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COATES *v.* COATES.

5-3220 377 S. W. 2d 824

Opinion delivered April 20, 1964.

Marcus Fietz, Frierson, Walker & Snellgrove, for appellant.

Robert Branch, Kirsch, Cathey & Brown, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a divorce case. The wife, Mrs. Billie H. Coates, filed suit against the husband, Joe F. Coates, alleging cruel treatment and/or indignities. Mr. Coates denied Mrs. Coates' allegations, and, by counterclaim, sought a divorce on the grounds of indignities and/or habitual drunkenness, both of which charges Mrs. Coates denied.[1] The cause was heard by the Chancellor, the evidence being taken *ore tenus.* There was a thorough airing of the matrimonial difficulties of these unfortunate people, with

[1] All of these various claimed grounds for divorce come under the 5th sub-section of Ark. Stat. Ann. § 34-1202 (Repl. 1962).

more than a score of witnesses testifying; and the record contains more than 600 pages. The Chancery Court denied Mrs. Coates' complaint, but granted Mr. Coates a divorce on the ground of indignities; and from that decree Mrs. Coates has appealed,[2] urging four points:

"1. The decree of the Court awarding a divorce to appellee was against the clear preponderance of the evidence.

"2. The Court should have awarded appellant a divorce and rights in appellee's property.

"3. The Court should have awarded appellant an interest in the business of the Kingsway Club.

"4. Appellant is entitled to an additional award for attorneys' fee and costs of this appeal."

We dispose of all four of the points under our own topic headings.

I. *Who Was Entitled To A Divorce?* If condonation had been brought into the case we would be strongly inclined to deny each party a divorce; but neither party offered the defense of condonation against the other. See *Ayers* v. *Ayers,* 226 Ark. 394, 290 S. W. 2d 24. Probably the reason condonation was not brought into the case was that each was anxious to be divorced from the other. They separated on January 22, 1963; and two days later Mrs. Coates filed her suit and obtained a temporary restraining order to prevent Mr. Coates from re-entering the home. Mr. Coates in his testimony said that there was no possibility of the couple living together again: "I would not have her off the Christmas tree." In studying the record we lay aside the matter of condonation.

The parties were married in January 1953 and lived together until January 1963. A son was born in 1959, but since that time the parties have gradually become more and more disagreeable to each other. To recite all the

[2] Mr. Coates has a cross appeal claiming that he is entitled to a divorce on the ground of habitual drunkenness, even if we should hold that the Chancery Court was in error in awarding him a divorce on the ground of indignities. We do not reach the cross appeal because we affirm on direct appeal.

evidence would serve no useful purpose. It is sufficient to say that there is ample evidence to support the Chancery decree awarding Mr. Coates a divorce. Mainly it was a question of which set of witnesses the Chancellor would believe. He saw them and evaluated their veracity. We see only the printed page. The Chancellor believed Mr. Coates' witnesses to corroborate his testimony as to indignities; and we cannot say that the Chancellor's findings are against the preponderance of the evidence. Likewise, the Chancellor saw Mrs. Coates and her witnesses and elected to disbelieve them; and we cannot say that such result is contrary to the preponderance of the evidence. Thus we dispose of all of the appellant's points 1 and 2, except the matter of property rights.

II. *Property Rights.* This is the real bone of contention in the litigation, since both parties want a divorce. If the Chancellor had awarded Mrs. Coates a divorce, she would have been entitled to greater property rights than the Chancellor awarded her. But, since the divorce was awarded Mr. Coates as the wronged party, the matter of property rights must be based on such a decree. The parties own as tenants by the entirety their home in Paragould, but subject to a mortgage. The Chancery Court found and decreed:

"... it would not be to the best interest of the parties that the tenancy by the entirety be dissolved at this time, but that this court should reserve and does reserve the jurisdiction to dissolve the tenancy by the entirety in the light of changed circumstances; that under the existing circumstances and until the further order of this court, the plaintiff shall, so long as she shall occupy said property as last hereinabove described as the home for herself and the minor child of the parties, be entitled to the use and occupancy thereof free from interference on the part of the defendant, with the defendant to pay the mortgage loan payments, the taxes, the insurance premiums on the improvements, and the utilities of said residence, including heat, electricity and telephone, excluding, however, long distance telephone calls.

"The plaintiff shall also be entitled, during the period as last hereinabove defined with respect to the property owned by the entirety, to the use of the household goods, the household appliances and the household furnishings in said property and this court should and does reserve the jurisdiction to determine the rights of the parties with respect to said household goods in the event the plaintiff should cease to use the same for the use of herself and their minor child in connection with the occupancy of the property owned by the entirety as above set forth.

"The defendant shall pay the plaintiff on the 4th day of each month beginning May 4, 1963, and monthly thereafter, the sum of $50.00 per month for the support for the minor child of the parties, William Mark Coates.

"The defendant shall pay to the plaintiff as alimony the sum of $100.00 per month on the 4th day of May, 1963, and monthly thereafter on the 4th day of each month, said award as to alimony and to support money being specifically subject to the jurisdiction of this court to change or modify the same in the event of changed circumstances with respect to the parties."

The Court also allowed Mrs. Coates to keep $500.00 which she had withdrawn from the bank at the time of the separation. We think the Court showed wisdom in the decree. Certainly we cannot say that the Court abused its discretion in this property settlement.

There remains the matter of the Kingsway Club, which is a restaurant of some kind that Mr. Coates owned and operated before he married Mrs. Coates. She claims that she is entitled to a half interest in the restaurant as a partner. We find no element of partnership to have been shown. It was Mr. Coates' club before the parties married; and Mrs. Coates worked in the club while she was his wife. Full details of the earnings of the club for the past several years were given. When Mr. Coates pays Mrs. Coates $100.00 a month alimony and $50.00 a month for the child, and keeps up the other payments which the Court required him to make, it seems to us

that full justice has been done as regards property rights. Of course, should Mr. Coates fail to fulfill all of the provisions in the decree, then prompt recourse may be had against him and his property.

III. *Court Costs And Attorneys' Fees.* When the suit was first filed suit money of $250.00 was allowed Mrs. Coates' attorneys. At the conclusion of the Chancery trial an additional $250.00 was allowed. Now, on appeal, we feel that an additional fee of $250.00 should be allowed Mrs. Coates' attorneys, and also that Mr. Coates should pay all the costs of all the courts in this matter.

The decree of the Chancery Court is affirmed except $250.00 additional is allowed as attorneys' fees, and all costs are to be taxed against Mr. Coates.

McCLURE INS. AGENCY *v.* HUDSON.

5-3243 377 S. W. 2d 814

Opinion delivered April 20, 1964.

Cole & Scott, for appellant.

Joe W. McCoy, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellant for specific performance of an option to buy the appellee's home in downtown Malvern. The chancellor dismissed the complaint, finding that the option could

be exercised only by the United States of America for the purpose of acquiring the property as a site for a post office.

The appellant, an incorporated insurance agency, also engages in the real estate business under the trade name McClure Real Estate. In 1962 McClure Real Estate obtained options upon four contiguous tracts, including the appellee's property, for the purpose of offering them as a unit to the United States as a site for a proposed new post office. George McClure, president of the company, testified that in taking the options he used a printed Government form so that all the options would be alike and so that they would conform to the single option that he in turn intended to submit to the Post Office Department.

The printed option form is entitled "Post Office Department Option to Purchase Land." It recites that for a consideration of one dollar (which was not paid) and other valuable considerations (not specified) Mrs. Hudson grants to the Postmaster General and his assigns an option to buy the property within 545 days for $8,000. If the use of the property for postal purposes is prohibited by covenant or by law the prohibition shall be considered a defect in the title. It is recited that the Postmaster General contemplates that a building to be used in whole or in part for postal purposes will be constructed on the property. At the end of the contract McClure typed in an additional paragraph, upon which he now relies, to the effect that the words "McClure Real Estate" should be substituted for any reference to the Postmaster General or the Post Office Department.

Mrs. Hudson testified that she signed the option with the understanding that the property was to be submitted as a post-office site. In view of the references in the contract to postal purposes we have no doubt that this was actually the intention of the parties. Even if the parties' intentions were not clear there would in any event be sufficient ambiguity in the matter to permit the introduction of Mrs. Hudson's parol evidence.

McClure in fact offered the four tracts to the Government, but the offer was rejected in December of 1962. Another site for the post office was selected. Later on, in April of 1963, McClure Real Estate attempted to exercise the option for itself, but Mrs. Hudson refused to sell. This suit followed.

We think the chancellor reached the right conclusion. The option, which appears to have been without consideration, was at most an offer to sell the property to the United States as a site for a post office. When the Government rejected the offer its action had the effect of terminating the offer, so that it could not later be accepted. Williston on Contracts (3d Ed.), § 51; Restatement, Contracts, § 35.

Corbin explains the rule in this language: "The power of acceptance created by an ordinary offer is terminated by a communicated rejection. This is true even though a definite time was given by the offeror for considering his offer and the rejection is before that time has expired. When the offeror receives a notice of rejection, he is very likely to change his position in reliance thereon; one aspect of this is that he will not think it necessary to send a notice of revocation, in those cases in which he has the power to revoke. This has led to the rule that a definite rejection terminates the offeree's power to accept." Corbin on Contracts (1963), § 94. That rule governs this case.

Affirmed.

Opinion delivered April 20, 1964.

[redacted]

Wayne Foster, for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. The issue presented here grows out of a property settlement incorporated in a divorce decree.

Ruth Wallace (one of the appellants) and Kenneth B. Smith (the appellee) were divorced on July 16, 1956 —Case Number 9161. The decree awarded to Ruth custody of the only child, Levi Henry Smith, and it incorporated a property settlement AGREEMENT which had been worked out by the parties.

The AGREEMENT, after setting out certain items of support for Ruth and Levi Henry, contained, in substance, the following provisions: The parties are the owners of 68 acres of land (described in detail) on which is located a house; It is agreed to sell the house and 8 acres of land (more or less) for not less than $9,200 with which appellee was to pay "all outstanding indebtedness"; and, they agree to convey the rest of the property to Levi Henry.

On August 30, 1961, Kenneth B. Smith filed a petition in Case Number 9746 (which by stipulation "is an aftermath of a divorce action . . . No. 9161") against Ruth Wallace Smith in essential parts as follows:

1. On or about March 15, 1960, the court modified the decree of July 16, 1956, to the effect that the husband could sell the house and as much of the acreage as necessary to net the sum of $9,200, and if any acreage is left over, the balance to be deeded to Levi Henry;

2. Appellee had tried to sell the property but could get only $6,000 for all of it;

3. The prayer was that appellee be permitted to sell all the property and apply the proceeds on the debts.

To the above petition Ruth filed a demurrer, alleging a defect of parties and insufficient facts to constitute a cause of action. The demurrer was overruled. Then Ruth, as Guardian of Levi Henry, filed an intervention, contending that Levi Henry has a vested interest in the 68 acres of land, and that he should be made a party. In her answer she asked the court to enjoin appellee from disposing of the property. Appellee, thereupon, moved the court to dismiss the intervention.

Based upon the above pleadings and upon the record in the original divorce action, No. 9161, (which is a part of this record—No. 9746—by stipulation of the parties) the trial court found: (a) The original decree was modified on February 18, 1960 to give appellee right to sell "such acreage as is necessary to net said Kenneth B. Smith the sum of . . . $9,200.00"; (b) the original decree "adequately provided for the Intervenor monetary support, insurance, and medical care"; (c) since the 68 acres will not net $9,200, there is no remainder in the property which intervenor may take as incidental beneficiary. The court then found in favor of appellee, dismissed the intervention, and ordered appellant (Ruth Wallace) to execute a deed to anyone who purchases the said property, otherwise a commissioner will be appointed to execute the deed.

After careful consideration we have concluded that the trial court must be affirmed. The answer to the decisive issue presented here depends on the construction of the AGREEMENT entered into by the parents of Levi Henry. It is readily apparent that it is subject to two separate meanings. (a) It could be interpreted to mean that appellee was to sell 8 acres (more or less) with the house on it for what it would bring, and that the rest of the land be deeded to Levi Henry. (b) On the other hand, it could be interpreted to mean appellee was to sell all of the land, if necessary, to raise $9,200 (or less).

The trial court had a right to put its interpretation on the ambiguous contract or agreement. *Hughes* v. *El Dorado Oil Co.,* 160 Ark. 342, 254 S. W. 663, and *Swift* v. *Lovegrove,* 237 Ark. 43, 371 S. W. 2d 129.

The trial court (on two occasions) construed the agreement to mean appellee could sell enough land (all if necessary) to raise $9,200 (or whatever amount the land would bring).

We are unwilling to say the trial court erred. In fact, the wording of the agreement, in our opinion, amply supports the trial court. It indicates the sale must bring "not less than $9,200". Also, the inference is that there were debts in that amount which were to be paid. It is reasonable that the parties wanted said debts to be paid.

In view of what we have said and the conclusion reached, Levi Henry had no vested interest in the land and therefore was not a necessary party to the suit.

Affirmed.

HOLT, J., not participating.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, J. (dissenting). The contract gave Levi Henry a vested interest in the 60 acres, as a donee beneficiary. That interest could be reduced or extinguished only if the parties reserved the power to take that action. Restatement, Contracts, § 142. It seems to me that the majority have adopted a strained construc-

tion of the agreement in reaching the conclusion that the power of modification was reserved.

The contract, after reciting the couple's ownership of 68 acres, provided that the house and eight acres would be sold for not less than $9,200, which was to be paid to the husband and used for the payment of debts. After the sale the rest of the property was to be conveyed to Levi Henry. There was no express reservation of the power to alter the contract to Levi Henry's disadvantage.

I am unable to find an implied reservation. If the contract had provided that Levi Henry would receive all the purchase money in excess of $9,200, if the property should sell for a greater amount, then there would be some logic and fairness in requiring Levi Henry to contribute to the deficit if the house and eight acres should sell for less than $9,200. But that was not the agreement. Any excess over $9,200 would have gone to the appellee-husband. Thus Levi Henry is put in the position of gaining nothing if the house and eight acres could be sold for more than the specified price but of being penalized if the property should sell for less than the amount.

"The reservation of power on the part of the promisee to change the beneficiary or otherwise to vary the terms of a gift promise must ordinarily be expressed in specific terms." Restatement, Contracts, § 142. The pivotal question here is whether Levi Henry's parents reserved "in specific terms" the power to alter the gift to his detriment. The majority seem to realize that this agreement is at best equally susceptible of two conflicting interpretations. While I do not agree that both interpretations are equally reasonable, even upon the majority's premise we still ought to hold that the power to revoke the gift was not retained in such specific language as the law demands.

Opinion delivered April 20, 1964.

[redacted]

Dinning & Dinning, for appellant.

Pickens, Pickens & Boyce and *John L. Anderson,* for appellee.

SAM ROBINSON, Associate Justice. Leslie J. Goad, a resident of Helena, had been an employee of the Mobil Oil Company since 1942; he died on the 3rd day of February, 1962. He had a certificate of insurance issued by the Metropolitan Life Insurance Company under a master policy issued to his employer. Goad's certificate was in the sum of $13,600.00. There was also due under the terms of the policy, a retirement annuity having a value of $1,722.12. Goad's widow was named as beneficiary in the policy, but later, Goad's children by a previous marriage were named as beneficiaries.

Subsequent to Goad's death, his widow, Hattie, filed suit against the insurance company in the Phillips Circuit Court asking judgment on the contract of insurance. The insurance company filed the case at bar—an interpleader—in the Chancery Court of Phillips County for the purpose of determining the legal beneficiaries of the policy. The full amount involved, $15,322.12, was tendered and deposited in the registry of the court. The

widow, Hattie, and the children of the deceased, Russell Lewis Goad, Helen Goad Foushee, Charles Dale Goad, and Jerry Leslie Goad, were made parties defendant for the purpose of determining the legal beneficiaries. The trial court held that the children were the beneficiaries. Mrs. Hattie Goad, the widow, has appealed.

First, appellant contends that since she had first filed suit against the insurance company in circuit court on the policy of insurance, the chancery court did not have jurisdiction to hear and determine the controversy; that the subject matter of the litigation was pending in circuit court, and that in a situation of this kind the court that first acquires jurisdiction has the right to conduct the matter to a final conclusion without interference from another court of equal dignity. Ordinarily this is true. *Askew* v. *Murdock Acceptance Corp.,* 225 Ark. 68, 279, S. W. 2d 557. But this rule is not applicable where, as here, the second suit is in the nature of an interpleader in chancery court. *Chicago, R. I. & P. R. Co.* v. *Moore,* 92 Ark. 446, 123 S. W. 233. The court said in *American Co. of Ark.* v. *Wheeler,* 181 Ark. 444, 26 S. W. 2d 115: "The chancery court having jurisdiction in the suit in the nature of a bill of interpleader, according to the usual practice, could restrain the several parties to the suit from proceeding in other courts to have the same matters adjudicated; . . ."

In the case of *Fulmer* v. *East Ark. Abstract & Loan Co.,* 173 Ark. 668, 293 S. W. 1018, the Abstract & Loan Co. instituted an action in the circuit court against Fulmer and named the Liverpool & London & Globe Insurance Company as garnishee. The insurance company filed an interpleader in the chancery court. There, this court said: "The insurance company was ready to pay this amount to whoever should be entitled to it. Fulmer and the abstract company each claimed to be entitled to the fund. Hence, in order to avoid a multiplicity of suits and in order to escape costs, the insurance company was entitled to some relief of an equitable nature concerning the fund in dispute, and should not be burdened with the cost of litigation because there were conflicting

claimants for the fund. In no other way could it have protected itself except by filing a complaint in equity in the nature of a bill of interpleader."

The widow, Hattie Goad, appellant, was named as beneficiary in the policy, but before his death, Goad changed the beneficiary to his aforesaid children and notified the insurance company of the change. Goad also executed a will in which he provided that the beneficiary be changed. Appellant contends that due to his mental and physical condition, Goad was not capable of making a valid change of beneficiary by will or otherwise.

It appears that Goad became ill and entered a hospital in Memphis August 30, 1961; that he was discharged from that hospital on September 11, 1961. On September 18, 1961 he went to Bradford to visit his son and became ill while there. On his return to Helena, he entered a hospital for a short time, and finally, on November 16, 1961, he entered St. Vincent's Hospital in Little Rock. He had sclerosis of the liver; his condition deteriorated and he became progessively worse until he died February 3, 1962.

On December 3, 1961, while in St. Vincent's, he signed a will, and an insurance form for change of beneficiary in his certificate of insurance. The will was mailed to his sister, Mrs. Wilson, at Bradford. His daughter, Mrs. Foushee, was one of the witnesses to the will. A lawyer was consulted about the matter, and on his advice a new will was prepared embodying the same terms as the first will. Goad, along with two proper witnesses, signed the second will on January 3, 1962. The will specifically named the Goad children as beneficiaries of the policy of insurance.

Appellant introduced strong evidence that Goad was in such condition that at the time he executed the will and the change of beneficiary form he was not capable of making a valid will or change of beneficiary. On the other hand, appellees also introduced weighty evidence to the effect that Goad did have the mental capacity to execute both instruments.

We have carefully reviewed the evidence, but it would serve no useful purpose to abstract it here. The chancellor had the opportunity to observe the witnesses and was in a much better position than is this court to determine the weight that should be given to the testimony of each and every witness. There is one outstanding uncontroverted fact, however, that we think is sufficient to tip the scales in favor of appellees. In changing the beneficiary in the certificate of insurance, Goad carried out an intent that had been expressed at a time when there is no question but that he was possessed of all his faculties. On re-direct examination, appellant, Mrs. Goad, testified that Mr. Goad had stated at a time when it is not contended that he was in any way incompetent, that he thought his inusrance should go to his children rather than to her people.

Appellant also contends that the signature on the will is not the genuine signature of the testator, but we cannot say that the chancellor's finding that the signature is genuine is contrary to a preponderance of the evidence.

Affirmed.

JOHNSON *v.* STATE.

5098 377 S.W. 2d 865

Opinion delivered April 20, 1964.

[Rehearing denied May 18, 1964.]

Edward V. Trimble, Charles E. Scales, for appellant.

Bruce Bennett, Attorney General, by *Richard B. Adkisson,* Asst. Attorney General, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from a conviction of murder in the first degree. On February 8, 1963, Jerry James Johnson was charged by information filed in the Pulaski Circuit Court. The information alleged that appellant murdered Aliene Arrington on July 31, 1962, with malice aforethought, deliberation and premeditation in the perpetration of the crime of robbery by stabbing her with a knife. After the bench warrant issued thereon was returned, the court ordered appellant to the State Hospital for observation, where he was found to be without psychosis. Thereafter on May 6, 1963, the court appointed counsel for appellant, his not guilty plea was entered and the case was set

for jury trial on May 27, 1963. On the third day of trial, after testimony of State's and appellant's witnesses, instructions of the court and argument of counsel, the jury returned a verdict finding appellant guilty of murder in the first degree. On July 8, 1963, appellant was sentenced to death by electrocution. On July 19, 1963, after hearing, appellant's motion for a new trial was denied. This appeal followed.

For reversal appellant primarily argues three points: (1) members of appellant's race were intentionally, deliberately and systematically limited in the selection of petit jury panels; (2) that appellant has been denied his rights under the Fourteenth Amendment of the United States Constitution in that Negroes have been excluded from being jury commissioners for the past fifty years; and (3) that appellant's confession was coerced and involuntary and his motion to suppress the confession and the evidence should have been granted.

This was a particularly abhorrent crime. The decedent, a lady in her fifties, owned and ran a small neighborhood grocery in Rixey, a community between North Little Rock and Jacksonville. One mid-summer afternoon she was found in the store by her aged mother, hands and feet tied, dead. She had suffered about twenty stab wounds. Some months later, early in February, 1963, while in jail on another charge appellant asked to talk to the jailer and when he did so, confessed verbally to killing Mrs. Arrington. According to the testimony of several of the officers, appellant repeated his story to several deputy sheriffs and the sheriff. Appellant took officers to the store, showed them the scene and the route he walked, then took them to talk to a man from whom he borrowed a pocket knife the morning of the killing, told them of throwing away his gloves, burning his clothes and hiding some of the stolen money in a flashlight. Appellant related that when his mother asked where his clothes were that evening, he told her they were out on the clothes line, then took similar ones outside and dirtied them, telling his mother that a dog had dragged them off the line; also that his step-father

that evening (the night of the murder) asked for the pocket knife appellant had borrowed to return to its owner. At trial appellant denied having committed the offense and testified that he confessed to the crime on a dare and in a desire for publicity. Testimony of appellant's and State's witnesses, however, neatly corroborated the confession appellant made to the sheriff and his deputies. For instance, appellant's step-father testified that appellant went to work with him the morning of the killing unloading slabs, borrowed a pocket knife, left work about eleven o'clock, and that when appellant came home that night he was asked where the clothes were that he had worn earlier and the step-father asked for the knife to return it to his co-worker. The co-worker testified about the loan of the knife, that he had asked the step-father to return it to him and that the step-father had done so the following day, and that the co-worker had so stated to the sheriff's deputies at the request of and in the presence of appellant during the sheriff's investigation of appellant's story. Appellant had explained how and where he committed the crime in considerable detail, saying that he decided to kill decedent so that she could not identify him if the police showed her the pictures of him they had. According to the testimony of the officers, appellant said he had his arm around the lady's neck while she was trying to call for someone, he picked up a butcher knife and stabbed her once. The knife bent, so he tied her up with string, went to the front of the store where he had dropped the pocket knife, then went back and stabbed her a number of times. All in all, review of the testimony impels a finding that there was substantial evidence to support the verdict of the jury.

The arguments, citations and facts of this appeal are remarkably similar to *Stewart* v. *State,* 237 Ark. 748, 375 S. W. 2d 804.

We shall consider appellant's last point for reversal first, that is, that appellant's confession was coerced and involuntary and his motion to suppress the confession and the evidence should have been granted. We find

no objection on this point in the trial record. Even if there had been such an objection, the testimony of the officers in the case at bar, along with competent proof of the commission of this crime, would have been admissible. *Norton* v. *State,* 237 Ark. 783, 376 S. W. 2d 267. Moreover, appellant admitted at trial that he had made such statements to the officers and confessed to other crimes as well. We consider this point, therefore, to be without merit.

Appellant next argues that members of appellant's race were intentionally, deliberately and systematically limited in the selection of petit jury panels. After selection of the jury, appellant in chambers moved to quash the entire panel on the grounds that "the jury commissioners of Pulaski County have allowed race to be a factor in its determination of qualified jurors, that the jury commissioners have not made any specific attempt to acquaint themselves with qualified Negro electors in this county, and that the proportion of Negroes that are called on the regular and special panels is less than the proportionate number of qualified Negro voters in this county." The court then asked if appellant wanted to introduce any proof in support of this motion. Appellant did not. Several weeks after the trial, appellant renewed this motion and was allowed by the court to present testimony in support of the motion, following which the motion was denied. Review of the testimony offered in support of the motion does not convince us that the jury commissioners failed to observe the standards against discrimination in jury selection set down by the United States courts. However it is not necessary for us to determine this. Appellant was offered the opportunity to present testimony in support of his motion prior to the jury's being sworn to try the case, at which time appellant by statute had the right to examine the jurors under oath as well as other witnesses whose attendance could be coerced (such as the jury commissioners). Ark. Stat. Ann. §§ 43-1901—43-1929 (1947). Having failed to do so at the appropriate time, it is beyond our province to legislate such new procedure as would permit an

accused to find fault with a jury or a jury panel long after an unsatisfactory verdict.

Appellant's third point urged for reversal is that appellant has been denied his rights under the Fourteenth Amendment of the United State Constitution in that Negroes have been excluded from being jury commissioners for the past fifty years. This precise point was raised in *Moore* v. *Henslee,* 276 F. 2d 876. In its per curiam opinion, the Eighth Circuit Court of Appeals said this:

"The focal point of appellant's contention, as advanced in their brief and in oral argument, is that discrimination in the selection of jury panels in Miller County, Arkansas, is necessarily practiced because the Negro race is not represented on the jury commission which is composed of three citizens. It is suggested that 'it is almost impossible' for an all-white jury commission to keep informed of the habits and qualifications of the Negro population so that eligible members of that race can be selected for jury duty. We are not persuaded by this novel argument which fails to find support in either precedent or logic. Adoption of the principle contended for would require indulgence in the unwarranted presumption that jury commissioners entirely of one race will not discharge their 'duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color.' *Cassell* v. *State of Texas,* 339 U. S. 289, 70 S. Ct. at page 633. Moreover, we are satisfied that the theory advanced by appellants would in reality lead to complexities in the administration of an important facet of our system of trial by juries. Application of the principle contended for, could not, in our view, be limited to the white and negro races. It would encompass all races, and the numerous nationalities and religious denominations existent in this country. The words of Mr. Justice Reed, speaking for the Court in *Akins* v. *State of Texas,* 325 U. S. 398, at page 403, 65 S. Ct. 1276, at page 1279, seem to be peculiarly appropriate:

" '*The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection.* Defendants under our criminal statutes are not entitled to demand representation of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' (Emphasis supplied.)"

We can add nothing to the eloquence or the reasoning of the Court of Appeals, and therefore find no merit in appellant's contention on this point.

As is our wont in this type of criminal appeal, we have examined and reviewed every objection in the record and find no error. The judgment of the trial court is therefore affirmed.

Opinion delivered April 27, 1964.

[Rehearing denied May 25, 1964.]

[redacted]

Dorothy Dixon Hatchett, Neill Reed and *U. A. Gentry,* for appellant.

Gordon & Gordon, for appellee.

CARLETON HARRIS, Chief Justice. T. O. Cullum died intestate in Van Buren County in 1928, leaving a widow, Laura, and no lineal descendants. Accordingly, the widow was endowed of an undivided one-half interest in the real estate owned by her husband, and the brothers and sisters (or descendants) of Cullum inherited the other half. Cullum and his wife had deeded ten acres of land in 1915 to Anna Johnson. Cullum was the owner of the Northeast Quarter of the Southeast Quarter of Section 31, with the exception of the ten acres, and of the Southwest Quarter of the Southwest Quarter of Section 32, Township 11 North, Range 12 West, by patent from the U. S. Government. On January 17, 1934, Laura

Cullum gave a mortgage to appellee, Ball Ground Monument Co., Inc., on a "part of the Northeast Quarter of the Southeast Quarter of Section 31, 30 acres," and a "part of the Southwest Quarter of the Southwest Quarter, 30 acres" of Section 32, Township 11 North, Range 12 West, to secure the payment of a certain indebtedness. Thereafter, on November 22, 1935, for the recited consideration of the cancellation of the mortgage indebtedness, Laura Cullum gave a deed to the Ball Ground Monument Company for the lands described in the mortgage. In 1951, the Monument Company, reserving all mineral and oil rights, conveyed the land to C. J. Pierce, one of the appellees herein, the deed reciting the same description as the deed to Ball from Mrs. Cullum. The balance of the land in dispute, ten acres, located in the Southwest Quarter of the Southwest Quarter of Section 32, was conveyed through a number of persons, all using indefinite descriptions (part or fractional) until it was acquired in 1953 by Pierce. Laura Cullum died intestate in 1957 or 1958 without lineal descendants, leaving certain brothers and sisters, or their descendants, as her heirs at law. Suit was instituted in November, 1962, by some of the appellants as heirs of Laura Cullum, and, subsequently, collateral heirs of T. O. Cullum intervened, adopting the allegations in the complaint, and both groups of heirs prayed that their interest in the lands be fixed and their title quieted. The complaint subsequently was amended to allege that the lands in question were wild, unimproved and unenclosed timber lands. After the overruling of a demurrer, Pierce answered, asserting that he and his predecessors in title had been in adverse possession of the premises involved for over twenty-five years, and had paid the taxes thereon for that period of time; laches was also pleaded. Subsequently, Ball Monument Company intervened, as a matter of protecting its mineral interests, and appellants cross-complained for $250.00 against the company, alleging the wrongful cutting of timber. After the filing of various other pleadings and stipulations, the cause proceeded to trial. The court dismissed the complaint, together with the amendments and the Cullum intervention, and quieted title to

the lands in Pierce, under a definite description, subject to the mineral rights held by Ball Ground Monument Company. From the decree so entered, appellants bring this appeal.

At the outset, it will be noted that, as far as any of the property in litigation is concerned, Pierce did not receive any conveyance from any party which contained a valid description of the property conveyed.

There is no dispute but that the lands involved are wild, unimproved, and unenclosed. Therefore, as far as acquiring title by adverse possession for seven years, Pierce could only attain such title under the statute relating to the payment of taxes for seven or more successive years *under color of title.* See Ark. Stat. Ann. § 37-102 (Repl. 1962). "Part descriptions are void for indefiniteness." *Miller* v. *Best,* 235 Ark. 737, 361 S. W. 2d 737. A void deed is not color of title. *Darr* v. *Lambert,* 228 Ark. 16, 305 S. W. 2d 333, and cases cited therein.

As to the Northeast Quarter of the Southeast Quarter, less the ten acres originally deeded to Anna Johnson, we find that the Chancellor correctly held for appellee, but this is due to the fact that the ten acres (Johnson) was definitely described. Though the conveyance to Pierce of the other thirty acres in the Northeast Quarter of the Southeast Quarter only contained a part description, and was therefore void, our holding in *Junction City Special School District No. 75* v. *Whiddon,* 220 Ark. 530, 249 S. W. 2d 990, is applicable to this situation. In that case, appellees had obtained a deed containing a void description to lands that were wild and unimproved, but had paid taxes on same for more than twenty years. The conveyance described the land as fractional Northwest Quarter, Northwest Quarter, Section 28 * * *, containing thirty-five acres. The remainder of the Northwest Quarter of the Northwest Quarter, five acres, was held by the appellant school district under a valid description during the twenty-year period. Suit was instituted by appellant, claiming title to the thirty-five acres. In affirming the Chancery Court this court stated:

"Here, the District had notice, or with any reasonable investigation could have ascertained, that appellees were paying the taxes over a period of 15 years on this 35-acre tract and performing acts of ownership over it (as above indicated) and claiming to own it. While the description under which appellees claimed was faulty, it was evident that they were claiming all that remained of the NW ¼ of the NW¼ of section 28, township 19, range 16 west, 35 acres, after appellant's 5-acre tract had been carved out of that 40 acres under a definite correct metes and bounds description, which located the 5 acres in the NW corner of the NW ¼ of section 28, township 19, range 16 west, etc.

"We think this was sufficient to identify this 35 acres claimed by appellees and entitled them to the benefits of § 37-103."

Here, as previously stated, ten acres had been deeded during the lifetime of Cullum and his wife to Anna Johnson, the deed containing a metes and bounds description, and its location is easily ascertainable. As in *Junction City,* it was apparent that appellees were claiming all that remained of the Northeast Quarter of the Southeast Quarter, and this was sufficient to identify this thirty acres claimed by Pierce under the fifteen year statute (§ 37-103, Presumption of Color of Title).

However, these circumstances are not present with reference to the forty acres described as Southwest Quarter of the Southwest Quarter of Section 32. This property was also acquired under void descriptions, though Pierce and his predecessors in title paid the taxes for a long number of years. Thirty acres was acquired under a part description in 1951, and the other ten acres was acquired under a part description in 1953. Pierce thereafter proceeded to pay on the entire forty, but this period of time, of course, falls far short of fifteen years. The payment of taxes by Pierce and his predecessors is of no aid to appellees, because it could not be ascertained from the descriptions the particular property that was being paid on; *i.e.,* it cannot be determined *what part* of the land Pierce and his predecessors were

claiming. The *Whiddon* holding is of no aid as far as this particular forty acres is concerned, because no part of this acreage is definitely described. It is true that many of the factors that were present in *Whiddon* are likewise present in this litigation. For instance, appellants have made no effort to pay taxes on the land in question during all of these years; the property has increased in value; the appellees and predecessors have exercised, to some extent, dominion over the lands,[1] and several of the appellants had lived in the vicinity for a period of time. However, the one additional fact, which with all of the aforementioned facts, caused this court to affirm the *Whiddon* case, is not present in this litigation. This was mentioned in *Darr* v. *Lambert, supra.* There appellant relied in large measure upon the *Whiddon* holding, but this contention was rejected. The court (referring to Whiddon) said:

"The court stated that the description was definite in so far as appellant was concerned. The reason the court said this was appellant already owned 5 acres of land in the said 40 acre tract and so must have known that the remainder consisted of 35 acres."

In *Watson* v. *Cornish,* 220 Ark. 662, 249 S. W. 2d 123, handed down a few months after the *Whiddon* decision, we held the description "pt. NW ¼ of Sec. 15, Twp. 16 S, Range 23 W, containing 60 acres" to be void for want of an identifying description.

"The suit was brought by record owners to quiet title, the contention being that appellants claimed under a clerk's tax deed. The land was sold in 1947 for 1946 delinquencies. It is shown that for 15 or 20 years the land had been owned by the Cornish family and that it had been assessed as a *part* of the northwest quarter, as above shown. The Chancellor found that the sale was void for want of an identifying description, * * *"

[1] Ball Company sold a small amount of timber off the land, and Pierce has caused surveys to be made, with the property lines marked by white paint on trees. Pierce also stated that the timber stand had been improved by virtue of the fact that the undesirable timber had been removed.

The opinion mentioned the case of *Price* v. *Price,* 207 Ark. 804, 182 S. W. 2d 879, where the court held "that a deed which describes the land as a *part* of a certain quarter section, or other governmental subdivision, without otherwise describing it, is void."

Appellee also relies upon the defense of laches, but we do not feel that this is a proper defense under the facts in this case. Offhand it might be mentioned that the record reflects that Mr. Pierce was advised, soon after the purchase from Ball Ground Monument Company, by Clifford Stobaugh, employee of Pierce and former County Surveyor, that the description was indefinite, and did not identify the property purchased. In other words, Pierce had notice of the defects of his title, and is hardly in a position to complain that he was injured or misled by the failure of appellants to earlier assert their title. In *Herget* v. *McLeod,* 102 Ark. 59, 143 S. W. 103, we said:

"In *Fordyce* v. *Vickers,* 99 Ark. 500, it is said: 'The true owner of the land can not be divested of his title thereto by the mere failure to pay taxes and the enhancement of it in value. The doctrine of laches is founded upon the principle, not only that there has been a delay in the payment of taxes by the owner, indicating either that he considers his claim to the land worthless or a total abandonment of his right to the property, and in the meanwhile a great enhancement in the value thereof, but also upon the ground that the party asserting the claim to it has good reason to believe that the alleged rights are worthless or have been abandoned, and, acting upon such belief, has paid taxes upon the land *under color of title*[2a] for at least the period of time named by the statute of limitation.'

"It will thus appear that, before the plea of laches can be available to deprive the true owner of his land, it must be shown that the party claiming same and his grantors have, prior to the commencement of the suit, paid the taxes upon the land *under color of title*[2b] for at

[2a, 2b] Emphasis supplied.

least seven years, the statutory period of limitation. The fact that the true owner has failed to pay taxes on the land for a period longer than seven years will not alone bar him; but it must also appear that during such period the defendant and those under whom he claims have themselves paid taxes thereon for at least seven years prior to the institution of the suit before the true owner can be declared barred by laches."

To summarize, appellees, because of the indefinite descriptions, held void deeds, and the circumstance which overcame or rectified the insufficient description in the Northeast Quarter of the Southeast Quarter is not present in the forty under discussion, *i.e., Whiddon* cannot apply.

As previously stated, though taxes had been paid for more than fifteen years, color of title cannot be presumed because the lands situated in the Southwest Quarter of the Southwest Quarter could not be located from the description used.

It follows from what has been said that the decree of the Chancellor is affirmed in part, and reversed in part, and this cause is remanded to the Van Buren Chancery Court with directions to proceed in a manner not inconsistent with this opinion.

Mr. Justice McFaddin dissents in part.

Ed. F. McFaddin, Associate Justice (dissenting in part). I dissent from that portion of the Majority Opinion which holds that the appellee Pierce, has shown a good title to the lands in the NE ¼ of the SE ¼, and which confirms the title of the appellee to said lands. The Majority reaches its conclusion because of the holding of this Court in *Junction City School District* v. *Whiddon,* 220 Ark. 530, 249 S. W. 2d 990. I wrote a dissenting opinion in that case; and for the same reasons therein stated I dissent in the present case. I regard the holding in *Junction City* v. *Whiddon* to be unsound and I hereby preserve my dissent.

5-3305 377 S. W. 2d 875

Opinion delivered April 27, 1964.

Bethell & Pearce, A. F. House, for appellant.

G. Byron Dobbs and *Thomas Harper,* for appellee.

ED. F. MCFADDIN, Associate Justice. This suit is an attack by appellants[1] on the validity of Ordinance 2421 of the City of Fort Smith, which ordinance reads:

"ORDINANCE NO. 2421

"AN ORDINANCE PROHIBITING BLASTING IN ROCK QUARRIES WITHIN THE CITY LIMITS OF FORT SMITH.

"BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF FORT SMITH:

"SECTION 1. No blasting or use of explosives in quarrying operations in rock quarries located in the city limits of Fort Smith shall be permitted.

"SECTION 2: Violation of this ordinance shall constitute a misdemeanor and shall be punishable by a fine not to exceed $1,000.00, or imprisonment in the city jail not to exceed six months, or both such fine and imprisonment.

[1] The appellants are James M. Hackler and Mississippi Valley Engineering & Construction Company.

"SECTION 3: Whereas, there is immediate danger to lives and property of the people of Fort Smith arising out of the use of explosives and blasting in rock quarries in the City of Fort Smith and an emergency exists, and this ordinance being necessary for immediate protection and safety shall be in force from and after its passage and approval.

"PASSED AND APPROVED this 6 day of August, 1963.

"/s/ Robert R. Brooksher, Mayor

"ATTEST: /s/ Carl R. Atkins, City Clerk."

The plaintiffs below (appellants here) alleged that Mr. Hackler owned a rock quarry located in the City of Fort Smith; that after the adoption of said ordinance the plaintiff, Mississippi Valley Engineering & Construction Company, contracted to mine and remove stone from the Hackler quarry; that the only way to mine the stone was by blasting; that the ordinance, insofar as it prohibited blasting, was void for a variety of reasons, one of which was that it absolutely prohibited the use of explosives in quarrying operations, rather than merely regulated the use of explosives. The prayer of the complaint was to enjoin the City of Fort Smith and its named officials from an enforcement of the said ordinance against the appellants.

Shortly after the filing of the complaint the Chancery Court issued a temporary injunction against the enforcement of the ordinance, and permitted blasting to continue at the quarry in a regulated manner until final hearing. At the close of the plaintiffs' case on final hearing, the City filed a demurrer to the evidence of the plaintiffs. The demurrer was sustained, the temporary injunction was cancelled, and the complaint was dismissed. From that decree there is this appeal, in which the appellants urge three points, being:

"I. Ordinance 2421 is invalid because it is arbitrary and unreasonable, and deprives the appellants of their property without due process of law.

"II. Ordinance 2421 is discriminatory and deprives the appellants of equal protection of the law.

"III. Ordinance 2421 is invalid because it conflicts with State law and regulations permitting the regulated use of explosives."

We find it unnecessary to consider the second and third points because the first point is decisive of this appeal. The ordinance is void because it is a prohibitory ordinance and not a regulatory ordinance. In *Bennett* v. *City of Hope,* 204 Ark. 147, 161 S. W. 2d 186, this Court said:

"Municipal corporations derive their legislative powers from the general laws of the state. Article 12, § 4, Constitution of Arkansas. In the *City of Argenta* v. *Keath,* 130 Ark. 334, 197 S. W. 686, L.R.A. 1918B, 888, we said: 'A municipal corporation has no powers except those expressly conferred by the Legislature, and those necessarily or fairly implied as incident to or essential for the attainment of the purposes expressly declared.' "

The statutory authority under which the City of Fort Smith was attempting to act in adopting the ordinance 2421 is found in Ark. Stat. Ann. § 19-2303 (Repl. 1956), and reads:

"They [municipal corporations] shall have power to prevent injury or annoyance within the limits of the corporation, from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated within the jurisdiction given the board of health in section 5203 [§ 82-204], to regulate the keeping and transportation of gunpowder, dynamite, and other combustibles, and to provide or license magazines for the same; . . ."

In *Bennett* v. *City of Hope, supra,* we said: "Power to regulate does not include power to prohibit." In *Town of Arkadelphia* v. *Clark,* 52 Ark. 23, 11 S. W. 957, the City of Arkadelphia had declared the owning, keeping, or raising of bees in the City of Arkadelphia to be a nuisance and had prohibited the same. In holding that ordinance to be void, this Court said:

"Neither the keeping, owning, or raising of bees is, in itself, a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city. It is, therefore, too broad, and is invalid."[2]

In *Jones* v. *Kelley Trust Co.,* 179 Ark. 859, 18 S. W. 2d 356, we held that the operation of a quarry and rock crusher was a lawful business and that it was not a nuisance *per se.* In *Balesh* v. *Hot Springs,* 173 Ark. 661, 293 S. W. 14, we held that if a business was lawful in itself and not a nuisance *per se,* then it could be regulated but not prohibited. In the case at bar the plaintiffs introduced a wealth of testimony, all going to show that blasting at the Hackler quarry could be carried on with safety by having small quantities of the blasting agent set off in a series, rather than in one large explosion. The witness, Dr. Harold H. White, gave most explicit testimony on this point. During the time that the Chancery Court permitted blasting in a regulated manner Dr. White placed a seismograph near the quarry and had blasting done with small quantities of explosives; and the reading of the seismograph definitely verified Dr. White's testimony. One witness, Jim Rutledge, a civil engineer in Fort Smith, stood within 60 feet of the point of the explosion, and experienced no harm. It was shown that the nearest houses or dwellings to the quarry were approximately 250 feet. It was furthermore shown that at another point in Fort Smith blasting in a shale quarry has been allowed for years without any reported damage. When the plaintiffs offered all this testimony the defendants filed a demurrer to the evidence; and, under *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, the testimony by the plaintiffs must be given its strongest probative force.

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[2] To the same effect, see *City of Springdale* v. *Chandler,* 222 Ark. 167, 257 S. W. 2d 934.

A valid ordinance could be adopted by the City of Fort Smith for reasonable regulation of blasting at quarries; but an ordinance is not valid when it completely prohibits all blasting. The situation here is very much like that which existed in *Pierce Oil Corp.* v. *City of Hope,* 127 Ark. 38, 191 S. W. 405.[3] There, the City undertook to regulate the keeping of explosives within the City and provided that more than 60 gallons of gasoline or other inflammable substances could not be kept within 300 feet of any dwelling. There was no absolute prohibition against the keeping of gasoline or explosives within the city: there was merely a regulation. To the same effect is *Little Rock* v. *Reinman,* 107 Ark. 174, 155 S. W. 105,[4] wherein the City enacted that a livery stable could not be within a certain area, but livery stables were not prohibited elsewhere. To the same effect is *Goldman* v. *City of North Little Rock,* 220 Ark. 792, 249 S. W. 2d 961, wherein junkyards could be prohibited within a limited district, but could not be prohibited throughout the entire City; and in that case we discussed in some detail the distinction between regulation and prohibition.

So in the case at bar it was beyond the power of the City to adopt an ordinance which absolutely prohibited blasting at rock quarries within the City when it was shown, as here, that the blasting could easily be regulated. The decree of the Chancery Court is reversed. Because the Court sustained the defendants' demurrer to the evidence, we remand the cause for further proceedings (Ark. Stat. Ann., Sec. 27-1729, 1962 Repl. Vol.). But we now restore and reinstate the Chancery Court orders which permitted appellants, upon making bond, to have blasting at the quarry pending final disposition of this cause; and for good cause shown, an immediate mandate is ordered.

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[3] The holding of this Court was affirmed by the United States Supreme Court in 248 U. S. 498, 63 L. Ed. 381, 39 S. Ct. 172.

[4] The holding of this Court was affirmed by the United States Supreme Court in 237 U. S. 171, 59 L. Ed. 900, 35 S. Ct. 511.

Opinion delivered April 27, 1964.

[redacted]

Tommy H. Russell and *Edwin E. Dunaway,* for appellant.

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

GEORGE ROSE SMITH, J. This is an application by the appellants, two lawyers living in Memphis, Tennessee, for a writ of certiorari to review a judgment finding them to be in contempt of the Pulaski Circuit Court. They contend that their conduct did not constitute contempt of court and, secondarily, that the punishment imposed is excessive.

These two attorneys, James O. Garner and Bernard M. Rosen, were representing the defendants in a civil action that had been set for trial on December 19, 1963. That morning they first filed a motion for a continuance, on the ground that they had been unable to employ local counsel until a few minutes before the trial was scheduled to begin. The court denied this motion, doubtless because it appeared that the petitioners had waited until the day before the trial before seeking to obtain local counsel.

Rosen then made an oral motion, out of the presence of the jury, to quash the entire panel of jurors. In presenting this motion he stated that on the day before Garner had been told, in a telephone conversation with someone in Little Rock, that the prospective jurors had "been stacked against the defendants" in the case about to be heard. Judge Amsler expressed his interest in the matter and asked if Mr. Garner would reveal the identity of his informant. The two lawyers declined to disclose the name of the person in question, though Rosen indicated that at some later time they would be ready to submit proof "with particulars, names and dates and times and places." Rosen requested that the court rule upon the motion solely on the basis of counsel's statements. The court denied the motion. After a request for a change of venue had also been denied the case proceeded to trial.

While the jury was deliberating Judge Amsler called Rosen and Garner before him and entered an order directing them to appear before the prosecuting attorney and reveal fully and completely all the information they had about the jury having been stacked. On January 3 the two lawyers duly appeared before the prosecuting attorney, but they still refused to reveal the name of their informant. When the prosecutor made his report to Judge Amsler the latter cited the two men for contempt of court.

In an effort to purge themselves of the charge of contempt Rosen and Garner disclosed the source of their information. Garner stated that on the day preceding the trial he had telephoned Wayne Owen, a Little Rock lawyer, in an effort to engage local counsel. Later in the day Owen called back and said that he had talked to Dale Price, another Little Rock lawyer, about assisting in the case, but Price declined "because he had been engaged in seeing that the jury was stacked against us."

Judge Amsler then sent for Owen and Price, whom we know to be men of good character. It developed at once that the assertion that the jury had been stacked

was wholly without foundation. Owen had not even talked to Price. He had discussed the matter with one of Price's partners. This lawyer, upon learning that Julius Acchione was representing the plaintiff in the principal case, said that Price would not be able to act for the defendants, because Acchione and Price had worked together in picking the jury. Owen understood this statement to mean that Acchione and Price had gone over the jury list to see who was on the jury (apparently as part of Acchione's preparation for the trial).

Before going to the courthouse on the morning of the trial Rosen and Garner asked Owen how juries are selected in Arkansas. Owen supplied the requested information. The Memphis lawyers, however, did not ask Owen for more details about the supposedly improper selection of the jury. Thus in moving that the panel be quashed they could at best have been relying upon Wayne Owen's statement of what Dale Price's partner had told him: "We can't participate, Wayne, because Acchione has been over here with Dale picking the jury."

At the conclusion of the hearing Judge Amsler adjudged both petitioners to be in contempt of court. He fined each one $250 and sentenced Rosen to ten days in jail and Garner to five days in jail. On the following afternoon, after the petitioners had been in the Pulaski county jail overnight, they were released on bond by an order of this court, in accordance with our practice in such cases.

We are unable to agree with the petitioners' insistence that their conduct was not contemptuous. In charging that the jury was "stacked" the petitioners obviously used the word in its card-playing sense: "To arrange cards secretly for cheating; hence, *Slang*, to have the odds fixed in advance." Webster's New International Dictionary (Second Edition). It was at the very least a charge that prospective jurors having a bias against the petitioners' clients had been deliberately selected for service in the case.

Our recent decision in *Tupy* v. *State,* 234 Ark. 821, 354 S. W. 2d 728, is pretty well in point. There the contemnor had distributed 2,300 copies of a pamphlet which referred to a "Set-up Grand Jury," with an implication that the circuit judge had taken some part in the improper selection of that body. We affirmed a conviction for contempt, finding that "the statement made in the pamphlet by petitioner destroys public confidence in the courts and Grand Juries."

In the case at bar the petitioners' unrebutted assertion that the jury had been stacked against their clients could have weakened the public's confidence in the impartiality of the jury system and thus in the impartiality of the court itself. It is no answer to say that the declaration was made in chambers, in the course of a judicial proceeding. Had they reflected for but a moment these attorneys must unquestionably have realized that such a serious charge would inevitably be investigated in circumstances that would bring it to the attention of the public. They must be held responsible for the natural consequences of their action.

We have concluded, however, that the remaining portions of their jail sentences should be remitted. We may state at the outset that we think the two petitioners should be treated in the same manner. Rosen was the spokesman in the presentation of the motion to quash the panel, but the erroneous information originally came from Garner. Each seems to have concurred in and approved the other's conduct throughout the proceeding. There seems to be no sound basis for finding Rosen to have been more at fault than Garner.

These lawyers were undoubtedly careless in making such an accusation without having carefully verified their facts. They showed the worst possible judgment in presenting their motion without supporting proof and in refusing to reveal the source of their misinformation. But a sentence for contempt is not intended primarily as a means of punishing one for carelessness or bad judgment. Its principal justification lies rather in the

need for upholding public confidence in the majesty of the law and in the integrity of the judicial system. When we have found that these ends will be met despite a reduction or even a remission of a jail sentence for contempt it has been our practice to modify the judgment. See *Lockett* v. *State,* 145 Ark. 415, 224 S. W. 952; *Baker* v. *State,* 177 Ark. 13, 5 S. W. 2d 337; *Pace* v. *State,* 177 Ark. 512, 7 S. W. 2d 29.

The petitioners have served what amounts in law to two days in jail. That puishment was deserved. But the allegation of jury stacking has been demonstrated to be so wholly without foundation that it is not possible to think that the standing of the Pulaski Circuit Court in the minds of the public has been impaired in the slightest degree. We are not convinced that "the ends of justice," as we said in *Pace* v. *State, supra,* require that these out-of-state attorneys be again confined to jail for conduct that does not appear to have been motivated by bad faith or malice.

As thus modified the judgment is sustained.

HAMILTON *v.* PAN AMERICAN SOUTHERN CORP.

5-3241 378 S. W. 2d 652

Opinion delivered April 27, 1964.

[Rehearing denied June 1, 1964.]

John Dale Thweatt, Moses, McClellan, Arnold, Owen & McDermott and *James R. Howard,* for appellant.

Thorp Thomas and *Roy Finch, Jr.,* for appellee.

PAUL WARD, Associate Justice. The principal question involved in this appeal relates to the liability of a sheriff for failing to make a statutory return on an execution. Most of the facts involved are not in dispute. The ones presently set out are not questioned.

Facts. In 1956 appellee, Pan American Southern Corporation, secured a judgment in the Pulaski County Circuit Court against one R. W. Coyle in the sum of $2,782.42. The judgment not having been paid, appellee's attorneys had an execution issued by the Pulaski County Circuit Clerk against Coyle, directed to the sheriff of Prairie County, in which county Coyle was living. The execution was dated August 30, 1961 and was signed: "Roger McNair, Clerk, by Martha Deaton, Deputy Clerk". It is agreed that the sheriff was obligated by statute, Ark. Stat. Ann. § 30-431 (Repl. 1962), to make a return within 60 days after the date of issuance. It is also agreed that the return must be made to the clerk of the issuing county—in this instance, Pulaski County. The sheriff of Prairie County (appellant) did not return the execution to Pulaski County until several months after it was due to be returned.

Ark. Stat. Ann. § 29-208 (Repl. 1962) in all material parts, provides that judgments shall be rendered for the plaintiff against the sheriff . . . "For failing to return an execution; the amount of the judgment on which it was issued, including all the costs and ten [10] per centum thereon."

Based on the above statute, appellee, in October, 1962, filed a Motion for Summary Judgment against appellant (E. O. Hamilton, Sheriff of Prairie County) in the amount of the judgment (together with interest) previously rendered against Coyle, plus 10% penalty. Appellant, in answering, in substance, contended, among other things, that ". . . there was no indication on said execution showing from which county or court it was issued . . ." and that, thinking the execution was issued by the clerk of Prairie County, he made proper return to said clerk within the time provided by law (60 days).

A jury trial resulted in a verdict and judgment against appellant in the amount of $4,696.27.

Appellant relies on three separate grounds for a reversal. We find no error based on the first and third grounds, and will therefore discuss them only briefly.

It was not error for appellee's attorney, on *voire dire* examination of the jury, to ask if any juror worked for an insurance company, since the law requires a sheriff to provide a surety bond. The question here raised by appellant was decided against his contention in *Brundrett* v. *Hargrove,* 204 Ark. 258, 161 S. W. 2d 762. Neither do we find any merit in the third ground. There the court refused appellant's requested Instruction No. 2, and properly so. The instruction permitted the jury to find appellee waived any rights it had under the statute. We have searched the record diligently and find no evidence to support such instruction.

The Issue. The decisive issue, and the one which we think calls for a reversal, arises out of the court's refusal to give appellant's requested Instruction No. 1. It reads as follows:

"You are instructed that in this case it is undisputed that E. O. Hamilton, Sheriff of Prairie County, failed to make a return on the execution to the Clerk of Pulaski County, Arkansas, from which it was issued within the time prescribed by law. *You are further told that it is undisputed that the sheriff did return the execu-*

tion to the Clerk of Prairie County within the time prescribed by law. You are instructed that if you find from a preponderance of the evidence in this case that the failure to make the return to the proper clerk (which was the Clerk of Pulaski County) was due to a mistake of existing facts on the part of the sheriff as to which clerk issued the execution and that such mistake was not made as a result of the sheriff's own negligence or carelessness, then you are told that the sheriff is not responsible to the plaintiff and your verdict will be for the sheriff." (Emphasis added.)

First, appellee contends the court was justified in refusing to give the above instruction because of the words we have emphasized. That is, appellee says it is not *undisputed* that appellant returned the execution to the clerk of Prairie County before the 60 days had expired. We do not agree with appellee. The copy of the execution (in the record) shows it was returned on October 26, 1961, signed by the sheriff, stating no property was found in Prairie County. Foster, the deputy sheriff, said he delivered the execution (at the direction of appellant) to the office of the clerk of Prairie County, well within the 60 days limit. We find no testimony in the record which contradicts the above.

Therefore we proceed to consider appellant's contention that he made the return to the clerk of Prairie County (instead of the clerk of Pulaski County) because he was led to do so by certain facts and circumstances over which he had no control. He says that the execution was handed to him by the clerk of Prairie County and that there was nothing on the execution to indicate it was issued by the clerk of Pulaski County. On the other hand, appellee says the sheriff should have known there was no clerk in Prairie County named "McNair" and that the seal on the copy of the execution shows it was issued out of Pulaski County. We have carefully examined the photostatic copy of the execution in the record, and find the imprint of the seal wholly illegible, and we find nothing else on the copy (except perhaps the name of McNair) which in any way indicates the execution

was issued from Pulaski County. Therefore, we feel that the record presents for the jury a question of fact as to whether appellant was excusable in failing to make a return of the execution on Pulaski County.

There can be no doubt that § 29-208 is highly penal. The fact that Coyle may have been insolvent would not release appellant from liability. *Atkinson* v. *Heer & Co.,* 44 Ark. 174. In dealing with a statute of this kind it is well established by our decisions that it "must be strictly construed in favor of those upon whom the burden is sought to be imposed." *State* v. *International Harvester Co.,* 79 Ark. 517, 96 S. W. 119. To the same effect, see also, *Fiser* v. *Clayton and Clayton* v. *McAmis,* 221 Ark. 528, 254 S. W. 2d 315; *Thompson* v. *Chadwick,* 221 Ark. 720, 255 S. W. 2d 687; *Davis* v. *Fowler et al,* 230 Ark. 39, 320 S. W. 2d 938; and *Smith* v. *Faubus,* 230 Ark. 831, 327 S. W. 2d 562.

In the case of *Bickham* v. *Kosminsky,* 74 Ark. 413, 86 S. W. 292, where a similar issue was considered this Court said: [quoting from *Simms* v. *Quinn,* 58 Miss. 221] " 'Those who propose to invoke against officers the severe penalties of the statute upon which this motion is based must be careful to do nothing which directly or indirectly contributes to the omission of duty complained of'." See also *Hammons* v. *Pendleton,* 96 Ark. 444, 133 S. W. 177; *Wilkerson* v. *Mobley,* 152 Ark. 124, 237 S. W. 726; and *McIlroy Banking Company* v. *Mills,* 178 Ark. 741, 11 S. W. 2d 481. This prompts us to suggest the advisability that, hereafter, the execution show the county in which it originates.

It follows from what we have said above that the trial court erred in refusing to give appellant's requested Instruction No. 1. The judgment is therefore reversed, and the cause is remanded for a new trial.

Reversed and Remanded.

5-3257 377 S. W. 2d 870

Opinion delivered April 27, 1964.

Lookadoo, Gooch & Lookadoo, Huie & Huie, Shaver, Tackett & Jones, William Deer, D. H. Crawford, Autrey & Goodson, for appellant.

Steel & Downey and *House, Holmes, Butler & Jewell,* for appellee.

SAM ROBINSON, Associate Justice. Appellant, Natural Gas Pipeline Company of America, filed this suit under the U. S. Natural Gas Act to condemn an easement for a pipeline right-of-way across the property of appellants, the Flanagans and the Bartons. Immediate possession of the right-of-way was obtained. Appellant property owners filed an answer and cross-complaint against the pipeline company. The property owners also filed a cross-complaint against appellee, O. R. Burden Construction Corporation, in which they sought compensation for damages alleged to have been caused by the construction of the pipeline.

The original plaintiff, the pipeline company, then filed a cross-complaint against the contractor, Burden,

asking that it be reimbursed for the amount of any judgment that might be rendered against it due to any action on the part of the contractor. Burden filed an answer to both cross-complaints, but later filed motions to strike the cross-complaints. The motions were granted, and the pipeline company and the landowners have appealed.

Appellants, the pipeline company and the landowners, contend that they have the right to make appellee a party defendant under the provisions of Ark. Stat. Ann. § 27-1134 (Repl. 1962), which provides for bringing in other parties by way of a cross-complaint, but this provision of the statute does not prevent the trial court from exercising discretion in deciding the question of whether a third party may be brought into the case. It will be noticed that the statute provides: "A defendant may file a cross-complaint against persons other than the plaintiff . . . when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-complaint." It is for the trial court to determine, in advance of the trial on the merits, whether a judgment can be rendered that will not prejudice the rights of the parties to the cross-complaint.

After a hearing on the motions to strike the cross-complaints, the trial court said: "If Burden is forced to remain in this case it is readily seen that the proceedings will become infiltrated with the law of contracts, the law of negligence, contributions among joint tortfeasors, etc. I do not believe that Burden can be forced to remain in the case and at the same breath be denied the right to bring in other contractors in an effort to obtain any rightful offset. Furthermore, the contract between the pipeline company and Burden would necessarily become a factor in the case."

It can easily be seen that if the motions to strike the cross-complaints had been overruled, the issues could have become so complicated that it would be very difficult for twelve jurors to keep from becoming utterly confused. In all probability, the appellee contractor would have wanted to file a cross-complaint against one

or more subcontractors, and the subcontractors might want to bring in other subcontractors. The litigation between the pipeline company and the landowners would be a condemnation proceeding; the action between the landowners and the contractor would be in tort; the action against the contractor by the pipeline company would be ex contractu or ex delicto, or both; the actions by the contractor against subcontractors could be on a contract or in tort. There is no telling how many parties would finally be involved.

Ark. Stat. Ann. § 27-1124 (Repl. 1962) provides: "When it appears that a new party is necessary to a final decision upon the counterclaim, the court may either permit the new party to be made, by a summons, to reply to the counterclaim in the answer, or may direct that it be stricken out of the answer and made the subject of a separate action."

Appellants suggest that the failure to bring the contractor into the case by way of cross-complaint could make available to the contractor a plea of res judicata in the event that suits were filed against the contractor at a later date. Without going into a discussion on when the doctrine of res judicata is applicable, suffice it to say that here, since the appellee was dismissed from the case on its own motion, it would be estopped to say that a judgment rendered in the cause would be an adjudication of its rights. 30 Am. Jur. 378; *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U. S. 252.

Appellants argue that by filing an answer prior to filing the motions to strike the cross-complaints appellee waived its right to be dismissed from the action. In support of their position on this point appellants cite *Flanagan* v. *Drainage Dist. No. 17,* 176 Ark. 31, 2 S. W. 2d 70; *Drainage Dist. No. 7* v. *Haverstick;* 186 Ark. 374, 53 S. W. 2d 589; *Teasley* v. *Thompson,* 204 Ark. 959, 165 S. W. 2d 940; and *Morris* v. *Varnell,* 222 Ark. 294, 258 S. W. 2d 889. In none of the aforesaid cases was the question of a party's right to be dismissed raised by a demurrer, in the answer, or by a motion prior to a trial on the merits.

In fact, the question was not raised until after both parties had rested, or until the case had reached the Supreme Court. Here, the question was raised before the case was reached on its merits, and appellants were in no way prejudiced by the question being raised by a motion to strike instead of it being raised in the answer.

Affirmed.

McFaddin, J., concurs.

Pierce *v.* Pierce.

5-3012 377 S. W. 2d 868

Opinion delivered April 27, 1964.

Felver A. Rowell, Jr., for appellant.

Gordon & Gordon, for appellee.

Frank Holt, Associate Justice. This appeal arises from the allowance of a portion of a claim filed by the appellee, C. J. Pierce, d/b/a C. J. Pierce Lumber Company, against the estate of his father, M. H. Pierce, deceased. In September, 1960, a month following his father's death, appellee filed his original claim for $10,371.28 seeking reimbursement for one-half of a salary paid by him to his employee, a timber cruiser, for a period of three and one-half years [1955-58] and, also, the repayment of certain severance taxes allegedly paid by appellee. Subsequently this claim was amended and

increased to $25,490.00 alleging additional claims based upon the use of appellee's truck and the rendering of personal services in the purchase of timber lands by appellee for his father during this three and one-half year period. Upon appellee's claim being denied by the executrix of his father's estate, the issue was submitted to the Probate Judge who allowed appellee's claim to the extent of $12,675.00. After deducting $12,491.41, which appellee admittedly owed his father's estate, the court rendered judgment for appellee in the sum of $183.59 against the appellant estate.

On appeal appellant relies for reversal upon two points: (1) The court erred in finding there was a contract, expressed or implied, to compensate appellee for the "salary of his timber cruiser and truck expense," and (2) that the court erred in finding there was a "mutual account" between appellee and his father's business firm. On cross-appeal the appellee contends for reversal that the court erred in not allowing his claim to the extent of the proof offered for a total of $30,217.50. Appellee further urges that appellant's appeal should be dismissed for failure to comply with Ark. Stat. § 27-2127.1 which requires that the transcript must be filed within seven months from the date of the entry of the judgment or decree. Since we think the appellee is correct in this latter contention, we first consider this point.

Pending the appeal the appellee filed a motion with the clerk of this court to dismiss the appeal for the reason that the transcript was not filed within the required statutory period of time. This motion was controverted by the appellant who argued that the transcript was filed within the required time and, furthermore, if not filed within that time it was due to an unavoidable casualty resulting from an error made by the probate clerk. Pursuant to our per curiam order the Probate Judge proceeded to take evidence to determine the actual date of the filing in the probate clerk's office of the questioned judgment upon which this appeal is based. Pursuant to this order the trial court has certified to us that:

"(2) From the evidence, it is found that the Judgment in question was filed with the Probate Clerk on some date subsequent to June 27, 1962, and not later than July 3, 1962, as shown by the testimony of Mr. Brewer, the clerk, * * *

(3) This finding is based on the showing that the Velma Catherine Mason and Mary Alice Cargile Order of July 2, 1962, was filed July 3, 1962, and appears of record immediately following the record of the Judgment in question."

In the case at bar it is undisputed that the transcript was filed with the clerk of this court on February 8, 1963. Under the findings of the Probate Judge the transcript should have been lodged not later than February 3, 1963, to comply with Ark. Stat. Ann. § 27-2127.1 (Repl. 1962). It provides in pertinent part that:

"* * * the trial court shall not extend the time to a date more than seven [7] months from the date of the entry of the judgment or decree."

We construed the meaning of the words "entry of the judgment or decree" in *Cranna, Administrator* v. *Long,* 225 Ark. 153, 279 S. W. 2d 828. There we held that if the judgment were not actually entered on the date rendered, then the date of the filing of the judgment with the clerk is the decisive date.

The appellant contends, however, that if the transcript was not timely filed it was due to an unavoidable casualty caused by an error of the clerk since the copy of the judgment contained in the transcript has typed thereon that it was filed on the 9th day of July, 1962. It is undisputed that the original judgment on file in the probate clerk's office does not have any filing date noted thereon. Further, pursuant to our directions the trial court has determined that the judgment was actually filed not later than July 3, 1962." The certificate of the probate clerk reveals that the entire transcript was completed on January 30, 1963, or in sufficient time to file it before the seven [7] months allowed by statute

for the filing of this transcript had expired. In addition, it is undisputed that the appellant and the cross-appellant state in their notices of appeal that they are appealing from a judgment "entered" on the 27th day of June, 1962. There is no reference in either notice of appeal to *any other date* concerning the rendition or filing of the judgment in question. In other words, neither of the parties at that time made reference to the judgment actually being filed on July 9, 1962.

Under the facts in the case at bar we do not find that the delay in filing the transcript was occasioned by an unavoidable casualty and, therefore, we are impelled to hold that the appeals of the appellant and cross-appellant must be dismissed because the transcript was not filed within the required time. In the instant case the applicable provision of the statute is clear and mandatory. Although we do not reach a discussion of the other points raised by the appellant and the cross appellant is might be said, however, that upon doing so it is possible we could have reached substantially the same result.

The appeals are dismissed.

Opinion delivered May 4, 1964.

[redacted]

Barrett, Wheatley, Smith & Deacon, for appellant.

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

CARLETON HARRIS, Chief Justice. Appellee, Bert Gaither, was involved in a collision while driving his 1963 International truck. At the time of the collision, Gaither held a policy of insurance with the appellant, Southern Farm Bureau Casualty Insurance Company, and the policy was in full force and effect. The particular provision pertinent to this litigation is as follows:

"The limit of the company's liability for loss is the actual cash value of the automobile or its damaged parts at the time of loss. The company may pay any loss or repair or replace the automobile or its damaged parts * * *."

An estimate was made by Webb Body Shop of Walnut Ridge, and a repair estimate was made on June 10, 1963, in the amount of $1,426.35. The appellant com-

pany authorized repairs on the basis of this estimate,[1] but appellee insisted that he was entitled to a new cab, and he refused to authorize the repairing agency to proceed. The testimony reflected that subsequently additional damage to the truck was discovered, consisting of a bent frame, and two badly cut tires, which were not included in the Webb estimate.[2] Appellee filed his complaint against appellant, and, after amendment, sought judgment in the amount of $2,618.07, together with penalty, attorney's fee, and costs. The company answered, contending that it was liable only to the extent of $1,326.35, and that it had promptly offered to pay this amount, which would fully comply with the policy, but appellee had refused to authorize the repairs. On the day of trial, Gaither reduced the prayer of his complaint to $2,075.00, but the company only tendered the aforementioned $1,326.35. At the conclusion of the evidence, appellant moved for a directed verdict, but the motion was denied. On trial, the jury returned a verdict for appellee in the amount sought, and the court thereupon entered its judgment for $2,075.00, plus a penalty of $249.00 and an attorney's fee of $350.00, together with costs. From such judgment comes this appeal.

Appellant contends that under the policy of insurance it had an absolute right to repair the damaged vehicle, provided it exercised its option to do so within a reasonable time, and obtained a reputable repairing agency, located at a reasonable distance from Gaither's home, to handle the repairs. It is asserted that when the company elected, under its option, to repair the vehicle, the original contract was converted into a contract to repair.

Appellee contends that it was the duty of the company to repair the truck in a manner that would restore it to substantially the same value as at the time of the collision. We have held that the measure of damages is

[1] The collision coverage provided that the first $100.00 must be paid by the insured.

[2] On August 29, an estimate was obtained from Lawrence County Implement Company on the latter damage, which totaled $774.33.

the difference in the market value of the vehicle immediately before and after the collision. *Resolute Insurance Co.* v. *Mize,* 221 Ark. 705, 255 S. W. 2d 682; *Kane* v. *Carper-Dover Mercantile Co.,* 206 Ark. 674, 177 S. W. 2d 41; and *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14, 3 A.L.R. 2d 593.

The company points out that a letter had been directed to Gaither in June, advising, "Repairs to your truck will be guaranteed, insofar as any damage to the vehicle sustained in the accident;" a similar letter was written in July, and the company agent also testified that he told appellee that the company would guarantee repairs and that if any item was overlooked or not properly repaired, same would be corrected at the expense of the company. However, it is admitted that the company would not agree to pay for a new cab, and it is also undisputed that no offer was made to pay for the damage subsequently discovered (the bent frame and damaged tires).

We think a jury question was presented through the evidence offered. The proof reflected that the truck had been driven approximately 1,000 miles, *i.e.,* it was practically new. Evidence was offered on behalf of appellee to the effect that the truck, with a repaired cab, would be less valuable than with a new cab. Wallace Jones, an implement salesman, testified that to repair the damaged cab, rather than to replace it with a new one, would decrease the value of the truck somewhere between $300.00 and $500.00. This witness also stated that he had observed the bent frame with the naked eye, and that the two tires were badly damaged, and would have to be replaced to restore the truck to its prior value. He testified that, in his opinion, the truck had a value of $3,275.00 before the accident, and $1,100.00 after the accident.

John Shaffer, shop manager of Lawrence County Implement Company, also testified that the frame of the Gaither truck was bent.

Appellant company offered evidence to the effect that the frame was not bent, but this, of course, was a jury question.

Considering the rule governing this type of case, as stated in *Resolute Insurance Co.* v. *Mize, supra,* and the fact that a practically new truck was involved, we think there was sufficient evidence that appellant, though willing to repair the truck on the basis of the first estimate made by Webb Body Shop ($1,426.35), had not made an offer that would substantially restore the vehicle to its prior market value.

It follows that the court did not err in refusing to direct a verdict for appellant, and the judgment is therefore affirmed.

REATHER *v.* WARD FURNITURE MFG. CO.

5-3222 378 S. W. 2d 201

Opinion delivered May 4, 1964.

Clinton R. Barry and *D. L. Grace,* for appellant.

Harper, Harper, Young & Durden, for appellee.

ED. F. MCFADDIN, Associate Justice. This is the second time this case has been before us. The first appeal was *Ward Furn. Mfg. Co.* v. *Reather*, 234 Ark. 151, 350 S. W. 2d 691. The history of the litigation shows the care that the judicial system has taken in dealing with this claim:

(a) For several years prior to 1956 Mr. Reather was employed by Ward Furniture Manufacturing Company (hereinafter sometimes called "employer"); and on September 26, 1956, while Mr. Reather was at work he suffered a collapse. Some time thereafter Mr. Reather filed a claim for workmen's compensation alleging that he had suffered an accidental injury by breathing dust and that he had become disabled on September 26, 1956.

(b) The claim was controverted; and the Workmen's Compensation Commission (hereinafter called "Commission"), in an opinion dated November 10, 1959, found that Mr. Reather was entitled to compensation; and the employer appealed to the Sebastian Circuit Court.

(c) The Circuit Court, by judgment of January 11, 1960, vacated and set aside the award and remanded the claim to the Commission for further testimony. . .

(d) Both sides offered additional evidence before the Commission; and on August 31, 1960, the Commission disallowed the claim of Mr. Reather; and he appealed to the Circuit Court.

(e) On December 15, 1960, the Circuit Court vacated the order of the Commission and directed that the case be returned to the Commission for further investigation and evidence. That judgment of the Circuit Court was appealed by the employer to this Court, and resulted in our Opinion in the said case of *Ward Furn. Mfg. Co.* v. *Reather*, 234 Ark. 151, 350 S. W. 2d 691, which affirmed the said judgment of the Circuit Court.

(f) The claim of Mr. Reather then went back to the Commission, which reopened the case for further evidence. In order to make full investigation, the Commis-

sion caused Mr. Reather to be examined by Dr. Grimsley Graham, who was asked by the Commission to answer certain propounded questions. Dr. Graham examined Mr. Reather and answered the questions propounded, and these will be subsequently discussed. Mr. Reather also had an examination by a doctor of his own selection, and offered other medical evidence.

(g) Based on the original record and all of the said supplemental evidence, including the report of Dr. Graham, the Commission, on July 26, 1963, made an order denying any compensation to Mr. Reather and stated that Mr. Reather had not sustained his burden of establishing a causal connection between his employment and his disability.

(h) Mr. Reather appealed to the Circuit Court which, on October 24, 1963, affirmed the order of the Commission; and from the said Circuit Court judgment Mr. Reather prosecutes the present appeal to this Court.

So much for the brief history of the litigation, which extends over a number of years. The decisive question now before us is whether there is substantial evidence in the record to sustain the findings of the Commission in disallowing the claim of Mr. Reather. If so, the Circuit Court judgment was correct and must be affirmed under our long recognized holdings, some of which are: *Lemmer* v. *Chicopee Mfg. Co.,* 233 Ark. 523, 345 S. W. 2d 629; and *Ft. Smith Couch & Bedding Co.* v. *Jones,* 231 Ark. 790, 332 S. W. 2d 817.

It is undisputed that Mr. Reather collapsed while at work for appellee on September 26, 1956. He claimed that he collapsed because of breathing dust while in his place of employment. The question is, whether his work under the conditions existing caused or contributed to his collapse. If so, he is entitled to compensation; but the burden was on Mr. Reather to prove a causal connection between his disabled condition and his employment. *Holland* v. *Malvern Sand & Gravel Co.,* 237 Ark. 635, 374 S. W. 2d 822. The Commission found that

Mr. Reather had failed to prove said causal connection; and we examine now to see if there is substantial evidence in the record to sustain the said finding.

As aforesaid, the Commission caused Mr. Reather to be examined by Dr. Grimsley Graham, a specialist in the field of thoracic and cardio vascular diseases; and the Commission propounded certain questions to Dr. Graham to be answered by him from his examination of Mr. Reather and the information furnished him by Mr. Reather. Dr. Graham made the examination and reported to the Commission in a four-page single spaced typewritten letter, dated June 5, 1962, and to that letter no objections were filed. In answer to one of the Commission's questions, Dr. Graham stated that Mr. Reather was suffering from a pulmonary disease, being bronchiectasis, and that the chest x-ray showed some generalized emphysema and intersticial type fibrosis.

Here is the Commission's second question to Dr. Graham:

"If the claimant is suffering from any pulmonary condition, is there, in your opinion, any causal connection between such pathology and the condition under which the claimant worked?"

And here is Dr. Graham's answer:

"It has been my feeling that bronchiectasis is not caused by any occupational exposure, but usually can be found to begin either in early childhood or during their younger years and may often have its onset at the time of whooping cough, which this man did have as a child, or with pneumonia; and once again this man's condition is consistent with having had pneumonia in 1925 and 1928. I do not believe that his exposure to the dust in any way created any underlying pulmonary pathology." Dr. Graham went on to state that any aggravation of Mr. Reather's condition that might have been caused by exposure to the dust would have ceased once Mr. Reather was removed from such exposure, and that the dust

did not create any change in his already pre-existing disability.

Thus, we have a case in which it was testified by Dr. Graham that there was no causal connection between Mr. Reather's work and his disability. In short, his work for appellee did not cause or aggravate his pre-existing disease or condition. Because of this testimony the Commission disallowed Mr. Reather's claim. Dr. Graham's report is substantial evidence and supports the decision of the Commission, so we have no choice except to affirm the judgment of the Circuit Court, which affirmed the decision of the Workmen's Compensation Commission.

Affirmed.

WARD and JOHNSON, J.J., dissent.

PAUL WARD, Associate Justice, (dissenting). I am dissenting, somewhat reluctantly, in this case because I fear a great injustice is being done to the claimant—reluctantly because it is not easy to point out any plain or specific error that has been committed by the commission or the courts. Very briefly I will attempt to explain my reasons for dissenting.

One. First Hearing. The full commission on November 10, 1959 made, in substance, the following findings of fact and law:

(a) Claimant had worked for many years in the presence of dust mixed with glue; he collapsed on September 25, 1956; and he has not been able to work since that time (up to the date of the hearing).

(b) Dr. H. B. Thompson testified: claimant had the most terrific case of asthma he had ever listened to and he sent claimant to Booneville; he was definitely assured that the occupation claimant was following was causing his trouble.

(c) The question is: does the testimony of claimant, his wife and Dr. Thompson constitute substantial proof

that claimant sustained an injury arising out of and in the course of his employment; no one denies that claimant became disabled while at work; that he was treated by a physician for a long period of time and that he has never worked at anything since he left his employment on September 25, 1956; it is undisputed that he has a *lung condition;* and so we are of the opinion that claimant has established a compensable injury and that he should be paid.

Two. The above opinion by the commission was nullified by the circuit court on January 11, 1960 and the matter was remanded for further development. At the next hearing before the commission the claim was disallowed on August 30, 1960. Again the circuit court sent the matter back for still further development, telling the commission he agreed with them that the new testimony added nothing to the record. To my mind that simply means that the medical testimony was the same as at the time of the first hearing.

Three. This appeal comes from the third hearing before the commission when the commission, on the basis of testimony by Dr. G. G. Graham, disallowed the claim. This brings us to the point of considering the effect of Dr. Graham's testimony. He was asked by the commission to answer four questions. The substance of the three pertinent questions and the doctor's answers is set out below.

(1) Q. Is claimant suffering from any pulmonary disease or condition?

A. It is most likely that claimant has bronchiectasis —probably more extensive in the left lung than in the right lung field. To make a definite determination it would require one other examination not made.

(2) Q. If claimant is suffering from any pulmonary condition, is there any causal connection between that and his work?

A. It is my *feeling* that there is not; it *usually* begins in early childhood and it *may* result from whooping

cough (which this man had as a child) or it *may* result from pneumonia (which claimant had in 1925 and 1928); "I do not *believe* that his exposure to the dust in any way *created any underlying* pulmonary pathology at this time; I do *feel*, however, that there was an aggravation of this condition at the time of his exposure to the dust, however, it is *my experience* that once removed from the exposure that this subsides rather readily and would not create any permanent change in the pre-existing condition." (Emphasis supplied.)

(3) Q. If there is any causal relation between claimant's lung pathology and his work, state whether claiman thas any disability now and if so, the degree.

A. "I believe this is more or less answered with question two . . ."

Four. I have carefully read all of the medical testimony pertaining to the question here involved and I cannot honestly say that I found any statement by any doctor which says plainly and positively that claimant's condition was ont caused or aggravated by the claimant's working conditions. Under the facts and circumstances of this case I believe this would be necessary to comply with what we held in the case of *Hall* v. *Pittman Construction Co.*, 235 Ark. 104, 357 S. W. 2d 263.

"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."

In the case of *Eddington* v. *City Electric Co.*, 237 Ark. 804, 376 S. W. 2d 550, we said:

"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."

The above language undoubtedly would apply with equal force if "working conditions" were substituted for the word "injury".

Here we have an able bodied man who worked every day for many years in a thick dust of wood fiber mixed with glue; he suddenly collapses while at work and, after eight years, has been unable to work even one day; no doctor has said he knows for sure that claimant's work did not cause or aggravate his condition. This almost leaves us with a choice between two theories: either claimant became disabled from working 13 years in thick dust or from having whooping cough some 40 years ago. I prefer the logic employed by the biblical blind man who was healed by Christ. When questioned as to how it happened, he replied, ". . . one thing I know, that whereas I was blind, now I see". St. John, 9:25. After reading the two records in this case I feel like saying: whereas, claimant was a well man before September 26, 1956, now (and since that time) he is disabled.

JOHNSON, J., joins in this dissent.

DEREUISSEAUX *v.* BELL.

5-3229 378 S. W. 2d 208

Opinion delivered May 4, 1964.

Kenneth Coffelt, for appellant.

Gordon & Gordon, Felver A. Rowell, Jr., for appellee.

George Rose Smith, J. Under the authority of Ark. Stat. Ann. § 62-2402 (Supp. 1963) the appellee, as administrator of the estate of Sam Bell, deceased, brought this suit to set aside certain assertedly fraudulent conveyances made by Sam Bell during the last year of his life. The chancellor, in accordance with an excellent memorandum opinion that he prepared, entered a decree granting the relief sought. For reversal the appellants, who were the immediate and ultimate recipients of the property conveyed, contend principally that there was no proof of actual fraud on the part of the parties to the various conveyances.

On November 16, 1961, Sam Bell, the decedent, shot and wounded his nephew, William Robert Bell. In February of 1962 Sam pleaded guilty to a charge of assault with intent to kill and was sentenced to fifteen years imprisonment. Sam was then suffering from a fatal disease and died in the penitentiary on November 28, 1962.

At the time of the shooting Sam Bell owned real and personal property worth about $25,000. In a series of transfers made during the first half of 1962 Sam Bell gave all his property (except a truck given to a nephew) to the appellant Leila Dereuisseaux, his favorite niece. In January, 1963, Mrs. Dereuisseaux, after having used part of the property to pay funeral expenses and other proper charges against the Bell estate, in turn gave the rest of the property to her daughter, the appellant Billie Jean Dereuisseaux. Billie Jean then delivered $12,000

in cash to her attorney, the appellant Kenneth Coffelt. This was her contribution under a contract by which she and Coffelt agreed to build and operate a motel. Coffelt had represented Sam Bell and Mrs. Dereuisseaux from the beginning. There is no question about his having been fully aware of the source of the funds paid to him by Billie Jean.

In May of 1962 William Robert Bell filed an action against Sam Bell for $121,000 as damages resulting from the shooting. After Sam's death that case was revived in the name of his administrator, the appellee. The present suit was filed by the administrator in February of 1963, the complaint alleging that the conveyances were executed with the fraudulent intention of placing Sam Bell's property beyond the reach of his creditor, William Robert Bell.

It is first contended that William Robert Bell was not a creditor of Sam Bell or of his estate and that therefore the conveyances cannot be regarded as fraudulent with respect to his cause of action. This contention has been rejected in a number of cases, including *Papan* v. *Nahay,* 106 Ark. 230, 152 S. W. 107, and *Horstmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729. Those cases hold that one having a cause of action in tort is a creditor with a right to question a fraudulent conveyance. In the *Horstmann* case we recognized the fact that such a claimant becomes a creditor "upon receiving his injury." Hence William Robert Bell was an existing creditor when the challenged conveyances were made; so we need not discuss a number of cases, cited by the appellants, that were concerned with subsequent creditors.

It was stipulated at the beginning of the trial that "Sam Bell gave all of his property, both real and personal, except the truck, to Leila Dereuisseaux." Mrs. Dereuisseaux and others gave testimony indicating that Bell was motivated not by any desire to defraud William Robert Bell but by the wish to provide for this niece, for whom he had great affection. It is argued that in view of this proof the appellee failed to prove such ac-

tual fraud as would justify the chancellor in setting aside the gifts.

This argument is unsound, for there is no requirement that conscious fraud be shown. We have repeatedly held that conveyances by an embarrassed debtor to his near relatives are presumptively fraudulent, and when the debtor's condition proceeds, as here, to the point of insolvency such conveyances are, with respect to existing creditors, *conclusively* presumed to be fraudulent. *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913; *Kaufman* v. *Citizens' Bank,* 189 Ark. 113, 70 S. W. 2d 572; *Connelly* v. *Thomas,* 234 Ark. 1024, 356 S. W. 2d 430. Since the presumption of fraud is conclusive it cannot be rebutted by proof that there was actually no intentional wrongdoing. There is no basis for any intimation of fraud on the part of Billy Jean Dereuisseaux or Mr. Coffelt, but since they took the property with knowledge of Bell's gratuitous transfers to Mrs. Dereuisseaux they cannot be considered to be innocent purchasers. *Ringgold* v. *Waggoner,* 14 Ark. 69.

There is some suggestion in the appellants' brief that the appellee is not in a position to attack the conveyance of one piece of real property, because it was Sam Bell's homestead. This contention was not raised in the appellants' pleadings nor, as far as we can discover, in any other manner in the trial court. There are a few casual statements indicating that Bell lived near Lake Conway, but there is no direct proof enabling us to say with confidence that the property was his homestead. This point is raised for the first time on appeal and therefore cannot be considered.

A final argument is that the appellee delayed so long in bringing this suit as to be guilty of laches. The record does not support this contention. Bell's conveyances to Mrs. Dereuisseaux began in January, 1962, and ended in May of that year. Mrs. Dereuisseaux gave the property to her daughter in January, 1963. This suit was filed in February, 1963. We are of the opinion that the administrator acted with diligence in the matter. More-

over, even if the delay were considered to be prolonged, it does not appear that the rights of the appellants were prejudiced in any way.

In setting aside the transfers the chancellor directed that the funds and other property be retained in the control of the court until William Robert Bell's personal injury action is finally decided. This procedure was proper. If there should ultimately be any assets in the estate not needed to satisfy the tort claim it will be necessary for the court to determine the proper distribution of the surplus.

Affirmed.

ROBINSON, J., not participating.

BALL *v.* SPENCER.

5-3263 378 S. W. 2d 205

Opinion delivered May 4, 1964.

Cecil Grooms, for appellant.

Kirsch, Cathery and *Brown,* for appellee.

PAUL WARD, Associate Justice. This suit was brought to reform certain deeds. The pleadings and testimony are rather long and tedious, but we believe a clear conception of the essential issues involved can be obtained from the following relatively brief statement.

Prior to 1959 appellee, Rellie Culp Smith (hereinafter called *Rellie*) obtained title to 80 acres of land described as the SW ¼ of the NE ¼ and the NW ¼ of the SE ¼, Section 31. Title to the SW ¼ of the NW ¼ is not in dispute on this appeal. On August 4, 1960 Rellie executed a deed to appellants conveying a portion of the NW ¼ of the SE ¼ (hereafter referred to as deed No. 1). The description in this deed was by metes and bounds and conveyed approximately 22 acres of land. On September 5, 1961 Rellie deeded Tom Ward all of the NW ¼ of the SE ¼ except 2 acres (not here involved) and except the 22 acres (described by the same description contained in deed No. 1). (We will refer to this deed as deed No. 2.) Later, Ward made a deed to appellee, R. E. Spencer, using the same description as in deed No. 2. (This is deed No. 3.)

Appellee, Rellie, contends she intended to convey (by deed No. 1) to appellants only 11.02 acres and that appellants knew they were to get only 11.02 acres. Later, when appellants indicated they were claiming all of the 22 acres, appellees filed suit (against appellants) to reform deed No. 1 to make it convey only 11.02 acres.

The Complaint. After referring to the deeds above mentioned, the complaint, among other things, contained (in essence). the following statements:

(a) Appellee (Rellie) and Gladys Ball (mother of appellants) and Gerald Ball all agreed on the description to the lands conveyed in deed No. 1; they all knew the established corners; and they all knew and agreed that the deed was to convey only 11.02 acres (as described by metes and bounds in the complaint).

(b) Appellants took possession of the 11.02 acres, but later (in late 1963) attempted to fence in the 22 acres.

(c) On April 1, 1961 appellants executed a mortgage (by the same description contained in deed No. 1) to one C. B. Dearin covering the entire 22 acres.

The prayer was that deed No. 1 be reformed to convey 11.02 acres; that the deeds to Ward and Spencer be reformed to include all of the NW ¼ of the SW ¼ except the 11.02 acres (and the other land not involved); and, that the mortgage to Dearin be reformed to cover 11.02 acres only.

The Answer. Appellants entered a general denial and further alleged (in substance) that Rellie helped to measure the land described in deed No. 1; that she knew or should have known the deed conveyed 22 acres and not 11.02 acres; and that she is estopped to deny the 22 acre description because she used the identical description (used in deed No. 1) in the deed to Ward (deed No. 2).

The Decree. On September 4, 1963, after a full hearing, the trial court found, in effect:

(a) The description in deed No. 1 should be reformed to convey 11.02 acres (setting out a metes and bounds description).

(b) The descriptions in deeds No. 2 and No. 3 should be reformed so that 11.02 acres (instead of 22 acres) would be excepted (again set out by metes and bounds descriptions).

(c) That the description in the mortgage to Dearin should not be reformed.

For reasons hereafter set out we conclude the trial court was correct in all respects, and that the decree should be affirmed. The court was justified in finding from the evidence that when deed No. 1 was executed Rellie intended to convey and appellants expected to receive only 11.02 acres.

The north line of the 22 acres extends approximately 369 feet farther north than the north line of the 11.02 acres, and the west line of the 22 acres extends approxi-

mately 183 feet farther west than the west line of the 11.02 acres, thus resulting primarily in the difference in acreage. All of the 11.02 acres is in woods, but the land on the north side (in the 22 acres) is in cultivation. Rellie testified that she, together with Gerald and his mother, measured the land and that they didn't go as far north as the cultivated land. She also stated that acreage was not discussed, but that they intended to go by the measurements. None of this was denied by appellants. Clarence Dawson testified he was familiar with the land in question; that he talked with appellant Gerald Ball about renting the land and that appellant told him he did not own any of the cultivated land, and that he (Dawson) would have to see Mr. Spencer (who at that time had received his deed).

There appears in the record a reasonable explanation for the erroneous description in deed No. 1. Rellie and Gerald Ball (with his mother) went to an abstractor to have the deed written. The abstractor told them first to make measurements of the boundaries of the land and furnish the data to him. The parties procured a "chain", made the measurements, established definite corners, and turned in the data from which the abstractor wrote the description. The trouble was that no one seemed to be sure just what kind of "chain" was used or how long it was. The abstractor testified he told them to measure the land with a chain but learned later it wasn't a regular chain used for measuring land. He also said he made a notation to the effect that the land ran north to the cultivated land. He further testified that it was his understanding that the parties marked and agreed on all the corners. Mrs. Gladys Ball (mother of Gerald) testified that she boughtt he chain at a hardware store; that it was of odd length—a light weight "cow" chain. She also admitted that there was a fence along the north edge of the woods and stated that they made no attempt to occupy or take charge of the cultivated land in 1961 or 1962. There is this additional significant circumstance. Appellants paid only $250 for the land, but it is obvious from the record that had the cultivated lands

been included, the price would have been considerably more.

We have carefully read the record and are convinced, that in a case of this type the evidence showing a mutual mistake meets the test as set out in *Gastineau, et al.* v. *Crow.* 222 Ark. 749, 262 S. W. 2d 654:

"In circumstances such as are presented here, the law is well established that in order to reform a deed or other written instrument 'the evidence must be "clear convincing, unequivocal and decisive," and must establish the right beyond a reasonable doubt. *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52. This rule does not require that the fact be established entirely beyond dispute. The only requirement is that there be more than a mere preponderance, and the evidence must be of sufficient weight to establish the issue beyond reasonable controversy or doubt.' *Adcox* v. *James,* 168 Ark. 842, 271 S. W. 980."

It is well settled by uniform decisions of this court that equity will reform a deed on the ground of mutual mistake. The rule was well stated in *Goodrum* v. *Merchants & Planters Bank,* 102 Ark. 326, 144 S. W. 198:

". . . to entitle a party to reform a written instrument upon the grounds of mistake, it is essential that the mistake be mutual and common to both parties; in other words, it must be found from the testimony that the instrument as written does not express the contract of either of the parties thereto."

If, as indicated above, the parties agreed on the actual boundary lines of a parcel of land consisting of 11.02 acres and the description in the deed (due to a defective "chain") was written to describe 22 acres, it is of no avail to appellant (Gerald Ball) that he later claimed the larger acreage when he learned of the mistake. In other words, the important thing is what did appellants think they were getting at the time the measurements were made? In the case of *Corey* v. *The Mercantile Insurance Company of America,* 205 Ark. 546, 169 S. W. 2d 655, where the same issue arose, we said:

"In all such cases, the question is, not what the parties would have intended but for a misapprehension, not what the parties would have intended had they known better, but, rather, did the parties understandingly execute the instrument, and does it express *their intention at the time,* informed as they were?" (Emphasis added.)

Cross-Appeal. We see no merit in appellees' contention that (since deed No. 1 has been formed) the mortgagee Dearin has a lien on only 11.2 acres. Appellees base this contention on the fact that Rellie testified she remained in possession of the cleared land up until the mortgage was executed, and that this constituted notice to Dearin—that is, Dearin was not an innocent mortgagee. Appellees cite no authority in support of this contention. We find, however, that in the case of *Turman* v. *Bell,* 54 Ark. 273, 15 S. W. 886, all phases of this question were ably and fully discussed. Among other things it was there stated:

"If the possession has continued after the making of the deed but a short time, it might be reasonably referred to the sufferance of the grantee; but where it was long continued, it would much more strongly imply a right in the occupant, and the implication would be sufficient to cast upon strangers the duty of inquiry." As we read the *Turman* case, where a grantor remains in possession of land after he has deeded it away and the grantee later mortgages the land, notice to the mortgagee of any unrecorded interest the grantor might have in the land would depend on the facts of each particular case—such as the length of time the grantor remains in possession and the type of his possession, whether so open and notorious as would reasonably be calculated to attract the attention of a prospective purchaser or mortgagee. We find no such facts in this case. Rellie says she remained in possession of the disputed land but she does not say in what way. It does appear she did not live on the land. It is not contended she personally cultivated the land. Even if it could be said Rellie had possession, it cannot reasonably be said she retained posses-

sion long enough to arouse suspicion that she was claiming ownership. The mortgage to Dearin was executed on April 1, 1961, but it is not shown that anyone was working the cultivated land that early in the year.

In view of the above, we conclude the decree must be, and it is hereby, affirmed on direct appeal and cross appeal.

TAYLOR v. SAMUEL.

5-3255 378 S. W. 2d 200

Opinion delivered May 4, 1964.

L. V. Rhine, for appellant.

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

SAM ROBINSON, Associate Justice. This is a suit for damages to personal property. Appellee, Alvin B. Samuel, owned a TD-9 tractor which he left parked in the country near a house occupied by Mrs. Rosa Hyde. The tractor needed repairs, and the water was drained from the radiator and cooling system.

Later, two men delivered some lumber and unloaded it near the tractor. After the lumber was unloaded, they could not get the lumber truck started; they asked Mrs. Hyde for her permission to use the tractor to pull the

truck to get it started; she told them that the tractor did not belong to her, that it was being repaired and that no water was in it. Regardless of the warning given by Mrs. Hyde, the men started the tractor and used it to pull the truck.

This action was filed by appellee, owner of the tractor, who alleged that the appellant, Taylor, his agents and employees, wrongfully and without permission used the tractor when the cooling system contained no water and as a result thereof the tractor was damaged in the sum of $713.39. There was a judgment for Samuel in the amount of $713.00, and Taylor, the defendant, has appealed.

There is substantial evidence that the two men who delivered the lumber used the tractor and damaged it in the stated amount. On the question of agency, Mrs. Hyde was permitted to testify that the men who delivered the lumber told her that they were delivering it for Taylor. Appellant objected on the ground that the testimony was hearsay.

Mrs. Hyde's testimony regarding what the men told her was hearsay and inadmissible. In *Rice* v. *Moudy,* 217 Ark. 816, 233 S. W. 2d 378, this court quoted as follows from 31 C.J.S. 919: "Evidence is hearsay when its probative force depends on the competency and credibility of some person other than the witness. Subject to certain exceptions, the courts will not receive testimony of a witness as to what some other person told him, as evidence of the existence of the fact asserted." None of the exceptions to the hearsay rule are applicable here.

Appellee argues that the fact of agency was clearly established by other evidence, and therefore, even if Mrs. Hyde's testimony of what the men told her was not admissible, it was harmless error; but as we view the record, the agency was not clearly established by other evidence.

Reversed and remanded for new trial.

5-3194 378 S. W. 2d 655

Opinion delivered May 4, 1964.

[Rehearing denied June 1, 1964.]

[redacted]

Ward & Mooney, Howard A. Mayes, for appellant.

W. B. Howard and *Jack Segars;* for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a judgment in favor of a client against an attorney on allegations of professional neglect or malpractice. The client, appellee Mildred Haley, retained appellant L. V. Rhine, an attorney, to represent her in a suit for divorce and a settlement of her property rights. The appellant undertook the employment. A property settlement agreement was drafted and signed and, subsequently, appellee was granted a decree of divorce.

The property settlement bound appellee's husband to pay appellee and for appellee's benefit various sums of money totaling approximately $13,000.00, which appellee had advanced to her husband during the years when the parties enjoyed a more amicable relationship. At the time of its execution appellee's husband, Dr. R. J. Haley, was the owner of several hundred acres of land in Greene and Lawrence Counties. The property settlement provided for no lien or tie on the lands and property of R. J. Haley to secure the amounts which he agreed to pay his wife.

Soon after the execution of the property settlement and the rendition of the decree of divorce, Dr. Haley defaulted and failed to make payments in accordance with the property settlement. Appellee again consulted appellant, with reference to the default and the collection of the amounts due her. While there was strenuous denial on the part of appellant, appellee contended that appellant undertook to collect such amounts.

After a considerable lapse of time, during which Dr. Haley paid relatively little on the obligations due appellee, Haley sold all his real property, took the proceeds and all his personal property and absconded to Louisiana with his new wife. After fruitless efforts to collect from her former husband, appellee instituted the present suit in Greene Circuit Court. A jury trial was requested. Following a lengthy hearing, instructions and argument,

the jury returned a verdict in favor of appellee in the sum of $12,898.27. From judgment on the verdict appellant prosecutes this appeal.

Appellant has filed a 292 page abstract and brief, urging eleven principal points for reversal. Several of the points are so interrelated as to allow their consolidation.

I.

In points 1, 2, 4 and 5 appellant asserts the trial court erred in the giving of Court's Instruction No. 6. In each instance appellant contends that one or more features of the instruction were abstract for want of evidence, and appellant further contends that the entire instruction was abstract in that there was no evidence to go to the jury on any aspect of the instruction. Instruction No. 6 is as follows:

"You are instructed that the plaintiff, Mrs. Haley, bases her right to recover in this action against the defendant, Mr. Rhine, upon two separate and alternative theories and in order to recover she must prove her contentions under either one or both of those theories, as hereinafter set out.

"It is Mrs. Haley's contention that at or about the time she signed the property settlement agreement, Mr. Rhine was negligent in failing to speak or act in the performance of a duty that he owed to Mrs. Haley with reference to the legal effect and consequences of that document, or that under the circumstances, in violation of a professional obligation, failed to incorporate within the instrument referred to, or in some other instrument, provisions which would effect a lien upon the property of Dr. Haley, and that such failure was a failure to exercise ordinary skill and care in the exercise of his duty. If you find from a preponderance of the evidence that the defendant was negligent in performing his professional duties in these particulars you will find for the plaintiff, and unless you do so find there can be no recovery for the plaintiff under this theory.

"The plaintiff, Mrs. Haley, further contends that even though you may find that Mr. Rhine had discharged his professional obligations to Mrs. Haley with respect to the property settlement and that thereby his contract of employment was terminated by the entry of the divorce decree, that thereafter a contract was entered into by and between her and Mr. Rhine whereby he undertook to collect the indebtedness owing as a result of the property settlement and that he failed to exercise reasonable and ordinary care in effecting this collection. You are instructed that if you find from a preponderance of the evidence that a contract or agreement, either express or implied, was entered into by and between the plaintiff and defendant for the collection of the indebtedness owing by Dr. Haley and further that the defendant failed to exercise ordinary skill and care in effectuating that collection, then and in that event you will return a verdict for the plaintiff, and unless you do so find there can be no recovery for the plaintiff under this theory."

Was the instruction abstract in any particular?

On appeals from circuit court it is not our function to re-try the case. We have examined the record for the sole purpose of ascertaining whether there was any evidence to sustain the giving of the instruction and support the resulting verdict and judgment. We think this question must be answered in the affirmative.

As indicated, the record is rather bulky and voluminous, and it would serve no useful purpose to detail the evidence at length. Suffice it to say there was ample evidence to justify the submission to the jury of the issues set forth in Instruction No. 6. When viewed in the light most favorable to appellee, as is our duty, there was evidence to show that the appellant was employed to draft the property settlement and procure the decree of divorce. In so drafting the property settlement, the appellant did not incorporate a lien to secure his client in the collection of the amounts due her, nor did he advise the client of the legal effect of her execution of the instrument. In particular, he did not advise the client

that by her execution of the agreement in question she was placing it within the power of her husband to follow the very course which he subsequently pursued.

The testimony was adequate to sustain a finding that after appellee's former husband made default appellant undertook to collect the amounts due her, and that at the time of such undertaking Dr. Haley was in possession of property having a value in excess of the amounts due appellee. It was undisputed that appellant failed to collect these amounts.

Some of the most outstanding attorneys in northeast Arkansas gave testimony indicating that appellant's course of conduct in connection with the employment failed to measure up to that which an ordinarily careful and prudent practitioner would have employed under the same or similar circumstances. The state of the record being thus, we cannot say that the trial court erred in giving Instruction No. 6 nor that the verdict and judgment are not supported by the evidence.

II.

Appellant complains that in the course of her testimony and on re-direct examination, appellee was allowed to make a so-called "self-serving declaration," stating her understanding of the legal meaning and effect of certain portions of the property settlement agreement. Assuming, without deciding, that such testimony would ordinarily be improper, it is clear from the record that any error in this respect was invited by appellant. Appellant cross-examined appellee at length with reference to her understanding and knowledge of the meaning of the meaning of the various words and phrases used in the property settlement agreement. Having embarked on this line of inquiry, appellant cannot now complain because appellee accepted his invitation to give such testimony and because the matter was pursued further on re-direct examination. *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 588, 53 S. W. 49.

III.

Appellant insists that he was entitled to a directed verdict on the ground that appellee had made no reasonable effort to collect directly from her former husband the amounts due her under the property settlement. In our view, the reasonableness of appellee's efforts to collect directly from her former husband was a question for the jury. Among other things, the record reflects that appellee brought an action against the holder of certain notes received by her ex-husband as part of the purchase price for the real property which he sold preparatory to absconding. In that action, to which her former husband was made a party by constructive service, appellee attempted to have her former husband declared to be the real and beneficial owner of the notes in question and to fasten a lien on such notes by equitable garnishment. This suit was unsuccessful at the trial level, and an appeal was prosecuted to this court, wherein we affirmed the action of the trial court in denying relief to appellee. See *Haley* v. *Greenhaw,* 235 Ark. 481, 360 S. W. 2d 753.

In addition to prosecution of the cited case, appellee testified to an unsuccessful search for property owned by her ex-husband in Arkansas and further testified that her attorneys had unsuccessfully attempted to collect the money from Dr. Haley in Louisiana.

Appellant suggests other steps which appellee might have pursued in attempting collection directly from the assets of her former husband. Without commenting upon the efficacy of such propositions advanced by appellant, it is sufficient to say that there was an issue of fact on this question and appellant was not entitled to a directed verdict on this theory.

IV.

In an apparent attempt to establish that Dr. Haley could still be compelled to pay appellee the amounts due her, appellant on cross-examination propounded a question to appellee about the amount which Dr. Haley earned

each month while practicing in Paragould. This question was objected to and the objection sustained on the ground of irrelevancy. When the objection was sustained appellant made no attempt to make an offer of proof or to show what the answer of the witness would have been, had she been permitted to answer. Under the long standing rule of this court, we cannot speculate as to what the answer would have been. Therefore, having failed to complete the record on this matter, appellant is now in no position to assert error on this point. *City of Prescott* v. *Williamson,* 108 Ark. 500, 158 S. W. 770.

Appellee interrogated the lawyers called by her as experts on the propriety of a lawyer devoting his efforts to the collection of a personal debt, rather than attempting to collect for the client, where the client's debtor is also the lawyer's debtor. The appellant objected to such interrogation on the ground that the hypothetical questions propounded to these witnesses failed to include the element that the lawyer was still employed by the client at the time he attempted to collect his own debt. It is appellant's insistance that any such conduct on his part occurred only after the termination of the attorney-client relationship. In asserting that the admission of such testimony was erroneous, appellant apparently takes the position that any answer to the question would be irrelevant.

An examination of the record reveals that four witnesses were interrogated by hypothetical questions with reference to the duty of a lawyer to place the interests of his client above that of his own. The first witness questioned about the matter was attorney Maurice Cathey. When this witness was questioned on the subject, appellant interposed a general objection, without stating the ground therefor. This objection was sustained by the trial judge. Whereupon the appellee made an offer of proof out of the hearing of the jury. Upon resumption in the presence of the jury, appellee re-phrased the question in the following language:

"Q. Mr. Cathey, I am going to state a new question. Assume the relationship of attorney and client, wife who signed the property settlement and attorney still existed, assuming further that the husband who was a party to the property settlement owed a note signed by the attorney as surety, would a reasonable, prudent and careful practitioner in this community attempt to collect the note wherein he was personally liable while doing nothing about collecting the amount due the wife?"

Appellee's counsel then inquired, "Does that meet the objection?" In response to this inquiry the court said, "I will permit the question to be answered." Appellant made no objection whatever to the propounding of the quoted question, nor the ruling of the court permitting it to be answered. Neither did he object to the answer or move that the answer be stricken.

The next witness to be interrogated on the subject was attorney Cecil Grooms. When a question substantially similar to the question previously propounded to attorney Cathey was asked of attorney Grooms the appellant objected, "I object to that question, the hypothesis does not include the fact, state of employment." Without a ruling by the court on the objection, appellee voluntarily modified the question propounded, as follows: "With the further additional assumption, Mr. Grooms, assume further the attorney was still employed by the wife?" Thereupon the witness answered the question without any further objection by appellant or any ruling of the court. Later attorney Frank Sloan was questioned on the same issue, and appellant objected on the ground that the record showed that he made no attempt to collect his personal obligation until after termination of his employment by appellee. This last objection was apparently that the matter was irrelevant on the issue of appellant's negligence. On cross-examination of witness Sloan, appellant propounded a hypothetical question on the same issue, with emphasis on the assumption that any efforts to collect his personal obligation occurred after termination of this employment. The wit-

ness answered that there would be no impropriety in attempting to collect or collecting personal obligations at that time.

Finally, attorney G. D. Walker was questioned by appellee by hypothetical questions on the same subject and appellant objected on the ground that the hypothesis failed to encompass the fact that appellant's efforts to collect his own obligation were after termination of his employment by appellee. This objection was overruled and the witness allowed to answer. Again appellant, on cross-examination of witness Walker, elicited testimony that there was nothing improper in collecting amounts due him, or for which he was liable, after termination of employment by appellee. By this cross-examination, appellant supplied the alleged missing element of the hypothesis and followed the procedure heretofore approved by this court. *Shaver* v. *Parsons Feed & Farm Supply, Inc.*, 230 Ark. 357, 322 S. W. 2d 690; *New Empire Insurance Co.* v. *Taylor,* 235 Ark. 758, 362 S. W. 2d 4.

We have gone into some detail to set forth the state of the record and the grounds of the objections interposed by appellant because this matter initially gave us some concern. However, with the record as indicated we are impelled to the conclusion that appellant waived all objections to the testimony in question.

Appellant's objections fall into two classes: (1) The hypotheticals failed to incorporate all pertinent facts, and (2) the matter was irrelevant to the issue of negligence. Appellant was apparently satisfied with the modified questions propounded to witnesses Cathey and Grooms and did not reiterate or renew his objection to this testimony from these witnesses on any ground. Certainly the modifications of the questions to these two witnesses before they answered corrected the objections interposed by appellant. Thus when the witnesses Sloan and Walker were interrogated on this subject, there was already testimony, admitted without objection, establishing the same facts to which these witnesses testified. Further, appellant cross-examined these witnesses and

proved by them that there was nothing improper in protecting his own interests after cessation of his employment. The testimony of Cathey and Grooms established and proved the rule objected to in the testimony of Sloan and Walker.

In *LaGrand* v. *Arkansas Oak Flooring Co.*, 155 Ark. 585, 245 S. W. 38, it was contended that a question propounded to an expert was improper. In that case the court said:

"Conceding, without deciding, that the question was an improper one, the appellant is not in an attitude to complain of the ruling of the court. For the error, if it be an error, was waived by the appellant by not objecting to a precisely similar question propounded by appellee's counsel on cross-examination to an expert witness which appellant had introduced to prove the nature of the injury to appellant's eye."

This court has never deviated from the rule of *LaGrand* on the many other occasions when the question has presented itself. *Payne* v. *Thurston,* 148 Ark. 456, 230 S. W. 561; *Ward* v. *Ft. Smith Light & Traction Co.,* 123 Ark. 548, 185 S. W. 1085; *Dierks Lumber & Coal Co.* v. *Tollerson,* 186 Ark. 429, 54 S. W. 2d 61; *Schlosberg* v. *Doup,* 187 Ark. 931, 63 S. W. 2d 337; *Arkansas Power & Light Co.* v. *Boyd,* 188 Ark. 254, 65 S. W. 2d 919. In some of the authorities it is said that when evidence of a similar nature has been admitted without objection, the error is waived. In others it is said that the error is not prejudicial. However, the holding of all of the authorities may be summed up by saying that in a situation such as that shown by the record in the case at bar appellant is in no position to complain.

The fact that appellant objected on the ground of irrelevancy as to the testimony of witnesses Sloan and Walker, whereas his earlier objections to the testimony of Cathey and Grooms were as to the form of the hypothetical question, is of no moment, because the earlier objections were corrected, and the testimony of the first

two witnesses, when admitted, came in without any objections. Therefore the admission of the testimony of Cathey and Grooms, without objection, was an effective waiver of the right to object to the testimony of Sloan and Walker on the ground of irrelevancy.

VI.

The witnesses mentioned in the discussion of the preceding point were called by appellee to testify as to what ordinarily careful and prudent practitioners in the Greene County area would have done under the same or similar circumstances. Appellant complains that such testimony is improper in that it allowed the witnesses to testify as to conclusions of law, and that no witness may be allowed to testify as to the law. It is said that when these witnesses gave their opinion as to the proper method of procedure, and when they explained the reasons for such procedure by reference to the governing law, they were usurping the function of the court. It is contended that the trial court has the sole and exclusive authority to advise the jury as to matter of law. Many authorities are cited by appellant in support of this proposition. However, the testimony in question was not proof as to conclusions of law, but, rather, it was evidence of standards of conduct for attorneys in the community in question, and references to the law were purely by way of explanation as to proper methods of procedure. The challenged testimony simply went to the issue of whether appellant was negligent in the performance of his professional employment.

In the early case of *Pennington* v. *Yell,* 11 Ark. 212, this court said:

"reasonable diligence and skill constitute the measure of an attorney's engagement with his client. He is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with and skilled in the same kind of busi-

ness, (as the cases of *Russell* v. *Palmer,* 2 *Wil.* 325, and of *Godfrey* v. *Dalton,* 6 *Bing.* 460.) These doctrines are sustained by all the authorities with unanimity and distinctness. 4 *Burr.* 2060. 3 *Camp.* 17, 19. 2 *Bos. & Pul.* 357. 4 *Ala.* 594. 2 *Porter* 210. 2 *How.* (*Miss.*) 317. 2 *Greenl. Ev., sec.* 144, *p.* 137."

In *Hampel-Lawson Mercantile Co.* v. *Poe,* 169 Ark. 840, 277 S. W. 29, this court had occasion to discuss and elaborate on the *Pennington* case as follows:

"Because the relationship between an attorney and client is one of trust and confidence, our own court, in *Pennington* v. *Yell, supra,* declared that the failure to exercise ordinary care as above defined on the part of attorney is *crassa negligentia*—gross negligence. When our court declared that an attorney is liable only for gross negligence or gross ignorance in the performance of his professional duties, it was but tantamount to saying that an attorney is liable to his client for a failure to exercise ordinary care as above defined. 6 Corpus Juris, § 226; *Holmes* v. *Peck,* 1 R. I. 242; *Goodman* v. *Walker,* 30 Ala. 482, 495."

The testimony in question was for the purpose of furnishing the jury with a guide and a standard by which to measure appellant's conduct under the circumstances in determining the ultimate issue of whether appellant was or was not negligent. While as an abstract proposition, it is improper to call witnesses to testify as to conclusions of law, this was not the situation in the case at bar. As to the propriety of an attorney's testimony as to negligence and standards of conduct in a malpractice action, the weight of authority is to the effect that such testimony is proper and permissible. In 5 Am. Jur., Attorneys at Law, §104, p. 342, it is said:

"In actions against attorneys for negligence, want of skill, or disobedience to instructions, the ordinary rules of evidence are applicable . . . Whether an attorney has been negligent or has displayed such ignorance in the performance of his professional duties as to render him liable to his client for damages resulting there-

from is sometimes to be ascertained from the testimony of those who are conversant with, and skilled in, the same kind of business." (Citing *Pennington* v. *Yell*, 11 Ark. 212, 52 Am. Dec. 262.)

See also *Automobile Underwriters, Incorporated* v. *Smith*, 166 N. E. 2d 341 (Ind. 1960); *Lynch* v. *Republic Pub. Co.*, 243 P. 2d 636 (Wash. 1952).

VII.

Appellant requested the following instruction:

"You are instructed that when Attorney L. V. Rhine was employed by Mrs. Mildred Haley to assist her and her husband in reducing a property settlement agreement to writing and to procure for her a decree of divorce from her husband, Mr. Rhine was not bound, in the absence of a special agreement, to file that written agreement for recordation or to see that it was made a public record. Such filing and recording of written instruments is no part of an attorney's duty, unless he has specially undertaken it."

This instruction was properly refused by the trial court for the reason that it was abstract. No evidence was adduced by either party and no instruction was given by the court submitting any issue as to any negligence on the part of appellant in failing to file for record the property settlement in question. Although there were allegations in the complaint to the effect that such failure was negligent, appellee apparently abandoned this theory at trial, and there was no reason for instructing the jury on a matter which was extraneous to the issues to be determined.

VIII.

Appellant requested the following instruction:

"You are instructed that defendant L. V. Rhine entered this trial with the benefit of a legal presumption that he had fully and correctly discharged every obligation that he ever owed to Mrs. Haley, and you must give

him the benefit of that presumption throughout the trial unless you become convinced by a preponderance of the evidence that he failed to perform some duty which you find that he owed to Mrs. Haley."

This instruction was refused by the trial court. It will be observed that the instruction was, in the final analysis, a request to charge that the burden was on appellee to establish her case by a preponderance of the evidence. This matter had already been covered by Court's Instruction No. 6 (*supra,* part I.). In a substantially similar situation this court held that there was no error in failing to give instructions as to legal presumptions which merely amounted to placing the burden of proof upon the plaintiff where such burden had been fairly placed upon the plaintiff in other instructions. *Cockerham* v. *Barnes,* 230 Ark. 197, 321 S. W. 2d 385. See also *Moore* v. *Lawson,* 210 Ark. 553, 196 S. W. 2d 908. Therefore there was no error in refusing appellant's requested instruction set out above.

Appellee has cross-appealed, contending that since every item of her damage was liquidated and because the items which she was precluded from collecting from her ex-husband bore interest according to their terms, the trial court erred in failing to add interest to the jury verdict. It is argued that the trial court reserved the question of whether interest was allowable for determination after rendition of the jury's verdict. However after rendition of the verdict, the trial court refused interest. There was no error in the action of the trial court in disallowing these items of interest. Although appellee's claim against her ex-husband was on contract, her claim against appellant was in tort on the theory that appellant was guilty of negligence.

In *Southern Farm Bureau Cas. Ins. Co.* v. *Hardin,* 233 Ark. 1011, 351 S. W. 2d 153, this court modified a judgment by deleting an amount added by the trial court to the jury verdict for interest. This modification was for the reason that the action was in tort and interest was allowable only from the date of judgment. Appellee rec-

ognizes the force of this holding, but in effect urges us to overrule the case. We see no valid reason for so doing. Accordingly, the cross-appeal is denied.

Finding no error in the proceedings, the case is affirmed on appeal and on cross-appeal.

5-3216 378 S. W. 2d 648

Opinion delivered May 11, 1964.

George E. Pike, for appellant.

William C. Davis and *Milton G. Robinson,* for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Lucille K. Champion, was granted an absolute divorce from appellant, Walton T. Champion, and was given custody of the four minor children. The court directed that $350.00 per month should be paid by appellant for the support of these minors, granted an attorney's fee of $1,200.00, and made the following findings relative to the personal and real property.

"That plaintiff shall pay the mortgage payments on the famliy residence located at 403 West 6th Street, Stuttgart, Arkansas, out of said sum paid to her by defendant each month, and plaintiff is hereby granted the use and occupancy of said family residence so long as

said property is used as a residence by plaintiff and/or the said minor children.

"That the household furnishings and equipment situated in the said family residence shall remain therein for the use of plaintiff and the said minor children.

"That the plaintiff is hereby awarded a one-third (⅓) interest absolutely in all personal property of defendant and said plaintiff is hereby awarded a one-third (⅓) interest for life in all real property owned by defendant; that the said interests herein awarded shall apply to all of defendant's property, both real and personal wherever situated. The estate by the entirety by which title to Lots 5 and 6, Block 1, Improvement Company's Second Addition to the City of Stuttgart, Arkansas, is now held, is hereby dissolved, and legal title to said property is hereby vested in the parties hereto as tenants in common, each of said parties owning an undivided one-half (½) thereof.

"If, within ninety (90) days from September 1, 1963, a proper and acceptable property settlement agreement has not been reached under the terms hereof, the Court hereby appoints, designates and constitutes Mr. John Gunnell as Commissioner of this Court, who, after due and proper notice as by law prescribed for judicial sales, shall proceed to take charge of all real and personal property belonging to the defendant, (wherever such property may be situated) and shall sell all of such real and personal property at the North Door of the Courthouse, Stuttgart, Arkansas, at public outcry to the highest bidder. From the proceeds of such sale, the said Commissioner shall pay all costs of such sale (including the cost of advertising in newspapers having a general circulation in the State of Arkansas, which advertising is hereby specifically authorized) from said proceeds of said sale, said Commissioner shall pay off and discharge all indebtedness which constitutes a lien or an encumbrance on said property, and shall report and hold the balance of said proceeds subject to further orders of this Court."

From the decree so entered, appellant brings this appeal.

The granting of the divorce and the order of custody are not at issue, as appellant only asserts one alleged error as follows:

"The Court erred in failing to designate and set out the specific property which plaintiff would receive and erred in not appointing commissioners to view and lay off to the plaintiff and defendant the specific lands to which they are entitled under the terms of the decree."

It will be noted from the decree (heretofore quoted) that the court did not specify the particular property to be given appellee. On the day the decree was entered, John Gunnell, Circuit and Chancery Clerk, was appointed receiver pursuant to joint petition of the parties. The parties were unable to agree on a division of the property, and appellant filed a petition to modify and amend the decree, praying that the court appoint three commissioners to divide both the personal and real property in accordance with the terms of the decree, appellant alleging that he believed that the property could be divided in kind. This petition was denied, the court finding:

"* * * no conditions have changed since the rendition of the original decree which would justify granting the prayer for relief prayed herein. The court further finds that "the question of a division of the property in kind was properly ruled upon at the time of the rendition of the final decree and has become final."

Accordingly, the only issue presented by this appeal is whether the court erred in ordering the sale of the properties, the proceeds to be divided as per the terms of the decree, instead of dividing the property in kind. The record is voluminous, but it would appear that the parties owned several lots in Stuttgart by the entirety, and Dr. Champion held title to the home place, the possession of which was awarded to Mrs. Champion and the children. Other holdings of appellant included five lots in Stuttgart, an apartment house, a farm of approxi-

mately 608 acres, known as the "Brummitt"[1] farm, the "Buckhorn"[2] farm, consisting of 2,130 acres, and 120 acres of farmland in Monroe County. The farm operations have not been profitable, and the testimony reflects that some of the lands could hardly be characterized as productive farm property; for instance, all the roads surrounding the Buckhorn farm are dirt roads, the farm is stumpy, grassy land, and according to George Harr, contained 1,000 acres of swamp land.

Albert Halley testified:

"You don't hardly get out; at one time you couldn't even drive a tractor down the road. Last year before I got my soy beans out, the latter part of October or first week of November, it started raining and I lost 10 or 15 acres of soy beans, and the road got under water."

According to Jim Shook, the land contained, "Pot holes, little sinks, low places and high places."

One witness testified that the Brummitt farm was overflowed about 75% of the time that he would visit there, and Marion Harr testified that it was mostly "waste land and overflow land * * *

"The beans this year might be eight inches high and skimpy, last year a little better, not a whole lot, and I haven't paid any attention to the cotton, and the rice, I have seen some good rice, and I have seen some you couldn't pull a combine in, you couldn't hardly walk across."

A great deal of similar testimony was offered, but probably the most pertinent fact to the issue involved is that practically all properties, real and personal, belonging to Dr. Champion, are under mortgage.

The court, in its findings, stated:

"A great deal of the testimony has concerned itself with the property rights of the parties, and the financial

[1] 262 acres of crop land; 78.8 acres rice allotment and 20.7 cotton allotment.

[2] 1540 crop land; 492.7 acres rice allotment; 138.7 acres cotton allotment.

condition of the parties, and primarily the financial condition of the Defendant. One thing is fairly clear and isn't subject to much dispute, if any dispute at all, and that is that the Defendant has his financial condition in an extremely unfortunate position. That is rather obvious from the testimony that has been given concerning his debts.

"The Defendant, while on the witness stand, testified at great lengths concerning the property that he owns and the amount of the indebtedness, both secured and unsecured, that he owes. There didn't seem to be any serious dispute concerning the property that he owns, and there doesn't seem to be any serious dispute that the indebtedness he testified about is correct. There possibly would be some controversy and some dispute why the debts came into being in the first place, but as to the amount of indebtedness there is no dispute or very little dispute.

"The Court will not list all of the items of indebtedness but I point up what the situation is: The Defendant testified that he owes the John Hancock Life Insurance Company in excess of $135,000.00, counting the interest that is due. He owes the Production Credit Association of Forrest City in the neighborhood of $55,000.00. He owes the First Federal Savings & Loan Association of Stuttgart, $16,000.00, and owes many other items which the Defendant has testified about and about which there seems to be no serious dispute. Those items, along with other items of indebtedness, are secured by mortgages on the real property and in some instances, personal property of the Defendant. * * * Evidence clearly indicates a bad financial condition, and I emphasize *bad.*"

Of course, a Chancery Court has full authority to order a sale of property, provided the proof is satisfactory that no division in kind can be made, even though commissioners have not been appointed to make such a determination. See *Briggs* v. *Jacobs,* 228 Ark. 589, 309 S. W. 2d 201, and cases cited therein. As here pointed out by the court, a great deal of the evidence dealt with

the various properties belonging to appellant. No specific proof was offered by appellant that these properties were susceptible to division in kind; in fact, in his argument, it is stated:

" 'If there was an effort made to divide it in kind, *there would be a chance*[3] that three good men could go on the ground, view the property and set aside to Mrs. Champion the part to which she is entitled.' "

Appellant points out that the Chancellor made no finding in his decree that the lands could not be divided in kind, but it was not necessary that this specific finding be set out. *Young, Admr.*, v. *Wyatt,* 130 Ark. 371, 197 S. W. 575. It is sufficient if the pleadings and proof justify the order made; actually, the court, in effect, did make the finding, for it denied appellant's motion to appoint commissioners with this language:

"the question of a division of the property in kind was properly ruled upon at the time of the rendition of the final decree * * *"

The burden is on appellant to establish that the court erred, and from the record before us, we are unable to make such a finding.

Affirmed.

[3] Emphasis supplied.

TEER *v.* PLANT.

5-3251 378 S. W. 2d 663

Opinion delivered May 11, 1964.

Martin, Dodds & Kidd, for appellant.

Gannaway & Darrow, for appellee.

SAM ROBINSON, Associate Justice. This is an action in ejectment filed by appellee, Johnson Plant; from a judgment in favor of the plaintiff, the defendant, Harley Teer, has appealed. Three points are argued. First, that the court erred in holding that appellee was entitled to possession; second, that appellant had acquired the property by adverse possession; and third, that appellant was entitled to reimbursement for improvements.

The land involved contains 1.18 acres. On April 7, 1962, appellee, Plant, acquired the property by warranty deed from his uncle, Tony Murph, who in turn had inherited the property from appellee's grandfather. Plant's predecessors in title had acquired the property by adverse possession extending continuously over a period of more than 40 years. The deed to Plant contained a valid and proper description of the property.

On March 21, 1955, appellant, Teer, obtained a tax deed from the State. The description of the land in the tax deed was as follows:

Part of the NW ¼, NW ¼, Section 33, Township 2 South, Range 11 West, containing 15 acres.

This is a part description which conveys nothing and is void. *Clem* v. *Missouri Pacific R. Co.* 223 Ark. 887, 269 S. W. 2d 306; *Price* v. *Price,* 207 Ark. 804, 182 S. W. 2d 879; *Hershey* v. *Thompson,* 50 Ark. 484, 8 S. W. 689. Neither is it sufficient to constitute color of title. *Clem* v. *Missouri Pacific R. Co.,* supra, *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660. Teer, therefore, acquired no interest in the property by virtue of his tax deed.

The second question is did Teer obtain title by adverse possession, notwithstanding the tax deed gives him

no color of title? It appears that the first act done by Teer, according to his testimony, indicating that he was claiming title to the property was the setting out of some small trees in the fall of 1955. It cannot be said that the mere planting of some small trees is sufficient to constitute adverse possession. Later he built a chicken house that extended a few feet over onto the property in controversy; he also dug a pond in 1956 or 1957 and built on the property a cow shed, a shed for hogs and one for dogs, but seven years had not expired from the time of such construction work until this action in ejectment was filed against him. The court said in *Dials* v. *Bryant,* 211 Ark. 212, 199 S. W. 2d 753: "Where actual possession is relied upon to support a plea of limitation or to establish title to land by limitation it must be shown that such possession was continuous, as well as notorious, adverse and exclusive. Mere fitful or intermittent possession is not sufficient. *Greer* v. *Vaughn,* 128 Ark. 331, 194 S. W. 232; *Driver* v. *Martin,* 68 Ark. 551, 60 S. W. 651; *Scott* v. *Mills,* 49 Ark .266, 4 S. W. 908; *Brown* v. *Bocquin,* 57 Ark. 97, 20 S. W. 813; *Sanderson* v. *Thomas,* 192 Ark. 302, 90 S. W. 2d 965; *Norword* v. *Mayo,* 153 Ark. 620, 241 S. W. 7; *Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 2d 566, 1011, 91 S. W. 20."

Next, appellant contends that he expended about $2,000.00 in improvements on the property, and that even if it should be held that he has not acquired good title to the property, he is entitled to be reimbursed for the money he spent on improvements and in payment of taxes. The record shows that for the years 1955 to 1961, inclusive, Teer paid taxes on 15 acres in the quarter section in which the land in controversy is located, but there is no showing that he paid taxes on the particular land here involved. It is also shown that he paid taxes for 1961 on 15 acres and that the 1.18 acres here involved constitutes a part of that 15 acres, but there is no showing of the value of the 1.18 acres as compared to the balance of the 15 acre tract, and therefore, there is no showing as to the amount paid as taxes on the land in

litigation here. Teer has a home on that part of the 15 acres not in litigation here.

As pointed out in *Wilkins* v. *Maggard,* 190 Ark. 532, 79 S. W. 2d 1003, under the Revenue Act, Ark. Stat. Ann. § 84-1121 (Repl. 1960), Teer is entitled to recover the cash value of any improvements he placed on the property subsequent to two years after his purchase from the State; however, here there is no showing of the cash value of such improvements. Just because Teer may have spent $2,000.00 does not mean that he has improved the property to that extent or that the cash value of the improvements amounts to that sum. In fact, it does not appear that the property is worth $2,000.00. In 1955 the State Land Department valued it at $8.00 per acre, and in 1962 the same Department valued the 1.18 acres at $120.00. But be that as it may, the record does not show that any of the claimed improvements were made subsequent to two years after Teer received the tax deed.

The judgment of the trial court provides that Teer has the right to remove any buildings he has placed on the property, and there is no cross-appeal.

Affirmed.

BURTON *v.* KEMP.

5-3259 378 S. W. 2d 667

Opinion delivered May 11, 1964.

Griffin Smith, for appellant.

Gus Causbie and *Harry L. Ponder,* for appellee.

JIM JOHNSON, Associate Justice. This suit originated with a boundary line dispute. On January 12, 1962, Robert M. Burton and Marjorie R. Burton, his wife, appellants here, filed suit in Sharp Chancery Court, Northern District, case No. 1491, alleging that they owned a tract of land 25 by 35 feet which they acquired by purchase on January 6, 1960, from appellees Dr. M. Y. Kemp and Nordis C. Kemp, his wife. They further alleged that they, appellants, own the property lying to the east, that a woven wire fence was the agreed boundary, as set out in the deed of purchase, that in January, 1962, appellee entered the land and removed the appellants' fence, making some claim to the land. Appellants prayed that appellees be enjoined from interfering with appellants' use and occupancy of the land (the 25 by 35 foot tract), that title be quieted in appellants, and that a mandatory injunction issue requiring appellees to restore the fence they removed. Appellees answered by general denial and counterclaimed, alleging that when they sold appellants the small piece of property they were defrauded, because appellants told them the woven wire fence was their common boundary when in fact the fence was 25 feet inside appellees' boundary, offered a corrected description by survey, alleging that they were entitled to reformation of the description in the deed, and that title to the disputed land should be quieted and confirmed in appellees.

Appellants answered the counterclaim by general denial, then amended this answer by alleging that the property purchased by appellees was forfeited and sold for 1944 taxes to Miriam B. Norman, who in turn conveyed by quitclaim deed to appellants. Appellees relied to these pleadings by alleging that the property was redeemed by appellees from sale for the 1944 taxes by a clerk's redemption certificate issued September 3, 1946.

The case came to trial before the chancellor on July 11, 1962. The court found in its decree that (1) the suit was originally instituted to quiet appellants' title in the 25 by 35 foot tract conveyed to them by appellees and as described in that deed of conveyance, (2) that appellees admitted the conveyance but alleged that they executed and delivered the deed to appellants as the result of appellants' fraudulent representation about the location of the boundary line, (3) that appellees' allegation of fraud was not sustained by the proof and appellees' counterclaim should be dismissed, and (4) that title to the 25 by 35 foot tract should be quieted and confirmed in appellants. The court then decreed that the title of appellants to the described property—and as described in their recorded warranty deed—was thereby quieted and confirmed in appellants. The court dismissed appellees' counterclaim and assessed all costs against them. No appeal was taken from that decree.

Thereafter on July 5, 1963, appellants filed suit no. 1543 in Sharp Chancery Court, Northern District, against appellees, alleging that appellants are owners of certain described property in Sharp County, alleging that appellees have repeatedly trespassed on their property and recently erected a fence on appellants' property and prayed for an injunction requiring appellees to cease further trespass and to remove the fence.

Appellees answered denying that appellants are owners of the property described in their complaint and further denying that they have at any time trespassed on any property belonging to appellants. On July 25, 1963, appellees filed an amendment to their answer alleging (1) their ownership of the described property by virtue of a recorded warranty deed of September 8, 1941; (2) whereas appellants' claim to the property is based on a tax deed issued by the Commissioner of State Lands because of a tax sale for 1944 taxes; (3) that the tax deed is void because prior to its issuance the land was redeemed by appellees, on September 3, 1946, for which they received a clerk's redemption certificate; and (4) that the subject matter of this suit was

in issue in the prior suit and hence merged in that judgment. For their counterclaim, appellees further stated that the tax deed constituted a cloud on their title and should be cancelled and set aside.

In reply to the counterclaim, appellants alleged that the parties and the subject matter of the counterclaim were identical in the prior suit, that appellees urged the same rights to the same land, which relief was not accorded by the trial court in the prior suit and that the judgment in the prior suit is conclusive of their rights.

Case no. 1543 was brought on for trial before the chancellor on September 10, 1963, being submitted on all pleadings and exhibits, together with the entire record of the prior suit. The court stated in its order that each party had pleaded that the doctrine of res judicata barred the claim of the other, and that it was agreed that this issue was the only one to be considered by the court. The court then found that the claim of appellants was res judicata on account of the prior suit and judgment, and dismissed appellants' complaint with costs.

Appellants' appeal from the order of dismissal raises two points for reversal: "(1) the trial court erred in dismissing appellants' complaint in which they asked for injunctive relief, and (2) the trial court erred in failing to grant the appellants the relief sought, for the reason that both parties interposed the plea of res judicata and not one iota of evidence was introduced in the present case which was not introduced in the former suit and it was considered and acted upon by the court and the court found all issues in favor of the plaintiffs [appellants]."

At the outset this opinion may be somewhat clarified by pointing out that the complaint in the first case (prior to other pleadings) related to the 25 by 35 foot tract of land between appellants' and appellees' property, whereas in the second suit the complaint alleges that appellants own the full half-acre claimed by appellees, which includes the 25 by 35 foot tract. Persistent and minute study of the brief transcript fails to reveal whether own-

ership of the balance of the half-acre of land, beyond the 25 by 35 foot tract, was actually in issue in the prior suit. (Clearly, ownership and description of the 25 by 35 foot tract of land was adjudicated in the prior suit.)

A tax deed, redemption certificate, affidavit of the county clerk and other documents relating to the half-acre tract are in the record, but we are unable to determine whether they were in evidence in the first suit or merely exhibits to a pleading in the second suit and therefore whether ownership of the balance of the half-acre was an issue *considered and determined by the court* in the first suit. Thus we are unable to determine whether the doctrine of res judicata is here applicable. In *Carrigan* v. *Carrigan,* 218 Ark. 398, 236 S. W. 2d 579, this court again approved the rule of *Russell* v. *Place,* 94 U. S. 606, 24 L. Ed. 214, as quoted in *McCombs* v. *Wall,* 66 Ark. 336, 50 S. W. 876:

" '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 on 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.' It further said in the same case 'to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,— that is, that the

verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.'

"In *Shaver* v. *Sharp County,* 62 Ark. 78, it is said: 'That which has not been tried cannot have been adjudicated. * * * That which is not within the scope of the issues presented cannot be concluded by the judgment.' "

See also 50 C.J.S., Judgments, § 843; 30A Am. Jur., Judgments, § 468.

Accordingly, this cause is reversed and remanded for development consistent herewith.

WIRGES *v.* HAWKINS.

5-3262 378 S. W. 2d 646

Opinion delivered May 11, 1964.

G. Thomas Eisele, for appellant.

Gordon & Gordon and *Charles H. Eddy,* for appellee.

FRANK HOLT, Associate Justice. The principal issue raised in this appeal is whether the appellant's complaint is subject to a motion for summary judgment.

The appellant, Gene Wirges, alleged in his complaint that the appellee, Rex Paul, secured a judgment against him in the sum of $11,187.72 in March, 1962, and caused execution to be placed in the hands of appellee, Marlin Hawkins, as sheriff; that notice was given that an execution sale of appellant's newspaper plant was set for 9 A.M., July 5, 1962; that on the day previous to this sale date the appellee and judgment creditor, Rex Paul, through his attorney, sold and assigned his judgment to Dr. Stanley Gutowski who delivered his check for $11,399.90 made payable to appellee Paul and his attorney for the full amount of the judgment plus interest; that this check was then made available to appellee Hawkins; that the plaintiff-appellant had no interest in the said fund and was not a party to the said transaction; that on the morning of July 5, the appellee Hawkins, upon being advised of the sale and transfer of the judgment to Gutowski, refused to call off the foreclosure sale unless paid his statutory costs before the hour set for the sale, despite Gutowski's instructions as the assignee of the said judgment; that appellant paid under protest the costs as claimed by appellee Hawkins in the amount of $528.45; appellant denied the legal right of the appellee Hawkins to collect $418.99, or the following cost items:

1. $341.99 3% commission for receiving and paying money on execution.

2. $25.00 Fee for Herman Hesson for services in making inventory.

3. $52.00 Notice published in the Morrilton Headlight. Appellant, in the alternative, sought recovery of the cost item of $341.99 from appellee Paul for making the Gutowski check available to appellee Hawkins in the event it is determined appellee Hawkins is entitled to this fee or commission. Appellees, Paul and Hawkins, filed demurrers to this complaint. The trial court overruled their separate demurrers treating appellant's complaint as a petition for retaxing the costs and giving each twenty (20) days in which to plead. Appellee Paul filed

an answer alleging a misjoinder of the parties because he would not be a proper party in a petition to retax costs. Appellee Hawkins filed a motion for summary judgment, admitting that appellant's complaint contained a true and correct statement of charges made for his fees. Therefore, appellee Hawkins asserted and now claims as a matter of law no genuine issue as to any material fact remains.

In response to appellee's motion for a summary judgment the appellant filed an amendment to his original complaint questioning the good faith of appellee Hawkins in his collection of the questioned fees and sought recovery of a statutory penalty in addition to recovery of the fees in question. The appellant contended that appellee Hawkins' admission of the collection of the questioned fees did not remove all of the factual aspects contained in his pleadings and, therefore, the motion for summary judgment should be denied. The trial court granted the motion for a summary judgment. For reversal the appellant first contends that the lower court was incorrect in granting appellee Hawkins' motion for a summary judgment since genuine issues as to material facts exist from his pleadings. We think the appellant is correct in this contention and, therefore, it becomes unnecessary to discuss appellant's additional point.

By Act 123 of 1961 [Ark. Stat. Ann. § 29-211 (Repl. 1962)], the Summary Judgment Act, the Arkansas Legislature adopted Rule 56 of the Federal Rules of Civil Procedure. Therefore, we proceed to review some decisions construing the summary judgment procedure. In *Sartor* v. *Ark. Gas Corp.*, 321 U. S. 620, 627, (1944) the court said:

"The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their

right of trial by jury if they really have issues to try. *American Ins. Co.* v. *Gentile Bros. Co.,* 109 F. 2d 732; *Whitaker* v. *Coleman,* 115 F. 2d 305."

In *Warner* v. *First National Bank of Minneapolis,* 236 F. 2d 853, certiorari denied 352 U. S. 927 (8th Cir. 1956), we find this further definition in the application of a summary judgment:

"* * * The trial court has correctly stated that a motion for summary judgment is an extreme remedy, and should be granted only in the absence of a genuine material fact issue. The burden of demonstrating the nonexistence of any genuine fact issue is upon the moving party, and all doubts shall be resolved against him." Citing cases.

In the recent case of *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S. W. 2d 89, we said:

"* * * It has been pointed out under the Federal Rule, that the theory underlying a motion for summary judgment is the same as that underlying a motion for a directed verdict. Moore's Federal Practice (2d ed.), § 56.10 (10). Hence any testimony that is submitted with the motion must be viewed in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party."

In *Winter Park Telephone Co.* v. *Southern Bell Telephone & Telegraph Co.,* 181 F. 2d 341 (5th Cir. 1950) it was held that a summary judgment is not proper where:

"* * * facts and circumstances although in no material dispute as to their actuality, reveal aspects from which inconsistent hypotheses might reasonably be drawn and as to which reasonable men might differ."

Also, see *U. S.* v. *Dollar,* 196 F. 2d 551 (9th Cir. 1952).

As previously stated, the appellees filed a demurrer to appellant's complaint. The trial court then held that the complaint, in effect, is a petition for retaxation of

costs, that it stated a cause of action, and is not subject to a demurrer. We agree that appellant's complaint was not subject to a demurrer. We have said that a motion for a summary judgment is similar to a demurrer. *Arkansas Airmotive Div. of Currey Aerial Sprayers, Inc.* v. *Arkansas Aviation Sales, Inc.*, 232 Ark. 354 335 S. W. 2d 813. There we said:

"* * * *The motion for summary judgment may be likened to a demurrer* to plaintiff's reply, and it is plain enough that the pleading is not subject to demurrer." [Emphasis added.]

In light of the foregoing decisions it is our opinion that justiciable issues exist in the case at bar in a proceeding to retax the costs and, therefore, the pleadings are not subject to a motion for summary judgment.

Judgment reversed and the cause remanded.

WIRGES *v.* BEAN, JUDGE.

5-3183, 5-3242, and 5-3252 378 S. W. 2d 641

Opinion delivered May 11, 1964.

[Rehearing denied June 1, 1964.]

G. Thomas Eisele, for Petitioner.

No brief was filed for respondent.

ED. F. MCFADDIN, Associate Justice. These three cases all arise from the same incident and therefore have been consolidated in this Court. From the allegations in the various pleadings filed by Mr. Wirges, we understand that he, as plaintiff, had a case pending in the Conway Circuit Court; that on March 19, 1963, one of his attorneys moved for a continuance which was denied; that his said attorney then moved for a voluntary nonsuit; that the Conway Circuit Court (Judge Wiley W. Bean, presiding) informed Wirges' counsel that the Court wanted Mr. Wirges personally present in Court concerning the motion for voluntary nonsuit; that Mr. Wirges appeared in open Court, and in the course of granting the voluntary nonsuit the Court had Mr. Wirges sworn and asked him certain questions and made certain remarks to him; and then the Court granted the voluntary nonsuit, as prayed. What Mr. Wirges desires is a transcript of all that transpired while he was in the court room on March 19, 1963. Before proceeding to a decision, we identify these three cases by their numbers in this Court.

I.

Case No. 3183 is an original proceeding in mandamus, filed in this Court on October 11, 1963, by Mr. Wirges as Petitioner, against Hon. Wiley W. Bean, as Judge of the Conway Circuit Court. We are asked to issue a writ of mandamus against Judge Bean, requiring him to order his Court Reporter to file for the inspection of Mr. Wirges the transcript of the said proceedings of

March 19, 1963. Mr. Wirges claims he wants this transcript so he can see exactly what the Judge said to him and about him at that time. Mr. Wirges alleges that he asked the Court Reporter, Mr. Arrington, to furnish him the said transcript, and offered to pay for the same, but the said Court Reporter said he would not furnish the said transcript unless and until the Circuit Court ordered him to do so. Mr. Wirges claims that he then asked Judge Bean to order Mr. Arrington to file the said transcript, and Judge Bean refused. On these allegations we are asked to issue a writ of mandamus against Judge Bean, requiring him to make the said order which Mr. Wirges desires. This case will be referred to as "the mandamus case."

II.

Case No. 3242 in this Court will be referred to as "the ex parte appeal." On August 30, 1963, Mr. Wirges filed a petition in the Conway Circuit Court, styled, "Ex Parte Gene Wirges." The pleading was a motion, praying for ". . . an order directing the Reporter to transcribe and make available to the Petitioner a full and complete transcript of the proceedings of March 19, 1963, referred to above." There was no defendant in the case and no summons was issued on the Petition. The transcript reflects a docket entry of October 7, 1963: "Ex Parte motion for transcript of proceedings re Gene Wirges, March 19, 1963. Over-ruled." It is apparent that this ex parte appeal case was a further effort by Mr. Wirges to get the transcript referred to in the mandamus case.

III.

Case No. 3252 is an original proceeding in this Court, filed January 8, 1964, styled, "Ex Parte Gene Wirges," and is a petition praying that this Court issue a writ of *Certiorari* ". . . directing that the transcript

of March 19, 1963 be brought up and made a part of the record herein, and, that upon examination thereof, said proceedings be quashed.'' This Case No. 3252 is Wirges' third attempt to put before this Court, in one form or another, his insistence that he is entitled to have furnished to him (for which he is willing to pay) a copy of what transpired concerning him in the Conway Circuit Court on March 19, 1963.

So much for the description of the cases. At the outset we mention that the thing which puzzles us in the consideration of all three of these cases is why Mr. Wirges insists so vehemently on having a stenographic transcription of what Judge Bean said to him and about him in his presence. Mr. Wirges and his attorney were both before Judge Bean and heard all that was said; and Judge Bean in his response to the petition for mandamus has attached as an exhibit a portion of Mr. Wirges' newspaper, ''The Morrilton Democrat,'' of October 10, 1963, in which appeared a full page article about what transpired in Judge Bean's Court on March 19, 1963. Since Mr. Wirges heard all that Judge Bean said, and since one of his lawyers was present in Court and heard the entire matter, what does Mr. Wirges need with the transcribed record of what was said? When the Court granted Mr. Wirges his desired voluntary nonsuit there was left no justiciable issue before the Court in that cause. Mr. Wirges' explanation is that he needs the transcription to consider what he should do in other cases pending by or against him in the Conway Circuit Court. It occurs to us that proceedings in discovery in those other cases might be a more appropriate procedure. But, regardless of why Mr. Wirges wants the transcription, we reach the conclusion that he has not proceeded in the correct and approved way to get the said transcript: that is, he has not taken the approved course to get the transcript, even assuming—but not deciding—that he was entitled to it.

I. His first case here is the mandamus case. Mr. Wirges wants us to mandamus the Conway Circuit Court

to in turn mandamus the Court Reporter of the Conway Circuit Court (who has never been brought into Court) to furnish Mr. Wirges a transcript of what transpired in the Conway Circuit Court on March 19, 1963. We can mandamus a Trial Court to hear a case; but we cannot control the judicial discretion of the Court by telling the Court how to decide the case. *Branch* v. *Winfield,* 80 Ark. 61, 95 S. W. 1007; *Maxey* v. *Coffin,* 94 Ark. 214, 126 S. W. 729; *Nixon* v. *Grace,* 98 Ark. 505, 136 S. W. 670; *Cantley* v. *Irby,* 186 Ark. 492, 54 S. W. 2d 286. Mr. Wirges had a plain and adequate remedy against the Court Reporter who failed to furnish the desired transcription. The procedure in *McCulloch* v. *Ballentine,* 199 Ark. 654, 135 S. W. 2d 673, will be subsequently mentioned. Mr. Wirges cannot use mandamus as a substitute for such remedy. *Basham* v. *Carroll,* 44 Ark. 284; *Automatic Weighing Co.* v. *Carter,* 95 Ark. 118, 128 S. W. 557; and *Snapp* v. *Coffman,* 145 Ark. 1, 223 S. W. 360. So the mandamus proceeding in this Court must be denied.

II.

The second case is the ex parte appeal. The case of *McCulloch* v. *Ballentine, supra,* shows the procedure that Mr. Wirges should have pursued. When the Court Reporter, Mr. Arrington, was asked by Mr. Wirges to furnish the desired transcription, Mr. Arrington informed Mr. Wirges—as Wirges says—that he (Arrington) would not comply with Wirges' request until the Circuit Court ordered him to do so. Mr. Wirges should then have filed *an adversary mandamus proceeding against Mr. Arrington* in the Circuit Court. Instead, Mr. Wirges elected to proceed ex parte; and that was an error in procedure. In *McCulloch* v. *Ballentine, supra,* we emphasized that the correct proceeding was against the Court Reporter:

"Upon the stenographer refusing thereafter to transcribe his notes and to furnish a transcription thereof, mandamus was prayed and granted by the circuit judge of that circuit requiring the stenographer to do so, and from that order is this appeal."

Likewise, in *Thornsberry* v. *State,* 192 Ark. 435, 92 S. W. 2d 203, we pointed out the correct procedure:

"We note in the statement of the appellant that he moved the court to require the reporter to transcribe the testimony, and this motion was refused. Court stenographers are usually paid salaries which are supposed to compensate them for their duties in taking the testimony in criminal cases and preparing bills of exception. When they fail or refuse to do this the circuit court, on proper application, should compel the performance of this duty. This court has held that application must be made first to the trial court for an order to compel the performance of the stenographer's duty. *Sutton* v. *City of Little Rock,* 191 Ark. 603, 87 S. W. 2d 20. In this case, from the statement of appellant, it appears that he made this application, but his remedy, on the refusal of the trial court to compel the stenographer to perform his duty, was by application to this court for review of the action to the court below. We make these observations simply for the purpose of indicating that defendants, regardless of how poor they may be, are entitled to a record of the proceedings in the court below to the end that those proceedings may be intelligently reviewed by this court, *and the remedy is ample to compel the court stenographer to prepare a bill of exceptions for authentication by the trial court.*" (Emphasis our own.)

Likewise, in *Sutton* v. *Little Rock,* 191 Ark. 603, 87 S. W. 2d 20, the appellant had failed to obtain the proper record and had asked this Court to obtain it for him. Such relief was refused, and we said:

"Appellant's only remedy in this case is by mandamus in the circuit court and against the stenographer thereof to compel the stenographer to prepare and file a transcription of the proceedings had and done in the cause, and, since no such proceeding is before us for review, we pretermit any discussion of the merits of appellant's contentions."

The language from *Sutton* v. *Little Rock* can admit of no misunderstanding: there must be a mandamus in

the circuit court "against the stenographer thereof" to compel the stenographer to prepare and file the transcription.

So the ex parte appeal of Mr. Wirges presents no justiciable issue to us, since the necessary party—*i.e.*, Mr. Arrington, the Court Reporter—was not a party to the record below and is not a party on this appeal; and it is against him that the mandamus must be directed. But the dismissal of this ex parte appeal is without prejudice to Mr. Wirges' right to file a mandamus proceeding against the Court Reporter upon making the proper allegations for a cause of action.

III.

The third case is the *certiorari* proceeding; and we find that Mr. Wirges has misconceived the procedure. *Certiorari* cannot be used as a substitute for another adequate remedy. As we have already stated, Mr. Wirges' remedy was to file a mandamus action against the Court Reporter in the Circuit Court. That remedy has not been pursued; and he cannot use *certiorari* as a substitute for that procedure. *Merchants & Planters Bank* v. *Fitzgerald,* 61 Ark. 605, 33 S. W. 1064; *Stroud* v. *Conine,* 114 Ark. 304, 169 S. W. 959; *Kenyon* v. *Gregory,* 127 Ark. 525, 192, S. W. 887; *McElvain* v. *Border,* 215 Ark. 626, 221 S. W. 2d 793. So the petition for *certiorari* is dismissed.

We have not overlooked Act No. 148 of 1953, even though it was not mentioned in the brief. Prior to the Act No. 148, we had uniformly held that the court reporter of the trial court was not subject to the direct order of the Supreme Court as regards the preparation and/or filing of the transcription of the testimony heard in the trial court. The case of *Ex Parte Whitley,* 113 Ark. 372, 168 S. W. 144, states the holding and the reasons for it. To simplify procedure after the Supreme Court had acquired jurisdiction on appeal, the Legislature of 1953 enacted the said Act No. 148, captioned and reading as follows:

"AN ACT to Clarify the Supreme Court's Jurisdiction in Matters Affecting Appeals.

"*Be It Enacted by the General Assembly of the State of Arkansas*:

"SECTION 1. Where the Supreme Court has acquired jurisdiction of a cause, but it is made to appear that the record is incomplete for want of documents, exhibits, or a bill of exceptions, and the trial court has lost such jurisdiction, the Supreme Court or a judge thereof shall have power to direct a writ to any clerk, reporter, or other person charged with the duty of preparing the matter in question, and may require compliance with its discretionary orders."

Thus, when a case has been appealed to the Supreme Court the court reporter of the trial court is now directly amenable to our orders in regard to preparing and/or filing the transcription of the testimony heard in the trial court. We recognized and applied the Act No. 148 in the case of *Edwards* v. *State,* 232 Ark. 748, 339 S. W. 2d 947. But the said Act No. 148 affords Mr. Wirges no relief in any of these three cases here involved. The mandamus case, as well as the *certiorari* case, is an original proceeding in this Court; and the Act No. 148 is limited to cases involving appellate jurisdiction. The caption so states. The ex parte appeal of Mr. Wirges is without a proper and necessary party—*i.e.*, the Court Reporter —and, therefore, presents no justiciable issue.

The petition for mandamus is denied, as is also the petition for *certiorari;* and the ex parte appeal is dismissed.

In No. 3242, Justice WARD concurs because he believes there is no justiciable issue.

HARRIS, C. J., and GEORGE ROSE SMITH, J. dissent in No. 3242.

GEORGE ROSE SMITH, J., (dissenting). It seems to me that in Case No. 3242, the ex parte appeal, the majority are taking an altogether unrealistic position in holding

that Wirges should have filed a conventional lawsuit against the court reporter, with a formal complaint, service summons, time for answer, and so forth. I find nothing in our prior decisions that lays down such a requirement.

Wirges filed a motion asking that the court reporter be directed to make available a transcript of the proceedings of March 19, 1963. In substance that motion amounted to exactly the same thing as an application for mandamus. The stenographer is, as we said in *Bell* v. *Rice,* 183 Ark. 105, 35 S. W. 2d 88, at all times amenable to the orders of the circuit court itself, acting under the supervision and control of the circuit judge. It would have been a simple matter for the court, in passing upon Wirges' motion, to have conducted an informal hearing and given to the reporter whatever instructions were thought to be appropriate. To me it is unthinkable that this litigant, in order to obtain a record to which in my opinion he was entitled as a matter of right, should be required to file an adversary proceeding merely to convince the circuit judge that he should direct his own stenographer to transcribe his notes.

A comparable situation arises under our own Rule 5. This rule provides that if an appellant thinks that our clerk is in error in refusing to accept a tendered record he may file a motion for a rule to require the clerk to docket the appeal. It has never been suggested that we should have our clerk served with a summons so that the dispute may be brought to an issue by written pleadings. In my judgment it is equally unreasonable to require this appellant to engage in formal litigation with a court stenographer as a condition to obtaining a transcript of the proceedings.

HARRIS, C. J., joins in this disent.

CITY OF HARRISON *v.* BOONE COUNTY.

5-3260 378 S. W. 2d 665

Opinion delivered May 11, 1964.

[Rehearing denied June 1, 1964.]

Bill F. Doshier, for appellant.

Bruce Bennett, Attorney General, by *John P. Gill,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. This is a suit by Boone county to enforce a contract by which it leased certain county property to the city of Harrison. The city defended the case upon the ground that the contract was invalid in its inception and imposed no binding obligation upon the city. The chancellor upheld the contract and accordingly awarded the county a judgment for past-due rentals. We think the court was right.

In 1949 the county owned a rectangular block of land within the city, the tract being occupied by the courthouse. The outer ten feet along all four sides of the block was separated from the rest of the tract by a curbing. This ten-foot strip had been paved for a number of years and was used for parking and as a street. The outer edge of the strip abutted city streets on all four sides.

In April of 1949 the city council adopted an ordinance providing for the installation of parking meters within the city. At the same time the council approved an oral motion "to have the city install parking meters on the ten foot strip of county property around the county square and used for parking purposes. The county to receive one half of the net proceeds from said parking meters, the city to provide for all servicing of meters."

Thereafter the mayor and city recorder executed a contract with the county, by which the city leased the strip upon the terms recited in the ordinance. The lease was to remain in force as long as the strip was used by the city for street purposes. The contract was duly approved by an order of the county court. The city installed parking meters along the curbing of the courthouse square and accounted to the county for one half of the net revenues until 1962. The city then took the position that the agreement was void and refused to make further payments. It insists, however, that it is entitled to maintain the meters upon the county property and to keep the entire revenue for itself.

We are of the opinion that the city is legally and morally bound by its contract. The city relies primarily upon Ark. Stat. Ann. § 19-3801 (Repl. 1956), which provides that the city council shall have the care, supervision, and control of public streets within the city. This strip, however, belongs to the county and has not been dedicated as a public street. Both the city and the county have the power to enter into contracts. Ark. Stat. Ann. § 19-2301 (Repl. 1956) and § 22-601 (Repl. 1962). There is no repugnance between the city's permissive control of the strip and its obligation to repay the county for the privilege of maintaining parking meters thereon. In an analogous case we upheld the power of the county to lease two rooms in the courthouse to a city. *Fayetteville* v. *Baker,* 176 Ark. 1030, 5 S. W. 2d 302.

The city also contends that the execution of the agreement should have been authorized by a written

resolution of the council. Ark. Stat. Ann. §§ 19-2311 and 19-2403. This is not a fatal defect, for the city did have the power to enter into a contract such as this one. Under the doctrine of *Day* v. *City of Malvern,* 195 Ark. 804, 114 S. W. 2d 459, and many similar decisions, the city ratified the agreement by performing its obligations thereunder for more than thirteen years.

Affirmed.

McMillion *v.* Armstrong.

5-3270 378 S. W. 2d 670

Opinion delivered May 11, 1964.

[Rehearing denied June 1, 1964.]

Loftin & Howard, by *E. H. Herrod,* for appellant.

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

Paul Ward, Associate Justice. This litigation grows out of certain alleged defamatory statements made by appellant, Dr. Stephen D. McMillion, about appellee, George V. Armstrong. The jury returned a verdict in

favor of appellee and against appellant in the amount of $5,000 compensatory damages and $500 punitive damages. On appeal the principal issue is whether or not appellant's statements were privileged. To clarify the issues later discussed we think it expedient to set out below certain undisputed background facts.

Background. The North Little Rock Airport is a subdivision of the North Little Rock City Government. The Airport is under the immediate control of a commission composed of five members. As of August 7, 1962, the members of the commission were W. F. Laman, Mayor; Harold Simons, Manager; Eddie Holland; S. W. (Bud) Bowker; and, C. F. Allen.

At times pertinent to this litigation the commission was considering the construction of an administrative building on the airport grounds, and Robert L. Moore, a contractor, was figuring with the commission on constructing said building. While Moore was attempting to confer with Simons and Armstrong he got the impression they were proposing some type of unethical deal and he reported the "deal" to appellant. Appellant in turn reported the alleged "deal" to the Mayor, the members of the commission, and his alderman.

Pleadings. Early in 1963 appellee and Harold Simons filed a complaint (and an amended complaint) charging appellant with making false and defamatory statements (on August 7, 1962) about Armstrong in words as follows:

"A contractor has been in touch with me and has told me that you tried to get some work done on your home and have the cost of the work included in the price charged to the City of North Little Rock for the airport administration building. I believe the man, and I know you did it. I will not serve on the airport commission with a man of your caliber, and either you are going to resign or I am."

It was also alleged that statements of import were made by appellant on other occasions and to other people,

and that such defamatory statements were calculated to cause, and did in fact cause, great injury to appellee's reputation. The complaint (and amended complaint) contained similar alleged statements by appellant against Simons, but Simons (for undisclosed reasons) later abandoned his part in the action.

To the above complaint appellant entered a general denial, and also stated "that if any statements were made that referred to these plaintiffs in any manner, that the statements would be privileged communication and not subject to liability . . . [and] that if any statements were made they were the truth."

Judgment was entered in accord with the jury's verdict, and on appeal appellant relies on four separate grounds for a reversal. However, under the view we take, it will be necesasry to discuss only one ground or point. It is our conclusion that the judgment must be reversed because of the error contained in Instruction Number I given by the trial court. The pertinent parts of the instruction read:

"You are instructed that as a matter of law that the communication involved in this action was not privileged, under all of the circumstances in evidence. Also, you are instructed that there is no evidence that would justify you in finding that the words spoken were true. Therefore, since there is no dispute as to the import of the words spoken by Stephen D. McMillion, you are instructed that they are actionable per se, and George V. Armstrong is entitled to compensatory damages as a matter of law."

There are other portions of the instruction which need not be copied, but which may be referred to later.

At least two vices are apparent in the court's instruction which calls for a reversal. They are: (a) the court usurped the function of the jury and; (b) it deprived appellant of the defense of good faith and conditional privilege.

(a) Assuming for the purpose of this opinion only, that it was incumbent upon appellant to show appellee proposed an unethical "deal", we think the testimony makes a jury question on that point. Since the jury has a right to accept or reject testimony, to believe or not to believe any witness, and to draw reasonable inferences, we refrain from setting out the testimony, but refer only to the portions favorable to appellant. Moore said he made two or three attempts to get the plans for the airport building from Simons, but that Simons failed to produce them—that finally Simons asked him to come to his house late one evening and get the plans — that when he arrived Simons did not produce the plans and showed no interest in them but pointed out certain work he wanted done on his house; then Simons (without any explanation) took him to appellee's home where he (Moore) presumed the plans were located — that when he got there appellee (who was introduced by Simons as a commissioner but who in fact was not) proceeded to show him what he wanted done to his house—that appellee asked no questions about price but said the gate would be open for him to come and go when he pleased. From these facts and circumstances he concluded Simons and appellee wanted him (in order to get the contract) to repair their houses without cost to them. Moore met with the other commissioners on August 6 and talked to them by phone on August 7 (1962) and each time stated he thought an unethical "deal" was being proposed—he stated each time he didn't remember what exact words were spoken but it all amounted to a "deal". In the case of *Thiel* v. *Dove,* 229 Ark. 601, 317 S. W. 2d 121, we said:

"On the other hand, it is clearly improper for the court to tell the jury that a specific fact in evidence is sufficient to support an inference of guilt, negligence, or the like. *Blankenship* v. *State, supra* [55 Ark. 244, 18 S. W. 54]; *Smith* v. *Jackson,* 133 Ark. 334, 202 S. W. 227; *Coca-Cola Bottling Co. of Southeast Arkansas* v. *Bell,* 194 Ark. 671, 109 S. W. 2d 115. It is for the jury to say whether the particular inference *should* be drawn

from all the proof in the case, and consequently the court comments on the weight of the evidence when it declares that a certain inference *may* be drawn from a specific fact."

(b) In our opinion it was not necessary, however, for appellant to prove appellee actually proposed an unethical "deal" but only to show that he acted in good faith when he passed on to the other commissioners the information he had received from Moore. The record is replete with evidence that Moore meant for appellant to understand Armstrong was proposing an unethical "deal". He made this clear to appellant (and to three commissioners) at the meeting on August 6 and also (over the phone) to the same people and the Mayor on August 7. Also, there is ample testimony in the record from which the jury could find that appellant acted only in good faith and for the best interest of the city and the commission when he talked about this matter to others. In most instances he was seeking advice as to what action should be taken by him. It was not until he was advised by his fellow commissioners to do so that he confronted appellee with the charge (at a meeting of the Mayor and the commissioners) on the night of August 7. In addition, we find nothing in the record to indicate that appellant mentioned the matter to anyone except to the other commissioners (including the Mayor) and to the alderman of his own ward. It is established by the record that the council appoints the commission members.

Under the facts and circumstances outlined above it was for the jury (and not the court) to say whether appellant acted in good faith. If appellant did act in good faith, he had a conditional privilege to convey the information to those with whom he was associated in a common cause. Rest., Torts, § 596. In the case of *Bohlinger* v. *Germaina Life Insurance Company,* 100 Ark. 477, 140 S. W. 257, we said:

"A communication is held to be qualifiedly privileged when it is made in good faith upon any subject-matter in which the person making the communication

has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty, although it contains matter which, without such privilege, would be actionable."

We recognize the possibility that appellant may have started out in good faith, but that he acted unreasonably later (in not apologizing to appellee) when he learned more about the facts, and thereby abused the conditional privilege which he enjoyed. However, that was also a matter for the jury and not for the court to decide. In *Thiel* v. *Dove, supra,* we also said:

"A conditionally privileged occasion is also abused if the speaker is motivated by malice rather than by the public interest that calls the privilege into being . . . We think the proof made the existence of malice a question for the jury."

See also Rest., Torts, § 599. It is true that in this case (and in said Instruction No. I) the court permitted the jury to find whether or not appellant acted with malice, and it is also true that the jury found he did act with malice. Those facts do not, however, cure the other errors in the instruction above pointed out. Had the jury found (if permitted to do so) that appellant was protected by a conditional privilege it might have found differently as to malice.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

HARRIS, C.J., and ROBINSON and HOLT, JJ., dissent.

