent him, and that he did not point out or call attention to any conflict or divergence of interest between the co-defendants. Furthermore, there is nothing in the record from which it can be inferred that the representation of the co-defendants by the same counsel resulted in any embarassment to the attorney or prejudice to his clients."

In *Peek* v. *United States,* 321 F. 2d 934, Peek contended that a conflict of interest existed between appellant and Susanna Peek, which prevented their joint trial counsel from giving to either his undivided loyalty. Peek was charged with robbery and conversion, and Susanna Peek, with conversion. In deciding adversely to this contention, the court held that the interests of appellant and Susanna were not in conflict with each other, and Peek had not been denied his right to counsel. In *Lott* v. *United States,* 218 F. 2d 675, the same argument was advanced. The court said,

"Upon submission, counsel for appellants raised as alleged fundamental error the fact that the court ap-

pointed the same counsel to represent defendants Reed, Pearce and Shaw, citing *Glasser* v. *United States,* 315 U. S. 60, 68-76, 62 S. Ct. 457, 86 L. Ed. 680. That case held that Glasser was deprived of his right, under the Sixth Amendment, to the assistance of counsel where the court, over objection, required his counsel to represent a co-defendant, with notice that their interests might be in conflict. Here there was neither objection, claim, nor notice to the court of any alleged conflict between the interests of the three defendants. We hold, therefore, that there was no denial of their constitutional right to the effective assistance of counsel."

In *Case* v. *State of North Carolina,* 315 F. 2 743, Case and a co-defendant, Shedd, were indicted and tried jointly for the offense of rape. Both were found guilty, the jury recommending life imprisonment for Shedd, but making no such recommendation with regard to Case. This meant, for the latter, that a death penalty was mandatory. The same attorney represented both men, though Shedd's family obtained additional counsel. When the trial commenced, counsel for Case moved for severance, stating that he represented both defendants, and that he was fairly certain that a conflict would arise between their interests. This motion was overruled. On appeal, the court (U.S.C.A. Fourth Circuit) reversed, finding that this conflict of interest was present at every stage of the trial. It is pointed out in the opinion that counsel sat silent while Shedd's confession was read, such confession not only implicating Case, but indicating that Case was the leader in the crime. In *U. S.* v. *Bentvena,* 319 F. 2d 916, three appellants, all represented by the same attorney, raised this same point. The argument was rejected, the court commenting that an appellant "must show some conflict of interest between himself and the other defendants represented by his attorney before he can claim successfully that the joint representation deprived him of his right to counsel." A long list of cases to the same effect is then cited. Actually, it appears that each case must be determined on its own particular facts.

In the case before us, as previously stated, there was no suggestion to the court that adequate representation could not be afforded by the single attorney appointed to represent the defendants. After the state rested, counsel took the appellants into chambers as a matter of making a record that the decision to testify, or not to testify, was being determined by the appellants themselves.[15] Counsel discussed with defendants this question, and recommended, for reasons appearing in the record, that they not testify, but the decision was left to Trotter and Harris. During this discussion, both appellants expressed their approval of counsel, and his efforts, during the trial.

We find no conflict of interest. Both men were charged with the same offense, which grew out of the same occurrence. The only evidence, which in any manner could be said to indicate a conflict of interest, was the statement of Harris made to the sheriff that, though he drove the car, he did not actually rape the prosecuting witness. This might indicate that he was only an accessory, but the distinction between principals and accessories was abolished in this state in 1936. See Ark. Stat. Ann. § 41-118 (1947). Accordingly, even under this statement, if Harris were guilty, he was guilty as a principal. When this testimony was offered, counsel immediately asked the court to instruct the jury that this evidence could not be considered in the case against Trotter. This action by counsel was vastly different from *Case* and *Glasser,* where counsel sat silent while evidence from one co-defendant strongly implicated the other defendant. It will also be observed that in *Case,* Shedd (whose confession had placed the chief blame on Case) received a lesser sentence than Case, indicating that this evidence had operated to his advantage, and to the disadvantage of his co-defendant. Here, both men received the same sentence.

For that matter, Harris does not argue that there was a conflict of interest; rather, it is only asserted

[15] This procedure was commended in *Nail* v. *State,* 231 Ark. 70, 328 S. W. 2d 836.

that appointed counsel did not have time to investigate the background of both defendants. Counsel for Harris states that his client had been discharged from the United States Navy because of epilepsy, and, at the hearing on the motion for new trial, offered an exhibit relative to Harris' medical history while in the Navy. It is also alleged that Harris was at the Fort Roots Hospital for about a day. These allegations, and evidence offered, are an apparent attempt to show insanity. It must be remembered that both appellants were sent to the State Hospital for psychiatric examination, and the hospital submitted a report, heretofore referred to, but at any rate, the issue of insanity should have been raised, and the plea interposed, before, or during, the trial, in accordance with the statute. See Ark. Stat. Ann. § 43-1301 (Supp. 1963).

Various other assignments of error are mentioned in the motion for new trial, relating to instructions, a motion on behalf of appellants for closed trial, and other miscellaneous objections. Because of the length of this opinion, we will not specifically discuss these alleged errors, but all have been examined, and we find no prejudicial error.

Affirmed.

COMMERCIAL STANDARD INS. CO. *v.* MOORE.

5-3210 376 S. W. 2d 675

Opinion delivered March 23, 1964.

[redacted]

Moses, McClellan, Arnold, Owen & McDermott, By *Wayne M. Owen,* for appellant.

Spitzberg, Bonner, Mitchell & Hays, By *Henry E. Spitzberg* and *Allan W. Horne,* for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation involves the liability of appellant on a title insurance policy. The appellees, James R. Moore and Marie L. Moore, his wife, filed this action against the appellant, Commercial Standard Insurance Company (hereinafter called "Commercial"), to recover for loss or damage sustained by the Moores. The complaint alleged that Commercial had issued to the Moores a policy of title insurance to protect the Moores against loss, *inter alia,* from materialmen's and mechanics' liens, that Commercial had failed to protect the Moores, who had been required to pay the sum of $8,066.40, for which recovery was sought, along with penalty and attorney's fees. The defenses of Commercial were, *inter alia:* (a) that the policy originally issued to the Moores did not protect them against materialmen's and mechanics' liens; and (b) that the agent of Commercial had neither the power nor the authority to change the policy, as was done. The cause was tried to a jury and resulted in a verdict and judgment for the Moores; and on this appeal Commercial urges these four points:

"I. At the conclusion of all of this evidence, the Court should have directed a verdict for the defendant.

"II. When Commercial Standard Insurance Company, through Beach Abstract & Guaranty Company, issued the policy of title insurance sued on herein, the pertinent parts of paragraph 6 of the policy sued on were in full force and effect, the same being: 'VI. Nothing contained in this policy shall be construed as insuring * * * (6) against loss or damage by reason of mechanics' or materialmen's liens, liens of contractors, subcontractors, or other liens arising out of the construction

or repair of buildings and improvements on the property, the title to which is hereby insured, not filed of record at the effective date of this policy * * *' and no suit or other action was ever brought to make noneffective this writing, and it could not be reformed in a court of law.

"III. Beach Abstract & Guaranty Company was without authority to alter paragraph VI of the policy sued on in any manner and even had it been authorized, an alteration after the loss had occurred would not be effective for lack of consideration.

"IV. The Court erred in giving over the general and specific objections of the appellant, appellees' Instruction No. 1."

I. *Appellant's Motion For Directed Verdict.* This necessarily involves a recital of the salient evidence. In October 1961 the Moores were buying a lot, in a new addition to Little Rock, on which a house was in the course of construction. The Moores employed Mr. Homer Tanner as their attorney to examine the abstract of the property. When he learned that construction was in progress, Mr. Tanner advised the Moores that only by a title insurance policy could they obtain full and safe protection against the possibility of materialmen's and mechanics' liens. At the Moore's request Mr. Tanner called Beach Abstract & Guaranty Company (hereinafter called "Beach") in Little Rock and explained the situation of the Moores to Mr. Cathey of Beach and inquired whether Beach would write a policy of title insurance to protect the Moores against the possibility of materialmen's and mechanics' liens attaching to the property they were buying. Mr. Cathey answered in the affirmative, and Tanner told the Moores to deal with Mr. Cathey of Beach in closing the matter. After Mr. Tanner furnished his title opinion and the above information, his services were completed. The Moores subsequently closed the transaction through Beach by paying the balance in full for the purchase price and by receiving from Mr. Cathey a policy of title insurance furnished by Beach as agent of Commercial and dated November 22, 1961.

Some time in January 1962 the Moores were served with notice of materialmen's and mechanics' liens. They took these notices to Mr. Tanner, and he called Mr. Cathey at Beach's office and informed him of the lien notices. At that time Mr. Cathey informed Mr. Tanner that the policy as issued did not protect the Moores against materialmen's and mechanics' liens. Whereupon Mr. Tanner and the Moores went to the Beach office and laid the full facts before the President of that company. They exhibited the policy that Commercial had issued; and Section 6 of that policy provided, *inter alia: "Nothing contained in this policy shall be construed as insuring* * * * (6) *against loss or damage by reason of mechanics' or materialmen's liens, liens of contractors, sub-contractors, or other liens arising out of the construction or repair of buildings and improvements on the property, the title to which is hereby insured, not filed of record at the effective date of this policy."* When Mr. Tanner explained the full situation to the President of Beach and told him that the main purpose for the Moores taking the title insurance was to obtain protection against materialmen's and mechanics' liens, the President of Beach directed Mr. Cathey to strike from the policy the above quoted and italicized language. This was done and initialed by Mr. Cathey.

Notwithstanding all the above, Commercial refused to protect the Moores against materialmen's and mechanics' liens and they were compelled to pay the amount that they sued for herein. There was evidence from which the jury could have found—as it evidently did—that Beach was the general agent of Commercial; and there was evidence that Commercial did issue title insurance policies that would protect against materialmen's and mechanics' liens. We will discuss later the authority of Beach as general agent; but under the evidence as we have detailed it in the light most favorable to support the verdict, as is our rule,[1] we conclude that a case was made for the jury and the Court was correct in refusing to direct a verdict for Commercial.

[1] *Reddell* v. *Norton*, 225 Ark. 643, 285 S. W. 2d 328.

II. *Necessity Of Reformation In A Court Of Equity.* In its second point Commercial urges that the policy as originally issued contained the provision previously quoted to the effect that there was no insurance against materialmen's and mechanics' liens; and that the Moores could not sue on the policy in a court of law until they first had it reformed by a court of equity. We find no merit in this contention because the parties could modify and change the contract between themselves, and if Beach was the general agent of Commercial (as we will discuss in Topic III, *infra*), then Beach had authority to make the contract state what the parties originally agreed upon. In *Mason* v. *Jarrett,* 218 Ark. 147, 234 S. W. 2d 771, we held that parties could voluntarily reform their contracts, saying: "Certainly the parties may do voluntarily that which a court of equity would have compelled them to do." In 29 Am. Jur. p. 701, "Insurance" § 337, the holdings are summarized: "In the absence of statutory or contract provisions, or of restrictions upon the power known to the insured, a general agent or agent having power to enter into contract of insurance in behalf of the insurer has authority to modify, with the consent of the insured, contracts already in existence. An agent authorized to make contracts of insurance may, at any time during the continuation of his agency, even though subsequent to the loss, correct a policy issued by him to conform to the agreement of the parties."

Thus, when Mr. Tanner and the Moores went to the President of Beach in January 1962 and explained the situation, the President of Beach reformed the policy to make it speak the truth in accordance with the conversation between Cathey and Tanner, which was the beginning of the dealings of the Moores with Commercial. The original policy is in the transcript before us, and the clause that we have previously copied is deleted and initialed. That was full reformation. There was no necessity for the Moores to go into equity to get the policy reformed because it was already reformed.

III. *The General Agency Of Beach.* This is the main issue in this lawsuit. If Beach was the general

agent of Commercial, then of course the reformation of the policy was validly accomplished. Arkansas is one of the States that makes the distinction between the authority of general agents and special agents of insurance companies; and we hold that a general agent is one who has authority to transact all business of the company of a particular kind and whose powers are *prima facie* coextensive to the business entrusted to his care. *Phoenix Assurance* v. *Boyette,* 77 Ark. 41, 90 S. W. 284; *Reserve Loan Life Ins. Co.* v. *Compton,* 190 Ark. 1039, 82 S. W. 2d 537; and *Dixie Life Ins. Co.* v. *Hamm,* 233 Ark. 320, 344 S. W. 2d 601. See also 29 Am. Jur. p. 550, "Insurance" § 151. In *Phoenix Assurance Co.* v. *Boyette, supra,* we said of the insurance agent there involved:

"But it is urged that the authority of the agent was limited, and he was not authorized to issue a policy such as is claimed this should have been. This view is not sustained by the facts. Bridewell, as agent for the company, kept policies for execution and delivery, passed upon applications, received premiums, counter-signed and issued policies, and was therefore a general agent for such purposes. Having the conceded power to issue a policy on all the cotton in the warehouse, he undoubtedly had the authority to issue a policy on any portion of it. *Insurance Co.* v. *Brodie,* 52 Ark. 11; *Phoenix Insurance Co.* v. *Public Parks Amusement Co.,* 63 Ark. 187; *German-American Insurance Co.* v. *Humphreys,* 62 Ark. 348."

In *Dixie Life Ins. Co.* v. *Hamm, supra,* we quoted with approval from American Jurisprudence:

" 'Broadly speaking, one must be regarded as the general agent of an insurance company if he is authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies. Accordingly, agents have been regarded as general agents where they fully represent the insurance company in a particular district and are authorized to solicit insurance, receive money and premiums, issue and renew policies, appoint subagents, and adjust losses.' "

In the case at bar it was shown that Commercial furnished policies to Beach; that one form would insure against materialmen's and mechanics' liens and another form would not; that Beach was authorized to accept risks as it saw fit and to agree upon and settle the terms of the insurance, using either form, as Beach thought appropriate; and that Beach signed and issued policies and collected the premiums. The words, "State Agent," as applicable to Beach, were printed on the Commercial binders issued to the Moores in this case; and the contract between Commercial and Beach introduced in evidence herein says that Commercial appoints Beach "its exclusive general agent for the State of Arkansas, with the exception of Miller County, which will be non-exclusive, with authority to receive applications for title insurance upon all lands situated in the State of Arkansas, to issue reports on the condition of titles to land described in such applications, to receive and collect such premiums for title insurance and such abstract and/or attorney's fees as are necessarily incident thereto, to counter-sign and deliver policies of title insurance and to nominate sub-agents for approval of first party;..."

In the light of all of the above, the Trial Court certainly committed no error against Commercial in submitting to the jury the question of whether Beach was the general agent of Commercial; and the jury verdict on this point is supported by abundant evidence. With Beach the general agent of Commercial we have the answer to the questions previously discussed.

IV. *Appellee's Instruction No. 1.* This was an instruction on the apparent scope of authority of Beach as the agent of Commercial. The instruction is lengthy and no useful purpose would be served by copying it here. It is sufficient to say that we find no error in this instruction as against the objections made by the appellant.

Affirmed.

5-3237 376 S. W. 2d 672

Opinion delivered March 23, 1964.

[redacted]

T. S. Lovett, Jr. and *Leffel Gentry,* for appellant.

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

GEORGE ROSE SMITH, J. On March 19, 1947, James Collier died testate in Pulaski County. His will left the bulk of his estate to two of his children, Nathaniel and Rosetta, with bequests of one dollar each to eight other children. The will was promptly filed in the office of the county and probate clerk, but for some reason no order admitting the instrument to probate was entered. The matter lay dormant until 1963, when the appellant, as the guardian and next friend of Nathaniel, the only surviving principal beneficiary, filed a petition for the probate of the will. This appeal is from an order holding that the attempt to probate the instrument is barred by limitations.

The appellant testified that after Collier's death she took the will to the clerk's office. At a deputy clerk's suggestion she employed an attorney, who filed the will and also prepared and filed the necessary proof of execution by the attesting witnesses to the will.

Under the statute then in force it was the duty of the probate clerk to proceed with the probate of the will. "When any will shall be exhibited for probate, the court of probate, or clerk thereof in vacation, in person or by his deputy, may and shall receive the probate thereof

in common form, and shall grant a certificate of probate, or, if the will be rejected, shall grant a certificate of rejection; but such action by such clerk or deputy, in vacation, shall be subject to the confirmation or rejection of the court." Ark. Stat. Ann. § 60-209 (1947). It was then the usual practice for the clerk to attend to the entry of the order of probate, in harmony with the directive that he "may and shall" receive the probate of the will in common form. Hence the oversight in this instance was at least partly chargeable to the clerk.

There was formerly no limitation upon the time within which a will might be offered for probate. *Hudson* v. *Hudson,* 219 Ark. 211, 242 S. W. 2d 154. The Probate Code, however, provides that no will shall be admitted to probate unless application therefor is made to the court within five years from the death of the decedent. Ark. Stat. Ann. § 62-2125 (Supp. 1963). The appellees now insist that the five-year statute began to run upon the adoption of the Code in 1949, so that the attempted probate in 1963 came too late.

We are not in sympathy with this contention. The Probate Code took effect on July 1, 1949, "except that when its application . . . would work injustice in particular proceedings then pending, the former procedure shall apply." Ark. Stat. Ann. § 62-2002 (Supp. 1963). This case falls within the exception. The appellant and her attorney had taken the necessary steps to offer the will for probate in common form under the law as it existed in 1947. It would be unjust to apply the five-year limitation in this instance, not only because a public officer was at fault in the matter but also because, in a doubtful situation, we prefer to give effect to the testator's intention by upholding the will.

Reversed.

HALE *v.* MANSFIELD LBR. CO.

5-3191 376 S. W. 2d 670

Opinion delivered March 23, 1964.

[redacted]

Donald Poe, for appellant.

Shaw, Jones & Shaw, for appellee.

SAM ROBINSON, Associate Justice. Lawrence Victor Hale was getting out timber for appellee, Mansfield Lumber Company. He died from a heart attack while working on the job. The Workmen's Compensation Commission denied compensation on the ground that he was an independent contractor. Hale's dependents have appealed.

There was no written contract between Hale and Mansfield, but according to the evidence, the oral contract was that Hale was to receive $7.50 per 1,000 board feet, plus payment of the insurance premium, for skidding the logs out of the woods and loading them on trucks. Hale owned the mules and a loader used in the operation, and he hired other men to help him. There is no indication that any kind of insurance premium was in the minds of the parties except the premium for workmen's compensation insurance; no other kind of insurance was involved.

Mansfield was removing timber from government land under a contract with the government. Even if it can be said that Hale was an independent contractor, he was an independent subcontractor, and Mansfield would be liable to his employees under the workmen's compensation law. *Huffstettler* v. *Lion Oil Company,* 208 F. 2d 549; *Hobbs Western Co.* v. *Craig,* 209 Ark. 630, 192 S. W. 2d 116; *Brothers* v. *Dierks,* 217 Ark. 632, 232 S. W. 2d 646.

Hale was one of the workmen getting out the timber; he worked in the woods the same as the other men. Mansfield paid a premium for workmen's compensation insurance of $11.36 on every $100.00 of remuneration paid to Hale. It can be fairly inferred that the insurance was to cover Hale as well as the other workers. The Commission held inadmissible evidence of payment of workmen's compensation to other workers in a similar position as Hale; but we think the evidence was admissible to show it was the intention of the parties that Mansfield arrange for the workmen's compensation insurance. Furthermore, Mansfield did procure such a policy.

It is provided in the workmen's compensation policy of insurance procured that it specifically covers logging; that is exactly the thing Hale was doing. In fact, $11.36 was paid as a premium on every $100.00 paid to Hale. It is reasonably inferrable that if Mansfield had not agreed to pay the premium on the workmen's compensation insurance policy, the premium money would have been paid to Hale as additional compensation for getting out the timber. From a practical standpoint, Hale was paying the premium himself.

The case of *Stillman* v. *Jim Walter Corporation,* 236 Ark. 808, 368 S. W. 2d 270, is analogous. There, the contract between the parties was that the employer would deduct 3% of the remuneration paid for the work done, and provide the workmen's compensation insurance. It was held that the employer was bound by the contract.

In the Stillman case we did not reach the question of whether the mere payment of premiums for a work-

men's compensation insurance policy estopped the employer and insurance carrier from contending that the worker was not an employee. The Stillman case turned on the point that under the arrangement between the parties, Jim Walters was obligated to furnish workmen's compensation insurance.

It is mentioned, however, in the Stillman case that the weight of authority is to the effect that the principle of estoppel is applicable in a situation of that kind. We still do not reach that exact point in the case at bar because of the contract that Mansfield was to pay the insurance premium. It was further pointed out in the Stillman case that estoppel might apply where workmen's compensation insurance had been procured on the worker, regardless of whether he was an independent contractor, because the procurement of such insurance puts the employer in a strong position to contend that the workmen's compensation law was applicable where the employer had been sued for a common law tort. In other words, if there was a good case against the employer on a common law tort arising out of a serious injury to the worker, the employer would be in a good position to say: I am not liable for the common law tort; the workmen's compensation law applies here. I procured a policy of workmen's compensation insurance protecting the injured workman. The employer might not prevail in his contention, but the injured party's action in tort would be weakened.

Under the contract between Hale and Mansfield, Mansfield was to pay the premium on the policy for workmen's compensation insurance. The premium was paid—$11.36 for every $100.00 that was paid to Hale as remuneration for getting out the timber. In these circumstances it cannot be said that the workmen's compensation law does not apply in this case .

The Workmen's Compensation Commission did not reach the point of whether Hale was injured in the course of his employment. Reversed and remanded for the determination of that question.

ARK. STATE HIGHWAY COMM. *v.* MONTGOMERY.

5-3171 376 S. W. 2d 662

Opinion delivered March 23, 1964.

Dowell Anders, H. Clay Robinson, for appellant.

Terral, Rawlings & Matthews and *John I. Purtle,* for appellee.

JIM JOHNSTON, Associate Justice. This suit involves the ownership of a 5½ foot strip of land across two lots along Highway 10 in Little Rock. During 1961 appellant Arkansas State Highway Commission reconstructed Highway 10, including the part of Highway 10 that is adjacent to the property of appellees, O. T. and Maudie Montgomery. On January 3, 1963, appellees filed suit in Pulaski Chancery Court against appellant, alleging that appellant claimed a sixty foot right of way adjacent to their property, but in fact had only a forty foot right of way, that appellees had never been compensated for the portion of their property claimed by appellant and sought to enjoin appellant from taking their property until condemnation proceedings were commenced.

Appellant answered denying that appellees had any right or title to any of the sixty foot highway right of way established by Pulaski County Court order of October 24, 1935, contending, *inter alia,* that title to the land here in question had passed by reason of such order. At trial before the Chancellor on April 22, 1963, the parties stipulated that the area in dispute is a strip 5½ feet wide immediately south of the curb, along the front of appellees' property. It is undisputed that the County Court records show that in 1935 the Pulaski County Court entered an order condemning a right of way sixty feet wide for Highway 10, to be constructed over an existing gravel road commonly called Little Rock West, and that in 1935 or 1936, the Highway Commission constructed a highway consisting of approximately eighteen feet of pavement with about five feet of shoulder and five feet of ditch on each side for a total use of right of way of approximately forty feet. Appellant conceded that it could not find evidence of direct notice to appellees or their predecessors in title of the County Court proceedings or that any compensation was paid to appellees or their predecessors in title. In addition a detailed exhibit was introduced by stipulation showing the location and exact measurements of appellees' property, the location of the business thereon and the location of the strip of land here in dispute. After trial the chancellor found that appellant "should be restrained and enjoined from claiming, taking or using in any way any portion of plaintiffs [appellees'] land which lies immediately south of and adjoining the present curb and pavement of Highway 10." From the decree, appellant has prosecuted this appeal, urging as its major point that the chancellor erred in not finding that the Highway Commission had title to the disputed area of land through the county court condemnation order.