CARLETON HARRIS, Chief Justice (dissenting). I am not in accord with the conclusion by the majority that this case must be reversed because error was committed in giving to the jury Instruction No. I, and I very much disagree with the finding that there was sufficient evidence to submit to the jury the question of whether the words spoken were true. The sole testimony relating to

the contact between Colonel Armstrong and Robert L. Moore is as follows:

"Q. Now, Mr. Moore, can you tell the jury when you got out of the car and walked up to Mr. Armstrong's, who introduced you?

A. Mr. Simons introduced me to Col. Armstrong as a member of the Airport Commission.

Q. Did you *think* (my emphasis) at that time you were looking for building plans?

A. I thought we were going to the Airport Commissioner's house to get a set of plans for the building.

Q. Who told you that?

A. I wouldn't say that I was told. I wasn't told why we were going there but since I had gone to Harold's[1] house in the first place to look at the plans and he didn't show them to me there then I *assumed* (my emphasis) that we were going to Col. Armstrong's house to see the plans.

Q. When you got to Col. Armstrong's house what was said?

A. I was introduced to his wife and we went straight on out the glass doors to the back of the house to this sun deck or patio.

Q. What transpired when you got out there—

A. He said what I—

Q. Who said?

A. Col. Armstrong said 'what I wanted was to take this hand rail off' he said 'I will probably use it later on another patio at the foot of the steps.' He said, 'I want a roof built over it and I want it screened in and fixed to where it will be a screened in patio.

Q. Did he tell you what kind of roof he wanted you to use?

[1] Referring to Simons.

A. I asked him specifically. I said, 'What type structure are you talking about? I said, 'Do you want wolmanized lumber, something of a lifetime construction or do you want to go the cheaper route or what do you want do you want fiberglass room or do you want shingles?' and he said, 'I am leaving all that up to you.'

Q. Then, what did you do?

A. We went back through the house outside. He told us the side gate would be open that I could come and go and that if there was no one at home I could come and go and he went back in the house and we got in the car and left."

This is all that is revealed by the transcript as to any contact between Armstrong and Moore; in fact, Mr. Moore stated that this was the only time he had ever seen Colonel Armstrong. Based on prior conversations with Simons (which were properly held by the trial court to be inadmissible) and the fact that Colonel Armstrong did not ask what the repair work would cost, Moore decided that he was being propositioned to do the work free of charge to Armstrong, (apparently the latter would use his influence as a member of the Airport Commission to assist Moore in being awarded the contract for the work at the airport) and the private work for appellee would then be included in the bill to the city. Thereafter, Moore told Dr. McMillion, in effect, that appellee had tried to make a "deal" with him. This, then, is the sum total of the evidence upon which Dr. McMillion based his charge that appellee was dishonest, and appellant steadfastly refused to alter that opinion, although he had only met Armstrong, and knew nothing about him. One circumstance that makes the charge so "far-fetched" is that Armstrong *was not even a member of the Airport Commission at the time that Moore went to the Colonel's home.* The conversation at the home took place on April 19, 1962, and appellee became a member of the Airport Commission on May 10, 1962. In fact, the work was done on appellee's house by another contractor, and paid for, before Armstrong ever became a member of the Com-

mission. The record reflects a check given by Armstrong to J. C. Cartwright in the amount of $280.00 on *May 8, 1962.* I think it can be said, without fear of contradiction, that if Colonel Armstrong had been convicted of soliciting a bribe on the basis of the testimony offered in this case, every member of this court would unhesitatingly have voted to reverse such conviction because of a complete lack of evidence.

Considering the fact that McMillion made his accusation concerning appellee to other members of the Commission individually, before making it at the Commission meeting, I have some doubt that he was entitled to the defense of "conditional privilege," but even if entitled to that defense, it does not appear, under the circumstances, that the court's instruction was prejudicial. I should mention one of the general rules relating to privileged defamatory communications. In *Arkansas Associated Telephone Company* v. *Blankenship,* 211 Ark. 645, 201 S. W. 2d 1019, this court, quoting 36 C.J., Page 1248, stated:

" 'The protection of the privilege may be lost by the manner of its exercise, although the belief in the truth of the charge exists. The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the party making it must be careful to go no farther than his interest or his duties require. Where the party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected, and the fact that a duty, a common interest, or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith.' "

In this state, the qualified or conditional privilege can be destroyed by malice, and the malice necessary to destroy a qualified privilege can, in addition to "malice in fact" (hate, vindictiveness, animosity) consist of such reckless disregard of the rights of another as to consti-

tute the equivalent of ill will. *Dun & Bradstreet, Inc.,* v. *Robinson,* 233 Ark. 168, 345 S. W. 2d 34.

Let it be remembered that the jury was not compelled by the instruction in question to establish damages of $5,500.00. A verdict for $1.00, or other nominal amount, could have been returned, but, in addition to fixing the sum of $5,000.00 compensatory damages, the jury returned a verdict of $500.00 as punitive damages, and, in doing so, necessarily found that Dr. McMillion had acted *with malice.* This meant that the jury found either that McMillion's charge was wanton and reckless, or that he acted with actual malice. In *Erwin* v. *Milligan,* 188 Ark. 658, 67 S. W. 2d 592, this court said:

"The court submitted to the jury, in the case of Mrs. Milligan against the appellant, the question of punitive damages. *Punitive damages are damages imposed by way of punishment,*[2a] and are given for the loss sustained. It is generally said that punitive damages are awarded in view of the supposed aggravation of the injury to the feelings of the plaintiff by the *wanton or reckless act of the defendant.*"[2b]

The finding of the jury in the instant case is not difficult to understand under the testimony presented. Even after the meager evidence (to my way of thinking, no evidence) had been discussed in the Commission meeting, appellant refused to "back up," but continued to insist that, "I believe you did it," and, "I still think it happened." The doctor stated that he would not serve on the same commission with a man of Armstrong's character, and that Armstrong would resign or he would resign, and if he (appellant) resigned, he would make known what had happened. In fact, at the trial, the doctor stated that he still adhered to the view expressed.

Since the jury found malice to have existed, I cannot see how appellant was prejudiced by the instruction. The situation bears some similarity to our holding in *Weatherford* v. *George,* 229 Ark. 536, 317 S. W. 2d 147.

[2a, 2b] Emphasis supplied.

In that case, involving a collision between vehicles, the appellant was found by the jury to be 100% negligent, and appellee accordingly guilty of no negligence. On appeal to this court, appellant vigorously contended that the trial court had erred in not submitting a particular instruction that he requested, relative to appellee's negligence being the proximate cause of the accident. In rejecting this contention, we said:

"It certainly follows, that if the jury found George guilty of no negligence whatever, they would not have found that negligence on his part was the proximate cause of the mishap. Accordingly, even if the failure to give the instruction was error, the verdict rendered by the jury had the effect of healing or remission."

Under the same reasoning, even if appellant was entitled to have the defense of conditional privilege submitted to the jury, such defense could have been of no aid, for the jury found *malice*—and awarded punitive damages—and when the jury found malice, the asserted defense of conditional privilege was wiped out. Of course, this finding also nullified appellant's contention of "good faith," for irrespective of Dr. McMillion's belief in the truth of his accusation, the jury found, at the least, that he had acted with conscious indifference and reckless disregard of the rights of appellee.

Solomon, reputed to have been the wisest man who ever lived, said, "A good name is rather to be chosen than great riches . . ."[3]

Aside from the fact that to accuse a man of a specific act of dishonesty, or a crime, is slander *per se,* the record establishes that McMillion's charges raised doubts in the minds of some of his fellow commissioners as to appellee's integrity. For instance, Commissioner Bowker stated, "It makes anybody stop and think * * * I am saying it makes you stop and wonder."

Commissioner Allen testified:

[3] Proverbs 22:1.

"It is hard for anybody to set here and hear accusations made or remarks made about anybody without being impressed one way or the other. As to whether that caused me to say right away, 'well I believe he is dishonest.' No. Did it put a doubt in my mind whether he could have done it. Yes, but now whether to say he was dishonest just like Mr. Bowker said it makes you stop and think." * * *

"Q. The only reason you could possible have for thinking he did do it was that Dr. McMillion had accused him of doing it and Mr. Moore said Lt. Col. Armstrong permitted him to look at his house?

A. That is about it."

Eddie Holland, Chairman of the Airport Commission, in response to the question as to whether he had any reason to believe Colonel Armstrong to be a dishonest man, stated:

"No, sir. I have no reason other than what I heard Mr. Moore say and being connected with the Airport Commission I was impressed and I felt like the commission should do something about it. I felt it had happened."

The unfortunate aspect about an accusation that reflects upon one's character, is that, even if totally untrue, and perhaps not really believed by the recipients of the information, such remarks almost invariably leave a question in the minds of the hearers, and every time the accused person's name is mentioned, the accusation is remembered, and the mental reaction, consciously or subconsciously, is—"I wonder".

As stated, I cannot agree that there is any testimony that would substantiate the truth of the charge, and the finding of malice cured any defect that might have existed under the court's instruction.

I therefore respectfully dissent.

ROBINSON and HOLT, JJ., join in this dissent.

ARK. STATE HIGHWAY COMM. *v.* SHERRY.

5-3288 381 S. W. 2d 448

Opinion delivered May 18, 1964.

[Rehearing denied September 14, 1964.]

Mark E. Woolsey and Don Langston, for appellant.

James R. Hale and *Lewis D. Jones,* for appellee.

CARLETON HARRIS, Chief Justice. This appeal arises from a decree of the Washington County Chancery Court, wherein that court enjoined the Arkansas State Highway Commission and Anchor Construction Company from entering upon certain premises which the Highway Department contends have been dedicated to the public.

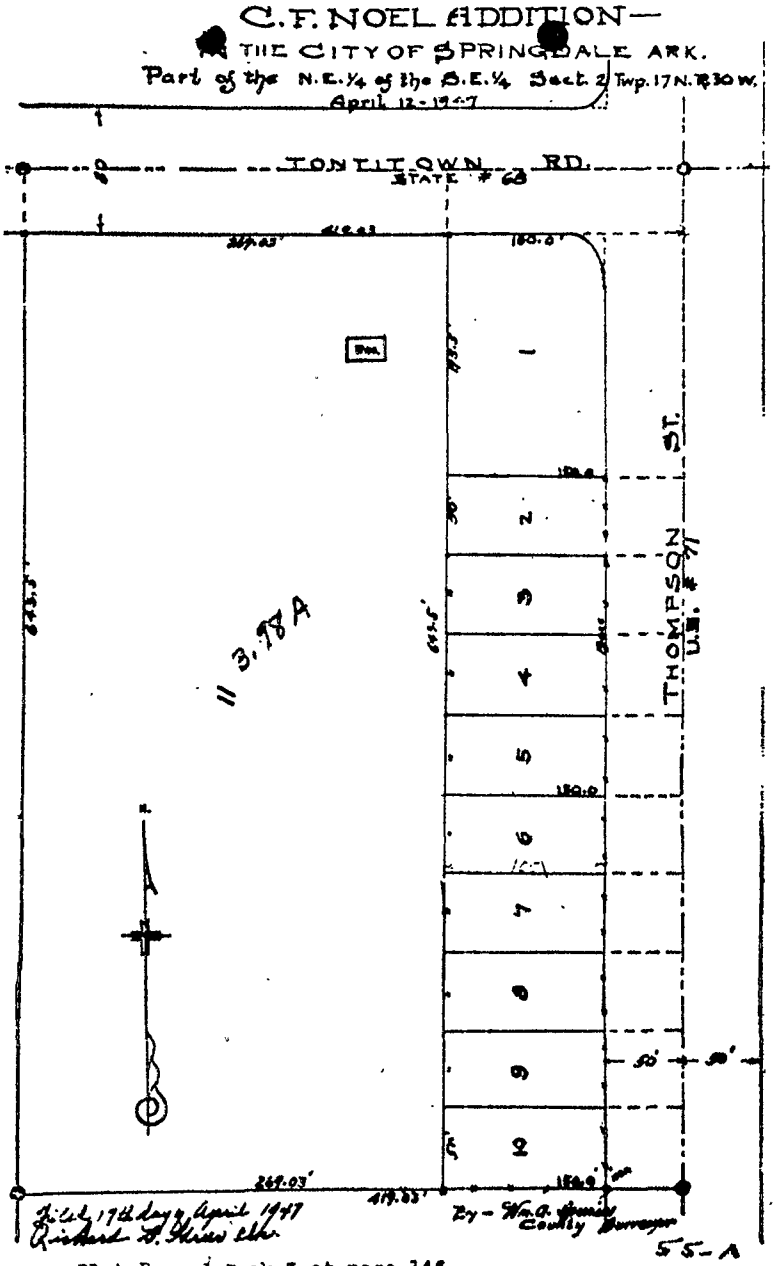
On April 17, 1947, C. F. Noel and wife owned a tract of land which they caused to be platted into lots. The plat was filed for record in the office of the Circuit Clerk of Washington County on April 17, 1947, and is properly recorded in one of the plat record books. Thereafter, Mr.

and Mrs. Noel sold lots with reference thereto.[1] (See attached plat.) This litigation arose in 1963 when the Highway Commission decided to reconstruct and widen U. S. Highway No. 71. On the basis of the plat, the Highway Department contends that Mr. and Mrs. Noel dedicated to the public 50 feet on the west side of the center line of the highway, and appellees contend that the extreme western 20 feet of the 50 is a part of their property. Accordingly, the sole question presented is whether the 20 foot strip abutting U. S. Highway 71 (Thompson Street) has been dedicated to the public, and it is more or less admitted by appellees that appellants are due to prevail if there is no ambiguity in the plat of the Noel addition; on the other hand, if there is any ambiguity, testimony was proper to determine the actual intent of the dedicators. This last (ambiguities) is the contention of appellees, and they stoutly argue that the evidence shows that the Noels never had any intention to dedicate the 50 feet to the public, and the decree should therefore be affirmed. We cannot agree.

A stipulation entered into between the parties reflects that Mr. and Mrs. Noel would have, if present at the trial, testified that they did not intend to dedicate the 20 foot strip to the public, and did not intend for the county surveyor to plat a 50 foot right-of-way for U. S. Highway 71. Appellant reserved the right to object to the competency of the evidence, did object and the court properly sustained the objection. In *Poskey* v. *Bradley,* 209 Ark. 93, 189 S. W. 2d 806, this court, citing an earlier decision, *Frauenthal* v. *Slaten,* 91 Ark. 350, 121 S. W. 395, said:

"While the fact of dedication depends upon the intention of the owner to dedicate, the intention to which the courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts."

[1] Appellees, the purchasers of part of the property involved in this litigation, are Hugh Sherry and Myrtle Sherry, and Kenneth Morris and Drucilla Morris, who were plaintiffs in the court below; also, Carlie Sutherlan, Thelma J. Sutherlan and John S. Glenn, interveners.



Plat Record Book 3 at page 146

Also, in *Porter* v. *City of Stuttgart,* 135 Ark. 48, 204 S. W. 607, the court said:

"That plat need not be made by the owner, and where he sells lots in conformity to the city map on which his property is laid out into blocks, streets, avenues and squares, such recognition of the plat is a dedication to public use; he adopts the map by reference thereto . . . A common law dedication does not operate as a grant, but by way of estoppel *in pais.* This doctrine is adopted from necessity for lack of a grantee capable of taking. The dedication, therefore, is regarded not as transferring a right, but as operating to preclude the owner from resuming his right of private property, or indeed any use inconsistent with the public use. The ground of the estoppel is that to reclaim the land would be a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use contemplated by the dedication, and, in case of sale with reference to plat, that the easement and servitudes indicated by the plat constitute a part of the consideration for which all conveyances referring to the plat are made, and therefore no person, while claiming under the conveyance can be permitted to repudiate them or deny that they exist where they are capable of existing."

Likewise, in *Incorporated Town of Mountain View* v. *Lackey,* 225 Ark. 1, 278 S. W. 2d 653, we said:

"We have many times held that when the owner of land makes a plat thereof and sells lots with reference to it, this amounts to a dedication of the streets and public ways shown on the plat. See *Hope* v. *Shiver,* 77 Ark. 177, 90 S. W. 1003. In *Frauenthal* v. *Slaten,* 91 Ark. 350, 121 S. W. 395, the rule is stated:

'The law bearing on the question of dedication of property to the public use is well settled by the decisions of this court. An owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable. He will also be held

to have thereby dedicated to the public use squares, parks and other public places marked as such on the plat. The dedication becomes irrevocable the moment that these acts concur.' ''

While Noel did not prepare the plat, he certainly approved and adopted it by causing it to be filed, and by selling lots with reference thereto.

Though the dedication was in 1947, and was not accepted until the commission decided to widen the highway in 1962, the dedication is irrevocable, and the highway commission had the right to accept this dedication for the public use when the necessity should arise.[2]

Appellees point out that the plat denotes the western line of the street as marked by a fence, and they apparently contend that this constitutes an ambiguity; also, they assert that in comparing the Tontitown road on the north side of the plat with Thompson Street on the east side, it will be noted that the ''boundary lines of Tontitown Road are clear and dark and show as boundary lines, while the fence line on the east side of the plat is not only marked with 'x's' to indicate barbed wire, but the word 'fence' is written in between lots 3 and 4.'' The record does not reflect when the fence was placed in its location, or who was responsible for having it done, but we do not think these facts are sufficient (under our decisions, heretofore quoted) to raise doubts as to the intention of Mr. Noel and his wife. It was stipulated that both would testify that they did not request that the fence

[2] In *Gowers* v. *City of Van Buren,* 210 Ark. 776, 197 S. W. 2d 741, we said: "In *Paragould* v. *Lawson,* 88 Ark. 478, 115 S. W. 379, this court said: 'The equitable doctrine of laches cannot be successfully invoked to defeat the right of the city to open the street which was dedicated to that use . . . Nor is the city estopped, on account of the inaction of its officers for a long period of time, to proceed to open the street . . . *Beebe* v. *Little Rock,* 68 Ark. 39, 56 S. W. 69. The owners of lots abutting on the platted street had notice of the dedication, and are presumed to have had knowledge of the city's legal right to proceed in its own time to open the street. *Brewer* v. *Pine Bluff, supra,* (80 Ark. 489, 97 S. W. 1034). They could, therefore, build up no right to continued occupancy of the dedicated strip on account of delay in opening the street to public use,' and in *Little Rock* v. *Wright,* 58 Ark. 142, 23 S. W. 876, it is said: 'The city had the right to postpone the removal of the obstructions, and the opening of the streets, until such time as its resources permitted, and the public necessities demanded.' "

be shown on the plat, though it did, in fact, exist; also, that they did not instruct the county surveyor to draw a right-of-way line for U. S. Highway 71 or Thompson Street on the plat. The fact remains, as heretofore mentioned, that they did cause the plat to be filed, disposed of all of the property, and, in executing deeds, did so with reference to the plat.[3]

Appellees further argue that the plat contains no dedicatory phrases, and was not signed by the owners. However, it is generally held that this is not essential to a dedication. In *Fitzgerald, et ux,* v. *Smith, et ux,* (Cal.) 271 P. 507, the California court held that where an owner of a subdivision of land records a map thereof without reservation, he thereby offers to dedicate streets and roads shown thereon to public use, even though there is no express declaration of dedication in the plat.

Appellees have made valuable improvements on the 20 feet in litigation, and this is unfortunate, but the plat was on record when they purchased the property, and the deeds received by them had been executed with references to this plat. In *Arkansas Fuel Oil Company* v. *Downs,* 205 Ark. 281, 168 S. W. 2d 419, this court cited the rule as follows:

" 'The right of the public to use a highway extends to the whole breadth thereof, and not merely to the part which is worked or actually traveled; and consequently, an obstruction upon the untraveled part is a proper subject of complaint by the public or persons specially injured,' and in American Jurisprudence, Vol. 25, p. 809, § 527, we find this language: 'Even though the entire width of a highway is not prepared for travel, or although a bridge or culvert does not extend to its entire width, the public rights of passage are not thereby limited in

[3] For that matter, the fence, which is shown to be 50 feet from the center line of Thompson Street (Springdale), does not extend completely across the east side of tract, but the line that is shown along and through the fence extends to the undisputed southern right-of-way line of the Tontitown road. The fence appears to stop at the southern edge of lot No. 1. Appellants also point out that the right-of-way line of Thompson Street directly connects and rounds off into the right-of-way line of the Tontitown road.

favor of one who places an unauthorized or improper structure within the highway limits * * *' "

Title acquired by dedication to the public is an easement, with the fee remaining in the adjacent landowner (*Arkansas Fuel Oil Company* v. *Downs, supra*), and we hold that under the plat, there has been a valid dedication to the public of an easement for highway purposes of the 20 foot strip of land in dispute.

The decree is reversed, and the cause remanded for entry of a decree not inconsistent with this opinion.

SOUTHERN HELICOPTER SERVICE, INC. *v.* JONES.

5-3256 379 S. W. 2d 10

Opinion delivered May 18, 1964.

Cockrill, Laser, McGehee & Sharp and *Burl C. Rotenberry,* for appellant.

Tompkins, McKenzie & McRae, for appellee.

Ed. F. McFaddin, Associate Justice. This is an action for damages resulting from personal injuries sustained by a little girl when struck by the rotor blades of a helicopter. The plaintiffs recovered judgment, and the defendants prosecute this appeal. The plaintiffs are Mary Gen Jones, a little 3-year-old girl, and her father, Arvin E. Jones; and the defendants are Southern Helicopter Service, Inc. and its employee, William F. Holland, who was the pilot of the helicopter.

Certain downtown merchants, desiring to stimulate business during the Christmas season, arranged to have "Santa Claus" arrive in Little Rock on Saturday morning, November 17, 1962. A helicopter, with "Santa Claus" aboard, was to land in a designated and roped off space on the southwest corner of Allright Parking Lot located between 6th and 7th Streets, and Center and Louisiana Streets, in the City of Little Rock. Allright Parking Lot occupies approximately two-thirds of the city block, the remaining or west third being occupied by the Downtowner Motel. A contract was made with the Southern Helicopter Service, Inc. to fly "Santa Claus" from the Little Rock Airport to the Allright Parking Lot. Several days prior to the designated date, Mr. Holland went to the parking lot and selected a landing site approximately 65 feet wide by 100 feet long in the southwest corner, and this space was roped off and policemen were present to keep people outside the landing area.

About ten A.M. on November 17th "Santa Claus" and Mr. Holland flew in a northerly direction over the designated landing place at an altitude of about 300 feet, and circled around for a landing in the designated space. When Mr. Holland reached the parking lot the second time, he decided that the roped off area next to the Downtowner Motel was too small for landing, and he was then so low that he could not gain sufficient altitude for another circle, so he landed in the southeast corner of the parking lot, being east of the roped off area. Fortunately, no one was injured in this hazardous landing.

Present to see the arrival of "Santa Claus" were a number of children and adults. This crowd had gathered around the roped off area because there was a platform and a loudspeaker, and prizes were to be given away. But when the helicopter landed outside the roped off area, the crowd immediately raced over toward the helicopter to see "Santa Claus." Mrs. Jones and her daughter, Mary Gen, with other companions, had been on 7th Street, and when they saw the helicopter land in the southeast corner of the parking lot they walked over to the helicopter to see "Santa Claus." Mrs. Jones had Mary Gen in her arms.

When the helicopter landed Mr. Holland applied the brakes and stopped the rotor blades, but left the engine of the helicopter running, as he intended to resume flight as soon as "Santa Claus" was safely out of the helicopter. Mr. Holland assisted "Santa Claus" in getting out of the helicopter and beyond the extent of the rotor blades; and by that time people had crowded so closely around the helicopter and under its blades that Mr. Holland saw it would be impossible for him to resume flight. Standing on the ground, he reached into the helicopter and turned off the engine switch, and when he did so, the rotor blades moved and Mary Gen Jones, being held up in her mother's arms, was struck in the face by a rotor blade and seriously injured.

Mary Gen Jones was hospitalized for some time. Mr. Jones sued for the hospital and doctor bills which he paid; and Mary Gen Jones, by her father as next friend, sued for her injuries and damages. The claimed acts of negligence of the defendants were: (a) in landing the helicopter in an unprepared and unguarded section of the parking lot; (b) in failing to rope off the area where the helicopter was landed; (c) in leaving the motor running in the helicopter while "Santa Claus" was being escorted away from it; (d) in failing to warn people in close proximity to the motionless rotor blades that when the engine was cut off the blades might move; and (e) in failing to fully set the brake on the rotor blades. The case was tried to a jury and resulted in a

verdict and judgment for Mr. Jones for $301.05 for doctors and hospital bills, and in $10,000.00 to Mary Gen Jones for her damages. From that verdict the appellants bring this appeal claiming errors in the giving of an instruction, in the refusing of instructions, and in the excessiveness of the verdict.

Although the cases involving helicopters[1] and involving persons injured from airplane propellers[2] are not numerous, nevertheless it is well recognized that in the absence of any special statute to a different effect, the general rules governing tort liability and negligence apply broadly in aircraft accident cases, including cases of death or injury arising from airplane collisions or near collisions, and many of the principles relating to civil liability for motor vehicle accidents, including those as to agency, the measure of care required, and negligence, are equally applicable to civil liability for aircraft accidents.[3] Webster's Dictionary defines helicopter: "An aircraft whose support in the air is derived solely from the reaction of a stream of air driven downward by one or more lifting rotors turning about substantially vertical axes." The helicopter here involved had one vertical axis to which were attached three rotor blades, each ten feet six inches in length, thus making a circle in excess of 21 feet about the shaft. The three rotor blades were arranged on the shaft so that when the helicopter was at rest one blade was only four feet six inches above the ground, another five feet two inches, and the third five feet eight inches. The questions here in issue do not challenge the general rules of law governing aircraft,

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[1] *N. Y. Airways, Inc.* v. *United States*, 283 F. 2d 496.

[2] *Cape Charles Flying Service, Inc.* v. *Nottingham*, 187 Va. 444, 47 S. E. 2d 540; *Strong* v. *Chronicle Pub. Co.* (Calif.), 93 P. 2d 649; *Maryland Cas Co.* v. *Stewart & Sons* (La.), 100 So. 2d 912; *Shattuck* v. *Mullin* (Fla.), 115 So. 2d 597. Attention is called to a series of annotations: "Negligence in operation of airplane on takeoff," 74 A.L.R. 2d 615; "Negligence in operation of airplane in landing," 74 A.L.R. 2d 628; and "Liability for injury or damage from taxiing aircraft," 74 A.L.R. 2d 654. See also our case of *Ratton* v. *Busby*, 230 Ark. 667, 326 S. W. 2d 889, 76 A.L.R. 2d 751.

[3] *Wilson* v. *Colonial Air Transport*, 278 Mass. 420, 180 N. E. 212, 83 A.L.R. 329; 8 Am. Jur. 2d, p. 685, "Aviation" § 64; "Aviation Accident Law," by Charles S. Rhyne, p. 91.

but relate only to specific instructions and to the amount of damages.

I. *Instruction No. 12.* The Court gave the jury twenty-two instructions which covered nearly every possible phase of law applicable to such a case:[4] credibility of witnesses; negligence; contributory negligence; ordinary care; proximate cause; preponderance of the evidence; burden of proof, concurring negligence; measure of damages, etc. Among the other instructions the Court gave its Instruction No. 12, as follows:

"You are told that it was the duty of the pilot of the helicopter to exercise ordinary care in the operation, landing, and attendance of his plane to avoid injury to others if danger was apparent or reasonably to be expected. If you find from a preponderance of the evidence that danger to others did exist and was reasonably to be expected and further so find that Holland failed with respect to his duties and that such failure, if any, on his part, proximately caused the helicopter blade to strike

[4] We copy a portion of the Court's Instruction No. 1: "Members of the jury, you have followed closely the opening statements and the testimony in this case. Therefore you know what each side claims with respect to the cause or causes of the mishap and as to the alleged injuries. So it will not be necessary for me to recount in detail the respective contentions of the parties because they are revealed by the testimony, and well commented on in the opening statements.

"Now, with some factual and legal situations in the case the jury is relieved of any responsibility. For example: at the time of the mishap, it is agreed that William F. Holland was in charge of the helicopter, the property of Southern Helicopter Service, Inc., and was acting within the scope of his employment as its agent, servant, and employee. This would make Southern Helicopter chargeable with the negligence, if any, committed by Holland.

"Now, it is not claimed that the infant child was guilty of any negligence. As a matter of law she is too young to be charged with negligence. Any negligence on the part of Mrs. Arvin E. Jones is not chargeable to the father or the child, and would not affect any obligation which might exist on the part of the defendants to reimburse him for his medical expenses or to respond to the child for damages, unless you should find the mother's negligence, if any, was the sole proximate cause of the mishap. So, the plaintiff's legal right to recover depends on whether you find the defendant Holland guilty of negligence, if any, which proximately caused the injuries, if any, to the child.

"Now, in this case, Gentlemen, there are six controverted or disputed questions for your possible consideration, and in a desire to be of assistance to you here are those questions or interrogatories you may be called upon to answer when you retire to deliberate: . . ." (Here followed six specific interrogatories.)

Mary Gen Jones, then you will find him guilty of negligence which was a proximate cause of the mishap.[5]

In their brief the appellants say of this instruction:

"The Court's instruction No. 12 furnished the jury absolutely no guides whatever, but truly left the jury to its own devices in determining just what the duties of appellant Holland were with respect to the operation and handling of the helicopter. To charge the jury that the pilot was required to '. . . exercise ordinary care in the operation, landing and attention of his plane . . .', as the trial court did, simply does not provide the jury with any legal yardstick with which to measure the pilot's conduct in the context of the issues developed by the evidence. The terms, 'operation,' 'landing,' and 'attendance,' as used in the instruction, are so broad, general, and all encompassing, that the jury might have seized upon any number of real or imagined acts or omissions of the pilot as a basis for its verdict, irrespective of whether same constituted negligence or whether there was substantial evidence to support them."

We find no inherent error in the instruction; and if the appellants had wanted to pinpoint the instruction to certain actions of the pilot, the appellants could have asked such a specific instruction. These generalized, or so-called "Mother Hubbard," instructions are erroneous when there is no testimony offered to sustain every alle-

[5] The defendants' objection to this instruction was: "Defendants object generally and specifically to Court's Instruction No. 12 for the reason that it is abstract and misleading and gives the jury no guide or standard on which to base a finding of negligence; does not submit specific acts for the jury's determination whether the same were negligence, and in effect gives the jury a license to roam at will among the allegations of the complaint and the proof in the case and consider acts as negligent when as a matter of law those acts should not be submitted to the jury for the reason that there is no substantial evidence upon which they could base a finding of negligence in the doing or failure to do those acts, and hence such as to permit the jury to answer an interrogatory finding defendant Holland negligent for an act or acts upon which there is no substantial evidence to base such a finding under circumstances that it would be impossible to determine what act or acts the jury found to be negligent and hence does not restrict the jury to consideration of only those acts upon which there is substantial evidence to submit to the jury the question as to whether same were negligent."

gation of negligence as contained in the complaint. *Graysonia Nashville Lumber Co.* v. *Hopkins,* 113 Ark. 598, 168 S. W. 129; *Wisconsin & Ark. Lumber Co.* v. *McCloud,* 168 Ark. 352, 270 S. W. 599. But when, as here, there was testimony to support each and every allegation of negligence contained in the complaint, then the defendants should have offered a more definite instruction, if such was desired. No such definite instruction was offered by the defendants and, failing to do so, the defendants cannot complain. In *Queen of Ark. Ins. Co.* v. *Malone,* 111 Ark. 229, 163 S. W. 771, we said: "It is true that the instructions given on this subject were general ones; but as the defendant failed to request correct instructions on the subject, it is in no position to complain because the instructions given by the Court were too general." In *Wallace* v. *Riales,* 218 Ark. 70, 234 S. W. 2d 199, the appellant did not request the court to submit to the jury a specific instruction, and we said: "A party failing to request a definite instruction is in no position to complain that one was not given." And in *Capital Transportation Co.* v. *Alexander,* 219 Ark. 419, 242 S. W. 2d 833, we said: "The issue of contributory negligence had been fully covered by general instructions, and the Court was not required to overemphasize this defense by devoting a separate charge to each act that might be thought to amount to negligence."

The pilot, Mr. Holland, admitted on the witness stand that the safe procedure would have been to cut off the motor when he landed:

"Q. Well, if you had followed the safe procedure which you have outlined, and to which you have testified, then the motor would have been off; all of the switches would have been turned; the blades could not have turned, is that right?

"A. Yes, sir.

"Q. And that would have ended any question about trouble, right?

"A. Yes, sir . . ."

The pilot admitted that he knew when he attempted to cut off the motor there might be a surge of power to affect the brake which had stopped the rotor blades; and he admitted that when he landed and pulled up the hand brake on the rotor blades he smelled the burning of the brake bands. All these admissions — and there were others—were, in themselves, pinpointing of negligence; so we find no reversible error in the giving of Instruction No. 12.

II. *Refusal To Give Defendants' Instructions Nos. 8 and 9.* These two refused instructions read:

"Instruction No. 8. You are instructed that you cannot find defendant Holland, pilot of the helicopter, guilty of negligence in landing the helicopter in the parking lot at the point where he did land the helicopter.

"Instruction No. 9. You are instructed you cannot find defendant Holland, pilot of the helicopter, guilty of negligence in failing to land the helicopter in the designated roped off area on the parking lot."

The appellants' argument on this point is two-pronged: (1) there was no evidence that it was negligence for the pilot to land where he did; and (2) even if the pilot was negligent in landing where he did, the action of Mrs. Jones in carrying the child under the extended helicopter blades was an intervening efficient cause of negligence which rendered remote the landing in the wrong place.

As to the first point—negligence in failing to land in the roped off place—the pilot admitted: "A. . . . Anytime that you bring a helicopter in, you are going to have people around it."[6] The fact that the pilot knew

[6] The pilot further testified: "Therefore, in the interests of safety is the reason I did that, plus an agreement to take the helicopter out of there once Santa Claus had got out. I didn't want to stay there, because I've seen it happen before. I don't know what it is, but anytime there is a helicopter down, they say they are not there to look at the helicopter, but the helicopter draws the biggest crowds.

"Q. But as you testified before, the safe procedure could have been done in approximately one minute.

"A. I would say not over two minutes.

people would crowd around the helicopter when it landed, is a good explanation as to why the designated place was roped off, with policemen there to keep the crowd away from a point of danger. So we find no merit in the first prong of the appellants' argument.

The second prong relates to the action of Mrs. Jones in carrying the child under the helicopter blades as an intervening efficient cause. Of course, any negligence on the part of Mrs. Jones cannot be imputed to the little child. The Court so instructed the jury; and as to that point there is no argument on this appeal. In Instruction No. 18 the Court, in effect, submitted to the jury the question of whether the act of Mrs. Jones was an efficient intervening cause of the injuries received by the little girl. This instruction read:

"You are instructed that even though you may find defendant Holland guilty of a negligent act or negligent conduct, if you further find that at the time of such negligent act or conduct, if any, on his part, plaintiff Mary Gen Jones was in a position of apparent safety and that she was placed in a position of risk, in which position she sustained injury by a negligent act or conduct on the part of her mother, not caused by or contributed to, but independent of any negligent act or conduct on the part of defendant Holland, then you are told that such negligent act or conduct, if any, on the part of defendant Holland would not be a proximate cause of the injuries sustained by Mary Gen Jones. If you so find from a preponderance of the evidence, you will answer 'No' to Interrogatory No. 2."

The Interrogatory No. 2 read:

"Do you find from a preponderance of the evidence that William F. Holland was negligent, and if so, was such negligence a proximate cause of the mishap? This can be answered 'Yes' or 'No'."

"Q. Now, that wasn't followed; you took Santa Claus out of the plane, walked off and came back?

"A. Yes, sir."

The jury answered the Interrogatory No. 2, "Yes"; so the jury found that Holland's negligence was the proximate cause of the injuries received by the little girl. In *Walton* v. *Tull,* 234 Ark. 882, 356 S. W. 2d 20, we quoted from *Hill* v. *Wilson,* 216 Ark. 184, 224 S. W. 2d 797, on this matter of an intervening act of a third person:

" 'The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if . . . a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted.' "

The pilot admitted that he knew people were under the helicopter when he reached in to turn off the motor. Some of the people under the blades testified as to having to "duck" to avoid being hit; and one brave police officer grabbed the blades to prevent injury to others. There was evidence sufficient to support the jury's finding that there was no intervening efficient cause: it was all one continuous procedure; a series of errors, in landing in the wrong place, leaving the helicopter unattended to escort "Santa Claus" away, leaving the motor running, failing to adequately set the rotor brakes, and turning off the motor without getting persons from under the blades. Which was the proximate cause? All of these acts blended together to produce the injury to this little girl; and there was no error in the Court's refusal to give the appellants' Instructions Nos. 8 or 9.

III. *Excessiveness Of The Verdict.* Finally, the appellants argue that the verdict in favor of Mary Gen Jones for $10,000.00 is grossly excessive; and on this point we see no merit whatsoever. When she was struck she screamed and turned her face to her mother, blood gushed from her mouth and nose, she was hysterical, and it was thought that she was bleeding to death. She was taken by ambulance to the hospital and given sedatives and a tetanus shot, her nose was stitched and

packed. Finally, she recovered sufficiently to be taken to her home in Nevada County; but the doctor who treated her testified that she would always have scars on her nose, which is depressed on the left side, and that she would always have black circles under her eyes. It was testified that as a result of the injuries she developed a nervousness, like biting her fingernails, which she had never experienced before. Discounting all the pain and suffering, this little girl has a flattening in the middle region of her nose, two scars on her nose, and a permanent discoloration under her eyes. If all this had happened to a little boy it might have been different; but where is the girl who does not want to be a beauty? Where is the little girl who does not aspire to be a Miss Arkansas or a Miss America? This little girl, with these scars and this discoloration, will go through life without the expectation that other little girls have in this regard. We refuse to say that the verdict is excessive.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

COPELAND *v.* HARNESS.

5-3266 379 S. W. 2d 1

Opinion delivered May 18, 1964.

[redacted]

N. J. Henley, for appellant.

C. Byron Smith, Jr., for appellee.

PAUL WARD, Associate Justice. This litigation is concerned with the interpretation of the last will and testament of W. B. Harness. The pertinent facts are not in dispute.

Background Facts. Harness died testate on May 12, 1961 seized of 200 acres of land on which he and his wife, Martha, had lived for many years. They had no children but Mr. Harness had several brothers, sisters, nephews and nieces—all of whom are parties herein. Harness' will (which was duly probated) in all material parts, reads as follows:

"Third . . . (a) It is my desire, will and direction that my said wife, Martha J. Harness, shall have and enjoy a life's estate in all the lands of which I die siezed and possessed.

"(b) At the death of my said wife it is my desire that my Nephew, Elmo Harness, shall have and enjoy a life's estate in said lands, and upon his death his son, Robert James Harness, shall succeed to a life's estate in my lands.

"(c) Provided, that in the event that either the said Elmo Harness or his son, Robert James Harness shall fail, refuse or neglect to actually live on my lands and should further fail, refuse or neglect to farm and care for same in a careful and husbandlike manner, then, and in that event, it is my will and direction that all of my real estate shall descend to my next of kin then living according to the laws of descent and distribution according to the laws of this state."

After the death of Martha on June 27, 1962 appellants (33 in number) filed suit on January 17, 1963 contending Elmo had forfeited his life estate by failing to live on and farm the land, and asking that the lands be sold and the proceeds divided among the heirs. The defendants (appellees here) were Sparlin Harness (a brother of the deceased), Elmo Harness (a nephew of the deceased), and Robert (a son of Elmo). Elmo contended he was living on and farming the land as required by the will, and Robert asked (if the court holds Elmo has forfeited his estate) that he be given a chance to live on and farm the land. All parties joined in asking the court to construe the designated portions of the will. At the close of a full hearing the court, in effect, held:

One. At Martha's death Elmo received a life estate under subsection (b) of the will, and he has substantially complied with the terms of subsection (c).

Two. If, in the future, Elmo fails to comply with subsection (c) Robert will have the right to protect his father's estate and his own interest.

Three. At Elmo's death Robert will receive a fee simple title to all the lands.

One. After carefully reviewing the testimony of the several witnesses under the applicable rules for construing wills we cannot say the trial court was wrong on this particular point.

Tending to show a forfeiture on Elmo's part, appellants' testimony, in substance, showed: Elmo lives in Little Rock, and no farming has been done on the land since June 27, 1962; the fences are in bad shape. Also Elmo was heard to say he and his wife made too much money in Little Rock to leave their home there.

To the contrary, testimony on behalf of appellees was in substance, as hereafter set out. Elmo testified: I took possession of the farm on August 4, 1962 (after Mrs. Harness died on June 27, 1962), and I have done everything I could do to improve the place; I have cut hay, trimmed hedges, and built some gates; I cut and

used about fifty posts in fixing the fences which were in pretty bad shape; with two exceptions I have been up to the farm every weekend and I consider the farm as much my home as my house in Little Rock. I have plans to farm this land in the future, and put cattle on it—and I have paid the taxes. Elmo's testimony was corroborated by his wife and several other witnesses.

The rules for construing wills have been stated many times by this Court. They are well stated in *Cross* v. *Manning,* 211 Ark. 803, 202 S. W. 2d 584, where there appears the following rules:

1. " 'The paramount principle in the construction of wills is that the general intention of the testator, if not in contravention of public policy or some rule of law, shall govern.'

* * * * *

5. " 'Wills are liberally construed, and every legitimate conclusion is indulged in order to reach a just and equitable result . . . and in cases of doubt the construction should be in favor of the first taker because it is against the policy of the law to tie up property . . .' "

Applying these rules to the facts in this case and the wording used by the testator, we think the trial court was correct in concluding the testator did not mean Elmo had to live continually on the land in order to enjoy a life estate. It appears from the record that Elmo has improved the property since he has had it in charge, and that the land is in better condition now than it was when Mr. Harness died. Also, we must assume Mr. Harness was aware of the fact that Elmo and his wife made their living in Little Rock, and it is unreasonable to believe he expected them to give up their jobs and spend all their time on the farm. Moreover, Elmo testified he had certain plans regarding the farm in the future, and it seems only fair that he should be given a reasonable opportunity to perfect those plans. This suit was filed only a few months after Mrs. Harness died. What Elmo may or may not do in the future is not our concern at this time.

Two. We are unable to agree that Robert can "step in" and enjoy a life estate in the land—by complying with sub-paragraph (c) of the will—when and if Elmo forfeits his life estate. In a sense this question is not before us now because we are holding Elmo has not committed a forfeiture. We do consider the question however in an effort to prevent possible useless litigation in the future. It seems to us that the language in sub-paragraph (c) of the will is plain and unambiguous, and that the intent of the testator is un-mistakable. The language used, stripped of the irrelevant parts, reads: ". . . in the event . . . Elmo Harness . . . should fail, refuse or neglect (etc.) . . . it is my will and direction that all my real estate shall descend to my next of kin then living . . ." This language, in our opinion, clearly eliminates Robert's life estate IF and WHEN Elmo forfeits his life estate.

Three. It is our conclusion that the trial court also erred in holding that, upon Elmo's death, Robert would receive a fee simple title to the 200 acres of land. The principal argument advanced by appellees to support the finding of the trial court is based on certain language used in the case of *Union Trust Company* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349. The language referred to (found at page 164 of the Arkansas Reports) reads:

"In construing wills, the general rule is that a gift for life without a limitation over passes a fee in real estate and an absolute interest in personalty, even though words denoting a life estate was intended were used."

Applying the above language to the facts in this case appellees very cleverly point out that (under the wording of the will) Robert is given a life estate "without a limitation over" and that, consequently he gets a fee. For several reasons we are not convinced by this argument.

The above quoted rule is limited by the language which follows in the same paragraph and reads:

"However, a clear gift to one for life, without a limitation over, is held not enlarged to a fee by such

omission, unless a declared purpose is shown to dispose of all the testator's estate by will . . ."

We find no such "declared purpose" in the will under consideration. In fact, just the opposite is shown, because in sub-paragraph (c) it is expressly provided that the estate "shall descend . . . according to the laws of descent and distribution . . ." The *Madigan* opinion was cited in the case of *Rufty* v. *Brantly,* 204 Ark. 32, 161 S. W. 2d 11, where the language above discussed was quoted in full, and the Court made the following comment: "This is, of course, a mere rule of construction, to be applied only in the circumstances stated, without the application of which the testator's intention may not be determined." We do not think it is necessary to resort to this seldom used rule in order to determine the testator's intention here. He used essentially the same words in giving Elmo a life estate that he used in giving Robert a life estate, and yet no one would contend that Elmo got a fee. We believe the testator clearly intended to give Robert a life estate only. Another circumstance somewhat supports our belief. Mr. Harness clearly desired his land to remain as long as possible in the name and under the control of someone bearing the name of "Harness". He knew this desire would more likely be fufilled if Robert took a life estate. On the other hand, he knew that, if Robert took a fee, he could dispose of the land at any time he pleased.

It is our conclusion, therefore, that the decree of the trial court should be, and it is hereby, affirmed in part and reversed in part as heretofore indicated.

McFaddin, George Rose Smith, and Robinson, JJ., dissent in part.

Ed. F. McFaddin, Associate Justice (dissenting in part). I agree with all of the Majority Opinion except that part which says that Robert would lose his life estate if Elmo's life estate should be forfeited.

As I read the will, bearing in mind the rules of construction stated in such cases as *Cross* v. *Manning,* 211

Ark. 803, 202 S. W. 2d 584, and *Thompson* v. *Ark. Natl. Bank,* 220 Ark. 802, 249 S. W. 2d 958, I reach these conclusions: that if Elmo's life estate should be forfeited, then Robert's life estate would come into existence just the same as it would on Elmo's death; and that on the death of Robert, or the forfeiture of his life estate, descent would then be cast to the heirs at law of W. B. Harness.

GEORGE ROSE SMITH and ROBINSON, JJ., join in this dissent.

RUSH *v.* STATE.

5095 379 S. W. 2d 29

Opinion delivered May 18, 1964.

Hardin, Barton and *Harton,* for appellant.

Bruce Bennett, Attorney General, By *Jerry L. Patterson,* Asst. Atty. Gen., for appellee.

SAM ROBINSON, Associate Justice. Appellant, Fred Rush, hereinafter sometimes referred to as Fred, has appealed from a conviction of murder in the first degree resulting in a life sentence in the penitentiary for the alleged killing of his step father, Paul Rush, hereinafter sometimes referred to as Paul, who was also Fred's adoptive father. The State's theory of the case is that Fred, his cousin Raymond Wood, and Carolyn Brown, entered into a conspiracy to kill Paul, and did kill him about 11 p.m. on May 13, 1962.

The State contends that in carrying out the conspiracy, in the early part of the night of May 13, Fred went by the V & R Sales Company, a furniture factory operated by the Rush family in Ft. Smith, and intentionally left a light burning on the third floor of the building; that later, in accordance with the plans of the conspirators, he drove by the building with his wife, and his children by a former marriage, and pretended to discover the light burning; that he then went to the apartment of his father, Paul, who was at the time separated from Fred's mother, and inveigled him into going to the factory with appellant to investigate the reason for the light burning; that in furtherance of the conspiracy, Raymond Wood was hidden in the building armed with a .22 caliber rifle waiting to kill Paul; that Carolyn Brown was waiting for Wood in an automobile outside the factory to enable him to escape after having killed Paul; that Wood did kill Paul and was driven away from the scene by Carolyn as planned; that in addition to killing Paul by shooting him in the neck with a .22 caliber rifle, Raymond shot Fred in the shoulder to allay any suspicion that Fred was in any manner involved in the killing.

Immediately after the killing, Fred was taken to a hospital and while there he was questioned by officers of the law.

Pat Taylor, a paramour of Fred's, was living in a motel in Ft. Smith with her cousin, Carolyn Brown. The next day, after the killing, Pat Taylor, Raymond Wood

and Carolyn Brown were questioned by officers; the questioning continued from time to time for months; they denied any knowledge of the killing.

Fred appears to be pretty much a libertine; although he was married and was living with his wife, he was keeping Pat Taylor. About nine months after the murder of Paul, Fred quit Pat Taylor and began to bestow his affections on one Louise Bromley. Along about the first of February, 1963, he left Ft. Smith with Louise Bromley and Carolyn Brown. They went to Houston, Texas, where they all lived together in an apartment.

About a month after Fred left for Houston with Carolyn Brown and Louise Bromley, and after first conferring with one Burnside, a professional bondsman and private detective, who had been engaged by the heirs of Paul, Pat went to the law enforcement authorities and told them that Fred, Raymond Wood and Carolyn Brown had conspired to kill Paul; that the plans to carry out the conspiracy had been worked out in her (Pat's) apartment in her presence. The arrest and conviction of Fred followed.

On appeal, appellant first contends that the court erred in refusing to grant a change of venue. At the hearing on the petition for change of venue it was shown that a local newspaper had given extensive coverage to the testimony of Pat Taylor and Bill Irons, witnesses for the State, who had testified at the preliminary hearing, and that there was great interest in the case all over the county. Attached to appellant's petition for a change of venue were the affidavits of about twelve residents of Sebastian County not related to the defendant. The substance of the affidavit is that the defendant could not get a fair and impartial trial in the county. The affiants appeared at the hearing on the petition and gave sworn testimony verifying what was said in the affidavits. There is no indication that any of the affiants is not a person of good character. The State offered no counter-affidavits and no rebuttal testimony.

Prior to the adoption of Initiated Act No. 3, adopted by the voters in 1936, our change of venue statute read: "Such order of removal shall be made on the application of the defendant by petition setting forth the facts verified by affidavit, if reasonable notice of the application be given to the attorney for the State, and the truth of the allegations in such petition be supported by the affidavits of two credible persons who are qualified electors, actual residents of the county and not related to the defendant in any way." C. & M. Digest (1921), § 3088.

This court has held that under the provisions of the foregoing statute the only issue to be decided on a petition for change of venue is the credibility of the affiants. The allegation of inability to obtain a fair trial could not be controverted. *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346; *Strong* v. *State,* 85 Ark. 536, 109 S. W. 536. It was also held that a credible person, within the meaning of the statute, is one who has knowledge of the feeling of the people throughout the county and is not merely a person ordinarily considered to be worthy of belief. *Duckworth* v. *State,* 80 Ark. 360, 97 S. W. 280; *Speer* v. *State,* 130 Ark. 457, 198 S. W. 113; *Williams* v. *State,* 162 Ark. 285, 258 S. W. 386; *Hedden* v. *State,* 179 Ark. 1079, 20 S. W. 2d 119.

As heretofore mentioned, the change of venue statute was revised by Act No. 3. The statute now provides for the filing of counter-affidavits and the taking of testimony on the truth of the facts set out in the original affidavits, and provides that the court shall grant or refuse the petition according to the truth of the facts alleged in it and established by the evidence. Ark. Stat. Ann. § 43-1502 (1947). And this is the method that has been used since the adoption of Act. No. 3. *Lauderdale* v. *State,* 233 Ark. 96, 343 S. W. 2d 422; *Perry & Coggins* v. *State,* 232 Ark. 959, 342 S. W. 2d 95.

In *Leggett* v. *State*, 227 Ark. 393, 299 S. W. 2d 59, hundreds of veniremen had been examined for the trial on the merits before the filing of the petition for change

of venue, and the jury was almost complete. From the testimony of the veniremen, previously heard, the court was able to reach the decision that the defendant could obtain a fair and impartial trial in the county.

In *Robertson* v. *State,* 212 Ark. 301, 206 S. W. 2d 748, the court said: ". . . The jurisdiction of trial courts has been enlarged to permit inquiry which before the adoption of Initiated Act No. 3 was not permissible. Pursuant to this enlarged authority the court heard the testimony of other witnesses besides that of the supporting affiants and announced the conclusion that appellant could obtain a fair trial in that jurisdiction. We may therefore review only the exercise of the judicial discretion vested in the court *and in view of the conflicts in the testimony,* we are unable to say that any abuse of this discretion was shown." (Emphasis added.)

In the case at bar there is no conflict in the testimony on the petition for change of venue. As heretofore mentioned, the State produced no affidavits and no witnesses on the question, and we cannot say that the court did not abuse its discretion in denying the petition for change of venue. We, therefore, hold that appellant is entitled to a change of venue.

On voir dire examination, the talesman C. E. Laws, stated that he rented a building to the V & R Sales Company (the Rush Company), and had discussed the case with an employee of that company; that such employee was listed as a witness, and that he (the venireman) had an opinion which would take evidence to remove, but that he could set aside the opinion and try the case on the evidence introduced at the trial and the instructions of the court. The defense challenged the venireman for cause; the court held that he was qualified; exceptions were saved.

In numerous cases this court has held that although a venireman has formed an opinion, from rumor and the reading of newspapers, that would take evidence to remove, he is qualified if he can go into the jury box and give both the State and the defendant a fair and impar-

tial trial and base his verdict only on the evidence introduced in the case and instructions of the court. *Hardin* v. *State,* 66 Ark. 53, 48 S. W. 904; *Ham* v. *State,* 179 Ark. 20, 13 S. W. 2d 805; *West* v. *State,* 150 Ark. 555, 234 S. W. 997; *Niven* v. *State,* 190 Ark. 514, 80 S. W. 2d 644. There it was pointed out that the venireman had not talked with any witness; *Howell* v. *State,* 220 Ark. 278, 247 S. W. 2d 952; *Leggett* v. *State,* 227 Ark. 393, 299 S. W. 2d 59. In *Lauderdale* v. *State,* 233 Ark. 96, 342 S. W. 2d 422, it was pointed out that the venireman had not talked to a witness.

But we have been cited to no case, and we have found none, holding that one is qualified to serve on a jury who has talked with a witness in the case and has formed an opinion that would take evidence to remove. We have at least two cases holding to the contrary. *Caldwell* v. *State,* 69 Ark. 322, 63 S. W. 59; *Lane* v. *State,* 168 Ark. 528, 270 S. W. 974. The court erred in holding the venireman, Laws, to be qualified to serve as a juror.

Carolyn Brown testified as a witness for the defense. She stated that on the night of the killing she and Raymond Wood had a date; that they drove to the top of a nearby hill and while there they fired a .22 pistol at some cans. From the record it appears that Wood had borrowed the pistol from appellant, who had a collection of guns. The prosecuting attorney had possession of the pistol in question. On cross-examination of Carolyn, she identified the pistol; over defendant's objection, the State was allowed to introduce it in evidence.

The State concedes that ballistic tests had been made and the pistol was not the weapon used in killing Paul Rush. But the State contends that the fact that Carolyn Brown and Raymond Woods had the pistol in some way corroborates Pat Taylor, and that the pistol was, therefore, admissible in evidence; but nowhere is it pointed out in what manner the pistol in any way corroborates Pat Taylor, and we have not discovered from the record how the pistol corroborates her. The pistol in question is very heavy for a .22 caliber; it has a 9-inch barrel, and

is rather wicked looking. The very fact that the pistol was admitted in evidence could have had a tendency to confuse the jury, notwithstanding there is no contention on the part of the State that the pistol was used in the killing. In these circumstances we do not think the pistol was admissible in evidence. *Everett* v. *State,* 231 Ark. 880, 333 S. W. 2d 233.

According to the testimony of Pat Taylor, she was, as a matter of law, an accessory before and after the fact to the killing. She testified that preparations were made in her apartment for the killing; that Raymond Wood's hair was dyed by Carolyn Brown; that appellant cut strips of adhesive tape to put on automobile tires to disguise the tire tracks, and an automobile license number was changed, all in her apartment; that after the killing she assisted in removing evidence of the dye which she said had been on Wood's hair. These facts constitute her as an accessory. *Froman* v. *State,* 232 Ark. 697, 339 S. W. 2d 601. There is no distinction between an accessory before or after the fact and a principal. Ark. Stat. Ann. § 41-118 (1947).

By Instruction No. 7, dealing with the requirement that an accomplice must be corroborated, the court left it to the jury to say whether Pat Taylor was an accomplice. The appellant argues that the court should have told the jury that as a matter of law she was an accomplice. The instruction is not inherently erroneous and appellant made no specific objection; therefore, the point was not preserved for consideration on appeal.

Other points are argued which we do not discuss because they are not likely to occur at a new trial.

For the errors indicated, the judgment is reversed and the cause remanded for a new trial.

McFaddin, J., concurs.

Ed. F. McFaddin, Associate Justice (concurring). I agree that the judgment of the Circuit Court should be reversed (a) because of the juror, C. E. Laws; and also

(b) because of the admission of the pistol. Both of these matters are clearly stated in the Majority Opinion.

But I do not agree with the holding of the Majority in regard to change of venue. I am firmly of the view that when a defendant moves for a change of venue he has the burden; and if his witnesses fail to establish his claimed change, then the Court can so hold. In this case I think the defendant's witnesses failed to establish the defendant's right to a change of venue; and I think the Circuit Court was correct in refusing the change of venue.

HERRINGTON *v.* HALL.

5-3277 381 S. W. 2d 529

Opinion delivered May 18, 1964.

[Rehearing denied September 21, 1964.]

Max Smith and *Paul K. Roberts,* for appellant.

George H. Holmes and *George N. Holmes,* for appellee.

SAM ROBINSON, Associate Justice. In September, 1962, an initiated petition to adopt a countywide stock law, purported to have been signed by 465 qualified electors, was filed with the County Clerk of Cleveland County. Acting under authority of Ark. Stat. Ann. § 2-303 (Repl. 1956), the Clerk certified the petition as sufficient to the County Board of Election Commission-

ers. On October 1, 1962, appellants herein filed a complaint in the Cleveland Chancery Court attacking the sufficiency of the petition and asking that the defendants be enjoined from placing the measure on the ballot for the election to be held on November 6.

On October 3, 1962, the plaintiffs gave notice to the defendants that there would be a hearing on the petition, by the court, on October 8. On October 8 the defendants filed a motion to quash and dismiss the complaint. There was no hearing on October 8 on the original complaint or the motion to dismiss. The record is completely silent as to the reason the issues were not presented to the court. In fact, there is no showing that any attempt was made to have a hearing on the complaint or the motion.

The measure was placed on the ballot; the election was held on November 6; the vote was 939 in favor of the stock law and 775 against it.

On December 31, 1962, appellants herein, who are the same persons who filed the original suit on October 1, 1962, filed a second suit making the prosecuting attorney of the district, the sheriff, and the County Judge of Cleveland County parties defendant. The second suit alleges insufficiency of the petition for the election, and asks that the defendants be enjoined from enforcing the stock law adopted at the November election. The first suit was considered as being consolidated with the action filed on December 31. A full scale hearing was held. The chancellor held in favor of the petition; the plaintiffs—those attacking the petition for the election—have appealed.

First, appellants argue that the trial court erred in not holding a hearing on the original petition prior to the election on November 6. The record does not show that appellants requested the court to try the case, and there is no record of any objection to the failure of the court to grant a trial. Furthermore, the failure of the court to decide the case prior to the election did not affect the validity of the election. Amendment No. 7 to the Constitution—the I & R Amendment—provides: "If the sufficiency of any petition is challenged such cause

shall be a preference cause and shall be tried at once, but the failure of the courts to decide prior to the election as to the sufficiency of any such petition shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure, if it shall have been approved by a vote of the people."

In arguing that the petition for the election is invalid, appellants contend that five of the petitions circulated for signatures of electors are invalid because they have no verifying affidavits; that others have false and fraudulent affidavits attached; that some are signed by persons other than those whose signatures they purport to be; that the trial court erred in admitting evidence as to the true identity of some of the signers of the petition. All of these points have to do with the sufficiency of the petition for the election.

The sufficiency of the petition cannot be questioned after the election. This court said in *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. 2d 485: "It, therefore, appears that after a question is submitted to and voted upon by the people, the sufficiency of the petition is of no importance. It is not important because, whether sufficient or insufficient, if the measure is adopted by the people at the election, it becomes the law . . ."

Appellants further maintain that the stock law measure adopted by the people of Cleveland County conflicts with Ark. Stat. Ann. § 41-430 (1947) which prohibits the running at large of certain livestock on the public highways. We can see no conflict between the measure under consideration and the aforesaid statute.

Affirmed.

Opinion delivered May 18, 1964.

Cockrill, Laser, McGehee & Sharp, for appellant.

Murphy & Arnold, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises after entry of a nunc pro tunc order following an earlier appeal to this court. In 1958 appellee Bartis Robinson was injured in an automobile accident in Illinois, while riding as a passenger in a car driven by Forrest B. Booth, an Arkansas resident and an insured of appellant Southern Farm Bureau Casualty Insurance Company. After the accident, Booth returned to Arkansas. Appellee sued Booth in Illinois and obtained a default judgment against Booth for $20,000. Appellant insurer had appeared to defend Booth and then withdrew from the case prior to the defaulted judgment. The Illinois judgment was reduced to an Arkansas judgment on January 2, 1961. After an execution issued against Booth was returned unsatisfied, appellee filed suit directly against appellant under the authority of our "direct action statute," Ark. Stat. Ann. § 66-526, since repealed and re-

placed by Ark. Stat. Ann. § 66-4002 (Supp. 1963). Following a jury verdict, judgment was obtained by appellee against appellant. The jury failed or refused to award interest and the court thereafter granted appellee's motion for judgment notwithstanding the verdict to include interest. From the judgment, which totaled $9,637.55, appellant appealed to this court. See *Southern Farm Bureau Casualty Ins. Co.* v. *Robinson,* 236 Ark. 268, 365 S. W. 2d 454, for additional factual background in this involved litigation as well as the law of that case.[1] This court held, *inter alia,* that appellee was entitled as a matter of law to interest if he was entitled to a judgment, citing the mandatory tenor of Ark. Stat. Ann. § 29-124 (Repl. 1962).

This court's mandate was filed in Independence Circuit Court on April 9, 1963, and thereafter appellant tendered to appellee the sum of $9,637.55 with six percent interest on *that* sum from October 26, 1961. Appellee refused this tender, insisting that he is entitled to the $9,637.55 plus interest computed on the entire $20,000 original judgment. Appellee filed a motion for order nunc pro tunc, alleging that there was an ambiguity or a scrivener's error in the judgment affirmed by this court. At hearing on the motion on September 25, 1963, the trial court found and held:

"On or about 1/29/62 this court advised counsel by letter that the motion for judgment notwithstanding the verdict was being granted. This ruling announced by letter, was intended to mean just exactly what it said, 'that the motion was granted.' There was no limitation in the ruling, and the court has the very distinct recollection that it was the court's intention at that time that the interest be computed until paid on the amount of the Illinois judgment, which was $20,000.00. It was not until the filing of this motion for order and judgment nunc pro tunc on interest that the court became aware that counsel for the plaintiff had committed a scrivener's

[1] See also 76 A.L.R. 2d 983 and 1964 Supp. Service, Liability insurer's liability for interest and costs on excess of judgment over policy limit, §§ 3, 4.

error in the precedent submitted to the court, and by doing so did not prepare a judgment which spoke the truth.

"Wherefore, the court orders that the judgment of 1/29/62 be corrected to speak the truth nunc pro tunc.

"Wherefore, it is considered, ordered and adjudged that interest be computed on $20,000.00 at the rate of 6% per annum from October 26, 1961, until date of tender of the correct amount of the judgment and interest, in addition to the other sums for which judgment was entered by the court on January 27, 1962, and that execution or other appropriate process may be issued therefor, and this judgment having been made on the 27th day of January, 1962, and it inadvertently omitted from the records, it is entered nunc pro tunc." From this order, appellant has prosecuted this appeal urging that the trial court erred in granting appellee's motion for order and judgment nunc pro tunc on interest.

There can be little doubt about the power of a trial court to entertain and grant an order nunc pro tunc, *Fitzjarrald* v. *Fitzjarrald,* 233 Ark. 328, 344 S. W. 2d 584, even during or after appeal, *Davie, Executrix* v. *Smoot,* 202 Ark. 294, 150 S. W. 2d 50; *Chronister* v. *Robertson,* 208 Ark. 11, 185 S. W. 2d 104. As stated in *Wright* v. *Ford,* 216 Ark. 55, 224 S. W. 2d 50:

"The common law rule that no judgment can be amended after the term at which it is rendered has been modified so that where the entry through some plain error fails to correspond with the judgment that was actually rendered, the court can at a later term correct the judgment, but there is no authority to revise a judgment, or to correct a judicial mistake, or to adjudicate a matter which might have been considered at the time of trial, or to grant an additional relief which was not in the contemplation of the court at the time the judgment was rendered."

A careful review of the record of this and the earlier appeal as well as our prior opinion fails to impeach the

credibility of the distinguished trial judge's statement in the nunc pro tunc order that "it was the court's intention at that time that the interest be computed until paid on the amount of the Illinois judgment, which was $20,000.00." Such interest was prayed for in the complaint and in the motion for judgment n. o. v. and was mentioned again in the alternative motion for new trial. The trial court granted this prayer without reservation. The attorney who prepared the precedent clearly made a scrivener's error. The state of the record being thus, the trial court properly granted the motion for an order nunc pro tunc to cause the judgment to speak the truth. *United Drug Co.* v. *Bedell,* 164 Ark. 527, 262 S. W. 316.

It follows, ergo, that appellant's tender of less than the total amount due failed to toll the running of interest. Appellant's "mistake in tendering an amount less than the sum due is the misfortune of the tenderer, the tender having no legal significance if refused, and the position of the parties remains the same as though no tender had been made." 86 C.J.S., Tender, § 7, p. 562; 52 Am. Jur., Tender, § 39, p. 243; *River Valley Cartage Co.* v. *Hawkins-Security Ins. Co.*, 17 Ill. 2d 242, 161 N. E. 2d 101, 76 A.L.R. 2d 978.

Affirmed.

WOOLARD *v.* THOMAS, COUNTY JUDGE.

5-3292 381 S. W. 2d 453

Opinion delivered May 18, 1964.

[Rehearing denied October 5, 1964.]

E. L. Holloway, for appellant.

Dennis L. Berry, for appellee.

FRANK HOLT, Associate Justice. The appellant, as a taxpayer, filed a petition in the Circuit Court seeking a declaratory judgment as to the constitutionality of Act 239 of 1953 [Ark. Stat. Ann. § 17-920—21 (Repl. 1956)]. This petition was consolidated with an appeal from the action of the Clay County Court, Western District, denying appellant's petition, as a taxpayer, in that court. Appellant's petition in the County Court, based upon Act 239 of 1953, stated an emergency existed because of the destruction of the Western District Courthouse by fire and because of the state of disrepair of the Western District Jail. The appellant petitioned the County Court to call an election pursuant to Act 239 of 1953 to determine whether the electorate of the Western District of Clay County would approve the construction of a courthouse and jail for that district and to levy a property tax only in the Western District of Clay County to pay for the proposed construction of the courthouse and jail as provided in Act 239. Also, the appellant alleged that approximately $17,000.00 had been paid to Clay County as insurance proceeds for property loss resulting from the destruction of the Western District County Courthouse and such proceeds should be credited in a special account and used only for the construction of a new courthouse

in the Western District and should not be commingled with the Clay County General Funds.

The Circuit Court affirmed the action of the Clay County Court in denying appellant's petition and held Act 239 of the Acts of 1953 unconstitutional insofar as the act authorizes a tax levy exclusively on property within one of two judicial districts within a single county to finance the construction or reconstruction of a courthouse or jail within the judicial district; and that the insurance funds in question were properly paid into the Clay County General Fund for appropriation and expenditure by the county. For reversal appellant first contends that the court erred in holding Act 239 of 1953 unconstitutional.

By Act 14 of 1881 Clay County is divided into two separate judicial districts, the Eastern and Western. This act also provides that all revenues from all sources shall be used for the exclusive benefit of the district in which the revenues arise. Act 239 of 1953 provides, *inter alia,* that where a county is divided into two judicial districts the qualified electors in each district have the power and the right, upon a finding of need by the County Court, to hold an election limited to that district for the purpose of approving the construction, reconstruction, or extension of a county courthouse and jail and the levying of an ad valorem tax solely upon the property in that judicial district to finance such construction.

We agree with the trial court in holding the act in question unconstitutional. The levy of a tax for a county purpose must be uniform on all the property of the county. Article 16, § 5, Arkansas Constitution of 1874. As to the construction or reconstruction of a county courthouse or jail, Amendment 17 of our Constitution vests the power and right of approval in the qualified electors *of each county.*

The case of *Hutchinson* v. *Ozark Land Co.*, 57 Ark. 554, 22 S. W. 173, arose from Clay County, also, and presented the question of the right of the County Court, in levying a tax, to fix a different millage for the Western

and Eastern Districts of the county. In construing Act 14 of 1881, which created the two separate judicial districts, we held that it was unconstitutional and in conflict with Article 16, § 5 of our Constitution insofar as it attempted to create two separate taxing districts in Clay County. There we said:

"* * * But it was not within the power of the legislature to create a district for the levy of the tax in question that did not embrace the whole county. The tax was for a county purpose, and its burden could not be imposed upon a part only of the county's territory. * * *

If the taxes levied in the two judicial districts of Clay county were not county taxes within the meaning of the constitution, then the county court had no power to levy them, and they were for that reason illegal. But if they were levied for county purposes, that made them county taxes, and the nature of such taxes required them to be imposed by a levy applicable to the entire county. Cooley, Taxation, 141, 152; *Pulaski County* v. *Reeve,* 42 Ark. 56. The expense of maintaining two judicial districts in a county is necessarily a county expense, and the revenue to pay it can be raised only by a county tax. Such a tax, to be valid, must be levied at a uniform rate upon all the taxable property of the county. Article 16, § 5, const.; * * * in determining this cause it is sufficient to say that these provisions cannot be treated as having created separate taxing districts without holding that they impair the unity and power which the constitution secures to Clay county as a political sub-division of the State."

Thus, we have clearly held that the levying of a county tax for county purposes must be uniform upon all property within a county and, therefore, a tax levy for a county purpose limited to a judicial district of that county is unconstitutional.

The levying of a tax for the construction of a courthouse is a tax levy for county purposes. In *Williams,*

et al, v. *Arkansas County Courthouse Improvement Distict, et al,* 153 Ark. 469, 240 S. W. 725, we said:

"If the expense of holding the courts and otherwise maintaining two judicial districts in a county is a county expense, it would seem that it necessarily follows that the *erection of a courthouse for the use of such district would also be a county expense.*" [Emphasis added.] It must be said that the construction or reconstruction of a district courthouse or jail is a matter of county-wide interest and responsibility and any tax levied for such a purpose is a tax levy for a county purpose.

The appellant next contends that the court erred in holding that the insurance proceeds paid to the county due to the burning of the Western District Courthouse should be placed in a special account and not credited to the County General Fund. In *Hutchinson* v. *Ozark Land Company, supra,* we said:

"All the affairs of the two districts are concerns of the county, and the expenses incurred in both, whether in the holding of courts or otherwise, constitute demands against the county; and a creditor of the county is not bound to look for payment alone to the district in which his claim arises. His claim being a debt of the county, a warrant issued upon its allowance is a county warrant, and as such the constitution makes it receivable for county taxes. const. art. 16, § 10. It is difficult therefore to see what effect can be given to the financial provisions of the act quoted above."

We agree with the trial court that the insurance proceeds in question were lawfully and properly paid into the County General Fund for appropriation and expenditure as county funds.

The judgment is affirmed.

LANGFORD *v.* GATES.

5-3292 381 S. W. 2d 456

Opinion delivered May 25, 1964.

[Rehearing denied September 14, 1964.]

W. H. Kitchens, Jr. and *Melvin Chambers,* for appellant.

Joe D. Woodward and *Harry Crumpler,* for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves the validity of a codicil, executed by Mrs. Hattie R. Gates. On March 28, 1947, following the death of her only child, and only descendant, Mrs. Gates executed a will, leaving all of her property to her husband, Walter L. Gates, appellee herein. Mr. Gates was Mrs. Gates' second husband, and the stepfather of her deceased daughter. On April 16, 1956, Mrs. Gates executed a codicil to her will, under which, at the death of her husband, all her property was devised to Harriet Langford "and the heirs of her body, who are William John Mitchell and R. Reed Mitchell." Mrs. Gates, 76 years of age, died on August 21, 1962, and appellee, then 75 years of age, offered her will for probate. The value of the

estate was listed as $500.00 for the real property and $500.00 for the personal property. The only heir of the deceased was W. O. Roberts, a brother, 75 years of age. Proof of Will was executed by two attesting witnesses, Wade Kitchens and Mrs. L. E. Adkins, Sr. Thereafter, appellant, Harriet Langford, for herself, and as natural guardian and next friend for her children, filed a petition for probate of the codicil heretofore referred to. The petition to admit the codicil was heard by the Probate Court, and, after a number of witnesses had testified, the court found that shortly after the death of decedent's daughter, Mr. Langford started corresponding with Mrs. Gates, and led the latter to believe that she (appellant) was a medium, capable of communicating with deceased persons, including the deceased daughter; that subsequently Mrs. Langford, and two minor sons moved to Columbia County.

"That throughout the acquaintanceship of the decedent and the Respondent, Harriet D. Langford, the Respondent continued to conduct purported seances, meetings and conversations between the decedent and her deceased daughter and other deceased relatives and continued to advise the decedent through her purported clairvoyant powers and that as a result of the same, the Respondent had complete power, control and total influence over the decedent.

"That shortly before the decedent executed the purported codicil to her last will dated the 16th day of April, 1956, the Respondent advised the decedent that she was able to foretell that the decedent and her husband, the Petitioner herein, would die together as a result of a common disaster and that the decedent's brother would inherit the decedent's estate against the decedent's wishes.

"That as a result of this advice the decedent made and executed the codicil to her last will dated April 16, 1956, and that the execution of same was a direct result of the Respondent's undue influence."

In accordance therewith, the court entered its judgment, finding that the codicil was induced by undue influence, and same was set aside, voided, and held for naught. From this judgment, appellants bring this appeal.

To properly understand the issue, it is necessary that a background of the facts leading to the litigation be set out. The evidence reflects that the daughter of Mrs. Gates, whose name was Harriet Wilkes (affectionately termed "Babe" by her family and friends), lived in California at the time of her death, but prior thereto had become acquainted with appellant in Portland, Oregon, in 1946. According to appellant, she (appellant) was a stenographer in a real estate office, and Mrs. Wilkes came to the office to see appellant's employer on business. While waiting, Mrs. Wilkes commenced talking with Mrs. Langford (at that time Mrs. Langford's married name was Mitchell). The two discovered that they had the same name (Harriet), and both were interested in the Spiritualist religion.[1] Thereafter, they attended church together several times, and became good friends. Mrs. Langford (Mitchell) moved to Minnesota, but maintained a correspondence with Mrs. Wilkes. One of the letters written by Mrs. Langford was returned by Mrs. Wilkes' secretary with a note that Mrs. Wilkes had died, and the address of her mother in McNeil was given. Appellant wrote to the mother, and the latter promptly responded, requesting information about her daughter and the association between the two. Thereafter, a steady correspondence was maintained, and finally Mrs. Langford invited Mrs. Gates to visit her while appellant's husband was in Korea. Mrs. Gates accepted the invitation, and spent six weeks in Minnesota. In 1953, Mrs. Langford's husband returned from overseas, and the two went to Fort Sill at Lawton, Oklahoma. Do-

[1] In the Encyclopedia Americana, Volume 25, Page 421 through 423, appears an interesting article on Spiritualism. The World Almanac of 1964 reflects that there are over 170,000 members of this religion in the United States, broken down as follows: Int. Gen. Assembly of Spiritualists, 164,072; Natl. Spiritual Alliance of the U.S.A., 3,208; Natl. Spiritualist Assn. of Chs., 5,721.

mestic difficulties arose, and appellant contacted Mrs. Gates, the latter inviting her for a visit, and during this visit, appellant met Mr. Gates. She subsequently returned to Lawton, obtained a divorce, and moved to Shreveport, Louisiana. There, she met Mr. Langford, and, according to the testimony of Mrs. Gilbert Marlar, wife of a McNeil minister, married Mr. Langford in the Gates' home. She and Mrs. Gates visited each other several times. On one occasion Mrs. Gates went to Shreveport to help with the children as one boy had polio. Subsequently, the Langfords moved from Shreveport to Wichita Falls, Texas, remaining there about six months. However, Mr. Langford did not like his employment there, preferring to work on tractors and farm machinery. While visiting in the Gates home, Mr. Langford was taken to prospective employers in that line of work by Mr. Gates, and Langford was subsequently given employment by Magnolia Motors. The couple then moved to Magnolia. This was in July, 1957, and, according to appellant, she and her family are still living there, purchasing a home.

The foregoing facts are undisputed in the record; likewise, it is undisputed that seances were conducted, and Mrs. Langford claimed on some of these occasions to have had communication with "Babe" and other members of the Gates family, including Mrs. Gates' parents, and two other daughters, Mary and Louise, who had been born prematurely and had died in infancy. These communications included reports of the activities of the deceased persons in the "spiritual world." Appellant wrote her impressions and gave them to Hattie Gates; the latter also, at times, felt that she was communicating with the "spiritual world," and made notes of her impressions, including conversations with her mother and father, two of her daughters, and other relatives. These messages were referred to as "readings."

Five witnesses testified in behalf of Mr. Gates, *viz,* Oren Roberts, a brother of Mrs. Gates; Lillian Butler Roberts, his wife; Mrs. Fay Reagan, a friend of the fam-

ily; Mr. Louis Braswell, a neighbor; and Cecil Fowler, superintendent of schools at McNeil, also a neighbor. All stated that Mrs. Gates strongly believed in the Spiritualist religion, and would frequently talk with the witnesses about this religion; that she was rather "fanatical" on the subject, but all likewise pretty well agreed that, outside of her religious discussions, and an extreme nervousness, her mental condition seemed to be entirely normal. Mr. Fowler specifically stated that in matters other than religion, Mrs. Gates appeared "as normal as the average person." Several of the witnesses testified that Mrs. Langford was frequently at the Gates home, and Mrs. Reagan stated that she felt that appellant exerted extreme influence over Mrs. Gates.

Mr. Gates testified that his wife had three children by a prior marriage, but only "Babe" survived to adulthood. He stated that he first heard of Harriet Langford soon after the daughter's death, and that it was because of the acquaintance of "Babe" with Mrs. Langford that the contact was made with his wife. He said that they corresponded nearly every week, and he further testified that, as far as he knew, his wife never believed in Spiritualism until after her acquaintance with appellant. Appellee stated that his wife went to Minnesota to learn more about the religion, and that she stayed in Minnesota about thirty days; upon her return, she had been converted, and believed in Spiritualism. Continuing, the witness stated that Mrs. Langford visited in the Gates' home on many occasions, and seances were held in the home. Mr. Gates testified that his wife became a nervous wreck, and that after a seance, or reading, she was upset for several days. He stated that he sat in on some of these as a matter of pleasing his wife, and pretended to believe in the religion in order to have "some peace in my home with my wife." Appellee testified that Mrs. Langford, in 1954, told them that they were going to die in a common disaster, apparently an automobile accident.

"She [referring to appellant] got my wife in such a nervous condition and so upset over it that she wouldn't

go anywhere in the car with me, wouldn't even come to town with me. She had her disturbed so there that she was afraid I was going to get in a wreck or something or another and kill both of us, she always preached about my driving. I drove a car back there in the old dirt road days and I drove over many states."

He stated that his wife's mental condition prior to the daughter's death in 1947 was very good, but subsequently, her mental condition was "terrible," and this condition generally grew worse after receiving a letter from, or engaging in conversation with, Mrs. Langford. Mr. Gates said that there was friction between his wife and her brother, W. O. Roberts, and his wife told him that she was going to make a will "so that if we were both killed during an accident and she fixed it so Harriet could get what was left." When asked if he thought it was his wife's intent to put a common disaster clause in the will, he replied, "that is what she should have done. * * * I think she did, that is what she told me." He stated that the will and codicil were kept by Mrs. Gates in a lock box in the home, and that he did not have access to the lock box, and did not see the will or codicil until after his wife's death.

Mrs. Langford denied mentioning anything about property to Mrs. Gates, denied making the statement about the common disaster, but stated that, while living in Shreveport,[2] Mrs. Gates, during a visit, told her one day,

" 'Now, I have something to tell you, and I want you to marks this well,' and I didn't know what was coming. I said, 'Well, what is it?' and she said, 'Last week we decided we would redo the will,' or something, I don't know just how she put it now, and she insisted I find something to write on and I had to scramble around to find a piece of paper and she said, 'No, something that is permanent,' and the only thing at hand was a beat up address book I keep and she said, 'Write this down:

[2] It is undisputed that Mrs. Langford was living in Shreveport on April 16, 1956, date of the codicil.

"Gates business,' " and I still didn't know what to think of it, I was sort of surprised, and she told me to write down the name of Wade Kitchens and I hadn't heard of it before and she said, 'His son is Hampton Kitchens. If I should pass away, you be sure to go to that office, there will be something there for you,' and I had no idea what or how much or anything, and I couldn't ask her, I was so surprised, I was sort of touched and too surprised to even ever ask her what it was.' "

She denied any knowledge of the codicil, or knowing of the devise, until after the death of Mrs. Gates, when Mr. Gates mentioned the codicil to her. Appellant stated that he told her the only reason the amendment had been made was to keep Mrs. Gates' brother, Oren, from getting any of the property, and he suggested that she go to Kitchens' office to see the will, and the amendment. Mr. Gates verified that he mentioned the codicil to her but said that he did not remember telling her that the codicil was added to prevent her brother and his family from inheriting as her next of kin. Mrs. Gilbert Marlar, wife of the Methodist minister of the church at McNeil through 1956, testified that Mrs. Gates was a strong willed person and that she did not see any difference in Mrs. Gates' mental capacity during the time that she knew her (through 1956).

This, then, is a summation of the evidence upon which the court found that undue influence had been exercised by Mrs. Langford over Mrs. Gates, and that the codicil was the result of such undue influence.

What is "undue influence?" In *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590, that term is given a definition that has been quoted and cited, as stated by the Arkansas Law Review[3] "with such frequency as to acquire the character of a juridictional classic." The opinion, written by Associate Justice William W. Smith, states:

[3] 7 Ark. Law Review, Page 116, a comment by George Banks Collins.

"As we understand the rule, the fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property. *And the influence must be specially directed toward the object of procuring a will in favor of particular parties.* [Our emphasis.] It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relations with them at the time of its execution."

The italicized phrase was emphasized in the case of *Allison* v. *Stroh,* 231 Ark. 862, 333 S. W. 2d 737, which opinion also quoted from *Davault* v. *Parks,* 190 Ark. 370, 79 S. W. 2d 68, as follows:

" 'Before a will can be invalidated upon the ground of undue infuence, there must be testimony proving or tending to prove that the influence was of such character as to destroy the testator's free agency, in effect substituting another's will in the place of his own, and the influence must be directed toward the object of procuring a will in favor of particular parties.' "

We are firmly convinced that, under the rule herein cited, together with cases hereafter mentioned, that the court erred in its finding, and should have admitted the codicil to probate.

What are the facts upon which appellee relies?

1. The evidence of Mr. Gates that Mrs. Langford had told appellee and his wife that they would die in a common disaster.

2. The fact that Mrs. Gates grieved terribly over the death of her daughter, and did not adopt the Spiritualist religion until becoming acquainted with Mrs. Langford.

3. The fact that Mrs. Langford and Mrs. Gates conducted seances, corresponded regularly, and visited regularly together.

4. The fact that Mrs. Gates apparently had complete confidence in Mrs. Langford, and, according to some witnesses, was strongly influenced by her.

It will be noted that there is *not a single line of evidence in this record to the effect that appellant directed any influence toward the object of obtaining a will in her favor (or in favor of her children)*. Frequently, where questions of undue influence arise, the party accused of exerting same is present when the will is made, or takes the testator to a lawyer's office. But here, it is undisputed that Mrs. Langford was in Shreveport at the time of the execution of the codicil, and there is no evidence at all that she knew the contents of the instrument until after the death of Mrs. Gates. The only evidence even coming close is the statement of Mrs. Langford that Mrs. Gates had told her that she was redoing the will, to go to Kitchens' office (after her death), and "there will be something there for you."

It was stipulated between counsel that the witnesses to the codicil, *viz,* Wade Kitchens and Gladys K. Pickens, would testify to the same facts sworn to in executing the "Proof of Will." This means that it is conceded that Mr. Kitchens and Mrs. Pickens would have testified that at the time of the execution of the instrument, Mrs. Gates appeared to be of sound mind, and acting without undue influence, fraud, or restraint. Actually, it would not appear that there was enough property involved to cause Mrs. Langford to design a course by which to obtain it, though the real estate is apparently somewhat more valuable than the figure given by Mr. Gates at the time of probating the will.

Of course, we are all influenced by our friends, and frequently seek their advice, very often in preference to seeking the advice of relatives, and it is not difficult to understand why these two women held a close rela-

tionship. Both had a common affection for the daughter who had died, and the fact that the daughter and Mrs. Langford both had the name, "Harriet," probably initially aroused some interest in Mrs. Gates; each was interested in the same religion, a religion which was not shared by anyone else in the community. Mrs. Gates' interest in this religion probably was stimulated by the fact that it was the religion of her daughter. In addition, Mrs. Gates was quite devoted to appellant's children, and, as previously mentioned, went to Shreveport to be of assistance when one of the children was stricken with polio. The proof thus establishes that they were unusually close friends, and it is not out of the ordinary for testators to remember friends in their wills. The affection that Mrs. Gates held for appellant is well demonstrated by the fact that the former presented to Mrs. Langford in January, 1954, a book, "Your Mental Mirror," which had been written by her daughter. In the book, Mrs. Gates wrote:

"Presented to Harriet G. Mitchell January 2, 1954 by Hattie Roberts Gates, mother of Harriet Clark Wilkes, in loving memory of my beloved daughter to a friend she loved so well. May the passing years cement our love for each other more closely and may we make great progress in the subject most dear to our hearts."

Let it be remembered that her husband was first provided for, and appellants would not receive anything until after the death of Mr. Gates. Here, a rather noticeable circumstance should be mentioned. The Chancellor apparently relied to a great extent upon the testimony of appellee to the effect that Mrs. Langford had stated that appellee and his wife would die in a common disaster, and he held that this influenced Mrs. Gates in making the codicil. Yet, if Mrs. Gates believed this statement, *why did she include Mr. Gates in the will at all?* He certainly could not enjoy a life estate if he were dead. It is established by the evidence, and stands undisputed, that Mrs. Gates did not like her brother, Oren Roberts, and it is easily understandable that she would

prefer to leave the remainder to friends, rather than to have her husband's relatives eventually take same.[4]

It is also observed that this codicil was not made during a last illness, or during a period of stress, but rather was executed a long time before the death of Mrs. Gates. In *Allison* v. *Stroh, supra,* we commented that the testator lived for almost four years after making the will; here, Mrs. Gates lived over six years after executing the codicil, and, accordingly, had every opportunity to make a change.

Actually, it appears that appellee's witnesses could not understand Mrs. Gates' adopting and becoming obsessed with a religion, some features of which, to a non-believer (in Spiritualism) might well appear farcical and preposterous, and this strongly contributed to their opinion of undue influence.

Be that as it may, under the facts in this litigation, we find nothing abnormal or particularly unusual in Mrs. Gates' disposition of the property, but were it otherwise, the result would be the same. As stated in 94 C.J.S., Section 226, Page 1075:

"Every influence exerted on a testator is not undue influence, and it is well settled that influence, consisting of appeals, requests, entreaties, arguments, flattery, cajolery, persuasion, solicitations, or even importunity, is legitimate and becomes 'undue,' so as to invalidate the will, only when it is extended to such a degree as to override the discretion and destroy the free agency of the testator."

As we said in *Allison* v. *Stroh, supra,* the undue influence must be of such character as to actually amount to substituting another's will in the place of that of the testator, and in *Black* v. *Dunklin,* 224 Ark. 528, 275 S. W. 2d 447, we find:

"Certainly, Mrs. Black had the legal right to dispose of her property in any manner that she saw fit, and the

[4] Mr. Gates has three nieces and one nephew, whose names do not appear in the record.

fact that such disposition might appear on its face to be unnatural, or inequitable, would have no bearing on the matter whatever—if such disposition expressed the will of Mrs. Black."

We are convinced that the codicil in question was voluntarily made, and expressed the desire of the deceased, *i.e.,* it was "her will."

In accordance with the reasoning set out herein, the judgment is reversed, and the cause is remanded to the Columbia County Probate Court, with directions to admit the codicil to probate.

GRAY *v.* STATE.

5110 379 S. W. 2d 22

Opinion delivered May 25, 1964.

Little & Enfield, for appellant.

Bruce Bennett, Attorney General, by *Russell J. Wools,* Asst. Atty. General, for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant Cecil Gray was charged, tried, and convicted of stealing twelve head of cattle of the value of $1,000.00 (Ark. Stat. Ann. § 41-3917 [1947]), and he brings this appeal. His motion for new trial contains six assignments; but we find no merit in any of them except those relating to the improper argument of the Prosecuting Attorney.

The defendant, Mr. Gray, testified that he moved from Texas to Arkansas in 1963 and purchased a farm of 200 acres near Huntsville in Madison County; that later he purchased a farm of 600 acres near Gatesway in Benton County and moved to that location in Benton County; that he did not buy any cattle, but raised hogs and goats; that he noticed stray cattle running on his Gatesway farm; that these cattle drank so much water from his troughs that it created a water shortage, so he drove the stray cattle into his corral; that on Sunday morning, June 23, 1963, he borrowed a truck from a neighbor and took the twelve head of stray cattle to his other farm in Madison County several miles away; and that he made two trips to takes the stray cattle from his farm in Benton County to his farm in Madison County. Mr. Gray claimed that he had no intention of stealing the stray cattle but was only removing them to get them away from his limited supply of water.

The State had shown that when Mr. Gray moved the cattle he had told several people he had bought them; that when he had first been asked on June 24th about moving the cattle he had denied ever having seen any cattle; that later, on June 26th, he had likewise denied to the Sheriff any knowledge of the cattle; but later he had admitted moving the cattle to Madison County, and that eventually he had gone with the Sheriff and Mr. Legg, the owner of the cattle, to Madison County, where Mr. Legg's cattle were located on Mr. Gray's place. In the face of all this testimony Mr. Gray insisted that he had no intention of stealing the cattle. He took the witness stand in his own defense, and on cross examination the following occurred:

"Q. Have you ever been convicted of anything?

"A. Never have been convicted in my life.

"Q. You haven't, now, down in — where did you come from?

"A. Texas.

"Q. Where in Texas?

"A. Angleton, Texas.

"Q. Do you know the sheriff down there?

"A. Jack Marshall.

"Q. Do you tell the jury you've never been convicted of anything or plead guilty to anything, under your oath? . . . Well, you know. Have you, or not?

"A. Now, I don't understand what you're talking about now.

"Q. Have you ever been convicted or pleaded guilty to any criminal offense at all?

"A. No, sir.

"Q. You understand what criminal offenses are? You are saying that, under your oath? We don't misunderstand each other?

"A. Not that I know of, I've never been convicted or plead guilty, or anything."

The excerpt, as above copied, seems to be all there is in the record concerning any testimony or evidence or question about previous conviction. With this as the background we come to the statements made by the Prosecuting Attorney in his closing argument. The entire closing argument of the Prosecuting Attorney was transcribed and is before us, and we copy the pertinent excerpt:

"MR. COXSEY: When the witness takes that stand and you ask him if he's been convicted of a crime—now follow me—and he says, no, we can't dispute it under the law. It's a collateral issue. You can't dispute it. Some of you may wonder if he is guilty, why we can't show it. We can't under the law. That's something between him and his own conscience and his own God and you tell me that he didn't perjure himself before the Almighty God and before man here? Not only is he guilty of taking cattle that don't belong to him and falsi-

fying to his fellow man, but he is guilty of perjuring his soul right here, and you know it, and he knows it.

"MR. LITTLE: Object and ask it be stricken.

"THE COURT: If you are going to object, I want to hear it.

"MR. COXSEY: He's going to object to everything I'm going to say.

"THE COURT: Overruled.

"MR. LITTLE: Save our exceptions."

We admire and commend a vigorous prosecuting attorney, as is the one in this case; yet there are certain limitations prescribed by our decisions as to the extent to which a prosecuting attorney—the representative of the State—may go in arguing the case to the jury. Here, we have a defendant on the witness stand who is asked and interrogated as to previous convictions. The State did not offer any previous conviction record, if there was such. Yet in the closing argument the Prosecuting Attorney said that even though the State could not impeach the testimony of the defendant as to previous convictions, still the Prosecuting Attorney knew that the witness had perjured himself on that point. This goes beyond the permitted line of argument.

We have a great number of cases on this matter of the extent to which a prosecuting attorney may go in his argument, and our Court has been more liberal in allowing arguments than have many other courts.[1] In *Carroll v. State,* 71 Ark. 403, 75 S. W. 471, we said:

"It is difficult to determine how far an attorney may go in expressing his opinion and conclusions on the facts as was the case in both these instances. The best the courts can do is to rule on questions of the kind very much as the circumstances of each case may determine."

[1] In 50 A.L.R. 2d 766 there is an exhaustive annotation entitled "Propriety and effect of prosecuting attorney's argument to jury indicating his belief or knowledge as to guilt of accused." In that annotation the holdings of the various jurisdictions are given. See also 53 Am. Jur. 392, "Trial" § 486.

In the light of our statement in *Carroll* v. *State, supra,* we reach the conclusion that the argument in the present case was improper and highly prejudicial. The State had introduced no evidence of any prior convictions of appellant Gray, and yet the Prosecuting Attorney told the jury he knew the defendant had committed perjury when he stated he had never been convicted of any offense. This was going too far. In *Hays* v. *State,* 169 Ark. 1173, 278 S.W. 15, the special prosecuting attorney in his closing argument stated facts that were not in evidence; and, in reviewing the case, because of the improper argument, we said:

"This court has been very careful to guard the rights of accused persons, and counsel for the State is never allowed to state facts which are not evidence for the purpose of securing a conviction. Counsel for the State not only stated that he believed that the defendant had carried the girl to El Paso, but that the presumption was that he had carried her there. As above stated, the court refused either to reprimand the attorney or to interfere with him in any way in making this kind of an argument. This amounted to an approval of the argument, and constitutes such prejudicial error as calls for a reversal of the judgment. *Doran* v. *State,* 141 Ark. 442; *Brown* v. *State,* 143 Ark. 523; *Crosby* v. *State,* 154 Ark. 20; and *Hughes* v. *State,* 154 Ark. 621."

The situation in the case at bar is similar to that in *Hughes* v. *State,* 154 Ark. 621, 243 S. W. 70, from which we copy:

"Lastly, appellant contends that his rights were prejudiced by the following statements of the prosecuting attorney made in closing the argument, to-wit: 'I know he is guilty, I am willing to meet my God in the next hour knowing that Hughes is guilty, because I am thoroughly convinced. I have examined the testimony and know so much about it, and know things that never get to anybody else.' When this statement was made, the counsel for appellant objected, and the court stated that the argument of the prosecuting attorney was im-

proper and the jury should not consider it. The statement was an attempt on the part of the prosecuting attorney to testify. He, in effect, said that he was in possession of facts which could not be revealed to the jury, but which riveted conviction upon appellant. Coming from a sworn official, the remark was calculated to make a deep impression upon the minds of the jurymen. It cannot, perhaps, be classed with remarks the effect of which cannot be removed even by a solemn admonition of the court, but it was certainly a flagrant violation of the right of appellant to a fair and impartial trial vouchsafed to him by the Constitution and laws of the State of Arkansas. Considering the highly prejudicial character of the remark, its effect could not be removed by a mild admonition of the court. We think the trial court, in the exercise of a sound discretion, should have challenged the statement, with such comment as the exigencies of the occasion demanded. He might have said that it was the sworn duty of the prosecuting attorney to reveal all the facts within his knowledge, and his failure to do so would have been proof conclusive that he had no such information; or he could have stopped the trial and required the attorney to establish the facts in his possession by competent testimony. Either course would have erased the ill effects of the remark from the minds of the jury, but, in the opinion of the majority, the mild admonition of the court, as indicated by the language used, did not meet the exigencies of the particular situation."

In the case at bar the defendant Gray duly saved his exceptions, no admonition of any kind was given, no withdrawal of the remarks was made; so we have no alternative except to reverse the judgment and remand the cause for a new trial.

NORTH HILLS MEMORIAL GARDENS *v.* SIMPSON.

5-3227 381 S. W. 2d 462

Opinion delivered May 25, 1964.

[Rehearing denied September 14, 1964.]

[redacted]

Russell & Hurley, Edwin E. Dunaway, for appellant.

Glenn F. Walther, for appellee.

GEORGE ROSE SMITH, J. This is the second application by the principal appellee, Rest Hills Memorial Park, Inc., for authority under the Cemetery Act to establish a new cemetery between North Little Rock and Jacksonville. Ark. Stat. Ann. §§ 82-411 *et seq.* (Repl. 1960). Both applications have been resisted by the appellant, which owns another cemetery, North Hills Memorial Gardens, situated about two miles from the site of the appellee's proposed cemetery.

Rest Hills' first application was denied by the Cemetery Board on March 26, 1962. The board's order is not in the present record, but apparently the application was rejected on the sole ground that sufficient grave spaces were available in other cemeteries to meet the public

need. Rest Hills took an appeal to the Pulaski Chancery Court, but the corporation elected to dismiss its appeal before the matter was heard by the court.

The present application was filed by Rest Hills in October of 1962. After an extended hearing the board changed its position and filed an opinion on March 29, 1963, granting the permit. North Hills appealed to the chancery court, where the board's decision was affirmed. This appeal followed.

At the outset the appellees, Rest Hills and three members of the Cemetery Board, attack the constitutionality of that section of the Cemetery Act that provides for an appeal to the chancery court. § 82-414. Counsel rely upon the settled rule that the legislature cannot enlarge or diminish the jurisdiction of equity as it existed when the Constitution of 1874 was adopted. *German Nat. Bk.* v. *Moore,* 116 Ark. 490, 173 S. W. 401.

We do not reach the merits of this contention. A constitutional question cannot be raised for the first time on appeal. *Latham* v. *Hudson,* 226 Ark. 673, 292 S. W. 2d 252. Even if the provision for a review in chancery is invalid it does not follow that there would be a complete absence of jurisdiction, as would be the case if the chancellor attempted to hear a criminal case. In this situation the appellees' jurisdictional objection cannot be interposed for the first time in this court. They waived the point by failing to seek a transfer of the cause to the circuit court. *Green* v. *Garrett,* 225 Ark. 311, 280 S. W. 2d 905.

It is first contended by the appellant that the board's original denial of Rest Hills' application for a permit is *res judicata.* It is true that when an administrative board acts judicially or quasi judicially its decision may be *res judicata* in a second proceeding involving the same question. *Bockman* v. *Ark. State Medical Board,* 229 Ark. 143, 313 S. W. 2d 826. We are not convinced, however, that all the technical rules that make up the common-law doctrine of *res judicata* should apply with equal force to administrative proceedings.

For example, if the plaintiff in a lawsuit loses his case on the merits because of his inadvertent failure to prove some fact essential to his cause of action he is not allowed to file a second suit and try the issues again. There is no good reason for applying this rule in an administrative matter such as this one. Counsel for the appellees point out that Rest Hills may have elected to dismiss its first chancery appeal and start over again for the reason that it did not then have title to the site of its proposed cemetery—a defect that might have been fatal. It would hardly be reasonable to deny a second application for an administrative permit merely because of some technical flaw in the first application.

Again, a decision at common law is conclusive not only of those matters that were actually litigated but also of those questions that were within the issues and might have been explored. This rule ought not to apply to the decision of a law body such as the Cemetery Board. Rest Hills' original application was denied on one ground only. At the second hearing the board considered additional matters, including the accessibility of the Rest Hills site, its beauty as compared to that of North Hills, and the various facilities that Rest Hills mean to provide. A chapel, a mausoleum, and a crematory were included in the applicant's long-range plans. An important consideration is "the need or desirability from the public standpoint of the proposed cemetery." § 82-419. If there is really a need for the proposed cemetery, as the board found, then the public interest should not be thwarted merely because Rest Hills did not present all its available evidence at the first hearing. The plea of *res judicata* was correctly rejected.

A second contention is that the board erred in finding that there was a public need for the Rest Hills cemetery. On this issue the testimony is in sharp conflict. Harry Leggett and Harold Brown, both of whom had extensive experience in this general field, gave their reasons for believing that the cemetery was needed. The appellant produced much evidence to the contrary. If

the case were being tried *de novo* we might be inclined to think the board's decision to be against the weight of the evidence. But that is not the standard of review. The question is whether the board's decision was arbitrary. *North Hills Memorial Gardens* v. *Hicks,* 230 Ark. 787, 326 S. W. 2d 797. In view of the persuasive proof proffered by both sides we are unable to say that the board's findings are not sufficiently supported.

In the chancery court the appellant made for the first time the interesting point that the Cemetery Board was not legally constituted. The original statute, Act 250 of 1953, created a three-member board. Ark. Stat. Ann. § 82-414 (Repl. 1960). In 1961, by Act 74, the legislature increased the membership to five (§ 82-414 [Supp. 1963]), but for some reason the two additional members had not been appointed when this application was heard by the board in the early part of 1963. The appellant insists that the proceedings before a board of only three members were void.

We are of the opinion that the board's action had at least practical validity. When there is a *de jure* office, as there was here, sound policy requires that the acts of a *de facto* incumbent be given effect. See *Pope* v. *Pope,* 213 Ark. 321, 210 S. W. 2d 319. Act 74 of 1961, *supra,* specifically provided that three members of the Cemetery Board should constitute a quorum and that orders should be made by majority action of the five members. All three members acted in this case. They were unanimous. Thus they exercised the same authority that they would have had if the other two members had already been appointed but had not been present at the hearings. In the absence of any timely objection to the composition of the board the appellant cannot be permitted to challenge the validity of the proceedings only after the decision has proved to be unfavorable to it.

The appellant argues several other grounds for reversal, some being that a member of the board was absent for four or five minutes during one of the hearings, that all the officers of Rest Hills were not excluded from

the courtroom during the trial in chancery, that the board should have required Rest Hills to contribute to its perpetual care fund more than the statutory minimum of 10% (§ 82-422), and that there are other prejudicial errors in the record. We have reviewed these arguments and find them to be without merit.

Affirmed.

JOHNSON, J. dissents.

JIM JOHNSON, Associate Justice (dissenting). I do not agree with the majority view. The entire record before us strongly indicates pungent tinges of an expedient opinion by the Arkansas State Cemetery Board, a ruling which on appeal can only be disturbed by a finding that the board acted arbitrarily. *Newton* v. *American Sec. Co.*, 201 Ark. 943, 148 S. W. 2d 311. In fact that majority concedes that "if the case were being tried de novo we might be inclined to think the board's decision to be against the weight of the evidence." The board's decision is not only against the weight of the evidence it is against virtually all of the evidence. On March 26, 1962, after a full and complete hearing on all issues this board judiciously denied appellee's application for a cemetery permit. A few short months later this same board based upon practically the identical testimony did a complete flip flop and granted appellee's permit. The record is silent as a tomb as to why. It is true as pointed out by this court in *North Hill Memorial Gardens* v. *Hicks,* 230 Ark. 787, 326 S. W. 2d 797, "there is nothing in Act 250 of 1953 calculated to create a monopoly in favor of existing cemeteries," still, in that case, we were careful to determine that Act 250 is a *banking* measure regulating the creation, maintenance and operation of perpetual care cemeteries, investing certain descretionary powers in the board not for the creation of monopolies but to insure the exercise of sound financial practices.

The legislature in its wisdom obviously recognized a need to protect the investiments of hundreds of thousands of the unsuspecting public when it enacted Act 250 of 1953. The law requires such cemeteries to set aside a percentage of the sales price of these lots in a perpetual

care fund, from which must be met the cost of maintaining these cemeteries eternally. The spirit of the act is to guarantee that persons who invest in lots for their loved ones in perpetual care cemeteries will receive what they pay so dearly for. Yet the record here shows beyond question that not a perpetual care cemetery in the Pulaski County area could fulfill this contractual obligation for perpetual care if their present sales were diminished. Even now some of these cemeteries appear to be teetering on the brink of bankruptcy. At this point there is not a perpetual care cemetery in the Pulaski County area which could be maintained by their perpetual care fund. Far from it. The record is as follows:

Pine Crest Memorial Park, Inc., is a garden type cemetery located ten miles west of Little Rock, approximately two miles from the Saline County line on the old Hot Springs highway. It consists of 229 acres, out of which 150 acres have been dedicated. 150,000 burial spaces have been sold from such 150 acres, and 206,000 more are available for sale from such acreage. Only 6,000 persons are buried in this cemetery, and its present rate of funerals is 300 per year. It maintains a perpetual care fund derived from 10% of the sale price of burial plots. At present the fund has a balance of $119,000.00, which earns from approxed investments about $4,000.00 annually. The cost of maintenance of the cemetery is $60,000.00 each year; therefore 1,000 spaces must be sold at an average of $100.00 each during the period of a year for the enterprise to operate successfully.

North Hills Memorial Gardens, a new cemetery, is situated midway between Little Rock and Jacksonville. It contains 200 acres, which will be utilized in both garden type and monument sections. At the present it has sold 1,000 burial spaces and is offering 179,000 additional spaces for sale. It must sell 500 to 600 spaces per year in order to meet its maintenance cost, which is presently $15,000.00. Forty-five persons are buried there.

Forest Hills Memorial Park is established on State Highway 5 at the Pulaski-Saline County line. In com-

prises 140 acres which if developed in entirety would require an expenditure of $35,000.00 per year for maintenance. Additional burial spaces in the amount of 40,000 should be sold in order to provide an annual income of $35,000.00.

Chapel Hill cemetery, containing 40 acres, is situated near Jacksonville. It has available for sale 19,000 spaces provided through the development of 20 acres and a like number of space can be secured by the development of the remaining 20 acres. Sales totaling $40,000.00 annually are necessary to meet the maintenance cost of $8,000.00.

Now against this overwhelming evidence appellant offered the testimony of its star witness, Mr. Harold Brown. Mr. Brown testified as an expert. He was qualified as follows:

"I live in Topeka, Kansas. I am a cemetery consultant, for approximately 11 years. You do not learn this in schools, but through experience. I was in the business 3 years prior to becoming a consultant. I act as a consultant on basic management problems relative to the business sales development. I consult with people before they go into the cemetery business. I do consultant work in several states, principally sales operation. I am consulted on almost every phase of the business. People consult me on all phases of the operation of the cemeteries. I am a member of the National Association of Cemeteries. These associations operate some schools for sales and administration. I have been an instructor in both associations. I have written a number of articles that have been published in the American Cemetery Magazine as well as a book called "How to Sell Cemetery Property Before Need.' "

On cross-examination Mr. Brown candidly admitted that he had worked for perpetual care cemeteries in the Pulaski County area and found the selling of cemetery lots as hard as he had ever encountered, that he gave it up because he didn't find it profitable.

Not one disinterested witness testified as to need for this additional cemetery.

The state of the record being thus, I am impelled to the conclusion that the State Cemetery Board when it granted appellee a permit acted arbitrarily and with reckless abandon flooded the already glutted marked with approximately 45,000 new cemetery lots, to be pushed by the accompanying avalanche of salesmen. By so doing the Board severely jeopardized the investments of all the people in the Pulaski County area who have heretofore invested in perpetual care cemetery lots. By the enactment of Act 250 the legislature in no uncertain terms admonished the Cemetery Board that "the need to be considered is a need from a public standpoint." Clearly the board failed in its responsibility.

For the reasons stated, I respectfully dissent.

BLAIR *v.* BRADLEY, ADM'X.

5-3282 379 S. W. 2d 5

Opinion delivered May 25, 1964.

John B. Driver, for appellant.

N. J. Henley, for appellee.

PAUL WARD, Associate Justice. The decisive question is: under the facts of this case when does property disposed of by will vest in the devisee?

Prior to 1925 Sam M. McDaniel (a widower) died intestate seized of 329 acres of land. He was survived by one daughter and three sons: Ida Bell (McDaniel) Blair, G. B. McDaniel, H. A. McDaniel, and W. M. McDaniel. Shortly after her father's death Ida Bell deeded all her interest in said lands to her three brothers. Later G. B. and H. A. acquired other real property.

In 1953 G. B. and H. A. each made a will leaving all their property to W. M. In 1960 G. B. (a widower) died without issue and H. A. (who was never married) died in 1961. W. M. died intestate December 22, 1962, leaving a daughter, Grace McDaniel Bradley, and a grandson, Donald McDaniel. On January 5, 1963, Grace was appointed administratrix of her father's estate.

Ida Bell died June 13, 1963, and the following month her heirs (appellants herein) intervened in the administration proceedings, claiming they owned (as heirs of their mother) one half of the estates of G. B. and H. A. Thereupon, on October 1, 1963, Grace Bradley filed for probate the wills of G. B. and H. A. These wills, admitted to probate without objections, devised everything they owned to W. M. Both sides requested the court to construe the wills and to determine the interest of each party.

The trial court dismissed the intervention of appellants and gave all the property of G. B., H. A. and W. M. to appellees, Grace and Donald, share and share alike.

Appellants very ably contend that, since G. B. and H. A. died more than a year before W. M. died and since W. M., during his lifetime, failed to offer their wills for probate the devises lapsed and that therefore they (as the only heirs of Ida Bell) were entitled to one half of the estates of G. B. and H. A. We find no authority to support appellants' argument. On the other hand, as we view the authorities, the devises (in the wills of G. B.

and H. A.) took effect at the time of the death of each of the testators. That rule would invest W. M. with the two estates during his lifetime, which would accordingly pass to his heirs under the laws of descent and distribution.

What appears to be the generally accepted rule is well and concisely stated in 96 C. J. S. *Wills* § 1099 (Time of vesting):

"Generally, title to real property passes to, and vests in, the devisees immediately on the testator's death and not at the probate of the will, at least where the will does not postpone the vesting of title."

It is not contended of course that the wills of G. B. and H. A. postponed the vesting of title. The text cites numerous cases from more than 25 states in support of the rule set out above. See particularly: *Noble et al* v. *Beach et al,* 21 C. 2d 91, 130 P. 2d 426, 428; *Stewart* v. *Morris et al,* 313 Ky. 424, 231 S. W. 2d 70, 71; and *Martin et al* v. *Hale et al,* 167 Tenn. 438, 71 S. W. 2d 211, 212.

In the case of *Booe* v. *Vinson,* 104 Ark. 439, 448, 149 S. W. 524, there appears this statement:

"It is also a well established principle that the law favors the vesting of estates, and, in the absence of a contrary intention of the testator appearing from the will, the estate will vest at the time of his death . . ."

The above rule has been consistently followed by this Court. See *McCarroll* v. *Falls,* 129 Ark. 245, 195 S. W. 387; *McKinney* v. *Dillard & Coffin Company,* 170 Ark. 1181, 283 S. W. 16; *Doake* v. *Taylor,* 195 Ark. 490, 112 S. W. 2d 958, and *Hargett* v. *Hargett,* 226 Ark. 929, 295 S. W. 2d 307.

Here the wills of G. B. and H. A. were probated well within the time (5 years) allowed by Ark. Stat. Ann. § 62-2125 (Supp. 1963).

There can be no doubt that the lands passed directly to the heirs (Grace and Donald) of W. M. upon his death since it appears there was no widow and no debts. See *Dean* v. *Brown,* 216 Ark. 761, 227 S. W. 2d 623.

Affirmed.

Opinion delivered May 25, 1964.

[redacted]

Parker Parker, for appellant.

William R. Bullock, for appellee.

SAM ROBINSON, Associate Justice. On August 16, 1962, Frank Balloun and 65 other landowners filed a petition in the Chancery Court, Dardanelle District, Yell County, praying for the formation of the proposed Smiley-Pin-Harris Creek Watershed Improvement District. The 66 petitioners alleged, among other things, that they were landowners within the proposed Watershed District, which was comprised of a total of 112 landowners, that their holdings represented a majority in acreage, and that pursuant to the requirements set out in Ark. Stat. Ann. § 21-906 (Repl. 1956), they represented a majority of the landowners in number and in valuation.

Prior to a hearing on the petition, a motion was filed by numerous landowners in the district asking the court to deny the creation of the district on several grounds. Ten of the movants alleged that their signatures had been obtained by fraudulent misrepresentation and concealment of material facts. All asserted that the district contained some 131 landowners and not 112

as alleged in the petition. The court denied the petition to create the district and the petitioners have appealed.

For reversal appellants argue that the trial court erred in allowing nine petitioners to remove their names after the petition had been filed with the court since they made no showing of irregularities, fraud or deceit. *Pendleton* v. *Stuttgart,* 235 Ark. 513, 360 S. W. 2d 750.

Although there is evidence in the record that several petitioners were unaware, at the time of signing, of a 15-20% tax assessment, and the fact that they were selecting five commissioners whose names were subsequently inserted in the petition, we do not reach the question of the correctness of the trial court's determination that these petitioners showed cause for the removal of their signatures. We find, however, that the signatures of some 12 additional petitioners should have been removed and that appellants, therefore, failed to provide the chancery court with a petition representing a majority of the landowners within the proposed district.

Seven of the petitioners owned no land within the proposed district as shown by the latest assessment of real property offered as exhibit by appeellants. Their names should be stricken and they cannot now contend that they were not before the court, inasmuch as they are paries to the litigation.

We further find that some five additional petitioners' signatures should be removed for other causes. Two petitioners had died before the filing of the petition; there was no revivor. Two signatures should have been removed as they were obtained without the authority of the landowners, and one landowner whose name appeared on the petition testified without contradiction that he never signed the petition and had no knowledge of how his name had been acquired. With these names deleted, the petition does not contain a majority in number.

If the petition for the formation of the district does not contain the names of both a majority in number and

in valuation, the court may, at its discretion, deny the petition. Ark. Stat. Ann. § 21-906 (Repl. 1956). Here, we do not find that the court abused its discretion.

Affirmed.

BECKWITH *v.* STATE.

5107 379 S. W. 2d 19

Opinion delivered May 25, 1964.

Wiley A. Branton and *L. Hobson Mahon,* for appellant.

Bruce Bennett, Attorney General, by *Beryl Anthony, Jr.,* Asst. Atty. General, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from an order overruling motions to quash information and discharge defendant.

On December 12, 1954, Mrs. Sue Helen Fuller was killed in Monroe County during a burglary. Appellant Paul Louis Beckwith was one of forty to sixty persons taken into custody the day of the murder. After being held in jail for over a week, appellant and the others were released when one Willingham confessed to the

crime. (Willingham was later released and charges against him dropped when, according to the prosecuting attorney's testimony, it was discovered that Willingham was a "nut.") In January, 1955, appellant was convicted of burglary in Desha County and sentenced to three years in the state penitentiary. On August 7, 1957, when Beckwith was released from the Arkansas penitentiary, he was turned over to Missouri authorities and thereafter convicted of an earlier crime. On July 5, 1962, the Monroe prosecuting attorney filed an information charging appellant with the murder of Mrs. Fuller on December 12, 1954. On August 12, 1962, when appellant was released from the Missouri penitentiary, he was returned to Arkansas and has been held in the Monroe County jail ever since. On October 8, 1963, appellant filed a motion to quash the information, and on November 29, 1963, filed a motion to discharge defendant and quash information. The first motion, together with another motion which was withdrawn, was brought on for hearing on October 8, 1963. Testimony of the prosecuting attorney, circuit clerk and appellant was taken at this hearing. On November 29, 1963, the motion to discharge defendant and quash information was argued before the court. From the court's order overruling the motions, appellant has prosecuted this appeal.

For reversal, appellant first urges that the trial court erred in overruling appellant's motion to quash information because (1) prosecution by information under Arkansas Statutes violates the Federal Constitution, and (2) the procedure followed by the prosecuting attorney in this case was unlawful and deprived appellant of due process of law.

We will assume without deciding that the part of the order questioned under point one is an appealable order.

The first portion of appellant's point one has been before this court a number of times. The court has consistently upheld the constitutionality of prosecution by information under Amendment 21 of the Arkansas Con-

stitution. This appellant candidly admits and cites relevant decisions such as *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307; *Cascio* v. *State,* 213 Ark. 418, 210 S. W. 2d 897; and *Payne* v. *State,* 226 Ark. 910, 295 S. W. 2d 312. However, appellant seriously urges this court to reconsider the question and overturn these precedents. After careful and thoughtful review of the record and the briefs as well as prior decisions, we find no compelling or persuasive reason to override our previous adjudications on this point.

The second part of appellant's first point is that the trial court erred in overruling appellant's motion to quash the information because the procedure followed by the prosecuting attorney in this case was unlawful and deprived appellant of due process of law. Appellant strongly contends that even if we continue to hold that prosecution by information is constitutional and that no preliminary hearing is necessary as a condition precedent to filing an information, as we do, then the procedure followed by the prosecuting attorney in this case has been so arbitrary, unreasonable and unlawful as to deprive appellant of due process of law. Appellant's argument is apparently based on various facts including (1) that a great deal of time has elapsed between the commission of the alleged crime and appellant's being charged, even though the Monroe County authorities were well aware of appellant's whereabouts in the Arkansas and Missouri penitentiaries, (2) that the prosecuting attorney did not seek leave of court before filing the information and then simply had the warrant issued by the court clerk, and (3) that the court itself did not issue the bench warrant on the information.

Appellant refers to the length of time between the murder and appellant's arrest as being unreasonable and a severe handicap to appellant in preparing his defense. We appreciate that "time gradually wears out proofs of innocence" just as surely as time wears out proofs of guilt, but the unwavering public policy of this state which has been a part of our statutory law since

at least 1838 is that "any person may be prosecuted, tried and punished, for any offense punishable with death, at any time after the offense has been committed." Ark. Stat. Ann. § 43-1601 (1947). Appellant argues that the statutes relating to process on indictment requiring the court to order issuance of the process on an indictment [Ark. Stat. Ann. §§ 43-1101 — 43-1112 (1947)] tion. We see no merit in this argument. If it could reasonably be said that there was in fact a question as to the propriety of the procedure followed in the case at bar, the trial court validated the filing of the information without leave of court as well as the warrant issued on the information by its later order overruling the motions to quash the information. From a review of the entire record, we cannot say that the procedure followed by the prosecuting attorney here has been so arbitrary, unreasonable and unlawful as to deprive appellant of due process of law.

Appellant's second point urged for reversal is that the court erred in overruling appellant's motion for discharge by reason of his having been held in jail beyond the third term of court without benefit of trial.

Ark. Stat. Ann. § 43-1708 (1947) reads as follows:

"Time accused may be kept in jail. If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

In construing the above and related statutes (§ 43-1709, Time accused may be kept on bail, § 43-1710, Trial not had for want of time, and § 43-1711, Evidence on part of state—continuance to procure), this court has consistently held that where a prisoner is out on bail, in order to take advantage of these statutes, such prisoner

must place himself in the attitude of demanding trial or at least resisting postponement. *Stewart* v. *State,* 13 Ark. 720. However where the defendant is held in jail the burden is on the State to show that the failure to bring him to trial was caused by a lack of time to try the case or delayed on application of the prisoner. *Ware* v. *State,* 159 Ark. 540, 252 S. W. 934; *Fulton* v. *State,* 178 Ark. 841, 12 S. W. 2d 777. There was no evidence in the record on whether there was want of time to try appellant. On the other hand, the record does contain the following stipulation between the prosecuting attorney and one of appellant's attorneys:

"Mr. Lee: If the court please, I would like to ask attorney Mahon if he would stipulate that the State has not delayed the trial of this case. I have always been agreeable to try the case at anytime you wanted and your main excuse has been, attorney Branton was busy down in Atlanta, Georgia, with other matters and couldn't get up here and the State has not delayed at all and has been ready and willing at all times to try the case and it has been you that has been asking for the delay.

"L. H. Mahon: I will stipulate to that."

The state of the record being thus, we cannot say that the State failed to sustain its burden of showing that the delay happened on the application of the prisoner.

Affirmed.

Opinion delivered May 25, 1964.

W. B. Howard and *Jack Segars,* for appellant.

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

FRANK HOLT, Associate Justice. The appellant was charged by information with the crime of first degree murder. A jury found him guilty of the crime of involuntary manslaughter and assessed his punishment at three years in the penitentiary. On appeal from a judgment on this verdict appellant relies for reversal solely upon the point that "the court erred in denying appellant's motion to quash the special jury panel selected by the sheriff after the quashing of the regular panel." We must agree with the appellant.

Prior to trial the appellant, a Negro, filed a motion to quash the regular petit jury panel alleging that members of his race had been willfully excluded from this jury panel by the jury commissioners on account of their race and color and such a systematic exclusion had existed locally for more than twenty-five years. There-

fore, such discrimination denied to him equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

Upon proof being presented in behalf of appellant's motion, the court quashed and discharged the questioned jury panel. It appears that in the Jonesboro District of Craighead County Negroes comprised 4.2% of the population and 2.4% of the qualified electors of that District and that for more than twenty-five years no Negro had served on a criminal court jury panel except two Negroes during a term of court in 1953. Upon quashing this original jury panel the court appointed the sheriff of the county to summons a new or special panel of petit jurors to serve for the balance of the term. Ark. Stat. Ann. § 43-1912.1 (Supp. 1963). The court directed the sheriff to select whomsever he desired in keeping with the requisite qualifications for jury service and, further, that members of the quashed panel were not ineligible to serve on a new panel. There were thirty-two of the thirty-eight quashed panel members in attendance at court during this procedure. The sheriff immediately resummoned these thirty-two members of the quashed panel as members of the special panel without considering any other persons. He then proceeded to select six Negroes, admittedly because of their race, and placed their names at the top of the list of the special jurors again making a complete list of thirty-eight jurors.

The following day the appellant moved to quash this special jury panel, again alleging that the appellant's rights, both statutory and constitutional, were violated in the manner of its selection. The court overruled appellant's motion to quash the special panel.

In *Bone* v. *State,* 198 Ark. 519, 129 S. W. 2d 240, the trial court denied a motion by appellant, a Negro, to quash the venire of petit jurors based upon the systematic exclusion of Negroes on the jury panel. The trial court, however, on the day of the trial placed three Negroes on the regular jury panel in an effort to meet the

objections of the defendant. Upon appeal, in discussing this point, we said:

"* * * If the objection made was tenable, and, no doubt, it was, it must have operated not to remove from the jury panel three members in whose places there might have been substituted qualified jurors of the Negro race, but *this objection was to the entire panel,* * * *. The removal of three from an improper venire upon which twenty-one improperly were left, certainly did not cure the error or *meet the requirements of the substantive law of the land.*" [Emphasis added]

In *Maxwell* v. *State,* 217 Ark. 691, 232 S. W. 2d 982, the original jury panel contained no Negroes. On a motion by appellant, a Negro, to quash the panel because of systematic exclusion of members of his race from the panel the court proceeded to discharge all but thirteen members of this panel. A special list was summoned. The new panel, totaling sixty-nine members, included eight Negroes and the thirteen retained from the original panel. The state contended that the commingling of the original thirteen jurors with the new panel containing the eight Negroes afforded the defendant due process of law, namely, the right to select a jury of twelve from a panel partially composed of members of his own race. In holding the action of the trial court was reversible error and required a new trial, we said:

"* * * The answer is that we are dealing primarily with the Constitution as distinguished from a particular defendant. * * * But there is no doubt that the local system of jury selection resulted in systematic exclusion of Negroes in violation of the Fourteenth Amendment, and that for the first time in many years colored electors were summoned when the special list was given the Sheriff."

In that case we held that the retention and commingling of thirteen of the original jurors on a new list totaling sixty-nine jurors denied the defendant his fundamental rights.

In the case at bar the appellee, however, contends that under the authority of Ark. Stat. Ann. § 43-1912.2 (Supp. 1963) the thirty-two members of the original panel quashed by the court could now be carried over and were eligible to serve on the new jury panel. This section reads:

"The quashing of a jury panel by order of the court shall not by reason thereof render the *individual members* of such panel ineligible to serve as jurors if *chosen subsequently according to law* at same at a succeeding term of court." [Emphasis added]

Under the facts in this case we cannot agree with appellee. The sheriff testified with commendable candor that he did not consider the qualifications of any other persons when he resummoned the thirty-two jurors in question and, further, that he was putting his "stamp of approval" on the selection previously made by the jury commisisoners. The trial court in quashing the original panel in effect found that the panel had been selected under a pattern of systematic exclusion of Negroes that had existed for some twenty-five years. The above quoted statute does not authorize the blanketing en masse practically the entire membership of an admittedly defective panel into a new or special panel. It is well settled that members of a jury must be selected as individuals on the basis of individual qualifications and not included or excluded as members of a race. *Dorsey* v. *State,* 219 Ark. 101, 240 S. W. 2d 30, certiorari denied, 342 U. S. 851; *Cassell* v. *Texas,* 339 U. S. 282.

We deem it unnecessary to reach other arguments advanced by the appellant.

The judgment is reversed and the cause remanded.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). It is my opinion that the judgment should be affirmed on the point discussed in the Majority Opinion; *i.e.,* the selection of the jury that tried the case.

The appellant had successfully quashed the original jury panel solely because there were no Negroes selected on said panel. The thirty-two white persons on the original jury panel were not individually disqualified: the only reason for quashing the panel was that there were no Negroes on the original panel.

The Sheriff then selected six Negroes for the new panel and placed them at the top of the list, and some of the Negroes served on the trial jury that convicted the appellant. The percentage of six Negroes to thirty-two white persons was a greater percentage of Negroes to whites than the percentage of Negro poll tax holders bore to the percentage of white poll tax holders in Craighead County; so surely the appellant received more than a fair percentage of Negroes on the panel and also more than a fair percentage of Negroes on the jury that actually tried and convicted him.

I think the Sheriff followed the exact requirements of Act No. 93 of 1961, as now found in Ark. Stat. Ann. § 42-1912.1-2 (Supp. 1963). Prior to the said 1961 Act the Jury Commissioners would have been reassembled to select a new panel of jurors (*Perry and Coggins* v. *State,* 232 Ark. 959, 342 S. W. 2d 95). That opinion was delivered on January 9, 1961, and the Legislature then passed Act No. 93 of 1961, approved February 16, 1961, to eliminate the delay that would be incidental to requiring the Jury Commissioners to be reassembled. The said 1961 Act changed the rule stated in such cases as *Maxwell* v. *State,* 217 Ark. 691, 232 S. W. 2d 982. Under the plain wording of the said 1961 Act, the Sheriff had the right to select the thirty-two white persons that he did, and no error was committed in that regard.

LONOKE PRODUCTION CREDIT ASSN. *v.* BOHANNON.

5-3271 379 S. W. 2d 17

Opinion delivered May 25, 1964.

Chas. A. Walls, Jr., for appellant.

James E. Dodds, for appellee.

FRANK HOLT, Associate Justice. This appeal involves the application of our Uniform Commercial Code. The first issue presented relates to the competing claims of appellant and the appellee, Raymond W. Strange.

On August 2, 1962, Charles Bohannon and his wife purchased some used farm machinery from a neighboring farmer, appellee Strange, giving a chattel mortgage with power of sale to secure the purchase price of $750.00 as evidenced by their note. The Bohannons took posses-

sion of the machinery. Appellee Strange did not file his mortgage until January 16, 1963.

On September 25, 1962, the appellant filed a financing statement and security agreement [executed pursuant to the Code] to secure a cash loan of $1,070.00 made by appellant to the Bohannons on this same farm equipment.

The Chancellor found that appellee Strange is the owner of the equipment and that neither appellant nor the Bohannons had any title or interest in the property. For reversal the appellant argues that title to the farm machinery passed to the Bohannons on August 22, 1962, the date of the purchase and the chattel mortgage. Therefore, since appellee Strange did not file his purchase money chattel mortgage until after the appellant had filed its financing statement and security agreement, the secured transaction of appellant was first perfected and takes priority over appellee Strange's unfiled mortgage.

It is true that ordinarily a secured party must perfect his secured interest by a formal filing as required by our Code. However, appellant's contention of priority is answered by Ark. Stat. Ann. § 85-9-302 (1) (c) (Addendum 1961). This section of the Code, in pertinent part, reads:

"* * * Security interest to which filing provisions of chapter *do not apply.*—(1) A financing statement must be filed to perfect all security interests *except the following*: * * * (c) a purchase money security interest in farm equipment having a purchase price not in excess of $2,500;". [Emphasis added]

The next subsection, (d), also exempts a purchase money security interest in consumer goods. Arkansas Law Review, Vol. 16, No. 1, p. 153, recognizes these exemptions in a situation such as in the case at bar. There it is said:

"* * * It has been noted that under § 85-9-302 (1) (c) and (d) no filing is required for perfection of

purchase money security interests in these types of goods." [Farm equipment and consumer goods]
See, also, Wyoming Law Journal, Vol. 14, No. 3, p. 220; *U.G.I.* v. *McFalls,* 18 D. & C. 2d, 713 (Penn. 1959).

A chattel mortgage is a secured transaction within the meaning of the Code. Ark. Stat. Ann. § 85-9-102 (2), which relates to secured transactions, provides:

"This Article [chapter] applies to security interests created by contract including pledge, assignment, *chattel mortgage,* chattel trust, * * * intended as security." [Emphasis added]
A security interest is defined in Ark. Stat. Ann. § 85-9-107 as follows:

"A security interest is a 'purchase money security interest' to the extent that it is (a) taken or retained by the seller of the collateral to secure all or part of its price;".

The chattel mortgage in the case at bar was a "purchase money security interest". A security interest "attaches" when a secured agreement such as this chattel mortgage has been executed, the secured creditor has given value, and the debtor has acquired some ownership in the collateral which he can encumber. Ark. Stat. Ann. § 85-9-204.

In the case at bar appellee Strange's purchase money security interest "attached" and was automatically perfected, although unfiled, on the date and delivery of the chattel mortgage since it involved the sale of farm equipment for a purchase price of less than $2,500.00. Thus, it must be said that appellee Strange's unfiled chattel mortgage had priority over appellant's recorded security interest and, therefore, it must be satisfied first from any proceeds of a sale of the farm equipment.

It is to be noted that appellee Strange contends that title to the farm equipment remained in him and the Chancellor so held. Appellee Strange is estopped from asserting this claim since he accepted the chattel mort-

gage. 36 Am. Jur., Right of Mortgagee, § 257, p. 819. To this extent the Chancellor's decree must be modified.

The next issue presented is the competing claims of appellee W. A. Fisher and appellant. Appellee Fisher, by oral agreement, entered into a business venture with the Bohannons with reference to placing his calves upon the lands of the Bohannons for them to feed and for purposes of sale. When the calves were sold there was to be an accounting between the parties. At the time the Bohannons left Arkansas they received $76.00 from Fisher in settlement of the account between them. Prior to the appointment of a receiver, Fisher acquired possession of the calves and removed them from Lonoke County. The calves were included with the farm equipment in the collateral covered by the financing statement and security agreement filed on September 25, 1962. The appellant contends that the court was in error in refusing to order Fisher to pay to the appellant the Bohannons' alleged equity in the calves. Appellee Fisher maintains that he never parted with the ownership of the calves and that the payment of $76.00 was in settlement for labor performed by the Bohannons and not for any equity. The Chancellor found this issue in favor of appellee Fisher. It certainly cannot be said that the Chancellor's finding on this issue is against the preponderance of the evidence.

The decree is affirmed.

Opinion delivered June 1, 1964.

[Rehearing denied September 14, 1964.]

E. V. Trimble and *C. C. Mercer,* for appellant.

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

CARLETON HARRIS, Chief Justice. This case has been before the courts on numerous occasions,[1] and is now here for the second time on the merits. Appellant was convicted of the crime of rape, and sentenced to suffer the punishment of death. Some twenty-five assignments of error are listed in the motion for new trial, though only one of these is argued by appellant in his brief.

Four of these assignments deal with the sufficiency of the evidence. The prosecuting witness, a white woman, 49 years of age at the time of the alleged crime, testified that she retired at her home in Little Rock about 9:30 P.M., and was awakened about 12:30 A.M. by noises. As she started through the kitchen, investigating the sounds, a man caught hold of her arm; she began to scream, but he choked her and pressed a knife to her

[1] *Bailey* v. *State,* 1957, 227 Ark. 889, 302 S. W. 2d 796; *Bailey* v. *State,* 1958, 229 Ark. 74, 313 S. W. 2d 388; *Bailey* v. *Henslee,* D. C. Ark. 1958, 168 F. Supp. 314; *Bailey* v. *Henslee,* D. C. Ark. 1960, 184 F. Supp. 298; *Bailey* v. *Henslee,* 8 Cir., 1959, 264 F. 2d 744; *Bailey* v. *Henslee,* 1961, 287 F. 2d 936; *Bailey* v. *Arkansas,* 1957, 355 U. S. 851, 78 S. Ct. 77, 2 L. Ed. 2d 59; *Bailey* v. *Arkansas,* 1958, 358 U. S. 869, 79 S. Ct. 101, 3 L. Ed. 2d 101; *Bailey* v. *Henslee,* 1960, 361 U. S. 945, 80 S. Ct. 408, 4 L. Ed. 2d 364; *Henslee* v. *Bailey,* 1961, 368 U. S. 877, 82 S. Ct. 121, 7 L. Ed. 2d 78; *Bailey* v. *Henslee,* 8 Cir., 309 F. 2d 840.

throat. The intruder, according to her testimony, stated that he wanted some money, and she replied that she would go get the money if he would let her go. He pushed her into the bedroom, held the knife to her throat, and forcibly had sexual intercourse with her. She begged him to leave her alone and promised to give him what money and jewelry she had. She first gave him $5.00 from her billfold, but this did not appease him. As the intruder pulled up his pants, he lost his billfold, and she got matches in order for him to look for it. In the light, the prosecutrix determined that he was a Negro. He found the billfold, which she noticed was brown, with a yellow and blue Air Force insignia on it. The prosecutrix was then forced to give him her purse containing $190.00, but he would not take the jewelry, stating, "he wasn't going to take that and have somebody catch him with that." After taking the purse, the man cut the telephone line, raped her again, and then left. She immediately ran next door, and notified her neighbor, and, shortly thereafter, her daughter and the police arrived. She subsequently identified appellant, Luther Bailey, as the perpetrator of the crimes. Actually, this testimony in itself was sufficient to sustain the charge, as we have held that corroboration is not necessary in a rape case. *McDonald* v. *State,* 225 Ark. 38, 279 S. W. 2d 44. However, there are many additional circumstances which forcefully point to appellant's guilt. For instance, the officers found a folder on the floor at the foot of the bed, containing various identification cards bearing the name of Luther Bailey. The injuries to the prosecutrix were plainly visible, and the officers found a cut screen, muddy footprints in the house, a severed telephone line, and they also determined that the master electrical switch had been turned off. With other officers, Deputy Sheriff Mose Turner drove to Woodson, near Little Rock, where Bailey lived, and went to his home. The officers arrived there between 2:30 and 3:00 A.M., but Bailey's wife reported that he was not at home. All of the officers then left except Turner and one other officer, who remained at the house for over an hour. Subsequently, Turner left to locate a telephone, and, while driving north toward

Little Rock, the officer met Bailey, who was traveling south. Turner recognized him, turned around, and had Bailey stop the car at Woodson. A search of Bailey's person revealed $133.00 in bills, together with a man's billfold bearing an Air Force insignia. An examination of his automobile revealed, *inter alia,* a paring knife, found in the glove compartment, and a ladies' purse, found under the front seat. In the purse were some check stubs, car keys, pictures, and women's hair clamps, and the check stubs bore the name of the prosecuting witness. It is evident that the testimony was more than adequate to sustain the conviction.

Only three points are argued in the brief, these being, first, that Negroes were intentionally, deliberately, and systematically limited in the selection of the petit jury panel; second, that Negroes have been excluded from serving as jury commissioners for the past 50 years;[2] and third, that Bailey was not retried within nine months as ordered and directed by the United States Eighth Circuit Court of Appeals.

The record does not reveal any objection interposed to the jury, but if otherwise, we certainly could not say error was committed as urged, since no motion to quash the panel was filed. The only reference to the jury was just prior to the *voire dire* when the defense counsel requested a subpoena *duces tecum* for the record and length of service of the jury panel during the term of court. This information was then supplied after which the defense requested a drawn and struck jury, and the names were placed in the box and drawn from the box. The record is absolutely barren as far as any other reference to the jury is concerned, except for the names of those who served on the trial jury. There appears no examination of jury commissioners, or of members of the petit jury panel. It would therefore appear that appellant must have been satisfied with the jury, else a record would have been made for the purpose of establishing discrimination.

[2] These two points were not raised in the motion for new trial.

We are unable to understand the reason for the remaining point argued by appellant, since this question has been clearly answered contrary to the contention made. In *Bailey* v. *Henslee,* 8 Cir., 1961, 287 F 2d 936, 938-939, the Circuit Court of Appeals for the Eighth Circuit held that Bailey had established an unrebutted *prima facie* case of limitation of members of his race in the selection of the jury which convicted him at the original trial. The opinion of the court concluded as follows:

"The State of Arkansas is entitled to a reasonable time within which to retry this defendant for the crime charged against him. Pending a retrial by the State, the District Court is directed to grant a stay of execution. If he is retried, the Court is directed to enter a dismissal of Bailey's present petition for release on habeas corpus. If he is not retried within nine months from the filing date of this opinion, the District Court is directed to grant Bailey's petition for a writ of habeas corpus."

The case was then remanded for further proceedings and the opinion of the court was filed in the office of the clerk of the Circuit Court of Appeals on March 17, 1961. A petition for rehearing was thereafter filed by Henslee[3] and denied on May 4, 1961. Thereafter the mandate was sent down to the district court and was received on May 17, 1961.

That court, in compliance with the opinion and mandate, issued its order for stay of execution, and further stated:

"Provided, however, that if Petitioner is retried within nine months from May 17, 1961, the filing date of said opinion of the Eighth Circuit Court of Appeals in the clerk's office of the United States District Court for the Eastern District of Arkansas, for the crime of rape allegedly committed by him in Pulaski County, Arkansas, on or about June 15, 1956, respondent may apply to this court for dismissal of this petition for a writ of habeas corpus and this stay of proceedings:

[3] This refers to the late Lee Henslee, former Superintendent of the Arkansas State Penitentiary.

"Provided, further, that should Petitioner not be retried within said period, writ of habeas corpus will then be granted."

The Pulaski County Circuit Court, after earlier appointing counsel to replace Bailey's counsel who had moved out of the state, set the second trial for January 29, 1962, and the trial did commence on that date. On the same day that the Circuit Court set the case, Bailey's attorneys filed in the Federal District Court for the Eastern District a "Petition for Writ of Prohibition and Mandamus," and the next day filed an application for a writ of habeas corpus. The grounds asserted in both applications were that Bailey was not retried within the time specified by the Circuit Court of Appeals, since the nine month period "from March 17, 1961, had expired on December 17, 1961." The application was denied by the District Court, and this action was upheld by the Circuit Court of Appeals. After discussing the matter somewhat at length, that court, in *Bailey* v. *Henslee,* 309 F. 2d 840, said:

"Our opinion could not operate to command any legal action in the proceedings until it ripened into a judgment formally communicated to the district court. It then follows, it seems to us, that the nine month period ran only from the date our mandate and opinion were filed with *that court.* Then and only then did they become effective. Then and only then did formal notice come to the district court of the result of the appeal to this court. Then and only then did the stay terminate which, under Rule 38 (a) (1), F.R. Cr.P., was in effect pending the appeal. Compare also Rule 35, F.R. Cr.P. The opinion, of course, was made available earlier to counsel under this court's Rule 14 (c) and to the district court when copies of the "slip opinion" were routinely delivered to them. Similarly, our judgment was entered in our own records under our Rule 14 (b) on the date it was filed with our clerk. But this court, as does any appellate court, acts formally and officially only through its mandate. * * * We therefore construe our mandate to the effect that the designated period runs from the

date of the filing of the mandate and opinion with the district court. * * * The beginning date in this case was thus May 17, 1961. The record shows that the second state trial began well within nine months from that date. The denial of the current application for the writ of habeas corpus was, as a consequence, proper."

Assignment 7 of the motion for new trial relates to a motion for a change of venue. Appellant filed a petition for change of venue and set up that he had caused subpoenas to be issued to several persons, "all of which are qualified electors in this county and are in a position to know the general opinion of the public to testify in support of this motion." The petition further requested that if the evidence offered was deemed insufficient, "the court would direct the Sheriff of Pulaski County to immediately go upon the streets of Little Rock, Arkansas, immediately preceding the said hearing and summons the first six (6) qualified electors that he meets to the end that they may be interrogated as to their opinion of the defendant's chances to procure a fair and impartial trial in Pulaski County, Arkansas." The court complied with this motion, although the application of appellant for a change of venue was not made in compliance with the statute. Ark. Stat. Ann. § 43-1502 (1947) requires that two credible persons, qualified electors and residents of the county, unrelated to the defendant in any manner, shall make an affidavit setting forth the facts which are relied upon for a change of venue. However, in *Hildreth* v. *State,* 214 Ark. 710, 217 S. W. 2d 622, we held that it was proper for the court to hear evidence in order to make a determination, even though affidavits were not presented. See also *Trotter and Harris* v. *State,* 237 Ark. 820, 377 S. W. 2d 14.

The motion being granted, the court proceeded to hear the testimony of the Sheriff of Pulaski County, two deputy sheriffs, two newspaper reporters, the publisher of the "Southern Mediator Journal" (circulation mainly among the colored population), the Chief of Police of Little Rock, the Chief of Police of North Little Rock, and seven witnesses at random selected by the sheriff at the

request of appellant. Of all the testimony taken, no one testified that, in his opinion, appellant could not receive a fair trial, and only one, C. H. Jones, expressed any doubt whatever. When asked if he thought appellant could obtain a fair trial in Pulaski County, this witness answered, "I should think so. I should think he should get a fair trial—I underscored that, you know, I know a case of that kind is very delicate. * * * If it was another county where there was a mixture of citizens, it would be better." Let it also be remembered that this alleged crime was committed in 1956, and the passage of such a long period of time would certainly operate to appellant's advantage. Outraged feelings and hot tempers in the community (if indeed such sentiment existed) would certainly tend to cool in six years. We find no abuse of discretion in the trial court's refusal to grant the motion.

Assignment 25 (amendment) of the motion for new trial asserts that the death penalty for rape has been unconstitutionally applied, in that it is reserved for use solely for Negroes charged with raping white women.[4] No motion, written or oral, was offered prior to, or during the trial, and there was no proof or offer of proof on this point before the trial court. This point has been raised before in this state, and we have held contrary to appellant's contention. See *Maxwell* v. *State,* 236 Ark. 694, 370 S. W. 2d 113.

It is urged in Assignment 16 that the trial court erred in permitting the introduction into evidence of certain items, *viz,* the identification folder, the knife, the money found on Bailey, the brown billfold, and the prosecutrix' purse. These articles were identified by several witnesses, and, in fact, no objection was made at the time when one officer identified the items. At any rate, the items were admissible evidence to establish a

[4] In his amendment, appellant asserts, "no white man has ever been electrocuted for rape on any woman, white or colored." Without any research whatsoever, it can quickly be stated that this statement is erroneous. In *Fields* v. *State,* 235 Ark. 986, 363 S. W. 2d 905, Fields, a white man, was convicted of rape, and sentenced to death. We affirmed the conviction on May 27, 1963, and Fields died in the electric chair January 24 of this year. See also footnote 1 in *Mitchell* v. *State,* 233 Ark. 578, 346 S. W. 2d 201.

connection between appellant and the crime. See *Grays* v. *State,* 219 Ark. 367, 242 S. W. 2d 701.

Assignment 9 relates to the testimony of Charles L. Pitts, who testified that the prosecuting witness appeared to have bruises and scratches on her throat and body. There was no error in admitting this testimony. *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9.

Assignment 11 asserts that the trial judge erred by admitting evidence obtained by Deputy Sheriff Turner, because (as it is contended) the arrest of Bailey was illegal. This argument is based on the fact that no warrant of arrest had been issued for the appellant, and it is contended that the evidence subsequently acquired was obtained illegally. 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. Of course, as heretofore pointed out, after finding Bailey's identification folder at the scene of the crime, there were certainly reasonable grounds to form the belief that he had committed the act. Let it also be remembered that Bailey was arrested during an early morning hour when it would have been extremely difficult to present the matter to a magistrate.

It seems to be well established that evidence found upon a person legally arrested may be used against him. As stated in 20 Am. Jur. § 401, Page 361:

"It is a well-established principle of our criminal law, that evidence of guilt found upon a person under legal arrest for a crime may be used in evidence against him."

With regard to the articles found in the automobile after Bailey was placed under arrest, it is pointed out in Volume 1 of Searches, Seizures and Immunities, Section 5, Page 104, "The general rule of law is that when a man is legally arrested for an offense, whatever is found on his person or in his control which it is unlawful for him to have and which may be used to prove the offense, may

be seized and held as evidence." Further, on Page 105: "The law is well established that searches may be permitted as an incident to a lawful arrest without warrant, and this rule of law prevails throughout the country." A similar view is taken in Volume 79, C.J.S., Searches and Seizures, Section 69, 847. It is important to remember that the evidence obtained from the automobile (the knife and the ladies' purse containing articles belonging to the prosecuting witness) was evidence connecting Bailey with the crime for which he was being sought, and with which he was subsequently charged, rather than evidence of some offense committed on some other occasion[5] of which the officer had no suspicion.

Assignments 12, 14, 17 and 19 relate to alleged error in permitting several of the officers to testify relative to statements made by the appellant. Each officer testified that appellant was advised of his rights, was not abused in any manner, and that the statements made were free and voluntary on the part of the accused. These same assignments were urged as grounds for reversal in the first trial, and we rejected the contentions as being without merit. *Bailey* v. *State,* 227 Ark. 889, 302 S. W. 2d 796. In addition, the entire transcribed statement was read into evidence upon the request of counsel for appellant.[6]

Assignment 18 relates to the introduction of photographs. This contention, too, was urged in the first trial, but was likewise held to be without merit. *Bailey* v. *State, supra.* The same applies to Assignment 21, wherein appellant asserts that his witness, Irene Wright, should have been permitted to testify that the prosecutrix had telephoned Bailey on several occasions. In disposing of this contention, in the first case, this court stated:

"In Assignments 17 and 18, appellant challenges the correctness of the court's striking the testimony of Irene Wright. She testified that appellant lived close to her

[5] In fact, the evidence also connected appellant with lesser crimes committed, under the evidence, during the same period of time as the rapes, *i.e.*, burglary, larceny, and robbery.

[6] This was likewise done in the first case.

and that she had received several telephone calls for him from a person who identified herself as the prosecuting witness. She did not know the prosecutrix and was not sure that the voice was that of a white woman. We think this testimony was properly excluded for the reason that the identity of the person who talked to the witness over the telephone was not satisfactorily identified. 'Generally, in order to introduce evidence of a telephone conversation or communication, otherwise unobjectionable, the identity of the person, who is claimed to have talked over the telephone, must first be satisfactorily established by the party seeking the introduction of the telephone conversation. To hold one responsible for statements and answers made over the telephone by unidentified persons would open the door for fraud and imposition,' 20 Am. Jur., Evidence, §366, P. 344."

In fact, most of the assignments of error relied upon were considered by this court on appeal following the original conviction on the charge, and the United States Supreme Court denied *certiorari.* 355 U. S. 851.

By Assignment 22, it is asserted that the trial court erred in giving certain instructions. With the exception of one instruction, only a general objection was made. We have held that it is appellant's duty by specific objection to point out the error in any instruction, and a general objection is only sufficient if the instruction is inherently erroneous. *Rutledge* v. *State,* 222 Ark. 504, 262 S. W. 2d 650. None of the instructions given were inherently erroneous. Specific objection was made to Instruction No. 2 on the basis that the statement made by appellant was not free and voluntary in that Bailey had been in the custody of the officers "five or six hours without having his constitutional rights explained to him or without having the benefit of counsel." Several witnesses testified that the admissions were made freely and voluntarily, and it will be remembered that Bailey's entire statement was read to the jury at the request of appellant. We thus find no merit in this contention.

The defendant requested that the court give the jury an instruction on assault with intent to rape, which the

court refused to do. Testimony on the part of the prosecuting witness was that she was twice raped; testimony on the part of the defendant was that he did not have intercourse with the prosecutrix, nor did he attempt any such act. In the statement offered by appellant (made a few hours after the offense had been committed), Bailey stated that he did have intercourse with the prosecuting witness, but with her consent. In either event, it is clear that there was no testimony by either the state or the defendant that only an assault had been made. Under the evidence, appellant was either guilty of rape—or he had committed no sexual offense whatsoever. Accordingly, there was no error in refusing to give this instruction. *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937; *Needham* v. *State,* 215 Ark. 935, 224 S. W. 2d 785.

In assignment 24, it is argued that the penalty was excessive. In *Rorie* v. *State,* 215 Ark. 282, 220 S. W. 2d 421, we said:

"Finally, appellant's counsel asks this Court to 'exercise its constitutional power and reduce the death sentence to life imprisonment.' Among other cases, we are cited to *Blake* v. *State,* 186 Ark. 77, 52 S. W. 2d 644, in which case this Court modified the judgment from the death sentence to imprisonment. When this Court finds that the evidence is insufficient to support the punishment assessed, then we have the power to modify the punishment. Our cases clearly reflect, however, that this modification is done, not on a basis of judicial clemency, but only in a case in which the evidence would not sustain the higher punishment assessed. In the case at bar we find the evidence sufficient to support the jury verdict."

The quoted statement likewise applies to the instant case.

Other errors are asserted in the motion for new trial, and some objections were made to certain testimony during the course of the trial which were not included in the motion. Since this is a capital case, we have explored the record, and given consideration to each objection made by appellant, as well as each assignment of error.

Finding no prejudicial error, the judgment is affirmed.

MR. JUSTICE HOLT disqualified.

TINER *v.* TINER

5-3231 379 S. W. 2d 425

Opinion delivered June 1, 1964.

[redacted]

Jay W. Dickey, Jr., and Jay W. Dickey, for appellant.

Paul B. Pendleton, Coleman, Gantt, Ramsay & Cox and Bridges, Young & Matthews, for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation stems from a traffic collision between a car driven by appellant, Berlin Tiner, and a car driven by A. R. Merritt. In the collision four of the children in the Berlin Tiner car were killed and one was permanently injured. Three of those fatally wounded were children of Berlin Tiner and his divorced wife, Alma Jean Tiner; the fourth fatally wounded child was Berlin Tiner's niece, Linda Tiner; and the permanently injured child was Berlin Tiner's nephew, Charles Tiner, Jr. Both Linda Tiner and Charles Tiner, Jr. were the children of Mr. and Mrs. Charles Tiner, Sr. Two separate actions were filed as a result of the traffic collision and in each case there were interventions, all of which matters will be subsequently described. Both cases were consolidated and tried in the Jefferson Circuit Court and resulted in verdicts against Berlin Tiner, who prosecutes the present appeal. The points presented on appeal are complicated by a variety of other issues which appear to have been settled, but a rather detailed statement of facts is necessary in order to explain how some of the present issues are still germane.

On September 3, 1961, the Berlin Tiner and the Charles Tiner, Sr. families had been visiting relatives in Stuttgart and prepared to return to their homes in Pine Bluff. Some of the group were in the Berlin Tiner car and some were in the Charles Tiner, Sr. car. In the car with Berlin Tiner were his three children,[1] his niece Linda, and his nephew Charles, Jr. Others of the party group were in the car of Charles Tiner, Sr. Berlin Tiner

[1] Berlin Tiner's children were Berlin, Jr., Rita, and Glorya. They were the children of Berlin Tiner and his divorced wife, Mrs. Alma Jean Tiner, and all three of the Berlin Tiner children were killed in the collision.

left Stuttgart some time before Charles Tiner, Sr. When Berlin Tiner had traveled several miles from Stuttgart toward Pine Bluff he encountered a sudden rain shower which made the asphalt highway very slick. His car skidded and "fish-tailed,"[2] and finally ran into and against the car of A. R. Merritt, who was proceeding from Pine Bluff to Stuttgart. This collision between the Berlin Tiner car and the Merritt car resulted in the death of the three Berlin Tiner children, the death of Linda Tiner, permanent injuries to Charles Tiner, Jr., injuries to Berlin Tiner, and also injuries to the Merritts.

On July 19, 1962, Mr. and Mrs. Merritt filed action for damages in the Jefferson Circuit Court against Berlin Tiner. This was Case No. 15738 and is hereinafter referred to as the "Merritt-Tiner" case. Berlin Tiner, by answer and cross complaint, sought to recover damages against the Merritts for his personal injuries and damages. The National Bank of Commerce of Pine Bluff, as the administrator of the estates of the three Berlin Tiner children, intervened and sought damages against Merritt and also sought damages against Berlin Tiner; and a portion of the damages sought by the administrator was for the mental anguish of the mother of the minors, Mrs. Alma Jean Tiner. Later, by specific amendment, the said administrator of the Berlin Tiner children sought damages against Merritt for the mental anguish of Berlin Tiner on account of the death of his children.

On September 27, 1962, Charles Tiner, Sr., individually and in his representative capacity as father and next friend of Charles Tiner, Jr. and administrator of the estate of his deceased daughter Linda Tiner, filed action in the Jefferson Circuit Court against Berlin Tiner and A. R. Merritt, seeking damages for personal injuries of Charles Tiner, Jr., and damages for the death of Linda Tiner, and included were damages for the men-

[2] This very descriptive word is used in Webster's Third New International Dictionary in relation to an airplane or a ship; but the witnesses, in using it in the case at bar, explained that the rear end of the car would whip around to the front as the car skidded down the highway.

tal anguish of Mr. and Mrs. Charles Tiner, Sr. occasioned by the death of their daughter Linda. This is Case No. 15820 and is hereinafter referred to as the "Tiner-Tiner" case. This complaint alleged that Berlin Tiner was guilty of willful and wanton negligence and that A. R. Merritt was guilty of at least simple negligence. There were some interventions in this case and also various *in limine* pleadings.

On April 5, 1963, the Jefferson Circuit Court, over the objections of Berlin Tiner, consolidated the two cases (*i.e.,* No. 15738 *Merritt* v. *Tiner,* and No. 15820 *Tiner* v. *Tiner*); and jury trial commenced in the consolidated cases on April 9, 1963, and continued for six days. On April 11, 1963, in the course of the trial, the complaint of A. R. Merritt and wife against Berlin Tiner, and Berlin Tiner's cross complaint against Merritt, were both settled and dismissed from the trial then in progress. But there were left (a) against Merritt and intervention and complaint of the administrator of the estates of the three Berlin Tiner children; and also (b) against Merritt the intervention and complaint of Charles Tiner, Sr. for Charles Tiner, Jr., and the estate of Linda Tiner. There were also left (c) the claim of Charles Tiner, Sr. in his personal and representative capacity against Berlin Tiner; and (d) against Berlin Tiner the claims of the administrator of the estates of the Berlin Tiner children.

The Trial Court submitted the case to the jury on special interrogatories; and below we copy each interrogatory and the answer of the jury to the same:

"SPECIAL INTERROGATORY NO. 1. Do you find from a preponderance of the evidence in this case that A. R. Merritt was guilty of negligence which was a proximate cause of the collision?"

"ANSWER: NO."

"SPECIAL INTERROGATORY NO. 2. Do you find from a preponderance of the evidence in this case that Berlin Tiner, Sr. was guilty of operating his automobile in willful and wanton disregard of the rights of

others, and that such was a proximate cause of the collision?"

"ANSWER: YES."

"INTERROGATORY NO. 3. Do you find from a preponderance of the evidence in this case that Charles Tiner, Jr. was guilty of contributory negligence as defined in the instructions given you by the Court?"

"ANSWER: NO."

"INTERROGATORY NO. 4. Do you find from a preponderance of the evidence in this case that Alma Jean Tiner was guilty of contributory negligence as defined in the instructions given you by the Court?"

"ANSWER: NO."

"INTERROGATORY NO. 5. If you have answered the first 4 interrogatories 'Yes,' or if you have answered any two of the first 4 interrogatories 'Yes,' now please state the percentage of fault of each person found to be guilty of negligence of willful and wanton negligence, considering the whole negligence in the case, of whatever degree, to be 100%."

(Since the jury did not answer any of the interrogatories "Yes" except the one relating to Berlin Tiner, it became unnecessary for the jury to answer this Interrogatory No. 5.)

"SPECIAL INTERROGATORY NO. 6. (To be answered only if either Interrogatory No. 1 or Interrogatory No. 2, or both, are answered 'Yes.') What do you find from a preponderance of the evidence in the case is the total damage sustained by:

(a) Charles Tiner, Jr., for his injuries?"

"ANSWER: $25,000.00."

"(b) Charles Tiner, Sr. for hospital, medical and doctor bills incurred by him because of the injuries to Charles Tiner, Jr."

"ANSWER: $2,175.42."

"(c) Charles Tiner, Sr., as Administrator of the Estate of Linda Tiner, for the funeral expenses of said child?"

"ANSWER: $664.52."

"(d) Charles Tiner, Sr. and Frances Tiner for mental anguish, if any, suffered by them because of the death of said Linda Tiner?"

"ANSWER: $25,000.00 (Total)."

"(e) National Bank of Commerce of Pine Bluff, Administrator in Succession of the Estates of Berlin Tiner, Jr., Rita Tiner, and Glorya Tiner for the funeral expenses of said children? (Which is agreed to be $1,689.07.)"

"ANSWER: $1,689.07."

"(f) National Bank of Commerce of Pine Bluff, Administrator in Succession of the Estates of Berlin Tiner, Jr., Rita Tiner, and Glorya Tiner, for the benefit of Alma Jean Tiner, mother of said children, for mental anguish, if any, suffered by her as a result of the death of her three children?"

"ANSWER: $40,000.00."

Judgments[3] were rendered in accordance with the

[3] We copy the pertinent excerpts of said judgments: "IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that so much of the prayer of the intervention of the National Bank of Commerce as administrator of the estates of Berlin Tiner, Jr., Rita Tiner and Glorya Tiner as prays judgment against A. R. Merritt for mental anguish on behalf of Berlin Tiner be, and the same is hereby dismissed with prejudice pursuant to the directed verdict given by this Court.

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff, Charles Tiner, Jr., through his father and next friend, Charles Tiner, Sr., do have and recover of and from the defendant, Berlin Tiner, judgment in the sum of Twenty Five Thousand ($25,000.00) Dollars.

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that Charles Tiner, Sr. do have and recover of and from the defendant, Berlin Tiner, judgment in the sum of Two Thousand One Hundred Seventy-Five and 42/100 ($2,175.42) Dollars.

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that Charles Tiner, Sr., as administrator of the estate of Linda Tiner, deceased, do have and recover of and from the defendant, Berlin Tiner, judgment in the sum of Six Hundred Sixty-Four ($664.00) Dollars.

verdicts, and from those judgments Berlin Tiner appealed from all judgments against him. The Administrator of the estates of the three Berlin Tiner children also appealed as against Merritt, but later the administrator dismissed all appeals against A. R. Merritt. Also, pending appeal, the judgments of the Bank as administrator of the estates of the three Berlin Tiner children, were settled and dismissed, which judgments against Berlin Tiner totalled $41,689.07. There are left now before us: (a) the appeal of Berlin Tiner against Charles Tiner, Sr., in his personal and representative capacity; and (b) the appeal of Berlin Tiner against A. R. Merritt on one angle of the case. We shall refer to Berlin Tiner as appellant and Charles Tiner, Sr. (in his personal and representative capacity) as appellee, and will refer to Merritt by such name, and the Administrator of the estates of the three Berlin Tiner children by such identification.

Berlin Tiner urges eight points on his appeal, being:

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that Charles Tiner, Sr. and Frances Tiner, jointly, do have and recover of and from the defendant, Berlin Tiner, judgment in the sum of Twenty Five Thousand ($25,000.00) Dollars by reason of the death of Linda Tiner.

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the National Bank of Commerce of Pine Bluff, administrator in succession of the estates of Berlin Tiner, Jr., Rita Tiner and Glorya Tiner, for the use and benefit of said estates do have and recover of and from the defendant, Berlin Tiner, judgment in the sum of One Thousand Six Hundred Eighty Nine and 07/100 ($1,689.07) Dollars, and that the National Bank of Commerce of Pine Bluff, as administrator in succession of the estates of Berlin Tiner, Jr., Rita Tiner, and Glorya Tiner, for the use and benefit of Alma Jean Tiner, their mother, do have and recover of and from the defendant, Berlin Tiner, judgment in the sum of Forty Thousand ($40,000.00) Dollars.

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Intervenor in Case No. 15738 take nothing against A. R. Merritt, and said intervention, insofar as it pertains to A. R. Merritt, be, and the same is hereby, dismissed with prejudice.

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED, that the plaintiffs in Case No. 15820 take nothing against A. R. Merritt, and said complaint, insofar as it pertains to A. R. Merritt, be, and the same is hereby, dismissed with prejudice.

"IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that all of said judgments shall bear interest from the date of said judgment so entered herein at the rate of six per cent (6%) per annum and that the Intervenor and the Plaintiffs herein should have of and from Berlin Tiner their costs herein paid, and as to all of said judgments, garnishment and execution may issue as in law provided, to which judgment Berlin Tiner objects and excepts."

"I. The trial court erred in permitting National Bank of Commerce, Administrator-in-Succession of the Estates of Berlin Tiner, Jr., Rita Tiner and Glorya Tiner, Deceased (children of Berlin Tiner) to intervene in the case of A. R. Merritt, et al, vs. Berlin Tiner.

"II. The trial court erred in permitting consolidation for trial of the case of Charles Tiner, Sr., et al, vs. A. R. Merritt and Berlin Tiner (No. 15820) with the case of A. R. Merritt, et al, vs. Berlin Tiner (No. 15738).

"III. The trial court erred in giving an instructed verdict against Berlin Tiner on his claim against A. R. Merritt, et al, for mental anguish.

"IV. The trial court erred in giving instructions No. 3, No. 15, and No. 18.

"V. The trial court erred in failing to declare a mistrial, upon the motion of Berlin Tiner, based upon a statement made by counsel for Charles Tiner, Sr., et al, in his closing argument to the jury.

"VI. The verdict of the jury was contrary to the evidence in finding Berlin Tiner guilty of willful and wanton negligence.

"VII. The verdict of the jury was contrary to the evidence in finding that Charles Tiner, Sr., Frances Tiner and Charles Tiner, Jr., were free of negligence which contributed to the death of Linda Tiner and to the alleged injuries of Charles Tiner, Jr.

"VIII. The verdict of the jury was excessive."

I and II.

We find no merit in the appellant's first two points. The Bank, as administrator of the estates of the three Berlin Tiner children, intervened and claimed damages against A. R. Merritt for at least simple negligence, and against Berlin Tiner for willful and wanton negligence. The claims of the administrator arose out of the one traffic mishap and were properly triable in the one case. Likewise, the consolidation of the two cases (No. 15728

and No. 15820) was within the sound discretion of the Trial Court; and we see no prejudicial error. The mere fact that some oft he parties (*i.e.,* the Merritts) might have recovered against Berlin Tiner by proving simple negligence, and that the other parties (*i.e.,* Charles Tiner, Sr. in his personal and representative capacity) could not recover against Berlin Tiner except by proving willful and wanton negligence—such situation—did not unduly complicate the case. The Court instructed the jury in detail on these matters, and the issues were submitted on special interrogatories. In short, we see no merit to appellant's first and second points.

III.

Appellant's third point relates to the instructed verdict the Court gave in favor of A. R. Merritt in regard to the mental anguish claim of Berlin Tiner for the death of the three Berlin Tiner children. We find no prejudice to Berlin Tiner in such ruling. When the trial commenced on April 9th Berlin Tiner was suing A. R. Merritt for Berlin Tiner's personal injury and property damage. Also, Berlin Tiner had insisted that the administrator of the estates of his three deceased children claim damages against A. R. Merritt for Berlin Tiner's mental anguish suffered because of the death of his three children. On April 11, 1963 (the third day of the jury trial) there was entered an order settling and dismissing the claim of Berlin Tiner against A. R. Merritt and the claim of A. R. Merritt against Berlin Tiner.[4]

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[4] The said order, including the captaion, reads as follows:

"IN THE
CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

A. R. MERRITT, LETA S. MERRITT AND A. R. MERRITT, TRUSTEE OF THE W. I. PAYNE ESTATE ..... PLAINTIFFS

v. No. 15738

BERLIN TINER, SR. ..... DEFENDANT

NATIONAL BANK OF COMMERCE OF PINE BLUFF, ADMINISTRATOR IN SUCCESSION OF THE ESTATES OF BERLIN TINER, JR., RITA TINER, AND GLORYA TINER, DECEASED ..... INTERVENOR

"ORDER OF DISMISSAL WITH PREJUDICE

"Now on this day come the plaintiffs, A. R. Merritt, Leta S. Merritt and A. R. Merritt, Trustee of the W. I. Payne Estate, by their

One of the claims of Berlin Tiner against A. B. Merritt was for the mental anguish Berlin Tiner claimed to have suffered because of the death of his three children. This claim was being prosecuted by the administrator of the estate of the three Berlin Tiner children. When the entire case was finally ready to submit to the jury several days after April 11, 1963, the Court instructed the jury that it would not consider any claim of Berlin Tiner against A. R. Merritt for mental anguish for the death of the three Berlin Tiner children. To that instruction Berlin Tiner objected, and now argues error.

There are several answers to appellant's argument. In the first place, the order of dismissal of April 11, 1963 (previously copied in the footnote) is broad enough to cover the mental anguish of Berlin Tiner against A. R. Merritt. Another and second answer is that the jury, in answer to Interrogatory No. 1, as previously copied, found that A. R. Merritt was guilty of no negligence. This finding rendered moot the matter of the instruction. *Johnston* v. *Fuqua,* 105 Ark. 358, 151 S. W. 693; *Capital Fire Ins. Co.* v. *Kaufman,* 91 Ark. 310, 121 S. W. 289. If Merritt was guilty of no negligence, then Berlin Tiner was not prejudiced by the Court's refusal to submit to the jury the issue of Berlin Tiner's mental anguish which could have been recovered against A. R. Merritt only if Merritt had been found guilty of negligence.

Instructions. The Trial Court gave more than thirty instructions covering all angles of the cases. Among

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attorneys, Bridges, Young and Matthews and Coleman, Gantt and Ramsey, and comes the defendant, Berlin Tiner, Sr., by his attorney, Jay W. Dickey, and announce to the court that the issues in this litigation between these parties have been settled and that the complaint of the plaintiffs and the cross complaint of the defendant should be dismissed.

"It is, therefore, considered, ordered and adjudged by the court that the complaint of the plaintiffs, A. R. Merritt, Leta S. Merritt and A. R. Merritt, Trustee of the W. I. Payne Estate against Berlin Tiner, Sr., be and it is hereby dismissed with prejudice and that the cross complaint of the defendant, Berlin Tiner, Sr., against A. R. Merritt and A. R. Merritt, Trustee of the W. I. Payne Estate be and it is hereby dismissed with prejudice.

"April 11, 1963

"/s/ Henry W. Smith, Circuit Judge."

other instructions given by the Court were Nos. 3, 15, and 18, each of which was given over the general and specific objections of Berlin Tiner. It would unduly prolong this opinion and would serve no useful purpose to copy the thirty instructions, and the appellant's objections to each of them. It is sufficient to say that we have carefully studied each of the instructions, the evidence which justified the Court in giving each, and the law which supports each; and we have concluded that there is no merit to appellant's arguments regarding any of these instructions.

V.

Appellant claims he was entitled to a mistrial because of a statement made by the counsel for Charles Tiner, Sr. in his closing argument. To give all the details concerning this situation would unduly prolong this opinion; but we find no merit to this point. The fact that Berlin Tiner was driving an automobile which belonged to the Smart Chevrolet Company had been mentioned several times in the course of the trial. Berlin Tiner himself testified, without objection, on Tr. p. 635: "I was driving a demonstrator automobile furnished me by Smart Chevrolet Company." So the fact that the attorney for appellee, in his closing argument, happened to mention the name of Smart Chevrolet Company, did not constitute any reversible error. Furthermore, the Court, when objection was made, promptly told the jury to entirely disregard any such reference. With all of this clearly shown, we find no merit to appellant's fifth contention.

VI.

Appellant's sixth point relates to the action of the Court in submitting the case to the jury on the question of whether Berlin Tiner was guilty of willful and wanton negligence. At every step in the trial the appellant insisted that there was no evidence of his willful and wanton negligence; and that is the point now before us. Our guest statutes are Ark. Stat. Ann. §§ 75-913 and 75-915 (Repl. 1957). Linda Tiner and Charles Tiner, Jr.

were guest passengers in the car of Berlin Tiner, and neither Charles Tiner, Jr. nor the estate of Linda Tiner can recover against Berlin Tiner unless and until they show that Berlin Tiner was guilty of willful and wanton negligence. Likewise, the three Berlin Tiner children were guest passengers in the car of Berlin Tiner; and the administrator of the estate of each of these children cannot recover for the estate or for the mental anguish of the mother, Mrs. Alma Jean Tiner, unless and until it is shown that Berlin Tiner was guilty of willful and wanton negligence. The Court so instructed the jury; and the instructions on this point are almost verbatim from those approved by us in the case of *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226.

With the burden being thus understood, we view the evidence in the light most favorable to the verdicts, as is our rule. What is the evidence as to the willful and wanton negligence of Berlin Tiner?

(1) Berlin Tiner stated that shortly before the collision there began a torrential rain: ". . . I went into it not as a drizzle. I went into the rain as a sheet or wall of rain . . ." He testified that his car began to skid or "fish-tail" on the slick asphalt road and was well over the center line, and on his left at the time of the collision, and had skidded or "fish-tailed" so much that the rear of his car was in front of the motor.

(2) It was shown that during the "sheet or wall of rain" visibility was practically nil.

(3) Charles Tiner, Jr. testified that shortly before the Berlin Tiner car entered the rain the car was traveling 80 miles an hour and that there was no lessening of that speed even up to the time of the collision. Other witnesses placed the speed of the Berlin Tiner car at 70 miles an hour, even as it approached the Merritt car.

So the question is whether a person traveling 80 miles per hour[5] in a sheet of rain, with practically no visibility, can thereby be found guilty of willful and

[5] Of course, Berlin Tiner denied such speed but, as aforesaid, we must view this evidence in the light most favorable to support the jury verdict.

wanton negligence. Some of our recent cases on our guest statute[6] are: *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226; *Sims* v. *Tingle,* 232 Ark. 239, 335 S. W. 2d 449; *Cousins* v. *Cooper,* 232 Ark. 605, 339 S. W. 2d 316; *Henshaw* v. *Henderson,* 235 Ark. 130, 359 S. W. 2d 436; and *Spencer* v. *Vaught,* 236 Ark. 509, 367 S. W. 2d 238. In *Harkrider* v. *Cox* and in *Spencer* v. *Vaught* we had occasion to consider the sufficiency of the evidence to take the case to the jury on the question of willful and wanton negligence; and we think the evidence in the case at bar meets all the tests stated in *Harkrider* v. *Cox.* Here, there was an excessive speed, with a lack of visibility, and a skidding car. One witness testified that Berlin Tiner told him that he could have gone to the ditch on the road on his right side but did not want to injure the car. This was bitterly denied; but it was evidence which the jury had a right to believe. So, we have a man driving down the road at a speed of 80 miles an hour, with his car skidding and "fish-tailing," with no visibility, and no real effort to check the speed of the car. We conclude that this evidence is sufficient to take the case to the jury on the question of willful and wanton negligence.

VII.

Appellant's seventh point relates to the matter of contributory negligence; and we find no merit to appellant's argument on this point. There is no evidence that Charles Tiner, Sr. was guilty of contributory negligence in allowing his children to travel in the car of Berlin Tiner. Charles Tiner, Jr. was thirteen years of age at the time of the collision, and Linda Tiner was ten years of age. The issues of negligence and contributory negligence are usually questions of fact; and, without reviewing all the evidence, we reach the conclusion that the question of the contributory negligence of these children was a question of fact for the jury. The jury found that they were not guilty of contributory negligence; and we cannot say that the jury's findings were in error.

[6] See "Family Torts in Automobile Cases" in 13 Ark. Law Review 299; and see also annotation in 42 A.L.R. 2d 350: "Rights of injured guests as affected by obscured vision from vehicle in which he was riding."

VIII.

Appellant's eighth and final point states that the jury verdicts were excessive. We have previously copied the verdicts. Charles Tiner, Jr. recovered for his injuries and pain and suffering the sum of $25,000.00. This is in no wise excessive. His right wrist was broken, his left arm was broken above the elbow, his left leg and hip were dislocated, and he had three broken ribs on his right side. He was unconscious for some time and was in the hospital several weeks and lay flat on his back for six weeks. A brace was placed on his foot and connected to his knee to force his foot to take a step. The doctor who treated him, and whose qualifications were admitted, testified that he saw the boy nearly every day while he was in the hospital; that the boy had a 54% disability to his left leg below the knee due to the permanent loss of sensation of feeling in the leg, as well as an inability to lift the foot; that the boy had a 21% disability to the left arm because the fracture had healed with a little angulation, resulting in the arm swinging toward the body rather than at the normal carrying angle where it swings from the upper arm; that the boy had a very weak joint and lift of the left foot and as a result had a tendency to drag the toe, giving him a peculiar gait; and would probably develop traumatic arthritis of the elbow joint. The doctor stated that Charles Tiner, Jr. had a 24.8% disability to his body as a whole; and, in the doctor's opinion, these injuries were permanent. Here is a young boy, maimed for life. Prior to the collision he had played baseball and football, and danced. All of these are now taken from him. Certainly the $25,000.00 judgment in his favor is in no wise excessive.

Charles Tiner, Sr. recovered judgment for $2175.42 because of the medical and doctor bills that he paid as the father of Charles Tiner, Jr.; and this is not excessive. Charles Tiner, Sr. paid the funeral expenses of his daughter, Linda Tiner, of $664.52, and recovered judgment for this amount; and no excess is present.

There remains, however, one verdict[7] which gives us most serious concern and that is the judgment of $25,000.00 to Charles Tiner, Sr. and his wife for mental anguish suffered because of the death of their daughter, Linda Tiner. Our statute allowing recovery for mental anguish in cases like this is Act No. 255 of 1957, now found in Ark. Stat. Ann. § 27-906 *et seq.* (Repl. 1962). This statute was upheld by us in *Peugh* v. *Oliger,* 233 Ark. 281, 345 S. W. 2d 610, in which case there is contained a discussion of mental anguish. In 15 Am. Jur. 602, "Damages" § 183, the holdings of various jurisdictions are summarized:

"Mental anguish from a pecuniary standard, is incapable of definite calculation. The law furnishes no definite rule or standard by which such suffering may be valued or compensated for in money or which will afford a certain basis upon which damages therefor can be estimated. The amount to be awarded in any particular case necessarily, therefore, rests in the discretion of the jury, subject to review as in other cases. The difficulty in measuring damages of this kind, moreover, should not preclude their recovery in a proper case."

In *Smith* v. *Tipton,* 237 Ark. 486, 374 S. W. 2d 176, we held that a verdict was not excessive which awarded parents $12,500.00 for mental anguish for the death of a son and there said:

"As to the *deceased boys,* there has not been and will never 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.

[7] There was a verdict in favor of the Bank, as Administrator of the estates of the three Berlin Tiner children, for $40,000.00 for mental anguish of Mrs. Alma Jean Tiner, the mother of the children; but this was settled pending appeal and is not before us.

We are unwilling to say the judgment of $12,500.00 in each case was excessive."[8]

The question now before us is whether the verdict for $25,000 for mental anguish in the case at bar is so grossly excessive as to shock the conscience of the Court. It is true that the verdict is large; but the evidence shows most strongly the great mental anguish that these parents have suffered. To detail such evidence would serve no useful purpose. It is sufficient to say that after reviewing all the evidence we cannot say that the verdicts should be reduced. Therefore, we leave them undisturbed.

Finding no error in the entire case, the judgments are affirmed.

HARRIS, C.J., not participating.

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[8] We find the following language used by the Florida Supreme Court in *Florida Dairies Co.* v. *Rogers*, 161 So. 85: "Damages for mental pain and suffering are not generally regarded as punitive, but more in the nature of compensatory. The law has devised no fixed standard by which they can be calculated, and since this is the case, the amount to be awarded must rest in the discretion of the jury. The law measures compensation for mental pain and suffering in money, and while this may be a poor criterion, it has been said that to forbid it because perchance the law's scales are not sufficiently delicate for their admeasurement is equally to condemn the use of scales in all other directions, and in the very cases and for the very purposes now admittedly sanctioned by the law."

VAN DALSEN *v.* INMAN.

5-3267 379 S. W. 2d 261

Opinion delivered June 1, 1964.

Gannaway & Gannaway, for appellant.

Spencer & Spencer, Gregory & Claycomb, for appellee.

ED F. MCFADDIN, Associate Justice. The Trial Court sustained the defendant's motion for summary judgment, and by this appeal the appellants challenge the correctness of such ruling. The appellants (plaintiffs below) are Brice Van Dalsen and the Railsback Tractor Company (hereinafter called "Railsback"), and the real appellee (which was the defendant below) is Jim Walter Corporation. The action was for personal injuries sustained by Van Dalsem and property damage sustained by Railsback when a car driven by Fred Inman, Sr. collided with the Railsback vehicle. It was alleged that Inman was negligent and that he was at the time the servant of Jim Walter Corporation and acting within the scope of his employment.

In testing the correctness of the ruling of the Trial Court in granting the summary judgment for Jim Walter Corporation, we state the facts in the light most favorable to the appellants, giving them the benefit of all the evidence. Fred Inman, Sr. lived in Stuttgart and was a salesman for Jim Walter Corporation and engaged in selling shell homes. Mr. Inman furnished his own automobile and paid his own expenses, and his only compensation was a commission of approximately $100.00 on each shell home that he sold. The office of Jim Walter Corporation was in Pine Bluff, and at the times here involved Hollis Adams was the manager of the Pine Bluff office and B. J. Weiss was the office secretary. Whenever Mr. Inman had a prospect whom he believed ready to purchase, he contacted Mr. Adams in the Pine Bluff office, who went with Inman to close the sale. Inman was supposed to work every day. He selected his route and the prospects to see, but he kept the Pine Bluff office informed of his whereabouts.

Mr. Inman's wife was in a Little Rock hospital, and about 11:00 A.M. on Tuesday, February 13, 1962, Mr.

Inman and his mother drove in Mr. Inman's car from his home in Stuttgart to visit Mrs. Inman. They reached the hospital shortly after 1:00 P.M. and visited with Mrs. Inman until about 2:00 P.M. From the hospital Mr. Inman and his mother drove to North Little Rock to visit Mr. Inman's sister. At about 4:45 P.M. Mr. Inman said: "Mother, we must be going. I want to go through Pine Bluff and see my boss man." Accordingly, Mr. Inman and his mother drove from Little Rock to Pine Bluff.[1] The office of the Jim Walter Corporation was closed and Mr. Inman left a note under the door which note was to tell Mr. Hollis Adams that Mr. Inman had three named prospects and that Mr. Adams would please meet him at a given place the next morning between 9:00 and 9:30 A.M. in order to close a deal with one of the named prospects.

After leaving the note under the door of the Jim Walter Corporation office in Pine Bluff, Mr. Inman and his mother resumed their return trip to Stuttgart; and at about 6:30 P.M., and outside the city limits of Pine Bluff, his car collided with the Railsback vehicle being driven by Van Dalsen. Mr. Inman and his mother were both killed, apparently instantly. Van Dalsen was injured and the Railsback vehicle was damaged. This action was filed by Van Dalsen and Railsback against Fred Inman, Jr., Administrator of the Estate of Fred Inman, Sr., and also the Jim Walter Corporation. The estate of Inman made no defense (it being stated in the brief that it was insolvent); but the Jim Walter Corporation denied all liability, claiming that Fred Inman, Sr. was not a servant acting within the scope of his employment at the time of the collision. After numerous discovery depositions had been filed, the Jim Walter Corporation moved for summary judgment. The motion was sustained, and the correctness of that ruling as to the Jim Walter Corporation is the sole issue on this appeal.

I. *Summary Judgment Procedure.* By Act No. 123 of 1961 Arkansas adopted Rule 56 of the Federal Rules

[1] We take judicial notice of the map of the State (*Bonner* v. *Jackson,* 158 Ark. 526, 251 S. W. 1), and of distances between places (*Heno* v. *Fayetteville,* 90 Ark. 292, 119 S. W. 287.)

of Civil Procedure, which is our summary judgment statute,[2] and is compiled as Ark. Stat. Ann. § 29-211 (Repl. 1962). Some of our cases involving this summary judgment statute are: *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S. W. 2d 89; *Epps* v. *Remmel,* 237 Ark. (Adv. Op.) 391, 373 S. W. 2d 141; and *Jones* v. *Comer,* 237 Ark. 500, 374 S. W. 2d 465. In *Russell* v. *City of Rogers supra,* we said:

"Our recent summary judgment statute, Act 123 of 1961, is a re-enactment of Rule 56 of the Federal Rules of Civil Procedure. Ark. Stat. Ann. § 29-211 (Repl. 1962). It provides that a summary judgment shall be rendered if the pleadings and proof on file show 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' It has been pointed out, under the Federal Rule, that the theory underlying a motion for summary judgment is the same as that underlying a motion for a directed verdict. Moore's Federal Practice (2d Ed.), § 56.02 (10). Hence any testimony that is submitted with the motion must be viewed in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party."

In the case at bar the burden rested on the movant, Jim Walter Corporation, to establish that there was no liability on its part under the facts most favorable to the plaintiffs. In other words, under the most favorable view of the facts to the plaintiffs, an instructed verdict would be given in favor of Jim Walter Corporation.

II. *The Scope Of Employment.* With the rule as to summary judgment thus understood, we weigh the evidence in this case; and we reach the conclusion that it establishes, without contradiction, that Mr. Inman was not in the scope of employment of Jim Walter Corporation at the time of the fatal collision, but was on a personal and private mission. In *Sweeden* v. *Atkinson*

[2] Sub-section (b) of said Section reads: "For Defending Party. 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."

Imp. Co., 93 Ark. 397, 125 S. W. 439, Mr. Justice Frauenthal, speaking for a unanimous Court, stated the following applicable rules:

" 'When a servant acts without reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible for either the act or omission of the servant.' . . . .

" 'The act of a servant done to effect some independent purpose of his own, and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is ordinarily held not to be within the scope of his employment as to render his master liable therefor.' "

In *St.L.I.M.&S. Ry. Co.* v. *Robinson,* 95 Ark. 39, 128 S. W. 60, we said:

" 'The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. Thus it will be seen that, in order to render the master liable, the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment.' . . . . 'It will thus be seen that the test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was done while carrying out the object and purpose of the master's business; for, if the act was done without authority and solely for purposes exclusively the servant's, then the master is not liable during such time that such acts are done. During such time he steps aside from his master's business and his employment.' "

And in *Hunter* v. *First State Bank,* 181 Ark. 907, 28 S. W. 2d 812, Justice Hart stated:

". . . the test of a master's liability for the act of a servant is not whether a given act was done during the existence of the servant's employment, but whether it

was committed in the prosecution of the master's business. This rule has been recognized and applied by this court in a suit for damages against the owner of an automobile for injuries sustained by a third person on account of the negligence of the chauffeur."

To the same effect see also *Ark. Natural Gas Co.* v. *Lee,* 115 Ark. 288, 171 S. W. 93; *C. R. I. & P. Ry.* v. *Womble,* 131 Ark. 411, 199 S. W. 81; *Mullins* v. *Ritchie Grocer Co.,* 183 Ark. 218, 35 S. W. 2d 1010; *Rex Oil Corp.* v. *Crank,* 183 Ark. 819, 38 S. W. 2d 1093; and *Vincennes Steel Corp.* v. *Gibson,* 194 Ark. 58, 106 S. W. 2d 173.[3]

In the case at bar Jim Walter Corporation established that on the day in question Mr. Inman started from his home in Stuttgart on a purely private and personal mission; *i.e.,* to visit his wife in a hospital in Little Rock; that in returning home to Stuttgart from Little Rock he digressed from the said personal and private mission long enough to leave a note under the door of the Jim Walter Corporation in connection with his employment; that Mr. Inman then resumed his private and personal mission to return to Stuttgart with his mother; and that on such personal and private mission he suffered the traffic mishap here involved. In short, Mr. Inman was not "in the scope of employment" of Jim Walter Corporation at the time of the fatal collision here involved. He was on a private mission, just as was the driver of the car in the case of *Phillips Motor Co.* v. *Price,* 204 Ark. 827, 165 S. W. 2d 251. In *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, the servant sustained a traffic mishap during the time when he had digressed from the scope of employment of the master. In the case at bar, the servant, Inman, had digressed from his personal and private mission long enough to leave a note for his master, but had returned to his personal and private mission at the time of the fatal traffic mishap.

Appellants have cited us to some workmen's compensation cases wherein salesman have been awarded

[3] In 52 A.L.R. 2d 287, there is an annotation: "Employer's liability for negligence of employee in driving his own car." This is not in point to our present case, but is mentioned for information purposes.

compensation for injuries sustained while returning home, and it is claimed that these cases govern in the case at bar. Such a workmen's compensation case is *Frank Lyon Co.* v. *Oates,* 225 Ark. 682, 284 S. W. 2d 637. But the liability of the Jim Walter Corporation in the case at bar is to be determined by the "scope of employment" cases involving master and servant, and not by the "arising out of and in the course of employment" rule in workmen's compensation cases. The workmen's compensation cases are not applicable to a master and servant case, such as in the case at bar. The Supreme Court of Wisconsin clearly stated this difference in *Village of Butler* v. *Industrial Comm.,* 265 Wis. 380, 61 N. W. 2d 490, in this language:

"The principles of the common-law doctrine of '*respondeat superior*' of the law of master and servant are inapplicable to workmen's compensation cases. Whether an employee is acting within the scope or course of his employment is usually determinative of the issue of whether his employer should be held liable in damages for his employee's wrongful act, but is not necessarily controlling in determining whether an employer should be held liable under the Workmen's Compensation Act if the employee is injured."

To the same effect see *O'Leary* v. *Brown,* 340 U. S. 504, 95 L. Ed. 483, 71 S. Ct. 470; and *Edwards* v. *Louisiana Forestry Comm.,* 221 La. 818, 60 So. 2d 449.

The Trial Court correctly sustained the motion for summary judgment offered by Jim Walter Corporation.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* MCNEILL.

5-3274 381 S. W. 2d 425

Opinion delivered June 1, 1964.

[Rehearing denied September 14, 1964.]

Mark E. Woolsey and *Don Langston,* for appellant.

Hardin, Barton & Jesson, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellees, Troy McNeill and his wife, to enjoin the State Highway Commission from constructing a cloverleaf interchange upon a highway near the McNeills' home, unless the Commission first files a bond to secure any damages that the McNeills may suffer as a result of the construction. The Commission contends that the presence of the completed interchange will not cause any legally compensable damage to the plaintiffs. The chancellor, rejecting this defense, granted the injunction but withheld any determination of the McNeills' damages until the principal question has been decided by this court.

The McNeills own a residence in Crestview Estates, an addition to Fort Smith. The Crestview bill of assurances provides that property in the addition shall be used only for residential purposes. The highway department does not propose to take any of the appellees' land. It is, however, acquiring a tract that is comprised of eleven lots within the addition and that abuts the appellees' north boundary line. When the interchange is

completed the area behind the McNeills' home will be a busy highway instead of a quiet residential district. Expert witnesses testified that this transition will diminish the value of the plaintiffs' property by $10,000 or more.

In their complaint the McNeills bottomed their right to damages upon two separate grounds: First, the value of their property would be reduced by the presence of the highway, with its attendant noise, dust, fumes, glaring lights, and vibration. Secondly, the value of their property would be reduced by the highway department's violation of the residential restriction contained in the bill of assurances. The chancellor rejected the first count in the complaint but upheld the second count.

There is no appeal from the trial court's denial of compensation upon the first count. In fact, in the oral argument counsel for the landowners candidly conceded that this count does not state a cause of action. Despite the fact that the merits of the first count are not now in issue we think it best to begin our discussion by considering this count, for our decision upon the main question is really based upon the lack of merit in the first count.

It is well settled in Arkansas that a landowner whose land is not being taken is not entitled to compensation for damage of the same kind as that suffered by the public in general, even though the inconvenience and injury to the particular landowner may be greater in degree than that to others. *Hot Springs R. R.* v. *Williamson,* 45 Ark. 429, aff'd 136 U. S. 121, 34 L. Ed. 335, 10 S. Ct. 955; *Little Rock & H. S. W. R. R.* v. *Newman,* 73 Ark. 1, 83 S. W. 653. On the other hand, a compensable injury occurs when there is a special damage to the plaintiff, as by a change in the grade of the street abutting his property or by a destruction of his access to a public street. *Campbell* v. *Ark. State Highway Comm.,* 183 Ark. 780, 38 S. W. 2d 753.

It cannot be doubted that the first count in the McNeills' complaint does not state a cause of action. They merely assert that after the project has been com-

pleted their back property line will border a public highway rather than a privately owned residential lot. Such an inconvenience is of the same nature as that suffered by the public in general whenever a highway is built in a residential district. There is no cause of action in the landowner for the resulting diminution in the value of his property.

We turn to the principal issue: Does the fact that the proposed interchange will violate the restrictive covenant render the appellant liable for the decrease in the market value of the McNeills' property? This problem has arisen in some twenty jurisdictions, with the decisions about equally divided between the allowance of compensation and its denial. The cases are discussed in Nichols, Eminent Domain (3d Ed.), § 5.73, and in a Comment, 53 Mich. L. Rev. 451. When compensation is allowed it is ordinarily measured by the diminution in market value. *U. S.* v. *Certain Land in the City of Augusta,* D. C. Maine, 220 F. Supp. 696; *U. S.* v. *11.06 Acres,* D. C. Mo., 89 F. Supp. 852; *Town of Stamford* v. *Vuono,* 108 Conn. 359, 143 Atl. 245; *Johnstone* v. *Detroit, G. H. & M. R. R.,* 245 Mich. 65, 222 N. W. 325. The American Law Institute indicates that compensation may be proper in some instances, but it refuses to express any opinion about the correct measure of damages. Restatement, Property, § 566.

Many of the decisions denying compensation are discussed in *Anderson* v. *Lynch,* 188 Ga. 154, 3 S. E. 2d 85. The courts seem to have had some difficulty in finding a sound basis for refusing an award, some saying that the plaintiff has no property interest in the land being taken, others that the restrictive covenant does not confer a property right, and still others that the public power of eminent domain should not be impaired by private contract.

We have no quarrel with an award of compensation if, as in Missouri, the same award would have been made if there had been no restrictive covenant. *Peters* v. *Buckner,* 288 Mo. 618, 232 S. W. 1024, 17 A.L.R. 543. But, as

we have seen in considering the first count in the appellees' complaint, that is not the law in Arkansas. Any cause of action asserted by the McNeills must rest solely upon the breach of the restriction.

In those jurisdictions where, as here, compensation would be denied in the absence of a restriction, the decisions approving an award on the basis of the restriction alone are, in our opinion, demonstrably wrong. We need not, however, adopt the somewhat dubious reasons that have been given for the denial of compensation. We think the problem is essentially a simple one in causation.

It seems almost too plain for argument that the reduction in the value of the McNeills' property is attributable not to the breach of the restriction but rather to the fact that a highway is about to pass through a residential district. Suppose, for example, that this addition, Crestview Estates, had been developed in exactly the same way that it was actually developed, as a residential district, but without any such restriction in the bill of assurances. If the interchange had then been constructed the McNeills' damage, as far as the pleadings and proof indicate, would have been the same to the penny as if the restriction had existed. Yet it would not have been compensable. Thus it is illogical to permit a recovery upon the theory that the breach of covenant is the proximate cause of the injury.

Another illustration to demonstrate the fallacy in the decisions allowing compensation: Assume the existence of a purely residential area that is in part restricted and in part unrestricted. If a highway should be constructed just within the restricted section the landowners on that side of the highway would receive compensation while those on the other side, although suffering identical damage, would be without a remedy. Under such a rule it is evident that whenever the owners of property in an unrestricted neighborhood learn that a throughway is coming in their direction it is to their advantage to enter into an agreement imposing restrictions. In that way, by merely signing a piece of paper which they may de-

stroy at will, they are able to pluck valuable causes of action from the thin air.

We do not deny the existence of a property right in the appellees. It may be that the restrictive covenant gave added value to their land when they bought it. But it is not the breach of the covenant alone that is causing their damage. This same tract, instead of being taken for a highway, might have been condemned by the city as a site for a public park. That too would have involved a breach of covenant, but the value of the appellees' property might actually have been enhanced. Thus there is no logical basis for attributing the appellees' present damage to the naked breach of covenant. Even without the restriction their injury would still have occurred. We cannot permit an irrelevant clause in the bill of assurances to create a fictitious cause of action.

Reversed and dismissed.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). I respectfully but vigorously dissent because, as I see it, a valuable property right is being taken from the appellees by the State Highway Commission and this Court is refusing to allow the appellees any compensation for such valuable property right, and all this in spite of Art. 2, § 22 of our Constitution, which says: "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

In 1955 an exclusive residential addition was developed in Fort Smith called "Crestview Estates Addition," and the bill of assurances under which each lot in the district was sold contained these provisions, *inter alia:*

"1. No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two and one half

stories in height; and a private garage; and one other detached accessory building of not over one story in height and architecturally harmonious to the dwelling structure.

"7. No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.

"11. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of 10 years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part. Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damages.

"12. These covenants and restrictions shall be deemed to be incorporated in every deed of the owners to any and all lots located in said addition."

Every lot in Crestview was bound by the restrictive covenants above recited, one of which was that no lot would be used for any purpose except for a residence. Naturally, this restrictive covenant rendered the lots most valuable for residential purposes. In 1957 the appellees, Mr. and Mrs. McNeill, purchased a lot and a half in Crestview and erected thereon their home in which they now live. In 1962 the Arkansas State Highway Commission purchased, by warranty deed, eleven lots in said Crestview Addition, and each lot was bound by the restrictive covenant that no lot would be used except for a residence.

The Arkansas State Highway Commission purchased these lots for the deliberate use of a highway and not for residential purposes, thus deliberately intending

to violate the said restrictive covenant on each lot. Is the State and its agencies above the law and superior to the rights of private persons? The Constitution answers this question in the negative in the quotation I have above given. I think the Sovereign should deal fairly with its subjects, and I decry any attempt to allow the Sovereign to buy property like a private person and then claim rights superior to private persons.

The Majority Opinion says this is the issue: "Does the fact that the proposed interchange will violate the restrictive covenant render the appellant liable for the decrease in the market value of the McNeill property?" I unhesitatingly answer this question in the affirmative. A restrictive covenant such as we have here is a property right. Such was impliedly recognized in *Linder Corp.* v. *Pyeatt,* 222 Ark. 949, 264 S. W. 2d 619. See also 14 Am. Jur. 609, "Covenants" § 194. So the appellees have a property right that has been damaged. That the appellees are suffering damages different from the general public seems to me to be crystal clear. Any person owning a lot in Crestview had a property right against every other lot in Crestview. The general public had no such right: the restriction was owned only by lot owners in Crestview; and that, to my way of thinking, distinguishes lot owners in Crestview from the general public.

So I disagree entirely with the Majority Opinion which says that the lot owners in Crestview suffered only damages the same as the general public. Every lot owner in Crestview had bought a lot, knowing he had a restrictive covenant against every other lot. Suppose somebody had bought eleven lots in Crestview for a supermarket. Would this Court hold that the McNeills had no right for damages? Why should the State Highway Commission, acquiring property by deed, have a greater right than a citizen would have who acquired by deed? I respectfully dissent.

I might close this dissent at this point; but the learned Chancellor wrote a 30-page opinion in this case, and it shows such tremendous research that I now copy

extensively from it so that anyone studying this question in the future will have the benefit of the Chancellor's opinion:

COPIED FROM THE CHANCELLOR'S OPINION

As to the claim of plaintiffs that defendants are violating the restrictive covenants in the Bill of Assurance to the compensable damage of their property, the defendants cite *Gremillion* v. *Rapides Parish School Board,* 134 So. 2d 700, in which court reviewed the split of authority. The result of this review reflected that the States of New Jersey, New York, Connecticut, North Carolina, Massachusetts, Michigan, Missouri, Tennessee, Virginia, and Wisconsin, through their respective Supreme Courts, were in accord that a restrictive covenant, such as the one in this case, was a property right and interest which when destroyed resulting in damage was compensable. The Courts of the States of California, Colorado, District of Columbia, Georgia, Florida, Ohio, Texas, West Virginia, and Louisiana hold otherwise.

The majority of courts have held that a person in whose favor a restrictive covenant exists has a compensable interest in a condemnation proceeding which prevents compliance with the restrictions. In 2 Nichols on Eminent Domain, Sec. 5.74 it is stated:

"The majority view holds that such a restriction often characterized as an equitable servitude, constitutes property in the constitutional sense and must be compensated for if taken. Such restrictions constitute equitable easements in the land restricted, and when such land is taken for a public use that will violate the restrictions, there is a taking of the property of the owners of the land for the benefit of which the restrictions were imposed. The owners of such property cannot maintain proceedings for damages against the original owner or enforce the restrictions against the condemnor, but they are entitled to an award of compensation for the destruction of their easements.

"If the existence of the easement diminished the value of the land subject thereto, as is ordinarily the

case when the easement is of such a character as a right of way, the compensation of the holder of the easement might well be deducted from the sum awarded to the owner of the servient tenement. In the case of mutual building restrictions, however, the existence of the restrictions often enhances rather than decreases the value of the land, and the owner of the land taken might consequently well object to receiving in any event less than fair market value of his property as a place of real estate."

The majority cases stand on a much stronger footing, both from a logical as well as a legal viewpoint.

One of the early leading cases in this field is that of *Johnstone* v. *Detroit C. H. & M. Ry. Co.*, 222 N. W. 325 (1928). There the Supreme Court of Michigan held that owners of property within a restricted subdivision whose property was not actually taken were nevertheless entitled to compensation upon a taking of a portion of the subdivision for railroad purposes. The Court held that compensation for destruction of building restrictions in acquiring the land through the subdivision for the railroad was measured by diminution in value of the land not taken. In *Johnstone* the court discussed the various cases on this point prior to that time including those cases which held that where the condemnation was for public use that the public body was not subject to the building restrictions. In rejecting this view the Michigan court stated:

"We cannot approve the application made in these cases of doctrine of public policy. The usual conveyance or contract affecting real estate contemplates its use by persons to the exclusion of all other persons and the public. In the right of use lies its value. The reasoning pursued, by reading the exclusive purpose out of the instrument as illegal, would read into it an exception of public use. In direct point, it would enable the state to destroy a common-law negative easement of light, air, and prospect without compensation. By analogy, it would deny payment for the destruction of an easement of way,

an unexpired rental term, increased values due to attractive leases or uses, and, if pursued to its conclusion, injury to the residue of a freehold when part is taken. All the authorities agree that these interests are compensable.

"Especially as applied to residence restrictions is the syllogism unacceptable. Restrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The Courts have long and vigorously enforced them by specific mandate. * * *

"Nor is there anything in our laws, system of government, or the spirit of our institutions which curtails the genius of a citizen in creating or enhancing values in his property in any lawful way, by physical improvement, psychological inducement, contract, or otherwise. His obligation to recognize the power of eminent domain and the possibility of its exercise in no wise restricts his right to legitimate profit. He may view the power in its constitutional entirety, with comitant requisite of just compensation, and order his affairs within the law with assurance that, if the state takes his property it will pay him the value of what it takes, of whatever that value may consist, so it is measured by the market. Anything less is confiscation.

* * *

"It is therefore held that owners of property in a subdivision in which, under a general plan, the property is restricted to specified uses, and in which the restrictions are valid, subsisting, and enforceable against the lands in the hands of private owners, are entitled to compensation upon the taking of any part of such subdivision for public use in violation of such restrictions; that, aside from nominal damages for destruction of the easement, the compensation is measured by the actual diminution in value of the premises of such owner as a result of the use to which the property taken is put, and that, in determining such diminution, the effect by way of benefit as well as by way of injury, of such use is to be taken into account."

In *Peters* v. *Buckner, Judge,* 232 S. W. 1024 (Mo. 1921) the court held that a grantee of a lot in a subdivision, the deeds to all the lots which contain a covenant against the erection of buildings for other than residential purposes, has an easement in and to every lot in the subdivision which is also covered by the covenant and that this easement is appurtenant to his lot for the enforcement of such covenant. The court further held that the easement of the owner of a lot in a subdivision in each lot is property which cannot be taken for public use without compensation. In the *Peters* case the Supreme Court of Missouri stated:

"There can be no doubt but what the erection of the schoolhouse on the lots mentioned in this case is, in spirit, a violation of the covenants of restrictions mentioned in the deeds of the Meadow Park Addition to Kansas City to the various purchasers of lots therein. While these restrictions are not binding upon the state or the school board, acting under the state's authority in such condemnation proceedings, yet, if such restrictions add actual value to all the lots of the addition, it should be protected by the courts of the state; then, when the school board undertakes to deprive the owners of those lots of those values, by condemnation proceedings, it should be required to pay for the same, as for all other values it takes from the property owners of the addition by such proceedings, and that, too, before their property can be taken or damaged, as before indicated."

City of Raleigh v. *Edwards,* 71 S. E. 2d 396 (N. C. 1952), involved a proceeding by the City against the defendant and others to condemn certain lots within the City as the site for the erection of an elevated water storage tank. An adjoining landowner intervened alleging that the erection of the proposed water tank would impair the value of his property by depriving him of the benefits of existing covenants restricting the use of the property sought to be condemned to private dwelling purposes only. The North Carolina Supreme Court

held that the restrictive covenants contained in the deeds to the lots in the subdivision wherein the water tank was to be erected vested in the interveners a property right in the land sought to be condemned which must be paid for. This was the first time this question had been presented to a North Carolina court and the court discussed the underlying principles and basic decisions in this field in the following language:

"The question whether the restrictive covenants contained in the deeds to the lots in the subdivision vested in the interveners a property right in the land sought to be condemned which must be paid for. This precise question does not seem to have been presented heretofore to this Court for determination, and the decisions from other jurisdictions reflect a contrariety of opinion.

"However, the decided weight of authority in other jurisdictions supports the proposition that such a restriction, being in the nature of an equitable servitude, is an interest in land and must be paid for when taken. The theory is that these restrictions impose negative easements on the land restricted in favor of and appendant to the rest of the land in the restricted area, and when a particular parcel thereof is appropriated for a public use that will violate the restrictions, such appropriation amounts in a constitutional sense to a taking or damaging of property of other landowners for whose benefit the restrictions are imposed. 18 Am. Jur., Eminent Domain, Sec. 157, p. 788. Annotations: 17 A.L.R. 554; 67 A.L.R. 385; 122 A.L.R. 1464.

"It is true that such other landowners may not enforce the restrictions against the condemnor, but they are nonetheless entitled to an award of compensation where, through the exercise of the power of eminent domain, there is a taking or damaging of such property rights * * *. 18 A. Jur., Eminent Domain, Sec. 157, p. 788. See *Peters* v. *Buckner,* 288 Mo. 618, 232 S. W. 1024, 17 A.L.R. 543; *Flynn* v. *New York etc. R. Co.,* 218 N. Y. 140, 112 N. E. 913; *Allen* v. *City of Detroit,* 167 Mich. 464, 133 N. W. 317, 36 L.R.A. N.S. 890; *Town of Stam-*

ford v. *Buono,* 108 Conn. 359, 143 A. 245. (Citing other cases.)

"In *Flynn* v. *New York, etc. R. Co., supra,* it was held by the New York Court that where a railroad company bought lots in a tract of land which was subject to restrictions, including a prohibition against the erection of any structure for business purposes, and built and maintained thereon an electric railroad, there was a deprivation of property rights entitling the other lot owners in the tract to compensation.

"In *Allen* v. *Detroit, supra* (167 Mich. 464, 133 N. W. 320), the Michigan Court held that the erection by a city of a fire engine house on property purchased by it, but restricted to residential purposes, was a taking of private property for public use and the owners of the lots for the benefit of which the restriction was imposed were entitled to compensation. The Court said: 'Building restrictions are private property, an interest in real estate in the nature of an easement go with the land, and a property right of value, which cannot be taken for the public use without due process of law and compensation therefor; * * *'

"The decisions representing the minority view rest for the most part on the theory that since all property is held subject to the power of eminent domain, the rights of the Sovereign or condemnor are impliedly excepted from the operation of these restrictive covenants; and that if not so excepted, the condemnor, not being party or privy to the contract creating the covenants, no action for damages will be against the condemnor. See 18 Am. Jur., Eminent Domain, Sec. 157, p. 677, footnote 20. Thus, in the final analysis the minority view is grounded on the theory that these restrictions, being contractual rights enforceable in equity only between parties in privy, do not constitute an interest in property at all. See Nichols on Eminent Domain, 3d Edition, Vol. 2, Sec. 5,73, pp. 72 and 83.

"On the other hand, the majority view rests squarely upon the theory that a negative easement created by

a building restriction is a vested interest in land (18 Am. Jur., Eminent Domain, Sec. 157, p. 788), and this Court has adhered unvaryingly to the principle that a negative easement of this kind is a vested interest in land. *McKinney* v. *Deneen,* 231 N. C. 540, 58 S. E. 2d 107; *Hildebrand* v. *Southern Bell Telephone & Telegraph Co.,* 219 N. C. 402, 14 S. E. 2d 252; *City of Charlotte* v. *Heath,* 226 N. C. 750, 40 S. E. 2d 600 (here it was conceded by all parties concerned that the negative easements involved were property rights to be condemned and paid for); *Turner* v. *Glenn,* 220 N. C. 620, 18 S. E. 2d 197; *Davis* v. *Robinson,* 189 N. C. 589, 127 S. E. 2d 697; *East Side Builders* v. *Brown,* 234 N. C. 517, 67 S. E. 2d 489. See also *Glenn* v. *Board of Education,* 210 N. C. 525, 187 S. E. 781; *Hiatt* v. *Greesboro, supra;* Mordecai's Law Lectures, 2d Edition, p. 557; Thompson on Real Estate, Permanent Edition, Vol. 7, Sec. 3620 through Sec. 3631; Clark, Covenants and Interests Running with Land, p. 174 et seq.

"In *Davis* v. *Robinson, supra,* 189 N. C. at page 598, 600, 127 S. E. at page 702, opinion by Varser, J. it is said: 'Easements are classified as affirmative or negative. "Negative easements are those where the owner of a servient estate is prohibited from doing something otherwise lawful upon his estate." * * * "An easement always implies an interest in the land. * * * It is real property, and it is created by grant." A building restriction is a negative easement.'

"In *Turner* v. *Glenn, supra,* 220 N. C. at page 625, 18 S. E. 2d at page 201, with Barnhill, J., speaking for the Court, it is said: 'The servitude imposed by restrictive covenants is a species of incorporeal right. It restrains the owner of the servient estate from making certain use of his property. It is an interest in land, conveyance of which is within the statute of frauds.'

"Thus, holding as we do that these negative easements are vested property rights, it follows by force of natural logic and simple justice that for the taking of such property just compensation must be paid as in

the case of the taking of any other type of property, and the lack of contractual privity between the owners and the condemnor is in no sense a determinative factor.

"Treating the allegations of the further defense as true, as is the rule on demurrer, *Hall* v. *Coble Dairies,* 234 N. C. 206, 67 S. E. 2d 63, we conclude that the interveners have a vested property right of value in the restrictions imposed on the lots sought to be condemned and that the proposed use of the property amounts in a constituional sense to a taking or damaging of this property right, for which the interveners are entitled to compensation commensurate with any loss they may sustain. Art. 1, Sec. 17 of the Constitution of North Carolina; Fifth Amendment of the Constitution of the United States."

In *Meagher* v. *Appalachian Electric Power Co.,* 77 S. E. 2d 461 (1953), the Virginia Supreme Court of Appeals faced this question for the first time. This was a suit involving the erection of high voltage transmission tower lines in violation of restrictive covenants binding upon the lands of the plaintiff and the defendant. There the court held that the restrictive covenant applicable to all of the lots in the subdivision was a property right in favor of those for whose benefit it was imposed, and that a public service corporation invading such property right because of public necessity must compensate those for whose benefit the covenant was imposed. In *Meagher* the court decided this question by using the following language:

"The next question is whether the restrictive covenants applicable to all of the lots in the subdivisions are a property right in favor of those for whose benefit they were imposed. The precise question has not heretofore been presented to this court and the decisions from other jurisdictions are in conflict. In the recent case of *City of Raleigh* v. *Edwards,* 235 N. C. 671, 71 S. E. 2d 396, 397, there is a clear and concise discussion of the subject. There the City of Raleigh instituted condemnation proceedings to acquire property in a subdivision for the

erection of a water tower. Several property owners in the subdivision intervened and asserted the claim that the proposed public improvement was in violation of the covenants restricting the use of the property in the subdivision to 'private dwelling purposes only,' and would deprive them of vested property rights of substantial value created by such covenants, and entitle them to compensation therefor. After a careful review of the authorities the court thus expressed its agreement with that view:

'* * * the decided weight of authority in other jurisdictions supports the proposition that such a restriction, being in the nature of an equitable servitude, is an interest in land and must be paid for when taken. The theory is that these restrictions impose negative easements on the land restricted in favor of and appendant to the rest of the land in the restricted area, and when a particular parcel thereof is appropriated for a public use that will violate the restrictions, such appropriation amounts in a constitutional sense to a taking or damaging of property of the other landowners for whose benefit the restrictions are imposed. 18 Am. Jur., Eminent Domain, Sec. 157, p. 788; Annotations: 17 A. L. R. 554; 67 A. L. R. 385; 122 A. L. R. 1464.

"The North Carolina court declined to follow the minority view which, it said, 'is grounded on the theory that these restrictions, being contractual rights enforceable in equity only between parties in privy, do not constitute an interest in property at all.' 71 S. E. 2d at page 401.

"Among other authorities taking the majority view are, *Ladd* v. *City of Boston*, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481 (opinion by Holmes, J.); *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242, 117 N. E. 244, L. R. A. 1918B, 55; *Johnstone* v. *Detroit Elec. R. Co.*, 245 Mich. 65, 222 N. W. 325, 67 A. L. R. 373; *Peters* v. *Buckner*, 288 Mo. 618, 232 S. W. 1024, 17 A. L. R. 543; *Flynn* v. *New York, etc. R. Co.*, 218 N. Y. 140, 112 N. E. 913, Ann. Cas. 1918B, 588. See also, Nichols' The Law of Eminent Domain, 3d Ed., Vol. 12, Sec. 5.73, pp. 81-84.

"A leading case presenting the minority view is *Anderson* v. *Lynch,* 188 Ga. 154, 3 S. E. 2d 85, 122 A. L. R. 1456, where the principal authorities relied upon by the defendant here are collected.

"Our previous decisions have clearly indicated that restrictive covenants create a valuable right in property. In *Spilling* v. *Hutcheson,* 111 Va. 179, 183, 68 S. E. 250, we approved the statement in 2 Pomeroy's Equity Jur., 3d Ed. Sec. 1342, that 'restrictive covenants in deeds * * * limiting the use of land in a specific manner, or prescribing a peculiar use, * * * create equitable servitudes on the land.'

"In *Cheatham* v. *Taylor,* 148 Va. 26, 39, 138 S. E. 545, we said 'that the right of a third person to the protection of the (restrictive) covenant is an equitable right by whatever named called.'

"In *Springer* v. *Gaddy,* 172 Va. 533, 541, 2 S. E. 2d 355, 358, we approved the holding that the right under such a restrictive covenant is 'a negative equitable easement.' But whatever may be its correct designation, we are of opinion that such restrictive covenants created an 'interest or estate' in land, which a public utility may acquire by eminent domain, Code, Sec. 25-8, but subject to the protection of Section 58 of the Constitution that it may not 'be taken or damaged for public uses, without just compensation.'

"It is argued that such restrictions cannot be invoked against a public service corporation clothed under the laws of the State with the power of eminent domain, because public necessity may require the taking of property in such an area despite such restrictions. The answer is, that 'Public necessity may justify the taking, but cannot justify the taking without compensation.' *City of Raleigh* v. *Edwards, supra,* 71 S. E. 2d at page 399.

"We are of opinion, then, that the acts of the defendant are a breach of the covenants and restrictions binding on its lands in these subdivisions, and constitute a taking or damaging of property rights for which compensation must be paid.

"Injunction is the proper remedy to prevent the taking or damaging of private property for a public use without just compensation by one who is invested with the power of eminent domain. *Virginia Hot Springs Co.* v. *Lowman,* 126 Va. 424, 427, 101 S. E. 326; *Nichols* v. *Central Virginia Power Co.,* 143 Va. 405, 413-415, 130 S. E. 764, 44 A. L. R. 727; 30 C. J. S., Eminent Domain, Sec. 405, p. 125."

One of the most recent cases involving this question is that of City of *Shelbyville* v. *Kilpatrick,* 322 S. W. 2d 203 (Tenn. 1959). There, the City brought a suit for declaratory judgment that it could erect a city water tower in a residential subdivision without paying compensation to other lot owners in the subdivision. The court held that where the recorded plat of a subdivision provided that all lots in the addition were restricted to residential purposes only, and the City acquired one of the lots for the purpose of erecting a water tower thereon, that the proposed violation of the restriction by the City would be the taking by the City of the 'property' of the owners of the other lots, so that the City would be required by the Constitution to pay just compensation. The Tennessee Supreme Court used the following language in the Kilpatrick case:

"The exact question seems never to have been decided in this jurisdiction. As observed by the Chancellor, the decisions of other jurisdictions 'are in irreconcilable conflict.'

* * *

"In view of the diametrically opposite views by eminent authorities on each side, it will not be amiss, at least in justification of the position taken by this Court, to state briefly the reasons attributed by each for the respective conclusions reached.

"A variance appears in the numerous decisions as to just what technical name should be given this restrictive covenant. All the decisions and textwriters, however, appear to agree in the conclusion that the reciprocal servitude owed by each lot to all the others in the sub-

division is an equitable easement; that this easement continues, with the exception (so some say) of the sovereign, into whosoever the respective dominant and servient estates may successively pass.

"The authorities likewise seem to agree upon the proposition that, as between individuals, the violation of the right created by this easement may be enjoined in equity by the owner of the dominant estate, or such owner may be entitled to compensation for its violation, all because it would be unconscionable to allow the owner of the servient estate to violate with impunity his contract creating this equitable easement.

"But when it comes to the question of whether the violation of this restriction by the sovereign in the taking of the servient lot by eminent domain (or by voluntary conveyance to it) for a public purpose those who say that it is not the taking of property within the meaning of the constitutional requirement mentioned place this conclusion upon the ground that the easement is not one which 'would permit the physical use or occupation thereof' by the other lot owners in the tract, 122 A. L. R. 1465, nor is it a 'true easement, as right of passage or rights to light and air, which are land and subject to condemnation as other interests in land.' 63 App. D. C. 104, 69 F. 2d 842, 844, 98 A. L. R. 389. Hence for each reason, no interest in land, they say, is taken.

"When it comes to the fact that those from whom the sovereign acquires the servient lot have agreed with the owner of every other lot in that subdivision to the easement in question, the above jurisdictions, or some of them, say that an individual cannot impose upon the sovereign 'the burden of compensating him for damage resulting from that public use which does not directly invade his land.' 17 A. L. R. 555, and that the parties may not 'in private contract create for themselves an estate in land not known to our law and thus entitle them to compensation where no such right existed before.' 122 A. L. R. 1465.

"Others upon that side go so far as to say that since the sovereign cannot be restricted in its use of the land for a public use, short of a nuisance, at least, it follows that an intention between the contracting parties not to include the sovereign will be implied. 188 Ga. 154, 3 S. E. 2d 85, 122 A. L. R. 1462.

"The contrary view is that when all the lots in a subdivision are subject to this restrictive easement, and one is taken for a public use, the owners of the other lots for whose benefit the restriction is imposed are entitled to compensation, if damaged, because such an easement constitutes an interest in the land upon which it is imposed.

"The Michigan case of *Johnstone* v. *Detroit, Grand Have, etc.,* 245 Mich. 65, 222 N. W. 325, 327, 67 A. L. R. 373, in taking this last stated view of the matter, discusses the question in quite some detail. In response to the argument that it is against public policy to apply such restrictive easements to the sovereign in the taking of land for a public use the Court pointed out that the police power is restrictive, only limiting the owner's use of property to public safety, etc. 'but never extends to depriving him of it for public benefit.'

"The Court recognized the fact that building restrictions 'did not constitute easement known to the common law.' But then called attention to the fact that the 'easements of light, air and access in property abutting on a public street is not a common law easement, but its impairment by public use in the street is a taking of property.'

"*Johnstone* v. *Detroit, etc., supra,* asserts that its holding 'is supported by the weight of authority.' The first annotation following the report of the case, after calling attention to the annotation in 17 A. L. R., supra, makes this statement: 'The few cases decided since the earlier annotation uphold the rule that compensation must be made where the taking of property under eminent domain violates building restrictions on the land adjacent thereto.'

"The reasoning of the cases holding that compensation must be made where the taking of property under eminent domain violates building restrictions placed thereon for the benefit of every other lot in the subdivision is, in the opinion of this Court, more consistent with the realities of the situation. Each of the respective owners of the respective lots entered into this restrictive agreement because each regarded it as something which added to the value of his or her own lot. Our case of *Ridley* v. *Haiman,* 164 Tenn. 239, 258, 47 S. W. 2d 750, 756, recognizes it to be a fact that such a restriction is 'an interest or right created by the deed itself,' meaning an interest or right in the servient lot.

"Certainly it is not within the spirit of our eminent domain law that such interest created by the deed may be taken away from its owner without compensation, if that owner is damaged. Not being within the spirit of the law, it ought not to be so held, unless required by the letter of the law. This Court finds nothing in the letter of our eminent domain law forbidding compensation to the owner under such circumstances. Nor is there anything in Article 1, Section 21, exhibiting an intention that this right in the servient lot may be taken by the sovereign without paying just compensation.

"It does not seem accurate to hold that the owner of the right to restrict the use of the servient lot to a certain use for the benefit of the dominant lot is not a property right in that servient lot. The only right, broadly speaking, that any owner of any real estate has in land is the right to use it. So, it would seem to follow that the ownership of the right to restrict the use of a given parcel of land to a certain use is, to that extent, a property right in that lot, for which, when deprived thereof, he should be compensated. Or, as better stated in *Johnstone* v. *Detroit, etc. supra,*—'as the right to restrict the use of real estate is an invasion of ownership, it would seem logical that it is done by virtue of a right or interest in such real estate.' "

In *Adaman Mutual Water Company* v. *United States,* 278 F. 2d 842 (ninth Circuit, 1960), the Federal Court discussed this problem by using the following language:

"Presently, a restrictive covenant is generally deemed a property right under federal law. *Chapman* v. *Sheridan-Wyoming Coal Co.,* 1950, 338 U. S. 621, 70 S. Ct. 392, 94 L. Ed. 393. We think it should be treated similarly in an eminent domain context where the purpose of the distinction between property interests and other rights is to differentiate losses directly connected with the land taken from losses comparatively more remote. It follows from this that any right or duty, benefit or burden, which moves or is transferred as one with either the land or an estate in it must be deemed an interest in that land and compensable upon condemnation of the fee. Because the transfer of these rights and duties are subject to legal principles different from those which govern the passing of other interests, a unique, direct connection with the land is established. This connection justifies the distinction mentioned above. Accordingly, we think that under the Fifth Amendment a restrictive covenant imposing a duty which runs with the land taken constitutes a compensable interest.

"The argument that an impermissible burden is put upon the power of eminent domain by a restrictive covenant is untenable. Why should a party receive compensation for an easement right which enhances the value of his property and yet be denied compensation for a right obtained by a restrictive covenant which similarly adds to the value of his holding? Both interests are directly connected to the land and we are unable to find a distinction between them which will justify dissimilar treatment at the hands of a condemning authority."

In the quotations from the above cited cases it is noted that one of the principal factors involved is a determination of whether or not the restrictive covenants actually run with the land or are contractual in nature between the parties. In the instant case there would seem to be little room for argument but that the restric-

tive covenants run with the land. Indeed, the Bill of Assurance creating the restrictive covenants specifically provides that they are to run with the land and are deemed to be incorporated in every deed of the owners of any and all lots located in the addition. Also, it should be noted that in Arkansas the rule is that a covenant which is beneficial or essential to the use of the land conveyed and which is expressly made binding upon the heirs, assigns or successors of the grantor, runs with the land. *Nordin* v. *May,* 188 F. 2d 411 (Eighth Circuit, 1951).

The Court has extended this opinion because of the primary importance of this litigation, not only to the plaintiff, but to all litigants similarly situated.

It is, therefore, the opinion and judgment of this Court that the restrictive covenants in the Bill of Assurance and extended into the deeds are property rights; that the acquisition of the eleven lots and the construction of the project thereon amounts in a constitutional sense to a taking or damaging of this property right, and the Court specifically finds and holds that as a direct result of the construction of this project in the Crestview Estates Subdivision by the defendants has materially and substantially damaged and diminished the market value of plaintiffs' property; and that the property so taken and damaged are compensable under the law of Eminent Domain and the Constitution of the State of Arkansas.

5-3298 379 S. W. 2d 271

Opinion delivered June 1, 1964.

George P. Eldridge, for appellant.

Spencer & Spencer, for appellee.

GEORGE ROSE SMITH, J. This is a foreclosure suit brought by the appellee upon a promissory note secured by a real estate mortgage. The defendants, Lavern Seward and his mother, interposed a plea of usury. The chancellor rejected this plea, finding that there had been a mutual mistake in the preparation of an allied construction contract and that the transaction was in fact free from usury.

On August 1, 1961, the appellee's assignor, Jim Walter Corporation, agreed to construct a shell home for the appellants, for which they agreed to pay 84 monthly installments of $64.40 each. The note sued upon evidences that debt. The appellants' copy of the construction contract recites that the price of the house was $3,695. If that recitation was correct the note embodies an interest charge of more than 10 per cent and is usurious. The appellee insists, however, that the true price was $3,895, in which case the interest charge is lawful.

We think the chancellor's decision was clearly right. The Jim Walter salesman who prepared the contract testified that he inserted the lower figure by mistake. He explained that $3,695 was the basic price for the par-

ticular home selected by the appellants. These purchasers chose to have masonite siding instead of wooden siding on the house, for which a standard charge of $200 was added to the base price. This salesman said that he discovered his error later in the day and promptly informed the appellants, requesting them to make the necessary change upon their copy of the contract.

There is much corroboration of the salesman's testimony. It is undisputed that masonite was actually used upon the appellants' house. It is undisputed that it costs more than twice as much as wood siding. According to the Jim Walter Corporation's printed schedule of installment payments a principal debt of $3,895 calls for 84 monthly payments of $64.40 each—the exact figures recited in the contract. Lavern Seward later sold two homes for Jim Walter Corporation. Both purchasers selected masonite siding and agreed to the extra charge; so Seward must have been aware of it. In their discovery depositions neither Seward nor his mother would deny that they were told about the $200 charge for the better grade of siding, though at the trial both changed their testimony. The record as a whole shows clearly and convincingly that a mutual mistake occurred.

In affirming the case upon its merits we do not imply that we approve the appellants' abstract of the record, the sufficiency of which the appellee has challenged. The abstract lacks the impartiality required by our Rule 9, in that it omits much of the evidence that supports the chancellor's decree. In view of the deficient abstract the appellants could not in any event have prevailed, but we have thought it best to reach the merits rather than to rest our decision upon a technical point.

Affirmed.

HOUSLEY *v.* HOUSLEY.

5-3302 379 S. W. 2d 272

Opinion delivered June 1, 1964.

[Rehearing denied October 5, 1964.]

Pope, Pratt & Shamburger, for appellant.

John Harris Jones, for appellee.

GEORGE ROSE SMITH, J. V. W. Housley died on June 6, 1963, leaving a will that he had executed on July 22, 1960. This application for a construction of the will was submitted to the probate court by agreement of the parties. The court held the will to be inoperative, so that the estate passed by intestacy to the appellee, the decedent's son and only heir. The appellant, the decedent's brother, insists that the will effectively devised and bequeathed the entire estate to him.

V. W. Housley and his son, the appellee, had been estranged for some time. In the second paragraph of his will V. W. directed that his son should not share in any property that he might leave. Then follows the third paragraph, which gives rise to this controversy and reads essentially as follows:

"III. Reposing the utmost confidence in the integrity and judgment of my brother, W. M. Housley

[the appellant], of Little Rock, Arkansas, who knows my and our relatives and kindred, their worthiness and needs and my feelings and affections concerning each of them, I hereby give, devise and bequeath to my said brother, W. M. Housley, all of the property of every nature, kind and classification; real, personal or otherwise designated, of which I die seized and possessed . . . in fee simple, unconditioned and unrestricted, to possess, to hold, to use, to own, to barter, to sell or to give away at his will and pleasure and to pass title thereto absolutely and in fee simple and to receive the consideration therefor, if any, and receipt therefor, without any accounting therefor to anyone, in accordance with instructions I have given my brother concerning my burial and the adjustment of any amounts I may owe, including taxes, if any and, also, with respect to any property which passes to him under this will and said property will pass to him by title absolute and in fee simple unconditionally and without restriction."

The will was prepared by an attorney, and a copy of it was sent to the appellant, the sole beneficiary. Almost three years elapsed between the execution of the will and the testator's death. The appellant denies that his brother gave him any instructions about the disposition of the estate, but there is much testimony that casts doubt upon the credibility of the appellant's statement. We need not consider whether the execution of the will was induced by fraud, as the appellee charges, for we think the probate court was right in holding the will to be inoperative.

There is no real question about the controlling rules of law. The difficulty lies in their application to this will. "Oral instructions cannot be incorporated into a written will by any words of reference, however clear, since by statute the will must be in writing. Accordingly, a gift to A to be used in accordance with testator's former instructions, or a gift 'with the hope and expectation and perfect faith that she will expend so much of the income and principal thereof, if it should become necessary in the carrying on of a certain charity in which she knows

I am deeply interested,' or a gift 'in accordance with my instructions to her,' or a gift 'to carry out instructions that I may leave in writing or verbally which I have not yet fully completed,' cannot operate as an incorporation of such oral instructions into the will as a part thereof.'' Page on Wills (Bowe-Parker Rev.), § 19.33. When the testator makes such an attempt to bequeath property to one who is to dispose of it in accordance with the testator's oral instructions, this provision in the will is void. The gift fails. *Fitzsimmons* v. *Harmon,* 108 Maine 456, 81 Atl. 667; *Moore* v. *O'Leary,* 180 Mich. 261, 146 N. W. 661; *Gross* v. *Moore,* 22 N. Y. S. 1019.

The appellant insists that the testator's dominant intention was to vest the fee simple title in his brother. It is argued that, as in *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20, the additional language in the will should be treated merely as an explanation of the testator's reasons for disposing of his property as he did.

We do not find this argument to be persuasive. No doubt V. W. Housley did intend to vest the fee simple title in his brother, but that fact alone does not solve our problem. If he intended for W. M. Housley to receive the fee so that he would be in a position to carry out V. W.'s oral instructions, then the third paragraph in the will is invalid. By analogy a trustee often takes the fee simple, as when he is given a power of sale and must be in a position to convey the fee, but he nevertheless holds the property in trust. Restatement, Trusts, Second, § 88.

The pivotal question is whether V. W. intended for his brother to have the beneficial interest in the property. We think it plain that he did not. It would have been a simple matter for this testator, especially with the assistance of an attorney, to make an absolute devise of his property to his brother in fee simple. Yet clause after clause in the will indicates that V. W. was not making an outright gift. If that had been his intention why did he think it necessary to express his confidence in W. M.'s integrity and judgment? Why did he think it necessary

to observe that W. M. "knows my and our relatives and kindred, their worthiness and needs and my feeling and affections concerning each of them"? Why did he think it necessary to declare that W. M. could dispose of the property and receive the consideration therefor, without accounting to anyone? Why, especially, did he say that the property was left to W. M. with the power to dispose of it "in accordance with instructions I have given my brother . . . with respect to any property which passes to him under this will"? Every one of these declarations is wholly inappropriate—indeed, completely irrelevant—if W. M. was to receive the beneficial interest in the estate. Yet each clause is of genuine significance if V. W. meant for his brother to carry out his oral instructions with respect to the gift. To sustain the appellant's position we should have to disregard every meaningful phrase in the controlling paragraph of this will except the declarations that W. M. was to take the property in fee simple. Yet, as we have seen, those declarations alone cannot govern our decision, because if V. W. intended for the appellant to distribute the property among the two brothers' relatives it was still necessary first to vest the fee in W. M.

The testator's attempt to disinherit the appellee fails, for the property was not effectively left to anyone else. *Williams* v. *Norton,* 126 Ark. 503, 191 S. W. 34. It is unfortunate that the decedent's intention must be thwarted; but even a reversal would not help matters, since the appellant declines to (and could not lawfully) carry out whatever his brother's wishes may have been.

Affirmed.

McFaddin, Robinson, and Holt, JJ., dissent.

Sam Robinson, Associate Justice (dissenting). I fully agree that the intention of the testator has been thwarted. In fact, it has been blocked, obstructed and defeated, all on the theory that doubtful language in the will creates a trust, and yet in the same breath the majority says no valid trust was created. There was a devise *absolutely* to a brother; therefore, I say the doubtful language

should not be construed as creating a trust, valid or invalid.

In this case the intention of the testator is clear. If there is any doubt about how the will should be construed, it should be construed so as to give effect to the intention of the testator. Yet, the doubtful language in the will is construed by the majority in a manner that absolutely defeats the expressed and known intention of the testator. In so doing, the majority does not follow established principles of will construction.

Actually, no trust was set up, valid or invalid. No trustee is named, no beneficiary is named, no duties of a trustee are specified, and no purposes of a trust are mentioned. The will was prepared by an able lawyer. It is not likely that an experienced lawyer would draw a will to create a trust and never mention the word trust. Not one time does the will in question use the word trust.

It is said in 49 A. L. R. 34: "There is a simple, sure, and familiar form of bequest to raise a trust, which consists of a devise to the legatee in trust to the beneficiary, and the failure to use it has been held to indicate an intention to avoid the creation of a trust. As remarked in one case: 'It certainly seems singular that a testator, having a full and settled intention to create a trust (for that is what must be read on the face of the will or no trust can exist), should adopt a mode which at best appears to be a mere suggestion or inference, instead of employing the familiar method and creating the trust by an express declaration.' "

In *Woolridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20, the language was more indicative of creating a trust than is the language in the case at bar. There, the will provided: "To Elizabeth Gilman I bequeath my entire stock in Simmons National Bank, and request that she never dispose of it, but keep it to educate her children, Charles and William Gilman." In holding that no trust was created, this court said: ". . . the word 'request' is employed as a mere expression of hope or confidence on the part of the testatrix that the legatee will use the bank

stock in the education of her children, but the extent and character of their education is left wholly to the judgment of the legatee. Therefore, we do not think the language used justified the conclusion that the testatrix intended to create a trust in favor of Charles and William Gilman."

An intent to create must be clearly expressed by the language of the will. *Bloom* v. *Strauss,* 73 Ark. 56, 84 S. W. 511; *Wallace* v. *Wallace,* 179 Ark. 30, 13 S. W. 2d 810.

"On the principle that words which cut an estate down must be as clear as those which create it, an absolute and beneficial interest which is clearly given will not be cut down to the legal title of a trustee by precatory words, unless they show testator intention to create a trust as clearly as though he had created it by express words." Page on Wills, Vol. 5, § 40.5, p. 116, 117.

In the case at bar, the will is clear and explicit that the property be left in fee to the testator's brother, the appellant herein. The will provides: "I hereby give, devise and bequeath to my said brother, William Housley, all the property of every nature, kind and classification, real, personal or otherwise designated . . . and title absolute and in fee simple, unconditional and unrestricted . . . and said property will pass to him by title absolute and in fee simple, unconditional and without restrictions." It is hard to see how language could be more explicit in giving the property to the brother in fee.

We have repeatedly held that words of art must be given their technical meaning. *Pletner* v. *Southern Lumber Co.,* 173 Ark. 277, 292 S. W. 370; *Fine* v. *McGowan,* 186 Ark. 1035, 57 S. W. 2d 565.

This rule is so firmly established that it is a rule of property. *Shields* v. *Shields,* 179 Ark. 167, 14 S. W. 2d 545. In *Moody* v. *Walker,* 3 Ark. 147, the court said: "When technical phrases or terms of art are used, it is fair to presume that the testator understood their meaning, and that they expressed the intention of his will,

according to their import and signification. When certain terms or words have by repeated adjudication received a precise, definite and legal construction, if the testator in making his will use such terms or similar expressions, they shall be construed accordingly to their legal effect . . . and . . . if this was not the case, titles to estates would be daily unsettled, to the ruin of thousands. It is all-important to the interest of society, that the rules of property should be definitely settled, and that they should possess uniformity and consistency."

"In fee simple" are words of art; they have only one meaning. Ballentine Law Dictionary, p. 494; 19 Am. Jur. 471-473.

It is presumed that the testator knew and understood the meaning of the words used in the will. *Crittenden* v. *Lytle,* 221 Ark. 302, 253 S. W. 2d 361; *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014. In the Galloway case, the court quotes from Doebler's Appeal, 64 Pa. St. 9, as follows: "It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted, had he been truly advised as to the legal effect of the words actually employed. That would be to make a will for him, instead of construing that which he had made."

The devise to appellant is as clear as a bell—"title absolute and in fee simple, unconditional and unrestricted." Doubtful language thereafter used should not be construed as cutting down the fee. ". . . an absolute gift in a will cannot be cut down by subsequent inconsistent language of doubtful or ambiguous significance, it being necessary before such a result will be permitted that the language indicating an intention to cut down the gift be as clear, plain, and unequivocal as that used in the gift itself; that the presumption is that the first taker receives a fee in spite of subsequent words casting doubt on the question; that in case of doubt as to the quantity of an estate devised, the general rule is

that an absolute rather than a qualified estate was intended; and that where a devise of an absolute interest is made, subsequent limitations attempting to deprive the estate of any of the incidents appertaining to it are repugnant and void." 57 Am. Jur., Wills § 1320.

These rules are supported by many Arkansas cases, including *Moody* v. *Walker,* 3 Ark. 147; *Byrne* v. *Weller,* 61 Ark. 366, 33 S. W. 421; *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682; *Letzkus* v. *Nothwang,* 170 Ark. 403, 279 S. W. 1006; *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349; *Collie* v. *Tucker,* 229 Ark. 606, 317 S. W. 2d 137.

Appellee relies on *Lytle, Ex'r.* v. *Zebold,* 235 Ark. 17, 357 S. W. 2d 20, but in that case there was no doubt whatever that a trust was created prior to the use of the language that could be construed as limiting a fee. Here, it will be remembered that the language devising a fee in the property is clear, unequivocal, and unambiguous. No one can say that the language depended on here to establish a trust is not doubtful. In *Ross* v. *Ross,* 135 Ind. 367, 35 N. E. 9, the court said: "Where an estate in fee is devised in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt upon a subsequent clause, not by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the estate in fee."

In *Burnes* v. *Burnes,* 137 Fed. 781, Mr. Justice Sanborn said: "The crucial question in the interpretation of this will is, did the testator intend to impose an imperative obligation upon his brothers to apply his estate, or their property, to the equal benefit of all the children of each of them, or to express a desire that they should do so, and to intrust to their discretion the exercise of the option to comply or refuse to comply with his wish? In *Knight* v. *Knight,* 3 Beav. 148, 172-174, Lord Langdale declared the law upon this subject in language which has rarely, if ever, been excelled in strength and clearness. He said:

'As a general rule, it has been laid down that when property is given *absolutely* [our italics] to any person, and the same person is by the giver, who has power to command, recommend or entreated or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish shall be held to create a trust: First, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish to be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendations or wish be also certain. . . . On the other hand, if the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created.' ''

In the case at bar, the testator devised the property *absolutely* to his brother. If the rule discussed by Judge Sanborn in the Burnes case was followed here, and there is no sound reason why it should not be followed, the appellee could not prevail because the language in the will said to create a trust is not imperative; and the persons claimed to have the benefit of the alleged trust are not certain. Furthermore, if a trust was created, certainly as trustee the brother would have "a discretionary power to withdraw any part of the subject from the object of the wish or request."

In my opinion, the law is clear that here it should not be said that the will creates a trust. I, therefore, respectfully dissent.

McFaddin, J., joins in this dissent.

ARK. STATE HIGHWAY COMM. *v.* TAYLOR.

5-3281 381 S. W. 2d 438

Opinion delivered June 1, 1964.

[Rehearing denied September 14, 1964.]

Mark E. Woolsey, Don Gillaspie, Don Langston, for appellant.

Bethell & Pearce, for appellee.

PAUL WARD, Associate Justice. In 1955 James F. Taylor and T. J. Van Zant (appellees herein), real estate developers, purchased approximately 60 acres of land on the eastern limits of Fort Smith. They promptly began to develop the parcel of land as a redistricted residential subdivision called "Eastern Hills Addition." A plat showing 115 separate building lots was filed. Streets (with minor exceptions) were laid out and improved, and most utilities (such as curbs, gutters, water pipes, gas pipes, electric light and power poles, and sanitary sewers) were installed.

Prior to June 15, 1962 appellees had sold 37½ lots upon most of which individual residences had been erected. On the date above mentioned the Arkansas Highway Commission (appellant herein) condemned and took possession of a strip of land off the east side of the development area for the purpose of constructing a segment of the Interstate Highway System. The development area (60 acres) is in the shape of a rectangle.

the north and south measurement being approximately ⅓ longer than the east and west measurement. Within the area is what appears to be a swag or gulch (not suitable for building lots) consisting of 9.1 acres, called tract A. It runs in a northeasterly direction (in the north portion of the area) from near the west line to the east line.

The portion taken by appellant embraces 41 building lots in whole or in part (29 in whole and 12 in part) and a portion near the middle of tract A. Appellant deposited $117,500 to reimburse appellees for the land taken. Appellees, by proper pleadings, asked the court to award them the sum of $350,000 as just compensation for the property taken and damaged. A lengthy trial resulted in two verdicts in favor of appellees: $180,000 for the property taken in whole or in part, and $5,683 for damage to certain of the remaining lots.

On appeal appellant seeks a reversal on three separate points or assignments of error. Since we have reached the conclusion that the judgments must be reversed and the cause remanded for a new trial, we deem it sufficient to set forth such testimony only as relates to the errors hereafter pointed out.

One. At the beginning of the trial appellant contended it was liable to appellees only for the lots or land actually taken. This contention was based on the theory that each individual lot in the subdivision constituted a "unit" of value. On the other hand appellees took the position that the entire tract of land (60 acres) should be considered the "unit" of value. The distinction is of course vital. If the whole tract is considered as a unit, then appellees would be entitled (under the familiar rule of this court) not only to the value of the land actually taken, but to any depreciation in value (caused by the taking) to the balance of the tract of land. In a pre-trial conference the trial court upheld appellees' theory, holding all the lots, or the entire 60 acres, constituted a unit of value. This holding, we think, was contrary to the weight of authority pertaining to this kind of situation.

Nichols, *On Eminent Domain* (3d Ed., Vol. 4, § 14.3, p. 707) states:

"It is well settled that when the whole or a part of a particular tract of land is taken for the public use, the owner of such land is not entitled to compensation for injury to other separate and independent parcels belonging to him which results from the taking . . ."

In *Wellington* v. *Boston & M. R. R. Co.,* 164 Mass. 380, 41 N. E. 652, there was a recorded plat and streets were in, and many of the lots platted were in separate ownerships. This case is very similar to the facts at bar in this respect. There the Court said:

"Upon the evidence, all the other lands of the petitioners had been made separate and distinct parcels by transforming the locality into a village with wrought and travelled streets, and making all the land not included in the streets into exactly defined house lots, some of which had been sold to other persons, and each of which then owned by the petitioners was held for the distinct purpose of independent sale. Whether a particular lot of land constitutes and independent parcel is a question which cannot be determined in the affirmative by the mere fact that it is separated from other land by a highway or street, or by paper lines, or by fences; nor can it be determined in the negative by the mere fact that it is all in one ownership, and is not divided by streets or by paper lines. But when, as in the present case, the evidence shows that there is an actual division by streets, wrought and in use for travel, and by recorded paper lines, and there is no evidence that any two of the lots are used together, or are held for sale as one parcel, and the only use shown is a separate and distinct use and holding of each lot by itself, we think each lot is a separate and distinct parcel."

A portion of the above case pertinent here was quoted with approval by this Court in *Kansas City Southern Railway Co.* v. *Boles,* 88 Ark. 533, 539, 115 S. W. 375. In that case we also find this statement:

"This testimony was competent to show the connected use of the lots. Although the lots are separated by an alley, they may be said to be contiguous and may be treated as parts of a single tract for the purpose of determining damages in condemnation proceedings, if the testimony shows that they are used as a unit."

There is no testimony in the record here to show that any one of the lots (which appellees still own) is used or is to be used in connection with any other lot.

In opposition to the above, appellees rely heavily on the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Theodore Maxfield Co.*, 94 Ark. 135, 126 S. W. 83. There, Maxfield, who owned a tract of land adjacent to the town of Batesville, had it platted into lots and blocks intending to have it annexed, but had not done so. Later appellant condemned a right-of-way approximately 100 feet wide across the entire tract of land. The only question was the amount of damages to be recovered. In resolving that question this Court said Maxfield could recover for the land taken "and the depreciation of the market value of the remaining portion." For several reasons we do not feel bound here by the decision. In the cited case only four lots had been sold, streets had not been opened up, the land (surrounded by a fence) was being "cultivated as a farm" up to the time suit was filed. A careful reading of the case reveals that the principal issue was whether the best use of the land was for farming or building sites. Our research reveals that although the *Maxfield* case has been cited with approval by this Court several times it has never been cited to sustain the point relied on here by appellees.

Although the judgment for $5,683 must be reversed because of the error above indicated, this does not mean that appellees cannot, under any facts or circumstances, recover anything for damages to property or lots not taken. First, we point out that tract A was severed by the right-of-way. Appellees, we think, would be entitled to recover for any damage done (by the severance) to the two portions of tract A not taken. Also, appellees

have the right to show any special damage (to any lot not taken) not suffered by the public in general, and as more fully defined in the case of *Arkansas State Highway Commission* v. *Troy McNeill et al,* 238 Ark. 244, 381 S. W. 2d 425, being handed down this day.

Two. Over appellant's objection the court gave the following instruction:

"In considering the question of whether the remaining lands of the owner have been damaged or depreciated in market value, you may consider the elements of compensable damage as are established by a preponderance of the evidence, including the effect of the taking or subdividing the land which remains, the cost of restoring the land that remains to a useful purpose, the effect which may result from altering the grade of surrounding property, impairment, if any, of view, air, and accessibility of remaining property, and any other damage which you find from a preponderance of the evidence reasonably flows from the taking of the property."

In view of what we have already said under the first point we see no necessity of discussing this point exhaustively. This instruction of course relates to lands not actually taken, and it is based on the erroneous assumption that the entire tract constitutes a unit of value. Again, we point out, as we did under the first point, appellees are entitled to be recompensed only for such damages as are special—not suffered by the general public. See: *Arkansas State Highway Commission* v. *Bingham,* 231 Ark. 934, 333 S. W. 2d 728. Also there is another error in the instruction. After recounting several elements of damages which the jury might consider, the court said, "and any other damage which you find from a preponderance of the evidence reasonably flows from the taking of the property." That language, we think, left too much to the discretion of the jury, especially under the unit value we have previously approved.

Three. It is also our conclusion that the court erred in permitting the introduction of certain testimony bearing on the market value of the lots which were taken by

appellant. Appellee, Taylor, properly testified in detail as to the improvements placed on the land, the expenses incurred, and what each individual lot was worth at the time of taking. In doing so he exhibited a price list, and explained how he arrived at the value of each lot on the basis of so much a front foot. On cross examination, in an effort to justify the prices he had named, Taylor explained that the price list did not reflect the correct value of the lots because of "exclusive listings" he held. To explain: appellees would sell a lot to a builder for $4,000 and require the builder to give him (Taylor) the exclusive right for 90 days to sell the house and lot for a 5% commission; if the house and lot sold for $20,000 he would receive a commission of $1,000—thus making the lot worth $5,000 instead of $4,000. Repeatedly, but without success, appellant requested the court to instruct the jury not to consider this testimony in arriving at the market value of the lots taken by appellant. For several reasons we think this type of testimony was not competent. The record reflects that in many instances Taylor alone got the commission; there was no way to be certain that a house would be sold during the term of the exclusive listing; the size of the commission would depend on the sales price which normally would vary; and, finally it would seem reasonable that considerable time, effort and expense would be involved in making such real estate transactions, but none of these items was taken into consideration.

Appellees have cross-appealed on the ground that the court erred in refusing to give three instructions requested by them. We believe it would serve no useful purpose to discuss these instructions. We have carefully examined each of them and find no reversible error in the court's action.

We find no merit in appellees' contention that they should be given all or part of their costs expended in supplying portions of the abstract which should have been supplied by appellant. Rule 9 (d) of this Court requires the appellant to furnish an abstract which will give "an understanding of all questions presented to this Court

for decision'' and Rule 9(e) gives us power to adjust costs when it is necessary for appellee to supply a deficiency in appellant's abstract. Since the issues raised by appellant pertain almost entirely to questions of law, we find that appellant's abstract complies substantially with the requirements of Rule 9(d).

It is our conclusion therefore that the judgments must be reversed, and the cause is remanded for a new trial.

Reversed and remanded.

ARK. LA. GAS CO. *v.* STRICKLAND.

5-3297 379 S. W. 2d 280

Opinion delivered June 1, 1964.

Mahony & Yocum, for appellant.

Brown, Compton & Prewett, for appellee.

PAUL WARD, Associate Justice. This is a personal injury case where appellant's only complaint on appeal is that the judgments are excessive.

Appellee, Jack L. Strickland, had been an employee of Calhoun County for several years prior to July 25, 1962, engaged in operating heavy road equipment—principally a road grader. On the date mentioned, while he was attempting to remove an obstruction from the road with the grader blade, he struck a six inch gas line belonging to appellant (Arkansas Louisiana Gas Company). The gas line was broken and the gas was instantly ignited. As a result the appellee was burned, particularly about the face and on the left arm and hand. Also, when he jumped from the grader he allegedly injured his left knee. He was in the hospital 13 days for which his bill was $262, and he has paid out $60 for doctor bills and $75 for medicine. As a direct result of the injury he lost 35 days of work during which time he drew his regular salary. He has been working ever since—a period of some 15 months.

Mr. Strickland filed suit against appellant for his injuries, and his wife sued for the loss of consortium. A jury trial resulted in a verdict and judgment in favor of Mr. Strickland in the sum of $7,500 and in favor of Mrs. Strickland in the sum of $2,500.

Appellant presents a forceful argument to the effect that the evidence does not justify a judgment in the amount of $7,500 in favor of Mr. Strickland, particularly in view of what we have held in other cases to which our attention is called wherein the extent of injuries was somewhat comparable to the injury in this case. In *Missouri Pacific Transportation Co.* v. *Kinney,* 199 Ark. 512, 135 S. W. 2d 56 (1939), a judgment for $8,000 was reduced to $4,000; in *Sloan* v. *Hathcoat,* 199 Ark. 530, 134 S. W. 2d 873 (1939), a judgment of $3,750 was reduced to $2,000; and in *Duty* v. *Gunter,* 234 Ark. 176, 350 S. W. 2d 908 (1961), a judgment of $7,500 (including damage to a truck) was reduced to $4,700. However, in the case of *Turchi* v. *Shepperd,* 230 Ark. 899, 904, 327 S. W. 2d 533 (1959), we said:

"A comparison of awards made in other cases is a most unsatisfactory method of determining a proper

award in a particular case, not only because the degree of injury is rarely the same, but also because the dollar no longer has its prior value."

That statement is applicable to this case we think. Not only were the first two cited cases decided 25 years ago, but there are other recognizable differences between those cases and this case. In the *Kinney* decision we said:

"While we think the testimony did not warrant the giving of the instruction on permanent injury and future pain and suffering, in the form it went to the jury, any prejudice resulting to appellants may be removed by reducing the judgment . . ."

Although the *Gunter* case is a recent one, the injuries appeared to be slight. "Gunter was not in the hospital more than thirty or forty minutes . . . His medical expense was nominal . . ."

The evidence in the case under consideration in substance shows: Mr. Strickland's clothes caught on fire while he was on the grader; when he jumped off, his knee was injured and still gives him trouble at times; he was taken by a friend to the hospital in Fordyce where he remained 13 days; while there he suffered pain and was given sedatives; he was burned on the leg, on the face, on his left hand and on his left arm. The burn on his face caused a change in the texture and complexion of the skin. The doctors described the injury to his arm as follows:

"A. The forearm had an over growth of scar tissue, which is an elevated area, which had healed, this is an irregular shaped scar and it is 7 inches in length from the top to bottom and is a loop about the size of a silver dollar or slightly more about in the center of this keloid, or scar.

"Q. That keloid scar will be there the rest of his life?

"A. Yes, he can have it treated, but the chances are it will still be there.

Mr. Strickland testified (corroborated by his wife) that he is still nervous and has trouble sleeping. It appears that he will have to be careful about working in the hot sun.

Viewing the testimony in the light most favorable to sustain the verdict of the jury, and in view of what we have heretofore said, we are unwilling to say, as a matter of law, the verdict is not supported by substantial evidence.

We have reached the conclusion, however, that the judgment of $2,500 in favor of Mrs. Strickland is excessive. In support of her claim for $2,500 for loss "of the consortium of her husband," Mrs. Strickland, in substance, testified: I attended my husband at the hospital every day, and he seemed to be in pain.

"Q. Did he ever have trouble sleeping at night?

"A. Yes, sir.

"Q. What did you do for that?

"A. I gave him tablets.

* * * *

"Q. Give us some examples, please, of the duties you had to perform around the house?

"A. I had to feed the chickens, the hogs, dogs and horse, get the water and wood.

"Q. How many cows do you have?

"A. I don't have a cow.

"Q. How many horses?

"A. One.

"Q. You fed the horses and hogs and chickens?

"A. Yes, sir.

"Q. How many hogs do you have?

"A. Around 45.

* * * *

"Q. I understand that your son and daughter were living there?

"A. Yes, sir, they work . . ."

The record shows that Mr. Strickland performed the above mentioned chores before he was injured. These being services which he is no longer able to perform, the logical presumption seems to be that the jury took that element into consideration in fixing the amount of his damages. Moreover, we fail to comprehend how the above mentioned chores comport with the word consortium as it is ordinarily used. It is defined by Black's Law Dictionary as follows:

"Conjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection, and aid of the other in every conjugal relation."

Since the record does not disclose to what extent Mr. Strickland is unable to sleep or how often his wife must give him a tablet, we are driven to the conclusion that the evidence does not support a judgment in excess of $1,000 in favor of Mrs. Strickland.

If, within seventeen calendar days, a remittitur be entered in keeping with this opinion, the judgments are affirmed as reduced. Otherwise, the case will be reversed and the entire cause will be remanded for a new trial.

Modified and affirmed on Entry of Remittitur.

JOHNSON, J., dissents as to remittitur.

RICHARDSON *v.* HUITT.

5-3296 379 S. W. 2d 265

Opinion delivered June 1, 1964.

Bernard Whetstone, for appellant.

McMath, Leatherman, Woods & Youngdahl, Huey & Rothwell, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Clifton Richardson, and appellee, Mark Wilson Huitt, age 40, are friends and neighbors. Huitt had a small tomato patch in Richardson's back yard. They live in Warren, where Huitt is a member of the police department. Richardson has two pecan trees in his yard. In November, 1962, he asked Huitt to thrash one of the trees and offered to pay him for doing it. Huitt agreed, and a few days later went over to Richardson's place for that purpose. Mrs. Richardson advised Huitt not to climb the tree; the men, however, did not agree with her. Richardson produced a ladder so that Huitt could get up in the tree, and also a pole with which to do the thrashing. Huitt went up in the tree and proceeded to thrash out the pecans. After he had thrashed all the pecans he could with the pole, Richardson gave him a hammer weighing about six pounds which Huitt used to strike the limbs and thrash out more pecans. After Huitt had been using the hammer 10 or 15 minutes, the limb on which he was standing broke; he fell to the ground, and both ankles were broken.

In March, 1963, Huitt filed this suit against Richardson alleging:

"1. That the Defendant failed to inspect the tree which he asked the Plaintiff to climb;

2. That Defendant had knowledge of the fact that this particular pecan tree had dead limbs periodically and same should be removed from the tree;

3. That the Defendant was negligent in failing to warn the Plaintiff of the dead limbs in the said pecan tree;

4. That the Defendant was negligent in failing to provide this Plaintiff with a safe place in which to work." Later the complaint was amended to allege:

"The Defendant, Clifton Richardson, was negligent in failing to furnish the Plaintiff, Wilson Huitt, with safe appliances with which to perform the work Plaintiff was employed to perform."

Richardson answered denying any negligence on his part and pleaded the affirmative defenses of contributory negligence and assumption of the risk. There was a trial to a jury which resulted in a verdict in favor of Huitt in the sum of $10,000.00. Richardson has appealed.

There are several points involved—the alleged negligence of appellant; the allegation of contributory negligence on the part of appellee, and the question of whether appellee assumed the risk. We reach only the issue of assumption of the risk, and we have concluded that the undisputed evidence shows that Huitt did assume the risk.

There is no evidence that appellant knew Huitt was standing on a dead limb. Huitt testified:

"Q. Was there anything wrong about that limb that you stood on?

A. Not that I know of.

Q. Was it a green limb?

A. When I climbed the tree, there wasn't no leaves on the tree. Nothing but pecans and little twigs. Wasn't no green limbs. One limb looked just as green to me as another.

Q. And this limb looked just as green as the others?

A. Just as green as the others.

Q. Looked just as sound as the others?

A. Just as sound as the others.

Q. No way you could look at it and told any different?

A. I imagine if a man got out there and took a little ax or something and hit on it, he might could have found the good ones from the dead ones.

Q. But you couldn't have told the difference by looking at them? Just looking at the tree, you couldn't tell?

A. No, sir.

Q. You couldn't tell by just standing under the tree, either, could you?

A. No, sir.

Q. Did you take an ax, or anything like that, and test this limb before you stood on it?

A. No, sir, I didn't.

Q. Why didn't you?

A. Because I didn't have no ax and I didn't think the limb was rotten. It was as green as the rest.

Q. After he handed the hammer up to you, did you take the hammer and beat the limb a little bit and see whether or not it was rotten?

A. No, sir.

Q. Why didn't you?

A. Because I thought the limb was as green as the rest of them. It was a 4 inch. I figured it would hold me up.

Q. In other words, at that time and nor now, did you see anything or observe anything that would have caused you to suspicion or believe or think that the limb might not be completely sound and green? Is that right?

A. To me, one limb up there looked just as sound as the other and that's why I stood on it.

Q. You thought the limb was safe, didn't you?

A. Yes, sir.

Q. Was there anything about the limb where anybody could have known that the limb was not good?

A. As I said a while ago, anybody could just walk up there and just look at it and it looked good. You might take an ax or hammer and hit it and tell the difference, but just walking up to the limb, you couldn't."

Appellee cites cases to the effect that it is the duty of the master to use ordinary care to furnish the servant a safe place to work, and, of course, the law is well established to that effect, but we know of no case where this rule has been extended to require the owner of pecan trees to furnish, for thrashing, trees having no dead limbs. And, furthermore, it has been held that the rule is not applicable where the employee assumes the risk.

The court said in *Gans Salvage Co.* v. *Byrnes,* 62 A. 155: "An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open or obvious, the dangerous character of which he had an opportunity to ascertain. . . . One who remains in a service which necessarily exposes him to hazardous risks from causes open and obvious, the dangerous character of which he knew or had an opportunity of knowing, must be considered as having assumed such risks, and, if injured in consequence thereof, has no claim against the employer . . . This doctrine, firmly grounded in the law of this state, in the law of England, and of probably every state in the federal Union, though usually stated as a general rule, constitutes, in reality, an exception to or qualification of the broad principle which requires the employer to use ordinary care to provide a reasonably safe place in which the servant may perform his work. It may be taken, then, as a postulate, that a servant, who, on entering into a contract of employment, knows of the dangers

of the premises or place of work, or by the use of ordinary care could see and understand them, assumes the risks which arise therefrom."

Of course, the tree itself was not dead as shown by the fact that it bore pecans. True, it had a dead limb, but there may be a dead limb on any tree, and that is one of the hazards that appellee assumed when he undertook to thrash the tree. There is no contention that Richardson told Huitt to stand on the limb that broke. It is fairly inferrable from the evidence that appellee made his own selection of the limbs on which he would stand while thrashing the tree. It is not shown that any equipment furnished by Richardson was defective.

An employee assumes the risk of all dangers ordinarily incident to his employment. *Grayson-McLeod Lumber Co.* v. *Carter,* 76 Ark. 69, 88 S. W. 597; *Walther* v. *Cooley,* 224 Ark. 1027, 279 S. W. 2d 288. See also Ark. Digest, Master & Servant, §§ 206 and 213, and the cases therein cited. Climbing a pecan tree that is 60 feet in height to thrash it is a dangerous business. There is always danger of a limb breaking, and such danger is incidental to the undertaking of thrashing the tree. It is said in Labatt's Master and Servant, Vol. 3, P. 3130: "A doctrine frequently recognized in the formal statements of the courts is that the principle which charges a servant with an assumption of the ordinary risk of an employment is applicable whether that employment may or may not be described as being inherently dangerous. It is, in fact, quite clear that any other position would be entirely illogical and unreasonable. Provided the risk from which the injury results is, as a matter of fact, obviously incident to the employment undertaken by the servant, it is impossible to argue, with any show of reason, that the essential elements from which an assumption of that risk is predicable are not present."

From a long list of cited cases, Labatt's gives numerous illustrations, such as: "There are many kinds of work in which danger is necessarily inherent, where precautions such as would insure safety to the workman

are either impossible, or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and in the absence of express stipulation to the contrary the risk is held to be with him, and not with the employer."

Appellee cites several cases holding that the servant did not assume the risk under the particular facts involved, but all of the cited cases are distinguishable on the facts from the case at bar.

When the established law of assumed risk is applied to the undisputed facts in this case, there can be no recovery.

Reversed and dismissed.

McFaddin, J. concurs.

Johnson, J. dissents.

Ed. F. McFaddin, Associate Justice (concurring).

I concur in the result reached by the Majority because I am of the opinion that there is no evidence of any negligence against the appellant Richardson. I rest my decision entirely on the absence of negligence.

Jim Johnson, Associate Justice (dissenting). I do not agree with the majority view. The theory upon which the majority opinion is bottomed might reasonably be applicable to a professional tree surgeon or one trained or experienced in the art of pecan threshing, but the logic in applying the theory to this policeman neighbor completely escapes me. I believe the majority have clearly usurped the jury function in this case by deciding that there was no question for the jury. Review of the testimony raises the question whether appellee could assume the risk when ordered by appellant to remain in the tree and try to knock down pecans with a sledge hammer. The majority took the license to infer from the evidence that appellee made his own selection of the limbs on which he would stand while thrashing the tree. It can just as logically be inferred from the evidence that had the six-

pound sledge hammer furnished appellee by appellant as the tool to do the job for which he was employed not been so heavy as to require the use of both hands, one of appellee's hands could have been free to hold on to another limb or to the tree, thus avoiding or minimizing his injury. Appellee's testimony is as follows:

. . . "We started back and he said, 'Well, we'd just as well go on and get the ladder and this bamboo pole and get those pecans,' and I said, 'Yes, sir'. So, out the door Mr. Clif went and I was behind him. He walked out to his garage and got his step ladder—a 10 foot step ladder—and he got this big long bamboo pole and brought this pole and step ladder up to the tree and put it up there. He said, 'OK, there's the step ladder. Go up there and shake them'. When I got up there, he handed me the pole. He said, 'Go up there and shake around the tree and try to get the top.' He said, 'I've done got the bottom.' So, I did. I went up there and I started thrashing the pecans with that pole the best I knew how. I shook them there for a while and tried to rattle those pecans and in a little while I said, 'Mr. Clif, I've done all I can do. *I'd just as well come down,'* and he said, *'No, I've got one more thing I want you to do,* Wilson,' I said, 'What's that, Mr. Clif?' He said, 'I've got a bolting ax out here and I'll send it up to you and you hit those limbs with that bolting ax and jar those pecans up at the top of that tree.' So, he went and got the ax and got him a nylon string or rope and he said, 'Let the pole down.' He tied the string to the pole and said, 'Pull it up.' So, I pulled it up—pulled the sledge hammer up and I was standing on a limb about 3 or 4 inches through and he said, 'Hit those limbs with that.' So, I took both hands—I had to use both hands to hit those limbs with that 6 pound hammer—and jarred the tree and all of a sudden this limb broke and I hit the ground. I had 2 broken ankles and I laid over on the ground.

* * *

"The only thing that Mrs. Ruth Richardson said to me was when Mr. Clif said, 'Let's go get those pecans,' she said, 'Wilson, don't climb that tree. You might get

hurt.' Going out the little hallway in the back, Mr. Clif turned around and said these words, he said, 'Nobody is going to get hurt.' "

One of a number of cases which are here relevant is *Griffin* v. *St. Louis, I. M. & S. Ry. Co.,* 121 Ark. 433, 181 S. W. 278, in which it was said:

"(2) It is insisted by counsel for appellee that under the undisputed testimony appellant must be deemed to have assumed the risk. We do not think, however, that it can be said as a *matter of law* that the risk was assumed merely because appellant, under the circumstances, proceeded with the work. He was acting under the immediate commands of the foreman and had the right to some extent to rely upon the foreman's superior knowledge. It was a *question for the jury* to determine whether or not appellant appreciated the danger of attempting to handle the piece of timber with an insufficient force of men.

. . . "In the present case the servant was acting under the immediate direction of a foreman, and, as stated before, he had a right to rely upon the foreman's superior knowledge and did not assume the risk unless the jury found that he *appreciated* the danger and *voluntarily proceeded* with the work in the face of it.

. . . "The testimony is, however, that the foreman directed appellant and his co-laborers to handle the piece of timber in the particular way mentioned; that is to say, with two of them at one end, and in doing the work they were following the explicit directions of the foreman. Therefore, we must come back to the proposition that under the proof in this case, before the risk of the danger was assumed, it must be found that appellant appreciated it."

This principle has been reiterated again and again by this court. In *Standard Oil Co. of Louisiana* v. *Webb,* 194 Ark. 569, 108 S. W. 2d 1086, it was stated thusly:

"The facts bring this case within the general rule that the question of assumption of risk is generally one

for the jury, and *always so* where a servant is acting in obedience to the orders of a superior unless it appears that he both knew and appreciated the danger in obeying such order; or, where such danger is so obvious that a reasonably prudent person would refuse to obey . . . The court correctly submitted the defense of assumed risk to the jury and its verdict against the contention of appellant has some substantial evidence to support it." [Emphasis mine.]

In *Woodley Petroleum Co.* v. *Willis,* 172 Ark. 671, 290 S. W. 953, after restating the above-quoted rule, was said:

. . . "We cannot say as a matter of law, in the instant case, that appellee knew of the danger, or that the danger was so obvious or patent that he should have known it. The evidence shows that he exposed himself to the danger in an effort to obey the order of his foreman. The order of the foreman carried an implied assurance that appellee could perform the work without danger to life or limb."

James B. Berry's Sons Co. v. *Presnall,* 183 Ark. 125, 35 S. W. 2d 83, also reiterates the above, and states:

"To have put his judgment up against the superintendent's would have brought about his immediate discharge. The danger was not so obvious that a reasonably prudent man would refuse to obey the order of his superior, and for this reason we think the question of whether appellee assumed the risk was one for the jury." And in *Chapman* v. *Henderson,* 188 Ark. 714, 67 S. W. 2d 570, this court said:

"The tendency of modern cases is to permit a recovery, unless the employer's direction calls for nothing less than recklessness on the part of the employee, leaving no ground for difference of opinions as to the perils of acting pursuant thereto. *Owosso Mfg. Co.* v. *Drennan,* 182 Ark. 389, 31 S. W. 2d 762."

In *Neely* v. *Goldberg,* 195 Ark. 790, 114 S. W. 2d 455, the court explained that there are three exceptions to the rule that an employee assumes the risks ordinarily inci-

dent to his employment, the second exception being, "the servant does not assume the risk of injury incident to his employment when the work is being done under the immediate direction and control of the employer," and went on to say, "[a]n employer cannot lull his employee into a sense of security by an assurance of safety and then escape liability for injuries resulting to the employee in relying on this assurance. In such cases, the employee does not assume the risk."

Thus the questions here for the jury to decide were whether appellee (1) knew there was danger, (2) appreciated the danger in obeying appellant's order, (3) had some right to rely on appellant's superior knowledge or reassurances that there was no danger. Appellee had been in the tree under the personal direction of appellant for some time poking pecans with the bamboo pole, when appellant ordered him to shake the tree with the sledge hammer. This is when the limb and appellee parted company with the tree. Prior to that there had been no sign of danger—the limb had apparently seemed and held firm. The trial court correctly submitted the matter of assumption of the risk to the jury.

For the reasons stated, I respectfully dissent.

BASKIN *v.* BASKIN.

5-3289 381 S. W. 2d 442

Opinion delivered June 1, 1964.

[Rehearing denied September 14, 1964.]

Griffin Smith, for appellant.

Williams & Gardner, for appellee.

JIM JOHNSON, Associate Justice. This is a suit to set aside a judgment. Appellant Ann Baskin obtained a judgment in Shelby County, Tennessee, Circuit Court against appellee William D. Baskin for $760.00 on September 20, 1963. A petition was filed in Perry Circuit Court, case No. 2202, on October 20, 1963, to reduce this judgment to an Arkansas judgment, with personal service on appellee on October 31, 1963. One day prior to the filing of case No. 2202, appellee Ora M. Baskin (William Baskin's mother) or October 29, 1963, filed suit No. 2201 against William Baskin in Perry Circuit Court for $12,000.00 plus interest on a promissory note. October 30, 1963, William Baskin was served, filed an answer confessing judgment and judgment was entered against him that day for $16,200.00. On January 10, 1964, appellant filed a petition in case No. 2202 (her foreign judgment registration) alleging that the judgment obtained by Ora Baskin (in case No. 2201) was a fraud, that the debt did not exist, that the proceeding was a conspiracy to defeat appellant's rights under her judgment, and prayed that the judgment of Ora Baskin be set aside. Appellees waived service and appeared in person and by counsel at the hearing on February 1, 1964. The cause was submitted on the pleadings in both cases and testimony of appellees. The circuit court found that the petition should be denied, from which appellant has appealed.

For reversal appellant contends that the evidence clearly established that the purported obligation to Oro Baskin did not in fact exist, that the entire proceeding in case No. 2201 was a device to obstruct enforcement of appellant's Tennessee judgment and that the trial court erroneously concluded otherwise.

This is manifestly a collateral attack on the judgment of Ora Baskin. While the record strongly indicates

an insidious scheme to avoid payment of appellant's judgment, the evidence presented was not evidence of extrinsic fraud necessary to impeach the judgment. Extrinsic fraud has been described as fraud in securing the judgment, not fraud in securing the notes sued on, *Sibley* v. *Manufacturers Furniture Co.*, 220 Ark. 234, 247 S. W. 2d 20; nor the truth or falsity of testimony on the amount of a mortgage debt, *Croswell* v. *Linder,* 226 Ark. 853, 294 S. W. 2d 493; but the fraud to impeach a judgment must be extrinsic of the matter tried, it must be fraud practiced upon the court in the procurement of the judgment itself. *Turner* v. *Turner,* 221 Ark. 932, 257 S. W. 2d 271.

Affirmed.

DAVIS *v.* WALLER, COUNTY JUDGE.

5-3321 379 S. W. 2d 283

Opinion delivered June 1, 1964.

Catlett & Henderson, for appellant.

Smith, Williams, Friday & Bowen, by *Herschel H. Friday* and *Frank Warden, Jr.,* for appellee.

JIM JOHNSON, Associate Justice. This is a taxpayers' suit to enjoin levy of taxes and issuance of bonds to defray the cost of constructing and equipping a county hospital.

On September 18, 1963, appellants Howard Davis and John H. Stamps filed a complaint in White Chancery Court against appellee Forrest Waller, White County Judge. The complaint alleges that the action was brought under Article 16, § 13 of the Arkansas Constitution (the illegal exaction provision); that a called special election was held on September 10, 1963, to determine (1) whether a county hospital should be constructed and equipped at an estimated cost (to the county) of $600,000, and (2) whether a tax should be levied not to exceed two mills to pay bonds to be issued for construc-

tion and equipment of the hospital; that a majority of the votes cast approved both construction and tax; that Amendment 17 as amended by Amendment 25, while authorizing a tax for hospital construction, gives no authority for the purchase and installation of hospital equipment; that the plans and specifications of the proposed hospital filed in the office of the county clerk were inadequate, incomplete and unsuitable to formulate a reasonable understanding of the nature, extent and approximate cost of the proposed hospital; and prayed that the county judge be enjoined from calling the quorum court into session to levy the tax, from presenting such proposal to the quorum court at any regular, special or adjourned term, and from issuing any bonds thereunder; and for a declaratory judgment that Amendment 17 as amended by Amendment 25 includes no authority for issuance of bonds to provide money to purchase equipment for a county hospital. The record reflects the following:

(1) The county court entered an order declaring the necessity for the project (the acquiring a site for and constructing and equipping a county hospital) on August 7, 1963, which order appointed an architect to prepare preliminary plans, specifications and estimates of cost for the proposed project.

(2) Plans, specifications and estimates (hereinafter referred to as plans) were prepared and filed in the office of the county clerk on August 9, 1963, where they remained subject to the inspection of any interested person. A copy of the plans was introduced in evidence.

(3) The county court entered an order on August 10, 1963, approving the plans and calling the special election for September 10, 1963. The election was duly held with the results as follows:

For construction	4075
Against construction	2707
For building tax	3987
Against building tax	2774

Following trial on December 9, 1963, the chancellor found:

(1) The preliminary plans were proper for a reasonable understanding of the nature, extent and approximate cost of the proposed hospital, and met all the requirements of Amendment 17, and such preliminary plans were properly approved by the county court, and

(2) The submission to the electors of the question of equipping the proposed county hospital and the proposed expenditures therefor out of the proceeds of the special tax are within the authority conferred by Amendment 17.

From the decree dismissing the complaint with prejudice, appellants have prosecuted this appeal.

For reversal appellants urge three points. The first and third points are that Amendment 25 does not authorize the levy of a tax to equip a hospital, and that equipment includes only those items affixed to the building and which are durable. These points questioning the legality of equipping the hospital have been considered very recently by this court in *Hollis* v. *Erwin,* 237 Ark. 605, 374 S. W. 2d 828, wherein we held that a county is authorized under Amendment 17 to equip a hospital, and explained that:

"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 . . . Certainly the equipping of the hospital is an essential part of its construction . . . There is authority for the equipping and furnishing of buildings authorized by Amendment 17."

Appellants ask us to re-examine this holding and we have carefully noted their argument. It is our considered opinion that *Hollis* is correct and we here reaffirm it. Appellants also argue that even if equipment may be

included, the only type that is proper is durable equipment affixed to the building. We do not agree. The public purpose embodied in Amendment 17 can be accomplished only by a functioning hospital and, therefore, bonds may be issued and the proceeds thereof spent for any type of equipment, furnishings and property necessary for or related to a functioning hospital.

Appellants' second and principal point urged for reversal is that the plans and specifications failed to furnish a reasonable understanding of the nature, extent and approximate cost of the hospital.

Section 2 of Amendment 17 provides for the preparation of such plans, specifications or estimates of cost as may be proper for a reasonable understanding of the nature, extent and approximate cost of the contemplated improvement. Section 3 of Amendment 17 vests jurisdiction in the county court to examine and approve such plans, specifications and estimates. Plans were prepared and filed in the office of the county clerk and were subsequently approved by the county court, in accordance with the provisions of Amendment 17. Appellants challenge the sufficiency of the plans to convey a reasonable understanding of the nature, extent and approximate cost of the proposed hospital. As set out above, appellants invoked the "illegal exaction" jurisdiction of the chancery court. We have stated that this provision of the Constitution does afford taxpayers injunctive relief in a proper case against arbitrary or unlawful action. *Starnes* v. *Sadler,* 237 Ark. 329, 372 S. W. 2d 585. However, the provision does not confer jurisdiction upon chancery in all situations and under all circumstances. In this case, the provision must be interpreted in the light of the language of Amendment 17 and the purposes intended to be accomplished by the electors in adopting Amendment 17. Since this is an area involving the public interest and since it has been the subject of a considerable amount of litigation, we have concluded that it would be appropriate here to reconcile some conflicts which have heretofore existed in our law. We have determined that the

various steps set forth in Amendment 17 which are preliminary to the election properly fall in the category of election procedures concerning which strict compliance may be mandatory before the election, but is only directory thereafter. Therefore, any defect with regard to any of the preliminary steps (in connection with the filing or the contents of the order declaring necessity, the filing or the contents of the plans, specifications and estimates, or the filing and the contents of the order approving the plans and calling the election) raised for the first time *after* an election cannot defeat the will of a majority of the electors. See the following cases involving analogous situations: *Wheat* v. *Smith,* 50 Ark. 266, 7. S. W. 161; *Cisco* v. *Caudle,* 210 Ark. 1006, 198 S. W. 2d 992; *Brown* v. *Bradberry,* 214 Ark. 937, 218 S. W. 2d 733; *Jeffery* v. *Fry,* 220 Ark. 738, 249 S. W. 2d 850; and *Luther* v. *Gower,* 233 Ark. 496, 345 S. W. 2d 608. As was stated in *Wheat* v. *Smith, supra*:

"... The courts hold that 'the voice of the people is not to be rejected for a defect or want of notice, if they have in truth been called upon and have spoken.' " In this regard, *Thomas* v. *Sewell,* 184 Ark. 289, 42 S. W. 2d 225, (in which a majority of the court held that the failure of the county court to enter the order approving the plans and calling the election on the record within a reasonable time before the election was a jurisdictional defect which avoided the authority conferred at the election and prompted the court to direct the entry of an injunction against the county proceeding further) is expressly overruled. We are convinced that our interpretation is the one intended by the adopters of Amendment 17 and the one necessary for the proper realization of the public purposes intended by the Amendment. Thus, these preliminary matters cannot be challenged after the election by a suit in chancery under Article 16, § 13 or otherwise or in any other court proceeding because any defect in the taking of the preliminary steps is cured by the election. Election contest questions arising from the conduct of the election can be raised in an appropriate election contest after the election and the mechanical

counting and determining of results can be raised in appropriate proceeding after the election. See *Jones* v. *Dixon,* 227 Ark. 955, 302 S. W. 2d 529. This is not to say, however, that questions of basic authority (such as the equipment issue raised by appellants herein, an attempt to issue bonds under Amendment 17 without an election, an attempt to levy more than a five mill tax, etc.) cannot be raised in proceedings in Chancery under Article 16, § 13 filed after the election.

It follows, from what has been said, that the challenge in appellants' complaint as to the sufficiency of the plans came too late since the suit was instituted after the election. In the case at bar, however, both parties indicated a desire for a complete disposition on the merits of the issues. We are convinced here that it would be in the public interest. Therefore we have proceeded to review the sufficiency of the plans. As we have seen, Amendment 17 vests jurisdiction in the county court to determine the sufficiency of the plans. Actually, under the Amendment and the facts of this case, the initial determination was made by a professional expert, the architect (see Section 2 of Amendment 17) which determination was subsequently approved, after examination, by the county court (see Section 3 of Amendment 17). As above pointed out, the proper procedure would have been a direct challenge before the election, and the court review of the action of the county court in this regard would go only to the extent of determining whether the county court regularly pursude its authority and did not act arbitrarily or capriciously. But, in order to dispose of the issue, we have examined the plans and the evidence and have determined that the county court in the first instance and the chancery court in the trial there properly found and concluded that the plans were sufficient to meet the requirement of Amendment 17 of conveying a reasonable understanding of the nature, extent and approximate cost of the proposed hospital. The plans, on a single sheet, reflect a front elevation which indicates generally the appearance of the building from the front; contain outline specifications; contain a floor

plan showing waiting rooms, offices, dining, kitchen, mechanical rooms, locker space, operating rooms, x-ray, central sterilization and supply, treatment rooms, record room, laboratory, isolation rooms, bedrooms (a typical bedroom with bath facilities is shown), nurses stations, linen areas, treatment areas, delivery rooms, scrub rooms, labor and recovery rooms, sanitation areas, nursery wing, emergency entrance and public entrance; and reflect an estimated total cost of $1,200,000. The evidence in this case reflects that the proper preparation of more detailed plans would have cost the county from $10,000 to $54,000. Indeed, if the various counties had to obtain and spend such substantial sums on plans, specifications and estimates before they could even let the electors vote on the question, it seems to us that the public purposes sought to be accomplished by Amendment 17 would largely be defeated.

The decree of the chancery court is affirmed, and, pursuant to motion of appellees and for good cause show an immediate mandate is ordered as being in the public interest.

NOTTINGHAM *v.* KNIGHT.

5-3294 379 S. W. 2d 260

Opinion delivered June 1, 1964.

Lowe, Moore & Webber, for appellant.

Autry & Goodson, for appellee.

FRANK HOLT, Associate Justice. The sole issue presented on this appeal is whether appellant was entitled to a transfer of this cause to a court of law.

The appellees brought an action in chancery court claiming ownership of a tract of land and seeking to enjoin the appellant from trespassing upon the described lands; to quiet and confirm appellees' title as against appellant; to cancel and remove as a cloud upon appellees' title certain instruments placed of record by the appellant and for the recovery of damages.

Appellant filed an answer denying the allegations and alleging that he is the owner of the disputed lands; that he is in sole possession and praying that the cause be transferred to a court of law; and, also, that title, right and interest in the lands be quieted and confirmed in him.

The Chancellor refused to transfer the cause to a court of law and upon trial, among other things, decreed that title to the lands be quieted and confirmed in appellees.

For reversal appellant contends on appeal that the Chancellor erred in refusing to transfer the cause to a court of law, urging that appellees' complaint constitutes an ejectment action and, also, that appellees cannot maintain a suit in chancery to quiet title since appellees were not in possession.

We have held and appellant cites in support of his position a number of cases to the effect that where the defendant in an action is in possession and control of the land in dispute when the suit is brought, he has a right to have the cause transferred to a court of law. These cases enunciate a legal principle which is not applicable when equitable issues are involved in the action. For example, appellant cites *Winkle* v. *School District,* 215 Ark. 670, 221 S. W. 2d 884 and quotes the following portion of the opinion:

"* * * It is undisputed that appellant was in actual possession and control when the suit was brought. He, therefore, has the constitutional right to demand that the issues be tried in a court of law. *No equitable issue was involved. The question of title was purely a legal one.*" [Emphasis added]

We think equitable issues exist in the case at bar. If we assume arguendo that appellees' complaint failed to state grounds for equitable relief, any such defect was supplied by appellant's pleadings. Appellant pleaded an equitable issue and invoked the aid of equity in his answer when he prayed "that the title, right and interest of the Defendant be quieted and confirmed against the claims of the Plaintiffs herein".

In *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660, we said:

"* * * The answer of the defendants was not only a denial of the complaint but also prayed, *inter alia,* 'that the title of the defendants be quieted and confirmed.' Appellants (defendants) now claim that the complaint was an action in ejectment and should not have been tried in the equity court. In *Goodrum* v. *Ayers,* 56 Ark. 93, 19 S. W. 97, we said:

"Conceding that the plaintiff was not in possession of the land, and for that reason could not maintain a suit to quiet title, it cannot avail the appellant; for he filed a cross-bill seeking to quiet his own title, and it gave the court jurisdiction of the entire controversy.' To the same effect, see *Weaver* v. *Gilbert,* 214 Ark. 800, 218 S. W. 2d 353. So, whatever of equity jurisdiction might have been lacking in the plaintiffs' complaint was fully supplied by defendants' prayer for relief."

In *Spikes* v. *Hibbard,* 225 Ark. 939, 286 S. W. 2d 477, we said:

"* * * Even if the complaint failed to state a ground for equitable relief the appellees supplied the defect by asking that their title be quieted. It is a familiar

rule that one who has invoked the assistance of equity cannot later object to that jurisdiction unless the subject matter of the litigation is wholly beyond equitable cognizance.''

See, also, 6 Arkansas Law Review, p. 83.

Therefore, the Chancellor was correct in refusing to grant appellant's motion to transfer the case at bar to a court of law. In view of our decision it is unnecessary for us to consider the other arguments advanced by the appellees.

The decree is affirmed.

CURRY, COUNTY JUDGE *v.* DAWSON, CHANCELLOR.

5-3340 379 S. W. 2d 287

Opinion delivered June 1, 1964.

Max M. Smith, Smith, Williams, Friday & Bowen, by *Herschel H. Friday* and *John C. Echols,* for appellant.

Paul K. Roberts, for appellee.

FRANK HOLT, Associate Justice. This is a petition for a writ of prohibition. The petitioners are the defendants in a taxpayers' suit now pending before the respondent Chancellor. The taxpayers' action was instituted by James O. Young, and numerous other plaintiffs, to restrain and enjoin the defendants [petitioners], Ray Curry and other county officials, from the imposition and collection of a tax based upon a county election in which the voters in two townships had no opportunity to vote. The respondent overruled defendants' demurrer to the complaint, refused to dismiss plaintiffs' complaint for lack of jurisdiction, and set the case for trial.

Petitioners contend that the plaintiffs' complaint constitutes an election contest and, therefore, chancery court has no jurisdiction to try this issue. Also, that a writ of prohibition is the only effective remedy available to the petitioners. It is respondent's position that the pending action is not an election contest and jurisdiction exists because the petitioners are attempting to exact an illegal tax in violation of Article 16, § 13 of our State Constitution.

The allegations in the complaint pertinent to this appeal are that pursuant to the provisions of Amendment 17 of the Constitution of Arkansas, as amended by Amendment 25, a county election was held on December 10, 1963 and as a result of this election a majority of the electors, 426, voted in favor of and 388 electors voted against the proposed reconstruction and extension of the Cleveland County Hospital; that a majority, 408 electors, voted for and 389 electors voted against the proposed building tax; that as a result of the certification that all polls were open and the measures were approved by a majority vote, the Cleveland County Quorum Court

levied a tax on the property of all the taxpayers of the county for the purpose of providing the necessary funds to finance the proposed building program; that the tax books are being extended and prepared for the collection of such tax, and it is proposed to offer general obligation hospital bonds for sale in the near future; that the elec- is void, the tax illegal, and the proposed sale of bonds is unauthorized because the certificate of the Election Commissioners is false since they "failed and neglected to provide [an] opportunity for the citizens and voters of said two townships [Whiteoak and Whiteville] to vote on said measures"; and that if the 260 eligible electors in those townships had been permitted to vote, 90% or 234 would have voted against the proposed measures, thus changing the outcome of the election. In an amendment to the complaint, plaintiffs named 41 electors in Whiteoak Township and alleged that these were eligible voters who "would have voted against both the proposed construction and the proposed building tax", thus changing the outcome of the special election.

The sole issue presented in the instant case is whether the action challenging the validity of the election is one to prevent an illegal exaction based upon a void election, or whether it is an action to contest an election.

We have often held that the questioning of the validity of the actual conduct of an election is an election contest and that the chancery court has no jurisdiction in such a cause. *Rich* v. *Walker,* 237 Ark. 586, 374 S. W. 2d 476; *Jones* v. *Dixon,* 227 Ark. 955, 302 S. W. 2d 529; *Parson* v. *Mason,* 223 Ark. 281, 265 S. W. 2d 526; *Priest* v. *Mack,* 194 Ark. 788, 109 S. W. 2d 665; *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. 2d 68; *Guthrie* v. *Baker,* 224 Ark. 752, 276 S. W. 2d 54. As was succintly said in *Parsons* v. *Mason, supra,* an election contest involves "going behind the returns and inquiring into the qualifications of the electors and other matters affecting the validity of the ballots."

It is true that we have held chancery court has jurisdiction to enjoin the illegal exaction of a tax as prohibited by Article 16, § 13 of our Constitution. *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S. W. 2d 26; *Harrison* v. *Norton,* 104 Ark. 16, 148 S. W. 497; *Arkansas-Missouri Power Corp.,* v. *City of Rector,* 214 Ark. 649, 217 S. W. 2d 335. However, none of these cases involved the actual conduct of an election or "going behind the returns".

An election contest is a special proceeding authorized only in accordance with constitutional and statutory provisions. *Sumpter* v. *Duffie,* 80 Ark. 369, 97 S. W. 435; *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230. The county court has exclusive original jurisdiction in all matters necessary "to the internal improvement and local concerns" of the county. Article 7, § 28, Arkansas Constution. The construction of a county hospital is a matter of internal improvement and local concern and the county court has exclusive jurisdiction in the trial of an election contest arising from a special election on the question of the construction of a county hospital and such contest must be commenced within twenty (20) days following the election. [Ark. Stat. Ann. § 3-1203 (Repl. 1956)]; *Jones* v. *Dixon, supra.*

The matters alleged in plaintiffs' complaint, in effect, necessitate "going behind the returns" as certified and, also subject the elector's qualifications to inquiry as well as any other matter affecting validity of the ballots. Plaintiffs' allegations in fact question the actual conduct of the election. Therefore, we hold that plaintiffs' allegations are in the nature of an election contest and not cognizable in equity.

The plaintiffs were not without a remedy. The county court was the proper forum in which to question, within twenty days after the election, the neglect and failure of the election commissioners to conduct an election in these two townships. Public policy demands that the requirements imposed by our constitution and our legislative enactments governing the trial of an election con-

test be strictly observed in order that election results have stability and a finality, especially where the construction of public improvements such as in the case at bar is in issue.

Prohibition is the proper remedy to prevent the chancery court from exceeding its jurisdiction on matters pertaining to an election contest. *Campbell* v. *Waggoner,* 235 Ark. 374, 360 S. W. 2d 124; *Faver* v. *Golden, Judge,* 216 Ark. 792, 227 S. W. 2d 453; *Murphy* v. *Trimble, Judge,* 200 Ark. 1173, 143 S. W. 2d 534. The expense of time and money required in an election contest renders inadequate the ordinary remedy by an appeal from a forum which is without jurisdiction.

The petition for writ of prohibition is granted and for good cause shown an immediate mandate is ordered.

SIMPSON, BANK COMMISSIONER *v.* MONETTE STATE BANK.

5-3261 381 S. W. 2d 442

Opinion delivered June 1, 1964.

[Rehearing denied September 21, 1964.]

Bruce Bennett, Attorney General, by *Jack L. Lessenberry,* Chief Asst. Atty. General, for appellant.
Leon B. Catlett and *E. J. Ball,* for appellee.

Smith, Sanderson, Stroud & McClerkin, W. S. Mitchell, John T. Williams, Cooper Land, Louis L. Ramsay, Jr., Fred M. Pickens, Jr., Harry E. Meek, Bowie & Boyce, Doug Bradley, for Amici Curiae.

ARTHUR G. FRANKEL, Special Associate Justice. The appellee, Monette State Bank, a domestic banking corporation, instituted suit for declaratory judgment to interpret Acts 190 of 1961 and 544 of 1963. The appellants are the State Bank Commissioner and the State Banking Board. Briefs were filed by the parties and amicus curiae and the case heard orally.

The facts are clear and undisputed. During 1937, appellee was granted a domestic banking charter and commenced business in Monette. Appellee was then given permission by the State Banking Board to open a teller's window in Caraway under the authority of Act 191 of 1935 [Ark. Stat. Ann. § 67-319 (Repl. 1957)]. That Act contained the provision that "* * * No office shall be continued at any place after a legally chartered bank has actually commenced business at that place." The General Assembly enacted Act 190 of 1961, now codified as Ark. Stat. Ann. § 67-340, et seq, (Supp. 1963) for the expressed and obvious purpose of clarifying the legal status of a large number of teller's windows that had been created and to furnish a comprehensive guide for the establishment of future windows and repealed Act 191 of 1935. In 1961 appellants issued a charter to the Caraway Bank authorizing the commencement of a new

banking business in Caraway. After this litigation had been instituted the General Assembly, in 1963, passed Act 544 which amended Sections 4 and 5 of Act 190 of 1961.

The question presented in this appeal is whether the teller's window operated by appellee in Caraway can be required to close and terminate business. Relying on Section 4 of Act 190 of 1961, appellee earnestly argues in its excellent brief that its Caraway window was "grandfathered" from the closing requirement. This proposition cannot be sustained by that Section [now § 67-343 (Supp. 1963)] which reads as follows:

"Every legally chartered banking instituiton, which, on or before the effective date of this act [§§ 67-340—67-352], was engaged in operating, or had obtained a permit to operate, any banking facility, may continue to retain and operate same under the general banking laws of the State of Arkansas, except as provided in section 8 [§ 67-348] hereof; and the requirements and restrictions set forth in this act, except as provided in said section 8 [§ 67-347], shall not apply to any such banking facility which, on or before the effective date of this act, was established, engaged in operating, or had obtained permit to operate; but the provisions and restrictions set forth in this act, except as provided in said section 8 [§ 67-347] shall be applicable only to those tellers windows which shall henceforth be established pursuant to the provisions of this act;".

Moreover, history of the legislation confirms a consistent attitude of the legislature to encourage organization and ownership of local banks by requiring a teller's window to close when a bank is chartered in the community where only window services are furnished.

Next, appellee forcefully contends that it possesses a vested right to continue the operation of its facility in Caraway. To subcribe to such a theory, Act 191 of 1935 which initially permitted the opening of the window must be ignored. Of greater consequence, the fundamental

rule of this jurisdiction that banking by corporation is only a privilege would necessarily be overruled. Appellee has failed to furnish any authority or reason to alter our many decisions. *State Use Crawfordsville Special School District* v. *Huxtable,* 191 Ark. 10, 12 S. W. 2d 1; *Holland* v. *Nakdimen,* 177 Ark. 920, 9 S. W. 2d 307. Appellee never possessed more than a conditional privilege which was constantly susceptible to immediate revocation. Such legislation was within the proper sphere of inherent police power. As asserted by appellants, a conditional privilege cannot produce a vested right.

Appellee also advanced the argument that the Acts in controversy are discriminatory since windows located in the same municipality as the parent bank (such as Little Rock banks) are not required to close when a new bank is chartered in the city. There is no merit in this. The Acts apply uniformly to all banking institutions. The fact that the legislature makes a distinction between a locality that does not have full banking services and teller's windows located within the municipality is not discriminatory but rather reasonable and necessary. It is proper to add that there is no question but that appellee has faithfully served its customers, but this fact is not material or decisive since the business that a window may transact is severely restricted. Ark. Stat. Ann. § 67-342 (Supp. 1963). This only points up the preferability of encouragement of new local full service banks for vigorous and vital communities.

However, we construe Act 190 of 1961 to contain the same provision as Act 191 of 1935 pertaining to closing of a teller's window. On this issue, Act 190 of 1961 is constitutional in all respects, and Act 544 of 1963 which only clarifies certain language is held to be constitutional and valid.

There is no question but what the General Assembly could retroactively alter that provision by Act 544 of 1963, and so logically no detriment accrued by the subsequent passage of Act 544. In *Holland* v. *Nakdimen, supra,* it was stated:

"* * * When Mrs. Scott and the bank made this contract they knew that the regulation and control of banks came under the internal police power of the State and that this contract must be subject to all laws then in force or which might thereafter be passed."
See, also, *Leep* v. *St. Louis, IM&S Railway Company,* 58 Ark. 407, 25 S. W. 75; *Dover* v. *State,* 165 Ark. 496, 265 S. W. 76; *Shields* v. *Ohio,* 95 U.S. 319.

It is deemed imperative to note that the legislature by the Acts considered here have not set standards to close a bank, but merely to terminate the operation of a teller's window. As noted previously, appellee has not suffered any inequity since the window from its inception was subject to closing.

In view of this decision, it becomes unnecessary to discuss or determine the admissibility of the testimony offered by appellants as to the intent of the legislature by enacting Act 190 to 1961.

The permanent injunction is dissolved and the cause dismissed at the cost of appellee.

GEORGE ROSE SMITH, J., concurs.

JOHNSON, J, dissents.

HOLT, J, not participating.

GEORGE ROSE SMITH, J., (concurring). The minority opinion seems to be based upon the premise that § 4 of Act 190 of 1961 was meant to apply to a teller's window such as the one now before us—a window situated in a city or town other than the one where the parent bank itself is located. When Act 190 is read as a whole it is clear, in my opinion, that § 4 was intended to apply only to those teller's windows authorized by § 1 of the act—windows in the same city or town as the bank itself. Section 8 of Act 190 was evidently meant to govern a window such as the one at Caraway. This section unmistakably carries forward the proviso originally found in Act 191 of 1935, by declaring that such a teller's window must be closed within ninety days after a full-scale banking institution is granted a charter to do business

within the city or town. Thus the appellee could never have acquired a vested right, for the controlling law has always provided that its Caraway window would have to be discontinued if a bank should be established in Caraway.

JIM JOHNSON, Associate Justice (dissenting). I do not agree with the majority view. If the majority opinion is allowed to stand, appellee and those similarly situated will be deprived of their property without due process of law in contravention of Article II of the Constitution of Arkansas and the 14th Amendment of the Constitution of the United States. The rationale of the majority if carried to its logical conclusion could open the door for the summary closing of any state chartered bank in Arkansas, protestations contained in the opinion to the contrary notwithstanding. While it's true as cited by the majority that regulation and control of banks come under the internal police power of the state, never has the power been extended to permit the closing of any entire facility. If a teller's window can be closed in this case under the guise of a proper exercise of the police power, what is to prevent the closing of the entire bank at some future date by the exercise of that same power. The precedent is being set.

The majority seems obsessed with the struggle to breathe life into Act 191 of 1935. This act is dead. The slate was wiped clean when Act 190 of 1961 said in Section 14:

"That Act 191 of 1935, and all other laws in conflict herewith, are hereby repealed."

This specific repeal caused Act 191 of 1935 to be no more. Upon its effective date Act 190 of 1961 became the law applicable to appellee's teller's window in Caraway. Section 4 of this act is as follows:

"Every legally chartered banking institution, which, on or before the effective date of *this act,* was engaged in operating, or had obtained a permit to operate, any banking facility, may continue to retain and operate same

wherever now located under the general banking laws of the State of Arkansas; *and the requirements and restrictions set forth in this Act shall not apply to any such banking facility which on or before the effective date of this Act, established, engaged in operating, or had obtained a permit to operate,* but the provisions and restrictions as set forth in this Act shall be applicable only to those teller's windows *which shall be henceforth established pursuant* to the provisions of this Act." [Emphasis mine.]

This provision is so clear as to defy misinterpretation. It emphatically says that the restrictions contained in Section 8 of Act 190 of 1961 providing for closing of a teller's window operated in a different city from that in which the banking institution is operating "upon the granting of a new charter for a banking institution," is inapplicable to appellee's teller's window which was in operation on and prior to March 7, 1961, the effective date of Act 190 of 1961. To construe this act otherwise is to legislate, a function which is beyond the province of this court.

Aside from the business appellee does through its Caraway facility (which amounts to about one-third of its deposits), it is undisputed that appellee has invested a considerable amount of money in machinery, equipment, fixtures, leasehold improvements and other tangible and intangible property in Caraway for the single purpose for use in a banking business. Under the law appellee had a perfect right to build this business and make these investments. Whatever doubts which might have existed as to the status of these rights under the dead 1935 act, certainly under the unmistakable terms of Act 190 of 1961 appellee acquired *vested property* rights to operate and continue to operate its facility at Caraway. There is nothing conditional about these acquired rights—they are absolutely vested. I have no quarrel with the holdings in the cases cited by the majority seeking to support their declarations on this point. The cases simply are not applicable here. It is funda-

mental as stated by the majority that "banking by corporation is a privilege," just as it is fundamental that the state through its internal police power has the right to promulgate and execute *reasonable* regulations of banking corporations. But such is not the case in the matter confronting us. The net effect of the majority holding goes beyond *reasonable regulation* and destroys a preexisting right to do business. To infer as the majority does that a corporate privilege cannot evolve into vested rights is to fly into the teeth of the momentous decision rendered in the celebrated case, *Trustees, Dartmouth College* v. *Woodward,* 4 Wheat. 518, 4 L. Ed 629, and the myriad cases which have never deviated from the rule there set. As spelled out unequivocally in Article II, § 22 of the Constitution of the State of Arkansas, "the right of property is before and higher than any constitutional sanction."

Following the passage of Act 190 of 1961, a bank was established in Caraway. The Caraway Bank was chartered during the period when appellee was operating its facility in Caraway under the property rights vested in it by Act 190 to 1961. Subsequently the General Assembly met and passed Act 544 of 1963, the relevant portions of which provide:

"Section 1. That Section 4 of Act 190 of the Acts of the General Assembly of the State of Arkansas for the year 1961, approved March 7, 1961, be, and the same is hereby, amended to read as follows:

"Section 4. Every legally chartered banking institution, which, on or before the effective date of this Act, was engaged in operating, or had obtained a permit to operate, any banking facility, may continue to retain and operate same under the general banking laws of the State of Arkansas, except as provided in Section 8 hereof; and the requirements and restrictions set forth in this Act, except as provided in said Section 8, shall not apply to any such banking facility which, on or before the effective date of this Act, was established, engaged in operating, or had obtained permit to operate; but the provi-

sions and restrictions set forth in this Act, except as provided in said Section 8 shall be applicable only to those teller's window which shall henceforth be established pursuant to the provisions of this Act; *provided, however, the provisions of Section 8 hereof shall in any event apply to all tellers windows and branch offices established subsequent to the effective date of Act 191 of the Acts of the General Assembly of the State of Arkansas for the year 1935.*"

In commenting on this last pronouncement by the legislature the majority says, "There is no question but that the General Assembly could retroactively alter that provision [Section 4 of Act 190 of 1961, *supra*] by Act 544 of 1963." That is not my understanding of the law. Vested property rights are not to be treated so lightly. This court distinctly declared the law applicable here in *Gillioz* v. *Kincannon,* 213 Ark. 1010, 214 S. W. 2d 212, as follows:

"The rule appears to be well settled generally that retrospective laws as the one here, are unconstitutional if they interfere with substantive, or substantial rights, and valid only when they effect remedies or procedure. C.J.S. 16, p. 861, § 417 *et seq.*

" 'Rights conferred by statute are determined according to statutes which were in force when the rights accrued and are not affected by subsequent legislation. The Legislature has no power to divest legal or equitable rights previously vested.' *Coco* v. *Miller,* 193 Ark. 999, 104 S. W. 2d 209.

"In 50 Amer. Jur., p. 493, § 477, the author says: 'Because every law that takes away or impairs vested rights under existing laws, is generally reprehensible, unjust, oppressive, and dangerous, such retroactive laws have not been looked upon with favor, but with disfavor, so that courts are loath to give a statute such effect. To the contrary, a prospective interpretation of statues affecting substantive rights is favored. It is a maxim, which is said to be as ancient as the law itself, that a new

law ought to be prospective, not retrospective, in its operation (*nova constitutio futuris formam imponers debet, non praeteritis*).' ''

See also *Brown* v. *Morison,* 5 Ark. 217; *Porter* v. *Hanley,* 10 Ark. 186; *Beavers* v. *Myar,* 68 Ark. 333, 58 S. W. 40; *Tipton* v. *Smythe,* 78 Ark. 392, 94 S. W. 678; *Smith* v. *Spillman,* 135 Ark. 279, 205 S. W. 107, 1 A.L.R. 136; *Robinette* v. *Day,* 210 Ark. 219, 242 S. W. 2d 124.

On the whole case I cannot escape the conclusion so eloquently stated by this court in *St. Louis, I. M. & S. Ry. Co.* v. *Alexander,* 49 Ark. 190, 4 S. W. 753, "This is not legislation, but confiscation, and is beyond the power of the legislature." The learned Chancellor's decree should be affirmed *in toto.*

For the reasons stated I respectfully dissent.

RIDGEWAY *v.* CATLETT, CHAIRMAN.

5-3372 379 S. W. 2d 277

Opinion delivered June 1, 1964.

Lee Ward, for appellant.

Bruce Bennett, Attorney General, by *Jerry L. Patterson,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. By filing the required pledges and paying his ballot fee the appellant, E. T. Ridgeway, qualified as a candidate for the nomination for the office of Governor in the coming Democratic primary. Thereafter it was brought to the attention of the appellees, the chairman and secretary of the State Democratic Central Committee, that Ridgeway had been convicted of the crime of embezzling public funds and might therefore be ineligible to hold public office. Arkansas Const., Art. 5, § 9. On May 20 the appellees notified Ridgeway that they would not allow his name to appear on the ballot as a candidate for Governor.

Ridgeway then filed this suit for a writ of mandamus to compel the appellees to perform the ministerial duty of certifying his name for inclusion on the ballot. By answer the appellees interposed Ridgeway's asserted ineligibility to serve as a defense to the suit. The chancellor sustained this defense and refused to issue the writ of mandamus.

The case presents two questions, both of public importance: First, is Ridgeway eligible to hold public office if he should be elected? Second, if he is in fact ineligible, is this the proper procedure for preventing him from becoming a candidate for the office?

Upon the first question we are unanimously of the opinion that Ridgeway is not eligible to hold public office. The language of Article 5, Section 9, is too clear to be misunderstood: "No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State."

The appellant argues that this section of the Constitution is inapplicable to him for the reason that in 1959 he received from the acting chief executive of the State a pardon which by its language purported to restore "all civil and political rights which were lost as a result of the conviction," and that therefore he is again eligible to hold public office.

This argument is without merit. Under the plain language of the Constitution it is the fact of conviction that disqualifies a person from holding public office. There is no intimation whatever that the pardoning power conferred on the Governor by Article 6, Section 8 is intended to permit such an act of clemency to supersede the clear mandate of Article 5, Section 9, which we have quoted. It is a familiar rule that where there is a specific provision, such as the disqualification that results from conviction of an infamous crime, such a provision must be given effect as against a general clause, such as the grant of the pardoning power. *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S. W. 656.

Despite Ridgeway's ineligibility to hold public office, the second question is completely controlled by our decision in *Irby* v. *Barrett,* 204 Ark. 682, 163 S. W. 2d 512, a case directly in point. There, as here, the party chairman and secretary refused to certify Irby as a candidate (for state senator) because he had been convicted of embezzling public funds. There, as here, Irby brought suit for a writ of mandamus, which the trial court denied.

We reversed the decree holding that the writ should be granted. We held that the party chairman and secretary do not have the judicial authority to determine that a candidate is ineligible to hold public office and for that reason to refuse to place his name upon the ballot. Our reasoning is clearly set forth in this paragraph from the opinion:

"If the chairman and secretary of the committee have the right to say that because of the decision of this court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be

considered or decided by the chairman and secretary of the committee? It may be that such power can be conferred upon them by laws of this state or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the state and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of the candidate omitted, he have a holding by the court that the name should not have been omitted."

In discussing a similar ruling by the Supreme Court of Kentucky in *Young* v. *Beckham,* 115 Ky. 246, 72 S. W. 1092, we said:

"The Kentucky court did not consider the correctness of the committee's finding that Beckham was ineligible to be a candidate. That question was pretermitted and not even referred to, the opinion being based solely upon the question of the power of the committee to exclude the name of a candidate. In holding that the committee did not have this power it was there said: 'We are of the opinion that the committee had no right to raise the question of the appellee's eligibliity to reelection to the office of governor. The governing authority of the party has no right to determine who is eligible under the laws of the land to hold offices. It can call primary elections and make proper rules for their government, but has no right to say who is eligible to be a candidate before the primary. The persons who are entitled to vote at the primary are the ones to determine who shall be selected as their candidate for a particular office. If the committee can say who is not eligible to be nominated as party's candidate for office, they

can, on the very last day before the ballots are printed, refuse to allow a person's name to go on the ballot upon the pretext that he is ineligible, and thus prevent his name from appearing upon the official ballot. They could thus destroy one's prospect to be nominated, for the rules of procedure in courts are necessarily such that no adequate relief could be afforded the party complaining, if at all, until after the primary election had been held. If the committee or governing authority has the authority to decide the question as to who is eligible to hold an office or be a candidate before a primary election, then they would have a discretion and judgment to exercise that could not be exercised by a mandamus. The most that could be done by such a writ would be to compel them to act upon the question.' ''

We think the Irby case to be sound and refuse to overrule it. Under the authority of that case the appellees, in their capacity as party officers, are not the proper persons to question Ridgeway's eligibility to hold office.

The decree is reversed and the cause remanded with directions that the writ be issued. This action is without prejudice to the institution of a proper proceeding.

Opinion delivered September 14, 1964.

[redacted]

James M. Blair, for appellant.
No brief filed for appellee.

CARLETON HARRIS, Chief Justice. The issue in this case is whether appellant, Homer Berry, was guilty of public drunkenness. On August 3, 1963, Berry was apprehended by Patrolman Bill Smith of the City of Springdale, and charged with the offense of drunkenness. Smith testified that about 1:45 A.M., he noticed appellant's truck stopped near the regular driving portion of Highway No. 71 in Springdale. According to the officer's testimony, the truck was not more than twenty-five feet, and not less than ten feet, from the paved portion of the highway, and was on the right of way. Smith's attention was directed to the truck because of the fact that he noticed fire in the back end of the vehicle. Upon making examination, he found appellant, apparently asleep in the cab of the truck, and when the officer opened the door, Berry almost fell out. Smith testified that he caught appellant to prevent his falling to the ground; that the latter could not stand on his feet; that he (Smith) could smell the odor of alcohol. Appellant identified himself as Major Homer Berry, stating that he was a "rain

maker." Smith testified that he assisted Berry to the patrol car; "I helped him by placing both of my hands under his arm pits and practically dragging him to the car." Berry insisted that he wanted to "stoke the burners,"[1] but the officer could not find fuel of any kind in the back of the vehicle. According to the witness, Berry maintained that he had only "had two beers." Appellant was convicted in the Municipal Court of Springdale of the offense of "Drunk on the highway," and was fined. On appeal, the Circuit Court found appellant guilty of public drunkenness (trial by jury having been waived), and fined Berry $15.00 and costs.[2]

From the judgment so entered comes this appeal.

It is first urged that the city failed to establish that appellant was guilty of any crime for which he could be lawfully prosecuted. This contention is based on the argument that Berry was not actually in a "public place" at the time of his arrest.

The statute, in effect at the time of this offense, is Ark. Stat. Ann. § 48-943 (1947), and reads as follows:

"Any person who shall in any public place, or highway, or street, or in or upon any passenger coach, street car, or in or upon any vehicle commonly used for the transportation of passengers, or in or about any depot, platform, waiting station or room, drink any intoxicating liquor of any kind, or if any person shall be drunk or intoxicated in any public place, or in any passenger coach, street car, or other public place or building, or at any public gathering, or if any person shall be drunk and disorderly, he shall be guilty of a misdemeanor and upon conviction thereof shal be punished by a fine of not less than five [$5.00] dollars nor more than one hundred [$100.00] dollars, or by imprisonment for not less than

[1] According to appellant's brief, for the purpose of inducing rain, Berry burned coke which had been infused with certain chemicals, with the intention that the resulting smoke would rise into the air and precipitate moisture. The coke was burned in two barrels which were located in the back of appellant's pickup truck.

[2] The fact that the Circuit Court technically found Berry guilty of public drunkenness, rather than "Drunk on Highway," as charged in the Municipal Court, is not argued as constituting error in itself.

five [5] days nor more than thirty [30] days, or by both such fine and imprisonment."

There is no evidence that appellant was drinking in a public place, nor is there any contention that he was disorderly. The question, therefore, is whether one sitting in a motor vehicle ten to twenty-five feet from the traveled portion of the highway is in a "public place" as contemplated by the statute.

Under sound logic, as well as construction by other courts of statutes similar to our own, we have concluded that the answer to the above question is "yes." Under statutes in some jurisdictions, there is a requirement that the intoxication must be coupled with boisterous or indecent conduct before the offender can be found guilty of the offense of public drunkenness, but it will be observed that our statute contains no such provision.

Certainly, Berry was not found in a private locality, and if he had been walking (or lying) alongside the highway at the same distance, no difficult question would be presented. Webster's Third New International Dictionary defines "public" as "a place accessible or visible to all members of the community." The Texas case of *Walker* v. *State,* 350 S. W. 2d 561, bears some similarity to the instant cause. In that case the defendant was found asleep in his automobile in a bar ditch along the highway, apparently having gone off the edge of the culvert while attempting to make a right hand turn. The sheriff found in the vehicle an open can of beer, which had turned over and spilled, and two unopened cans of beer. As here, the defendant contended that the evidence was insufficient to sustain a conviction, in that, at the time of the arrest, he was not in a public place. The Court of Criminal Appeals rejected this contention, and held that the evidence was sufficient to sustain the conviction. Earlier cases were cited, including *Byrom* v. *State,* 73 S. W. 2d 854, where the court said that a public place is "a place where all persons are entitled to be."[3]

[3] Article 477, V.A.P.C., provides: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Here, appellant's vehicle was ten to twenty-five feet away from the traveled portion of the road, and, according to the arresting officer, apparently had reached its final location through accident. Officer Smith testified:

"This truck was on the crest of a hill west of Fayetteville Lake. There is a flat place on top of this hill in the borrow pit and it appeared that this truck had just run out of the road up onto the embankment and rolled back down and come to a stop. It had been put in neutral, the engine was still running. My first thought was to charge the man with actually being in control of a vehicle while intoxicated."

As heretofore mentioned, the officer also testified that Berry stated that he had only had "two beers." While we consider that the primary purpose of the statute against public drunkenness is to prevent annoyance to other members of the general public, the statute likewise serves as a protection to the offender himself. Here, Berry was asleep, with the motor of the truck running and the window glass up. It is common knowledge that under similar circumstances many persons have been asphyxiated when the exhaust system or heater of the vehicle was defective. Not only that, but the unattended fire, which occasioned the officer's attention, could well have, had the wind risen, gotten out of control and burned the truck, or surrounding property. We think the recited testimony was sufficient to enable the trial court to find that Berry's offense was committed "in a public place."

It is also urged that the evidence was insufficient to establish appellant's intoxication. We do not agree. In addition to the testimony of Smith, Joe Frank Sims, likewise a patrolman for the Springdale police, testified that he assisted Berry into the station; that the latter was unstable on his feet, and dirty; that his clothes were untended; that his shirttail was out, and that his language was incoherent. He likewise stated that the odor of alcohol from appellant's breath and body was very strong, and it was his opinion that Berry "had been drinking considerably heavy." Luther Shipley, desk operator at the police station, testified that the officers helped Berry

through the door to the desk "holding him up. Helping him walk." Shipley stated that Berry, after entering the station, "said he was sick," and requested a physician, and Dr. Joe Parker arrived approximately 45 minutes after the arrest had been made. The doctor stated that he could not say with reasonable certainty whether Berry was intoxicated or not, but that he could smell the alcohol.

We are of the view that the evidence herein set out, constituted sufficient and substantial evidence to support the judgment of the court. Counsel for appellant points out that the witnesses for the prosecution did not know Berry, and accordingly were not familiar with his normal actions. Of course, there could be incidents where a person, because of an affliction, or accident, could not walk straight—or talk coherently—but there is no showing that this was true in the present instance. It would hardly be logical to require that an arresting officer have a prior acquaintance with a defendant before he could qualify to testify that the individual arrested was drunk. We dare say that a large number of arrests for drunkenness, perhaps the majority, are made in instances where the arresting officer has no prior acquaintance with the person arrested. Officer Smith had served with the Springdale Police Department for seven years, and testified that he had experience in arresting violators for public drunkenness.

We find no reversible error.

Affirmed.

JOHNSON, J., dissents.

CITY OF LITTLE ROCK *v.* CAVIN.

5-3370 381 S. W. 2d 741

Opinion delivered September 14, 1964.

Joe Kemp and *Jack Young,* for appellant.

John Jernigan, for appellee.

ED F. MCFADDIN, Associate Justice. The City of Little Rock filed this suit for a declaratory judgment. The defendants were Wiley D. Cavin, Sr. and the other two members of the Pulaski County Board of Election Commissioners. The real question was whether a 1958 election in Pulaski County—involving the matter of voting machines—could be held effective under a 1962 constitutional amendment and a 1963 legislative enactment passed in pursuance to said amendment. The City claimed the affirmative, the defendants urged the negative; and the Chancery Court ruled against the City. The appeal was not filed in this Court until May 28, 1964; but the appellants, claiming public interest, insisted on a speedy decision, so we heard and decided the case on June 1, 1964, and announced affirmance of the Chancery decree, with the present Opinion to be filed later.

Events occurred in the following order:

(a) By Act No. 484 of 1949 the Arkansas Legislature provided that the use of voting machines could be submitted to a vote of the citizens of any county.

(b) At the General Election in 1958 the voting machine issue was submitted to the voters of Pulaski County, and a majority voted for such machines.

(c) Under Act No. 484 of 1949 the Shoup voting machine was submitted to and approved by the State Board of Election Commissioners, but the Pulaski County Board of Election Commissioners failed and refused to take any action to provide such voting machines in Pulaski County.

(d) On October 21, 1959, the City of Little Rock filed suit in the Pulaski Circuit Court against the Pulaski County Board of Election Commissioners, praying for mandamus to require the use of voting machines. The Circuit Court refused the prayed relief; and the City appealed to this Court.

(e) In the case of *City of Little Rock* v. *Henry* (No. 5-2370), 233 Ark. 432, 345 S. W. 2d 12, decided on April 10, 1961, this Court held that the said Shoup machine did not comply with the requirements of Article III, Section 3 of the Arkansas Constitution.[1] That case, referred to as "the first case," became final when the petition for rehearing was denied on May 1, 1961.

(f) Rather than try to find a voting machine that would fulfill the constitutional requirements pointed out in our said Opinion, the proponents of voting machines initiated a proposed constitutional amendment, which was submitted to and adopted by the voters of the State at the 1962 General Election as Amendment No. 50, and which, in its entirety, reads:

"§ 1. REPEAL OF ARTICLE III, SECTION 3. —Article III, Section 3, of the Constitution of the State of Arkansas is hereby repealed and the following section is substituted therefor.

[1] The concluding paragraph of that opinion reads: "The trial court declared Act 484 to be unconstitutional, but we think the declaration should be only that the use of the Shoup machine in its present form is contrary to the constitution. The machine's defect is that it does not make a record of individual votes. Act 484 is silent upon that point, however, and consequently the act cannot be said to violate the constitution. We perceive no constitutional objection to a machine conforming to the specifications of Act 484 and having the additional characteristic that is lacking in the Shoup machine."

"§ 2. ELECTIONS BY BALLOT OR VOTING MACHINES AUTHORIZED.—All elections by the people shall be by ballot or by voting machines which insure the secrecy of individual votes.

"§ 3. NUMBERING AND RECORDING OF BALLOTS — DISCLOSURE OF VOTE PROHIBITED — EXCEPTION.—In elections by ballot every ballot shall be numbered in the order in which it is received, the number shall be recorded by the election officers on the list of voters opposite the name of the elector who presents the ballot, and the election officers shall be sworn or affirmed not to disclose how any elector voted unless required to do so as witness in a judicial proceeding or a proceeding to contest an election.

"§ 4. VOTING MACHINES. — Voting machines may be used to such extent and under such rules as may be prescribed by the General Assembly.

"§ 5. EFFECTIVE DATE. — This amendment shall take effect and be in force from January 15, 1963."

(g) On February 14, 1963, there was approved Act No. 53 of 1963, captioned:

"AN ACT Implementing Constitutional Amendment No. 50, Authorizing Use of Mechanical Voting Machines in Voting Precincts for Recording and Computing the Vote at Party Primary and General Elections and Other Elections Authorized by the State Board of Election Commissioners or County Boards of Election Commissioners, Authorizing Cities, Counties or the State to Furnish Such Mechanical Voting Machines to the Various Precincts and Political Subdivisions Situated in the State of Arkansas, Providing for the Purchase of Such Machines by the Various Cities, Counties or State, Authorizing Methods of Payment, Authorizing the State Board of Election Commissioners to set Standards of Machines to be Used in any Election in the State of Arkansas and the Purchase Thereof; and for Other Purposes."[2]

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[2] The emergency clause reads:

"EMERGENCY CLAUSE: It is hereby determined that Amendment Fifty (50) to the Constitution of the State of Arkansas, as adopted

(h) On October 30, 1963, the City of Little Rock filed the present suit in the Pulaski Chancery Court against the Pulaski County Board of Election Commissioners, praying—as aforesaid—for a declaratory judgment to the effect that the vote in the 1958 election held in Pulaski County on the issue of voting machines was valid and still binding on the County Board of Election Commissioners and that the effects of such election and the subsequent constitutional amendment and Legislative enactment were to require steps to be taken to obtain voting machines for use in Pulaski County, or particularly for use in the City of Little Rock.

(i) The Pulaski County Board of Election Commissioners resisted the suit, and on May 15, 1963, the Pulaski Chancery Court denied any relief to the City of Little Rock and this appeal resulted, being filed in this Court on May 28, 1964.

With the order of events thus understood, we come to the real question which, as previously indicated, is whether the City of Little Rock may use the 1958 election results under Act 484 of 1949 as compliance with Act 53 of 1963. The City insists that the 1949 Act was valid; that the 1958 election was held under that Act; that the Constitutional Amendment No. 50 and the 1963 Legislative enactment were all matters in furtherance of the 1949 Act; and that therefore there is no necessity for another election. The Pulaski County Board of Election Commissioners insists that the decision of this Court in 1961 concluded the first case; that Amendment No. 50 was adopted to "overrule" that case; that Act 53 of 1963, being a complete reenactment of the 1949 Act, thereby impliedly repealed the 1949 Act; and that the 1963 Act is prospective and a new election must be held in accordance with the provisions of the 1963 Act.

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by the people of the State, should be implemented by the foregoing Act at the earliest possible date in order that Cities, Counties, and the State may, if they so desire, utilize the provisions of this Act, and it is hereby declared by the General Assembly of the State of Arkansas that it is advantageous and desirable that the foregoing enabling Act be adopted at the earliest practicable date. An emergency is, therefore, declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, which take effect and be enforced from the date of its approval."

For any one of several reasons we agree with the result reached by the Chancery Court; but the stating of one reason will suffice. In *City of Little Rock* v. *Henry, supra* (the first case), we held that the Shoup voting machine did not comply with the requirements of Article III, Section 3 of our Constitution; and it was to overcome the effect of that decision that the proponents of voting machines obtained the adoption of Amendment No. 50, which eliminated the language in Article III, Section 3 of the Constitution, which had ruled out the Shoup voting machine. This Amendment No. 50 was neither curative nor retrospective: it specifically provided in Section 5 thereof: "This amendment shall take effect and be in full force from January 15, 1963." The amendment also provided in Section 4: "Voting machines may be used to such extent and under such rules as may be prescribed by the General Assembly." Thus, the amendment did not become effective until January 15, 1963, and thereafter the Legislature by Act No. 53 of 1963 prescribed for the use of voting machines. If the Amendment No. 50 had been intended to be retrospective or curative it certainly would not have contained (a) a future effective date, or (b) provisions that the Legislature "may" prescribe for voting machines. In short, the Amendment No. 50 was prospective and did not validate elections held before its effective date.

It is a well recognized rule of constitutional law that the adoption of a constitutional amendment which merely permits the enactment of a statute of a certain type does not, of itself, validate such a statute which was void when enacted before the adoption of the constitutional amendment. *Whetstone* v. *Slonaker* (Neb.), 193 N. W. 749; *Plebst* v. *Barnwell* (La.), 148 So. 2d 583; *Northern Wasco* v. *Wasco County* (Ore.), 305 P. 2d 766. See annotation in 171 A.L.R. 1070 entitled: "Removal or suspension of constitutional limitation as affecting statute previously enacted"; and see also 16 C.J.S. p. 140, "Constitutional Law" § 45. If a bad statute is not validated retrospectively by a subsequent constitutional amendment, then likewise, a bad voting machine is not validated retrospectively by a subsequent constitutional amendment

which would allow the Legislature to provide for voting machines of a particular kind. Stated another way, if the subsequent adoption of a constitutional amendment, prospective in effect, does not validate preexisting statutes, then, likewise, the subsequent adoption of Amendment No. 50 did not validate the election concerning the Shoup voting machine, which machine was held in our first case to be lacking in constitutional compliance.

The City of Little Rock cannot claim the Amendment No. 50 as effective to validate a 1958 election for a voting machine that was not in compliance with the constitutional requirements at the time of the 1958 election. Those desiring voting machines must now proceed under Amendment No. 50 and Act No. 53 of 1963, entirely forgetting the 1958 election.

The Chancery decree is affirmed.

McDONALD *v.* BRYANT, SECRETARY OF STATE.

5-3435 381 S. W. 2d 736

Opinion delivered September 14, 1964.

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

Bruce Bennett, Attorney General, by *Jack L. Lessenberry,* Chief Assistant Atty. Gen. and *John P. Gill,* Asst. Atty Gen., for appellee.

ED F. MCFADDIN, Associate Justice. This is an original action[1] by citizens and taxpayers against the Secretary of State, and is an attack on both the popular name and the ballot title of proposed Constitutional Amendment No. 55. Prior to July 10, 1964, a petition to initiate proposed Constitutional Amendment No. 55 was filed with the defendant as Secretary of State. The Attorney General—acting under the provisions of Ark. Stat. Ann. § 2-208 (Repl. 1956)—had approved the popular name and the ballot title. See *Washburn* v. *Hall,* 225 Ark. 868, 286 S. W. 2d 494. On July 10, 1964, the Secretary of State advised the sponsors of proposed Amendment No. 55 that the necessary valid signatures were present and that both the popular name and the ballot title were legally sufficient. The proposed amendment is now in process of publication and will be submitted to the voters at the 1964 General Election unless litigation prevents it. On August 13, 1964, the plaintiffs filed this proceeding, and prayed that this Court enjoin the defendant Secretary of State from certifying the proposed Amendment No. 55 to the State Board of Election Commissioners.

It is conceded by all parties that there is no necessity for the appointment of a Master, under Rule 17c of this Court; and we are asked to decide the case on the pleadings and briefs. Plaintiffs preface their argument with the following paragraph, which we approve:

"Since the popular name and ballot title of the petition are the only portions of the proposal which appear on the ballot, *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356 (1931), the proponent owes a duty to the electorate to draft a popular name and ballot title which is nonpartisan, descriptive of the amendment, free from misleading words and phrases, and, generally speaking, one which is simply a fair representation of his proposal. *Johnson* v. *Hall,* 229 Ark. 400, 316 S. W. 2d 194 (1958)."

[1] Section 16 of Constitutional Amendment No. 7 says in part: "The sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes.". Section 17 of the Amendment No. 7 says in part: "If the sufficiency of any petition is challenged such cause shall be a preference cause and shall be tried at once . . ."

1. *The Popular Name.* The popular name[2] of the proposed Amendment No. 55 is: "GARLAND COUNTY LAWFUL WAGERING AMENDMENT." The petitioners' attack on this popular name is summarized:

"The popular name of the petition is misleading in that it contains partisan coloring, superfluous words designed to solicit votes, and conveys a false idea as to the meaning and effect of the proposed act."

We have several cases involving attacks on the popular name of proposed measures. Some of them are: *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72; *Hope* v. *Hall,* 229 Ark. 407, 316 S. W. 2d 199; *Moore* v. *Hall,* 229 Ark. 411, 316 S. W. 2d 207; and *Leigh* v. *Hall,* 232 Ark. 558, 339 S. W. 2d 104. In the light of our cases we proceed to examine the popular name of the proposed Amendment No. 55. It is claimed that the word "lawful" is misleading and is a coloring designed to solicit votes for the amendment which proposes to legalize gambling in Garland County. Also, it is claimed that the word "wagering" is a softening of the real word "gambling," or a "sugar-coating of the pill." We find no substantial merit in the plaintiffs' attack against the popular name here involved. The amendment proposes to legalize gambling in Garland County. The words, "wagering," "betting," and "gambling," are practically synonymous, and the terms are so used in common parlance, in dictionary and legal definitions, and in statutory and constitutional enactments.

Webster's New Third International Dictionary says of wagering: "Relating to the act of one who wagers: betting . . ."; and of betting the same authority says: "To stake (money) on the outcome of an issue or the performance of a contest (betting $2 on the race); (betting $100 on the election)"; and of gambling the same authority says: "The act or practice of betting: the act of playing a game and consciously risking something on an uncertain event: wagering." Thus it will be observed that wagering and betting are snyonymous terms with gambling.

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[2] Ark. Stat. Ann. § 2-208 (Repl. 1956) provides for a popular name. See *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72.

Black's Law Dictionary has these definitions:

"WAGER: A contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them or that they shall gain or lose on the happening of an uncertain event or upon the ascertainment of a fact in dispute, where the parties have no interest in the event except that arising from the possibility of such gain or loss."

"BET. An agreement between two or more persons that a sum of money or other valuable thing, to which all jointly contribute, shall become the sole property of one or some of them on the happening in the future of an event at present uncertain, or according as a question disputed between them is settled in one way or the other."

"GAMBLE. To play, or game, for money or other stake; hence to stake money or other thing of value on an uncertain event."

The United States Government by U.S.C.A. Title 26 § 3285 (Internal Revenue Code of 1939) has a federal statute which levies a "tax on wagers," that is a tax on betting; so wagering and betting are synonymous terms in the federal statute. Likewise, Arkansas Constitutional Amendment No. 46 provides: "Horse racing and pari mutuel *wagering* thereon shall be lawful in Hot Springs, Garland County, and shall be regulated by the General Assembly." (Italics supplied.) The word *"wagering"* means *"betting"* in the Arkansas Constitutional Amendment.

So when the word "wagering" was used as a popular name for the proposed Amendment No. 55, the framers of the popular name were using a word that was definitely defined in the dictionary, definitely determined in the cases, and previously used with a definite meaning in both State and Federal enactments. There are scores of cases which hold that "betting" and "wagering" are all forms of gambling. Some of them are: *Lucas* v. *Harper,* 24 Ohio State 328; *Somers* v. *State,* 37 Tenn. 438; *Thornhill* v. *O'Rear* (Ala.), 19 So. 382; *Carpenter* v. *Beal-McDonnell & Co.,* 222 F. 453; *5-Spot Short*

Range v. *Rinehart* (Ohio), 10 N. E. 2d 450; *U. S.* v. *Nadler,* 105 F. Supp. 918; *Rahke* v. *U. S.,* 180 F. Supp. 576.

We have found no case, and learned counsel for petitioners have cited us to none, that makes any sound distinction between wagering and betting as forms of gambling. We hold against the petitioners in their attack on the popular name of Amendment No. 55.

II. *Ballot Title.* The ballot title of the proposed Amendment No. 55 is as follows:

"AN AMENDMENT MAKING GAMES OF CHANCE AND WAGERING THEREON LAWFUL IN ESTABLISHMENTS IN GARLAND COUNTY, ARKANSAS, LICENSED PURSUANT TO THIS AMENDMENT IF APPROVED BY A MAJORITY OF THE LEGAL VOTERS OF GARLAND COUNTY, ARKANSAS, VOTING ON THE QUESTION BY VOTE ON THIS AMENDMENT OR AT A SPECIAL LOCAL OPTION ELECTION; CREATING THE ARKANSAS GAMING CONTROL BOARD TO ADMINISTER AND ENFORCE THE PROVISIONS OF THIS AMENDMENT AND TO REGULATE WAGERING ACTIVITIES PERMITTED HEREUNDER, SAID BOARD TO CONSIST OF 5 MEMBERS APPOINTED BY THE GOVERNOR, AND PRESCRIBING THE TERMS, QUALIFICATIONS, POWERS, DUTIES, FUNCTIONS AND AUTHORITY OF THE BOARD; APPOINTING THE ATTORNEY GENERAL OF THE STATE AS THE ATTORNEY FOR THE BOARD; AUTHORIZING THE APPROPRIATION OF FUNDS FOR EXPENSES AND OPERATION OF THE BOARD; PROVIDING FOR HEARINGS BY THE BOARD AND APPEALS THEREFROM; PROVIDING FOR THE LICENSING OF WAGERING ESTABLISHMENTS AND FIXING THE MAXIMUM PERMITTED NUMBER; PROVIDING FOR THE ELIGIBILITY AND QUALIFICATIONS OF LICENSEES; RESTRICTING THE LOCATION OF LICENSED ESTABLISHMENTS AND PROVIDING FOR CHANGE OF LOCATION IN

CERTAIN CASES; FIXING THE DURATION OF LICENSES AND PROVIDING FOR AUTOMATIC RENEWALS WITH CERTAIN EXCEPTIONS; PROHIBITING TRANSFERS OF LICENSES OR INTERESTS THEREIN WITH CERTAIN EXCEPTIONS; LEVYING A STATE TAX OF NOT LESS THAN 4% NOR MORE THAN 5½% OF THE QUARTERLY GROSS PROFIT FROM WAGERING OF EACH LICENSEE; PROVIDING FOR THE COLLECTION OF SAID TAXES; PROVIDING FOR STATE LICENSE FEES AND FIXING THE AMOUNT THEREOF; AUTHORIZING THE CITY OF HOT SPRINGS AND THE COUNTY OF GARLAND TO LICENSE AND TAX LICENSEES AND PROVIDING FOR LIMITS ON SUCH LICENSE FEES AND TAXES; PROHIBITING PERSONS UNDER 21 FROM PLAYING OR LOITERING ABOUT OR BEING PERMITTED TO PLAY OR LOITER ABOUT LICENSED GAMES OF CHANCE; MAKING CERTAIN LAWS RELATING TO GAMBLING INAPPLICABLE TO ACTS PERMITTED BY THIS AMENDMENT; PROVIDING THAT SAID AMENDMENT SHALL BE SELF-EXECUTING."