The question involved in this point is notice. In *Arkansas State Highway Commission* v. *Dobbs,* 232 Ark. 541, 340 S. W. 2d 283, we said that, "It is axiomatic that insufficient notice is no notice at all" and went on to say:

"In *State Highway Commission* v. *Holden,* 217 Ark. 466, 321 S. W. 2d 113, where there was a County Court Order without notice to the landowners the court approved this language:

" 'It is our view that the act of taking is not complete *when the judgment of condemnation* is rendered. Since such judgment may be without notice, the lawmaking body must have had in mind an order of condemnation followed by entry upon the land. *Such entry, being physical and visible, affords the proprietor an opportunity to exact payment or to require a guaranteeing deposit.'* (Emphasis supplied.)

"In that case the Court said '. . . that the landowner is entitled to damages as of the date when the act of taking is *complete*—that is, when his lands are actually entered and taken under the order.' "

The issue here, then, is whether there was such notice of the county court order when Highway 10 was constructed in 1935 or 1936 as would afford the landowner an opportunity to seek just compensation for his property from the county court within the one-year statutory limitation. That burden of proof is on appellant. We stated in *Arkansas State Highway Commission* v. *Dean,* 236 Ark. 484, 367 S. W. 2d 107, that:

"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 land owner had actual notice of the taking of his land. *Arkansas State Highway Commission* v. *Anderson,* 234 Ark. 774, 354, S. W. 2d 554."

Appellant in the instant case was unable to prove payment of compensation or publication of notice, and failed to show that construction of Highway 10 in 1935 or 1936 was anything more than the paving of an existing road. This being true, we have held this situation to be insufficient to put adjoining property owners on notice that additional lands were being taken. See *Arkansas State Highway Commission* v. *Dobbs, supra,* and *Arkansas State Highway Commission* v. *Dean, supra.*

Appellant next urges that the deed to appellees, as well as prior deeds in the chain of title, except from the conveyance "that part in the present right of way of Highway 10" and are therefore clear proof of notice of the taking of the property. There is, however, nothing within these instruments to indicate whether the grantors considered the "present" right of way to be a forty-foot or a sixty-foot right of way. It is undisputed, however, that no more than forty feet was used for highway purposes prior to 1961 and that appellees' deed, which was introduced into evidence, under which they claim ownership was executed in June 1959. It is our view that the word "present" undoubtedly indicates the right of way to be the forty feet that was in use at the time of the conveyance. Appellees also testified as to actual use and occupancy of the property here in dispute. The detailed exhibit introduced by stipulation of the parties showing appellees' property and its location on Highway 10 along with the graphic depiction of the land here in dispute clearly refutes appellant's contention that the case at bar falls within the rule of *Arkansas State Highway Commission* v. *James,* 236 Ark. 556, 367 S. W. 2d 236. We find no merit in appellant's insistence that appellees failed to prove their ownership of the property in dispute.

When Highway 10 was reconstructed in 1961, appellant ditched beside the highway within the disputed 5½ foot strip and put down drain tile (culverts) as appellees had done in 1959. Appellant argues persuasively that this ditching and laying tile was such an entry as would constitute notice to appellees, and that since this action was filed more than a year after the ditching, appellees' action, which should have been a claim for compensation in the county court, was barred by the one-year period of limitation for filing such claims. Appellees contend on the other hand that the one-year statutory limitation is not applicable to them because appellant has not taken the property; that at the most there was a temporary interruption of their proprietary use which did not amount to a taking; that

since 1959 appellees have used the 5½ foot strip as part of the driveway and parking area of their cafeteria, and still do so. Appellees urge that appellant's entry on their land was a temporary, occasional or incidental injury such as is discussed by the Federal District Court in *Sponenbarger* v. *United States,* 21 F. Supp. 28, *rev'd* 101 F. 2d 506, *rev'd* 308 U. S. 256. Review of the record reveals, first, that one of the appellees testified that appellant removed the drain tile appellees had installed in 1959. On questioning by the court, the witness testified that the location of their culvert was "two feet under the pavement." "In other words, the tile you had placed there, if it had been left there, it would have been paved over today." Second, in addition to paving over the area where appellees had placed their tile, appellant ditched the disputed strip, placed 18-inch tile all the way across and moved a utility pole onto the strip. Third, while the highway prior to the 1961 reconstruction was forty feet wide including paving, shoulders and ditches as stipulated by the parties, it is undisputed that after reconstruction the paved portion alone of Highway 10 is forty-nine feet wide. Finally, in appellees' complaint appellees allege that "certain parts of plaintiffs [appellees'] property has been taken and a paved highway constructed thereon without compensation to plaintiffs." On trial de novo on the record before us, we deem these itemized facts to be more than sufficient to demonstrate an actual taking that would put appellee-landowners on notice that their land was being taken or had been taken, and thus start the running of the one-year limitation for claims provided for by Ark. Stat. Ann. § 76-917 (Repl. 1957). This notice afforded appellees an opportunity to seek just compensation from the county court within one year after their actual notice of the taking. Appellees failed to present their claim for damages within the statutory period and are foreclosed from so doing now. *Greene County* v. *Hayden,* 175 Ark. 1067, 1 S. W. 2d 803.

Reversed and dismissed.

Opinion delivered March 23, 1964.

[redacted]

Claude B. Brinton, Bon McCourtney and *Lawrence Gouldman,* for appellant.

Bruce Bennett, Attorney General, By *Jerry L. Patterson,* Asst. Atty. General, for appellee.

FRANK HOLT, Associate Justice. The appellant, Joe T. Baker, was charged by information with the crime of involuntary manslaughter. Upon a jury trial he was found guilty of the lesser offense of negligent homicide and his punishment assessed at one year imprisonment in the county jail. From the judgment upon that verdict the appellant brings this appeal.

For reversal the appellant first questions the sufficiency of the evidence. It is a most familiar rule that upon appeal the evidence must be viewed in the light most favorable to the appellee and if there is any substantial evidence to support the jury's verdict it must be sustained. *Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376; *Grays* v. *State,* 219 Ark. 367, 242 S. W. 2d 701;

Carnal v. *State,* 234 Ark. 1050, 356 S. W. 2d 651, certiorari denied, 83 S. Ct. 146, 371 U. S. 876. With this rule in mind we proceed to review the evidence in this case.

On March 21, 1962 appellant and his half brother, Tom Baker, were riding in appellant's pick-up truck which was entirely on the wrong side of the road when the truck collided head-on with a vehicle driven by Ray Helton who was accompanied by his wife and child. The appellant and his half brother each contend the other was driving. As a result of the collision Mark Helton, infant child of the Heltons, was killed. The accident occurred on a straight portion of the road about three o'clock in the afternoon and visibility was clear. There was no evidence of skid marks by the Baker vehicle. It came to rest in Helton's lane of traffic. Helton's vehicle was found in the ditch on his side of the road some distance from the point of impact. The appellant and his half brother were thrown from the pick-up truck and appellant was found unconscious on the pavement critically injured. Tom was found in a dazed condition near the scene of the accident.

Through the window of his store a witness observed the appellant's pick-up truck a few seconds before the collision and estimated its speed at 70 to 75 miles per hour as it passed another vehicle. He testified that "you could count to three" after it went out of sight before he heard the impact. A broken vodka bottle was found about three feet from the right side of the truck and beer cans were also found on the floor board of the truck and at the scene of the accident. The investigating officer testified that the appellant had a strong odor of alcohol on his breath. The appellant admitted that he had had three drinks of whiskey from about 12:30 P. M. until 3 P. M. when the accident occurred. Further, that during this time he had purchased a bottle of whiskey, however, he denied opening it. There was no evidence the half brother was drinking. The half brother testified that the appellant was drunk and driving the vehicle on the wrong side of the road at approximately sixty miles per hour when the truck collided head-on with the

Helton vehicle. We think the evidence in this case was amply sufficient to sustain the verdict and judgment. *Craig* v. *State,* 196 Ark. 761, 120 S. W. 2d 23; *Comer* v. *State,* 212 Ark. 66, 204 S. W. 2d 875; *Campbell* v. *State,* 215 Ark. 785, 223 S. W. 2d 505, and *Walker* v. *State,* 237 Ark. 36, 371 S. W. 2d 135.

The appellant specifically questions the sufficiency of the evidence that he was the driver of the pick-up truck. No witness could testify who was driving other than appellant and Tom, his half brother. Appellant testified that Tom had been driving him around from 12:30 P. M. until the accident at 3:00 P. M. Tom admitted that he had made a statement under oath that he and not the appellant was the driver. In repudiating this statement he maintained that the appellant had promised him money to make the statement. He testified that he asked to drive the car since appellant was drunk and that appellant refused. Furthermore, the appellant contends that the physical facts, with reference to the position of the vehicle and where he was found unconscious and where Tom was observed in a dazed condition following the accident, are contrary to his half brother's testimony as to which one was driving the truck. The conflicting evidence as to which one was the driver of the vehicle was a proper question for the jury's determination and it chose to disbelieve appellant's version as it had a right to do. *Lewis and Wren* v. *State*, 220 Ark. 914, 251 S. W. 2d 490.

The appellant also urges "there is no proof of willful or wanton negligence". The answer to this contention is that the appellant was convicted of negligent homicide which, according to Ark. Stat. Ann. § 75-1001 (Repl. 1957), only requires sufficient proof that the appellant operated his vehicle in a reckless or wanton disregard for the safety of others. The jury was so instructed by Instruction No. 10 without any objection to it. The word "willful" is not contained in this statute. It was deleted by Act 174 of 1955 as an amendment to this statute.

Finding no error in any of appellant's contentions, the judgment is affirmed.

BERRY *v.* GORDON.

5-3045

Supplemental Opinion on Rehearing Delivered March 23, 1964.

Macon & Moorhead, Garner, Shaw & Kimbrough, for appellant.

Catlett & Henderson, Bruce Bennett, Attorney General, *Mehaffy, Smith, Williams, Friday & Bowen,* By *Wm. J. Smith* and *George E. Pike, Jr.,* for appellee.

BOYD TACKETT, Special Justice. In a petition for rehearing the appellant insists that we were in error in holding that the provisions of Act 399 are severable to such an extent that Sections 1 and 2 can stand even though Section 3 is held to be unconstitutional. In the brief submitted in support of the petition for rehearing much stress is laid upon the fact that Act 399 does not have a separability clause. Hence, it is suggested, the entire act must fall.

We adhere to our original opinion. It goes almost without saying that there has never been any requirement that an act must have a severability clause before an invalid section can be found to be separable from the

rest of the act. In fact, the law has always been just the other way. "The separability clause is a comparatively modern legislative device, the courts having separated statutes long before its innovation." Sutherland, Statutory Construction (3d Ed.), § 2408. "If the part which remains after the defective portion is severed is capable of carrying out the purpose of the legislature, the courts will have little difficulty in finding the legislative intent to make separable, even if no separability clause has been included." Anderson, Drafting a Legislative Act in Arkansas, 2 Ark. L. Rev. 382, 399. Both before and since the use of the severability clause became commonplace we have frequently held statutes to be separable even though no such provision was embodied in the act. Among our many cases to this effect are *State* v. *Marsh,* 37 Ark. 356; *Cotham* v. *Coffman,* 111 Ark. 108, 163 S. W. 1183; *State ex rel. Norwood* v. *N. Y. Life Ins. Co.,* 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099; *Greer* v. *City of Texarkana,* 201 Ark. 1041, 147 S. W. 2d 1004. We are aware of no decision to the contrary.

Section 1 of Act 399 declared the legislative purpose to reimburse designated state officers for their public relations expense. Section 2 of the act made the necessary appropriation to carry the law into effect. These two sections, standing together, constitute a complete and workable law. The vice in Section 3 was that it would have permitted the funds to be paid out even though the expense had not actually been incurred; so it was in substance a salary increase going beyond the limits set by the constitution. Section 3 is clearly severable, for there is no sound reason to think that the General Assembly would not have wanted to reimburse these officers for expenses actually incurred even if it had realized that an appropriation in the nature of a salary increase could not be sustained.

A second contention is that we were mistaken in holding that the opinion of the Attorney General relieved the officers in question from the duty to account for the funds they had received. Counsel point out that in the cases that were cited in our first opinion the fact that

the Attorney General had approved an unauthorized expenditure of public money was held to protect the disbursing officer from having to repay the funds. In none of the cases did the court hold that the Attorney General's opinion was also a protection to the person who received the irregular outlay.

Even if counsel are correct in their position there is still an unassailable reason why the appellant cannot prevail upon this point. In a suit to compel a public officer to account for funds alleged to have been wrongfully received the plaintiff has the burden of proof. *White* v. *Williams,* 192 Ark. 41, 89 S. W. 2d 927. Here the plaintiff offered no proof upon this issue, electing instead to move for a summary judgment. The chancellor took occasion to observe in his written opinion that the plaintiff "declines to present any evidence whatever that the amounts paid to the defendants are not actual official expenses incurred by them."

In our original opinion we stated unequivocally that "the officials are not entitled to reimbursement of expenditures not expended." The clear implication of that statement is that upon a proper showing by the plaintiff there might be a recovery of funds to which the recipient was not entitled. At the trial the appellant had the opportunity to prove that the appellees had received public money in excess of their actual public relations expense. The appellant chose not to take advantage of the opportunity that was presented. He is therefore not in a position to insist that he be given a second chance to prove his case.

The appellant also suggests that Act 399 is a special act of the type forbidden by Amendment 14 to the state constitution. We could answer this contention by pointing out that it is raised for the first time on rehearing and is thus not properly before us. *Midland Valley R. Co.* v. *Lemoyne,* 104 Ark. 327, 148 S. W. 654; *Bost* v. *Masters,* 235 Ark. 393, 361 S. W. 2d 272. Nevertheless, inasmuch as the matter is one of public interest, we have thought it best to consider this contention upon its merits.

An act is special when it arbitrarily separates some person, place, or thing from those others upon which, but for the separation, it would operate. *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 2d 617. In other words, classification is permissible if it bears a reasonable relation to the purpose of the statute. *Jacks* v. *State,* 219 Ark. 392, 242 S. W. 2d 704. Needless to say, it is not our place to pass upon the wisdom of legislation.

We are not prepared to say that the classification in Act 399 is demonstrably arbitrary. The General Assembly expressly found that inadequate salaries were being paid to the Speaker of the House, the President of the Senate (the Lieutenant Governor), and to the constitutional officers in the executive branch, omitting only the Governor. Had these officers been state employees the legislature could have met the difficulty by increasing their salaries. But that course was not open with respect to these elected officers, for the constitution places a ceiling upon their salaries. In this situation it cannot fairly be said that the legislature was unreasonable and arbitrary in its decision to provide reimbursement for expenses actually incurred.

The appellant insists that the omission of the Governor from the benefits of the act makes the classification discriminatory. A complete answer to this contention is that the General Assembly also adopted Act 369 of 1961, which appropriated funds for the maintenance and operation of the Governor's mansion. Inasmuch as this appropriation may be regarded as an adequate provision for the chief executive's public relations expense, there was a sound reason for his being omitted from Act 399.

The petition for rehearing is denied.

(Original opinion delivered January 20, 1964, p. 548.)

5-3224 377 S. W. 2d 47

Opinion delivered March 30, 1964.

Keith, Clegg & Eckert, for appellant.

Mahony & Yocum, Homer T. Rogers, Gaughan & Laney, Lester E. Dole, Jr., for appellee.

CARLETON HARRIS, Chief Justice. The issue on this appeal is whether appellant, J. B. Warmack, is the owner of, and entitled to be paid for, ⅛ of the ⅛ royalty oil or for 1/16 of the ⅛ royalty oil, run from the southeast quarter of the northwest quarter of Section 25, Township 15 South, Range 16 West, in Ouachita County. The record reflects that from 1935 to 1959, appellee, Henry H. Cross Company, which had purchased the oil runs from this tract, paid Warmack on the basis of the belief that he owned ⅛ of the ⅛ royalty, apparently relying upon a title examination by the company's attorney. In 1959, another examination of the title was made, and this examination revealed that Warmack owned only 1/128 of the oil. The Cross Company thereupon discontinued paying

Warmack, and he instituted suit. The company answered by Bill of Interpleader, making parties of all the record owners of minerals and royalty in the lands. All answered alleging their record ownership, and asking that their title be quieted against Warmack. On hearing, Warmack's complaint was dismissed for want of equity, and the court gave the Cross Company judgment for the overpayment ($63.29) made to appellant for the last three years. From the decree so entered comes this appeal.

Appellant's claim is based on alleged adverse possession, and laches and estoppel. Admittedly, the only record title held by Warmack is a 1/16 of a ⅛ royalty acquired from L. L. McDonald on January 18, 1935. The conveyance was a quitclaim deed, wherein McDonald quitclaimed to appellant all of his interest to oil, gas, and minerals in the tract. Warmack testified that McDonald told him that he owned 1/64 of the oil. The deed denotes the fact that a prior conveyance had been made to a Mrs. Carrie Schavey, one of the appellees and whose royalty rights are presently unquestioned on this appeal.

We think, in disposing of appellant's contention of adverse possession, that the chancellor's reasoning and findings were sound. After stating that Warmack's claim of adverse possession was based on the fact that the Cross Company paid appellant for almost 25 years on the premise that Warmack owned 1/64 rather than 1/128, the court stated:

"There are several intervening defendants in this law suit and Warmack testified that he was not claiming adversely against any of the defendants with royalty interest. In fact, he never explained whose royalty he claims to have held in adverse possession and testified that his controversy was with Cross. The other royalty owners have had actual possession of their royalty interest to which they have good record title. They have been paid for their oil runs and have never claimed anything adversely against Warmack. The proof further showed they had no knowledge of what interest Warmack

was claiming and nothing was ever done by Warmack to indicate he was claiming adversely against any of them. The Court, after giving this matter much consideration, is of the opinion that plaintiff Warmack could not be in adverse possession of any royalty belonging to Cross, because Cross does not have any royalty, and never has had, in this land; and it is further determined and found by the Court that Warmack has acquired nothing by adverse possession against any of the defendants and that the overpayment by defendant Cross to the plaintiff was a mistake by the defendant Cross when making those payments to plaintiff from month to month and that he did not acquire title by adverse possession by reason of such error or mistake.

"The Court has done extensive research and finds no decision in Arkansas covering this matter. The only case I was able to find is *Saunders* v. *Hornsby (Texas CA)* 173 S. W. (2) 795, which was cited by Counsel for the defendant Cross, and the Court is of the opinion the authority of and the reasoning in that case should be accepted here and that Warmack must fail in the instant case for the same reason Saunders failed."[1]

Evidently, appellant emphasized the adverse possession in the lower court since that court did not comment on Warmack's other contention, *viz,* laches and estoppel. Here, this last assertion is rather vigorously argued, but we are of the view that the contention is without merit. Though, during his testimony, Warmack never did state whose royalty he claimed, it finally develops that his asserted interest is in conflict with a group of

[1] In *Saunders,* the court said: "Appellant further contends under these assignments of error that by executing the division order by which the pipe line company was authorized and instructed to pay to him the 7/64 of the ⅛ royalty interest, of which appellee was the record owner, and the receipt and collection by him of that interest constituted an appropriation of a like portion of the oil and gas in place and was sufficient to constitute adverse possession of it. We do not think it can be said that such acts of appellant were, in any sense, an appropriation of that portion of the estate owned by appellee. By executing the division order and collecting the 7/64 of the royalty belonging to appellee, appellant merely converted to his own use the oil and gas that had already been produced by the Gulf Production Company and did not affect that which remained in the ground, which is the subject matter of this case."

appellees termed the "Hobson defendants."[2] Hobson made final disposition of his remaining interest in 1947 to Homer T. Rogers.

It being admitted that these appellees were the holders of the record title, the burden was on appellant to establish his claim. Appellant says that not only was there a delay by appellees of some 25 years in asserting their rights, but that, in addition, two material witnesses have died which has prevented appellant from offering evidence that would support his claim to the royalty. Warmack, in this assertion, is referring to the death of L. L. McDonald, from whom he acquired his interest, and Mrs. Maud Crawford, who handled the title work for Cross in 1935, and upon whose opinion the division order was based. The title opinion to Cross from Mrs. Crawford has been lost, nor could a copy be located in the attorney's files. Appellant says, "Why did not Hobson, Orgain, and Hutchinson make some demand for payment for their royalty for 25 years? Appellees had a full opportunity to answer, but they chose to remain silent." As stated, the burden was upon appellant to overcome the record title held by appellees, and there was nothing to prevent the taking of the depositions of Hobson or other "Hobson defendants," who are still living; nor was there anything to prevent appellant from calling certain of these parties as witnesses for the purpose of ascertaining the cause of their delay in asserting their interest. In fact, one of these defendants, Homer Rogers, was in the courtroom engaging in the trial of the case. There does not appear to be any evidence that these appellees even knew that Warmack had any interest at all; certainly there is no evidence that any of these appellees knew that there was a conflict between the interest of appellant and their own interests, nor that Warmack was actually receiving royalties to which they were entitled. In fact, the court found, "The proof

[2] Homer T. Rogers, Will E. Orgain, D. P. Perkins, Margaret Josephine Hutchinson, Margaret Jean Kuenstler, Bank of the Southwest National Association and D. P. Perkins, Trustees U/W of F. M. Hutchinson, Deceased: Mildred McNellie Castle, Viola McNellie Althause, Lucille McNellie Rowan, and William Benton III.

further showed that they [other royalty holders] had no knowledge of what interest Warmack was claiming * * *." Of course, the "Hobson defendants" could not acquiesce in Warmack's being overpaid, unless they first knew that he was being overpaid. Solely from the standpoint of logic, it would definitely appear that they were without knoweldge of this fact, for it is not human nature that persons, knowing of a right to receive money, will forego that right, and permit a complete stranger to receive it in their stead.

Of course, appellees are not bound because the Cross Company had erroneously made the payments to Warmack. Almost, appellant's argument would seem to boil down to the fact that because appellant has been overpaid for the last 25 years, he should continue to be overpaid.

We find no error in the decree.

Affirmed.

PIGAGE *v.* CHISM.

5-3195 377 S. W. 2d 32

Opinion delivered March 30, 1964.

Brown, Compton & Prewett, for appellant.

Mahony & Yocum, for appellee.

ED. F. MCFADDIN, Associate Justice. The only appellant, E. J. Pigage Jr., is an 11-year-old boy and is

called "Tad." One afternoon in January 1962, while playing with a companion, Tad ran across the road in front of a car being driven by the appellee, Mrs. Chism, and Tad was struck and seriously and painfully injured. By his father, as next friend, Tad sued Mrs. Chism for damages; and Tad's parents each also sought damages because of the injury to the minor and expenses incurred therefrom. The case was tried to a jury; and, among other instructions, the Court, without objection, told the jury:

"If you find from a preponderance of the evidence that Tad Pigage, Junior, was negligent, and that his negligence was the sole and proximate cause of his injuries, or that his negligence contributed to the cause of his injuries, then you are told that the negligence of said plaintiff is attributable to his father and mother, E. J. Pigage, Senior, and Mary E. Pigage, who are also plaintiffs in the case, and that means that negligence on the part of Tad Pigage would be the same as negligence on the part of the father and on the part of the mother, and should be treated as such by you in arriving at your verdict."

The jury returned these three verdicts:

"We the Jury find in favor of the claim of E. J. Pigage, Senior, individually, and assess his recovery in the sum of $2,500.00.

"We, the Jury find in favor of the plaintiff, Mary E. Pigage, individually, and assess her recovery in the sum of $500.00.

"We, the Jury, find in favor of the defendant as to the claim of E. J. (Tad) Pigage, Jr., by and through his next friend, E. J. Pigage, Sr."