Plaintiffs summarize their attack on this ballot title:

"The ballot title of the petition is defective and insufficient in that it does not convey a complete and intelligible idea of the scope and import of the proposed act, is misleading in that it conveys a false idea as to the meaning and effect of the proposed act, contains partisan coloring, and is designed to solicit votes."

The proposed Constitutional Amendment has seventeen sections and contains more than 3400 words. The ballot title has approximately 300 words. We have carefully compared the ballot title against the text of the amendment; and we cannot agree with the petitioners in their attack on the ballot title.[3] We have a number of

[3] The Attorney General submitted the following tabulation in support of his position that the ballot title fully, fairly, and impartially conveyed an intelligible idea of the scope and import of the proposed amendment:

WORDING OF BALLOT TITLE	Reference to Section of Proposed Amendment
AN AMENDMENT making games of chance and wagering thereon lawful in establishments in Garland County, Arkansas licensed pursuant to this Amendment if approved by a majority of the legal voters of Garland County, Arkansas, voting on the question by vote on this Amendment or at a special local option election;	"Section 1
"creating the Arkansas Gaming Control Board to administer and enforce the provisions of this Amendment and to regulate wagering activities permitted hereunder, said board to consist of 5 members appointed by the governor, and prescribing the terms, qualifications, powers, duties, functions and authority of the board appointing the attorney general of the state as the attorney for the board; authorizing the appropriation of funds for expenses and operation of the board; providing for hearings by the board and appeals therefrom;	"Section 2
"providing for the licensing of wagering establishments;	"Section 3
"and fixing the maximum permitted number;	"Section 4
"providing for the eligibility and qualifications of licensees;	"Sections 5, 6 & 7
"restricting the location of licensed establishments and providing for change of location in certain cases;	"Section 8
"fixing the duration of licenses and providing for automatic renewals with certain exceptions;	"Section 9
"prohibiting transfers of licenses or interests therein with certain exceptions;	"Section 10
"levying a state tax of not less than 4% nor more than 5½% of the quarterly gross profit from wagering of each licensee; providing for the collection of said taxes;	"Sections 11 & 13
"providing for state license fees and fixing the amount thereof;	"Section 12
"authorizing the city of Hot Springs and the county of Garland to license and tax licensees and providing for limits on such license fees and taxes;	"Section 14
"prohibiting persons under 21 from playing or loitering about or being permitted to play or loiter about licensed games of chance;	"Section 15
"making certain laws relating to gambling inapplicable to acts permitted by this amendment;	"Section 16
"providing that said amendment shall be self-executing."	"Section 17

cases involving the ballot title of initiated measures, some of which are: *Westbrook* v. *McDonald,* 184 Ark.

740, 43 S. W. 2d 356, 44 S. W. 2d 331; *Shepard* v. *McDonald,* 189 Ark. 29, 70 S. W. 2d 566; *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81; *Newton* v. *Hall,* 196 Ark. 929, 120 S. W. 2d 364; *Hogan* v. *Hall,* 198 Ark. 681, 130 S. W. 2d 716; *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884; and *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470.

In *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470, we said:

"Our decisions upon the sufficiency of ballot titles have been so numerous that the governing principles are precisely familiar. On the other hand, it is not required that the ballot title contain a synopsis of the amendment or statute. *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884. It is sufficient for the title to be complete enough to convey an intelligible idea of the scope and import of the proposed law. *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 332. We have recognized the impossibility of preparing a ballot title that would suit everyone. *Hogan* v. *Hall,* 198 Ark. 681, 130 S. W. 2d 716. Yet, on the other hand, the ballot title must be free from 'any misleading tendency, whether of amplification, of omission, or of fallacy,' and it must not be tinged with partisan coloring. *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81."

In *Leigh* v. *Hall,* 232 Ark. 558, 339 S. W. 2d 104, Mr. Justice J. Seaborn Holt, after quoting from *Bradley* v. *Hall, supra,* used this language:

". . . a ballot title must be (1) intelligible, (2) honest, and (3) impartial. . . . In the case of *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248, we said: '. . . The real objection urged to the title of the act . . . is the fact that it is not sufficiently elaborate. Any other ballot title would be susceptible of the same criticism unless it were in itself a complete abstract of the act which would be impracticable under ordinary conditions.' And further, '. . . it has never been understood that the title of a statute should disclose the details embodied in the act. It is intended simply to indicate the subject to which the statute relates. . . . When the *general subject* is indicated,

no detail matters need be mentioned in the title.' (emphasis supplied) The title of a measure does not have to constitute a synopsis of the measure, *Bradley* v. *Hall, supra.*''

It would unduly prolong this opinion to list and discuss the several specific attacks made on the ballot title of proposed Amendment No. 55. It is not a question of how we individually feel about the merits of the measure: we are concerned only with the legal requirements to allow the measure to be submitted to the voters. It is sufficient to say that we have carefully studied all the arguments advanced by the plaintiffs and conclude that the ballot title of proposed Amendment No. 55 is good against all such attacks.

The petition for injunction is denied.

JOHNSON, J., disqualified.

NUNEZ *v.* O. K. PROCESSORS.

5-3328 381 S. W. 2d 754

Opinion delivered September 14, 1964.

A. A. McCormick, for appellant.

Bethel & Pearce by *Donald P. Calloway,* for appellee.

George Rose Smith, J. The Uniform Enforcement of Foreign Judgments Act, adopted in Arkansas in 1949, created a simplified method of enforcing foreign judgments. Ark. Stat. Ann., Title 28, Ch. 8 (Repl. 1962). In the case at bar these appellants filed a petition in the circuit court of Sebastian county, seeking to enforce a Nevada judgment against the appellee in the sum of $415.85. This is an appeal from an order sustaining a demurrer to the appellants' petition.

Counsel for the appellee open their printed brief by stating that they feel it to be their duty to call attention to a jurisdictional defect in the record: the want of a final appealable order. Despite this suggested defect counsel proceed to argue the case upon its merits. In the reply brief the attorney for the appellants insists that the order is in fact an appealable one.

The order in question recites that the demurrer is sustained, that the petition is quashed, and that the petitioners are allowed ten days in which to file a proper petition. Within the ten days the appellants filed a notice of appeal in which they stated that they elected to stand upon their pleadings.

The order in itself was not final, for it did not dismiss the parties from the court nor conclude their rights in the subject-matter of the controversy. *Piercy* v. *Baldwin,* 205 Ark. 413, 168 S. W. 2d 1110. To the contrary, the order recognized the continued pendency of the case by allowing the petitioners ten days in which to amend their pleadings.

It is argued by the appellants that the element of finality was supplied by the declaration in the notice of appeal that they elected to stand upon their pleadings. Substantially this same contention was made in *Fairview Coal Co.* v. *Central Ry.,* 153 Ark. 295, 239 S. W. 1058. In rejecting this argument we said: "It was clearly an interlocutory order, unless the use of the language to the effect that appellant refused to plead further amounted to a final disposition of the case. We think this language a mere recital of the attitude of appellant, and in no sense an act or order of the court."

In the past, in the situation now confronting us, it has been our practice to dismiss the appeal "for want of jurisdiction." *Green* v. *Thomas,* 8 Ark. 56. In some instances we took that action with obvious reluctance, realizing that it entailed serious inconvenience and added expense to both litigants. In the case at bar, for example, we have before us a record that is almost complete and printed briefs in which counsel have argued the issues upon their merits. If we summarily dismiss this appeal the parties may conceivably be compelled to duplicate their record and briefs, after having first obtained a final order that in all likelihood will be entered without objection.

We think it our duty to alleviate this hardship upon our own motion, as far as we can. Even though we cannot brush aside jurisdictional defects in the record, we certainly can afford the parties an opportunity to supply what is lacking. All that is really needed in this case is a final judgment dismissing the appellants' petition and a notice of appeal from that judgment. If the parties will, within fifteen days, take the necessary action to supplement the record in those respects and, further, will file a stipulation that the appeal may be heard upon the briefs already on file, we shall decide the case upon its merits. Otherwise the appeal will be dismissed without prejudice. Needless to say, this opinion is intended to provide a precedent under which lawyers may supply similar deficiencies in future cases without the court's intervention.

COCKRELL *v.* DOBBS, JUDGE.

5-3418 381 S. W. 2d 756

Opinion delivered September 14, 1964.

Jack Holt, Sr., for appellant.

David Whittington, Prosecuting Attorney, for appellee.

George Rose Smith, J. This is a petition by Bruce Cockrell for a writ of mandamus to compel the respondent, as the presiding judge of the Garland circuit court, to grant a hearing upon Cockrell's motion for a change of venue. The petitioner, charged with murder, asked for a change of venue, asserting that he could not obtain a fair trial in Garland county. In refusing to conduct a hearing upon the motion Judge Dobbs explained that he had concluded that he could not grant any relief even if the motion had merit.

This was Judge Dobbs's reasoning: The Bill of Rights provides that the venue may be changed to another county within the same judicial district. Ark. Const., Art. 2, § 10. This provision has been construed to prohibit a change of venue to a county in a different judicial district. *State* v. *Flynn,* 31 Ark. 35. Act 49 of 1963, by transferring Montgomery county to another judicial district, left Garland county as the only county in the Eighteenth Judicial District. Hence Judge Dobbs concluded that he was powerless to grant a change of venue, for there is now no other county within the district to which the case might be removed.

In seeking a writ of mandamus the petitioner contends that the Bill of Rights by implication prohibits the legislature from reducing any judicial district to a single

county, so that Act 49 is unconstitutional. During our summer recess four members of the court heard the petition and unanimously granted the writ. This opinion for the full court explains why the writ was issued.

We are unwilling to say that Act 49 is invalid. The constitution (Art. 7, § 13, and Art. 18) empowers the General Assembly to change the judicial districts from time to time. There is no express requirement that a district contain more than one county. Shifts in population might readily qualify a single county to become a complete judicial district. There is no sound basis for reading into the constitution the implied limitation upon the legislative power now urged by the petitioner—a restriction that in practice might prove to be demonstrably unwise. We uphold Act 49.

We are nevertheless of the opinion that the court below construed the Bill of Rights much too narrowly, permitting its strict letter to defeat its manifest purpose. Changes of venue were recognized at common law. Without a doubt Section 10 of Article 2, authorizing a transfer to another county within the district, was meant to preserve the accused's right to a change of venue, not to deny that right. The important declaration in this section of the constitution is its guaranty of a trial by an impartial jury. A change of venue is a means to that end. The subordinate directive that it be to another county in the district is also for the protection of the accused, for it prevents the trial from taking place at an unreasonable distance from the county where the offense was committed.

The Bill of Rights must be read in context. When the constitution was written Article 18 enumerated the original judicial districts, all containing four or more counties. In that setting the provision for a transfer to another county within the district was of benefit to the accused. But when a county becomes a district in itself it would defeat the plain purpose of Section 10 to hold that the circuit court is powerless to grant a change of venue, even though it is shown that the defendant cannot hope to obtain a fair trial in the county. The heart of

Section 10 is its guaranty of an impartial jury. Any interpretation that destroys that guaranty is wrong. For these reasons we directed, during the summer recess, that the respondent conduct a hearing upon the petitioner's motion, to the end that the case might, if necessary, be transferred to an adjoining county. This is the view that has been taken elsewhere when the identical question has arisen. *Turner* v. *State,* 87 Fla. 155, 99 So. 334; *State* v. *Harvey,* 128 S. C. 494, 122 S. E. 860.

HOLT, J., not participating.

HAYDEN *v.* GARDNER.

5-3291 381 S. W. 2d 752

Opinion delivered September 14, 1964.

Terrall, Rawlings & Matthews, for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. The question for decision on this appeal relates to the garnishment of a joint bank account. The pertinent facts, undisputed, are summarized below.

Facts. Appellant, Dallas W. Hayden, recovered a judgment in the amount of $327.14 against appellee, John A. Gardner. After the time for appeal expired Hayden

caused to be issued a Writ of Garnishment against the Bank of Crossett in which Mr. and Mrs. Gardner had a joint savings account in the amount of $1,455.81 (subject to a pledge to pay a note to said bank in the amount of $463.50). In addition to the admitted facts above set out the vice-president of the bank testified that he was familiar with the account of Mr. and Mrs. John A. Gardner, that both had the right of withdrawal and that he did not know who made the deposits. (A ledger sheet introduced in evidence showed numerous deposits and withdrawals dating back to 1957.)

Findings and Order of the Trial Court. Based on the factual situation above set out, the trial court held:

> "Where there is a joint account and such fact is shown, the Court must assume that the funds belong equally to each of the depositors until the contrary appears. No proof appearing to the contrary, the Court must indulge that assumption here.
>
> "The Court finds that from the proof before this Court, the funds garnished were from a joint bank account owned equally by the defendant and his wife; that his wife's property is not subject to garnishment for payment of a judgment against the husband in tort.
>
> "IT IS THEREFORE CONSIDERED AND ORDERED, the Motion of the defendant is sustained, the garnishment quashed, garnishee discharged and the Clerk ordered to pay the funds held in the registry of the Court to the defendant and his wife jointly, and costs are adjudged against plaintiff."

From the above action of the trial court appellant now prosecutes this appeal, seeking a reversal.

After careful consideration we have concluded that, for the reasons hereafter set forth, the order of the trial court must be reversed and the cause remanded for further action.

General Statement. Even a casual research of the authorities reveals that the law relative to the garnishment of joint bank accounts is far from settled or uniform. We know of no better way to emphasize this fact than to refer to an article published in 26 U. Chi. L. Rev., Spring of 1959, pp. 376-404, and particularly to the caption given the article as carried in C.C.H. 1959-60 Legal Periodical Digest paragraph 1029. The caption is: "Five More Years of the Joint Bank Account Muddle". Equally revealing is a case note, Garnishment, Vol. 71 Harvard Law Review 557 (1957-58). [*Leaf* v. *McGowan*, 13 Ill. App. 2d 58, 141 N.E. 2d 67 (1957)] where we find this statement:

> "Joint accounts are peculiarly difficult to categorize in common-law terminology. Although they contain a survivorship feature, making them analogous to a joint tenancy, this analogy is weakened by the 'joint and several' ownership feature—the right of each depositor, as against the bank, to withdraw all the funds. It is not surprising, therefore, that the problem of the extent to which joint accounts are garnishable for the debts of one depositor has given rise to a wide variety of solutions."

This note then points out that at one extreme some authorities hold a joint account is immune from garnishment, while, at the other extreme it has been "held that the entire account is subject to garnishment on the theory that the creditor is 'subrogated' to the power exercisable by the debtor-depositor to withdraw all the money". The note then sets out a third view—"that the joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which parol evidence is admissible to show the respective contributions of each depositor, as well as any intent of one to make a gift to the other".

Without attempting to evaluate the merits of the above mentioned theories or views, we conclude that the last mentioned one is the most reasonable, and it is the one which we now adopt. In fact we find confirmation

for this adopted view in the case of *Park* v. *McClemens, EX'r,* 231 Ark. 983, 334 S. W. 2d 709 where we held testimony could be introduced to show the true nature of a joint account. This was reaffirmed in the case of *Ratliff* v. *Ratliff, Adm'x,* 237 Ark. 191, 372 S. W. 2d 216.

In an attempt to clarify and simplify to some extent the law and procedure with reference to the garnishment of joint bank accounts, we proceed to apply the adopted theory to the facts in the case under consideration, and also to the order of the trial court above set forth.

One. It goes without argument that Mrs. Gardner has (or might have) some interest in the money in the joint account. Therefore she should have been made a party to the garnishment proceedings against the bank. This can be done upon remand.

Two. The trial court held, in the absence of proof to the contrary, that presumably Mr. and Mrs. Gardner owned the funds in equal amounts, and ordered the funds to be paid over to them. The effect of the trial court's order was that Hayden could not garnishee Mr. Gardner's one-half of the funds. It is our view that under the facts in this case the court should have held all of the joint bank account was prima facie subject to garnishment, and that the burden was on each joint depositor to show what portion of the funds he or she actually owned. We believe this is the fair and reasonable rule because the depositors are in a much better position than the judgment creditor to know the pertinent facts.

Three. Even though the trial court found Mr. Gardner owned one-half of the funds it also held appellant could not maintain a Writ of Garnishment against the bank for that amount. Under the view we have adopted that was error.

On remand, any funds adjudged to belong to Mr. Gardner will be subject to garnishment.

The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

GRUMBLES *v.* GRUMBLES.

5-3201 381 S. W. 2d 750

Opinion delivered September 14, 1964.

[Rehearing denied October 5, 1964.]

Arnold & Hamilton, for appellant.

Carneal Warfield, for appellee.

SAM ROBINSON, Associate Justice. This appeal grows out of a divorce suit. Plaintiff, Lois Thomas Grumbles, who is the appellant here, was granted a divorce from appellee. There has been no appeal from that part of the decree granting the divorce and granting custody of the two children to plaintiff-appellant, but appellant appeals from that part of the decree awarding alimony and child support contending that not enough was allowed, and also from that part of the decree pertaining to the division of real and personal property.

Appellant and appellee were married in July, 1944 and separated in December, 1961. Two children were born of the marriage; Thomas Harold was born in 1951, and Judith Lynne was born in 1953. The petition for divorce was not contested and the decree of divorce was entered on July 30, 1962. The court reserved for further consideration questions regarding division of the property and alimony and child support. Later, considerable evidence was introduced touching on these questions. After considering all the evidence, the court made findings of law and facts and announced that a decree would be entered in accordance therewith. At this point the parties stated that they would like to confer in an effort to reach an agreement on a division of the property. The court agreed and the parties retired. Later they came back into open court and the appellant personally informed the court that an agreement had been reached and, from a written memorandum, stated the terms thereof. The court approved the agreement, made notes of the details, and instructed counsel for appellee to draw a precedent for a decree embodying the terms of the agreement. This was done, but when the precedent was presented to the court appellant objected to it being entered as a decree, not because it did not embrace the agreement as made, but because appellant had apparently changed her mind.

The agreement appears to be fair to both sides, but appellant argues that she is not bound by it and states the proposition in this manner: "When is an agreement not an agreement, may be the most apt way to pose the pivotal question." Appellant cites no authority to the effect that she is not bound by the agreement, as to the provisions of the decree. But we may assume that in some circumstances a party would not be so bound. Here, however, when the court questioned counsel as to the objections to the precedent, counsel stated that it should be made clear that Mrs. Thomas, mother of appellant, and from whom the parties had borrowed money, is not a party to this litigation; this was not a valid objection. The record itself shows Mrs. Thomas is not a party.

There was, however, one mistake in the precedent. It showed 10 shares of KSVA stock which was going to Mrs. Thomas, when it should have been 12 shares. The mistake was corrected.

Some insurance policies in which the children were named as beneficiaries were also mentioned, but under the decree, as entered, the appellee is to continue to pay the premium on the policies; hence, there can be no valid objection on that point. In the circumstances the court had the discretion to overrule appellant's objection to entering the decree to which appellant had previously consented, *Garretson* v. *Altomari,* 181 N.W. 400, and from the record we cannot say that the court abused its discretion.

Appellee is a dentist and earns approximately $1,000.00 per month after taxes. Appellant was allowed $354.00 per month alimony and child support, and under all the facts and circumstances we cannot say that the court abused its discretion in that respect.

The decree is affirmed.

At the outset, the chancellor allowed a preliminary fee of $150.00 for appellant's attorney. Apparently the matter of an additional fee at the close of the case was not taken up with the trial court. Appellant now asks that this court allow an additional fee of $2,500.00, plus the total cost of the appeal, amounting to about $900.00.

We would much prefer that the trial courts fix the attorney's fee in cases of this kind for the work done by attorneys in the trial court. We would then have no difficulty in fixing the fee for the amount of work done on appeal. In this case, however, since the fee for the trial work has not been fixed, and it being desirable to bring the litigation to an end as soon as practical, we are allowing a total fee of $1,500.00 to be added to the $150.00 heretofore allowed. Each party is to stand one-half of the cost of appeal, including the cost of the record, briefs, and filing fee.

Opinion delivered September 14, 1964.

[redacted]

No brief filed for appellant.

Bruce Bennett, Attorney General, By: *Jack L. Lessenberry,* Chief Asst. Atty. Gen., for appellee.

FRANK HOLT, Associate Justice. The appellant was charged by a felony information with the crime of unlawfully resisting the execution of a criminal process in violation of Ark. Stat. Ann. § 41-2803[1] (1947). A jury trial

[1] "Every person who shall resist the execution of any civil or criminal process by threatening or by actually drawing a pistol, gun or other deadly weapon upon the sheriff or other officer authorized to execute such process shall, upon conviction thereof, be imprisoned in the penitentiary for a term not less than one [1] nor more than five [5] years."

resulted in his conviction and a penitentiary sentence of two and one-half years.

On appeal appellant questions the sufficiency of the evidence. The State presented evidence that Sheriff Birtcher and his Deputies, Pope and Gladden, went to appellant's home for the purpose of searching appellant's house for the illegal possession of intoxicating liquor. The Sheriff and his Deputies were in uniform and identified themselves as officers with a search warrant when appellant answered their knock at the front door. The appellant slammed the door and ran to the rear of his house. Sheriff Birtcher and Deputy Pope immediately forced the door open and found the appellant in the kitchen where the Sheriff observed him disposing of untaxed liquor with one hand while pointing a pistol at the Sheriff's head with the other. In the struggle disarming appellant the pistol was also pointed at Officer Pope. According to appellant's evidence it was his wife who went to the front door. He admitted he had a fully loaded gun in his hand because he did not know who was at the door but denied that he threatened the officers or pointed the gun at them. He contended that the first knowledge he had of the officers having a search warrant was when he was placed in jail. These were issues of fact to be determined by the jury. Certainly there was sufficient evidence to warrant the jury's verdict. *Williams* v. *State,* 70 Ark. 393, 68 S. W. 241; *Patterson* v. *State,* 141 Ark. 422, 217 S. W. 480; *Slim & Shorty* v. *State,* 123 Ark. 583, 186 S. W. 308.

Appellant contests the validity of the felony information, urging that the trial judge erred in overruling his demurrer to the original information. In overruling appellant's demurrer the trial court instructed the prosecuting attorney to amend the information. The prosecuting attorney filed a second or an amended information, whereupon appellant moved that such information be dismissed. It was then agreed by the appellant that the original information could be amended by interlineation which was done. Appellant insists the court should have

then dismissed the second information. It is undisputed that appellant was tried upon the first information as amended by the interlineation with appellant's approval. We fail to see any merit in appellant's argument. Furthermore, the amendment of a formal accusation is permitted by statute where it does not substantially affect the nature or degree of the alleged crime. Ark. Stat. Ann. § 43-1024 (1947). The offense alleged in the instant case was not so affected by the amendment.

Appellant argues for reversal that the search warrant was not a valid and subsisting process and should not have been admitted into evidence because the search warrant and affidavit upon which it was based were not properly prepared or legally issued. When these two instruments were admitted into evidence the court inquired if there were any objections and the appellant's attorney replied there were none. No motion was ever made to suppress this evidence. It is necessary that proper objections and exceptions be made in a criminal case in order to preserve a point for review upon appeal. *Hicks* v. *State,* 225 Ark. 916, 287 S. W. 2d 12; *Hardaway* v. *State*, 237 Ark. 966, 377 S. W. 2d 813.

There is yet another answer to appellant's attack on the validity of the search warant. The validity of a criminal process, regular on its face, is immaterial in the prosecution for a violation of this statute. One cannot defy and obstruct the service of such a process without being subject to prosecution. *Appling* v. *State,* 95 Ark. 185, 128 S. W. 866. It is undisputed that the search warrant in the instant case was regular on its face.

The appellant contends that the "court erred in giving court's instructions over defendant's objections which were dictated into the record and which objections and exceptions were made a part of this motion". This general assignment of error is too indefinite and is not sufficient to bring the matters forth on appeal. *Page* v. *State,* 181 Ark. 314, 25 S. W. 2d 422; *McGee* v. *State,* 215 Ark. 649, 375 S. W. 2d 234.

Finding no merit in any of appellant's assignments of error, the judgment is affirmed.

5-3244 381 S. W. 2d 748

Opinion delivered September 14, 1964.

Kenneth Coffelt, for appellant.

Judith Rogers, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a denial of a petition for reduction of alimony payments.

A divorce decree was entered May 1, 1962, by the Pulaski Chancery Court in which appellant Clyde Peters was ordered to pay appellee Mildred Peters the sum of $50.00 per week as permanent alimony (out of which she was to support their daughter), together with all past and future medical and hospital bills of appellee and their minor child as well as all obligations outstanding as of February 12, 1961. Thereafter on August 20, 1963, appellant filed a motion requesting a modification of the decree, alleging changed conditions. Appellee countered with a motion alleging appellant had refused to make support payments and pay doctor bills in accordance with the order of the court, praying that appellant's motion be dismissed, for attorney's fee and that the payments be increased $10.00 per week until all arrearages are paid.

At the conclusion of a lengthy hearing on these motions, the trial court held that appellant's request for

modification should be denied and his motion dismissed, and that the motion of appellee should be sustained. Judgment in the sum of $1,100.00 for arrearages was entered October 2, 1963. From such order and judgment comes this appeal.

At the time of the divorce decree in 1962, appellant was working about 70 hours a week and earning some $250.00 per week. Even so, the family indebtedness which appellant was required by the divorce decree to pay was considerable. Soon after the divorce appellant entered into a financial arrangement with a credit union, depositing his full check, receiving enough personally for a simple existence, the credit union paying out the balance to appellee and various of their creditors. For some time appellant appeared to make a diligent effort under the circumstances to comply with the orders of the court. Then appellant became ill, and during April, May, June and July, 1963, had no earning capacity at all. The illness resulted in his earning capacity being cut approximately in half, at least temporarily. At the time of the hearing on the motions, appellant was unemployed and had been for several weeks, following garnishment proceedings brought by a creditor on a medical debt incurred by his teen-age daughter unbeknownst to appellant.

The record does not reflect that appellee's needs have diminished since the divorce, however it was shown that appllee is gainfully employed, albeit at a meager salary.

The state of the record being thus, we cannot escape the conclusion that the trial court erred in failing to find that such changed conditions exist as to warrant a modification of the divorce decree.

> "The chancery court has the unquestioned power . . . to alter the allowance of alimony at any allowed being governed by the circumstances of the particular case." *Boniface* v. *Boniface,* 179 Ark. 738, 17 S. W. 2d 897. Ark. Stat. Ann. § 34-1213 (Repl. 1962).

After a careful review of the record on trial de novo we conclude that the circumstances of this particular case warrant a reduction in the amount of alimony to $25.00 per week during such time as appellant's illness continues to necessitate limited employment. Upon a showing that appellant is able to resume full employment, the Chancellor is directed to order resumption of full compliance with the orders contained in the divorce decree together with $10.00 per month to be applied to the accumulated arrearages.

The motion of appellee's attorney for the release of $100.00 previously deposited with this court for the payment of brief cost and attorney's fee is granted. An additional attorney's fee in the amount of $100.00 for services on this appeal is awarded appellee's attorney.

Modified and affirmed.

Justice McFaddin would affirm the decree in its entirety.

Justice Robinson not participating.

Coffelt *v.* Bryant, Secretary of State.

5-3433 381 S. W. 2d 731

Opinion delivered September 14, 1964.

Kenneth Coffelt, for appellant.

Bruce Bennett, Atty. General, By: *William L. Paton, Jr.,* Asst. Atty. Gen. and *Jerry L. Patterson,* Asst. Atty. Gen., for appellee.

BRUCE IVY, Special Associate Justice. This is an action brought by appellant for a writ of mandamus to have his name placed on the ballot as an Independent Candidate for the office of Attorney General of the State of Arkansas at the General Election to be held November 3, 1964.

Appellant presented to appellee a petition signed by seventy-five qualified electors of the State of Arkansas and demanded that his name be placed on the ballot as an Independent Candidate. Appellee refused said petition, basing his action upon an Opinion from the Attorney General of the State of Arkansas, because appellant had failed to secure the signatures of 46,214 qualified electors, being 15 percent of the total votes cast for all candidates for the office of Governor at the preceding election. Appellant also tendered to Nancy J. Hall, State Treasurer, a check in the sum of $37.50 as a filing fee, which was refused.

Subsequent to the refusal of his petition and the ballot fee appellant brought this action.

Appellant alleged, among other things, that the refusal of his petition and the filing fee violates his rights under the Constitution and the Laws of the State of Arkansas, the Constitution of the United States of America and particularly Act 205 of the Arkansas General Assembly of 1957 and violates the Fourteenth Amendment to the Constitution of the United States of America. He claims that Act 205 of 1957 gives him the right to be an Independent Candidate by securing the signatures of not less than 50 nor more than 1,000 qualified electors. He also alleges that to require signatures of 46,214 qualified electors would prohibit any person from becoming an

Independent Candidate for a state office. That such a requirement would discriminate against an Independent Candidate for public office. He alleges that the action of appellee makes it impossible for an Independent Candidate, without party affiliation, to run for public office in the State of Arkansas. He prays for a writ of mandamus directing appellee to accept his petition and place his name on the ballot to be voted on at the General Election on November 3, 1964.

The matter was heard before Special Judge Guy Amsler, Jr., on August 6, 1964, and the court found in favor of appellee, from which judgment appellant brought this appeal.

In appellant's brief he sets out the points to be relied upon, which are as follows:

"1. The judgment of the lower court is contrary to the provisions of Section 5, Amendment 29, and Sections 3, 4, and 18, Article 2, and Section 2, Article 3, Bill of Rights, Arkansas Constitution, and Act 205 of the Acts of the General Assembly of the State of Arkansas for 1957, and Section 1, Amendment 14, and par. 1, Section 2, Article 4, United States Constitution, and violates appellant's rights and the rights of the electors of this State, under the provisions of these laws.

"2. Act 352 of the Acts of the General Assembly of the State of Arkansas for 1955, upon which appellee relies, on the advice of the Attorney General, is unconstitutional in that it conflicts with Section 5, Amendment 29, and Sections 3, 4, and 18, Article 2, and Section 2, Article 3, Bill of Rights, Arkansas Constitution, and Section 1, Amendment 14, and par. 1, Section 2, Article 4, United States Constitution, because

> "(a) The act places an unreasonable, arbitrary and prohibitive burden on appellant, and others similarly situated, and the electors of this state.
>
> "(b) The Act discriminates against appellant and the electors in that it places an arbitrary, unreasonable, greater and prohibitive burden on an In-

dependent Candidate for office and his supporters as compared to candidates for office with party affiliation, and as compared to candidates for municipal and Township offices and for vacancies in office, and the supporters of those candidates.

"(c) The act destroys the right of equality of all persons before the law, and the right of the people to petition to enforce their inalienable rights. The Act abridges these rights. The Act grants to certain citizens and classes of citizens privileges and immunities which upon the same terms do not apply, and are not required of other citizens.

"(d) The Act makes elections in Arkansas everything but free and equal, and prevents the free exercise of the right of suffrage.

"(e) The Act abridges the privileges and immunities of petitioner and the citizens and electors of Arkansas, and deprives them of their liberty to seek office as an Independent, and to vote for an independent candidate for state office, without due process of law, and denies to them the equal protention of the laws.

"3. Act 352 of the Acts of the General Assembly of the State of Arkansas for 1955 was repealed and superseded by Act 205 of the Acts of Arkansas for 1957."

There seem to be only Two (2) main issues involved:

NUMBER ONE: Was Act 352 of 1955 repealed by Act 205 of 1957? Whether or not the law still requires Independent Candidates running for state offices, where there is no vacancy, to secure the signatures of fifteen percent (15%) of the total vote cast for Governor at the prior General Election.

NUMBER TWO: Whether or not Act 352 of 1955 discriminates against Independent Candidates and is in violation of the Constitution of the State of Arkansas and the Constitution of the United States and whether or not said act is unconstitutional.

In taking up and considering Number One, we have carefully studied and considered the provisions of Act 205 of 1957. The title of this Act reads as follows:

> "AN ACT to Amend the Election Laws of This State to Require Primary Elections in Certain Instances; to Repeal Conflicting Laws; and for Other Purposes."

Section 1 of said Act amends Section 1 of Act 238 of 1943. Section 2 amends Section 1 of the initiated Act 1 of 1916, as amended by Section 1, Act 277 of 1951, Section 3-204, Arkansas Statutes of 1947. Section 3 of said Act amends Section 22 of Act 30 of 1891, Section 3-261, Arkansas Statutes of 1947. Section 4 provides that Section 1, Act 479 of 1949, Section 3-266, Arkansas Statutes of 1947, was repealed in its entirety. In the closing of the Act it states "Any provision of our election laws to the contrary is hereby repealed in its entirety to this extent."

It will be seen that Act 205 of 1957 refers to specific Acts to be amended or repealed and no reference is made to Act 352 of 1955. The provisions of Act 352 of 1955 are not in conflict with Act 205 of 1957.

In addition to the Amendments and repeal of certain Acts, Act 205 of 1957 fixes the law for the nominations of any and all major political parties as candidates for public offices in the State of Arkansas and regulates the holding of these elections.

The Act also provides the methods by which an Independent Candidate may qualify to run for office in case of a vacancy. One of the methods is by a petition of not less than 50 nor more than 1,000 qualified electors, for state offices.

Appellant contends that Act 352 was repealed directly by Act 205, or by implication. This court has held that repeals by implication are not favored. *Arnold* v. *City of Jonesboro,* 227 Ark. 832, 302 S. W. 2d 91; *Daniel* v. *City of Clarksville,* 232 Ark. 31, 334 S. W. 2d 645; *Bond* v. *Missouri Pacific R. Co.,* 233 Ark. 32, 342 S. W. 473.

After a careful study of Act 205 of 1957 and the laws relating thereto, we hold that Act 352 of 1955 was not repealed by Act 205 of 1957 and was not repealed by implication. The provisions requiring an Independent Candidate who desires to run for a state office where there is no vacancy to secure a petition of 15 percent of the qualified electors are still in full force and effect.

In considering issue Number Two, whether or not Act 352 of 1955 discriminates against an Independent Candidate and is in violation of the provisions of the Arkansas Constitution and the Constitution of the United States and whether or not this Act is unconstitutional, we have given thoughtful consideration to appellant's argument and the citations contained in his brief. After making a study of the cases cited it is our opinion that these cases are not in conflict with the provisions of Act 352 of 1955.

Appellant contends that Act 352 of 1955 is unreasonable and arbitrary, places an undue burden upon Independent Candidates, discriminates against them in favor of other candidates, and is unconstitutional. He cites the following cases: *Spreckles* v. *Graham,* 194 Cal. 516, 228 P. 1040; *Hooper* v. *Britt,* 203 N. Y. 144, 151, 96 N. E. 371; *State ex rel Ragan* v. *Junkins,* 85 Neb. 1, 122 N. W. 473; *State ex rel Holliday* v. *O'Leary,* 43 Mont. 157, 115 P. 204.

After making a study of the cases cited it is our opinion that the holdings in these cases add very little to appellant's contentions.

Appellant also cites the cases of *Moorman* v. *Taylor,* 227 Ark. 180; *Fisher* v. *Taylor,* 210 Ark. 387; and *Newton County Republican Central Committee* v. *Clark,* 228 Ark. 965.

In the case of *Moorman* v. *Taylor* the court held that Act 352 of 1955 did not apply to city officers. That was the only question involved.

Fisher v. *Taylor.* Fisher was a resident of Mississippi County, Arkansas, but at the time he was serving in the United States Navy and desired to become a candidate for the office of State Representative in the

General Assembly for his County. While on a ship at sea he prepared and executed a power of attorney authorizing and empowering his mother to take the necessary steps to have his name placed on the ballot in the 1946 Democratic Primary Election. His mother in due time went to the Secretary of the Democratic Central Committee of Mississippi County and procured from him a blank Party Loyalty Pledge, signed the pledge, left it with the Secretary, and paid the required fee of $50.00, after which the Chairman of the County Central Committee returned the check and refused to place Fisher's name on the ballot. Thereafter appellant brought suit in the lower court praying that a writ of mandamus issue requiring his name to be placed on the official ballot. The lower court sustained the contentions of the Democratic Central Committee, and Fisher appealed.

In that case the court held: "Where there has been a substantial compliance with the party rules by one seeking to become a candidate for office, he should not be deprived of this privilege because of a failure to observe literally all requirements of such rules." The Court further stated: "The right to become a candidate for public office is a fundamental right, not to be curtailed without good cause; and any Statute or party rule, by which this right is diminished or impaired should receive a liberal construction in favor of a citizen desiring to exercise the right."

It can be seen that the *Fisher-Taylor* case has no bearing on the issues involved in this case. It did not mean that an Independent Candidate could by-pass a Primary Election and run for public office by paying $37.50 and having a petition signed by not less than 50 qualified electors.

Newton County Republican Central Committee v. *Clark,* 228 Ark. 965. This case involved the interpretation and validity of Act 205 of 1957, commonly called the Compulsory Primary Act, which involves all political parties. The holding in that case did nothing to impair the provisions of Act 352 of 1955, which only added other provisions to our election laws.

Again referring to appellant's contentions that Act 352 of 1955 is unreasonable, arbitrary and prohibitive, places an undue burden upon an Independent Candidate, and is unconstitutional, it is our opinion that the Legislature, in passing this Act, did not intend to place a lighter burden upon Independent Candidates than that placed upon candidates who run in party primaries.

This may well have been the reasoning of the General Assembly: The regular candidates who run for office are required to pay extensive filing fees which are used by the party to defray the expense of holding Primary Elections. In many cases these candidates are faced with strong opponents, and they are required to carry on a time-consuming and expensive campaign. After they have won the election and have become the successful nominees they should not be faced with Independent Candidates who have paid only a $37.50 filing fee and secured a petition with not less than 50 names signed by qualified electors, unless these Independent Candidates can show a public demonstration and demand for their election. If this condition should exist, it would not be to difficult for the Independent Candidate, where there is no vacancy, to secure a petition signed by not less than 15 percent of the qualified electors at the last election. To permit an Independent Candidate to run for office where there is no vacancy without securing a petition signed by 15 percent of the qualified electors would be unfair and unjust to the regular candidate who had been nominated for office. In addition to being unfair and unjust it could easily be argued that this would amount to a discrimination against the regular nominee.

Appellee denies that appellant's rights under the Fourteenth Amendment are in any way restricted by Act 205 of 1957. He cites the case of *Snowdon* v. *Hughes,* 64 S. Ct. 397, 321 U. S. 1, for which the United States Supreme Court held: "The protection extended to citizens of the United States by the privileges and immunities clause . . . does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. *Slaughter-House Cases,* 16 Wall. 36, 74, 79; *Maxwell* v. *Bugbee,*

250 U. S. 525, 538; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 539; *Madden* v. *Kentucky,* 309 U. S. 83, 90-93. The right to become a candidate for state office, like the right to vote for the election of state officers, *Minor* v. *Happersett,* 21 Wall. 162, 170-78; *Pope* v. *Williams,* 193 U. S. 621, 632; *Breedlove* v. *Suttles,* 302 U. S. 277, 283, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause."

Furthermore, even an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor and Marshall* v. *Beckham,* 178 U. S. 548; *Case* v. *Newell,* 246 U. S. 650.

There is no denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination. However, a discriminatory purpose is not to be presumed. *Tarrance* v. *Florida,* 188 U. S. 510. There must be shown "clear and intentional discrimination." *Gundling* v. *Chicago,* 177 U. S. 183; *Bailey* v. *Alabama,* 219 U. S. 219. Certainly the appellant in the case at hand can show no "clear and intentional discrimination" directed toward him as an Independent Candidate for public office. The statute which he attacks sets out the same requirement for him as it does for any other Independent Candidate seeking any other political office in the State whereof a vacancy does not exist.

Act 352 of 1955 complies with and is not in violation of the Fourteenth Amendment to the Constitution of the United States. The United States Supreme Court in the case of *McDougal et al.* v. *Greene et al.,* 335 U. S. 281, 93 L. Ed. 3, 69 S. Ct. 1, upheld an Illinois statute which required that a petition to nominate a candidate for a General Election for new political parties be signed by at least 25,000 qualified voters, including 200 qualified voters from at least 50 counties in the State of Illinois.

Our law provides three methods by which a candidate may qualify for public office:

NUMBER ONE: He can become the nominee of one of the parties in the Primary.

NUMBER TWO: He may become an Independent Candidate through nomination by petition in compliance with Act 352 of 1955 where there is no vacancy, or in compliance with Act 205 of 1957 where there is a vacancy.

NUMBER THREE: By qualifying as a write-in candidate as required by law, Arkansas Statutes Annotated, § 3-826 and § 3-1022.

The court will take judicial knowledge of the fact that write-in candidates have met with success in previous elections in this state. This avenue is still open to appellant if he desires to follow it.

After full consideration of all the facts and the law we are of the opinion that Act 352 of 1955 is not unconstitutional and that the constitutional rights of appellant have not been violated.

Finding no error the Judgment of the lower court is hereby affirmed.

ROBINSON and HOLT, JJ., not participating. Special Associate Justice E. DEMATT HENDERSON also sat in the case.

KINDER *v.* MILLER.

5-3272 382 S. W. 2d 372

[Rehearing Denied October 26, 1964.]

Opinion delivered September 21, 1964.

Williams & Gardner, for appellant.

Robert E. Irwin and *W. H. Schulze,* for appellee.

CARLETON HARRIS, Chief Justice. On February 19, 1963, Anna Belle Martin Miller, appellee herein, entered into an agreement to sell 302 acres of land, located in Pope County, Arkansas, to Chester U. Kinder and J. C. Kinder, his son. On the above date, the parties met at the Bank of Russellville, and J. C. Kinder, by check, made a $200.00 down payment. Upon the face of the check was written, "Earnest Money on Purchase Price of 302 acres of land on Pea Ridge, Pope County, Arkansas, 5-1-1963." Mrs. Miller endorsed the back of the check as follows: "2-19-63, I agree to furnish Abstract up to date with good and merchantable title to said 302 acres land on Pea Ridge for the sum of an additional $14,800.00 to be paid on 5-1-1963." On the same day, the two Kinders and Mrs. Miller went to the Farmers Home Administration, an agency of the United States

Department of Agriculture, for the purpose of the Kinders applying for a loan to enable them to purchase the property. As a prerequisite to obtaining consideration for Kinder's loan application, the parties executed an instrument entitled, "Option to Purchase Real Property."[1] Kinder was not approved for the loan, and this information was conveyed to Mrs. Miller; however, appellant told Mrs. Miller that he and his son were endeavoring to make arrangements; that "we have another deal on for it." Subsequently (on April 23), Kinder took a man by the name of Monroe Davis to see Mrs. Miller. Davis testified that he and appellee reached an agreement on the purchase of the place; that he was to pay $2,000.00 down at the time the deeds were executed, $500.00 per month for the next six months, and thereafter he would pay $2,000.00 a year until the full amount of $15,000.00 had been paid. He stated that out of the first $2,000.00 payment made to Mrs. Miller, $200.00 would be given Mr. Kinder (the refund of the earnest money payment the Kinders had made). Mrs. Miller confirmed that a conversation took place with Davis and Kinder, but she stated that no definite arrangement was made. Admittedly, no written contract was entered into between these parties. Appellee testified that Kinder said that he could not get the money, and that he was surrendering his rights in the option to Davis.

"He said he was turning it over to Mr. Davis and him and Mr. Davis would work out the two hundred dollars between them if me and Mr. Davis could work out a deal between us on the payment."

According to Monroe Davis, Mrs. Miller was to have the abstract brought up to date and notify him when this was done; thereafter, he intended to take the abstract to his attorney.

On May 1, Mrs. Miller entered into a written contract with Charles Reed and Foster C. Davis, whereby

[1]The instrument was executed by Mrs. Miller as "seller" and by Chester Kinder and wife as "buyers." J. C. Kinder did not sign since the agency apparently would not permit more than one of the parties to make application for the loan.

she agreed to sell them the land. On May 6, Chester Kinder directed a letter to Mrs. Miller, advising that he accepted the offer contained in the option, and was ready to pay the purchase price upon delivery of the abstract, certified to date, together with proper deed. This notice was received by Mrs. Miller on May 8. Suit was instituted by Chester Kinder and wife against Mrs. Miller seeking specific performance. Reed and Foster Davis intervened, setting up that they had entered into a contract with appellee to purchase the property for the sum of $15,000.00. On trial, the court found for appellee, holding that the petition of the Kinders for specific performance should be dismissed for want of equity, but giving judgment in favor of the appellants against Mrs. Miller for the sum of $200.00. The court further held that the intervenors (Reed and Foster Davis) were entitled to enforce their contract of May 1, 1963, against the appellee. From the decree so rendered, appellants bring this appeal.

Mr. and Mrs. Kinder predicate their cause upon the "Option to Purchase Real Property," which was executed at the office of the Farmers Home Administration on February 19. The clauses relied upon by appellants read as follows:

"4. The Seller agrees to pay all expenses of title clearance including, if required, abstract or certificate of title or policy of title insurance, continued down to the date of acceptance of this option and thereafter continued down to and including date of recordation of the deed from the Seller to the Buyer, * * *

"8. This option may be exercised by the Buyer, at any time while the offer herein shall remain in force, by mailing, telegraphing or delivering in person a written notice of acceptance of the offer to ANNA BELLE MARTIN MILLER at Box 725 in the city of Russellville, County of POPE, State of ARKANSAS. The offer herein shall remain irrevocable for a period of 2 months from the date hereof and shall remain in force thereafter until (1) year from the date hereof unless earlier termi-

nated by the Seller. The Seller may terminate this offer at any time after the 2 months' irrevocable period provided herein by giving to the Buyer ten (10) days written notice of intention to terminate at the address of the Buyer. Acceptance of this option by the Buyer within ten (10) days after such notice is received by him shall constitute a valid acceptance of the option."

Appellants point out that no abstract was ever delivered, and contend that, since the offer was never terminated in writing by Mrs. Miller, the Kinders had until February 19, 1964, to exercise the option; that they actually exercised it in writing on May 6, 1963 (when the notice of acceptance was mailed to Mrs. Miller).

It is quite apparent that the Kinders must rely almost entirely upon the option to purchase, and we accordingly first discuss the validity of that instrument. After careful consideration, we are of the view that this option was, at the time of the acceptance by appellants, totally inoperative. The option seems clearly to have been given solely for the purpose of permitting the Kinders to apply for a loan from the Farmers Home Administration. The instrument is a printed Government form, and certain of its provisions emphasize the requirements of the F.H.A. Section 2 of the option provides:

"2. *This option is given to enable the Buyer to obtain a loan insured or made by the United States of America, acting through the Farmers Home Administration,*[2] United States Department of Agriculture, and its duly authorized representatives, (hereinafter called the "Government"), for the purchase of said property. It is agreed that the Buyer's efforts to obtain such a loan constitute a part of the consideration for this option."

In fact, Section 4 concludes by providing, "Title evidences will be obtained from persons and be in such form as the government shall approve." Section 6 provides:

"6. The Seller further agrees to convey said property to the Buyer by general warranty deed (except

[2] Emphasis supplied.

where the law provided otherwise for conveyances by trustees, officers of courts, etc.) in the form, manner and at the time required by the Government, conveying to the Buyer a valid, unencumbered, indefeasible fee-simple title to said property meeting all requirements of the Government; * * *''

We think, from a study of the language quoted, that when the government loan to Mr. Kinder was disapproved, the option relied upon by appellants became valueless, and ineffectual.[3]

The transaction between the parties is therefore controlled by the notations on the check given on February 19. According to the writing on the face of the check, the Kinders were given until May 1, 1963, to complete the transaction, and under the wording of the endorsement, the $14,800.00 was to be paid to Mrs. Miller on that date. It is true that the abstract was never furnished to either Kinder or Monroe Davis (though appellee had sent it to Vance Abstract Company to be ''brought up to date''), but the record does not reveal that either man again contacted appellee in an effort to obtain the abstract prior to May 1, nor did either offer Mrs. Miller the purchase price before that date.[4] As

[3] It is not clear whether the loan was rejected in March or in April.

[4] The transcript makes it clear that Monroe Davis was familiar with the notations on the check, and that he was aware of the fact that the May 1 date was particularly important. From the transcript:

"Q. All right, sir. Did you check at the abstractor's office before you left Russellville that afternoon? To see whether or not the abstract had been—

A. No, sir. It was a few days after that.

Q. All right, when did you check?

A. A few days before the 1st of May.

Q. All right, sir. And where?

A. I checked over at Vance's office.

Q. And did you learn that the abstract was there?

A. Mrs. Vance uh—

Q. You can't tell what she told you.

A. Yes.

Q. The abstract had been delivered there to be brought up to date?

A. Right.

Q. Has that abstract ever been delivered to you for examination?

A. No, sir.

stated, Kinder was evidently relying upon the provision of the option, heretofore discussed, and which we have determined to be nugatory.

This appeal is somewhat puzzling, inasmuch as it appears from the testimony that Kinder's original interest in promoting a sale was only for the purpose of recovering the $200.00 which had been paid at the outset as earnest money; he so testified;[5] in fact, this finding was made by the trial court, and Kinder was given judgment for $200.00.

The trial court's dismissal of the complaint was based on somewhat different reasoning from that herein set out, the Chancellor finding that appellants had abandoned any rights that they might have had under the option. Certainly, there was evidence to indicate a lack of desire on the part of the Kinders to pursue any possible rights under the purported option to purchase the property, and, in fact, even under Chester Kinder's own testimony, it is difficult to understand whether Mrs. Miller was to sell the property to Kinder, or to Monroe Davis. From Chester Kinder's testimony:

Q. Now, Mr. Davis did you make several inquiries about the abstract?

A. I did.

Q. When?

A. Shortly before the first of May.

Q. All right, sir. Why the first of May?

A. Uh—I knew about the check that Mr. Kinder had given her.

Q. That's this two hundred dollar check?

A. Right. And that's all I knew about it.

Q. Did you know that it had on it the date, first of May?

A. Right.

Q. And that's what you were worried about?

A. Right.

Q. All right, sir. And did you inquire about the abstract?

A. I did.

Q. And from whom?

A. Mrs. Vance.

Q. And did you also inquire from Mrs. Miller?

A. Yes, on the 5th day of May."

[5] Chester Kinder testified that he was no more interested in Monroe Davis getting the place than in somebody else getting it, but that he expected to get his $200.00 back through a sale to Davis.

"Q. Now did Mr. Davis understand at that time—you were talking with him and Mrs. Miller—that he was going to get the land from Mrs. Miller?

A. He was buying through me, but he was making the payments to Mrs. Miller, yes.

Q. And the terms were two thousand dollars down, didn't you say?

A. That's what him and Mrs. Miller agreed on that date.

Q. Did you go along with that?

A. Yes.

Q. All right, he was going to pay five hundred dollars a month for a certain period of time, didn't you say?

A. Yes.

Q. Did you go along with that?

A. Well it was alright with me. I told him any deal him and Mrs. Miller made on the terms would be all right with me." * * *

Subsequently, however, he testified:

"I told Mr. Davis—this is what I told Mr. Davis—I told him if anything interfered if he wasn't going to get the place, under the trade him and Mrs. Miller made, even at the last hour, to let me know it and I was going to take the place."

Also, it would appear that if Kinder had wanted to purchase the property himself, financial arrangements could have been made with Mrs. Miller for he testified:

"After we came out of the bank and was going to her car—she says, 'I can't think of everything, but I could have sold you boys this place and financed it myself.' "

There was also testimony by Charles Reed that J. C. Kinder had told him that the Kinders were not buying the place; that "if you want to, go ahead and buy it."

J. C. Kinder denied that such a statement had been made, and the testimony is conflicting in several respects throughout the record, but the Chancellor, of course, had the opportunity to view the witnesses, and hear their testimony.

At any rate, as previously stated, we hold that when the Kinder application for the loan was disapproved, the option was without effect, and we further find that appellants did not comply with the provisions of their agreement, *viz,* to pay the balance of the $15,000.00 to appellee on May 1, 1963.

Affirmed.

RUSSELL *v.* CITY OF ROGERS.

5-3285 382 S. W. 2d 378

Opinion delivered September 21, 1964.

[Rehearing Denied October 26, 1964.]

Jeff Duty, for appellant.

Bob Scott, for appellee.

ED. F. MCFADDIN, Associate Justice. This is the second appearance of this case. See *Russell* v. *Rogers,* 236 Ark. 713, 368 S. W. 2d 89. The opening paragraph of the opinion on the first appeal states the situation:

"This is an action by the City of Rogers to recover judgment for $8,674.00 under an oral contract by which

the appellant Russell agreed to pay the city at the rate of $2.00 a foot for 4,337 feet of sewer line to be laid by the city in an undeveloped subdivision owned by Russell. Russell admits that the line was laid by the city. His defense is that he was induced by misrepresentation to enter into the contract. The circuit judge, considering the matter upon the pleadings and upon Russell's testimony in a deposition offered by the city, sustained the city's motion for a summary judgment in the full amount sued for."

We held that the summary judgment should not have been granted and remanded the case for a trial on the merits. Such trial was had to a jury and the City of Rogers recovered verdict and judgment against appellant, Mr. Russell, for $8,674.00. Mr. Russell prosecutes this appeal, claiming one point:[1] "The verdict and judgment is contrary to the law and the evidence."

Mr. Russell insists that he was misinformed by the City of Rogers. He claims that he was told—and the City of Rogers admits that he was told—that the cost of the line would be $2.00 per foot, if paid on completion of the work, but it would be $4.00 per foot if paid later when connection was desired. Mr. Russell claims that he was promised that all property owners would be treated the same; and that such was not true. When Mr. Russell admitted the original contract with the City, he thereby admitted that he owed the City $8,674.00, *unless* (a) the statement that all would be treated alike was a material part of his contract, and (b) the City acted fraudulently in failing to advise him of contracts subsequently made with other property owners. When Mr. Russell admitted the original contract, the City had made its case, and the burden was on Mr. Russell to prove that he was excused from the contract because of fraudulent and material misrepresentations by the City. *Nelson* v. *Cowling*, 77 Ark. 351, 91 S. W. 773, 113 A.S.R. 155; *Mazander* v.

[1]The case was submitted to the jury under instructions covering material and fraudulent misrepresentations. Mr. Russell made no objections to any of the instructions and did not ask the Court for an instructed verdict in his favor.

Reed, 233 Ark. 511, 345 S. W. 2d 469; *Clay* v. *Brand,* 236 Ark. 236, 365 S. W. 2d 256.

Did Mr. Russell establish his claim of fraudulent and material misrepresentations? It was definitely shown that the representations regarding $2.00 and $4.00 were true when made in February 1961; that in April 1961 a different contract was made with persons situated differently from Mr. Russell; but that not one situated as was Mr. Russell was treated differently than was Mr. Russell. The City showed that Mr. Russell's property (Hillcrest Addition) was at the end of the line away from the disposal outlet, and that $16,000.00 was expended to connect Mr. Russell's property to the system. There was evidence from which the jury could have concluded in favor of Mr. Russell; or could have decided—as it did—for the City. In other words, there was ample evidence to sustain the verdict and judgment rendered.

Affirmed.

WOODS v. KIRBY.

5-3284 382 S. W. 2d 4

Opinion delivered September 21, 1964.

E. L. Holloway and *Kirsch, Cathey & Brown,* for appellant.

W. B. Howard, Jack Segars and *John C. Watkins,* for appellee.

George Rose Smith, J. This is an action in unlawful detainer brought by the appellant Woods to recover possession of a farm which he as landlord rented to the defendant Kirby for the 1963 crop year. Upon filing his complaint the plaintiff, having made the necessary statutory bond, had the sheriff serve a writ of possession upon Kirby. Ark. Stat. Ann. §§ 34-1506 to -1510 (Repl. 1962). Kirby was unable to make a retaining bond and therefore surrendered possession on the last day before it would have been the sheriff's duty to evict him.

The case was tried before a jury, whose verdict found Kirby's eviction to have been wrongful and fixed his damages at $1,700. In appealing from the ensuing judgment Woods contends primarily that he was entitled to a directed verdict and secondarily that the amount of the verdict is unsupported by the evidence.

Upon the main issue there was a question of fact for the jury. In the latter half of 1962 Woods sold Kirby certain farming equipment, with Kirby giving a note for the purchase price. At the same time the parties orally agreed to the lease of the farm, with the understanding that in the following March Kirby would execute a renewal note and a security agreement to provide Woods with a lien upon the crop and the equipment for whatever Kirby's indebtedness upon the equipment and as a tenant proved to be.

In 1962 Kirby had lived on the farm as a day laborer, and he continued in possession. Woods and his witnesses gave testimony indicating that Kirby breached his contract by wrongfully refusing to execute the new note and security agreement. Kirby testified that it was Woods who was at fault, in that he demanded a lien upon a mechanical cotton picker which Kirby had acquired in a separate transaction and which was not to have been included (according to Kirby) in the consolidated loan. This conflicting evidence raised an issue of fact.

Counsel for Woods also argue that he was entitled to a peremptory instruction because Kirby waived his claim for damages by voluntarily surrendering possession of the land instead of waiting to be forcibly put off by the sheriff. This argument is without merit. One who is compelled to yield up the premises under the threat of legal process already issued may be said not to act voluntarily. *Mack* v. *Patchin,* 42 N. Y. 167; *Corman* v. *Sanderson,* 72 Wash. 627, 131 P. 198. Here Woods, the landlord, was not prejudiced by his tenant's obedience to the command contained in the writ of possession that Woods had wrongfully obtained. To the contrary, Kirby's submission saved whatever taxable costs a forcible ouster might have involved.

Woods is right, however, in insisting that the verdict for $1,700 is excessive. This award could be upheld only by permitting Kirby to recover attorney's fees incurred by him in defending the present action. He was allowed to testify that he had agreed to pay one attorney half of any damages that he might be awarded and to pay a second attorney $300. The court instructed the jury that a tenant's measure of damages for wrongful eviction includes reasonable attorney's fees. The court was in error, for ordinarily counsel fees are not recoverable except when allowed by statute. *Romer* v. *Leyner,* 224 Ark. 884, 277 S. W. 2d 66. There is neither statutory nor common law authority for such an allowance in an unlawful detainer action.

We cannot correct the matter by an affirmance on condition of remittitur, for we are at a complete loss to say what damages the jury would have allowed if the attorney's fees had not been considered. Kirby and his witness Ermert were decidedly indefinite in fixing the value of Kirby's work in preparing part of the farm for cultivation. Ermert said that the cost of breaking the land was approximately "two or three dollars, I guess," and that Kirby's labor in cutting stalks was worth "About the same as breaking, I guess . . . Possibly a little cheaper. I don't know." The maximum award that the competent testimony would have supported is something less than a thousand dollars, but we cannot with confidence arrive at any maximum figure that the jury would surely have allowed. In the circumstances a new trial must be granted.

Other possible errors are argued, but they are not at all apt to arise upon a second trial. With respect to the appellant's requested Instruction No. 5 it is enough to say that we cannot approve the language that was offered, for it might have precluded the tenant from recovering his expenditure for labor and materials that were actually beneficial to the landlord.

Reversed.

JOHNSON *v.* HICKEY.

5-3295 382 S. W. 2d 377

Opinion delivered September 21, 1964.

[Rehearing Denied October 26, 1964.]

Williams & Gardner, for appellant.

Robert E. Erwin, for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether appellee, Anna S. Hickey, has the legal right and capacity to sell 26 acres of land to James Wallace, or is she legally obligated to sell it to appellants, her daughter and son-in-law, Beatrice and John Johnson. Mrs. Hickey has agreed to sell the land to Wallace, and appellants are attempting to prevent the consummation of the transaction.

The litigation was started by Mrs. Hickey as an action in ejectment to remove the Johnsons from the land where they were living at the time. The Johnsons set up equitable defenses and the case was transferred to chancery. The Johnsons claim that they have an option to purchase the land and, in addition, that due to Mrs. Hickey's alleged mental condition she does not have the mental capacity to make a valid conveyance to Wallace. After considering all the evidence, the Chancellor reached the conclusion that the Johnsons have no valid option to purchase, and that Mrs. Hickey is competent and has the mental capacity to make a valid conveyance. We agree with the Chancellor.

The property belonged to Mrs. Hickey's husband. After his death all the children joined in a conveyance to their mother, appellee herein. Later, Mrs. Hickey sold part of the land to her son, Robert Hickey, and at a still later date, sold the 26 acres here involved to appellants. Appellants purportedly paid her $500.00 and gave their promissory note in the sum of $1,300.00 for the balance of the purchase price.

At the time of the sale to the Johnsons, Mrs. Hickey was drawing a $30.00 per month welfare check. Upon receiving the $500.00 and the $1,300.00 note, the welfare payments to her were stopped. She prevailed upon the Johnsons to trade back so that the Welfare Department would resume the monthly welfare payments. The Johnsons reconveyed to Mrs. Hickey by warranty deed. The $500.00 which was supposed to have been paid as part of the purchase price in the first instance had been deposited in a joint account, and only $100.00 had been used for the benefit of Mrs. Hickey. Notwithstanding the fact that she had received only $100.00, she cancelled the $1,300.00 note, and in addition, gave the Johnsons a mortgage on the property to secure the payment of $750.00.

In February, 1953, Mrs. Hickey conveyed part of the original home place (not the part involved here) to her son and daughter-in-law, Robert E. and Lorraine Hickey, who in turn conveyed it to the Johnsons. Although the deed from Mrs. Hickey to Robert and Lorraine was executed in 1953, it was not filed for record until March, 1963, a long time after this litigation began. When filed for record it had printed on it the following clause: "With Option on Northwest Quarter of the Southwest Quarter of Section 26, Township 9 North, Range 22 West, containing 40 acres, more or less, to remain with heirs."

It is perfectly obvious from the deed, which was introduced in evidence as an exhibit, that the typewriter used in writing the clause purporting to grant an option was not the typewriter used in writing the other parts of the deed.

In a written opinion, the Chancellor found as a fact that Mrs. Hickey had not agreed to sell the land herein involved and that the testimony of appellants did not establish an enforceable contract. In *Schuman* v. *Hughes*, 203 Ark. 395, 156 S. W. 2d 804, the court said: A memorandum of sale of land that does not show the purchase price, the terms and conditions of the sale, the time for payment is not sufficient to satisfy the require-

ments of the Statute of Frauds. See also *Tate* v. *Clark,* 203 Ark. 231, 156 S. W. 2d 218; *Wyatt* v. *Yingling,* 213 Ark. 160, 210 S. W. 2d 122.

Appellants also contend that Mrs. Hickey is not mentally competent to make a valid deed to Wallace, and that she has been subjected to undue influence. Even if it could be said that appellants have the legal capacity to raise this point, little need be said in connection therewith. The preponderance of the evidence supports the Chancellor's finding that Mrs. Hickey is of sound mind and can execute a valid deed and that no undue influence was used.

Affirmed.

TOWNSEND *v.* LOWREY.

5-3300 382 S. W. 2d 1

Opinion delivered September 21, 1964.

Van Chapman and *Jack Holt,* for appellant.

Lightle & Tedder, for appellant.

JIM JOHNSON, Associate Justice. This appeal arises from child custody proceedings. On Agust 12, 1957, appellant Vestal Townsend obtained a divorce from appellee Barbara Helen Townsend (now Lowrey) in White

Chancery Court. In the divorce decree the Chancellor awarded appellant "the temporary care and custody of Alicia Lynn Townsend, infant child of the parties" and specifically retained jurisdiction for the purpose of making further orders relative to custody. On December 8, 1961, appellee (now a California resident) filed a petition for change of custody, following which the Chancellor obtained reports from the Welfare Departments of Arkansas and California about the living conditions and environments of both parents. After a hearing on May 14, 1962, the Chancellor granted custody of the little girl to her mother (appellee) for the summer months, permitting appellee to take her to California and requiring a $500.00 bond to guarantee the child's return to White County by August 15, 1962. On April 26, 1963, appellee again petitioned for change of custody, praying that she be granted her daughter's custody during the school year, giving appellant custody during the summer months. After another hearing the Chancellor on July 8, 1963, stating that "it now appears that it would be for the best interest of said child that said custody provisions be revised," granted appellee custody of the child during the school year in California and appellant custody in Arkansas during the summer. From this second order comes this appeal.

For reversal appellant urges that (1) there was no evidence upon which to substantiate the court's finding that the appellee should have custody of the child during the school years, and (2) that the trial court abused its discretion in changing custody of the child.

We have no doubt of appellant's love for his daughter. Testimony reveals that appellant cared for her as a baby while appellee worked, before the parties separated. The Arkansas Welfare Department report indicates that at a brother's behest, he quit a pipe-line job in Michigan so that he could help his aged parents raise his daughter. Obviously his parents love their granddaughter Alicia and want her to remain with them. Appellant lives with his parents in a six-room farm home about three miles from Searcy which they rent for $15.00

a month. In addition to appellant, Alicia and the elderly parents, the family circle is completed by a divorced brother and an unmarried sister and her small daughter. Appellant shares a bedroom with his brother and Alicia shares a bedroom (which was once the front hall) with her grandparents. The home is on a recently-paved road and has electricity, telephone and butane heat although there is no running water or indoor toilet facilities. A school bus stops at the house. While appellant's parents have little or no formal education, appellant completed fourth grade and his unmarried sister finished the ninth grade. They testified that appellant would help Alicia with her school work as long as she could and his sister would help her thereafter. At the time of the first hearing the brother and sister were working steadily and the parents were receiving Social Security, Old Age Assistance and commodities. After not working appreciably (other than playing fiddle in a band) for several years, appellant started working at Harding College as a yard man and janitor just before the first hearing and was still so employed a year later at the second hearing. Although appellant's parents are members of a church, they rarely attend. The testimony indicates that Alicia was taken to church infrequently.

The picture of appellee's environment is not as complete; however, perusal of appellee's testimony laid to rest our wonder that she had not sought custody sooner, when she testified that during the first two years in California there was no money to come to Arkansas, hardly enough to pay for food and rent, and that after her son was born he became ill with pneumonia and required long and expensive hospitalization. Appellee and her husband are both steadily employed, have a modern home in a pleasant residential neighborhood close to schools. They own a motor boat and go camping about once a month during the summer. They belong to the Dominicus Methodist Church which they attend fairly regularly, as the children attend Sunday School. The testimony shows that appellee's husband is as anxious

as appellee to have Alicia's custody and raise her with her half-brother.

On this point, it has been well stated that:

"In these matters the desire of the parent for the child, which is a natural emotion, is secondary. Children of tender years are but helpless hostages given to fortune in an environment or condition which is not of their making and in which they would be helpless indeed were it not for the conscience of Chancery." *Bounds* v. *Dunn,* 234 Ark. 514, 353 S. W. 2d 20.

It is axiomatic that our concern, as is the Chancellor's, must be for the welfare of the child. Child custody cases frequently wring forth an earnest coveting of Solomon's insight in order to determine what course is in the child's best interest. In the case at bar, the vast change in appellee's circumstances between the divorce decree and the first temporary custody order is apparent. Appellee, who was 15 when she married appellant, and 17 when she ran off to California, has apparently matured responsibly. Not the fact that appellee and her husband are buying a home but the fact that their furniture, car, truck, boat, motor and their son's large hospital bills are all paid connotes a certain economic responsibility. Their son's enrollment in nursery school and church school (and Alicia's first attendance at school while visiting her mother) indicates that appellee is trying to create an environment of learning for her children, so necessary for well-adjusted growth in our shrinking world.

Review of the entire record lends us to the conclusion that the Chancellor's action in first granting appellee a measure of custody apparently on a trial basis and then, upon proof that such custody was satisfactory and desirable, granting appellee Alicia's custody on a more permanent basis, was a sensible approach to the sensitive problem of what is in this child's best interest. This court has frequently held that "during the period of tender years, it is to the best interest of the child for the mother to have it." *Wimberly* v. *Wimberly,* 202 Ark. 461, 151

S. W. 2d 87. On the record before us, we find no abuse of the Chancellor's discretion.

Affirmed.

WARD, J., concurs; HOLT, J., not participating.

PAUL WARD, Associate Justice (concurring). In an attempt to preserve some semblance of consistency and continuity in our decisions dealing with the important and tender subject of child custody, I am constrained to give briefly my reasons for concurring in the majority opinion.

The prime, if not the only, point relied on by appellant in this case was the well known rule that there was no "change in conditions" to justify changing the previous order of the court giving custody (for nine months each year) to him. We have announced this rule uniformly and consistently. See *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450; *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47; *Hamilton* v. *Anderson,* 176 Ark. 76, 2 S. W. 2d 673; *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817; *Myers* v. *Myers,* 207 Ark. 169, 179 S. W. 2d 865; *Bounds* v. *Dunn,* 234 Ark. 514; 353 S. W. 2d 20. In the *Myers* case the Court said, in reference to former orders of child custody:

". . . such orders *cannot* be changed without proof showing a change in circumstances from those existing at the time of the original order . . ." (Emphasis added.)

Notwithstanding the above, the majority ignored the real point involved and chose to base their decision on a quotation lifted from the *Bounds* case cited above which is a beautiful eulogy on the love of a parent for his offspring and the "conscience of Chancery". The trouble with the quoted language is (a) that it lacks reason and logic when lifted out of context, and (b) when read in context it fails to support the majority opinion. (a) If love of the mother for her child is a ground for awarding her custody, then the love of its father is a ground for awarding him custody. (b) In the *Bounds* case the court first gave the custody of two small children to the

father; in a later action the mother sought to change custody to her. The trial court refused to make the change and we affirmed, quoting this language:

" 'A party seeking modification of a divorce decree provision for custody of a child on the ground of changed conditions bears the burden of proof of changed conditions warranting a modification in the interest of the child.' "

I agree with the result reached by the majority. I do so, however, with some reluctance because, while there is some evidence of "change of condition", it is not really convincing.

MOHR *v.* HAMPTON.

5-3268 382 S. W. 2d 6

Opinion delivered September 21, 1964.

Gus R. Camp, James Foreman, Metropolis, Illinois, for appellant.

Howard A. Mayes, Kirsch, Cathey & Brown, for appellee.

FRANK HOLT, Associate Justice. The appellants brought this action to establish ownership of $16,418.00 in cash and securities in their uncle's lock box by gift inter vivos or causa mortis. The Chancellor held that the decedent did not make a gift in either manner to the appellants. On appeal the appellants contend "that the proof substantiates a gift either inter vivos or causa mortis."

The decedent, Fred Folks, was 67 years of age at the time of his death. His permanent residence was in Rector, Arkansas where he had resided in the home of his aunt, Mrs. Adelia Hampton, for many years. Folks had been estranged from his divorced wife since 1931. His relationship with his daughter, Chelsene Lohranz, and only surviving heir, was marked by occasional correspondence and visits. He made annual visits to his home town of Vienna, Illinois to see his sister, the mother of the appellants, until her death in May, 1962. Folks' next visit to Vienna was on December 22, 1962. On this occasion he was visiting in the home of appellant, Mary Georgia Elliott, his niece, and her husband, Don Elliott. Except for a one-day return trip to Rector to attend to some business matters he remained in their home until his death on January 21, 1963.

Don Elliott testified that he was awakened about 11 or 11:30 P.M. by Folks who complained of being short-winded. After walking around, Folks stated he was better and returned to bed. Folks had previously complained of a heart ailment. Shortly thereafter Folks again called Elliott. Dr. Wakefield came to the Elliott home and an ambulance was summoned for the purpose of removing Folks to the hospital if it became necessary. Mr. and Mrs. Elliott, Dr. Wakefield, J. W. Robinson,

owner of the ambulance and funeral director, his assistant, Mr. Lillidoll, Ernestine Mohr, appellant and Folks' niece, and her hubsand, Ernest Mohr, were all present in the Elliott house where Folks died at 1:15 A.M. Only two witnesses, Don Elliott and J. W. Robinson, testified as to any knowledge of the alleged gift which occurred during the last ten or fifteen minutes of Folks' life.

Elliott's first version of what occurred at the time of the alleged gift was that while the doctor was making arrangements on the phone for Folks' admittance to the hospital, Folks asked for his overalls and pulled out a little blue book [a savings account book indicating a balance of $2,815.64 in a Kennett, Missouri bank] and "these keys and he just opened it up and he put them in there like that and * * *" he asked me to give them to Mary Georgia and Ernestine [appellants] and said: "These keys is theirs and whatever is behind that lock belongs to them. Don't give the others a thing"; that he, Elliott, then gave his wife and sister-in-law each a key. Upon further questioning Elliott declared the decedent told him the lock box was in the Bank of Rector. Elliott first testified that when Folks placed the keys in the bank book there were two sets of keys; one consisting of the two lock box keys and the other set consisting of three keys. On further questioning Elliott testified that in addition to the two separate sets there was a loose key which later proved to be a key to the Dalton Hardware Store in Rector where decedent kept his carpentry tools. Elliott and appellants declared emphatically that each of appellants thereafter retained in their exclusive possession the lock box key which he had given to them and at no time thereafter were the lock box keys placed on a ring with the other keys.

This testimony is squarely contradicted by Arthur McNiel whom appellants visited in Rector the day following their uncle's death for the purpose of establishing if a will existed. Mr. McNiel testified that appellants and their husbands showed him several keys which were together on a ring or string; that he voluntarily identified the lock box key; that neither the appellants nor

their husbands indicated that they had any knowledge of the fact that the key was to a lock box and made no statements concerning their claim of ownership to its contents; that they questioned him concerning a will and that he told them he had advised Folks to make a will but that he knew of none.

After their conversation with McNiel, appellants and their husbands went to the Bank of Rector and talked to Miss Mary Lee Hill, an official of that bank. She testified that they told her the funeral director had asked the nieces to guarantee payment of the funeral expenses and "they told me that they didn't know if he had one [a will] and then they presented this key which they said they thought might be a key to a lock box". Whereupon she ascertained from the bank records that it was the key to a box in her bank; then they asked permission to examine the box to see if it contained a will; that this was permitted and no will was found; that upon examining the contents of the box it was observed that the box contained an undetermined amount of money and securities and that the appellants asserted no claim whatsoever to the ownership of the contents of the box at that time. She testified that it was on February 20, 1963, or a month later, that the bank first learned about such a claim when an Illinois attorney called and advised that he represented appellants who were claiming the contents of the box by virtue of a gift from their uncle: "Of course we don't know whether there's anything in the box or not."

Elliott testified on cross-examination that after Folks had given the keys to him Folks took $10.00 from his pocket while they were getting him on the stretcher and handed it to his niece, Mrs. Elliott, the appellant, with the statement that the money was to be used by her and her sister, Mrs. Mohr, to buy cigarettes for him while he was in the hospital. This does not indicate that Folks was apprehensive of impending death.

Mr. Robinson was the only other witness present at the time of the alleged gift. To some extent his testimony

corroborated Don Elliott's. However, in other respects it was contradictory.

An asserted gift, whether causa mortis or inter vivos, must be established by evidence which is "clear and convincing". *Smith* v. *Clark,* 219 Ark. 751, 244 S. W. 2d 776; *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030. In *Baugh* v. *Howze,* 211 Ark. 222, 199 S. W. 2d 940, we said that to constitute a gift inter vivos there must be, among other essential elements, "a clear intent to make an immediate present and final gift beyond recall and at the same time unconditionally releasing all future dominion and control by the donor over the property so delivered." See, also, *Bennett* v. *Miles,* 212 Ark. 273, 205 S. W. 2d 451.

Further, the tenor of appellants' evidence is that a close relationship existed between them and their uncle. In *Baker* v. *Eibler,* 216 Ark. 213, 224 S. W. 2d 820, we said:

"The claim of a gift causa mortis, where a confidential relationship exists, * * * *imposes a heavy duty of proof on the claimant.* A rebuttable presumption arises from the mere existence of the relationship that the gift was obtained by undue influence or improper means. The burden is on the alleged donee to rebut this presumption and to establish that the claimed gift was fairly and properly made to him." [Emphasis added.]

We agree with Chancellor that the appellants have not met the burden of proof necessary to establish the asserted gift inter vivos or causa mortis by the required standard of clear and convincing evidence. Certainly it cannot be said that the Chancellor's findings are against the preponderance of the evidence.

The decree is affirmed.

5113 382 S. W. 2d 185

Opinion delivered September 28, 1964.

[redacted]

Odell C. Carter and *T. S. Lovett, Jr.,* for appellant.

Bruce Bennett, Attorney General, By: *John P. Gill,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Omar Jordon, was charged by Information with the crime of murder, the information alleging that Jordon murdered James Scott by shooting him with a pistol. On trial, Jordon was convicted of voluntary manslaughter, and was sentenced to six years imprisonment. From the judgment so entered, appellant brings this appeal. The sole contention of error raised by appellant is that the court refused to instruct the jury on the defense of justifiable homicide.

The proof reflected that Jordon was a partner with Willie Jordon, his brother, in the operation of a pool hall and cafe at Grady, Arkansas. Appellant would assist in operating the establishment on weekends. On December 14, 1963, Omar Jordon went to the place of business; while sitting on a bench he was struck in the head by a bottle thrown at him by Joe Nathan Hill, a patron of the cafe. Appellant, knocked off the bench by the blow, reached for his pistol, which he was carrying in his belt.[1] While being drawn, the pistol fired, and James Scott, a bystander, was struck by the bullet, and subsequently died. Jordon stated that Hill (who, after hitting appellant with the bottle started toward the outside door) was facing appellant, and backing out the door with a pistol in his hand.

Appellant requested the following instruction:

"Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise, to commit a known felony."[2]

The court refused to give the instruction, and, as stated, appellant contends that the failure to so instruct constituted prejudicial and reversible error.

It is first the position of the state that self-defense, or justifiable homicide, is not a valid defense where the testimony reflects that the killing resulted from an accidental or unintentional act. Of course, if the sole defense of a defendant is that a killing was accidental, there would be no occasion for an instruction on self-defense or justifiable homicide. As stated in *Curry* v. *State*, 97 S. E. 529:

"Furthermore, if there was no intent to kill, the law of killing in self-defense, in the ordinary sense in which that is understood, does not enter into the case, since that only applies where the accused intentionally kills

[1] As a reason for carrying the pistol, Jordon stated: "I come out there and set stuff on the counter, sometimes I put cash you have to have for Saturday night at the back."

[2] Ark. State. Ann. § 41-2231 (1947).

his assailant to protect his own life, or to prevent the commission upon him of a serious injury amounting to a felony."

It is true that appellant testified that Scott was killed when the weapon discharged accidentally, and appellant's brother, Willie Jordon, testified that Omar told him, immediately following the shooting, "my pistol went off." However, appellant testified that he was in the act of drawing the pistol as a matter of defending himself from Hill; that the weapon discharged accidentally when someone grabbed his arm, and the bullet struck Scott. From appellant's testimony:

"When I fell I went to get up and try to defend myself and someone had my hand and the gun, the gun went off; where it was pointed I don't know, but I did reach for the gun. * * * When I was hit I fell and I could see him reach for his gun. I reached for my gun and someone grabbed me and the gun went off.

Q. You lay it on somebody else for grabbing the gun in your hand?

A. I could see it all myself, he did have the gun.

Q. Then you say it was completely an accident, it wasn't to protect yourself at all?

A. When I drew the gun I was trying to defend myself."

According to this evidence, though Scott was killed by the accidental discharge of the weapon, the weapon itself was brought into play intentionally by Jordon as a means of defending himself against Hill. It follows that we do not agree with this argument advanced by the state.

It is also asserted that the instruction was properly refused by the court because the evidence established that the assailant (Hill) was retreating at the time of the homicide. *McDonald* v. *State,* 104 Ark. 317, 149 S. W. 95, is cited by the state on this proposition. In that case, we said that if an individual, though the assailant,

endeavored to withdraw in good faith from the combat, the danger had ceased to be immediate and urgent, and the defendant had no right to make and continue the pursuit of the deceased, and could not justify a killing on the ground of self-defense.

In the case before us, it is undisputed that Hill struck Omar Jordon with a bottle at a time when there was no altercation between these individuals, *i.e.,* the assault was unprovoked. Likewise, three witnesses, besides appellant, testified that Hill had a pistol, though only appellant himself testified that Hill was standing in the doorway pointing the gun toward appellant when the latter reached for his weapon. All witnesses agree that Hill, after striking appellant, went to the outside door, but the testimony is in conflict as to whether he stood in the door or went on to the outside. Hill himself testified, "I turned and backed out. * * * I saw him go for his gun as I began to turn to run." Hill, however, denied that he had a pistol.

The circumstances in *McDonald* were vastly different from those at hand. According to appellant's testimony, his assailant had not actually retreated (and there was certainly no pursuit); rather, Hill was standing in a position, and with the means (the pistol) to continue the assault. The state's contention might be valid, if, under the testimony, Hill had only been armed with a knife, or brass knucks, for appellant would have been in no *immediate* jeopardy. But the possession of the pistol would have enabled Hill to inflict death, or great bodily harm, upon the appellant from the doorway. Under these conditions, there was no duty to retreat. As was stated in *Luckinbill* v. *State,* 52 Ark. 45, 11 S. W. 963:

"The deceased never retreated to a place from which he could not, if he had desired, have shot the defendant. The evidence tended to show that he was not attempting to retire from the combat, but was merely seeking a situation more favorable for waging it. If such was true, it was not incumbent on the defendant to suspend his

defense until the deceased had gained the situation he sought, but he had the same right to defend himself as if the deceased were standing and attempting to shoot him.

This citation also completely refutes the state's contention that the instruction offered was incorrect, because it did not include the defendant's duty to retreat. Let it be remembered that, undisputedly, the whole chain of events lasted for only a few seconds, and appellant, suddenly knocked to the floor by the throwing of the bottle (according to his own testimony) reached for his pistol on observing Hill in the doorway with the pistol.

The general instructions ordinarily appropriate in a homicide case were given, *i.e.,* the reasonable doubt instruction, the definition of murder, the meaning of the terms "express malice" and "implied malice," the difference between first and second degree murder, and the definition of voluntary manslaughter. The court also instructed the jury that the defendant claimed that the killing was the result of an accident, and further instructed that body as to the definition of involuntary manslaughter.

The court's Instruction No. 12 was as follows:

"If you believe from the evidence beyond a reasonable doubt that the defendant in Lincoln County, Arkansas, on the 14th day of December, 1963, wilfully, unlawfully and feloniously, with malice aforethought, shot at Joe Nathan Hill at a time when Joe Nathan Hill was doing him no harm nor attempting to do him any harm, and the bullet struck James Scott and killed James Scott, you will convict the defendant of the crime of murder in the second degree."

This instruction was correct. In *Ringer* v. *State,* 74 Ark. 262, 85 S. W. 410, which bears a strong similarity to the case at bar, the evidence reflected that the defendant (appellant) was violently assaulted by one John McCollum, who cut the defendant with a knife. McCol-

lum then turned, and ran over a hill to the rear of the store, but the defendant did not know this. Excited and bleeding from the wounds he had received, the defendant hurried to the back of the store, seized his gun, and turned and fired toward the door. During the difficulty, York McCollum, father of John, had been seated in the store. About the time Ringer reached his gun, York McCollum started toward the door, and the shot fired by Ringer struck York McCollum in the back and killed him. Ringer expressed regret, stating that he "did not intend to hit York" but that he had fired toward the door under the belief that John McCollum was about to reenter and renew the assault upon him. In discussing these facts, this court said:

"So in this case the guilt of the defendant depends to a large extent on whether his intention at the time he fired the shot was to do an act made criminal by the law. If the act he intended to do was criminal, then the law holds him responsible for what he did, even though such result was not intended. On the other hand, if he intended only a lawful act, he will not be punished for a result that he did not intend, if he acted with due care.

"As a matter of course, if defendant intended to shoot York McCollum, the man he killed, he is guilty, for this man had done nothing; but if, on the other hand, he fired the shot to protect himself against John McCollum, then whether his intention was criminal or not must depend upon the circumstances as they appeared to him at the time he fired the shot. The law does not hold it unlawful or criminal for a man to shoot in necessary self-defense; and if the defendant believed that John McCollum was still following up the attack, and that it was necessary to shoot in order to protect himself, then the intention with which the act was done was not criminal; for, as before stated, it is not unlawful to intend to do an act which one honestly believes to be necessary to protect himself, when the circumstances justify such belief. Again, if the defendant knew that John McCollum was not in the doorway, but believed that he was near there, and, thinking that he might renew the

attack, fired in order to frighten him, then for a much stronger reason he is not guilty of a criminal intent in firing the shot; for, if one may take life in self-defense, it follows, of course, that he may commit an act designed only to frighten and drive away a person whom he believes is about to assault him. * * *

"* * * Believing that McCollum was about to enter the doorway and follow up his assault with a knife, defendant seized his gun and fired towards the door to protect himself against the assault upon his life which he belived was impending, but with no intention of hitting York McCollum, who was in the store at the time with the defendant. Under these circumstances, we are not able to say, as a matter of law, that the intention of the defendant in firing this shot was unlawful and criminal. We think that was a question for the jury."

This is the same contention urged by appellant in this case, *i.e.,* that Scott was killed without intent, at a time when Omar Jordon was justified in defending himself against Joe Nathan Hill.

We think Jordon was entitled to this instruction, particularly after the court had given, on its own motion, Instruction No. 12. The defendant's requested instruction was the direct opposite, the antithesis, of Instruction No. 12. If the jury was to be instructed that appellant was guilty of murder in the second degree, if he unlawfully and feloniously shot at Hill and killed Scott, then, at his request, appellant was entitled, under the proof, to have the jury told that, if the killing of Hill would have been justifiable homicide, he was not guilty of any offense in shooting Scott. Though an instruction using the names of the parties would probably have presented the matter more clearly, the proffered instruction was a copy of the statute, and, we think, together with all the other instructions given by the court, made clear the position of the appellant.[3] No instruction was given defining self-defense or justifiable homicide, though

[3] Of the sixteen instructions given by the court, only No. 12 and No. 13 specifically used names.

these terms are referred to in two or three other instructions.

While the jury might not have believed appellant's testimony to the effect that Hill was standing in the door with a pistol, and might well have reached the same verdict, we think Jordon was entitled, under the evidence, to have his version presented. We cannot say that the failure to give this instruction constituted only harmless error.

Because of the error heretofore set out, the judgment is reversed and the cause remanded to the Lincoln Circuit Court.

SMITH, J., dissents.

GEORGE ROSE SMITH, J., (dissenting). A new trial is being ordered because the court refused to give this instruction: "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise, to commit a known felony." Jordon was entitled to an instruction submitting the defense of justifiable homicide, but I do not think the one he asked for was proper in this particular case.

The requested instruction stopped short after telling the jury in general terms that the killing of a person in necessary self-defense is justifiable. It did not tell the jury, as I think it should have, that if the killing of Hill would have been justifiable then the killing of Scott in the course of an attempt to exercise the right of self-defense against Hill would also have been justifiable. Nor was that point of law explained to the jury in any other instruction. It is such a difficult point that I cannot believe the jury, upon being told that Jordon had a right of self-defense against Hill, would have inferred that the right might also be carried over to justify the accidental killing of Scott. Thus the requested instruction was an abstract one and was, in my judgment, properly refused.

5-3279 382 S. W. 2d 363

Opinion delivered September 28, 1964.

[redacted]

Parker Parker, for appellant.

Williams & Gardner, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal is the consummation of litigation that has been pending in the Pope Chancery Court since June 5, 1957. Finally, on January 24, 1964, there was a decree for the plaintiffs, and this appeal by defendants challenges the correctness of such decree.

On June 5, 1957, Joe Hamilton (appellee) filed this suit against James H. Wallace and Virginia Darr Wallace (appellants), seeking judgment against the defendants on their note to him dated August 19, 1954, for the face amount of $7,938.85 and interest thereon, and for the foreclosure of a mortgage on certain real estate. In due time the defendants filed a demurrer, which was overruled; and then on November 29, 1957, defendants filed their answer, which was a general denial. The next entry in the record before us is the filing of an amendment to the defendants' answer on August 1, 1963, in

which they pleaded limitations, usury, and payment of the note sued on. The case was tried in the Chancery Court and resulted in the decree heretofore mentioned. On appeal appellants claim these points:

"1. The Court erred in refusing Appellants' petition to set aside his Findings and Ruling of the Court.

"2. Where an original note was usurious, all renewal notes of the original note are usurious.

"3. The Trial Court erred in permitting the introduction of $3,000.00 note, Exhibit 2, Transcript 67; mortgage, Exhibit 4, Transcript 72; and note, $7,938.85, Exhibit 5, Transcript 74, over objection of Appellant.

"4. The Finding of Facts by the Trial Court are contrary to the preponderance of the evidence.

"5. The pleadings cannot be treated as amended after trial to conform to proof which amendment amounts to stating a new cause of action."

We consolidate and discuss these five points under our own topic headings.

I. *Appellants' Efforts For A Continuance.* Even though the cause had been pending for many years,[1] the appellants sought further delay; and now ask that the findings of the Court be set aside for failure to grant such delay. They claim they were hurried into a trial without due notice, and were never allowed to have some of their witnesses present in person. We find no merit in this assignment.

In the course of the trial, the defendants' attorney asked the Court to delay the trial, and the Court remarked: "The Court directs the defendants to proceed and put on whatever evidence they do have here, and then I will consider your motion." After all proffered

[1] Hon. Bob Bailey, who filed this cause for the plaintiff, died on December 26, 1957. There was subsequent counsel for plaintiff, and then finally the present counsel became the attorneys for the plaintiff. The defendant changed from his original counsel to the present counsel. Furthermore, the regular Chancellor of the Pope Chancery Court was disqualified in the cause, and that fact necessitated an exchange of circuits.

witnesses had testified, the Court said: "I am going to take this case under submission for a decision to be handed down any time after twenty days from this date, but at any time prior to the end of that twenty days, the defendants in the case will be permitted to take the depositions of those parties mentioned—Mrs. Wallace or any one or all of those three witnesses named—and file them in this case and it will be considered by the Court as a part of the record . . ." There was no objection by the defendants' counsel to this ruling of the Court. As a matter of fact, the defendants subsequently filed the depositions of four witnesses and never thereafter complained of any lack of opportunity to take other depositions; nor did defendants comply with the statute in any way as to what any absent witness would testify. In short, there was no compliance with Ark. Stat. Ann. § 27-1403 (Repl. 1962). We have repeatedly held that the granting or refusing of a continuance is in the sound discretion of the Trial Court. *Supreme Lodge* v. *Robbins,* 70 Ark. 364, 67 S. W. 758; *B. & O.* v. *McGill,* 185 Ark. 108, 46 S. W. 2d 651. We find no abuse of such discretion by the Trial Court in the case at bar.

II. *The Amount Awarded The Plaintiff.* The Trial Court awarded the plaintiff judgment for the note sued on ($7,938.85), together with interest thereon at the contract rate from the date of the note until the date of the decree; and in Points 2 to 4 inclusive, appellants complain of such result. The original note sued on was introduced in evidence. Both Mr. Wallace and his wife admitted signing the note. With the record in such condition, the plaintiff had discharged his burden of proof, and the burden shifted to the defendants to sustain their claimed defenses. *Daugherty* v. *Merrifield,* 190 Ark. 537, 80 S. W. 2d 72; and *Lynch* v. *Garnes,* 227 Ark. 767, 301 S. W. 2d 739. There were three of these defenses. The first was limitation. Of course, there can be no merit to the plea of limitation because the note was dated August 19, 1954, and this suit was filed June 5, 1957; and the statute of limitation on a promissory note was and is five years. Ark. Stat. Ann. § 37-209 (Repl. 1962).

The second defense was usury; and the defendants, having pleaded that defense, had the burden of proving it. *Cox* v. *Darragh Co.,* 227 Ark. 399, 299 S. W. 2d 193. The Trial Court found that they failed to sustain such burden; and we agree with the Trial Court. The evidence to support this usury claim was, that in 1949 Wallace had borrowed $5,000.00 from Hamilton to pay some labor bills on construction work at Mountain Home, Arkansas, and had executed a note for $7,000.00, which was usurious; and that the note sued on herein was a renewal of the said usurious note. Hamilton testified that he loaned Wallace some money to pay labor bills on work at Mountain Home, but there was no usury in that transaction. Furthermore, Hamilton strongly maintained that the consideration for the present note was for money loaned by Hamilton to Wallace to pay labor bills in some work at *Stuttgart.* After studying the record, we conclude that the Chancellor made no error in refusing the plea of usury.

As regards the plea of payment, the record is quite voluminous. It appears that Wallace was in the building business and frequently borrowed money from Hamilton. On April 27, 1951, Wallace and wife executed two notes to Hamilton, each for $3,000.00, due in one year, and bearing interest from date until paid at the rate of 10% per annum; and these notes were secured by one or more mortgages. On August 19, 1954, Wallace and wife executed to Hamilton the note here sued on for $7,948.85. Hamilton claims that this note was a renewal of the two notes executed in 1951. The Wallaces claim: (a) that one of these notes was a duplicate of the other and should have been destroyed; and (b) that on August 20, 1954—the day after the execution of the note—there was paid to Hamilton the sum of $3,680.00, which paid in full all amounts due him. It is strikingly strange that on August 19, 1954, a note was executed by the defendants to Hamilton for $7,938.85 if the Wallaces only owed him $3,680.00, which was paid the day following the execution of the said note; yet that is the testimony of the defendants. As we have previously observed, when Ham-

ilton introduced in evidence the note of August 19, 1954, and the defendants admitted signing the note, the burden of proving payment shifted to the defendants. The Chancellor found that they had not paid the note; and we cannot say that such finding was in error.

III. *The Description Of The Mortgaged Property.* The mortgage to the appellee covered a tract 173 feet by 160 feet; but Mr. and Mrs. Lowrey intervened and claimed that Hamilton had released from the mortgage a tract 173 feet by 71 feet when the Lowreys purchased it. The Court thereupon amended the decree to allow foreclosure only on the tract of 173 feet by 89 feet, not claimed to have been released from the mortgage. Appellants argue in their fifth point that the decree should not have been so amended. We find no error prejudicial to the appellants in the amending of the decree. Furthermore, this point may now be moot as a practical matter because (a) the appellants filed a supersedeas bond which superseded the judgment for the debt, and (b) we have affirmed the judgment for the debt.

Finding no error, the decree is affirmed.

HUDSPETH MOTORS *v.* WILKINSON.

5-3283 382 S. W. 2d 191

Opinion delivered September 28, 1964.

Fitton & Meadows, for appellant.

No brief filed for appellee.

George Rose Smith, J. O. N. Wilkinson, the defendant below, bought a used truck from Hudspeth Motors, Inc., and executed a conditional sales contract calling for eighteen monthly payments. After having paid two installments during a period of some five months Wilkinson attempted to repudiate the contract, asserting a breach of warranty. The seller repossessed the truck, resold it, and brought suit under the Uniform Commercial Code for the balance still assertedly due. Ark. Stat. Ann. § 85-9-504 (Add. 1961). Wilkinson admitted his original obligation but relied upon the breach of warranty as an affirmative defense. The trial court let the case go to the jury, who returned a general verdict for the defendant.

In the absence of a brief for the appellee we have been able to discover only two grounds upon which the verdict might be sustained. First, before reselling the truck by private sale Hudspeth gave Wilkinson more than a week's notice, by certified mail, of the proposed resale. Wilkinson, who was living on a rural mail route, presumably received a notice from the postoffice that this piece of mail was being held for him, but he did not send his son to pick it up until about two weeks after the sale. Although this want of notice was not pleaded as a defense the trial court instructed the jury that if Wilkinson had no knowledge of the proposed resale before it took place he was entitled to a verdict.

This instruction was wrong. All the Code requires is that the buyer be given reasonable notification. § 85-9-504. Notification is defined as the taking of such steps as may be reasonably required to inform the person to be notified, "whether or not such other actually comes to know of it." § 85-1-201 (26). There is no evidence in the record to indicate that notice by certified mail was not reasonable.

Secondly, the court submitted to the jury Wilkinson's principal defense, the asserted breach of warranty. It is clear from Wilkinson's own testimony, however, that he waived any breach that might have occurred by failing to take the necessary steps to reject the truck within a reasonable time.

Wilkinson, a dairyman, bought the truck on February 13, 1962, with the intention of using it on his milk route. He testified that Hudspeth's salesman assured him that the vehicle was suitable for that purpose, that it was in good shape mechanically, and that it used little or no oil. Wilkinson stated that on the first day he drove the truck he found that its two-speed mechanism was not working properly and that it used two quarts of oil on his route of from 80 to 85 miles. Wilkinson made some attempt to report his dissatisfaction to the salesman he had dealt with, but he admits that his efforts to get hold of the salesman were unsuccessful. He also says that he complained to two mechanics employed by Hudspeth, but after a test drive one of them denied that there was anything wrong with the truck. Wilkinson eventually had the defective two-speed mechanism repaired by someone else at his own expense. He concedes that he drove the truck daily for a period of months. Finally, on about June 19, more than five months after he bought the vehicle, its engine "blew up," and he employed a mechanic to dismantle the engine and see how badly it was damaged. There is no proof to indicate that this mechanic found that the explosion was due to a defect that existed when Wilkinson bought the vehicle.

Under the Code if the truck did not conform to the terms of the contract Wilkinson was required to reject it within a reasonable time, notifying the seller of his decision. §§ 85-2-601 and -602. His failure to make an effective rejection amounted to an acceptance. § 85-2-606. Although the buyer could have revoked his acceptance if it had been induced by the seller's assurances that the defects would be corrected, § 85-2-608, there is no such proof in this case. Wilkinson did not testify that anyone at Hudspeth Motors ever led him to believe

that the vehicle could or would be put into good condition. Under the principles announced in *Kern-Limerick v. Mikles,* 217 Ark. 492, 230 S. W. 2d 939, and similar cases, Hudspeth was entitled to an instructed verdict upon the buyer's cross complaint. There being no substantial evidence to support Wilkinson's affirmative defense the cause will be remanded for the entry of a judgment in favor of the plaintiff.

Reversed.

OWEN *v.* KROGER CO.

5-3313 382 S. W. 2d 192

Opinion delivered September 28, 1964.

George F. Hartje, Jr., and *Moses, McClellan, Arnold, Owen & McDermott* and *James R. Howard,* for appellant.

Cockrill, Laser, McGehee & Sharp, for appellee.

GEORGE ROSE SMITH, J. This is an action by Ed Owen and his wife to recover damages for personal injuries and loss of consortium resulting from Mrs. Owen's having slipped and fallen upon a banana peel on the floor of the Kroger Company's grocery store at Conway. At the close of the plaintiffs' proof the trial court directed a verdict for the defendants (the company and its local manager) on the ground that the peel was not shown to have been on the floor sufficiently long for the defend-

ants to be chargeable with negligence in having failed to discover it. *Kroger Gro. & Baking Co.* v. *Dempsey,* 201 Ark. 71, 143, S. W. 2d 564. The sufficiency of the evidence is the only question before us.

The fall took place between 10:30 and 11:00 in the morning. Mrs. Owen testified that as she was leaving the check-out counter she stepped on a slippery object and fell and hurt herself. She said that "one of the boys" (apparently a store employee) picked up a large dark object and said that it was a banana peeling. Mrs. Turnbow, the clerk at the counter, exclaimed: "I'm sorry, Mrs. Owen, but there was small boys in here eating bananas earlier this morning."

Giving the proof its strongest force in favor of the plaintiffs we think an issue of fact was made. The jury might reasonably have believed that the boys bought the bananas in the store, in which case their peelings would be apt to be yellow rather than dark in color. The darkening process, as we all know, takes time. Moreover, the clerk's expression, "earlier this morning," ordinarily connotes something more than the lapse of a very short time, as the appellees suggest. Had the interval been extremely brief Mrs. Turnbow might be expected to have said "a few minutes ago," or words to that effect. At the very least there is an area of uncertainty that entitles the plaintiffs to the benefit of our doubts until the defendants come forward with more explicit testimony. If the plaintiffs were required to show the exact time when the peeling was dropped the defendants would be right in arguing that the answer lies in the realm of speculation. But the plaintiffs' burden was merely to show that the interval, though indefinite, was substantial. We think their testimony fairly supports that inference.

Reversed.

GYNGARD *v.* GARNER.

5-3306 382 S. W. 2d 369

Opinion delivered September 28, 1964.

[Rehearing Denied October 26, 1964.]

Bon McCourtney and *Claude B. Brinton,* for appellant.

W. G. Wiley, for appellee.

PAUL WARD, Associate Justice. This is a taxpayer's suit to recover (for the benefit of Izard County) the rental value of county road machinery allegedly used by Lloyd Garner (County Judge of said county) in constructing ponds, terraces, etc. on private property. Garner, appellee, filed a motion to dismiss the complaint which was sustained by the trial court. Appellants failed to plead further, their complaint was dismissed, and this appeal follows.

This litigation stems from our decision in *Needham* v. *Garner, County Judge,* 233 Ark. 1006, 350 S. W. 2d 194, decided October 16, 1961. In that case we upheld the right of a taxpayer to maintain a suit in chancery court to enjoin Garner (who was and still is the County Judge of Izard County) from using county road machinery to construct ponds, terraces, etc. on private property.

The present suit was also brought by a taxpayer in circuit court (for the benefit of the county) to recover

from the same Lloyd Garner the rental value of the county road machinery used as described in the *Needham* case. The record in this case contains the complaint and the decree in the *Needham* case which were introduced by appellee with the approval of the trial court.

After various pleadings were filed by both parties (including a complaint and amended complaint) appellee filed a "Motion to Dismiss" on the grounds that . . . "the complaints of the plaintiff fail to state a cause of action" and because the "court is wholly without jurisdiction". The said motion to dismiss was sustained by the trial court using the following language: "It is determined that the defendant's motion to dismiss, which contains some aspects of a demurrer, should be sustained . . ."

A careful study of our former decisions leads us to conclude that the judgment of the trial court must be affirmed. In *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. 2d 610, we affirmed a decree in chancery holding the former suit to redeem land and declare a deed a mortgage to be *res judicata* of a subsequent suit by the grantor to recover rents and damages for waste by defendants, although the grantor failed to assert such claim in the original suit. We there 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; *Prewitt* v. *Waterworks Imp. Dist. No. 1,* 176 Ark. 1166, 5 S. W. 2d 735".

The same issue of *res judicata* was involved in the case of *Olmstead* v. *Rosedale Bldg. & Supply, et al.,* 299 Ark. 61, 313 S. W. 2d 235, in which this Court affirmed the holding in the *Robertson* case quoting extensively therefrom on page 65 of the Arkansas Reports. For other de-

cisions to the same effect see *Crump* v. *Loggains,* 212 Ark. 394, 205 S. W. 2d 846 and *Timmons* v. *Brannan,* 225 Ark. 220, 280 S. W. 2d 393.

The rule above announced is applicable to the case here under consideration. It is not contended by appellant that appellee has misused any of the county road machinery since the decision in the *Needham* case. It is obvious therefore that all claims here asserted arose before, and could have been litigated in, that case.

Affirmed.

McFaddin, J., concurs.

Ed. F. McFaddin, Associate Justice (concurring). I concur in the result reached by the Majority because I am firmly of the opinion that the demurrer was properly sustained to the amended complaint. In the amended complaint (on which the appellants stood) there are these allegations: ". . . that the defendant was and is at all times hereinafter mentioned and set forth the duly elected and qualified County Judge of Izard County. That the defendant herein named, as such Judge, was in direct control of all property, real and personal, belonging to and owned by said County . . ."

It is thus clear that appellee Garner was sued because of acts he did as County Judge; and the case of *Hutson* v. *State,* 171 Ark. 1132, 287 S. W. 398, is directly in point, to the effect that a County Judge may not be made personally liable for acts that he does as County Judge. I consider the above case ruling here. Thus I never reach the matter of *res judicata,* since I am firmly of the opinion that the demurrer should have been sustained in accordance with our holding in *Hutson* v. *State, supra.*

AMERICAN METAL WINDOW CO. *v.* WATSON.

5-3303 382 S. W. 2d 576

Opinion delivered September 28, 1964.

[Rehearing denied November 2, 1964.]

[redacted]

Patten & Brown, for appellant.

No brief filed for appellee.

FRANK HOLT, Associate Justice. This is an action by appellant to collect an account of $1,029.89 from the appellee. Upon a trial before the court, sitting as a jury, a judgment was rendered in favor of the appellee. For reversal appellant contends that (1) the appellee is indebted to the appellant for materials furnished; (2) an account stated existed between appellant and appellee; and (3) there is no substantial evidence to support the court's finding that the account had been paid.

For about two years appellee Watson, a contractor, had purchased windows as needed from John Triska, owner of Tri-Hall Window Company. On February 1, 1962, appellee Watson paid Triska his current account in full. On the same date it appears he sold to Triska a duplex and lot, taking a note and second mortgage as security for the $2,250.00 balance. At that time Triska

promised to pay for this balance by crediting Watson's pending and future purchases to this $2,250.00 balance. The note and mortgage indicated future credits were to be made.

At this same time Triska was also indebted to the appellant, American Metal Window Company, Inc., as his supplier. Three weeks later, or on February 22, 1962, Triska sold his business [Tri-Hall Window Company] to appellant together with accounts receivable. Triska was retained by appellant as their agent with authority to make sales and collections. On this same date several orders of window materials were delivered to appellee's construction site. Delivery and packing slips accompanying the deliveries reflect the name of appellant as the supplier. According to Watson, these orders were placed with Triska before he sold his business to appellant.

Upon receiving a March invoice from appellant, Watson reported it to Triska who told him: "You forget them. I'm taking care of your windows." Appellee Watson contends this was in accordance with their agreement. Thereafter, two smaller orders were delivered through Triska as agent of appellant. Monthly statements were mailed by appellant to appellee. When a demand was made by appellant in August, 1962, that he pay his account, appellee informed appellant that he had paid their general manager and agent, Mr. Triska.

Appellant contends that the packing slips accompanying the deliveries gave notice of their ownership of the material before it was used by appellee and, therefore, appellee was indebted to appellant by virtue of his acts as well as by express contract and that the said slips and monthly statements made "an account stated" between appellant and Watson. In rejecting these contentions of appellant the court found: "That the defendant paid the agent of the plaintiff for the items set forth in the account and that said agent was acting in the apparent scope of his authority." Thus, the entire issue revolves around appellant's third point.

The appellant, American Metal Window Company, was a supplier of Triska's business firm [Tri-Hall Window Company] before appellant acquired ownership of it. Appellee Watson was a customer of Triska's before the change in ownership. According to Watson, he had no knowledge of the change in ownership from Tri-Hall Window Company to American Metal Window Company. Furthermore, the truck making his deliveries continued to bear the name of Tri-Hall Window Company and the telephone number remained the same. Appellee also testified that Triska advised him to ignore appellant's invoice and, accordingly, appellee applied his purchase to Triska's account as agreed. It is not disputed that Triska's agency encompassed the right to make sales and collect appellant's accounts.

When the evidence as to the nature and extent of an agent's authority is in conflict it is a question of fact for the jury. *Bradley Advertising, Inc.,* v. *Froug Stores, Inc.,* 193 Ark. 639, 101 S. W. 2d 789. In the case at bar the court, sitting as a jury, determined that appellant's agent was acting within the scope of his authority when appellee made his payment to the agent in the manner claimed by appellee.

It is well settled law in this state that the finding of the trial court, as the trier of the facts, has the verity and binding effect of a jury verdict and will be sustained if there is any substantial evidence to support it. In *International Harvester Company* v. *Layton,* 148 Ark. 156, 229 S. W. 22, where the trial court sat as a jury, we said:

"* * * it is not our province on appeal to determine where the preponderance lies. Under the often announced rule of this court, we must give the evidence its strongest probative force in favor of the court's finding."

In determining the sufficiency of the evidence to support a verdict all 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; *Missouri Pacific* v. *Dotson,* 195 Ark. 286, 111 S. W. 2d 566.

The judgment is affirmed.

GREER LUMBER CO. *v.* DOLES.

5-3445 382 S. W. 2d 189

Opinion delivered September 28, 1964.

B. S. Clark, for appellant.

John Sizemore, for appellee.

PER CURIAM ORDER 3345. *Greer Lumber Co. et al.* v. *Joe S. Doles,* from Prairie Circuit; So. Dist.; by consent, the parties are given leave to apply to the Workmen's Compensation Commission for approval of a joint settlement. HARRIS, C. J., and MCFADDIN, J., dissent.

ED. F. MCFADDIN, Associate Justice (dissenting). This case was appealed to the Supreme Court from the Prairie Circuit Court, Southern District; and here in this Court all parties have now filed a pleading as follows:

"JOINT MOTION TO REMAND TO THE ARKANSAS WORKMEN'S COMPENSATION COMMISSION FOR FURTHER PROCEEDINGS. "The appellants and the appellee have reached an agreement to settle the above captioned matter by Joint Petition in accordance with Ark. Stat. Ann. § 81-1319 (1) (Repl. 1960) subject to the approval of the Arkansas Workmen's Compensation Commission. Therefore, the appellants and the appellee jointly move that the Supreme Court of Arkansas remand the above captioned matter to the Arkansas Workmen's Compensation Commission for further proceedings."

This Court is granting the Motion and is remanding the case directly to the Workmen's Compensation Commission. In short, the cause will be taken from the Supreme Court to the Workmen's Compensation Commission, and the Circuit Court of Prairie County will be entirely ignored and bypassed in the matter. I respectfully dissent from such direct proceeding. If the parties want the cause remanded, we should send it back to the Prairie Circuit Court, from whence we received it. The word "remand" in Black's Law Dictionary is defined as: "The sending the cause back to the same court out of which it came, for purpose of having some action on it there." Adjudicated cases follow the definition. See *State* v. *Swafford* (Tenn.), 198 S. W. 2d 1007; and *State* v. *Slater* (Ida.), 241 P. 2d 1189.

The Arkansas Workmen's Compensation Law says in Ark. Stat. Ann. § 81-1325 (Repl. 1961): "Appeals from the circuit court shall be allowed as in other civil actions." In other civil actions it has been the rule of this Court that if the cause is to be remanded, it be remanded back to the court from which the Supreme Court receives it. As early as *Poindexter* v. *Russell,* 11 Ark. 664 (decided in 1850), this procedure was recognized. In that case there had been an attempted appeal from the Justice of the Peace Court to the Circuit Court and then to this Court. There was some irregularity in the method of appeal from the Justice of the Peace Court. The Supreme Court sent the cause back to the Circuit Court, rather than to the Justice of the Peace Court. So far as I can find, the procedure is uniform that causes are remanded to the court from which they are received. If the People of Arkansas had wanted appeals to be made directly from the Workmen's Compensation Commission to the Supreme Court, they could have so provided; but Ark. Stat. Ann. § 81-1325 (Repl. 1961) provides for appeals from the Workmen's Compensation Commission to the Circuit Court, and from that tribunal to the Supreme Court. We have no right to bypass the Circuit Court on remand; and I therefore respectfully dissent from the order remanding this cause directly to the Workmen's Compensation Commission.

5-3323 382 S. W. 2d 370

Opinion delivered October 5, 1964.

Kenneth Coffelt, for appellant.

W. J. Walker, for appellee.

CARLETON HARRIS, Chief Justice. On June 11, 1959, Irene Rowe, appellee herein, was granted an absolute divorce from William E. Rowe, appellant herein, and was awarded custody of the two minor children, Keith Rowe and Garry Rowe. The decree, *inter alia,* provided, "The defendant shall pay into the register of the Master of this court, $25 each and every week hereafter as alimony, maintenance and child support." On December 18, 1963, appellee filed a petition in the trial court, setting out the aforementioned language, and praying, "for an order of this court amending the original decree by deletion of the word 'alimony' from the decree." On January 8, 1964,[1] the chancellor granted the relief prayed, and an order was entered amending the decree of divorce, "in that the word alimony is deleted from the decree and henceforth the $25.00 per week payments made by the defendant to the plaintiff shall be for the maintenance and support of the parties' two minor children." From the decree so entered, appellant brings this appeal.

[1] The order was actually made on December 19, 1963, but was entered nunc pro tunc on January 8, 1964.

In response to the question as to why she was requesting that the word "alimony" be deleted, and that the payments be declared child support, Mrs. Rowe replied:

"With the word 'alimony' in there I have had to claim that in addition and add it on to my teaching salary as my whole salary and I have met with the income tax people and even had to pay them back because I did not know that in the beginning and that is why that I would like for it all to be claimed as child support instead of the word 'alimony.' The way it is worded I have to claim it all as my income."

In other words, Mrs. Rowe was required to add the $1,300.00 paid to her by appellant, to her own teaching income, which made a difference in the amount of income tax due.

For reversal, appellant asserts that at the time of the entry of the amended decree, the court term, at which the original decree had been issued, had expired, and the court was therefore without jurisdiction to amend. We have, many times, held that the court has continuing jurisdiction to modify allowances. In *Perry* v. *Perry,* 229 Ark. 202, 313 S. W. 2d 851, this court said:

"As a matter of law the trial court retains control of the cause with jurisdiction to modify an allowance of alimony or maintenance."

See also *Watnick* v. *Bockman,* 209 Ark. 696, 192 S. W. 2d 131.

It is also argued that there was no change of circumstances (following the rendition of the original decree) that would justify the court in entering the order here appealed from. It is true that we have held that one seeking modification of a prior decree, involving custody or support of children, has the burden of establishing changed circumstances that necessitate the modification. *Stovall* v. *Stovall,* 228 Ark. 1077, 312 S. W. 2d 337. Of course, in practically all of our cases of this nature, the necessity for showing change in circumstances relates to

an application seeking a change of custody of the children from one parent to another, or an application requesting an increase, or decrease, in child support payments. Here, neither of these questions is involved. No change in the custody order was sought, or made; nor was the amount of payment, that Mr. Rowe had been making, changed. The order simply designates the $25.00 per week entirely for support of the two children, rather than including any support for the wife. Mrs. Rowe testified that she was able to support herself. Of course, we think the time element itself establishes a change of circumstances, for the children, at the time of the amended decree, were four and a half years older than when the original divorce decree was granted and support order entered. Both children are now of school age, rather than only one, and we think it readily apparent, under normal circumstances, that more money is required to support boys 13 and 8 years of age, than would be necessary for the maintenance of boys 9 and 4 years of age. Likewise, we do not think it can be successfully argued that $50.00 per month for each child is an unreasonable amount to require the father to pay; appellant's income has not been reduced since the rendition of the divorce decree; in fact, he has received a slight increase in salary.

Mr. Rowe stated that he was not claiming these children as dependents in filing his Federal income tax return, but does claim them in preparing his state income tax return.[2]

Appellant does not set out any specific reason for opposing the dropping of the word, "alimony," and for this court to mention any possible reason or reasons, would be only to speculate.

We think the court had full authority to amend its original decree, and we are unable to say that such action was improper under the testimony presented.

Affirmed.

[2] When asked why he carried them on one and not the other, Mr. Rowe replied, "It is my affair, isn't it?"

5-3323 382 S. W. 2d 361

Opinion delivered October 5, 1964.

[redacted]

Anthony G. Kassos, for appellant.

Bruce Bennett, Attorney General, By: *Beryl F. Anthony, Jr.,* Asst. Atty. Gen., for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant, Andrew Otis Terry, was tried on an information which charged the statutory offense of burglary, being Ark. Stat. Ann. § 41-1001 (1947), which, as amended by Act No. 185 of 1955, now reads:[1]

"Burglary is the unlawful breaking or entering a house, tenement, railroad car, automobile, airplane, or any other building, although not specially named herein, boat, vessel or water craft, by day or night, with the intent to commit any felony or larceny."

From a jury verdict of guilty and judgment pronounced thereon, there is this appeal by court appointed counsel; and the point urged is that the evidence was insufficient to establish the offense of burglary. There was no evidence of *entry,* so the answer to the posed question is whether there was sufficient evidence of *breaking* to constitute burglary.

[1] In 9 Ark. Law Rev. 402 there is a short discussion of the Act No. 185 of 1955. In the same connection see also 3 Ark. Law Rev. 466.

The evidence indicated rather clearly that appellant was a "peeping tom" (see Act No. 156 of 1955, as found in Ark. Stat. Ann. § 41-1426 (Supp. 1963). He was caught outside the bathroom window of the prosecuting witness. The window was several feet above ground level and appellant had pushed back into the brick foundation the iron grill over the ventilator in order to stand on the brick and look in the bathroom window. The ventilator opening was below the floor level of the house and allowed entrance to no part of the dwelling. The metal grate was still in the back of the brick opening. Only a foothold space had been accomplished, so the pushing of the iron ventilator could not be termed a "breaking," as will be shown by the cases hereinafter cited.

Appellant had also pried loose one of the lower corners of the metal screen framing over the bathroom window, but the window was locked and none of the glass was broken. The window facing and sash had been painted during the day and there were no marks of any kind on the window or the newly painted sash or facing; so there had been nothing more than the prying loose of the lower corner of the metal screen frame. The appellant was seen as he was looking in the window and was immediately apprehended. There was no entry and only the foregoing detailed efforts toward breaking.

Has there been a sufficient breaking to establish the offense of burglary? That is the question. Governed by our own cases on breaking we must answer the posed question in the negative. In *Minter* v. *State,* 71 Ark. 178, 71 S. W. 944, a similar question was posed, and Justice Riddick, in holding that there had been no breaking, used this language:

"No one contends that there was an entry of the house by the defendant in this case, and in our opinion no breaking is shown. Actual breaking, as applied to burglary, means the making of an opening or mode of entrance into a building by force. 5 Am. & Eng. Enc. Law (2d Ed.) 45; Bishop, Stat. Crimes (3d Ed.) 312. But the evidence does not show that any opening was

made into the house. The defendant removed some slats on the outside of the window, and removed some tacks and putty from the window sash, but the glass of the window sash was still in place, and was between the defendant and the inside of the house. We are, therefore, of the opinion that the evidence did not show either a breaking or an entry into the house, and that the crime charged was not proved."

In *Anderson* v. *State*, 84 Ark. 54, 104 S. W. 1096, the appellant had been tried and convicted of burglary and in reviewing the conviction this Court said:

"The statute does not change the character of the 'breaking' that was essential at common law to complete the offense. Such breaking at the common law was 'any disrupting or separating of material substances in any enclosing part of a dwelling house, whereby the entry of a person, arm, or any physical thing capable of working a felony therein may be accomplished.' 2 Bishop, Cr. Law § 91. Rapalje, Larceny & Kindred Offenses, 375. That the term 'break' in the statute is to be given the same meaning as that term at common law, see numerous authorities collated in 6 Cyc. 175. The essentials of the above definition as to the 'breaking' must be met by proof before the crime of burglary by 'breaking' is complete. The proof in this case falls short of it. There was no 'opening or mode of entrance' here by which a felony could have been committed within the building. *Minter* v. *State,* 71 Ark. 178. The only opening into the building was the hole in the door, and it is not shown that it was possible to abstract anything through this opening, or that any latch or fastening could have been reached whereby to effect an entrance. Therefore the judgment has no evidence to support it, and the cause is reversed and remanded for new trial."

The Attorney General admits the effect of the foregoing cases, but insists that our definition of burglary should be "modernized," and to support his contention cites, *inter alia; Simmons* v. *State* (Ga. App.), 88 S. E. 904; *State* v. *Chappell,* 185 S. C. 111; *State* v. *Wilson*

(Mo.), 125 S. W. 479; *State* v. *Rosencrans* (Wash.), 167 P. 2d 170; and *State* v. *Maxey* (S. C.), 62 S. E. 2d 100. This desire to have the definition of burglary "modernized" should be addressed to the Legislative branch of Government, rather than to the Courts. Under our holdings, as previously cited, we cannot find any "breaking" to have been accomplished in this case.

The judgment is reversed and the cause is remanded for a new trial.

NUNEZ *v.* O. K. PROCESSORS.

5-3328 382 S. W. 2d 384

Opinion delivered October 5, 1964.

A. A. McCormick, for appellant.

Bethell & Pearce and *Donald P. Callaway,* for appellee.

GEORGE ROSE SMITH, J. The appellee, O. K. Processors, Inc., brought suit against the appellant, Art Nunez, in the state of Nevada. Nunez won the case and was awarded a judgment for costs of $15.85 and for an attorney's fee of $400.

Nunez and his Nevada lawyer, John F. Mendoza, then filed the present petition, verified by their local attorney, to register the Nevada judgment in the Sebastian circuit court under the Uniform Enforcement of Foreign Judgments Act. Ark. Stat. Ann., Title 29, Ch. 8 (Repl. 1962). Upon filing their petition they obtained a writ of execution against O. K., the judgment debtor. The trial court sustained a demurrer to the petition, directed that any future petition be verified by Nunez himself, and quashed the writ of execution. Pursuant to our suggestion in a preliminary opinion, *Nunez* v. *O. K. Processors,* 238 Ark. 346, 381 S. W. 2d 754, the parties corrected a deficiency in the record by obtaining a final judgment in the court below. We now consider the appeal under its merits.

The petition to register the Nevada judgment was awkwardly drafted, in that both the caption and the body of the petition followed the style of the Nevada case by referring to O. K. as the plaintiff and to Nunez as the defendant. It was, however, signed and verified by A. A. McCormick as attorney for the petitioners, Nunez and Mendoza. This ostensible reversal of roles was the basis of O. K.'s demurrer, which asserted that the failure to identify the petitioners created a defect of parties.

The demurrer should have been overruled. On demurrer doubts must be resolved in favor of the sufficiency of the petition. This petition asked that the Nevada judgment be registered under the Uniform Act, *supra.* An authenticated copy of the Nevada judgment was attached as an exhibit to the petition. There can-

not be the slightest doubt that Nunez and Mendoza are seeking to enforce the Nevada judgment. It is absurd to suppose that O. K. was misled into thinking that it was really the plaintiff in the Arkansas proceeding. This petition was good against demurrer.

In insisting that Nunez should have verified the petition in person the appellee relies upon Ark. Stat. Ann. § 27-1108 (Repl. 1962). This statute permits a party to object to verification by the opposing attorney when the moving party does not believe that the attorney can truthfully verify the pleading and that the matters alleged are within the personal knowledge of the adverse litigant himself. The basic premise for the appellee's motion to verify—that the facts were within Nunez's personal knowledge—is wanting. The petition asserts only one essential fact, that a judgment was rendered in Nevada. (A second allegation, that nothing had been paid upon the judgment, was confirmed by the clerk of the Nevada court, as the Uniform Act contemplates. § 29-803.) An authenticated copy of the judgment was attached to the petition. Thus McCormick knew just as much about the cause of action as Nunez did, if not more. Personal verification by Nunez would have added nothing to the credibility of the petition.

In fact, O. K. admitted in its motion and in its trial brief that its real reason for seeking Nunez's verification lay in O. K.'s doubts about whether McCormick was really authorized to represent Nunez in this proceeding. A lawyer's authority to represent his client in litigation is presumed and can be put in issue by the adverse party only upon a showing of *facts* tending to indicate a want of authority. *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, 147 S. W. 83. No such facts are asserted here. Hence the allegations essential to a direct attack upon McCormick's authority are absent. The motion to verify cannot serve as a tactical means of attaining the same end by indirection.

The writ of execution was properly issued when the petition to register the Nevada judgment was filed in the

court below. A salient purpose of the Uniform Act is to permit the judgment creditor to obtain that relief more promptly than he used to be able to. Ark. Stat. Ann. § 29-806; Commissioners' Note to § 6 of the Uniform Act; Leflar, The New Uniform Foreign Judgments Act, 3 Ark. L. Rev. 402, 415. When the petition is reinstated in the trial court the writ should also be reinstated.

Reversed.

DIXIE AUTO INS. CO. *v.* GOUDY.

5-3310 382 S. W. 2d 380

Opinion delivered October 5, 1964.

Levine & Williams, for appellant.

Carlton Currie, for appellee.

PAUL WARD, Associate Justice. This appeal calls for an interpretation of certain language in a liability insurance policy. An outline of the pertinent facts involved is set out below.

On December 16, 1960 the Dixie Auto Insurance Co. (appellant herein) issued its policy to W. G. Goudy (appellee herein) covering a specifically described 1956

Ford passenger automobile. [A copy of the policy was put in evidence and certain pertinent parts are set out in the briefs to which reference will be made.] On August 15, 1961 appellee bought a 1949 model Ford car. On the same day appellee, while driving this car, had a collision with a car belonging to a Mr. Robert P. Fratesi, resulting in injuries to appellee and Mrs. Fratesi and in damage to Mr. Fratesi's car. Mr. and Mrs. Fratesi filed suit against appellee, and on February 16, 1962 they recovered a default judgment for $5,880.

On September 27, 1962 appellee filed suit against appellant setting out many of the above stated facts and particularly the Fratesi judgment, and prayed for judgment in the amount of $5,880 together with statutory penalty and attorney's fee. Appellant filed an answer, raising the points and issues hereafter discussed.

By consent of the parties the cause was tried before the circuit judge sitting as a jury. The trial resulted in a judgment in favor of appellee as prayed for. This appeal follows.

After a careful study of the record, the briefs, and the points relied on by each party, we find that certain issues relied on by appellant for a reversal are properly raised and they will be discussed in the following sequence.

One. Was the 1949 Ford covered by the policy? The trial court held it was, and we agree. Both parties rely on the wording found in § 4 of Paragraph IV of the policy which in material part reads as follows:

"(4) Newly Acquired Automobile—an automobile ownership of which is acquired by the named insured or his spouse if a resident of the same household if (i) *it replaces an automobile owned by either and covered by this policy,* or the company insures all automobiles owned by the named insured and such spouse on the date of its delivery, and (ii) the named insured or such spouse notifies the company within thirty days following such delivery date; but such notice is not required under cover-

age A, B and division i of coverage C if the newly acquired automobile replaces an owned automobile covered by this policy." (Emphasis added.)

Appellant relies on the italics in above quotation. It is contended, and we agree, that the 1949 car was not used to replace the 1956 car. However, we think other language makes this contention immaterial. Following the italicized language we find: "or the company insures *all* automobiles owned by the named insured . . ." (Emphasis added.) It is, however, appellant's argument that the latter language applies only when the insured owns a fleet of cars and not when he owns just one car. We agree this argument sounds reasonable but it is not sustained by the authorities. The case of *Horace Mann Mutual Casualty Company* v. *Howard K. Bell et al.,* 134 F. Supp. 307 (W. D. Ark. 1955) is very much in point, and sustains appellee herein. There appellant had issued its policy to cover (only) Bell's 1950 Plymouth—being the only car he owned at that time. Later Bell bought a pickup truck which was involved in a collision. The pertinent terms of the policy (set out in the opinion) were like those in this case. In stating the issue the opinion says:

"The evidence in the instant case clearly establishes that the pickup truck purchased by the defendant Bell did not replace the Plymouth automobile described in the policy . . . Thus the crucial question is whether the plaintiff insured 'all automobiles owned by the named insured' at the delivery date."

In holding the pickup truck was covered, the court quoted with approval the following from *Dunmire Motor Co.* v. *Oregon Mutual Fire Ins. Co.,* 166 Or. 690, 114 P. 2d 1005:

" 'It is our opinion that, taking the automatic coverage provision in its entirety, it was intended to apply to any other automobile acquired by the assured who owns one or more automobiles, provided that all the automobiles, whether one or more, then owned by him were insured by the defendant corporation.' "

No decision of our Court in point has been called to our attention, nor do we know of any.

Two. Appellant says the judgment of the trial court should be reversed because appellee gave no notice to appellant of the accident as required by the terms of the policy. As stated previously, this case was tried before the court, and, therefore, all findings of fact must be sustained if supported by substantial evidence. It is not denied here that appellee testified he gave notice of the accident involving the 1949 car on the day after it occurred. It is also not disputed that later the matter was turned over to an adjuster who made a detailed report to appellant. It is, however, argued by appellant that the report showed appellee was only interested in being repaid for medical expenses incurred by him as a result of the accident, but we find abundant evidence in the record to sustain a finding that appellant knew of, and investigated, the accident with Fratesi.

Three. We cannot agree with appellant that the case must be reversed because Fratesi secured a *default* judgment against appellee. We agree with appellant that ordinarily a jury must be impaneled to assess damages in a case like this. [See *Naperskie* v. *Trevillion,* 202 Ark. 638, 151 S. W. 2d 992.] However in our opinion appellant waived any right it might have had at any time to refuse payment because of the default judgment by denying all liability as further hereafter explained and discussed.

Four. It is now strenuously contended by appellant that it is not liable to appellee in any amount because appellee failed to give notice of the Fratesi suit as required by the terms of the policy. In support of its contention, appellant quotes portions of the policy as follows:

"Notice of Claim or Suit—Coverages A and B. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

"Action Against Company—Coverages A and B. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

Again, it is our conclusion that appellant waived its right under the above provisions by denying any and all liability.

Not only does appellant contend there is no substantial evidence to show such a denial but also contends that even so, such denial did not constitute a waiver. We are forced to disagree with appellant on both counts.

The exhibits (introduced in evidence by appellee) included reports, dated November, 1961, to appellant by the adjusting agency. Among other things they showed: (a) an investigation had been made as to the extent of injuries to Mrs. Fratesi as a result of the collision; (b) an investigation had been made as to how the accident occurred; and (c) that appellee was clearly to blame for the accident. Exhibit No. 6 shows that the adjusting agency advised appellant in these words:

"As per your instructions we have contacted the assured and advised that there would be no coverage. * * *

"We have contacted Attorney Jack Davis, who was representing the claimant's collision carrier for their subrogation rights and advised him that Mr. Goudy has no coverage under his policy with your company and we have further contacted Attorney Jay Dickey, who was representing operator of the adverse vehicle for personal injuries, advising him that there is no coverage."

Appellant did not contend it counteracted or modified the above reports.

In view of the above we must conclude there was substantial evidence to sustain a finding that appellant disclaimed all liability under the terms of the policy.

Applying the relevant law to the facts we find appellant waived its rights under the above quoted provisions of the policy.

In the case of *American Fidelity & Casualty Company, Inc.* v. *Northeast Ark. Bus Lines, Inc.*, 201 Ark. 622, 146 S. W. 2d 165, many of the pertinent facts were similar to those of the case under consideration. The policy (as set out in the opinion) provided that assured shall "give immediate notice" of any accident, and shall forward to the insurer "every process, pleading and paper" in case suit is brought. Notice of the accident was not given until six months had elapsed after the accident, and suit was filed against the insured about the same time. There was a trial before the judge and a default judgment was entered in favor of Shelton, the injured party. Appellant paid the judgment, but sued the insured to recover the amount paid on the ground that he had not complied with the provisions of the policy relative to notice. The trial court and this Court held against the insurer's contention upon the ground that the insurer had "denied all possible liability under the insurance contract . . . * * * The law does not impose upon appellees [the insured] the doing of a vain and useless thing." In the case under consideration it seems to us that it would have been a vain and useless thing for appellee to give notice to appellant of the Fratesi suit since it had already disclaimed all liability.

In this connection the general rule seems to be well stated in 45 C. J. S. *Insurance* § 1062:

"—Repudiation of Liability on Different Ground. As a general rule, the insurer under a policy of liability insurance waives objections as to notice of claim and failure to forward papers where it repudiates liability on a different ground."

The reason for this rule is concisely stated in *Haskell* v. *Eagle Indemnity Co.*, 108 Conn. 652, 144 A. 298:

" 'The denial by the defendants of all liability in this case expressly conceded that there was a loss, and

was a notice to the plaintiffs that they would not be bound in any event, though formal proofs were furnished. * * * . . . the law rarely, if ever, requires the observance of an idle formality. . . .' ''

See also 76 A. L. R. 147, 123 A. L. R. 974, and 18 A. L. R. 2d 491. In the latter citation there appears this statement:

''It is well settled by the later cases involving this point that the insurer is precluded from defending successfully against an action brought under a liability policy on the ground of a violation by the insured of the provisions as to notice and the forwarding of suit papers where it had denied liability on some other ground.''

Fifth. Finally it is argued by appellant that the Fratesis should have been made parties to this suit. The answer to that argument is that appellee tried to make them parties but appellant objected, and his objection was sustained by the court.

It follows that the judgment of the trial court must be, and it is hereby, affirmed.

HARRIS, C. J., not participating.

PITTS *v.* GREENE, ADM'R.

5-3311 382 S. W. 2d 904

Opinion delivered October 5, 1964.

[Rehearing denied November 9, 1964.]

Mahony & Yocum, for appellant.

Brown, Compton & Prewett, for appellee.

PAUL WARD, Associate Justice. Susan Ann Russell, at the age of seventeen years, was fatally injured while riding in an automobile which was struck by a large trailer truck. The truck was owned by the Pitts Trucking Company (hereafter called "Pitts") and it was being driven by appellant Henry Gibson. The car in which Susan was riding was being driven by her high school classmate, Fifi Greene. It is not denied that Miss Greene was entering a street intersection in El Dorado with the green light when the truck ran the red light and struck her car.

Suit was filed against Pitts and Gibson by Chester L. Greene, as Administrator of the Estate of Susan Ann Russell, deceased. Although other issues are involved on appeal, the prime contention of appellants at the trial was and here is that the collision was caused by the failure of the truck's brakes to function and that the collision was a result of an unavoidable accident.

At the conclusion of a trial the jury returned a verdict in the amount of $2,179.28 for the use and benefit of the Estate of Susan, $25,000 in favor of Susan's mother, and $15,000 in favor of her father. Judgment was rendered accordingly, and this appeal follows.

For a reversal appellants rely on seven separate points which we will discuss under the following headings: *One,* appellants' request for instructed verdicts; *Two,* alleged error in giving certain instructions; *Three,* alleged error in refusing to give a requested instruction; and *Four,* excessive judgments in favor of Mr. and Mrs. Russell.

One, appellants contend the court should have instructed a verdict in favor of each of them, it being conceded apparently that any negligence shown on the part of Gibson would be attributed to Pitts. Simply stated, the issue is whether the record contains any substantial evidence to support a finding of negligence on the part of Gibson. Appellants strongly contend the record contains no such evidence. We are unable to agree with appellants.

Several witnesses who saw the accident testified as to how it happened. We think it will suffice to summarize this testimony since there is slight dispute as to the material facts. The collision occurred at the intersection of West Hillsboro Street and South Washington Street —the former running east and west and the latter north and south. Just west of said intersection and at each intersection there was a red-green traffic signal. For convenience we may hereafter refer to where South West Avenue intersects Hillsboro Street as the "first intersection" and to the intersection where the collision occurred as the "second intersection". The truck consisted of a tractor or cab and a 37-foot trailer. It was loaded with 25,000 pounds of steel at the time, and the overall weight of the truck and the load was a little over 54,000 pounds. Gibson stated he had been driving cross-country since 6:30 that morning, and the collision occurred at about 3:30 o'clock p.m. West Hillsboro Street slopes 5 feet from the first intersection to the second intersection and then it begins to rise as it goes over a viaduct 37 feet high.

The testimony of Appellant Gibson was in material respects substantially as follows: I am 36 years old; I

had been driving for Pitts 7 years and had driven this truck 4 months when the accident occurred; previous to the accident I had used the brakes several times that day and had had no trouble; the first stop I made in El Dorado was at the first intersection — there were two cars in front of me and when the light turned green I started east along West Hillsboro Street—I was driving 20 to 25 miles per hour; when I was about 200 feet west of the second intersection I saw the light turn red at the second intersection—I didn't attempt to put on my brakes until I had run about 50 feet and then when I did try to apply the brakes I found they didn't work; I first tried the service brake and then the emergency brake and after that I tried to put the truck in low gear—just as I tried to put the truck in low gear the cab of the truck was entering the intersection and collided with the automobile in which Susan was riding; if I had put the truck in low gear when I was 200 feet from the second intersection it would not have stopped the truck but it could have slowed it down and likely have missed the car; the truck picked up speed because of the down slope without applying any power; when I tried to put the truck in low gear it was already entering the second intersection.

This Court has held that any material facts may be established by circumstantial evidence. *St. Louis, I.M. & S. Ry.* v. *Hempfling,* 107 Ark. 476, 156 S. W. 171. In the case of *Adams* v. *Browning,* 195 Ark. 1040, 115 S. W. 2d 868, this Court reversed the action of the trial court in directing a verdict for the defendant, saying:

> "Under our system of jurisprudence, it is the province of the jury to pass upon the facts. It is not only their privilege but their right to judge of the sufficiency of the evidence. The credibility of the witnesses, the weight of their testimony, and its tendency, are matters peculiarly within the province of the jury. If there is any substantial evidence it is the duty of the court to submit the matter to the jury."

When applying the factual situation in this case to the law as set out in the above case, we are unable and unwilling to say there is no substantial evidence of negligence on the part of Gibson to support the finding of the jury. The jury had a right to believe all or any part of his testimony, and the jury might have concluded that appellant was driving at too great a speed compatible with the slope of the street and the weight of the truck and its contents; at one time Gibson seems to say that as soon as he learned that the brakes would not work he tried to put the truck in low gear while at another time he seems to say he tried to apply the service brake and the emergency brake before attempting to put the truck in low gear. Gibson also testified that just as he attempted to put the truck in low gear it had already entered the second intersection; but at another time it would appear that he was 150 feet away from the intersection when he tried to shift to low gear. Such apparent discrepancies of course could have been considered by the jury.

There is another ground under which Pitts might have been held liable aside from any negligence on the part of Gibson. See *Brand* v. *Rorke,* 225 Ark. 309, 280 S. W. 2d 906. The facts in that case were somewhat similar in principle to the facts of the case under consideration. Appellant, Brand, was injured while riding in a car driven by appellee, Rorke. In appellant's complaint against Rorke it was alleged that the latter was driving an automobile without brakes which was the cause of her injuries. At the trial appellant testified that appellee was driving down a mountain highway when the brakes failed, etc. The trial court directed a verdict in favor of appellee. In reversing the trial court we made this statement:

> "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 dis-

prove 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. [Cases cited.] 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."

Two, appellants objected to several instructions given to the jury. It would serve no useful purpose to set out all these instructions and comment on each one of them. However, we have carefully examined each and find no reversible error. We deem it sufficient therefore to comment only on the principal objections raised.

Instruction No. 12 reads as follows:

"You are instructed that it is the duty of every person operating a motor vehicle upon a public street or highway to keep a lookout for other vehicles which may be upon the streets or highways, and to have his or her vehicle under such control as will enable him or her to check its speed or to stop if necessary in order to avoid injury or damage, where danger is reasonably to be anticipated or is apparent."

Appellants' objection to the above instruction is that it imposes an absolute duty on the driver to keep a lookout and to have his vehicle under control, etc. while the law requires only reasonable care. We cannot agree that the instruction, as given, constitutes reversible error when it is considered in connection with previous statements of this Court and with other instructions given by the court in this case. In *Livingston* v. *Baker,* 202 Ark. 1097, 155 S. W. 2d 340, we said:

"Criticism of this instruction is particularly directed to the language, 'When the driver of a motor vehicle sees danger ahead, or it is reasonably apparent if he is keeping a proper lookout, or if he is warned of approaching imminent danger,' then it

> is his duty to bring his vehicle under control and to stop it if necessary to avoid the danger. We see no objection to this language when applied to the undisputed facts in this case or to the facts which the jury found by its verdict to be true, even though disputed."

The above comment is indeed applicable to the facts here. Unquestionably Gibson was warned of "approaching imminent danger" when he saw the signal light at the second intersection turn red.

In the case of *Northwestern Casualty & Surety Co.* v. *Rose,* 185 Ark. 263, 46 S. W. 2d 796, where the issue was similar to the one here raised, we said:

> "It is the well-settled rule that the duty rests upon the driver of an automobile to exercise ordinary care in its operation, and in the exercise of such care it is his duty to keep a constant lookout to avoid injury to others. This is particularly incumbent upon him when driving on the street of a city in order to avoid injury to pedestrians, as he should anticipate their presence upon such streets and their equal right to their use."

From the above it is apparent that at least *two* duties rest upon the driver: one is the duty to exercise reasonable (or ordinary) care in operating a vehicle while the other is the duty to keep a proper lookout for the safety of others. Instruction No. 12 covered the latter duty only. Other instructions of the court correctly defined negligence and ordinary care as applied to Gibson in operating a vehicle on a street or highway.

The trial court gave Instruction No. 22 which deals with the question of damages for mental anguish. Appellants objected on the ground that "it ignored this court's rule that damages for mental anguish can only be awarded for such anguish over and above normal mental anguish". Granting that appellants' objection is sustained by *Peugh* v. *Oliger, Admx.,* 233 Ark. 281, 345 S. W. 2d 610, we do not agree that the suggested defect

in the given instruction calls for a reversal. We think it was cured by other instructions given to the jury. Instruction No. 21 given by the court told the jury that in order to recover damages for mental anguish it "must be more than the normal grief over the loss of a loved one". In addition, the court, in Instruction No. 1, told the jury it must consider all instructions as a whole.

Three, appellants here contend that the court erred in failing to give Instruction No. 17 requested by them, and set out in appellants' argument as follows:

> "You are instructed that a motorist, in a sudden emergency, and who is required to act quickly and acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence, provided he exercised, in the emergency, care of a reasonably prudent individual under like circumstances."

We find no error. First, because the court had already given Instruction No. 15A which we find correctly covered the same subject matter. Also, it appears that the instruction copied above omits a portion of the requested instruction which was refused by the court. The omitted portion appears to us to be argumentative and therefore objectionable. Anyway it was not necessary for the court to give both instructions.

Four, finally, it is urged that the judgments based on mental anguish are excessive. As stated, the jury gave Susan's mother $25,000 and her father $15,000. Appellants now ask us to reduce these judgments, but we are not persuaded to do so. In approaching this question we are reminded of what we said in the case of *J. Paul Smith Co.* v. *Tipton,* 237 Ark. 486, 374 S.W. 2d 176:

> ". . . 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."

We have recently been called on to consider the same question in the cases of *Tiner* v. *Tiner,* 238 Ark. 222, 379 S. W. 2d 425, and *Peugh* v. *Oliger, supra,* in which sizeable amounts were approved for mental anguish. In none of these cases was there shown more evidence of mental anguish than is shown here, particularly as applied to Mrs. Russell. Susan is pictured by several witnesses as a lovely girl, active in school and church affairs, and attached to her parents. Susan's mother said she went to pieces and had to go to work since she couldn't stay at home, that she was unable to work and had to leave town several times—but nothing helped. The nurse drew a touching picture of how Mrs. Russell acted when she visited the hospital, indicating excessive grief—this was continuous while the nurse was there. The extent to which Susan's death affected the father is indicated by the showing he was visibly upset while testifying—his face was contorted and it was hard for him to make audible answers. At times he covered his face with his hands.

It was within the province of the jury to fix the pecuniary remuneration to compensate the parents for their grief because of the death of Susan. We are not able to point to any satisfactory reason why we could or should, under the facts in this case, reduce the amounts fixed by the jury.

Affirmed.

5-3320 382 S. W. 2d 366

Opinion delivered October 5, 1964.

Wright, Lindsey, Jennings, Lester & Shults and *Thomas E. Sparks,* for appellant.

L. Weems Trussell, for appellee.

JIM JOHNSON, Associate Justice. This is an action for damages for personal injuries sustained in one of a chain of automobile rear end collisions.

On November 10, 1962, appellee Faye V. Clark was a passenger in an Oldsmobile automobile being driven by her husband on Highway 71 in Washington County. They and their two passengers were en route to a foot-

ball game in Fayetteville. Ahead of the Oldsmobile was a Pontiac being driven by Mr. Samuel Campbell; behind was a Cadillac driven by appellant Garland Williams. Several cars ahead in the line of traffic came to a stop, as did Mr. Campbell. Mr. Clark braked sharply, but skidded into the rear of Campbell's Pontiac. Immediately after this collision Clark's Oldsmobile was struck from the rear by Williams' Cadillac. Appellee, riding in the front seat of the Oldsmobile, was thrown forward on her knees, her right foot twisted underneath her. About March 28, 1963, appellee filed suit in Dallas Circuit Court against appellant, three occupants of appellant's car and Mr. Campbell, owner of the Pontiac ahead. Trial was had on August 29, 1963, at which time the court directed a verdict in favor of all the defendants other than appellant, leaving appellee and appellant as the only parties to the suit. Appellant's motions for a directed verdict as to him were denied, and the jury subsequently returned a verdict for appellee in the sum of $25,000.00, for which sum judgment was entered. Appellant has appealed urging that (1) the court erred in refusing to grant his requests for a directed verdict, and (2) the verdict was grossly excessive.

Appellant moved for a directed verdict at the close of appellee's case and again at the conclusion of all the evidence, both of which motions were denied. In *Smith* v. *McEachin,* 186 Ark. 1132, 57 S. W. 2d 1043, the canon on directed verdicts was pronounced with such clarity that it will bear repeating again:

"It is a rule of universal application that, where the testimony is undisputed and from it all reasonable minds must draw the same conclusion of fact, it is the duty of the court to declare as a matter of law the conclusion to be reached; but, where there is any substantial evidence to support the verdict, the question must be submitted to the jury. In testing whether or not there is any substantial evidence in a given case, the evidence and all reasonable inferences deducible therefrom should be viewed in

the light most favorable to the party against whom the verdict is directed, and if there is any conflict in the evidence, or where the evidence is not in dispute but is in such a state that fair-minded men might draw different conclusions therefrom, it is error to direct a verdict."

In the case at bar there was testimony of quite a few eyewitnesses, passengers and drivers of at least four cars, including appellant and appellee. Appellant's contention is that appellee was probably injured when her husband collided with the vehicle ahead of his, and that appellee failed to produce any substantial evidence to discharge appellee's burden of proving that she was injured as a result of appellant's negligence. Appellee's testimony was that when her husband hit the Pontiac ahead, she was thrown or slid forward to her knees, and that when appellant's Cadillac hit appellee's Oldsmobile from the right rear causing the rear of the Oldsmobile to swing out across the center line of the highway, it "threw me and jarred me around and turned my ankle under me." Testimony of the driver of the Pontiac, Mr. Campbell, states that he was driving in the right hand lane, the Oldsmobile behind him, which hit him "square across the rear end." Testimony of others corroborate that the Oldsmobile was in line behind the Pontiac, hit it squarely from the rear in the first collision after laying down some twenty feet of skidmarks from braking, and in the second collision the rear of the Oldsmobile was knocked or pushed sideways across the center highway line, snapping the car around. There was testimony that appellant was following the Oldsmobile more closely than was prudent considering the traffic and its speed, failed to exercise ordinary care in avoiding collision with the car in front, failed to keep a lookout and keep his automobile under reasonable control as to be able to check its speed or to stop, that he didn't brake his car but tried to pull into the left lane and while doing so struck the Oldsmobile, knocking it sideways across the highway. All of this is controverted, of course, but this and other evidence in the record, submitted to the

test of *Smith* v. *McEachin, supra,* convinces us the question of whether appellant was negligent and, if so, whether his negligence was a proximate cause of appellee's injuries was properly a jury question. Thus the trial court did not err in refusing to direct a verdict for appellant.

Appellant's second argument is that the verdict of the jury was grossly excessive.

In a recent case, *Beggs* v. *Stalnaker,* 237 Ark. 281, 372 S. W. 2d 600, this court reiterated its rule relative to damages as follows:

"'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."

In addition to the testimony of appellee about the injury to her foot and ankle, its continued duration, the later inversion of her foot requiring a special cast and still later orthopedically-corrected shoes, the pain, swelling and discomfort she has continued to have, the irritability, tension and depression apparently resulting from the trauma of the accident, appellee and her husband testified how her injuries prevented appellee from performing many of her duties in their business and at home. He also corroborated her testimony about her physical and emotional damage. Three doctors testified on behalf of appellee. A Little Rock orthopedist testified that appellee had a permanent residual disability of 25% of the foot and ankle as a result of the severe mid-tarsal joint sprain, possible fracture and severe ligamentous injury. Appellee's family doctor testified that the permanent disability would be from 25% to 35% and that he was "more inclined to 35%"; that while he was not qualified to testify about personality changes, appellee

was more upset and nervous since the accident, suffered from agitated depression, had required various tranquilizers and on occasions sleeping tablets, and had lost 15 pounds in a two-month period following the collision. A Little Rock neurologist testified that from his examination and history, appellee had some predisposition toward acute chronic depression prior to the accident, that a chronic depressing reaction with anxiety was precipitated by the accident and, based upon his experience in the field of neurology, that these acute episodes of depression would tend to grow in severity in the future and should require treatment.

Appellant offered no medical or other testimony in contravention of appellee's damages.

"We cannot measure human suffering in dollars and cents, but we have in numbers of cases held that it entitled the sufferer to a substantial recovery in damages." *Gaster* v. *Hicks,* 181 Ark. 299, 25 S. W. 2d 760. While we as jurors might not have concurred with the verdict here returned, our province on appeal is confined to a determination of whether the amount of the verdict resulted from passion or prejudice or was so grossly excessive as to shock the conscience of the court. In order to preserve the sanctity of the jury system it has been wisely determined that juries have the same right to pass upon the question of the amount to be awarded as compensation for an injury that they have to pass upon the question of liability for the injury; and we may not set aside a verdict in either case where it is supported by substantial testimony. *Phillips Motor Company* v. *Rouse,* 202 Ark. 641, 151 S. W. 2d 994.

Finding no error, the judgment is affirmed.

George Rose Smith, J., and Robinson, J., think the verdict is excessive.

5-3309 382 S. W. 2d 900

Opinion delivered October 5, 1964.

[Rehearing denied November 9, 1964.]

[redacted]

William J. Smith and *Ben Allen,* for appellant.

Gordon & Gordon, for appellee.

Frank Holt, Associate Justice. The appellee, Willie Harelson, brought this action against the appellants, Missouri Pacific Railroad Company, and its employees, W. E. Parsall, F. E. Matthews, and A. J. Hanson, to recover damages for personal injuries he sustained in a spur

track crossing accident. The appellants denied the various allegations of negligence and pleaded the defense of contributory negligence. Upon interrogatories a jury found the issues in favor of the appellee and awarded him damages in the amount of $12,500.00. On appeal from this judgment the appellants first contend that their motion for a directed verdict should have been granted.

The collision occurred at the crossing of a street and a railroad spur track. The paved street runs north and south. The spur track runs east and west. They intersect at right angles. At the time of the accident there was a large sheet metal building located at the southwest corner of the intersection. There was evidence that this building was six to fourteen feet west of the street and somewhat less than six feet south of the spur track thus creating a "blind" corner. The train engine had proceeded west across this intersection upon some business property where two box cars were coupled onto the front end which was about one hundred feet from the crossing. The engine, with brakeman Duty and appellants, engineer Matthews and fireman Hanson aboard, was backed into the spur track crossing as appellee came upon it. The appellee, with six passengers, was driving north toward this crossing a few minutes after leaving their work at 4:00 P.M. It was a cold day, the pavement was covered with snow and ice, the car windows were up and the car heater operating. The windshield and windows permitted a clear and unobstructed view. The appellee testified that he was looking straight ahead and that it was impossible for him to see to his left or the west until he was even with the north end of the metal building which was blocking his view. He was corroborated by the other occupants of his car. He testified that he did not notice the presence of the engine backing into the crossing until his brother discovered it just as he drove upon the track. The engine struck the left front door of his automobile and carried it down the spur track approximately thirty feet. Appellee was driving approximately ten miles per hour as he entered the spur track crossing. The engine was traveling approximately three

or four miles per hour. No one was on the rear end of the engine as it backed into the crossing. The engineer and fireman were in their regular positions near the front of the engine. The brakeman was on the front end of the engine where the cars were coupled.

The fireman, appellant Hanson, was the only crewman who observed the accident. He testified that he was keeping a lookout from his position which was about thirty feet from the lead or rear end of the fifty-foot-long engine; that as they backed into the crossing his view was blocked by the building; that he first saw appellee's car when it was about six feet from the track and as the rear end of the engine entered the crossing; that he then gave a warning to the engineer who applied the emergency brakes before striking the car. There were no signs of any kind maintained at the crossing and no bell was ringing since it was frozen. According to appellee's evidence no whistle was heard to blow. For many years appellants had stationed a flagman at this crossing to warn the public during such switching operations. Appellee and the occupants of his car were accustomed to the presence of a flagman since they had traveled this street and crossing for many years going to and from their employment.

The appellants submit that the appellee, in failing to look or listen, was guilty of contributory negligence equal to or greater than that of appellants and, therefore, the court should have granted appellants' motion for a directed verdict. We cannot agree. The failure to look and listen is not always negligence as a matter of law nor an absolute duty. In the early case of *Martin* v. *Little Rock & Ft. S. Ry. Co.*, 62 Ark. 156, 34 S. W. 545, we recognized there was no absolute duty to look and listen without any exception. There we said:

> "We do not hold in every case where a traveler fails to look and listen, and is injured by a train while crossing a railway track, the case should be taken from the jury. It is only where it appears from the evidence that he might have seen had he

> looked, or might have heard had he listened, that his failure to look and listen will necessarily constitute negligence."

See, also, *St. Louis I. M. & S. Ry. Co.,* v. *Hitt,* 76 Ark. 224, 88 S.W. 911; *Tiffin* v. *St. L. I. M. & S. Ry. Co.,* 78 Ark. 55, 93 S.W. 564; *Chitwood* v. *St. Louis I. M. & S. Ry. Co.,* 104 Ark. 38, 148 S.W. 278; and 44 Am. Jur., Railroads, § 546 et seq.

Furthermore, in the case at bar we think the practice of stationing a flagman at the crossing, to which appellee was accustomed for many years, gave him the right to rely upon the presumption that the track was clear. *Railway Company* v. *Amos,* 54 Ark. 159, 15 S.W. 362. On this subject see 71 A.L.R. 1160.

Where fairminded men can honestly differ as to the existence of either negligence or contributory negligence, it is not a question of law. It is a question of fact to be settled by a jury. *St. Louis I. M. & S. Ry. Co.,* v. *Hitt, supra.*

In the case at bar we think the facts are such that fairminded men could differ in their conclusions as to the existence of either negligence or contributory negligence of the parties. The question was properly submitted to the jury for its determination.

The appellants next contend that the court erred in submitting to the jury instructions relating to the maintenance of a lookout. Appellants particularly complain that the word "defendants" is used in Instruction No. 2. This instruction was given in the language of the statute. Ark. Stat. Ann. § 73-1002 (Supp. 1963). The duty to keep a lookout may be discharged by a single member of a train crew provided such person is in a position to do so efficiently and effectively. The duty is not imposed upon all members of the train crew. *St. Louis S. W. Ry. Co.,* v. *Cone,* 111 Ark. 309, 163 S.W. 1170; *Taylor* v. *St. Louis I. M. & S. Ry. Co.,* 116 Ark. 47, 171 S.W. 1182.

In *Kelly* v. *DeQueen & Eastern Ry. Co.,* 174 Ark. 1000, 298 S. W. 347, we said:

"We think the law requires the railroad company to keep an efficient lookout, and if the person on the train is so situated that it is impossible to keep a lookout to ascertain whether persons are in danger of being hit by moving the cars, it would then be the duty of the railroad company to keep such a lookout as would discover persons that might be hit by the moving of the train." Certainly it was a question for the jury, in the case at bar, under proper instructions, to determine whether the appellants had met this test. As the engine was backing into the crossing the engineer was on the north side of the engine maintaining a lookout in that direction. It was impossible for him to see appellee approaching from the south. The brakeman, Duty, was riding the front end of the engine approximately fifty feet from the rear end. The fireman, Hanson, was the only employee of the railroad who could possibly see appellee as he approached the crossing from the south. Hanson's position was thirty feet from the rear end of the engine as it backed into the crossing. The large building blocked his view to the south. We are of the view there was substantial evidence justifying the submission to the jury the questions whether an efficient and effective lookout was being kept and whether the accident could have been averted by keeping such a lookout. The jury could have believed that had the engineer received an earlier warning the train could either have been stopped or slowed sufficiently to avoid the collision. The questions pertaining to a lookout were correctly submitted to the jury under proper instructions.

Appellants contend that the court erred in refusing to give their requested Instruction No. 26A. This instruction follows Ark. Stat. Ann. § 75-637 (Supp. 1963) defining the duty of a traveler to stop at a railroad crossing. We think that appellants' Instructions Nos. 17 and 18, which were given by the court, fairly presented appellants' theory of the case on this issue. These instructions defined the duty of a traveler approaching a railroad crossing, as well as his duties when obstructions, noises, or other conditions prevent effective looking and

listening. It is not error to refuse to give an instruction upon a subject adequately covered by instructions already given. *Tiffin* v. *St. Louis I. M. & S. Ry. Co., supra; Pine Bluff & S. W. Co.* v. *McCaskill,* 88 Ark. 177, 114 S. W. 208; *Nuckols* v. *Flynn,* 228 Ark. 1106, 312 S. W. 2d 444.

Finally appellants urge that the verdict of $12,500.00 is excessive. The appellee suffered an injury to his left shoulder. He continued his employment as an "oiler" although he was relieved of any duties requiring use of his left arm for six weeks at which time he resumed his regular duties. His duties mainly require oiling machinery and no heavy lifting is necessary. The uncontradicted medical evidence is that there is a rotator cuff tear in appellee's left shoulder resulting in a ten per cent permanent partial disability to the body as a whole; that upon movement of the shoulder there is a grating noise in the joint and pain results; that appellee cannot move his left arm above shoulder level without pain and this limited motion appears permanent; that injections of cortisone have to be made with a two and one-half inch needle into the tenderest spot of the shoulder joint to control inflammation; that the necessity of this injection may be expected to continue about every five weeks the rest of his life at a cost of $8.00 per injection. Appellee was fifty-three years of age at the time of the injury with a life expectancy of 19.19 years and was earning $11.50 per day on the date of the trial. The medical bill was $279.00. The undisputed testimony is that appellee had worked for approximately twenty-six years in his present employment and that because of his injury he had to refuse a promotion in his work. This proffered job would have paid him $2.00 more per day. This was a proper element of damages for consideration. *Hines* v. *Patterson,* 146 Ark. 367, 225 S. W. 642; *Clark Lbr. Co.* v. *St. Coner,* 97 Ark. 358, 133 S. W. 2d 1132; *St. L. I. M. & S. Railway Co.* v. *Sweet,* 60 Ark. 550, 31 S. W. 571. In view of the diminution of appellee's earning capacity, the pain and suffering endured, and to be endured during the remainder of his life, his attendant

medical expenses, and his permanent partial disability, we cannot say that the verdict of the jury is excessive.

Finding no reversible error, the judgment is affirmed.

BALLARD *v.* BEARD.

5-3318 382 S. W. 2d 593

Opinion delivered October 12, 1964.

E. V. Trimble, for appellant.

Cockrill, Laser, McGehee & Sharp, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal is an effort to have an instrument admitted to probate as the last will and testament of Ethel Bell Beard. The appellant is one of the beneficiaries under the alleged will, and appellee is the surviving husband of the deceased.

Ethel Bell Beard died April 5, 1963. Seven days later an instrument was admitted to probate as her last will and testament. On April 23, 1963, Leroy Beard, surviving husband of the deceased, filed this petition[1] praying that the probate order be set aside. On September 3, 1963, the Probate Court heard the contest; and set aside the order of probate, finding that Ethel Bell Beard died intestate. From the said order[2] of September

[1] He alleged, regarding the instrument: "(a) It is not duly executed, witnessed or attested by two or more credible witnesses in the presence of each other and in the presence and at the request of the decedent; . . ."

[2] Here is the text of the order challenged on appeal: "Now on this day this cause comes on to be heard, petitioner Leroy Beard, appearing by his solicitor, Abner McGehee, and Dora King, Executrix of the Estate of Ethel Bell Beard, appearing in person and by her solicitor, Edward V. Trimble, the same is submitted to the Court upon the

3rd there is this appeal; and the points of appellant's argument are:

"1. That it will be presumed, in the absence of contrary evidence, that will was executed in compliance with all requirements of law.

"2. That the Court errored in permitting witnesses to give parole testimony to vary the written instrument that they signed.

"3. That the Appellee has not sustained the burden of proof required for nullifying the genuineness of the Will."

We consolidate and consider the appellant's points together. The evidence offered to the Court at the hearing on April 12, 1963, when the will was admitted to probate, was the usual form of "proof of will," and was as follows:

"PROOF OF WILL

"We, C. Washington, and Willie Williams, on oath state:

"We are the subscribing witnesses to the attached written instrument, dated September 11, day of 1963,

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petition to contest probate of will, testimony of witnesses and exhibits thereto, from all of which the Court doth find:

"1. That the petition to contest the probate of will filed herein was filed within the time allowed by law.

"2. That the instrument purporting to be the last will and testament of Ethel Bell Beard which was admitted to probate by this court on the 12th day of April, 1963, was not executed, witnessed or attested by two or more credible witnesses in the presence of each other and in the presence and at the request of the decedent, and that the order admitting said purported will to probate should be set aside, and Dora King, heretofore appointed executrix of the estate of Ethel Bell Beard, is hereby discharged as executrix of said estate.

"3. That the decedent, Ethel Bell Beard died intestate. "It is, therefore, by the Court Considered, Ordered, Adjudged, and Decreed that the order admitting an instrument purporting to be the last will and testament of Ethel Bell Beard to probate is hereby set aside, and Dora King is hereby discharged as Executrix of the Estate of Ethel Bell Beard and is further ordered to make a complete and final accounting of her actions as such executrix to this court within ten days of the entry of this order; and the Court hereby appoints Leroy Beard, surviving spouse of Ethel Bell Beard, as administrator of her estate and to serve in such capacity without the necessity of bond, and the Clerk of this Court is hereby ordered to issue Letters of Administration to the said Leroy Beard. Dated this 3rd day of September, 1963."

which purports to be the last will of Ethel Bell Beard, deceased. On the execution date of the instrument the testatrix, in our presence, signed the instrument at the end thereof, or acknowledged her signature thereto, declared the instrument to be her will, and requested that we attest her execution thereof; whereupon, in the presence of the testator each of us signed our respective names as attesting witnesses. At the time of execution of the instrument the testatrix appeared to be eighteen years of age or older, of sound mind, and acting without undue influence, fraud or restraint.

"DATED this 11th day of April, 1963.

"/s/ Willie Williams
"/s/ Cleouphs Washington

"STATE OF ARKANSAS
COUNTY OF PULASKI

Subscribed and sworn to before me this 11th day of April, 1963. /s/ Alice S. Trimble, Notary Public (SEAL)."

At the trial on September 3, 1963, each of the alleged attesting witnesses to the will — *i.e.,* Cleouphs Washington and Willie Williams—testified against the proof of will and also against the attestation of the will. Regarding the "proof of will," Cleouphs Washington testified that he merely signed a paper that some man brought to him; that he never swore to the paper; and that he was not in the presence of the alleged notary at any time. Willie Williams testified that no notary public was present when he signed the paper; that he was never sworn; and that he did not know what the paper was. The Notary Public whose name appears on the proof of will was not called to testify as a witness to refute the testimony of the witnesses, Washington and Williams, or to show that the Notary did administer any oath to either of them. So the "proof of will," on which the initial probate was based, stands entirely impeached; and the Court was correct in setting aside the probate of a will where due proof had never been made.

We come then to the testimony of Washington and Williams as to the attestation of the proffered will; and each of them testified against the validity of the instrument. The will—the original of which is before this Court—was a typewritten instrument prepared by a person who was not a lawyer. The first page of the will concludes with the signature of the alleged testatrix; and the entire attestation is on a second and separate page. Cleouphs Washington testified that Zola McGuire brought the attestation page to him at his home and asked him to sign it, telling him that Ethel Bell Beard was in the hospital and wanted him to sign the page; and that he signed it under those circumstances. He testified that when he signed the page only he and Zola McGuire were present; that he never saw Ethel Bell Beard or Willie Williams sign any instrument of any kind at any time; and that Ethel Bell Beard never at any time asked him to sign as a witness to her will. Willie Williams testified that Zola McGuire brought a paper to him at his home and asked him to sign it, claiming it related to some out-of-town property; that he wrote his name; that only he and Zola McGuire were present; that he never saw Ethel Bell Beard sign her name; that she never asked him to witness any instrument; and that Cleouphs Washington was not present when he signed the said paper for Zola McGuire. While there was some slight contradiction to the testimony of these witnesses, yet, in the main, their testimony stood up against vigorous cross-examination. A significant fact is that Zola McGuire did not testify.

The appellant insists that the Court should not have allowed Washington and Williams to testify *in disparity of the proof of will or against the attestation of the will;* but we hold that they were competent to so testify, even though their testimony under such circumstances is viewed with suspicion. In *Leister* v. *Chitwood,* 216 Ark. 418, 225 S. W. 2d 936, we quoted from *Rogers* v. *Diamond,* 13 Ark. 474, and from *Anthony* v. *College of the Ozarks,* 207 Ark. 212, 180 S. W. 2d 321; and then used this language:

"The situation, as here, where one of the subscribing witnesses denies the existence of certain facts necessary for legal execution of a will, is discussed in 2 Page on Wills (Lifetime Ed.), § 758. There it is stated: 'The testimony of the subscribing witnesses which denies the performance of one or more of the facts which are necessary to the validity of the will is, at best, to be received with caution, and to be viewed with suspicion . . .

"The subscribing witnesses are especially discredited where they testify in favor of the will at probate and against it at contest; or where they hesitate and evade before denying the validity of the execution of the will' (page 473)."

Likewise, in *Bruere* v. *Mullins,* 229 Ark. 904, 320 S. W. 2d 274, we recognized the general rule that attesting witnesses may testify against the validity of the will, even though their testimony is viewed with suspicion. Cases generally are to the same effect. See 57 Am. Jur. p. 585, "Wills" § 881; annotation in 79 A. L. R. 394 entitled, "Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator." See Page on Wills (Bowe-Parker Rev.) Vol. 3, § 29.24.

When we hold—as we do—that the attesting witnesses to the will were not disqualified from testifying against the validity of the will, we have decided all of appellant's points, because, with the testimony of the attesting witnesses in the record, the great preponderance of the testimony is against the validity of the will.[3] The Probate Court was correct in so holding.

Affirmed.

[3] Ark. Stat. Ann. § 60-403 (1947) gives the requirements for the valid execution of a will.

5-3287 382 S. W. 2d 578

Opinion delivered October 12, 1964.

[redacted]

Harper, Harper, Young & Durden, Warner, Warner, Ragon & Smith, for appellant.

Mark E. Woolsey, Don Gillespie and *Don Langston,* for appellee.

GEORGE ROSE SMITH, J. The appellants are residents of Fort Smith, owning homes in the eastern part of the

city. The appellees, whom we will refer to as the Commission, are the members and directors of the State Highway Commission, their official residence being in Pulaski county. In 1963 the Commission began the construction of Interstate Highway 540, a four-lane limited-access highway that will pass through the residential district where the appellants live. This suit was brought by the appellants, either as plaintiffs or as interveners, to enjoin the Commission from proceeding with the construction of the highway until adequate security has first been given for the payment of the appellants' compensable damages. The chancellor dismissed the suit, finding that the proposed construction does not involve any compensable injury to these property owners. That is the issue on appeal.

Several different questions are presented. We consider first the case of Mrs. Wenderoth and Mr. and Mrs. Pierce, who complain that as a result of the new highway they will be compelled to travel an added half a mile to reach the Fort Smith business district or to take their children to school. These plaintiffs live on Kinkead Avenue, which will be blocked by the new highway at a point a few hundred feet east of their homes. Instead of being able to drive down Kinkead directly to town or to the school they will have to travel to and from an underpass a quarter of a mile north of Kinkead in order to cross the new highway.

Any diminution in property values that may result from an inconvenience of this kind is not compensable. In *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S. W. 2d 949, we rejected a similar claim, pointing out that such damages are not special or peculiar to the complaining landowners. As we said there: "Every person that travels the street suffers the same inconvenience as the appellants." Thus the case falls within the rule that "a landowner whose land is not being taken is not entitled to compensation for damage of the same kind as that suffered by the public in general, even though the inconvenience and injury to the particular landowner may be greater in degree than that to others." *Ark.*

State Highway Comm. v. *McNeill,* 238 Ark. 244, 381 S. W. 2d 425.

The other appellants, Mrs. Crigler and Dr. and Mrs. Haynes, own homes that are directly across the street from each other on Park Avenue, an east-west street. The new highway, running north and south, will occupy a right-of-way that borders on the western side of these appellants' lots. The new roadbed will pass under Park Avenue at right angles at a depth of 27 feet. The underpass will be in a cut having sloping sides that furnish lateral support for the Crigler and Haynes lots.

No change is to be made in the grade of Park Avenue, upon which the two homes front and to which their driveways provide access. No part of either lot is being taken. It is insisted, however, that the owners will suffer special compensable damages because their lots will lie along a sloping 27-foot cut instead of along the level ground that formerly existed.

This contention is not well taken. It is not enough for a landowner to show that his damage differs from that suffered by the general public. He must also show either that part of his land has been taken or that a property right has been invaded. Nichols, Eminent Domain (3d Ed.), § 14.1. It must often happen that the value of a city lot is diminished as a result of the condemnation of adjoining property for some distasteful purpose, such as the construction of a city jail. But, as the court convincingly demonstrated in *City of Geary* v. *Moore,* 181 Okla. 616, 75 P. 2d 891, this is an injury "for which the law does not, and never has, afforded any relief."

In the *McNeill* case, *supra,* we held that the condemnation of a highway right-of-way alongside a lot in a residential district does not make the State liable for the ensuing reduction in the value of neighboring property. The only difference between that case and this one is that here the highway is to be below the original ground level. A landowner, however, cannot complain because his neighbor reduces the grade of his lot. *Holden* v. *Carmean,* 178 Ark. 375, 10 S. W. 2d 865. Thus there is

no distinction in principle between the *McNeill* case and this one. Our holding in *Ark. State Highway Comm.* v. *Partain,* 192 Ark. 127, 90 S. W. 2d 968, affords the appellants no support. There the grade of an existing street that bordered Partain's property was raised by the Highway Commission. We merely followed our settled rule that a landowner who improves his property in reliance upon the grade of an abutting street suffers a compensable damage if the grade is changed. That is not the situation here, for these appellants' lots were not previously bounded by a street on the west.

The new highway, at the bottom of the proposed cut, will curve slightly as it passes the Crigler and Haynes lots. If the edge of the right-of-way being condemned paralleled this curve in the paved highway it would cross at least a corner of these two lots. At first the Commission attempted to purchase the corner of Mrs. Crigler's lot that would be needed to make the right-of-way parallel the pavement. The parties were unable to agree upon the purchase price, however, and the Commission abandoned its efforts to acquire this corner, as it was free to do. *Selle* v. *City of Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58. The Commission evidently decided that the acquisition of a right-of-way across the corners of the Crigler and Haynes lots was not necessary to the completion of the project. We do not perceive how the Commission's decision *not* to condemn a portion of these appellants' property entitles them to special damages. It is true that their lots now jut slightly into the public easement, but a comparable situation exists in the case of any corner lot that lies at the intersection of two city streets. The situation in itself is not damaging.

There is no merit in the contention of Dr. and Mrs. Haynes that they are entitled to compensation because their home has been damaged by clouds of dust that were created by the construction work. This is not a taking. It is at most a tort for which the sovereign State cannot be held liable. Ark. Const., Art. 5, § 20. Nor is the Commission responsible for the city's action in

removing its water main from the new right-of-way and re-laying it along the edge of the Haynes lot. This is not State action.

Affirmed.

FRED'S DOLLAR STORE *v.* ADAMS

5-3338 382 S. W. 2d 592

Opinion delivered October 12, 1964.

Barrett, Wheatley, Smith & Deacon, for appellant.

R. W. Laster and *R. Dale Hopper,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellee, Christine Adams, to recover damages for personal injuries that resulted from a fall which took place as she was leaving the appellant's store in Osceola. The only question before us is whether the jury's award of $20,000 is excessive.

The accident occurred on October 27, 1962. At the time of the trial more than thirteen months later Miss Adams was still suffering pain from her principal injury, which was to her lower back. Four different physicians had examined or treated her, without success. In Feb-

ruary of 1963 she was confined to a hospital for thirteen days and was in traction except when she was receiving heat therapy. In May she was returned to the hospital for another twelve or thirteen days. Among other things a myelogram was performed. Her doctors thought that she was suffering from a ruptured disc in her back. They recommended surgery, but Miss Adams was not financially able to bear the expense of the operation.

On the date of her injury the plaintiff was twenty-six years old. She lived on a farm with her two brothers, keeping house and doing farm work. In season she also earned $5.00 a day as a cotton picker. Dr. Moffatt found that there was a 50 per cent limitation of motion in her back. There is evidence to show that she is no longer able to keep house or to work in the fields. Heat therapy is necessary three or four times a day. It is recommended that she wear a supporting girdle during the day and use a heating pad at night. Past and estimated future medical and hospital expenses amount to almost a thousand dollars. From the evidence the jury was justified in concluding that the plaintiff's condition is not likely to improve, at least without surgery.

The appellant argues that certain matters, such as future disability and loss of earning capacity, cannot be considered, because the court's instruction on the measure of damages did not specifically refer to them. This point is not well taken. The court told the jury that "you may take into consideration" several enumerated elements of damage. The instruction did not expressly or by implication forbid the jury from taking into account other matters that were established by the testimony. Upon this record we are not compelled to assume that the jury laid aside significant elements of damage that had been established without objection in the course of the trial.

In a case of this kind precedents are of scant value. No two cases are so nearly identical that essential points of difference cannot be found. The ultimate question is whether the verdict shocks the conscience of the court

or demonstrates that the jurors were motivated by passion or prejudice. *Alexander* v. *Botkins,* 231 Ark. 373, 329 S. W. 2d 530. There is no suggestion here that Miss Adams is a malingerer. When we consider the suffering that she endured for more than a year before the trial, the economic loss that has resulted from her injuries, and the extent to which these matters may be expected to persist in the future we are not warranted in finding that the award is too liberal.

Affirmed.

U-FINISH HOMES *v.* HALE.

5-3312 382 S. W. 2d 583

Opinion delivered October 12, 1964.

Clark, Clark & Clark, for appellant.

Hale & Henson, for appellee.

CARLETON HARRIS, Chief Justice. On January 8, 1963, U-Finish Homes, appellant herein, obtained a judgment against American Homes and Cabins, Inc., for $3,594.12. In March of 1963, appellant caused writs of garnishment to be issued, directed to John E. Hale, Sr., and Ray Cooper, appellees herein; appellant alleged that Hale and Cooper were indebted to American Homes and Cabins. The court, after denying a motion by appellant for summary judgment, and after hearing testimony on a motion for judgment against the garnishees, ordered the writs of garnishment dismissed.

The facts are as follows:

American Homes and Cabins, an Arkansas corporation, was incorporated in February, 1962, for the purpose of building shell homes, and was engaged in that business at the time of the events giving rise to this litigation. Howard Mozingo was president of the corporation, and John E. Hale, Sr., one of the appellees herein, served as secretary, and also as part-time bookkeeper, for which he received the sum of $25.00 per month.[1] Hale originally held 100 shares of stock in the company, and later acquired 200 shares from H. J. Allison, who had been one of the original incorporators. Appellee Cooper purchased 100 shares of stock from Howard Mozingo for the sum of $300.00.

On August 2, 1962, Hale and Cooper executed a "Stock Sale and Transfer," by which Hale sold his 300 shares to Howard Mozingo, and Cooper sold his 100 shares to Marie Mozingo, wife of Howard; all shares were sold at $4.50 a share. The stock certificates, evidencing Hale's ownership of 300 shares, and Cooper's ownership of 100 shares, were endorsed to the Mozingos on August 16, 1962. Hale was paid for his stock by a check for $1,350.00, drawn on the account of American Homes and Cabins, Inc., at the National Bank of Commerce, Pine Bluff, Arkansas. Cooper was paid for his stock by a check for $450.00, drawn on the same account. The checks were signed by Howard Mozingo, as president, and countersigned by John E. Hale, Sr., as secretary of American Homes and Cabins. On the same date that he disposed of his stock, Hale resigned as secretary of the corporation, and a new secretary was elected on the same day. Appellant, after obtaining the judgment against American Homes and Cabins, caused writs of garnishment to be issued against Hale and Cooper. In the motion for summary judgment, appellant sought judgment against Hale for $1,350.00, plus interest and costs, and against Hale and Cooper, jointly and severally,

[1] Hale was regularly employed by National Investors Life Insurance Company.

for $450.00, plus interest and costs,[2] alleging that the use of the corporate funds for purchase of the stock, at a time when the corporation had outstanding debts, constituted a fraud upon the creditors of American Homes and Cabins; it was asserted that appellant (as a creditor) was entitled to recover from Hale and Cooper the amounts of corporate funds that they had received. As previously stated, the court held contrary to appellant's contention, and ordered the writs of garnishment dismissed. Thus, this appeal.

Appellant states that only one question is involved in this litigation, *viz*:

"To what extent is a corporate stockholder who sells his stock in the corporation to another stockholder and receives his pay, not from the stockholder to whom the shares were sold but from the assets of the corporation, liable to the creditors of the corporation for the corporate funds so received by him?"

That question cannot readily be answered under the proof in this case for the answer depends upon the financial condition of the corporation at the time of the transfer. We think, for liability to attach to the seller, in favor of a creditor, it should appear that the corporation was insolvent, or was, at least, on the verge of insolvency. The term, "insolvent," is given several meanings, both in legal and standard dictionaries, and has been used in situations varying all the way from "unable to pay debts as they fall due in the usual course of business" to "one who has gone into bankruptcy." Webster's Third New International Dictionary also defines the term as "having liabilities in excess of the reasonable market value of assets held."

The books, or account ledgers, of American Homes and Cabins were not introduced into evidence, but rather the contention made by appellant (that liabilities exceeded assets) is based on oral testimony and answers

[2] Liability against Hale for the $450.00 was asserted because of the fact that Hale had, as secretary of the corporation, signed the check to Cooper, along with Mozingo, the president.

to depositions. The record here is not easy to follow, and the testimony is quite conflicting in some respects; it is extremely difficult to determine just what amount of indebtedness was *past due,* but there is definitely no evidence that American Homes and Cabins had (or has) been adjudged a bankrupt; nor is there any evidence of executions returned unsatisfied.[3]

In its brief, appellant has compiled a list of creditors of the corporation as of August 16, 1962, together with the amounts due such creditors, and the amounts are totaled at $17,528.70. Assets are listed as $7,917.06, including bank account of $6,517.06, but not including a 1957 Ford automobile, upon which no value is placed. But these figures do not establish that the corporation was insolvent, or that liabilities exceeded assets on August 16. For instance, the list includes indebtedness due Stewart Building Supplies, Inc., arising from the various jobs wherein Stewart furnished supplies. One listed is the "Elton Dixon Job," wherein it is shown that American Home and Cabins owed $2,936.90. However, the record reflects a check in that amount, payable to the Stewart Company, given on the 16th day of August, and cashed on August 17. Another creditor listed by appellant is Bahner Abstract Co., which, according to appellant, was due $648.22. Mr. Ott, president of the abstract company, in responding to interrogatories, testified that this amount was paid on August 17, 1962. G.M.A.C. is also listed as a creditor in the amount of $886.36, but this amount was paid by American Homes, through check, on the 16th of August. These payments total $4,471.48. While it is true that these amounts paid, are due to be deducted from the amount of cash shown in the bank, and heretofore mentioned, the bank statement further shows that during the period from August 16 to September 1, alone, over $9,500.00 was deposited in the bank by the corporation.[4] Hale also

[3] One of appellees' attorneys made the statement: "There has been an execution." This, of course, was not evidence, even if the return were shown.

[4] The bank statement does not show the payment of the G.M.A.C. check. The check, however, is in the transcript, but the date of payment cannot be definitely determined.

testified that Mozingo had $8,000.00 worth of checks on August 16, which the corporation had evidently received from sale of houses.

The record reflects that the first judgment was obtained on December 4, 1962.

According to the evidence of Hale, he received the 200 shares of stock from Allison in payment of $400.00 due this appellee for bookkeeping work, and the 100 shares from the corporation were likewise received in payment of services performed by attorneys, one of which was Hale's brother, appellee testifying that these shares were held in trust by him for the benefit of the attorneys who had not been paid. Hale stated that he sold the stock because he needed the money at that time. Cooper simply bought the stock as an investment, and subsequently resold it for a profit.

The Chancellor viewed these witnesses, heard their testimony, and was in a far better position to evaluate the evidence. It was his finding that the writs of garnishment should be dismissed, and we are unable to say that the Chancellor's findings were against the preponderance of the evidence.

Affirmed.

CANNADAY *v.* FIRST NATIONAL BANK OF FAYETTEVILLE.

5-3301 382 S. W. 2d 589

Opinion delivered October 12, 1964.

[redacted]

Crouch, Blair & Cypert, for appellant.

Wade & McAllister, Dickson, Putman, Millwee & Davis, Pearson & Pearson, Greenhaw & Greenhaw, and *Russell Elrod,* for appellee.

PAUL WARD, Associate Justice. In August, 1958 the City of Fayetteville entered into a contract with C. R. Cannady, d/b/a Cannady Construction Company (hereafter referred to as "Cannady") to make certain improvements to the City Airport. The contract provided primarily for certain excavations and for putting in place large amounts of stone and aggregate in constructing additions to the runway. Before the work was finished trouble arose, and a multitude of legal maneuvers followed. Since several pleadings and parties are involved, it seems expedient to set out below a list of identifications.

(a) Cannady employed, as sub-contractor, James A. Ulrich (hereafter called "Ulrich") to do most of the work—especially the stone and aggregate items. To help finance his undertaking Ulrich executed to the First National Bank of Fayetteville (hereafter called "Bank") a note for $15,500 which amount was advanced to him. Later Ulrich abandoned the undertaking and Cannady employed the Tune Construction Company (hereafter called "Tune") to complete the work. Ulrich purchased materials from the McClinton Brothers Company (hereafter called "McClinton") in the amount of $7,104.53 for which McClinton was not paid. Cannady was required to make a statutory performance bond, and it was executed by the Employers Mutual Casualty Company (hereafter called "Mutual").

(b) The Bank sued Ulrich for a balance of $13,500 on his note and caused a writ of garnishment to be issued against Cannady alleging he held certain credits due Ulrich. Later the Bank had a receiver appointed for Ulrich. In his answer Cannady contended that he could not determine whether or not he would owe Ulrich, or how much, until a settlement was made with the City and Ulrich. The City filed an intervention alleging that it owed Cannady a balance of $9,836.66 and paid that amount into court. Cannady then answered that he was entitled to an additional $25,000 because the City was purporting to pay on the cubic contents of the stone and aggregate in place on the runways when, under the terms of the contract, the City should pay on the basis of loose stone and aggregate in the trucks. Tune claimed he was due $1,003.58, plus penalty and attorney's fee from Mutual and Cannady. For material furnished Ulrich, McClinton claimed $7,104.53 and penalty and attorney's fee from Mutual and Canaday. Mutual denied all liability, and particularly denied liability for penalties and attorneys' fees.

The issues set out previously were presented to the trial court sitting as a jury. After a lengthy trial the court made, in substance, the following findings of fact and law.

Findings of Fact. The Bank was entitled to judgment against Ulrich for $13,900, including interest; Tune was entitled to judgment for $1,003.58 against Cannady and Mutual; McClinton was entitled to judgment for $7,104.53 against Cannady and Mutual; of the $9,836.66 deposited in court, $9,401.41 goes to Ulrich (or rather to the receiver) and the balance of $435.25 goes to Cannady; and, when the Bank garnished Cannady the City owed Cannady the sum of $9,401.41.

Findings of Law. (a) The Bank's lien (by virtue of garnishment) was prior to any other lien.

(b) Cannady's claim of $25,000 against the City is denied.

(c) Tune is entitled to judgment against Mutual and Cannady for $1,003.58 and from Mutual a 12% penalty and $350 attorney's fee.

(d) McClinton is entitled to judgment against Mutual and Cannady for $7,104.53 and from Mutual a 12% penalty and $500 attorney's fee.

For a reversal appellants, Cannady and Mutual, rely on certain specified points which we now discuss in the order presented by them.

One. Cannady and Mutual first contend there is no substantial evidence to sustain the court's finding that Cannady had in his possession goods, chattels, money, credits and effects belonging to Ulrich in the amount of $9,401.41 (as held by the court). We are unable to agree.

In the record we find the following testimony: All labor and work done by Ulrich (including work done by Tune and material furnished by McClinton) amounted to $98,433.65; Cannady paid to Ulrich personally a total of $38,317.41 and for other claims (such as for aggregate, piping, equipment rental, etc.) the sum of $18,715.68—making a total of $57,033.09. Add to the last figure $9,836.66 deposited in court by the City and we have a grand total of $66,369.75 accounted for out of $98,-433.65. This leaves the sum of $31,563.90 unaccounted for by Cannady. Certainly Cannady was in a better position than anyone else to explain what use was made of money. It is our conclusion, therefore, that there was substantial evidence to support the finding of the trial court that Cannady owed at least as much as $9,836.66 to Ulrich. The trial court also had a right, in this connection, to consider the fact that Ulrich had borrowed $15,500 from the Bank to finance him as a sub-contractor.

Two. It is next contended that the court erred in giving the Bank a prior lien on the $9,401.41 paid into court. This contention appears to be based on the fact that the Bank's writ of garnishment was served on Cannady before the money was paid by the City into court. Under the general rule announced by this Court, we think

it makes no difference that Cannady did not know at the time the writ was served against him *how much* he owed Ulrich so long as he actually did owe him (as we have just held). In the case of *Harris* v. *Harris,* 201 Ark. 684, 146 S. W. 2d 539, this Court quoted with approval from 28 C.J. 129, § 171, the following:

"Under some statutes it has been held that a debt not presently payable is not subject to garnishment. But generally debts contracted, although not presently payable or matured, but which will certainly become payable in the future, may be reached. And this, although the terminology of the statute is that claims or debts 'due' may be garnished, the term 'due' being taken in its larger sense as importing merely an existing obligation, without reference to the time of payment."

The *Harris* case has been cited with approval in *Miller* v. *Maryland Casualty Co.,* 207 Ark. 312 (p. 318), 180 S. W. 2d 581 (p. 584); *Coward* v. *Barnes,* 232 Ark. 177 (p. 179) 334 S. W. 2d 894 (p. 896); and *Gossett* v. *Merchants & Planters Bank,* 235 Ark. 665 (p. 667), 361 S. W. 2d 537 (p. 538). It is not denied that the Bank was first to have a writ of garnishment filed against Cannady. The lien thus created took effect at the time the writ was served. See: *Bergman* v. *Sells & Co.,* 39 Ark. 97 and the *Gossett* case, *supra.*

Three. We do not agree with appellants that the court erred in assessing penalties and attorneys' fees to Tune and McClinton. It is first insisted by appellants that there was no demand for payment made on Mutual, but the record shows that on March 17, 1961 Mutual was advised of the extent of the claims. Mutual was asked to affirm or deny the claim. The failure of Mutual to deny the claim under oath amounted to an admission. See: *White River Limestone Products Co.* v. *Mo.-Pac. Rd. Co.,* 228 Ark. 697, 310 S. W. 2d 3; *Brown* v. *Lewis,* 231 Ark. 976, 334 S. W. 2d 225; and 10 Ark. Law Rev. 439, 454 (1956). Also, although two months elapsed, Mutual made no effort to settle the claim out of court.

Four. Finally it is insisted that the cause should be reversed because the court misinterpreted the prime contract, and thereby used the wrong method to determine payments due for stone and aggregate used on the runways. We do not agree.

The prime contract between the City and Cannady is long and complicated but it suffices to quote the following portion:

"The quantity of crushed aggregate base course to be paid for shall be the number of cubic yards of material *placed,* bonded, and accepted in the completed base course." (Emphasis added)

Appellants contend the City should pay for the cubic for the cubic yards loose in truck, while the City contended it should pay for materials measured in place. It is apparent the former method would mean more money to Cannady.

The trial court held the contract was not ambiguous and found that the ". . . materials for base and sub-base furnished under the written contract should be measured by compact in place measurement rather than loose truck load measurement". We agree that the above mentioned portion of the contract was not ambiguous, and likewise agree the trial court interpreted it correctly.

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

Affirmed.

5-3344 382 S. W. 2d 588

Opinion delivered October 12, 1964.

[redacted]

Richard W. Hobbs, for appellant.

Lookadoo, Gooch & Lookadoo, for appellant.

SAM ROBINSON, Associate Justice. On March 8, 1963, appellee, E. E. Nowlin, filed suit in the Clark Circuit Court against appellant, George Phillips, alleging that defendant was indebted to plaintiff in the sum of $2,-280.00 for past due rent on a store building. Defendant filed a general denial. The case was set for hearing in July, 1963, but defendant obtained a continuance on account of illness. The case was reset for October 15, 1963, and again the defendant obtained a continuance alleging illness. The case was reset for November 1, 1963. On that date it was again maintained that defendant was unable to attend trial.

It was agreed by the attorneys in the case that the deposition of defendant would be taken and the cause submitted to the court in that manner. On November 27, 1963, the attorneys in the case, accompanied by a court reporter, went to defendant's home to take his deposition. He refused to give a deposition contending that he was sick and unable to do so.

The court, sitting as a jury, after having heard the testimony of plaintiff, made a finding in his favor for the amount sued for, $2,280.00. A judgment was rendered

accordingly. Whether a continuance should be granted is in the discretion of the trial court. *Sage* v. *Sage,* 219 Ark. 853, 245 S. W. 2d 398; *Wood* v. *Wood,* 234 Ark. 358, 352 S. W. 2d 176; *Andrews* v. *Lauener,* 229 Ark. 894, 318 S. W. 2d 805.

Here, there was no abuse of idescretion. It does not appear that the trial court was greatly impressed with the testimony of appellant that he was unable to give his deposition on November 27, and neither are we impressed by his statement to that effect.

Affirmed.

HICKS *v.* WOODRUFF.

5-3322 382 S. W. 2d 586

Opinion delivered October 12, 1964.

DuVal L. Purkins, for appellant.

William H. Drew, for appellee.

JIM JOHNSON, Associate Justice. This is an action by appellants Dave Hicks and Billy D. Hicks, his son, for specific performance of an option to purchase clause con-

tained in a farm lease contract, against appellees Thomas E. Woodruff and Pauline B. Woodruff, his wife, and Dewey Beavers and Naomi Beavers, his wife, in Chicot Chancery Court. After a long drawn out hearing the diligent chancellor concluded in 31 pages of findings that the lease was operative, that the option was ambiguous, that appellants had failed to comply with the terms of the option and that appellants' complaint should therefore be dismissed. From the judgment on these findings appellants have prosecuted this appeal.

Appellants urge two points for reversal, both of which pertain to the chancellor's interpretation of the option clause. After protracted and careful study of the seven volume record on trial de novo, we do not reach either point argued.

This is a suit for specific performance in which appellants sued on a written contract, the farm lease. They, of course, had the burden of proving the existence of the writing. Appellees, admitting the execution of the contract, claim it has been rescinded, canceled or abandoned and therefore have the burden of proving such claim. 18 C.J.S., Specific Performance, § 140, p. 715; 3A Corbin, Contracts, § 749 *et seq.* Rights acquired under a contract may be abandoned or relinquished by agreement, conduct or by a contract clearly indicating such purpose. To constitute an abandonment of rights, an actual intent to abandon must exist. 17A C.J.S., Contracts, § 412. The rule applicable here is succinctly stated in Restatement, Contracts, § 406, comment b (1932), as follows:

"b. The agreement to rescind need not be expressed in words. Mutual assent to abandon a contract, like mutual assent to form one, may be manifested in other ways than by words. Therefore, if either party even wrongfully expresses a wish or intention to abandon performance of the contract, and the other party fails to object, there may be sometimes circumstances justifying the inference that he assents. If so there is rescission by mutual assent; but mere failure to object to repudiation is

not a manifestation of assent to a rescission. Sometimes even circumstances of a negative character, such as the failure by both sides to take any steps looking towards the enforcement or performance of a contract, may amount to a manifestation of mutual assent to rescind it.''

The conduct of the parties here clearly evidences a rescission of the farm lease (which contained the option to purchase). It is axiomatic that the option to purchase was dependent upon the existence of the lease, and if the lease was rescinded, the option to purchase was a fortiori rescinded. *Smith* v. *Carter,* 213 Ark. 937, 214 S. W. 2d 64. The actions and correspondence of the parties subsequent to 1961 manifested an obvious intention to abandon performance of their contract as written and resulted in appellees making a substantial change of position, that is, appellants permitted appellees to expend over $11,500.00 in clearing some 231 acres of land on the farm which had been the subject of the option. Appellees then rented this cleared land to someone else, with the knowledge of and without objection from appellants, although the lease sued on expressly gave appellants exclusive control of the property. Prior to this, in January 1962, when half of the 1962 rent was past due under the lease, appellants wrote appellees stating, ''It's rent time again,'' and requested that appellees rent the land to them in 1962 for $3,000.00. (The lease provided for $4,900.90.) Further, under the lease sued on appellants rented the entire farm, but after appellants' letter, appellees rented them only the land they farmed in 1961, and appellants made no claim for the balance of the farm. If the lease were in force, appellants would have had the right to farm all of the lands described in the lease including the 231 newly-cleared acres at no additional rental. Certainly it was never in the contemplation of the parties at the inception of the farm lease contract for appellees to gratuitously enrich appellants by making extremely valuable improvements on property they had optioned to sell at a fixed pirce. Without detailing other facts utterly inconsistent with the continued exist-

ence of a lease, suffice it to say that appellees clearly met the burden of proving rescission of the contract.

Having thus concluded, we reach the same results as the learned chancellor but for different reasons. Accordingly, the decree is afirmed.

BARNES *v.* YOUNG.

5-3276 382 S. W. 2d 580

Opinion delivered October 12, 1964.

W. B. Howard and *Jack Segars,* for appellant.

Gerald E. Pearson, for appellee.

FRANK HOLT, Associate Justice. This is a suit by appellee against appellants to quiet title to a two and one-half

acre strip of land lying between their properties. Also, damages are sought for destruction of a fence and growing crops. Appellee claims ownership of acquiescence and adverse possession and asserts that a fence constitutes an agreed boundary. The appellants denied these assertions and contend that the use of this disputed strip by appellee and his predecessors in title was permissive. The Chancellor found the issues in favor of the appellee and this appeal follows.

For reversal appellants first urge that "the court erred in excluding testimony as to parol agreements of appellee's predecessors in title, recognizing that the fence in question was not the boundary line and agreeing that their use of the land was permissive." The deposition of appellant S. F. Barnes, father of the other two appellants, was offered in evidence to this effect. The appellants are correct in their contention that this evidence is admissible. This is true even though appellee's predecessors in title are now deceased. It is well settled that declarations against interest of one in possession of land, though now deceased, which are adverse to his title are admissible against successors in interest who claim under him. *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456; *Norden* v. *Martin,* 202 Ark. 180, 149 S. W. 2d 550; *Howell* v. *Simpson,* 216 Ark. 873, 228 S. W. 2d 40.

It is likewise urged that appellant Woodrow Barnes should have been permitted to testify as to a conversation he overheard between his father, S. F. Barnes, and Herman Young, now deceased, about the time Young acquired title from their common grantor. From our review of the excluded testimony, we are of the opinion it is too general, or indefinite, to indicate any agreement concerning permissive use. Further, when the Chancellor excuded the attempted testimony no offer was made to show exactly what the testimony of the witness, Woodrow Barnes, would have been. We cannot consider on appeal an objection to the exclusion of testimony unless there is a showing of what it would have been.

Stewart v. *Bittle,* 236 Ark. 716, 370 S. W. 2d 132; *Lynch* v. *Garnes,* 227 Ark. 767, 301 S. W. 2d 739.

The appellants next contend that the preponderance of the evidence showed that the boundary line between the respective tracts had never been established. We assume, arguendo, that the excluded evidence of Woodrow Barnes was sufficiently clear to be admissible. When we consider on a trial de novo his rejected testimony, along with that of his father, S. F. Barnes, to the effect that the use of the land by the appellee and his predecessors in title was permissive, we are of the view that the evidence in the case at bar preponderates in favor of the appellee.

There is some evidence that the true boundary line is about ninety feet south of the fence. However, there is no evidence in this case supporting the claim of agreed or permissive use of the disputed land except that of these interested parties. Appellant S. F. Barnes, ninety-two years of age, gave a deposition about an understanding of permissive use of the disputed land that occurred in 1907 when he purchased his land from a Mr. Pratt and another such incident in 1925 or '26 when appellee's father, Herman Young, purchased the adjoining tract from Pratt. Also, that he had "talked about the corners" with appellee. The other evidence is by appellant Woodrow Barnes concerning a conversation he overheard between his father and Herman Young about 1925 or '26 when he, Woodrow, was a boy approximately ten years of age.

Contrasted with this meager evidence there is testimony by the appellee and distinterested witnesses that the fence in question existed for approximately fifty years prior to the date of the trial; that a wire fence replaced an old picket fence about 1925 or 1926 when Herman Young, appellee's predecessor, purchased the land from Pratt; that appellee and his predecessor in title, his father, had exercised possession and control adversely over the disputed strip for more than the required seven years or for approximately thirty-seven

years by cultivating it up to the disputed fence; that part of it had been placed in "the soil bank" program; and that appellee's first knowledge of appellants questioning his ownership was shortly before this litigation. Appellee denied appellants' assertion of permissive use by his father or himself.

In *Stewart* v. *Bittle, supra,* we said:

"It may be conceded, as claimed by appellant, that there never was any express agreement to treat the fence as the dividing line between the two parcels of land. Such an agreement, however, may be inferred by the actions of the parties."

Also, see *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18. In the case at bar we think that the recognition of the fence as visible evidence of the division line for some fifty years was of such quietude and acquiescence that an agreement is fairly inferred that it represents the true boundary.

We are of the view that ownership of the property in question was also established by adverse possession. *Pitts* v. *Pitts,* 213 Ark. 379, 210 S. W. 2d 502. Certainly, from a careful review of the evidence in this case, upon a trial de novo, we cannot say that the Chancellor's finding that the existing fence constituted the true boundary is against the preponderance of the evidence. *England* v. *Scott,* 205 Ark. 47, 166 S. W. 2d 1014.

The appellants next contend there was no evidence on which to predicate a $175.00 judgment for damages resulting from appellants' tearing down the fence and plowing up appellee's crops. Appellee established the damage to his growing crops by showing only the gross income from similar crops which had matured and he had harvested. This is not the proper measure of damages. The appellee was only entitled to the value of his growing crop at the time of its destruction or damage. *Moore* v. *Lawson,* 210 Ark. 553, 196 S. W. 2d 908; *Turner* v. *Smith,* 217 Ark. 441, 231 S. W. 2d 110.

Appellee sought to prove his damages for destruction of the existing fence by showing the replacement cost of a new fence. This was incorrect. The appellee was entitled only to the cost of replacement of the existing fence in substantially the same condition that existed at the time appellants destroyed it. *Bush, Receiver* v. *Taylor,* 130 Ark. 522, 197 S. W. 1172; *Missouri Pacific R. Co.* v. *Wood,* 165 Ark. 240, 263 S. W. 964.

The decree is modified to the extent that the award of damages is disallowed. Accordingly, the decree is modified and affirmed.

Opinion Delivered October 19, 1964.

Thorp Thomas & Roy Finch, Jr., for appellant.

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

CARLETON HARRIS, Chief Justice. Carroll Johnson, Jr., of Gallatin, Tennessee, president of Standard Coin-Op Distributors, Inc., a Tennessee corporation with its home office in Memphis, and engaged in the coin laundry and dry-cleaning business, sent two dry-cleaning machines to Standard, Inc., of Little Rock, for reconditioning. (One was sent in September, 1961, and the other in November of the same year.) According to the evidence, appellant company accepted the machines, and Teddy Abeles, vice-president of appellant company, agreed that the machines would be overhauled or reconditioned at a charge of between $350.00 and $500.00 each. It developed that one of the machines was subject to a mortgage by a prior owner, and Johnson requested Standard to send that machine back without being reconditioned. After waiting a week for the request to be complied with, Johnson called again, and was advised that it would be sent at once. According to Johnson, numerous similar requests were made for the machine to be returned, and he finally

made a trip to Little Rock to determine why his request had not been honored. Johnson also demanded the return of the second machine, but never received either one. In June, 1963, appellee instituted suit, alleging that appellant company had converted the machines to its own use, and seeking judgment for the value of the machines at the time of the conversion, which was alleged to be $10,620.00. An answer was filed, denying the material allegations of the complaint, and setting out that the machines were not purchased from the appellant company, "and were not covered by warranty. Defendant [appellant] was under no obligation to repair the machines of the plaintiff [appellee], and merely acted as a bailee thereof for the sole benefit of the plaintiff." Nearly three months later, appellant amended its answer to allege that it had offered to return to appellee the machines sued for, but, because of appellee's refusal to identify its machines, had been unable to return them. On trial, the Circuit Court, sitting as a jury, found that the two dry-cleaning machines had been sent to appellant company for repair, and had been accepted by appellant for that purpose; that appellant was under an obligation to hold appellee's property separate from the other machines, and thereby be in a position to deliver the machines to appellee; that appellant company did not keep the machines separate from other machines, but dismantled and co-mingled the parts together, and was therefore unable to redeliver the machines to appellee; even though demand was properly made. The court found that the fair market value of each machine, at the time the demand was made for the return of the property, was $3,500.00. Judgment was accordingly awarded appellee in the amount of $7,000.00. From such judgment comes this appeal.

For reversal, appellant asserts first that there was no proper demand, or refusal, to return the machines involved prior to the institution of this action, and, second, that the damages are not only excessive but there is nothing in the evidence upon which the court could have found the damages to be $7,000.00.

Pertinent testimony was as follows:

Johnson, in addition to his testimony that demand had been made for the return of the machines several times, also testified that he made a trip to Little Rock, and talked with Jim Spaulding, sales manager of Standard at that time.[1] He stated that Spaulding told him that the machines had been dismantled and the parts sold. He also testified that he had been offered two machines the Saturday before the trial,[2] but they were not the ones he had sent to appellant. Spaulding testified that the Standard Coin-Op machines had a value of from $4,500.00 to $4,800.00 each.

C. B. Pugh, president of Standard, Inc., testified that his company was not in the business of remodeling or reconditioning machines; rather, that it only manufactured them. However, he did not deny that the machines were in the possession of appellant, but stated that any agreement made had been entered into by Teddy Abeles, vice president of Standard. The witness said that Abeles had left the day before the commencement of the trial to go to Canada, because of previous commitments. He further testified that the Johnson machines were outdated in 1962, and did not have a value of more than $500.00 to $1,000.00 each. Pugh testified that about twenty-two machines, all alike, were disassembled at the same time, and this number included the two machines sought by Johnson. He said that no parts had been sold, and though he had requested Johnson on several occasions to furnish the serial numbers of the machines, in order that appellant would know which particular machines belonged to appellee company, this information had not been furnished. He stated that Johnson could "pick them up" after identification.

C. A. Carter, sales engineer for Standard at the time of the trial, testified that he did not know whether the machines (here in litigation) were saleable in Septem-

[1] Spaulding is no longer with appellant company, having resigned in June, 1963.

[2] This was apparently two days before the trial, the case having been tried on September 23, 1963, a Monday, and the testimony reflecting that the offer was made "last Saturday."

ber, 1962, but he stated that they were not saleable in January, 1963 (because of their being old models).

It is earnestly contended by appellant that there was no absolute refusal to return the property to appellee, and Pugh said that his company would have returned the machines if Johnson had furnished the serial numbers. Johnson admittedly did not furnish the serial numbers.

"* * * I knew my machines weren't down there. He wouldn't show them to me. He could take the serial number and put it on another machine and ship it back as the right one. * * * The serial number is only on a little plate, stamped on and you can move the plate from machine to machine."

It is insisted by appellant that the failure to return the machines (because of not knowing the serial numbers) amounted to only a qualified refusal, and Johnson's not providing these numbers constituted a valid legal reason for not complying with appellee's demand. Authority is cited to the effect that mere negligence of a bailee does not amount to a conversion.

We are of the view that the facts in the case before us establish much more than mere negligence on the part of appellant company. The proof reflects that the machines were sent to appellant for reconditioning; though Pugh stated that his company did not accept machines for that purpose, there is no denial that these machines were actually received. According to the evidence of both the president of appellee company, and the president of appellant company, the agreement was entered into between Johnson and Abeles. Abeles, as previously pointed out, did not testify, but had left this state the day before the trial. Certainly, if appellant disputed the evidence of Johnson relative to the purpose in sending the machines to appellant company, and it was necessary that Abeles be away from the state, the deposition of this witness could have been taken.

Appellant argues in its brief that, to repair, or recondition, the machines, it was certainly necessary that

they be dismantled. That assertion cannot be disputed, but we have found no valid reason for intermingling the parts of at least twenty-two machines, and thus making it impossible to determine from which machines the various parts were taken. Mr. Pugh admitted that there was no way to definitely determine which parts came from the Johnson machines, and accordingly no way in which to restore those parts to the machines involved in this litigation. He simply said that the parts installed by his company would be "better parts * * * better than the ones we took off."

We are of the opinion that, irrespective of whether the parts had already been sold, or whether they remained on appellant's premises in bins, there was substantial evidence of a conversion. The furnishing of the serial numbers would not have enabled appellant company to locate the various parts which had been removed. This is not a case wherein the bailee lost property, or where it was accidentally destroyed, or inadvertently misplaced. From a legal standpoint, this case bears some similarity to the Texas case of *Rabe* v. *Jourdan,* 102 S. W. 1167. In that case, Jourdan sued Rabe, the latter having purchased a number of rings and gems (loose stones) from a ten-year-old boy under circumstances that would have put an ordinarily prudent person on notice that the property was stolen. The jewelry belonged to Jourdan, who demanded the return of his property, alleging the jewelry to have a value of $2,309.00. However, Rabe testified he had intermingled the jewelry with his own, and denied refusing to return the property, asserting that he had told Jourdan that if he (Rabe) had any of Jourdan's property, he was ready to deliver it upon proper identification; that he had offered to let Jourdan inspect all property in his possession, and was still willing for this to be done. The jury found for Jourdan in the amount of $1,052.00. In affirming the judgment, the Texas court said:

"* * * We have examined the testimony and ascertain that there was evidence which would warrant a finding that the goods received by defendant were so inter-

mixed with defendant's stock that defendant stated, when asked for them, that he himself was unable to select them. It is true that he says he told plaintiff to pick them out, and he would let him take them; but plaintiff testified he was unable to select them, and told defendant so. There can be no doubt that there was evidence of a demand, of a confusion of the goods consisting largely of loose stones, with property of defendant, and of both plaintiff's and defendant's inability to identify and select them, which practically amounted to a refusal of plaintiff's demand for them, *inasmuch as the result of the confusion of the goods was chargeable to defendant. The demand was sufficiently shown to be refused, if it appeared that defendant had placed himself in a position that rendered compliance impracticable.*"[3]

Here, neither Pugh nor Johnson could identify the parts, but the officers and employees of appellant company, through their acts, placed appellant "in a position that rendered compliance impracticable."

Accordingly, we find no merit in appellant's first contention, nor can we agree with appellant in its second contention. It is asserted that there was no evidence to support the $7,000.00 judgment. It is true that appellee's testimony was to the effect that the machines were worth $4,500.00 each, but this gives appellant no cause for complaint, since the amount awarded was $2,000.00 less than the value given by appellee's witnesses. Frequently a jury will return a verdict for a figure which is between the values given by witnesses for plaintiff and defendant, respectively, and we have upheld such verdicts. *Ark. State Highway Comm.* v. *Kennedy,* 234 Ark. 89, 350 S. W. 2d 526.

Of course, it is not our prerogative to determine whether judgment should have been rendered in the stated amount. We are only concerned with the question of whether there was substantial evidence to support the court's findings. As heretofore set out, testimony was offered by apparently competent witnesses as to the

[3] Emphasis supplied.

value of the machines, and we are unable to say that the testimony so offered did not constitute substantial evidence.

On the whole case, we find no reversible error.

Affirmed.

B-W ACCEPTANCE CORP. *v.* TERRELL

5-3325 382 S. W. 2d 884

Opinion Delivered October 19, 1964.

Willis V. Lewis, for appellant.

No brief filed for Appellee.

ED. F. MCFADDIN, Associate Justice. The question here posed is whether the appellee Terrell filed within due time his appeal from the Camden Municipal Court to the Ouachita Circuit Court. If the question is answered in the affirmative there must be an affirmance; if the question is answered in the negative a reversal is required.

Appellant filed a replevin action against the appellee in the Municipal Court of Camden. There was a bond and a cross bond. On February 21, 1963, judgment was rendered for the plaintiff (appellant here) and on the same day the defendant (appellee here) gave notice of appeal. On February 23, 1963, the defendant filed in the Municipal Court an affidavit for appeal and a bond for appeal, which bond was approved by the Municipal

Judge. Then on February 27, 1963, there were filed in the Circuit Court three pages: one page was the original affidavit for appeal; the second page was the original bond given by defendant to supersede the judgment of the Municipal Court; and we copy in full below the third page:

"TRANSCRIPT OF CIVIL CASE NO. 552

"B. W. Acceptance Corp. Plaintiff

v. Mr. Willis V. Lewis, Atty.

Jefferson Terrell Defendant

Mr. L. B. Smead, Atty.

"Complaint at law filed 1-22-63 against defendant for $243.09 plus costs. Order for delivery in replevin issued 1-22-63 and made returnable 2-7-63. Bond of plaintiff filed 1-22-63. Case continued until Feb. 21, 1963 on motion of Mr. Smead, Atty. for Defendant. Cross bond filed by defendant on 2-1-63.

"This case came on to be heard the 21st day of Feb. 1963. The testimony of both plaintiff and defendant presented and it is the finding of the Court that plaintiff is entitled to judgment for amount prayed for in complaint and costs and that said judgment be entered against surety for amount prayed for in complaint and all costs accrued. "Notice of appeal given by Atty. for defendant. Appeal bond set at $500.00."

It will be observed that this third page was not signed by the Municipal Clerk or certified in any way.[1] It was a mere unsigned typewritten page. No other papers of any kind were filed in the Circuit Court until November 14, 1963, when, on request of the Circuit Judge, the Clerk of the Municipal Court sent to the Circuit Court the complete file of all the pleadings and proceedings in the Municipal Court. In the Circuit Court the appellant filed a motion to dismiss the appeal as filed out of time;

[1] By *sub-poena duces tecum* we caused the original of these three pages to be brought before us in order to see if there was any kind of certificate to the pages.

but the Trial Court held that the filing in the Circuit Court, on February 27, 1963, of the three pages heretofore mentioned, was a substantial compliance with the law and that the appeal had been filed in due time. From a final judgment dismissing the cause of action of the plaintiff there is this appeal; and the question posed has heretofore been stated.

We have two statutes which are mentioned in the appellant's brief in this case. The first is Ark. Stat. Ann. § 22-707 (Repl. 1962), which reads:

"All appeals of civil cases from municipal courts must be taken and the transcripts of appeal lodged in the office of the clerk of the circuit court within thirty (30) days after judgment is rendered, and not thereafter, only after the party appealing has paid to the clerk of the municipal court the costs now allowed for the preparation of the transcript, and also the filing costs due the circuit clerk. The clerk of the municipal court shall within (5) days after such payment lodge such transcript with the circuit clerk and pay to him the amounts due as filing costs. The circuit court shall advance on its docket such causes on appeal and the same shall stand for trial de novo in the circuit court ten (10) days after being docketed."

The second statute is Ark. Stat. Ann. § 26-1307 (Repl. 1962), which reads:

"If a party appeals from a justice of the peace judgment or a common pleas judgment or a municipal court judgment the clerk of the court or the justice of the peace of the court from which the appeal is taken must file the transcript of the judgment in the office of the circuit court clerk within thirty (30) days after the rendition of the judgment."

There is no brief filed in this Court by the appellee but, regardless of which of the above statutes the appellee might have desired to urge, the result is the same: the appellee failed to comply with the requirements of either

statute.[2] All that was filed in the Circuit Court within the thirty day period were the three pages sent from the Municipal Court, as previously mentioned. These pages failed to constitute a "transcript." In *Camden Gas Corp.* v. *Camden,* 183 Ark. 583, 37 S. W. 2d 74, we said: "The transcript is nothing but a certified copy of the record below. . . ." A good case recognizing that a certificate is required to constitute a transcript is *L. & N. RR.* v. *Caudill* (Ky.), 194 S. W. 2d 508.

In the case at bar there was nothing certified, so there was no *transcript,* as required by the statute for timely filing of appeals from municipal court to circuit court. Our holding in *Barber* v. *Crabtree,* 214 Ark. 463, 217 S. W. 2d 265, points to the present holding. The fact, that the three pages were sent from the Municipal Court, rather than filed direct in the Circuit Court, does not differentiate the case at bar from the adjudicated case. The three pages filed in the Circuit Court were not certified in any way, and therefore there was no compliance with the requirements for a *transcript.*

The judgment of the Circuit Court is reversed and the cause is remanded, with directions: (a) to enter a judgment dismissing the attempted appeal of Jefferson Terrell from the Municipal Court; (b) to render judgment for the B-W Acceptance Corporation on the bond; and (c) for all other proper relief.

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[2] Recent cases on Ark. Stat. Ann. § 26-1307 (Repl. 1962) are: *Whiteley* v. *Pickens,* 225 Ark. 845, 286 S. W. 2d 4; Ex parte *Hornsby,* 228 Ark. 975, 311 S. W. 2d 529; and *Craig* v. *State,* 235 Ark. 563, 361 S. W. 2d 16.

5-3341 382 S. W. 2d 892

Opinion Delivered October 19, 1964.

Eugene S. Harris and Bridges, Young & Matthews, for appellant.

McMath, Leatherman, Woods & Youngdahl, for appellee.

George Rose Smith, J. This is a claim filed by the appellees, the widow and children of Orvis Noel Rogers, for death benefits under the workmen's compensation law. The Commission denied the claim upon the ground that the case falls within the "going and coming rule," which exempts the employer from liability for an injury that occurs while the employee is traveling to or from his place of work. The circuit court reversed the Commission's decision, holding that the decedent's transportation was being furnished by his employer, so that the case comes within a recognized exception to the exclusionary rule. The single question is whether the Commission's decision is supported by any substantial evidence.

Rogers, a tractor driver, was one of a seven-man crew employed by McCollum in logging operations. Jim Garlington was the foreman of the crew. For a month or two before Rogers' death Garlington had been picking

up Rogers and two other members of the crew and taking them to and from work daily in his pick-up truck. Two other men in the crew provided their own transportation. The remaining two were truck drivers who drove their employer's trucks to and from work.

Rogers lived about a mile from Highway 167. It was his practice to drive his own car to the highway in the morning in time to meet Garlington at about 6:30. Rogers would leave his car by the highway and ride with Garlington to the logging site, a distance of nine miles or more. It was understood that if Garlington did not appear by 7:00 a.m. it meant that the crew would not work that day.

On the morning of Rogers' death the weather was bitterly cold, a few degrees above zero. Garlington decided that it was too cold to work in the woods and therefore made no attempt to pick up his passengers. There is evidence that Rogers drove to the highway as usual and kept his engine running and his heater operating while he waited. Apparently Rogers started to go back home when Garlington did not show up within the agreed time. At about 8:15 a mail carrier discovered Rogers' car stopped on the road at a point more than halfway along the return route to his home. The position of the car indicated that Rogers may have attempted to park on the righthand side of the road. The engine was still running, and Rogers' lifeless body was slumped over in the driver's seat. The cause of death was carbon monoxide poisoning. Mrs. Rogers testified that there was something wrong with the muffler on the car, but her husband had not indicated that the condition was dangerous.

Counsel for the appellees contend that Garlington was acting for his employer in driving Rogers to and from work. From this premise it is argued that Rogers was also in the course of his employment while waiting in his own car beside the highway and that the onset of his asphyxiation must have taken place before he started to return to his home. We find it unnecessary to test this chain of reasoning, for there is substantial evidence to

support the Commission's finding that Rogers' transportation was not being furnished by his employer.

The governing rule of law was applied in *Cerrato* v. *McGeorge Contracting Co.,* 206 Ark. 1045, 178 S. W. 2d 247, and *O'Meara* v. *Beasley,* 215 Ark. 665, 221 S. W. 2d 282. In both those cases the injury occurred while fellow employees were riding together, but the Commission found that the transportation was not being provided by the employer. In view of that fact we upheld the Commission's denial of compensation. On the other hand, in the cases principally relied upon by the appellees, *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579, and *Blankinship Logging Co.* v. *Brown,* 212 Ark. 871, 208 S. W. 2d 778, the Commission awarded compensation upon a finding that the employees' transportation was being furnished by the employer. We affirmed that finding. Thus there is no essential conflict in our decisions.

In the case at hand there is sufficient proof to support the Commission's conclusion that this particular arrangement was a matter between fellow employees, not imputable to their employer. Garlington unquestionably owned the pick-up truck that he used in going to and from work. There is no proof that McCollum contributed anything to the expense of its operation. In fact, it does not appear that Garlington's conduct in giving a ride to some of his crew involved any additional expense to himself, for he did not have to go out of his way to pick them up. McCollum, the employer, stated that he paid no part of Rogers' transportation expense. He did not care whether Rogers traveled to the highway in his own car, or walked, or rode with a neighbor. "He was just supposed to bring himself to work." The fact that two other members of this same crew provided their own transportation is contrary to the inference that the contract of employment contemplated transportation by the employer.

We do not discuss the various inferences and arguments that are relied upon by the appellees. These are matters that addressed themselves to the Commission.

It is our duty to view the evidence in the light most favorable to that tribunal's findings. To affirm the circuit court's decision we should have to declare as a matter of law that fair-minded men could reach no conclusion except that the arrangement between Garlington and Rogers was actually chargeable to McCollum. Such an extreme position is not dictated by our prior decisions, liberal though they have been in this particular field. The Commission was free to conclude that Garlington voluntarily used his own vehicle to carry some of his crew to work at his own expense, with no prearrangement or participation on the part of McCollum. We are not permitted to set aside the Commission's decision upon a disputed question of fact.

Reversed.

HARRIS, C.J., not participating. MCFADDIN, J., concurs. JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, (dissenting). I do not agree with the majority opinion. I would affirm the judgment of the circuit court. The logic of its ruling in my view cannot be refuted. The opinion of the learned judge is hereby quoted in full as it lucidly presents the basis of my dissent.

"This court has no hesitancy in reversing the Commission in this case because the material facts are undisputed. Compensation thus resolves itself into a question of fact. Orvis Noel Rogers was a tractor driver of Gilbert R. McCollum, a lumber mill owner and logger, whose woods crew at the time of Rogers' death was engaged in cutting a tract five miles north of Kingsland for McCollum's mill at Farindale. This tract was approximately twenty miles from the point on Highway 167 where McCollum's woods foreman picked up Rogers by prearrangement and invariable custom. The woods foreman, Jim Garlington, picked up two other employees at another point on Highway 167 about 4 miles from where Rogers was picked up. Garlington was in complete charge

of the woods crew and McCollum testified that whatever arrangements he made were 'satisfactory with him.'

"This arrangement had been in effect for about two months, significantly since work on the Kingsland tract had begun. In the Referee's opinion, adopted by the Commission, this arrangement was not considered to be an incident of the employment, but merely as an 'arrangement between fellow employees'. Such a view completely overlooks the fact that Garlington was in complete charge of the woods operations for Mr. Collum. Garlington was more than a fellow employee. He had the sole responsibility for the operation on which the deceased was employed. In all the arrangements he made and all that he did in carrying out these arrangements he was McCollum's *alter ego*. No other conclusion can be drawn from the evidence in this case.

"There is another factor that is equally persuasive in my finding that the transportation provided by Garlington was company-furnished transportation and thus an incident of the employment. Rogers lived a considerable distance from the Kingsland tract. On a salary of $50 per week it is inconceivable that he would have been expected to furnish his own transportation, into the log woods. To have expected Rogers to drive his automobile 35 or 40 miles a day and support a family of seven on a salary of $50 per week is hardly likely. Mr. Garlington would have had great difficulty in maintaining a woods crew under such an arrangement. Quite obviously the monetary benefit of free transportation by his foreman into the distant log woods was an important consideration in the employment relationship. (See *Ward* v. *Cardillo,* 135 F. 2d 260 (D. C. 1943) *infra.*) It cannot be dismissed as 'an arrangement made between fellow employees of the respondent, and . . . not imputable to the respondent.'

"The arrangement for picking up Mr. Rogers was quite specific. He was to be at the point where the county road on which he lived intersected Highway 167 at 6:30 A.M. He was to remain at this location until 7:00 A.M.

If Garlington had not arrived by then, it could be assumed that he had decided not to work the crew because of weather conditions and Rogers could return home. There is a small clearing at the intersection and Rogers always waited there for Garlington. The various witnesses estimated this clearing to be from two-fifths to three-fourths of a mile from Rogers' home.

"On Monday, January 14, the day before Rogers' death, the crew worked only part of the day because of the cold. Mr. McCollum saw Rogers in Farindale at about 5:00 P.M. Rogers was specifically told that part of the crew would work the next day and that he could work. According to his wife, Rogers understood from McCollum that he was supposed to work the next day, regardless of the cold, for he told her when they discussed the exceptional cold (8 degrees), 'But he told me to be there and I've got to go.'

"Obviously McCollum did not tell his foreman, Garlington, that Rogers had been instructed to work the next day. Garlington got up around 5:30 A.M., went outside and decided it was too cold to work. Rogers had no 'phone and this decision was not communicated to him.

"Rogers got up between 5:00 and 5:30 and left home a few minutes after 6:00 A.M. A neighbor followed his car out to the clearing at the intersection and another neighbor at 6:20 or 6:25 A.M. saw his car in the clearing with the motor running. Since his standing instructions were to remain at this point until 7:00 A.M., it must be assumed that he remained in the clearing, waiting for Garlington, until this time or shortly thereafter. He then started back to his home from the clearing. As stated above, this distance was estimated as between two-fifths and three-quarters of a mile. When he reached the turn-off from the county road to his home, he lapsed into unconsciousness. His car nosed off of the road into some little bushes. According to the undertaker the front end of the car was completely off the road as if he didn't turn far enough to the right. At about 8:15 or 8:30 A.M. the rural mail carrier found Rogers' lifeless body in the

automobile. The motor was still running. While he went to notify Mrs. Rogers, the car ran out of gasoline and the motor stopped. Mrs. Woodrow Burford, a close neighbor of the Rogers, who lives to the left of the road leading to Rogers' home, heard and saw the Rogers car at the location where the mail carrier found it. It had its lights on and periodically the motor raced. She could not fix the time when the car reached this location except to say that it was between 6:30 and 7:30 A.M.

"The undertaker testified that Rogers' skin had the reddish tint and his blood the bright red color that is characteristic of carbon monoxide poisoning. The referee's finding, adopted by the Commission, was that death occurred from this cause. Carbon monoxide poisoning is so common and has been so widely studied that we may take judicial knowledge of the mechanism by which it produces death in the human body. The gas is tasteless, colorless and odorless and is formed by burning carbon fuels in a deficiency of air or oxygen. The gas forms a relatively stable compound with haemoglobin, the part of the blood which carries oxygen from the lungs. The formation of this compound called carbonic oxide haemoglobin prevents the haemoglobin from carrying oxygen and asphyxiation results. Of course, it takes some time for this process to reach fruition. Here it undoubtedly began at the clearing where Rogers was waiting for his foreman, because he would have driven the short distance from the point at the clearing to the point where he became unconscious in about a minute. It would have required a longer period to build the deadly compound to a critical point in his bloodstream. It is common knowledge that carbon monoxide concentration builds faster in a stationary car than in one which is moving because some air is forced into a moving car.

"CONCLUSIONS OF LAW

"The first legal question to be decided is whether the arrangement between the foreman Garlington and Rogers constituted company-furnished transportation. The referee and the Commission held that it did not and

such holding formed the principal basis for a denial of compensation to the widow and five children. The holding however, overlooks such cases as *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579 (1943), and *Blankenship Logging Co.* v. *Brown,* 212 Ark. 871, 208 S. W. 2d 772 (1948), where compensation was awarded under similar circumstances. In the former case the claimant was a timber cutter who received injuries while riding home from work in a truck. The employee lived about fifteen miles from where the work was being carried on, and at the hearing the employer when asked about the arrangement with his men as to transportation to and from work said: 'We had trucks going out there and if they wanted to ride, they could.' This is quite similar to McCollum's testimony in the instant case. There are two other significant similarities to *Hunter* v. *Summerville.* In the latter case the truck *was owned by a sub-contractor working on the same job.* Secondly, the custom was for the employees to furnish their own transportation to a certain filling station where they would be picked up.

"In the *Blankenship* case the employer actually owned the vehicle in question, but it was being driven on the day of the death of the claimant's decedent by an allegedly unauthorized employee. The court pointed out that for the exception to be applicable to the transportation arrangement need not be rigid nor clearly defined. It is only necessary that the transportation be furnished in some manner by the employer 'for the mutual benefit of himself and the workmen of facilitate the progress of the work.' The court at 212 Ark. 875-76 quoted:

'This exception to the rule may arise either as the result of custom or contract, express or implied. It may be implied from the nature and circumstances of the employment and the custom of the employer to furnish transportation . . .

" 'There are no rigid legal principles to guide the Deputy Commissioner in determining whether the employer contracted to and did furnish transportation to and from work. "No exact formula can be laid down which will automatically solve every case." (Citing cases.) Each

employment relationship must be pursued to discover whether the employer, by express agreement or by a course of dealing, contracted to and did furnish this type of transportation. . . .'

"Respondents cite the case of *Dickinson* v. *Central Construction Co.,* 233 Ark. 360, 344 S. W. 2d 599 (1961), a 4-3 decision affirming a denial of compensation by the Commission, where two employees were injured while being transported by their foreman to work from Camden to Pine Bluff. But this case may be easily distinguished. Sales, the foreman, while working in Pine Bluff on some construction jobs, had an apartment there, although his home was at Camden. The claimants also lived at Camden but ordinarily drove their own trucks to the job sites at Pine Bluff. Sales went home to Camden for Thanksgiving. Before leaving Pine Bluff on Wednesday he had not delivered checks to some of his employees and it was necessary for him to return the day after Thanksgiving to perform this duty. Since he had to go from Camden to Pine Bluff he invited claimants to leave their cars and ride with him. Thus, we had an isolated instance of transportation purely for the convenience of the claimants in which their employer had no interest and to which no approval had been given, express or implied, by contract or by custom.

"On the other hand, the transportation in the instant case was regular, daily transportation at an appointed time. It was by virtue of an arrangement made by the employer's woods foreman when the employer began cutting a tract at a considerable distance from Rogers' home. It had been in effect for two months, with the employer's knowledge and acquisence.

"This court has no doubt but that the Supreme Court would have reached a different result in the *Dickinson* case if Sales, the foreman, had by prearrangement transported the claimants each day from Camden to Pine Bluff with the tacit approval of the employer, instead of on one isolated occasion for their own convenience. In other words, this case pointed up the testimony of the

claimants 'that it had not been the custom of practice for the employer to furnish the transportation.' 233 Ark. at 362. Therefore, the case at bar is factually akin to *Hunter* v. *Summerville* and *Blankenship Logging Co.* v. *Brown, supra,* rather than to *Dickinson* v. *Central Construction Co.* The former cases are binding on the first issue presented—whether the transportation was company-furnished. It follows then that the Commission erred, as a matter of law, in finding that the transportation was only 'an arrangement between fellow employees.'

"The second issue, only touched in passing by the referee and Commission, presents the major difficulty to this court. Even though the transportation here was company-furnished, did Rogers' death come within the ambit of that transportation? Virtually all jurisdictions recognize that company-furnished transportation constitutes an exception to the 'going and coming' rule. However, many jurisdictions hold that coverage does not begin until the claimant actually enters the company vehicle. Arkansas, however, is in the vanguard of those jurisdictions applying a more liberal rule. *Simply stated,* the liberal rule is that when the employer furnishes the transportation, all the incidents related to meeting, boarding, waiting for, and leaving the employer's conveyance become compensation-covered incidents of the employment.

"Larson's textbook, the leading work on workman's compensation, builds its discussion of the liberal rule around the landmark Arkansas case, *Owens* v. *Southeast Arkansas Transportation Co.,* 216 Ark. 950, 228 S. W. 2d 646 (1950). Larson says in Section 1740 of Workmen's Compensation Law:

"The case which appears to have extended protection the furtherest involved a bus driver who had finished his day's work, and, pursuant to his privilege of riding home without charge on his employer's busses, had dashed diagonally across a city street to catch a bus that was about to leave. He was struck by a motorist,

and his death was held compensable. The court put it this way:

" 'In effect the Company said to Owens, "Take your pass and go across the street to our bus; your day's work has been finished, and we are interested in seeing that you get home as expeditiously as possible." '"

"Larson then cites several cases as being in accord with the Arkansas holding. One of these, *Flanagan* v. *Webster,* 107 Conn. 502, 142 A. 201 (1928), is almost on all fours with this case. The facts given in the opinion are as follows:

"The commissioner made an award of compensation to the plaintiff claimant, from which defendants appealed. The superior court reversed the case upon the finding of the commissioner for the advice of this court. On December 23, 1926, the plaintiff was and had been for less than two weeks prior to this date in the employ of the defendant employer and at work upon the state highway in the town of Chesire. The plaintiff lived in the village of West Chesire. The only way in which he could reach his work was through transportation furnished by the defendant employer in one of its trucks which stopped for him in the morning usually at a point on the state road and carried him to his place of work. It ordinarily came along in time to get the men to their work at 6:30 a.m. On the slated morning the plaintiff left his home and walked to the state road where the truck usually picked him up. It was late on this morning; the weather was cold and because of this the plaintiff walked along the road in order to keep warm and upon its left side. The truck came up with him, and stopped on the right-hand side of the road for him to board it. While plaintiff was crossing the highway to board the standing truck, he was struck by an automobile and sustained a fracture of the femur. The commissioner held upon these facts that the plaintiff when injured was doing something incidental to his employment, and that the injury arose out of and in the course of his employment. The defendants claimed that, as the plaintiff had not actually boarded the truck, he was not on premises controlled by the em-

ployer, and consequently, the injury did not arise out of and in the course of his employment."

The court's language, in granting compensation, is highly appropriate to the case at bar:

"Thus the employer might designate the place where the automobile was to be boarded; it might be on private property or on a public highway. If the employee went to the designated place within a reasonable time prior to the time when he was to board the automobile, he would, from the time he reached the designated place, be then carrying out the direction of his employer, and that direction would become an incident of the employment and a part of the means of transportation, just as a railway station, or a bus waiting room, is a necessary incident of the railway or busline. Similarly, when an employee is directed to report each morning at a given place, or to a certain person, to receive instruction as to where he is required to work that day, the relation of master and servant has been held to commence at the time he reported, and his employment to have begun at that time, and that the injury there after occurring, prior to the time of actually beginning work, was suffered in the course of his employment. Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238, L.R.A. 1916A, 327; Milwaukee v. Industrial Com., 185 Wis. 311, 201 N. W. 240. So it has been held that the fact that the injury occurs while the employee was in the act of boarding the train and not while being transported does not relieve the employer of liability for compensation. Fisher v. Tidewater Building Co., 96 N. J. Law 103, 114 A. 150. Nor does it relieve the employer where the employee is injured when upon his employer's premises and engaged in the preparation necessary for beginning the work of his employment. . . .

"If the plaintiff had, when he walked from his home to the state road where his employer's truck usually picked him up, remained at this point, and was there injured while waiting for the truck, there could be no doubt that during the period plaintiff was waiting at this point he was in the course of his employment. His being

at this point, upon this finding, would have been an incident of his employment, and a fulfillment of the implied direction of his employer. Under the authorities we have cited the employee would be held to have been in the course of his employment.

"Here decedent's injury began at the designated spot where he was to await company-furnished transportation. Rogers reached this point at about 6:10 A.M. The weather was extremely cold (8-10 degrees). We know his motor was running at 6:25 A.M. We know it was still running about 8:15 A.M. when he was found dead in his automobile. He had started home from the clearing where he was supposed to wait until 7:00 A.M. and had lost consciousness as he started to turn into the driveway to his home, two-fifths to three-fourths of a mile from the clearing. Though the insidious effect of the carbon monoxide rendered him unconscious, a minute or so after he left the clearing, we know that the deadly gas had begun to be absorbed into his blood stream while he was waiting at the spot designated by his foreman where he was to receive company-furnished transportation. So, the injury began while he was at this location. In this respect this case is no different from one of the other cases cited by Larson in Section 1740 as being in accord with *Owens* v. *Southeast Arkansas Transportation Co., supra.*

"In that case, *Radermacher* v. *St. Paul City Ry. Co.,* 8 N. W. 2d 466 (Minn. 1943), claimant, a car cleaner, had a ticket book entitling him to ride free on his employer's streetcars. While he was waiting for a streetcar in a 'safety isle', he was struck by a 'hit and run' driver. The injury was held to be compensable.

"Assume that while Rogers was waiting in the clearing, a 'hit and run' driver ran off the road, struck his car and killed. This would be exactly the *Radermacher* case. There is no difference in Rogers' being killed by a 'hit and run' driver and being asphyxiated by carbon monoxide, the deadly effects of which began when Rogers was parked at this location. Nor is the legal import

changed, if Rogers had been hit by a 'hit and run' driver and badly injured, but in order to get help, walked back down the road toward his home and collapsed and died before reaching there.

"Other cases awarding compensation in similar fact situations are: *Sibler* v. *Lincoln-Alliance Bank & Trust Co.,* 280 N. Y. 173, 19 N. E. 2d 1008 (1939), (claimant injured crossing street to home where foreman had taken him after late work); *Ward* v. *Cardillo,* 135 F. 2d 260 (D. C. 1943) (claimant injured crossing street to board company truck which picked him up morning at 7:00 A.M.; *free transportation found to be a part of compensation, since it saved claimant $5 per day in transportation costs*); *Povia Bros. Farms* v. *Valez,* 74 So. 2d 103 (1954) (claimant injured crossing road to board company truck, which picked up employees in neighborhood each morning as driver saw them, no particular assembly point being designated).

"Cases involving compensable deaths from carbon monoxide are: *Mascika* v. *Connecticut Tool Engineering Co.,* 147 Atl. 11 (Conn., 1929) (decedent asphyxiated in own car preparing to go on trip to collect bills); *Derleth* v. *Roach & Seeber Co.,* 227 Mich. 258, 198 N. W. 948 (1924) (decedent, a traveling salesman, fearing batteries would freeze in very cold weather, went home to test them in own garage, where he was asphyxiated); *Leilich* v. *Chevrolet Motor Co.,* 328 Mo. 112, 40 S. W. 2d 601 (1931) (traveling salesman asphyxiated while changing tire in home).

"Mention might also be made of the *State Employees' Retirement System* v. *Industrial Commission,* 97 Cal. App. 2d 380, 217 P. 2d 922 (1950). A game warden, who sometimes slept in his car while on night patrol, was found dead of carbon monoxide on a secluded side road. The interior of the car had been made into a bed and at the decedent's side was the nude body of a female (not his wife). The California court affirmed an award of compensation. If California can grant compensation under these circumstances to one of its citizens, surely

compensation is justified in Arkansas by reason and justice, in the case at bar. More, instead of being overcome while at an assignation, Rogers was overcome when he went, under an express work order from his employer, to a point where he was customarily picked up by his foreman. The foreman was not told by the employer that Rogers was to work and because of the extreme cold (8-10 degrees) decided not to pick up the crew. This decision was not communicated to Rogers and he was asphyxiated by carbon monoxide, while vainly waiting for his foreman in the extreme cold.

"In view of this court there is more work-connection with the death here than in *Owens* v. *Southeast Arkansas Transportation Co., supra,* and the other cases discussed *supra.* The usual transportation afforded Rogers was an incident of the employment, but because of the events surrounding Rogers' presence at the clearing on this particular morning, the failure to provide transportation was even more of an incident of the employment."

For the reasons stated, I respectfully dissent.

ED. F. MCFADDIN, Associate Justice, (concurring). I concur in the reversal of the Circuit Court and the affirmance of the action of the Workmen's Compensation Commission in disallowing compensation. The Majority Opinion contains this paragraph:

"Counsel for the appellees contend that Garlington was acting for his employer in driving Rogers to and from work. From this premise it is argued that Rogers was also in the course of his employment while waiting in his own car beside the highway and that the onset of his asphyxiation must have taken place before he started to return to his home. We find it unnecessary to test this chain of reasoning, for there is substantial evidence to support the Commission's finding that Rogers' transportation was not being furnished by his employer."

I agree with the Majority that Mr. Rogers' transportation was not being furnished by his employer; but

there are other—and to me equally cogent—reasons why Mr. Rogers was not covered by the Workmen's Compensation Act at the time of his death.

In the first place, he had left the pick-up point and started home. Some time after 7:00 A.M. Mr. Rogers apparently realized that Mr. Garlington was not coming for him, so Mr. Rogers started back to his home. He drove down the county road about three-fourths of a mile and stopped. He was found dead in his car about 8:15. When Mr. Rogers left the pick-up point on the highway and started home in his own vehicle he ceased any semblance of coverage under the Workmen's Compensation Act, and for that reason I think the Commission was correct in denying compensation.

Another and equally cogent reason for denying compensation is the fact that there is no evidence that Mr. Rogers received the "lethal dose" of carbon monoxide while he was on the highway waiting for Garlington to arrive. Speculation cannot take the place of proof. Mr. Rogers was in possession of sufficient faculties to turn his car around and drive toward home; and we cannot speculate as to when Mr. Rogers received the lethal dose of carbon monoxide.

HOWARD *v.* WARD
HOWARD *v.* RHINE

5-3314 & 3315 383 S. W. 2d 107

Opinion Delivered October 19, 1964.

[Rehearing denied November 16, 1964.]

W. B. Howard & Jack Segars, for appellant.

Howard A. Mayes, Rhine & Rhine, Ward & Mooney, for appellee.

PAUL WARD, Associate Justice. On March 18, 1963 appellant (a practicing attorney) filed a complaint in circuit court against Lee Ward (a practicing attorney) alleging, in substance, that Ward accused him of blackmail and criminal libel by filing a "Motion to Dismiss" in another lawsuit; that the said Motion was not relevant or pertinent to the issues in said lawsuit; that the said Motion was made, filed and published "for the sole purposes of expressing his ill will and animosity toward" appellant and of impeaching his character, honesty and integrity; and, that "by reason thereof he [plaintiff-appellant] should recover" from the defendant $10,000 for compensatory damages and $15,000 for punitive damages.

On the same day appellant also filed a similar complaint against L. V. Rhine (a practicing attorney) who as co-counsel with Ward joined in filing the said Motion. Since the issues and facts are the same in both cases we will hereafter discuss only Case No. 3314 (*Howard* v. *Ward*).

In order to understand clearly the issue raised on this appeal it is necessary to give in chronological order a summary of the background facts and circumstances.

On January 13, 1962 Mrs. Orine Carr (represented by appellant, her attorney) sued her husband, George Carr, (a Sergeant in the Air Corps) for divorce, alimony and child support. See *Carr* v. *Carr,* 237 Ark. 533, 374 S. W. 2d 359. On January 31, an answer was filed. On April 14 George filed a Motion to dismiss Orine's Complaint—the Motion being based on attached copy of a divorce decree granted to him on March 19, 1962 by a court in Georgia. While the attorneys on both sides were waiting for an opportunity to argue the merits of the divorce case, the appellees here (attorneys Ward and Rhine), on March 8, 1963, filed the said "Motion to Dismiss" the complaint filed by Orine.

The above Motion triggered the present litigation. Attached to the Motion were two letters (dated April 4 and May 2, 1962) written by appellant to George's Commanding Officer. The letters accused George of being a sex pervert and threatened to prosecute him for abandoning his children. In the Motion appellees stated that the charge of sex perversion was false and amounted to "criminal libel" and "That the threat of criminal prosecution was made with an intent to blackmail this defendant, causing him to accede to the demands of Attorney W. B. Howard and force this defendant to pay large amounts of money in the prosecution and settlement of this divorce case."

As stated at the beginning, it was upon the above statements that appellant based his complaint against appellees. Answering the complaint, Ward filed a motion for summary judgment, stating that the Motion to Dismiss was "absolutely privileged". The trial court granted the motion for summary judgment and dismissed appellant's complaint, using the following language:

"Based upon the pleadings, exhibits and affidavits appearing of record, there is no justifiable issue remaining between the litigants.

"The alleged defamatory matter upon which plaintiff bases his claim to damages was filed as a pleading with a court of competent jurisdiction in the prosecution

of an existing cause of action. Said alleged defamatory matter was relevant and pertinent to questions raised in said cause of action of the parties, and was, as a matter of law, absolutely privileged."

From the above action of the court appellant now prosecutes this appeal.

Appellant and appellee agree (and we concur) that the decisive rule of law applicable here is correctly stated in *Mauney* v. *Millar,* 142 Ark. 500, 219 S. W. 1032, in the following words:

"There are two classes of privileged communications recognized in the law governing the publication of alleged libelous matter: One of these classes constitutes an absolute privilege, and the other a qualified privilege, and, according to the great weight of authority, pertinent and relevant statements in pleadings in judicial proceedings are held to be within the first class mentioned, and are absolutely privileged. * * * The test as to absolute privilege is relevancy and pertinency to the issue involved, regardless of the truth of the statements or of the existence of actual malice." [Cases and authorities cited.]

Following the above quotation in his brief appellant makes this statement:

"Therefore, the prime issue to be determined upon this appeal is, were the charges of blackmail and criminal libel relevant to any issue in the divorce case of *Carr* v. *Carr?*"

The pivotal question for decision therefore is: were the questionable words used in the Motion filed in the *Carr* case relevant to any of the issues therein raised? Fortunately the courts have laid down some rather definite rules to aid us in seeking to resolve this question. In the *Millar* case, *supra,* appears the following:

"The following statement of law as to the liberality of the courts in determining what is or what is not pertinent is made in Ruling Case Law, volume 17, p. 336, as

follows: 'As to the degree of relevancy or pertinency necessary to make alleged defamatory matter privileged the courts favor a liberal rule. The matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety. In order that matter alleged in a pleading may be privileged, it need not be in every case material to the issues presented by the pleadings. It must, however, be legitimately related thereto, or so pertinent to the subject of the controversy that it may become the subject of inquiry in the course of the trial.' "

In *Bussewitz* v. *Wisconsin Teachers' Ass'n,* 188 Wis. 121, 205 N. W. 808, 42 A.L.R. 873, the issue was very similar to the issue here. Appellant sued appellee to recover money allegedly spent in its behalf. Appellee answered, accusing appellant of "unlawfully and feloniously" converting association money to his own use. Thereupon appellant brought suit against appellee for $25,000 damages based on the above mentioned answer, claiming the use of the word "feloniously" was not relevant, pertinent or material to the issue involved. The Supreme Court of Wisconsin held otherwise, stating:

"The question of relevancy in these inquiries is for the determination of the court, and not for the jury. In considering whether allegations in a pleading are pertinent or relevant, it does not follow that the same tests are to be applied as on motions to strike out averments as irrelevant. * * *

"In Nebraska it is held that on such an inquiry all doubts should be resolved in favor of relevancy and pertinency. *Simon* v. *London Guarantee & Accident Co.,* 104 Neb. 524, 177 N. W. 824, 16 A.L.R. 743. In a New York case it was held that if the allegation could possible be pertinent or material the privilege is absolute. *Chapman* v. *Dick,* 197 App. Div. 551, 188 N.Y.S. 861."

The *Bussewitz* case is reported in 42 A.L.R. 873, with an Annotation citing many cases in support.

Applying the above liberal rule, we are led to conclude that the Motion filed by appellee was relevant to the pending divorce proceeding, as was found by the chancellor in that case and by the trial judge in this case.

If appellant had any purpose in writing the letters to George's Commanding Officer it obviously was to help his client in the prosecution of her quest for a divorce and especially for alimony and child support. It was not, we think, unreasonable for appellee to assume this was a matter which should be brought to the attention of the trial court. It is not significant, we think, that the Motion was not filed until several months after the letters were written because it is not shown just when they came into appellees' possession. Neither do we think it is material that the testimony had been taken in the divorce case when the Motion was filed. The case had not been decided or even submitted for decision, and appellees had a right, if not a duty, to try to present all matters affecting the rights of their client.

It is therefore our opinion that the trial court was correct in granting appellees' motion for a summary judgment, and his action in both cases is hereby affirmed.

Affirmed.

CITY OF JACKSONVILLE *v.* WILLIAMS

5-3316 383 S. W. 2d 103

Opinion Delivered October 19, 1964.

[Rehearing denied November 16, 1964.]

Howell, Price & Worsham, for appellant.

James L. Sloan, for appellee.

SAM ROBINSON, Associate Justice. O. Loren Hudson and Ben G. Williams originally filed this suit against the City of Jacksonville contending that some time prior to February 15, 1958, they were employed as deputy marshals for the City of Jacksonville; that on February 15, 1958 they were wrongfully and illegally discharged by the Mayor of the city. Later, Ben G. Williams died, and the suit in his behalf was carried on by the administratrix of his estate. It is alleged that Hudson and Williams were entitled to be paid at the rate of $275.00 per month for the balance of the year 1958, and prayed for a judgment accordingly. The cause was tried in April, 1963; there were judgments in favor of the plaintiffs; the defendant, the City of Jacksonville, has appealed.

Ark. Stat. Ann § 19-1104 (Repl. 1956) provides that the city marshal shall have power to appoint one or more deputies. It is stipulated that one Garner, who was the marshal of Jacksonville, appointed Hudson and Williams for the year 1958, and on February 15, 1958, the Mayor of the City of Jacksonville discharged Garner, the marshal, and the deputy marshals. One Kennedy took over the duties of marshal. Garner filed suit against Kennedy alleging that he had usurped the office of marshal. There was a judgment in the circuit court to the effect that Garner was entitled to the office. Kennedy appealed to this court. We held that without the approval of the City Council the Mayor did not have the authority to discharge the marshal, and that Garner was, therefore, entitled to the office. *Kennedy* v. *Garner,* 230 Ark. 698, 326 S. W. 2d 810.

It is now contended that Hudson and Williams had been appointed for the entire year by Garner, and that the Mayor had no authority to discharge them; that they were entitled to their salaries from the city for that part of the year in which they had no other employment, notwithstanding the fact that subsequent to February 15, 1958 they did no work for the city.

The City Council fixed the deputy marshals' salaries at $275.00 per month, but the Council had the right to withhold the payment of such salaries when the employees did not work, and evidently did withhold such salaries, otherwise no suit would have been filed. The statute provides that the marshal may appoint deputies, and it was held in *Conner* v. *Burnett,* 216 Ark. 559, 226 S. W. 2d 984 that cities are authorized to pay salaries to deputy marshals, but there is no statute requiring the city to pay salaries to deputy marshals, and although there is a city ordinance fixing the salaries of the deputies, the deputies have no cause of action against the city for salaries where they have done no work to earn such salaries. Although the deputies may have been discharged by someone exceeding his authority, the fact is that they did no further work for the city, and in these circumstances they were only entitled to the fees as set out in Ark. Stat. Ann. § 19-1104 (Repl. 1956) which provides that deputy marshals "shall receive the like fees as sheriff and constable in similar cases".

In *State ex rel Rusch* v. *Board of County Commissioners of Yellowstone County,* 191 P. 2d 670, the court said: ". . . The status of deputies necessitate the holding that such subordinates are not 'public officers' who may receive the compensation prescribed for their services merely by virtue of their appointment without regard to whether they render service in the position or not."

Reversed and dismissed.

McFaddin & Johnson, J.J., dissent.

Ed. F. McFaddin, Associate Justice, (dissenting). I respectfully dissent because I am of the opinion that

the judgments of the Circuit Court in favor of Williams and of Hudson should both be affirmed, largely under the authority of our holding in *Kennedy* v. *Garner,* 230 Ark. 698, 326 S. W. 2d 810. In that case Garner had been chosen as Marshal for the City of Jacksonville for the year 1958. He was serving as such Marshal on February 15, 1958, when the Mayor discharged him and appointed Kennedy in his place. This Court held that Garner was entitled to the office of Marshal because the Mayor had no right to discharge him and that Garner had never abandoned his office. In the appellants' brief in the present case it is stated that Garner received his salary for the balance of the year 1958 because of our holding in *Kennedy* v. *Garner.*

By the same token, I think Garner's two deputies—Williams and Hudson—should recover their full salary for the year 1958, less what they earned in other work. If the Mayor had no right to discharge the Marshal, he certainly had no right to discharge his deputies, whose pay scale of $275.00 per month had been approved by the City Council of Jacksonville.

The agreed statement of facts says:

"I. O. Loren Hudson and Ben G. Williams were duly appointed and qualified as deputy marshals of Jacksonville on January 15, 1958, at which time Jacksonville was a city of the second class, in accordance with Ark. Stats. (1947) § 19-1104.

"II. After January 15, 1958, and until January 2, 1959, at which time the term of office of the appointing marshal, C. S. Garner expired, O. Loren Hudson and Ben G. Williams did not abandon their offices as deputy marshals, nor were they removed from their offices as deputy marshals, except that the following events occurred:
(a) On February 15, 1958, the mayor of Jacksonville purported to remove O. Loren Hudson and Ben G. Williams from their positions as deputy marshals . . .
(b) At all times relevant hereto after February 15, 1958, the mayor prevented O. Loren Hudson and Ben G. Williams from functioning in their offices as deputy mar-

shals and prevented the payment of any compensation to them as such deputy marshals. ..."

Both Mr. Williams[1] and Mr. Hudson filed the present action for their unpaid salaries for the balance of 1958, and each credited on his claim for unpaid wages the amount he had been able to earn at other employment. The Trial Court found: "Ben G. Williams made a reasonable effort to minimize his damages and did so to the extent of earning $770.00." The Court also found that Mr. Hudson made a reasonable effort to minimize his damages and did so to the extent of earning $600.00. I maintain that these two deputy marshals were duly employed by Marshal Garner, agreeable to the City Council and at an agreed monthly pay scale of $275.00 each; and each was wrongfully discharged (just as was Marshal Garner); and that each is entitled to recover his monthly pay for the balance of the calendar year 1958, less what he was able to earn at some other employment. Therefore, I would affirm the Trial Court.

JOHNSON, J., joins in this dissent.

[1] Mr. Williams died on October 15, 1963.

FLUNDER *v.* CHILDS

5-3273 382 S. W. 2d 881

Opinion Delivered October 19, 1964.

Wilbur Botts, for appellant.

Chris Carpenter, for appellee.

JIM JOHNSON, Associate Justice. This litigation involves title to real property and was commenced as an action in ejectment.

On January 11, 1945, a deed from Mrs. M. E. Lumsden to Mary Jackson and W. J. Jackson, her father, was filed for record in Arkansas County. We will refer to the deeded property as Lot 12. The deed was dated January 9, 1945, and recited a consideration of $850.00. At that time and thereafter until her death, Mary Jackson was the wife of Robert Sam Hobson. The Hobsons owned and operated a cafe on nearby property (known as Lot 10) and W. J. Jackson, Mary's father, lived in the back of the cafe. Sometime after the deed the Hobsons built or remodeled a house on Lot 12 and lived there until their respective deaths.

On February 23, 1952, Mary Jackson Hobson died intestate without descendants leaving her father as her only heir at law and Hobson as her surviving spouse. Hobson continued to live in the home on Lot 12 and Jackson continued to live in the rear of Hobson's cafe on Lot 10.

On September 22, 1962, Robert Sam Hobson died testate leaving a step-daughter by an earlier marriage, Ozella (Hobson) Childs, as executrix and sole legatee.

On October 15, 1962, W. J. Jackson filed a complaint in ejectment in Arkansas Circuit Court, Southern Dis-

trict, against appellee Ozella Childs individually and as executrix of Hobson's estate to obtain possession of Lot 12, after giving her and her tenant notice to quit. Appellee answered, making general and specific denials and counter-claimed, alleging first that the deed from Mrs. M. E. Lumsden was originally made to Robert Sam Hobson and Mary Hobson and after preparation and execution the names of the grantees were "illegally and fraudulently" erased and the Jackson names substituted, and the deed should be so reformed and corrected; second, that the Hobsons went into possession of the property about January 9, 1945, improved the lot by building a house on it, claimed title, paid all taxes, and have been in actual, open, notorious and peaceful possession up to the time of Hobson's death; third, that Hobson had been in actual adverse possession since Mary's death in 1952, claiming title against Jackson and the whole world for more than seven years. The case was thereafter transferred to Arkansas Chancery Court.

On April 5, 1963, W. J. Jackson died testate leaving a nephew, appellant Hilton Flunder, as his sole legatee and executor of his estate. After petition, an order of revivor of the suit was entered September 7, 1963.

After trial on September 24, 1963, the chancellor found (1) that appellee failed to show by "clear and concise" evidence the alteration of the deed and denied appellee's prayer for reformation of the deed, (2) that Hobson had actual, peaceable, continuous, open and adverse possession of the property from 1952 until his death in 1962, more than seven years, that Jackson had knowledge of the adverse possession and made no claim to the property until after Hobson's death; and (3) that appellee individually and as executrix is the owner of the property by adverse possession and is entitled to a decree of court for said lands. From such decree comes this appeal.

Appellant relies on three points, the first one being that the decree of the lower court should be affirmed in denying reformation of the deed from Mrs. Lumsden to Mary Jackson and W. J. Jackson, her father.

In *Berk* v. *Beckett,* 200 Ark. 1189, 137 S. W. 2d 898, this court said:

"We have many times announced the rule to be that while parol evidence is admissible in a suit to reform an instrument, which has been duly acknowledged, on the ground of mistake, fraud, or mutual mistake, however, such evidence must be *clear, convincing* and *decisive.*" [Emphasis ours.]

In the case at bar, the original deed was admitted into evidence as well a pencil-written receipt, both of which appear to have been signed by the same person. The deed, on its face and back, shows that the names originally typed in as grantees were erased and the names "Mary Jackson and W. J. Jackson, her father" typed in over the erasures. The receipt, dated January 9, 1945 as was the deed, recites "Received of Mary Hobson and Robert [sic] Hobson Eight Hundred & Fifty on Lot 12, Block 2," and signed "Mrs. M. E. Lumsden." There was testimony that Sam and Mary Hobson built or remodeled a house on this property, that Sam paid the taxes and collected the rents. There was ample testimony that during Mary's lifetime, W. J. Jackson lived at Hobson's cafe and continued to live there after Mary's death while Sam occupied the house on Lot 12. It is also undisputed that the deed was recorded on January 11, 1945, two days after it was executed and seventeen years before Sam's death.

In *Gist, adm'r* v. *Gans,* 30 Ark. 285, we held that:

"Mr. Greenleaf says: 'Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury, upon proofs to be adduced by the party offering the instrument in evidence.' 1 Greenleaf, Ev., sec. 564.

"In this State we all know that many instruments are written by unskilled persons, and that erasures, interlineations, etc., frequently appear on the face of notes, bonds, bills, deeds and other contracts. We are, therefore, not disposed to sanction a more rigid rule than that expressed in the paragraph above. . . ."

In the case at bar the erasures are apparent, but there is no evidence as to who made them, when, or why. All interested parties in the original transaction, the grantor Mrs. Lumsden, the Hobsons and W. J. Jackson, were deceased prior to the trial. The presence of erasures raises no presumption of fraud, *Phipps-Reynolds Co.* v. *McIlroy Bank & Trust Co.,* 197 Ark. 621, 124 S. W. 2d 222; *Williams* v. *Welch,* 223 Ark. 214, 266 S. W. 2d 61; and on the record before us the chancellor was clearly correct on this point in finding that there was no clear, convincing and decisive evidence warranting reformation of the deed here in question on the ground of mistake, fraud or mutual mistake. *Berk* v. *Beckett, supra.*

The other two points that appellant relies on are: (1) that the trial court committed error in holding title in appellee by adverse possession, in failing to consider the fact that Mary Jackson Hobson and Robert Sam Hobson were husband and wife, and that Robert Sam Hobson continued to live on the property as his curtesy right in his wife's property after her death, and (2) the court erred in holding that appellee had gained title to the lands in controversy by adverse possession since Robert Sam Hobson, through whom appellee claims title, went upon the lands by permission and had never been any change brought to the knowledge of the owner that he was claiming the land by adverse possession.

Having found that there was no evidence to warrant reformation of the deed, and title was therefore in Mary Jackson Hobson and W. J. Jackson as tenants in common, Robert Sam Hobson's entry on the land was permissive, that is, as Mary Hobson's husband. After her death Hobson was entitled to one half of her one half interest in this real property in fee as curtesy. Ark. Stat.

Ann. § 61-228 (1947). Thus Hobson, receiving a one-fourth interest, became a tenant in common of this property with W. J. Jackson. This court has had several occasions recently to consider adverse possession by cotenants. In *McGuire* v. *Wallis,* 231 Ark. 506, 330 S. W. 2d 714, where one heir claimed property by adverse possession against other heirs, this court said:

"It must be remembered at the outset that the possession of one tenant in common is presumed to be the possession of all and, further, that in view of the family relation stronger evidence of adverse possession is required in this case than in one where no such relation exists. *Staggs* v. *Story,* 220 Ark. 823, 250 S. W. 2d 125; *Baxter* v. *Young,* 229 Ark. 1035, 320 S. W. 2d 640. Thus Clovis had a heavy burden of proof."

Sam Hobson's entry on the land was permissive as we have said, his wife being a cotenant of this property with her father. There is no allegation, and certainly no proof, that Sam claimed adversely to his wife or that his wife claimed adversely to her cotenant, W. J. Jackson. It is true that Mary and Sam lived on the property, paid the taxes, improved the property and collected the rents. After Mary's death, Sam lived on the property as a cotenant in his own right (by curtesy) and continued to pay taxes and collect rents. In *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W. 2d 809, a similar case which reviews a number of citations, it was said:

"While it is possible for a tenant in common to acquire title by adverse possession, we said in *Hardin* v. *Tucker,* 176 Ark. 225, 3 S. W. 2d 11: 'In order for the possession of a tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed.' " Here, the testimony is substantial and uncontroverted that there was no change in Hobson's possession or in his relationship with Jackson after Mary's death. Jackson continued to live at Hobson's cafe and Hobson continued to live and pay taxes on Lot 12, which was con-

sonant with Hobson's collection of the moderate rents from two shacks on the rear of Lot 12. *Smith* v. *Kappler, supra.* Having reviewed all of the testimony on trial de novo, it is our view that appellee has failed to meet the heavy burden of proof reiterated in *McGuire* v. *Wallis, supra.*

The question of proper parties was not raised. See, however, Ark. Stat. Ann. § 61-110 (1947).

Reversed.

NICHOLAS *v.* NICHOLAS

5-3327 382 S. W. 2d 887

Opinion Delivered October 19, 1964.

Sexton, Morgan & Robinson, for appellant.

Jeff Duty, Edgar Woolsey, for appellee.

FRANK HOLT, Associate Justice. This is an appeal from two chancery court orders, one refusing to reduce the appellant's alimony payment and the other adjudging him in contempt of court for failure to make the payments as ordered.

The appellee was granted a divorce from appellant in 1959. She was also awarded custody of their son with $65.00 per month as child support and $50.00 per month as alimony. In 1961, on appeal to this court, we denied any reduction in appellant's alimony and child support payments. *Nicholas* v. *Nicholas,* 234 Ark. 254, 351 S. W. 2d 445. In October of 1963 appellant filed his present petition again seeking a reduction of his alimony pay-

ment. The appellee responded by asking for an increase in child support payment. The trial court denied both motions. About two months later the Chancellor adjudged the appellant in contempt for failure to make the payments of child support and alimony as ordered.

On appeal appellant urges that because of a change in circumstances the Chancellor erred in refusing his request for a reduction in alimony payment and, also, in adjudging him in contempt.

In August, 1963, appellant was making $400.00 per month at which time he had to undergo surgery for removal of two ruptured discs. He testified this resulted in his removal from the payroll for about six weeks. Since then his salary has been $200.00 per month. This reduction is expected to continue during the remaining period of his convalescence consisting of three to six months. Appellant's employer is his present wife. He has been employed by her as the manager and only licensed embalmer in her funeral home since they married shortly after appellant's divorce. The appellant testified that he owns no property other than a motor boat and ski rig valued at $1,800.00 and that all property, including a 1963 family car, is owned by his present wife.

The evidence on behalf of the appellee reflects that certain real estate, which appellant testified was owned by his wife, was assessed in both their names; that a variety of advertising material indicates that the Hardwicke Funeral Home is owned by appellant and his wife. None of these publications reflect that he is the manager. The funeral home cannot legally operate without a licensed embalmer. Since his injury it has not been necessary to employ another in that capacity or add any other employee. The appellee's salary is $230.00 per month as a bank employee where she was employed when the case was previously before us. Their son, now eighteen years of age, is in college and requires a minimum expenditure of $100.00 per month as a student. He has a skin disorder that has necessitated a drug expense of approximately $40.00 per month which will continue indefinitely.

The Chancellor, as the trial court, had before him the witnesses and observed their demeanor in every respect. He was in a position to see more than the printed word which alone comes to this court. Therefore, with this conflict in evidence, we cannot say that the finding of the chancery court in denying the reduction of alimony and adjudging the appellant in contempt in this unique case is against the preponderance of the evidence.

The decree is affirmed.

TENBROOK *v.* DAISY MFG. CO.

5-3299 383 S. W. 2d 101

Opinion Delivered October 26, 1964.

[redacted]

Rex W. Perkins, Walter R. Niblock and Sam A. Weems, for appellant.

Riddick Riffel, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case, wherein appellant contended that she was accidentally injured in the course of her employment, and thus entitled to compensation benefits. The Referee made a finding in her behalf, but this decision was reversed by the full Commission, and on appeal the Circuit Court of Washington County upheld the findings of the Commission, and entered its judgment accordingly.

This case must be affirmed under Rule 9 (d). In *Vire* v. *Vire,* 236 Ark. 740, 368 S. W. 2d 265, we said:

"* * * We have stated numerous times that we are not required to explore a record that is presented to us, but that the duty rests on appellant to furnish this court such an abridgment of the record as will enable us to understand the matters presented. See *Allen* v. *Overturf,* 236 Ark. 387, 366 S. W. 2d 189, and cases cited therein."

The record in this case contains over two hundred and twenty-five pages of pleadings, exhibits, and testi-

mony; but the only portion abstracted is the opinion of the Referee in granting the award.

When appellees, prior to the submission of this case, moved (in their brief filed with the court), that the judgment be affirmed because of appellant's failure to comply with Rule 9 (d), appellant sought permission to supplement her brief with an abstract of the judgment and testimony; but this likewise is not permissible. In *Reeves* v. *Miles,* 236 Ark. 261, 365 S. W. 2d 460, we said:

"The fact that the appellant, in her reply brief, has abstracted the record does not, in our opinion, justify us in waiving the total failure to comply with Rule 9 (d) in the first instance. To do so would be manifestly unfair to the appellees. They were not required to supply the deficiency and were at liberty, if they thought the abstract to be insufficient, to proceed upon the assumption that the decree would be affirmed. To allow the appellant to supply the abstract in the reply brief would have the effect of trapping the appellees."[1]

We have consistently, in dozens of cases, applied the rule here under discussion.

It follows that the judgment is affirmed; it may be stated, however, that, in this instance, appellant has not been prejudiced by failing to present a proper abstract; for the judgment would be affirmed on the merits of the controversy, and the applicable law.

[1] In the same case, however, it was said: "We stress the fact that here the appellant's omission was total; we do not intimate that an appellant would be penalized for a mere deficiency such as may result from inadvertence or from a failure to anticipate the appellee's argument."

DELTA OXYGEN CO. *v.* SCOTT

5-3290 383 S. W. 2d 885

Opinion Delivered October 26, 1964.

[Rehearing denied December 7, 1964.]

[redacted]

Smith, Williams, Friday & Bowen, By: *Boyce R. Love,* for appellant.

Gordon & Gordon, for appellee.

ED. F. MCFADDIN, Associate Justice. Appellee Tommy Scott filed two actions against appellant, Delta Oxygen Company (hereinafter called "Delta"), seeking to recover damages for injuries he sustained while using Delta oxygen in his welding work. In one action Scott claimed that Delta was guilty of negligence which caused his injuries; and in the other action Scott claimed that Delta breached an implied warranty in regard to the oxygen. The two actions were consolidated for trial; the jury verdict and judgment was for Scott; and Delta brings this appeal, listing six points:

"1. The doctrine of Res Ipsa Loquitur should not have been applied in this case; and, there being no evi-

dence of any specific acts of negligence on the part of the defendant, a verdict should have been directed by the trial court for the defendant.

"2. There was no privity of contract between the plaintiff and the defendant, and it was error for the trial court to overrule the defendant's demurrer to the warranty suit.

"3. The court was in error in failing to direct a verdict for the defendant concerning the warranty action, there being no proof that the product failed or was unfit for the purpose intended.

"4. It was error for the court to refuse to strike all of witness Vernon Myers' opinion testimony.

"5. It was error for the court to give plaintiff's instruction No. 2.

"6. It was error for the trial court to deny the defendant a new trial when one of the jury commissioners was a party in a case requiring the intervention of the very jury panel he helped select."

We will discuss some of these assignments under our own topic headings, and the disposition of such matters discussed will make unnecessary the discussion of all the other points.

I. *Res Ipsa Loquitur.* The Trial Court submitted the negligence facet of the case to the jury with instructions incorporating the doctrine of *res ipsa loquitur,* and the appellant claims that the Trial Court was in error in so doing. This point has given us most serious concern. The question is whether the doctrine of *res ipsa loquitur* was applicable to the negligence action under the evidence in this case; and to understand the point it is necessary to state in some detail the factual situation.

Tommy Scott was skilled in the welding business, specializing in the work of "bit re-tipping." He would take worn down oil well bits and re-tip them by welding new metal on the worn out part. At the time here involved, Tommy Scott was working for his brother, Harry

Scott, in the shop of the latter in Morrilton, Arkansas. Harry Scott had purchased nine cylinders[1] of oxygen from Delta at its place of business in Little Rock and had transported the cylinders to his workshop in Morrilton. The cylinders were placed standing upright against the wall. The oxygen from one cylinder had been used by Tommy Scott in his welding work, and he was preparing to use the oxygen from the second cylinder when the explosion or fire occurred which caused his injuries.

Tommy Scott testified that in the welding work he was doing it was necessary to use an acetylene torch for the purpose of a flame, and oxygen to make sufficient heat to melt the metal. To make this combination possible he was using a "Victor J-27" torch,[2] from which one green colored rubber hose went to the pressure gauge on the oxygen cylinder and one red colored rubber hose went to the acetylene generator. Tommy Scott testified that when he saw that the oxygen from cylinder No. 1 was running low in the torch, he turned off the oxygen valve and also the acetylene valve on the torch and placed the orifice and the torch in water to extinguish the flame, and laid the torch on the floor.

Tommy Scott described how he then went about the task of putting the new or No. 2 cylinder of oxygen into use: the oxygen cylinder was about five feet high and of very heavy metal, since the oxygen in the cylinder was under 2200 pounds of pressure; he removed the heavy metal cap from the top of the No. 2 oxygen cylinder and slightly and momentarily turned on the valve of the cylinder to allow a small amount of the pressurized oxygen to escape; then he turned off the valve on the new

[1] The empty cylinders were to be returned to Delta after the oxygen had been used.

[2] This identical torch used by Tommy Scott was exhibited to the jury and its use and functions explained. Likewise, in oral argument before us, counsel for both sides exhibited the torch and explained its use and functions. It is a somewhat narrow metal instrument about 20 inches long, easily held in the hands of the welder; and the rubber tubes are attached to the end of the torch toward the sources of supply. On the torch there are separate control valves for each ingredient —oxygen and acetylene—to regulate the flowage or stoppage of same; and at the firing end of the torch there is an orifice, or small opening, where the flaming acetylene is heated by the oxygen and the heat thus applied to the material sought to be welded.

oxygen cylinder; *attached to the oxygen valve on the new No. 2 cylinder his own regulator or pressure gauge, to which was connected the green rubber hose that was to convey the oxygen from the new cylinder to the torch when he should again turn on the valve of the new oxygen cylinder.*

All of the above was accomplished without mishap of any kind. Then Tommy Scott again turned on the valve on the top of the oxygen tank, thereby allowing the oxygen to flow through the pressure gauge into the green colored hose; and instantly when he turned on the valve on the new oxygen cylinder an explosion and fire occurred and he was painfully and seriously burned.

Investigation disclosed that the explosion and/or fire had occurred in the regulator or pressure gauge which Scott had attached to the oxygen tank. This regulator or pressure gauge had two indicators, one to show the pressure of oxygen in the new cylinder, and the second to show the amount of oxygen leaving the cylinder. The explosion blew away entirely the second indicator; and some of the parts of it were found on the floor of the shop beside the oxygen cylinder which had fallen down. The indicator of the regulator which showed the pounds of pressure was still attached to the oxygen cylinder, even after the fire and explosion.

We have stated in considerable detail enough of the facts to show that the explosion or fire did not occur in the oxygen tank, or in the valve on the oxygen tank, or when Scott first opened the valve on the tank to allow some of the oxygen to escape before he put his own pressure gauge on the oxygen tank. Absent any contributory negligence—and we must so find in the light of the jury verdict—the question now before us is whether the facts as heretofore stated—and we have stated them in the light most favorable to the jury verdict—make a case for the application of the rule of *res ipsa loquitur*.[3] The trial

[3] Sometimes it is called "the rule" of *res ipsa loquitur*, and other times it is called "the doctrine" of *res ipsa loquitur*. The cases, annotations, and law review articles on *res ipsa loquitur* are countless. We mention only a few. In Ark. Law School Bulletin of May 15, 1940 (Vol. 8, No. 2) at page 43, there is an article entitled, "*Res Ipsa*

Court so held, and the correctness of that ruling is the point now before us.

In Chiles v. Ft. Smith, 139 Ark. 489, 216 S. W. 11, Mr. Justice Frank G. Smith, in discussing the doctrine of *res ipsa loquitur,* quoted from 20 R.C.L. p. 187, as follows:

" 'More precisely the doctrine *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care."

To paraphrase the above as applicable to the case at bar is to say that when a product is made by a defendant for a recognized use, and the plaintiff so uses the product and without fault or negligence on his part receives injury, then the mishap itself speaks negligence and the burden is on the defendant to show itself free of negligence. Is the doctrine of *res ipsa loquitur* applicable to this case? One of the clearest recognized essentials of the plaintiff's right to invoke the doctrine of *res ipsa loquitur* is that the plaintiff's injury must have come about solely because of the defendant's product. This is stated in 38 Am. Jur. p. 996, "Negligence" § 300:

"It is essential to the application of the doctrine of res ipsa loquitur that it appear that the instrumentality which produced the injury complained of was at the time of the injury under the management or control of the defendant or of his agents and servants. *When, however, it appears that the victim had exclusive control of the offending thing, no imputation of responsibility will attach to the defendant.* It is not only necessary to show that

Loquitur in Arkansas." See also 9 Ark. Law Review, p. 98, for that portion of the address of Dean Prosser concerning *res ipsa loquitur.* See annotation in 56 A.L.R. p. 493, "Applicability of *res ipsa loquitur* to explosion of gases or chemicals." See also annotation in 23 A.L.R. 484, "Applicability of *res ipsa loquitur* in case of boiler explosion."

the offending instrumentality was under the management of the defendant, but it must be shown that it proximately caused the injury, or that the injury was caused by some act incident to the control of the instrumentality. The doctrine does not apply where the agency causing the accident was not under the sole and exclusive control of the person sought to be charged with the injury. If it appears that two or more instrumentalities, only one of which was under defendant's control, contributed to or may have contributed to the injury, the doctrine cannot be invoked." (Emphasis supplied.)

We have a number of Arkansas cases which have direct holdings on this point. In *Kroger* v. *Melton,* 193 Ark. 494, 102 S. W. 2d 859, Melton purchased pork chops at the Kroger store, took them home, cooked and ate them. He became ill and sued Kroger for damages, alleging the pork chops to have been contaminated when sold to him. Melton did not attempt to show Kroger's negligence, but claimed that the doctrine of *res ipsa loquitur* cast on Kroger the burden of proving the absence of its own negligence in handling the pork chops. But this Court held that the doctrine of *res ipsa loquitur* was not applicable, saying:

"Appellee seeks to invoke the doctrine of *res ipsa loquitur* to supply the missing link in his testimony. But this doctrine has never been applied where the instrumentality which caused the injury was not in the exclusive control of the defendant at the time of the injury. Many cases to that effect are cited in the brief of appellee. Here the chops alleged to be responsible for appellee's injury were not in the exclusive possession of appellant; on the contrary, they were in the exclusive possession of appellee subsequent to the sale."

In *Mo. Pac.* v. *Shores,* 209 Ark. 539, 191 S. W. 2d 580, Shores was injured when a block of ice fell or was thrown from a troop train. He sued the railroad company and claimed that since he was injured by something which fell or was thrown from the train the doctrine of *res ipsa loquitur* was applicable. This Court held that res ipsa loquitur did not apply, saying:

"The doctrine of *res ipsa loquitur* cannot be invoked in this case to supply the absent proof of negligence because it is necessary, before that doctrine may be applied, that the machinery or object causing the injury be shown to have been under the sole control of the one against whom liability is asserted. 'It is essential to the application of the doctrine of *res ipsa loquitur* that it appear that the instrumentality which produced the injury complained of was at the time of the injury under the management or control of the defendant or his agents and servants. . . . The doctrine does not apply where the agency causing the accident was not under the sole and exclusive control of the person sought to be charged with the injury.' 38 Am. Jur. 996; *Southwestern Telegraph & Telephone Co.* v. *Bruce,* 89 Ark. 581, 117 S. W. 564; *Arkansas Power & Light Company* v. *Jackson,* 166 Ark. 633, 267 S. W. 359; *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. 2d 849, 82 S. W. 2d 244. In the case at bar, the evidence showed that the train and its passengers were under the control of an army officer, and that members of the train crew were not allowed to enter the baggage car, from which the ice came, without obtaining permission from the soldiers."

In *Arkansas Power & Light Co.* v. *Butterworth,* 222 Ark. 67, 258 S. W. 2d 36, an action was filed against the power company for damages for loss of a building by fire alleged to have been caused by an excessive voltage of electricity allowed to enter the building through the negligence of the power company. The Trial Court held that the doctrine of *res ipsa loquitur* was applicable, since the electricity was the product of the power company. We held that the Trial Court was in error, saying:

"Here only a portion of the instrumentality was under the control of the defendant. It had the exclusive control of the transformer station and the wire up to where it entered the plaintiff's mill; *but from that point on all of the wiring, switches, fuses, motors, lights, welding apparatus, and grounding facilities were exclusively under the control of the plaintiffs.* The case of *Southwestern Gas & Electric Co.* v. *Deshazo,* 199 Ark. 1078,

138 S. W. 2d 397, is directly in point as to the *res ipsa loquitur* feature of the case. In that case three farmers cut a tree growing near a high voltage line of the Southwestern Gas & Electric Co. The tree fell on the line and broke it, causing it to sag; whereby it came in contact with a telephone wire going to a switchboard where Mrs. Deshazo was the operator. Excessive high voltage passed from the electric line to the telephone wire and injured her. This Court said: 'We think it may be announced that the only instance in which the rule of *res ipsa loquitur* applies must be that the act or thing causing the injury must have been under the exclusive control and management of the one charged. . . . Certainly the electric company had no control over the office of the telephone company nor the grounding of any of the wires.' Likewise in the case at bar, the defendant electric company had no control over the wires in the mill or the grounding of the electric system therein. *Therefore it did not have exclusive control of the instrumentality or thing from which the fire may have developed; hence the doctrine of res ipsa loquitur is not applicable.*" (Emphasis supplied.)

Further discussion appears to be unnecessary.[4] We hold that the rule of *res ipsa loquitur* is not applicable in the case at bar since it was clearly shown that the fire or explosion occurred in the plaintiff's own regulator and that the oxygen from the cylinder had previously been allowed to escape without causing any fire or explosion. For the error in submitting the case to the jury on the

[4] Cases from other jurisdictions are in accordance with our holdings. For cases holding the rule of *res ipsa loquitur* to be unavailable in situations somewhat similar to those in the case at bar, see: *Kramer* v. *Hollingshead* (N. J.), 75 A. 2d 861; *McCabe* v. *Boston Gas Co.* (Mass.), 50 N. E. 2d 640; *McDonnell* v. *Montgomery Ward* (Vt.), 154 A. 2d 469; *Conley* v. *United Drug Co.* (Mass.), 105 N. E. 975; and *Marshall* v. *Cameron* (W. Va.), 59 S. E. 959. See also Harper & James "The Law of Torts," Vol. 2, § 19.7. The case at bar is not like the bottled drink cases of which *Coca Cola* v. *Mattice*, 219 Ark. 428, 243 S. W. 2d 15, is one. In those cases the contents of the bottle *in the original package* exploded and caused injury. There had been no opening of the bottle. But, in the case at bar, the oxygen tank had been opened once to allow a small amount to escape. Then, when the plaintiff's own regulator was attached and the oxygen tank again opened, the explosion occurred. So the bottled drink cases are not applicable here.

doctrine of *res ipsa loquitur* the judgment must be reversed and the cause remanded for a new trial.

II. *The Breach of Warranty Action.*[5] The case was submitted to the jury on interrogatories, the first three of which related to negligence and contributory negligence. Interrogatory No. 4 and the answer thereto were as follows:

"Interrogatory No. 4. Do you find from a preponderance of the evidence that the defendant, Delta Oxygen Company, Incorporated, sold the bottle of oxygen in question to Harry Scott and that there was an implied warranty that said bottle was reasonably fit for the use for which it was intended, and that said bottle was not in fact reasonably fit for its intended purpose, and that when it was put to use, the plaintiff, Tommy Scott, sustained personal injuries and damages as the proximate result of a breach of implied warranty? "Answer: Yes."

While insisting that the instructions on *res ipsa loquitur* were correct, appellee further insists that, even if the instructions on *res ipsa loquitur* were erroneous, nevertheless the judgment should be affirmed because of the finding of the jury that appellant was guilty of breach of warranty. We cannot agree with the appellee in such contention because we find no substantial evidence of breach of any warranty. Ark. Stat. Ann. § 85-2-315 (Add. 1961) reads as follows:

"Implied Warranty—Fitness for particular purpose.—Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose. [Acts 1961, No. 185, § 2-315.]"

The oxygen sold by Delta to Harry Scott was supposed to increase the heat of a flame, and there is noth-

[5] No point is made on this appeal questioning the ruling of the Trial Court on the consolidation of the negligence action and the breach of warranty action. See *Kapp* v. *Bob Sullivan,* 232 Ark. 266, 335 S. W. 2d 819.

ing to show that the oxygen in cylinder No. 2 failed in that responsibility. If the cylinder had exploded, the "bottled goods" cases might apply;[6] but the cylinder did not explode: it was intact even after the fire. The explosion occurred in the regulator which the plaintiff, Tommy Scott, had affixed to the oxygen valve on the cylinder. We have previously detailed that the valve on the oxygen cylinder was first opened and oxygen allowed to escape; the valve on the oxygen cylinder was closed and the regulator of plaintiff attached to the valve on the oxygen cylinder; and then the valve was opened and there was the explosion.

In testimony it was claimed that there must have been some grease in the valve on the oxygen cylinder and that the force of the oxygen forced the grease into the regulator where the explosion occurred; but this was the rankest speculation. If there was any grease on the valve of the oxygen cylinder there is no showing that it got there through any breach of warranty by Delta. The entire evidence of breach of warranty is based on speculation. In *Kapp* v. *Sullivan Chev. Co.,* 234 Ark. 395, 353 S. W. 2d 5, we discussed, not only the matter of *res ipsa loquitur* being there inapplicable but we also discussed, the fact that Kapp's case rested entirely upon conjecture and speculation; and said:

"Several *possible* causes of the break are argued, but in truth, they are only *possibilities,* and do not reach the status of probabilities. Negligence cannot be established by guess work. As stated in *Henry H. Cross Co.* v. *Simmons,* 96 F. 2d 482, a decision under Arkansas law: 'To submit to a jury a choice of possibilities is but to permit the jury to conjecture or guess, and where the evidence presents no more than such choice it is not substantial, and where proven facts give equal support to each of two inconsistent inferences, neither of them can be said to be established by substantial evidence and judgment must go against the party upon whom rests the burden of sustaining one of the inferences as against the other.' In *Glidewell* v. *Arkhola Sand & Gravel Co.,*

[6] See Footnote No. 4, *supra,* for one of these cases.

212 Ark. 838, 208 S. W. 2d 4, this Court said: 'Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof, . . .' "

On account of the erroneous instructions on *res ipsa loquitur* the judgment of the Circuit Court is reversed and the cause is remanded for a new trial, not only on the issue of negligence but also on the issue of breach of warranty. In view of the likelihood of another trial we will now discuss some of the other points which present questions that may arise on retrial.

III. *The Witness Vernon Myers.* Appellant's fourth point is: "It was error for the court to refuse to strike all of witness Vernon Myers' opinion testimony." We find no merit in this point. The witness Myers testified that he had been a welder for twenty years and was then teaching welding in the vocational training school at Morrilton, Arkansas. He modestly disclaimed being an "expert," but he was certainly well qualified by professional, scientific, and technical training, and also by practical experience, to answer the questions propounded to him. The Court did not abuse its discretion in allowing the witness to give his opinion. See *Firemen's Ins. Co.* v. *Little,* 189 Ark. 640, 74 S. W. 2d 777; and *Ratton* v. *Busby,* 230 Ark. 667, 326 S. W. 2d 889.

IV. *Absence Of Privity Between Tommy Scott and Delta Oxygen Company.* Appellant's point No. 2 is: "There was no privity of contract between plaintiff and defendant, and it was error for the Trial Court to overrule defendant's demurrer to the warranty suit."

This assignment brings before us a question now occupying much space in reported cases and in legal periodicals. Appellant's contention is: that Delta sold the oxygen to *Harry Scott;* that appellee Tommy Scott was an *employee* of Harry Scott; that Tommy Scott did not purchase the oxygen from Delta so Tommy Scott is not *in privity* with Delta and therefore cannot maintain an action against Delta for breach of warranty. The case of *Nelson* v. *Armour,* 76 Ark. 352, 90 S. W. 288, was decided by this Court in 1905. In that case Armour sold a can of

food to a retail dealer in Texarkana, Mr. A. J. Offenhauser. The retail dealer in due course of trade sold the same can of meat to Mr. Nelson, who sued Armour, claiming that there was a breach of warranty as to the fitness of the food. Armour insisted that Nelson did not purchase the meat from Armour so there was no privity of contract between Nelson and Armour on which Nelson could base an action for breach of warranty. In sustaining the contention of Armour, this Court said:

"Unlike covenants as to the title to land, a warranty upon the sale of personal property does not run with the property. There is no privity of contract between the vendor in one sale and the vendees of the same property in subsequent sales. Each vendee can resort, as a general rule, only to his immediate vendor. *Boyd* v. *Whitfield,* 19 Ark. 447; *Bordwell* v. *Collie,* 45 N. Y. 494."[7]

From this quoted language it has been assumed that in Arkansas there can never be a breach of warranty action in a case like this one, except between the immediate parties to the sale unless and until the Legislature passes legislation changing the rule of privity, or the Court modifies or limits the holding in the case of *Nelson* v. *Armour* heretofore quoted. When the Arkansas Legislature adopted the Uniform Commercial Code the privity defense was eliminated in certain instances. That statute, now found in Ark. Stat. Ann. § 85-2-318 (Add. 1961), reads:

[7] This case of *Nelson* v. *Armour* has been cited in numerous cases in this State and in numerous annotations and law review articles. See: *Colyar* v. *L. R. Bottling Works,* 114 Ark. 140, 169 S. W. 810; *Heinemann* v. *Barfield,* 136 Ark. 500, 207 S. W. 62; *Drury* v. *Armour,* 140 Ark. 371; 216 S. W. 40 (particular attention is called to the dissenting opinion of Justice Hart in that case); and *Lewis* v. *Roescher,* 193 Ark. 161, 98 S. W. 2d 956. Worthy of study is the article by Dean Prosser in 69 Yale Law Review 1099 entitled, "The assault upon the citadel (strict liability to the consumer)." See also: Annotation in 74 A.L.R. 2d 1111 entitled, "Privity of contract as essential to recovery in negligence action against manufacturer or seller of produce alleged to have caused injury."; and annotation in 80 A.L.R. 2d 488 entitled, "Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables." And see: 28 NAACA Law Journal 204; 29 NACCA Law Journal 41; and 30 NACCA Law Journal 369, 374. The leading recent case is that of *Henningsen* v. *Bloomfield Motor* (N. J.), 161 A. 2d 69. See also 77 C.J.S. p. 1123.

"Third party beneficiaries of warranties express or implied. A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."[8]

Thus, as to a natural person who is in the family or household of the buyer or is a guest of his household, etc., the Legislature has abolished the defense of privity in a breach of warranty action. Why then should we keep this old rule of "privity" against an action for breach of warranty brought by the servant or employee of the original purchaser, as is the situation here? Delta sold the oxygen to Harry Scott, the brother of appellee Tommy Scott. If Harry Scott had resold the oxygen to Tommy Scott, then there would have been the factual situation similar to that which existed in *Nelson* v. *Armour, supra.* But Tommy Scott was the servant and employee of Harry Scott, who directed him to use the oxygen in the work. In short, there was no resale of the oxygen by the purchaser from Delta and we see no sound reason why the employee or servant of a purchaser, using the product in the course of employment as directed, should be barred from suing on the warranty because of any shield of privity.

To apply the strict rule of privity against such an employee as here, would mean that if the purchaser of the oxygen from Delta had been a corporation then there would never have been anyone to sue on the breach of warranty for personal injuries because a corporation could hardly have a burned arm or a burned leg. This simple homely supposition points to the common sense in

[8] Appellee has urged that Tommy Scott was "in the family of" Harry Scott and that the above quoted statute would give Tommy Scott a cause of action for breach of warranty against Delta free from the privity defense. There is no need to lengthen this opinion to discuss that point: rather, we prefer to hold that an employee of a purchaser is not barred by the defense of privity in a factual situation like the one here.

allowing an employee of the purchaser[9] to sue on the breach of warranty in a case like the one at bar. The doctrine of privity should not be a shield against a breach of warranty action in a case like the one here; and to that extent we change what some may have said was the Arkansas holding. We now hold that such an employee of the original purchaser is not barred by the defense of privity. In short, we find no merit to the shield of privity as urged by the appellant in the case at bar. It is fair to the Bench and Bar to say that we reserve for future cases the right to review our holdings on this entire matter of privity in all cases of breach of warranty.

CONCLUSION

Other questions presented in the briefs are not likely to occur on retrial so we forego any further discussion.

Reversed and remanded for a new trial.

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[9] We are conscious of the splendid opinion delivered by the learned Federal Judge in *Green* v. *Equitable Power Mfg. Co.*, 94 F. Supp. 126, in which there was a sincere attempt to follow what was thought to be the Arkansas holding then in force on privity as reflected by numerous annotations and law review articles.

HUGHES *v.* LEE

5-3348 383 S. W. 2d 97

Opinion delivered October 26, 1964.

[redacted]

Bob Scott, for appellant.

Clayton Little, for appellee.

George Rose Smith, J. In September of 1962 the appellant, Jennie Hughes, entered into a contract with C. J. Harter and his wife for the exchange of a motel that Mrs. Hughes owned in Texas and a 680-acre farm that the Harters owned in Benton county, Arkansas. Mrs. Hughes was represented in the transaction by the appellee, Carl W. Lee, a Bentonville real estate broker, who was to receive a commission of $5,000 for his services. The parties to the exchange deposited their respective deeds with Lee pending the complete performance of their contract.

This suit was brought by Mrs. Hughes to compel Lee to surrender possession of the deed that he was holding for her. By counterclaim Lee sought judgment for the unpaid sum due upon a promissory note that Mrs. Hughes had given him for his commission. The only disputed questions that now remain in the case are, first, the exact amount of the balance that is owed by Mrs. Hughes upon her note, and, second, her liability for a 10 per cent attorney's fee upon the note.

The first issue—the amount due upon the note—requires us to determine, upon conflicting testimony, the true terms of an oral agreement by which Mrs. Hughes and Lee agreed to dispose of the proceeds resulting from the sale of the crops that were growing on the Harter farm when Mrs. Hughes acquired it. (Upon this issue the appellant invokes the parol evidence rule, but at the trial both litigants so fully developed the testimony about

the oral agreement that we think it plain that the application of the rule was waived.)

Lee acted as the intermediary in negotiating the exchange contract in September, 1962. At that time the Harter farm was subject to a mortgage upon which a $2,000 payment would fall due on the following January 1. Both the contracting parties were worried about this payment. Lee testified that Mrs. Hughes told him that she couldn't make the trade if she had to make this payment. According to Lee he discussed the matter with Harter, who said that "he hadn't got a dime" and that "if I have to pay the $2,000 I can't—I'll have to keep the crops." This impasse threatened to stalemate the negotiations and evidently jeopardized Lee's hope of receiving a commission.

Lee testified in effect that he solved the problem by relieving Harter of any obligation to make the $2,000 payment, by taking from Harter a bill of sale for the crops, and by orally agreeing with Mrs. Hughes that he (Lee) would assume equal responsibility with her for the $2,000 payment. According to Lee he discharged his entire obligation to Mrs. Hughes by endorsing a $1,000 credit upon her promissory note.

Mrs. Hughes disputes Lee's version of their oral agreement. She says that Lee assured her the growing crops were worth at least $2,000 and that he agreed to take *half* the crops in return for assuming half the January payment to the mortgagee. Harter corroborates Mrs. Hughes to some extent, saying that he had thought the crops would prove to be worth $2,000.

Mrs. Hughes duly made the payment to the mortgagee. The crops were sold, but, perhaps in part because they were harvested later than they should have been, they brought net proceeds of only $1,195.30. Lee contended in the court below that he was entitled to keep the entire proceeds of sale, since he had given Mrs. Hughes a credit of $1,000 upon her note. The chancellor held, however, that Lee should surrender his profit of $195.30, because as an agent he was also a fiduciary.

We do not think the chancellor went quite far enough in affording relief to Mrs. Hughes. It is implicit in Lee's own testimony that he broke the deadlock in the negotiations by incurring a personal financial risk. Yet, according to him, he assumed a $1,000 obligation in return for the *full* ownership of crops that both Harter and Mrs. Hughes (and, we think, Lee himself) thought to be worth $2,000. Thus under Lee's version of the oral agreement he took almost no risk and stood to reap a fairly certain profit. Even under the chancellor's decision the entire loss falls on Mrs. Hughes. In our view the weight of the evidence supports Mrs. Hughes' statement that she and Lee assumed equal responsibility for the $2,000 payment in return for equal ownership of the crops. Since the crops brought $1,195.30 Mrs. Hughes must be credited with half that amount instead of with the profit of $195.30 only. This modification will also proportionately reduce the attorney's fee allowed to Lee.

Mrs. Hughes' promissory note contained a provision for a reasonable attorney's fee of not more than 10 per cent of the amount due, if the note should be placed in the hands of an attorney for collection. Such a provision is valid. Ark. Stat. Ann. § 68-910 (Repl. 1957); *Hollaway* v. *Pocahontas Fed. Sav. & Loan Assn.*, 230 Ark. 310, 323 S. W. 2d 204. There is no merit in the appellant's contention that the fee ought to be disallowed because the amount of Mrs. Hughes' maximum possible liability upon the note was deposited in court while the case was pending. The deposit was made simply to enable Mrs. Hughes to obtain an immediate delivery of the deed that Lee was holding in escrow. In making the deposit Mrs. Hughes did not admit liability for its amount. To the contrary, she denied that she owed more than $850 to Lee. The services of Lee's attorneys were necessary to win the judgment he has obtained.

It is argued that Lee's failure to recover the full amount sued for should prevent the allowance of counsel fees. That is the rule under the statute governing actions upon insurance policies, but that statute requires that the demand for the full amount be successfully maintained in

the action. Ark. Stat. Ann. § 66-514 (Repl. 1957); *Pacific Mut. Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 764. Moreover, that act allows a penalty in addition to the fee; so the statute is highly penal. *LaSalle Fire Ins. Co.* v. *Jenkins,* 185 Ark. 484, 47 S. W. 2d 792. By contrast, the statute governing this case merely provides for a reasonable fee, not to exceed 10 per cent of the amount due, for services actually rendered. § 68-910, *supra.* In this instance a 10 per cent fee appears to be reasonable. We perceive no sound basis for refusing to enforce the parties' contract for such a fee.

With the indicated modification the decree is affirmed. The cause will be remanded for the entry of a decree conforming to this opinion. The costs of this appeal will be borne equally by the parties.

JONES *v.* DIERKS FORESTS, INC.

5-3330 383 S. W. 2d 110

Opinion delivered October 26, 1964.

James H. Pilkinton, for appellant.

Watson, Ess, Marshall & Enggas, Kansas City, Mo., *George E. Steel, Elbert Cook,* for appellee.

PAUL WARD, Associate Justice. Appellant very briefly, conveniently and appropriately states the prime issue in this case:

"Appellee holds 'paper' title to the 33.12 acres in dispute. Appellant claims the land by adverse possession contending that he has been in possession of, claimed and exercised ownership of said property against the world, and especially Appellee and its predecessor in interest, Dierks Lumber and Coal Co., Inc., for more than seven years prior to filing of suit. The issue involved is whether Appellant's possession has been of such a nature, and for the required time, as to ripen into title by adverse possession."

Appellant, Norman Jones, filed a complaint in chancery stating in substance: he is the owner by adverse possession of four separate tracts of land, each described by metes and bounds as shown on a plat, totaling 33.12 acres; appellee, Dierks Forests, Inc., has some claim to the land—the nature of which is unknown—and is trespassing on said land; appellant (and those under whom he claims) has been in adverse possession of the lands for more than 7 years; that an "ancient" fence has been the agreed boundary line between the parties for many years. Appellee's answer was a general denial. In addition, appellee pleaded a deed to the lands, adverse possession, payment of taxes and also alleged the lands were unimproved. The chancellor held against appellant, and this appeal follows.

One. It is first insisted that the decree should be reversed because the chancellor relied solely on "his own personal inspection of the property". For reasons presently set forth, we are unable to agree with appellant. While it is true the chancellor did view the land, it is not shown that he relied solely on what he saw; and, also, the record contains ample testimony upon which he may

have relied. In some instances and under some circumstances it is permissible for the trial judge to make a personal inspection. The rule is concisely stated in 89 C.J.S. *Trial* § 588b as follows:

"A view or inspection is permissible for the purpose of enabling the court to understand the evidence and properly to apply it, but the authorities are in conflict as to whether or not the facts ascertained on the view can be considered as evidence or have the effect of supplying evidence."

In the case of *Mitcham* v. *Temple,* 215 Ark. 850, 223 S. W. 2d 817, we said:

"The Chancellor personally inspected the property, took note of the condition of hedge and fence, and used this information (presumptively procured by consent of the parties) as aid to a better understanding of what the witnesses had testified to. This, of course, was permissible when so limited."

In addition to the above, the record shows that appellant consented to and accompanied the chancellor on the inspection. We have held that a party cannot complain of error which he himself has invited. See *Missouri Pac. R. Co.* v. *Gilbert,* 206 Ark. 683, 178 S. W. 2d 73.

Two. Appellant next contends the decree should be reversed "because chancellor held that plaintiff (appellant) must prove his adverse possession extended 'a considerable period' beyond seven years". From our review of the record we do not understand the chancellor imposed any such burden on appellant and appellant's brief does not make it clear he did so. On the other hand, the court, in its Memorandum Opinion, stated that "Adverse possession may not ripen into ownership unless possession for seven years has been actual, open, etc. . . ."

Three. Finally, it is ably urged by appellant that the court's finding is against the weight of the evidence. It is admitted by appellant he has the burden of proving adverse possession. We conclude the trial court's decision was not against the weight or preponderance of

the evidence. It is not disputed that appellee had record title to the land in controversy, or that it has paid taxes thereon for more than twenty years. Appellant's principal reliance is on the fact that he had the lands enclosed (with other lands owned by him) by a fence for more than seven years, during which time he grazed cattle on the lands. The record, however, shows conclusively that the said fence (during a great portion of the time) had such large gaps in it that it would not contain cattle. Such being the case, the chancellor was justified in finding appellant's possession was insufficient to "fly the flag" as required by our decisions in *Dowdle* v. *Wheeler,* 76 Ark. 529, 89 S. W. 1002, and *Dierks Lumber & Coal Co.* v. *Carroll,* 223 Ark. 424, 266 S. W. 2d 294.

Affirmed.

SHERMAN, ADM'X *v.* MO. PAC. R.R. CO.

5-3307 383 S. W. 2d 881

Opinion delivered October 26, 1964.

[Rehearing denied December 7, 1964.]

F. C. Crow, for appellant.

William J. Smith and William H. Sutton, for appellee.

SAM ROBINSON, Associate Justice. There was a collision at a grade crossing between a railroad train and a pickup truck. Two men, occupants of the truck, one the driver, the other a guest or passenger, were killed. The administratrix of their estates filed suits joining the railroad company and the engineer, C. D. Haver, as defendants. The cases were consolidated and tried. After both sides had rested, the trial court directed verdicts for the defendants. The administratrix has appealed, and the issue is whether the court erred in directing the verdicts.

About 7:30 a.m. on the morning of March 1, 1963, Ernest Albert McDade and Fred Joe McDade, brothers, were in a pickup truck travelling east on a blacktop highway on the outskirts of Camden. A Missouri Pacific freight train consisting of four diesel units, 40 empty boxcars, and 26 cars loaded with ordinary freight, was travelling north on the main line of the Missouri Pacific tracks. The train, after having stopped in Camden, had traveled about one mile when the collision occurred. Both the train and the truck were going 20-25 miles per hour. Ernest Albert McDade, driver of the truck, made no effort to stop or avoid the collision. It is obvious that he never saw the train, although for the last 150 feet the truck traveled before reaching the railroad track there was nothing to obstruct his view of the train. It was broad daylight.

The engineer, fireman and brakeman on the train were in the cab of the lead engine, located at the front thereof. They all saw the truck just as soon as it could be seen, at a time when both the train and the truck were about 150 feet from the crossing. The trainmen testified that when they first saw the truck the train whistle had not been blown because of a city ordinance prohibiting the blowing of a train whistle in Camden, except in an emergency; appellant makes no point regarding the validity of the ordinance.

The trainmen testified that the bell, which is operated electrically, was ringing; that it had been turned on when the train pulled out of Camden and had not been

turned off. The engineer testified that notwithstanding the city ordinance it was his practice to blow the whistle or horn when he saw anyone approaching a crossing that was also being approached by the train; that he assumed the driver of the truck would stop for the train. He had the right to make this assumption. *Crossett Lumber Co.* v. *Cater,* 201 Ark. 432, 144 S. W. 2d 1074. There the court said: "The operatives of trains have the right to assume that a traveler or a pedestrian approaching a railroad track will act in response to the dictates of ordinary prudence and the instinct of self-preservation, and will, in fact, stop before placing himself in peril, and the duty of the railroad employees to take precautions begins only when it becomes apparent that the traveler at a crossing will not do so."

The engineer further testified that when the train got to within 75-80 feet of the crossing it appeared that the truck was not going to stop; that he, therefore, blew the distress signal and applied the brakes, but that the brakes did not slow the train in the distance of 75 feet to the crossing; that the train struck the truck broadside at the crossing and carried it on the front of the engine 4/10 of a mile, the distance it took the train to stop. He further testified that he stopped the train just as soon as it could be stopped after he applied the brakes, 75-80 feet before reaching the crossing.

It is clear from the evidence that the driver of the truck was negligent in not looking to see if a train was approaching the crossing. The train and truck reached the crossing at approximately the same moment. If the truck driver had only looked to his right he could not have failed to see an object as big as a railroad engine. The train was bound to have been making considerable noise. The court judicially knows this to be a fact. *Kansas City Southern Ry.* v. *Baker,* 233 Ark. 610, 346 S. W. 2d 215; *Missouri Pacific R. Co.* v. *Doyle,* 203 Ark. 1111, 160 S. W. 2d 856.

But even though it is shown conclusively that the driver of the truck was negligent, there is still the question of whether the court was correct in directing verdicts

in favor of the defendants. Notwithstanding the fact that the truck driver was negligent, he is entitled to recover if his negligence was of less degree than the negligence of the defendants. Ark. Stat. Ann. § 73-1002 (Supp. 1963.)

The question we have to decide is whether it can be said, as a matter of law, that the truck driver's negligence is greater than that of the trainmen when the evidence is viewed as we must view it, in the light most favorable to the ones against whom the verdicts were directed. *Powell* v. *Jonesboro, L. C. & E. R. Co.,* 166 Ark. 252, 266 S. W. 78.

Appellees introduced weighty evidence that not only was the truck driver negligent, but that there was no negligence on the part of the defendants. If, however, there is any substantial evidence to support a verdict for the party against whom a directed verdict is sought, it is the duty of the trial court to let the case go to the jury, and this is true although later on it might be within the prerogative of the trial court to set the verdict aside as being contrary to the preponderance of the evidence. *Little Rock & Ft. Smith Ry. Co.* v. *Henson,* 39 Ark. 413; *Jones* v. *Lewis,* 89 Ark. 368, 117 S. W. 561. Mr. Justice Hart said in *St. Louis S. W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215: "Under the provision of the Constitution that "judges shall not charge juries with regard to matters of fact but shall declare the law,' it has been repeatedly held that the circuit court has no power to determine the facts of the case and direct a verdict for either party, even though if returned for the opposite party it would set it aside as against the weight of the evidence."

We have cases with facts similar to the facts in the case at bar where it has been held that it was the duty of the trial court to direct a verdict for the defendant, such as *Missouri Pacific Rd. Co.* v. *Davis,* 197 Ark. 830, 125 S. W. 2d 785; *Missouri Pac. Rd. Co., Thompson, Trustee* v. *King,* 200 Ark. 1066, 143 S. W. 2d 55; *Lloyd Adm'x* v. *St. Louis S. W. Ry. Co.,* 207 Ark. 154, 179 S. W. 2d 651.

On the other hand, we have cases in point where it was held that the trial court properly submitted the issues to the jury. *Powell* v. *Jonesboro, L. C. & E. Ry. Co.,* 166 Ark. 252, 266 S. W. 78; *St. Louis-San Francisco Ry. Co.* v. *Horn,* 168 Ark. 191, 269 S. W. 576; *Missouri Pac. Rd. Co.* v. *Rogers,* 206 Ark. 1052, 178 S. W. 2d 667; *Missouri Pac. Rd. Co., Thompson, Trustee* v. *Magness,* 206 Ark. 1081, 178 S. W. 2d 493; *Missouri Pac. R. Co.* v. *Walden,* 207 Ark. 437, 181 S. W. 2d 24. See also *Phillips* v. *Kurn,* 145 F. 2d 908.

Some of our former decisions regarding degree of negligence appear to be in irreconcilable conflict, but upon close examination it will be seen that there is some distinction in the facts on which the decisions are rendered. The sum and substance of our holding is, and has been, that each case must stand on its own facts. We said in *St. Louis-San Francisco Ry. Co.* v. *Horn,* supra,: "Each case must, of course, be considered upon its own peculiar facts, and the legal sufficiency of the evidence on the question of degree of negligence must be tested, the same as in other cases, by the state of the testimony presented in a given case."

We believe the evidence in the case at bar was sufficient to take the case to the jury. The witness, Mrs. Freeman, testified that she did not hear the whistle or bell, although she was in a good position to have heard either if it had been sounded, and there is an inference from her testimony that the light maintained at the crossing by the railroad company to warn travelers on the highway of approaching trains was not burning. Moreover, the witness Charles Stinett, who was nearby, did not hear the bell, and there is testimony of the fireman that although the train is equipped in a manner that he could apply the emergency brakes, he did not do so. Our attention has not been called to any testimony that the engineer applied the emergency brakes; if there is evidence in the record to that effect we have failed to discover it. True, the engineer stated that he applied the brakes, but it is not clear that he applied the *emergency* brakes, and the fact remains that although the

train was going at a speed of only about 20-25 miles per hour it took it 4/10 of a mile to stop. The engineer testified that the train could not be stopped any sooner, but it must be remembered that he is a party to the litigation.

The witness Delmer Paul Parrish, a police officer, testified that immediately following the wreck he heard the engineer state that if he had applied his brakes all at once he would have derailed the train, and John W. Daniell, another police officer of the City of Camden, testified that he heard the engineer state that he was afraid to apply his emergency equipment because he would scorch the track and derail the train. If the speed of the train had been slowed just a little the truck may have cleared the tracks without being struck.

Reversed and remanded.

WARD, J., dissents.

PAUL WARD, Associate Justice (dissenting). In my opinion the majority has wholly failed to recognize the real issue involved on this appeal.

The issue is *not* whether there is substantial evidence to show negligence on the part of the railroad company. The real issue is whether there is substantial evidence to show the driver's negligence was of a less degree than that of the railroad company. See: *Missouri Pacific Railroad Company* v. *Davis,* 197 Ark. 830, 125 S. W. 2d 785; and *Missouri Pacific Railroad Company* v. *Price,* 199 Ark. 346, 133 S. W. 2d 645. In the *Davis* case there was (as here) evidence of negligence on the part of the driver and the railway company. Appellees were severely injured at a railway crossing. When they were within 100 feet of the crossing they could have seen the train as it approached. They testified that the whistle was not blowing and the bell did not ring until just before the collision, and they were corroborated by two other people. This was disputed by the engineer who stated he blew the whistle and rang the bell, and that he applied the emergency brake which caused one wheel of the engine to run off the track. This Court in summing up

the testimony said "it must be assumed that no signals were given by appellant." The case was allowed to go to the jury which rendered a judgment in favor of appellees. On appeal this Court reversed the lower court and dismissed appellees' causes of action, using this language:

"We have, therefore, a case in which it appears that the jury found that there was negligence on the part of the railroad company in the failure to give warning of the approach of the train to the crossing; but it appears to be utterly unreasonable to say that this negligence was comparable to that of the plaintiff, or that the jury was warranted in finding that the plaintiff's negligence was of less degree than that of the railroad company.

* * * *

"Under these circumstances, it is not merely to split hairs, it is to trifle with the testimony, to say that the jury was warranted in finding that the negligence of the plaintiffs was of less degree than that of the railroad company. In our opinion, the trial court should have told the jury, as a matter of law, that the negligence of the plaintiffs was not of less degree than that of the railroad company."

In the *Price* case the facts and the issue were similar to those in the *Davis* case. Price was seriously injured as he attempted to cross in front of a train at night—he testified that he looked and listened until he was close to the crossing, but he heard no signals and saw no head light. His testimony was corroborated by other witnesses. Again, there was testimony of negligence on the part of both the driver and the railroad company. The matter was submitted to a jury which returned a verdict in favor of appellee for $20,000. This Court, in commenting on the testimony, said:

". . . we must assume that the bell was not being rung; that the whistle was not blown; that the flash light system (through some mysterious caprice of mechanics) had suspended operation; that the engine headlight was dim; that appellee slowed to a speed of 15 or 20 miles

an hour as he crossed the tracks; that he looked and listened, and did not see a train nor hear a signal, and that, having thus reassured himself, he proceeded upon the track at the very instant a passenger engine (which the undisputed evidence shows was not traveling more than 20 miles per hour) engaged the crossing."

This Court reversed the judgment of the trial court and dismissed appellee's cause of action using the language set out below:

"To say in the instant case that appellee's negligence was not, as a matter of law, equal to or greater than that of appellants would be to disregard human experiences and known factors of physical operations, and this we cannot do. Of course, comparative negligence is a matter of jury determination, *but there must be substantial evidence to sustain a verdict that a defendant's negligence was of a higher degree than that of the plaintiff, and such evidence is lacking in the case before us.*" (Emphasis added.)

The majority opinion does not even recognize much less pass on the issue so clearly defined in the two cases just discussed. Also, as previously pointed out, the issue is one for us and not the jury to pass on in the first instance.

I would therefore affirm the judgment of the trial court.

FORD MOTOR CREDIT CO. *v.* CATALANI.

5-3355 383 S. W. 2d 99

Opinion delivered October 26, 1964.

Griffin Smith, for appellant.

William H. Drew, for appellee.

JIM JOHNSON, Associate Justice. This is an action to cancel a conditional sales contract for usury.

On April 3, 1963, appellee Pete Catalani purchased a Ford automobile from appellant Hollis Motor Company at McGehee and executed a conditional sales contract to finance the unpaid balance of the purchase price. Appellant Ford Motor Credit Company, holder of the contract, has assumed all responsibility for the calculations of interest upon which this suit is based and has in fact released Hollis Motor Company from any liability. On May 2, 1963, appellee filed suit against appellants in Chicot Chancery Court, alleging that the conditional sales contract interest exceeds ten percent per annum and that the contract is therefore void, and prays cancellation. Appellants answered that the contract is not usurious because any excess interest was the result of erroneous mathematical calculation without intent to charge a usurious rate, and prays that the excess be remitted and the complaint dismissed. On September 12, 1963, the parties entered into a stipulation that provided (omitting details): (1) appellee purchased a certain car, receiving credit for a trade-in, leaving a certain balance due; (2) the balance due was financed by appellant Ford Motor Credit Company; (3) itemized insurance and finance charges; (4) described the payment schedule; (5) detailed the items comprising the principal sum financed; (6) itemized the credit life insurance charge; and (7) stipulated finally that "the payment schedule on the contract sued on herein, when computed, produces an interest rate in excess of ten percent per annum." At trial on September 12, 1963, testimony of appellee and the manager of appellant Ford Motor Credit Com-

pany's office was taken. By decree of December 23, 1963, the court held that the contract was usurious, cancelled the contract and quieted title to the automobile in appellee.

On appeal appellant Ford Motor Credit Company contends that an isolated failure to properly compute the amount of interest on an installment contract is not usury, and that the only issue is "whether this admitted error was deliberate."

Appellee testified about purchasing the automobile, signing a conditional sales contract at Eudora, being contacted by Reed, manager of the Ford Motor Credit Company office in Jackson, Mississippi, who advised appellee that the first contract was in error and had appellee sign a second contract which reduced the number of monthly payments from 24 to 23 and increased the final balloon payment somewhat. Appellee testified that Reed told him that the legal interest rate in Arkansas is 10.5% and that he (appellee) did not learn that the maximum legal interest rate in Arkansas is 10% until he talked to his lawyer a few days later. Reed testified about finding an error in appellee's contract, and having appellee sign the second one, which was the one sued on. (It appears that the first contract was also usurious.) Reed denied telling appellee that the Arkansas lawful interest rate is 10.5%. Reed's testimony reveals that when Hollis Motor Company called him and asked him to figure the payments under the proposed contract, his secretary figured it according to Ford Motor Credit Company's formula. Reed also figured the payments, reached a different and higher result and arbitrarily assumed that his figures, rather than those of his secretary, where accurate and used them in preparing the contract. The secretary's work sheet was introduced in evidence along with Reed's, in an attempt to show Reed's mathematical error which occasioned the usury. It is demonstrated by the secretary's work sheet that the company's formula is accurate. Reed was unsuccessful in attempting to convince the trial court that his error was a simple mathematical error in calcu-

lation. From the detailed analysis of the figures involved in the chancellor's findings (24 pages), as well as Reed's lengthy testimony, it seems apparent that Reed's error was in using the wrong interest rate, one which may be permissible in Mississippi without forfeiture of the principal but not in Arkansas [Miss. Code Ann. § 36 (1942)]. This is not the type of error in mathematic calculations which the courts of Arkansas will forgive and forget by allowing the lender to repay the overage. To the contrary—this court has staunchly resisted all attempts to erode the constitutional interdiction of contracts bearing more than ten percent interest. In *Brooks* v. *Burgess,* 228 Ark. 150, 306 S. W. 2d 104, the usury was patent and when the debtor objected, foreclosure proceedings were brought for the amount of the principal only, and later amended to ask for interest in accordance with the terms of the mortgage. The holding in the *Brooks* case is particularly apt here:

"That the suit was brought only for interest at the legal rate amounts in substance to no more than an effort to remit the excess, which cannot validate the contract. *Habach* v. *Johnson,* 132 Ark. 374, 201 S. W. 286.

"Nor is this a situation that permits a finding of excusable mistake. We have often recognized that a lender who attempts to compute his charges according to law is not to be penalized for an inadvertent mathematical error or for a true mistake of fact, such as the inclusion of an incorrect charge for insurance. *Garvin* v. *Linton,* 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; *Cox* v. *Darragh Co.,* 227 Ark. 399, 299 S. W. 2d 193; *Griffin* v. *Murdock Acceptance Corp.,* 227 Ark. 1018, 303 S. W. 2d 242. That is not the case before us. Here the lender made no effort to compute the interest at the legal rate, nor was there a mathematical error in his calculations. At the most Burgess made a mistake of law, that of thinking that his method of charging interest was lawful. If the usury laws are to mean anything at all it is plain enough that those who engage in the business of lending money must at their peril familiarize themselves with those laws. Otherwise there is nothing to prevent

every lender from habitually collecting excessive interest charges, as long as he purges the account of usury when it becomes necessary to go into court."

Affirmed.

MILWAUKEE INS. CO. *v.* WADE.

5-3346 383 S. W. 2d 105

Opinion delivered October 26, 1964.

Victor Hlavinka, for appellant.

Autrey & Goodson, for appellee.

FRANK HOLT, Associate Justice. The appellee brought this action against the appellant to enforce the provisions of an insurance policy covering appellee's registered quarter horse [Tom Ike]. The issues were presented to the trial court, sitting as a jury, and it found that the death of the horse was made necessary because of injuries received in a collision of the vehicle in which the horse was being transported. The trial court awarded judgment for $1,000.00, the face amount of the policy, plus the statutory penalty and an attorney's fee.

For reversal the appellant urges several points which he ably summarizes by stating: "The only question presented on this appeal is whether the evidence will support the Trial Court's finding that the vehicle in which the insured quarter horse was being transported struck the shoulder of the road and/or collided with the embankment of the adjoining ditch."

The horse was in a two-horse trailer which was attached to a pickup truck owned and being driven by an individual who had borrowed the horse from appellee. The driver temporarily lost control of the truck trying to avoid striking a dog. The vehicle left the road and the front bumper struck the embankment of a roadside ditch before the driver, without stopping, was able to bring the vehicle back upon the highway. Then he stopped to investigate the condition of the horse since he had heard some noise in the trailer during the incident. The horse was found standing in the road favoring his left hind leg. Pins securing the hinges on the tailgate of the trailer were sheared. Later it became necessary to destroy the horse because of the leg injury received at the time of this accident.

The pertinent provisions in the Mobile Agricultural Equipment and Livestock Floater Policy reads as follows:

"2. b. This policy insures livestock against:

(1) Death or destruction, directly resulting from or made necessary by: (d) Collision ** of a vehicle on which the insured property is being transported; collision with other vehicles except those owned or operated by the Assured or by any tenant of the Assured;". The appellant argues that the pickup truck and the trailer were two separate vehicles and since "Tom Ike" was being transported on the trailer hitched to the truck and only the pickup truck struck the embankment, therefore, the collision was not with the vehicle [the trailer] in which the horse was being transported. We cannot agree with appellant's construction of the meaning and purpose of the policy in question. In *Aetna Life Ins.*

Co. v. *Spencer,* 182 Ark. 496, 32 S. W. 2d 310, Mr. Chief Justice Hart aptly stated:

"Contracts of insurance should receive a *reasonable construction so as to effectuate the purposes* for which they are made. In cases where the language used is ambiguous, it should be constructed in favor of the insured because the policy is written on forms prepared by the insurer. Of course, legal effect should be given to all the language used, *and the object to be accomplished* by the contract should be considered in interpreting it." [Emphasis added.]

Also, see *American Fidelity & Casualty Co.* v. *McKee,* 198 Ark. 601, 130 S. W. 2d 12; *Importers' & Exporters' Ins. Co.* v. *Jones,* 166 Ark. 370, 266 S. W. 286; 29 Am. Jur., Insurance, § 305, p. 683. The obvious intention of the parties in the instant case was to insure this horse from death or destruction caused *by a collision while being transported.* It is undisputed that the insured quarter horse was being transported in a semi-trailer attached to the pickup truck which collided with a roadside ditch embankment. The trailer alone had no motive power and was incapable of transporting the horse without the pickup truck. We think that the trial court made a fair, reasonable, and sensible construction of the disputed terms of the insurance policy in question.

Another familiar rule is that any intent to exclude coverage should be expressed in unmistakable language and the burden to show an exclusion rests upon the insurance company to prove facts which bring it within the exception. *Riverside Ins. Co.* v. *McGlothin,* 231 Ark. 764, 332 S. W. 2d 486. A review of the record in this case does not reveal that the trailer or semi-trailer was so excluded.

It is well settled that the finding of a trial court, sitting as a jury, has the same verity and effect as that of a jury and, further, that we must affirm if there is

any substantial evidence to support it. In the case at bar we think there was ample evidence to sustain the finding of the trial court. A fee of $200.00 is reasonable for the services of appellee's attorney on this appeal.

Accordingly, the judgment is affirmed.

ARK. STATE HIGHWAY COMM. *v.* HIGHTOWER.

5-3333 383 S. W. 2d 279

Opinion delivered November 2, 1964.

Lee C. Allen, Lindsey J. Fairley & Mark E. Woolsey, for appellant.

Felver A. Rowell, Jr., for appellee.

CARLETON HARRIS, Chief Justice. The issue on this appeal is the validity or non-validity of a certain minute order which was adopted by the Arkansas State Highway Department, and which relates to the construction of access driveways to state highways from abutting property. The Chancellor found that the regulation, herein question, was discriminatory under the Fourteenth Amendment to the United States Constitution, and the equal protection clause of the Arkansas State Constitution. With this finding, the Highway Department's complaint against appellees was dismissed, and, from the decree so entered, appellant brings this appeal.

On June 28, 1961, Minute Order No. 4161 was adopted by the commission.[1] This order sets out the requirements for construction of access driveways, and, *inter alia,* provides for the proper width of such driveways, and for safety zones; it prescribes the length of such zones, the type of curbs, or posts, that shall be used, and other factors relating to safety. The regulation only applies to new construction, and, under the order, those interested in constructing access driveways from their property to the highway are required to obtain a permit from the department. Appellees applied for a permit, which was granted. The permit provided for the erection of four safety islands with three entrances into the property between the islands, and further provided for the erection of concrete curbs around the safety islands. After accepting the permit, appellees proceeded to build the access driveways, but refused to construct the islands called for in the permit. Marion Hightower stated that it would be "awfully expensive" to build concrete curbing; that, in his opinion, there was no reason for the safety islands. The court, in holding with appellees, commented that the evidence reflected that property owners with driveways in existence prior to the adoption of the order were not required to conform to the standards (for driveways) sought to be imposed on appellees in this case. By written opinion, the court then stated:

"From the foregoing, it will be seen that the facts in this case are not in dispute. The minute order, which has the effect of a statute, is a valid exercise of the police power of the state. See *Arkansas State Highway Commission* v. *City of Little Rock,* 227 Ark. 660, 300 S.W. 2d 929 (1957). As a factual finding, both from the testimony, and a view of the premises, it is found that the required islands would contribute to the safety of the

[1] Ark. Stat. Ann. § 76-201.5 (Repl. 1957), Sub-section (m) authorizes the commission to "adopt reasonable rules and regulations from time to time for the protection of, and covering traffic on and in the use of the State Highway System, and in controlling use of, and access to, the highways, except that no provision contained herein shall be construed as replacing the existing 'rules of the road.'" There is no contention in this litigation that the minute order does not have the same effect as an enacted statute.

highway at this point and are reasonable under the circumstances.

"The defendants have raised the issue that the order is discriminatory, apparently under the 14th amendment to the United States Constitution and under the equal protection clause of the Arkansas Constitution of 1874, (Article 2, Section 3). * * *

"Although no cases from Arkansas have been found, it appears to be the law that an abutting owner has the right to construct driveways connecting with a highway, subject to such reasonable regulations as public authority may prescribe. [Citing authority] * * *

"It thus appears that the question is whether or not the order involved, by requiring permits only for new driveways thus excepting existing driveways from its terms, amounts to an unconstitutional discrimination. The question might be stated whether or not the classification of driveways existing prior to the effective date of the order, (June 28, 1961), as being exempt from the order as proposed to driveways created subsequent to that date, is a reasonable classification.

"I am holding that the order by exempting existing driveways does amount to an unconstitutional discrimination. In this respect I might mention that my limited research has uncovered cases holding both ways on this question. * * *

"It appears to this court that the order would be discriminatory if enforced against these defendants, when no attempt is being made to enforce it against driveways in existence prior to its adoption. Particularly this is so in view of the fact that a filling station without such safety islands is directly across the road from the property is question. It also appears that if such an order as to driveways is to be enforced at all, it will have to be enforced against all driveways and not simply against those sought to be constructed subsequent to the effective date of the order. As a factual matter, it appears that there is a definite need for such driveways and islands at all entrances to the highways of this state and

that such an order, if applied fairly, would be reasonable and necessary for the safety of the highways."

It will be noted that the court found that the required islands would contribute to the safety of the highway at the point in question; that such a requirement is reasonable, and that a definite need exists for such driveways and islands at all entrances to the highways of the state. The holding of invalidity as to the order is based solely on the finding that appellees were being discriminated against because owners of stations constructed prior to the order were not covered by the regulation.

We think the learned trial court erred in reaching this conclusion, and we are of the view that appellees cannot prevail in this litigation for two reasons.

First, we do not agree that appellee is relieved of the requirements of the order simply because owners of other stations (built before the order went into effect) are not affected by its provisions.

At the outset, let it be said (as stated by the trial court) that there is authority on both sides of this question; in fact, several cases are cited by opposing counsel in support of the respective positions taken, but we are definitely of the view that the order is not invalid as being discriminatory. In reaching this conclusion, there are certain basic tenets that have been recognized. First, the general rule is that statutes will be considered to operate prospectively only, unless a legislative intent to the contrary is clearly expressed, or strongly implied, from the language used. See *Chism* v. *Phelps,* 228 Ark. 936, 311 S.W. 2d 297, and authorities cited therein. In fact, it appears, if the regulation in question affected stations already in operation at the time of the rendition of the order, that fact itself might render such order invalid. As stated in 50 Am. Jur., Section 477, Page 493:

"Because every law that takes away or impairs vested rights under existing laws, is generally reprehensible, unjust, oppressive, and dangerous, such retroactive laws have not been looked upon with favor, but with dis-

favor, so that courts are loath to give a statute such effect. To the contrary, a prospective interpretation of statutes affecting substantive rights is favored. It is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation (*nova constitutio futuris formam imponere debet, non praeteritis*)."

In 136 A.L.R. 207 is found an annotation pertinent to the principle at issue in this litigation:

"With respect to the regulation of buildings and businesses in the interest of the public health or safety, the courts in a number of cases have held valid and constitutional legislation which in terms excepted existing buildings or business from its regulatory provisions."

In the case of *Sammarco* v. *Boysa,* 193 Wis. 642, 215 N.W. 446, 55 A.L.R. 370, the Wisconsin court said:

"There is a manifest difference between prohibiting the erection of undesirable buildings, or buildings to be devoted to undesirable purposes within a given area, and compelling the destruction of buildings already constructed or prohibiting a continuance of the use to which they may presently be devoted. In the one case the owner has made expenditures in the construction of his building or in fitting up his premises for the use to which they are devoted, while in the other case no such expenditures have been incurred. This circumstance furnishes an unimpeachable basis for classification for the purposes of legislation such as we are construing . . . To assert that the ordinance here under consideration denies the equal protection of the law would not only defeat the purpose of zoning laws in general, but it would amount to a declaration that society is powerless to prevent the growth and development of an evil without completely stamping out the evil."

Here, in this case, the state, under appellees' theory, would be powerless to promulgate regulations of a progressive nature, though the regulations were entirely prospective in effect.

Let it be remembered that there is a distinct difference between the effect of the regulation on the owner of a business already existing at the time of the order, and the effect upon an individual who contemplates establishing a business after the rendition of the order.

In the first instance, a vested right would be disturbed by the new regulation—a regulation not in effect, not contemplated, when the owner of the business built his establishment. To compel compliance would probably mean the expenditure of a considerable sum of money by the owner, an expense unforeseen at the outset. But the individual who contemplates constructing an establishment *after* the new regulation, enters upon the venture "with his eyes open," *i.e.*, with full knowledge of the probable cost of compliance. Certainly, he is not compelled to enter into the new business venture, and the cost of compliance with requirements can be taken into consideration in determining whether to proceed. In *Newman* v. *Mayor of City of Newport,* 57 A. 2d 173, a city ordinance provided that a person owning land abutting upon any public street or highway in the city of Newport, and who desired an entrance or driveway over a sidewalk adjoining his land, should, after certain preliminary requirements, file an application for authority to construct the driveway. Appellant filed such an application, and it was denied. On appeal, Newman contended that the city ordinance was unconstitutional for several reasons, including the fact that it did not apply to *existing* driveways. In disposing of this contention, the Supreme Court of Rhode Island said:

"The constitutionality of the ordinance is further questioned on the ground that by its terms it does not apply to existing driveways and therefore gives owners and occupants of existing business properties an unfair economic advantage, and denies to petitioners the equal protection of the laws. The mere statement of this proposition shows that it merits little consideration. We are not concerned with the economic advantage that business places existing at the time of the passage of the ordinance may have derived from its enactment."

Were it otherwise, appellees still could not prevail in this litigation, for we think they are precluded from challenging the validity of the minute order. Appellees applied for authority to construct access driveways to the highway, and sought a permit for this purpose. The permit was granted, and accepted by the appellees. Mr. Hightower was entirely familiar, or could have been, with the requirements therein set forth, including the provision for the safety islands. Appellees accepted benefits granted by the permit (construction of the driveways), and, accordingly, we do not think the Hightowers are in a position to attack the validity of the order, or to question any requirement included in the permit. In *St. Louis Public Service Company* v. *City of St. Louis,* 302 S.W. 2d 875, the Missouri Supreme Court said:

"The rule is well settled that one voluntarily proceeding under a statute or ordinance, in claiming benefits thereby conferred, will not be heard to question its validity in order to avoid its burdens. The same or similar rules have been applied in litigation involving many different types of instruments, licenses, or other transactions. The designation used in referring to this rule or doctrine is obviously unimportant. It is frequently called an estoppel. However, it is akin to the rule against assuming inconsistent positions and it involves the principles of waiver, election, and ratification rather, perhaps, than being limited to the precise principles of equitable estoppel. Regardless of the name or principle designated, the result is clearly the same. It precludes one who accepts the benefits from questioning the validity of the accompanying obligation. For convenience, we will, hereinafter refer to this rule or doctrine as an estoppel."

A similar holding was rendered in the Nebraska case of *James H. Dailey Estate* v. *City of Lincoln, et al.* 185 N.W. 332. There, the court stated:

"We are of the opinion that the facts stated in the petition do not raise the legality, illegality or constitutionality of the complained of provisions of this building ordinance. The plaintiff could not, after having ap-

plied for and accepted from the building inspector a permit to build a wall twelve inches thick, build one eight inches thick, and, when ordered to show cause why the permit granted should not be revoked or canceled, for that reason plead that the provisions of the building ordinance requiring him to agree to build in accordance with the plans and specifications were illegal and void and not binding upon him. Nor could the plaintiff, after having applied for, received and accepted from the building inspector a permit, question his authority to grant the same. Nor could it, after having agreed that if it did not build in accordance with the plans and specifications submitted its permit might be canceled by the council, question the council's authority to cancel its permit. By its conduct it is estopped from questioning the right of the building inspector to issue the permit granted on its application and the council's authority to revoke the same for not building in accordance with the plans and specifications. As between the plaintiff and defendant, the provisions of the sections complained of cannot be questioned by plaintiff. If the plaintiff desired to question the legality of this building ordinance, it should have done so before it applied for, received and accepted a permit thereunder."

We think the language in these cases is apropos in the instant litigation, and appellees, having accepted the permit, are not now in a position to question the complete validity of the order.

It is also asserted that Minute Order No. 4161, insofar as the safety islands are concerned, provides alternate methods of construction, *viz,* concrete curbs, or posts, but that the permit issued to Hightowers requires the use of concrete curbs. This argument likewise is completely answered by the preceding paragraphs. In fact, the application signed by Marion Hightower requests permission to construct driveways as described in the permit.

Reversed.

5-3304 383 S. W. 2d 283

Opinion delivered November 2, 1964.

[redacted]

Kenneth Coffelt, for appellant.

Coleman, Gantt, Ramsay & Cox, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves a bailment. The essential facts are practically undisputed. Appellant Christensen made a purchase at the drug store of appellee Dady at about 5:00 P.M., and the amount paid for the articles purchased was $1.64. In the course of the transaction, Christensen laid his billfold on the counter and forgot to repossess it. After Christensen's departure the clerk who had waited on him found the bill fold and delivered it to Dady, who placed it in the drawer of a filing cabinet. The next morning Christensen called Dady and learned that the billfold had been found. About 4:00 P.M. when Christensen called at the drug store for the billfold, it could not be found; and Christensen filed this action against Dady, claiming that, as bailee, Dady had failed to exercise the proper care for the protection of the bailment. Christensen testified that the billfold contained $1,040.00 in currency and also credit and identification cards.

Dady testified that he had no safe in the store; that he placed the billfold in the drawer of a filing cabinet where he kept his own papers; that he exercised the proper degree of care for the safety of the bailment; that his store had been previously burglarized; and that

evidently his store was burglarized again during the night and the billfold and contents taken. The police investigated the matter but found no trace of the billfold or contents. The jury verdict was for Dady, and Christensen brings this appeal and lists the following as his point on appeal:

> "The trial court in passing on the instructions offered, given and refused, committed reversible error in sending the case to the jury on the slight degree of care theory instead of the ordinary care doctrine and the gross negligence theory instead of ordinary negligence, and in failing to let the jury say whether it would serve to the benefit of both parties for Dady to take care of Christensen's property."

As to the first prong of appellant's point little need be said. The law is well settled as to the degree of care required of a gratuitous bailee[1] and the degree of care required of a reciprocal bailee;[2] and both appellant and appellee concede this to be true. The question is, what was the type of bailment that existed as disclosed by the facts of this case.