Thus the jury refused to allow Tad Pigage Jr. any recovery, but awarded recovery to his mother and father in the amounts stated. The attorneys for Tad Pigage Jr. moved for a mistrial because the verdicts were inconsistent, in that a recovery had been awarded each of the parents and none awarded the boy. The attorneys for Mrs. Chism accepted the verdicts, saying:

"We will accept the verdicts as they are, your Honor. . . . . The Jury has found in favor of the defendant as to the boy . . . Now, standing alone, there is no question about the verdict. Now, if they have found a verdict in favor of the father and the mother in any amount, and the defendant accepts that verdict, then I don't see where the court has any right to declare a mistrial. We are the only ones that could except to that. It is the defendant that could say that the father couldn't recover, or that the moher couldn't recover because the child did not recover, but we are not saying that. We are accepting the verdict, and I don't believe the court has the right, or authority, to set aside the verdict of the jury in favor of the defendant as to the child. If the other two verdicts are erroneous then the people harmed by them are the ones to raise the objection, and we are not raising any. That is our position."

Thereupon, over objections of Tad Pigage Jr., the Court accepted the three verdicts and rendered judgment in accordance with each verdict. Neither of the parents has appealed and each has accepted payment of the judgment awarded; so Tad Pigage Jr. is the sole appellant here and relies on one point, to-wit:

"The Lower Court Erred in Overruling the Plaintiff's Motion For a Mistrial on the Grounds That the Verdicts Were Inconsistent."

It is true that the verdicts are inconsistent in that recovery was refused the principal party (*i.e.,* appellant) but was awarded the secondary parties (*i.e.,* the parents of the appellant); but the appellant can claim no advantage from such inconsistency since there was a definite verdict against him as the principal party. The appellee, Mrs. Chism, if she had so desired, might have urged the matter of the inconsistent verdicts, but the appellant cannot benefit from the inconsistent verdicts under the state of the record before us since he was the primary or principal party and the verdict in his case is the controlling verdict. In 39 Am. Jur. p. 727, in discussing the right of a parent to recover from a third

party for an injury caused by such party to the child, the holdings are summarized:

"Since . . . the parents' cause of action arises out of the injury to the child, an act or omission which would not support an action by the child will not furnish a ground of action by the parent . . . The parent takes his right of action subject to any defense that could be urged against the child in whom the whole cause of action, but for the law, would vest."

The case of *Shiels* v. *Audette,* 119 Conn. 75, 175 A. 323, 94 A.L.R. 1206, was an action by a parent to recover for loss of services and money expended in the care of a minor son who was injured by falling off a truck owned and operated by the defendant; and the Court stated the applicable law in this language:

". . . an essential element of the cause of action vested by law in the parent is that the compensation recoverable by him for expenses flows from a personal injury for which, under the law, the child would be entitled to recover compensation. Proof of that fact is an essential prerequisite to recovery. If the child was not entitled to recover compensation for his injury, there can be no recovery by the parent. 'If the injury occurs under such circumstances as do not give the child a right of action for the personal injury, the father cannot recover.' *Thibeault* v. *Poole* (Mass.), 186 N. E. 632, 635. This principle prevails generally. *Callies* v. *Reliance Laundry Co.,* 188 Wis. 376, 206 N. W. 198, 200, 42 A.L.R. 712; *Tidd* v. *Skinner,* 225 N. Y. 422, 432, 122 N. E. 247, 3 A.L.R. 1145; *Vorrath* v. *Burke,* 63 N. J. Law, 188, 42 A. 838; *Winner* v. *Oakland Tp.,* 158 Pa. 405, 410, 27 A. 1110, 1111; *Wueppesahl* v. *Connecticut Co.,* 87 Conn. 710, 89 A. 166; 46 C.J. p. 1303."

The status of the appellant and the parents, as regards recovery against the appellee, is analogous to the situation of agent and principal, where the agent alone is charged with having committed a tort. When the verdict is in favor of the agent, then the principal is thereby exonerated because the agent is the primary party and

the principal is the secondary party. In *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468, such situation was before us; and here is our holding:

"Now, under the allegations and proof in this record, if there was no negligence on the part of the servants of the appellee Coal Company, which was the proximate cause of the injury to and death of appellant's decedent, and for which none of them were liable, then neither could the appellee Coal Company be held liable. Because, as already stated, there could be no liability of the appellee Coal Company, independent of the acts of its servants which the appellants alleges were the proximate cause of the injury."[1]

In the case at bar, when the jury returned a verdict against the appellant, Tad Pigage Jr., that ended his cause of action. The fact that there was an inconsistency in the secondary verdicts did not give Tad Pigage Jr. any further rights. The defendant accepted the verdicts, and Tad's mother and father have been paid the verdicts awarded them. In asking that the secondary verdicts—in favor of the parents—control over the primary verdict against him, the appellant is, in effect, asking that the "tail wag the dog." Appellant, alone, cannot claim any advantage because of the inconsistency between the primary and the secondary verdicts.

Affirmed.

[1] Attention is here called to *Porter-DeWitt Constr. Co.* v. *Danley,* 221 Ark. 813, 256 S. W. 2d 540; *Citizens Coach Co.* v. *Wright,* 228 Ark. 1143, 313 S. W. 2d 94; and *Davis* v. *Perryman,* 225 Ark. 963, 286 S. W. 2d 844.

LITTLE ROCK TOWEL AND LINEN SUPPLY CO. *v.* INDEPENDENT LINEN SERVICE CO. OF ARK.

5-3202 377 S. W. 2d 34

Opinion delivered March 30, 1964.

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

J. Allen Hanover and *Wayne W. Owen,* for appellee.

George Rose Smith, J. The principal appellant, Jack S. Bew, was formerly the president and general manager of the appellee, a corporation engaged in the linen service business. Bew's contract with Independent Linen provided that during his employment with the company and for a period of five years thereafter he would not be connected directly or indirectly with any other linen service company or with any laundry anywhere within Independent Linen's territory in Arkansas, which included all the state except two small areas in the northwest and southwest corners.

In April of 1963 Bew decided to go in business for himself. To this end he created the other appellants, two

corporations, and in their names bought from Myron Lasker a family laundry business in Little Rock and a companion linen service business that Lasker had operated in conjunction with the laundry. A few weeks later Independent Linen brought this suit, not only to enjoin Bew from engaging in either the laundry business or the linen service business but also to compel him to transfer both his purchases to Independent Linen, on the theory that his conduct had been a violation of his fiduciary duty as an officer of the company. The chancellor entered a decree granting relief to the plaintiff on both grounds and denying Bew's counterclaim for back salary in the sum of $17,000. All three matters are in issue upon this appeal.

First, we are of the opinion that Bew is correct in his insistence that his agreement not to engage in either the laundry business or the linen service business for five years was contrary to public policy and void. A naked contract not to compete with another is against public policy. *Shapard* v. *Lesser,* 127 Ark. 590, 193 S. W. 262, 3 A.L.R. 247. Such an agreement is permissible, however, either in connection with the sale of a going business or, as here, in connection with a contract of employment. Yet even in those instances the restraint is unreasonable and void if it is greater than is required for the protection of the promisee or if it imposes an undue hardship upon the person who is restricted. Rest., Contracts, § 515, which we quoted with approval in *Marshall* v. *Irby,* 203 Ark. 795, 158 S. W. 2d 693. Owing to the possibility that a person may be deprived of his livelihood the courts are less disposed to uphold restraints in contracts of employment than to uphold them in contracts of sale. Williston, Contracts (Rev. Ed.), § 1643; Banks, Covenants Not to Compete, 7 Ark. L. Rev. 35.

The contract before us not only provided Independent Linen with greater protection than it required; it also imposed an undue hardship upon Bew. According to the proof there is a clear-cut distinction between a family laundry and a linen supply service. A family

laundry is engaged principally in laundering clothing and household linen for residential customers. A linen service company deals principally with commercial customers. Such a company owns commercial uniforms, restaurant linen, barber supplies, and the like, which the company rents to its patrons. Its routemen make calls at frequent intervals for the purpose of collecting soiled linen and replacing it with an equal supply of clean linen.

When Independent Linen and Bew executed their agreement the company was engaged in the linen service business, but never in its history had it been engaged in the laundry business. Hence its attempt to restrain Bew from entering the latter field went decidedly farther than the company's protection required. On this point the Restatement of Contracts, § 515, gives this pertinent illustration: "A employs B for five years as manager of a cotton mill. As part of the bargain B promises not to become a manager of a mill of any kind in the city where he is employed by A for three years after the termination of the employment. The restraint is more extensive than is necessary to protect A, and the promise is illegal."

Moreover, the attempted restraint for a period of five years was unnecessarily long and imposed an undue hardship upon Bew. The appellee relies upon *Orkin Exterminating Co.* v. *Murrell,* 212 Ark. 449, 206 S. W. 2d 185, where we upheld an employment contract containing a restraint. There, however, the business involved trade secrets, and the restriction was for only a year. We do not perceive that the linen service business really involves trade secrets. Hence the case at bar is controlled by *McLeod* v. *Meyer,* 237 Ark. 174, 372 S. W. 2d 220, where we held void an employment contract calling for a five-year restraint.

Secondly, the chancellor found that Bew had violated his fiduciary duty toward Independent Linen in purchasing the two businesses from Lasker. The decree in effect substituted Independent Linen for Bew as the purchaser of the Lasker enterprises. Bew was directed to transfer

the assets of those businesses to Independent Linen, and the latter was directed to reimburse Bew for the amount of his payments to Lasker.

In charging a breach of trust the appellee contends that Bew purchased the Lasker properties for himself at a time when he knew that his own employers were negotiating with Lasker for the same purpose. Bew insists that his employers had already lost interest in the Lasker properties before he took any step to acquire them. This issue involves a question of fact upon which we think the chancellor's decision to be contrary to the weight of the evidence.

We narrate only the salient points disclosed by a large record. Bew came to Little Rock in 1955 as executive vice-president and general manager of Independent Linen. That company was then a subsidiary of Memphis Steam Laundry, Inc. In November of 1962 Moe Pear and his associates organized All State Linen Service, Inc., and purchased all the stock of Memphis Steam. Thus Independent Linen became a subsidiary of All State.

Early in 1963 Lasker decided to sell his enterprises. He requested a Memphis attorney, Herbert Glazer, to see if Memphis Steam might be interested in the purchase. Glazer took the matter up with J. Allen Hanover, who was the attorney for Pear and his company, All State. Pear and his associates were interested and had two conferences with Glazer. They learned that Lasker owned a building in which he operated a family laundry as his main business and a comparatively small linen supply service. We think it a fair inference from the record that the Pear group were interested only in the latter.

Pear or some other officer of All State instructed Bew to inspect the Lasker plant. Bew did so and made a report which, as far as the record discloses, was entirely accurate. The appellee argues that the report may have been inaccurate and professes to have no knowledge about the true condition of the Lasker property. We find

it impossible to believe that the appellee filed a complaint seeking to take over Bew's contract without having first satisfied itself that the purchase was advantageous.

Bew was next instructed to see if Lasker would sell the linen supply business to Independent Linen and the rest of his holdings to others. This proposal was completely unacceptable to Lasker, who was determined to protect his employees by selling his holdings as a unit. Bew reported this fact to his employers, and in our opinion they had no further interest in the Lasker property. Charles Pear, one of the owners of All State, admitted on the witness stand that he had told Bew that if his report was correct he and his associates did not want to buy the laundry. There is no indication that Bew's report was not correct. Lasker and his local attorney both testified that they talked to Glazer by telephone and were informed that "the deal was dead." Lasker also stated positively that Bew did not approach him about buying the property for himself until "the Memphis deal . . . was dead." Furthermore, when Bew went to Memphis to inform Pear and another officer of All State of his purchase their only protest was that he was under contract not to enter a competing business. If they were really still actively negotiating for the Lasker property that fact would surely have been mentioned at once.

In insisting that there was a breach of a fiduciary duty the appellee relies strongly upon *Raines* v. *Toney,* 228 Ark. 1170, 313 S. W. 2d 802. That case bears little resemblance to this one, for there the corporate officer undermined his own company by acquiring one of its general agency contracts for himself. This language in that opinion is really applicable here: "This doctrine of 'corporate opportunity' is but one phase of the rule of undivided duty and loyalty on the part of corporate fiduciaries. It does not preclude a corporate fiduciary from engaging in a distinct enterprise of the same general class of business as that which his corporation is engaged [in], so long as he acts in good faith." We are not persuaded by the weight of the testimony that Bew acted in bad faith.

Furthermore, we are not at all convinced that the proper parties are before us. Lasker, who sold his business largely on credit, may well have an objection to the substitution of a new purchaser, especially as the contract provided for Lasker's employment as a consultant for seven years. Yet Lasker is not a party to the case. Indeed, there is reason to doubt if Independent Linen is the right plaintiff. There is almost no indication in the proof that it was ever intended that this particular subsidiary would purchase the Lasker properties. Bew mentioned only the proposal that Independent Linen buy the linen supply business. Charles Pear testified that he asked Bew whether he thought the Lasker property should be purchased "by All State," and whether Bew thought it would be a good purchase "for All State." Moe Pear and his associates were officers of the parent company. Their testimony relates only in general terms to their efforts to acquire the Lasker holdings. Yet Independent Linen is the sole plaintiff. Whether Bew may have violated a duty toward All State or toward the Pear group is not an issue in the case at bar. There is almost a complete absence of proof that he disregarded any obligation owed to Independent Linen, for that company is not shown to have been interested in the Lasker properties.

Thirdly, Bew filed a counterclaim for the recovery of back salary in the sum of $17,000. Prior to the fiscal year ending May 1, 1962, Bew's income as manager of of Independent Linen had averaged about $35,000 a year, reaching a peak of $48,400 in the last of the years mentioned. His contract of employment recited that his compensation would be fixed by mutual agreement. At the beginning of the 1962-1963 fiscal year the directors of Memphis Steam adopted a resolution setting his salary at $12,000 a year, plus five per cent of the profits. It was expected that under this resolution Bew's income would be about $35,000.

All State bought Memphis Steam in November of that year. On or about January 1, 1963, the directors of All State notified Bew that thenceforth he would be paid

a fixed salary of $20,000 a year, with no share in the profits. Bew insists that he did not agree to this arrangement, but the record simply does not support his contention. He continued to work for the company for three more months, accepting compensation at the new rate. There is no proof whatever of the amount of profits he might have received had the first resolution not been rescinded. In the circumstances he must be regarded as having acquiesced in the directors' decision to reduce his compensation to $20,000 annually.

The decree is reversed, and both the complaint and the counterclaim are dismissed for want of equity.

McFaddin, J., concurs; Ward, J., dissents.

Paul Ward, Associate Justice (dissenting). My dissent goes only to the second part of the majority opinion which deals with Bew's fiduciary relation as an agent of his employers.

The majority correctly state the issue "involves a question of fact." I cannot agree, however, with the majority that the chancellor's decision is contrary to the weight of the evidence. In this connection it is not necessary to cite cases sustaining the well established rule that in close questions of fact we do not disturb the findings of the chancellor. The rule is based on common sense and the obvious fact that the chancellor, who sees the witness, can judge his sincerity better than we who only see the printed words.

Apparently the majority rely heavily on the fact that Pear admitted he told Bew that if his report was correct Pear and his associates did not want to buy the laundry. The record reveals, however, that Bew gave Pear no time to see "if his report was correct" before he started negotiations in his own behalf. Bew is bound to have known he was obligated to people other than Pear, but he did not even take the pains to report to them. Consider also the following:

(a) Pear (at page 211 of the record) testified:

"He [Bew] also stated to me with the exception of a new boiler he did not have a piece of equipment in his plant I would have. I did say 'Jack, if we look into it and find everything you say is right and not worth looking into, we would not want it'."

(b) Guy Raby, President of the Memphis Steam Laundry, who, with Pear, instructed Bew to look over the Lasker businesses, testified (page 160-161 of the record) that Bew reported Lasker wanted a package deal.

"Q. Was that report that he gave you and Mr. Pear, was it favorable or unfavorable?

"A. Well at that time it did not sound too favorable.

"Q. What did you tell Mr. Bew at that time, to quit, cut off the negotiations?

"A. No we did not tell Mr. Bew that we were not interested because neither Mr. Pear or I were in position to give him such instructions. We had not had an opportunity to take it up with the Executive Committee or other officers of the corporations. So far as we knew negotiations were still in effect."

(c) Mr. Pear (page 210 of the record) stated he did not tell Bew the deal was off, and (on page 212 of the record) he said, "No, I did not break off negotiations."

It appears to me that the majority, in concluding the chancellor found against the weight of the evidence, failed to recognize the source of the testimony relied on to show "the deal was dead" when Bew started negotiations to buy from Lasker. It should be kept in mind that Lasker and his attorney only knew what Bew chose to tell them, and also that Glazer, who was Lasker's own agent, did not see fit to take the stand. Thus, we have Bew extricating himself from a tricky situation by his own "bootstraps."

As I read the record Bew fabricated a series of incidents and relied on them in an effort to escape the fiduciary duty imposed on him by law which is clearly and uniformly announced in many of our own decisions.

In *Raines* v. *Toney,* 228 Ark. 1170, 313 S. W. 2d 802, it was said:

"The law imposes a high standard of conduct upon an officer or director of a corporation, predicated upon the fact that he has voluntarily accepted a position of trust and has assumed the control of property of others."

In *Yahraus* v. *Continental Oil Co.,* 218 Ark. 872, 239 S. W. 2d 594, the Court had this to say (quoting from 2 Am. Jur. *Agency* § 252, pp. 203-204):

" 'It is well settled that an agent is a fiduciary with respect to the matters within the scope of his agency. The very relation implies that the principal has reposed some trust or confidence in the agent. Therefore, the agent or employee is bound to the exercise of the utmost good faith and loyalty toward his principal or employer. He is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition thereto. His duty is to act solely for the benefit of the principal in all matters connected with his agency. This is a rule of common sense and honesty as well as of law.' "

In *Collins* v. *Heilman,* 225 Ark. 666, 284 S. W. 2d 628, we find:

"We have often stated that an agent, regardless of how innocent his intentions may be, cannot place himself in a situation where personal interests conflict with the duties owed his principal."

In *McHaney* v. *McHaney,* 209 Ark. 337, 190 S. W. 2d 450, there appears this statement (from *Walthour* v. *Pratt,* 173 Ark. 617, 292 S. W. 1017):

" 'Everyone, whether designated agent, trustee, servant or what not, who is under contract or other legal obligation to represent or act for another in any particular business or line of business, or for any valuable purpose, must be loyal and faithful to the interest of such other in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it.' "

See also to the same effect *Dudney* v. *Wilson,* 180 Ark. 416, 21 S. W. 2d 615, and *Walthour* v. *Pratt, supra.*

I would, therefore, affirm the trial judge on the point discussed.

ED. F. MCFADDIN, Associate Justice (concurring). I concur in the result reached by the Majority, but through a process of reasoning slightly different from that shown in the Majority Opinion.

I agree with the Majority on the first point of the Opinion: Mr. Bew's agreement not to engage in the laundry business or linen service for five years was too broad and was therefore void as contrary to public policy.

I disagree with the Majority's reasoning on the second point. I cannot say that the finding of the Chancellor is contrary to the preponderance of the evidence. As I see it, Mr. Bew had no right to purchase the Lasker business for himself at the time he was in the employ of the appellee. I agree with most of the Dissenting Opinion of Judge Ward on this point.

But even while disagreeing from the Majority's reasoning on the second point, I nevertheless reach the same conclusion the Majority has reached; because, as I see it, the appellee is not entitled to take over Bew's contract of purchase from Lasker. Several points are involved here. When Mr. Bew's corporations acquired the Lasker interests one of the integral and governing provisions of that contract was that Bew's corporations would employ Myron B. Lasker for a period of seven years at $6,500.00 a year. Lasker agreed to work for Bew's corporations, not for the appellee; and Lasker could not be forced to work for the appellee. Specific performance will not be granted on an executory contract to do work. *Leonard* v. *Board of Directors,* 79 Ark. 42, 94 S. W. 922. See also 49 Am. Jur. p. 157. Furthermore, Myron B. Lasker was not even a party to the record in this case Appellee might have been entitled to damages against Bew, but appellee is not entitled to an assign-

ment of the contract of sale. Appellee proved no damages, so wins a mere pyrrhic victory on this point.

As to the third point, I agree with the Majority that no damages were proved by Bew.

So I concur in the result reached by the Majority, but still maintain that Mr. Bew should not have dealt with Lasker while Bew was in the employ of the appellee.

RICHARDS *v.* NESBITT.

5-3217 377 S. W. 2d 40

Opinion delivered March 30, 1964.

John F. Park, for appellant.

J. Roy Howard and *James R. Howard,* for appellee.

SAM ROBINSON, Associate Justice. This litigation involves the adoption of two children. The appellant, Jo Ann Richards, formerly Jo Ann Nesbitt, is the mother; Donald E. Nesbitt, one of the appellees, is the father. On August 8, 1962, the Probate Court of Pulaski County, First Division, acting on authority of Ark. Stat. Ann. § 56-106 (1947), appointed Ruth Johnston, Director of Child Welfare for the State of Arkansas, as guardian of

the children, with full authority to consent to adoption without notice to or consent of the natural parents.

On October 9, 1962, Mr. and Mrs. C. R. Nesbitt, parents of Donald E. Nesbitt, father of the children, filed a petition in the Pulaski Probate Court asking that the order authorizing the adoption be set aside and that they be granted custody of the children. The natural mother, Jo Ann, filed a response resisting the petition. Miss Johnston, guardian of the children, did likewise. Seven months later, on May 23, 1963, Donald Nesbitt filed a petition concurring in the petition previously filed by his parents.

On August 8, 1963, one year after the date of the original order appointing the guardian and giving her authority to consent to adoption, the probate court granted the petition to set aside the order authorizing the adoption. The natural mother, Jo Ann Richards, and Miss Johnston, the guardian, have appealed.

In cases, involving custody of children, we have held repeatedly that the interest of the child is the first thing to be considered. *Carr* v. *Hall,* 235 Ark. 874, 363 S. W. 2d 223; *Benson* v. *Benson,* 237 Ark. 234, 372 S. W. 2d 263. Here, the custody of the children is involved; they have been placed with people who are seeking to adopt them. Appellees are endeavoring to prevent the adoption.

To avoid confusion with regard to appellee, Donald Nesbitt, father of the children, and his parents, appellees, Mr. and Mrs. C. R. Nesbitt, we will refer to the father of the children as Donald, and refer to appellant, Jo Ann Richards, the natural mother, as Jo Ann.

Donald and Jo Ann were divorced in 1960. Jo Ann was awarded custody of the children, and Donald was ordered to pay $100.00 per month as child support. It appears that for about four months following the divorce he paid nothing. Finally, Jo Ann was permitted to move with the two children into an apartment owned by Donald's mother, Mrs. C. R. Nesbitt. Jo Ann was not charged any rent, but neither did Donald pay the $100.00 per

month support for the children. The arrangement really amounted to Jo Ann paying Mrs. Nesbitt $100.00 per month rent for the apartment, which appears to be mighty high rent considering that Jo Ann worked five days a week to support herself and the children.

In the meantime, Donald married again, his new wife having three children, and after her two children were placed for adoption, Jo Ann married again.

Along about April, 1962, Jo Ann's situation became desperate; she was in poor health and had to undergo surgery. Her doctor advised her to rest as much as possible.

The United Fund of Little Rock, a charitable organization, maintains what is known as a Family Service Agency. One of the functions of the Agency is to counsel with and assist people in Jo Ann's predicament. In April, 1962, Jo Ann went to the Family Service Agency for help. As a result, Mrs. Dick, an employee of the Agency, got in touch with Donald. He came in and discussed the matter, promising to return; however, he did not return, and the Agency could not find him until the following July.

In an effort to relieve Jo Ann's condition as much as possible and give her a little rest, the Agency placed the children in a foster home for one week. During this time Jo Ann and Miss Nellie Reed of the Agency were discussing and considering some kind of permanent arrangement that would be for the best interest of the children. As heretofore mentioned, Donald could not be located.