That brings us to the second prong of the appellant's point, which is that the Trial Court failed to let the jury say whether the bailment here involved was a gratuitous bailment or a reciprocal bailment. It is well recognized that when the basic facts are in dispute as to the nature of the bailment (*i.e.*, gratuitous or reciprocal), then the determination of the relationship should be left to the jury under proper instructions. *Bail* v. *Culbert,* (Ala.), 96 So. 228; *Staples* v. *Left Fork* (W. Va.), 77 S.E. 2d 872; *White* v. *Burke* (Wash.), 197 P. 2d 1008; *Hearst* v. *Cuneo* (7th Cir.), 291 F. 2d 714. See also 8 C.J.S. p.

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[1] A gratuitous bailee is responsible for goods entrusted to him when the goods are damaged or lost through his gross negligence. See *Rollins* v. *E. St. L. Cotton Co.*, 144 Ark. 146, 221 S. W. 452; *Wear* v. *Gleason,* 52 Ark. 364, 12 S. W. 756; and *Baker* v. *Bailey,* 103 Ark. 12, 145 S. W. 532.

[2] A reciprocal bailee is responsible for goods entrusted to him when the goods are lost or damaged because of the failure of the bailee to use ordinary care and diligence. See *Bertig* v. *Norman,* 101 Ark. 75, 141 S. W. 201; *Tombler* v. *Koelling,* 60 Ark. 62, 28 S. W. 795; and *Warren* v. *Geater,* 206 Ark. 518, 176 S. W. 2d 242.

552, "Bailments" § 53. But the appellant did not offer any instruction submitting such issue to the jury.

Even if we assume that there was enough evidence introduced to allow the issue of the type of bailment to be submitted to the jury, nevertheless the appellant should have asked an instruction submitting such issue. No such instruction was requested by anyone, and the point seems to be raised here for the first time. If appellant though that the evidence made a jury question on the type of bailment, then he should have requested an instruction to that effect. One who fails to request an instruction cannot complain because it was not submitted to the jury. *Jones* v. *Seymour,* 95 Ark. 593, 130 S.W. 560; *Wallace* v. *Riales,* 218 Ark. 70, 234 S.W. 2d 199. The plaintiff should have offered a correct instruction for the Court to submit to the jury the question of the type of bailment. No such instruction was offered. Affirmed.

ROBINSON, J., not participating.

RICHISON *v.* BOATRIGHT.

5-3357 383 S. W. 2d 287

Opinion delivered November 2, 1964.

John G. Holland, for appellant.

Shaw, Jones & Shaw, for appellee.

George Rose Smith, J. In July of 1959 the appellant was working as a carpenter in the construction of a new roof upon a commercial building in Fort Smith. In the course of his work he stepped through a piece of unsupported roofing felt and fell against the ceiling joists, injuring himself. In 1962 he brought this action for his inuries against the appellee, I. B. Boatright, who was the roofing contractor for the job in question. The jury's verdict was for the defendant. In this court the appellant complains of the trial judge's action in giving or refusing instructions.

At the trial the issues of Richison's contributory negligence and of his assumption of the risk were submitted to the jury. Richison specifically objected to these instructions, insisting that there was no evidence to justify the submission of these questions. We think the court was right in holding that an issue of fact was presented upon each point.

At the time of the accident Richison and the other carpenters had been putting ceiling joists in place and then nailing down decking at right angles to the joists. The roofers worked behind the carpenters, covering the decking with strips of felt. Neither the decking nor the felt had been completely laid when the plaintiff was hurt.

On the afternoon preceding the accident the roofers had caught up with the carpenters, having covered all the completed decking with felt. The unfinished edge of the decking was irregular, apparently because the decking boards were not all the same length. (Upon this point the testimony is not as clear to us as it was to the jury, for the witnesses referred to a model and to diagrams that were not introduced in evidence.) The roofers allowed the felt to overhang the edge of the decking by some eight inches, but the witness McKinney testified that before leaving the job the roofers nailed on a board that completely covered the overhang. Despite this pre-

caution Richison says that the next day he stepped through a piece of unsupported felt.

On the issue of negligence the jury could have found that Richison was at fault. He had assisted in putting down the decking and must have known that the ends of the boards were staggered. The jury could have found that he was careless in walking too close to the edge, even if the protective board referred to by McKinney had somehow been removed. On this point the case is similar to *Headrick* v. *H. D. Cooperage Co.*, 97 Ark. 553, 134 S.W. 957, where the plaintiff stepped into a hole in the floor of a sawmill. He knew that the hole was there, but its exact location had been obscured by an accumulation of sawdust. We held that his contributory negligence was a matter for the jury.

In the same way the defense of assumed risk involved an issue of fact. The jury may have believed that Richison voluntarily exposed himself to danger in walking along the edge of the unfinished work. In *Chicago, R.I. & P. Ry.* v. *Allison,* 171 Ark. 983, 287 S.W. 197, it was held that where a carpenter working on the roof of a caboose tripped and fell over a piece of tin dropped by a fellow worker the defense of assumed risk was properly left to the jury.

It is argued that two other instructions were inherently erroneous. The plaintiff's only pertinent objection was to "all instructions given." Some of the instructions were correct; so this *en masse* objection is unavailing. *Wootton* v. *State,* 232 Ark. 300, 337 S.W. 2d 651. Counsel also relied upon Ark. Stat. Ann. §§ 81-101 and -108 (Repl. 1960) in requesting the court to tell the jury that if Boatright (though not Richison's employer) had control of the laying of the roofing felt it was his duty to furnish the plaintiff a safe place to work. We do not determine whether this statute was intended to enlarge an employer's common law duty to use ordinary care to furnish a safe place to work. By its terms the act applies only to a person having five or more employees. § 81-101. There being no proof that Boatright had that minimum

number of employees, the instruction was properly refused. *Layne-Arkansas Co.* v. *Henderson,* 221 Ark. 691, 255 S.W. 2d 423.

Affirmed.

BENNETT *v.* GUNDOLF.

5-3358 383 S. W. 2d 289

Opinion delivered November 2, 1964.

Robert N. Hardin and *Patten & Brown,* for appellant.

Gannaway & Darrow, for appellee.

PAUL WARD, Associate Justice. Appellant DeWitt Bennett III sued three of his young acquaintances to recover damages for personal injuries received when he was run over by his own car. The question of joint adventure also enters into the case.

In order to understand the issues raised (particularly that of joint adventure) it is necessary to set out in some detail the facts and circumstances out of which appellant's injuries arose. The three defendants, Billingsley, Gundolf, and Boswell left Benton at about 10 p.m. and drove a short distance to a "bauxite pit" to go swimming and plan a party for the following day. Billingsley drove his father's car and took Boswell with him. Gundolf followed in his own car. Appellant (apparently

finding out about the swimming party) drove out to the bauxite pit, arriving about 20 minutes after the other three. It is admitted he had been drinking during that evening. At any rate, shortly after appellant arrived he lay down on the ground and went to sleep. The other boys did not go swimming that night, but they did decide to go skiing the next day. It was disclosed by appellant upon arrival that he might have trouble starting his car when the time came to leave. Therefore, when the boys were ready to go home Billingsley and Gundolf undertook to start appellant's car. In doing so they asked Boswell to stay with appellant, and they pushed his car, with Billingsley's car, some distance from the original parking area. In a short time they succeeded in starting appellant's car, and Billingsley drove it back while Gundolf drove Billingsley's car. When Billingsley arrived in appellant's car at the place where the boys had been assembled he ran over (and injured) appellant who was still lying on the ground.

After (apparently) suit was filed by appellant, Billingsley's Insurance Company paid $9,500 and he was released. Upon trial the court instructed a verdict in favor of Boswell and the jury returned a verdict in favor of Gundolf.

For a reversal appellant on appeal urges only two points.

One. In the case of Gundolf it is urged that the trial court erred in refusing appellant's requested Instruction No. 5 which defined joint venture or joint adventure. It is unnecessary to copy the instruction here because appellee concedes it is a correct abstract statement of the law. It is, however, insisted by appellee that the instruction was properly refused since it was not supported by any evidence. To be specific, appellee says (and we agree) that one of the two necessary elements of any joint venture is the equal right of each person to direct and govern the movements and conduct of the other person in respect thereto. See: *Stockton* v. *Baker,* 213 Ark. 918, 213 S.W. 2d 896; *Wymer* v. *Dedman,* 233 Ark. 854,

350 S.W. 2d 169; and *Woodard* v. *Holliday*, 235 Ark. 744, 361 S.W. 2d 744.

Again, we agree with appellee Gundolf that the record discloses no evidence from which a jury could find that he (or Boswell) had any right (or opportunity) to direct and govern Billingsley when he drove the car over appellant. Neither Gundolf or Boswell was in the car with Billingsley nor was it at any time planned for them or either of them to be. In fact, the record discloses that Billingsley knew more than the others about starting appellant's car since he had worked on it previously.

Two. As previously indicated Boswell could not be held liable for appellant's injuries on the theory of a joint adventure, but appellant further contends that a jury question was presented as to Boswell's negligence in failing to protect appellant. The trial court instructed the jury to return a verdict for Boswell, and we think it was proper to do so. The evidence is that Boswell was sitting in Gundolf's car when Billingsley returned in appellant's car. It appears that Billingsley knew as well as Boswell that appellant was lying on the ground and also where he was lying. It is not shown that Boswell knew Billingsley was going to run over appellant in time to prevent him from doing so. It is not shown that Boswell was left behind for the purpose of protecting him from being run over. The evidence is that when the two boys went off to start appellant's car Boswell was asked to "stay with Dee" (appellant), and he said he would.

Finding no substantial evidence of negligence on the part of Boswell, we must affirm the action of the trial court.

Affirmed.

PALMER *v.* STANDARD LIFE & ACCIDENT INS. CO.

5-3352 383 S. W. 2d 285

Opinion delivered November 2, 1964.

Lohnes T. Tiner, Ward & Mooney, for appellant.

Henry S. Wilson, for appellee.

SAM ROBINSON, ASSOCIATE JUSTICE. On May 1, 1962, the appellee, Standard Life & Accident Insurance Company, issued to the Mid-South Grain Company, Inc., a group accident and health policy of insurance. In connection therewith, it issued and delivered to appellant, Harry C. Palmer, as an employee of the grain company, its certificate of insurance No. 0248 under the group policy.

On June 7, 1962, Palmer was injured. Later he filed a claim with the insurance company for benefits under the terms of the policy in the sum of $1,724.29. The insurance company denied liability; Palmer filed suit. The trial court directed a verdict in favor of the insurance company on the theory that the undisputed evidence shows that Palmer was not an employee of the grain company and therefore, under the terms of the policy, could not recover. Palmer has appealed.

The policy provides: The insurance company "Certifies that a Group Accident and Health Policy has been issued to the Employer shown below, and that the Employee named herein became eligible for benefits, subject to the terms of the Policy, on the Effective Date indi-

cated . . . provided that on the Effective Date shown above he is then regularly performing the duties of his occupation; otherwise the Effective Date shall be the date of his return to active duty."

The provision that on the effective date of the policy, May 1, 1962, the insured must be performing the duties of his occupation does not mean that he insured must be actually working at his job with the grain company at the time he is injured, because the policy excludes from its coverage "bodily injury arising out of or in the course of employment."

Palmer operated a crop dusting service whereby he used airplanes to dust crops with insecticides and fertilizer. The grain company sold the material used in dusting the crops. Palmer had a working arrangement with the grain company whereby he promoted the sale of the commodities the grain company had for sale, and the grain company made collections from farmers for Palmer for his work in dusting the crops. In fact, the grain company made most of the collections for work done by Palmer; about 90% was collected by the grain company; they even made collections for him where they had not sold the material used in dusting the crops, and in some instances they paid Palmer even though the farmer did not pay the grain company.

At the time of the issuance of the policy, evidently the insurance company, the grain company, and Palmer all thought that Palmer was an employee of the grain company within the meaning of the policy. Palmer is designated as an employee in the policy. There is no showing that on the date Palmer was injured his situation with the grain company was any different than it was at the time of the issuance of the certificate of insurance to him in which he is designated as an employee. There is no explanation of why the insurance company considered Palmer as an employee of the grain company at the time of the issuance of the certificate to him, but did not consider him to be such an employee at the time he was injured.

Appellee cites *Aetna Life Insurance Co.* v. *Carroll,* 188 Ark. 154, 65 S.W. 2d 25, as sustaining the view that Palmer was not an employee at the time he was injured, but in that case Carroll worked for the Terry Food Stores, Inc. up to May 31, 1932, at which time he was discharged. He died June 17, 1932. The policy provided that it terminated automatically at the end of the policy month in which the employee terminated.

Appellee also relies on *Armour & Co.* v. *Rice,* 199 Ark. 89, 134 S.W. 2d 529. In that case Rice sued Armour for personal injuries, alleging that at the time he was injured he was an employee of Armour. This court held that there was no substantial evidence to show that Rice was an employee of Armour. There, the court quoted from Labatt on Master and Servant as follow: " 'employee' is defined as 'a person employed to do certain work for another under the express or implied terms of an agreement between them, and the master is to have the right to exercise control over the performance of the work, to the extent of prescribing the manner in which it shall be executed.' "

Even if it should be considered that the foregoing definition is applicable here, there is no showing that Palmer did not come within that definition as an employee in promoting sales for the grain company. The great weight of authority is that the term "employment", as used in a policy of group insurance, refers to a status rather than to a contractual relationship. *John Hancock Mutual Life Ins. Co.* v. *Pappageorgu,* 24 N.E. 2d 428. See annotation 68 A.L.R. 2d 35.

Reversed and remanded.

CRAWFORD *v.* COX PLANING MILL & LUMBER CO.

5-3360 383 S. W. 2d 291

Opinion delivered November 2, 1964.

Ward & Mooney, for appellant.

Rose, Meek, House, Barron, Nash & Williams, Frierson, Walker & Snellgrove, for appellee.

FRANK HOLT, Associate Justice. The trial court sustained appellees' demurrers to the appellants' amended complaint. On appeal the only issue is whether appellants' amended complaint stated a cause of action under the doctrine of attractive nuisance.

The appellant alleged that the "minor" child [no age stated] was injured when he fell from an unguarded scaffold while playing the game of hide-and-seek on a Sunday afternoon in a construction area on public school grounds where no warning signs or barricades of any nature existed. The plaintiff's complaint further stated:

> "The unfinished walls of buildings under construction and the scaffolding erected adjacent there-

to by or at the direction of the defendants, while they may have been relatively safe for experienced artisans of mature judgment, were so narrow in width and unstable in structure as to be a definite and positive hazard to young children without experience or knowledge of their latent dangers, in that the flooring of said scaffolding would spring up and down and slip upon its base in such a manner as to cause such a child to lose his balance and equilibrium and unpredictable movements of the flooring of said scaffolding, unforeseeable by a child, did cause Glenn Crawford, a minor, to fall and resulted in his injuries."

We have recognized and applied the doctrine of attractive nuisance in permitting recovery for injuries to children where instrumentalities or conditions of any kind exist that attract and injure children who are too young or immature to realize the existence of its dangerous character. *Foster* v. *Lusk,* 129 Ark. 1, 194 S.W. 855; *Standard Oil Co. of Louisiana* v. *Dumas,* 183 Ark. 616, 38 S.W. 2d 17; *Arkansas Power & Light Co.,* v. *Kilpatrick,* 185 Ark. 678, 49 S.W. 2d 353.

In other instances we have refused the application of this doctrine because of the character of the instrumentality and maturity of the child. *Garrett* v. *Arkansas Power & Light Co.,* 218 Ark. 575, 237 S.W. 2d 895; *Carmichael* v. *Little Rock Housing Authority,* 227 Ark. 470, 299 S.W. 2d 198, and *Jones* v. *Comer,* 237 Ark. 500, 374 S.W. 2d 465.

The doctrine of attractive nuisance is intended for the protection and benefit of children of such a tender age that they are incapable of exercising sufficient judgment and discretion to avoid a danger or peril.

In the case at bar, since the demurrers to appellant's complaint were sustained, we must consider the alleged facts as being true. However, in accordance with the general rules the appellant must allege sufficient facts in the complaint to invoke the doctrine of attractive nuisance.

Buildings under construction ordinarily are not regarded as coming within the doctrine of attractive nuisance so as to impose liability for injury to trespassing children. 65 C.J.S., Negligence, § 29, 475; Annotation, 44 A.L.R. 2d 1258; 36 A.L.R. 252.

The attractiveness of an instrumentality itself is not sufficient to invoke the doctrine. In addition to attractiveness, it must be shown that the object, instrumentality, or conditions are so dangerous to a child that precautionary measures are required. *Arkansas Valley Trust Co.,* v. *McIlroy,* 97 Ark. 160, 133 S.W. 816. If every instrumentality that is attractive to a venturesome boy and, also, has an element of danger about it constitutes an attractive nuisance then there is no limit to its application. Perils or dangers, such as exist from climbing, are obviously known to children who are old enough to be unattended and capable of venturesome conduct. Any child capable of climbing knows that if he falls from a fence, a tree, or any elevated structure injury can result. *Senders* v. *Baird,* 195 Ark. 535, 112 S.W. 2d 966.

In the case at bar the scaffold embodied no perils not readily apparent to children capable of responding to their natural climbing instincts. It was not such a dangerous instrumentality that it comes within the scope of the doctrine of attractive nuisance. Therefore, the allegations of the complaint constituted no submissible issue for the jury.

Affirmed.

BAUER *v.* EUDY.

5-3326 383 S. W. 2d 493

Opinion Delivered November 9, 1964.

Swift & Alexander, for appellant.

Bruce Ivy, for appellee.

CARLETON HARRIS, Chief Justice. Appellants are owners of certain farm lands in the Osceola District of Mississippi County, being known locally as the "Bauer Farm," and comprising approximately 1,000 acres. Since 1951, these lands have been rented to appellees J. O. Eudy and Bruce Eudy. Over this period of time, four separate lease contracts, each identical in content, have been entered into by the parties. The last such contract covered the period of time from January 1, 1959, through December 31, 1960. Appellants became dissatisfied with the manner in which the Eudys were operating the farm some time early in 1959, and testimony reflected that complaints had been made by A. F. Barham of Osceola, agent for Dr. Bauer, to the appellees by registered mail. On June 21, 1960, suit was instituted by appellants, it being alleged that the contract had been violated by appellees in several respects, and, *inter alia,* damages were sought. A general denial was filed by the Eudys, who likewise filed their cross complaint, asserting that appellants were indebted to them for certain repair work that had been done on the farm; judgment was also sought for fertilizer and defoliant, appellees contending that appellants were liable for a part of this cost.

At the conclusion of the trial, the court rendered an oral opinion, finding against appellants on their complaint, and likewise finding against appellee on certain of the repair items for which suit had been brought.[1] However, $700.00 of the amount claimed was allowed for the tearing down of a barn, and the building of a tractor shed in 1958; claim was also allowed for fertilizer in the sum of $203.47, together with interest. From the decree embodying these findings, appellants bring this appeal.

While the original complaint alleged various violations of the contract by appellees, the only alleged violation here relates to that portion of the contract under the heading, "Drainage Ditches." This provision reads as follows:

"The party or parties of the second part will permit no driving of vehicles in or across any of the farm ditches except at regular crossings or when cleaning said ditches. They will make, without cost to parties of the first part, such other farm ditches from time to time as may be necessary to properly drain said lands at all times.

"The party of the second part will also, between the first day of September and the fifteenth day of October in each year during the life of this contract cut and burn all weeds, grass, bushes, briars and other vegetation from said ditches, the banks thereof, and from all turn rows and margins of said lands.

"He will also keep all farm ditches upon said lands clear and free of drifts, slides, bars, weeds, grass, bushes, briars or other vegetation which may obstruct the free flow of water therein."

Whether appellees violated this provision is simply a question of fact, and we accordingly can see no useful purpose in setting out the testimony. Dr. Bauer, Ralph Ferguson, Jim Pittman and A. F. Barham all testified

[1] The total amount claimed for work in the cross complaint was $2,890.00, but the Chancellor found that $2,190.00 of this claim was barred by the Statute of Limitations; he also denied the claim for one-fourth of the cost of defoliant, since this was not contemplated under the contract.

for appellants by deposition. At the trial, C. H. Bond, Jr., testified orally, and Mr. Barham and Ferguson also testified orally. Six witnesses, including J. O. Eudy, testified for appellees, *viz,* Don Fletcher, Marcus Stovall, James Terry, Ralph Bowden and Roy Rounsavall. The testimony by appellant's witnesses was to the effect that appellees had not complied with the provisions of the contract, herein quoted; to the contrary, the testimony of the witnesses for appellees was to the effect that the provisions had been complied with. The testimony was rather positive on each side, and appellants admit that, under our holdings, "the chancellor is the best judge of the veracity of the witnesses, their demeanor and the weight of their testimony," but urge that, in the instant case, "the chancellor committed error in not finding that the rule of preponderance of evidence was carried by the plaintiffs [appellants] and their witnesses with reference to defendants' breach of contract." We cannot agree with this contention, for we are certainly unable to say, from the printed record before us, that the chancellor decided against the preponderance of the evidence.

The Chancellor allowed labor costs of $700.00 to appellees for tearing down a barn and building a tractor shed. The amount sought by appellees was $2,890.00, but the court held that all items were barred by the Statute of Limitations, except the $700.00 item (this work took place in 1958). Appellants point out that Mr. Eudy indicated that he would not have instituted this claim except for the fact that he was sued by appellants. Of course, this is really not pertinent to the claim itself. The fact that he had not originally planned to seek remuneration does not mean that he was not lawfully entitled to it. Appellants do not dispute that this work was done, though they stoutly contend that it was not done at their direction. Mr. Barham stated that the agreement was made between Eudy and Bauer. Bauer testified that he gave permission for the work to be done, but would not have done so had he known that he would be charged with the cost. Eudy testified that he obtained an esti-

mate from the Joiner Lumber Company as to the proper charge for tearing down the barn and putting up the shed, the estimate being $700.00 (such estimate being offered in evidence); that this amount was agreed upon. Appellants mention that no claim was asserted for this amount at the end of 1958 (at which time the old contract expired, and the new one was entered into). But we do not consider this fact controlling. We daresay that frequently, for reasons of friendship, promotion of harmony, or other valid reason, the holder of a claim fails to assert his claim or make demand for payment. The fact remains that the court found that the work had been done; that there had been an agreement to pay Eudy $700.00 for this particular labor, and we are unable to say that this finding was against the preponderance of the evidence.

With reference to the allowance of a portion of the cost of the fertilizer, the court found:

"In regard to the fertilizer, the court is convinced the fertilizer was used. It has been testified here $813.91 worth of fertilizer was used on the crops. One-fourth of that would be $203.47. The contract does state the amount of fertilizer and poison would have to be by agreement of the parties."

However, in its opinion, the court pointed out that in past years (under the same provision in the contract) fertilizer had been used, and the landlord had paid one-fourth of the cost. Further:

"The court also feels like the clause in the contract whereby the tenant agrees to farm the land in a good husbandlike manner, would cover the use of fertilizer."

We do not feel that appellants have established error.

Affirmed.

5-3336 383 S. W. 2d 500

Opinion Delivered November 9, 1964.

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

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

ED. F. MCFADDIN, Associate Justice. Four teen-agers were travelling in a high powered car at an enormous speed. The car ran into a bridge abutment and all four occupants were killed. This is an action for damages brought by the administratrix of one of the teen-agers against the owner of the automobile.

Mrs. Dorothy Easley Rankin is the mother and administratrix of the estate of Nancy Ann Easley, aged sixteen, who was killed in the above mentioned collision on August 10, 1960. The other occupants of the car, also killed, were Jerry Muncrief, aged 19, James Muncrief, aged 13, and Carolyn Muncrief, aged 15. The Muncrief children (two brothers and a sister) were first cousins of Nancy Ann Easley. The defendant is Mrs. Frances Soncini, the owner of the Cadillac convertible, which she

had allowed Jerry Muncrief to drive. Trial resulted in a verdict and judgment for Mrs. Rankin as administratrix of the estate of Nancy Ann Easley; and Mrs. Soncini brings this appeal, urging three points:

"1. The trial court erred in denying appellant's motion for a directed verdict at the close of the appellee's case in chief.

"2. The trial court erred in denying appellant's motion for a directed verdict at the conclusion of the entire case.

"3. The trial court erred in denying the appellant's motion to dismiss appellee's Amendment to Amended and Substituted Complaint on the ground that this pleading was barred by the statute of limitations pertaining to actions for wrongful death."

I. *The Plea Of Limitation.* This is appellant's third point, but we discuss it first. There was considerable uncertainty as to which of the children was actually driving the car at the time of the fatal collision. To understand the plea of limitation it is necessary to give dates of some of the pleadings:

(1) On September 14, 1962, Mrs. Rankin, as administratrix, filed this action against Mrs. Soncini. The original complaint, in addition to alleging negligence of the driver of the car, damages, etc., alleged that Mrs. Soncini was the owner of the car and ". . . that the defendant was further negligent and careless in entrusting the said Cadillac convertible automobile, a dangerous instrumentality, to a minor that she knew was irresponsible, unstable, and an unsafe driver."

(2) On September 28, 1962, the defendant, Mrs. Soncini, filed a motion that the plaintiff make the complaint more definite and certain by alleging the name of the person driving the car at the time of the collision; and this motion was granted.

(3) On December 19, 1962, the plaintiff, by amendment, alleged that Mrs. Soncini had entrusted the car to David Millich, who had negligently and carelessly en-

trusted the car to Jerry Muncrief, whom he knew was irresponsible and unstable.

(4) To the complaint and amendment Mrs. Soncini filed a demurrer; and then on July 11, 1963, the plaintiff filed an amended and substituted complaint in which it was alleged that Mrs. Soncini negligently entrusted the automobile owned by her ". . . to Michael Gerald Muncrief,[1] a minor of the age of 19 years, that she knew, or by the exercise of ordinary care should have known, was irresponsible, unstable, and incompetent, both physically and mentally, to have possession and control of the said automobile. That on the said date, the said Michael Gerald Muncrief drove the defendant's said automobile to his home and picked up his brother, James Hugh Muncrief, a minor of the age of 13 years, and his sister, Carolyn June Muncrief, a minor of the age of 15 years. That he then drove the said automobile to the home of his first cousin, Nancy Ann Easley, a minor of the age of 16 years, the plaintiff's intestate, and picked her up. That the said Michael Gerald Muncrief, because of his irresponsibility, unstableness and incompetency, permitted his said sister, Carolyn June Muncrief, to drive the said automobile in violation of law. That the said Carolyn June Muncrief, under the negligent direction of the said Michael Gerald Muncrief, drove the said automobile . . ."

(5) On July 15, 1963, the defendant demurred to the amended and substituted complaint, which demurrer was overruled, and the defendant requested and obtained a continuance of the case and then filed a general denial.

(6) On August 27, 1963, the plaintiff filed an amendment to the amended and substituted complaint, and in the amendment alleged that Michael Gerald Muncrief (also referred to herein as Jerry Muncrief) was driving the automobile at the time of the fatal collision.

It will be observed that the fatality occurred on August 10, 1960, and that the last mentioned amendment

[1] This is the same party known and referred to as "Jerry Muncrief" throughout the testimony, and this opinion.

was filed on August 27, 1963, which was three years and seventeen days after the fatality; and because of that fact the defendant pleaded the statute of limitations, relying on Ark. Stat. Ann. § 27-907[2] (Repl. 1962). The plea of limitation was denied; and that is the ruling now under consideration.

We hold that the filing of the amendment on August 27, 1963, was not the beginning of a new cause of action but was in compliance with the defendant's original request to furnish the name of the person who was driving the car at the time of the fatal impact. There was considerable uncertainty all the time as to who was driving the car because all of the occupants in the car were killed. Finally, after the taking of the deposition of David Millich on July 24, 1963, the plaintiff was able to definitely allege that Jerry Muncrief was the driver of the car, and that was the final allegation. The naming of Jerry Muncrief was not the beginning of a new cause of action but in compliance with the defendant's request for the name of the driver. The amendment filed on August 27, 1963, did not change the cause of action or add any new parties; it merely made definite and certain an allegation as to the driver of the car. What we said in *Western Coal Co.* v. *Corkille,* 96 Ark. 387, 131 S. W. 963, is applicable here:

"The amendment was therefore only a continuation of the original complaint, and it took effect as of the date when the latter was filed. 1 Enc. Plead. & Prac. 621; *Wright* v. *Walker,* 30 Ark. 44; *Brockaway* v. *Thomas,* 32 Ark. 311; *Kuhns* v. *Wisconsin, etc. Ry. Co.,* 76 Ia. 67; *Gordon* v. *Chicago, R. I. & P. Ry. Co.,* 129 Ia. 747."

II. *Defendant's Motions For Instructed Verdict.* Under this topic we consider the appellant's first and second points, as previously listed. The plaintiff alleged,

[2] That section reads: "Every such action shall be brought by and in the name of the personal representatives of such deceased person, and if no personal representative, then same shall be brought by the heirs at law of such deceased person. Every action authorized by this act [§§ 27-906—27-910] shall becommenced within three [3] years after the death of the person alleged to have been wrongfully killed and not thereafter. [Acts 1957, No. 255, § 2, p. 790.]"

and the case was tried to the jury on the theory (a) that Mrs. Soncini was the owner of the Cadillac car; (b) that she was negligent in entrusting the car to Jerry Muncrief; (c) that she knew Jerry Muncrief to be an incompetent and careless driver; (d) *that Jerry Muncrief was the driver of the car at the time of the collision;* and (e) that his careless and negligent driving caused the death of the plaintiff's intestate. With becoming candor, appellant concedes that there was sufficient evidence to take the case to the jury on items (a), (b), (c), and (e) above; but appellant contended below—and urges here—that there was no substantial evidence on item (d) above; that is, *that Jerry Muncrief was the driver of the car at the time of the collision.*

In short, the appellant contends that there is a missing essential in the plaintiff's proof and that the plaintiff cannot recover since there is no substantial evidence that Jerry Muncrief was driving the car at the time of the fatal mishap. The issue is thus narrowed to the evidence on that sole point,[3] since the appellees wave aside any contention that Mrs. Soncini might be liable if Jerry Muncrief was in the car and directing its operation, even though not the actual driver. So the issue is pinpointed to the evidence as to who was actually driving the car at the time of the fatal impact.

The abutment collision occurred about 4:10 P.M. on Arkansas Highway No. 7, called the "Old Little Rock Highway." The scene was several miles east of Hot Springs on what is called the "Belvedere Stretch." The Soncini car was travelling away from Hot Springs at a rate of speed estimated from 80 to 100 miles per hour and was weaving down the highway. The car finally crossed to the left and hit the bridge abutment with tremendous force. The motor was wrenched from the car and remained on the highway. The car leaped the bridge abutment and fell wheels down in the ditch. The door on the left (driver's) side was torn off the car. The door

[3] The guest statutes (Ark. Stat. Ann. §§ 75-913 and 75-915 [Repl. 1957]) were not pleaded and were not issues in this case. Among other cases cited in the briefs are: *Rook* v. *Moseley,* 236 Ark. 290, 365 S.W. 2d 718; and *Carter* v. *Montgomery,* 226 Ark. 989, 296 S.W. 2d 442.

on the right remained attached to the car. The top was broken away from the windshield and there was left a space of several feet between the upper part of the windshield and the car top. Part of the seats from the car were found on the ground to the left of the car. Jerry Muncrief's body was some distance up the road on the left side of the highway. The bodies of James and Carolyn Muncrief were under the culvert of the bridge. Nancy Ann Easley's body was still in the car, with her feet near the door on the right side and her head resting on the back of the back seat.

We have given the final position of the car and its occupants in some detail since the question of who was driving the car was a question for the jury to decide from the testimony of the witnesses and all of the physical facts and all inferences to be drawn therefrom. Mrs. Barbara Jean Ward, a sister of the deceased Muncrief children, testified that she saw Jerry Muncrief driving the Cadillac convertible when he came to the Muncrief house and picked up his brother and sister and drove away some time around 3:30 in the afternoon. At that time the top was up on the convertible, which was a two-door car. Jerry was driving, Carolyn was in the middle of the front seat, and James was on the right side of the front seat. Since the fatal impact occurred between 4:00 and 4:10 P.M., the testimony of Mrs. Ward would give the position of the occupants approximately 40 minutes before the collision. When the children left the Muncrief home they were going to Nancy Ann Easley's home some 10 or 11 blocks away. Mrs. Muncrief, mother of the children, also testified that Jerry Muncrief was driving the car at the time it left the Muncrief home. On this testimony the appellee contends that when a certain person is shown to be driving a car and in control of it, that condition continues until shown otherwise by indisputable testimony. *Flick* v. *Shimer* (Pa.), 17 Atl. 2d 332; *Limes* v. *Keller* (Pa.), 74 Atl. 2d 131; *Claussen* v. *Johnson* (Iowa), 278 N. W. 297; *Moore* v. *Watkins* (Tenn.), 293 S. W. 2d 185. See also annotation in 32 A. L. R. 2d 988, entitled: "Proof, in absence of direct testimony by sur-

vivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident."

For the appellant, Mrs. Bernice Rogers testified that she was driving east on the Belvedere Stretch at about 4:00 P.M. and was travelling slightly under 60 miles an hour; that she first saw the Cadillac car through her rear view mirror; that the Cadillac car passed on her left; and that she also saw the occupants through the rear window of the Cadillac car. Mrs. Rogers said all four of the occupants were in the front seat of the Cadillac car and that a girl with dark hair, wearing it as a ponytail, was on the extreme left of the front seat. This description would fit Nancy Ann Easley. Mrs. Rogers could not say that the girl was driving the car, but she did say that the girl was on the extreme left of the front seat.

When we consider that the positive testimony established that Jerry Muncrief was driving the car 30 to 40 minutes before the wreck, that Mrs. Rogers testified that a girl with a ponytail was on the extreme left of the front seat (which description would fit Nancy Ann Easley), and when we consider the positions of the bodies and the position of the wrecked car—when we consider all of these matters—we conclude that a question of fact was made for the jury as to whether Jerry Muncrief was the driver at the time of the fatal impact. It was for the jury to decide how much weight to give to the presumption that Jerry Muncrief, having been the driver, continued to be so. It was for the jury to decide how much Mrs. Rogers could have actually seen with a car passing her as this one was, and how much she could have seen through the back window of the Cadillac convertible. It was for the jury to decide whether the position of Nancy Ann Easley's body in the car indicated that she was all the time seated in the back seat and was kept from being thrown clear of the car because the top of the convertible had not become entirely severed. The Trial Court correctly submitted to the jury the question of who was the driver of the car; and we leave that verdict undisturbed.

Affirmed.

5-3361 383 S. W. 2d 508

Opinion delivered November 9, 1964.

[redacted]

Charles W. Garner, for appellant.

Lightle & Tedder, for appellee.

GEORGE ROSE SMITH, J. In 1960 the appellants, the widow and heirs of R. E. Shafer brought this suit to quiet their title to several tracts of land in White county. By intervention the appellees, Lee and Fred Akers, asserted title by adverse possession to a very small part of the land—a parcel of about 1.9 acres. The chancellor sustained the appellees' contention and entered a decree quieting their title. The appellants insist that the decree is against the weight of the evidence.

That one or both of the appellees had actual possession of the disputed tract for some sixteen years before this suit was filed is practically an undisputed fact. The land lies on the bank of the White river and has been the site of a fishing and boating facility. Lee Akers bought the business, which was known as Freshwater Fish Company, from E. F. Brown in 1944. In about 1955 Fred Akers, Lee's brother, became a partner in the venture.

Lee testified that when he bought the Fish Company's business in 1944 he was unable to find out who owned the land. He says that he has claimed ownership of the land ever since he acquired the business. There is no doubt about the Fish Company's possession having been open and notorious. Its proprietors have main-

tained fishing docks and a houseboat at the edge of the water. On the land itself there have been cabins with electric lights, parking areas, a gasoline pump supplied from a buried storage tank, racks for drying nets, and equipment such as rental boats for commercial and sporting fishermen.

The appellees have not had record title to the land, but neither is there proof of record title in the appellants. They merely show that in 1952 R. E. Shafer, their predecessor in title, received from a cooperage company a deed to land that includes the 1.9 acres in question. The Shafers have paid the taxes every year upon the tracts they claim.

It is contended by the Shafers that the Fish Company's possession has been permissive. They say that for about sixteen years R. E. Shafer rented a 40-acre tract of pasture land that Lee Akers owned in the vicinity. After Shafer obtained his deed in 1952 he permitted Akers to occupy the river front property now in issue in return for Shafer's continued occupancy of the pasture land. Akers denies this testimony, asserting that he rented the pasture to Shafer in 1950 only, after a flood had compelled Shafer to seek more land for his mules.

In urging their contentions the parties rely upon oral testimony that is hopelessly in conflict. The Fish Company's actual occupancy of the property is consistent either with its own claim of adverse possession or with the Shafers' claim of a parol agreement for an exchange of possessory rights. It is of some significance, however, that Akers had controlled the property for eight years before 1952, when the Shafers say that his occupancy became merely permissive. The chancellor had the advantage of seeing and hearing the witnesses as they testified. Our review of the record does not convince us that his decision is against the preponderance of the evidence.

Affirmed.

CLAY *v.* DODD.

5-3349 383 S. W. 2d 504

Opinion delivered November 9, 1964.

[redacted]

William M. Stocks, Bethell & Pearce, for appellant.

Wayland A. Parker, for appellee.

PAUL WARD, Associate Justice. This is a dispute over a common boundary line between property owned by the parties. Appellees' land lies in the northwest quarter of Section 4, Township 6 North, Range 31 West. Appellant's land adjoins on the west and is located in the northeast quarter of Section 5, same township and range. Appellant says the common boundary line is one-half mile long. It is conceded by appellant that "the fence line enclosing the described lands and separating the same from adjoining land was established more than fifty years ago."

When appellant moved a portion of the fence 20 feet to the east, appellees filed this suit to restrain him from further trespassing and from interfering with the quiet enjoyment of their lands. Appellees claimed adverse possession by them and their predecessors in title for more than 50 years and also claimed that the fence dividing their property from appellant's property had been mutually accepted for said period of time. In his

answer appellant "admits that plaintiffs acquired said property by purchase about 14 years ago and took immediate possession of same", but denies "that there has been a mutual agreement by the parties respecting the boundary line within the past 14 years . . ."

At the close of a lengthy hearing the trial court found that no question of adverse possession was involved, but that the decisive question was "whether the fence, which by the undisputed evidence, has been in existence for the past fifty years, has been acquiesced in by the respective owners and their predecessors in title." The trial court resolved this question in favor of appellees and quieted appellees' title to the land bounded by the west fence line as established by the evidence, and enjoined appellant from asserting any claim to the disputed strip of land.

After a careful study of the record and the several contentions of the parties we are unable to say the trial court's finding is against the weight of the evidence. This appears to us to be a case wherein we must rely strongly on the frequently stated rule that the trial judge, who sees and observes the witnesses, is in a better position than we are to adjudge the credibility of the witnesses and the weight of their testimony. This is true because much of the testimony refers to certain locations on the ground which are not identifiable on the exhibits, thereby rendering the testimony meaningless.

Although it is contended by appellant that many years ago there were two fences (between which ran a road) it is not clear to us at what period the east fence ceased to exist. There is, however, testimony that there was never more than one fence. It appears undisputed that when appellees bought their property 14 years ago there was only one fence which was the west boundary line of their property. Consequently, we think the trial court was justified in finding that the old fence line became the boundary line by acquiescence of the parties and their predecessors in title. It is not seriously contended by anyone that there was ever any misunder-

standing about or trouble over the fence line for over 50 years. In such situation the applicable rule was clearly stated by this Court in *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18:

"It is true that in this case the original rail fence line was established without a prior dispute as to boundary; but the recognition of that line for the many intervening years (34 in this case) shows a quietude and acquiescence for so many years that the law will presume an agreement concerning the boundary."
See *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S. W. 2d 490.

We do not agree with appellant that the trial judge committed reversible error in viewing part of the old fence line. The court was confronted with conflicting testimony about whether there has been one or two fences in existence for some 50 years. Under the circumstances it appears the trial judge was merely seeking to evaluate the conflicting testimony. This he had a right to do, under our decision in the case of *Mitcham* v. *Temple,* 215 Ark. 850, 223 S. W. 2d 817. Also, it appears that appellant expressed no objection to the court's action although he had an opportunity to do so before the rendition of the decree.

Likewise, we find no error in the court's allowing appellees to introduce into evidence their Exhibit "C" which is a map of their lands made by the Soil Conservation Service in the regular course of business in that county. The purpose of the map's introduction, as stated at the time, was to depict the west line of appellees' property as described in the complaint. We are unable to see, and appellant has not pointed out, how he has been prejudiced by the introduction of the map. Also, the map was admissible under our decision in *Graves* v. *Wimpy,* 237 Ark. 368, 372 S. W. 2d 812.

Affirmed.

5-3359 383 S. W. 2d 506

Opinion Delivered November 9, 1964.

Edgar R. Thompson, for appellant.

Fred A. Newth, Jr., for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from a judgment for the plaintiff in a malicious prosecution action. The appellant, Southern Farmers Association, Inc., sells gasoline at wholesale. Appellant Shaw Wilson is apparently manager of that company; there is no contention that he was not acting within the scope of his authority in the action he took in this matter.

Appellee, G. W. Whitfield, operated a filling station; he bought gasoline from Southern Farmers. Along about 1958 he had become indebted to Southern Farmers for an amount between $7,000 and $8,000. Southern Farmers cut off his regular credit and thereafter sold him gasoline on a plan whereby a tank of gasoline, amounting to something over $1,400, would be delivered to him and he would give his check for it, although he would not have sufficient money in the bank to cover the check. Southern Farmers was fully aware of that fact, and would hold the check until Whitfield had sold enough of the gasoline to deposit in the bank sufficient funds to make good the check held by Southern Farmers. This method of operation was carried on for several years.

Finally, on July 13, 1962, Whitfield gave to Southern Farmers a check in the sum of $1, 480.66 in payment of a load of gasoline. Southern Farmers ran the check through the bank the first time about 10 days later, on July 23, and twice thereafter; there never was sufficient money in the bank to cover the check.

On September 25, 1962, appellant, Shaw Wilson, acting in his capacity as agent for Southern Farmers, along with the attorney for the company, appeared before Virginia Ham, Deputy Prosecuting Attorney in Pulaski County, and prevailed upon her to approve the issuance of a warrant of arrest for appellee, Whitfield, charging him with giving a bad check with the intent to cheat and defraud. Whitfield was arrested. A hearing was conducted in the Little Rock Municipal Court. At the time of the hearing, the case was passed indefinitely by the court with a notation that it was to be dismissed if not tried by October 19, 1962.

Nothing further was done about the case, and about a year later Whitfield filed this suit against Southern Farmers and Shaw Wilson for malicious prosecution. The cause was tried to a jury, resulting in a verdict and judgment for Whitfield in the sum of $1,000.00. Southern Farmers and Wilson have appealed.

Three points are argued. First it is contended that there has been no termination of the prosecution. This is a necessary requisite to an action for malicious prosecution. But, even if it could be said that the Municipal Court reached no decision in the case, the undisputed facts would support a finding by a jury that appellants had abandoned the prosecution and this is a sufficient termination of the action against the accused to form the basis of an action for malicious prosecution. The court said in *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851: "There was testimony from which the jury might have found that appellant Twist abandoned the criminal prosecution instituted by him against appellee before the justice of the peace. Such abandonment, as we have seen, constituted a legal termination of that prose-

cution." See also *Winkler* v. *Lenoir & Blowing Rock Lines*, 143 S. E. 213.

Next, appellants contend that a full disclosure of all pertinent facts was made to the attorney for appellants and also to the Deputy Prosecuting Attorney, and that appellants acted on their advice. If the record supported this contention it would constitute a valid defense to a suit for malicious prosecution. *Jennings Motors* v. *Burchfield,* 182 Ark. 1047, 34 S. W. 2d 455. Here, however, the record does not bear out the assertion that Wilson disclosed all the facts to the attorney for Southern Farmers and to the Prosecuting Attorney. Mrs. Ham, the Deputy Prosecuting Attorney, when asked whether either Mr. Wilson or his attorney had told her that it had been a policy of the Southern Farmers to hold the checks and let Whitfield pay them off as he sold the gasoline, testified: "A: No sir. Not to my recollection they did not. Q: They didn't relate those facts to you? A: No sir."

The attorney for Southern Farmers testified: "Q: In other words you know that Mr. Shaw Wilson knew no money was in the bank? A: I did not know that."

A great preponderance of the evidence shows that Mr. Wilson did know that the money was not in the bank to cover the check at the time he accepted it, and that it had been his practice to accept checks on the same basis for about five years. If Wilson had made the full disclosure that he had been regularly accepting Whitfield's checks over a period of about five years when he knew that the checks were not good at the time he accepted them, and knew the same thing about the particular check involved here, perhaps the warrant for Whitfield's arrest would not have been issued.

Affirmed.

5-3332 383 S. W. 2d 496

Opinion Delivered November 9, 1964.

[redacted]

Mahony & Yocum, for appellant.

Brown, Compton & Prewett, for appellee.

JIM JOHNSON, Associate Justice. This suit resulted from a collision between a passenger car and a pick-up truck being driven to a service station for servicing by the service station operator. At the time of the collision appellants Jim Reynolds, S. P. Reynolds and C. W. Williams, doing business as Reynolds & Williams Contractors and Construction Company, were engaged in widening and resurfacing part of Highway 167 near El Dorado. On Saturday morning June 12, 1961, the superintendent of appellants' concrete work, Gordon Smith, drove into El Dorado. After completing other business, Smith went to the service station of John H. Davidson, where Smith had been having appellants' automotive equipment serviced for the past few weeks. He asked Davidson to wash, grease and change oil in the truck and asked if the truck could be ready by 12:00 or 1:00 P.M. Davidson then, either at his suggestion or Smith's request, rode with Smith several miles out of El Dorado toward appellants' job site, where Smith

turned the truck over to Davidson. En route to his service station, Davidson collided with a car belonging to appellees C. R. Bounds and Gloria Bounds, his wife, and driven by Mrs. Bounds.

On September 27, 1961, appellees filed suit in Union Circuit Court, Second Division, against Davidson and appellants. Appellees alleged that Davidson was acting as the agent, servant and employee of appellants, that Davidson was driving appellants' truck and at a certain location negligently lost control of the truck and collided with Mrs. Bounds' automobile. The complaint alleged in detail the particulars of Davidson's negligence, the extent of Mrs. Bounds' injuries and the damages to both Mr. and Mrs. Bounds. On November 1st, the complaint was amended to join Gordon Smith as a party defendant and to allege that appellants' truck was in the custody and possession of appellants' employee, Gordon Smith, that at the time of the collision Davidson was acting as an agent, servant and employee of appellants or of Smith.

In their answer appellants and Smith denied the complaint and pleaded contributory negligence of Mrs. Bounds. On May 24, 1962, their answer was amended to allege, *inter alia,* that at all times since delivery of the truck to Davidson for servicing he was a bailee and independent contractor, and not an agent, servant or employee of appellants and Smith. Davidson answered separately by general denial, and on May 29, 1963, Davidson's answer was amended to allege that the collision was the result of unavoidable accident. After a slight shuffling of attorneys and judges (one of appellees' original attorneys having become circuit judge, the other being joined by Davidson's original attorneys as partners and thus now representing appellees, and Davidson having acquired other counsel prior to trial), and the circuit judge and chancellor exchanging circuits, the case was brought to jury trial on October 29, 1963. At the close of all the evidence the court on motion directed a verdict in favor of Gordon Smith. After deliberation the jury returned a verdict for appellees against

Davidson and appellants. From judgment on the verdict, appellants have prosecuted this appeal. Davidson did not appeal the judgment against him.

For reversal, appellants rely on two points: (1) the trial court erred in overruling appellants' motion for a directed verdict, and (2) the trial court erred in refusing to give appellants' requested instruction No. 2 (which read: "The evidence is not sufficient to entitle the plaintiffs to recover damages in any amount against the defendants . . . Reynolds & Williams and you will return a verdict for said defendants.").

Appellants urge that *Andrews* v. *Bloom,* 181 Ark. 1061, 29 S. W. 2d 284, is squarely in point and controlling of this case. In that case an automobile owner's (Andrews') wife telephoned their usual auto repairman and asked that her husband's car be picked up at their home for servicing, which the garage did as an accommodation to regular customers. The garageman sent two of his regular employees to get the car and on the way back to the garage the one driving (Gullett) collided with Bloom. This court held that Gullett received his instructions from the garage owner, was subject to his direction and control, was therefore the servant of the garage owner and not Andrews, the car owner, and reversed and dismissed the suit against Andrews.

Appellees urge, on the other hand, the law applicable here is represented by the recent case, *Campbell* v. *Bastian,* 236 Ark. 205, 365 S. W. 2d 249. In this case Campbell's car was parked near the home of one Ellis. Campbell called Ellis and asked him to bring the car to his (Campbell's) home, which Ellis proceeded to do. As Ellis was turning into Campbell's drive, he collided with Bastian's truck, who sued Campbell for the damages. The trial court instructed the jury that Ellis was the agent of Campbell at the time of the collision and on this point, *inter alia,* Campbell appealed. This court held that, "When an owner asks another person to drive a vehicle for him to a certain place and such requested person undertakes to comply with the request and is on the

prescribed route, it is clear, as a matter of law, that the driver in such a situation is acting as the agent of the owner and not as a bailee of the vehicle. Because of Campbell's testimony as herein quoted, we find no error committed by the trial court in declaring as a matter of law that Ellis was the agent of Campbell."

These apparently divergent views brings us to the review of a number of references including 35 ALR 2d 804, "Liability of owner of motor vehicle for negligence of garageman or mechanic." In Section 7 of the annotation on picking up and delivering cars it is said in general that "an automobile owner is not liable for damage caused by his automobile when being picked up for transportation to a garage for storage or service, or when being returned to the owner, through the negligence of an employee of the garage, such employee being regarded as the servant of the garage operator rather than the car owner," citing *Andrews* v. *Bloom, supra.*

In general on an owner's liability for damage caused by his car while it is being serviced or repaired, 35 ALR 2d 804 states:

"In the great majority of cases involving negligent operation of a car by service personnel in connection with the work for which it has been placed in their custody, the courts have held that the owner is not liable.

"This result is generally reached on the theory that the service establishment becomes the bailee of the car as an independent contractor, since the owner is concerned only with the results of the work and not with the detailed manner in which it is carried out."

Review of a number of cases wherein motor vehicle owners were or were not found liable for the negligence of a garageman or his employee reveals that liability of an owner depends on his legal relationship with the garageman or his employee at the time of the accident, and this relationship is usually a question of fact.

To clarify this abstruse statement are some examples:

A delivers his car to B's garage and leaves it there for servicing, planning to pick it up later. This is a simple bailment and A would not be liable for damage caused by his car through the negligence of B or one of B's employees. 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 578, p. 132.

When the car has been serviced, A calls C who works near the garage and asks C to drive his (A's) car home. C does so and causes an accident. This is simple agency; no bailment involved. A is liable for damages from C's negligence. *Campbell* v. *Bastian, supra.*

Or, when the car has been serviced, A calls D, an employee of B's garage, who has just gone off duty, and persuades D to deliver the car to A. B's policy is never to deliver cars. D, however, undertakes to do so, even though he has no driver's license, and causes an accident. Here D, acting entirely without B's authority, was A's servant and A was therefore liable for his negligence. *Marron* v. *Bohannan,* 104 Conn. 467, 133 Atl. 667, 46 ALR 838.

Next time the car needs servicing, A calls B and asks B to pick up the car at A's home and take it to B's garage for servicing, as B frequently does for regular customers. B sends an employee, C, for A's car, who picks up the car and has an accident on the way to the garage. Since C is entirely under the direction and control of B, A is not liable for C's negligence. *Andrews* v. *Bloom, supra; Luckett* v. *Reighard,* 248 Pa. 24, 93 Atl. 773, Ann. Cas. 1916A, 662.

Next time, A asks B to pick up the car and do some errands for A on the way back to the garage. B causes an accident while engaged in A's errands. While doing A's errands B is subject to A's direction and control and A is therefore liable for B's negligence. This would also be true where A sent C, B's employee, on an errand for A and C caused an accident. *Gordon* v. *Peters,* 313 Ill. App. 261, 39 N. E. 2d 680.

A, car owner, stores his car by the month at B's garage. B had stipulated that any delivering of A's car must be at A's risk. A drove up to B's garage one day and C, B's employee, got into the car and drove or rode off with A, apparently to deliver A home. Returning to the garage in A's car, C has an accident. Since C was subject to the direction and control of A, A is liable for C's negligence. *Holloway* v. *Schield,* 294 Mo. 512, 243 S. W. 163, 22 NCCA 310.

A arranges with B, who owns the storage garage where A stores his car, to pay B so much an hour to have one of B's employees, C, chauffeur A. Although A pays B for C's services, C, who is subject to A's direction and control, is A's servant, and A is liable for C's negligent auto operation while chauffeuring A. *Jimmo* v. *Frick,* 255 Pa. 353, 99 Atl. 1005.

In one case difficult to reconcile and apparently contra to *Andrews* v. *Bloom, supra,* A delivered his car to B for repairs. B was a bailee for that purpose. B did not deliver cars for his customers, except occasionally for A as a favor or accommodation. The Missouri court held that while the car was being repaired, B was a bailee, but that when he delivered it as an accommodation, without charge and not as a usual matter, B was A's servant in making the delivery. *Andres* v. *Cox,* 223 Mo. App. 1139, 23 S. W. 2d 1066.

And so we reach the case at bar. We have no doubt that at the garage Davidson was bailee of appellants' truck as an independent contractor. And we have no doubt that appellants could have made Davidson their agent for some purpose during the course of delivering the truck to his garage. But did they? The issue resolves itself simply to whether there was sufficient evidence of agency (rather than bailment) to create a jury question. In this particular instance we think not. The tone of all the testimony on this point convinces us that Davidson was simply accommodating a fairly new customer who had still other trucks and equipment which would require servicing. Davidson testified that he frequently

delivered cars for his customers as an accommodation when asked, although he didn't advertise the fact, and did not customarily go out of the city limits to pick up or deliver a car. Davidson further testified that in the instant case he wanted the business and was willing to accompany Smith and bring the truck back; that he was going out there (past the city limits) and bring it back for the profit he could make off the wash, grease and oil change, and he didn't ask how far he had to go to get the job. It is undisputed that Smith gave Davidson no instructions relative to the return trip and that the purpose of the return trip was solely to accomplish the servicing job.

Appellee makes a commendable but strained effort to draw a fine line between the work to be done at the station and the trip back to the station, conceding in effect that during work at the station a bailor-bailee relationship would have existed, while contending that on the trip back to the station an agency relationship obtained, and cites *Andres* v. *Cox, supra.* This Missouri case is interesting and would be most persuasive if this question were a matter of first impression in this jurisdiction. We are bound, however, by our own rule expressed in *Andrews* v. *Bloom, supra,* which stands for the proposition quoted as the general rule in 35 ALR 2d 804, § 7, set out above, and upon considered reflection thereof we believe this to be the better rule. Applying this rule to the facts in the case at bar, there is no evidence that any other relationship than a bailment was created when Smith delivered possession of the truck to Davidson.

Reversed and dismissed.

5-3337 383 S. W. 2d 489

Opinion Delivered November 9, 1964.

Smith, Williams, Friday & Bowen and *Wootton, Land & Matthews,* for appellant.

McMath, Leatherman, Woods & Youngdahl and *Richard W. Hobbs,* for appellee.

FRANK HOLT, Associate Justice. The appellees, Mary Ellen Gray, administratrix of the estate of Martha Imogene Gray, deceased, and Lee Beavers, administratrix of the estate of Verona Beavers, deceased, brought separate actions against the appellants, William T. Norman and Better Built Homes, Inc. These actions, consolidated for trial, resulted from the deaths of appellees' two girls, each twelve years of age, who were killed instantly while riding a bicycle near their homes when they were struck by an automobile driven by appellant William T. Norman, an employee of appellant Better Built Homes, Inc.

A verdict was rendered by a jury awarding each of the appellees $35,000.00 against both of the appellants.

For reversal appellants rely upon seven points. They first argue that the court should have directed a verdict for the appellants at the conclusion of all the evidence. We cannot agree when we review the evidence in the light most favorable to the appellees as we must do on appeal. *Harkrider* v. *Cox,* 232 Ark. 165, 334 S. W. 2d 875. The case at bar was submitted to the jury upon the conflicting theories of negligence and contributory negligence as to how the accident occurred. It was within the province of the jury to believe appellees' theory and disbelieve appellants' version. Therefore, the only question we can consider is whether there is any substantial evidence to support the jury's determination of these issues. We will not disturb the finding of fact by a jury on conflicting evidence if there is any substantial evidence to support the jury's determination. *St. Louis-San Francisco R. Co.* v. *Bishop,* 182 Ark. 763, 33 S. W. 2d 383.

Appellees' evidence was to the effect that the twelve-year-old girls, while both were riding an unlighted bicycle on the shoulder of Highway No. 70 about six p.m., were struck from behind by a speeding automobile. The grandfather of one of the children testified that he went to the scene immediately following the accident and observed the position of the children's bodies and that early the next morning he measured distances with a tape measure from the point where their bodies were found by following a trail of blood. According to his testimony, the physical facts established that the point of impact was on the shoulder of the road 5 feet and 3 inches south of the edge of the blacktop pavement and 91 feet east of an intersection. Both the children and appellant Norman were traveling eastward. The physical facts further reflected that the vehicle carried the bicycle and the children's bodies 74 feet before appellant Norman's brakes became fully effective at a point south and near the center line of the highway; that from this point the skid marks indicated appellant's vehicle trav-

eled 241 feet in an arc from the center line to the north edge of the pavement and back to the center line; that as the vehicle veered back to the center line, the bodies of the girls were flung from the hood and windshield of the car to the north shoulder of the highway and came to rest, along with the bicycle, near each other; that one body skidded 92 feet on the pavement and an additional 30 feet on the north shoulder and the other body skidded 30 feet on the pavement and 9 feet on the shoulder. According to him, there was evidence of gouge marks from the bicycle on the pavement indicating the path of the car. He testified that before the continuous skid marks of the automobile began, he found irregular skid marks left by the bicycle tires. He found shattered glass beginning about 53 feet from the point of impact at regular intervals in the eastbound traffic lane to where the car came to rest. His testimony of the physical facts was corroborated in some respects.

According to appellant Norman's theory of the case, he was traveling 40 to 45 miles per hour as he proceeded through the intersection; that as he passed an oncoming car he put his lights on high beam and saw in his eastbound lane an object which was 175 to 200 feet ahead of him and about one-half to two feet from the shoulder of the road. He began to slow up and observed it was either one or two children on an unlighted bicycle; that he then locked his brakes and made a sharp turn to the left or into the westbound lane in order to go around the children; that they unexpectedly turned to their left and into his path where the right front fender of his car struck them at a point about 250 feet [instead of 91 feet as claimed by appellees] from the intersection; that the beginning of glass spray was found 350 feet from the intersection; that the bodies of the girls were carried on his hood and windshield and they were propelled from the car when he cut back sharply into his eastbound lane of the road. There was other evidence, direct and circumstantial, which tended to corroborate the appellant.

Where there are two conflicting versions of the cause of a collision or accident, it is within the province

of the jury to resolve the conflict or inconsistencies in the evidence. *Jonesboro Coca-Cola Bottling Co.* v. *Holt,* 194 Ark. 992, 110 S. W. 2d 535; *Schwam* v. *Reece,* 213 Ark. 431, 210 S. W. 2d 903; *Fields* v. *Freeman,* 177 Ark. 807, 8 S. W. 2d 436. It is true that in the case at bar the appellees relied largely upon physical facts and circumstances in establishing the allegations of their complaint. We have reiterated many times that physical facts can be more persuasive than statements by witnesses. *East Texas Motor Freight Lines Inc.* v. *Dennis,* 214 Ark. 87, 215 S. W. 2d 145. In *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. 2d 798, we said:

"* * * that a well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that any issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions."

See, also, *Phillips Motor Co.* v. *Price, Admx.,* 204 Ark. 827, 165 S. W. 2d 251; *Arkmo Lbr. Co.* v. *Luckett,* 201 Ark. 140, 143 S. W. 2d 1107.

In the case at bar the issue of appellants' negligence was properly submitted to the jury since there was substantial evidence to sustain its verdict in resolving the two conflicting theories.

Appellants contend in their next three points that there was no evidence to justify the court giving instructions on the duty of a driver (1) to keep a proper lookout, (2) to keep the vehicle under proper control, and (3) on the subject of speed. We think the court properly submitted these issues to the jury. Appellants argue that since the bicycle had no light or reflectors, appellant Norman had met the requirement to keep a proper lookout. We have often said that a violation of a traffic statute is only evidence of negligence. The unlighted bicycle was a proper matter for the consideration of the jury, however, as we said in *Duckworth* v. *Stephens,* 182 Ark. 161, 30 S. W. 2d 840:

"* * * the failure to attach lights to the buggy was a matter of proper consideration, but it did not relieve Duckworth from the duty of acting as a reasonable prudent person in the operation of his car and of keeping such lookout as prudence for his own safety and humanity for the safety of others would dictate."

Appellant Norman himself testified that he was 175 or 200 feet from the children on the bicycle when he first observed them in his traffic lane. There was evidence that this area was somewhat congested and that he had previously observed children playing in this vicinity. In *Self* v. *Kirkpatrick,* 194 Ark. 1014, 110 S. W. 2d 13, we said:

"Persons operating an automobile and seeing children ahead of them must exercise such care as a man of ordinary prudence would exercise under the circumstances."

It is appellees' version that the children were carried 74 feet from the point of impact before the beginning of skid marks from appellant's vehicle. According to appellees' evidence, it took appellant Norman 315 feet—241 feet of which was a continuous skid—to bring his vehicle to a stop from the point of impact. Appellant Norman testified that at the time of the accident he was driving 40 to 45 miles per hour. He also testified that he left Hugo, Oklahoma about 3.20 P.M., a distance of 168 miles to the scene of the accident which occurred two hours and forty minutes later or about 6:00 P.M. He further testified that he made three or four brief stops in traveling this distance. There was testimony that appellant Norman stated on two different occasions that he didn't know what happened. When we consider the evidence in the case at bar relating to proper lookout, control, and speed, we are of the opinion that each of these was a proper issue for the jury to consider. *Craighead* v. *Missouri Pacific Transp. Co.,* 195 F. 2d 652; *Patterson* v. *Bell,* 204 Ark. 777, 164 S. W. 2d 902; *Black & White, Inc.* v. *Fisher,* 224 Ark. 688, 275 S. W. 2d 876.

Appellants next contend that the court erred in refusing to give their requested instruction on unavoidable accident. We think the court properly refused this instruction. In *Bennett* v. *Staten,* 229 Ark. 47, 313 S. W. 2d 232, we recognized that the issue of unavoidable accident is raised:

"* * * only when there is evidence tending to prove that the injury resulted from some cause other than the negligence of the parties."

See, also, *Itzkowitz* v. *P. H. Reubel,* 158 Ark. 454, 250 S. W. 535. It must be said that the deaths of these little girls would not have occurred unless somebody was negligent. Appellants alleged that the accident was caused by the negligence of the children and appellees asserted that the accident was caused by the negligence of appellant Norman. The court submitted these issues of negligence and contributory negligence to the jury under proper instructions. We are of the view there was no evidence in the case at bar that made a submissible issue to the jury on an unavoidable accident.

The appellants next argue that the court erred in refusing to give their instruction which recites that the rules of the road apply to riders of bicycles in the same manner as drivers of motor vehicles. We think that adequate instructions relating to the conduct of bicycle riders were given by the court. The court is not required to duplicate instructions on any subject. *Nuckols* v. *Flynn,* 228 Ark. 1106, 312 S. W. 2d 444.

The appellants' final contention is that the judgments of $35,000.00 awarded to each of the appellees are excessive. In the case at bar the court's instruction contained three elements of damage for the jury's consideration, namely, mental anguish, loss of services of the deceased children, and funeral expenses. After deducting the undisputed funeral expenses, approximately $34,000.00 remains covering the elements of mental anguish and loss of services. There was a general verdict so we do not know how much the jury allocated to each of these two elements of damage. *J. Paul Smith Co.* v.

Tipton, 237 Ark. 486, 374 S. W. 2d 176. The award of damages for mental anguish is most difficult to evaluate as was aptly said in *Winner* v. *Sharp*, 43 So. 2d 634.

"No other affliction so tortures and wears down the physical and nervous system. Psychosomatic illness of a serious nature may follow. The emotions may be unstrung, the nerves put on edge and the end effect may be a period in a rest home, a mental hospital, serious physical derangement and sometimes death."

In the case at bar both little girls were healthy, talented, and industrious. Imogene Gray was a good student in conduct and grades. She was a majorette and particularly talented in art. Verona Beavers was also a good student and possessed unusual musical talents. She performed in talent shows at her school and was also a member of the choir in her church. Both mothers required medical attention because of their grief. Mrs. Beavers was described as "a nervous wreck." She had lost weight and suffered a change in personality. Mrs. Gray had lost her husband after an extended illness only nine days before this accident. Imogene was the only child she had left in her home. There was evidence that as a result of the death of Imogene, Mrs. Gray was suffering from a "very bad mental and physical condition."

In 15 Am. Jur., Damages, § 602, it is said:

"Mental anguish from a pecuniary standard, is incapable of definite calculation. The law furnishes no definite rule or standard by which such suffering may be valued or compensated for in money or which will afford a certain basis upon which damages therefor can be estimated. The amount to be awarded in any particular case necessarily, therefore, rests in the discretion of the jury, subject to review as in other cases. The difficulty in measuring damages of this kind, moreover, should not preclude their recovery in a proper case." See, also, *International Harvester* v. *Land,* 234 Ark. 682, 354 S. W. 2d 13; *Tiner* v. *Tiner,* 238 Ark. 22, 379 S. W. 2d 425; and *Pitts* v. *Greene,* 238 Ark. 438, 382 S. W. 2d

904, where we approved substantial verdicts on the element of mental anguish alone.

Appellants argue that there is little or no proof on loss of services. There was proof that these little girls dutifully assisted their widowed mothers. Imogene was most helpful to her mother in nursing her ailing father. It is true that a twelve-year-old girl is incapable of earning very much of value, but the jury is permitted to indulge in conjecture on the future value of such services. In *Missouri Pacific RR Co.* v. *Maxwell,* 194 Ark. 938, 109 S. W. 2d 1254, we approved the following instruction:

"You are instructed that where damages are claimed for the death of a child incapable of earning anything or rendering services of any value, the value of its probable future service to the parent during its minority is a matter of conjecture and may be determined by the jury without the testimony of witnesses."

In the case at bar these verdicts include damages for "pecuniary injuries" and "mental anguish." We cannot say, under the facts in this case, that the awards fixed by the jury should be reduced by us.

The judgment is affirmed.

Opinion delivered November 16, 1964.

Kirsch, Cathey & Brown, for appellant.

Cecil Grooms, for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to the construction of a trust instrument. Arthur Wineland, an elderly widower, who contemplated remarriage, on February 9, 1959, conveyed certain farm lands (being all the property that he owned) to the Security Bank & Trust Company, as trustee. The bank executed a declaration of trust, the construction of which is now before this court. The trust instrument provides that the beneficiaries are Arthur Wineland (the settlor), the widow of Arthur Wineland, two sons, Albert Wineland and Oscar Wineland, and a daughter, Winnie Wineland Fletcher. Article II sets out the terms of the trust, and Article III

provides for the distribution of income. These are the pertinent sections that are at issue in this litigation, and they read as follows:

ARTICLE II—Term of The Trust

"The Trust shall continue during the lifetime of Arthur Wineland, any widow that survives him, and Oscar Wineland, upon the death of the survivor of these three persons, the trust shall terminate and the trustee shall convey, pay over and distribute all remaining assets to the other beneficiaries named above, to-wit; Albert Wineland and Winnie Wineland Fletcher, in equal shares, if living. In the event either Albert Wineland or Winnie Wineland Fletcher dies before receiving full distribution from the Trust estate, his, or her, heirs shall take that which the one so dying would have taken, if living.

ARTICLE III—Distribution of Income

"All net income from the Trust Estate, after payment of principal and interest on mortgage indebtedness, shall be distributed annually, or at such more frequent intervals as the trustee may elect, to Arthur Wineland, the trustor, during his lifetime, after the death of Arthur Wineland, net income shall be distributed to any widow surviving him. After the death of the trustor and his widow, if she survives, income shall be distributed as follows: The trustee is authorized to pay net income to, or for the son of Arthur Wineland, Oscar Wineland, but when the same shall be done, and to what extent, shall be determined by the son, Albert Wineland, if living, otherwise by the trustee. The discretion vested in Albert Wineland and the Trustee shall be uncontrolled, as it is not the intention to vest any beneficial interest in the Trust Estate in Oscar Wineland. Any net income of the Trust Estate not distributed, or paid to or for the benefit of Oscar Wineland, shall be divided equally between Albert Wineland and Winnie Wineland Fletcher."

Arthur Wineland died on May 8, 1962, leaving no surviving widow (divorce having intervened), but being

survived by the three children heretofore mentioned. On August 17, 1963, Oscar Wineland instituted suit against the Security Bank and against his brother and sister, alleging that, under the terms of Article III of the trust, he was entitled to receive the net income of the trust, subject only to any withholding that might be made because of some valid reason; that he was capable of handling the funds and that neither the bank nor his brother, Albert, had justified, or attempted to justify, in any manner, withholding the net income from him; that the actions of the bank and Albert Wineland were arbitrary and contrary to a proper interpretation of the trust instrument. It was further asserted that Albert Wineland had refused to make any payments to Oscar, except on the condition that Albert, individually, together with Winnie Fletcher, should receive like payments, and that this "is contrary to and in violation of the terms of the declaration of trust, whereby the plaintiff is entitled to the net income of the trust estate during his lifetime." Oscar Wineland prayed for an accounting as against the trustee of all income received after the death of Arthur Wineland; that the bank should be charged with all expenditures which it had made, or permitted to be made, from the trust estate, other than mortgage loan payments, taxes and reasonable repairs; that personal judgment should be rendered against his brother, Albert Wineland, and sister, Winnie Wineland Fletcher, with respect to any sums they had received from the trust estate, and that the bank should be directed to pay to appellant the entire net income of the trust estate; further, that it should be enjoined from paying any portion to his brother and sister during his (Oscar's) lifetime, and that a declaratory judgment should be entered construing the declaration of trust and defining the rights of the bank and all beneficiaries.

Appellees answered, contending that Albert Wineland was given uncontrolled discretion in what should be paid to Oscar, and that, under the trust provision, any balance left should be divided between appellees, Albert Wineland and Winnie Fletcher. Appellees joined

in asking the court to declare the rights and responsibilities of the several parties to the litigation. At the conclusion of the trial, the court made extensive findings, holding that Albert Wineland and the bank, to date, had not been guilty of an abuse of discretion, and had not acted contrary to the provisions of the trust instrument in withholding certain trust income from Oscar. Albert Wineland had previously tendered a check for $200.00 to Oscar, preparing like checks for his sister and himself, but this payment was refused by appellant, and Albert then proposed to distribute an equal one-third of the net income from the trust estate which had accrued to date to each of the children, after deducting a sufficient amount for state and county taxes, and a reasonable reserve for other essential expenses, including repairs to improvements on the trust funds. The bank and Albert Wineland were directed to pay to Oscar Wineland one-third of the net income from the trust estate which had accumulated to date, after the withholdings heretofore mentioned, and with regard to the future, the court found:

"The defendant, Albert Wineland, has the discretionary power to postpone or withhold income payments in the event in the future, the plaintiff, Oscar Wineland, should become intemperate or other than thrifty with regard to the handling of his personal finances, with the determination as made by Albert Wineland to be conclusively upon all parties unless made contrary to any factual basis."

The request of Oscar for an injunction against the payment of any portion of the net income to his brother and sister was denied. The court, however, found that the bank had acted contrary to the provisions of the trust in permitting portions of the income to be used for the payment of expenses of the last illness of the decedent, Arthur Wineland, for his burial, and the erection of a monument, and the bank was directed to restore the amount so spent ($275.03). The costs of the action were assessed against the net income of the trust estate. From the decree entered, appellant brings this appeal,

contending that the court erred in not ordering that all the net income of the trust estate should be paid to appellant, and that the costs of the action should have been assessed against appellees, individually, without right of reimbursement from the income of the trust estate. Appellees cross-appeal from that portion of the decree wherein the bank was charged with the sums expended from the trust estate representing certain debts of the decedent, the funeral expenses, and expenses of the monument.[1]

The material facts in this litigation are not in dispute, and the parties also agree completely upon the meaning of one provision of Article III, *viz,* that Arthur Wineland, definitely intended that Oscar's wife or children should not acquire any ownership interest in the farm lands. From the evidence, it appears that Oscar, several years prior to the death of his father, had been in financial difficulties, and also had been very intemperate in his drinking habits. Oscar had, at one time, farmed some of his father's land (not here involved), but discontinued doing so in 1945, when that particular land was sold. The sale of the farm created some resentment and ill will, and Oscar moved to Michigan, where he lived for twelve years. Upon returning for visits, Oscar would visit his father, but there were still conflicts over the son's drinking habits. Apparently, Oscar quit drinking in 1960 or 1961, but his father never did learn of this fact before his death. Appellant asserts that the trust instrument was executed because of the fact that the father did not feel that Oscar was competent (because of habits) to properly handle his finances, but, inasmuch as Oscar's beneficiaries would never receive any part of the land, the elder Wineland intended that the son should receive all of the net income. Appellant says that this interpretation is strengthened because of the fact that Oscar is thirteen years older than his brother, Albert, and sixteen years older than his sister; that the father recognized that Oscar would, in all proba-

[1] Appellees also cross-appeal as to the assessment of the costs, contending that the costs should have been taxed against appellant individually.

bility die first, and that the other two children would still have the opportunity to enjoy the use of the property which had been placed in trust. Also, appellant insists that the father certainly would not have intended to punish his son because he had "reformed," and that an interpretation to the effect that Oscar was entitled to all of the money if he was in dire need, or if he became a public charge, but only entitled to a one-third portion if he conducted himself properly, has the effect of rewarding slothfulness, and punishing virtue. Oscar had testified that his brother, in discussing the provisions of Article III, had told him, "The way I see it, I can give you $1.00 or whatever I want to." Both Albert and his sister testified that they knew of no misconduct, lack of thrift, or any other fact relating to the personal habits of Oscar which would justify a refusal to pay the net income of the trust estate to appellant.

Albert took the position that his father had intended, in creating the trust, that Oscar would not be allowed to go in need, or become a public charge, and had accordingly left it up to the younger son to see that this did not happen; that if hungry and in need, Oscar would be entitled to receive up to the full amount of net income; that since Oscar was self-supporting, his position was the same as that of the other two children.

It would appear that the trustor had in mind that his daughter and younger son would, at least for some part of the time, participate in the net profits; otherwise, there would be no need for the provision, "any net income of the trust estate not distributed, or paid to or for the benefit of Oscar Wineland, shall be divided equally between Albert Wineland and Winnie Wineland Fletcher."

Appellant cites a number of cases to the effect that the language employed wherein Albert is given complete discretion to determine when, and to what extent, payments shall be made, is not, legally speaking, so broad as it appears. We agree that Albert is not permitted to act arbitrarily or without the exercise of reasonable

judgment. These cases need not be discussed since we concur that the holdings to this effect constitute sound law. For instance, Albert would not be permitted, under present circumstances, to give to his brother only $1.00, for this would constitute an arbitrary act. However, under the facts, as presented by the evidence, we conclude, as did the chancellor, that there has been no arbitrary action; and we are unable to agree with appellant that the division approved (one-third of the net income to each child) was improper. As to the argument that, under the construction rendered by the Chancellor, the son is being penalized for "turning over a new leaf," and that the father did not intend such action, we can only say that, under the evidence, Arthur Wineland apparently never considered this possibility. The trust agreement was executed by the settlor under the belief that his son was not competent to handle his affairs, since it seems to be undisputed that the elder Wineland did not know of the change in Oscar's habits. But in interpreting the provisions, we cannot consider what Arthur Wineland *might* have done if he had known this fact; rather, the trust can only be construed in the light of the father's knowledge at the time he executed the instrument.

It might be pointed out here that we do not pass upon Article III of the trust insofar as it relates to the future, *i.e.,* the power of Albert to hold or withhold trust income, or to determine whether Oscar would be entitled to a greater portion of such income, or the full amount, under a different set of facts. That question is not now before us.

We do not agree with appellant's contention as to the costs. While the complaint was filed against the bank, and the brother and sister, individually, the suit actually sought a construction of the trust agreement. In fact, part of the relief sought in the pleading is a prayer to construe the declaration of trust. Appellees also requested construction of the trust instrument. Under these circumstances, we think the Chancellor prop-

erly exercised his discretion in taking the costs against the trust estate.

We thus also dispose of that portion of the cross-appeal, but we find merit in the other argument advanced by appellees. In making this determination, it is not necessary that we discuss the question of the use of trust funds for the payment of the bills in question. At the time of his death, Arthur Wineland had a deposit of $352.77 in the bank. This money was used to apply on the debts heretofore mentioned, together with $275.03, which was taken from the trust income. The Chancellor directed that this latter amount be replaced in the trust estate by the bank. It will be recalled that, under Article III of the trust agreement, Arthur Wineland received the income from the trust, payable annually (or at more frequent intervals, if the trustee so elected). Wineland died on May 8, 1962, and the record does not reflect that any income for 1962 was ever distributed to him. Prorating the net income over the entire twelve months, Arthur Wineland's estate would be entitled to approximately one-third of $2,000.00, this figure representing the approximate net income for that year. The subsequent beneficiaries of the trust (succeeding Arthur Wineland) were not entitled to receive any net income until the father's death, which means that the settlor's estate was entitled to considerably more than $275.03. In *Rogoski, Admr.* v. *McLaughlin,* 228 Ark. 1157, 312 S. W. 2d 912, this court said:

"We are unable to agree with the trial court's conclusion that these paragraphs of the will had the effect of bequeathing to the surviving husband the entire net income for the first three months of 1956, most of this income having already accrued before Mrs. Upton's death on March 13. A will is ordinarily construed to speak as of the death of the testator, *Weeks* v. *Weeks,* 211 Ark. 132, 199 S. W. 2d 955, and as a general rule the beneficiary of a testamentary trust is entitled to the income only from the date of the testator's death. Rest., Trusts, § 234."

We think that the Chancellor erred in charging the bank with these items, and that portion of the decree is accordingly reversed.

Affirmed on direct appeal; reversed in part on cross-appeal.

SUTHERLAND *v.* SUTHERLAND.

5-3161 383 S. W. 2d 663

Opinion delivered November 16, 1964.

Shelby C. Ferguson, for appellant.

No brief filed for appellee.

ED. F. MCFADDIN, Associate Justice. The vital question is the custody of a little girl four years of age named Alicia[1] Faye Sutherland, the child of the appellant, Mrs. Dorothy Sutherland, and the appellee, John D. Sutherland.

In June 1962 John D. Sutherland, by his guardian,[2] N. W. Sutherland, filed suit for divorce and for care and custody of the little girl. By cross complaint Mrs. Dorothy Sutherland also sought divorce and care and custody of their child. There were several hearings, and, during the pendency of the divorce suit, the parties resumed cohabitation and then re-separated. The cohabitation

[1] In some places, the first name of the child appears as "Letha."

[2] It is alleged that the guardianship of John D. Sutherland is because of a mental condition.

ended the pending divorce suit; but the Chancery Court had heard enough testimony to be seriously concerned about the welfare of the child. A deplorable situation is presented by the evidence, some competent and some incompetent. At all events, on April 30, 1963, the Chancery Court entered this decree:

"Now on this 30 day of April, 1963, comes on to be heard the matter of the custody of Alicia Faye Sutherland, minor child of John D. Sutherland and Dorothy Sutherland, pursuant to a decree of this Court dated January 8, 1963.

"This Court finds that on January 8, 1963, the Arkansas State Department of Public Welfare was asked to make a full, careful, and complete investigation of relatives of said child in order for this Court to determine where the custody of the child should be placed. The Welfare Department was also directed to report its findings and judgment as to the custody to this Court. However, shortly after the Order was made, the home was involved in a murder attesting to the unsuitability of the mother's home.

"That from this event and a report made by Mr. J. O. Benton, Director of Fulton County, the Court finds that the custody of the said minor child should be placed with the Child Welfare Division of the State Department of Public Welfare.

"IT IS THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the custody of Alicia Faye Sutherland be and hereby is placed with the Child Welfare Division of the State Department of Public Welfare until further orders of this Court or the Probate Court of this County. The mother, Mrs. Dorothy Sutherland, is hereby ordered and directed to bring Alicia Faye Sutherland to this Court and turn the child over to a representative of the Child Welfare Division of the State Department of Public Welfare or to be in contempt of this Court.

"IT IS SO ORDERED."

It is from the foregoing decree regarding the custody of the daugther that Mrs. Sutherland has prosecuted this appeal, proceeding *in forma pauperis* through her attorney, who is serving without compensation. She urges these five points:

"1. When the plaintiff and defendant resumed marital relations, the Chancery Court was without further jurisdiction of the parties or subject matter.

"2. The Court's Decree of April 30 is void because no notice was given to either the plaintiff or defendant that the Court was about to take action on custody of child.

"3. The Court's Decree in awarding custody of child is void because custody was awarded to a stranger to the action.

"4. Court was without authority to rely on mere reports of officers of departments and double hearsay to base his decree of custody of child.

"5. The sworn testimony does not justify the Court's Decree."

It is unnecessary for us to consider each point separately. There is no appearance here by the appellee, John D. Sutherland, or his guardian; but the State Welfare Department has appeared in this Court as intervener. The Attorney for John D. Sutherland has died and the appellee's guardian has not employed other counsel. The Welfare Department states:

"Both the juvenile court and the chancery court hesitate to make any orders regarding the welfare of this child while this action is pending. Since the mother has had the child for over two years and there have been changes in circumstances that would necessitate a rehearing to determine whether the home of the mother is suitable for the child at this time, the case should be remanded to the chancery court."

The best interest of the child is always the polestar in these custody cases. *Roberts* v. *Roberts,* 216 Ark. 453,

226 S. W. 2d 579; *Venegas* v. *Mascorro,* 216 Ark. 173, 224 S. W. 2d 532. Here, the Chancellor made an order that was only intended to be temporary. The mother wants the custody case heard on its merits; the Welfare Department desires the same thing; and the father has not appeared. We therefore conclude that the best interest of the little girl will be served by remanding this cause to the Chancery Court to reinvest it with jurisdiction. There, the parents, the Welfare Department, and/or the juvenile authorities will have ample opportunity to take proper steps to insure that the best interests of this little girl are properly protected.

It is so ordered.

FORT SMITH CHAIR CO. *v.* LANEY, COMMISSIONER.

5-3324 383 S. W. 2d 666

Opinion delivered November 16, 1964.

Gayle Windsor, Jr., Bethell & Pearce, for appellant.

No brief filed for appellee.

ED. F. MCFADDIN, Associate Justice. This is an unemployment compensation case;[1] and the employer is resisting the claims of three employees, Ballard, Wilson, and Rhodes, who worked at the Fort Smith Chair Company. On account of lack of business the three were temporarily laid off from work some time prior to May 1961. Such was their status on May 31, 1961, when a labor dispute arose between the employer and the workers, who were members of United Furniture Workers of America. A strike[2] went into effect on that date, with picket lines established.

On June 13, 1961 Fort Smith Chair Company notified Ballard, Wilson, and Rhodes to return to work, but they refused to return to work because they were members of the striking Union[3] and would not cross the picket line. Thereupon, the Fort Smith Chair Company objected to Ballard, Wilson, and Rhodes receiving any further unemployment benefits after June 13, 1961. The local unemployment office in Fort Smith held that Ballard, Wilson, and Rhodes could not receive unemployment compensation after June 13th; the Appeals Referee reversed the holding and held that they were entitled to unemployment compensation; the Board of Review and also the Circuit Court affirmed the Appeals Referee; and the case is here on appeal. Thus the problem is: an employee is temporarily laid off because of lack of work, and during such period a strike occurs, and during such strike the employee is recalled to his former

[1] Some of our more recent cases concerning unemployment compensation are: *Reddick* v. *Scott*, 217 Ark. 38, 228 S. W. 2d 1008; *Little Rock Furn. Co.* v. *Commissioner*, 227 Ark. 288, 298 S. W. 2d 56; *Thornbrough* v. *Schlenker*, 228 Ark. 1012, 311 S. W. 2d 753; *Monsanto* v. *Commissioner*, 229 Ark. 362, 314 S. W. 2d 493; and *Thronbrough* v. *Stewart*, 232 Ark. 53, 334 S. W. 2d 699.

[2] The strike was held to have been unlawfully called. See *Fort Smith Chair Co.* v. *Local 270*, 143 NLRB 28, also reported in 1963 Commercial Clearing House NLRB decisions, § 12, 475. This was affirmed by the Circuit Court of Appeals of the District of Columbia on April 16, 1964 in *United Furn. Workers* v. *NLRB*, reported in CCH 49 Labor Cases, § 18, 897; and *certiorari* was denied by the U. S. Supreme Court on October 12, 1964 in Case No. 276 styled *United Furn. Workers* v. *NLRB*.

[3] Of course, all the striking employees were refused unemployment compensation because of Ark. Stat. Ann. § 81-1105 (Repl. 1960), which so provides.

work and refuses to cross the picket line to return to work. Under such facts, is the worker entitled to unemployment compensation benefits after he refuses to cross the picket line to return to his former work?

Our applicable statute is Ark. Stat. Ann. § 81-1105 (f) (Repl. 1960), the germane portion of which reads:

"... no individual may ... be paid benefits for the duration of any period of unemployment if he lost his employment or has left his employment by reason of a labor dispute ... at the factory, establishment, or other premises at which he was employed (regardless of whether or not such labor dispute causes any reduction or cessation of operations at such factory ...) as long as such labor dispute continues; ... provided, however, that this sub-section shall not apply if it is shown that he is not participating in or directly interested in the labor dispute; ..."[4]

Under the above statute an employee may not be paid benefits for the duration of unemployment if he lost his employment or left his employment by reason of a labor dispute. It would be an unreasonable refinement to say that these three employees were on temporary layoff prior to the strike and did not "lose employment" or "leave employment" because of the strike. They were on temporary layoff, and when called back to employment they refused to return; so they thereby lost employment. Refusal to cross the picket line made the claimants participants in the strike. 81 C.J.S. p. 279, "Social Security" § 186. Some of the cases from other jurisdictions bearing on the question here posed are: *Employees of Lion Coal Corp.* v. *Industrial Comm.* (Utah), 111 P. 2d 797; *Muncie Division* v. *Review Board* (Ind.), 51 N. E. 2d 891; *Tucker* v. *American Smelting Co.* (Md.), 55 A. 2d 692; *Jones & Laughlin* v. *Unemploy-*

[4] The above statute is the Act No. 99 of 1959. Prior to 1959 the labor dispute section was Ark. Stat. Ann. § 81-1106(d), but in 12 Ark. Law Review, p. 416, in commenting on our holding in *Monsanto* v. *Thronbrough,* 229 Ark. 362, 314 S. W. 2d 493, it is stated: "... it seems tacitly apparent that the shift of the labor dispute section of the Employment Security Act from disqualification, Ark. Stat. Ann. § 81-1106(d) (1947), to eligibility, Ark. Stat. Ann. § 81-1105 (f) (1957), does not change its effect."

ment Board (Pa.), 195 A. 2d 922; *Abbott* v. *Appeal Board* (Mich.), 34 N. W. 2d 542; *Clapp* v. *Appeal Board* (Mich.), 38 N. W. 2d 325; *In Re Persons Unemployed* (Wash.), 110 P. 2d 877; and *In Re Sadowski,* 13 N. Y. S. 2d 553.

In *Muncie* v. *Review Board, supra,* this statement appears:

"If unemployment is originally caused by lack of work but thereafter work becomes available at the factory, establishment or other premises where he was last employed, and the employee refuses to work because of a labor dispute at such place in which he is participating, he is thereafter disqualified for benefits under the Act."

In *Jones & Laughlin* v. *Unemployment Board, supra,* there is the quotation of the general rule from C. J. S.:

"The general rule in cases of this nature, established by cases from other jurisdictions, would seem to be that '* * * if unemployment is originally caused by a lack of work and a labor dispute develops during the unavailability of work, the dispute does not disqualify the employee until work becomes available and he refuses the work because of the dispute.' " 81 C. J. S. Social Security and Public Welfare, § 187.[5]

From a study of our statute and the adjudicated cases, we reach the conclusion that the three employees—Ballard, Wilson, and Rhodes—refused to return to their prior employment because of the strike and therefore made themselves a part of the strike and cannot draw unemployment compensation benefits from the time they refused to return to employment. Therefore, the judgment of the Circuit Court is reversed and the cause remanded to the Board of Review to enforce the result of this decision.

JOHNSON, J. dissents.

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[5] In 28 A.L.R. 287 there is an annotation entitled: "Construction and application of provisions of unemployment compensation or social security acts regarding disqualification for benefits because of labor disputes or strikes." And in Paragraph 9 of that annotation there is a discussion of various cases involving strikes during a layoff period. See also 48 Am. Jur. 540, "Social Security" § 36. See also 12 Ark. Law Rev. 123.

Opinion delivered November 16, 1964.

[redacted]

Harold C. Raines, Jr., for appellant.

Bruce Bennett, Attorney General, By: *Russell J. Wools,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, J. The appellant, Stephen A. Christian, was convicted of embezzlement and sentenced to imprisonment for one year. He contends that the jury's verdict of guilty is not supported by sufficient evidence.

In some respects the State's proof is so fragmentary that it is difficult to recount the facts with precision. In the fall of 1962 Christian appears to have been the executive vice-president of New Era Construction Company, a corporation engaged in building houses. The prosecuting witness, Joseph P. Roderick, entered into a written contract employing New Era to construct a house for $6,000. In the course of construction Roderick delivered to Christian three checks, payable to the corporation, totaling $3,350.80. It is evident that New Era was prevented by insolvency from completing its contract. An expert witness called by the State was of the opinion that the unfinished construction represented an outlay of not more than $2,000 for labor and materials. In addi-

tion, Roderick was compelled to pay off materialmen's liens that amounted to more than $1,600.

About a year and a half after New Era abandoned the job Christian was charged by information with having embezzled all the money that Roderick had paid to the corporation. The State, to sustain the charge of embezzlement, had the burden of proving that the accused, as an officer of the company, had participated in misappropriating funds to such an extent as to be criminally responsible. *State* v. *Guthrie,* 176 Ark. 1041, 5 S. W. 2d 306. It is upon this pivotal point that the State's proof is fatally deficient.

There is no substantial testimony to establish Christian's guilt. He received the checks from Roderick, but there is no proof that he controlled the expenditure of their proceeds. An attorney testified that he sent a letter to Christian asking for an accounting of the sums paid to New Era. In reply Christian submitted a number of receipts that fell decidedly short of demonstrating where all the funds had gone. It is plain enough, however, that Christian's failure to explain what the corporation had done with the money does not satisfy the State's burden of proving that he was personally at fault.

Roderick testified that, at Christian's request, Roderick advanced $350 to the corporation to enable it to pay a franchise tax that was overdue. Yet it certainly cannot be said that Christian was guilty of embezzlement in using this sum in the very way that Roderick expected that it be used. The State also produced a receipt indicating that New Era had paid $51.72 to a carpenter who never worked upon the construction job in question, but the testimony fails to show that the accused was criminally implicated in the transaction.

There is no reason to doubt that Roderick's payments to the New Era company were misapplied, but Christian's culpable participation in any wrongdoing that may have occurred is a matter of speculation rather than of proof. Upon this record the conviction cannot be upheld.

Reversed and remanded for a new trial.

Opinion delivered November 16, 1964.

[redacted]

Richard W. Hobbs, for appellant.

Walter G. Wright, for appellee.

PAUL WARD, Associate Justice. Our only concern here is with the amount of temporary alimony and attorney's fee allowed the wife in a divorce suit which is still pending.

Appellant Charlene B. Yohe and appellee Charles D. Yohe were married June 8, 1963 and lived together until November of the same year. On January 20, 1964 appellant filed suit for a divorce on the ground of indignities, asking for her attorney's fee and alimony pendente lite. Appellee filed a motion to dismiss the complaint on the ground appellant was not a domiciliary of Arkansas. Then appellant renewed her motion for temporary alimony and preliminary attorney's fee.

A hearing was had on the two motions upon the testimony of appellant. The court denied appellee's motion to dismiss and ordered him "to pay plaintiff's attorney a preliminary fee of $125.00 and to pay plaintiff for her maintenance the sum of $150.00 per month, until further

order of the court''. From the above order appellant now prosecutes this appeal, contending the trial court erred in refusing to allow her more money for alimony and attorney's fee pending further litigation.

After a careful review of the record we are unable to say the trial court committed reversible error, especially in view of the inconclusiveness of the testimony. Appellant was of the opinion her husband's income was around $2,500 per month, but at the same time she admitted he placed a $2,000 mortgage against his automobile to pay current bills. She also stated that appellee's office overhead was between $600 and $700 per month, and that it cost around $1,700 per month to maintain a home. Also appellee's testimony indicates she may not have been in great need of money to live while prosecuting the divorce suit. She owns a home in which she has an equity of over $20,000, and appellee gave her $7,000 three months before they were married. Appellant says she has been living with her daughter (by a former marriage) in another state for which she pays $25 per week.

Considering the fact that the allowances were only temporary and that there was no way of knowing, pending a full and final hearing, the needs of appellant or the financial status of appellee, we cannot say the trial court abused its sound discretion. This court has been consistent and specific as to the applicable rule in a situation of this nature.

In the case of *Kearney* v. *Kearney,* 224 Ark. 484, 274 S. W. 2d 779, we said:

''We have consistently held, through a long line of cases, that the question of alimony (under the provisions of § 34-1210, Ark. Stats. 1947), and the amount to be allowed to the wife pending the suit for divorce, together with her costs for attorneys' fees and suit money, are within the sound discretion of the court, and unless abused, the court's action will not be disturbed here.''

In *Allen* v. *Allen,* 171 Ark. 241, 283 S. W. 984, there is this language which is also applicable here:

"It cannot be determined in advance what amount of fee will be earned, and it must be left to a decision at the end of the litigation, when the extent of the services will be known and the result of the recovery and appellant's ability to pay."

The order of the trial court is accordingly affirmed.

Affirmed.

BELT *v.* BASER.

5-3366 383 S. W. 2d 657

Opinion delivered November 16, 1964.

Spears & Sloan, for appellant.

Nance & Nance, for appellee.

JIM JOHNSON, Associate Justice. This suit involves ownership of the proceeds of a life insurance policy.

On May 26, 1962, Horace R. Baser was issued a certificate of insurance by Travelers Insurance Company under Baser's employer's group life policy in the sum of $2,500.00. The beneficiary was his mother, Ruby E. Baser. On November 29, 1962, the named beneficiary was changed to Joan D. Baser, his wife. On the morning of January 23, 1963, Horace Baser and Joan Baser were found dead in their home, apparently the result of gunshot wounds.

Appellee Ruby Baser filed a petition in Crittenden Probate Court on March 8, 1963, for appointment of an administrator of the estate of Horace Baser and after qualification, letters were issued to her as administratrix. Her inventory of the estate included the proceeds of the Travelers policy. A petition for distribution of funds was filed on October 16, 1963, by appellant J. W. Belt, adoptive father of Joan Belt Baser's three children (born of a prior marriage), praying that the insurance proceeds be declared the property of the estate of Joan Baser. Appellee's motion to dismiss the petition for distribution was denied, the court finding that the petition was not a claim for distribution but was in fact a claim that the funds do not belong to the estate of Horace Baser. After hearing on December 17, 1963, the probate court found (1) that the insurance policy named Joan Baser as beneficiary and further provided that in the event of the death of the beneficiary prior to the death of the insured, the proceeds of the policy should be paid to the insured's estate, and (2) that there was no sufficient evidence that Horace Baser and Joan Baser died otherwise than simultaneously and that the proceeds are assets of Horace Baser's estate, and dismissed appellant's petition.

For reversal appellant urges first that "the findings of the court are erroneous and contrary to both the law and the evidence."

The insurance policy provisions applicable in this case are as follows:

"If death shall occur while the employee is insured under said policy in accordance with the terms, conditions and provisions thereof, the amount of insurance in force thereunder on his life at the date of death will be paid to the beneficiary by the employee." . . .

"Payment of any part of the insurance for which there is no beneficiary . . . surviving at the death of the employee, shall be made to the executors or administrators of the employee . . ."

Appellant contends that the burden was on appellee to prove that the beneficiary was not "surviving at the death of the employee," and cites *Watkins* v. *Home Life & Accident Ins. Co.*, 137 Ark. 207, 207 S. W. 587. In that case the insured and the beneficiary were shot and killed from ambush and there was nothing in the proof to indicate which died first. The estates of both men claimed the proceeds of the policy. The relevant portion of Judge Hart's opinion is as follows:

"The clause relied on, therefore, is the following: 'If any beneficiary shall die before the insured, that the interest of such beneficiary shall vest in the insured.' This provided for a substituted beneficiary in case of the death of the primary one. The beneficiary, therefore, had a qualified interest in the policy, and *his death in the lifetime of the insured is therefore a condition which must exist and must be shown to exist before the right of any subsequent beneficiary can be asserted.* J. E. Fischer was the beneficiary named in the policy, and under its terms his representative had a *prima facie* title to the fund. In this case by the terms of the policy itself the substituted beneficiary could only take in case the insured survived the beneficiary. *It is not a case where the beneficiary takes in the event he survives the insured.* The insured and the beneficiary both died in the same disaster. There is no proof as to which one died first. Until it is shown that the beneficiary died in the lifetime of the insured, we think, according to the terms of the policy of insurance, the fund is payable to the representative of the beneficiary because it is only in the event

of the death of the named beneficiary in the lifetime of the insured that the heirs of the insured can take." [Emphasis ours.]

In the case at bar, the policy provides that the beneficiary will take in the event the beneficiary survives the insured, and the burden was therefore on appellant to prove that the beneficiary (under whom he claims) survived the insured, which he failed to do.

Appellant next states that the trial court erred in holding that under the Uniform Simultaneous Death Act [Ark. Stat. Ann. §§ 61-127, 61-128 (1947)] the presumption is that the insured survived the beneficiary, urging that there is no presumption either way and is a question of proof.

Section 61-127 provides:

"Where the insured and beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died other than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary."

Section 61-128 states:

"This act shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this act."

The policy provisions here coincide with the provisions of the Simultaneous Death Act. The trial court found that there was no sufficient evidence that the insured and the beneficiary died other than simultaneously. The record sustains the trial court's findings. The Act creates its own presumptions and exceptions and like all prima facie presumptions falls when the fact to be presumed can be proved. It follows, therefore, there would be no presmuption either by Act or policy wording if appellant had proved that the beneficiary had survived the insured.

Appellant's final point urged for reversal is that "it is against public policy for one committing homicide, or anyone claiming under him, to profit by his wrongful act." This is irrefutable—as far as it goes. See Ark. Stat. Ann. § 61-230 (1947). In the case at bar there were inferences but no legal proof that the insured murdered the beneficiary and killed himself. They were found dead in their bedroom, each with two gunshot wounds in the head and a pistol lying closer to Horace Baser than to Joan Baser. "To conclude that the insured killed his wife in order to do what he could have accomplished by notifying the company of his desire to change the beneficiary is too absurd to require any discussion. And a denial of liability on the ground of public policy based on such a premise, as respects a contract of insurance on his own life, is carrying the doctrine far beyond its limits as recognized in this state. The killing of the wife initiated no claim whatever upon the policy on the husband's life; it was his suicide which made the policy payable." *Longenberger* v. *Prudential Ins. Co. of America,* 121 Pa. Super. 225, 183 Atl. 422.

" 'Public policy is based upon the theory that the murderer himself intends to enjoy and that that is the reason he murdered; but where he could have no enjoyment out of it, he could not have had the intent. The rule of public policy doesn't apply at all.' . . . When the reason for the application of the rule does not exist the rule cannot be invoked." *Union Central Life Ins. Co.* v. *Elizabeth Trust Co.,* 183 Atl. 181 (N. J. 1936).

Affirmed.

5-3373 383 S. W. 2d 661

Opinion delivered November 16, 1964.

Robert N. Hardin, Ed McDonald and *Ben McCray,* for appellant.

Cockrill, Laser, McGehee & Sharp and *Burl C. Rotenberry,* for appellee.

FRANK HOLT, Associate Justice. The appellants, Tommy Riggan and his father, James A. Riggan, brought this action against the appellee, P. J. Langley, for the recovery of damages resulting from an automobile collision. A jury trial resulted in a verdict and judgment for the appellee. For reversal of this judgment the appellants first contend that the court erred in permitting the introduction of pictures of the roadway where the accident occurred. Appellants argue that the pictures were inadmissible because they were taken a year after the acci-

dent and at a time when the conditions of the road had been changed. The pictures in question represent different views of the road at the crest of the hill where this accident occurred, the scene of the accident itself, and the location of certain vehicles exactly as they were following the accident.

The accident occurred when appellants' vehicle collided with an oncoming car while going around appellee's unoccupied vehicle which was parked partially on the road and in a roadside ditch. Appellee's evidence shows that in all material respects the photographs substantially represented conditions as they existed on the day the collision occurred with the exception that the roadside ditch was not as deep because of the grading of the road in the interim. Any variance in the road conditions, as well as the time interval of one year, was fully explained to the jury. The true test of the admissibility of photographs into evidence depends upon the fairness and accuracy of the portrayal of the scene. *Wheeler Admx.* v. *Delco Ben,* 237 Ark. 55, 371 S. W. 2d 130. In *Powell Brothers Truck Lines, Inc.* v. *Barnett,* 196 Ark. 1082, 121 S. W. 2d 116, we said:

"* * * It makes no difference, of course, when a picture was taken, if the evidence shows that the conditions are the same as when the accident occurred, or when the evidence shows the difference, if there is any." Also, see 20 Am. Jur., Evidence, § 731; *Jewell Tea Co.* v. *McCrary,* 197 Ark. 294, 122 S. W. 2d 534, and *Southern National Insurance Co.* v. *Williams,* 224 Ark. 928, 277 S. W. 2d 487. The admissibility of photographs as an aid to the jury is a matter within the sound discretion of the trial judge and unless that discretion is abused we do not disturb the trial court's ruling. *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566. In the case at bar we think the trial court correctly admitted the photographs in evidence. The jury was not misled since the evidence fully apprised the jury of any variance in any material conditions.

The appellants next contend that the court erred in giving appellee's Instruction No. 8 to which a general

objection was made. This standard instruction defined the duties of both the appellants and the appellee with respect to keeping a proper lookout and a vehicle under control. The final sentence of this instruction tells the jury that the failure to meet the defined standard of care is negligence. Appellants urge that the court should have told the jury that violation of these "rules of the road" is only evidence of negligence. The question presented is somewhat similar to the one considered in *Wright* v. *Covey,* 233 Ark. 798, 349 S. W. 2d 344.

"* * * In many instances it is proper to say that a certain fact, such as the violation of a statute, is merely evidence of negligence rather than negligence in itself. *Gill* v. *Whiteside-Hemby Drug Co.,* 197 Ark. 425, 122 S. W. 2d 597. But this instruction is not confined to a particular fact; it is concerned with the plaintiff's failure to exercise such care as would be exercised by a reasonably prudent person. It must be obvious that the plaintiff's failure to conform to that standard of care is negligence, simply because that is really the legal definition of negligence."

This instruction was not inherently erroneous and the fallacy, if any, should have been reached by a specific objection in order to give the court the opportunity to correct it. *Swift* v. *Barker,* 236 Ark. 805, 370 S. W. 2d 71; *Bussell* v. *Missouri Pacific RR Co.,* 237 Ark. 812, 376 S. W. 2d 545. No error was committed in giving this information.

Appellants' final contention is that the court erred in giving appellee's Instruction No. 9 as modified. This instruction also defined several statutory "rules of the road" applicable to the issues in this case. In giving appellee's instruction the court modified it by including verbatim one of appellants' instructions which purported to be verbatim Ark. Stat. Ann. § 75-647 (a) (Supp. 1963). However, it omitted certain words from this statute. Thus, this invited error cannot be assigned to the trial court. *The Home Company* v. *Lammers,* 221 Ark. 311, 254 S. W. 2d 65.

Finding no error, the judgment is affirmed.

CALLAWAY *v.* PERDUE.

5-3374 385 S. W. 2d 4

Opinion delivered November 23, 1964.

[Rehearing denied January 11, 1965.]

William H. Drew, for appellant.

Switzer & Griffin, for appellee.

CARLETON HARRIS, Chief Justice. In September, 1944, P. L. Callaway and his wife, Irene, conveyed 320 acres of land to their grandson, Logan Lee Perdue, age one and one-half years. In April, 1955, Mrs. Callaway was appointed guardian of the person and estate of the minor. In February, 1963, Mrs. Callaway died.

In April, 1963, Logan Lee Perdue, then twenty years of age, whose disabilities as a minor had been previously removed,[1] instituted suit against his grandfather and H. A. Etheridge, alleging that these individuals had, in 1953, cut and removed timber growing on the lands (which had been deeded to him by his grandparents) of the value of $5,376.00, "and did convert and dispose of same to their own use. * * *" Callaway filed a general denial, and Etheridge answered, admitting purchasing and removing timber from the lands in question, but asserting that he contracted with Callaway for such purchase and removal. The case proceeded to trial, but at the conclusion of the presentation of the evidence, appellee took a non-suit as to defendant Etheridge. The jury returned a verdict against Callaway in the amount of $13,382.40, representing treble damages for the value of the timber taken. From the judgment so entered by the court, comes this appeal. Appellant sets out seven points for reversal, which we proceed to discuss.

[1] The order removing disabilities does not appear in the record, but Perdue testified that this had been done, and no question was raised by appellant in the trial court.

It is first asserted that the action against appellant is "barred by the Statute of Frauds." We do not see that the Statute of Frauds has any application in this case whatsoever. Appellee's case is predicated upon the fact that Etheridge purchased the timber from Callaway, and had same cut and removed; that Callaway had no right to sell the timber, and wrongfully disposed of it. There was no written contract, but the Statute of Frauds, if applicable at all, could only relate to the transaction between Callaway and Etheridge, and certainly has nothing to do with the rights of the true owner of the property. According to Perdue's allegations, Callaway and Etheridge, respectively, wrongfully sold, and purchased, appellee's timber, and converted the proceeds to their own use.

It is next asserted that the proof is insufficient to support the verdict. It is true that the evidence is rather meager. The principal testimony connecting Callaway with the transaction is that of defendant Etheridge who testified that Callaway told him (Etheridge) that he wanted to sell some timber on his land, and Etheridge was to stop by the Callaway home and advise Mrs. Callaway whether he was interested in purchasing same. Etheridge, who was engaged in buying and selling timber for Bradley Lumber Company, left word with Mrs. Callaway that he would be glad to handle it. According to Etheridge, Mrs. Callaway told him to go ahead and cut the timber. The witness stated that all of his negotiations were carried on with the wife, and after cutting the timber, he paid Mrs. Callaway. Subsequently, however, he met Mr. Callaway, and the latter told him that he had made a $20.00 mistake in the amount paid Mrs. Callaway, and Etheridge thereupon paid appellant an additional $20.00. Logan Lee Perdue, appellee, testified that his grandfather told him that he had cut the timber, and Homer Perdue, father of appellee, likewise testified that Callaway had told him ten or twelve years back that "he had cut and sold Logan Lee's timber." The witness stated that he went to the land belonging to his son, and observed that the timber has been cut; that no money

was turned over to him. Accordingly, the only evidence that appellant participated in the trespass and conversion was the statements of Etheridge that he had been approached by Callaway relative to the sale, and had paid $20.00 extra to appellant; the statement of appellee that his grandfather had told him that he (the grandfather) had sold the timber, and third, the evidence of Homer Perdue, father of appellee, that P. L. Callaway had made the same statement to him.[2]

The aforementioned evidence, though scanty, was, we think, sufficient to take the case to the jury.

Appellant contends that, even if there is sufficient evidence to present a jury question, the amount determined by the jury is excessive because treble damages were awarded.[3] This argument is based on the contention that the pertinent statutory provision (Ark. Stat. Ann. § 37-204 [1947]) requires that actions for penalty be commenced within two years. The entire section reads as follows:

"Actions for recovery of statutory penalty—Two years.—All actions on penal statutes, where the penalty, or any part thereof, goes to the State, or any county or person suing for the same, shall be commenced within two [2] years after the offense shall have been committed, or the cause of action shall have accrued."

Section 37-226 is relied upon by appellee as tolling Section 37-204 under the facts of this case, and permitting his recovery of treble damages. That section reads as follows:

"If any person entitled to bring any action, under any law of this state, be, at the time of the accrual of the

[2] The record does not reflect the reason for the failure of Homer Perdue to take some action on behalf of his son at the time of learning that the timber had been cut and removed.

[3] Ark. Stat. Ann. § 50-105 (1947) provides, "If any person shall cut down, injure, destroy or carry away any tree placed or growing for use or shade, or any timber, rails or wood, standing, being or growing on the land of another person, * * * in which he has no interest or right, standing or being on any land not his own, * * * every person so trespassing shall pay the party injured treble the value * * * with costs."

cause of action, under twenty-one [21] years of age, or insane or imprisoned beyond the limits of the state, such person shall be at liberty to bring such action within three [3] years next after full age, or such disability may be removed.''

We think this last statute is controlling. In the early case of *Nebraska National Bank* v. *Walsh,* 68 Ark. 433, 59 S. W. 952, this court construed Section 4826 of Sandels and Hill Digest, that section being absolutely identical to Section 37-204, heretofore quoted, and held contrary to appellant's contention.

For the fourth point for reversal, it is argued that the trial court erred in not allowing a continuance because of the illness of the appellant, and in refusing to allow certain interrogatories, propounded to him, together with answers, to be read to the jury. We find no merit in this contention, and actually the point may be peremptorily disposed of because of the fact that the record does not reflect that any motion for a continuance was made at the time of trial. However, inasmuch as this case is going to be reversed on a subsequent point, the question may well arise again as to whether the interrogatories can properly be used, particularly in view of the fact that appellant has apparently died since the judgment was rendered. Although no Order of Revivor appears in the record, appellant evidently is now deceased, since the transcript reveals a motion by ''Don F. Callaway, Executor, of the Estate of P. L. Callaway, Deceased,'' through his attorney, for an extension of time in which to file this appeal.[4]

On October 21, 1963, appellee served notice on appellant for the taking of the discovery deposition of Callaway on November 15, 1963. Counsel then filed his motion, seeking to prohibit appellee from taking this deposition, setting out that Callaway was a patient in the Lake Village Infirmary, and previously had been confined to his bed at his home for more than eight

[4] While the cause was likely revived in the name of the executor, no order appearing, we have continued to refer to P. L. Callaway as "appellant."

months. An affidavit was executed by Dr. Alan G. Talbot, enumerating the ailments of Callaway, and further stating:

"* * * It is further the opinion of this attending physician that to subject the patient to interrogation by reason of his illnesses as heretofore set out, will be detrimental to the patient in aggravating his physical condition. That such interrogation would not only aggravate his physical condition but would probably create such a state of tension that he may suffer serious relapses and actual danger to his life."

The record does not reflect what action, if any, was taken by the court. The trial of the case was held on November 20, 1963, but as previously stated, no request for continuance appears in the transcript. However, prior to the notice of the taking of depositions, appellee had, on August 5, 1963, propounded to appellant certain interrogatories, and these were answered on August 16, 1963. At the trial, counsel for Callaway offered into evidence the interrogatories and answers thereto, contending that he was entitled to do so, and stating:

"* * * It is a matter of public knowledge that the Defendant, P. L. Callaway, has been confined in bed for more than eight months and is currently confined in the Lake Village Infirmary suffering from maladies, as shown by the affidavit of the doctor, duly filed herein, and that he is physically unable to even sit, much less come to this courtroom."

The assertion that the interrogatories and answers were admissible is based on Ark. Stat. Ann. § 28-355 (Repl. 1962) which first makes provision for the service of written interrogatories upon any party by an adverse party, and then reads as follows:

"Interrogatories may relate to any matters which can be inquired into under Section 1 (b) [§ 28-348, subsec. (b)], and the answers may be used to the same extent as provided in Section 1 (d) [§ 28-348, subsec. (d)] for the use of the deposition of a party."

It will be noted that the quoted provision refers back to Section 28-348, Subsection (d), which 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: * * *

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; * * *"

Careful research reveals that counsel is in error in his contention, and he is not entitled to use these interrogatories. Section 28-348 (d) is an exact copy of Rule 26 (d), Federal Rules of Civil Procedure, and the quoted portion of Section 28-355 is identical with the corresponding portion of Rule 33. Federal cases do not sustain appellant's position, and the answers to interrogatories are generally held inadmissible, if offered on behalf of the party making answer, as "self-serving declarations." In *Haskell Plumbing and Heating Company* v. *Weeks, et al.* 237 F. 2d 263, the Circuit Court of Appeals for the Ninth Circuit stated:

"It seems clear that the trial court was in error in permitting these answers, which were self-serving, to be introduced on behalf of the plaintiffs and that this error was compounded by refusal to permit the plaintiffs to be cross-examined upon the question of the amount of their losses. It is true that Rule 26 (d) permits the use of depositions or portions thereof, but only 'so far as admissible under the rules of evidence.' The rules of evi-

dence would permit answers such as these to be used against the party giving them, but because they are self-serving they should not have been admitted on behalf of these plaintiffs."

See also *Bailey* v. *New England Mutual Life Ins. Co. of Boston, Mass.*, 1 FRD 494; *United States* v. *Smith*, 95 F. Supp. 622; *Stottlemire* v. *Cawood*, 213 F. Supp. 879; *Coca Cola Co.* v. *Dixi-Cola Laboratories*, 30 F. Supp. 275. One of the principal reasons for not allowing the use of the interrogatories on behalf of the answering party is the fact that there is no opportunity for cross-examination. In reviewing various cases, one exception to the non-admissibility of interrogatories is noted, *viz*, where the adverse party offers part of the answers to the interrogatories, the person making answer is entitled to read any other answer which tends to explain or correct the answers offered by the adverse party. No cases involving the death of a party who had previously answered interrogatories have been found, but Moore, in Volume 4, (2d Ed.) Federal Practice, Page 2343, gives a hypothetical case which seems to cover the point at issue. The illustration given, with the names of the parties here inserted in parenthesis, is as follows:

"Suppose that in response to P's (Perdue's) interrogatories D (P. L. Callaway) served answers, then died and his personal representative, X (Don Callaway, Administrator of the Estate, hereinafter called Don) was substituted. To the extent that D's (P. L. Callaway's) answers contained admissible evidence, such as admissions, P (Perdue) could use them either under Rule 26 (d) (2) or (d) (3). But X (Don), despite Rule 26 (d) (3), should not be able to use material in the answers favorable to X's (Don's) case or defense, since D's (P. L. Callaway's) answers, although under oath, were not subject to cross-examination by P (Perdue), and hence are not admissible in evidence against P (Perdue)."

It is asserted that the trial court erred in excluding from the evidence letters of guardianship issued to Irene Gordon Callaway (wife of P. L. Callaway) as guardian

of the person and estate of appellee. We find no merit in this contention. In the first place, the timber was cut in 1953, and the letters of guardianship (which although not admitted into evidence, are in the record) were issued in April, 1955, and it is difficult to understand from the argument the purpose appellant had in mind in tendering the exhibit for introduction. Of course, the letters do not show whether the money received from the timber sale was placed in the guardianship account, and no effort was made to introduce any annual accountings that might have been filed by the guardian. At any rate, under the proof in the present record, we are unable to determine the pertinency of the proffered exhibit.

Appellant contends that a mistrial should have been declared by the court. The suit was originally commenced against both Callaway and Etheridge, and Etheridge had employed one Ellis Coulter to cut the timber on the 320 acres here involved. Coulter, while testifying concerning his employment, made certain statements which were admissible as to Etheridge, by virtue of the fact that Etheridge was a defendant. However, at the conclusion of all the evidence, appellee took a non-suit as to this defendant, and appellant asserts that this action was prejudicial to him. The motion for a mistrial was alternative motion, the first motion being a request for a directed verdict. Though some testimony by Coulter (quoting Etheridge as to the amount that defendant had paid Callaway for the timber) was hearsay evidence as to Callaway, counsel did not ask the court to apprise the jury that the testimony of Coulter was not admissible against Callaway, nor was there any request for an instruction to this effect. We find no error under this point.

Also, while on the stand, Coulter stated that he had noted in a memorandum book the number of feet of timber which had been cut, and the price he received per thousand. The witness testified that the notations referred to were placed in a book at the time of the cutting, but the book that he referred to while testifying was not the 1953 book.

"I had a memorandum book, which I carried in my pickup and in some way they rolled it around and dropped it and there was oil from the saw and different things and some of it got on this book, I transferred this stuff onto this 1956 book."

The introduction of this last book was objected to by appellant, and the court stated:

"I want this witness to find his record book; however, if he can't find the book this was transferred from, I will allow it to be used in evidence."

Coulter subsequently testified that he could not find the original record book, but the second book does not appear in the transcript. At any rate, appellant does not designate the introduction of the exhibit as one of his points of error, and we do not pass on it.

Finally, it is contended that certain instructions were erroneous, and we agree that the giving of Instruction No. 4 constituted reversible error. The jury was instructed:

"If you find the issues in favor of Logan Lee Perdue, you will award him such sum as you find will be equal to 3 times the value (at the stump) of the timber so damaged, broken, destroyed or carried away."

The court had previously quoted the statute on single damages (Ark. Stat. Ann. § 50-107 [1947]), but it will be noted that the questioned instruction positively directs the jury to grant treble damages if they find for appellee. It is our opinion that, under the proof in this case, a jury question was presented as to whether appellant was liable for single or treble damages.

It is true that our statute relative to treble damages (the pertinent parts of which have already been quoted in Footnote 3) does not actually use any words which require the trespasser to hold an evil intent or act in bad faith before being liable for the penalty. Yet, our cases make clear that a necessary element to justify treble damages is intent of wrongdoing, though such intent may

be inferred from the carelessness, recklessness, or negligence of the offending party. In *Laser* v. *Jones,* 116 Ark. 206, this court had occasion to interpret Section 7976 of Kirby's Digest, which reads identically with Section 50-105 of the present statute. There, in an opinion by the late beloved Justice Frank G. Smith, this court said:

"It is, therefore, proper to consider the use which may be, and is, made of the tree, and if the tree adds to the value of the land, while its destruction detracts from its value, then this difference in value is the measure of the recovery, even against one who, without malice, destroys it. But, if the tree was *maliciously*[5] destroyed, the damages recoverable are treble this value."

In *Fogel* v. *Butler,* 96 Ark. 87, it was said:

"It will be observed that the instruction as given by the court told the jury that if they found that the defendant cut the timber without authority and knowingly, the jury should allow three times the value of the timber. Now, it is manifest that the court meant, and that the jury understood, that, before treble damages should be given, the jury must find not only that the defendants had no authority to cut the timber, but that they knew they had no such authority."

In *Floyd* v. *Richmond,* 211 Ark. 177, 199 S. W. 2d 754, we stated:

"Appellant next contends 'that there was nothing in the record whatever to warrant the submission to jury of the question of punitive damages, and that in so doing the learned trial court gravely prejudiced this appellant and committed reversible error.' We think this contention untenable for the reason that, as has been indicated, there was evidence from which the jury might have found that there was an element of willfulness in appellant's action in severing the trees and this warranted instructions on this issue."

See also *Case* v. *Hunt,* 217 Ark. 929, 234 S. W. 2d 197, where we said:

[5] Our emphasis.

"Our statutes do not impose double or treble damages upon one who cuts timber from the land of another unless he does so wilfully and intentionally."

Also see *Freeze* v. *Hinkle,* 229 Ark. 714, 317 S. W. 2d 817.

It is apparent from these citations that treble damages are only invoked where one cuts timber with the intention of depriving the true owner of the value thereof. We do not think that one acting in good faith is liable for treble damages.

The circumstances in the instant case appear to be most unusual, and a study of the testimony leaves several questions unanswered. It will be recalled that the particular property in question was deeded to appellee by the grandfather (who is the defendant in this case), and the grandmother (who subsequently was appointed guardian). There is no explanation as to why the grandmother, rather than the child's father or mother, was appointed guardian, nor can the answer be found in the record as to why the grandparents deeded the property to the one and one-half year old grandchild. But unless they were endeavoring to defraud creditors (of which there is not the slightest indication in the record), their motive would appear to have been a good one, based on the love and affection for this child.

The record reveals the following testimony of Logan Lee Perdue, appellee herein, during his examination by counsel:

"Q. Now will you state to this Jury when you first can recall owning this property, the deed of which has been entered in the record, which was just when you were a very small child. Do you remember when you first recall owning this property?

A. The first time that I can recall was during high school, when I was in the 10th and 11th grades.

Q. Did you ever have an opportunity to speak with the Defendant, Mr. Callaway, concerning this property?

A. Yes, I did.

Q. Will you state to the Jury what your conversation with Mr. Callaway consisted of?

A. I recall that during high school, when I started to make my decision to attend college, I went to see my grandparents and he told me that 'I cut your timber and I have enough money for you to attend college and a little left over.' * * *

Q. Where were you?

A. We were in the bedroom at his home.

Q. What grade were you in then?

A. I do not recall exactly—10th or 11th grade.

Q. How old would you have been then?

A. I would say 15 or 16.

Q. Sir, since that time have you finished high school?

A. Yes.

Q. Have you gone to college?

A. Yes.

Q. When did you go to college?

A. I went to college in 1960.

Q. Where did you go?

A. I went to Ouachita.

Q. How long did you go to Ouachita?

A. I went to Ouachita a year."

Subsequently, Perdue testified that he attended Ouachita for two semesters, but only finished one; that he received money from his grandfather during both semesters, and that in the spring semester of 1962, he attended Southern State; that he also received money from his grandfather at that time, and that the grandfather offered to send money during the summer se-

mester, but that he did not take it. He also testified that his grandmother sent him money about once a month. Appellee testified that this money did not come from the timber sale, but rather, was derived from bonds which had been purchased by his parents, but were in the possession of his grandfather. When asked how he knew where the money came from, he replied, "I do not know definitely, but merely what my mother and father have told me." He testified that these bonds were in his name, and that of the grandfather. There is no explanation of why bonds, purchased by the parents, were in possession of the grandfather, and bearing the grandfather's name. The father, Homer Perdue, stated that he and his wife had bought some "very small" bonds, and had given them to the boy, leaving them in Callaway's safe deposit box. He also stated that he and Callaway had purchased $1,000.00 in bonds for the boy "from some profits from a cattle deal. * * *"

We think the circumstances set out made a jury question of whether Callaway had acted wrongfully. Why did the grandparents deed the property to the boy if they intended to reap any personal benefits from the lands or timber? Certainly, if the grandfather had intended to commit a wrongful act, he would not have told his grandson that he had sold the timber, and that there should be enough for college with "a little left over." Apparently the grandson "fell out" with his grandfather since he testified that he tore up a check that had been given to him by the latter.

Under the instruction in question, the jury was given no opportunity to find that Callaway acted in good faith, and we think that this was reversible error. The finding that this instruction was erroneous means also that Instruction No. 2 will have to be reworded.

Reversed and remanded.

BAILEY *v.* STEWART.

5-3377 385 S. W. 2d 20

Opinion delivered November 23, 1964.

[Rehearing denied January 11, 1965.]

[redacted]

Williams & Gardner, for appellant.

Jeff Mobley and *William R. Bullock,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is the second time this case has been to this Court. The opinion in the first appeal (*Bailey* v. *Stewart,* 236 Ark. 80, 364 S. W. 2d 662) identifies the parties and issues, and contains this paragraph which gives the factual background:

"The accident happened on a November afternoon near a drive-in cafe in Dardanelle, where Stewart was standing outside a window provided for take-out purchases. Cossey, driving a car owned by Don Duvall, and Bailey, driving his two-ton truck, were approaching the vicinity of the cafe from opposite directions. Cossey attempted to turn left, across Bailey's traffic lane, to enter the cafe parking area. Cossey testified that he signaled his intention to turn, with his arm and with his

signal light, and that he thought he could turn safely in front of the truck, which was still some distance away. In this thought Cossey proved to be mistaken. Bailey's truck, after laying down 42 feet of skid marks, struck the righthand side of Cossey's car, which had almost completely left the street, and knocked it with great force against a parked truck. The latter vehicle rolled forward and pinned Stewart to the wall of the cafe, causing serious and painful injuries to both his legs."

Stewart had sued Bailey after settling with Cossey, the alleged joint tortfeasor; and on the first trial the verdict rendered for Stewart left it uncertain as to whether the jury intended Stewart to receive $9,000.00 from Bailey or only $1,000.00. In keeping with our opinion on the first appeal, when Mr. Stewart did not elect to accept $1,000.00, the cause was remanded for a new trial; and on the new trial (from which comes this appeal) the case was submitted to the jury on interrogatories. We now copy the said interrogatories and the answers made by the jury to each:

"INTERROGATORY NO. 1. Do you find, from a preponderance of the evidence in the case, that the defendants, John M. Bailey, was guilty of negligence in the operation of his truck and that such negligence, if any, was the proximate cause of plaintiff's injuries?

"ANSWER: YES.

"INTERROGATORY NO. 2. Do you find, from a preponderance of the evidence in the case, that the third-party defendant, Jimmy F. Cossey, was guilty of negligence in the operation of his car and that such negligence, if any, was a proximate cause of plaintiff's injuries?

"ANSWER: YES.

"INTERROGATORY NO. 3. If your answers to Interrogatories 1 and 2 are 'YES', then answer this question: Using 100% to represent the total negligence involved in the accident, what percentage of negligence do you find attributable to each of the following parties?

"John M. Bailey?

"ANSWER: 50%.

"Jimmy F. Cossey?

"ANSWER: 50%.

"INTERROGATORY NO. 4.

"1. Do you find from a preponderance of the evidence that the Plaintiff, John L. Stewart, is entitled to recover damages in this action from the defendants, John M. Bailey and Jimmy F. Cossey?

"ANSWER: YES.

"2. If your answer to the above question is 'YES' then answer this question: What do you find from the evidence, if any, to be the actual damages sustained by the plaintiff, John L. Stewart, if any?

"ANSWER: $24,000.00.

"3. The jury will reduce the total amount of actual damages awarded, if any, by $9,000.00, heretofore paid plaintiff, John L. Stewart, by third-party defendants, Jimmy F. Cossey and Don D. Duvall, as follows: Total amount of actual damages as shown above:

"ANSWER: $24,000.00.

"Less amount heretofore paid plaintiff, John L. Stewart, by third-party defendants . . . $9,000.00.

"Total damages due plaintiff, John L. Stewart:

"ANSWER: $15,000.00."

Based on the above answers the Circuit Court rendered judgment for Stewart and against Bailey for $12,000.00; and Bailey appeals, urging three points:

"1. The verdict of the jury is inconsistent and so confusing that it is impossible to determine the amount of its award.

"2. The verdict of the jury was excessive and unsupported by the evidence.

"3. There is no substantial evidence to support the jury's verdict and it should now be reversed and dismissed."

We consider the points in the order listed.

I. In his first assignment appellant claims that there is an inconsistency in the jury verdict and points to part 3 of Interrogatory No. 4 as demonstrating the inconsistency. We find no merit in this assignment. When the Trial Court submitted the said part 3 of Interrogatory No. 4 to the jury, the Court had typewritten into the interrogatory: 'Less amount heretofore paid plaintiff, John L. Stewart, by third-party defendants . . . $9,000.00.' So the jury wrote '$24,000.00' on the first line, and '$15,000.00' on the third line. Thus, the jury clearly indicated that Stewart was damaged a total of $24,000.00 and had received $9,000.00 from the third-party defendants and would still be entitled to receive a balance of $15,000.00 except for the settlement with the third-party defendants. The Trial Court, in framing this interrogatory, was taking every precaution to avoid the uncertainty which caused the reversal on the first appeal. But when the Trial Court entered judgment on the interrogatories, the Court properly entered judgment against Bailey for only $12,000.00. This was true because: (a) Stewart was damaged a total of $24,000.00; and (b) Stewart's release to Cossey had provided that its effect should be to reduce the damages recoverable against any other person to the extent of Cossey's pro rata share of the responsibility, thereby relieving Cossey of any liability for contribution in accordance with Ark. Stat. Ann. § 34-1005 (Repl. 1962), which was actually cited in the release. Hence when Cossey was found to have been 50% negligent the effect of the release was to reduce Stewart's recoverable damages against Bailey by 50% of the total, leaving a liability of only $12,000.00. The interrogatories and answers were clear; and the Court rendered the correct judgment on the interrogatories.

II. In his second assignment the appellant argues that the verdict of the jury was excessive and unsup-

ported by evidence. We find no merit in this assignment. Mr. Stewart was 36 years of age at the time of his injuries, He was confined to a hospital for eleven days and to his home for six weeks. During much of the time he was completely helpless. His medical expenses to date of trial were $928.95; he lost earnings in the amount of $1,520.00; and he suffered pain. He is still unable to do full work and is partially disabled for life. One of the doctors testified that at the time of the present trial Mr. Stewart was still limping, that he had a slight tilting of the back and pelvis to the right, an apparent shortening of the right leg, and changes in the joints of the lower lumbar and lumbo sacral joint of the back, which were the result of traumatic arthritis. The doctor testified that these changes would probably increase with the years; that traumatic arthritis has a tendency to progress and is crippling and disabling; and that Mr. Stewart now has a disability of about 25% to his left lower extremities. Also the doctor testified that there was a disk condition resulting from the injury which would make Mr. Stewart prone to herniation. We cannot say that the verdict was excessive in the light of the evidence offered.

III. In his third point appellant insists that there is no substantial evidence to support the jury's verdict and that the cause should be reversed and dismissed. From what we have already stated it is apparent that there is sufficient evidence to support the amount of the verdict, so this assignment goes to the question of whether there is any evidence to show that Mr. Bailey was guilty of negligence. This point was fully covered on the first appeal and the appellant is precluded by the *law of the case* from again urging this point. In the opinion on the first appeal, we said:

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

of negligence in failing to observe it and thereby avoid the collision."

On the present trial the evidence as regards negligence was practically the same as the evidence offered on the first trial; and on the first appeal we held that the question of negligence was for the jury. Under the rule of "law of the case" the appellant is precluded from rearguing the point decided on the first appeal. In *Ford Motor Co.* v. *Fish,* 233 Ark. 634, 346 S. W. 2d 469, we said:

"In *Hallum* v. *Blackford,* 202 Ark. 544, 151 S. W. 2d 82, it was insisted that the Court should have directed a verdict. But we pointed out that we had denied that contention on the first appeal and that the plaintiff's evidence on the second trial was the same as on the first trial; and we said: 'Under the rule many times announced by this Court, the decision on the former appeal becomes the law of the case on this appeal unless we can say that the testimony on this second appeal is substantially different from that on the first appeal. We think it unnecessary to attempt to set out or abstract the testimony presented in this record. Suffice it to say, that after carefully reviewing it and comparing it with the testimony on the first trial, we find no substantial or material difference.' In *Missouri Pacific R. R. Co.* v. *Foreman,* 196 Ark. 636, 119 S. W. 2d 747, Mr. Justice Donham cited sources of cases on the rule of 'law of the case', and concluded with this language: 'We hold that, since the question as to whether or not the evidence was sufficient to go to the jury in the instant case was settled by this court on the former appeal, there was no error committed by the lower court in submitting the case to the jury on the second trial.' "

Finding no error, the judgment is in all things affirmed.

KECK *v.* GENTRY.

5-3383 384 S. W. 2d 242

Opinion delivered November 23, 1964.

[redacted]

W. Q. Hall, for appellant.

Dickson, Putman, Millwee & Davis, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellants, Lester Keck and Ray Bolinger, (*a*) to obtain a judgment upon a $5,000 promissory note executed by Joseph A. Gentry and (*b*) to set aside an assertedly fraudulent conveyance by which Gentry conveyed 680 acres of land to his wife, who is also a defendant. At the close of the plaintiffs' proof the chancellor sustained a demurrer to the evidence and dismissed the complaint as far as the second count was concerned. The court directed that the case be transferred to law for trial of the cause of action upon the promissory note.

On demurrer to the evidence we view the proof in the light most favorable to the plaintiffs. *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. It is enough to say that the testimony, when so considered, shows that Gentry is indebted to the plaintiffs upon the note and that, while so indebted, he conveyed the land to his wife for a recited consideration of one dollar.

Although the complaint alleges that the purpose of the conveyance was to defraud the plaintiffs and to prevent the collection of the note, it is not specifically alleged that the conveyance rendered Gentry insolvent. For this reason the chancellor sustained an objection to the plaintiffs' offer to prove that Gentry had admitted being "broke." In sustaining the demurrer to the evidence the chancellor held that a *prima facie* case for setting aside a fraudulent conveyance cannot be made without an allegation and proof of the debtor's insolvency.

We think the court fell into error. We have often held that when a person who is in debt makes a voluntary conveyance to a near relative, such as his wife, the transfer is presumed to be fraudulent, and if the debtor's condition proceeds to the point of insolvency the presumption becomes conclusive. *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054; *Dereuisseaux* v. *Bell,* 238 Ark. 60, 378 S. W. 2d 208. These plaintiffs proved that Gentry owed a substantial sum of money and that he conveyed 680 acres to his wife. That proof was sufficient to make a *prima facie* case, shifting to the defendants the burden of going forward with the evidence. To require the plaintiffs also to prove either that Gentry received no consideration for the deed or that the transfer left him without sufficient assets to pay the promissory note would be an unsound rule, not only because it would compel the plaintiffs to shoulder the difficult burden of proving the negative but also because the missing information lies peculiarly and exclusively within the knowledge of the defendants. It is mainfestly fair that they be required to develop this aspect of the controversy.

In this court the appellees have not even argued the merits of the appeal. They merely insist that the order dismissing the seceond count in the complaint is not appealable. We cannot agree with this contention. The order is a final disposition of the creditors' effort to set aside the conveyance. Had the plaintiffs acquiesced in the order by going to trial in the circuit court upon the other count in the complaint their right to attack the conveyance later on would have been foreclosed by the doctrine of *res judicata.*

The decree is reversed and the cause is remanded for further proceedings.

BABER *v.* HICKS.

5-3386 384 S. W. 2d 267

Opinion delivered November 23, 1964.

[Rehearing denied December 21, 1964.]

James H. Pilkington, for appellant.

W. S. Atkins, for appellee.

GEORGE ROSE SMITH, J. For at least eighteen years the appellants, the W. T. Babers, and Annie Lurane Christian were close friends. From time to time during those years Mrs. Christian lived in the Babers' home at Ozan and later at Hope. This case concerns a conveyance that Mrs. Christian made to the Babers on August 8, 1962. By this deed Mrs. Christian conveyed 187 acres of land to the Babers in consideration for their promise to take her into their home and support her for the rest of her life. In the deed Mrs. Christian reserved a life estate in the land, which had produced an income of about $800 a year.

After the execution of the deed in August the parties lived together in harmony until Mrs. Christian accepted an invitation to visit relatives in Tennessee and Virginia at Christmas. That visit eventually proved to be so extended that Mrs. Christian never returned permanently to Arkansas. In May, 1963, Mrs. Christian's niece, the appellee Myrna Hicks, obtained an appointment in Virginia as Mrs. Christian's guardian, admittedly with a view to bringing this suit to set aside the deed for undue influence and mental incapacity.

After an extended trial the chancellor directed that the deed be canceled. In reviewing the record *de novo* we are concerned only with an issue of fact. In our opinion the decree is against the weight of the evidence, which we summarize in sufficient detail to explain our decision. The issues of undue influence and mental weakness blend together, as they usually do in cases of this kind; so we will not attempt to discuss them separately.

Mrs. Christian was 79 years old when she executed the deed. Her husband had died in 1937. Her only child, a son, died in 1945. After her son's death Mrs. Christian lived in the Babers' home for about two years, and their friendship continued thereafter.

During her widowhood Mrs. Christian was self-supporting. In addition to looking after the property that she and her husband had owned she worked as the bookkeeper for a cotton gin company and served efficiently as the city treasurer of Ozan. Her employment in both capacities lasted until a few months before she executed the deed to the Babers. For a year or more before that time Mrs. Christian had occupied her own home in Ozan.

A month or so before the execution of the deed Mrs. Christian returned to the Babers' home in Hope, apparently because of ill health attributable to the growth of a goiter. The goiter was removed on July 19. Upon leaving the hospital Mrs. Christian resumed her residence with the Babers and remained with them until she went to visit her relatives at Christmas.

The deed was executed on August 8. It was prepared by Mrs. Christian's own attorney, O. A. Graves, whose high character is not questioned by the appellee. The contract for life-time support does not appear to have been a short-sighted arrangement from Mrs. Christian's point of view. The land was worth only about $22,000. Under the terms of the deed Mrs. Christian not only obtained the assurance of a permanent home with friends of long standing; she also reserved to herself the income from the land for the rest of her life. The chancellor, in his written opinion, gave some emphasis to the thought that under the contract Mrs. Christian would be required to pay her own medical expenses, but we can find no provision to this effect in the deed or elsewhere in the proof.

On the issue of mental incapacity the appellee offered much testimony to show that from about 1961 Mrs. Christian had been very nervous and had suffered a marked loss of weight. It does not appear, however, that these infirmities seriously affected her ability to manage her own affairs. Between the execution of the deed in August and her departure from Hope in December Mrs. Christian continued to drive her own car and to look after her own affairs. She renewed leases with two tenants for the coming year, took care of the insurance upon her car, and negotiated the sale of her home in Ozan. It is especially significant that although Mrs. Hicks, the appellee, insists that her aunt was incompetent in August of 1962, Mrs. Hicks herself renewed Mrs. Christian's Arkansas driver's license in the following February and completed the sale of the Ozan house under a power of attorney executed by Mrs. Christian in March. If Mrs. Christian was incompetent to enter into a contract with the Babers in August it is difficult to believe that she was competent to give Mrs. Hicks a power of attorney seven months later.

The medical evidence is pretty well balanced. Two physicians who had examined Mrs. Christian for the purpose of testifying in the case were of the opinion that she was not of sufficient mental capacity to execute the

deed. Her own doctor, however, who had treated her both before and after the deed was signed, expressed the opposite opinion. It is also shown that Mrs. Christian was confined to the State Hospital for two short periods after her husband was killed in 1937, but the proof does not establish any permanent impairment of her mind. In fact, she testified at the trial in much detail, with no indication of incoherence. We are not impressed by her statement that Mrs. Baber persuaded her to enter into the contract for support by representing that she alone could keep Mrs. Christian from being confined again to the State Hospital. This rather improbable suggestion is really the appellee's principal basis for arguing that there was an exertion of undue influence.

Upon the record as a whole we are persuaded that Mrs. Christian's dissatisfaction with her contract is the result not of its invalidity in the first instance but of a change of mind on her part after she left the Babers' home. In setting aside the chancellor's decree we recognize, of course, that Mrs. Christian is still entitled to make her home with the appellants in accordance with the terms of the agreement.

Reversed.

McFaddin, J., not participating.

Cowling v. City of Foreman.

5-3463 384 S. W. 2d 251

Opinion delivered November 23, 1964.

Johnson & Johnson, for appellant.

Byron Goodson, Rose, Meek, House, Barron, Nash & Williamson by: *George E. Campbell,* for appellee.

PAUL WARD, Associate Justice. This litigation stems from the proposed construction of a new sewer system (and repairs to the existing water system) for Foreman—a city of the second class with a population of about 1,000 people.

The City Council of Foreman applied for and obtained grants-in-aid from the United States in the total amounts of $108,993.00. It was contemplated that these grants would be supplemented by funds to be raised by issuing sewer revenue bonds pursuant to the terms of Act 132 of 1933. So, on May 18, 1964 the city council passed two ordinances. Ordinance No. 71 provided for the construction of a modern sewer system and for improvements to the existing water system. Ordinance No. 70 fixed rates to be charged for said services.

Upon a petition being filed by certain citizens the city council, on June 15, 1964, ordered a referendum on both ordinances, and fixed June 23, 1964 as the date

of the election. On June 16 the election commissioners issued election notices which were promptly and properly posted by the sheriff, and a notice was published June 18 in The Foreman Sun, a weekly newspaper published in the City of Foreman. Ordinance No. 70 was approved by a vote of 158 to 154, and No. 71 was approved by a vote of 174 to 150.

After the election certain residents, property owners and qualified electors filed two identical suits against the mayor and recorder of Foreman and also the county election commissioners. One suit was filed in the circuit court, but has been dismissed. In this suit, filed in chancery court, it was alleged that "notice .. . was not published for the time in the manner and form required by law"; that if proper notice had been given there would have been a much larger vote cast; and, that consequently many qualified electors had been deprived of their rights to vote. The prayer was that the said election be set aside, and that the certificate of the election commissioners certifying the results be cancelled and set aside. Later the complaint was amended to allege: many people who would have voted against the ordinances did not know of the election date and therefore did not vote; that many electors who owned real estate in Foreman which was being subjected to a tax lien would have voted against the ordinances but had no chance to do so; and, that "numerous irregular ballots" should not have been counted, particularly in boxes 1-2-3.

To the above complaint and amended complaint the city and election commission filed a general denial. The matter was submitted to the chancellor upon the pleadings, exhibits, stipulations and testimony. The trial court refused the relief prayed for, and this appeal follows. Appellants here seek a reversal on three separate grounds which we will now discuss.

One. We find no reversible error in the refusal of the trial court to grant a continuance. The suit was filed July 4, 1964 and the decree was rendered on July 31, 1964. Appellants complain that they should have

been given time to take the depositions of eleven of their witnesses who did not appear to testify although a subpoena was issued for each of them. It is well settled that the matter of a continuance in a case of this nature rests in the sound discretion of the trial court. *McMorella* v. *Greer,* 211 Ark. 417, 200 S. W. 2d 974. It is also the well settled rule that the party seeking a continuance must, among other things, show due diligence. In applying the above rules to this case it is deemed sufficient to make only a brief reference to the facts. One witness was in Virginia and it was not shown that she was interested in the result of the litigation; In the case of two absent witnesses no effort was made to send them an absentee ballot; The court found that two witnesses knew of the election and presumably could have voted. As to two witnesses the court counted their votes against the ordinances; Two witnesses lived and worked in Minnesota, and another lived and worked in Odessa, Texas, and the court was not convinced they were qualified to vote in the City of Foreman. Under the above state of the record we are unwilling to say the trial court abused its sound discretion.

Two. Likewise, we are unwilling to say, under the facts of this case, that the election was invalidated (as urged by appellants) because appellees failed to comply with Ark. Stat. Ann. § 3-804 (Repl. 1956) which reads:

"Proclamation of place holding election.—It shall be the duty of the sheriff of each county, at least twenty [20] days before each general election, and ten [10] days before the holding of each special election, to give public notice, by proclamation, throughout the county, of the time and several places of holding such elections in this county, and the officers to be elected at such time."

For several reasons we are not convinced (though we here make no holding either way) that the above section of the statute is applicable in this case. The statute mentioned was originally Section 8 of an Act approved January 23, 1875. This act contained 102 sections and

it is designated a "general election law" relating to "all elective state, county and township officers whose term of office is fixed by the constitution at two years." A consideration of the entire act indicates that Section 8 (3-804) was to apply when it became necessary to fill a vacancy occurring in one of the offices above mentioned. It is unreasonable to think Section 8 (passed in 1875) was intended to apply to a city ordinance referred to the people under an amendment passed 45 years later. If any doubt exists as to the applicability of § 3-804 to this case it is erased by Act 218 of 1963 which deals specifically with the referral of a city ordinance, and which states that "the procedure shall be that as required by Amendment 7 to the Constitution of the State of Arkansas." Appellants have not pointed out, nor are we aware of, any language in said amendment (or in any legislative enactment based thereon) which requires any specified number of days notice of an election on the referral of a city ordinance.

However, irrespective of what we have heretofore said, we think the trial court was justified in refusing to cancel and nullify the election, under the facts disclosed by the record. It is not disputed that there was a thorough job of publicizing the election for at least eight days. Posters were circulated and posted, and a notice was carried in the town paper the week before the election was held. The evidence is undisputed that a record number of votes were cast in this particular election. In a town the size of Foreman (1,000 population) it is difficult to believe many (if any) people did not know of the election and of the issues involved. We think the language used in the case of *Hildreth* v. *Taylor,* 117 Ark. 465, 470, 175 S. W. 40, 41 is decisive of the issues here. This Court, in considering the sufficiency of the notice of an election at which an amendment to the constitution was adopted, said:

"The authorities on this subject are not entirely harmonious. This court is, however, committed to the rule, which is in accord with the great weight of authority, that, so far as concerns elections of officers, the

failure to perform any duty such as giving notice does not deprive the electors of the right to choose public officials. In *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161 Chief Justice Cockrill, speaking for the court, said: 'The right to hold the election in such cases comes from the statute, and the notice required to be given thereof is only a reminder to the people of what the law has otherwise provided. An omission to publish the statutory notice of the election does not, in such cases, affect its validity.' "

The Court then went on to explain that the rule applied not only to election of "officers" but to other elections.

Also, it is pointed out that appellants knew the election was called for June 23 and that only eight days notice would or could be given, yet no attempt was made to stop the election or postpone the election date. Since appellants waited until the election was held and the result announced, they are faced here with the rule well established by this Court which is concisely stated in *McKenzie* v. *City of DeWitt,* 196 Ark. 1115, 1118, 121 S. W. 2d 71, 73.

"In fact, it has been held that all the provisions of election laws are mandatory if enforcement be sought prior to the holding of the election, but, after the election, the rule is different, and those provisions will ordinarily be held as directory only in support of the result. Of course, there may be some special provision of the statute in which it may be declared that some act is essential to the validity, or that some omission might make void an election, but the general rule must be that after the election shall have been held, general provisions must yield in order to support the result of the election. It was so held in *Jones* v. *State,* 153 Ind. 440, 55 N. E. 229. That holding has been cited with approval by this court, and, so far as we have been able to discover the doctrine has been uniformly adhered to. *Wallace* v. *Kansas City So. Ry. Co.,* 169 Ark. 905, 279 S. W. 1."

See also the recent case of *Davis* v. *Waller, County Judge,* 238 Ark. 300, 379 S. W. 2d 283.

Based on the record as a whole we are unable to say the weight of the evidence shows the result of the election would have been any different if it had been advertised a few days longer. Therefore we must affirm the trial court on this point. See: *Hildreth* v. *Taylor, supra.*

Three. We find no merit in appellants' contention the trial court erred in refusing to allow them to recount the ballots in certain boxes. They totally failed to follow the statutory procedure to secure such relief. See: Ark. Stat. Ann. § 3-1012 (Repl. 1956) and *Wooten* v. *Fielder,* 194 Ark. 72, 105 S. W. 2d 547.

It is therefore our conclusion that the decree of the trial court should be, and it is hereby, affirmed. Appellees, having perfected this appeal under the provisions of Ark. Stat. Ann. § 27-2128 (Repl. 1962), are entitled to their costs including the cost of the record.

Affirmed.

BARKIS *v.* BELL.

5-3365 384 S. W. 2d 269

Opinion delivered November 23, 1964.

[Rehearing denied December 21, 1964.]

Wootton, Land & Matthews, for appellant.

Richard W. Hobbs, for appellee.

SAM ROBINSON, Associate Justice. On the 22nd day of April, 1963, appellee herein, Linda Bell, filed suit in the Garland Circuit Court asking for jugment in the sum of $60,000 for personal injuries alleged to have been suffered by her in an automobile accident due to the negligence of appellant herein, Bruce Barkis. Within the statutory time, Barkis filed a motion for additional time to answer. The motion was granted. Before the allotted time expired, Barkis filed a second motion for additional time; again the motion was granted. The time to answer, as extended, expired June 10, 1963. On that day Barkis filed Answers to Interrogatories which had been filed with the Complaint. Two days later, on June 12, the attorney for the plaintiff called the attention of Barkis' attorney to the fact that the record did not show an answer had been filed. The attorney for Barkis immediately, on June 12, filed an answer. It was a general denial.

About six months later, on January 29, 1964, the plaintiff, Linda Bell, filed a motion to strike the answer on the ground that it had not been filed within the time allowed by law. In response to the motion to strike, one of the attorneys for defendant—appellant—filed an affidavit in which he stated: "On June 10, 1963, in the afternoon, I went to the office of the Circuit Clerk in the Garland County Court House and took with me several files, among these being the file in this case. In the file at that time were originals and a number of copies of both the Interrogatories and the Answer. I went to the office of the Circuit Clerk in the Garland County Court House and at that time delivered to one of the deputy clerks the original of the Answers to the Interrogatories and also the Answer to the plaintiff's Complaint. These pleadings were taken by the deputy clerk."

In reply, appellee filed an affidvavit of a deputy in the Circuit Clerk's office in which she stated: "At approximately 4:20 p.m., very close to our closing time, on June 10, 1963, Mr. Richard H. Wootton appeared at the office of the Circuit and Chancery Clerk and he handed me certain Answers to Plaintiff's Interroga-

tories in this case to be filed. Answers to the Interrogatories was the only thing he handed to me and asked to be filed. He did not hand me any Answer or pleading with respect to this case at that time."

The trial court granted the motion to strike the answer, and rendered judgment for the plaintiff subject to the right of defendant to contest the amount of damages.

In *Walden* v. *Metzler,* 227 Ark. 782, 301 S. W. 2d 439, and *Pyle* v. *Amsler,* 227 Ark. 785, 301 S. W. 2d 441, we held it was mandatory that the Circuit Court render judgment for the plaintiff where an answer was not filed in the time prescribed by statute. Subsequently there became effective Act 53 of 1957, Ark. Stats. Ann. § 29-401 (Repl. 1962), which provides: "Judgment by default shall be rendered by the Court in any case where an appearance or pleading, either general or special, has not been filed within the time allowed by this Act; provided, . . . that nothing in this Act shall impair the discretion of the Court to set aside any default judgment upon showing of excusable neglect, unavoidable casualty or other just cause."

In *Fitzwater* v. *Harris,* 231 Ark. 173, 328 S. W. 2d 501, and *Easley* v. *Inglis,* 233 Ark. 589, 346 S. W. 2d 206, we construed the foregoing statute as giving the court authority to set aside a default judgment for any one of three reasons: (1) excusable neglect, (2) unavoidable casualty, (3) other just cause. Although, no doubt, an answer in the case at bar was not filed on June 10, surely the failure of counsel for defendant to file it at that time, in the circumstances shown, is covered by one of the causes for setting aside a judgment enumerated in the foregoing statute.

In addition to counsel's testimony that he took the answer to the court along with the Answers to the Interrogatories to file in the case and thought he had filed it, he is corroborated by the circumstances. In the first place, it is not likely that counsel would have made the trip to the court house to file the Answers to the Interrogatories without taking the Answer to the Complaint

along to file it. It was very short—a general denial. Furthermore, when counsel for the defendant was informed two days after the Answer was due that it had not been filed in court, he found copies of it in his file, but the original was not there. Evidently it was lost, and in filing the Answers to the Interrogatories counsel was under the impression that he had also filed the answer to the complaint. In these circumstances we believe that it would be within the letter and spirit of Ark. Stats. Ann. § 29-401 (Repl. 1962) to set aside the default judgment.

Reversed.

HARRIS, C. J. and WARD, *J.*, (dissenting). It is not entirely clear on what ground the majority opinion is based. It is indefinite in that it reverses the trial court for one of three reasons without specifying any particular reason. Nevertheless, for reasons hereafter set out, I am unable to agree with the result reached by the majority.

1. The decision of the trial court was based on appellee's motion to strike appellant's answer which (as conceded by the majority) was filed two days late. That is the order from which appellant prosecutes this appeal. Appellant did *not* at any time ask the trial court to set aside the default judgment. That being true, the issue cannot be considered on this appeal according to the uniform decisions of this Court every time the question has been raised. A few citations should suffice. In *White* v. *Moffett,* 108 Ark. 490, 497, 158 S. W. 505, we said: "The case can not be tried here on an issue not raised below." *Bank of Pangburn* v. *Tate,* 147 Ark. 292, 296, 227 S. W. 389: "Parties can not treat an issue as joined by the pleadings, and, after trying it out, raise the question for the first time on appeal . . ." *Holloway* v. *McArthur,* 224 Ark. 461, 463, 274 S. W. 2d 474: "It is sufficient to say that waiver was not an issue in the trial court and may not be raised for the first time here." *Fine* v. *City of Van Buren,* 237 Ark. 29, 34, 371 S. W. 2d 132: "We are without authority to grant relief which was not sought in the court below."

2. Similarly, the majority has completely ignored another firm rule of this Court. Set out below are the exact points copied from appellant's brief:

I.

"The Court's Order striking appellant's Answer and granting a default judgment was improper because appellant, within the time prescribed by Statute and by Court Order, entered his appearance and filed pleadings in the cause.

II.

"The appellant's Answer was actually filed within the time authorized by the Court."

Rule 9 (c) of the Procedural Rules of this Court provides, in material parts, as follows: ". . . appellant shall list . . . the points relied upon for a reversal of the judgment or decree." In appellant's brief it is not even argued that the trial court erred in refusing to set aside the default judgment. To the contrary, appellant's only argument is that his answer was filed in time—an argument which the majority specifically reject—and rightly so. In *Campbell* v. *Beaver Bayou Drainage Dist.,* 215 Ark. 187, 189, 219 S. W. 2d 934, we said: "Under our well-established holdings, in a civil case all assignments not argued in the briefs are considered to be waived . . ." In *Connell* v. *Robinson,* 217 Ark. 1, 4, 228 S. W. 2d 475, we find: ". . . on this appeal we consider only the alleged errors argued in the brief." Also, in *Cloud Oak Flooring Company* v. *J. A. Riggs Tractor Co.,* 223 Ark. 447, 448, 266 S. W. 2d 284, we said: "The appellant argues only two questions in its brief. These are the only points properly presented here." What I cannot understand is: why the above rule should not apply in this case.

For any one and all the above reasons, I would affirm the judgment of the trial court.

Carleton Harris, Chief Justice (dissenting). I feel that the majority should make clear the ground on which the Circuit Judge is being reversed. To me, the circum-

stances, related in the majority opinion, do not constitute unavoidable casualty or excusable neglect. If counsel for appellant had been struck by an automobile, suffered a heart attack, or had been prevented from reaching the courthouse by other comparable circumstances, an unavoidable casualty would have occurred. In *Interstate Fire Ins. Co.* v. *Tolbert,* 233 Ark. 249, 343 S. W. 2d 784, a dissent points out an example of what might constitute excusable neglect. Under the theory adopted by the majority in the present case, the attorney evidently lost the answer to the complaint on the way to the courthouse, and this, in my view, does not come within the meaning of the term "excusable neglect." There was nothing to prevent the attorney from handing the answers to interrogatories and answer to the complaint to the clerk separately, for the purpose of making sure that both had been filed; in fact, I daresay that a large number of attorneys follow this practice when filing divers pleadings. Not only that, but there is no requirement that an attorney wait until the last day to file his answer. The court had given an additional fifteen days for the filing of this pleading, and, as mentioned by the majority, the answer was only a general denial, which, of course, would require but a few minutes to prepare. I do not know just what the term "other just cause" includes—nor do the majority enlighten me.

The statutes in question (pertinent portions of which are quoted in the majority opinion) permits the trial court to exercise its discretion in determining whether to set aside any default judgment upon a showing "of excusable neglect, unavoidable casualty, or other just cause." By reversing the trial court, the majority is holding that the Circuit Court abused its discretion, and further is holding, in effect, that there is no substantial evidence to support the finding of the trial court. To me, it is incomprehensible that, under the circumstances herein, this court can say either that the Circuit Court abused its discretion, or that there was no substantial evidence to support the ruling. Actually, it appears that the majority here has substituted its judgment for that of the Garland Circuit Court.

May I also add that past precedent is being ignored —and new precedent, I fear, established. Perhaps I should first make plain that I have no reason to think that the attorney here, a member of an honorable and distinguished firm, has prevaricated as to the facts—to testimony without any reservation whatsoever. It may the contrary, I feel sure that he has not, and I accept his be puzzling, therefore, that I am so concerned with the decision of the majority. The answer is expressed fully in an opinion written by the late beloved Justice Frank G. Smith in the case of *Byler* v. *State,* 210 Ark. 790, 197 S. W. 2d 748. There, that wise and able jurist said:

"It may be asked therefore, what difference it makes that this relationship existed between the presiding judge and the sheriff? 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.' "

I am simply addressing myself to the subject of "precedent."

Under our system of jurisprudence, the trial court has long held the prerogative of passing on the credibility of the witnesses that appear before it. Here, the majority has accepted completely, at face value, the testimony of the attorney, and though I am confident that the trial court's decision was based entirely on its understanding of the law involved, rather than on a factual basis, *i.e.,* it did not question the accuracy of the testimony presented by the attorney, it should be remembered that this will not be the only case on this subject that will ever come before this court. In fact, the point at issue will likely arise many times in the future. I think that our Circuit Courts should feel free, unhampered and unfettered by any appellate court decision, to pass on the credibility of witnesses—even though such witnesses be attorneys.

For the reasons herein given, I respectfully dissent.

5-3317 384 S. W. 2d 256

Opinion delivered November 23, 1964.

[redacted]

Thomas & Finch, for appellant.

Joe P. Melton, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a divorce and custody decree. Appellee Quenton Palmer filed suit for divorce in Lonoke Chancery Court on May 9, 1963, against appellant Dorothy Palmer, alleging indignities and praying permanent custody of the parties' eight year old daughter. Appellant answered, denying appellee's allegations and counterclaimed for divorce, alleging indignities, adultery and drunkenness, and that appellee obtained custody of their daughter by removing the child without appellant's knowledge or consent, and asked, *inter alia,* for custody and child support. The case was tried September 27, 1963, and the court decreed a divorce. Custody of the child was awarded appellee with the right of visitation to appellant, and appellee was ordered to pay appellant $75.00 and "the following personal property—1 blanket—1 cedar chest—1 table lamp and all of her clothes. Pay her attorney $75.00 as his fee." From the decree comes this appeal.

For reversal appellant contends, first, that the trial court "erred in awarding what amounted to 100% of the property to appellee." Ark. Stat. Ann. § 34-1214 (Repl. 1962) provides:

"In every final judgment of divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; ..." The testimony regarding property was conflicting, appellee testifying that he "didn't know what she [appellant] did with her money" earned during the marriage, and appellant testifying that she helped pay bills and contributed her wages to payment of household expenses and purchases of appellee's car, furniture and appliances. It was undisputed that appellant owned as her separate property the personalty awarded her by the court. This court said on an identical point in *White* v. *White,* 228 Ark. 732, 310 S. W. 2d 216:

"At any rate, considering the fact that the witnesses were before the court, where the chancellor had the opportunity to observe their demeanor and attitude from the witness stand, we are unable to say that the court's holding was against the preponderance of the testimony, and without so finding, Mrs. White cannot prevail."

Appellant next urges that the trial court erred in allowing Regina Palmer, age eight, to testify. Ark. Stat. Ann. § 28-601 (Repl. 1962) states:

"All persons except those enumerated herein shall be competent to testify in a civil action. The following persons shall be incompetent to testify:

"First: Infants under the age of ten [10] years, and over that age if incapable of understanding the obligation of an oath."

After appellant's objection to the child's testimony, the court permitted appellee to question the child, who was not put under oath. The court was clearly in error in

permitting a child under ten to testify in a civil suit. *St. Louis I. M. & S. R. Co.* v. *Waren,* 65 Ark. 619, 48 S. W. 222; *Beal-Doyle Drygoods Co.* v. *Carr*, 85 Ark. 479, 108 S. W. 1053; *Lamden* v. *St. Louis S. W. Ry. Co.,* 115 Ark. 238, 170 S. W. 1001; *Missouri Pacific R. Co.* v. *Kellar,* 168 Ark. 626, 271 S. W. 7. On appeal, however, chancery cases are tried de novo on the record before us and all incompetent testimony is excluded. *Rutherford* v. *Casey,* 190 Ark. 79, 77 S. W. 2d 58. Recounting the indelicate testimony would add no merit to this opinion. Suffice it to say that there was more than sufficient competent testimony on which the chancellor could find that appellee was entitled to a divorce and, further, on which the court could—and did—grant appellee custody of the minor child of the parties.

Affirmed.

GRIFFIN *v.* MOON.

5-3347 384 S. W. 2d 243

Opinion delivered November 23, 1964.

Smith, Sanderson, Stroud & McClerkin, for appellant.

Lowe, Moore & Webber, for appellee.

FRANK HOLT, Associate Justice. This case requires the interpretation of a will. The appellees instituted an action against the appellants seeking specific performance of their written agreement to purchase certain realty. The appellants' refusal to purchase was based upon their assertion that appellees did not have a merchantable title because of the ambiguous terms in a will devising the property to the appellees. The chancellor decreed specific performance of appellants' contract to purchase the lands. On appeal appellants' sole contention is that the trial court erred in finding that appellees' title to the land in question is marketable.

The appellants argue that the correctness of the decision of the chancellor depends upon the construction of a portion of the will which reads as follows:

"I give all the residue of my estate comprising a farm of twenty-four (24) acres and one lot, where I now reside, in Miller County, State of Arkansas, after fulfilling the foregoing legacies, to my wife, with the remainder thereof on her decease or marriage, to my said children and their children, respectively, share and share alike."

The testator was survived only by his widow, Maggie J. Moon, and his four sons, Ivor, Erbert, Loy and Fred Moon. These parties and the wives of the four sons are the appellees. The testator's widow is living and has never remarried. Each of his sons now has children, however, his sons had no children when the testator died. The appellants reject the title as unmarketable upon the

contention that the remainder interest does not finally vest in the testator's children until the death or remarriage of the life tenant, the testator's widow. Further, that the testator's grandchildren, born and unborn, eventually would be entitled to an interest as remaindermen. We do not agree with the appellants and find no merit in either contention.

The real issue to be determined is whether the testator's four sons, the appellees, took a vested or contingent remainder upon the death of their father. If they took a vested remainder, then they can join with their mother, the life tenant, and convey a merchantable title; if they took only a contingent remainder, then they cannot. *Greer* v. *Parker,* 209 Ark. 553, 191 S. W. 2d 584. We are of the view that the questioned provisions of the will created a vested remainder in the testator's sons upon his death.

In the early case of *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524, we said:

"It is also a well established principle that the law favors the vesting of estates, and, in the absence of a contrary intention of the testator appearing from the will, the estate will vest at the time of his death; and, if a will is susceptible of a dual construction, by one of which the estate becomes vested and by the other it remains contingent, the construction which vests the estate will be adopted."

In *McKinney* v. *Dillard & Coffin Co.,* 170 Ark. 1181, 283 S. W. 16, the devise involved principles applicable to the case at bar. In that case the father devised realty to his daughter for her natural life and at her death the lands were devised to her children in equal portions and if at the time of her death "any of her children be dead, leaving children, then such child or children is to have the same interest in said lands that said parent would have had, if alive." In that case we held that the remainder vested in the daughter's children as soon as born and before the death of the daughter. Further, that such vested interest, upon partition of the lands by the con-

sent of the life tenant and vested remaindermen, was subject to a valid and enforceable mortgage. See, also, *Jenkins* v. *Packington Realty Co.,* 167 Ark. 602, 268 S. W. 620, and *Black* v. *Bailey,* 142 Ark. 201, 218 S. W. 210.

In the very recent case of *Gibson* v. *Lowry,* 235 Ark. 234, 357 S. W. 2d 531, we held that where a will gave a life estate to the testator's mother and stepfather and provided that at their death the farm should vest absolutely in the testator's brother, a vested remainder and not a contingent remainder was created in the brother. There we said that the interest vested "at the same instant and by the same grant as the life estate" and that although "the enjoyment of the possession of this interest was postponed until the termination of the life estate, still this right, * * * was presently fixed, and was in no wise dependent upon the happening of any event. *McCarroll* v. *Falls,* 129 Ark. 245, 195 S. W. 387."

Thus, in the case at bar, appellants' contention that under the terms of the will the remainder is not vested in the testator's four sons until the death or remarriage of the life tenant is without merit. We hold that the testator's four sons now have a vested remainder and it is not subject to the happening of any future event. Their remainder interest vested at the same time that the life estate vested. See, also, *Landers* v. *People's Building & Loan Assn.,* 190 Ark. 1072, 81 S. W. 2d 917, and *Steele* v. *Robinson,* 221 Ark. 58, 251 S. W. 2d 1001.

It is well settled that where both the life tenant and vested remaindermen join in a deed the entire estate in fee is passed to the grantee. Therefore, it follows that in the case at bar a deed by the appellees conveys a merchantable title.

The decree of the chancellor ordering specific performance of the contract is affirmed.

ADAMS *v.* SIMS.

5-3378 385 S. W. 2d 13

Opinion delivered November 23, 1964.

[Rehearing denied January 11, 1965.]

Frank Lady, for appellant.

Henry S. Wilson, for appellee.

E. J. Butler, Special Associate Justice. This is a suit instituted by certain citizens and taxpayers of the City of Trumann, Arkansas, in their individual capacities and as members for and in behalf of the Trumann Anti-Urban Renewal Association, Appellants, against the City of Trumann, Arkansas, its Mayor, Members of its City Council, Members of the Trumann Urban Renewal Agency, and its Executive Director. Appellees, seeking an injunction to permanently restrain and enjoin the Appellees from taking any action of any type in regard to the proposed Speedway Renewal Project ARK R-33, for the City of Trumann, and requesting the Court to declare the proposed plan and any and all documents issued or made in connection therewith by or in the name of the City of Trumann, its Mayor and Urban Renewal Agency to be null and void.

The Decree of the lower Court upheld the validity of all proceedings of Appellees pertaining to the Trumann Urban Renewal Agency, Plan and Feasibility of Relocation for Speedway Urban Renewal Project ARK R-33, except the "Cooperation Agreement" between the City of Trumann, Arkansas, and the Urban Renewal Agency of the City of Trumann, Arkansas, executed on April 18, 1963, which the Court held to be void and unenforceable. The Appellants appealed from the holding of the lower Court and assigned eleven errors as grounds for reversal. The Appellees did not take a cross-appeal from the holding of the lower Court that the "Coopera-

tion Agreement'' of April 18, 1963 was void and unenforceable. Therefore, the question of the validity of the ''Cooperation Agreement'' will not be considered by this Court.

Even though the Appellants in their brief assigned eleven errors alleged to have been committed by the lower Courts as grounds for reversal, it is apparent that they all boil down to three principal issues, namely: (1) the validity of the proceedings of the City Council of Trumann, Arkansas in setting up the Urban Renewal Agency, authorizing it to transact business and exercise powers, and in approving the Urban Renewal Plan and feasibility of relocation for Speedway Urban Renewal Project ARK R-33, in the City of Trumann; (2) the constitutionality of the Arkansas Urban Renewal Statutes under which the Urban Renewal Agency was created in the City of Trumann and under which the plan for Speedway Urban Renewal Project ARK R-33 was approved; and, (3) the assessing of the costs of this case.

The City Council of Trumann, Arkansas, in January of 1962, passed a resolution activating an ''Urban Renewal Agency'' for said municipality. Arkansas Statutes, 1947 Ann. Section 19-3063.8. The Commissioners were appointed pursuant to statutes and the Urban Renewal Agency began functioning. Arkansas Statutes, 1947 Ann., Section 19-3063.9. For the next two years this Urban Renewal Program received considerable publicity in the City of Trumann through news articles and legal notices published in ''The Trumann Democrat,'' and other news media having substantial circulation in the City. On December 27, 1962, the City Council of Trumann adopted a resolution approving the Urban Renewal Plan and feasibility of relocation for Speedway Urban Renewal Project ARK R-33. Arkansas Statutes, 1947 Ann., Section 19-3063.11.

The Appellants assign as error the admission by the lower Court as evidence in the case Appellants' Exhibits No. 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 on the grounds that they were certified copies of documents not re-

corded or on file in the office of the City Clerk, and that their admittance violated the Best Evidence Rule. The testimony of John H. Meeks, City Clerk, does not substantiate this contention, and it is clear that copies of resolutions, ordinances and by-laws of municipal corporations certified by its clerk may be received in evidence with as much effect as the originals. Arkansas Statutes, 1947 Ann., Sections 19-2405 and 19-2404. While the Court does not contenance nor encourage carelessness on the part of city officials or the keeping of inadequate city records, the ordinances, resolutions or acts of municipal councils will not be invalidated if it appears from the record that the proceedings were regular and in substantial compliance with the law, and presumptions will be indulged in favor of the validity of the corporate action. McQuillin, Municipal Corporations, Vol. 5, 3rd Ed., Sections 14.01 and 14.03. The weight of authority recognizes that most corporate acts can be proven as well by parole evidence as by the introduction of written instruments. The fact that the records of a city failed to disclose actions by its city council is not conclusive that the council did not take same. Parole evidence is permissible to establish the real facts of corporate acts in the absence of records, or where the record which it kept is so meager where the particular transaction, act or vote is not disclosed. *Smith* v. *Ford,* 203 Ark. 265, 157 S. W. 2d 199; *McGee* v. *Mainard,* 208 Ark. 188 S. W. 2d 635; *Handley* v. *Stutz,* 139 U. S. 422, 11 S. Ct. 532, 35 L. Ed. 232; *Crebs* v. *City of Lebanon,* 98 Fed. 459; *Traction Company* v. *Canal Company,* 1 Pa. Sup. Ct. 409; McQuillin, Municipal Corporations, Vol. 5, 3rd Ed., Sections 14.08 and 14.09.

The contention of the Appellants that the actions of the Trumann City Council and Special Council Meetings were void in that the requirements under Ordinance No. 6 of the City of Trumann were not met in calling the Special Meetings, is not well taken. It appears from the record that in each instance there was proof that all the Council Members either had notice or had executed waivers of notice and consent to the Special Meetings. It has been held that the proceedings of special meetings

of city councils are valid and legal if all the members had notice and that there was sufficient number present to transact business. *City of Mena* v. *Tomlin Bros.*, 118 Ark. 166, 175 S. W. 1187; *City of Greeley* v. *Hammon*, 17 Colo. 30, 28 Pac. 460.

The Appellants contend that the resolution entitled "The Urban Renewal Plan for Speedway Urban Renewal Project ARK R-33, Trumann, Arkansas" which is identified in the record as Appellants' Exhibit No. 1, and which was adopted on December 27, 1962, is void because it was not authenticated and published in accordance with provisions of Arkansas Statutes, Section 19-2404, and was not distinctly read on three different days, and does not contain a proper title as required by the provisions of Arkansas Statutes, Section 19-2402.

Act No. 40 of the General Assembly of Arkansas for the year 1961, Sections 1 and 2 (Arkansas Statutes, 1947 Ann., Sections 19-3063.7 to 19-3063.11, inclusive) provide that the actions of a city council in activating an "Urban Renewal Agency" appointing commissioners and adopting plans for Urban Renewal Projects can be accomplished by resolutions. Therefore, it was not necessary that the resolutions passed by the City Council of Trumann on January 10, 1962, activating the Urban Renewal Agency and on December 27, 1962, approving the Urban Renewal Plan be authenticated and published, as in this instance Arkansas Statutes, Section 19-2404 is not applicable to resolutions, but only applies to by-laws of ordinances. The instant case is distinguished from the case of *McClellan, Mayor* v. *Stuckey, et al.*, 196 Ark. 816, 120 S. W. 2d 155, since the resolutions here involved are not of a general and permanent nature. Arkansas Statutes, Section 19-2402, which provides for the reading of ordinances on three separate days is not applicable in this instance because it specifically states that it applies only to by-laws and ordinances of a general or permanent nature and it does not specify that resolutions be specifically and distinctly read on three different days. Since the Urban Renewal Act only requires resolutions, this Section of the Statutes would not apply to the resolution

passed by the City Council of Trumann on December 27, 1962, entitled "The Urban Renewal Plan for Speedway Urban Renewal Project ARK R-33," because said resolution was not an ordinance and could not be construed under previous decisions of this Court to be of a general or permanent nature.

In the case of *City of El Dorado* v. *Citizens' Light & Power Co.,* 158 Ark. 550, 250 S. W. 882, this Court said, referring to what is now Section 19-2402, Arkansas Statutes, 1947:

". . . The test as to the requirement of the statute is whether or not the ordinance is one of a 'general or permanent nature,' and unless it falls within that class the statute requiring a reading on different days or a suspension of the rule has no application. The fact that the franchise created by the ordinance runs for a long period of time does not make it general or permanent. Of course, all ordinances enacted by city councils are not permanent in the sense that they cannot be repealed; but those which endure until repealed are deemed to be permanent, and all others are not permanent. Ordinances of a general nature are those which are general and uniform in their application."

It is clear from the record that the Trumann Urban Renewal Plan for Speedway Urban Renewal Project ARK R-33 is neither general or permanent. The Plan invoked by the Trumann City Council on December 27, 1962 does not encompass the whole City of Trumann, and, therefore, is not general, and the said Plan will be effective by the terms of the Resolution only for a term of twenty years, and, therefore, is not permanent. It is also apparent that the adoption of the Speedway Urban Renewal Project by resolution of the City Council of Trumann did not purport in any way to adopt a zoning plan.

Arkansas Statutes, Section 19-2404, refers only to by-laws or ordinances of a general and permanent nature and the same reasoning and interpretation applies to the resolutions involved in this litigation as has been stated hereinbefore pertaining to Arkansas Statutes, Section

19-2402. Under the facts in this case and the statutes controlling, it was not necessary for the City Council of Trumann to read the resolutions involved on three separate days, nor was it necessary that the said resolutions be authenticated and published.

The contention of the Appellants that Plaintiffs' Exhibit No. 1, entitled "The Urban Renewal Plan for Speedway Urban Renewal Project ARK R-33" is void in that it does not contain a proper title required by provisions of Arkansas Statutes, Section 19-2402, must be rejected, as it is apparent that one subject is clearly expressed in its title. This Court is compelled to conclude that the Urban Renewal Plan for Speedway Urban Renewal Project ARK R-33, Trumann, Arkansas, was adopted by the City Council of Trumann in compliance with the provisions of Act 212 of the Acts of Arkansas for 1945 as amended by Act 189 of the Acts of Arkansas for the year 1957, and Act 40 of the Acts of Arkansas for the year 1961. The findings of the Chancellor in the lower Court are supported by the weight of the evidence which is contained in the record on appeal.

The Court cannot accept the Appellants contentions that the Urban Renewal Agency of Trumann, Arkansas and the Urban Renewal Plan for Speedway Urban Renewal Project ARK R-33, Trumann, Arkansas, is unconstitutional because the agency and the plan violates Sections 13 and 22 of Article II of the Arkansas State Constitution and Amendment No. 14 of the Constitution of the United States. The constitutionality of similar Acts of the Arkansas Legislature creating Urban Renewal and Housing Authorities in the State of Arkansas and providing procedures for operation have already been decided, and this Court has held same to be constitutional. *Hogue* v. *Housing Authority of North Little Rock,* 201 Ark. 263, 144 S. W. 2d 49.

In the case of *Kerr* v. *East Central Arkansas Regional Housing Authority,* 208 Ark. 625, 187 S. W. 2d 189, this Court stated:

"An act must be held valid, unless something in Constitution restrains Legislature from saying that des-

ignated course of conduct or policy is for public welfare or thing authorized by act is so demonstrably wrong that reasonable people would not believe it to be legislative intent."

In the case of *Rowe* v. *Housing Authority of the City of Little Rock,* 220 Ark. 698, 249 S. W. 2d 551, this Court upheld the constitutionality of Act 212 of the General Assembly of Arkansas for the year 1945, commonly known as the "Urban Redevelopment Law" or the "Blighted Area Law." The provisions of Act No. 189 of the Acts of 1957, and of Act No. 40 of the Acts of 1961, amending Act 212 of 1945 (the same being contained in Arkansas Statutes 1947 Annotated, Sections 19-3063.1 to 19-3063.11) do not violate the constitutional provisions relied on by the Appellants in this case.

It should not be overlooked that one provision of the Trumann Urban Renewal Plan reads as follows:

"C 2 c. It is specifically noted that the adoption of this Urban Renewal Plan does not constitute an adoption of the proposed zoning plan; but shows the intent of the City Council to consider its adoption through the regular procedures prescribed by the Arkansas law on city planning and is herein included for informational purposes."

If the Urban Renewal Agency cannot reach an agreement on price with the landowners in the project area, then the procedures under the eminent domain statutes must be invoked and the land and property cannot be taken without just compensation.

In the case of *Watson* v. *Harris,* 214 Ark. 349, 216 S. W. 2d 784, this Court held that it was the actual taking or damaging of lands for public use rather than any plan or purpose to take or damage same that under State and Federal Constitutions must be compensated.

This Court stated in the case of *Rowe* v. *Housing Authority of the City of Little Rock, supra*:

"To cite, much less discuss, all of the cases involving Housing Authority legislation would consume pages.

Most of these cases are collected in the Annotations in 130 A.L.R. 1069 and 172 A.L.R. 966. See also *Redfern v. Board of Commissioners of Jersey City,* 137 N. J. L. 356, 59 A. 2d 641; In the Matter of Slum Clearance in the City of Detroit, 331 Mich. 714, 50 N. W. 2d 340; and Opinion to the Governor, 76 R. I. 249, 69 A. 2d 531. Regardless of the wisdom of the legislation, we cannot say that the Act 212 is unconstitutional as regards the four grounds on which it is here assailed."

In this case, regardless of the wisdom of the legislation, we cannot say that Act 189 of 1957 and Act 40 of 1961 are unconstitutional as regards the three grounds on which they are here assailed. Nor do we find in the facts of the case any Acts on the part of the Appellees beyond the purview of these Statutes that are in violation of the constitutional grounds raised by the Appellants.

The finding and order of the Chancellor that the respective parties hereto pay their own costs incurred in connection with this litigation should be sustained.

The Decree is affirmed.

HARRIS, C. J., and GEORGE ROSE SMITH, J., disqualified and not participating.

MCFADDIN & JOHNSON, JJ., and DALE PRICE, Special J., dissent.

ED. F. MCFADDIN, Associate Justice (dissenting). The Majority Opinion clearly states the three points, and my dissent goes only to the first of these.[1] I am convinced that the proceedings of the City Council of Trumann of December 27, 1962, and all subsequent proceedings, are invalid. The City Council should be required to publish the resolution of that date and then have subsequent proceedings. It must be borne in mind

[1] As stated in the Majority Opinion the first point is: "The validity of the proceedings of the City Council of Trumann, Arkansas, in setting up the Urban Renewal Agency, authorizing it to transact business and exercise powers, and in approving the Urban Renewal Plan and feasibility of relocation for Speedway Urban Renewal Project ARK R-33, in the City of Trumann; . . ."

that on December 27, 1962, the City Council of Trumann by resolution approved the Urban Renewal Plan, *but the resolution was never published, as required by law.*

The Majority Opinion says that the City Council's action was only a "resolution" and therefore did not have to be published; but my answer to that statement is the decision of this Court in *McClellan* v. *Stuckey,* 196 Ark. 816, 120 S. W. 2d 155. In that case, the City Council (of Lepanto) adopted one "resolution" authorizing and another approving a special census, which had the effect of changing Lepanto from a town to a city of the second class. Neither of the resolutions was ever published; and this Court held that the failure to publish the resolutions was fatal to the proceedings. Mr. Justice McHaney, speaking for a unanimous Court, said:

"Two resolutions of the city council were passed, one on October 14, acting upon the petition of ten or more residents, in which enumerators were appointed to take a census, and the other was passed on November 26, 1935, as the result of which the town was advanced to a city of the second class. Section 9559 of Pope's Digest provides that all by-laws, or ordinances, of a general or permanent nature and those imposing any fine, penalty or forfeiture shall be published in some newspaper of general circulation in the corporation . . . The trial court held that the resolutions above mentioned, of October 14 and November 26, were within the purview of that section of the Digest and should have been published. We think the court was correct in so holding. It is immaterial that these enactments of the city council were designated as resolutions. The effect was to provide for a new and different form of government for the municipality which did affect all of the people thereof, and there could have been no good reason why they should not be published, unless to keep the people in ignorance of what the mayor and council were undertaking to do."

The § 9559 of Pope's Digest mentioned in the above quoted opinion as requiring publication, said: ". and

all by-laws or ordinances of a general or permanent nature, and of those imposing any fine, penalty or forfeiture, shall be published in some newspaper of general circulation in the corporation . . ." The above quoted language was held to cover a resolution on a special census in Lepanto. The same identical language is found in Ark. Stat. Ann. § 19-2404 (Repl. 1956) as the governing law today regarding publication; and if the quoted language applied to a resolution as was held in *McClellan v. Stuckey,* it would certainly apply to a resolution like the one here involved. The holding in *McClellan* v. *Stuckey* is ruling in the case at bar. The City Council of Trumann passed a resolution which set up the Urban Renewal Authority, which for a long period of years has the power of eminent domain (Ark. Stat. Ann. § 19-3015 (Repl. 1956) and can take in fee and forever the property of citizens. Such is of a rather permanent nature!

I cannot distinguish the *McClellan-Stuckey* case from the one at bar; and therefore I am compelled to dissent on this one point. Why not publish the resolution of the City Council in a newspaper, as provided by law, and let people generally know then and there what was proposed to be done in the community and what were the conditions the federal government would impose on those accepting federal money? The spotlight of publicity is required by law, and this Court should do nothing to let it be avoided.

For the reasons herein stated, I respectfully dissent.

Dale Price, Special Justice (dissenting). I respectfully dissent from the holding of the majority in this case, and I concur in the dissenting opinion of Justice McFaddin.

The majority has passed upon the power of the Legislature to delegate to an agency certain powers which it may exercise, including the power of eminent domain. While I find no fault with the citations and pronouncements made by the majority in that regard, they have remained silent upon the constitutional question posed by the appellant.

Appellant maintained that Speedway Urban Renewal Project was unconstitutional in that it applied to the entire 47.91 acres in the tract. Yet only 27.52 acres were to be acquired by the Agency. The majority opinion infers that Section C 2 c of the plan quoted in the opinion does not make the proposed zoning provisions applicable and therefore places no new burdens or restrictions upon the landowners whose lands are not being condemned. The zoning plan referred to consists of only one map, which is designated as URP4 and entitled "Proposed Zoning Plan." In addition to the zoning plan there are thirty-two pages of strict controls affecting the entire tract, whether or not it be taken by the agency.

Article II, Section 22 of the Arkansas Constitution provides:

"The right of property is before and higher than any consttiutional sanction; and private property shall not be taken, appropriated, or damaged for public use without just compensation therefor."

This Court has held in *Shellnut* v. *Arkansas State Game and Fish Commission,* 22 Ark. 25, 258 S. W. 2d 570, in dealing with a question similar in principle to the present case, that:

"Even though Constitutional Amendment No. 35 gives broad powers to the Commission, nevertheless, the Commission is subservient to, and bound by, Art. 2, Sec. 22 of the Constitution, which reads:

"* * * private property shall not be taken, appropriated or damages for public use, without just compensation therefor. "

It is not necessary that the property should be completely taken in order to bring the case within the protection of this Constitutional guaranty. It is only necessary that there be such serious interruption of the common and necessary use of the property as to interfere with the rights of the owner. See *Pumpelly* v. *Green Bay*

& Mississippi Canal Co., 13 Wall. 166, 80 U. S. 166, 20 L. Ed. 557.

(2) The effect of the Commission's "Special Regulation" of 1950 was to seriously restrict the appellants' use of their lands, and was, therefore, violative of the quoted Constitutional provision."

Regardless of whether the improper power to be exercised be called a "regulation" as in the *Shellnut* case, or a "plan" as in the instant case, the effect is the same, and it constitutes an appropriation or taking of property without just compensation.

The landowners within the project whose property is not being condemned and paid for by the agency must still bear with and comply with the requirements of the agency. The majority opinion cites the opinion of *Rowe* v. *Housing Authority of the City of Little Rock, supra,* yet it is distinguishable from the instant case in that THE ENTIRE ten-acre tract was acquired by the agency by eminent domain proceedings and just compensation was paid to ALL the affected landowners. I would declare the ordinance adopting the plan unconstitutional.

I am permitted to state that Justice Johnson joins in this dissent.

MILLER *v.* F. W. WOOLWORTH CO.

5-3392 384 S. W. 2d 947

Opinion delivered November 30, 1964.

[Rehearing denied January 11, 1965.]

G. E. Snuggs, for appellant.

Shackleford & Shackleford, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Mrs. Goldie Miller, instituted suit[1] against F. W. Woolworth Company, appellee herein, seeking damages for physical injuries, alleged to have been sustained when she, while a customer in the Woolworth Store, suffered a fall. Appellee answered, denying liability, and the case proceeded to trial. At the conclusion of appellant's testimony, Woolworth moved for a directed verdict, which motion was denied. Appellee then placed several witnesses on the stand, and again moved for a directed verdict at the conclusion of all the evidence. The motion was again denied, and the case was given to the jury. A verdict was

[1] J. B. Miller, husband of Mrs. Miller, is also a party to the suit, and is an appellant herein, but inasmuch as the testimony, hereinafter set forth, deals only with Mrs. Miller, we will continue to use the singular term, "appellant."

returned for the appellee, and from the judgment so entered, appellant brings this appeal.

According to Mrs. Miller's testimony, she was shopping in the Woolworth Store on October 6, 1962, at about 4:20 P.M. After leaving some purchases at the checking counter, she went to the back of the store to select some other articles that were on sale. While returning to the counter, she fell to the floor injuring herself. In describing the accident, Mrs. Miller said:

"Well, after I picked up the articles I wanted I started back to the check stand with them and for some reason my foot just went sliding like you do and I wanted to grab this counter, thinking I could steady myself, and I realized they've got these little old glass things sitting up on them. You know it's a little extension, I suppose to keep children from reaching up and meddling, and when I grabbed them I could feel it sort of give under my hands and I turned loose quickly, because I felt like the glass would break in my hands. Of course, when I turned loose I just tumbled and sat down and fell down on this side."

She stated that she could see a "long sort of shiny, skiddy-looking place;" that it did not appear to be "new;" that it wasn't wet. She testified that she did not get any dirt on her clothes, but her hands were gritty and dirty "like they would be, I guess, in a public place." This was all the evidence offered by appellant relative to how the fall occurred.[2]

William E. Ball, Pauline Armer, James Richmond, and Mrs. Floy Carelock, employees of the company, and Billy Joe Campbell, a patrolman with the El Dorado Police Department, testified on behalf of appellee. Mr. Ball stated that he examined the floor where Mrs. Miller

[2] A physician testified in regard to the injuries sustained by appellant, but that point is not at issue here. Appellant's husband also testified about her physical condition, and William E. Ball, manager of the store, called by appellant, testified briefly to the effect that he had sole supervision and control of the store, and followed rules and regulations set by the Woolworth Company. Ball also testified in response to interrogation by appellant's counsel, that the store sold lunches and candies.

had fallen, and saw no evidence of a hazardous condition; that the floor had just been swept, and was clean and dry. James Richmond, the janitor, testified that he completed sweeping the store about 4:15, including the aisle where appellant's fall occurred. The witness stated that he used a push broom, made of cloth, and treated with an oil; that he saw nothing on the floor that appeared to be slick or dangerous. Mrs. Armer testified that the sweeping of the floor had been completed at the time of the alleged injury. Mrs. Carelock, a clerk, stated that she went to the spot where Mrs. Miller had fallen, and examined the floor closely, but could find nothing that would occasion a fall. She testified that the floor was clean and dry, and that she observed no substance of any kind, nor did she see any skid marks. Mr. Campbell, the patrolman, stated that he was in the store at the time of the fall, and that he helped pick Mrs. Miller up off the floor. He said the floor was clean and dry, and that he did not see anything "slick," nor did he see a streak or skid mark. In fact, on cross-examination, he was asked, "Are you telling the jury that Mrs. Miller just fell down on the floor and hurt herself, no cause at all? Is that what you're telling the jury?" Mr. Campbell replied, "Yes, Sir." This completed the testimony, as it related to the accident.

Appellant first states:

"The ruling of the court on defendant's motion for directed verdict in its favor, made at the conclusion of plaintiff's testimony in chief, being a question of law and not of fact, settled the issue of 'presumption of negligence' on the prima facie showing made by plaintiff's testimony."

In 38 Am. Jr., Section 307, Page 1004, we find:

"No presumption of negligence on the part of a proprietor of a shop or store arises from the mere fact that a customer * * * sustains a fall while in a store, the doctrine of *res ipsa loquitur* not being applicable in such a case."

In *Deason* v. *Boston Store Dry Goods Company,* 226 Ark. 667, 292 S. W. 2d 261, quoting from an earlier case, this court said:

" 'It seems to be uniformly held in cases of this character that where a customer falls as a result of slipping upon some foreign object or substance, and there is no substantial proof showing that the store owner knew of its presence, or in the exercise of ordinary care should have known of its presence, there can be no recovery. In other words, it is necessary to show by substantial testimony the length of time the object had been on the floor or that it got there through the negligence of the defendant or its employees. Negligence is never presumed, but must be proved by the party alleging it.' "

We find no merit in this contention.

The next argument for reversal is somewhat unique. Quoting from appellant's brief:

"The ruling of the court on defendant's motion for directed verdict in its favor, at the conclusion of all of the testimony adduced in the trial, being a question of law and not of fact, settled the issue of the sufficiency of defendant's testimony to overturn the prima facie case of negligence made by plaintiffs' leaving for the consideration of the jury only the fact issue of quantum of recovery."

Appellant's argument is erroneous. The trial court's refusal to direct a verdict for appellee did not have the effect of establishing negligence on the part of the company; the ruling only meant that, in viewing the evidence in the light most favorable to the party against whom the motion was directed (appellant), the court concluded there was sufficient evidence to make a jury question. See *Pierce* v. *Stirling,* 225 Ark. 108, 279 S. W. 2d 840.

In Volume 88, C.J.S., Section 264 (b), Page 722, we find:

"Where a motion to direct verdict is overruled, the trial continues as if it had not been made; no judgment

is thereupon rendered against the adverse party nor may the court, because it has overruled the motion, thereupon direct a verdict for the adverse party on the ground that the motion admitted the truth of his evidence. * * * A refusal of the motion means only that there was sufficient evidence to prevent a direction, * * *''

In 53 Am. Jur., Section 362, Page 292, it is said:

''* * * The trial court should not assume to direct a verdict when its ruling would require it to pass upon the credibility of witnesses and waive testimony, or would require it to resolve conflicts in the evidence; whenever there is credible evidence from which a reasonable conclusion can be drawn in support of the claim of the party against whom the motion is made, the motion must be denied and the case submitted to the jury.''

In the Texas case of *Adam* v. *Adam,* 127 S.W. 2d 1001, the court held:

'' 'The effect of the motion made by the defendants to instruct the jury to find for them has practically the same effect as a demurrer to the evidence in calling for the opinion of the court on the legal sufficiency of the proof, but it does not have the effect to withdraw the case from the jury. If a motion be overruled, the trial must proceed as if it had not been made; and the court cannot, because the motion has been overruled, instruct the jury to find for the plaintiff, upon the ground that the motion admitted the truth of the evidence adduced.' ''

Numerous cases hold likewise; in fact, we know of none to the contrary.

Appellant finally contends that there is no substantial evidence to support the verdict. We do not agree. Aside from the testimony of the store employees, Campbell, the policeman who happened to be in the store, and who apparently was a completely disinterested witness, testified that the floor was clean and dry, and that he observed no streak, skid mark, or slick substance on the floor.

Affirmed.

5-3353 384 S. W. 2d 238

Opinion delivered November 30, 1964.

[redacted]

W. Dane Clay, Rose, Meek, House, Barron, Nash & Williamson, for appellant.

Josh W. McHughes, Brooks Bradley and *J. H. Carmichael, Jr.,* for appellee.

ED. F. MCFADDIN, Associate Justice. The issue here posed is the matter of priority as between assignments. This is the second appearance of these parties in this Court. The first case was *Bradley et al.* v. *Neal,* 234 Ark. 728, 354 S. W. 2d 269, in which we held that Bradley *et al.* were entitled to judgment against the estate of W. B. Warren in the sum of $3,000.00 and we remanded the case with directions, and such judgment was rendered on April 18, 1962.

Then on May 15, 1962, Bradley and McHughes filed the present action in the Probate Court, alleging that the $3,000.00 judgment was unpaid and that Virginia Warren Neal, individually or as executrix of the Estate of W. B. Warren, had in her possession certain notes which had been duly assigned to Bradley and McHughes, and that she should be required to deliver to Bradley and McHughes sufficient of the proceeds of said notes to satisfy the $3,000.00 judgment, with interest and costs.

This petition was resisted by Virginia Warren Neal, who claimed that she—personally—held an assignment of the said notes, which assignment was prior in point of time to the assignment to Bradley and McHughes. The Trial Court held that the assignment to Bradley and McHughes was superior to the Virginia Warren Neal assignment, and from that holding there is this appeal; and the points listed are:

"I. The recordation statutes do not apply to an assignment of notes.

"II. If the recordation statutes were applicable, appellees had actual notice of the prior interest of appellant.

"III. Res Judicata is inapplicable."

The evidence disclosed the following:

(1) That W. B. Warren and Zelma Lee Warren, his wife, were the owners of two notes as follows: one note dated December 21, 1949 for the original sum of $15,132.22 payable $155.00 monthly beginning January 21, 1950, principal and interest, signed Charley Hughes and Hattie Hughes, and secured by a lien on certain real estate; and one note dated December 21, 1949 for the original amount of $17,774.51 payable $125.00 monthly beginning January 21, 1950, principal and interest, signed by Claudia Carter and secured by a lien on certain real estate.

(2) That the said two notes were left with Block Realty Company in Little Rock for collection and remittance to Mr. and Mrs. Warren.

(3) That on September 5, 1956, W. B. Warren and Zelma Lee Warren, his wife, executed, acknowledged, and delivered to Virginia Warren Neal an assignment of the said notes, subject to a retained life estate in Mr. and Mrs. Warren. This assignment[1] was never recorded.

[1] This assignment read: "ASSIGNMENT. KNOW ALL MEN BY THESE PRESENTS: That we, W. B. Warren, and Zelma Lee Waren, his wife, in consideration of love and affection and other valuable consideration, do hereby set over, assign, and convey unto Virginia Warren Neal, the following described notes:

(4) That Block Realty Company was informed of the said assignment to Virginia Warren Neal; and that after the death of Zelma Lee Warren, Virginia Warren Neal became executrix of her estate and Block Realty Company remitted each month the collections on the said notes by check payable to *"W. B. Warren and Virginia Neal, Administratrix."*

(5) That on May 16, 1960, W. B. Warren executed, acknowledged, and delivered to Brooks Bradley an assignment[2] of the same notes.

"The Claudia Carter note, upon which a principal balance of $13,566.99 remains due, and which note is payable in installments of $125.00 per month, said note being secured by a first mortgage on the following described property, to-wit: The West 65 feet of Lot 1, and the North 35 feet of the West 65 feet of Lot 2, Block 233, ORIGINAL CITY OF LITTLE ROCK; and "The Charley Hughes note, upon which a principal balance of $6,864.49 remains due, said note being payable in monthly installments of $155.00 per month, and payment for which is secured by a first mortgage on the following described property, to-wit: The West 100 feet of Lot 3, Block 233, and that part of Lot 2, Block 233, ORIGINAL CITY OF LITTLE ROCK, which is described as follows: The South 15 feet of the West 55 feet of said Lot 2, and the South 10 feet of the East 35 feet of the West 100 feet of said Lot 2.

"The parties hereto do, however, reserve for themselves or the survivor of them, the monthly income for life from each of the aforesaid notes.

"WITNESS OUR HANDS AND SEALS ON THIS 5th DAY OF SEPTEMBER, 1956. /s/ W. B. WARREN /s/ ZELMA LEE WARREN."

[2] This assignment reads: "ASSIGNMENT. For valuable consideration, I, the undersigned, hereby sell, transfer, assign, set over and deliver to Brooks Bradley the unpaid balance on the following described notes, owned by me and now held for collection by Block Realty Company, Little Rock, Arkansas, to-wit:

"1. One note dated December 21, 1949 for the original sum of $15,132.22 payable $155.00 monthly beginning January 21, 1950, principal and interest, signed Charley Hughes and Hattie Hughes and secured by a lien on the following property located in Pulaski County, Arkansas, to-wit: West 100′ of Lot 3 and Part of Lot 2, Block 233, Original City of Little Rock, Arkansas.

"2. One note dated December 21, 1949, for the original amount of $17,774.51 payable $125.00 monthly beginning January 21, 1950, principal $125.00 monthly beginning January 21, 1950, principal and interest, signed by Claudia Carter and secured by a lien on the following property located in Pulaski County, Arkansas, to-wit: West 65′ of Lot 1 and North 35′ of West 65′ of Lot 2, Block 233, Original City of Little Rock, Arkansas.

"This assignment is made for the purpose of securing advances made to me, represented by notes, and further payment of a fair and reasonable fee, pending termination of litigation now pending in the Pulaski County Chancery Court against Virginia Warren Neal.

(6) That before Bradley accepted his said assignment he visited Block Realty Company and caused W. B. Warren to write to Block Realty a letter dated May 16, 1960, which read:

"May 16, 1960. Block Realty Company, 212 Spring Street, Little Rock, Arkansas. Gentlemen:

"You are holding two notes for collection which belong to me and which I have assigned to Brooks Bradley, my attorney, as per the enclosed assignment. Please hold said notes for collection and you are hereby specifically requested not to deliver said notes or any collections thereon, to anyone other than Brooks Bradley, my attorney.

"Yours very truly, /s/ W. B. Warren."

(7) That Block Realty Company endorsed on the aforesaid letter the following:

"Received the original of this letter together with copy of assignment this 16th day of May, 1960. /s/ Block Realty Co. by Sam A. Block."

(8) That Bradley caused the assignment from W. B. Warren to him to be filed for record and recorded in the office of the Circuit Clerk and Recorder of Pulaski County, Arkansas, on May 17, 1960; and that the assignment of Virginia Warren Neal, mentioned in Paragraph (3) *supra,* was never recorded.

"WITNESS my hand and seal this 16th day of May, 1960.
"STATE OF ARKANSAS)
COUNTY OF PULASKI) ss ACKNOWLEDGMENT

"On this day personally appeared before the undersigned, a Notary Public, Jean Loper, within and for the County and State aforesaid duly qualified, commissioned and acting, W. M. Warren to me well known as the Grantor in the foregoing Assignment, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

"WITNESS my hand and official seal on this 16 day of May, 1960. /s/ Jean Loper, Notary Public. My Commission Expires: April 6, 1964.

"No. 14482 FILED FOR RECORD May 16, 1960 at 11:05 A.M. AND RECORDER May 17, 1960. (SEAL) ROGER McNAIR, CIRCUIT CLERK.

"This instrument prepared by Brooks Bradley, 617 Pyramid Life Bldg., Little Rock, Ark."

(9) That Bradley associated McHughes with him in the Warren case, and McHughes stands or falls with Bradley in the present case.

I. *The Recording Statutes.* We have stated the facts in considerable detail and now we come to the appellant's first point, which is that "The recordation statutes do not apply to an assignment of notes."[3] The assignment to Virginia Warren Neal was in 1956 and the assignment to Mr. Bradley was in 1960. Even though the Neal assignment was prior in point of time, the Trial Court held the Bradley assignment to be superior because the Bradley assignment was recorded and the Neal assignment was not recorded. We reach the conclusion that our recording statutes do not apply to notes or proceeds of notes, but only to liens on land. These statutes are in Ark. Stat. Ann. § 16-101 (Repl. 1956) *et seq.* Section 16-101 requires the recorder to provide books for recording "all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing of or concerning any lands and tenements or goods and chattels." Section 16-103 relates to "any deed, mortgage, deed of trust, bond, conveyance, or other instrument of writing authorized by law to be recorded." Section 16-107 requires an index concerning "Deeds, mortgages, or other instruments in writing concerning lands and tenements." Section 16-115 provides that "no deed, bond, or instrument of writing for the conveyance of any real estate or by which the title thereto may be affected in law or equity, hereafter made or executed

[3] Throughout this entire record the parties have wisely and correctly referred to the transfers by Mr. Warren as "Assignments." It does not appear that Mr. Warren made a negotiation or indorsement on either one of the notes sufficient to comply with either the Negotiable Instruments Law or the Uniform Commercial Code. The attempted transfers to Neal and Bradley fail as such "indorsements" to comply with either the Negotiable Instruments Law or the Uniform Commercial Code, because neither of the transfers was a complete transfer of the entire instrument. A life estate was retained in the Neal transaction; and the Bradley transaction was to secure the payment of attorney fees. "The indorsement must be an indorsement of the entire instrument." 11 Am. Jur. 2d p. 343, "Bills and Notes" § 320. See annotation in 63 A.L.R. 499, "Construction and application of provision of Negotiable Instruments Law in respect to indorsements which purport to transfer only part of amount payable." See also companion annotation in 149 A.L.R. 1055.

shall be good or valid against a subsequent purchaser of such real estate . . ." It will thus be seen that our recording statutes relate only to instruments touching and affecting real estate. The recording of the assignment from Warren to Bradley gave notice to the world *as regards the lien on the lands,* but gave Bradley no right superior to the prior assignment of the notes to Neal.

The general rule is that recordation statutes do not apply to assignment of notes unless specifically so stated by statute. In 4 Am. Jur. 300, "Assignments" § 88, in speaking of recordation, the text states: "Ordinarily, however, the recording statutes are inapplicable to assignments." In 45 Am. Jur. p. 444, "Records and Recording Laws" § 43, cases are cited to sustain this textual statement: "Notes secured by a mortgage may be effectively transferred as to all persons without recording if there is no requirement in the recording act that the transfer be recorded." Again, in 11 Am. Jur. 2d p. 348, "Bills and Notes" § 326, the text reads: "General recording acts do not apply to assignments of choses in action, and recordation is not required in absence of a statute specifically applicable to them. . . . A note secured by a mortgage may be effectively transferred as to all persons without recording if there is no requirement in the recording act that the transfer of the note be recorded." We find no authority that would support a holding that the prior unrecorded assignment of a note may be defeated by a subsequent recorded assignment.[4]

So we conclude that the recording statutes in Arkansas afford no protection to Bradley and that the as-

[4] Originally it was held in Arkansas that the assignment of a vendor's lien note was protected in a lien in the land even if the assignor released the lien of record. See *Hebert V. Fellheimer,* 115 Ark. 366, 171 S. W. 144; and *Driver* v. *Lacer,* 124 Ark. 150, 186 S. W. 824. But by Act No. 374 of 1917, as now found in Ark. Ann. § 51-1016 (1947), the law was changed, so now if the assignor is the lien holder of record then a release by him will protect a subsequent purchaser of the land as against the assignee *even though the debt itself is unaffected by the release of the lien. Kinney* v. *N. Memphis Sav. Bank,* 178 Ark. 716, 11 S. W. 2d 486; *Vance* v. *White,* 180 Ark. 470, 21 S. W. 2d 853; and *Farmer's Bank & Trust Co.* v. *Taylor,* 189 Ark. 939, 75 S. W. 2d 808.

signment to Mrs. Neal is superior to the Bradley assignment since the Neal assignment is prior in point of time; and this holding renders it unnecessary for us to consider the appellant's second point regarding knowledge.

II. *Res Judicata.* The appellees insist that even if the recording statutes do not apply, nevertheless the appellees should prevail since the appellees insist that the prior litigation is *res judicata* against the appellant. We cannot agree with appellees in such insistence. In the first case—as reported in 234 Ark. 728, 354 S. W. 2d 269—the only question was the amount of the fee to which Mr. Bradley was entitled. His claim was treated as an ordinary claim. There was no mention in our opinion as to any assignment to Virginia Warren Neal, and such assignment was not within the purview of the issues in the first case. *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. 2d 610. Thus, there is no *res judicata* in favor of the present appellees.

The judgment is reversed and the cause remanded for entry of a judgment in keeping with this opinion and for further proceedings not inconsistent herewith.

ARK. STATE HIGHWAY COMM. *v.* SISSON.

5-3406 384 S. W. 2d 264

Opinion delivered November 30, 1964.

Mark E. Woolsey, Lindsey J. Fairley, Don Langston, for appellant.

S. Morton Rutherford, III, Tulsa, Oklahoma, for appellee.

George Rose Smith, J. This is a proceeding brought by the Highway Commission to condemn a fifteen-foot strip along the edge of a lot in Springdale, the site of a filling station. The appellees are the landowner, Willella Sisson, and her lessee, Sunray DX Oil Company. The jury awarded the landowner $15,000 and the lessee $6,750.

On direct appeal the Commission contends that the trial court, in empaneling the jury, erred in allowing the land-owner and the lessee three peremptory challenges each. This contention is well-taken. Our statutes contemplate that each side—the plaintiffs and the defendants—will have a total of three peremptory challenges. Ark. Stat. Ann. §§ 39-229 and -231 (Repl. 1962). It is firmly settled that the number may not be increased even though the parties on one side or the other are actually adversaries. *Hogan* v. *Hill,* 229 Ark. 758, 318 S. W. 2d 580; *Utley* v. *Heckinger,* 235 Ark. 780, 362 S.W. 2d 13. The rule is plainly applicable here. When a single tract is involved the alignment of the condemnor on one side against those having an interest in the land, such as a landlord and tenant, on the other is so clear-cut that the issues are properly determinable in a single trial, with-

out severance. *Ark. State Highway Comm.* v. *Thomas,* 231Ark. 98, 328 S.W. 2d 67.

On cross appeal Sunray, the lessee, raises a number of questions about the admissibility of evidence and the instructions to the jury. We review those that are likely to arise upon a second trial.

In the operation of the filling station Sunray had installed and was using many removable chattels which it owned, including tanks, signs, awnings, a chair, a desk, a table, cabinets, etc. In an attempt to show the rental value of the service station Sunray sought to prove that all these articles of personal property were worth about $7,000. This evidence was inadmissible. The issue was the rental value of the real property, not the value of the chattels. See *Kansas City So. Ry.* v. *Anderson,* 88 Ark. 129, 113 S.W. 1030, 16 Ann. Cas. 784. The proffered testimony had no bearing upon the question before the jury.

Sunray also tried to prove the construction cost and the value of another service station in the neighborhood. Even though the two structures may have been similar, both the cost and the value of the one were collateral matters as far as the value of the other was concerned. The issues in a condemnation case would be hopelessly obscured if the parties were allowed to dispute about the cost or the value of some other piece of property. Counsel for Sunray cite *St. Louis, I.M. & S. Ry.* v. *Theodore Maxfield Co.,* 94 Ark. 135, 126 S.W. 83, 26 L.R.A. (n.s.) 1111. That opinion is not as clear as it might be, but we feel certain that the court's reference to the "value" of other lands in the neighborhood was intended to mean only the value as established by actual sales of comparable property. Such sales form a permissible basis for an expert witness's opinion of the worth of the property in controversy. It does not follow, however, that, in the absence of a sale, the expert should be allowed to give his opinion about the value of other similar land in the vicinity.

Sunray's three principal arguments concerning the instructions may be considered together. The primary term of Sunray's lease will not expire until September of next year. A clause in the lease provides that Sunray cannot, during the primary term, cancel the lease on the ground that, as a a result of specified governmental action, a service station can no longer be operated on the property. There is proof that after this condemnation the size of the lot will be so reduced that a service station cannot be operated upon what is left, under the city zoning law.

In view of these facts Sunray contends: First, that the jury should have been peremptorily instructed to return a special verdict for the full amount ($6,075) that Sunray is obligated to pay as rent during the remainder of the primary term; secondly, that the court should have given a requested companion instruction explaining the measure of Sunray's damages in addition to this $6,075; and, thirdly, that the court ought not to have told the jury that it should consider the value of Sunray's leasehold in arriving at the value of the landowner's interest in the property.

We think the court was right upon all three points. To begin with, the peremptory charge for a special verdict of $6,075 was wrong, for even if this charge had been correct in other respects the future payments would have to be reduced to their present value. The companion instruction was dependent upon this peremptory charge and falls along with it.

There is another serious flaw in the three combined arguments. When a condemnation takes the whole of leased property or renders the remainder untenantable it is not fair to the landlord to make an unencumbered cash award to the tenant for the full value of his leasehold estate, for he may squander the money without making the rental payments later falling due. Thus, as Nichols points out, the better procedure is to make some provision for the landlord's protection, else his interest in the leasehold is taken with no assurance that he will

ultimately be compensated for it. Nichols, Eminent Domain (3d ed.), § 5-23 [3].

The court was evidently right in telling the jury that it should consider the value of Sunray's leasehold in determining the value of Mrs. Sisson's interest as the owner of the fee. If the State is to be required to compensate Sunray for the rental payments that it must make after it has been in effect dispossessed by the condemnation, it is evidently necessary that Mrs. Sisson's receipt of these rental payments be taken into account in fixing the amount of her compensation. Otherwise the State would be paying not only the value of the leasehold but also the value of the fee unencumbered by that estate. Upon a retrial the instructions in question must be redrafted to submit these issues properly to the jury.

Objections to other instructions are argued, but since these instructions are not set out in the abstracts or in the briefs we are unable to say whether they were right or wrong.

Reversed and remanded on direct appeal; affirmed on cross appeal.

DREYFUS *v.* ST. PAUL FIRE & MARINE INS. CO.

5-3350 384 S. W. 2d 245

Opinion delivered November 30, 1964.

Spitzberg, Bonner, Mitchell & Hays, for appellant.

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

PAUL WARD, Associate Justice. This particular litigation began when Martin Dreyfus (hereafter referred to as appellant) sued the St. Paul Fire and Marine Insurance Company (hereafter at all times referred to as appellee) for $1,700 which is the amount Dreyfus paid to settle a former law suit filed against him. Appellee filed a motion for a summary judgment which was submitted to the trial court upon certain affidavits and exhibits, and later granted. Appellant now prosecutes this appeal. To understand the former law suit referred to, and to understand the issues presented on this appeal, it is necessary to set out in some detail the factual background.

Appellant who lives in this state is the owner of a large trucking company. He is protected by a liability policy issued by appellee, with a $25,000 liability limitation. In October 1959 one of appellant's employees, Roscoe Jackson, was driving a company truck in the State of Mississippi (near Greenville) when it collided with an automobile occupied by Mrs. Tom Uzzle who was severely injured. Mrs. Uzzle filed suit in the U. S. District Court of Mississippi against appellant and Jackson, seeking $250,000 in damages for the alleged injuries. Appellant promptly notified appellee of the suit and he also hired an attorney in Greenville to protect him against a possible judgment in excess of $25,000. Appellee's attorney started negotiations for a settlement of the Uzzle claim on the basis of $15,000 but this offer was refused. Then appellant's attorney entered into negotiations with Uzzle's attorney in an effort to reach a settlement. This resulted in an offer by Uzzle's attorney to take $21,700 in full satisfaction. This offer of settlement was recommended by appellant's attorney to appellee's attorney. In response, appellee indicated it was unwilling to pay more than $20,000. Thereupon appellant told Uzzle's attorney he would accept the offer and

pay $21,700. The settlement was consummated by appellee paying Uzzle $20,000 and by appellant paying her $1,700. Mrs. Uzzle gave separate releases to appellant and appellee at the request of appellant.

We have concluded after a careful study of the record and the able argument presented by both sides, that the trial court must be sustained in entering a summary judgment in favor of appellee. In considering this case it must be kept in mind that we are not dealing with a demurrer by appellee to appellant's complaint. Appellee's motion for a summary judgment was made pursuant to Ark. Stat. Ann. § 29-211 (Repl. 1962). The only point relied on for a reversal is that "The trial court erred in granting the motion of appellee for a summary judgment."

We are not convinced by appellant's principal argument. That argument, in essence, is: Under the decisions of this Court the crucial issue here is the good faith (or lack of negligence) on the part of appellee in refusing to pay all of the $21,700, and that said issue was (under the testimony presented) a question for the jury and not for the trial court.

Appellant relies heavily on three decisions of this Court: *Home Indemnity Company* v. *Snowden,* 223 Ark. 64, 264, S.W. 2d 642; *Southern Farm Bureau Casualty Ins. Co.* v. *Parker,* 232 Ark. 841, 341 S.W. 2d 36; *Southern Farm Bureau Casualty Ins. Co.* v. *Hardin,* 233 Ark. 1011, 351 S.W. 2d 153. The decisions in the above cited cases are not decisive or controlling in the case here because those decisions were based on fact situations different from those of this case. In the *Snowden* case the insurer refused to pay anything on the $83,950 claim against the insured (Snowden). Thereupon Snowden negotiated a settlement with the claimant (the injured party) for $8,000. The insurer (whose limit of liability was $5,000) again refused to pay anything. After the insured paid the $8,000 he sued insurer for all the money back, and received a judgment for that amount. On appeal we said, in effect, that under the

circumstances the insurer acted in bad faith and must pay the limit of its policy. The *Parker* decision in principle was similar to the *Snowden* decision. The injured party sued the insured and recovered a judgment for $12,500. The insurer's limit of liability was $5,000 and the judgment was settled for $6,500, the insurer paying $5,000 while Parker paid $1,500. The insured (Parker) sued and recovered judgment against the insurer for $1,500. On appeal we affirmed the judgment. The record showed the insurer could have settled the claim for $4,000, and we held, in effect, the insurer was "negligent" in failing to do so. In doing so we also approved the "bad faith" rule—holding in effect that the insurer acted in "bad faith". Likewise, in the *Hardin* case there was evidence the insurer could have settled a $15,000 claim against the insured for $5,000 (the policy limit) but negligently or in bad faith failed to do so. The result was that to settle it cost over $13,000 of which amount the insurer paid $5,000. On appeal we approved a judgment for $8,810 which the insured recovered in the trial court against the insurer.

Under the undisputed factual situation in the case before us, we are unable to see how the question of bad faith or negligence on the part of appellee becomes an issue as it did in the previously cited cases. All parties (the insurer, the insured, and the claimants) were represented by attorneys who are conceded to be experienced and competent. All parties and their attorneys knew all the pertinent facts. They knew appellee's limit of liability was $25,000; they knew appellant would be liable for any judgment in excess of $25,000; they knew Mrs. Uzzle had sued for $250,000; and, they knew more than we could possibly know here from the record about the nature of the injuries and about the evidence of negligence, or the lack thereof, on the part of Jackson.

It was under the above circumstances that appellant (through his attorney) initiated negotiations with the Uzzles to settle the law suit, even though the policy contains the following clause: ". . . the Company may

make such investigation, negotiation, and settlement of any claim or suit as it deems expedient." As a result of his own initiative appellant received an offer of settlement for $21,700 from Mr. and Mrs. Uzzle. This offer, as previously stated, was communicated to appellee's attorney who informed appellant that his company would not be willing to pay more than $20,000 to settle the case. Without further consulting or advising with appellee, appellant accepted Uzzles' offer. The suit was then settled by appellant's paying $1,700 and appellee's paying $20,000. At no time did appellant indicate that he expected appellee to reimburse him for the $1,700 or that he himself was paying the amount under protest.

Under the facts and circumstances outlined above we must conclude that appellant paid the $1,700 voluntarily under the personal belief and legal advice that it was to his own best interest to do so. Accordingly to the only testimony on the point, if appellant had told appellee he was paying $1,700 under protest (or with the expectation of being reimbursed) appellee would not have paid the $20,000. The record, in our opinion, contains no evidence from which a jury could have found any bad faith or negligence on the part of appellee.

The exact issue here raised seems never to have been before this Court, but it has been decided adversely to appellant's contention in other jurisdictions. See *St. Joseph Transfer & Storage Company* v. *Employer's Indemnity Corporation,* 224 Mo. App. 221, 23 S.W. 2d 215 (K.C. Ct. of App.—Mo.—1930); *Levin* v. *New England Casualty Company,* 101 Misc. Rep. 402, 166 N.Y.S. 1055 (Sup. Ct. of N.Y.—App. Term—1917); and *Pickett* v. *Fidelity & Casualty Company of New York,* 60 S.C. 477, 38 S.E. 160 (Sup. Ct. of So. Car.—1901). In the first case cited there is language which we adopt as applicable here: "Both parties had a right to enter into a contract of settlement, which would be in accord and satisfaction of the original contract of insurance." Likewise we approve as applicable here language found in the *Levin* case:

"The defendant was under no duty to settle the claim. The policy gave it the option of contesting it, if it saw fit to do so. It had the right to await the decision of the court as to the claimant's demand, or to pay such sum in settlement as it saw fit. The plaintiff apparently believed that it was to his interest to settle, rather than face the uncertainty of a trial and a possible verdict against him, part of which he might have to pay."

It is our conclusion therefore that the judgment of the trial court must be affirmed.

Affirmed.

ROBINSON and JOHNSON, JJ., dissent.

SAM ROBINSON, Associate Justice, (dissenting). The trial court granted the motion for a summary judgment on the ground that there was no genuine issue of a material fact. This court has affirmed the judgment. In my opinion, the Arkansas statute authorizing summary judgments in cases where there "is no genuine issue as to a material fact" should not be stretched to a degree which allows the courts to summarily dispose of cases where the parties have the constitutional right to a trial by jury.

The Arkansas Constitution provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law . . ." Arkansas Constitution, Article 2, Sec. 7. The Constitution further provides that "Judges shall not charge juries with regard to matters of fact . . ." Arkansas Constitution, Article 7, Sec. 23.

In the case at bar there is a genuine issue as to a very material fact. The appellant alleged in her complaint "that the defendant [insurance company] considered its own best interest and disregarded the plaintiff's interest while good faith and fair dealing required it to give at least equal consideration to the interest of the plaintiff; and that the defendant's refusal to pay the

entire amount necessary to effect the settlement was made in bad faith."

Defendant, in its answer, admitted that it refused to pay more than $20,000.00 in settlement of the case, but denied all allegations in the complaint not specifically admitted. The issue was drawn; it was clearly a question for the jury: Did the insurance company, by virtue of its rights under the contract of insurance, in good faith, considering all the facts, refuse to pay more than $20,000.00, or did it refuse to pay more because it well knew that the policyholder was in such a hazardous position that he would contribute to the amount necessary to effect a settlement?

There was a stipulation between the parties, but nothing in the stipulation removed or settled the foregoing issue. It can be seen from the stipulation that Mrs. Uzzle was seriously injured. Her doctor bills, etc. amounted to $3,600.00; she was confined to the hospital for 35 days. Several months after the date she received the injury she had to undergo a serious operation for the removal of a ruptured intervertebral disc. It was further stipulated:

"The medical testimony relative to Marjorie Uzzle's injuries and disability arising from the collision was conflicting. Two physicians, specialists in their fields, examined her under Court order upon motion of the defendant insurer. One of such physicians was of the opinion that she would have minimal permanent impairment as a result of a disc protrusion. He found no other significant condition related to the accident. The other court-appointed physician was of the opinion that she had a residual permanent disability resulting from injuries sustained in the accident of 15%. Her personal physician, also a specialist, was of the opinion that her accident-connected disability was 40%."

Thus, there was substantial evidence that Mrs. Uzzle was 40% disabled due to the injuries. She had sued for $250,000.00. The forum was favorable to the plaintiff; she

had been severely injured, and it was a clear case of liability. The defendant, Dreyfus, was good for a judgment, but had only $25,000.00 in liability insurance. He would have had to pay personally that part of a judgment up and above $25,000.00. In these circumstances, there was a genuine issue as to whether the insurance company wrongfully refused to pay more than $20,000.00 in settlement of the case. It did refuse to settle, and as a consequence, appellant, Dreyfus, was compelled to pay $1,700.00 out of his own pocket.

A jury could have found that the insurance company knew from all the circumstances, to a moral certainty, that it could refuse to pay more than $20,000.00 by way of settlement and Dreyfus would come up with whatever additional amount it took to settle the case; that he could not afford to do otherwise, the risk was too great.

The majority has said, in effect, that three cases decided by this court, and relied on by appellant, are distinguishable from the case at bar. The cases are *The Home Indemnity Co.* v. *Snowden,* 223 Ark. 64, 264 S.W. 2d 642; *Southern Farm Bureau Casualty Ins. Co.* v. *Parker,* 232 Ark. 841, 341 S.W. 2d 36; *Southern Farm Bureau Casualty Ins. Co.* v. *Hardin,* 233 Ark. 1011, 351 S.W. 2d 153. In all of those cases this court held it to be a question for the jury as to whether the insurance company wrongfully or negligently failed to settle damage suits within the limits of the policy. Actually, in my opinion, the majority does not point out any valid distinction between those cases and the case at bar.

In *The Home Indemnity Co.* v. *Snowden,* supra, the insurance company refused to pay $5,000.00, the policy limit, because, according to its view, there was no liability at all on the part of the policyholder. This court held that it was a jury question as to whether the insurance company had wrongfully failed to settle the case. In a dissenting opinion it was contended that according to the undisputed evidence, the insurance company was fully justified in refusing to make the settlement. The case fully supports the policyholder in the case at bar,

and it cannot be distinguished in a manner favorable to appellee herein.

The next case that the majority says is distinguishable is *Southern Farm Bureau Casualty Ins. Co.* v. *Parker,* supra. It is closely in point with the case at bar and fully supports the appellant policyholder. The majority has demonstrated no real distinction. The second syllabus is quoted to show the facts:

"Insured had $5,000 coverage against personal injuries; he was involved in a traffic mishap and sued for $25,000. The injured party offered to settle the damage action for $4,000, but the insurer refused to consider such offer. Jury verdict against insured for $12,500 was settled by insured for $6,500, with $5,000 paid by the insurance company and $1,500 paid by the insured who then sued the insurance company for $1,500. HELD: The insurance company owed the insured the duty to act in good faith and also the duty to act without negligence, and insured could hold the insurance company liable on either the bad faith or the negligence theory." There is no distinction on the point involved, and that is whether the insurance company wrongfully or negligently failed to settle.

The other case the majority says is distinguishable, but actually shows no distinction, is *Southern Farm Bureau Casualty Ins. Co.* v. *Hardin,* supra. To quote the first syllabus is enough to show that the case cannot be distinguished from the case at bar in a manner favorable to the insurance company:

"It was undisputed that in a suit brought in the home county of the injured plaintiff against the insured whose liability coverage was limited to $5,000 for injury to one person and $5,000 property damage, the insurer refused the plaintiff's offer to settle the case for $4,000, and although the insurer had placed a settlement value of about $2,500 on the case, it made no further effort or counteroffer to reach a settlement. The jury verdict in favor of the plaintiff was settled by the insured for

$15,000, of which the insurer paid $6,190 and the insured, $8,810. HELD: In these circumstances it was a jury question as to whether the insurance company was negligent or failed to act in good faith by not attempting to reach a settlement within the limits of the policy."

All three of the aforesaid Arkansas cases, with facts not more favorable to the policyholder than are the facts in the case at bar, stand for the proposition that it is a jury question as to whether the insurance company negligently or wrongfully failed to settle a claim within the limits of the policy, and thus caused the policyholder to contribute to a settlement.

To support its view, the majority has cited three cases from other states. The latest of these cases was decided in 1930, a long time before the adoption by the Federal Courts of Rule 56. None of the cases involved a summary judgment.

First, there is the case of *St. Joseph Transfer & Storage Co.* v. *Employer's Indemnity Corp.*, 224 Mo. App. 221, 23 S.W. 2d 215 (1930). It is directly in conflict with the heretofore mentioned Arkansas cases. Moreover, in that Missouri case the court said: "This is not case wherein the liability is clear." The court strongly indicated that if it had been a clear case of liability the result would have been different. And, furthermore, there is a vast difference in rendering a summary judgment where, at best, a controversial point is only partly developed and ruling for one of the parties where there has been a full scale development at a jury trial.

One of the other cases cited by the majority as sustaining its view is *Levin* v. *New England Casualty Co.*, 166 N.Y.S. 1055 (1917). That case is also directly in conflict with the heretofore mentioned Arkansas cases. In the New York case the court said: "The defendant [insurance company] was under no duty to settle the claim. The policy gave it the option of contesting it, if it saw fit to do so. It had the right to await the decision of the court as to the claimant's demand or to pay such sum

in settlement as it saw fit." In addition, there was no showing as to whether the insurance company wrongfully or negligently refused to settle the claim, and apparently, the court held that it had a right to consider only its own interest in determining whether a settlement would be made. Up to the present time this has not been the law in Arkansas.

The other case cited by the majority is *Pickett* v. *Fidelity & Casualty Company of New York,* 60 S.C. 477, 38 S.E. 160 (1901). Frankly, after reading this case I am wholly unable to see in what manner it supports the majority opinion. A policyholder sued an insurance company for $1,500 on a liability policy of insurance. There was a judgment for the plaintiff; the insurance company appealed, and the judgment was affirmed.

In my opinion it was error to render a summary judgment in favor of the insurance company. I, therefore, respectfully dissent.

MYERS *v.* ARK. STATE HIGHWAY COMM.

5-3375 384 S. W. 2d 258

Opinion delivered November 30, 1964.

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

Mark E. Woolsey and *Thomas B. Keys,* for appellee.

SAM ROBINSON, Associate Justice. This is an eminent domain proceeding. The Arkansas State Highway Commission condemned for highway purposes a little over one-half acre of a tract consisting of a little less than two acres belonging to appellant, Johnnie A. Myers. Appellant contends that by reason of the taking he has been damaged to the extent of about $100,000.00. The Highway Department claims he has been damaged in the sum of about $2,000.00. The case was tried to a jury and there was a verdict for appellant in the sum of $6,250.00. Myers has appealed.

Appellant contends, first, that the court erred in requiring appellant, who was testifying as a witness, to answer questions on cross examination concerning the amount that his father had paid for the entire tract of property in 1951. The amount paid was $16,500,00. In *St. Louis & San Francisco Railway Co.* v. *Smith,* 42 Ark. 265, this court reversed the trial court for refusing to admit such evidence. There, this court said: "The price which the owner gave for his land may be put in evidence, because it tends to show its value. It is not, of course, conclusive, because the owner may show in explanation, the circumstances under which he bought, the condition of the property at the time, and the improve-

ments he has made upon it since the purchase." The weight of authority is in accord with the decision in the aforesaid railway case. See Annotation 55 A.L.R. 2d, 791.

The order authorizing the taking in the first instance, and the judgment provides:

"Any and all rights or easements of existing, future or potential common law or statutory rights of access or ingress and egress to, from or across the controlled-access facility to or from abutting and adjoining lands be and they are hereby, condemned and extinguished, provided there is reserved to present and future owners or occupants of said abutting and adjoining lands the right of direct access as prescribed and limited by the regulations and policies of the Arkansas State Highway Commission to any adjacent frontage road, if established and when constructed, but access to and from the throughway or main travelled roadway shall be only at interchange points as may be established and maintained by proper authority."

The trial court permitted witnesses for the Highway Department to testify, over appellant's objections, that appellant had not lost the right of ingress and egress to and from his remaining property and Highway 5. Appellant contends that, as a matter of law, under both the first order and the final judgment he lost such right of ingress and egress. The Highway Department argues that he had not lost such right. Under both the first order and the final judgment, when considered in connection with highway plans introduced in evidence, it would appear that appellant has lost such right. If, however, it is not the intention of the Highway Department to destroy the right of ingress and egress, at a new trial, the record on this point should be made clear. If the legal right to ingress and egress has been destroyed by the eminent domain proceeding, witnesses should not be permitted to testify to the contrary.

We now come to a point that requires a reversal of the judgment. It will be recalled that about one-half acre

was taken from a tract of about two acres. At the request of appellee, the court gave Instruction No. 1 as follows:

"Whenever private property is appropriated as an incident to the taking for public purposes, the owners are entitled to just compensation for the lands taken. In this case the just compensation which the owners are entitled to receive is the fair market value of their lands as of the time it was taken for public purposes, which was February 26, 1960."

Appellant objected generally; and specifically as follows: "The instruction states that just compensation is the fair market value of the land at the time it was taken and does not tell the jury that the measure of damages is the difference between the fair market value immediately before and the fair market value immediately after the taking. This instruction is designed for a case in which the entire land of the owner is taken and is not proper where a portion of a tract of land is taken."

The instruction was erroneous. The compensation the owner is entitled to receive where only a portion of a tract is taken in an eminent domain proceeding is the difference in the value of the whole tract immediately before and the value of what is left after the taking. *Arkansas State Highway Comm.* v. *Fox,* 230 Ark. 287, 322 S.W. 2d 81; *Arkansas State Highway Comm.* v. *Ptak,* 236 Ark. 105, 364 S.W. 2d 794; *Arkansas State Highway Comm.* v. *Hood,* 237 Ark. 202, 372 S.W. 2d 387.

The instruction, as given, states that just compensation is the fair market value of the land at the time it was taken and does not tell the jury that the measure of damages is the difference in the fair market value immediately before and the fair market value immediately after the taking.

Appellee argues that if Instruction No. 1, as given by the court, was erroneous, such error was cured by other instructions. The court did give other instructions which correctly stated the law as to the proper measure

of damages, but such correct instructions did not cure the error. In arguing the case to the jury, counsel for the appellee would have had every right to read to the jury Instruction No. 1 and emphasize that under this instruction the landowner could only recover the value of the land actually taken, which, in this case, appears to be a hole or gully. Such an argument would be confusing to the jury, because the real issue was the difference in the value before and after the taking.

Appellee also argues that appellant, in his answer, asked only for the value of the land taken and cites *Bradley* v. *Keith,* 229 Ark. 326, 315 S.W. 2d 13, as authority for the proposition that it is the duty of the defendant in an eminent domain proceeding to allege damages to the property not taken if he expects to recover on that theory. Suffice it to say that without objection the case at bar was tried on the theory of the before and after value. Both sides introduced evidence to prove such values. In addition, an instruction submitting that issue to the jury was given without objection.

Reversed and remanded.

WARD, J., dissents.

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

The court gave two instructions. The first instruction told the jury appellant was entitled to "just compensation" for the land taken. The majority hold this instruction to be reversible error because it did not tell the jury what constituted "just compensation". The second instruction did tell the jury what constituted "just compensation", and that is conceded to be true by the majority.

It is not contended by appellant or stated by the majority that the two instructions are contradictory as a matter of law. In the case of *Roland* v. *Terryland, Inc.,*

221 Ark. 837, 844, 256 S.W. 2d 315, where the same question was being considered, we said, quoting from *Hearn* v. *East Texas Motor Freight Lines,* 219 Ark. 297, 241 S.W. 2d 259: " 'They [instructions] are ordinarily read to the jury with continuity and unless *contradictory as a matter of law* must be considered as a whole' " (Emphasis added).

We have uniformly held that instructions must be considered as a whole. *Wright* v. *Rochner,* 233 Ark. 50, 342 S.W. 2d 483, and *Purnell* v. *Missouri Pacific Ry. Co.,* 235 Ark. 957, 362 S.W. 2d 674. In addition, the court in this case told the jurors "not to take any one of the instructions as the law of the case, but to consider each instruction with every other instruction and consider all instructions as a whole"!

The majority is fearful the appellee's attorney might sway the jury by emphasizing the first instruction. If we assume jurors are that easily swayed, then appellant was fully protected because his attorney could stress the second instruction.

HURLEY *v.* PEEBLES.

5-3380 384 S. W. 2d 261

Opinion delivered November 30, 1964.

Wright, Lindsey, Jennings, Lester & Shults, By: *John D. Eldridge,* for appellant.

Fletcher Long and *Dungan* and *Daugherty,* for appellee.

JIM JOHNSON, Associate Justice. This appeal involves attempted imputation of negligence in a suit for personal injuries sustained by a back seat passenger in the rear car of a rear end collision.

Early on the morning of September 20, 1960, about 5:00 A.M., a car driven by Alpheus Hubbard going south on Highway 17 collided with the rear of a truck near Shoffner eleven miles south of Newport. The truck was being driven by Donaciano Vasquez, an employee of W. F. "Buck" Hurley (who has since died). Passengers in the Hubbard car were appellee Edward Eugene Peebles and Joe F. Stobaugh. Hubbard and Stobaugh, in the front seat, died as a result of their injuries and appellee, who was asleep on the back seat of the car, was injured. (Another case resulting from this collision is *Stobaugh* v. *Hubbard,* 234 Ark. 917, 355 S. W. 2d 283.)

Appellee filed suit in Woodruff Circuit Court on February 25, 1963, against appellant Gladys Hurley, executrix of the estate of W. F. "Buck" Hurley, deceased. The complaint alleged, *inter alia,* that appellee was a passenger in Hubbard's car when it collided with the truck driven by Vasquez, an employee and agent of Hurley in the course of his, Vasquez' employment. The complaint contained detailed allegations of Vasquez' negligence, appellee's injuries and damages, and prayed judgment for $35,145.00 (including $24,600.00 for past and future loss of earnings). Appellant answered, (1)

denying appellee's allegations, (2) alleging that appellee was negligent in failing to exercise ordinary care for his own safety as a passenger and that such carelessness caused or contributed to his damages, and (3) pleaded that Hubbard was negligent in operating his vehicle and that Hubbard's negligence is imputed to appellee for the reason that Hubbard and appellee were engaged in a joint enterprise with an equal right to direct and control Hubbard's vehicle, and that Hubbard's negligence caused or contributed to appellee's damages.

Appellee amended his complaint on August 8, 1963, alleging additional injuries and damages based on a physical examination made in July, 1963, and increased his prayer for damages to $67,545.00, which appellant answered and denied.

Trial was had on February 5, 1964, and after deliberation the jury returned its verdict for appellee in the sum of $28,583.00. From judgment on the verdict comes this appeal.

For reversal appellant urges that the trial court erred in holding as a matter of law that negligence, if any, of Hubbard would not be imputed to appellee, and in refusing to submit that issue to the jury.

Appellant offered several instructions on imputation of negligence, the first of which was:

"Defendant's requested instruction No. 4.

"If you find from a preponderance of the evidence that Alpheus Hubbard was under the influence of intoxicants to such an extent that his ability to drive a vehicle was impaired, or that he was operating his vehicle at an excessive rate of speed under the circumstances, then you may take this into consideration in determining whether or not Alpheus Hubbard was negligent and whether or not such negligence, if any, was a proximate cause of the collision, injuries and damages."

The court refused this instruction, stating:

"Defendant's requested instruction No. 4 is refused for the reason that the court has held that, as a matter of law, the testimony in this case is insufficient to establish joint venture and that, therefore, the negligence of Alpheus Hubbard would not be imputed to the plaintiff in this case."

The court gave appellee's requested instruction No. 4 as follows:

"You are instructed that there is no competent evidence in this case that the plaintiff Peebles was engaged in a joint venture with the decedent Hubbard at the time of the collision. Therefore, Hubbard's negligence, if he was guilty of any negligence, would not be imputed to the plaintiff in this case."

And the court then instructed the jury orally as follows:

"As you have already been told, a joint venture was alleged in the answer and some proof was offered along that line, but the court holds that there is no competent evidence in this case to establish a joint venture."

to which instruction appellant objected, urging that under the evidence in this case the jury should be instructed, as a matter of law, that they were engaged in a joint venture, or at least the court should submit the issue of whether they were engaged in a joint venture to the jury.

Joint venture, variously called joint enterprise, common purpose and joint adventure, has been the subject of confusion in this state, and we therefore seize upon this opportunity to attempt to clarify the law. There is *no* confusion, however, about the basic law of joint enterprise.

"This court has consistently held that in order for a joint enterprise to arise two fundamental and primary requisites must concurrently exist, to-wit: a community of interest in the object and purpose of the undertaking in which the automobile is being driven and an equal right to direct and govern the movements and conduct of each other in respect thereto. If either or both of these

elements is absent, there is no joint enterprise." *Woodard* v. *Holliday,* 235 Ark. 744, 361 S.W. 2d 744.

The confusion has arisen relative to application of the law and in erroneous use of the term; that is, mislabeling apparent "assumption of risk" as "joint enterprise." This mislabeling has evolved into what could be called the "drunken joint enterprise" theory. This unique "theory" seems to have resulted from a misconception of the language in *Albritton* v. *Ferguson,* 197 Ark. 436, 122 S.W. 2d 620. Careful scrutiny of *Albritton* reveals that this opinion fails to say that which subsequent decisions appear to say it says on joint enterprise. In *Albritton* there was testimony that eight young people had gone in one car to Pine Bluff where they visited road houses, drank[1] and danced, the collision occurring on their way home. The Supreme Court, after finding that the trial court erred in giving an instruction which assumed as a matter of law that Parker (the driver) and Miss Albritton were engaged in a joint enterprise, concluded its discussion on this matter as follows:

"So it must appear that this question, so frequently referred to as 'common purpose,' or 'joint enterprise,' or 'joint adventure,' should be defined according to the definitions that we have hereaafter given. If upon a new trial the court may not determine, as a matter of law, from undisputed evidence whether the relation between the parties, the driver of the automobile and Miss Albritton, was such as to be classed as a joint enterprise, or whether they were merely host and guest, and it be necessary to a proper conclusion, on account of disputed evidence, or evidence of such character that reasonable men might differ as to its effect and value, the court will in such event submit to the jury the proposition and give

[1] The court distinguished *Albritton* from the *Chitwood* case, *infra,* as follows:

"It was not shown that Miss Albritton did very much drinking, but even if she had been drinking there is no development of the case that tends in the least to show that this might have affected the driving of the car, nor do we think that such drinking that she may have done at the time shows or establishes a condition as relates to her, similar to that in the Chitwood case. *Sparks* v. *Chitwood Motor Co.,* 192 Ark. 743, 94 S.W. 2d 359."

instructions so as to determine the relative rights of the parties as their relations may have been determined arising out of this question as to joint enterprise, or host and guest."

A divided court in *Missouri Pacific Transportation Co.* v. *Howard,* 201 Ark. 6, 143 S.W. 2d 538, reversed a judgment in favor of appellee passenger because of erroneous instructions. Before discussing the instructions, the court stated that there was sharp conflict in the testimony, appellee's evidence being that the driver and passengers were sober, appellant's being that they were drunk, "in the car . . . driving around on pleasure bent," and then said, "If this testimony is true [i.e., all inebriated], the parties in the car were engaged in a joint enterprise, and the negligence of the driver would be imputed to each of them. *Albritton* v. *Ferguson* [supra]." To set the record straight, if the group, appellee, the driver and other passenger, were drunk, appellee may have "assumed the risk" [*J. Paul Smith Co.* v. *Tipton,* 237 Ark. 486, 374 S.W. 2d 176], but the facts reflected in the *Missouri Pacific Transportation Co.* v. *Howard* opinion, *supra,* do not meet the criteria of joint enterprise as we understand them in the law of Arkansas. *Woodard* v. *Holliday, supra.*

In *Wilson* v. *Holloway,* 212 Ark. 878, 208 S.W. 2d 178, the court cites *Missouri Pacific Transportation Co.* v. *Howard, supra,* and *Albritton* v. *Ferguson, supra,* as authority for the "drunken joint enterprise" theory, and then states:

"In the case of *Sparks* v. *Chitwood Motor Co.,* 192 Ark. 743, 94 S.W. 2d 359, Justice Mehaffey approved the following statement from Berry on Automobiles, § 5.181: 'If the occupants and driver of an automobile drink together and become intoxicated, each is as responsible as the driver for negligent driving, and none can recover for injuries due to such negligence."

The logic in this quotation is well-founded in the law of assumed risk and was ample basis for the holding in

Wilson v. *Holloway* without reference to the dicta on "drunken joint enterprise." See *Sparks* v. *Chitwood Motor Co., supra.*

The true test of joint enterprise has been succinctly stated as follows:

"Any one of several persons engaged in an enterprise is barred from recovery against a negligent defendant by the contributory negligence of any other of them if the enterprise is so far joint that each member of the group is responsible to third persons injured by the negligence of a fellow member." Restatement, Torts, § 491 (1934).

In the case at bar there was no substantial evidence that Hubbard was intoxicated on the journey home. Under the facts here obtaining, the test would be whether Peebles, asleep on the back seat, would have been liable to Vasquez or Hurley for negligent driving of Hubbard. Clearly he would not.

Affirmed.

ASHWORTH *v.* HANKINS.

5-3238 384 S. W. 2d 254

Opinion delivered November 30, 1964.

Murphy & Burch, for appellant.

No brief filed for Appellee.

FRANK HOLT, Associate Justice. In 1953 the appellees, H. C. Hankins and Mrs. H. C. Hankins, contracted to sell realty to certain parties who, in 1960, assigned their rights under the contract to the appellants, Leon Ashworth and Fannie Jo Ashworth, with the consent of the appellees. Now the appellants, as buyers, have sued the appellees, as sellers, for the specific performance of their contract. When the appellants completed their testimony the appellees filed a written demurrer to their evidence. The trial court sustained the demurrer and dismissed appellants' complaint. On appeal the appellants contend, in effect, that they presented a *prima facie* case and, therefore, the chancellor should not have sustained a demurrer to their evidence. We must agree with the appellants.

It is a well settled rule that where a demurrer to the plaintiff's evidence has been sustained such evidence, on appeal, must be viewed in the light most favorable to the appellant. *Werbe* v. *Holt,* 217 Ark. 198, 229 S.W. 2d 225. As we reiterated in the very recent case of *Brock* v. *Bates,* 227 Ark. 173, 297 S.W. 2d 938:

"* * * the Court must give the evidence its strongest probative force in favor of the plaintiff and rule against the plaintiff *only* if such evidence, when so considered, fails to make out a *prima facie* case." [Emphasis added]

In the case at bar an examination of the contract reveals that the total purchase price was $6,000.00 payable in monthly installments of $50.00 each. According to the evidence, including the notations on the contract, the appellants became delinquent several times as much as one, two and three months. Multiple payments on these delinquencies were accepted by appellees. The last pay-

ment was made in June, 1962, at which time there was a balance owed of $2,205.47. The appellants filed their complaint in October, 1962, seeking specific performance and alleging, *inter alia,* that they had previously tendered, and with the filing of this complaint tendered, the full balance due under the terms of the contract. There was evidence that in September, 1962, the appellees were told the appellants would have the money to pay the entire balance within a few days because they had sold the property and the purchaser's loan depended upon approval of the title; that it was appellants' understanding that the appellees had no objection to waiting for completion of the loan to pay off the balance due under the contract; that instead, appellees withdrew from the escrow agent the contract and other papers and refused to convey the property to appellants. Upon filing of the complaint there was again tendered the *full balance,* including interest, an insurance premium, and one year's taxes which appellees had paid.

We have long adhered to the rule that equity ahors a forfeiture. *Friar* v. *Baldridge,* 91 Ark. 133, 120 S.W. 989. There we said:

"* * * 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 reason for this rule is aptly expressed in *Williams* v. *Shaver,* 100 Ark. 565, 140 S.W. 740, where we said:

"* * * It is well recognized that the right of forfeiture is a harsh remedy and liable to produce great hardships."

In the case at bar approximately $4,000.00, plus interest, had already been paid on the original contract over a period of nine years. During the fifteen months preceding this litigation the appellees had accepted in multiple payments the repeated delinquencies of appellants.

In the very recent case of *Berry* v. *Crawford,* 237 Ark. 380, 373 S.W. 2d 129, the contract provided that

time was of the essence and we required specific performance although the payment was not tendered until after the due date. In holding that the vendor was not entitled to a forfeiture we again recognized the equitable principle that forfeitures are abhorred and equity will seize the slightest circumstance indicating a waiver in order to avoid or prevent a forfeiture. In the instant case the contract in question does not express that time is of the essence. See, also, *Vernon* v. *McEntire,* 232 Ark. 741, 339 S.W. 2d 855, and *Feibelman* v. *Hill,* 141 Ark. 297, 216 S.W. 702.

In the case at bar, when we view the evidence presented by the appellants in the light most favorable to them and apply this evidence to the rules enunciated by these cases, it must be said that the appellants' evidence constituted a *prima facie* case. It therefore follows that the case must be reversed and remanded with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

5-3379 384 S. W. 2d 492

Opinion delivered December 7, 1964.

W. B. Brady, Spitzberg, Bonner, Mitchell & Hays, By: *Beresford L. Church, Jr.,* for appellant.

McMath, Leatherman, Woods & Youngdahl, for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves the construction of the language of the "air travel" clause in an insurance policy issued on the life of Ralph L. Denny. The policy is entirely an accident policy, and the company agrees to pay benefits up to $10,000.00 for loss of life or certain bodily injuries sustained by the insured. As to AIR TRAVEL, the company is liable for:

"Injury sustained in consequence of riding as a passenger, and not as an operator or crew member, in or on, boarding or slighting from, or being struck by any aircraft having a current and valid airworthiness certificate or any transport type aircraft operated by the

Military Air Transport Service (MATS) of the United States or by the similar air transport service of any duly constituted governmental authority of any recognized country.''

While on temporary duty at Goose Bay Air Base, Labrador, Denny, an Airman Second Class in the United States Air Force, was struck and killed by a propellor of a KC-97G (Stratofreighter). Mrs. Pearl Denny, mother of Ralph, the beneficiary under the policy, made claim to the insurer, American Homestead Insurance Company, appellant herein. The company denied her claim on the ground that Denny was a crew member of the plane, and also on the ground that the plane was of a type excluded under the provisions of the policy. Suit was thereafter instituted, and the court, sitting as a jury, found for Mrs. Denny, holding that ''Airman Ralph Denny was not a crew member of the particular plane that caused his death. Denny was not struck by an 'aircraft having a current and valid airworthiness certificate or any transport type aircraft operated by the Military Air Transport Service (MATS) of the United States,' but that he was fatally injured when struck by an aircraft operated 'by the similar air transport service of any duly constituted governmental authority of any recognized country.' '' The judgment was thereupon entered in the principal amount of $10,000.00, together with the sum of $1,200.00 as penalty, and attorneys fees in the amount of $1,000.00. From such judgment appellant has appealed.

For reversal, appellant asserts that Denny was not covered under the policy because (1) he was a crew member of the aircraft which caused his death, and (2) Denny was struck by an aircraft of a type excluded from coverage under the policy.

Inasmuch as we think appellant must prevail under the second contention, we see no necessity to discuss the question of whether he was a crew member of the aircraft which caused his death.

Let it first be said that it is agreed that the term, "airworthiness certificate" has no application to the facts in this case, since this certificate is only issued to civil aircraft. Likewise, it is admitted by appellee that the KC-97G plane is not a MATS aircraft (and, in fact, the court so found).[1]

At the outset, it might be well to discuss some of the functions of MATS (Military Air Transport Service). Air Force regulations relate that the overall mission of this branch of the Air Force "is to maintain in a constant state of readiness, the military airlift system necessary to perform all airlift tasks under emergency conditions assigned by the Joint Chiefs of Staff in approved war plans and appropriate JCS and Air Force guidance documents. MATS will supervise and operate the Air Weather Service, the Air Photographic and Charting Service, the Air Rescue Service, a domestic aeromedical evacuation system, and the 1254th Air Transport Wing, Special Missions." Additional functions mentioned, and covering several pages, include individual air transport service for the President of the United States and other government officials and foreign dignitaries, and maintaining liaison with the civil air industry. There are numerous other functions performed by MATS, which, however, are not pertinent to this litigation.

The KC-97G plane (a propeller of which struck Denny) is a part of SAC (Strategic Air Command), and the function of SAC is to bomb foreign targets in time of war. The KC-97G is a tanker plane, and is used to refuel bombers while in flight. Actually, it may be said that it serves as an airborne gasoline tank truck. Of course, there is the similarity that both a MATS plane and the KC-97G are aircraft belonging to the United

[1] In a letter by Colonel Paul P. Douglas, Jr., (admitted by stipulation) it is pointed out that the Stratofreighter was not assigned to, or connected with, the Military Air Transport Service, and it was not transporting gasoline, parts or material to be used by the air transport service. Captain Richard F. Leisman stated (in a letter admitted by stipulation) that Denny was assigned to the 384th Organizational Maintenance Squadron, 384th Bombardment Wing, Little Rock Air Force Base, Strategic Air Command, and the plane involved was also assigned to the same unit.

States Air Force, but we see no other similarity that would bring this type of plane under coverage in the accident policy. A passenger automobile and a gasoline truck are also similar in that both are operated by gasoline engines, both have four wheels, and both have headlights and taillights, but it could not seriously be argued that these two types of vehicles render the same service.

It will be noted that the air travel clause provides that coverage is afforded where one is injured while being transported (also boarding, alighting from, or struck) by an aircraft operated "by the Military Air Transport Service of the United States or by the similar air transport service of any duly constituted governmental authority of any recognized country." This last, to us, plainly means that one is covered when he is transported in, or struck by, a plane of a foreign country, which is a part of the air branch of that nation, the duties of which correspond to those of MATS in this country.[2] However, the "similar [to MATS] air transport service" referred to includes only the transport service provided by a "recognized country." In other words, there would be no coverage if a person were riding in a transport plane belonging to Red China, even though the plane was a part of the Chinese air arm that corresponded with MATS.

Appellee argues that this last portion of the clause does not refer to a foreign country. She seems to contend that the words, "recognized country," refer to the United States, and that SAC is a governmental authority

[2] As a matter of interest, it might be pointed out that the policy involved is not one which, to use a comparison, provides coverage only when a person is injured "riding a one-eyed red mule on a muddy road." Actually, the policy affords rather broad coverage for the amount of annual premium paid ($10.00). Coverage is provided for any injury sustained in consequence of driving, riding in, or being struck by an automobile, and further coverage is afforded for injury sustained while riding as a passenger, boarding or alighting from, or being struck by any aircraft holding a valid airworthiness certificate, as well as coverage under the clause quoted in this opinion. The policy provides double indemnity benefits if the injury is sustained while one is riding as a fare-paying passenger on any public conveyance owned and operated by a common carrier, which would, of course, include commercial planes, trains, and busses.

operating planes for a purpose similar to MATS. In *St. Paul Fire & Marine Ins. Co.* v. *Kell,* 231 Ark. 193, 328 S.W. 2d 510, this court, quoting from an earlier case, said:

"It is the duty of the Courts to construe the language used by the parties and such construction is performed by considering the sense and meaning of the terms which the parties have used as they are taken and understood in their plain ordinary and popular sense."

We think appellee's argument is erroneous under the plain and ordinary interpretation of the words used, and we find no substantial evidence to support the judgment of the trial court.

Reversed and dismissed.

ROBINSON and JOHNSON, JJ., dissent.

REDDELL *v.* MO. PAC. R.R. CO.

5-3381 384 S. W. 2d 486

Opinion delivered December 7, 1964.

McMath, Leatherman, Woods & Youngdahl, for appellant.

William J. Smith, W. A. Eldredge, Jr., for appellee.

Ed. F. McFaddin, Associate Justice. This is a case brought by an employee against the railroad company under the provisions of the Federal Employer's Liability Act, as found in United States Code Annotated, Title 45, §§ 51-60, inclusive. The appellant, James R. Reddell was plaintiff below; and the appellee, Missouri Pacific Railroad Company, was defendant below. For convenience we will refer to the parties as they were styled in the Lower Court. The Trial Court granted a summary judgment for the defendant and the plaintiff brings this appeal. The sole issue is whether the defendant was guilty of any negligence. If so, the judgment of the Trial Court must be reversed so that the case may be submitted to a jury.

The facts are undisputed. They were established both by stipulation and by defendant's answers to plaintiff's interrogatories. Reddell was a man 33 years of age and for some time had been working as a helper on a Jordan spreader. Pictures in the transcript show the Jordan spreader to be about the size of an ordinary railroad car. It is mounted on wheels like a boxcar and rolls on the railroad track. The cab is on the front and back of the cab there are blades on each side of the car which may be retracted against the car or extended out for ditching and grading of the railroad right-of-way. The Jordan spreader is operated from a cab in the extreme front, which cab is about 90 inches long and 86 inches wide; and ingress and egress to the cab is by a doorway at the back of the cab. The floor of the cab is 12½ inches lower than the floor of the platform on which a person must exit from the cab. The doorway from the cab to the platform is about 24 inches wide and about 64½ inches high. Just back of and above the doorway there is an iron beam. In leaving the cab the step up to the platform is 12½ inches high; and 17 inches outside of the cab door on the platform side of the equipment there

is the overhead steel beam previously mentioned which is a regular part of the spreader equipment.

At about 8:20 A.M. on a clear day in April, the Jordan spreader was on the railroad track and was not in motion. Reddell was in the cab; and in attempting to leave the cab he bumped his head against the iron beam over the doorway, and received injuries, for the compensation of which he brought this action. He alleged that the railroad company was guilty of negligence in failing to furnish him a safe place to work in that the iron beam above the doorway was too low. The reason Reddell bumped his head was because when he undertook to leave the cab he either failed to stoop sufficiently to pass under the iron beam, or raised to an erect position too soon and thus bumped his head against the said overhead steel beam. He claimed that the railroad company was negligent in failing to furnish him a safe place to work because he should have been furnished a place where he could make an exit from the cab without bumping his head. On the undisputed facts the Trial Court granted the defendant's motion for summary judgment, having reached the conclusion that the plaintiff had failed to show the defendant to have been guilty of any negligence.

As we have heretofore stated, this case was filed under the Federal Employer's Liability Act, which is "the law unto itself"; and State courts must construe the Act as the Supreme Court of the United States has construed it. Some of the numerous cases decided by that Court involving the Act, are: *New York Central & H. R.R. Co.* v. *Tonsellito,* 224 U.S. 360, 37 S. Ct. 620, 61 L. Ed. 1194; *Mo. Pac. R.* v. *Aeby,* 275 U.S. 426, 48 S. Ct. 177, 72 L. Ed. 351; *Rogers* v. *Mo. Pac.,* 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, and *Gallick* v. *B. & O. R.R.,* 372 U.S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618. The Act has several times been before this Court. Two of our cases are: *Mo. Pac. R. Co.* v. *Hathcock,* 200 Ark. 294, 139 S.W. 2d 35; and *Mo. Pac. R. Co.* v. *Davis,* 208 Ark. 86, 186 S.W. 2d 20. A summary judgment should never be granted against a plaintiff in a case like this one if there is any substantial evidence

on which a jury might base a finding that the defendant had been guilty of negligence. Contributory negligence is not a defense, but may be shown only to reduce the damages. U.S.C.A. Title 45, § 53. But in order to recover, the plaintiff must show the defendant to have been negligent. *Mo. Pac.* v. *Davis, supra.* In the excellent briefs filed by both sides, many cases have been cited, some of them being: *Stanczak* v. *Penn. Rr. Co.* (7th Cir.) 174 F. 2d 43; *Delevie* v. *Reading Co.* (3rd Cir.), 176 F. 2d 496; *Armenia* v. *Wyer* (2nd Cir.), 210 F. 2d 592; *Slaughter* v. *Atlantic Coastline,* 112 U.S. App. D.C. 327, 302 F. 2d 912; *Chojinski* v. *New York Central,* 151 A. 122, 8 N.J. Misc. 576; *Werner* v. *Illinois Central,* 309 Ill. App. 292, 33 N.E. 2d 121; *Smith* v. *Schumacker,* 30 Cal. App. 2d 251, 85 P. 2d 967; *Louisville & Nashville R. Co.* v. *Cooke,* 267 Ala. 424, 103 So. 2d 791; *Butler* v. *Gay* (Fla. App.), 118 So. 2d 572; and *Coleman* v. *Gulf, Mobile & Ohio,* 17 Ill. App. 2d 220, 149 N.E. 2d 656.

After giving full consideration to the applicable statutes and the adjudicated cases, and the facts in the case at bar, we reach the conclusion that the plaintiff has entirely failed to show that the railroad company was guilty of any negligence. This Jordan spreader was a standard item of railroad equipment and there is no showing that the overhead iron beam on this spreader was different from that on any other spreader. There is no showing that the overhead iron beam was not an essential part of the mechanism of the Jordan spreader. There is no claim that the iron beam was defective, or that this Jordan spreader was defective in any way, or that the iron beam was misplaced or lower on this spreader than on any other. Plaintiff Reddell had worked on this particular spreader for some time. His height is not shown in the record. To hold the railroad company to have been negligent in this case, would be to say that the use of this Jordan spreader by the railroad company was *ipso facto* negligence. Such is not shown. The plaintiff has failed to show any negligence by the railroad company in this case.

Affirmed.

ARK. FOUNDRY CO. *v.* FARRELL.

5-3230 385 S. W. 2d 26

Opinion delivered December 7, 1964.

[Rehearing denied January 11, 1965.]

Barber, Henry, Thurman & McCaskill, House, Holmes, Butler & Jewell, John B. Moore, Jr., Owens, McHaney & McHaney, for appellant.

Sharp & Sharp, By *James B. Sharp* and *John D. Thweatt,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellants to enforce laborers' and materialmen's liens arising from the partial construction of a warehouse building in the city of Brinkley. The only serious question is whether the lienors are entitled to enforce their claims against the land as well as against the building. The chancellor held that the claimants have no lien against the land.

The trial extended over several days, producing a record comprising eleven volumes of pleadings, testimony, and exhibits. We find it unnecessary to set out the conflicting evidence in detail; for even if it should be conceded that the proof establishes the fact situation relied upon by the appellants in their brief they are still not entitled to a reversal of the decree.

The unfinished warehouse was built by Charles Malham and his brother upon vacant lots owned by Paul M. Farrell as trustee. Farrell (and the members of his family for whom he acted as trustee) owned a number of substantial business enterprises. Over a period of years Charles Malham had been employed by the Farrell interests as a laborer and in other positions of neglible responsiblity. Malham and Paul M. Farrell were personal friends and fellow church members. On many occasions Farrell had befriended Malham, as by advancing funds (which were not repaid). Some two years before the building in controversy was begun Farrell had assisted Malham in entering the business of buying and selling soybeans. In this venture Farrell provided much of the needed equipment and allowed Malham to occupy some vacant land rent-free.

In the fall of 1958 Malham proposed that he expand his operations by constructing a $45,000 grain warehouse having a storage capacity of 341,000 bushels. Malham and Farrell discussed the proposal several times. Malham planned to finance the venture, at least in part, by collecting advance storage charges from farmers who would be patrons of the warehouse. Ultimately Malham succeeded in raising more than $20,000 in this fashion and used the money in the construction.

Malham testified that Farrell agreed to help him in the project and to permit him to use the land now in dispute either rent-free or under a long-term lease that would be agreed upon later on. Farrell contradicts Malham's testimony to some extent, but in deciding this appeal we may take Malham's version to be correct.

In October of 1958 Malham employed a contractor and began to erect the warehouse upon the Farrell land. Farrell insisted at the trial that Malham's entry upon the land was an out-and-out trespass, but we think it plain that Farrell consented to Malham's occupancy of the property. There is, however, no suggestion that Farrell made any affirmative statement or took any affirmative action that might lead the laborers and materialmen

to think he meant to subject the land itself to their liens. All that can be said is that Farrell stood by and allowed the construction to proceed. Eventually Malham came to the end of his resources and had to abandon the venture before the building was complete. There is evidence that Malham succeeded in finding sufficient financial backing to enable him to offer to buy the land, but Farrell refused to sell the property "at any price." Within apt time the appellants sought to enforce their liens against the land as well as against the improvement.

It is recognized by the appellants that, under the statute, they must show that their labor and materials were furnished pursuant to a contract with the owner of the land or with his agent. Ark. Stat. Ann. § 51-601 (1947). In contending that this burden has been met counsel rely upon a line of cases involving leases that required the tenant to make improvements upon the premises. In that situation the tenant is held to be the landowner's agent.

The landmark case is *Whitcomb* v. *Gans,* 90 Ark. 469, 119 S.W. 676. There the written lease *obligated* the tenant to make improvements and repairs costing not less than $400. In holding that under such a lease the tenant acted as the landlord's agent in contracting for the construction work we left open the question whether the same rule would apply if the landlord had merely consented that the tenant might, at his option, improve the property: "We need not go so far as to hold that a lessor may make his property subject to lien merely by consenting for the lessee to make improvements. The lessor, in the present case, did more than that. She not only consented to the making of the improvements, but she bound the lessee to do so."

The issue left open in the *Whitcomb* case was squarely presented in *Hawkins* v. *Faubel,* 182 Ark. 304, 31 S.W. 2d 401, where the lease did not *obligate* the tenant to make the contemplated improvements. In holding that in this situation the land itself was not subject to a materialman's lien we said: "We now decide the question

reserved in the case of *Whitcomb* v. *Gans, supra,* and we hold that the lessor does not make his property subject to lien merely by consenting for the lessee to make improvements."

That case governs this one. Counsel for the lienors candidly concede that the terms of Malham's supposed oral agreement with Farrell were "nebulous." Not even under the most favorable view that might be taken of Malham's testimony can it be said that he assumed a *duty* to build the warehouse. At most he had Farrell's oral permission to enter the land and erect the warehouse if he chose to do so. The essential element of a binding obligation is wholly lacking.

It is equally plain that, under our decisions, Farrell's conduct did not create an estoppel. In considering a similar situation in *Gunter* v. *Ludlam,* 155 Ark. 201, 244 S.W. 348, we held: "There is no element of estoppel in the present case which would bar appellants from asserting the superiority of their [vendor's] lien. Mere knowledge on their part that labor and material were furnished for the construction of the building, or even their consent thereto, in the absence of some affirmative act which indicated a willingness to subordinate their claim to that of the subsequent lienors was not sufficient to operate as an estoppel." Accord: *Fine* v. *Dyke Bros.,* 175 Ark. 672, 300 S.W. 375, 58 A.L.R. 907.

Counsel also cite *McGehee Realty & Lbr. Co.* v. *Kennedy,* 200 Ark. 926, 141 S.W. 2d 524. There we allowed the liens because we found that the owner of the lot had given it to his son, who contracted for the construction of a house upon the property. Thus the land was lienable, for the son had ownership rather than mere possession. See *Mansfield Lbr. Co.* v. *Gravette,* 177 Ark. 31, 5 S.W. 2d 726. In the case at bar Malham's vague testimony did include an assertion that in the preliminary discussions Farrell promised to give him the lots, but a finding that a gift actually took place would be contrary not only to Malham's own testimony but also to many convincing facts and circumstances in the record.

It is with reluctance that we affirm this decree. Farrell, as the owner of the lots, is alone in being in a position to bid in the property without having to substantially destroy the value of the warehouse by removing it from the land. It appears that he is using his advantage to reap a windfall at the expense of the appellants. All that can be said is that his conduct is within his strict legal rights.

There are two motions for costs. The appellants designated an abbreviated record and submitted a short printed abstract. The appellees required that the whole record be brought up and a filed a supplemental abstract of 418 printed pages. The appellants ask reimbursement for the additional record. The appellees counter with a similar request for the cost of the supplemental abstract. We grant the appellants' motion to the extent that unnecessary pleadings were designated at a cost of $284.40. In other respects both motions are meritorious in part only. Neither side attempts to point out the exact extent to which the added expense was unnecessary. We do not consider it to be our duty to sift the complete record and the supplemental abstract to determine just what additional costs might be allowed to each side.

Affirmed.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). I cannot bring myself to vote to affirm this case because I am thoroughly convinced that a great injustice is being done, and that Mr. Farrell is being allowed to unjustly enrich himself at the expense of the appellants. The equity courts came into existence to relieve against the rigors and/or injustices of the law; and this case comes to us on appeal from an equity court. I think it is our duty to mold a remedy for these appellants to prevent Mr. Farrell from unjustly enriching himself at their

expense. I like this language from the Supreme Court of Florida:[1]

"Its first maxim is that equity will not suffer a right to be without a remedy. . . . In a changing world marked by the ebb and flow of social and economic shifts, new conditions constantly arise which make it necessary, that no right be without a remedy, to extend the old and tried remedies. It is the function of courts to do this. It may be done by working old fields, but, when it becomes necessary, they should not hesitate to 'break new ground' to do so."

Our Court spoke out in like manner in *Renn* v. *Renn,* 207 Ark. 147, 179 S. W. 2d 657, wherein we said:
". . . equity must always be as astute in preventing fraud as corrupt minds are in conceiving it. A court of conscience must keep the granted relief abreast of the current forms of iniquity. We would never naively refuse relief against fraud simply because there is no similar instance of such fraud in the books."

I am willing to "break new ground" to prevent Mr. Farrell from being unjustly enriched at the expense of these appellants. The Majority Opinion recognizes that affirmance is unjust, when it says:

"It is with reluctance that we affirm this decree. Farrell, as the owner of the lots, is alone in being in a position to bid in the property without having to substantially destroy the value of the warehouse by removing it from the land. It appears that he is using his advantage to reap a windfall at the expense of the appellants. All that can be said is that his conduct is within his strict legal rights."

I would build an estoppel against Mr. Farrell and not permit him to be heard to say that he had not given—or leased for a long number of years—the land to Malham on which the warehouse was situated. Heretofore we have molded the remedy to grant relief when the

[1] *State ex rel, Watkins* v. *Fernandez,* 106 Fla. 779, 143 So. 638, A.L.R. 240.

equities demanded it. *Quality Excelsior Coal Co.* v. *Reeves*, 206 Ark. 713, 177 S. W. 2d 827. I think the same thing should apply here. We could at least require that Farrell would receive a reasonable annual rent, for the use of the land on which the building was situated, for a period of ten years. That would be somewhat in line with the cited case that we have mentioned above.

In *Keylon* v. *Arnold*, 213 Ark. 130, 209 S. W. 2d 459, a son refused to care for his mother in her declining years and, remaining silent, knowingly allowed her to convey the land to the appellee for the purpose of caring for the lady. We held that the son by his silence created an equitable estoppel against himself and that he could not, after his mother's death and after appellee had fully performed the contract, be heard to assert that he (the son) owned the land; and we said in that case:

"It is well settled that equitable estoppel may arise by silence or inaction. In 19 Am. Jur. 661 this appears: 'An estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by "standing by", and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence where there are a knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim "one who is silent when he ought to speak will not be heard to speak when he ought to be silent".'

"*Trapnall* v. *Burton*, 24 Ark. 371, is an opinion prepared by Albert Pike. In that opinion there is this classic language: 'If a person who has the claim to, or is the owner of property real or personal, stands by and permits it to be sold, without giving notice of or asserting his right, he is estopped from setting up his claim or title, against the purchaser. *Shall* v. *Biscoe*, 18 Ark. 142; *Corbett* v. *Norcross*, 35 N.H. 99; *Storrs* v. *Barker*, 6 C.J.R. 344. "There is no principle," said Chancellor

Kent, in *Wendell* v. *Van Renssalaer,* 1 J.C.R. 354, "better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowlingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice; and his conscience is bound by this equitable estoppel".' "

In *Keylon* v. *Arnold,* a person who claimed the land sat still and remained silent; and we held that he was estopped to later assert his claim after he had seen others in good faith act on the assumption that the person with whom the others were dealing was the actual owner of the land. I think that principle applies here. The Majority Opinion says that to reach such conclusion we would be doing violence to a number of our cases, some of which are: *Hawkins* v. *Faubel,* 182 Ark. 304, 31 S. W. 2d 401; *Gunter* v. *Ludlam,* 155 Ark. 201, 244 S. W. 348; and *Fine* v. *Dyke Bros.,* 175 Ark. 672, 300 S. W. 375, 58 A.L.R. 907. But I distinguish the case at bar from those cases because there are facts here present which show that Mr. Farrell *was in bad faith* in letting these materialmen furnish the material. Here are portions of Farrell's own testimony regarding his conduct with Malham:

"Q. Well, did he talk to you about putting a building on your property?

"A. He mentioned it in conversations. . . .

"Q. Did you tell him he could not build on your property?

"A. No, sir; I never did tell him not to build.

"Q. Well, did you give him permission to build?

"A. No, sir; I never gave him permission to build.

"Q. Well, what did you do when you noticed construction was proceeding on your property?

"A. I called my attorney, Mr. James Sharp, and had him come down to my office, and asked him what to do.

"A. All right, sir.

"Q. We thought about going down there and stopping him. But we figured this would entail a lawsuit or damages, because the boy was dreaming about a $50 thousand a month profit. . . .

"Q. Did you forbid him to build a building on that property?

"A. No, sir; I never told him not to build it.

. . .

"Q. Then the question asked you was what caused you to fear a lawsuit should you stop him from building on your property?

"A. Because he was so worked up, and was in trouble, and if anybody had stopped him at that time—especially me—he would have sued for future profits. . .

"Q. What factual basis did he have, or did you fear he had, against you?

"A. Nothing. Only he would have thought I would have been stopping him from making a lot of money.

"Q. And you took that position after seeking the advice of counsel.

"A. Yes, sir.

"Q. Can you be any more specific as to what caused you that fear, other than your thinking this man was dreaming?

"A. No, sir.

"Q. Did your attorney advance any other ground?

"A. Not that I remember.

"Q. That is a rather unusual basis for an attorney to render a legal opinion on, is it not?

A. Yes, sir. But I have forgotten what he said, if he said anything else.

"Q. But he did tell you not to touch that man; to let him alone Is that right?

"A. That's right.

. . .

"Q. Did you not see them pouring concrete at the site of that building?

"A. I saw them pouring concrete when the building was nearly finished.

. . .

"Q. All right. What did you tell him about going on with that building. Did you forbid him to go on with it?

"A. No, sir.

"Q. All right. What was the arrangement after he finished the building? He had it almost done, you said.

"A. We did not have any arrangement of any kind.

"Q. Did you have any understandingn at all?

"A. We had no understanding of any kind.

"Q. Were you going to let him use your property rent free?

"A. Yes, sir. We had no agreement about rent, lease, or the purchase of the property. And no money, or any amount of money was ever mentioned in any way.

"Q. Well, did you lead him to believe that after he got his project done you would let him use that property?

"A. Well, if he could have built the project I would have probably let him use it free.

"Q. Well, you led him to believe he could lease it there, didn't you? You weren't going to make him move it, were you?

"A. No, sir.

"Q. No, sir, what?

"A. I never said I would make him move it.

"Q. And you led him to believe you wouldn't make him move it, did you not?

"A. What is the question?

"Q. I said you led him to believe you would not make him move his building after he got it built?

"A. Well, yes, sir."

To quote further from the testimony of Mr. Farrell would only tend to unduly prolong this dissent. I maintain that he is estopped to claim against these appellants. His testimony clearly established: (a) that Farrell allowed Malham to erect the building with the understanding that it would not have to be moved; and (b) that Farrell knew that materials were being furnished to build a $30,000.00 building on his land, and he never uttered a word of warning to the material furnishers or to Malham. I maintain that Mr. Farrell acted in bad faith. In *Trapnall* v. *Burton, supra,* Justice Albert Pike quoted Chancellor Kent: " '. . . if one man knowingly, though he does it passively, by looking on, suffers another to . . . expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person.' " That situation fits Mr. Farrell in the case at bar; and I maintain that on the basis of Mr. Farrell's conduct, equity should allow the purchaser of the building on the land to have the use of the land rent free for a sufficient period of time to amortize the cost of the building.

There is another significant fact in this case that should be mentioned; and it is that Mr. Farrell made a trade with the local laborers in the course of this litigation, the effect of which was, that if they lost their labor lien claims in this litigation he would pay them in full the amount of such claims. This was almost equiva-

lent to buying their silence. The result is that the local laborers are paid and the materialmen are defeated, and Farrell reaps a wonderful reward. In a case on an entirely unrelated factual situation, Judge John E. Miller said: "The facts here require the application of the principle that equity will not permit one to unjusttly enrich himself at the expense of another." (*E. L. Bruce Co.* v. *Bradley Lbr. Co.*, 79 F. Supp. 176.) I would not permit Farrell to unjustly enrich himself at the expense of these materialmen. I would distinguish the case at bar from our previously adjudicated cases on the basis of Mr. Farrell's bad faith, and I would hold that Mr. Farrell is in equity estopped from claiming the use and possession of the land on which this building is located for a period of years sufficient to allow the building to sell for a reasonable purchase price. I think that is equity. The old maxim is: "Equity will not suffer a wrong to be without a remedy." Mr. Farrell remained silent when he should have spoken, and he cannot now be heard to speak and claim that the building on the land must be removed at the time of the purchase. I would carve out a remedy in accordance with the facts, just as was done in the case of *Quality Excelsior Coal Co.* v. *Reeves,* 206 Ark. 713, 177 S.W. 2d 827.

For these reasons I dissent from the Majority Opinion, which affirms the Chancery decree and gives Farrell a windfall profit.

SAFEWAY STORES *v.* SHWAYDER BROTHERS.

5-3389 384 S. W. 2d 473

Opinion delivered December 7, 1964.

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

Fulk, Wood, Lovett & Parham and S. Hubert Mayes, Jr. for appellee.

PAUL WARD, Associate Justice. Two issues are raised on this appeal. One, is there an appealable order? Two, is Act 101 of 1963 constitutional as appellant seeks to apply it to the facts of this case? The facts necessary to an understanding of these issues are as hereafter briefly set forth.

On November 17, 1962 John E. Chronister was in one of the stores belonging to Safeway Stores, Inc. and sat down on a metal chair manufactured by Shwayder Brothers, Inc. (hereafter called appellee). The chair collapsed and Chronister was severely injured by the ensuing fall. On July 19, 1963 he filed suit against Safeway Stores (hereafter called appellant). On August 21, 1963 appellant answered and also cross-complained against appellee, a non-resident corporation, not authorized to do business in Arkansas. Appellant, after alleging acts of negligence on the part of appellee, stated that if appellant "is found to be liable in any degree to the plaintiff (Chronister), then this defendant (appellant)

is entitled to have judgment over and against'' appellee for indemnity or contribution as provided by Ark. Stat. Ann., § 34-1001 (Repl. 1962) et seq., being the Uniform Contribution Among Tortfeasors Act.

Appellant obtained service on appellee under the provisions of Act 101 of 1963, Ark. Stat. Ann., §§ 27-2501 —27-2507 (Supp. 1963), known as the Uniform Interstate and International Procedure Act. There is no contention that the form or manner of service, as required by the Act, was defective. Appellee entered a special appearance to file a motion to vacate, quash, and set aside the said ''purported summons and purported service''. This motion was sustained by the trial court, and it is from this action of the trial court that appellant prosecutes this appeal.

One. Appellee makes an able argument that there is no appealable order in this case, and that therefore the appeal should be dismissed. To sustain this argument appellee relies heavily on what we said in a *per curiam* opinion in the case of *Robberson* v. *Steele Canning Co.,* 233 Ark. 988, 349 S.W. 2d 814. While that case appears on casual examination to be controlling in this case, we think a valid and logical distinction exists. In the *Robberson* case it will be observed that we said the trial court quashed the ''*service* of summons'', and that we also said: ''we think the better practice is to require him either to stand upon the sufficiency of his *service* and permit a final order to be entered, or to have the return amended to conform to the rulings of the court''. (Emphasis added.) In the cited case we think the court had in mind that it would be a waste of time, money and effort to perfect an appeal to this Court only to learn it was necessary ''to have the return amended'' and then perhaps start again on the long and expensive cause of perfecting another appeal. In other words, in the *Robberson* case, the trial judge was in effect saying to the appellant: when you amend your service I am ready to hear your case. The above situation was not, we think, the situation in the case here under consideration. Here,

the trial court did not quash the "purported summons" because of any defect in the way it was served—that is, a defect which could be amended. To the contrary, the trial court "held the attempted retroactive application of Act 101 . . . relating to service of summons on non-resident defendants is unconstitutional and void"; That holding by the court amounted in fact to a judgment on the merits of the real issue raised by this appeal. Not only so, but the trial court also said "this court is without jurisdiction as to" appellee. This certainly makes it clear that appellant would not be allowed under any circumstances to try its case against appellee. We must conclude therefore that the only relief available to appellant was to appeal to this Court. In that respect the trial court's order was final and appealable.

Two. As previously indicated, appellant's contention is that the trial court erred in holding said Act 101 unconstitutional as applied to appellee—a non-resident corporation. Putting it another way, appellant says: "The trial court erred in granting appellee's motion to quash on the ground that Act 101 of 1963 cannot apply retroactively". In other words, the decisive issue here, as appellant sees it, is whether said Act 101 deals with procedure or with the substantive rights of appellee. In our opinion the Act deals only with procedure (in this case), as contended by appellant, and is therefore governed by our decision in the case of *Harrison* v. *Matthews,* 235 Ark. 915, 362 S.W. 2d 704. There, in construing Act 54 of 1961 Ark. Stat. Ann. § 27-339 (Repl. 1962), we held service pursuant to the Act was good in "a case involving a cause of action that antedated the statute". In so holding we quoted with approval the following from *State ex rel. Moose* v. *Kansas City & M. Ry. & B. Co.,* 117 Ark. 606, 174 S.W. 248:

"The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should receive a more liberal con-

struction, and should be given a retrospective effect whenever such seems to have been the intention of the Legislature."

In the *Harrison* case we also said:

"Act 54 did not create new substantive rights. Whatever cause of action this appellant now has was already in being when the statute was adopted. Its only effect was to permit a plaintiff to obtain personal jurisdiction in the courts of this state over a nonresident defendant. The act is procedural in nature, merely providing in this instance a new forum for the enforcement of existing rights. Being procedural, the act applies to all cases filed after it became effective."

It is of course conceded that Act 101 was enacted some months after Chronister was injured by the alleged negligence of appellee, but it did not, in our opinion, affect any substantive rights of appellee. It was remedial only and therefore must be construed restrospectively in this case.

Appellee makes the further contention that the aforementioned Act 54 is distinguishable from Act 101, and, based thereon, astutely argues that the *Harrison* case, *supra,* furnishes no sound basis for holding that service under Act 101 is constitutional as applied to a nonresident defendant. We recognize a difference in the two acts and have given consideration thereto. Act 54 is limited (insofar as we are here concerned) to a situation wherein the tortfeasor was domiciled in Arkansas at the time the cause of action arose. This is not true of Act 101, but we do not consider the distinction is one vital to the issue of constitutionality. It was pointed out in the *Harrison* case that the tortfeasor was a *non-resident* at the time of service, just as appellee was a *non-resident* in this case. The Court's significant language in the *Harrison* case regarding "domicile" was this: "When a tort occurs in Arkansas, as it did here, this state has a sufficient connection with the controversy to justify basing jurisdiction upon domicile . . .", meaning of course

"domicile" when the cause of action arose. Having so held, we think it is even more reasonable and logical to say the state has a sufficient connection with the controversy in this case to justify basing jurisdiction upon the fact that appellee, though a non-resident, unqualified to do business in Arkansas, was nevertheless doing business in this state, using our markets, and deriving profits therefrom.

Appellee's contention that this case is controlled (in its favor) by *Gillioz* v. *Kincannon,* 213 Ark. 1010, 214 S.W. 2d 212, has been sufficiently answered in the *Harrison* case, *supra.*

The order of the trial court is accordingly reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). The Majority Opinion says: "Two issues are raised on this appeal. One, is there an appealable order? Two, is Act 101 of 1963 constitutional as appellant seeks to apply it to the facts of this case?"

The Majority Opinion then proceeds to decide both points. I never reach the second point because I am thoroughly convinced that there is no appealable order in the record in this case. Here is the order (copied in full) from which the appeal was attempted to be taken:

"Comes on for hearing the Special Appearance and Motion to Quash of Schwayder Brothers, Inc. and upon hearing before the Court, arguments and briefs of counsel and other matters appearing before the Court, it is BY THE COURT CONSIDERED, ORDERED, AND ADJUDGED that the attempted retroactive application of Act 101 of the Acts of Arkansas for 1963, relating to service of summons on non-resident defendants is un-

constitutional and void; that no sufficient service has been made on Schwayder Brothers, Inc.; that this Court is without jurisdiction as to Schwayder Brothers, Inc.; that Special Appearance and Motion to Quash of Schwayder Brothers, Inc. be and the same is hereby granted and the purported Summons and purported service thereof on Schwayder Brothers, Inc. be and same is hereby vacated, quashed, set aside and held for naught; that the exceptions of defendant Safeway Stores, Incorporated be and the same are hereby specifically preserved."

There was never any statement by the appellant that it stood on the above order; and there was never any order of dismissal. In short, I find no final order from which an appeal could be taken. The case of *Robberson* v. *Steele Canning Co.,* 233 Ark. 988, 349 S.W. 2d 814, involved an order quashing service of summons, just as in the case at bar; and we held in *Robberson* v. *Steele Canning Company* that the order quashing the service was not final and appealable. I cannot distinguish that case from the case at bar. The decision in *Robberson* v. *Steele* was not new law; it followed previous decisions of this Court. See *Harlow* v. *Mason,* 117 Ark. 360, 174 S.W. 1163; and *Yocum* v. *Okla. Tire & Supply Co.,* 191 Ark. 1126, 89 S.W. 2d 919. I see no reason to depart from these cases. In *Nunez* v. *O.K. Processors,* 238 Ark. 346, 381 S.W. 2d 754, we allowed the appellants to go back to the Trial Court and obtain a final order so the case would not have to be rebriefed. In the case at bar, we are not even requiring that to be done. I maintain that there is no final and appealable order in the case at bar and therefore I dissent from the Majority holding on that point. I never reach the second point.

5-3387 384 S. W. 2d 472

Opinion delivered December 7, 1964.

Trantham & Knauts, for appellant.

Bryan J. McCallen & Dennis L. Berry, for appellee.

SAM ROBINSON, Associate Justice. Title to a 40 acre tract of land is involved in this litigation. There are 93 pages of testimony and exhibits in the record. The decree shows that the court took such evidence into consideration in reaching the decision. The decree states:

"This case, having been submitted to the Court heretofore by agreement of counsel, is now considered and tried upon its merits upon plaintiff's complaint, plaintiff's amended complaint, plaintiff's addendum to amended complaint, plaintiff's second amended complaint, the separate answer of defendant, L. H. Woolard, guardian and administrator of the estate of Minerva Parlie Harpole, deceased, the plea of L. H. Woolard as administrator, the answer and cross-complaint of defendants, William P. Harpole and Odis Harpole, the response of plaintiff to the cross-complaint of defendants, William P. Harpole and Odis Harpole, the return of the sheriff of Clay County, Arkansas, reflecting personal service of summons upon defendant, Ernest Pringle, the deposition of plaintiff and the deposition of Herbert H. Johnson on behalf of plaintiff, the deposition of O. B. Byes, Almous Niswonger, Ernest Pringle with Exhibit "A" thereto, William P. Harpole with Exhibit "A" thereto, and Odis Harpole on behalf of defendants, William P. Harpole and Odis Harpole, and three copies

of right-of-way grants to Mississippi River Fuel Company, a certificate of the Clay County Court Clerk as to tax payment, copy of funeral record of Martin Luther Harpole, and copy of marriage license of Martin L. Harpole and Pearlie Gibbs all introduced on behalf of defendants, William P. Harpole and Odis Harpole, . . ."

Many times we have pointed out that it is wholly impractical for the seven members of this court to examine one record in order to determine the facts. The appeal must be affirmed because of the failure of appellant to abstract the evidence. *Vire* v. *Vire,* 236 Ark. 740, 368 S.W. 2d 265; *Reeves* v. *Miles,* 236 Ark. 261, 365 S.W. 2d 460; *Allen* v. *Overturf,* 236 Ark. 387, 366 S.W. 2d 189; *Farmers Union Mutual Insurance Co.* v. *Watt, et ux,* 229 Ark. 622, 317 S.W. 2d 285; *Anderson* v. *Stallings,* 234 Ark. 680, 354 S.W. 2d 21; *Weir* v. *Hill,* 237 Ark. 922, 377 S.W. 2d 178.

Affirmed.

ELLIS *v.* FERGUSON.

5-3388 385 S. W. 2d 154

Opinion delivered December 7, 1964.

[As amended on denial of Petition for Rehearing January 18, 1965.]

Barrett, Wheatley, Smith & Deacon, for appellant.

Carmack Sullivan for appellee.

JIM JOHNSON, Associate Justice. This appeal questions the sufficiency of evidence to support a judgment under the Guest Statutes.

On April 18, 1961, appellee Shelby C. Ferguson was a guest in an automobile driven by appellant H. M. Ellis and owned by Bon McCourtney. They were proceeding south from Hardy toward the Udell Motel for the purpose of attending, as attorneys, a criminal hearing to be held at the motel. As appellant approached the motel, he slowed down and turned left across the highway toward the motel driveway, when his car was hit by one driven by J. L. Tyner.

Ellis and McCourtney filed suit against Tyner for personal injuries and property damage in the Northern District of Sharp County Circuit Court. Tyner asserted

a claim against Ellis and McCourtney. Ferguson filed an intervention, seeking to recover for personal injuries against Tyner, Ellis and McCourtney. All the various claims were settled except Ferguson's claim against Ellis and McCourtney under the Guest Statutes. This was tried before a jury on March 31, 1964. The court directed a verdict for McCourtney at the close of appellee's evidence. The jury returned a verdict for Ferguson against Ellis in the sum of $6,000.00. From judgment on the verdict comes this appeal.

For reversal appellant states that the trial court erred in refusing to direct the jury to return a verdict for him, contending that the evidence was insufficient as a matter of law to justify submission of the case to the jury.

The evidence on negligence is simply this: appellant slowed down to about ten miles an hour preparatory to making the left turn into the motel driveway. Appellant testified that he did not see the Tyner vehicle until a split second before the collision, although it is undisputed that he looked south. It was also undisputed that appellant's view to the south was impaired by a low spot in the road. Appellee testified that he saw Tyner's car both before it entered and after it emerged from the low spot, assumed that appellant also saw it, and gave no warning of the car's approach. Appellee testified that Tyner was traveling sixty to seventy miles an hour, whereas Tyner testified that his speed was about fifty miles an hour. Testimony was disputed as to whether appellant had his turn signal on.

We have consistently held that whether an automobile is being operated in such a manner as to amount to wanton or willful conduct in disregard of the rights of others must be determined by the facts and circumstances in each individual case. *Splawn* v. *Wright,* 198 Ark. 197, 128 S. W. 2d 248.

Wantonness is essentially an attitude of mind and imparts to an act of misconduct a tortious character, such

conduct as manifests a "disposition of perversity." Such a disposition or mental state is shown by a person, when, notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, he proceeds into the presence of danger, with indifference to consequences and with absence of all care. *Jenkins* v. *Sharp,* 140 Ohio St. 80, 42 N.E. 2d 755.

It is equally well settled that one who willfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission exposes another to death or grave bodily injury, is liable for the consequences, even if the other was guilty of negligence or other fault in connection with the causes which led to the injury. It is not necessary to prove that the defendant deliberately intended to injure the plaintiff. It is enough if it is shown that, indifferent to consequences, the defendant intentionally acted in such a way that the natural and probable consequence of his act was injury to the plaintiff. There is a "constructive intention as to the consequences, which, entering into the willful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence, becomes, by reason of a reckless disregard of probable consequences, a willful wrong." *Baines* v. *Collins,* 310 Mass. 523, 38 N.E. 2d 626, 138 A.L.R. 1123.

Viewing the facts in the case at bar in the light most favorable to the jury verdict, and applying the foregoing rules which are as liberal as can be approved short of judicial repeal of the Guest Statutes, we cannot escape the conclusion that while there was evidence here which would have sustained a finding of simple negligence there was no substantial evidence of the willful and wanton misconduct denounced in Ark. Stat. Ann. §§ 75-913 and 75-915.

Reversed and dismissed.

Opinion delivered December 7, 1964.

Bon McCourtney & Associates, By: *H. M. Ellis* and *Claude B. Brinton,* for appellant.

Bruce Bennett, Attorney General, By: *Richard B. Adkisson,* Assistant Attorney General, for appellee.

FRANK HOLT, Associate Justice. On the night of December 20, 1963, the home of Leonard Dever was destroyed by fire. The bodies of Leonard Dever, his wife, and four

of their children were found in the ruins. Two other children escaped. The appellant, Frank Harris, was subsequently convicted and sentenced to life imprisonment for the murder of Leonard Dever. That case is not before us. In the case at bar the appellant was charged by an information with the joint crimes of the murders of Mrs. Martha Dever and her four children, Nelle, Joanne, Sharon and Janette Dever, while in the perpetration of or the attempt to perpetrate arson and/or robbery. A jury found the appellant guilty of murder in the first degree and fixed his punishment at death in each of the five cases. From these judgments the appellant brings this appeal.

For reversal appellant urges several points; and we have also considered every objection made at the trial as we do in capital cases. Ark. Stat. Ann. § 43-2723 (Repl. 1964) and *Hays* v. *State,* 230 Ark. 731, 324 S.W. 2d 520. The point that gives us most serious concern is the admissibility of the testimony of six-year-old Mary Dever. We are of the view that prejudicial error was committed in holding, over the objections of the appellant, that her testimony was competent.

It is the appellant's theory of the case that when he went to the Dever home to purchase whiskey an altercation ensued between him and Dever; that as a result, Dever struck the defendant, shot Mrs. Dever, set fire to their house, shot at appellant as he escaped and then Dever killed himself. According to the State's theory, the appellant, armed with a twenty-gauge shotgun, went to the Dever home, where he was known, for the purpose of robbing Dever who was reported to carry large sums of money; that appellant shot and robbed Dever, shot Mrs. Dever, and then set fire to the house resulting in the death of the four children other than Ronald and Mary Dever who escaped. The State presented both Mary and Ronald as witnesses to corroborate its case.

At common law and by statute in our State a child below ten years of age is never a competent witness in a civil action. Ark. Stat. Ann. § 28-601 (Repl. 1962). However, this is not the rule in criminal cases. We have held

many times that in criminal cases there is *no precise age* at which a child is, or is not, competent to testify and, further, that the trial court is given wide discretion in making the determination of competency and also in the absence of clear abuse, such judicial discretion is not disturbed upon appeal. *Needham* v. *State,* 215 Ark. 935, 224 S.W. 2d 785; *Ramick* v. *State,* 212 Ark. 700, 208 S.W. 2d 3; *Guthrie* v. *State,* 188 Ark. 1081, 70 S.W. 2d 39; *Hudson* v. *State,* 207 Ark. 18, 179 S.W. 2d 165; *Yother* v. *State,* 167 Ark. 492, 268 S.W. 861; 8 Ark. Law Rev. 100.

Although we have recognized no age limitation in criminal cases, we have consistently held that in order for a child-witness to be competent the child must meet certain qualifications. In *Batchelor* v. *State,* 217 Ark. 340, 230 S.W. 2d 23, we repeated these requirements saying:

"* * * if the child-witness, when offered, has capacity to understand the solemnity of an oath and to comprehend the obligation it imposes, and if in the exercise of a sound discretion the trial court determines that at the time the transaction under investigation occurred the proposed witness was able to receive accurate impressions and to retain them to such an extent that when testifying the capacity existed to transmit to fact-finders a reasonable statement of what was seen, felt or heard,—then, on appeal, the Court's action in holding the witness to be qualified will not be reversed."

See, also, 58 Am. Jur., Witnesses, § 129 and 97 C.J.S., Witnesses, § 63b.

With this well settled rule in mind, we review some of the pertinent portions of Mary Dever's testimony. When asked her age, she held up six fingers. She stated God would punish her if she didn't tell the truth. She testified that all she knew about God or the Bible was what someone had recently told her; that she had never been to church and she had never been taught about God by anyone before this time. In support of the State's theory she related that appellant shot Dever, then

required Mrs. Dever to remove a billfold from his body and hand it to him.

She also testified on direct examination by the State:

"Q. What did Frank [appellant] say?

A. Frank said 'I am going to shoot you.'

Q. Did he shoot your mama?

A. (Witness nodded in the affirmative)

Q. Before Frank shot your mama, did he ask your mama for anything?

A. (Witness shook her head in the negative)

Q. After he shot your mama, you say he got some matches?

A. (Witnesses nodded in the affirmative)

Q. Did he get anything else besides the matches?

A. Fuel.

* * *

Q. What did he do with theh fuel after he got it?

"A. Burned up the house."

On cross-examination by appellant she testified:

"Q. What was your Mama pointing the gun at your Daddy for?

A. She said, 'if you don't stop that talk, I am going to shoot your head off.'

* * *

Q. When your mama drew the gun on your daddy and told him to quit cursing, didn't your daddy knock your mama over on the bed?

A. Yes.

Q. And that is when your daddy shot your mama before she fell on the bed?

A. Yes."

On redirect examination by the State the child-witness repeated practically what she had related on direct examination.

Then on recross-examination, in support of appellant's theory of the case, she again contradicted what she had said on direct and redirect examination. For instance, she testified in part as follows:

"Q. Mary, you remember testifying a while ago that your daddy knocked your mama over on the bed and shot her after she threatened to blow his head off? That is true, isn't it?

A. (Witness nodded in the affirmative)

Q. But Uncle Burke [brother of Leonard Dever] didn't tell you to say that?

A. No.

Q. But Uncle Burke did tell you to say Frank shot your daddy and your daddy was laying on the floor?

A. Yes.

Q. Uncle Burke didn't tell you to tell your daddy run Frank out of the house and shot at Frank outside, did he?

A. No.

Q. And that is the truth, isn't it?

A. Yes.

Q. But Uncle Burke did tell you to tell Frank poured fuel oil on the floor and on the bed?

A. Yes.

Q. Uncle Burke told you to swear to that?

A. Yes.

Q. After your daddy shot your mother and you testified Frank ran out, your daddy ran after him, your daddy came back but Frank didn't come back any more?

A. No.

Q. Didn't you see your daddy pouring fuel oil after Frank left?

A. Yes."

She also stated that her father had poured fuel oil on the bed and floor, and in answer to the query, "Where else did he put it?", she answered, "On the windows".

Thus there were not merely inconsistencies but irreconcilable conflicts in her testimony bearing on the essential elements of the alleged crimes. We cannot approve such contradictory versions on these vital issues. We are of the view that this child either did not receive accurate impressions of the events transpiring that tragic evening, or if she did, she did not have the capacity or intelligence to retain the impressions to the required extent so as to transmit to the jurors in a reasonable, clear, and coherent manner what she saw, heard, and felt.

In Mary's testimony there are other examples of her inability to recollect. For example:

"Q. When your house burned down, do you remember that?

A. (Witness shook her head in the negative)

* * *

Q. Do you remember when there was a fire at your house?

A. (Witness shook her head in the negative)

* * * [The house had burned six months previously]

Q. Were you here at the courthouse yesterday?

A. (Witness nodded in the affirmative)

Q. Where were you at the courthouse yesterday?

A. I wasn't here.

Q. Where were you yesterday? (question repeated)

A. I forgot.

Q. Huh?

A. I forgot.

Q. You forgot where you were yesterday.

A. (Witness nodded in the affirmative)

* * *

Q. What school do you go to? Do you remember when you started to school?

A. (Witness shook head in the negative)

Q. Do you know where you are going to school?

A. My brother does.

Q. But do you know where you are going to school?

A. (Witness shook head in the negative)."

In *State* v. *Ranger,* 98 A. 2d 652, the Maine Supreme Court held inadmissible the testimony of children ages ten and eight saying:

"* * * The proposed child witness should know the difference between truth and falsehood, and apparently must be able to receive accurate impressions of facts, and be able to relate truly the impressions received. * * * Although many ancient proverbs indicate that some of our ancestors believed that only truth could come from childhood lips, we know through modern psychology that protective imagination is a common attribute of most children * * *."

In *Crosby* v. *State,* 93 Ark. 156, 124 S.W. 781, the accused was convicted of murder in the first degree. There we reversed and remanded for a new trial because the examination of the ten-year-old witness was not comprehensive enough to establish that he had a sufficient sense of the purity of truth or the sanctity of an oath.

We think the trial court in the case at bar is governed by the standard we set in *Payne* v. *State,* 177 Ark.

413, 6 S.W. 2d 832, as to when the testimony of a child-witness is subject to exclusion. There we said:

"It is, of course, the duty of the trial court to follow closely the examination of a witness about whose competency there is a serious question on account of his youth, and if, during the course of the examination, it appears that the witness does not appreciate the questions asked him and the relevancy of the answer given, because of his youth, it would be the duty of the trial court to exclude the entire testimony of the witness, *although his preliminary examination* apparently indicated that the witness understood the obligations of an oath". [Emphasis added]

It appears that at the time of Mary Dever's preliminary examination it might have been thought that she was a competent witness. However, her subsequent testimony with its major inconsistencies and irreconcilable conflicts on material issues, some of which we have detailed, convinces us her testimony was subject to exclusion.

As previously stated, we do not think she was capable of receiving and retaining accurate impressions sufficiently to truly relate them to the fact-finders in a reasonably coherent statement. Therefore, we must hold it was error for the trial court not to remove her from the witness stand and exclude her testimony when it appeared that she did not meet the requirements reiterated in *Batchlor* v. *State, supra,* governing child witnesses in criminal cases. According to the record in the case at bar it must also be said that upon the proper objection being made, the testimony of Ronald Dever, nine years of age, was subject to challenge for the same reasons.

We deem it unnecessary to discuss the other matters relied upon by appellant for reversal. It is with great reluctance that we feel compelled to exclude this child's testimony as an instrument of justice when we consider the competent evidence. However, we feel there is no alternative in the proper administration of justice since

the character of her testimony constitutes reversible error.

Accordingly, the judgments are reversed and the causes remanded.

Opinion delivered December 14, 1964.

Keith, Clegg & Eckert, M. Darwin Kirk, J. P. Greve and *Ben Hatcher,* Tulsa, Okla., for appellant.

Chambers & Chambers, for appellee.

CARLETON HARRIS, Chief Justice. Appellee was the owner of a certain forty-acre tract located in Columbia County. On September 15, 1958, Shell Oil Company, which held an oil and gas lease covering said land, assigned the lease to Sunray DX Oil Company, appellant herein. The lease recites that it is given to the lessee "for the purposes of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building tanks, power stations, telephone lines, and other structures thereon

to produce, save, take care of, treat, transport and own said products and for dredging and maintaining canals, constructing roads and bridges, and building houses for its employees, and, in general, for all appliances, structures, equipment, servitudes and privileges which may be necessary, useful or convenient to or in connection with any such operations conducted by lessee thereon, * * *". On May 21, 1963, appellee instituted suit against the company, seeking damages in the amount of $6,500.00 ($4,000.00 actual and $2,500.00 punitive), alleging that her land had been permanently injured because of the fact that appellant had deliberately, and by negligent acts, dumped salt water and waste oil on the land, and had permitted salt water to flow upon it, with full knowledge that the salt water was a poinsonous substance, and would kill and destroy vegetation; that these substances did destroy all vegetation. Appellant answered, denying the allegations of the complaint, and denying any improper use of appellee's land. It was further asserted that if appellee had any cause of action, such cause was barred by the statute of limitations. The case proceeded to trial, and at the conclusion of appellee's evidence, appellant moved for a directed verdict, contending that the evidence was insufficeint to establish a cause of action, and further, that the action was barred by the three-year statute of limitations. The court overruled the motion, and appellant declined to offer any evidence, standing on the motion for a directed verdict. After receiving instructions, the jury retired, and returned a verdict in the amount of $2,000.00, with interest at 6% per annum. From the judgment entered in accordance with the verdict, appellant brings this appeal.

During the oral argument, it was pointed out that the testimony reflected that producing oil wells had been located and developed in the center of each of the ten-acre tracts of the forty acres. The four wells were operated from a unit located in the center of the forty-acre tract, and the fluid content from each of the four wells was pumped to a large metal tank (called separator) near the center of this forty acres. The salt water was

"bleeded" from the tank to an earthen pit, which had been dug also near the center of the tract. Salt water was then pumped from the pit to a disposal well located on another tract of land.

According to appellee's evidence, the earthen pit was low in one place, which permitted the salt water to overflow, and this overflowing particularly occurred when it rained. Appellee's contention was, and is, that the salt water overflowed from the pit to the surrounding land, destroying valuable timber, and making the land unfit for further agricultural use.

For reversal, it is first asserted that appellee's claim is barred by the three-year statute of limitations. In raising this point, appellant makes a two-pronged attack. First, it is pointed out that if the pit were of a permanent character, and its construction and continuance were necessarily an injury, the damage was original, *i.e.*, the very nature of the construction made evident the fact that damage would occur, and compensation should have been sought at once. If such were the case, the statute of limitations began to run upon the construction of the pit, and suit was not instituted within the statutory period. Appellant has stated the law correctly, and we have so held numerous times. See *St. Louis Iron Mountain & Southern Railway* v. *Biggs,* 52 Ark. 240, 12 S.W. 331; *St. Louis Iron Mountain and Southern Railway Company* v. *Anderson,* 62 Ark. 360, 35 S.W. 791; and *Brown* v. *Ark. Central Power Company,* 174 Ark. 177, 294 S.W. 709. These holdings are not applicable to the case before us, however, nor does appellant vigorously argue that this type of construction was such as to constitute an injury from the time the pit was originally dug on the premises. The pit itself was not the cause of the alleged damage sustained; rather, the fact that it overflowed, spilling the salt water onto the lands, occasioned appellee's complaint. But appellant does argue with vigor that the statute of limitations began to run more than three years before the institution of the suit. The complaint was filed by appellees in May, 1963, and appellant,

in making its argument, refers to the fact that there was testimony of damage to the lands in question in 1959. It is true that there was some testimony that damage was discovered in 1959. W. H. Thurman, son of appellee, testified that every time it rained, the pit overflowed, the salt water spreading in every direction, except south, killing timber and vegetation near the center of the forty acres; that damage occurred in 1959, and increased in 1960. W. E. Thurman, a grandson of appellee, testified that the salt water began to damage the land around the pit in 1959. "Then it started easing on out * * * every time it would rain more it would go on out further * * *." H. D. Thurman, another son of appellee, testified that while there was damage in 1959, it constantly grew worse, "along about '61, along through the winter was when the pits overflowed so and the summer of '61 was when it killed so much vegetation there." Kennith Gray stated that in 1959 he noticed some leaves dying, that the damage grew successively worse, and "* * * it had got to where several of the big trees were dying." It is thus evident that there was testimony as to damage in 1959, 1960, and 1961. It was a jury question as to when the land in question was *permanently* damaged. *Missouri Pac. R. Co.* v. *Horn,* 121 S.W. 2d 102; *Moore* v. *Charles F. Luehrmann Hardwood Lumber Company,* 82 Ark. 485, 102 S.W. 385. In the latter case, we said:

"The next alleged error is as to the statute of limitations. There was a dispute as to whether the timber was cut in 1901 or 1900. That issue was properly sent to the jury, and its finding is conclusive."

In *H. F. Wilcox Oil & Gas Co.* v. *Juedeman,* 101 P. 2d 1050, the Oklahoma Supreme Court stated:

"It seems well settled that in an action for damages for permanent injury to real estate caused by continuing salt water pollution the limitation begins to run at the time when it becomes obvious that a permanent injury has been suffered."

It is next asserted that there is insufficient proof of wrongful operations, and no proof of negligence. Appellant contends that it had the right to go on the land and do all things necessary and incidental to drilling, operating, and maintaining the wells for the production and marketing of oil, and that it is only liable for wanton or negligent destruction, or liable only for damages to that portion of the land that was not reasonably necessary for the oil operations. From appellant's brief:

"Plaintiff nowhere alleges that defendant used more land than was reasonably necessary to do the things defendant had a right to do under its lease. Plaintiff complains of salt water and waste oil being dumped or permitted to flow upon her land. Plaintiff does not allege that said salt water or waste oil traveled beyond the areas necessarily required by defendant for its oil operations under said lease. Plaintiff does not allege specific acts of negligence. Plaintiff does not allege how many acres of land were injured, or how many acres were reasonably required for defendant's operations. Plaintiff does not specifically allege what defendant could have done to correct the situation, or whether it was possible, under the existing circumstances, to have made such correction. Plaintiff also failed to supply such deficiencies by proof."

We do not agree with this argument. Appellee's testimony showed that an area consisting of five or six acres in the center of the forty was damaged. We are unable to understand appellant's statement: "*Plaintiff does not allege that said salt water or waste oil traveled beyond the areas necessarily required by defendant for its oil operations under said lease.*" Appellant seems to indicate by the italicized statement that, as a part of its normal operations, it was entitled to permit the salt water to travel over some part of appellee's lands, but we do not concur with this view. Was it necessary that the salt water travel over the land at all? How did it help appellant's oil operations for the salt water to overflow the pit? We cannot agree with appellant's state-

ment that negligence has not been shown, for the evidence reflected that one side of the pit was low (whether from faulty construction or erosion is not shown), and this permitted the salt water to overflow, and, particularly so, during rainy periods. There was also evidence that the percentage of salt water continued to increase, until, in fact, the wells were shut down. Nonetheless, appellant apparently[1] made no repairs to the pit, and the damage continued to increase.

The Arkansas Legislature of 1957 recognized the dangers of salt water by enacting Act 381 of 1957. That act (Ark. Stat. Ann. 53-211 and 212 [Supp. 1963]) makes it "mandatory that salt water produced from any newly discovered oil and/or gas field, commencing with July 1, 1957, be disposed of by the producer of said salt water by either putting it in pits or re-cycling it back into the proper sand." A fine ranging from $100.00 to $1,000.00 is provided for those who violate the provisions.[2]

Finally, it is asserted that appellee has not properly established her damages. W. H. Thurman testified that he went over the property in May, 1960, and he valued same at $4,000.00. He then testified that the sale value of the property in May, 1963, was $2,000.00. Fred W. O'Bier, a real estate dealer, testified that he was familiar with appellee's property, and had handled property sales in the general area; that, in his opinion, the forty acres would have been worth $200.00 an acre in May, 1960, or a total of $8,000.00, but was only worth $100.00 an acre in 1963, or a total of $4,000.00. We have held that where there is permanent damage to real property, the measure of damages is the difference in market value before and after the injury. See *Benton Gravel Company* v. *Wright,* 206 Ark. 930, 175 S.W. 2d 208, and cases cited therein. See also Volume 4, Summers Oil and Gas, Chapter 21, Section 658, Page 88. Appellant contends that the witnesses should have testified more specifically, and in

[1] As previously stated, appellant introduced no testimony.

[2] This act, of course, has no application to the instant case, since this operation commenced before the effective date of the act.

more detail, as to how they reached these figures, but these facts could have been ascertained on cross-examination. Counsel did not interrogate Thurman on this point, and did not cross-examine O'Bier at all. Of course, damages of this nature are difficult to establish to an exactness, but the testimony reflected that the five or six acres in the middle of the forty-acre tract were permanently damaged, all vegetation and timber dying, and the witnesses appeared qualified to express an opinion as to the effect the damage to this acreage had on the entire forty.

Affirmed.

YOUNG *v.* YOUNG.

5-3396 384 S. W. 2d 469

Opinion delivered December 14, 1964.

[Rehearing denied January 18, 1965.]

Bridges, Young & Matthews and *Coleman, Gantt, Ramsay & Cox,* for appellant.

Gregory & Claycomb, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellee, Mrs. Dema Young, filed this suit against the appellant,

Raymond A. Young,[1] to enjoin him from selling—during her lifetime—the home in which she was living, and also to require him to pay her one-third of the amount for which he had sold the business, known as Young's Laundry and Cleaners, in Pine Bluff, Arkansas. Mrs. Young claimed that in 1945 Mr. Young made an oral contract with her, which she was seeking to enforce in this suit. Mr. Young denied any such contract, and pleaded the statute of frauds (Ark. Stat. Ann. § 38-101 [Repl. 1962]). Trial in the Chancery Court resulted in a decree awarding partial relief to Mrs. Young. From that decree Mr. Young has appealed, claiming that Mrs. Young was entitled to no relief; and Mrs. Young has cross appealed, claiming she was entitled to more relief than the chancery Court awarded her.

The appellant lists three points, which we consider together. They are:

"I. An oral contract to make a will or convey an interest in land must be established by clear, cogent and convincing evidence.

"II. Performance to take an oral contract out of the statute of frauds must consist of extraordinary services and constitute a sacrifice.

"III. The proof does not establish the oral contract alleged by appellee."

The rule has been many times stated by us: an oral contract to make a will or to convey an interest in land must be established by evidence that is clear, cogent, and convincing. *Watts* v. *Mahon,* 223 Ark. 136, 264 S.W. 2d 623; *Crowell* v. *Parks,* 209 Ark. 303, 193 S.W. 2d 483; *Jensen* v. *Housley,* 207 Ark. 742, 182 S.W. 2d 758. Here, we have evidence of possession taken by Mrs. Young under the alleged contract, and also part performance by

[1] Mr. Young had authorized the National Bank of Commerce of Pine Bluff to act as his Agent and Attorney to collect the rents on his real estate and the payment due him for the sale of the laundry business, so the said Bank was joined as a party defendant, and is also a party appellant here. But the real litigation is between Mr. Young and Mrs. Young, and we will refer to them as though they were the only litigants.

her; and such evidence, if believed, is sufficient to take the contract out of the statute of frauds. *State Bank* v. *Sanders,* 114 Ark. 440, 170 S.W. 86; *Ferguson* v. *Triplett,* 199 Ark. 546, 134 S. W. 2d 538; *Harper* v. *Albright,* 228 Ark. 760, 310 S.W. 2d 475. But the question still remains as to whether Mrs. Young offered the quantum of evidence required *i.e.,* "clear, cogent, and convincing", which was said in one of our cases to be "substantally beyond a reasonable doubt." (*Crowell* v. *Parks, supra.*) To answer that question requires a study of the evidence.

Mr. Young appears to have owned several pieces of real property in Pine Bluff, and also to have owned and operated a rather profitable business known as Young's Laundry and Cleaners. Mr. and Mrs. Young were married in 1927. Mrs. Young had been working in the business before the marriage, and continued to do so thereafter, being practically the manager of the cleaning portion of the business. In 1941 the parties were divorced; and Mrs. Young moved to Little Rock, where she obtained employment in a cleaning establishment. In 1945 Mrs. Young returned to Pine Bluff and resumed employment in Young's Laundry and Cleaners. The terms and conditions under which this happened are in great dispute and give rise to the present litigation.

Mrs. Young testified that in 1945 Mr. Young came to her and said he needed her to assist in the management of the laundry and cleaning business, and orally agreed with her that if she would return to Pine Bluff and assist in the management of the business, he would not only pay her a good salary, but would also give her a home in which to live for her entire lifetime, and would make a will leaving her one-third interest in the laundry and cleaning business. She testified that she faithfully performed her part of the contract, and that he had breached his contract by selling the business without paying her anything and was threatening to breach the remainder of the contract by moving her out of the house where she was living. Mrs. Young testified positively

and unequivocally as to the 1945 contract with Mr. Young, and she was corroborated, in whole or in part, by a number of witnesses, some of whom were not related to either of the parties.

It was shown—and admitted by Mr. Young—that ever since Mrs. Young returned to Pine Bluff in 1945 she had lived, rent free, in some house owned by Mr. Young, and was so living at the time of the litigation. It was also shown that in addition to her salary for working in the business, Mr. Young had also given her annual bonuses. Several witnesses—unrelated to the parties—testified that they had heard Mr. Young say that Mrs. Young would own a one-third interest in the business at his death and that she would have a home as long as she lived. One witness testified that before Mrs. Young returned to Pine Bluff in 1945, Mr. Young said to Mrs. Young in the presence of said witness: "I want you to be a part of the business and I would like to furnish you a home for the rest of your life, and you can have a job as long as you want it and a third of the business in my will at the time of my death."

Mr. Young admitted that Mrs. Young had lived, rent free, in a house of his ever since 1945; but he claimed that he let several of his employees have free house rent. He testified at length in denial of the alleged 1945 contract; and two other of his former employees testified that they had never heard of the alleged 1945 contract. The Chancellor heard the evidence *ore tenus*. He saw the witnesses and observed their manner of testimony. If Mrs. Young and her witnesses are to be believed, then she certainly offered the required quantum of evidence as to the 1945 contract. A study of the printed page inclines us to the view that their evidence had the ring of sincerity, reasonableness, and honesty; and we affirm the degree on direct appeal.

Mrs. Young's Cross Appeal. In July 1961 Mr. Young sold the laundry and cleaning business for $60,000.00 and that sale precipitated this litigation. The Chancellor awarded Mrs. Young the equivalent of a life estate in the

home where she was then living, and also awarded her what amounted to a one-third interest in the balance still remaining unpaid by the purchaser for laundry and cleaning business, and this amount so awarded her was approximately $12,000.00. On her cross appeal Mrs. Young claims that she is entitled to a judgment for $20,000.00, being one-third of the total sale price of the business. She claims that Mr. Young's act in selling the business, in effect, matured the contract to will her one-third of the business, and she cites this statement from Corpus Juris Secundum, Vol. 17A, p. 649, "Contracts" § 470: "The act of a party in voluntarily placing it out of his power to perform a contract on his part does not relieve him of liability for non-performance; but constitutes a breach of the contract, for which an action may be brought although the time for performance has not yet arrived under the terms of the contract." She also cites this statement from Corpus Juris Secundum, Vol. 94, p. 894, "Wills," § 125e: "In an action for damages for breach of contract the measure of damages is what the promisee has lost by the promisor's failure to keep his agreement, which is ordinarily the value of the property agreed to be bequeathed or devised . . ."

We are cited to no Arkansas case involving a situation exactly like the one here, and our search has failed to disclose such a case. This is an action for breach of contract to make a will before the death of the person who was to make the will. In addition to the text and cases cited in 94 C.J.S. p. 894, *supra*, we call attention to the text in 57 Am. Jur. p. 166, "Wills" § 189, and to the annotations in 69 A.L.R. 81 and 106 A.L.R. 751, on the subject, "Decedent's agreement to devise, bequeath, or leave property as compensation for services." It will be observed that these annotations relate to a situation arising *after* the death of the promisor, whereas here we are dealing with a situation that arose while the promisor was still living. In 57 Am. Jur. 166, "Wills" § 189, the text reads: "There is a conflict of opinion in reference to the measure of damages recoverable for a breach of contract to devise specific property in consideration of

services." We prefer to leave open the question of the measure of damages in a case like this one; and because of the state of the present record, we affirm the Chancellor's findings as to Mrs. Young's damages. Certainly the $20,000.00 claimed by Mrs. Young should be reduced to its present cash value; and the life expectancy of Mr. Young is not shown. Again, the value of the business is subject to some question. Mr. Young owned, and still owns the buildings and he is renting them to the purchaser. Whether the price of the business was made high or low on account of a favorable rent contract, is not shown. There was no testimony independent of the sale price as to the real value of the business. The Chancellor also gave consideration to the fact that Mrs. Young delayed for about two years after the sale before filing the present suit; and she could well have been waiting to see if sufficient of the purchase price was paid to prevent a return of the business to Mr. Young for any reason. We have mentioned several factors that might have entered into the Chancellor's assessment of the damages.

To conclude the matter, we also affirm the decree on Mrs. Young's cross appeal; but the costs of the entire appeal are adjudged against the appellant.

HARRIS, C.J., not participating.

GEORGE ROSE SMITH and JOHNSON, J.J. dissent.

(Supplemental opinion on denial of Petition for Rehearing P. 929.)

JIM JOHNSON, Associate Justice, (dissenting). I do not agree with the majority view. A careful study of the entire record before us impels me to the conclusion that the testimony in this case amounts to no more than a swearing match between partial witnesses. To say that the caliber of evidence here presented rises to the dignity of being so clear, cogent and convincing so as to be "substantially beyond a reasonable doubt," *Crowell* v. *Parks*, 209 Ark. 803, 193 S.W. 2d 483, obliterates the sacred rule heretofore required to be followed to prove the existence of an oral contract to make a will.

For the reasons stated I respectfully dissent. GEORGE ROSE SMITH, J., joins in this dissent.

5-3403 384 S. W. 2d 490

Opinion delivered December 14, 1964.

Knox Kinney, for appellant.

Fletcher Long, for appellee.

GEORGE ROSE SMITH, J. On April 7, 1963, Kathryn Stephens was killed while riding in a car that was owned and was apparently being driven by the defendant-appellant, Granville Bridges. Kathryn was twenty-one years old. Although she had never been married, she was survived by a four-year-old son. This action for wrongful death was brought by the administrators of Kathryn's estate. The verdict and judgment awarded the administrators, in addition to the funeral expenses, the sum of $17,500 to compensate the child for the loss of his mother's care, support, and nurture.

Kathryn was a guest in the car. The appellant first contends that he was entitled to a directed verdict, on the ground that the plaintiffs failed to proved either that he

was driving the car when the accident occurred or that he was guilty or willful and wanton misconduct. Ark. Stat. Ann. §§ 75-913 and -915 (Repl. 1957).

Whether the appellant was driving the car was an issue of fact. The accident, a collision with another car, took place on Sunday evening at about seven o'clock. During the afternoon Kathryn had been riding around with the appellant and Herbert Lee, who was also killed. The appellant testified that he went to sleep in the back seat while the car was temporarily parked at about 5:30 and that he remembered nothing until he awoke in a hospital the next day. There was proof, however, that a man was driving the car when the collision occurred and that Herbert Lee, the other man in the vehivle, could not drive. Bridges admittedly owned the automobile and had been driving it earlier in the afternoon. It was for the jury to decide who was driving at the time of the accident.

The issue of willful and wanton misconduct was also a question of fact. Just before the collision the Bridges car was traveling north at 30 or 35 miles an hour on a county road that was crossed by U.S. Highway 70. A stop sign required Bridges to stop before entering the highway, but he ignored the sign and attempted to drive across the highway without stopping. Another automobile coming down the highway at great speed struck Bridges' car and caused the death of both his companions.

There was substantial evidence to show that Bridges had been drinking beer during the afternoon and was intoxicated when the collision occurred. We adhere to the view unanimously expressed in *Cooper* v. *Calico,* 214 Ark. 853, 218 S.W. 2d 723, that one who drives under the influence of intoxicants may be found to be chargeable with willful and wanton misconduct. In the *Cooper* case a majority of the court did not think there was sufficient proof of the driver's intoxication, but that is not the situation in the case at bar. We think it goes without saying that one who drives a car while he is drunk may fairly be

held to be engaging in misconduct—criminal misconduct —that is both willful and wanton. (In the case at hand it is not contended that Kathryn Stephens assumed the risk of her host's drunken driving.)

We find no error in the trial court's refusal to give a requested instruction which included a statement that willful misconduct means something more than gross negligence. In other instructions the court had read the guest statute to the jury and had given an acceptable definition of willful misconduct. There was no need for the court to refer also to "gross negligence." That phrase does not actually appear in our guest statute. Moreover, the requested instruction did not define gross negligence; so the jurors would have been left in doubt about the meaning of the court's language.

Counsel's final argument is that the $17,500 verdict for Kathryn's infant son is excessive. This contention is based in part upon the erroneous premise that the statutory reference to "pecuniary injuries" limits the measure of damages to the present value of the financial support that Kathryn would have provided for her child during his minority. Ark. Stat. Ann. § 27-909 (Repl. 1962). This interpretation of the statute is too narrow. The award may also include compensation for the loss of parental love, care, supervision, and training. *Mo. Pac. R.R.* v. *Creekmore,* 193 Ark. 722, 102 S.W. 2d 553; *Strahan* v. *Webb,* 231 Ark. 426, 330 S.W. 2d 291.

Soon after the birth of her son Kathryn, who was living with her parents, obtained employment and applied most of her earnings to the support of her son. Later on, it is true, she was committed for a time to the State Hospital as a result of drug addiction. Long before her death, however, she had been released and had returned to her parents' home. The jury could have found that during the remaining seventeen years of this fatherless child's minority he would be dependent upon his mother not only for financial support but also for all the loving care that a child ordinarily receives from both his parents. We cannot believe that an award of $17,500 for this

tragic loss demonstrates that the jurors were motivated by passion or prejudice.

Affirmed.

FREEMAN *v.* STATE.

5114 385 S. W. 2d 156

Opinion delivered December 14, 1964.

[Rehearing denied January 18, 1965.]

Harold L. Hall, for appellant.

Bruce Bennett, Attorney General, By: *Beryl Anthony, Jr.,* Assitant Attorney General, for appellee.

PAUL WARD, Associate Justice. During a fight at the Hollywood Club in North Little Rock on the night of September 16, 1962 Ted B. Freeman (appellant herein) allegedly shot and killed Billy McKim and shot and wounded Buck Berryman. Appellant was charged with the crime of murder in the second degree, was convicted as charged, and was sentenced to 10 years in the state penitentiary. Appellant now prosecutes this appeal, alleging several specified grounds for a reversal.

A study of the testimony fails to reveal clearly the exact details of just what happened on the night in question. Appellant, who ran the Am Vets Club in North Little Rock at night time, closed that club at about 2:30 a.m. and went to the Hollywood Club to return some brandy which he had borrowed. With him at the time was his assistant, Mildred Gill, who was carrying a large purse which contained the club money and also a pistol which appellant had handed to her as they left. Appellant's version of what happened was substantially as follows: I entered the Hollywood Club and sat down at a table with some other people; Buck Berryman came over to our table and knocked me to the floor and started kicking me; then some other people also started kicking me and someone hit me with a piece of iron pipe; then Mildred handed me the pistol, and when Buck jumped on me the gun went off; when some one hit me on the hand I lost my gun—I fired only one time; I don't know whom the shot hit; they took me to the hospital where I stayed fifteen or sixteen days—there were eleven lacerations on my head. We intended to have a drink at the Hollywood Club and then go home; I fired the shot because I was in fear of my life. Mildred Gill corroborated the testimony of appellant. She also testified she saw Billy McKim (the deceased) kick appellant, but she didn't know who shot McKim.

Other witnesses gave a different version of the part appellant played in the melee. Russell Patterson (the operator of the Hollywood Club) testified in substance: I broke up the fight between appellant and Berryman, and told P. D. Nash to take Berryman out; while they were walking toward the door I was talking to McKim; then I heard a shot and thought Berryman was shot in the stomach; then someone fired two more shots— it looked like appellant fired the third shot right at McKim, but Berryman was also advancing toward appellant at the time; I then hit appellant on the head three or four times trying to knock the gun out of his hand; someone hollered and appellant jumped out of the window; I don't know what happened to the gun after I knocked it out of appellant's hand. Buck Berryman testified in substance: I went over to the table where appellant was sitting in an attempt to settle our old troubles; when it appeared appellant was going going for something in his pocket I pushed him out of his chair; then P. D. Nash and I started to leave when I felt the shot hit me in the back; I turned and saw another shot—I saw the flame from the gun and I made a run for him (presumably meaning appellant) and we both went down. P. D. Nash corroborated Berryman's statement, but he made it clear that he saw appellant with the gun and that the gun "went bang, bang, bang"—three or four times, and that at the same time he heard McKim say he had been shot. He also testified that after the shooting he saw Russell Patterson trying to take the gun away from appellant.

In addition there was testimony showing that ill feelings had existed for some time between appellant and Buck Berryman, and that appellant had previously made threats to harm or kill Berryman.

In view of the above we are unwilling to say, as a matter of law, that there was no substantial evidence to support the jury's verdict. On appeal we must view the evidence in the light most favorable to the state. *Allgood* v. *State,* 206 Ark. 699, 177 S.W. 2d 928. There are, however, other points relied on by appellant which we now examine.

One. Points 1, 2, 3, and 4 raised by appellant are similar and may be discussed together. The court quite properly, we think, allowed the state to show Berryman and appellant had a fight sometime during the past six months. The court allowed Berryman to testify relative to threats by appellant to kill him. The court allowed Nash to testify appellant said he was going to kill Berryman. The court also allowed Laura Wilkins Neal to testify that appellant showed her a gun and said he was going to shoot Berryman if he "ever got into it with him again". The trouble between appellant and Berryman and the threats made by appellant were all admissible to show who was the agressor and also the motive or ill will on the part of appellant. *Crowe* v. *State,* 178 Ark. 1121, 13 S. W. 2d 606 and *McGraw* v. *State,* 184 Ark. 342, 42 S.W. 2d 373. We see no merit in appellant's contention that the incidents mentioned were too remote in time to be admissible in evidence. The fight occurred sometime within six months before the shooting. The threats occurred at approximately the same time, and they also appeared to be of a continuing nature.

Two. There was no reversible error in allowing three empty shells to be introduced in evidence. They were found in appellant's gun soon after the shooting, and there was no evidence to show the gun was tampered with in the meantime. Appellant said he fired only one time and the empty shells tended to confirm other testimony by the state that more than one shot was fired.

Three. There is no merit in the contention the court committed reversible error in punishing Buddy Cook for contempt in the presence of the jury. Cook, who had been subpoenaed as a witness, failed to appear as ordered. It does not appear from the record that the jury even knew by which side he had been subpoenaed, and certainly it does not appear that the matter was in any way prejudicial to appellant.

Four. Appellant objects to two statements made by the deputy prosecuting attorney in his address to the jury. We have examined the record carefully and are

convinced that the statements complained of were mere expressions of his opinion. The matter was brought to the attention of the court and the jury was admonished to be guided only by the evidence. In such matters much is and must be left to the sound discretion of the trial judge: *Reynolds* v. *State,* 220 Ark. 188, 246 S.W. 2d 724.

Five. Finally, appellant argues that the trial court erred in refusing to grant a new trial on newly discovered evidence. It is stated that Ed Gatewood was intimated by the state's attorney and therefore kept from making "any statement other than what was in the statement already made by him". No error is shown because no conclusive proof is offered that the witness was intimidated, and also there is no showing what testimony he would have given if he had testified. It is also stated that appellant had discovered another witness, Glynn Deese, who would testify that he saw the shooting and five or six men were beating the defendant. We see no reversible error because no due diligence is shown and because this testimony was merely cumulative, and tended only to impeach other testimony. Such testimony is not grounds for a new trial. *Jones* v. *State,* 196 Ark. 176, 116 S.W. 2d 610 and *Therman* v. *State,* 205 Ark. 376, 168 S.W.2d 833.

Affirmed.

SEAY *v.* SEAY.

5-3402 384 S. W. 2d 466

Opinion delivered December 14, 1964.

[redacted]

Clark, Clark & Clark, for appellant.

No brief filed for Appellee.

SAM ROBINSON, Associate Justice. This is an appeal from the action of the Chancellor in denying appellant's petition that a life estate be declared terminated.

On the 19th day of December, 1960, Floyd G. Seay and Mary Delon Seay were divorced in Wichita County, Texas. Several children had been born of the marriage. In connection with the divorce case, and pursuant to the decree therein, Floyd G. Seay conveyed to Mary Wilma Seay, a life estate in about 79 acres of land with the remainder to six children of the parties. There is a house on the land and it is located in Faulkner County, Arkansas. The deed from Seay to Mrs. Seay and the children is as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"That I, Floyd G. Seay, of lawful age and unmarried, for and in consideration of the sum of Ten Dollars ($10.00) and other consideration to me in hand paid by Mary Wilma Seay, Floyd Wayne Seay, Morris Delon Seay, James L. Seay, Phil E. Seay, Mark E. Seay, and Joseph P. Seay, the receipt of which is hereby acknowleged, do hereby grant, bargain, sell and convey unto the said Mary Wilma Seay, for and during her natural life, with remainder therein after her death unto the said Floyd Wayne Seay, Mark E. Seay, and Joseph P. Seay, and unto the heirs and assigns of said remaindermen forever, the following described lands situated in Faulkner County, Arkansas, to-wit:

"The west one-half (W½) of the southwest quarter (SW ¼) of Section Seventeen (17) Township Four (4) North, Range Fourteen (14) West, 80 acres, more or less.

"To have and to hold the same unto the said Mary Wilma Seay, for and during her natural life, with remainder therein after her death unto the said Floyd Wayne Seay, Morris Delon Seay, James L. Seay, Phil E. Seay, and Joseph P. Seay, and unto the heirs and assigns of said remaindermen forever, with all appurtenances thereunto belonging. And I do hereby covenant with said grantees that I will forever warrant and defend the title to said lands against all lawful claims whatever.

"Said grantee Mary Wilma Seay shall, during the life estate hereby vested in her, keep all taxes and special assessments coming due against said lands paid, and shall keep all improvements upon said property continuously and adequately covered by fire and extended coverage insurance for the benefit of herself and the remaindermen named herein, and upon her failure to pay said taxes and special assessments, and/or her failure to keep the aforesaid insurance in force, then her life estate shall terminate and title to said lands shall vest immediately in the aforesaid remaindermen."

On March 18, 1961, Katie Sellers, Mother of Mrs. Seay, filed a petition in the Probate Court of Faulkner County, Arkansas, for the appointment of a guardian for Mrs. Seay, alleging her to be incompetent. On March 25, 1961, letters of guardianship were issued naming Katie Sellers as guardian. On December 3, 1963, the children, Floyd Wayne Seay, Morris Delon Seay, adults, and James L. Seay, Phil E. Seay, Mark E. Seay and Joseph P. Seay, minors, by their next friend and Father, Floyd G. Seay, as remaindermen, filed the case at bar in the Faulkner County Chancery Court. The Complaint alleges that Mrs. Mary Wilma Seay has failed to pay the taxes and has failed to keep insurance paid as required by the deed conveying to her a life estate. The

prayer is that the court make a finding that the life estate has terminated by reason of the life tenant's failure to pay the insurance and taxes as required by provisions of the deed. The trial court denied the prayer of the complaint and the remaindermen have appealed.

The evidence shows that the life tenant has failed to pay the taxes and has failed to keep the insurance on the house in force. It appears that she is incompetent and perhaps will never be able to pay the taxes and insurance premiums. The house is vacant, and attempts to rent it have been unsuccessful because there is no water available.

The language in the deed is clear and explicit. The conveyance to Mrs. Seay was upon a conditional limitation. She took a life estate determinable upon the failure to comply with the provisions of the conveyance, that is, the failure to keep the taxes paid and the insurance in force. "An estate on special limitation is one which, by its terms, is to terminate automatically if a specified event occurs before the time at which the estate would otherwise normally terminate." Tiffany Real Property, Third Edition, Vol. 1, Sec. 217. "If a condition subsequent be followed by a limitation over in case the condition is not complied with, it is termed a 'conditional limitation,' and takes effect without any entry or claim, and no act is necessary to vest the estate in the party to whom it is limited." Thompson on Real Property, Vol. 4, Sec. 2165.

"A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation. It partakes of the nature of a condition because it defeats the estate previously limited, and of a limitation because, on the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim." 19 Am. Jur. 557.