About the first of June the children were again temporarily placed in a foster home. Finally it was decided that the children should be adopted by a good family who would love and care for them, and rear them in a proper manner. With this end in view, the matter was taken up with Ruth Johnston, Director of the Child Welfare Division of the State Department of Public Welfare. Miss Johnston agreed that the children should

be adopted and knew people who would love to have them and who met all the requirements of the State Welfare Department to qualify as adopting parents.

Miss Reed finally got in touch with Donald and presented the plan to him. He agreed that Miss Johnston be appointed guardian and agreed to the adoption. The agreement was in writing, subscribed and sworn to before a notary public. Donald's consent, however, was not necessary because the adoption was under paragraph 4 of Ark. Stat. Ann. § 56-106 (1947).

Miss Johnston filed a petition in probate court asking that she be appointed guardian with authority to consent to the adoption. Among other things, the petition alleges: "Appointment of a guardian is sought because the parents of said children are unfit to properly care for the children and will not be able to care for said children. That said children are entitled to the love and affection of a normal Arkansas home. The Child Welfare Division has a home to place the children where the children will receive the finest care, love and affection." The petition was granted. The children were placed for adoption with a family living in some county other than Pulaski, and adoption proceedings were instituted in that county.

A year later, the Probate Court of Pulaski County set aside the order authorizing Miss Johnston, the guardian, to consent to the adoption. As heretofore mentioned, the natural mother, Jo Ann, and the guardian have appealed.

The probate court set aside the order authorizing the adoption principally on Donald's testimony that he gave his consent to the adoption in the first place because he thought he would go to jail for contempt of court because of his failure to abide by the court's order to pay monthly support for the children. The answer to that contention, however, is that his consent was not necessary in the first instance, and the order of the probate court so provides. The order states: "IT IS THEREFORE CONSIDERED, ORDERED AND AD-

JUDGED THAT said Ruth Johnston, Director of Child Welfare, be and hereby [of the two minor children, Kimberly Dawn and Donald Mark Nesbitt] is appointed guardian of the person and estate with full right and authority to consent to adoption, without notice to or consent of the Natural Parent, or Parents; . . ."

Moreover, Donald does not now say that he can or will support the children if the adoption is blocked. In fact, he does not want the children. He testified that they would be a burden to him; he would depend on his parents to support and rear the children. There is no showing that his parents are suitable for that purpose. Furthermore, it does not appear that Jo Ann, who knows Donald's parents, would consent to them having custody of the children, and there is nothing to indicate that the court would take the children away from Jo Ann without her consent. Donald and his parents gave Jo Ann insufficient help, if any at all, when she was in dire need of it. She consented to the adoption because in her opinion, and in the opinion of Miss Reed and Miss Johnston, it was the best thing for the children.

Appellees rely to a large extent on the case of *Combs* v. *Edminston*, 216 Ark. 270, 225 S. W. 2d 26. There, a young unwed mother had given consent to the adoption of the baby on the night the baby was born and was allowed to withdraw such consent before the entry of an interlocutory order. And in *Martin* v. *Ford*, 224 Ark. 993, 277 S. W. 2d 842, it is pointed out that consent may be withdrawn before the making of an interlocutory order. But those cases are not in point with the case at bar even though no interlocutory order of adoption had been entered in the county where that proceeding was pending until after the commencement of this action.

In the two above mentioned cases, no condition existed whereby, under the provisions of the statute, the consent of the parents could be dispensed with. Not so in the case at bar. Here, the adoption is controlled by paragraph 4 of Ark. Stat. Ann. § 56-106 (1947), which provides that the consent of the parents is not necessary where: "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." In the case at bar, a guardian of the children had been appointed by order of the probate court and the guardian had been given authority to consent to the adoption without notice to or consent of the children's natural parents; therefore, under the provisions of the statute, Donald's consent was wholly unnecessary.

In the original order it is stated that it is to the best interest of the children that the Director of Child Welfare be appointed guardian with power to consent to adoption. The evidence fully bears out that finding, and the court was in error in setting aside the order giving the guardian authority to consent to the adoption.

Reversed with directions to enter a judgment not inconsistent herewith.

WARD, J., dissents.

HOLT, J., not participating.

PAUL WARD, Associate Justice (dissenting). My dissent is based on the points or issues hereafter set out.

One. The second paragraph on page 2 of the typewritten opinion indicates to me the majority consider this to be a child custody case. The two cases cited, as showing that "the interest of the child is the first thing to be considered," are chancery cases, while the case here is appealed from the probate court. This is not a custody case, and the trial court so held, stating: The probate court "has no jurisdiction to act upon the custody of the children involved herein." Yet, on page 4 of the opinion, the majority again state: "But, as we heretofore pointed out, the first consideration is the welfare of the children." It goes without argument that the welfare of the children will be the prime issue when the matter of adoption is considered in the chancery court. Hence, it appears to me the majority are relying heavily

(if not exclusively) on something that is not even an issue in this case.

Two. In my opinion, only one issue is presented by this appeal, and that issue involves purely a legal question—can a parent, who has consented (in writing) to the adoption of his child, arbitrarily revoke such consent before a preliminary or interlocutory order of adoption has been entered in a chancery court?

First, it should be pointed out that there are two ways in which a parent may give his consent for adoption. (a) One, the parent gives his written verified consent for a person (known to him) to adopt his child—as set out in Ark. Stat. Ann. § 56-106 (1947). (b) The other (as here), the parent consents for the probate court to appoint a guardian for his child with "authority to consent to adoption . . ." to some person unknown to him. See § 56-106 (IV).

In the case under consideration we are dealing with situation (b) only. Naturally, if the probate order appealed from is affirmed (that is, if the father is allowed to withdraw his consent) then the adoption proceeding (in an unnamed county, in chancery court) must fail. The majority appear to fail to understand that the father has not *consented to the adoption of his children but has only consented to have Miss Johnston appointed guardian* (with power to consent).

My first position is that the father is no more firmly bound in one instance than the other. Certainly the majority has not proven (or even contended) otherwise. My second position is we have already clearly indicated that (before an interlocutory order of adoption has been entered in chancery court) the parent can *arbitrarily* withdraw his consent. It was so held in *Combs* v. *Edmiston,* 216 Ark. 270, 225 S. W. 2d 26, and in *Martin* v. *Ford,* 224 Ark. 993, 277 S. W. 2d 842.

It is true that the Probate Court had authority to take Donald's children away from him and appoint Miss Johnston guardian (with power to consent to adoption)

without his consent. In such case, however, it was necessary to have a trial at which Donald was present or of which he had notice. In the case under consideration no such trial was held. Miss Johnston filed her petition on August 8, 1962 and the order (appointing her) was signed the same day. If a trial was held (which is not shown) Donald had no notice. The same judge who made the order later set it aside and I believe he knew more about the facts and merits of the case than this Court could possibly know.

NIX *v.* ORMOND.

5-3215 377 S. W. 2d 11

Opinion delivered March 30, 1964.

John B. Driver, for appellant.

Opie Rogers, N. J. Henley, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from a suit in ejectment filed by appellees, Hallie C. Ormond and Jeanne C. Ormond, his wife, against appellants Leatrice R. Nix and Virgil Lane in Van Buren Circuit Court on January 3, 1963. Appellees alleged that they are owners of certain property in Van Buren County, which was described and their title deraigned from the State, and alleged that appellants were in unlawful possession of the lands, using them for pasture and other purposes and prayed judgment for the recov-

ery of their property and damages for the unlawful possession and detention of the land in the sum of $1,000.00. Appellant Lane demurred, alleging that he was merely the agent, servant and employee of appellant Nix and prayed for dismissal of the complaint as to him. Appellant Nix answered, alleging that she had first and paramount right of possession and ownership of the property under a purchase contract of November 1957 with W. C. and Mary Jenkins (appellees' predecessors in title). She cross-complained against appellees and named the Jenkins and C. W. Scarsdale as defendants in the cross-complaint, prayed that the purchase contract with the Jenkins be specifically enforced, that the subsequent deeds from Jenkins to Ormond to Scarsdale and back to Ormond be cancelled and set aside as a cloud on appellant Nix's title, and finally prayed damages against appellees for use of the land and hay and timber cut in the sum of $3,500.00.

Appellees and the cross-defendants demurred to the cross-complaint on the grounds, *inter alia*, that (1) the cross-complaint shows on its face that the alleged purchase contract was dated October 23, 1957, and the last correspondence relating to it was dated November 7, 1957, that the cross-complaint was filed on February 8, 1963, which was more than five years after the contract was made and more than five years after the last correspondence relating to it was had; (2) that the cross-complaint shows on its face that the Jenkins had an option to return a $300.00 earnest money payment or to do such curative work as might be recommended by the title examiner and that the Jenkins exercised their option to refund the $300.00, and appellant Nix accepted the return of the $300.00, which constituted a waiver of any rights under the contract; and (3) that never having asked or insisted on performance of the purchase contract, appellant is now estopped from claiming any right under the contract. The trial court sustained this demurrer, dismissed the cross-complaint against the Jenkins and Scarsdale and found that the issues in the case were then based on appellees' complaint and appellant

Nix's general denial. The trial court sitting as a jury heard the testimony of the parties and their witnesses and found appellees to be the owners of the lands described in their complaint, that appellants admitted that appellees own all of this land except a small portion lying between an old slough and the present channel of the Red River consisting of approximately five acres, that appellees are the owners of the five acres and that the present channel of the Red River was the boundary of appellees' land, that appellants failed to show by evidence any title or right of possession of any of the lands and should be ejected, and that appellees' prayer for damages should be denied. From such judgment appellants have appealed, urging, first, that the trial court erred in sustaining the demurrers to the cross-complaint and in finding that appellant Nix failed to allege sufficient fraud to toll the statute of limitations.

Appellant Nix's cross-complaint alleges that:

"1. . . . [Appellant] Nix and defendants W. C. Jenkins and Mary Jenkins on October 23, 1957, made and entered into a written contract whereby [the] Jenkins agreed to sell lands described in complaint . . . for $2,500.00. Copy of said contract is attached hereto marked Exhibit "A" . . .

"2. Cross plaintiff executed and delivered to W. C. and Mary Jenkins her check to said lands in the sum of $300.00 under the terms of said contract. That cross defendants W. C. and Mary Jenkins caused to be prepared and delivered to cross plaintiffs attorney for examination an abstract of title under the terms of said contract. October 30, 1957, the attorney's written opinion on title was handed down delivered to cross plaintiff with a copy to cross defendants, Jenkins. Certain curative measures, of minor character, were requested in said opinion on said date and the cross defendants, in an effort to evade performance of the contract and to defraud the cross plaintiff and in deliberate breach of said contract, by quitclaim deed conveyed said lands to cross defendants, Hallie C. Ormond on November 4, 1957.

"On November 5, 1957, cross defendants W. C. Jenkins and Mary Jenkins employed services of counsel who notified cross plaintiff that they did not desire to execute a deed required in the contract and said counsel returned in his letter to the cross plaintiff the aforesaid $300.00 check.

"Letter containing cross defendants refusal to take curative measures and check was not received by cross plaintiff until November 7, 1957, on which date cross defendants, Hallie C. and Jeanne M. Ormond conveyed said land by quitclaim deed to C. W. Scarsdale.

"C. W. Scarsdale on June 6, 1960 conveyed by quitclaim deed said lands to Hallie C. Ormond.

"3. Cross plaintiff has only recently discovered that cross defendants Hallie C. Ormond and Jeanne M. Ormond are related to cross defendant C. W. Scarsdale and wife and they are and were at all times herein referred to joint venturers in various business activities in various phases of timber and lumbering business. After conveying said lands by quitclaim deed to cross defendants Scarsdale, Hallie C. Ormond, his agent, servants, and/or employees cut the timber from said lands and sold a portion of it to Scarsdale, and in fact cross plaintiff now discovers that defendants in cross complaint H. C. Ormond and his wife have never relinquished possession, dominion and control over said lands to any persons during the period of time from November 4, 1957 to the date of the filing of this complaint.

"4. The aforesaid course of conduct by all of the cross defendants was had and done with a deliberate intent and design to cheat, hinder, and defraud cross plaintiff and to prevent her acquiring title to said property by proper conveyance from cross defendants, Jenkins, and in the enforcement of the terms of her written contract with cross defendants, Jenkins . . ."

The purchase contract attached to the cross-complaint and marked "Exhibit A" contains the following paragraph:

"First party [Jenkins] covenants and agrees to and with Second Party [appellant Nix] that they will, at their own expense, furnish to attorney for second party an abstract of title to the above described lands for the examination of said attorney; and in the event title is not approved by said attorney, they will pay back the $300.00 paid herewith, and/or will take such curative measures as are recommended by said attorney to be in a position of conveying to second party a good and merchantable and marketable title to said lands."

The Jenkins clearly had an option to refund the $300.00 deposit or do the curative title work requested. If appellant Nix considered their election to refund the deposit and thus cancel the contract was improper or premature, the burden was on her to demand performance of the contract. More than five years has passed, so that appellant's cross-complaint is clearly barred by the statute of limitations unless tolled by fraudulent concealment. Reviewing the pleadings quoted above, there are simply not enough facts set out to sustain, or even to really raise, the assertion of fraudulent concealment of a cause of action from appellant. As stated in *Williams* v. *Purdy,* 223 Ark. 275, 265 S. W. 2d 534, which see: "There are no allegations of such affirmative and positive acts of fraudulent concealment on their part as to toll the running of the statute of limitations nor is the fraud alleged of such character as necessarily implies concealment."

Appellants' second point urged for reversal is that the trial court erred in rendering judgment in ejectment in behalf of appellees.

The boundary line of the five acres in dispute is described as "all that part of the N½ of the NE¼ of Section 16 . . . that lies North of Red River, *said River being the line,* . . ." [Emphasis ours.] Appellant Nix (whose property joins appellees' property on the south) tried to prove that when the original government survey of the property was made prior to 1830, the old slough was then the channel of the Red River, that in 1956 when

she had the property surveyed she had instructed the surveyor to use the old government field notes for the survey, that the then owner (Jenkins) was present during the survey, accepted the old slough as his boundary line instead of the present channel of the Red River (all of which Jenkins denied), and thus the five acres was a part of appellant Nix's property. The government field notes were not in evidence, apparently the testimony of the surveyor was not available and no evidence was introduced indicating that this section of the Red River ever flowed anywhere but in its present channel. The trial court sitting as a jury heard all the evidence and testimony and found as a fact that the present channel of the Red River is the boundary of appellees' land. Upon review of the whole case we cannot say that there is no substantial evidence to support the judgment.

Affirmed.

JOHNSON *v.* JAMES.

5-3218 377 S. W. 2d 44

Opinion delivered March 30, 1964.

Wayne Foster, Russell & Hurley, for appellant.

J. Roy Howard and *James R. Howard,* for appellee.

FRANK HOLT, Associate Justice. This case involves a dispute among relatives as co-tenants. It was precipitated when eminent domain proceedings were instituted against the appellants and appellee as the sole heirs at law of Cato Johnson in order to acquire the title to Lots 4, 5, 6 and 7, Block 1, Military Heights Addition, North Little Rock, Arkansas. The appellee, Cato James, by cross complaint against his relatives, the appellants, sought to establish in himself the sole and absolute title to the lots. The appellants, Horace Johnson, Jr., Effie Johnson, Julius James and Dink James, his wife, responded by appropriate pleadings. The cross complaint also named other relatives, Charles Johnson and Essie, his wife, and Geneva James each of whom defaulted. The Chancellor found the issues in favor of appellee upon his cross complaint and decreed that the title to the lots in question be vested in him by adverse possession and, further, that as the sole and absolute owner he was entitled to the funds representing the value of the property acquired by the eminent domain proceedings. From such decree the appellants bring this appeal and for reversal contend that appellee's "claim was not unequivocally hostile" to the extent "notice of an adverse claim would be presumed" to exist for "more than seven years prior to the commencement of this action." In other words, appellants question the sufficiency of the evidence to vest the title in appellee by adverse possession.

When appellees' and appellants' common ancestor, Cato Johnson, died in 1925 the appellee was living with him on the property in question. He has continued to

live on this property from that time until it was acquired by the eminent domain proceedings in 1961. During this time appellee has had the sole and exclusive possession of the four-room dwelling situated in the middle of the four lots which were fenced. Appellee testified that he expended approximately $1,500.00 improving the property by adding a bedroom and installing plumbing facilities, mortgaging the property in order to do so. The appellee has paid all taxes on the property, rented part of the property and retained the rent, and paid for the insurance. It is undisputed that when Cato Johnson died in 1925 he left a will which is in evidence without objection. By the terms of this unprobated will the property in question was devised absolutely to the appellee. It reads, in pertinent part, as follows:

"*First:* I devise to my grandson, Cato James, my home place in Military Heights, North Little Rock, Arkansas, consisting of four twenty-five foot lots and buildings thereon, at No. 306 West 27th Street."

The will also provided that "I am not forgetting my grandchildren, Horace Johnson, Cato Johnson, Jr., * * * and Julius James."

Appellee testified that his grandfather, the testator, had shown him the will stating "now nobody can do you no harm." Appellee kept the will in his possession. He testified: "I told all the family about the will" and "the whole family knowed it," including the appellants. His aunt, Essie Johnson, corroborated appellee's testimony that the existence of the will was known. However, she considered that appellee's interest was limited to a life estate. Appellant Horace Johnson, Jr., contended he never knew a will existed. He admitted that he lived in the vicinity and knew of appellee's exclusive occupancy for the thirty-six years. Appellant Effie Johnson, widow of the grandson, Cato Johnson, Jr., did not testify although it appears she is a resident of the community. Appellant Julius James, who has for many years resided in Tennessee, testified that he knew about the will and understood that it provided for appellee to have a "life-

time will on the place." He knew of appellee's exclusive occupancy for the thirty-six years and was an annual visitor, often spending the night with his brother, the appellee. Appellee also testified that he understood that by the will his grandfather "gave it [the property] to me, just gave it to me."

It is well settled that possession by a tenant in common is presumed to be possession by all cotenants and where a family relationship exists, then stronger and more cogent evidence of adverse possession or hostile acts of ownership are required than where no such relationship exists. *Staggs* v. *Story,* 220 Ark. 823, 250 S. W. 2d 125; *McGuire* v. *Wallis,* 231 Ark. 506, 330 S. W. 2d 714. We have also held that knowledge of adverse possession must be made known to other cotenants directly or by notorious acts of such an unequivocal character that notice may be presumed and, further, that acts of possession, payment of taxes, enjoyment of rents and profits, and the making of improvements are consistent with a cotenancy and do not necessarily amount to disseizin. *McGuire* v. *Wallis, supra; Griffin* v. *Solomon,* 235 Ark. 909, 362 S. W. 2d 707; *Hardin* v. *Tucker,* 176 Ark. 225, 3 S. W. 2d 11. However, we have held that when the acts of ownership of a cotenant are of such a notorious nature as to amount to a declaration of hostility to other cotenants for more than seven years, that title by adverse possession is vested in the occupant. *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96; *Hildreth* v. *Hildreth,* 210 Ark. 342, 196 S. W. 2d 353; *Singer* v. *Naran,* 99 Ark. 446, 138 S. W. 958.

In the case at bar the appellee has lived on and had sole and exclusive possession of the property in question for thirty-six years exercising such acts of ownership as payment of taxes, enjoyment of rents and profits, payment of insurance made payable to him, together with possession of an unprobated will giving him the property. According to appellee the appellants had direct knowledge of the will. Until this property was acquired by eminent domain proceedings the appellants never asserted any claim to the property. When we consider

these factors in the aggregate we are convinced that title to the property in question was vested in the appellee by adverse possession for more than the required statutory period of seven years. Individuals ordinarily do not slumber so undisturbed upon their property rights for thirty-six years under these circumstances.

We find no merit in any of appellants' contentions.

Affirmed.

JOHNSON, J., dissents.

5-3249 377 S. W. 2d 165

Opinion delivered April 6, 1964.

Mark E. Woolsey and *Bill B. Demmer,* for appellant.

Hall, Purcell & Boswell, for appellee.

CARLETON HARRIS, Chief Justice. This is a condemnation case. Pursuant to filing its Declaration of Taking, the Arkansas Highway Commission condemned and took possession of 0.09 acres of land belonging to C. D. Byrd and wife. On September 10, 1963, a jury was impanelled for the purpose of hearing evidence and determining the amount of compensation to which Mr. Byrd and his wife were entitled because of the taking and damage to their land. The jury returned a verdict in the amount of $7,000, and from such judgment comes this appeal.

For reversal, the Highway Commission relies upon two points, but it is only necessary that we discuss the first point, since we are of the view that the court committed error in permitting certain testimony. The evidence offered by appellees consisted of the testimony of Mr. and Mrs. Byrd. The Byrds had operated a restau-

rant for several years before the condemnation proceedings. They operated in one building for about four years, and then built a new building back of the old one, tearing down the older structure in order to have space for a parking lot.[1] In testifying, Mr. Byrd stated that a little better than half of his parking area was condemned.[2] In mentioning various factors which were taken into consideration in reaching his determination of the before (condemnation) and after (condemnation) value, Mr. Byrd's testimony reveals the following:

"Q. Ted, how many years did you operate out there in this old building?

A. Oh, I would say approximately four years or better.

Q. Did you include that forty-two hundred dollars in expenses that you were out when you tore down the old building in your estimate of before and after value?

A. Well, I estimated the building of the building and the tearing down and disposing of it—of what it cost to build it and dispose of it.

Mr. Stanley: At this time we move to strike the testimony of this witness with reference to the before and afer value for the reason he stated he included forty-two hundred dollars it cost him to destroy an old building prior to the time he constructed the building now in question.

The Court: Will you read back the question and answer?

Mr. Stanley: I'll restate the question.

The Court: If you would.

Q. Ted, in arriving at the before and after value —there's been some testimony that it cost forty-two hundred dollars to tear down the old building and build your new building—I believe it was forty-two hundred dollars—

[1] The Byrds also had their home located on the premises, a little back and north of the new building.

[2] A strip, approximately 38 feet wide across the front was taken.

A. Yes, sir.

Q. Now, my question was did you include that in arriving at your before and after value in your claim for just compensation here today?

A. I don't know if I get that exactly or not.

Q. Did you consider that forty-two hundred dollars when you were arriving at what you felt was the difference in the fair market value of your property before and after the taking?

A. No, sir, that was valued in on the value of the property before the taking. In other words, that's what it cost me to dispose of the building in order to have that parking area.

Mr. Stanley: We move to strike.

The Court: Motion denied."

Mrs. Byrd also testified that it cost around $4,200.00 to construct, and tear down, the old building. The Highway Department attorney objected to this testimony.

Highway attorney: "Your honor, we're going to have to object to this line of questioning because it has nothing to do with the value of the premises as of 16 March 1962."

Appellee's attorney: "I don't know whether it does or not, it's a fact."

Highway attorney: "He's questioning now if there is evidence as to—"

Appellee's attorney: "That they tore down a building that cost them about forty-two hundred dollars, including the cost of tearing it down, in building a new one. I mean that's all I'm doing."

The objection was overruled.

Of course, in arriving at a before and after value, appellees were entitled to show the value of the land, together with the improvements thereon at the time of the taking, and the value of the property after the

taking—but not the cost of an improvement that had formerly been placed on the land but which had been removed prior to the condemnation, for after the building had been removed, that portion of the land was in its original condition, and its value was neither greater nor less because of the fact that a building had been located thereon for about four years.

Appellees state that the motion of appellant was not proper because it moved to strike all of Mr. Byrd's testimony. We have held on several occasions that this is not a proper motion if any of the witnesses' testimony is admissible. *Arkansas State Highway Commission* v. *Wilmans,* 236 Ark. 945, 370 S. W. 2d 802. *Arkansas State Highway Commission* v. *Carpenter,* 237 Ark. 46, 371 S. W. 2d 535. Appellees are mistaken as to the motion made in the instant case. It will be noted that the motion, set out above, only seeks to strike the testimony of Byrd *with reference to the before and after value.* This motion was proper and should have been granted. It is clear that in reaching his evaluation of the fair market value of the entire premises before the taking, Byrd was permitted to include the cost of constructing, and tearing down, the old building in order to enlarge his parking lot, and this occurred quite a period of time before the taking by the Highway Department. Under the facts in this case, either of these costs was inadmissible.

From what has been said, it is apparent that the court erred in overruling the objection made to the portion of Mrs. Byrd's testimony dealing with the expense of constructing and tearing down the old building, and likewise erred in refusing to strike the testimony of Mr. Byrd in regard to the before and after value because of the fact that Byrd, in reaching his before value figure, considered the $4,200.00 which he stated was the cost of erecting and tearing down the old building.

Reversed.

SOUTHERN COTTON OIL DIVISION *v.* CHILDRESS.

5-3162 377 S. W. 2d 167

Opinion delivered April 6, 1964.

Hout, Thaxton & Hout and *Rose, Meek, House, Barren, Nash & Williamson,* for appellant.

Pickens, Pickens & Boyce, Smith, Williams, Friday & Bowen, Robert V. Light, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case, and necessitates a review of the holdings on the matter of "horse-play"[1] or "sky-larking."

Mrs. Minnie Lee Childress seeks recovery for herself and children because of the death of her husband, George Childress, while in the employ of the appellant, Southern Cotton Oil.[2] The facts are without substantial dispute. For many years the appellant, Southern Cotton Oil has had a cottonseed oil mill at Newport. George Childress worked for the appellant for about seven years. On August 15, 1957, he reported for work about 7:00 A.M. and was assigned the job of using a compressed air hose for blowing out the vent pipes in the soybean storage shed.

Alfred Ballentine, a fellow-employee, was working that day in another room of the plant. About 2:00 o'clock

[1] Most of the American cases use the word, "horse-play;" and most of the English cases use the word, "sky-larking." We make no distinction in terminology.

[2] At the time of the death of George Childress, Southern Cotton Oil appears to have been a division of Wesson Oil and Snowdrift Company. Later Southern Cotton Oil appears to have become a division of Hunt Food & Industries, Inc., and is so styled in the briefs in this Court. For brevity, we merely call the appellant "Southern Cotton Oil."

in the afternoon Ballentine needed an 18″ pipe wrench and went to the soybean shed to see about getting the wrench. George Childress was then using a high-pressure air hose with a nozzle on the end of it, blowing out the vents in the storage room. As Ballentine went by Childress, one or the other made a friendly and challenging gesture. After Ballentine investigated the matter of the pipe wrench, he started out of the bean shed and passed by Childress; and they engaged in friendly scuffling and in the process of the scuffle Ballentine got hold of the nozzle of the air hose that was blowing in a continuous stream and in some way the end of the air hose was forced against the anus of the deceased and air forced into his body and as a result George Childress died. A portion of this scuffle was witnessed by Mr. Jerry Jeffrey, manager of the Company, who immediately went to the men and, finding that Childress had been injured, he made arrangements for Childress to be taken to the hospital. The company paid the medical and hospital bills that resulted from the injury. Childress died on August 18, 1957, of internal injuries, the result of the air being forced into his body.

Alfred Ballentine testified that he and George Childress had been friends for seven years; that they had scuffled there at the Southern Cotton Oil plant five or six times before that day; that there was no anger or ill feelings between them; and that it was just friendly playing. Ballentine said that when he passed by Childress enroute to see about the pipe wrench, Childress was seated in the door at work and Childress reached for him; that as Ballentine came back, Childress jumped up and went running around Ballentine with the air hose, as though to wrap it around him; that they started scuffling and Ballentine tried to get loose and Childress was trying to tie the hose around him; that they were not mad, they were just playing, and that they scuffled for a few minutes and some way in the process the air was forced into Childress' body through his anus.

Ballentine also testified that during the entire time he worked at the plant no one gave him any instructions

or warning regarding the use of the air hose; that he did not know that an air hose could injure a man seriously or kill him; that he did not know that placing the air hose near a man's rectum might kill him. Ballentine said some other employees had used the air hose to clean the lint off their clothes; and that he had never played with an air hose before. A number of other witnesses testified, but all the evidence was about to the same general effect as that heretofore mentioned. The fact remains that Childress and Ballentine, while on the job, engaged in a friendly scuffle, and as a result Childress was killed.

The Workmen's Compensation Commission refused to allow compensation.[3] On appeal the Circuit Court reversed the Commission and held that Mrs. Childress and her children were entitled to recover compensation. The Circuit Court was of the view that our case of *Johnson* v. *Safreed,* 224 Ark. 397, 273 S. W. 2d 545, changed the holding in *Hughes* v. *Tapley,* relied on by the Commission. From the Circuit Court judgment, Southern Cotton Oil prosecutes this appeal; and we are thus presented with the problem of whether there may be a recovery in a case like this one wherein a worker is injured in what is called "horse-play" or "sky-larking."

I. *The Holdings Generally.* Before considering our own cases, it is proper that we consider as background information the trend generally in "horse-play" cases. The earlier workmen's compensation cases usually held

[3] The opinion of the Commission reads in part: "Briefly, the facts are these. On August 15, 1957, the deceased, George Childress, and a fellow employee, Alfred Ballentine, during work hours became engaged in friendly 'horseplay' which resulted in a high pressure air hose causing serious injury to George Childress, resulting in his death on August 18, 1957. The positions of the claimants and respondent are clear, the question being whether said accidental injury comes within the purview of the Act. The case of *Hughes* v. *Tapley,* 206 Ark. 739, 177 S. W. 2d 429 (1944), involved horseplay and the court said: 'While it is true that appellant, in the instant case, has received most serious and painful injuries, he was, on the evidence presented, the unfortunate victim of his own acts, and his injuries resulting therefrom did not arise out of his employment and therefore he is not entitled to compensation.' The Commission holds that this is still the law in this State; and in the instant case, we find that the deceased was the instigator of the horseplay; that the parties here were not acting in the furtherance of the employer's business; and that the conditions of employment did not induce the horseplay."

that there could be no recovery in "horse-play" cases;[4] but Justice Cardozo's opinion in *Leonbruno* v. *Champlain,* 229 N. Y. 470, 128 N. E. 711, 13 A.L.R. 522 (1920),[5] is generally credited with having ushered in the modern ruling. Justice Cardozo there said:

"Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service . . . The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risk of such associations and conditions were risks of the employment."

The courts then began to allow recovery to the innocent victim of the horseplay, but a majority continued to refuse recovery to the instigator of the horseplay if he were injured. Larson[4] states this rule:

"Injury to a non-participating victim of horseplay is compensable, but to the instigator is usually not. A few states permit recovery even by active participants in horseplay if such activity has become customary. A suggested rationalization of the rule on participants in horseplay is to treat the question, when an instigator is involved, as a primarily course of employment rather than 'arising-out-of-employment' problem; thus, minor acts of horseplay would not automatically constitute departures from employment but might here, as in other fields, be found insubstantial. So, whether initiation of horseplay is a deviation from course of employment

[4] Larson comments on page 343: "The modern observer may find it hard to believe that such claims were uniformly denied in early compensation law; . . ." The Law of Workmen's Compensation by Prof. Arthur Larson, Vol. I, page 343, § 23.10.

[5] In Vol. 13 of A.L.R. there are reported several of the leading cases on horseplay, being: *Socha* v. *Cudahy Packing Co.* (Nebr. 1921), 13 A.L.R. p. 513 (an air hose fatality, like the case at bar); *Payne* v. *Industrial Comm.* (Ill. 1920), 13 A.L.R. p. 518 (also an air hose case); *Leonbruno* v. *Champlin Silk Mills* (N. Y. 1920), 13 A.L.R. p. 522; and *Hollenbach* v. *Hollenbach* (Ky. 1918), 13 A.L.R. p. 524; and the annotation in 13 A.L.R. p. 540 *et seq.*, "Workmen's Compensation: right to compensation in case of injuries sustained through horseplay, or fooling." This annotation is supplemented in 20 A.L.R. 882, 36 A.L.R. 1469, 43 A.L.R. 492, 46 A.L.R. 1150, and 159 A.L.R. 319.

would depend on (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (*i.e.*, whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay."

The trend of the recent cases has been to eliminate the distinction between instigator and victim, and to examine the real facts as to: (a) whether there was a substantial deviation from employment; (b) the extent of the horseplay; (c) whether it should have been known to the employer so as to be stopped; and (d) other factors which might tend to allow recovery to the injured party. Larson[4] has several pages devoted to these various matters. In 99 C.J.S. p. 753, "Workmen's Compensation" § 225, after stating the general rule, the text states:

"An injury to an employee as a result of horseplay, skylarking, or practical joking is ordinarily compensable where the injured employee did not participate in the fun or where such activities were customary in the particular employment."

The text then adds this:

"Other authorities go further and hold that the test of coverage by the compensation statute is whether or not the horseplay, skylarking, and practical joking that caused the injury may reasonably be regarded as an incident of the particular employment, and where it may be so regarded, an injured employee is entitled to compensation even though he was a participant."

Schneider[6] says:

"Since a majority of the jurisdictions now award compensation to innocent or non-participating employees, and to employees whose participation is but momentary and not 'aggressive', a rule, under the broader

[6] Schneider's Workmen's Compensation, 3rd or Permanent Edition, Text Vol. 6, page 560, § 1609.

conception of the law, may be said to be that injuries sustained by an employee while in the course of his employment as a result of another's horseplay, are compensable as arising out of and in the course of his employment.

"The question of whether the aggressor should be entitled to compensation for injuries resulting from his own aggressiveness is one which must be left for future determination. The general trend, however, appears to be in that direction."

Hon. Samuel B. Horovitz, writing in 3 NACCA Law Journal 57, in 1949, said:

"Clearly, fooling at work is incidental to it, and a hazard of men working together. The more recent and better rule is to allow an award for an injury resulting from horseplay, even to aggressors, where the injury is a by-product of associating men in close contacts, thus realistically recognizing the 'strains and fatigue from human and mechanical impacts.' "

To list all the cases and Law Review articles on this matter would be a work of supererogation.[7] To sum up: the recent cases are in accord with the words of the Supreme Court of Michigan in *Crilly* v. *Ballou* (1958), 91 N. W. 2d 403, in which the Michigan Court reviewed its own earlier case denying recovery, overruled it, and said:

"We need not undertake to define the outer limits of compensability. We rule on the case before us . . . So much for the present and the future. As for the past, we specifically overrule the Tarpper case, *supra,* and subsequent cases of like character, and hold that injuries received in assaults, either sportive or malicious, are not, by reason of such fact alone, beyond the realm of

[7] We do mention these few in each of which recovery was allowed the injured claimant, although he might have been the instigator of the horseplay: *Diaz* v. *Newark Industrial Co.* (N. J. 1960), 159 A. 2d 462, affirmed 167 A. 2d 662; *Petro* v. *Martin Baking Co.* (Minn. 1953), 58 N. W. 2d 731; *Cunning* v. *City of Hopkins,* (Minn. 1960), 103 N. W. 2d 876; and *Ransom* v. *Hill Co.* (Tenn. 1959), 326 S. W. 2d 659. See also 65 Harvard Law Review p. 360; 37 Virginia Law Review p. 766; 34 Cornell Law Quar. p. 460; 54 Harvard Law Review p. 154; 41 Illinois Law Review p. 311; 26-27 NACCA Law Journal p. 248; and 29 NACCA Law Journal p. 239.

compensability. If arising out of the employment and received in the course thereof they are compensable."

II. *Our Own Cases.* Turning from the holdings elsewhere, we come to our own cases. There are four of these:

(1) *Birchett* v. *Tuf-Nut Garment Mfg. Co.* (1943), 205 Ark. 483, 169 S. W. 2d 574. We denied compensation to an employee, saying:

"The question here presented is a new one in this state. Decisions from other jurisdictions, while persuasive, are not conclusive. Claimant's injuries arose out of a personal difficulty which she provoked herself. The cause of the ill-feeling is immateiral. During a rest period, she entered the work room and saw a group of employees reading a document. They were not near her place of work, were not talking to her and were not molesting her in any way whatever. She went up to this group and snatched the paper, which was not hers and which she had never seen before, from her fellow employees, stuffed it in the bosom of her dress and ran away with it. She does not claim she was acting in a playful spirit. In the ensuing struggle for its recovery by the employees from whom she snatched the paper, she claims she got hurt."

(2) *Hughes* v. *Tapley,* (1944), 206 Ark. 739, 177 S. W. 2d 429. Work had temporarily stopped and Hughes intended to throw a lighted fuse near a deaf and dumb fellow employee named Turley, which would have caused the man to be frightened and jump. Hughes got a carbide light, apparently to be used in lighting the fuse; and when he placed the carbide lamp on a box of powder the lamp toppled over and Hughes was injured. He claimed compensation from Tapley, his employer. The Commission denied recovery to Hughes, and we affirmed, saying:

"This case simply and clearly presents a situation where appellant, Hughes, voluntarily stepped aside from his employment to engage in a sportive act, horseplay or

prank, or in order to frighten the unfortunate deaf and dumb Negro, Turley, and in his preparation to carry his plans into effect, he was injured, solely by his own acts. The injuries thus received did not arise out of appellant's employment."

We then quoted from an annotation as follows:

" 'It is generally held that no compensation is recoverable under the Workmen's Compensation Acts for injuries sustained through horseplay or fooling which was done independently of and disconnected from the performance of any duty of the employment, since such injuries do not arise out of the employment within the meaning of the acts.' "

(3) *Barrentine* v. *Dierks* (1944), 207 Ark. 527, 181 S. W. 2d 485. Barrentine and a fellow employee (Parker) had a fight before lunch regarding something Barrentine might have said about Parker. After lunch, while Barrentine was getting a drink of water, Parker slipped up behind him and hit Barrentine on the head. The Commission denied recovery to Barrentine, finding that the "assault was caused by feeling engendered from purely personal causes and had no connection with the work of the master and did not arise out of employment." We affirmed the Commission's findings and refusal of an award of compensation to Barrentine.

(4) The foregoing three cases all indicate denial of compensation; but then ten years later came the fourth case, *Johnson* v. *Safreed* (1954), 224 Ark. 397, 273 S. W. 2d 545. Johnson and his fellow employee, Deloney, engaged in an affray and bitter words in the course of the work; and since Deloney was senior in point of service, the master, Safreed, discharged Johnson, who left the place of work and started to a truck to be transported to town. Deloney pursued Johnson and struck him on the head with a pick, inflicting injuries for which Johnson sought compensation from Safreed, the master. The Workmen's Compensation Commission denied recovery to Johnson, finding: (1) that Johnson was the original

aggressor in the affray; and (2) Johnson's injury did not arise out of and in the course of his employment.

This Court, in an opinion by Justice Millwee, reversed the Commission and held that Johnson was entitled to compensation. Justice Millwee reviewed the earlier cases and the present ones, saying:

"Until recently a majority of jurisdictions that had passed on the question refused compensation to an aggressor even though the dispute was work-connected . . . However, commencing with the opinion by Judge Rutledge in *Hartford Accident & Indemnity Co.* v. *Cardillo,* 112 Fed. 2d 11, cert. denied, 310 U. S. 649, 84 L. Ed. 1415, 60 Sup. Ct. 1,100, various courts began to re-examine their position and adopt the view that aggression of the claimant, without more, would not bar recovery for an injury sustained in a work-connected dispute. During the past few years the trend of the cases in line with this holding is such that it may now be said that a majority of the jurisdictions which have examined the issue favor the proposition that aggression does not bar recovery . . .

"When the foregoing principles are considered in the case at bar, we are convinced that the framers of our statute did not intend to preclude recovery where the aggressive act amounted to nothing more than a light blow on the shoulder with the fist administered impulsively in a sudden altercation by one who was attempting to protect himself from serious bodily injury. We accordingly conclude that the acts of appellant under the undisputed facts were not of that serious or deliberate character necessary or essential to evince a wilful intention on his part to injure Deloney."

Johnson v. *Safreed* was an assault case; and if a recovery can be allowed the original aggressor in an assault case, then likewise, recovery can be allowed the original instigator in a horseplay case. One cannot read the Opinion in *Johnson* v. *Safreed* without being convinced that in 1954 this Court departed from the older holdings (like *Hughes* v. *Tapley*) and took a positive step

toward the award of compensation in a case like the one at bar. The holding in *Johnson* v. *Safreed* was so understood by the Bench and Bar contemporaneously with the Opinion. In an article in 1957 in 11 Ark. Review, p. 429, after reviewing the three earlier cases heretofore mentioned, the writer of the article said of *Johnson* v. *Safred*:

"In the *Johnson* case, compensation was awarded to a worker who had struck the first blow in a fight which culminated in his injury. The court quoted extensively from modern authority, relying particularly on the opinion of Justice Rutledge in the *Hartford* case, and pointed out that jurisdictions recently began following the view that the aggression of the claimant, without more, would not bar recovery. The instant fact situation was distinguished from those in the *Birchett* and *Barrentine* cases, but whatever the relation of the *Johnson* rule to its predecessors, the conclusion of the Arkansas court in the most recent altercation situation was: 'When the accumulated pressures of work-induced or work-aggravated strains and frictions finally erupt into an affray which results in injury to one of the participants, it is artificial to say that an injury to the one who struck the first blow did not arise out of the employment, but an injury to the recipient of that blow did arise out of the employment.' . . . Similarly, the horseplay situation has been examined by the court only once, in a 1944 case, and in view of the apparent change made on controlling doctrines on altercations and assaults, a prediction of an allowance of an award under some horseplay circumstances does not seem unreasonable.

"The growing industrialization of the State of Arkansas is likely to focus increasing attention on the purposes and effects of the Workmen's Compensation statute. The modern and liberal interpretation which the Arkansas court has given to the act underlines its duel purpose: protection of the employer from harrassing and unreasonable verdicts, and guaranty for the employee and his dependents of security of recovery for industrial accidents."

The learned Circuit Judge in the case at bar rendered an Opinion which, after reviewing our earlier cases, concluded with these words:

"The important question which poses itself to this court appears to be whether or not the injury which caused the death of Childress arose out of the employment. In reading *Johnson* v. *Safreed,* 224 Ark. 397, 273 S. W. 2d 545 (1954), it is crystal clear that the Arkansas Supreme Court is no longer using as the test in Workmen's Compensation cases, 'whether the parties here were acting in the furtherance of the employer's business,' as stated in the Opinion of the Commission in the instant case. In the *Johnson* v. *Safreed* case the Arkansas Supreme Court declared that the more modern rule and the more humanitarian doctrine of 'arising out of the employment' would be the applicable yardstick . . .

"Therefore, it is the opinion of this court that *Hughes* v. *Tapley, supra,* is not now the law in this State; that in the instant case the question whether or not the decedent was the instigator is insignificant; that the conditions of employment did induce the horseplay; that the employer had knowledge of the fact that horseplay was engaged in by employees; and that the injury which caused the claiman's death arose out of the employment. Therefore, this case is held to be compensable."

We agree with the Circuit Court; conclude that the clamaints are entitled to compensation in the case at bar; and the judgment of the Circuit Court is affirmed.

HARRIS, C.J. dissents.

CARLETON HARRIS, Chief Justice (dissenting). While I have every sympathy with an injured employee, and with his family where the injury is fatal, and likewise fully agree that a liberal construction should be given the Compensation Act, nonetheless, it does not appear to me that recovery should be allowed in this type of case. I cannot bring myself to feel that it is right or proper, or that the ends of justice are best served by permitting the recovery of compensation by a worker, or his dependents, where the employee sustained his injury at a

time when he was not performing his duties, but rather, to the contrary, had deliberately stepped aside to commit an act to satisfy his own sense of humor, such act being totally unrelated to the task for which he was employed.[1]

There are numerous cases from various jurisdictions relative to injuries sustained while engaging in horseplay; some allow recovery, and some deny it, but according to C.J.S., Volume 99, Section 225, Page 753, the majority view is as follows:

"The courts are sharply divided as to whether injuries resulting from horseplay, skylarking, and practical joking are compensable. Under what is apparently the majority view, an injury to an employee as a result of sportive acts of coemployees, horseplay, or skylarking is not compensable as not arising out of the employment where the injured employee was a participant, initiator, or instigator."

The court majority in the case before us appear to take the view that *Hughes* v. *Tapley,* 206 Ark. 739, 177 S. W. 2d 429, was overruled by *Johnson* v. *Safreed,* 224 Ark. 397, 273 S. W. 2d 545. Quoting from the majority opinion:

"*Johnson* v. *Safreed* was an assault case; and if a recovery can be allowed the original aggressor in an assault case, then likewise, recovery can be allowed the original instigator in a horseplay case."

I do not agree with that analysis. As stated by Larson's Workmen's Compensation Law, Volume 1, Section 23.50, Page 354:

"While assaults and horseplay have some features in common, they also have some differences which make it doubtful whether the reasoning of assault cases can be taken over bodily and applied to horseplay. This reasoning pictures the day-to-day enforced contact of divergent personalities under the strains of industrial life, with the not improbable culmination in flareups of tem-

[1] The Commission found that Childress instigated the horseplay which resulted in his fatal injury, and this is not disputed.

per as the direct result of this environment. There is something relentless and inescapable about the emotional explosion that is thus ultimately thrust upon the claimant "aggressor" virtually against his will. But in a horseplay case, the most you can say is that the employment environment provides temptation and opportunity, rather than implacable emotional pressure. Hence, when a prankster sets out to play a practical joke, there is a higher probability that the action may amount to a deliberate and conscious deviation from employment than in the assault cases, in which almost every instance of violence is a spontaneous and unpremeditated reaction to the play of the surroundings on the claimant's temperatment."

Also, Justice Millwee, who wrote the opinion in *Johnson* v. *Safreed, supra,* makes it a point to particularly call attention to the fact that the injury sustained by the claimant in that case was "work-connected." In fact, this is emphasized three times in the opinion.

The majority quote a portion of the opinion of the Circuit Court in the present case, stating that they agree with the findings therein. One of these findings was that "the conditions of employment did induce the horseplay;" also, "the injury which caused the claimant's death arose out of his employment." I cannot agree with these conclusions, nor definitely determine the basis upon which they were made. It is to be supposed that these findings relate to the fact that the employer had the air hose on the premises, and that fact "induced the horseplay;" also, because Childress was injured by the perversive use of one of the pieces of equipment necessary to his work, the injury "arose out of the employment."

I, of course, agree that an innocent victim of horseplay should be granted compensation, but where the injury is the result of the inured person's willful, deliberate, and total departure from the duties for which he was employed, I cannot see that compensation is in order. To my way of thinking, Childress was as far from performing his duties at the time of inury, as if, instead

of wrestling and playing with an air hose, he had spent that time asleep or entirely away from the premises.

I, therefore, respectfully dissent.

WEIR *v.* HILL.

5-3253 377 S. W. 2d 178

Opinion delivered April 6, 1964.

Davis & Mills, for appellant.

Scott & Davidson, Kirsch, Cathey & Brown, for appellee.

GEORGE ROSE SMITH, J. This appears to be an action brought by the appellee to recover judgment upon six promissory notes executed by the appellant. We do not reach the merits, for under Rule 9 we are compelled to affirm the the judgment. The appellant has submitted only a statement of the case, a list of the points relied upon for reversal, and a brief. There is no abstract of the pleadings, the judgment, or the testimony that was heard below. To determine the facts in the case we should have to explore the record, which is contrary to our practice. *Vire* v. *Vire,* 236 Ark. 740, 368 S. W. 2d 265.

Affirmed.

Opinion delivered April 6, 1964.

Douglas Bradley, for appellant.

Mitchell D. Moore, for appellee.

PAUL WARD, Associate Justice. The issue for decision grows out of the sale of a combine and a title retention note. The material facts are not in dispute.

Appellee, Louis George, d/b/a Louis George Motor Company (hereafter referred to as George), sold an Allis Chalmers 66 combine to J. C. Henry for the price of $1,575 on October 11, 1956. Henry paid $325 cash as a down payment and executed a title retaining note for the balance of the purchase price (plus $37.50 for life insurance). One payment of $300 was due January 1, 1957, and the other payment of $987.50 was due November 15, 1957. Four days after the note was executed Henry assigned it to the Mississippi County Bank.

Henry was unable to make the $300 payment due January 1, 1957, and George agreed not to repossess the combine if Henry would give him satisfactory security. So, on January 18, 1957 Henry executed another note

for $300 payable to George due October 15, 1957. Appellant was an accommodation signer on this note and George agreed to accept it.

When the $987.50 became due on October 15, 1957 it was also not paid by Henry, and George repossessed the combine. Shortly thereafter George paid the bank $1,407.10 and the title retention note was turned over to him.

Some four years later — on June 2, 1962 — George filed this suit against Henry and appellant to recover on the $300 note executed by them on January 18, 1957, but no service was had on Henry. Appellant filed an answer contending he was only an accommodation endorser and that Henry's indebtedness to George was extinguished (or satisfied) when he repossessed the combine. The cause was tried before a jury, and after both sides rested, the court directed a verdict in favor of George in the sum of $300. Thereupon appellant filed a motion for judgment non obstante veredicto, and this motion was overruled. This appeal follows.

In addition to the facts above set out George (the only witness), in material parts, testified in regard to the $300 note signed by appellant as follows:

"Q. Did the note have anything to do with the sale price of the combine?

"A. None at all. All it did was secure the payment.

"Q. Why did you have Mr. Woodsmall to endorse the note?

"A. I told Mr. Henry to get somebody that was good enough that would secure me for the amount of that note for the payment he couldn't pay at that time, that I would go ahead and accept it."

* * * * *

"Q. Now, you did, after receipt of this note, Plaintiff's Exhibit 1, you did thereafter repossess this combine, didn't you?

A. Yes, sir.

"Q. You didn't turn that note over to the bank?

"A. No.

"Q. At the time you took this note, the bank owned that title retaining note?

"A. Yes."

In our opinion the only reasonable deduction that can be drawn from the above is that George took the accommodation note to secure the payment of the $300 due on the title retention note—in fact he so states. If George, had, in truth and in fact, taken the note as a payment on the prime note, then credit should have been so indicated. Moreover, at the time the accommodation note was executed, the bank was the owner of the prime note and so George had no power to force the bank to accept a note in lieu of cash.

Under the above factual situation, when applied to the numerous uniform decisions of this court, the trial court should have directed a verdict in favor of appellant.

In *Hollenberg Music Company* v. *Bankston*, 107 Ark. 337, 154 S. W. 1139, the Court said:

"When a debt, secured by a reservation of title, matures, the vendor has the right to retake the property and thus cancel the debt, or he may bring his action to recover the debt, and thus affirm the sale and waive the reservation of title; and as a general rule, the choice of inconsistent remedies abandons and debars the pursuit of any except the one chosen. *Dudley E. Jones* v. *Daniel*, 67 Ark. 208. But this choice of remedies is to be exercised in the event only that the vendor *decides to take some affirmative action.* He is not required to act simply because the debt has matured." (Emphasis added)

Beene Motor Company v. *Dison*, 180 Ark. 1064, 23 S. W. 2d 971, held:

". . . when appellant retook possession of the car, it elected to take the property to which title had been retained, and thereby cancel the indebtedness. It had

only one of two remedies; either it could have treated the sale as canceled and repossessed the property, as it did, or treat the sale as absolute, and sue for the purchase price.

* * * * *

". . . when appellant elected to retake the truck, it also elected to cancel the balance of the indebtedness due against the car, which had the effect of relieving the appellee Shepherd either as surety or joint maker on the note."

This Court said in *Oliver, Wheeler, Thomas Company, Inc.* v. *Boon, Administrator,* 224 Ark. 830, 276 S. W. 2d 417:

"When title is retained as security for the unpaid debt, the seller cannot be permitted to recapture the property and also to exact its price from the buyer."

Quoting from *Gale & Company* v. *Wallace,* 210 Ark. 161, 194 S. W. 2d 881, in *Noble Gill Pontiac, Inc.* v. *Bassett,* 227 Ark. 211, 297 S. W. 2d 658, we stated:

" 'When the debt becomes due the vendor, in sales of this character, may bring an action to recover the debt, and by this he affirms the sale and waives the reservation of title; or he may elect to take the property, and by doing so, cancels the debt. He may not, however, have both remedies, and, where he elects to retake the property an action to recover on the debt is barred.' "

In view of what we have heretofore said, it is our opinion that when George repossessed the combine he elected to disclaim the sale and thereby also released Henry of all indebtedness. It is undisputed that appellant would not be liable unless Henry was also liable.

Reversed and Dismissed.

McFaddin and Robinson, JJ., dissent.

Ed. F. McFaddin, Associate Justice (concurring and dissenting). I reach the conclusion that the judgment of the Circuit Court should be reversed and the cause remanded for a new trial; so I concur with the Ma-

jority in reversing the judgment, but dissent from the Majority as regards dismissing the case.

George filed suit against Woodsmall on the $300.00 note, and Woodsmall admitted the execution of the note. The record shows that at the close of the case by George, Woodsmall also rested without offering any evidence; and then the Court, on its own motion, directed a verdict for the plaintiff. I think the case should have been submitted to the jury on the record made.

If George accepted the $300.00 note signed by Woodsmall as a *payment* on the larger note, then the repossession of the combine, for the remaining balance due on the larger note, would not have released Woodsmall from the note which he signed and which was accepted as a *payment* on the larger note. On the other hand, if George took the $300.00 note signed by Woodsmall as *additional security* for the larger note, then repossessing the combine under the larger note would have released Woodsmall on the $300.00 note. So the question should have been submitted to the jury on the evidence offered as to whether George took the note signed by Woodsmall as *payment* or as *additional security*. I think a fact question was made for the jury, and the case should be remanded for a new trial.

Justice ROBINSON joins with me in the views herein.

CUDE *v.* STATE.

5-3239—5-3240 377 S. W. 2d 816

Opinion delivered April 6, 1964.

[Rehearing denied May 11, 1964.]

Shaw & Shaw, for appellant.

Ivan H. Smith, for appellee.

SAM ROBINSON, Associate Justice. The issue is the authority of the courts to appoint a guardian for children between the ages of 7 and 15, inclusive, who are not attending school, and to give the guardian custody of the children with directions to have them vaccinated to facilitate school attendance.

Appellants, Archie Cude and his wife, Mary Frances, are the parents of eight children, three of whom are between the ages of 7 and 15, inclusive. The children are Wayne Monroe, age 12, Delia Marie, 10, and Linda May, 8. Wayne went only to the second grade; the other two have not attended school at all. The children are not in school for the reason that the school authorities will not permit them to attend school because they have not been vaccinated against smallpox. The Cudes will not permit such vaccinations; they contend that it is contrary to their religion.

This litigation was commenced by Ben Core, Prosecuting Attorney for the Ninth Judicial District of the State of Arkansas, filing in the Probate Court of Polk County, on behalf of the State, a petition alleging that the three Cude children were not attending school; that the father, Archie Cude, had been fined on three occasions for violating the law requiring that parents send their children to school, and he has persisted in his refusal to have the children vaccinated so that they can attend school, and that the father has avowed that he will never permit the children to be vaccinated; that unless the children are removed from the custody of the natural parents they will not have all the benefits and advantages of a school education. The petition asks that the children be placed in the custody of the Child Welfare Division of the State Welfare Department.

The appellants responded, contending first, that the probate court did not have jurisdiction, and further, that vaccination of the children was against respondents' religious beliefs. There was a full scale hearing; it was shown that the children were not attending school because they had not been vaccinated; that the appellants

would not permit them to be vaccinated because of their religious beliefs, and appellant, Archie Cude, testified that if the children were taken from him and vaccinated he would not accept them back.

The court appointed Miss Ruth Johnston, Director of the Child Welfare Division of the State Welfare Department, as guardian of the children. The order further provides: "Said guardian is authorized and directed to file a petition in the Chancery Court of Polk County, Arkansas, for the purpose of obtaining the physical control and custody of the children for the purpose of having such children properly vaccinated and immunized against the disease of smallpox, and thereafter enrolled in the public schools of this State, all in accordance with the laws of this State, and all to be done by qualified and licensed and practicing physicians of this State as soon as is reasonably possible after the said children are in the custody of said guardian. After the immunization of the said children, the guardian shall offer, through the office of the Prosecuting Attorney for the 9th Judicial Circuit, to deliver the said children back into the custody of the Defendants, and the guardian is authorized and directed to do so, and if the Defendants shall not accept the said children back into the home of the Defendants, then the said guardian is hereby authorized and empowered to consent to the subsequent adoption of the said children by a party or parties acceptable to the Guardian and to the Probate Court which may consent."

Pursuant to the foregoing order, the guardian, Ruth Johnston, filed a petition in the chancery court asking for custody of the children. Over appellants' protest the petition was granted. The Cudes have appealed.

Actually, there are two appeals; one from the order of the probate court appointing the guardian; the other from the order of the chancery court giving Miss Johnston custody of the children. The cases have been consolidated on appeal.

For the purposes of the appeal, we will assume that the Cudes, in good faith because of their religious beliefs,

will not permit the children to be vaccinated. Then the question is whether they have the legal right to prevent vaccination. The answer is that they do not have such right.

There is no question that the laws of this State require parents to send to school their children between the ages of 7 and 15, inclusive. Ark. Stat. Ann. § 80-1502 (Repl. 1960) provides: "Every parent, guardian, or other person residing within the State of Arkansas and having in custody or charge any child or children between the ages of seven [7] and fifteen [15], (both inclusive) shall send such child or children to a public, private, or parochial school under such penalty for non-compliance with this section as hereinafter provided."

The school administrative authorities of the State of Arkansas have adopted a regulation requiring vaccination as follows: "No person shall be entered as a teacher, employee or pupil in a public or private school in this state without having first presented to the principal in charge or the proper authorities, a certificate from a licensed and competent physician of this State certifying that the said teacher, employee or pupil has been successfully vaccinated; or in lieu of a certificate of successful vaccination, a certificate certifying a recent vaccination done in a proper manner by a competent physician; or a certificate showing immunity from having had smallpox. . ." There is no question about the validity of this regulation. *State* v. *Martin,* 134 Ark. 420, 204 S. W. 622; *Seubold* v. *Ft. Smith Special School Dist.,* 218 Ark. 560, 237 S. W. 2d 884.

It is clear that the law requires that the children attend school, and a valid regulation requires that they be vaccinated. The next question is: Are appellants, because of their religion, exempt from the law and the regulation requiring that the children be vaccinated so that they can go to school? It will be remembered that appellants do not object to the children going to school; it is the vaccination that is objectionable to them. But, according to a valid regulation, the children are not permitted to go to school without having been vaccinated.

Article 2, Sec. 24 of the Constitution of Arkansas provides: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect or support any place of worship; or to maintain any ministry against his consent. No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship above any other." The foregoing provision of the Constitution means that anyone has the right to worship God in the manner of his own choice, but it does not mean that he can engage in religious practices inconsistent with the peace, safety and health of the inhabitants of the State, and it does not mean that parents, on religious grounds, have the right to deny their children an education.

The U. S. Supreme Court said in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, S. Ct. 438, 88 L. Ed. 645: "The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

It is a matter of common knowledge that prior to the development of protection against smallpox by vaccination, the disease, on occasion, ran rampant and caused great suffering and sickness throughout the world. According to the great weight of authority, it is within the police power of the State to require that school children be vaccinated against smallpox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise. In fact, this principle is so firmly settled that no extensive discussion is required.

In the early case of *Reynolds* v. *U. S.,* 98 U. S. 145, the issue was whether a Mormon who believed in polygamy was immune from the operation of the statute forbidding the practice of multiple marriage. There, the court said: ". ... the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere and prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"

In cases too numerous to mention, it has been held, in effect, that a person's right to exhibit religious freedom ceases where it overlaps and transgresses the rights of others. We cite a few cases upholding the validity of statutes requiring vaccination, and affirming orders of courts authorizing blood transfusions, etc. *In Re Whitmore,* 47 N. Y. Supp. 2d 143; vaccination of school child. *Sadlock* v. *Board of Education,* 58 A. 2d 218; vaccination of school child. *State* v. *Perricone,* 181 A. 2d 751; giving blood transfusion to infant. *New Braunfels* v. *Waldschmidt,* 207 S. W. 303; vaccination of school child. *Mosier* v. *Barren County Board of Health,* 215 S. W. 2d 967; vaccination of school child, *Board of Education of Mountain Lakes* v. *Maas,* 152 A. 2d 394; vaccination of school child. *In Re Clark,* 185 N. E. 2d 128; blood transfusion for three year old child.

This court said in *Seubold* v. *Ft. Smith Special School District,* 218 Ark. 560, 237 S. W. 2d 884: "In

Jacobson v. *Massachusetts,* 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. 358, the Supreme Court of the United States considered the matter of compulsory vaccination as infringing on rights claimed under the United States Constitution, and held that a State law requiring compulsory vaccination did not deprive a citizen of liberty granted by the United States Constitution. More recently, in the case of *Zucht* v. *King,* 260 U. S. 174, 67 L. Ed. 194, 43 Sup. Ct. 24, the United States Supreme Court again considered the matter of compulsory vaccination; and Mr. Justice BRANDEIS, speaking for the Court said: '. . . Long before this suit was instituted, *Jacobson* v. *Massachusetts,* 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765, had settled that it is within the police power of a state to provide for compulsory vaccination.' "

Appellant contends that in the circumstances of this case the probate court does not have jurisdiction to appoint a guardian. The Constitution of Arkansas, Article 7, Sec. 34 provides: "In each county the Judge of the court having jurisdiction in matters of equity shall be judge of the court of probate, and have such exclusive original jurisdiction in matters relative to . . . *guardians . . . The judge of the probate court shall try all issues of law and of facts arising in causes or proceedings within the jurisdiction of said court, and therein pending*" (our italics).

It will be noticed that the above provision of the Constitution gives probate courts jurisdiction in matters relative to guardians, and provides that the probate court shall try all issues of law and facts in causes within the jurisdiction of the court and pending therein.

In 1911, by Act 215, the General Assembly created what is known as the Juvenile Court. For the purposes of the Act, all persons under 21 years of age are considered wards of the state, Ark. Stat. Ann. § 45-201 (1947), and a dependent or neglected child means any person under the age of 21 who ". . . has not proper parental care or guardianship . . ." Ark. Stat. Ann. § 45-203

(1947). The county judge was made the judge of the Juvenile Court.

Ark. Stat. Ann. § 45-210, which is a part of Act 215 of 1911, provides: "Any reputable person, being a resident of the county, may file with the clerk of the court, having jurisdiction of the matter, a petition in writing setting forth that a certain child, naming it, within his county, is either dependent, neglected or delinquent, as defined in section 1 [§§ 45-203, 45-204]; and that it is for the best interest of the child and this State that the child be taken from its parent, parents, custodian or guardian and placed under the guardianship of some suitable person to be appointed by the court; and that the parent, parents, custodian or guardian of such child, are unfit or improper guardians, or are unable or unwilling to care for, protect, train, educate, correct, control or discipline such child, or that the parent, parents, custodian consent that such child be taken from them."

Ark. Stat. Ann. § 45-221 (1947) provides that the juvenile court may appoint a guardian for a dependent or neglected child. In the case of *Ex Parte King,* 141 Ark. 213, 217 S. W. 465, (1919); this court held that in some instances the juvenile court could appoint guardians. However, both Judge McCulloch and Judge Frank Smith wrote strong dissents to the effect that under the Constitution, only the probate court had jurisdiction in matters of guardianship. (At the time of that decision the county judge was also the probate judge.) But, regardless of the soundness of the King case, all doubt as to what court has jurisdiction to appoint a guardian was put to rest by the Probate Code of 1949. Section 191 of Act 140 of the Acts of 1949 (Probate Code) provides: "The jurisdiction of the Probate Court over all matters of guardianship, other than guardianships ad litem in other courts, shall be exclusive, subject to the right of appeal. (c) Not to conflict with Juvenile Courts. The provisions of this code shall not be construed to affect the jurisdiction of authority now vested in Juvenile Courts except in the matter of appointment of guardians."

Without doubt, the foregoing act gives the probate court exclusive jurisdiction in all matters of guardianship, including the appointment of guardians; hence, whatever jurisdiction the juvenile court had to appoint guardians under the act creating such courts, as construed in the King case, is now vested in the probate court. Under the provisions of Article 7, Sec. 34 of the Constitution, "The judge of the probate court shall try all issues of law and of facts arising in causes or proceedings within the jurisdiction of said court and therein pending."

The issue of whether the three children of appellants were neglected was before the probate court in the proceeding for the appointment of a guardian, and the court had jurisdiction to determine that fact. The evidence that the parents would not permit vaccination and thereby enable the children to attend school is sufficient to base a finding of neglect. *In Re Marsh,* 14 A. 2d 368; *Morrison* v. *State,* 252 S. W. 2d 97; *Santos* v. *Goldstein,* 227 N. Y. Supp. 2d 451.

Appellants argue that Archie Cude has been fined on three occasions for not sending the children to school, and that the State has no other remedy. This action was not instituted for the purpose of punishing Cude, but to enable the children to obtain a reasonable education. The fact that Cude has been fined for violation of the law in not sending his children to school in no way benefited the children. It did not bring about the desired result of the children being sent to school.

Appellants argue other points, all of which have been considered and found to be without merit.

Affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice (dissenting). The only penalty which the legislature saw fit to provide for the failure to compel certain children to attend school is contained in Ark. Stat. Ann. § 80-1508 (Repl. 1960) as follows:

. . . "Each day such persons violate the provisions of this act shall constitute a separate offense, and the penalty for the violation of such provisions shall be a fine not to exceed ten dollars [$10.00] for each offense."

This penalty has been administered against appellants not because they have refused to comply with the compulsory attendance law but because they have refused to comply with an administrative regulation which resulted in the school authorities prohibiting their children's attendance.

It is well settled that penal statutes are to be strictly construed in favor of the accused and courts are not permitted to enlarge the punishment provided by the legislature either directly or by implication. *State* v. *Simmons,* 117 Ark. 159, 174 S. W. 238.

While much of the logic contained in the majority opinion from a sociological standpoint appears to be unanswerable, nevertheless from a legal standpoint I have found no way to escape the conclusion that the trial court and this court on trial de novo on appeal are enlarging the penalty for failure to comply with the compulsory attendance law to an extent never dreamed of by the proper lawmaking body. In the absence of legislation to the contrary, I as a judge am not willing now or ever to say as a matter of law that the failure to comply with this one simple regulation of school administrative authorities constitutes such neglect of children so as to warrant the state administering the cruel and unusal punishment of depriving such children of their natural parents and depriving the natural parents of their children.

Some consolation may be derived from the fact that the children in the case at bar will be offered back to their parents when the State Welfare Department carries out the orders of the court. Even so, the precedent set here that permits the taking of the children *at all* is the vice that opens a Pandora's box which may haunt this court for years to come. In my view, one of the forseeable spectres is the unfettered interference by the

State Welfare Department in areas where it has no legal standing whatsoever. In its apparent zeal to protect the immuned from the unimmuned I believe the majority has given meaning to the word *neglect* which no amount of rationalization can justify. This is the door that has been left open. History reveals that once a door is open to an administrative agency that door is not easily closed. Whose children under what pretext will be taken next? Will they be kept forever? For the reasons stated, I respectfully dissent.

[redacted]

INTERNATIONAL PAPER CO. *v.* WARNIX.

5-3247 377 S. W. 2d 162

Opinion delivered April 6, 1964.

[redacted]

Gaughan & Laney, for appellant.

Ed F. McDonald, for appellee.

JIM JOHNSON, Associate Justice. This suit arises from a boundary line dispute. A similar controversy between appellee and appellant's predecessor in title was involved in a prior suit, *Brown Paper Mill Co.*, v. *Warnix*, 222 Ark. 417, 259 S. W. 2d 495. In that suit Brown Paper Mill Company sought to enjoin appellee Warnix from cutting timber on land claimed by Brown Company and to recover damages for timber already cut. At that trial

appellee presented the testimony of the county surveyor relative to his survey of the boundary line. Brown Company disputed the accuracy of the county surveyor's measurements, but offered "no persuasive substitute" in that Brown Company employed two surveyors who disagreed with each other and with the county surveyor. This court ruled, "To accept any of the three suggested lines is to reject the other two. After studying the record we are not convinced that any one of the three is demonstrably more reliable than the other two. In these circumstances the chancellor rightly held that the plaintiff had not met its burden of proof."

In the case at bar appellant, International Paper Company, successor to Brown Paper Mill Company, Inc., filed a complaint on August 13, 1962, in Grant Chancery Court to enjoin appellee W. F. Warnix from cutting or removing any timber "east of a marked and visible line established and maintained by plaintiff . . . between Section 33 and 32," praying that plaintiff's title be quieted and confirmed against defendant (appellee) and that the boundary line between the lands be established as marked by plaintiff. A temporary injunction was then issued. Appellee filed a general denial and thereafter an amended answer and cross-complaint in which he denied that he claimed any land east of the original line, and further denied that he had any notice or warning of the repainting of any lines contrary to that which he had blazed out, and cross-complained for damages in the sum of $500.00.

At trial of the cause on July 5, 1963, the chancellor found that the parties stipulated that the issue is the true location of the line, and found that the preponderance of the evidence proves that the true line is the one claimed by appellee, that the temporary injunction should be dissolved and appellee on his cross-complaint should be awarded $100.00 as damages. From this decree appellant has appealed, urging three points for reversal.

Appellant's first point is, "The location of the line between appellant's and appellee's land is res adjudicata

having been adjudged to be located as contended here by appellant. The trial court erred in refusing to recognize the line as determined in *Brown Paper Mill Co. Inc.* v. *Warnix, supra.*" Both parties seem to be under the misapprehension that this court adopted a line in the Brown case. On the contrary—this court specifically refused to select a line and stated that, "After studying the record we are not convinced that any one of the three [lines] is demonstrably more reliable than the other two." This court simply upheld the ruling that Brown Company had not met its burden of proof.

Appellant's second point urged for reversal is that the clear preponderance of the evidence shows that the parties have accepted the line contended for by appellant. Three of appellant's employees testified to marking a line with aluminum paint in 1958, following old red markings two-thirds of the way, which they understood and believed to be the true boundary line, and that they did so with appellee's knowledge, consent and acquiescence. These three witnesses are apparently well qualified as foresters; however none of them claimed to be surveyors or to have worked with a surveyor in locating this line; none of them testified to starting from a recognized corner, but testified that they had measured a certain number of feet from an existing fence which was some distance from the section corner. Appellee, on the other hand, denied that he had consented or acquiesced in that line and testified that the old red markings were those of a timber estimator who had cruised the timber and that the boundary line was in a different location, well-blazed by earlier surveys. Appellee and several of appellee's witnesses testified to being present and working in a survey party some years earlier and testified to where they understood the true line to be, describing the particular surveyor's individual blaze as well as the section corner blaze with which this line corresponded. Reviewing the record on trial de novo, considering the disputed testimony on this point as well as the uncontradicted testimony of appellee relative to his damages (appellant's third point), we cannot say that the chan-

cellor's findings are against the preponderance of the evidence and must therefore affirm the trial court.

HARRIS, C. J., and GEORGE ROSE SMITH and FRANK HOLT, JJ., dissent.

GEORGE ROSE SMITH, J., (dissenting). I think our decision in *Brown Paper Mill Company* v. *Warnix* is *res judicata.*

In the first case the plaintiff Brown alleged in its complaint that it was the owner of a strip of land about 50 feet wide bounded on the west by an old wire fence and on the east by a blazed line marked with red paint. Warnix filed a general denial. Lamb, the county surveyor, testified that the true line between the two forty-acre tracts was in fact about 80 feet east of the fence. That 30 feet, lying at a distance of from 50 to 80 feet east of the fence, is the property now in dispute.

In the *Brown* case the chancellor's decree found that "the allegations contained in the complaint of the plaintiff have not been proved to the satisfaction of this court; That the defendant is the owner of the lands described in the complaint of the plaintiff; that plaintiff's complaint should be dismissed." In affirming that decree we said that "[t]he only disputed issue is the correct location of the boundary line between two forty-acre tracts."

A judgment is *res judicata* not only with respect to matters that were actually litigated but also with respect to matters that were within the issues and might have been litigated. *Thomas* v. *McCullum,* 201 Ark. 320, 144 S. W. 2d 467. Thus the question now before us is whether the true location of the common boundary line was in issue in the earlier case.

It seems to me that it was. That case was in essence a boundary line dispute. Brown asserted that it owned the 50-foot strip lying immediately east of the fence. Warnix denied that assertion. By implication the issue was simply which of the two lines constituted the boundary. If Warnix intended to claim still another 30 feet,

as he does now, he should have pleaded his ownership and insisted that it be recognized in the decree. Instead the decree, which presumably was prepared by Warnix's lawyer, merely declared that he owned the 50-foot strip described in the complaint.

Lawsuits ought not to be tried piecemeal. Warnix had his opportunity to claim the additional 30 feet in the first case, but, despite the favorable testimony of the county surveyor, he failed to do so. That should conclude the matter. In fact, the decree now before us again dismisses the complaint for want of equity. If the majority are correct then it seems that Warnix is free to claim still more land in a third case. I would hold that the first decision fixed the line as being 50 feet east of the fence.

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

PARKER *v.* PARKER.

5-3219 377 S. W. 2d 160

Opinion delivered April 6, 1964.

Aurelle Burnside, for appellant.

T. O. Abbott, for appellee.

FRANK HOLT, Associate Justice. This is an appeal from a probate court order admitting the will of Alabama Parker to probate and dismissing the appellants' petition contesting the will. For reversal the appellants first urge that the testatrix lacked testamentary capacity and was subjected to duress and undue influence in making her will. Since these two points are so intertwined we consider them together. On appeal this cause is considered *de novo* and it is well settled that we affirm a probate court order in a will contest unless against the preponderance of the evidence. *Parette* v. *Ivey,* 209 Ark. 364, 190 S. W. 2d 441.

On June 4, 1959 the testatrix, Alabama Parker who was seventy-eight years of age, went to her lawyer's office and executed her will which is now in question. She died on September 21, 1962, survived by twelve children and a grandson as her only heirs at law. In her will she bequeathed $1.00 each to seven of her children and the grandson, the appellants, and named her remaining five children, including the appellee, K. F. Parker, Executor, as residuary devisees to share equally.

In behalf of validity of the will, Emma Jean Burton, a retired school teacher and decedent's friend of long standing, testified that at the request of the testatrix she was present when the will was read, witnessed the signing together with Geneva Paschal [now deceased] and both of them attested to it. She testified that she considered Alabama competent to execute the will. The testatrix' personal physician from 1947 until her death in 1962 testified that in his opinion the testatrix was mentally competent to make the questioned will and to understand such a transaction. The attorney who drafted the will had handled legal matters for the testatrix and had known her for approximately forty years. He testi-

fied that he considered her mentally competent. Further, that when he read it to her in the presence of the attesting witnesses the testatrix replied, "That is it, that is the way I want it," and proceeded to sign her will. He testified that he did not discuss the provisions of the will with anyone other than the testatrix and it was drafted strictly in accordance with her request. There was testimony by a granddaughter of the testatrix, Sandra Kay Parker, fifteen years of age, that she had lived with her grandmother most of her life and that she considered her to be competent and capable to conduct her affairs. There was evidence by other witnesses that the testatrix was physically and mentally capable of transacting her personal and business affairs.

The appellants offered evidence that their mother was feeble from age, had difficulty recognizing people, was very forgetful, and appeared mentally confused. Old age, physical incapacity, and partial eclipse of the mind will not invalidate a will if the testator had the capacity to understand the making of the will on the date it was made. *Yarbrough* v. *Moses,* 223 Ark. 489, 267 S. W. 2d 289. In the case at bar Sandra Kay Parker testified that her grandmother was unable to easily recognize people because she had cataracts on her eyes. Within a month after the execution of the will the testatrix, accompanied by a friend, made a train trip to Chicago where one of her children lived and thence to California where another one of her children resided. She had included both of these children among the residuary or principal beneficiaries in her will. From Chicago she was also accompanied by the fifteen-year-old granddaughter who testified that her grandmother required no medical attention of any kind on the trip.

The appellants further urge that their mother was dominated and subjected to undue influence by Ernestine Parker, the daughter and youngest child who resided with her mother from 1953 until her mother's death in 1962. This was denied by Ernestine who testified that she in no manner influenced her mother and that she

had no knowledge of the circumstances surrounding the making of the will.

We have long adhered to the rule that the burden of showing the lack of testamentary capacity and undue influence in the making of a will is upon the contestants. *Werbe* v. *Holt,* 218 Ark. 476, 237 S. W. 2d 478; *Sullivant* v. *Sullivant,* 236 Ark. 95, 364 S. W. 2d 665. Also, we have frequently defined the requisite mental capacity to make a valid will. It is that the testator must have (1) the ability to retain in memory without prompting the extent and condition of his property, (2) the mental ability to comprehend to whom he is giving his property, and (3) realization of the deserts and relationship to him of those he excludes from his will. *Shippen* v. *Shippen,* 213 Ark. 517, 211 S. W. 2d 433.

With respect to undue influence, we have long adhered to the rule that:

"* * * The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property."

McCulloch v. *Campbell,* 49 Ark. 367, 5 S. W. 590. The argument of undue influence is directed solely at Ernestine Parker who lived with her mother. It is significant that the mother saw fit to include four of her other children along with Ernestine as the principal beneficiaries, each sharing equally. In *Bruere* v. *Mullins,* 229 Ark. 320 S. W. 2d 274, we said:

"* * * one having the testamentary capacity to make a will, is not required to mete out equal and exact justice to relations, and the motives or partiality, affection or resentment by which they are influenced are not reviewable; and if one has the capacity to make a will, he may make it as eccentric, injudicious and unjust as caprice, frivolity or revenge can dictate."

Appellants also contend that the will was not properly executed. It is undisputed that the will was signed

by the testatrix and in the presence of two attesting witnesses. Both witnesses were disinterested since neither was given any "beneficial interest by way of devise." Ark. Stat. Ann. § 60-402 (Supp. 1963). Further, we think that proof of the execution of the will was properly made.

In the case at bar we agree with the Probate Judge that the appellants have not sustained the burden of proof required of them in establishing the lack of testamentary capacity of their mother or that undue influence was exerted upon her or that her will was not properly executed.

Affirmed.

5-3234 377 S. W. 2d 608

Opinion delivered April 13, 1964.

Mark E. Woolsey, for appellant.

Ralph W. Robinson and *Theron Agee,* for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves a further interpretation of certain provisions of the will of William Bowlin. Item Six of that will was construed in the case of *Bowlin* v. *Vinsant,* 186 Ark. 740, 55 S. W. 2d 927. Bowlin died testate in 1916. He was survived by his widow, Julia Bowlin, and five living children, *viz,* Noble Bowlin, Lizzie Lowery, Lillie Brownfield, Gertrude Vinsant, and John Bowlin; also, there were five grandchildren, the children of a daughter, Rebecca Clark, who predeceased her father. Appellees are the children of Paul Bowlin, deceased, Paul having been a son of John Bowlin, and accordingly a grandson of William Bowlin. In addition to Paul Bowlin, father of appellees, John Bowlin was survived by five other children, Marcus Bowlin, Othel Bowlin, Lillie Lewis, Maude Campbell and Virgie May Ray. Under Item Three of the will, Virgie May Ray and Lillie Bowlin

Lewis were bequeathed the sum of $10.00 each, and their names do not otherwise appear in the will.

In 1916, Marcus Bowlin, Othel Bowlin, Maude Campbell, and Paul Bowlin (father of appellees) conveyed, by quitclaim deed, to their sister, Lillie Lewis, the lands involved in this appeal. In January, 1960, Lillie Lewis died intestate, leaving as her sole and only heir at law, Carl Lewis, appellant herein. Lillie and appellant had been in possession of the lands from the time of the conveyance (1916) to Lillie from her brothers and sister.

In May, 1962, appellees filed a complaint, alleging that they were part owners of the lands in question,[1] and they sought their proportionate share of the rents for 1959, 1960 and 1961. After the overruling of a demurrer, an answer was filed wherein it was asserted that Carl Lewis was the owner of the lands by virtue of being the sole heir of Lillie Lewis, Lillie having obtained her title to the property by virtue of the quitclaim deed heretofore mentioned, and one of the grantors of that deed having been Paul Bowlin, father of appellees. The cause was tried by the court, sitting as a jury. After certain stipulations in open court, and the taking of oral testimony, the court held that under the provisions of the will of William Bowlin, appellees are the owners of 7/32 interest, or a 1/32 interest each, and judgment was entered for appellees in the sum of $122.40 each, or a total judgment of $856.80, together with interest from date, at the rate of 6% per annum. From the judgment so entered, appellant brings this appeal.

Bowlin v. *Vinsant, supra,* involved the construction of Item Six of the will of William Bowlin. The language at issue was as follows:

"I also further give and devise unto my said wife, Julia, for and during her natural life, the use, occupancy of my dwelling house and premises now occupied by us as a dwelling and home in Van Buren, Arkansas, with the lots and land enclosed and adjoining thereto, and at

[1] It was subsequently stipulated that Marcus Bowlin, Othel Bowlin, and Paul Bowlin are deceased.

her death or should my wife not survive me, I give and bequeath the said personal property herein set forth or so much as may be undisposed of by my said wife, not in any manner intending to limit my wife in the disposition of said personal property, unto my daughter Gertrude Vinsant, and I give and devise the said dwelling house and premises devised unto my wife during her life, at her death or should my said wife not survive me, unto my daughter, Gertrude Vinsant and unto the heirs of her body."

This court held that this language created a life estate in the wife, Julia, but that the daughter, Gertrude Vinsant, took the fee. Cited as authority for the holding was the case of *Pletner* v. *Southern Lumber Company,* 173 Ark. 277, 292 S. W. 370. To the same effect was the holding in *Bell* v. *Gentry,* 141 Ark. 484, 218 S. W. 194.

In the instant litigation, a certain provision of Item Nine of the will is at issue. This provision reads as follows: "I give and devise unto my grandchildren, children of John Bowlin, viz: Marcus L. Bowlin, Paul C. Bowlin, Othel Bowlin and Maude E. Campbell and unto the heirs of their bodies, the one seventh part or share of said real estate or the one twenty-eighth part or share each."

The trial court, in effect, held that this language devised only a life estate to the named grandchildren of William Bowlin with the fee in "the heirs of their bodies," some of these heirs being appellees herein. In other words, the dispute in this case relates to the interest acquired by Marcus L. Bowlin, Paul C. Bowlin, Othel Bowlin and Maude E. Campbell, grandchildren of William Bowlin. If the quoted language in Item Nine devised the fee to these grandchildren, then appellant should prevail, for his mother received a quitclaim deed from these parties in 1916. If, on the other hand, the language only created a life estate in these grandchildren, then appellees, children of Paul Bowlin, are entitled to the interest contended for. The trial court held with appellees, and we think, unquestionably, held cor-

rectly. This holding was in accord with a line of cases following *Horsley* v. *Hilburn,* 44 Ark. 458,[2] and is also in accord with our statute, Ark. Stat. Ann. § 50-405 (1947), which reads as follows:

"In cases when by common law any person may hereafter become seized in fee tail of any lands or tenements, by virtue of any devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance."

An interesting article, Branch, "The Effect of Stare Decisis Upon Fee Tail in Arkansas," is found in Volume 10, Arkansas Law Review (1955-56), Page 181.[3] The article quotes Richard R. Powell, at that time Professor of Law at Columbia University, and Reporter on Property for the American Law Institute as follows:

" 'Arkansas, by decision, has injected a peculiar distinction between limitations "to B and the heirs of his body" (which are construed to be governed by the stat-

[2] See *Bradley Lumber Co. of Ark.* v. *Burbridge,* 213 Ark. 165, 210 S. W. 2d 284, and cases cited therein.

[3] From the article: "In order to reduce these situations to a simple form, consider the following: 'To A for life with remainder to B and the heirs of her body.' This would certainly create a life estate in A, but there must be another estate in someone else in order to add up to fee simple absolute. There is, by the will, a devise of the remainder to B and the heirs of her body. At common law a devise or conveyance to a person and the heirs of that person's body created an estate in fee tail. This is a devise to a person and the heirs of that person's body. By statute in Arkansas this would create a life estate in B and an estate in fee simple absolute in the bodily heirs of B.

"The above situation is the one with which the court was faced in the *Pletner* case. The court said that it is a well-established rule that a conveyance or devise to a person and the heirs of the body of such person creates an estate tail in the grantee or devisee, which, by statute, becomes an estate for life in the grantee or devisee and a fee simple absolute in the person to whom the estate tail would first pass by common law, citing *Horsly* v. *Hilburn.* But the court said this doctrine could not be applied since the estate is not devised to B and her bodily heirs, creating a life estate in B and fee simple absolute in her bodily heirs, but the life estate is given to A and the remainder to B and her bodily heirs."

ute) and limitations to B for life, remainder to C and the heirs of his body.'' In the latter situation the statute is not applied, and if C is alive at B's death, C gets an estate in fee simple absolute, but if C is then dead, C's descendants get the estate in fee simple absolute.' ''

Professor Powell then criticizes the distinction made by the court between the two types of devises, and, in fact, several learned writers have questioned the soundness of the rule established in the *Bell, Pletner* and *Bowlin* cases. In *Eubanks* v. *McDonald,* 225 Ark. 470, 283 S. W. 2d 166, this court pointed out that to repudiate the rule by judicial decision would result in the invalidation of titles that had been acquired in reliance upon the rule in question.

Appellant recognizes the distinction between the two lines of cases, but argues that the will should be construed from its ''four corners'' in determining the intention of the testator, and that under such construction, he is due to prevail. In *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, we said, ''The first and great rule in the exposition of wills (to which all other rules must bend) is that the intention of the testator expressed in his will shall prevail, *provided it be consistent with the rules of law.''*[4] The italicized phrase precludes any speculation as to the intentions of William Bowlin, for we have several times stated the legal effect of the language employed.

In *Crittenden* v. *Lytle,* 221 Ark. 302, 253 S. W. 2d 361, this court said:

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

'' 'When technical phrases or terms of art are used, it is fair to presume that the testator understood their meaning, and that they expressed the intention of his

[4] Emphasis supplied.

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

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

"The function of a court in dealing with a will is purely judicial; and its sole duty and its only power in the premises is to construe and enforce the will, not to make for the testator another will which might appear to the court more equitable or more in accordance with what the court might believe to have been the testator's unexpressed intentions. 'The appellants are correct in the statement that the purpose of construction is to arrive at the intention of the testator; but that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will.' "

See also *Howell* v. *Henry,* 235 Ark. 1, 356 S. W. 2d 747.

Under our statute, heretofore quoted, and the numerous decisions of this court, a devise "unto A and unto the heirs of his body" would create a life estate in A and an estate in fee simple absolute in A's bodily heirs. Here, the pertinent clause in Item Nine of the will created only a life estate in Marcus L. Bowlin, Paul C. Bowlin, Othel Bowlin and Maude E. Campbell, and their heirs, including appellees, took the fee.

Affirmed.

5-3233 377 S. W. 2d 611

Opinion delivered April 13, 1964.

Thompson & Thompson and *Phil Stratton,* for appellant.

Spitzberg, Bonner, Mitchell & Hays, By: *Allan W. Horne,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves the property settlement of a divorced couple. Mr. and Mrs. Foit married in 1939 and separated in 1957. After the separation they agreed on a property settlement, and Mrs. Foit obtained an uncontested divorce on August 8, 1862. The property settlement of the parties, as contained in the divorce decree, recited:

"It is further ordered, adjudged and decreed, that defendant pay to Plaintiff, Evelyn Ruth Foit, Twenty Five Hundred Dollars for her interest in the real estate owned by the parties hereto, when said real estate is sold. It is further ordered, adjudged and decreed that plaintiff have all the furniture which is in the house now occupied by plaintiff."

Mrs. Foit received the furniture, but refused to execute a deed to the real estate. Thereupon, in 1963, Mr. Foit deposited $2,500.00 in the Registry of the Court and petitioned that Mrs. Foit be required to execute the deed covering the real estate. After hearing the evidence, the Court, on August 5, 1963, ordered Mrs. Foit to execute the said deed; and from that order Mrs. Foit prosecutes the present appeal, claiming that she was entitled to more than the $2,500.00 and the furniture.

She admitted that she made the property settlement agreement as contained in the decree; and she did not offer any evidence to show that she was misled, defrauded, or under duress; she simply asserted that she was entitled to more than $2,500.00. In other words, she has changed her mind, just as she has changed her attorneys. One attorney represented her in the divorce case in 1962; another represented her in the 1963 proceedings; and now she has the present counsel.

We find no merit to Mrs. Foit's appeal. She was the one who wanted the divorce. Her 1962 attorney told her that she could get more than $2,500.00 and the furniture; but that was what she wanted in the way of a property settlement. Now she wants to retain the divorce, but to reopen the property settlement in the absence of any proof of fraud, duress, or overreaching of any kind. This case has many aspects similar to that of *Faulkner* v. *Mowry,* 228 Ark. 285, 307 S. W. 2d 860; and the holding in that case is ruling here.

Affirmed.

JOHNSON, J., not participating.

WASHINGTON FIRE & MARINE INSURANCE CO. *v.* HAMMETT.

5-3226 377 S. W. 2d 811

Opinion delivered April 13, 1964.

[Rehearing denied May 11, 1964.]

Frank Lady, for appellant.

W. B. Howard, Jack Segars, for appellee.

George Rose Smith, J. The appellee brought this suit for a declaratory judgment. She seeks to determine whether her attorney, W. B. Howard, is entitled to charge the appellant, her automobile collision insurer, an attorney's fee for having recovered the full amount of a subrogation claim held by the insurance company. This appeal is from a decree permitting Howard to retain 40% of the recovery as his fee.

In May of 1962 the appellant issued a $50 deductible policy of collision insurance to the appellee. On October 1 the appellee suffered personal injuries and property damage in a collision with Ray Purcell's car. The appellant promptly paid all but $50 of the property damage (which amounted in all to $289.94) and took a subrogation agreement from the appellee. On October 29 the appellant sent a form letter to Purcell, warning him not to settle his liability without reimbursing the insurer for its claim. On November 11 the company again wrote to Purcell, stating that if it did not hear from him with ten days it would have no alternative except to file suit. The company did not in fact bring an action or take any further steps to enforce its claim against Purcell.

On November 21 the appellee employed Howard under a contract fixing a contingent fee of 40% of any sum obtained by compromise settlement. Howard filed suit against Purcell on February 27, 1963, seeking to recover both for his client's personal injuries and for her property damage. In March a compromise settlement was reached with Purcell's insurer. That company issued two checks, one for the personal injury claim and the other, in the amount of $289.94, for the property damage. The latter included both the appellant and the appellee as payees. This suit was filed when the parties were unable to agree upon Howard's right to a fee.

The subrogation agreement provided that the insured should do nothing after the loss to prejudice the rights of the insurer. It is now insisted that the appellee breached the contract by filing suit for the property damage and by entering into the compromise settlement.

This argument is without merit. The appellee was entitled to file the action in her own name, the insurer not being a necessary party. *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566. Moreover, since the appellee's cause of action against Purcell could not be split, the insurer's claim for property damage would have been destroyed if Mrs. Hammett had failed to include that count in her complaint. *Motors Ins. Corp.* v. *Coker,* 218 Ark. 653, 238 S. W. 2d 491. The appellant is charged with knowledge of the rule of law permitting the insured to bring an action for all the property loss. If the appellant wished to be informed of the filing of any such suit, so that it might intervene, it could have inserted such a requirement in the subrogation agreement. That was not done.

We do not perceive that the appellee's action in compromising the property damage claim for its full amount was prejudicial to the rights of the insurer. In fact, if the appellee had paid over the entire proceeds of settlement to the insurer there would have been no dispute between the parties. Hence if the appellant's rights have been prejudiced it is not because of any conduct on the part of the insured but because in the circumstances the law allows her attorney to collect a fee.

The appellant's real grievance lies in having to pay a fee to an attorney not of its own choice. Subrogation, however, is governed by equitable principles. *Webster* v. *Horton,* 188 Ark. 610, 67 S. W. 2d 200. If the appellant had employed its own attorney and had actively participated in the action against Purcell it could not fairly have been compelled to contribute to Howard's fee. *Pontiac Mutual County, etc. Co.* v. *Sheibley,* 279 Ill. 118, 116 N. E. 644. But when the insurance company has benefited from the work done by the insured's attorney there is no inequity in requiring it to bear its fair share of the collection expense. An almost identical case so holding is *United Services Automobile Assn.* v. *Hills,* 172 Neb. 128, 109 N. W. 2d 174. Other cases recognizing the insurer's duty to contribute to the expense of collection include *Brown* v. *T. W. Phillips Gas & Oil Co.,* D.C. Pa.,

105 F. Supp. 479; *Shawnee Fire Ins. Co.* v. *Cosgrove,* 85 Kan. 296, 116 Pac. 819, 41 L.R.A. (n.s.) 719; *Newcomb* v. *Cincinnati Ins. Co.,* 22 Ohio St. 382, 10 Am. Rep. 746; *Powers* v. *Calvert Fire Ins. Co.,* 216 S. C. 309, 57 S. E. 2d 638, 16 A.L.R. 2d 1261. There is no contention that a 40% fee for collecting this small claim is unreasonably high.

The appellant also relies upon a second instrument executed by Mrs. Hammett, called a Loan Receipt. This document recites that she will not make a settlement or give a release without the written consent of the insurer. Howard actually gave the appellant notice of the proposed settlement a week before it was consummated. Inasmuch as Purcell's insurer paid the full amount of the property loss the appellant had no valid reason for withholding its consent. Hence it is not in a position to complain of the fact that its consent was not obtained.

Affirmed.

FAUBUS, CHAIRMAN *v.* MILES.

5-3319 377 S. W. 2d 601

Opinion delivered April 13, 1964.

[Rehearing denied May 4, 1964.]

Bruce Bennett, Attorney General, By *Jack L. Lessenberry,* Asst. Attorney General, for appellant.

C. B. Nance, Jr., for appellee.

PAUL WARD, Associate Justice. The subject of this litigation is the constitutionality of Act 19 of the First Extraordinary Session of the Sixty-Fourth General Assembly. Said Act 19 purports to accomplish two major objectives: one is to establish a system of voter registration and the other is to abolish the poll tax as a prerequisite to vote in any election.

Shortly after Act 19 was passed (with an emergency clause) and signed by the governor, a citizen and taxpayer (representing the citizens and taxpayers of the state) brought suit against the governor as Ex Officio Chairman of the State Board of Election Commissioners, the Chairman of the State Democratic Committee, and the Chairman of the Pulaski County Democratic Central Committee (representing all officials charged with the responsibility of conducting elections), for a declaratory judgment under the authority of Ark. Stat. Ann. § 34-2501, et seq. (Repl. 1962).

In the petition it was in essence alleged (among other things): Act 19 provides that a citizen, otherwise qualified, "may vote for candidates seeking nominations of a political party for state, district, county, township, and municipal offices in party primaries and seeking election to offices in general elections, *without paying for or possessing a poll tax*"; that such provision is contrary to the constitution; that the defendants will permit said unconstitutional act to be put in operation in a short time; and, that the time in which to enjoin the de-

fendants is of the essence. Petitioner's prayer was that the defendants be enjoined from:

"a. Permitting any person to qualify as a candidate in either a primary or general election for a State office or the office of any political subdivision of the State if such person has not paid his poll tax or does not exhibit a poll tax or evidence that he has paid his poll tax as required by the Constitution and statutes of the State of Arkansas.

"b. Permitting any person to cast a ballot in either a primary or general election for a candidate for a State office or the office of any political subdivision of the State if such person has not paid his poll tax or does not exhibit a poll tax receipt or other evidence that he has paid his poll tax as required by the Constitution and statutes of the State of Arkansas.

"c. Certifying as a nominee for any political party any candidate for a State office of any political subdivision thereof any person who has not paid a poll tax as required by the Constitution and statutes of the State of Arkansas.

"d. Placing on the official ballot for the general election a nominee or person unless he has paid the poll tax required by the Constitution and statutes of the State of Arkansas.

"e. Permitting any person to cast a ballot on any issue or proposition other than a candidate if such person has not paid his poll tax or does not exhibit evidence of payment of his poll tax as required by the Constitution and statutes of Arkansas."

In addition to the above, petitioner prayed that Act 19 be declared unconstitutional insofar as it seeks to permit a person (otherwise qualified as an elector) to be a candidate or to cast a ballot in any election other than for the positions or offices set out in Amendment 24 of the Constitution of the United States.

To the above complaint defendants demurred on the ground that it did not state allegations sufficient to con-

stitute a cause of action. Defendants also answered, denying Act 19 is unconstitutional in any part, but asserting it is authorized by Amendment 39 to the Constitution of Arkansas. The prayer was that the complaint be dismissed and that Act 19 be declared constitutional.

The issues posed by the foregoing pleadings were presented to the chancery court. Whereupon the court, after making certain findings of fact, entered a Declaratory Judgment (in essence and substance) as follows:

(1) The defendant's demurrer is overruled.

(2) Act 19 is constitutional insofar as it provides for voter registration and voting for those officials enumerated in Amendment 24 to the U. S. Constitution, but it is unconstitutional in all respects insofar as it seeks to permit a person to vote for a state, district, county, township or municipal office or on a state or local issue without having paid for a poll tax.

(3) The defendants (appellants here) are enjoined from doing any of the things mentioned in the prayer of the complaint as heretofore set out.

On appeal from the above Declaratory Judgment, appellants urge a reversal in part, relying on the grounds hereafter discussed. We acknowledge appreciation of the Amici Curiae brief presented by the Arkansas League of Women Voters and the Arkansas State AFL-CIO.

The Issue Defined. The basic issue presented for our decision, briefly stated, is whether Amendment 39 to the State Constitution gives the legislature the power to dispense with the payment of a poll tax as a prerequisite for voting. It is apparently conceded by all parties (as was held by the trial court) that a poll tax is no longer a prerequisite to voting in a primary or general election for persons running for federal offices (i.e., offices mentioned in Amendment 24 to the U. S. Constitution). The basic issue above mentioned is therefore limited in this opinion to the poll tax as a prerequisite to voting for persons running (in a primary, gener-

al, or special election) for a state, district, county, township or municipal office, or voting on a state or local issue, or in a school election. All such offices, officers, or issues shall hereafter (for brevity) be referred to as state (as opposed to federal) offices, officers, or issues.

It is our opinion that said Amendment 39 does not give the legislature the power to dispense with the poll tax as a prerequisite for voting in state elections (as previously limited and defined). In order to make clear the reasons for our opinion, we set out below a brief resume of the pertinent portions of our constitution.

(a) Section 1 of Article 3 of the Constitution (as amended in 1920 by Amendment 8) provides: that every citizen 21 years old who has resided in the state 12 months, in the county 6 months, and in the voting precinct 1 month (with certain exceptions) and who *has paid a poll tax,* shall be allowed to vote. (*Jones* v. *Floyd,* 129 Ark. 185, 195 S. W. 360, interprets this amendment to mean a poll tax is a prerequisite to voting.)

(b) Amendment 11 (adopted in 1926) requires every male citizen over 21 years of age to *pay* an annual per capita tax of $1.00 for school purposes.

(c) Section 2, Article 3 of the Constitution provides that the *right to vote* shall not be made to "*depend upon any previous registration of the elector's name . . .*" (Emphasis added.)

(d) Amendment 39 (adopted in 1948) which is being interpreted here, gives the legislature power to do two things: One is to "enact laws providing for a registration of voters"; and the other is "to require that the right to vote . . . shall depend upon such previous registration".

Three obvious conclusions are readily deducible from the above constitutional provisions. *One,* that previous to the adoption of Amendment 39 the legislature had no power to pass a "registration" law (due to Section 2, Article 3). *Two,* that the legislature did have the power (by virtue of Amendment 39) to pass a "registra-

tion'' law. *Three,* that the legislature had the power (by virtue of Amendment 39) to make ''registration'' a prerequisite to voting in any election. We are therefore driven to the conclusion that insofar as Act 19 requires compliance with *Two* and *Three* just mentioned, it is constitutional.

We are convinced, however, that the people, in adopting Amendment 39, did not intend to do away with the necessity of paying a poll tax in order to vote. Perhaps the most obvious and the most forceful reason (why the people did not so intend) is that if they so meant, they would have so stated—it would have been easy to do so.

In addition to the above, there are other forceful reasons why we think Amendment 39 did not do away with the necessity of a poll tax in order to vote. The payment of a poll tax is only one of several qualifications of an elector required by Amendment 8 as heretofore pointed out. If Amendment 39 gives the legislature power to abolish the poll tax (as a prerequisite to voting then it would seem to follow also that the legislature could change or abolish the qualifications pertaining to age and residence. Such an interpretation amounts to holding Amendment 39 repeals Amendment 8 by implication. Repeal by implication is not favored, and the legal presumption is against such repeal. These rules of construction are well established and they apply with equal force to statutes and constitutional amendments. See: *Polk* v. *Corning School District No. 8 of Clay County,* 202 Ark. 1094, 155 S. W. 2d 342, and *Shepherd* v. *Little Rock,* 183 Ark. 244, 35 S. W. 2d 361.

We find no merit whatever in the argument advanced by appellants that Amendment 24 to the Constitution of the United States abolishes the poll tax as a prerequisite to voting in state elections (as previously herein defined). Said amendment, in material parts, reads:

''The right of citizens of the United States to vote in any primary or other election for President or Vice

President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." It is abundantly clear from the above quoted language that said Amendment 24 has nothing to do with state elections (as previously herein defined).

Section 14 of Act 19 sets up a temporary system of registration "applicable to all elections held in this State after the 1st day of June, 1964, and before the 1st day of July, 1965". We reiterate that the legislature has the power to require a persons to "register" before he can vote (in any election) even though such person has paid for a poll tax in due time as provided by law. We call attention, however, to certain provisions of the section which purport to substitute a "free" poll tax (for registration purposes) in lieu of a poll tax for which the voter has paid $1.00 (in due time as provided by law). It is our conclusion that the legislature has no power, in state elections (as heretofore defined), to substitute said "free" poll tax (for registration purposes) in lieu of a poll tax for which the voter has paid $1.00 (in due time as provided by law). It is our conclusion that the legislature has no power, in state elections (as heretofore defined), to substitute said "free" poll tax for the poll tax required by Amendment 8 which provides that the voters "shall exhibit a poll tax receipt or other evidence that they have *paid* their poll tax . . ." (Emphasis added.) To hold otherwise would be to approve a subterfuge for evading the letter and the spirit of a plain constitutional provision. The Constitution (Amendment 40) directs that the money raised from the payment of poll taxes shall go to support the public schools. This important source of revenue for a worthy purpose, in our opinion, is entitled to protection by the courts until the people (by amendment) direct otherwise.

With the clarificaions herein mentioned, the judgment of the trial court is affirmed.

Affirmed (as clarified).

JOHNSON, J., concurs.

JIM JOHNSON, Associate Justice (concurring). I agree with the majority opinion wherein it is determined that Amendment 39 to the Constitution of the State of Arkansas and Amendment 24 to the Constitution of the United States in no way repeal Amendment 8 to the Constitution of the State of Arkansas. This determination, of course, renders void that portion of Act 19 of the First Extraordinary Session of the Sixty-fourth General Assembly which sought to abolish the poll tax as a requisite to vote in state elections. I concur in this separate opinion for the reason that it is my view that, while this declaratory judgment action was confined to the narrow issues discussed in the majority opinion, in the public interest the Court should have further discussed the remaining portions of Act 19 which immediately affect the right of citizens of this state to vote.

First, I feel that it should be pointed out that the valid portions of Act 19 do not radically change the law as it existed prior to the passage of Act 19. Every person who possesses a valid paid 1963 poll tax receipt, and who is otherwise qualified under existing law, can still vote for candidates for federal office until October 1. 1964 as was true under the old law. The new law simply goes further and provides that those persons who failed to qualify by purchase of a 1963 poll tax will be permitted to vote, if they otherwise qualitfy, simply by registering with the county collector during the last 20 days of April of 1964. These registrants will be issued a so-called "free" poll tax receipt which will permit them to vote for candidates for federal office until October 1. As things now stand, the holders of current paid poll tax and "free" poll tax receipts, by virtue of the valid portions of Act 19, will be permitted to vote for candidates for federal office in the summer primaries of 1964. Only those holders of a valid *paid* poll tax receipt will be permitted to vote for candidates for state and subdivision offices.

I feel that it is necessary now to project the effect of the holding of the Court beyond the summer primaries. Here again the law has not been materially

changed for those who pay the poll tax prior to October 1, 1964. By virtue of the valid portions of Act 19, those who hold a valid *paid* poll tax receipt issued prior to October 1, 1964, will be considered properly registered for all purposes until July 1, 1965. That is, such registrants, if otherwise qualified, will be permitted to vote in the November, 1964, general election for candidates for state and federal office. Those registrants who hold only the "free" poll tax receipts will be permitted to vote, if otherwise qualified, for candidates for federal office only, provided they register again during the last 20 days of September, 1964, and such registration will be valid for that limited purpose until July 1, 1965.

In order to be registered beyond July 1, 1965, both the holders of paid poll tax receipts and those who have not paid a poll tax must register with the county collector at any time during the period between January 1, 1965 and April 10, 1965. The holders of valid paid poll tax receipts will continue to enjoy the privileges of voting in all state and federal elections. All others who register will be limited to the privileges of voting for candidates for federal office only.

My second reason for concurring by means of a separate opinion is that I feel that the Court should have pointed out that the net effect of the majority holding, in which I am in complete agreement, is that the people alone have the power to alter the basic difficulty presented by the adoption of Amendment 24 to the Constitution of the United States. Until the voice of the people of Arkansas is heard by the repeal of the portion of the Constitution of the State of Arkansas requiring the payment of a poll tax as a requisite to voting, this state will be faced with a dual registration system and dual balloting as a resulting necessity.

HARDAWAY *v.* STATE.

5104 377 S. W. 2d 813

Opinion delivered April 13, 1964.
[Rehearing denied May 11, 1964.]

[redacted]

Paul K. Roberts, for appellant.

Bruce Bennett, Attorney General, by *John P. Gill,* Asst. Atty. Gen., for appellee.

SAM ROBINSON, Associate Justice. Appellant, Al Hardaway, was convicted of possessing untaxed alcohol and resisting an officer. Appellant, Victor Hardaway, was convicted of assaulting an officer and interfering with an officer. The alleged offenses grew out of the action of peace officers in searching the home of Al Hardaway on authority of a purported search warrant. Untaxed alcohol was found in the house and later was introduced as evidence at the trial.

The issues appellants raise on appeal are the validity of the search and the correctness of an instruction given by the court telling the jury that the search warrant was valid. Prior to the trial no motion was made to suppress the evidence, and during the trial no objection was made to the introduction of the evidence; but after both the State and the defense had rested, appellants filed a motion to suppress the untaxed alcohol as evidence, alleging that the purported search warrant was invalid. The court overruled the motion; appellants made no objection and saved no exceptions. Likewise, appellants made no objection and saved no exceptions to

the action of the court in giving the instruction to the effect that the search warrant was valid.

Under the provisions of Act 555 of 1953, the saving of formal exceptions to orders and rulings of the court is unnecessary; but this Act does not apply in criminal cases. *McConnell* v. *State,* 227 Ark. 988, 302 S. W. 2d 805. Objections and exceptions are necessary in a criminal case of this kind to preserve the point for review on appeal. *Hicks* v. *State,* 225 Ark. 916, 287 S. W. 2d 12; *Powell* v. *State,* 231 Ark. 737, 332 S. W. 2d 483.

Affirmed.

PEEK *v.* BANK OF STAR CITY.

5-3223 377 S. W. 2d 158

Opinion delivered April 13, 1964.

Coleman, Gantt, Ramsay & Cox, for appellant.

Fulk, Lofton, Wood, Lovett & Parham, for appellee.

JIM JOHNSON, Associate Justice. This suit resulted from a rather involved series of banking transactions frequently called check kiting. Sometime late in December, 1961, the cashier of appellee Bank of Star City advised one of its customers, the late J. Thurman McCool,

that he had a number of bank drafts being returned unpaid and that he would either have to deposit sufficient funds to cover these drafts or the bank would accept future drafts for collection only. McCool had several accounts at this bank including one styled "Business Machines Company" and another "Jefferson Printing Company." McCool had sold appellant, Noah S. Peek, Jr., quite a number of installment contracts and notes for business machines McCool had sold to others. On January 1, 1962, McCool obtained a check on a "customer's draft" form from appellant, apparently intended as an advance on several contracts appellant planned to buy from McCool. Appellant testified that when he signed the customer's draft form, it was dated January 1, 1962, the figures "500.00" were typed in, as was "Citizen's Bank, England, Arkansas." Appellant signed the check and wrote "Peek Farm Service" above his name. On January 2nd when McCool presented the check to appellee bank, the check was payable to "Peek Finance Company," the "sum of $22,500.00" was imprinted on it with a checkwriter, two 2's and a comma were typed in front of the 500.00, and the words "to establish account" was also typed on the face of the check. On the back was a rubber-stamp endorsement, "For deposit only, Peek Finance Company." Appellee's cashier opened an account styled "Peek Finance Company" for which McCool signed the signature card as the only authorized signer for this account, and received $2,450.00 in cash. During the next two days appellee received over $14,000.00 worth of drafts returned which had been credited to McCool's Business Machines Company account, which appellee deducted from McCool's Peek Finance Company account. On January 5, 1962, the Citizens Bank of England, being unable to contact appellant, returned the check because there were not sufficient funds in the Peek Farm Service account to pay it, and so advised appellee bank by telephone. Appellee bank put the check through for payment a second time and it was returned with the following notation on the back: "Protested—check was altered —forged and counterfeit signature and further the body of check was altered and raised. Noah S. Peek, Jr."

During this time McCool disappeared and was later found dead. After making demand for payment of the check, appellee filed suit in Jefferson Circuit Court on March 23, 1962, against appellant alleging that it had received the check for value and without notice of any infirmity thereon and prayed judgment for $22,500.00. The matter was tried on August 6, 1963, and the jury returned a verdict for appellee in the sum of $8,500.00. From judgment on the verdict, appellant has prosecuted this appeal urging that the verdict of the jury was perverse and in conflict with the instructions of the court and the evidence.

The cashier and other witnesses of appellee testified about drafts which had been credited to McCool's Business Machines Company account being returned unpaid to appellee, who in turn charged the drafts, together with the $2,450.00 cash given McCool, against McCool's Peek Finance Company account for a total of $16,818.75. Appellant contends that under no conceivable posture of the evidence in this case applied under the law given in the instructions could the jury have validly found that appellant was indebted to appellee in the sum of $8,-500.00, the amount of the verdict, and that such amount was purely speculative, apparently a jury attempt to compromise the losses between the parties, and therefore perverse. The testimony in the case at bar was sharply conflicting, indicating such negligence on the part of appellant as to support a verdict for the full $16,818.75, and on the other hand indicating such negligence on the part of appellee as to support a verdict for appellant. The rule here applicable was simply stated in *Fulbright* v. *Phipps*, 176 Ark. 356, 3 S. W. 2d 49: "It is true that the verdict is not consistent, but this is not grounds for us to reverse the judgment, as it is supported by very substantial and sufficient testimony."

Appellant next contends that his motion for a directed verdict should have been sustained. At the close of appellee's testimony, appellant moved that a verdict be directed in his favor on the ground that given its highest probative value the evidence elicited in favor of

appellee was insufficient to constitute grounds for any recovery by appellee against appellant, which was denied. This motion was renewed at the close of appellant's case by means of an offered binding instruction, which was refused by the court. In *Neal* v. *St. L.I.M.&S. Ry. Co.,* 71 Ark. 445, 78 S. W. 220, this court said:

"The pratcice of directing a verdict for the defendant when it is clear that the evidence is not sufficient to make out a case for plaintiff is a wise one, for it saves time and costs, and expedites the business of the court; but a case should not be withdrawn from the jury in that way unless it can be said as a matter of law that no recovery can be had upon any reasonable view of the facts which the evidence tends to establish. *Catlett* v. *Railway Company,* 57 Ark. 527; *Texas & P. Ry. Co.* v. *Cox,* 145 U. S. 593; 6 Enc. Plead. & Prac. 679-680."

Under the long standing practice in this state, even where ". . . we think there is not much evidence to sustain the assertion of the plaintiff, he had, we think, the right to submit the question to the jury. . . ." *Hutchinson* v. *Gorman,* 71 Ark. 305, 73 S. W. 793. And where, as here, the evidence was substantial and certainly conflicting, the trial court did not err in refusing to direct a verdict for appellant.

Appellant finally urges that two of the instructions offered by appellee and given by the court were prejudicially erroneous. We have reviewed all of the instructions, whether offered by appellee, appellant or the court. Taken as a whole, including the two complained of instructions, we find that the instructions fairly correlate the testimony to the applicable law, including the Uniform Commercial Code. Finding no error, we therefore affirm.

TED SAUM & COMPANY *v.* SWAFFAR.

5-3248 377 S. W. 2d 606

Opinion delivered April 13, 1964.

John H. Joyce and *Glen Wing,* for appellant.

David J. Burleson, for appellee.

FRANK HOLT, Associate Justice. The question presented in this case is the right of the appellee, Richard Swaffar, to maintain the present action for damages against the appellant, Ted Saum and Company, a corporation, based upon the alleged conversion of appellee's truck. This action resulted when Mrs. Ruth Saum brought a foreclosure proceeding in chancery court to collect the balance due on a note made payable to her by the appellee and secured by a chattel mortgage on appellee's truck. The appellee filed a general denial and a cross complaint against Mrs. Saum and the appellant, Ted Saum and Company, a corporation, for damages, alleging an unlawful conversion by them of appellee's truck. The issues were properly joined with the appellant specifically pleading, *inter alia,* the defense of *res judicata.*

Upon trial the Chancellor awarded Mrs. Saum a judgment for $1,064.56 in her foreclosure suit against the appellee and dismissed appellee's counterclaim against her for conversion of his truck. The Chancellor awarded appellee judgment for $4,500.00 against appel-

lant as damages for conversion of the truck from which judgment appellant brings this appeal. There is no cross-appeal. For reversal appellant contends that the issue of appellant's liability to appellee is *res judicata.*

Appellee had driven a truck for appellant for several years before entering military service in August of 1958. He borrowed $3,550.00 from Mrs. Saum to pay off the balance due on his truck. The certificate of title was delivered to him. Since he was unable to sell his truck before entering military service, he left it with appellant under a lease agreement. During a part of his one year in the service appellee's truck was operated pursuant to this agreement. Appellant then sold the truck for $4,-500.00 to another driver. The appellee contends it was an absolute sale without his knowledge and consent, therefore, it constituted an unlawful conversion of his property. The appellant contends the sale was conditional subject to appellee's approval and delivery by him of the title certificate. Further, that appellee's truck was always available to him upon payment of the balance of the mortgage on the truck to Mrs. Saum.

In December, 1959, appellee filed an action in the Washington County Circuit Court against Ted Saum, individually, for damages for unlawful conversion of the truck. Neither Mrs. Saum nor appellant, Ted Saum and Company, a corporation, was a party to that suit. Following this the present action was instituted in chancery court and while it was pending, the case in circuit court was tried in November, 1960. The jury returned a verdict for the defendant, Ted Saum, individually, and judgment was rendered in conformity with this verdict. Therefore, the appellant insists that the defense of *res judicata* is applicable to the present litigation. The appellee, however, contends the issue in this proceeding is not *res judicata* because the parties are not the same. Also, he argues that the appellant corporation's liability is not limited to the action of one agent but is derived from the action of any of its agents, or the possibility that some agent other than Saum might have been involved in the alleged conversion.

The appellee's pleadings in the previous litigation in circuit court and the present action in chancery court refer to one issue, the alleged conversion of appellee's truck. The only difference between the two law suits, as between appellant and appellee, is that in the first one appellee names Ted Saum, individually, the defendant and in the present proceeding appellee names Ted Saum and Company, a corporation, as the defendant. Also, the cross complaint filed by appellee in the present action alleges: "* * * that *all the transactions hereinafter mentioned* were between Richard Swaffar and Ted Saum, the husband of the plaintiff herein, and *in all of such transactions* the said Ted Saum was acting for the cross defendant, Ted Saum and Company, a corporation;". [Emphasis added] The proof conforms to this allegation.

We agree with the appellant that the present action is barred by *res judicata.* We think that the principle announced by us in *Davis* v. *Perryman,* 225 Ark. 963, 286 S.W. 2d 844, is controling in the case at bar. There we quoted with approval:

"* * * a judgment in favor of either the master or principal on the one hand, or the servant or agent on the other, sued alone, is *res judicata,* or conclusive, * * * in a subsequent action against the other, a deriviative responsibility being present." See, also, *Patterson* v. *Risher,* 143 Ark. 376, 376, 221 S. W. 468. In the case at bar the liability of appellant, Ted Saum and Company, a corporation, is derivative from the acts of its agent, Ted Saum, according to the pleadings and proof of the appellee. We think the following language from 50 C.J.S., Judgments, § 757, is applicable:

"Persons who, although not parties or privies, were so connected in interest or liability with plaintiff or defendant in the former action that the judgment may be regarded as virtually recovered for them may avail themselves of such judgment as res judicata in a subsequent suit. So one whose liability is dependent on, or derived from, the liability of one who was exonerated in an earlier suit brought by the same plaintiff on the same

facts may take advantage of the bar of the prior judgment *even though he was not a party to the earlier action or in privity with the defendant therein.''* [Emphasis added]

The language in *Sides* v. *Haynes,* 181 F. Supp. (Ark. 1960) concisely states the law in this state as to the reason for the doctrine of *res judicata.* There the court said:

''* * * The true reason for holding an issue res judicata is not necessarily for the identity or privity of the parties, but the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy, and that a plaintiff who deliberately selects his forum is bound by an adverse judgment therein in a second suit involving the same issue.''

Further, *res judicata* is applicable not only to an issue actually litigated, but also governs as to matters within the issue that might have been litigated. *Thomas* v. *McCollum,* 201 Ark. 320, 144 S. W. 2d 467; *Rose* v. *Jacobs,* 231 Ark. 286, 329 S. W. 2d 170.

We hold that appellee's cause of action upon his cross complaint in the present litigation is barred by *jes judicata.* Therefore, since the judgment must be reversed on this point, we do not reach the other points argued by appellant.

The judgment is reversed and the cause dismissed.

[redacted]

[redacted]

[redacted]

[redacted]