It is said in *John* v. *Lane,* 199 Ark. 740, 135 S.W. 2d 853: "In other words, the breach of a condition subsequent merely gives the grantor or his heirs the right to

secure a revesting of the former estate, so that, if no steps are taken to secure a revesting, the estate granted remains as before, while the happening of the event described [as] a conditional limitation *ipso facto* determines the estate."

In the case at bar it makes no difference whether the provision in the deed requiring the life tenant to pay the taxes and insurance premiums is a condition subsequent, in which event the next taker would have to take affirmative action to terminate the life estate, or whether it is a limitation, in which case the life tenancy expires ipso facto upon the failure of the life tenant to comply with the provision of the limitation. This is true because, in the case at bar, those who have the next expectant interest have taken action to have the fee vested in them.

Reversed with directions to enter a decree not inconsistent therewith.

McMahan *v.* Carroll County.

5-3407 384 S. W. 2d 488

Opinion delivered December 14, 1964.

[redacted]

M. D. Anglin, Len Jones, for appellant.

J. E. Simpson, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a jury verdict awarding no damages to a landowner for land taken in a condemnation order entered by the Carroll County Court.

Appellants Blake McMahan, Faye McMahan and Keith McMahan filed a claim in county court against appellee Carroll County alleging $5,000 damages as the result of the condemnation order which took some eleven acres through a 366-acre tract of land owned by appellants. The claim was denied by the county court and appellants appealed to Carroll Circuit Court, Eastern District. On appeal the claim was tried to a jury which returned a form verdict finding no damages to the land. From the judgment entered on the verdict comes this appeal.

For reversal appellants rely on seven points but fail to abstract the record in support of the points urged. We decline to dismiss this appeal for failure to properly abstract the record as required by our Rule 9 (e) for the reason that appellee Carroll County voluntarily supplied the bare essentials of the record. From the deficient abstract we find only one point sufficiently presented for our consideration. Appellants contend that the verdict was not in keeping with due process of law, apparently relying upon Art. 2, § 22 of the Constitution of Arkansas: "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

The record reveals that the appellee county interposed a defense that appellants' property was enhanced by the paving of the road and such enhancement was equal to or greater than the value of the land taken or severance damages to the remainder of appellants' land.

Thus we come to the question: Can enhancement be equated with just compensation? This question has been raised before and has been answered in the affirmative by past decisions of this court with respect to condemnation by public authority.

Article 12, § 9 of the Arkansas Constitution states: "No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law." This provision does not apply to condemnation by public authority. *Paragould* v. *Milner,* 114 Ark. 334, 170 S.W. 78; *Cannon* v. *Felsenthal,* 180 Ark. 1075, 24 S.W. 2d 856.

We have repeatedly held that where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits (see *Cullum* v. *Van Buren County,* 223 Ark. 525, 267 S.W. 2d 14, and cases there cited), but "the benefit which will be thus considered must be those which are local, peculiar, and special to the owner's land, who has been required to yield a portion *pro bono publico.*" *Lazenby* v. *Arkansas State Highway Commission,* 231 Ark. 601, 331 S.W. 2d 705; *City of Paragould* v. *Milner, supra; Ross* v. *Clark County,* 185 Ark. 1, 45 S.W. 2d 31; *Washington County* v. *Day,* 196 Ark. 147, 116 S.W. 2d 1051.

The condemnor properly assumed the burden of proving appellants suffered no damage by reason of enhancement, and it has not been demonstrated to us by appellants that the trial court failed to correctly instruct the jury on the applicable law. A competent witness testified that in his opinion appellants' land was worth as much or more after the taking as before the taking. Three other witnesses for appellee, real estate salesmen

and brokers, testified that appellants' land was worth four to six thousand dollars more after the taking and construction of the road. The new road bisects some of appellants' pasture. The county, however, raised the level of the highway somewhat, built an underpass and put in drainage to minimize erosion at appellants' request. The record is clear that appellants' land before the taking was two and one-half miles from a paved road, and that after the taking a paved road ran within several hundred yards of appellants' home. While this new paved highway may be said to be a benefit to the public generally, we are of the view that as to appellants' land this is also a local, peculiar and special benefit. See Wright, Ark. Eminent Domain Digest, § 7.1, p. 189; *Cate v. Crawford County,* 176 Ark. 873, 45 S.W. 2d 516. Thus it cannot be said that the jury did not have before it substantial evidence to support its finding that appellants had received just compensation in the nature of enhancement to their land.

Affirmed.

VAN HOUTEN *v.* BETTER HEALTH INS. ASSN. OF AMERICA.

5-3384 384 S. W. 2d 465

Opinion delivered December 14, 1964.

Cecil A. Tedder, Jr., for appellant.

Same Montgomery, for appellee.

FRANK HOLT, Associate Justice. The appellant brought this action against the appellee to recover $4,739.28 for benefits allegedly due on three family group insurance contracts issued by the appellee. The appellee answered by a general denial. The jury rendered its verdict for the appellee. From a judgment entered accordingly the appellant brings this appeal.

The policies in question, containing the applications for insurance, were introduced into evidence by the appellant. Paragraph nine of the application provides that any falsity in the application barred recovery "if made with the intent to deceive". The applications each disclosed that Mr. Van Houten had been hospitalized once, Mrs. Van Houten twice, and their daughter once. According to their family doctor, they had received hospital attention approximately eighty-five times from 1953 to 1962. The policies were issued in March, May and June, 1962. When a claim was filed by appellant soon thereafter, the policies were then canceled and a refund of the premium offered because of the failure to make a full disclosure of the medical history. According to appellant, a full disclosure was made and the agent failed to note the medical history.

For reversal the appellant first contends that the court erred in permitting the appellee to assert the affirmative defense of fraud since it was not specifically pleaded by the appellee in its answer. Appellee reserved in its answer the right to amend, however, this was not done.

The general rule is that fraud, as an affirmative defense, must be specifically pleaded by the party claiming it. *Bridges* v. *Harold L. Schaefer, Inc.*, 207 Ark. 122, 179 S.W. 2d 176. However, when a case is tried upon

an issue not responsive to the pleadings and there is testimony upon that issue without objection, then we treat the answer as being amended to conform to the proof and the scope or sufficiency of the answer cannot be questioned on appeal. *Parker* v. *Jones,* 221 Ark. 378, 253 S.W. 2d 342; *Farmers Union Mutual Ins. Co.,* v. *Wyman,* 221 Ark. 1, 251 S.W. 2d 819; *Abel of Ark.* v. *Richards,* 236 Ark. 281, 365 S.W. 2d 705, *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S.W. 720.

In the case at bar the appellant not only failed to make timely objections to some of the evidence offered on the issue of fraud, more significantly, the appellant himself elicited evidence on the subject of fraud from his own witness, Mrs. Van Houten, to the effect that she was aware of the provisions in paragraph nine. On cross-examination she admitted there was a failure to disclose that she had been released from the hospital only two days before one of the applications was completed. Also, another one of his witnesses, Mr. Phillips, responded to appellant's query that in his opinion the insurance policies were procured under conditions intending to deceive the appellee insurance company. Further, the appellant offered and the court gave Instruction No. 6 relating to the issue of fraud. Therefore, we find no merit in appellant's contention that the issue of fraud was not affirmatively asserted in the answer. Since the appellant elicited evidence himself on that subject and also requested and was given an instruction on the issue of fraud, we treat the answer as being amended to conform to the proof.

Appellant next argues that the court erred in giving appellee's requested Instruction No. 6. Since appellant has failed to abstract the instruction, we cannot consider this alleged error on appeal. *Wilson-Ward Co.,* v. *Fleeman,* 169 Ark. 38, 272 S.W. 853; *Sloan* v. *Ayers,* 209 Ark. 119, 189 S. W. 2d 653. However, the questioned instruction is based upon Ark. Stat. Ann. § 66-3208 (Supp. 1963) and under the facts in this case correctly instructed the jury on the issue of fraud according to appellee's theory of the case.

Appellant's final contention is that the court erred in refusing to grant appellant's motion to amend his pleadings to conform to the proof. Appellant's proof established a lesser sum than was alleged in his complaint. We perceive no prejudicial error since the jury found appellant was entitled to no recovery.

The judgment is affirmed.

5-3409 384 S. W. 2d 950

Opinion delivered December 21, 1964.

John Lofton, Jr., Ben McCray, for appellant.

Robert N. Hardin, O. Wendell Hall, Louis Tarlowski, for appellee.

CARLETON HARRIS, Chief Justice. This litigation relates to an award for damages sustained by T. J. Ratliff, appellee herein, when Ratliff's automobile was allegedly struck by one driven by Allen Holland, appellant herein. In his complaint, Ratliff alleged that his car was struck from the rear by one driven by appellant, causing the Ratliff vehicle to overturn, and resulting in the injuries

to appellee complained of; there were further allegations of intoxication and willful and wanton misconduct on the part of Holland, and the complaint sought punitive damages. On trial, the jury returned a verdict in favor of appellee in the sum of $15,000.00, and from the judgment entered in accordance therewith, appellant brings this appeal. For reversal, appellant asserts that the court erred in giving appellee's Instructions Nos. 9 and 10 on the measure of damages, erred in permitting appellee to introduce a mortality table showing appellee's life expectancy, and erred in failing to instruct the jury that there could be no award of punitive damages. We proceed to a discussion of the points mentioned.

Instruction No. 9 set out the various elements of damage which the jury might consider in fixing an award, if any, for appellee. As listed in the instruction, these were as follows:

"1. The nature, extent, duration, and permanency of his injury.

2. The reasonable expense of necessary medical care, treatment and services received, and the present value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future.

3. The pain, suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.

4. The value of time lost and the present value of time, earnings, profits, and salaries reasonably certain to be lost in the future.

5. The present value of the loss of ability to earn in the future.

6. The difference in market value of Ratliff's vehicle immediately before and immediately after the occurrence; in determining this difference you may take into consideration the reasonable cost of repairs."

The instruction was generally and specifically objected to, the specific objection contending that there was no testimony to establish permanency of the injury, or length of duration; that the evidence was insufficient

to permit the jury to reasonably determine the loss of profits or earnings in the future; that there was no evidence to show the present value of the automobile, nor testimony that would enable the jury to make a determination of the value of the vehicle before and after the accident. We disagree in the main with appellant's contention.

The evidence reflects that Ratliff spent eleven days in the hospital, was in a plaster body cast for fourteen weeks, and thereafter wore a metal and leather body brace, which was still being worn on the date of trial; there was testimony that the brace would have to be worn for some months thereafter. Further testimony by Dr. H. Austin Grimes reflected that Ratliff had suffered a compression fracture of a vertebra in his spine, and a partial or complete destruction of a disc. X-rays revealed an abnormal boney proliferation, and the injury had caused an abnormal curvature of the spine forward. Dr. Grimes stated that the injury was a painful one, and that Ratliff would have to wear the steel and leather brace for at least a year; that pain would continue. Further testimony by the doctor was to the effect that Ratliff's normal movement would be impaired; that appellee would have to be particularly careful to avoid hurting himself, and that any type of occupation requiring bending would be difficult for Ratliff to perform. With regard to the permanency of the injury, Dr. Grimes stated that the least on this type of injury would be "in the neighborhood of ten to fifteen percent disability" to the body as a whole.

It is true that the doctor testified that he could not answer with certainty as to the extent of the disabiliy, but that is hardly unusual. It would be rare indeed, except in cases of injuries that would obviously cause a total permanent disability, for a doctor to testify specifically as to any degree of permanent injury. However, Dr. Grimes testified as an expert, and gave his opinion, based on the experiences and knowledge he had acquired in the medical field. We think this evidence was sufficient to permit the jury to consider the extent, duration, and permanency of the injuries sustained by

Ratliff; also, to consider the pain and suffering experienced in the past, and reasonably certain to be experienced in the future. The introduction of the mortality table was likewise permissible. Both matters were mentioned by the late Justice Minor W. Millwee in the case of *Abraham* v. *Jones,* 228 Ark. 717, 310 S.W. 2d 488.

"Appellants also argue the court erred in permitting the introduction of the mortality table showing appellee's life expectancy. The only objection urged at the trial was that this testimony was immaterial because there was no evidence of any future loss of earnings or disability. On this point we think the trial court correctly held that the testimony offered by appellee was sufficient to warrant a jury finding for future loss of earnings and disability. This testiomny, although contradicted, was to the effect that appellee was still suffering pain and unable to perform his usual occupation as a farm laborer at the time of the trial. Similar evidence has been held sufficient to sustain a verdict for future loss of earnings and disability."

Appellant argues that the court erred in including the word "salaries" in the instruction, inasmuch as there was no evidence that appellee had ever worked for a salary. No specific objection was made to the inclusion of this word, and we therefore do not consider this argument.

A vigorous attack is also made on the use of the word "profit," but we find no merit in this contention. The evidence reflected that Ratliff had been engaged in working for himself by building batteries and bird boxes. He testified that he was earning between $200.00 and $300.00 per month prior to the injuries complained of, but that he was not able to engage in the battery repair business at the time of trial because of inability to lift a battery; that he had earned approximately $100.00 during the month prior to the trial. Appellant cites authority to the effect that, as a general rule, recovery is not allowed for the loss of business or profits from invested capital or labor of others, irrespective of the

prominence of the part in the business taken by the injured person.

There is much conflict in the authorities relative to the right to prove the loss of profits to the business of an injured party occasioned by his inability to give personal attention to the business, but where one is the sole owner of, and laborer in, a business, it appears that evidence of profits is clearly admissible. As far back as 1915, this court, in *St. Louis, I. M. & S. Ry. Co.* v. *Eichelman,* 118 Ark. 36, 175 S.W. 388, quoting from a Pennsylvania case, said:

" 'Profits derived from capital invested in business can not be considered as earnings, but in many cases profits derived from the management of a business may properly be considered as measuring the earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner.' * * *

"It is permissible always to prove one's capacity for and disposition to work, and any special qualifications which one has which tends to increase his earning capacity may be shown. And it was, therefore, competent here to show what appellee's duties were in connection with his business; what his qualifications were for discharging those duties; what the services of one similarly qualified would have been worth to this business; and the extent to which appellee had been rendered unable to discharge his customer duties."

The court, in the *Eichelman* case, ruled that certain evidence had been improperly admitted, but the inadmissible evidence related to accumulated profits from invested capital and the labor and services of a co-partner. In *Coca-Cola Bottling Co. of Southeast Arkansas* v. *Jones,* 226 Ark. 953, 295 S.W. 2d 321, we said:

"* * * The plaintiff, who owned and conducted his own business, was incapacitated for several weeks by his injuries. His absence from the grocery store involved a financial loss that the jury were entitled to consider.

Various phrases have been used to describe the compensable loss sustained when a self-employed person is disabled. We have said that 'profits derived from the management of a business may properly be considered as measuring the earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner.' *St. Louis, I. M. & S. Ry. Co.* v. *Eichelman,* 118 Ark. 36, 175 S.W. 388. Much to the same effect is the statement that the damages are to be measured by the value of the proprietor's services during the period of his injury."

The case of *Yost* v. *Studer,* 227 Ark. 1000, 302 S.W. 2d 775, related to a dentist who had been injured in a collision and had lost time from his practice. The proof reflected that Yost lost about two weeks from his work, and, on appeal, the appellant contended that the court erred in refusing to submit to the jury the question of whether Yost had been damaged by loss of time from the practice of his profession. As authority for his position, appellant relied upon *Coca-Cola Bottling Co. of Southeast Arkansas* v. *Jones, supra.* This court rejected this contention, stating:

"The situation in the case at bar is quite different from the *Jones* case. Here, when plaintiff finished his case, not a scintilla of evidence had been introduced as to any damages he may have sustained because of loss of time. The jury had the benefit of no evidence whatever to be guided by in determining such alleged damages. Any verdict based on such alleged loss of time would have been pure speculation. There was no inkling as to whether such loss, if any, was $50.00 or $5,000.00. In these circumstances, it would have been utterly impossible for the jury to have reached an intelligent conclusion as to such alleged damages."

In the instant case, evidence was offered as to earnings before and after the injuries, and was admissible to aid the jury in fixing the value of appellee's time.

Appellant also objected specifically to that part of the instruction dealing with the market value of Ratliff's

vehicle. Here, appellant's objection has merit. The only evidence relative to the value of Ratliff's automobile was testimony to the effect that it was worth $300.00 before the accident. There was absolutely no evidence as to its value after the collision, though it does appear from the testimony that appellee continued to drive the car.

Appellant's final assertion of error is based on the court's refusal to instruct the jury that there could be no award of punitive damages. In his opening statement, counsel for appellee told the jury:

"Now the recklessness that is charged against Allen Holland is such that I believe that when the Court instructs you that he will instruct that for wanton conduct that shows disregard to others, you may award punitive damages as punishment. That will be a matter for you to decide. When you have heard all the evidence in this case, I think you will come to the conclusion that a substantial judgment should be awarded merely to compensate Tom Ratliff, and to pay him for the loss he has sustained. You may or may not determine that in addition he ought to be punished by an additional amount. Thank you very much."

When the presentation of evidence was concluded and the jury instructed, appellee offered an instruction defining punitive damages and permitting a recovery for such damages if the jury found that Holland's acts were committed willfully or wantonly. The court refused the instruction. Appellant also asked the court to give an instruction telling the jury that appellee was *not* entitled to punitive damages, but the court refused to do so, and error is asserted. It is contended that Holland was entitled to this instruction to counteract any effect that the opening statement of appellee's counsel might have had on the jury. We do not agree. Counsel had told the jury that he believed that the court would instruct relative to punitive damages—but this was not done, and we do not see the need for this negative instruction. At any rate, while the request was made, appellant did not

offer any instruction in this regard, and therefore, cannot be heard to complain.

As previously stated, there was no evidence to justify a recovery for the damage to appellee's car, and the judgment should accordingly be reduced by the highest figure used in giving the value of that vehicle. This figure was $300.00, and the judgment should be reduced to $14,700.

The judgment is affirmed on the condition that remittitur is entered as indicated within seventeen calender days; otherwise, the judgment will be reversed, and the cause remanded for a new trial.

HOOD *v.* CITY OF PINE BLUFF.

5-3399 385 S. W. 2d 1

Opinion delivered December 21, 1964.

Dick Hood, for appellant.

George N. Holmes and *Stephen A. Matthews,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal is an attack on Ordinance No. 3803 of the City of Pine Bluff. Two suits were filed in the Chancery Court against the City and its officials. Jim Hood was plaintiff in one

suit, and John Hestand in the other. The suits were consolidated in the Chancery Court and trial resulted in a decree upholding the Ordinance and this appeal ensued in which the appellants urge only two points, subsequently to be set out and discussed. At the outset, we copy the Ordinance in full:

"ORDINANCE NO. 3803

"AN ORDINANCE GRANTING AN EXCLUSIVE PERMIT FOR THE PLACING OF REST BENCHES BEARING ADVERTISING MATTER UPON PORTIONS OF CERTAIN PUBLIC THOROUGHFARES AND OTHER LOCATIONS.

"BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF PINE BLUFF, ARKANSAS:

"1. An exclusive permit is hereby granted and awarded to H. L. Jones, his heirs and assigns, for a period of ten (10) years from the effective date hereof, to place artistic benches bearing advertising in the City of Pine Bluff, Arkansas, at such places, points and locations as the permittee selects. The permittee is hereby authorized to locate and place benches along public streets and thoroughfares, shopping centers and other localities which will serve the public convenience and necessity.

"2. The said H. L. Jones, his heirs and assigns, are granted permission to sell advertising space on such benches; provided, however, that no advertisement for any alcoholic beverages will be placed on any portion of any bench.

"3. For and in consideration of such permit, the said H. L. Jones, his heirs and assigns, agree to pay to the City of Pine Bluff the sum of Five and No-100 Dollars ($5.00) per bench per year, said fee being payable in advance annually within thirty (30) days from the effective date or anniversary date of this ordinance, with a minimum of fifty (50) benches guaranteed. Any benches placed in the interim shall be at the rate of Five

and No-100 Dollars ($5.00) per bench for any period six (6) months or over, and at the rate of Two and 50-100 Dollars ($2.50 per bench for any period less than six (6) months and shall be due and payable upon the issuance of a permit by the City Engineer. Before the placement of any bench a permit must be issued by the City Engineer and the location of said bench approved by director of traffic.

"4. All rest benches hereafter placed along streets of the City of Pine Bluff shall be constructed of a combination of materials that will be durable and attractive. Each bench shall be approximately seven (7) feet long, two (2) feet wide and fifty (50) inches high, and shall not weigh more than eight hundred (800) pounds. The benches shall be kept in good and safe condition and repair at all times. Permittee further agrees to keep the immediate area around the benches in clean, orderly and sanitary condition and in such maner as not to create a fire hazard or menace to health.

"5. If at any time during the period of the permit granted herein, or any extension thereof, any public property upon which any bench or benches are located is needed for public purposes, permittee, his heirs and assigns, will remove such bench at his own expense upon the request of the Mayor of the City of Pine Bluff or his agents.

"6. If permittee, his heirs and assigns, shall abandon or fail to perfor many of the duties, covenants, or things imposed upon him herein, the City of Pine Bluff may declare this permit breached and terminate same, unless said breach is corrected within thirty (30) days after the breach occurs and notice given by the City of Pine Bluff to the permittee. In such event the City of Pine Bluff is authorized, at its option, to take possession of said benches, disposing of them to the best advantage in its judgment, and any residue over and above the expenses involved shall be paid to the permittee, his heirs and assigns.

"7. Any assignee of permittee shall be obligated to notify the City Clerk of the City of Pine Bluff of any assignment of all or any part of this permit within thirty (30) days from the date of any such assignment. No assignment will be made or recognized without prior approval of the City Council of the City of Pine Bluff.

"8. There is hereby granted to the permittee, his heirs and assigns, an option to renew this permit for an additional ten (10) year period beyond the original term hereof upon the same terms and conditions as contained herein; provided, however, that the price per bench per year may be renegotiated and a new price agreed upon; provided further that such renegotiated price shall not exceed Ten and No-100 Dollars ($10.00) per bench per year.

"9. This ordinance shall be in full force and effect thirty (30) days following its passage.

"Passed by the City Council November 18, 1963."

The evidence disclosed that the plaintiff, Jim Hood, had been the holder of a bus bench franchise in the City of Pine Bluff under an Ordinance somewhat similar to the Ordinance No. 3803. Hood's franchise had expired in 1959 but he had continued thereafter to place bus benches in the City of Pine Bluff without a franchise. H. L. Jones made a proposal to the City of Pine Bluff for a franchise for bus benches. His proposal was referred to the City Traffic Committee. Jim Hood also submitted a proposed ordinance that he be given an exclusive franchise. Both the proposed Hood and Jones ordinances were studied by the City Council's Traffic Committee and the entire Council; and changes were made; and the Ordinance No. 3803 was duly adopted by the City Council of Pine Bluff on November 18, 1963. No advertisement of any nature was published prior to the passage of the Ordinance No. 3803, and no bids were taken prior to the passage of the Ordinance. The City of Pine Bluff has at all times owned parks and recreational facilities.

Now we proceed to consider the two points on which the Ordinance is attacked; and we carefully limit our holding in this case to these two points and do not attempt to consider any other matters.

I.

The appellants' first point is: "The Ordinance fails to comply with Act 224 of 1959." A careful study of the said Act convinces us that it has no application to a situation like the one here. This Ordinance only attempts to allow H. L. Jones a permit to erect benches on the sidewalk area of the streets and to have advertising matter on the benches. There is no sale, lease, or other disposition of any recreational area or park property by this Ordinance. The Act 224 of 1959, as amended by Act 25 of 1961, may now be found in Ark. Stat. Ann. § 14-701 (Supp. 1963) *et seq.* The said Act purports to grant authority to certain agencies, including municipalities, ". . . to sell, lease, grant, exchange or otherwise dispose of any property or interest therein comprising parks, playgrounds, golf courses, swimming pools, or other property which has been dedicated to a public use for recreational or park purposes . . ."

Granting to H. L. Jones a permit to erect benches with advertising material on them is *not* a sale or other disposition of a park or recreational facility in any way.

II.

Appellants' second point is: "The Ordinance is void for uncertainty, being unreasonable and an arbitrary delegation of power." We find no merit in this point; and we cannot do better than to copy the excellent opinion of the learned Chancellor on this point:

"Is Ordinance No. 3803 void for indefiniteness and vagueness? A portion of Section 1 of the Ordinance when read alone lends weight to this argument of Plaintiff. A portion of Section 1 reads as follows: 'The permittee is hereby authorized to locate and place benches along public streets and thoroughfares, shopping centers

and *other localities which serve the public convenience and necessity.'* (Emphasis added.) As stated, this language standing alone would make the Ordinance rather indefinite. However, when this section is read in conjunction with last sentence of Section 3 and Section 5, it properly protects the public and the governing authority from abuses by the franchise holder. This is a valid delegation of discretionary powers to an administrative officer or officers, see 37 Am. Jur., "Mun. Corp.," Section 160, and it meets the requirement of certainty and definiteness required by law. See 37 Am. Jur., "Mun. Corp.," Section 163.

"Did the Mayor and City Council act unreasonably and arbitrarily in passing Ordinance No. 3803? The evidence reflects that two men were seeking the exclusive bench franchise for the City of Pine Bluff. These men are H. L. Jones and Jim Hood. Both men, personally as well as through counsel, were given an opportunity to be heard before a legally constituted meeting of the City Council; both men had authorized an Ordinance to be prepared setting out the terms of their respective bids to the city for the exclusive franchise for the placing of benches within the city. When a final vote was taken, an Ordinance favoring H. L. Jones passed by a vote of 5 to 3. Plaintiff Hood now contends that the Council acted arbitrarily. This argument is without merit. The Council is a legislative body and it was free in this matter to grant an exclusive franchise to one of two individuals. It chose one and, in effect, rejected the other. The loser, as is often the case, doesn't like the decision, but the will of the Council prevailed in a fair voice . . ."

Finding no merit in either of the two points urged by the appellants, the decree is affirmed.

HARRIS, C.J., not participating.

KENDALL *v.* HENDERSON.

5-3442 384 S. W. 2d 955

Opinion delivered December 21, 1964.

[redacted]

Macom & Moorhead, for appellant.

George E. Pike, for appellee.

ED. F. MCFADDIN, Associate Justice. The question here posed is whether the Quorum Court of Arkansas County has the legal authority to appropriate, and the County Court of Arkansas County has the legal authority to expend, County funds for the erection of a building on County property to house historical relics of particular interest to the County.

The appellee (plaintiff below), J. Y. Henderson, brought this suit as a citizen and taxpayer of the County, to enjoin the appellants (defendants below) from making such expenditures, as previously appropriated by the Quorum Court. The said appellants are: Harold Kendall, County Treasurer; W. B. Norsworthy, County Clerk; and John L. Peterson, County Judge and presiding officer of the Quorum Court.[1] The cause was presented to the Chancery Court on stipulated facts, pertinent portions of which we now copy:

"For more than four years last past there has been located at Arkansas Post State Park in the South end of Arkansas County, Arkansas, a museum containing articles of historical significance and artifacts having historical significance and value to the people of Arkansas

[1] Ark. Stat. Ann. § 17-401 (Repl. 1956) gives the composition of the Quorum Court, and Ark. Stat. Ann. § 17-409 (Repl. 1956) states the order of making appropriations.

County, Arkansas, and to others interested in the history of Arkansas Post and Arkansas County, Arkansas, donated or lent to such museum by residents of Arkansas County and by others. Among the articles, relics and artifacts contained in said museum are articles which have historical interest and significance to persons visiting said museum applicable to the period when Arkansas Post was territorial capitol of Arkansas and applicable to the period of the Civil War and later dates. Said articles are presently, and at all times herein mentioned prior to the present have been, housed in a log cabin structure belonging presently to the State of Arkansas.

"The site of Arkansas Post State Park is in process of being acquired by the United States of America and in the immediate future will be, and become, a National Monument owned by the United States of America, and administered under the juridiction of the National Park Service of the United States Department of Interior . . . Arkansas County . . . will lose all control and jurisdiction over the structure occupied by said museum upon acquisition of said site by said National Park Service.

"National Park Service, aforesaid, has announced publicly and has established the policy that in the development of the Arkansas Post National Monument the historical significance of such site from a National Monument standpoint will be the French and Spanish Territorial period, and that only secondary emphasis will be given to the historical significance of the site as the first territorial capitol of Arkansas and as the site of an important Civil War battleground, and that no museum will be provided for the assembling of relics and artifacts of historical significance to this period of the history of such site.

"Considerable public interest has been developed among the citizens of Arkansas County for the preservation and extension of the museum presently located in Arkansas Post State Park . . ."

The stipulation further stated (and we synopsize): that the Quorum Court in 1962 appropriated $2,400.00

for the purchase of suitable grounds for the location of the museum building; and a tract of 2.13 acres was deeded to the County in April 1963. Then at the Quorum Court meeting in November 1963, the sum of $30,000.00 was appropriated[2] for the erection of a building on the acquired land, to be known as the Arkansas Post Museum. Again, we further quote from the stipulation:

"Said museum if constructed, will be owned and maintained by Arkansas County, Arkansas, and will house the historical relics and artifacts presently housed in the Arkansas Post State Park and Museum and such other historical relics and artifacts as may hereafter be made available to it, and will be operated for public use and enjoyment.

"That if such museum be constructed, the lands acquired by the County for the site of said museum and not actually occupied by the structure will be landscaped and improved into a parking and recreational area in connection with the use of said building."

The prayer of the complaint was that the defendants be enjoined from expending any of the County funds for the museum building. The Chancery Court was of the opinion that the County had no legal right to expend County funds for the erection of said museum building, and accordingly the injunction was granted. This appeal challenges the correctness of said Chancery decree; and appellants list only one point:

"The Chancery Court erred in finding from the facts set forth in the stipulations, that the construction and operation of the proposed museum would not constitute a 'county purpose' as that term is defined and understood under the Laws of Arkansas."

Learned counsel for each side have thoroughly briefed this case, citing the Arkansas cases as well as those from other jurisdictions,[3] but we conclude that our

[2] The making of this 1963 appropriation and its expenditure constitute the cause of this litigation.

[3] Indicative of such study, we call attention to the following cases, selected from the brief of one side or the other: the English case of

own cases require reversal of the Chancery decree. We start with these facts: (a) the County already owns the land; (b) the Quorum Court has made the appropriation of $30,000.00 for the erection of the building; (c) the County has that amount available; and (d) the County and its officers will honor the appropriation and expend the money unless restrained. The question is, whether the County has the legal authority to expend County funds for such purpose.

The germane portion of Art. 7, § 28 of the Arkansas Constitution says: "The County Court shall have original jurisdiction in all matters relating to . . . the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." The appellants insist that this museum building is either a "county purpose," an "internal improvement," or a matter of "local concern" to Arkansas County; and appellants insist that if this museum building be either one of the said matters, then the County Court has the legal right to make the said expenditure. Appellants also point out that the 1941 Legislature, by Act No. 291, which is now Ark. Stat. Ann. § 19-3601 (Repl. 1956), provided that: "Any . . . county may . . . acquire, equip, and maintain lands, buildings, or other recreational facilities; and expend funds for the operation of such program . . ."; and that this museum and grounds will be also a "recreational facility."

The appellees maintain, and the Chancery Court, in a scholarly Opinion, held, that this museum will be a matter of interest to the State, and not only to the County, and therefore is not a matter of mere local concern. In his Opinion the Chancellor pointed out that other

Atty. Gen. v. *Sunderland* (1875), Law Reports (Chancery Div.) Vol. 2, p. 634, Law Journal (1876) Vol. 45, p. 839; *Vale* v. *City of San Bernardino* (Calif.), 292 P. 689; *Board of Trustees of Phila. Museum* v. *Trustees of U. of Pa.*, 96 A. 123, Ann. Cas. Vol. 1917D, p. 449; *Aquamsi Land Co.* v. *City of Cape Girardeau* (Mo.), 142 S.W. 2d 332; *McClatchey* v. *Atlanta* (Ga.), 101 S.E. 682; *Hunter's Estate* v. *Colo.*, 49 p. 2d 1009, 101 A.L.R. 1202; *Hogge* v. *Rowan County* (Ky.), 231 S.W. 2d 8; *State* v. *Dickenson* (Fla.), 33 S. 514; and *Florida Power Corp.* v. *Pinellas Utility Board* (Fla.), 40 S. 2d 350.

buildings and locations relating to matters of historic interest are financed by the State,[4] and that such policy of the Legislature clearly indicates that it is for the State and not for the County to finance this enterprise.

We turn now to our own cases. In only one of them —*Johnson* v. *Donham,* 191 Ark. 192, 84 S.W. 2d 374— has this Court reached a restrictive result regarding "county purpose." In that case we held that a lew library for the Prosecuting Attorney of Pulaski County was not a "county purpose."[5] In other cases before and after the *Johnson-Donham* case, counties, either under the claim of "county purpose," "internal improvement," or "local concern," have been permitted to expend county funds for such matters as: (a) a local registrar for birth and death certificates (*Burgess* v. *Johnson County,* 158 Ark. 218, 250 S.W. 10); (b) agricultural and home demonstration agents (*Wilson and Smith* v. *Union County,* 139 Ark. 559, 101 S.W. 2d 791); and (c) county fair buildings (*Gordon* v. *Woodruff County,* 217 Ark. 653, 232 S.W. 2d 832).

One of the most enlightening cases is *Little Rock Chamber of Commerce* v. *Pulaski County,* 113 Ark. 439, 168 S.W. 848. In that case, Pulaski County owned certain real estate and deeded it to the Little Rock Chamber of Commerce for $1.00. This Court held that the County Court had the authority to sell its real estate and, in the absence of fraud or a grossly inadequate consideration,

[4] Attention was called to Ark. Stat. Ann. § 8-301 (Repl. 1956) regarding the Arkansas State War Memorial Building in Little Rock; also to Ark. Stat. Ann. § 8-205 (Repl. 1956) regarding the wartime capitol at Washington in Hempstead County, Arkansas; to Ark. Stat. Ann. § 8-201 (Repl. 1956) regarding the Arkansas Commemorative Commission; to Ark. Stat. Ann. § 8-601 (Repl. 1956) regarding the Prairie Grove Battlefield Commission; to Act No. 164 of 1961 regarding the Marks' Mills Battleground State Park; to Act 10 of 1961 regarding the Jenkins' Ferry Battleground State Park; and to Act No. 182 of 1961 regarding the Poison Springs Battleground State Park.

[5] The holding of that case was largely overcome by Act No. 245 of 1949, as now found in Ark. Stat. Ann. § 24-124 (Repl. 1962), wherein it was enacted that the Prosecuting Attorney could equip the law library out of the amount appropriated for "contingent expenses," and the legality of that Act has not been before us. Of course, we now have a statute providing for county law libraries (Ark. Stat. Ann. § 25-501 [Repl. 1962]).

the conveyance would stand. The consideration for the said deed, there involved, was the fact that the Little Rock Chamber of Commerce had accumulated large sums of money and property by gift from citizens and property owners "and was expending the same for public benefit in inducing the location of factories and other business enterprises in Pulaski County"; that it had thus induced certain large manufacturing plants to locate in the County and thereby increased the population of the said County and the revenues from taxation; and that the benefit to be derived by the County from increased revenues would amount to more than the value of the property conveyed. If a County can legally deed away its property for such considerations as those stated in the case, then certainly a County can assist in building a museum to attract visitors. Arkansas is trying to attract visitors. It will be recalled that Arkansas Post was probably the first settlement in the State of Arkansas. The Federal Government is directing its energies as regards Arkansas Post State Park toward the French and Spanish period; the people of Arkansas County desire to have something that will direct the attention of visitors toward the early Statehood of Arkansas and one of the battles fought in that vicinity. The fact that the Federal Government is not emphasizinng State and local history does not preclude the County from emphasizing it. Frequently the Federal Government has one aim in mind, and the local community has another.

Another enlightening case is *City of Blytheville* v. *Parks,* 221 Ark. 734, 255 S.W. 2d 962, in which we approved a bond issue by the City of Blytheville, with the proceeds to be used for the purpose of acquiring additional lands for an airfield which the City intended to deed immediately to the Federal Government. The question was, whether the City could issue bonds to acquire property to be deeded to the Federal Government and, after quoting *Little Rock Chamber of Commerce* v. *Pulaski County, supra,* we held that the City of Blytheville had such authority because it would be of benefit

to the community in several ways, one of which was increased visitors to the City.

The case of *Gordon* v. *Woodruff County, supra,* points unerringly to our conclusion. In that case 32 acres had been deeded to Woodruff County and the Quorum Court appropriated $2,500.00 to aid in the construction of a building for the county fair. The appropriation was challenged on the basis that such expenditure would not be for "county purposes." We held that the transaction fell within the scope of "county purposes." The purpose of a building for a county fair was to house exhibits to attract people to the fair. Here, the people of Arkansas County want to construct a building to house historical relics and other matters peculiar to Arkansas County to attract visitors. The same reasoning in *Little Rock Chamber of Commerce* v. *Pulaski County, supra; City of Blytheville* v. *Parks, supra;* and *Gordon* v. *Woodruff County, supra,* applies to the case at bar. There is no question of the availability of the funds. The only question is whether Arkansas County can expend the money for the building. We conclude that such expenditure may be legally made.

The decree of the Chancery Court is reversed and the cause is remanded to enter a decree in accordance with this Opinion.

GEORGE ROSE SMITH, & WARD, J.J., dissent.

GEORGE ROSE SMITH, J., (dissenting). Our earlier opinions have drawn a reasonably clear distinction between a State purpose and a county purpose. The most comprehensive discussion appears in *Cotham* v. *Coffman,* 111 Ark. 108, 163 S.W. 1183, which involved a statute requiring a county to contribute to the payment of a circuit judge's salary. In holding the statute unconstitutional we used this language:

"It is to our minds clear that the 'county purpose' referred to in the Constitution means some purpose peculiarly within the province, as distinguished from those general purposes left to the State at large—such, for instance, as for building bridges, courthouses, jails, taking care of the poor, making public roads, etc. . . . It is true that some of these county purposes, such as building courthouses and jails inure equally to the benefit of the State, but it is well understood that these things are provided for by the county. We think that the purpose can not, in the sense of the Constitution, be both a State and county purpose. It must be one or the other. . . . A State purpose must be accomplished by State taxation, a county purpose by county taxation, or a public purpose for any inferior district by taxation of such district. This is not only just, but it is essential."

The *Cotham* case was followed in *Fort Smith Dist. of Sebastian County* v. *Eberle,* 125 Ark. 350, 188 S.W. 821, where an act requiring a county to pay the salary of a State-appointed local registrar was declared to be unconstitutional. Again, in *Johnson* v. *Donham,* 191 Ark. 192, 84 S.W. 2d 374, we held that Pulaski county could not on its own initiative purchase a law library for the prosecuting attorney. That case involved a district that embraced only two counties, Pulaski and Perry. Since the population of the former was more than ten times that of the latter, it is evident that Pulaski county would actually have received almost the entire benefit from the proposed library. It was nevertheless our conclusion that the appropriation was not for a county purpose.

In the case at bar the only fact indicating that Arkansas Post is of peculiar interest to Arkansas county is its geographical location. Ever since the enactment of Act 57 of 1929 Arkansas Post has been a State park, maintained at State expense. The museum now in controversy has also been a State-supported facility. Of course it cannot be doubted that a former State capital is of historical importance to the State as a whole. That the park is being converted into a National Monument

demonstrates that its preservation is of value to the nation as well.

The proof shows that the acquisition of this museum will cost the county taxpayers $60,000, to be paid for in two years. There is also the matter of maintenance for the indefinite future. Neither the record nor the briefs indicate that the museum will attract any tourists who would not be brought to the county anyway by the National Monument alone. If, as we have held, a county cannot constitutionally contribute to the support of localized State functions from which the citizens of the county unquestionably derive a direct benefit, it seems to me that the constitution also forbids the use of county taxes for the support of a State park or a National Monument.

REED *v.* REED.

5-3413 385 S. W. 2d 33

Opinion delivered December 21, 1964.

Levine & Williams, for appellant.

No brief filed for appellee.

GEORGE ROSE SMITH, J. This is a divorce suit brought by the appellant. The chancellor granted the appellee a divorce on her counterclaim and also awarded her the

custody of the couple's two children. It is contended that the court erred in restricting the plaintiff's right to testify and in finding that the testimony offered by the defendant was sufficient to establish a ground for divorce.

Upon the first point the record is evidently incomplete. At the trial the chancellor refused to permit the husband to testify about the merits of the case. We have no doubt that the chancellor had his reasons for this exceptional procedure, but the trouble is that the deficient record prevents us from reviewing the correctness of his action.

In the absence of any explanation a trial court's refusal to allow a party to testify is *prima facie* wrong. It was the appellee's duty to designate for inclusion in the record any explanatory matter that might be needed to support the court's action. We cannot indulge the presumption that the omitted portion of the record would sustain what appears to be an error. Ark. Stat. Ann. § 27-2127.6 (Repl. 1962); *Southern Farmers Assn.* v. *Wyatt,* 234 Ark. 649, 353 S.W. 2d 531. We have no choice except to set aside the decree.

In attempting to prove a ground for divorce the appellee confined herself to a statement, without details, that her husband had deserted her. Her only corroborating witness was her mother, whose testimony was equally deficient. Inasmuch as the case must be retried we merely point out that the proof must go beyond a recitation of conclusions of law and establish the specific facts that are relied upon to justify the party's demand for relief. *Dunn* v. *Dunn,* 114 Ark. 516, 170 S.W.234; *Sutherland* v. *Sutherland,* 188 Ark. 955, 68 S.W. 2d 1022. As the case has not yet been fully developed we do not attempt to review the court's child custody award.

Reversed.

5-3400 384 S. W. 2d 943

Opinion delivered December 21, 1964.

[redacted]

C. R. Starbird, for appellant.

Batchelor & Batchelor, for appellee.

PAUL WARD, Associate Justice. Appellee, The AAA Lumber Company, is a corporation engaged in the retail sale of building supplies. On September 9, 1963 appellee filed a complaint (later amended) against D. L. and Gina Lunsford (husband and wife) alleging they were indebted to it in the sum of $1,670.31 for building materials purchased and used in constructing a house on 20 acres of land owned by Odis and Eula Stephens who are the parents of Gina, and who were later made parties defendants. It was further alleged that the Lunsfords were non-residents and owned no property here except the said building; and that Mr. and Mrs. Stephens were estopped to deny the Lunsfords owned the said building. Appellee prayed for judgment against the Lunsfords for the amount stated above, that the building be subjected to attachment, that it be removed from the land and sold (if necessary), and that the proceeds be applied on the judgment. No question is raised as to the procedure for attachment.

Judgment was rendered against the Lunsfords as prayed and they have not appealed.

Mr. and Mrs. Stephens (appellants here) filed an answer to the above complaint, admitting they owned the land, that they helped the Lunsfords build the house, and that appellee furnished the building materials. They alleged the house became a part of the realty. They denied that the Lunsfords were non-residents or that there was any agreement for the Lunsfords to have title to the house. They prayed that the complaint and the attachment be dismissed or, if the attachment be sustained, that their interest be prior to that of appellee.

After testimony was introduced by both sides, appellants offered seven instructions which were refused by the court without objection. Then the issues were submitted to the jury on three general instructions along with the following interrogatory:

"Do you find from a preponderance of the evidence in this case that the defendants, Odis Stephens and Eula Stephens, stood by, observed the buying of lumber from the AAA Lumber Company, and the using of the lumber in the house in question and participated in the picking up and hauling items from said company to the building site and actually helped in the building of the house without making protest or advising the plaintiff that said land belonged to them and that they claimed said house?" To the above interrogatory the jury's answer was "Yes". The only objection and exception to the above procedure was the following:

"The defendants object to the submission by the Court to the Jury the question of estoppel in this case for the purpose of holding defendants, Odis Stephens and Eula Stephens, liable for the debts of D. L. Lunsford and Gina Lunsford.

"THE COURT: This is overruled."

The obvious answer to the above objection was stated at the time by the trial court when it said: "The court never thought of holding them (appellants) personally liable."

Likewise, appellee does not here seek to hold appellants personally liable.

Appellants urge two additional points for a reversal, but we find no reversible error in either.

One. Appellants' argument is to the effect that the house when built became a part of the realty and therefore could not be detached and sold. Ordinarily this is true, but there are recognized exceptions. See: *Soule, Guardian* v. *First National Bank of Ft. Smith,* 202 Ark. 326, 150 S.W. 2d 204, and *Hankins* v. *Luebker,* 224 Ark. 425, 274 S.W. 2d 356. In the first case this point arose where machinery was attached to and was a part of the realty in 1934, but where later it was disposed of, and we said: "They were sold separate and apart from the building in which they were stationed, and this, in legal effect, was a severance, which invested them with the character of personality." In the other cited case this Court was dealing with pumping units installed in a rice field which concededly was ordinarily a part of the realty. This Court there said:

"It is well settled by our own cases and the authorities generally that parties may treat as personal property machinery or improvements which would otherwise be a part of the realty, and, thus convert it into personal property as between themselves."

Here the record is replete with testimony to show, and to support the finding, that appellants, by their actions, led appellee into thinking the Lunsfords were buying building materials to build their own house and not a house for appellants. Mr. Stephens even admitted that he was paid by the Lunsfords for helping them build the house and that appellee furnished the material. Therefore we think the trial court was right in holding, without objection, appellants were estopped from now claiming the house was a part of the realty and that it belonged to them.

Two. We find no merit in appellants' contention that the Lunsfords were not non-residents and that,

therefore, there was no legal basis for service by attachment. The pertinent part of the attachment statute, Ark. Stat. Ann. § 31-101 (Repl. 1962) reads as follows:

"The plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered.

"First. In an action for the recovery of money, where the action is against—

1. A defendant, or several defendants who, or some one of whom, is a foreign corporation, or nonresident of the State . . ."

The pivotal word, as here connected, in the above section is "non-resident". The question here therefore is not whether the Lunsfords were domiciliaries of this state but whether they were non-residents. This Court has consistently held that the words "domicile" and "residence" are not synonymous. If the Lunsfords were non-residents at the time this suit was filed, then the attachments must be sustained. See: *Krone* v. *Cooper,* 43 Ark. 547, where we said:

"Thus, where a mother left the state of her domicile and accompanied her children into another state, with the intention, however, of returning when their education was completed, she was held liable to the process of attachment in the state of her domicile, as being a nonresident of that state. *Alston* v. *Newcomer,* 42 Miss. 186."

Here it is not disputed that the Lunsfords were not residing in this state though there is some intimation they might someday make this state their domicile. It is not denied that they moved to Dallas in August 1963, and that Mr. Lunsford is now employed in California.

In addition to the above it is conceded that Mrs. Lunsford was present at the trial and that she also testified in the case. By so doing she entered her appearance. *Nichols* v. *Arkansas Trust Company,* 207 Ark. 174,

179 S.W. 2d 857; *Prosser* v. *Ark. Baptist Hospital,* 237 Ark. 157, 372 S.W. 2d 395.

Affirmed.

GEORGE ROSE SMITH and ROBINSON, JJ. dissent.

GEORGE ROSE SMITH, J., (dissenting). It should be made clear at the outset that this case does not involve a materialman's lien. Lee Edwards, the appellee's president and general manager, testified that he refrained from filing a lien because Lunsford asked him not to do so, saying that it would "foul Mr. Stephens up." Thus the lumber company, with notice that the Lunsfords did not own the land, allowed its remedy against the improvement itself to lapse.

The majority opinion nevertheless creates, on the theory of estoppel, what is in substance a materialman's lien. Reliance by the adverse party is an essential element in an equitable estoppel. If the complaining party had no knowledge of the conduct that is said to give rise to an estoppel there could have been no reliance and therefore no estoppel. *Miller Lbr. Co.* v. *Wilson,* 56 Ark. 380, 19 S.W. 974.

There is no substantial evidence to show that any action on the part of Mr. and Mrs. Stephens misled the appellee either into giving up its lien or into believing that the house was to become the Lunsfords' separate personal property. Edwards, the head of the lumber company, testified that on about three occasions Stephens picked up small items, such as nails, that D. L. Lunsford had ordered. Stephens said at the time that the material was going into the house being built for Lunsford. It may also be true, though this is not clear, that it was known to the lumber company that Stephens was assisting his son-in-law in building the house.

These facts fall decidedly short of creating an estoppel. Under our decision in *Gunter* v. *Ludlam,* 155 Ark. 201, 244 S.W. 348, and similar cases, one who stands by and permits another to construct a building on his land is not estopped to assert his ownership as against a materialman's lien. Here the same principle applies to the improvement as well, for the appellee failed to perfect its lien.

Most of the appellee's argument relates to transactions between the Stephenses and the Lunsfords. Stephens testified that he intended for the house to be a home for his daughter and her husband. He kept track of his own contributions of labor and material so that he could take them into account later on in making a fair division of his property among his three children. The proof does not suggest that Mr. and Mrs. Stephens were under an enforceable duty to convey the house and lot to the Lunsfords.

What happened between the Stephenses and the Lunsfords is immaterial as far as the appellee's reliance is concerned, for no one at the lumber company knew anything about these matters. If, however, there had been a binding agreement between the Stephenses and the Lunsfords that the house was to become the latters' severable personal property, then it might be said that the appellee could claim subrogation to the Lunsfords' rights. The short answer to such a suggestion is that no such agreement was established. Mr. and Mrs. Stephens and their daughter all testified, but none of them intimated that the dwelling was to become personal property. Any such suggestion is in fact wholly unreasonable. An agreement that an improvement is to remain personal property means that its owner intends to have the power to remove it from the land. Otherwise the agreement could have no purpose. This house was built upon a concrete foundation and could not have been moved without its being damaged. There was obviously no thought in the minds of any of the parties that the house would ever be moved. The jury did not find, and

on the proof could not have found, that the dwelling was personal property. The judgment should be reversed.

ROBINSON, J., joins in this dissent.

MALVERN GRAVEL CO. *v.* MITCHELL.

5-3343 385 S. W. 2d 144

Opinion delivered December 21, 1964.

[Rehearing denied January 18, 1965.]

Joe W. McCoy, James C. Cole, Wood, Chessnutt & Smith, Rose, Meek, House, Barron, Nash & Williamson, for appellant.

Wendell O. Epperson, Lookadoo, Gooch & Lookadoo, for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether the appellant, Malvern Gravel Company, is liable under the Federal Employers' Liability Act for injuries sustained by appellees, Arlie Mitchell and James Rogers, who were employees of the gravel company at the time they were injured. There were jury verdicts for the plaintiffs, Mitchell and Rogers. The gravel company has appealed. If there is substantial evidence that the gravel company is a common carrier, within the meaning of the Federal Employers' Liability Act, the trial court was correct in refusing to direct a verdict for appellant, but if there is no substantial evidence that the gravel company is a common carrier within the meaning of the aforesaid Act, the judgments must be reversed.

Mitchell and Rogers, while working in the due course of their employment, were underneath a railway car closing a defective hopper door on a car which belonged to the Missouri Pacific Railroad Company. They were severely injured when an employee of the gravel company, while operating a switch engine, shoved a railway car into the car under which appellees were closing the hopper door.

Mitchell and Rogers, as employees of the gravel company, were awarded compensation under the Arkansas Workmen's Compensation Law, which limits the amount of compensation recoverable. Later, they filed suits in the Hot Spring Circuit Court against the Missouri Pacific Railroad Company, the Malvern & Ouachita River Railroad Company, and the Malvern Gravel Company, alleging that the defendants were common carriers engaged in interstate commerce; that they were, therefore, liable to appellees under the Federal Employers' Liability Act. Under that Act, notwithstanding the Arkan-

sas Workmen's Compensation Law, there is no limit to the amount of recovery for a personal injury. *Missouri-Kansas-Texas R. Co. of Tex.* v. *Waddles,* 203 S.W. 2d 350; *Schirra* v. *Delaware, L.&W.R. Co.,* 103 F. Supp. 812.

The cases of the plaintiffs against the defendants were consolidated and proceeded to trial. After all parties had rested, the court directed a verdict in favor of the Malvern & Ouachita River Railroad Company, and there is no appeal from the court's action in that respect. The jury returned verdicts in favor of each plaintiff in the sum of $200,000 against the Missouri Pacific Railroad Company and the Malvern Gravel Company. Presumably, the Missouri Pacific settled the judgment against it. In any event, it is not a party to this appeal. Only the gravel company has appealed.

The principal issue, and the only one we reach, is whether the appellant, Malvern Gravel Company, is a common carrier within the meaning of the Federal Employers' Liability Act. Although it is engaged in interstate commerce, if it is not a common carrier as such a carrier has been defined by the Federal Courts, it is not liable under the Act.

The Federal Employers' Liability Act provides: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . ." 45 U.S.C.A., Sec. 51.

The Malvern & Ouachita River Railroad Company, hereinafter called M & O, was issued a charter in Arkansas as a railway company in 1929. Actually, the M & O did not transport anything for anyone and was incapable of doing so. It only owned a right-of-way of about 1¾ miles with no rails thereon. As rolling stock, it

owned one switch engine, but no tracks on which to operate it and no railway cars to pull. It never, at any time, operated as a railroad or as a common carrier within the meaning of the Federal Employers' Liability Act. Although it may have been a common carrier under the provisions of Arkansas Constitution, Article 17, Sec. 1, and because of having exercised the right of eminent domain, it was not a common carrier within the meaning of the Federal Employers' Liability Act. The U.S. Supreme Court has said: "In our opinion, the words 'common carrier by railroad' as used in the act, [Federal Employers' Liability Act], mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by mention of cars, engines, track, roadbed and other property pertaining to *a going railroad.*" *Wells Fargo & Co.* v. *Taylor,* 254 U.S. 175, 41 S. Ct. 93. (Our emphasis.)

In 1932, the Malvern Gravel Company was chartered as a corporation. The incorporators were entirely different from those who had incorporated the M & O in 1929. At the present time, the Malvern Gravel Company owns the controlling stock in the M & O but there is no showing as to when the gravel company acquired the M & O stock. Sam Clark is the president of both companies. He became associated with both companies about 15 years ago. As a corporation, the gravel company is authorized to excavate, mine, quarry and produce, refine, grade, crush, dress, manipulate, amalgamate and prepare for building and construction purposes or otherwise, prepare for market, and to purchase, manufacture, make, acquire, sell or otherwise dispose of, distribute, and generally deal in and with gravel, sand, stone, rock, clays, ores, metals, and vegetable and mineral substances and building and construction materials of all kinds, etc. It was not authorized to operate as a railway company.

Some time after the Malvern Gravel Company came into existence as a corporation, for the consideration of

$2,500 per year, it leased from the M & O, a corporation that had never operated as "a going railroad", the short right-of-way and a railroad engine owned by M & O. The gravel company leased rails from the Missouri Pacific and caused them to be placed on the right-of-way it had leased from the M & O. By using the leased engine, rails and right of way the gravel company has been able to move its products from its plant to a point where they could be placed on the main lines of the Missouri Pacific and Rock Island Railroads, and thus transported in both intrastate and interstate commerce.

The gravel company has never held itself out as a common carrier. In fact, with the exception of a few times, its railway facilities have been used by no one except the gravel company itself. At one time a road contractor had a "batch" plant located on gravel company property near the gravel plant. The gravel company was selling material to the contractor, and used its own railway facilities to deliver, on its own property, the material it was selling to the contractor. About a half dozen other times the gravel company, as a favor, permitted its facilities to be used, on the gravel company property, to unload material purchased elsewhere by others who did not have a convenient place or facilities to unload heavy material. No charge was made for such accommodations. The gravel company merely did a few friendly acts to help some neighbors.

The Missouri Pacific delivered and picked up its cars on the gravel company property. The gravel company, with its engine, picked up empties and delivered the cars that it had loaded with its own material to the Rock Island and was allowed $5.00 per car for doing so. This was done because the Arkansas Commerce Commission had a rule that a railroad company must do the switching or pay the customer for doing it. The Missouri Pacific did its own switching in connection with the gravel plant, but the Rock Island chose to pay the gravel company for doing it.

The Malvern Brick & Tile Company is near the gravel company property. The railroad track of the gravel company crosses property belonging to the brick company. The brick company also has a locomotive, and uses a portion of the track in question and helps to maintain it. The gravel company never handles any material for the brick company.

Appellant argues that the burden of proof was on plaintiffs, appellees, to show that the Federal Employers' Liability Act is applicable, and appellees concede that they had the burden of proof in that respect.

To sustain their contention that the gravel company is a common carrier, appellees, in their excellent brief, rely to a large extent on what are known as the "Tap Line Cases", 234 U.S. 1. There, a number of lumber companies who operated short line railroads contended that they were common carriers; they held themselves out as such, and maintained that as common carriers they were entitled to a rebate of a part of the tariff collected by the principal railroads hauling the shipments. The Tap Line Cases are easily distinguishable from the case at bar. In those cases the court said: "They [the Tap Lines] are engaged in carrying for hire the goods of all those who see fit to employ them." This statement in itself shows that the tap lines were common carriers. In the case at bar, there is no showing that the gravel company ever held itself out as being willing to haul for others, for hire or otherwise. In fact, the evidence is completely convincing that the gravel company operated the 1¾ miles of railroad solely for the purpose of getting its own products to market, and for no other purpose.

Appellees also rely heavily on *Kach* v. *Monessen Southwestern Ry. Co.*, 151 F. 2d 400, but there the issue was whether the railroad company was operating in interstate commerce, and not whether it was a common carrier.

Appellees cite several other cases as supporting their argument that the gravel company is a common carrier.

We have carefully examined all the cited cases. They are distinguishable on the facts, and it would unduly extend this opinion to deal at length with each case. Appellees also suggest that the gravel company is a common carrier because of its close connection with the M & O Railroad.

There are three things that must combine to constitute a common carrier within the meaning of the Federal Employers' Liability Act; (1) a carrier must be engaged in interstate commerce; (2) it must operate a railroad in interstate commerce; and (3) it must operate a railroad as a common carrier.

Even if we should find that the M & O and the gravel company are so closely associated that they could be considered as one company, and that such cases as *Black & White, Inc.* v. *Love,* 236 Ark. 529, 367 S.W. 2d 427, are applicable in that respect, it would not help appellees because according to many decisions of the Federal Courts, neither the M & O or the gravel company, or the two companies operating individually or in concert with one another have ever operated as a common carrier within the meaning of the Federal Employers' Liability Act. Time and again the Federal Courts have defined a common carrier that comes within the meaning of the Act. We are bound by the decisions of the Federal Courts in that respect. *Chicago, R.I. & P.R. Co.* v. *Wright,* Okla. 1954, 278 P. 2d 830, certiorari denied, 75 S. Ct. 581, 349 P.S. 905, 99 L. Ed. 1241.

In *Duffy* v. *Armco Steel Corp.,* 225 F. Supp. 737 (1964), the court held that a defendant is not "a common carrier by railroad" for purposes of Employers' Liability Act where defendant owned and operated railroad equipment within its manufacturing plant, the equipment being used to transport material over leased right of way. The court said: "The railroad equipment owned and operated by Armco has not been used to transport goods of others, nor has Armco offered their use to the public. Thus, it appears to a certainty that there is no genuine issue as to any material fact in this case. De-

fendant asserts, and the Court agrees, that defendant although operating in interstate commerce is not a common carrier by railroad.'' It was held in *Tilson* v. *Ford Motor Co.,* 130 F. Supp. 676 (1955), that where the operation of a railroad by an automobile manufacturer served only the automobile manufacturer, the automobile manufacturer was not a common carrier within the meaning of the Federal Employers' Liability Act.

In *Kelly* v. *General Electric Co.,* 110 F. Supp. 4, the electric company owned rolling stock and tracks and its tracks were partly located in the bed *of a public street* and were connected with those of a railroad common carrier. It shipped goods F.O.B. plant and moved cars partially loaded with goods of others. But it did not hold itself out as a common carrier and did not carry for hire the goods of others. The court held that it was not a common carrier within the meaning of the Federal Employers' Liability Act. There, the court said: ''The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed.''

In *Jones* v. *N.Y. Cent. R. Co.,* 182 F. 2d 326 (1950), the court quoted the language of the U.S. Supreme Court in *Wells Fargo & Co.* v. *Taylor,* 254 U.S. 175, to the effect that a common carrier for the purposes of the Federal Employers' Liability Act is one who operates a railroad as a means of carrying for the public.

There is no substantial evidence in the record that appellant or M & O operated a railroad as a means of carrying for the public. In other words, there is no substantial evidence that either or both companies operated as a common carrier within the meaning of the Federal Employers' Liability Act.

Reversed and dismissed.

McFaddin & Johnson, J.J., dissent.

ED. F. MCFADDIN, Associate Justice, (dissenting). The Majority Opinion states the issue in the first paragraph: "If there is substantial evidence that the gravel company is a common carrier, within the meaning of the Federal Employers' Liability Act, the Trial Court was correct in refusing to direct a verdict for appellant, but if there is no substantial evidence that the gravel company is a common carrier within the meaning of the aforesaid Act, the judgments must be reversed." Then in a subsequent paragraph the Majority Opinion has this statement: "There are three things that must combine to constitute a common carrier within the meaning of the Federal Employers' Liability Act: (1) a carrier must be engaged in interstate commerce; (2) it must operate a railroad in interstate commerce; and (3) it must operate a railroad as a common carrier."

I propose to take these three essentials and demonstrate that there is ample and substantial evidence to take the case to the jury on each of these three essentials. It is not for this Court to sit as an appellate jury and render a factual finding on each of these three essentials: it is our duty to determine whether there is substantial evidence to take the fact questions to the jury; and this I now propose to demonstrate as to each of the three essentials listed in the Majority Opinon, as above quoted.

I. *The Malvern Gravel Company Was A Carrier Engaged In Interstate Commerce.* The proof abundantly shows that the Malvern Gravel Company made carload shipments of gravel over its railroad track from its plant to various states, and transported over its tracks shipments from outside Arkansas. So the Malvern Gravel Company was engaged in interstate commerce. That the Malvern Gravel Company was a carrier so engaged in interstate commerce is clearly demonstrated by the fact that the Malvern Gravel Company was the same as the Malvern & Ouachita River Railroad, even though they existed as separate corporations.

The record shows that the Malvern & Ouachita River Railroad was incorporated and received its charter from the State of Arkansas on April 30, 1929, ". . . for the purpose of forming a railroad corporation to incorporate, own, construct and operate a short line of railroad necessary to the successful mining quarrying and marketing of stone, rock and other materials . . ." The incorporators certified that 391 shares of the 400 shares were owned by Frank McGillicuddy, and that the railroad would be about four and one-half miles long in Hot Spring County, Arkansas. In order to acquire a part of the right of way, the Malvern & Ouachita River Railroad exercised the power of eminent domain in the Hot Spring Circuit Court in May 1929. So we have an Arkansas railroad corporation exercising the power of eminent domain. Article 17, Section 1 of the Arkansas Constitution states: "All railroads, canals and turnpikes shall be public highways, and all railroads and canal companies shall be common carriers." Notice the language: ". . . all railroads . . . shall be common carriers."

That the Malvern Gravel Company is the same as the Malvern & Ouachita River Railroad is abundantly established from the evidence. On April 3, 1931, the *Malvern Gravel Company* entered into a signed contract with the Missouri Pacific Railroad Company. Mr. Frank McGillicuddy—previously stated as owning 391 of the 400 shares of the issued stock of the Malvern & Ouachita River Railroad—signed the agreement as representing both the Malvern Gravel Company and the Malvern & Ouachita River Railroad. The instrument is so enlightening that I copy pertinent excerpts:

"It is understood that the Missouri Pacific, in compliance with recent order of the Arkansas Railroad Commission, desires to perform the service required of it by the Commission's order in connection with the service mentioned in the caption, in lieu of paying to the Gravel Company the allowance prescribed by the Commission, in the event the work is performed by the Gravel Company rather than by the railroad. In order to carry out this arrangement, the following is agreed upon:

"1. The Malvern Gravel Company (Malvern & Ouachita River Railroad Company) will provide track upon which Missouri Pacific engines and cars may be safely operated between the Missouri Pacific main line connection and the loading facilities of the Malvern Gravel Company; the latter being located approximately one and three quarters (1¾) miles from the Missouri Pacific main line. . . .

"2. The Malvern Gravel Company (Malvern & Ouachita River Railroad) will provide suitable track facilities convenient to its plant where empties will be set out by the Missouri Pacific engine and crew, also suitable track or tracks from which loads will be moved by the Missouri Pacific crew. Commercial loads for movement via Missouri Pacific will be placed together by the Malvern Gravel Company (Malvern & Ouachita River Railroad) on designated tracks so that switching in the plant by the Missouri Pacific crew for the purpose of getting this business together, will not be necessary. . . .

"4. The hour or hours at which Missouri Pacific will make trip to plant of the Malvern Gravel Company (Malvern & Ouachita River Railroad) will be agreed upon between representatives of the two companies on the ground, and may be changed from day to day as conditions require, by mutual agreement between these representatives. . . .

"/s/W. E. Lamb, Superintendent—Mo. Pac. RR. Co.

"/s/Frank McGillicuddy, Representing Malvern Gravel Co.

(Malvern & Ouachita River RR. Co.)"

It will be observed that the Malvern & Ouachita River Railroad was the name placed in parenthesis after Malvern Gravel Company in each instance, and this certainly indicates that the two were considered as one. On January 21, 1932, Malvern Gravel Company became a Delaware corporation and on January 25, 1932, it qualified to do business in Arkansas, and has so remained.

On June 1, 1934, Malvern Gravel Company leased from the Missouri Pacific Railroad Company track materials consisting of 27,114 lineal feet of steel rails, and also angle bars, frogs, guard rails, switch plates, and other such materials for operating a railroad. The charter of the Malvern Gravel Company did not authorize it to construct a railroad track, yet it did so because its alter ego, Malvern & Ouachita River Railroad, needed a railroad track. In the present case Mr. Sam R. Clark testified that he was President of both companies. I copy excerpts from his testimony:

"Q. State your name, please, sir.

"A. Sam R. Clark.

"Q. Mr. Clark, are you connected with the Malvern Ouachita River Railroad in any way?

"A. Yes, sir. I'm president of both companies.

"Q. What do you mean both companies?

"A. Malvern Gravel Company and Malvern Ouachita River Railroad Company.

"Q. All right. Mr. Clark, what operations are carried on by the Malvern and Ouachita River Railroad Company? Do they carry on any operations at all?

"A. No, it's just a book corporation is all it is . . .

"Q. For what purpose was that railroad incorporated?

"A. It is my understanding that the only reason the railroad was incorporated was to condemn the right of way from the plant site to the Missouri Pacific switching yards. . . .

"Q. What is the relationship between the Malvern and Ouachita River Railroad Company and the Malvern Gravel Company?

"A. Malvern Gravel Company owns stock in the company.

"THE COURT: What was your answer?

"A. I said the Malvern Gravel Company owns stock in the company. There's a hundred shares of stock in the Malvern Ouachita River Railroad Company and the Malvern Gravel Company owns 97 shares of that stock. I own a share and my wife owns a share and Wilburn Cox owns a share. According to Arkansas Law there has got to be three incorporators, so Malvern Gravel Company owns all the stock except the three shares.

"Q. Does Malvern Gravel Company have any lease with the Malvern Ouachita River Railroad Company?

"A. Yes, sir.

"Q. What is the rental on that lease?

"A. Twenty-five hundred per year.

"Q. Do you rent all the facilities of the Malvern and Ouachita River Railroad Company?

"A. Yes, sir.

"'Q. How long have you been operating under that lease, ever since you have been there?

"A. Ever since I have been there, and I don't know how long before that. I have been there for 15 years. . . .

"Q. Your Malvern and Ouachita River Railroad Company rents or leases its track and other material to the Malvern Gravel Company, is that correct?

"A. Yes, sir.

"Q. And you pay $2,500.00 per year on that lease?

"A. Yes, sir.

"A. Yes, sir.

"Q. What other property does the Malvern and Ouachita River Railroad Company own besides the track down there?

"A. They own about three different parcels of right of way along that railroad.

"Q. Well, what other personal property to they own?

"A. They own the locomotive.

"Q. They own the locomotive?

"A. Yes, sir.

"Q. Now that's the locomotive that does the switching down there, is that correct?

"A. Yes, sir.

"Q. That is in the Malvern Gravel Company plant down there?

"A. Yes, sir. . . .

"Q. Who is president of Malvern & Ouachita River Railroad Company?

"A. I am.

"Q. How long have you been president of it?

"A. Roughly I would say about six or eight years.

"Q. Do you have a board of directors for Malvern and Ouachita River Railroad Company?

"A. Yes, sir.

"Q. Would you name some of the individuals on that board?

"A. I am on the board and Frank Riley and Bill Riley was on the board. We haven't replaced him. He is deceased.

"Q. Now, is this the same board that operates the Malvern Gravel Company?

"A. Yes, sir."

The State and Federal income tax returns of Malvern & Ouachita River Railroad were introduced in evi-

dence. These showed the only income of the Malvern & Ouachita River Railroad to be $2,500.00 per year, which it was testified was the lease money paid to it by the Malvern Gravel Company.

The fact that the Malvern Gravel Company and the Malvern & Ouachita River Railroad are separate corporations affords the Malvern Gravel Company no immunity, because courts disregard the fiction of the corporate entity in order to do justice. This is discussed in detail in 13 Am. Jur. p. 160 *et seq.*: "A subsidiary or auxiliary corporation which is created by a parent corporation merely as an agency for the latter may sometimes be regarded as identical with the parent corporation, especially if the stockholders or officers of the two corporations are substantially the same or their systems of operation unified." This principle of disregarding the claim of separate corporations has been applied to railroad companies. In *Chicago, Milwaukee RR. Co.* v. *Minneapolis Civic Assn.*, 247 U.S. 490, 62 L.Ed. 1229, the United States Supreme Court held that a railroad company owning what are obviously merely terminal or spur delivery tracks in a city and which is a mere agency or instrumentality of two other railroad companies entering the city which owned its capital stock and controlled its operations, cannot be regarded as an independent public carrier merely because it is technically a separate legal entity. In *Buie* v. *Chicago R. I. Ry. Co.*, 95 Tex. 51, 65 S.W. 27, 55 L.R.A. 86, the Supreme Court of Texas held that when one corporation makes use of another as its instrument through which to transact its business, the principal corporation is really represented by the agent of the sub-corporation and its liability is the same as if it had done business in its own name.[1]

The Arkansas Supreme Court has pierced the fiction of the corporate entity when justice so demanded.

[1] In 1 A.L.R. 610 there is an annotation entitled: "Disregarding corporate existence"; and in Section III of that annotation there are given many instances wherein courts have considered the parent company and the subsidiary company to be one and the same. To the same effect see also annotations in 34 A.L.R. 599 and 63 A.L.R. 2d 1055.

Some of these cases are: *Rounds and Porter* v. *Burns,* 216 Ark. 288, 225 S.W. 2d 1; *Plant* v. *Cameron,* 228 Ark. 607, 309 S.W. 2d 312 and *Black & White* v. *Love,* 236 Ark. 529, 367 S.W. 2d 427. In *Rounds and Porter* v. *Burns, supra,* we pierced the fiction of separate corporate entities, and held the parent corporation liable for the debt of its subsidiary because the parent corporation manipulated the subsidiary "to its own advantage at the expense of the appellee. Under the principles already stated this conduct entitles the appellee to a judgment directly against the parent corporation without regard to the separate entitle of the subsidiary." In *Plant* v. *Cameron, supra,* we held the parent corporation (Cameron) liable for the debt of the subsidiary corporation (Nashville), saying: "Though the corporations are separate legal entitles it would constitute a constructive fraud in this case to allow Nashville to now claim an entirely separate existence from Cameron." In *Black & White* v. *Love, supra,* there were two taxicab companies, one being Black & White and the other being Checker Cab Company. Love sued Black & White which defended on the ground that only Checker Cab Company was liable. We affirmed a judgment against Black & White, saying: "Furthermore, the two corporations were owned by the same shareholders, operated by the same officers, and the cabs were interchanged. It would be putting fiction above right and justice to allow Black & White to hide behind the corporate entity of Checker in this case."

The evidence is clear that Malvern Gravel Company and Malvern & Ouachita River Railroad were one and the same corporation, and that Malvern Gravel Company was a carrier engaged in interstate commerce.

II. *The Malvern Gravel Company Operated A Railroad In Interstate Commerce.* As previously stated, the evidence showed beyond peradventure of a doubt that the Malvern Gravel Company's railroad received and transported over its railroad tracks, with its engine, carload shipments from outside Arkansas, and also shipped its

products over its railroad tracks onto the Missouri Pacific track; and these cars moved in interstate commerce. So, clearly, the Malvern Gravel Company was operating a railroad in interstate commerce. There is no necessity to further dwell on this point.

III. *The Malvern Gravel Company Operated A Railroad As A Common Carrier.* I now point out some of the instances in the record where evidence was introduced that the Malvern Gravel Company acted as a common carrier:

(a) Pursuant to a tariff filed with the Arkansas Commerce Commission, the Rock Island Railroad paid to the Malvern Gravel Company $5.00 a car for the services which Malvern Gravel Company rendered the Rock Island Railroad in picking up empties at Abco (a switching point) and bringing the loaded cars back to that point. Thus, the Malvern Gravel Company received, and is receiving, $5.00 per car from the Rock Island Railroad for switching cars over the tracks of the Malvern Gravel Company.

(b) The Malvern Brick & Tile Company uses a part of the railroad track of the Malvern Gravel Company under a joint maintenance agreement.

(c) In 1957 two cars of limestone from Neosho, Missouri, consigned to the Arkansas Highway Department, were switched by the Malvern Gravel Company over its railroad tracks and unloaded from a location on the tracks of the Malvern Gravel Company.

(d) In 1962 several cars of steel beams from Tulsa, Oklahoma, consigned to Fairchild Construction Company, were likewise switched by the Malvern Gravel Company over its railroad tracks and unloaded from a location on the tracks of the Malvern Gravel Company.

(e) In 1963 two cars of cinders from Strawn, Arkansas, consigned to the Malvern Public School, were likewise switched by the Malvern Gravel Company over its railroad tracks and unloaded from a location on the tracks of the Malvern Gravel Company.

Altogether it was shown that over a dozen cars moved in interstate shipment over the tracks of the Malvern Gravel Company. There is no instance in the record where the Malvern Gravel Company ever refused to do any hauling offered to it by anyone. The fact that the Malvern Gravel Company did not post tariffs does not prevent it from being a common carrier. One isolated incident of hauling over its tracks as a common carrier might not be sufficient but repeated incidents over a number of years, as here shown, certainly made a case for the jury; and the Malvern Gravel Company, a common carrier under the laws of Arkansas, is shown to have repeatedly hauled and transported interstate shipments.

The Majority Opinion cites the following cases as instances in which a corporation was held to be outside the Federal Employers' Liability Act. These cases are: *Duffy* v. *Armco Steel Corp.*, 225 F. Sup. 737; *Tilson* v. *Ford Motor Co.,* 130 F. Sup. 676; *Kelly* v. *General Elec. Co.,* 110 F. Sup. 4; and *Jones* v. *N.Y. Central,* 182 F. 2d 326. In none of these cases[2] was there a factual situation like that in the case at bar; so I forego discussing them. As aforesaid, there is no instance ever shown werein Malvern Gravel Company refused to haul interstate shipments over its tracks; and there are repeated instances, as above mentioned, wherein the Malvern Gravel Company actually did haul interstate shipments over its tracks. I submit that these instances are enough to submit the issue to the jury for decision as to whether the Malvern Gravel Company operated a railroad as a common carrier.

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[2] The Majority Opinion states: "Time and again the Federal Courts have defined a common carrier that comes within the meaning of the Act. We are bound by the decisions of the Federal Courts in that respect." I maintain that the Arkansas Supreme Court is "bound" only by the decisions of the United States Supreme Court. The decisions of other Federal Courts are only persuasive.

CONCLUSION

This is a long dissent, but the Majority Opinion strikes at the very heart of our jury system. As an appellate Court we are not to decide what we think the evidence shows in a jury case: we are to decide whether there was substantial evidence to take the factual issue to the jury for its decision. Because I believe so thoroughly in the jury system, I cannot in good conscience remain silent when I see a fact question decided by the appellate court instead of by the jury as the Constitution provides.

Therefore, I respectfully dissent.

JOHNSON, J., joins in this dissent.

JESSUP *v.* HANCOCK.

5-3412 385 S. W. 2d 24

Opinion delivered December 21, 1964.

Trantham & Knauts, for appellant.

Kirsch, Cathey & Brown, Alfred J. Holland, for appellee.

JIM JOHNSON, Associate Justice. This is an action to oust a school director for usurpation of office. The facts are undisputed. Appellee Ed Hancock was a school director of the Knobel School District in Clay County on September 24, 1963, when he was defeated for re-election by appellant Stephen Jessup. At the time appellant owned no real property in the school district, but purchased property on September 25th, the day following the election, and thereafter took the oath of office. On December 13th, 1963, appellee filed suit in Clay Circuit Court, Western District, against appellant, the complaint being in the nature of an information by way of quo warranto, alleging that appellant was ineligible to serve as school director, that appellee was entitled to continue to serve until his successor was chosen, that appellant had usurped the office, and prayed that appellant be removed and appellee restored to office. In its judgment of March 30, 1964, the trial court found that appellant's acquisition of real property after the election was not sufficient to meet the requirements of Ark. Stat. Ann. § 80-504.1 (Repl. 1960) ("Director to be owner of real estate"), and ordered appellee restored to office. From the judgment comes this appeal.

Appellee filed his complaint under the provisions of Ark. Stat. Ann. § 34-2203 (Repl. 1962) which states:

"Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the State or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise."

Appellant contends that the trial court had no jurisdiction to hear this matter and should have dismissed the complaint, asserting that appellee's suit was in fact an election contest. Our decision in *Faulkner* v. *Woodard,* 203 Ark. 254, 156 S.W. 2d 243, is clearly controlling. Quoting from *Wood* v. *Miller,* 154 Ark. 318, 242 S.W. 573, we said in the *Faulkner* case that: ' "This is not, in fact, a contest of an election, for, as was said in *Wheat* v. *Smith,*

50 Ark. 266, 7 S.W. 161, there is nothing to contest concerning the result of the election. Appellee was elected, as condeded, but appellant is contesting his eligibility to hold the office, . . .'' '

Appellant's second point urged for reversal is that he did not have to own real estate on the exact day of the election, that is, September 24, 1963, but could comply with Ark. Stat. Ann § 80-504.1 if he owned real estate at the time he was commissioned by the County Clerk to enter upon his duties as such director.

Some of the statutes relative to school directors are: § 80-504 (''A school director shall be a bona fide resident and qualified elector of the school district in which he serves''), § 80-504.1 (''Hereafter, no person shall be eligible to be a member of any school board in the State unless such member is the owner of real property in the school district in which he serves''), and § 80-505 (''Each school director elected or appointed shall, within ten [10] days, after receiving notice of his election or appointment subscribe to the following oath: . . . The County Clerk upon receipt of oath prescribed for school director, shall immediately commission such persons and they shall enter at once upon their duties as school directors.'').

This is a case of first impression in this jurisdiction. Our research reveals an excellent annotation in A.L.R. which thoroughly discusses the question here presented: ''Time as of which eligibility or ineligibility to office is to be determined,'' 88 A.L.R. 812, supplemented by 143 A.L.R. 1026. The marrow of the annotation is that where a constitution or statute specifies the time when the conditions of eligibility must be present, as where it is required that qualifications for public office exist at the time of election, the courts uniformly hold that a person not qualified at the time of election cannot make himself eligible subsequent to the election. On the other hand, if the constitution or statute requires such conditions (of qualification) to exist at the time of the commencement of the term of office or the time of the induction of the candidate into office and assumption of the duties (as

distinguished from the time of election), it is clear that existence of conditions of eligibility at the commencement of the term or induction of the candidate into office is sufficient to qualify him for the office, irrespective of their existence at the time of the election. Where time for existence of conditions of eligibility is not specified, one group of courts takes the view that the word "eligible" relates to time of election, whereas another group of courts, constituting the majority, takes the view that "eligible" has reference to capacity not of being elected to office, but of holding office, and that therefore, if qualified at the time of commencement of the term and induction into office, disqualification of the candidate at the time of election is immaterial.

Our statute § 80-504.1, "Hereafter, no person shall be eligible to be a member of any school board in this State unless such member is the owner of real property in the school district in which he serves," does not specify that this condition of eligibility must exist at the time of election. After review of a number of cases from other jurisdictions, it is our view that the better rule is that, where it is not otherwise specified in our statutes or constitution, eligibility means being qualified at the time of commencement of the term and induction into office. This is consistent with this court's reasoning in *Jones* v. *Duckett,* 234 Ark. 990, 356 S.W. 2d 5, and *Johnson* v. *Darnell,* 220 Ark. 625, 249 S.W. 2d 5, which, while not in point here, do relate to eligibility and commencement of term of office.

Reversed and the cause dismissed.

5-3430 385 S. W. 2d 33

Opinion delivered December 21, 1964.

[redacted]

Coleman, Gantt, Ramsay & Cox and *William C. Bridgforth,* for appellant.

Levine & Williams, for appellee.

FRANK HOLT, Associate Justice. This litigation results from the forfeiture of a land contract. The Chancellor's decree required the appellant to convey the lands in question to the appellee, Martha McCoy. On appeal the question presented is whether the appellant waived his right to enforce the forfeiture provision in the contract.

In 1954 appellee, Martha McCoy, and her husband entered into a "Rental Contract and Option to Purchase" eighty acres from the appellant. Later appellee McCoy acquired her husband's interest. The contract was for a period of fifteen years providing for an annual rental payment of approximately $400.00 which diminished to about $200.00 upon the last payment. These annual payments, evidenced by notes, began January 9, 1955 and were to end January 9, 1969 at which time, upon payment of $1.00, appellant agreed to convey the property. Time of payment was made the essence of the contract.

The annual payments were promptly made for six years. The annual payment due on January 9, 1963 was not made and the appellant declared a forfeiture on February 11, 1963 by letter to the appellee, Martha McCoy. Her son and agent, appellee Floyd Davis who was farming the land, was given a similar notice. The appellees then offered to pay appellant the full balance due on the contract. The appellant refused, insisting on the forfeiture provision in the contract. The appellees contend that the appellant waived the forfeiture provision by his acts and conduct.

Forfeiture provisions are valid and enforceable in contracts for the sale of land. *White* v. *Page,* 216 Ark. 632, 226 S.W. 2d 973. However, forfeiture provisions may be waived by the acts and conduct of the parties. *Friar* v. *Baldridge,* 91 Ark. 133, 120 S.W. 989; *Berry* v. *Crawford,* 237 Ark. 380, 373 S.W. 2d 129.

In the case at bar the first delinquency occurred when the annual payment of $333.68 became due January 9, 1961. A payment of $139.68 was made on February 9, 1961, leaving a balance of $194.00. On December 18, 1961 the appellant wrote the appellees concerning this delinquent balance and, also, the 1962 annual payment of $318.16 coming due the following month. The pertinent part of the letter reads:

"This is formal notice to you that unless we receive payment in full of $586.06 on or before January 9, 1962, we will cancel your contract and you will forfeit all interest in the land.

* * *

Bring us a check for $1,946.06 and we will issue you a deed to the property. If you do not do that, or at least pay the $588.06 due as of January 9th, 1962, we cannot go along with you further and will have to cancel the contract."

On the due date of January 9, 1962 no payment was made nor was a forfeiture declared. Three days later the bal-

ance of $194.00 due on the 1961 payment was paid to appellant. At the same time $130.10 was paid on the 1962 payment. The delinquent balance of $188.06 plus taxes and insurance was paid on March 7, 1962. The January 1963 payment of $302.64 plus taxes, insurance and interest was not paid when due and on the following February 11th appellant gave written notice of forfeiture. Appellant then refused payment of the full balance due on the contract contending he had orally warned appellees that no further extensions would be granted. Appellees denied this assertion.

It is a well-known equitable principle that equity abhors a forfeiture and will seize upon slight circumstances that indicate a waiver in order to prevent forfeiture. *Cordell* v. *Enis,* 162 Ark. 41, 257 S.W. 375; *Vernon* v. *McEntire,* 232 Ark. 741, 339 S.W. 2d 855; *Berry* v. *Crawford,* 237 Ark. 380, 373 S.W. 2d 129; 18 Ark. Law Rev. 175. The right of forfeiture can be a harsh remedy producing great hardships and, therefore, before a forfeiture is enforceable equity requires strict compliance with the important terms of the contract even where there is an express provision for forfeiture. *Williams* v. *Shaver,* 100 Ark. 565, 140 S.W. 740.

In the case at bar the purchase price was approximately $4,300.00 payable over a period of fifteen years in annual payments. Six of these payments were promptly met, plus the taxes and insurance, leaving a balance due of less than one-half of the purchase price when the forfeiture was declared. The appellant had indulged the appellee, Martha McCoy, in her requested extensions on the notes due in January 1961 and 1962 and failed to enforce a written notice given in December 1961 that a forfeiture would be declared for failure to pay the 1962 note promptly on the due date together with the delinquent balance. Instead, part payment was made three days after the due date and on March 7, 1962 the full delinquent balance was accepted making all payments current. Sometime before the January 1963 annual payment became due the appellant mailed to appellee McCoy

a routine notice of the amount due and payable. We agree with the Chancellor that these circumstances had the effect of lulling the appellee into an assurance of another extension before declaring a forfeiture. It cannot be said that the Chancellor's finding that the appellant had waived his express right of forfeiture is against the preponderance of the evidence.

The decree is affirmed.

HURLEY *v.* OWENS

5-3410 385 S. W. 2d 636

Opinion delivered January 11, 1965

[redacted]

Ben D. Lindsey, for appellant.

Shackleford & Shackleford, for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to the validity of three deeds to lands located in Union County, appellant apparently contending that there was not, under the law, proper delivery of the deeds, and further contending that the court erred in admitting certain testimony.

We do not reach the merits of the case, for under Rule 9 (d) of this court, it is necessary that the judgement be affirmed. We have stated numerous times that we are not required to explore a transcript that is lodged with us, and that the duty rests on the appellant to supply this court with such an abridgment of the record as will enable us to understand the matters presented. *Vire* v. *Vire,* 236 Ark. 740, 368 S. W. 2d 265; *Weir* v. *Hill,* 237 Ark. 922, 377 S. W. 2d 178.

The pleadings, exhibits, and decree are abstracted, but there is no abstract of the testimony, although several witnesses testified. The testimony is essential to a decision on the merits, and to determine the facts, we would be required to explore the record, which, as stated, is contrary to our practice.

Affirmed.

RANEY *v.* RAULSTON, COUNTY JUDGE

5-3428 385 S. W. 2d 651

Opinion delivered January 11, 1965

J. Nelson Truitt, N. J. Henley, for appellant.

Smith, Williams, Friday & Bowen, By: *Herschel H. Friday* and *John C. Echols,* for appellee.

CARLETON HARRIS, Chief Justice. This question on this appeal is whether a certain building proposed to be erected in Jasper, county seat of Newton County, can be financed and equipped under the authority of Amendment No. 17 of the state constitution, as amended by Amendment No. 25. Amendment No. 17 authorizes the qualified electers of each respective county in the state to vote on the question of the construction or extension of any county courthouse or county jail, and authorizes the levy of a tax (limited by the amendment) to defray the costs. Amendment No. 25 extends this authority to include the construction of county hospitals. At a special election held on December 10, 1963, a majority of the voters of Newton County voted in favor of constructing and equipping a building designated as a county hospital

for Newton County in order to provide needed hospitalization, medical, and nursing services for the citizens of the county. Procedural steps taken before and after the election are not questioned, and the only contention for reversal is that the county lacks the basic authority, under Amendment No. 17 (as amended), to construct and equip the sort of building that has been approved by the electors. The proposed building will contain thirty beds, ten of which, with the related bedside equipment and central facilities will meet the requirements for licensing as a ten-bed hospital under Act 414 of 1961 (hereinafter discussed), and the remaining twenty beds, with related bedside equipment and central facilities, while not meeting the minimum requirements of that act for licensing as a hospital, will qualify for licensing as a twenty-bed nursing home.

Appellants assert that a combination hospital and nursing home is not a hospital within the meaning of Amendment No. 17 (as amended), and that the county accordingly has no authority to construct this type of building. Suit was instituted against the county judge, praying that he be enjoined and restrained from calling the levying court of the county into session for the purpose of levying the aforesaid tax, and that he be further enjoined from issuing any bonds under the purported authority of Amendment No. 17 (as amended). After the filing of an answer, testimony was taken, and, at the conclusion thereof, the complaint was dismissed and appellee's prayer for a declaratory judgment to the effect that the building could be constructed and equipped, under the authority of Amendment No. 17 (as amended), was granted. From the decree entered, appellants bring this appeal.

In seeking a reversal, appellants principally rely on the provisions of Act 414, Ark. Stat. Ann. § 82-328 (Supp. 1963), which defines "hospital" and "nursing home."[1] Under that act, the definitions are as follows:

[1] The specific intent of the act is stated as vesting "sole authority to license hospitals and nursing homes in the State Department of Public Health." It would appear also that one of the purposes of the act was to insure full utilization of Hill-Burton funds.

"(d) 'Hospital' means a public health center, a general, tuberculosis, mental or chronic disease hospital, or a related facility such as a laboratory, out-patient department, nurses home or training facility, or a central service facility operated in connection with a hospital. An establishment furnishing primarily domiciliary care is not within this definition. * * *

"(f) 'Nursing Home' means and shall be construed to include any building, structure, agency, institution, or other place, for the reception, accommodation, board, care or treatment of two [2] or more unrelated individuals who, because of age, illness, blindness, disease, or physical or mental infirmity, are unable sufficiently or properly to care for themselves, and for which reception, accommodation, board, care or treatment, a charge is made, provided, the term 'Nursing Home' shall not include the offices of private physicians and surgeons, boarding homes, hospitals, or institutions operated by the Federal government."

Admittedly, under these definitions, the part of the proposed building to be devoted to a "nursing home," would not qualify as a general hospital.

Appellee argues that in passing Act 414, it would not appear that the Legislature had any reference to, or thought of, Amendment No. 17 in defining the terms, heretofore referred to. Rather, it is pointed out that the definitions included are controlling only "as used in this act." It is mentioned, as previously stated, that one of the purposes of the legislation was to acquire the use of Hill-Burton funds. Ark. Stat. Ann. §§ 82-335 and 82-336 (Supp. 1963) both refer to the fact that any construction program shall be carried out "in accordance with regulations prescribed by the Federal act." In other words, the cited definitions are those which meet the standards of Federal requirements for Federal aid, which might be given for the construction of hospitals or nursing homes.[2] There is no reference, at any place in the act,

[2] In the present instance, the estimated cost of construction of the building is $250,000.00, of which the county is to furnish $115,000.00, and the balance is to be furnished by the proper agency of the Federal government.

to Amendment No. 17, or to the method of acquiring funds as set forth in that amendment.

It is also argued that a definition adopted in 1961 could not possibly have any effect upon an amendment adopted in 1938; that, to determine the intent of the people in passing Amendments No. 17 and No. 25, it would be necessary to use the widely recognized definition of "hospital" in use at that time. Appellee cites a definition of "hospital" from Webster's New International Dictionary, 2nd Edition (Published in 1935), which he also asserts to be inclusive of the same elements and substance used in the definition of nursing homes found in Act 414. It is further asserted that the Legislature is not empowered to add to, or take from, the language of a constitutional amendment adopted by the people, unless that authority is granted in the amendment (*Kitchens* v. *Paragould,* 191 Ark. 940, 88 S. W. 2d 843), and that Amendment No. 17, as amended, is complete within itself, self-executing, and requires no statutory implementation. It is not incumbent that we comment upon these arguments, for it is not necessary in deciding this litigation, to determine whether the construction of a building, housing *only* a "nursing home" (as defined in Act 414), could properly or validly be built under the provisions of, and the authority of Amendment No. 17, and we do not pass on that issue.

At the outset, let it be stated that in construing provisions of the constitution, we endeavor to effectuate as nearly as possible the intent of the people (as it may be ascertained from the language of the provision) in passing the measure, and, if necessary, as a means of attaining that end, a liberal interpretation will be warranted. *Walton* v. *Arkansas Construction Commission,* 190 Ark. 775, 80 S. W. 2d 927. Under the admitted facts, a part of the building, even under Act 414, will qualify as a "hospital," and will include such facilities as surgery, x-ray and delivery rooms, and other facilities ordinarily found in a general hospital. The equipment in the balance of the hospital will be such as to provide for those persons who

are not in need of emergency treatment, but who, because of physical or mental infirmities, are in need of care. Actually, it will be noted that both the definitions of "hospital" and "nursing home" very clearly denote buildings used for the service of *persons who are afflicted with some type of illness or infirmity.* In other words, the "nursing home" facility is not simply a "boarding home," and may not be used as such; board is only incidental to the other services rendered. It appears from the testimony that the only reason that the entire thirty-bed unit will not be able to qualify as a "hospital" (as defined by Act 414) is that there will not be sufficient funds to provide the equipment necessary for a general hospital. It is evident that many hospital services will be provided under the "nursing home" unit, and if additional monies are ever provided, it can be easily converted to general hospital status. In *Kervin* v. *Hillman, County Judge,* 226 Ark. 708, 292 S. W. 2d 559, the facts reflected that a main hospital was to be located in Fordyce, the county seat, "with emergency units thereof in Sparkman and Carthage." After the project was approved by the voters, and the tax levied, Kervin, a property owner and taxpayer in Dallas County, filed a suit to restrain the County Judge from proceeding further in the sale of the bonds, and to restrain the collector from proceeding with the collection of the tax. It was asserted by appellant that the "emergency units are not complete hospitals but are small units each providing two beds designed for and intended to meet immediate and emergency temporary needs only for first-aid treatment for their respective geographical areas, these geographical areas being some distance from the hospital at Fordyce, and that said patients receiving first-aid treatment in these small units will either be discharged or prepared by such treatment for admission to the hospital at Fordyce. * * * that Amendment No. 17, as amended, contemplates the construction of a single hospital unit to be located at the county seat and does not contemplate or authorize the construction of such emergency units." We held against this contention, stating: "It is obvious that the real purpose of Amendment No. 17 (as

amended) was to make it possible for a county to provide hospital facilities for its citizens."

In *Garner* v. *Lowery,* 221 Ark. 571, 254 S. W. 2d 680, we held that Garland County had the power to purchase an existing hospital, even though Amendment No. 17 only provides for the construction of a hospital.

In *Hollis* v. *Erwin, County Judge,* 237 Ark. 605, 374 S. W. 2d 828, we approved, under authority of Amendment No. 17 (as amended), the construction of two separate hospital units (included on one ballot), one being located in McGehee, and the other in Dumas.

It is obvious from these citations that this court has liberally construed the amendment, and we think in so doing, the intent of the people in passing Amendments No. 17 and No. 25 has been effectively carried out. Certainly, the construction of the building, here in question, will provide the people of Newton County with a well-equipped general hospital unit, and with a unit containing additional beds and equipment which will be used to provide the citizens of that county *additional medical services* for those who, because of illness, disease, or physical or mental infirmity, are unable to properly care for themselves.

Appellants have not specifically argued that there is no authority to equip the building in question (if there is authority for its construction), but in setting out the point relied upon for reversal, there is an allegation that this cannot be done under the authority of Amendment No. 17, as amended. This same contention was raised in *Hollis* v. *Erwin, County Judge, supra,* and we held contrary to the contention, stating: "Certainly the equipping of the hospital is an essential part of its construction."

Affirmed.

WARD, J., dissents.

PAUL WARD, Associate Justice (dissenting). It must be conceded that a county has no power to levy a tax (even by a vote of the people) to construct a public building for county purposes or county activities without

specific sanction by the state constitution. For example: It was necessary to amend the state constitution to give a county power, in specific and definite terms (a) to build a "County Court House" (Amendment No. 17); (b) to build a "County Jail" (Amendment No. 17); (c) to build a "County Hospital" (Amendment No. 25); (d) to maintain a "Public City Library" (Amendment No. 30); (e) to maintain, operate, and support a "County Hospital" (Amendment No. 32); (f) to build a "County Library" (Amendment No. 38); and, (g) to induce Industrial Development in a county (Amendment No. 49).

There has been no constitutional amendment giving the county the right to levy a tax on the people to build a "County Nursing Home." Nevertheless the majority opinion, by a process of reasoning and deduction which I am unable to follow, holds Newton County can levy a tax to construct a nursing home.

The majority say they are not deciding whether Newton County can (under Amendment No. 17) build *only* a nursing home. Obviously the reason they so state is that to do so would be like saying black is white.

In view of the above it must be assumed that the majority take the view that a nursing home is a necessary or essential part of a hospital. They can justify this view only by what we held and said in *Hollis* v. *Erwin, County Judge,* 237 Ark. 605, 374 S. W. 2d 828. There we said under Amendment No. 17 a county could levy a tax to "equip" a hospital. But it must be noted that we also said: "Certainly the equipping of the hospital is an *essential* part of its construction." (Emphasis added.)

Can it reasonably be said that a nursing home is an *essential* part of a hospital? As strongly as I feel the need of nursing homes and as much as I would like to help Newton County acquire one at the expense, largely, of the Federal Government, I cannot conscientiously hold it is an essential part of a hospital.

A hospital is one distinct entity and a nursing home is another distinct entity, as has been clearly indicated by the legislature. By Act 414 of 1961 the legislature de-

fined a *hospital* and separately defined a *nursing home;* they provided one *license* for a *hospital* and another *license* for a *nursing home;* and, they provided for an *advisory council* for a *hospital* and a different *advisory council* for a *nursing home.* By what occult process of deduction can the majority say a *nursing home* is an essential part of a *hospital* when all facts, experience, and observation are to the contrary? One dictionary definition of "essential" is "Important in the highest degree". Another definition is "Indispensable". It is common knowledge that for many years thousands of hospitals have operated (and are now operating) without the aid of a nursing home.

In an attempt to evade the obvious facts above set forth and to justify the result reached the majority resort to the *liberal construction rule* as set out in some opinions of this Court. I submit that even a casual examination of the cases relied on reveals no justification for the conclusion reached by the majority.

In *Walton* v. *Arkansas Construction Commission,* 190 Ark. 775, 80 S. W. 2d 927, we held that state bonds issued to complete construction of the State Hospital for Nervous Diseases at Benton were not prohibited by Amendment No. 20 of the state constitution. Said amendment did not, however, prohibit state bonds issued for an "*existing outstanding indebtedness of the State. . . .*" The proof showed (and the Court held) that the state bonds in question had been issued and sold before Amendment No. 20 was adopted. Any other decision would have been unreasonable.

In *Garner* v. *Lowery, County Judge,* 221 Ark. 571, 254 S. W. 2d 680, we held that under Amendment No. 17 (as amended) the county could purchase a hospital which was already built. The essence of our decision was that the purpose of the amendment was to enable the county to *acquire* a hospital—whether by *construction* or *purchase.* To make that decision support the view of the majority they would have to take the wholly untenable position that the purpose of Amendment No. 17 was to provide a nursing home.

In *Kervin* v. *Hillman, County Judge,* 226 Ark. 708, 292 S. W. 2d 559, we held that Amendment No. 17 (as amended) authorized the county to build a hospital at the county seat and two emergency stations at other locations. There was no contention (and could be none) that an emergency station was not an *essential* part of a hospital. The real contention was that the amendment "contemplates the construction of a single hospital unit to be located at the county seat". In answer to that contention we pointed out that Section 4 of the amendment provided that "more than one building or improvement may be embodied in such proceeding".

As previously stated, I would like very much to help the people of Newton County secure financial aid from the Federal Government for a nursing home (and they can do so by providing matching funds from a source other than a property tax) but I am not willing to help them exchange their constitutional birthright for a mess of pottage.

ARK. STATE HIGHWAY COMM. *v.* SCOTT

5-3401 385 S. W. 2d 636

Opinion delivered January 11, 1965

Mark E. Woolsey and Don Langston, for appellant.

James L. Langston, Hardin, Barton, Hardin & Jesson, for appellee.

Ed. F. McFaddin, Associate Justice. The appellant, Arkansas State Highway Commission (hereinafter sometimes called "Commission"), filed this suit in the Sebastian Chancery Court, Fort Smith District, seeking a declaratory judgment as to the width of the highways (U. S. Highway No. 71 and U. S. Highway No. 271) adjacent to the property of the appellee, Thomas Nelson Scott.[1] At the close of the plaintiff's (appellant's) case the Trial Court sustained the defendant's (appellee's) written demurrer to the evidence (Ark. Stat. Ann. § 27-1729 [Repl. 1962]), dismissed the complaint, and confirmed the title of the appellee. From such decree there is this appeal, in which appellant lists two points:

"I. The Chancellor erred in finding that the Arkansas State Highway Commission did not have title to the lands in dispute.

"II. The Chancellor erred in finding that Appellees had title to 23 feet of the right-of-way of U. S. Highway 71 and 19 feet of the right-of-way of U. S. Highway 271."

We find it unnecessary to discuss the appellant's points because of the view we take of the case. Before detailing any of the evidence we call attention to our holding in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, which holding has been followed and cited in a score of cases, some of which are: *Weaver* v. *Weaver,* 231 Ark. 341, 329 S. W. 2d 422; *Neely* v. *Jones,* 232 Ark. 411, 337 S. W. 2d 872; and *Jones* v. *Brooks,* 233 Ark. 148, 343 S. W. 2d 99. The rule of *Werbe* v. *Holt* is that in passing on the defendant's demurrer to the evidence it is the duty of the Trial Court to give the evidence for the plaintiff its strongest probative force, and the demurrer to the evidence should be sustained only when the plaintiff's evidence, as so considered, fails to make a prima facie case. Because of such rule we must reverse and remand the decree here challenged; and one reason therefor now is given.

[1] Mrs. Scott, wife of Thomas Nelson Scott, was joined as a defendant, but for clarity we refer to Mr. Scott as defendant and appellee.

In going south from Fort Smith a traveler would go over both of the two highways, U. S. No. 71 and U. S. No. 271, until reaching a point immediately north of the property of appellee Scott. At that point U. S. Highway 271 continues[2] due south along the west side of the Scott property; and U. S. Highway No. 71 makes a long sweeping curve to the left and goes along the northeast side of the Scott property. Mr. Scott has a store and gasoline pumps on his property abutting on both highways; and it was and is the claim of the appellant that Mr. Scott is encroaching on the right of way of each highway. This suit was filed to have that issue determined. We bypass any consideration of U. S. Highway 271 and confine our opinion to the testimony as regards U. S. Highway No. 71.

As regards U. S. Highway No. 71, the Commission claims a right of way 70 feet wide along the Scott property and claims that Scott is encroaching on the right of way a considerable distance both by his building and by the approaches to his gasoline pumps. To make its case for a 70 foot right of way for U. S. Highway 71, the Commission introduced an order of the Sebastian County Court, Fort Smith District, dated September 3, 1927, laying out and condemning a right of way 70 feet wide. This was an order made under Act No. 611 of 1923, as now found in Ark. Stat. Ann. § 76-917 (Repl. 1957), which statute has been many times before this Court. Some of the cases are: *Miller County* v. *Beasley,* 203 Ark. 370, 156 S. W. 2d 791; *Ark. Highway Comm.* v. *Holden,* 217 Ark. 466, 231 S. W. 2d 113; *Ark. Highway Comm.* v. *Dobbs,* 232 Ark. 541, 340 S. W. 2d 283; *Ark. Highway Comm.* v. *Cook,* 233 Ark. 534, 345 S. W. 2d 632; *Ark. Highway Comm.* v. *Anderson,* 234 Ark. 774, 354 S. W. 2d 554; *Ark. Highway Comm.* v. *Dean,* 236 Ark. 484, 367 S. W. 2d 107.

The County Court order of September 3, 1927 was made without notice to the landowner,[3] but gave him one

[2] U. S. Highway No. 271 was formerly known as Arkansas State Highway No. 45.

[3] In 1927 the landowner appears to be Mr. Goodwin. He conveyed to Mr. Bumpers in 1930, who conveyed to T. C. Scott and wife in 1933; and they conveyed to appellee, Thomas Nelson Scott in 1941.

year in which to file his claim for the taking. Our cases, as above listed, hold that the said year begins to run from actual entry on the land made under the said order.[4] To show notice to the 1927 landowner in the case at bar, the Commission offered considerable evidence. For example, the witness, Roy Williamson, testified that he worked for the Highway Commission from 1929 to 1932; that he was familiar with the route and location of U. S. Highway No. 71 in 1927; that a new location was made under the court order here involved; and that the road now going by the Scott property was an entirely new location made under the 1927 order. Here are excerpts from his testimony:

"Q. Was this a new location through this property where Mr. Scott's store is located?

"A. Yes, sir, that is right.

"Q. In 1927 when that highway was located through that property, is that correct?

"A. Yes.

"Q. If I understand your testimony, U. S. Highway 71 before 1927 went, turned off where at, where Phoenix Village is now, is that correct?

"A. That is right.

"Q. And now after 1927 it goes by Nelson Scott's store?

"A. Right. As well as I remember, that was just a pasture, grazing land, farm land.

"Q. Did they have to go in and clear it, grub that place

"A. I couldn't say whether there was any timber in there or not.

"Q. There was no road, is that correct?

"A. No road."

[4] As to what other ways there may be to start the year for filing claims, we need not now consider. We, therefore, bypass such matters as service of notice or some form of estoppel.

Thus there was evidence that under the said 1927 order the Highway Commission made an original entry on the present Scott property and constructed the present U. S. Highway No. 71 at a place where there had previously been only a pasture. The burden was on the Highway Commission to show that the landowner had actual notice of the taking of his land (*Ark. Highway Comm* v. *Anderson,* 234 Ark. 774, 354 S. W. 2d 554), but actual entry on the land at a place where there had previously been no highway, has always been held to be such actual notice. (*Ark. Highway Comm.* v. *Holden,* 217 Ark. 466, 231 S. W. 2d 113; *Ark. Highway Comm.* v. *Cook,* 233 Ark. 534, 345 S. W. 2d 632.)

There is no occasion for us to detail the other evidence in the case because what we have already mentioned made a prima facie case as regards notice of the location and width of the right of way of U. S. Highway No. 71. The defendant's demurrer to the evidence should have been overruled because, as regards U. S. Highway 71, the plaintiff made a prima facie case. Since the plaintiff made a case for the fact finder on one angle of the situation, the entire demurrer should have been overruled. We therefore find it unnecessary to discuss the evidence as to U. S. Highway 271, since we reverse and remand the entire case for further proceedings not inconsistent with this Opinion.

One other point should be mentioned. The appellee says:

"The county court orders relied upon by the appellant are void and unconstitutional under both the United States Constitution, Amendment XIV, and the Arkansas State Constitution, in that no provision for notice is made and no proper notice of the taking was given and are therefore unconstitutional in their application."

To support his position, as above quoted, the appellee relies strongly on two decisions of the Supreme Court of the United States, being *Walker* v. *Hutchinson,* 352 U. S. 112, 1 L. Ed. 2d 178, 77 S. Ct. 200; and

Schroeder v. *City of N. Y.*, 371 U. S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279, 89 A. L. R. 2d 1398. Also, the appellee cites us to an annotation in 89 A. L. R. 2d 1404 entitled, "Eminent Domain: permissible modes of service of notice of proceedings." In effect, the appellee wants us to overrule *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260, and our other cases which have upheld the validity of the statute that is now Ark. Stat. Ann. § 76-917 (Repl. 1957).

We find no merit in appellee's contention. He has confused "notice of the proceedings" with "reasonable opportunity to seek compensation." The annotation in 89 A. L. R. 2d 1404 relied on by the appellee recognizes this distinction[5] in these words:

"Where the taking of property is for a public use, the due process clause of the Fourteenth Amendment does not require that the necessity and expediency of the taking be determined upon notice and hearing. However, with respect to the compensation for the taking, due process requires that the owner be given reasonable notice of, and an opportunity to be heard in, the pending proceedings."

We adhere to our holding in *Sloan* v. *Lawrence County, supra,* wherein we quoted with approval the following:

"The State needs the property and takes it, and while the citizen can not resist, he has the right to insist upon just compensation to be ascertained by an impartial tribunal. It is a compulsory purchase by public authority, and the individual receives money in the place of the property taken. He has a right to his day in court on the question of compensation, but he has no right to a day in court on the question of appropriation by the State unless some statute requires it."

For the error in sustaining the demurrer to the evidence the decree is reversed and the cause remanded.

[5] Neither side has mentioned Act No. 185 of 1963. We list it only for information, but without comment.

5-3416 385 S. W. 2d 656

Opinion delivered January 11, 1965

Richard W. Hobbs, for appellant.

R. Julian Glover, for appellee.

GEORGE ROSE SMITH, J. The question in this case is whether one who is injured in a collision with a car being driven by a drunken driver has a cause of action against the tavern keeper whose unlawful sale of liquor to the offending driver brought about her intoxication. The trial court held that the tavern keeper is not liable. A demurrer to the appellant's complaint, as far as it concerned the tavern keeper, was sustained and the action dismissed.

The complaint alleges: On September 22, 1961, the appellee Southern Entertainment, Inc., operated the Southern Club in Hot Springs. Alcoholic drinks were served at the bar, in violation of the statute that requires liquor to be sold only in the unbroken package for consumption off the premises. Ark. Stat. Ann. § 48-309 (Repl. 1964). The Club served drinks to its co-defendant, Ruby Turner, until she became visibly intoxicated. The Club then knowingly and wrongfully permitted her to leave the premises, get in her car, and drive away. As a result of her drunkenness Miss Turner ran into a parked taxicab and injured the plaintiff.

At common law the seller was not liable in this situation, the courts usually saying that the proximate cause of the injuries was the consumption of the liquor, not its sale. *Cherbonnier* v. *Rafalovich,* D. C. Alaska, 88 F. Supp. 900; *Henry Grady Hotel Co.* v. *Sturgis,* 70 Ga. App. 379, 28 S. E. 2d 329; *Cowman* v. *Hansen,* 250 Iowa 358, 92 N. W. 2d 682; *Stringer* v. *Calmes,* 167 Kan. 278, 205 P. 2d 921; *Waller* v. *Collinsworth,* 144 Ky. 3, 137 S. W. 766, 44 L. R. A. (n.s.) 299, Ann. Cas. 1913A 510; *State* v. *Hatfield,* 197 Md. 249, 78 A. 2d 754; *Barboza* v. *Decas,* 311 Mass. 10, 40 N. E. 2d 10; *Beck* v. *Groe,* 245 Minn. 28, 70 N. W. 2d 886, 52 A. L. R. 2d 875; *Tarwater* v. *Atlantic Co.,* 176 Tenn. 510, 144 S. W. 2d 746; *Seibel* v. *Leach,* 233 Wis. 66, 288 N. W. 774.

In many states the common law rule has been changed by Dramshop Acts, which expressly impose civil liability upon the seller. We have no statute of this kind in Arkansas. Before prohibition we did have a statute, later repealed, that required a saloon keeper to post a $2,000 bond to pay "all damages that may be occasioned by reason of liquor sold at his house of business." Kirby's Digest § 5121. We construed this statute rather narrowly, holding in two cases that the sale was not the proximate cause of the plaintiff's damages and in a third that the saloon keeper was not negligent in failing to foresee the plaintiff's injury. *Gage* v. *Harney,* 66 Ark. 68, 48 S. W. 898, 43 L. R. A. 143, 74 Am. St. Rep. 70; *Peter Anderson & Co.* v. *Diaz,* 77 Ark. 606, 92 S. W. 861, 4 L. R. A. (n.s.) 649, 113 Am. St. Rep. 180; *Bolen* v. *Still,* 123 Ark. 308, 185 S. W. 811.

In the absence of a Dramshop Act we have two statutes that might be regarded as having changed the common law rule. We have mentioned the first, which directs that liquor be sold in the package for consumption off the premises. We think it clear that this provision in the law was meant simply to prevent the return of the saloon, with its notorious evils. Beer, unlike liquor, may be lawfully sold for consumption in restaurants and other public places. We are not convinced that the legislature meant to impose tort liability upon a bar

keeper who permits a patron to become drunk upon whisky and yet exonerate the same bar keeper from liability for permitting another patron to become drunk on beer.

The second pertinent statute makes it a misdemeanor for any person to sell or give away liquor to a minor, a habitual drunkard, or an intoxicated person. Ark. Stat. Ann. § 48-901. The present complaint may be construed to charge a violation of this section, in that the Southern Club sold drinks to Miss Turner after she had reached the point of intoxication.

Statutes generally similar to this one exist in most, if not all, of the states. They are not ordinarily considered to change the common law rule of nonliability. In a few cases, however, such legislation has been given that effect. It has been said that there has been an increasing tendency in recent times to depart from the traditional view. Case note, 9 Ark. L. Rev. 179. The appellant urges this minority rule to support his contention that the Southern Club should be held responsible in this case.

The cases finding liability are so few that they may be reviewed quickly. In Arizona and South Dakota it is held that a tavern keeper who ignores a woman's warnings not to sell liquor to her husband is liable to her for loss of consortium. *Pratt* v. *Daly,* 55 Ariz. 535, 104 P. 2d 147, 130 A. L. R. 341 (but see *Collier* v. *Stamatis,* 63 Ariz. 285, 162 P. 2d 125); *Swanson* v. *Ball,* 67 S. D. 161, 290 N. W. 482. California adopted this position, on rehearing, in *Cole* v. *Rush,* 271 P. 2d 47, but on a second reconsideration the court again changed its mind and returned to the common law rule, leaving the matter to the legislature. *Cole* v. *Rush,* 45 Cal. 2d 345, 289 P. 2d 450, 54 A. L. R. 2d 1137.

In New Jersey liability on the theory of negligence was imposed upon a tavern keeper who unlawfully sold liquor to an intoxicated minor. The court pointed out, however, that its holding was limited to persons engaged in the liquor business—long recognized to be a privilege. *Rappaport* v. *Nichols,* 31 N. J. 188, 156 A. 2d 1, 75 A. L. R.

2d 821. A federal court reached the same conclusion under an Illinois statute prohibiting sales to an intoxicated person. *Waynick* v. *Chicago's Last Dept. Store,* 7th Cir., 269 F. 2d 322. The owner of a bar may also be liable to the consumer himself for his injuries—a holding not so broad as one that would extend the liability to third persons. *Schelin* v. *Goldberg,* 188 Pa. Super. 341, 146 A. 2d 648.

There is a significant distinction between these cases and the one now before us. In all the decisions cited the liability to the injured person fell solely upon one engaged in the sale of alcoholic beverages. Our statute is not so narrow. It applies to *any person* who sells or gives away intoxicating liquor to a minor or to an inebriate. By its terms it is equally applicable to a liquor dealer and to a host who serves cocktails in his own home. Perhaps the legislature did not mean for the law to be so sweeping in its scope, but we must give effect to the statute as we find it.

Even if the prohibition against the sale of liquor to an intoxicated person had the comprehensive implications that the appellant attributes to it, we do not see how the impact of the statute could be confined to those who *sell* liquor, legally or illegally. The same reasoning would be applicable in the case of a person entertaining his friends in his home. He would be compelled to maintain supervision over all his guests and to refuse to serve drinks to those nearing the point of intoxication. Such a principle of liability would be more far-reaching than any decision that we have discovered. We think it clear that the lawmakers, in enacting the statutes now on the books, have not undertaken to extend the offender's responsibility to the extreme degree now urged by the appellant. It may be that a Dramshop Act is to be desired, but such a measure should be the result of legislative action rather than of judicial interpretation.

Affirmed.

5-3414 385 S. W. 2d 643

Opinion delivered January 11, 1965

Joseph C. Kemp, Jack Young, for appellant.

Jack Holt, Jr., Jack Holt, Sr., for appellee.

PAUL WARD, Associate Justice. Appellee, B. A. Griffith, a lieutenant on the Little Rock police force, was accused of mistreating Theo Shaw on September 15, 1963 while Shaw was in his custody on a suspicion charge. On September 24, 1963 the acting chief of police wrote to appellee stating his services were terminated for violation of that portion of the department rules and regulations which reads: "No officer shall wilfully mistreat or use unnecessary violence toward any person". On appeal to the Civil Service Commission testimony was introduced and the commission, on October 10, 1963, sustained appellee's dismissal.

Appellee then perfected an appeal to the circuit court where the case was tried on the transcript of the proceedings before the Civil Service Commission and upon testimony taken ore tenus. The trial court found:

"The record of proceedings and evidence introduced at the hearing before the Civil Service Commission, together with other evidence ore tenus before the Court, from all of which the Court, giving the evidence its greatest and proper weight, finds that the charges have not been sustained by the preponderance of the evidence.

"It is therefore ordered that the order of the Civil Service Commission of Little Rock, upholding the discharge of Lieutenant Griffith from the Police Department, be set aside and that Griffith be restored to his former duty and rank as of the date of discharge."

A careful review of the pertinent testimony leads us to conclude that the order of the circuit court must be affirmed. The testimony is conflicting, and there is no convincing evidence that appellee mistreated Shaw. On the early morning (about 4 o'clock) of September 15, 1963 appellee sent two police officers to Shaw's home to pick him up; they brought him to the jail for questioning. Shaw says that while he, appellee, and one or two other officers were present in the recreation room, he was struck by appellee with what looked like a piece of rubber—that he was also struck by two other police officers. This is denied emphatically by appellee and the other officers present. C. H. Jones, editor of the Southern Mediator Journal for 26 years, testified in substance: On the night after Shaw was allegedly mistreated I interviewed Shaw about the incident; my write up appeared in the Journal four days later (exhibiting the article). At no time during the interview was appellee's name mentioned as having been implicated in the alleged beating of Shaw. Shaw did make reference to two other policemen all the way through the interview. Ten people, including attorneys, police officers and ex-police officers, testified they had known appellee for many years (ranging from 5 to 25 years) and that he had a good reputation.

Under the rules applicable to a case of this type, we cannot say the judgment of the trial court is against the preponderance of the evidence. The case was tried de novo in the circuit court and it is tried de novo here. *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750, and *Campbell* v. *City of Hot Springs,* 232 Ark. 878 (p. 881), 341 S. W. 2d 225.

Affirmed.

HOLT, J., not participating.

PUFAHL *v.* TAMAK GAS PRODUCTS CO.

5-3390 385 S. W. 2d 640

Opinion Delivered January 11, 1965

Skillman & Webb, for appellant.

Wright, Lindsey, Jennings, Lester & Schults, By: Philip S. Anderson, Jr., for appellee.

SAM ROBINSON, Associate Justice. Paul R. Pufahl, age 22 and unmarried, lived with his parents, Mr. & Mrs. Carl H. Pufahl, at West Memphis. He worked for appellee, Tamak Gas Products Company. On September 12, 1962 he was accidentally killed while working in the due course of his employment.

Appellants here, Mr. & Mrs. Carl Pufahl, father and mother of the deceased, filed a claim with the Workmen's Compensation Commission contending that they and a daughter were partially dependent on their son for support, and were, therefore, entitled to compensation as provided by Ark. Stats. Ann. § 81-1315(i), which provides:

"If the employee leave dependents who are only partially dependent upon his earnings for support at the time of injury, the compensation payable for such partial dependency shall be in the proportion that the partial dependency bears to total dependency. . . ."

The Workmen's Compensation Commission denied the claim; the parents appealed to the Circuit Court

where the decision of the Commission was affirmed, and the parents have appealed to this court.

The statement of facts made by the Commission is sustained by substantial evidence. The Commission said: "The primary issue to be decided herein is whether claimants were partially dependent upon the deceased at the time of his injury and death. Here the record establishes that the father claimant was steadily employed and his gross monthly earnings were $325.52 and he also participated in a profit share amount which is usually set at the end of the fiscal period. According to the only detailed evidence of record, deceased contributed about $50.00 per month to the support of the family including himself. This included $30.00 for rent which was not always paid by deceased. It includes $10.00 per month which includes clothes for the deceased. It also includes $10.00 per month during the school term for lunches and bus fare for the deceased's minor sister. It is therefore obvious that at least part of the $50.00 was spent directly for deceased's own benefit and use. Was deceased actually doing any more than supporting himself? On the record which is now before us, we can reach no other conclusion. Deceased living at home, he ate his meals at home, and his laundry was done at home. The proof establishes that the deceased contributed something less than $50.00 per month so, when this contribution is offset by the cost of maintaining deceased at home, we are of the opinion the deceased was doing no more than supporting himself. When the cost of maintaining the family is broken down on a per person basis, deceased's share of that cost is $59.35. The record shows that deceased was contributing less than $50.00 per month. Such facts do not establish, in our opinion, that claimants were partially dependent upon the deceased. On the contrary, they point to the fact that deceased was dependent to some small degree upon his parents."

The commission held that the parents and sister were not dependents of the deceased to any extent within the meaning of the Workmen's Compensation Law.

Appellants stoutly contend that the case at bar is in point with and controlled by *Crossett Lumber Co.* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161, but there is a vast difference in the two cases. In the Crossett Lumber Company case the Commission found in favor of dependency, while in the case at bar the Commission found there was no dependency. We have repeatedly held that if there is any substantial evidence to support the finding of the Commission, it will not be disturbed on appeal; that the finding of the Commission is to be given the same force and effect as a jury verdict. *Cole* v. *Hendry Corp.,* 230 Ark. 100, 321 S. W. 2d 377; *Shipp* v. *Tanner,* 229 Ark. 815, 318 S. W. 2d 821; *Duke* v. *Pekin Wood Products Co.* 223 Ark. 182, 264 S. W. 2d 834. Furthermore, the testimony must be weighed in the light most favorable to the findings of the Commission. *West* v. *Lake Lawrence Pulpwood Co.,* 233 Ark. 629, 346 S. W. 2d 460.

Here, we cannot say there was no substantial evidence to support the finding of the Commission. It is true that it can be said there was evidence that appellants were partially dependent on their son, but it cannot be said that there is no substantial evidence to the contrary. Appellants also cite *Kimpel, Guardian* v. *Garland Anthony Lumber Co.,* 216 Ark. 788, 227 S. W. 2d 932, and *Nolen* v. *Wortz Biscuit Co.,* 210 Ark. 446, 196 S. W. 2d 899. Those cases are clearly distinguishable on the facts.

Affirmed.

JIM JOHNSON, Associate Justice, (dissenting). I do not agree with the majority opinion. The referee found and the majority concede that "there was evidence that appellants were partially dependent" on the deceased workman. In my view the question presented for our consideration on this appeal is not whether there was substantial evidence to support a finding to the contrary but whether the law was properly applied by the Workmen's Compensation Commission to the undisputed facts in this case.

The rule applicable here was adopted by this court in *Crossett Lumber Company* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161, wherein it was stated from Honnold's two-volume treatise on Workmen's Compensation, Vol. I, page 232, as follows:

"The phrase 'actual dependents' means dependents in fact whether wholly or partially dependent. Hence it was no defense, in proceedings under an Act using this term, that petitioner and his family were not entirely dependent on deceased. Partial dependency, giving a right to compensation, may exist, though the contributions be at irregular intervals and of irregular amounts, and though the dependents have other means of support, and be not reduced to absolute want."

The rule having been thus established, I look now to the uncontradicted facts. They are as follows: Carl Pufahl testified that his son, the deceased, paid the rent on the family house of $30.00 per month, that his son also paid $10.00 per month on a bill made by the father to Sears Roebuck, that he aided in the purchase of clothes for his younger sister and from time to time gave her money for school lunches, that while the father was hospitalized in 1958 the deceased had the entire responsibility for support of the family, and that the deceased would contribute on an average of $50.00 per month to the family, depending on the needs of the family. Mrs. Carl Pufahl testified that her son, the deceased, contributed at least one-third of the expenses at home, that the family pooled the incomes.

In the teeth of this overwhelming evidence of partial support the Workmen's Compensation Commission attempted to rationalize away this young man's efforts in behalf of his family. As I see it this strained action by the Commission was a misapplication of the law which resulted in a grievous error in favor of the appellee insurance company. The humane purpose which the Workmen's Compensation Law seeks to serve leaves no room for narrow technical application. We said in *Holland* v. *Malvern Sand & Gravel Co.,* 237 Ark. 635, 374 S. W. 2d 822:

"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."

For the reasons stated I respectfully dissent.

[redacted]

MILUM *v.* MILUM

5-3404 385 S. W. 2d 658

Opinion Delivered January 11, 1965

[redacted]

Moore & Brockmann, for appellant.

Ben C. Henley, for appellee.

SAM ROBINSON, Associate Justice. Roy W. Milum, Sr. died on May 9, 1963. The administrators of his estate, William J. and Roy W. Milum, Jr., sons of the deceased, filed an inventory. Listed among the assets of the estate were Calico Rock Bonds valued at about $12,000, and Nettleton School District Bonds of the value of about $52,000.

Also surviving the deceased was another son, John C. Milum, Sr. and a daughter, Mary Milum Reed. Marian

Milum, wife of John C. Milum, Sr., filed exceptions to the inventory of the estate on behalf of her four minor children, John C. Milum, Jr., Rebecca Lee Milum, William Roy Milum and James Wesley Milum. Mrs. Milum claimed that the aforesaid bonds had been given in trust to her husband, John, for her minor children and that the bonds are, therefore, not assets of the estate. Upon a trial of the issues, the Probate Court held that the bonds are assets of the estate. The children, by their mother, Marian Milum, have appealed.

Subsequent to the death of Roy C. Milum, the heirs found among his effects, statements from dealers in investment securities showing that he had purchased bonds of Calico Rock in the sum of $12,000 and had purchased Nettleton School District Bonds in the sum of $52,400. There was also a memorandum that the bonds had been placed in Box 304 of the Commercial Bank. The key to the lock box at the Commercial Bank was among Roy C. Milum's effects.

After William J. Milum and Roy W. Milum, Jr. had been appointed administrators, they, along with their brother, John C. Milum, Sr., and their sister, Mary Milum Reed, and an attorney, went to the bank to open the lock box. All of those present expected to find the bonds in the lock box, except John C. Milum, Sr. He knew the bonds were not there. He pretended, however, to be as much surprised as the others at not finding the bonds in the lock box. A few days later, while the administrators were preparing to take further steps in an effort to locate the bonds, John C. Milum told them that they need look no further; that he had the bonds; that they had been given to him by their father for the use and benefit of his (John's) children; that the bonds were to be used for the education of the children. Thus, there arose the issue of whether the bonds belonged to John in person, or as trustee for his children, or did they belong to the estate.

The finding of the Probate Court that the bonds were delivered to John by his father as an advancement is sustained by a preponderance of the evidence, although

there is some evidence to the contrary. John had the bonds. He stated that his father had given them to him to be used for the education of John's four children. He further testified that his father had given him specific instructions on cashing the bonds as they became due and how the proceeds should be handled, and that he had carried out his father's instructions in that respect to the letter.

But the evidence also shows that at the time he turned the bonds over to his son John, Roy was personally involved in a divorce proceeding. His then wife was not the mother of his children. The testimony of Lloyd Shouse, attorney for Roy Milum at the time of the divorce, can be construed to the effect that Roy gave the bonds to John as an advancement. Roy was nearly 80 years of age at the time and was worth a considerable sum. He died about nine months after the divorce was granted to his wife.

The inventory of the estate shows a valuation of about $425,000.

There is no evidence at all indicating that Roy had ever favored any of his children over the others, although, subsequent to his divorce, two of his children had provided an apartment for him at their homes in Harrison. Roy had other grandchildren besides John's children. It appears that some of them had finished school and Roy had not helped with their education. One son was in debt to the extent of about $10,000 for money he had borrowed to educate his daughter.

A gift of a large portion of an estate from a parent to a child during the lifetime of the parent is prima facie an advancement. The court said in *Perdue* v. *Perdue,* 198 Ark. 657, 130 S. W. 2d 703: "It has long been the established rule of law in this state that a gift of a considerable portion out of the body of the estate from a parent to a child during the lifetime of the parent is prima facie evidence of an advancement; that it was so intended, and that this presumption must be overcome by a preponderance of the testimony." See also *Russell* v.

Pagan, 167 Ark. 143, 267 S. W. 573; *Jackson* v. *Richardson,* 182 Ark. 997, 33 S. W. 2d 1095; *Neal* v. *Neal,* 194 Ark. 226, 106 S. W. 2d 595; *Clement* v. *Blythe,* 220 Ark. 551, 248 S. W. 2d 883, 31 A. L. R. 2d 1033.

The conduct of John after his father died, and his testimony in Probate Court did not overcome the prima facie case that the bonds were turned over to him by his father as an advancement.

A short time after Roy's death, all the heirs were gathered together, along with an attorney. Assets of the estate were discussed, including the bonds. All of the heirs, except John, thought the bonds were in the lock box, and John did not say one word indicating that Roy had given the bonds to him or turned the bonds over to him in trust for his children. Later, when he testified, John attempted to explain his conduct by saying that he remained silent about having the bonds because he had promised his father that he would tell no one, and that he wanted to "search his soul", although it appears from his testimony that he had previously told at least three people of his version of the transaction.

In the circumstances it cannot be said that the evidence to establish a trust in personal property comes up to the high standard required by law. *Scott* v. *Miller,* 179 Ark. 7, 13 S. W. 2d 819; *Hand* v. *Mitchell,* 209 Ark. 996, 193 S. W. 2d 333; *Kelley* v. *Northern Ohio Co.,* 210 Ark. 355, 196 S. W. 2d 235; *Blalock* v. *Blalock,* 222 Ark. 299, 258 S. W. 2d 891.

Appellant argues other points dealing mainly with the admissibility of evidence. We have examined each point and find no error.

Affirmed.

Ward and Holt, J. J., not participating.

5-3356 385 S. W. 2d 649

Opinion Delivered January 11, 1965

James L. Sloan, for appellant.

John Harris Jones, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from denial of a motion to set aside a divorce decree.

Appellee Talmage Ladd filed a complaint for divorce in Jefferson Chancery Court on March 15, 1963, against appellant Marjorie Ladd, his wife. Appellant executed a power of attorney appointing an attorney to represent her, waiving notice, "recommending" that custody of the parties' four minor children be given to appellee, stating that there had been a property settlement between the parties under which appellee was to occupy the home owned by the parties so long as he desired with the understanding that if the place were sold appellant is to receive one-half of the net proceeds of the sale. The decree was taken June 11, 1963, and the court after finding that appellee was entitled to a divorce granted custody of the children to appellee and gave appellee possession of the home.

On August 8, 1963, during the term of court in which the divorce decree was rendered, appellant, by her father-

R. G. Billings, who had since been appointed her guardian, filed a motion to set aside the decree. She alleged, in effect, that she was of unsound mind at the time she signed the power of attorney which enabled appellee to get an uncontested divorce; that appellee had practiced fraud upon her by representing that the power of attorney was for the purpose of giving him custody of the children during appellant's illness, and not to enable him to get a divorce. Appellant also alleged in her motion that she and appellee had lived together subsequent to the signing of the power of attorney. Shortly after the beginning of the next term of court, appellant's counsel was permitted to withdraw. With present counsel the motion was heard January 27, 1964. The trial court found that there was no proof of fraud upon the court regarding the decree; that there was no allegation or proof by appellant of a meritorious defense to the action in which the decree was entered; that appellant was competent to know what she was doing when she executed the power of attorney; and that no proof was offered that the best interest of the children would be served by changing their custody, and dismissed the motion. From the order comes this appeal.

There is no allegation in the motion to set aside the decree which, if true, would render the decree absolutely void. The motion can be construed as alleging three grounds for setting aside the decree under the provisions of Ark. Stat. Ann. § 29-506 (Repl. 1962), which 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 obtaining the judgment or order.

"Fifth. For erroneous proceedings against an infant, married woman or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. . . .

"Seventh. For unavoidable casualty or misfortune preventing the party from appearing or defending."

The allegation in the motion to set aside the decree that the parties had lived together as man and wife subsequent to the acts alleged as grounds for divorce can be construed as stating a meritorious defense to appellee's complaint asking for a divorce. An allegation stating a meritorious defense is necessary in a motion to set aside a judgment after the term has expired. *Osborne* v. *Lawrence,* 123 Ark. 447, 185 S. W. 774; *Hill* v. *Teague,* 194 Ark. 552, 108 S. W. 2d 889; *Haville* v. *Pearrow,* 233 Ark. 586, 346 S. W. 2d 204.

Appellant has raised six points to be relied on, but the case boils down to three issues: (1) Was fraud practiced by the successful party in obtaining the decree; (2) Was appellant of unsound mind at the time she signed the power of attorney; (3) Was there an unavoidable casualty preventing appellant from appearing and defending.

Review of the testimony on the first issue reveals: appellant testified that appellee told her that the power of attorney was for temporary custody only, that no divorce was intended (which was corroborated by appellant's father), and that when she went to the lawyer's office she stayed barely two minutes, just long enough to sign the power of attorney. Appellee on the other hand testified that he explained to both appellant and her father the purpose of the power of attorney; appellee's former attorney testified that appellant discussed it at some length with him before it was dictated and while it was being typed, that the attorney assured appellant she did not have to sign it and if she didn't want to sign it, not to sign it. This was corroborated by his secretary and another secretary in the office. The attorney further testified that appellant made no attempt to withdraw the power of attorney during the three months between its execution and the date of the divorce decree.

On the second issue, that appellant was of unsound mind at the time she signed the power of attorney, appellee had the benefit of testimony of a psychiatrist who saw appellant between February 22nd and March 1st while she was hospitalized and several times after March

15th, when she executed the power of attorney. He testified that while appellant had a low intellect and functional level, she was not psychotic, that she was slow, not insane. Appellant's father testified that appellant was as smart then as when she finished high school. Appellee's former attorney testified in detail that in his opinion appellant completely understood what she was doing when she signed the power of attorney.

On trial de novo on the record before us, we cannot say the Chancellor's findings that no fraud was practiced by appellee in obtaining the divorce and that appellant was not of unsound mind at the time she signed the power of attorney are against the weight of the evidence. It follows, therefore, having disposed of the issues of fraud and unsound mind, there is no showing of unavoidable casualty, and the decree of the trial court is, therefore, affirmed.

WRIGHT *v.* DEWITT SCHOOL DISTRICT.

5-3408 385 S. W. 2d 644

Opinion Delivered January 11, 1965

Tom Gentry, for appellant.

Macom & Moorhead, for appellee.

FRANK HOLT, Associate Justice. The issue presented in this case is whether a state health regulation is in conflict with freedom of religion as ordained by the First Amendment to the Constitution of the United States.

The appellants, adults and school age children, are members of a church known as the General Assembly and Church of the First Born. The appellee, DeWitt School District #1 of Arkansas County, pursuant to a state health regulation, required all students to be vaccinated against smallpox as a prerequisite to attending the school. This requirement contravenes appellants' religious beliefs. As a result the appellants instituted this action to enjoin the appellee school district from enforcing this regulation as to themselves and other similarly situated, alleging that such regulation would require appellants to do an act opposed to their religious beliefs and is in violation of their religious freedom as guaranteed by the First Amendment to our Federal Constitution; that the school age appellants had been attending the schools operated by appellee for many years without being vaccinated and as a result no one had suffered any adverse effect; that there had been no smallpox in Arkansas County for more than fifty years and that no immediate, grave or present danger existed which justified any infringement upon their constitutional right of the free exercise of their religious views. This appeal is from the decree of the chancellor sustaining appellee's demurrer and dismissing the complaint.

The sole point relied upon by appellants for reversal is that: "These appellants may not be required to

submit to vaccination as a prerequisite to attend the schools operated by appellee under the facts in this case as such would be in violation of their rights of the free exercise of their religion as guaranteed to them by the First Amendment to the Constitution of the United States."

We think the chancellor was correct in sustaining the demurrer and dismissing the complaint. The appellants do not have the legal right to resist on religious grounds the enforcement of this health regulation requiring the vaccination of all children as a prerequisite to attendance of the schools operated by the appellee. *Cude* v. *State,* 237 Ark. 927, 377 S. W. 2d 816. There we held:

"* * 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."

The questioned state health measure, quoted in the *Cude case,* is Regulation #21, Rules and Regulations Pertaining to Communicable Diseases, 1960 Revision, approved by the State Board of Health July 28, 1960. The State Health Department has the authority to promulgate health regulations having the effect of law for the purpose of efficiently controlling communicable diseases. Ark. Stat. Ann. § 82-109—110 (Repl. 1960). We have long recognized the health regulation requiring vaccination of all school children as being a valid exercise of the police power of the state. *State* v. *Martin,* 134 Ark. 420, 204 S. W. 622; *Seubold* v. *Fort Smith Special School Dist.,* 218 Ark. 560, 237 S. W. 2d 884.

It is well settled that a demurrer admits facts *well pleaded* in a complaint. Therefore, appellants argue their allegation that no immediate, grave or present danger exists must be taken as true since the appellant children have been attending school without being vaccinated and no case of smallpox has occurred in Arkansas County for more than fifty years. Appellants insist

that these elements of imminent danger must exist before there can be any valid interference with their religious liberties and that the trial court should have overruled the demurrer and required such proof. We do not agree with this contention. *Seubold* v. *Fort Smith Special School District, supra.*

It is well known that smallpox is a contagious disease which is a scourge to mankind. Furthermore, it cannot be said that the boundaries of a county present any barrier to the spread of this infectious disease. Our courts, both state and federal, take judicial notice of the very nature of this loathsome disease and that it presents a clear and ever present danger which is best controlled by health measures such as the one in question. In *Cude* v. *State,* supra, we said:

"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."

In *Jacobson* v. *Massachusetts,* 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643 it was argued, as in the case at bar, that the court erred in sustaining the demurrer to the complaint questioning the validity of a health regulation. There the state put in evidence only the health regulation requiring vaccination and that the offer of free vaccination was made to the appellant. The appellant made various offers of proof, none of which were allowed by the court. Appellant offered to submit proof that three-fourths of the states did not require vaccination; that "Smallpox has ceased to be the scourge which it once was,"; that "The states which make no provision for vaccination are not any more afflicted with smallpox than those which compel vaccination,"; and that "The Board of Health is entrusted with arbitrary power, and determines the necessity for, and methods of, vaccination". In rejecting all of these contentions and upholding the trial court's refusal of this proffered proof the court said:

"* * If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands. * * * According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."

Thus, the courts are not required to listen to conflicting evidence as to the need of vaccination against smallpox. The legislature, acting through its duly constituted agency, is the proper forum to determine by a reasonable enactment what the health, morals and safety of the public require for the common good.

Also, in *Jacobson* the court took judicial notice of the need for vaccination:

"A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. * * * While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold the statute in question is a health law, enacted in a reasonable and proper exercise of the police power."

The authority to supervise and control the activities of children is broader than that over similar actions of adults. *Prince* v. *Massachusetts,* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645. In that case a child labor law was upheld against the claim that it impinged upon the First Amendment. There the child was distributing magazines of a religious nature. The court said:

"But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,*

133 U. S. 333. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. *Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.*" [Emphasis added]

In *Zucht* v. *King,* 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194, the court held that a city ordinance that made vaccination a prerequisite to school attendance did not impinge upon the Fourteenth Amendment to our Federal Constitution. There the court said:

"* * Long before this suit was instituted, *Jacobson* v. *Massachusetts,* 197 U. S. 11, had settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative."

In that case, as in the case at bar, a demurrer was sustained to the suit to enjoin the enforcement of the ordinance.

Appellants rely upon *West Virginia* v. *Barnette,* 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, and *Sherbert* v. *Verner,* 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965. In the *Barnette case* the supreme court struck down a state law requiring students to salute the flag and recite the pledge of allegiance as being an unnecessary invasion of the right of free speech. In the *Sherbert case* the court upheld the right of a member of the Seventh-day Adventist Church to be eligible for unemployment compen-

sation although she refused to work on Saturday which was in violation of her religious beliefs. The activities sought to be regulated in both of these cases had nothing to do with public health measures. We do not construe these cases as being applicable to the facts in the case at bar.

There is no necessity for unduly lengthening this opinion by again reviewing the numerous cases cited by us in the *Cude case* holding that rights of religious freedom cease when they transgress upon the rights of others. This principle is well expressed in *U. S.* v. *Willard,* 211 F. Supp. 643 (Ohio 1962) where the court said:

"[12] Under the First Amendment of our Constitution, freedom to believe in and to adhere to one's chosen form of religion cannot be restricted by law, but freedom to act in accordance with one's religious beliefs necessarily 'remains subject to regulation for the protection of society.' *Cantwell* v. *State of Connecticut,* 310 U. S. 296, 303, 304, 60 S. Ct. 900, 903, 84 L. Ed. 1213."

Another recent case resolving the conflict between religious freedom and the rights of society as a whole is *In Re Jenison,* 120 N. W. 2d 515 (Minn. 1963). There the court held that a woman juror was not relieved of jury duty because it conflicted with her religious beliefs in the Biblical stricture "judge not, that you will not be judged". The court said that "refusal to serve is inconsistent with the peace and safety of the state." In *Crowley* v. *Christensen,* 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620, the court aptly said:

"But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law."

Appellants are at liberty to enjoy unrestrained their religious opinions and beliefs. However, their freedom to act according to their religious beliefs is subject to a reasonable regulation for the benefit of society as a whole. We affirm that the health regulation in question is a reasonable exercise of police power on a subject of paramount and compelling state interest and, therefore, is valid.

The decree is affirmed.

5-3437 385 S. W. 2d 800

Opinion delivered January 18, 1965.

[redacted]

Ben M. McCray, for appellant.

Hall, Purcell & Boswell and House, Holmes & Jewell, for appellee.

CARLETON HARRIS, Chief Justice. On December 25, 1961, at approximately 6:30 P.M., Bill Milner, one of the appellants herein, was returning to his father's home on Highway No. 183, traveling west, between Benton and Bauxite. Milner was operating a 1959 Chevrolet Belair, the property of the father. When reaching the point where the elder Milner's driveway intersected the highway on the south side, and while making a left turn, preparatory to entering the driveway, the Milner vehicle collided with a 1952 Chevrolet pickup truck which was traveling east on the highway, and driven by appellee, Exie Marshall. Both vehicles were damaged, and Marshall received leg injuries. Appellee instituted suit in the Saline Circuit Court against the Milners, and appellants answered, denying liability; J. K. Milner counterclaimed for the amount of damage done to his automobile. The cause was tried before the court, sitting as a jury, and at the conclusion of the evidence the court

found that the collision was due to "the sole negligence of Bill Milner," and judgment was entered in favor of Marshall against this appellant in the amount of $2,000.00. From such judgment comes this appeal. For reversal, appellants rely upon a single point, *viz,* that the evidence was not sufficient to support the judgment.

Only three witnesses testified at the trial, appellant Bill Milner, the appellee, and Bobby Gunn, a trooper with the Arkansas State Police. Milner testified that he was nineteen years of age at the time of the collision, and had visited a friend in Little Rock during the day (Christmas). He returned after dark, and turned his lights on when leaving Little Rock. Upon reaching the location of his father's home on the highway, he slowed, or stopped, to allow an approaching car to pass, and then, seeing no further vehicle, started his left-hand turn toward the driveway. Suddenly he observed an oncoming truck, without headlights burning, not more than five or ten feet away, "Very close. Just a moment before the collision." The car struck the truck, and Milner contends that the wreck was a result of, and caused by, appellee's negligence in driving without headlights.

Marshall testified that his headlights were on when he left home about 6:20 P.M., and that the lights were still on at the time the accident occurred.

Trooper Gunn testified that he investigated the collision, and examined the vehicles involved. He found that the Chevrolet automobile was heavily damaged on the left front. As to the truck, the left front was heavily damaged; the dash lights were burning; the taillight was burning; the left headlight was broken out, and the right headlight was not burning. The officer was asked if he questioned Marshall as to whether his lights were on at the time of the collision, and Gunn replied, "I asked if he had lights and what happened. He said he did not know what happened." On cross-examination, the officer reiterated this testimony with the statement, "My question was, 'What happened, did he have his lights on?' He said he did not know." Trooper Gunn stated that

he did not break the question down into two parts, but only asked the one question. He further testified that Marshall had suffered injury. The trooper was unable to determine why the bulb in the right headlight was not burning, and he could not say that it was not caused by the jolt of the collision.

The court, in its "finding of fact," observed that,

"The evidence introduced presents a problem of considering the credibility of the witnesses.

"The testimony of Patrolman Gunn concerning admissions made by the plaintiff is not controlling for the reason that Gunn testified that he inquired of the plaintiff, how the accident happened and whether he had his lights on. He testified that the plaintiff answered, 'I don't know, or I don't know how it happened.' This testimony would be subject to two constructions.

"This court finds it difficult to believe that any person could drive in the night time for a distance of three or more miles without having his lights on, or without having an accident earlier."

Appellants contend that appellee, in response to the question from the State Policeman, should have emphatically replied, "Yes, my headlights were burning and this man just pulled in front of me." It is argued that Marshall's failure to answer each part of the question explicitly constituted an admission that his lights had not been burning at the time of the collision. We do not agree. It is true that the question was "double barreled," and the answer is therefore somewhat ambiguous. However, a copy of Trooper Gunn's report (which the officer used to refresh his memory on some questions) was placed in the record, and this report only denotes that Marshall stated that he "did not know what happened." Let it also be remembered that Marshall had been injured, and one's answers to interrogation at such a time are not always clear. Certainly, there was as much reason, if not more, for the court to feel that appellee's answer referred to that portion of the question

relative to how the accident occurred, rather than to that portion of the question concerning the lights.

Appellants assert that the court was engaging in speculation in finding "it difficult to believe" that a vehicle with no lights burning, could be driven for three or more miles after dark without having a prior accident. We do not agree that this is such speculation as to constitute error, since it was a pertinent circumstance in considering the credibility of the witnesses. The court's initial statement was to the effect that the litigation presented "a problem of considering the credibility of the witnesses," which is, of course, to say that only a fact question was involved, and the court was considering all circumstances as a matter of determining which of the conflicting accounts (given respectively by appellant and appellee) was correct.

Of course, it is well settled that the finding of the trial court, as a trier of the facts, has the same binding effect as a jury verdict, and will be sustained if there is any substantial evidence to support the judgment. *American Metal Window Co.* v. *Watson,* 238 Ark. 418, 382 S. W. 2d 576. Marshall stated positively that his lights were on; and, though he was a party to the suit, and his testimony is considered disputed as a matter of law, such testimony constituted substantial evidence to support the judgment of the court, sitting as a jury. *Turchi* v. *Shepherd,* 230 Ark. 899, 327 S. W. 2d 553.

Affirmed.

5-3385 385 S. W. 2d 790

Opinion delivered January 18, 1965.

[redacted]

Gentry & Gentry, for appellant.

H. B. Stubblefield, for appellee.

ED. F. MCFADDIN, Associate Justice. This case involves a trusteeship. Mr. Ralph H. Baker, Sr., departed this life in March 1963, and the appellant, Ralph H. Baker, Jr., is the administrator of said estate with will annexed. The present litigation grows out of a real estate transaction wherein Mr. Baker, Sr. acted as trustee for himself and the appellee, Mr. W. W. Leigh; and Mr. Baker, Sr. died without having settled his trusteeship. Mr. Leigh brought this suit, and his difficulty in making proof was because the administrator pleaded the dead man statute,[1] as he had a perfect right to do. Mr. Leigh

[1] The "dead man statute" is found in § 2 of the Schedule of the Arkansas Constitution, and reads: "Provided, that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party. . . ."

was thus unable to testify as to any of his transactions with Mr. Baker; and the evidence in Mr. Leigh's behalf as to such transactions had to be established by written instruments, cancelled checks, bank statements, and the testimony of third persons.

On December 16, 1958, Mr. Baker, as Trustee, paid Messrs. Ellis $4,250.00 for a 6-months option to purchase a tract of 40 acres at a total consideration of $40,000.00. In exercising the option, a fee of $2,000.00 was paid an attorney. The option was exercised, and on June 19, 1959, a deed was executed by Messrs. Ellis to "Ralph H. Baker, Trustee", reciting the total consideration to be $40,000.00, paid and payable as follows:

$11,600.00 in cash;
$12,400.00 vendor's lien notes to Messrs. Ellis;
$16,000.00 Hoffman lien notes assumed by Baker, Trustee.

On June 22, 1959, Ralph H. Baker, Sr. signed and delivered to W. W. Leigh an instrument reading as follows:

DECLARATION OF TRUST

"STATE OF ARKANSAS }
COUNTY OF PULASKI } ss

"Whereas Ralph H. Baker, Trustee, has this the 22 day of June 1959 purchased:

"The Northwest Quarter of the Southeast Quarter (NW ¼ SE ¼) Section Three (3), Township One North (Twp. 1 N.), Range Thirteen West (R 13 W), in Pulaski County, Arkansas

for the account of the following persons, and in the proportion set opposite their respective names, to-wit:

"William W. Leigh, Fifty per cent (50%)

"Ralph H. Baker, Fifty per cent (50%)
and upon the following terms of purchase: ..... cash, balance over a period of ..... years, amortized at ..... and balance bearing interest at .....%.

"Now be it known that Ralph H. Baker, Trustee, acknowledges that he holds the title to said lands for the use and benefit of the persons named, but upon the following terms and conditions, to-wit:

"As this land is purchased on terms, the above parties shall pay their respective portions of the balance due thereon.

"It is specifically understood between all the parties hereto, that all of the interested parties shall promptly pay to the Trustee their proportionate part of all State and County taxes, and any special taxes, levied against said lands.

"Trustee, Ralph H. Baker, covenants to exercise such trust in good faith on his part.

"Witness my hand and seal at Little Rock, County of Pulaski, State of Arkansas this the ..... day of June, 1959.

"/s/ Ralph H. Baker
Ralph H. Baker, Trustee
"/s/ Ralph H. Baker, Jr., Witness."

In September 1963 Mr. Leigh filed the present suit.[2] He alleged the trusteeship of Mr. Baker Sr., as shown by the above instrument, and claimed that he (Leigh) had paid a total of $48,775.22 on the trust property and that Mr. Baker Sr. had paid only $520.18. On the basis of these figures Mr. Leigh prayed that he have judgment against the estate of Mr. Baker and a lien on the one-half interest of Mr. Baker Sr. in the land for $24,-127.52, being the amount Mr. Leigh had paid for the protection of the interest of Mr. Baker Sr. The answer was a general denial and plea of limitations. Trial in the Chancery Court resulted in a decree for Mr. Leigh for all the prayed relief; and this appeal resulted, in which appellants[2] urge two points:

[2] The defendants below and appellants here are Ralph H. Baker, Jr., as administrator with will annexed of the estate of Ralph H. Baker, Sr., Deceased, and also Mrs. Ruth Baker, being the widow of Ralph H. Baker, Sr., Deceased.

"I. The Court erred in awarding judgment against Ralph H. Baker, Jr., Administrator of the Estate of Ralph Baker, Sr., deceased in the amount of $24,127.52, the amount of such judgment should have been $15,259.43.

"II. The Court erred in declaring the fixing any lien on the undivided interest of the estate of Ralph H. Baker, deceased."

I. *Amount Of The Judgment.* This is appellant's first point. In the trial there were introduced Mr. Leigh's cancelled checks, identified by witnesses, as to the amounts[3] paid by him in connection with this land transaction, as follows:

Item	Date	To Whom Paid	Amount
A.	Jan. 22, 1959	Ralph H. Baker	$11,061.18
B.	Dec. 5, 1958	Ralph H. Baker	250.00
C.	Dec. 5, 1958	Ralph H. Baker	6,000.00
D.	Aug. 3, 1959	W. B. Worthen Co.	714.65
E.	Aug. 3, 1959	William W. Leigh	5,000.00
F.	Feb. 16, 1960	Worthen Bank & Tr. Co.	409.79
G.	June 20, 1960	Ralph H. Baker, Tr.	6,944.00
H.	Aug. 1, 1960	Worthen Bank & Tr. Co.	5,762.50
I.	Sept. 8, 1960	Ralph H. Baker	72.44
J.	Oct. 18, 1960	Ralph H. Baker	241.50
K.	Apr. 11, 1961	Ken Schuck	425.00
L.	June 19, 1961	T. E. Ellis & Gilbert A. Ellis, Trustees	6,572.00
M.	Aug. 1, 1961	Worthen Bank & Tr. Co.	5,125.00
		TOTAL	$48,578.06

The payment of $520.18 by Mr. Baker, Sr. seems to be undisputed. If we add the amounts shown above

alleged to have been paid by Leigh	$48,578.06
to the amount paid by Baker	520.18
we get a total of	49,098.24
Mr. Baker's half of that amount as the cost of the 40 acres would be	24,549.12
Mr. Baker had paid	520.18
so according to the evidence Mr. Leigh had paid for the account of Mr. Baker	$24,028.94

[3] The complaint alleged payment of two other checks totalling $197.16, but these checks were not introduced, so we disregard them.

In their first point the appellants claim that Mr. Leigh should have an unsecured judgment for only $15,259.43 instead of the amount rendered by the Court. The appellants reach this figure of $15,259.43 by deducting from the total amount paid by Mr. Leigh the items "A," "B," and "C," and Item "K," as identified and shown in the tabulation of Mr. Leigh's checks above. Appellants claim that the items "A," "B," and "C," should be stricken because it was not until the Declaration of Trust was signed that Mr. Baker became bound to Mr. Leigh to pay half of the cost; and appellants claim that Item "K" should be stricken because it was a surveying item and not within the purview of the Declaration of Trust. We cannot agree with appellants as to Items "A," "B," and "C." There was introduced into evidence another instrument, shown to have been signed by Mr. Baker Sr. and delivered to Mr. Leigh, which recited:

"Dear Bill:

"The attached memorandum will serve as a complete record of this transaction as far as payments are concerned. Of the eight thousand paid down, you put up $6,000.00. As I remember it you gave me a check on L. B. Leigh and Co. for $5,000.00 and another personal check for $1,000.00. I put up the other $2,000.00 completing the down payment.

"You have put up all the rest of the money except I paid the semi-annual interest due on 1st lien 8-1-59 of $262.50. If you will pay the semi-annual interest on this item due 4-1-60 this will even up this item. In addition you paid the accrued interest before that when we closed the deal amounting to $533.34. Don't forget to charge this item in your 1959 INCOME TAX REPORT.

"/s/ Ralph

"P.S. You actually advanced $12,133.34 on 6/19/59 broken down as follows:

"Payment	$11,600.00
Interest	533.34
	$12,133.34"

There was also introduced the closing figures when Mr. Baker Sr., Trustee, closed the transaction with Messrs. Ellis at the Beach Abstract Company. From these, and from other proof in the case, it is thus clear that Mr. Leigh has paid far more than the amount which he was to pay; that is, his half of the purchase price and interest. Because of failure to introduce some checks, we find that the proof on this point justifies a judgment for Mr. Leigh for only $24,028.94, as previously explained; so we affirm the judgment in favor of Mr. Leigh for $24,028.94.

II. *The Lien On Baker's Interest In The Land.* This point consumes the larger portion of appellants' brief. They insist that Mr. Leigh cannot acquire a lien on Mr. Baker's interest merely by showing that Mr. Leigh has paid money that Mr. Baker should have paid, and they undertake to show that Mr. Leigh cannot obtain a lien by subrogation, equitable lien, or resulting trust. We agree with appellants that the mere payment by Mr. Leigh of more than his half of the cost did not, standing alone and in the absence of other factors, give Mr. Leigh a lien on Mr. Baker's half interest in the land. The case of *Dowdy* v. *Blake,* 50 Ark. 205, 6 S. W. 897, is on this point. But there are many other factors in this case and after considering all of these we hold that Mr. Leigh is entitled to a lien on Mr. Baker's interest in the land because of the application of the equitable doctrine of subrogation. In *Southern Cotton Oil Co.* v. *Napoleon Hill Co.,* 108 Ark. 555, 158 S. W. 1082, this Court discussed at some length the equitable doctrine of subrogation, saying:

"The doctrine of subrogation is an equitable one, having for its basis the doing of complete and perfect justice between the parties without regard to form, and its purpose and object is the prevention of injustice. Cyc. also says, 'And generally, where it is equitable that a person, not a mere stranger, intermeddler, or volunteer, furnishing money to pay a debt, should be substituted for or in place of the creditor, such person will be so substituted.' 37 Cyc. 371. . . ."

Quoting from an earlier case, this Court also said as regards subrogation:

"'It rests upon the maxim that no one shall be enriched by another's loss, and may be invoked wherever justice and good conscience demand its application in opposition to the technical rules of law, which liberate securities with the extinguishment of the original debt. This equity arises when one not primarily bound to pay a debt, or remove an incumbrance, nevertheless does so; either from his legal obligation, as in case of a surety, or to protect his own secondary right; or upon the request of the original debtor, and upon the faith that, as against the debtor, the person paying will have the same sureties for reimbursement as the creditor had for payment. And this equity need not rest upon any formal contract or written instrument. Like the vendor's lien for purchase money, it is a creation of a court of equity from the circumstances.' The theory of equitable assignment, as laid down by Pomeroy is: 'In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor, primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection. The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his own benefit; such a person is in no true sense a mere stranger and volunteer.' Pomeroy, Equity Juris., vol. 3, § 1212."

Subsequent cases have applied this doctrine of subrogation in a variety of circumstances. In *Cowling* v. *Britt,* 114 Ark. 175, 169 S. W. 783, Justice Hart said: "Subrogation is a doctrine of purely equitable origin, and in its operation is always controlled by equitable

principles." In *Federal Land Bank* v. *Richland,* 180 Ark. 442, 21 S. W. 2d 954, Justice Butler said:

"But, as the doctrine of subrogation was evolved by courts of equity for the prevention of injustice, it is administered not as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular case before the court. Therefore no rule can be laid down for its universal application, and whether it is applicable or not depends upon the particular facts and circumstances of each case as it arises, and is subject to that most ancient maxim, 'he who seeks equity must do equity.' "

In *Commonwealth* v. *Martin,* 185 Ark. 858, 49 S. W. 2d 1046, Justice Butler said:

"In many cases it has been our policy to apply the doctrine of subrogation, where by so doing the ends of justice will be met (*Chaffee* v. *Oliver,* 39 Ark. 531; *Cohn* v. *Hoffman,* 45 Ark. 376; *Neff* v. *Elder,* 84 Ark. 277, 105 S. W. 260, 120 Am. St. Rep. 67; *Beauchamp* v. *Bertig,* 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; *Southern Cotton Oil Co.* v. *Napoleon Hill Cotton Co.,* 108 Ark. 555, 158 S. W. 1082, 46 L. R. A. (N. S.) 1019); . . ."

See also *Webster* v. *Horton,* 188 Ark. 610, 67 S. W. 2d 200; and *Cooper* v. *Home Owners Loan Corp.,* 197 Ark. 839, 126 S. W. 2d 112.

Text writers and cases from other jurisdictions also show the force of this equitable doctrine of subrogation. In 50 Am. Jur. p. 692 *et seq.,* "Subrogation" § 14 *et seq.,* the following appears:

"§ 14. Maxims Applicable.—The various maxims of equity, elsewhere considered, are brought into play when subrogation is sought. It frequently calls for an application of the maxim that 'no one shall be enriched by another's loss.' . . .

"§ 15. Favored Doctrine.—As observed above, the doctrine of subrogation, which in its beginning was somewhat strictly and narrowly applied, was later liberalized and expanded and came to be recognized as a wholesome

and highly meritorious doctrine. Being founded on principles of natural reason and justice and being one of the benevolences of the law, it is a highly favored doctrine and one which has been most liberally dealt with in the courts. Perhaps no doctrine of equity jurisprudence is more beneficent in its operation, and perhaps none stands in higher favor."

As to some of the persons entitled to subrogation the same volume of Am. Jur. states on pages 695 and 696:

"Recognized inclusions are of those who, like sureties or guarantors, pay the debt to another in the performance of a legal duty imposed by contract or rules of law; those who pay the obligations of another for the purpose of protecting their own rights or interests, including supposed interests; those who pay the debt of another under an agreement for subrogation to the right of the creditor; those who pay on the invitation of the public and whose payment is favored by public policy; and persons whose funds or property have been misapplied by an agent or other fiduciary, or have otherwise been used in such a way as to enrich others unjustly." And on page 739 of the same volume of Am. Jur. there is this statement:

"One whose money has been wrongfully or fraudulently used by another in the purchase of real property may work out a remedy by subrogation to the lien of the vendor. Thus, subrogation to a vendor's lien has been allowed where a trust fund in the hands of a vendee of land is used to pay the purchase price or to discharge the lien on the lands under such circumstances as to amount to a fraud on the beneficiary."

In 83 C. J. S. p. 604, "Subrogation" § 9, the text reads:

"Payment to protect own rights and interests. Subrogation will arise in favor of those who act under the necessity of self-protection. One who pays another's debt to protect his own rights and interests, or who pays an-

other's debt in order to protect some interest which he represents, is not ordinarily considered a volunteer and may be subrogated to the creditor's rights. Likewise, one who has an interest which is jeopardized by the continued existence of the debt of another is not a volunteer in paying that debt, and he may obtain subrogation." And on page 630 of the same volume of C. J. S. the text reads:

"Where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid."

As to the right of a cestui to be subrogated to the interest of the trustee, the American Law Institute's Restatement of the Law of Trusts, Second Edition, p. 448, § 202, says:

"Discharging trustee's individual obligation. Where the trustee wrongfully uses trust funds in discharging an obligation owed by the trustee individually to a third person, the beneficiary is entitled to be subrogated to the rights which the obligee had before the obligation was discharged. A court of equity will afford relief to the beneficiary by putting him in the position occupied by the obligee before the obligation was discharged. If the obligation was a secured obligation, the beneficiary is entitled to the security interest held by the obligee. If the obligation was of such a character that the obligee was entitled to priority over other creditors of the trustee, the beneficiary is entitled to a similar priority."

With the equitable doctrine of subrogation thus understood, we revert to the tabulation of Items "A" to "M", inclusive, as found in Topic I of this Opinion. It was shown that all of the items in the tabulation except Items "A," "B," "C," and "K," were amounts advanced by Mr. Leigh to pay the principal and interest of the vendor's lien notes to Messrs. Ellis ($12,400.00) and the Hoffman lien notes ($16,000.00). As to payment by Mr. Leigh of these items (totalling $28,400.00, plus interest) there can be no doubt of Mr. Leigh's right of

subrogation and a lien against Mr. Baker's interest in the land for the amount that Mr. Leigh paid to protect Mr. Baker's interest. "Where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid." (See C. J. S. above cited.)

Items "A," "B," and "C," of the said tabulation (in Point I of this Opinion) relate to the amount paid by Mr. Leigh shortly after the exercise of the option by Mr. Baker. These items total $17,311.18 paid to Mr. Baker as the down payment to Ellis and the expenses incident to the sale. Appellants claim that Mr. Leigh is only an unsecured creditor against Mr. Baker's estate for Mr. Baker's half interest of this $17,311.19. We disagree with appellants in this contention. The declaration of trust was dated June 22, 1959; and the undated memorandum (written soometime after August 1, 1959) signed by Mr. Baker[4] says: "You actually advanced $12,133.34 on June 19, 1959." Thus, Mr. Baker admitted that the advance was used to pay for the trust property. Mr. Leigh thus made the advance to Mr. Baker, as Trustee, in order to protect Mr. Leigh's own rights; and there is ample authority that one who pays money to protect his own rights is not a volunteer, and is entitled to subrogation in a case like this. As to Item "K" (a payment to Ken Schuck of $425.00 on April 11, 1961), the proof is rather inconclusive, and we prefer to omit this item from the rule of subrogation.

Reverting again to the tabulation of Items "A" to "M" inclusive, as found in Topic I, when we exclude Item "K" ($425.00), there is left a total of $48,153.06 definitely established to have been paid by Mr. Leigh on the trust property. Mr. Baker paid $520.18, making a total of $48,773.23 paid by both. One half of said total would be $24,386.62 which Mr. Baker should have paid. Since he only paid $520.18, it follows that Mr. Leigh is entitled to a lien against Mr. Baker's interest in the

[4] This is previously copied in Topic I of this Opinion.

property for $23,866.44, being the amount of Mr. Leigh's overpayment.

The decree of the Chancery Court is affirmed as to Leigh being entitled to a judgment and a lien on Baker's interest in the property; but the decree is modified as to the amounts; the amount of Leigh's judgment being $24,028.94 and the amount of Leigh's lien on Baker's interest in the land being $23,866.44; both amounts to bear interest from the date as stated in the Chancery decree. As so modified, the cause is remanded for further proceedings not inconsistent with this Opinion. All costs of all courts are to be paid by appellants.

YOUNG *v.* YOUNG.

3396 384 S. W. 2d 469

Supplemental opinion on denial of Petition for Rehearing delivered January 18, 1965.

ED. F. MCFADDIN, Associate Justice (Additional Opinion on Rehearing). In his petition for rehearing Mr. Young calls attention to a matter which was contained in his original brief, but which we did not discuss in our Opinion of December 14, 1964.

The Chancery decree permanently enjoined Mr. Young from selling, during Mrs. Young's lifetime, the property at No. 3121 Olive Street in Pine Bluff, where Mrs. Young is now living. Mr. Young claims that this property is in a section fast becoming commercial, and that he should be allowed to furnish Mrs. Young a home for her lifetime at some other suitable location and then be allowed to sell the property at 3121 Olive Street.

Of course, Mr. and Mrs. Young may negotiate between themselves, if they so desire, as to another suitable home for Mrs. Young for her lifetime. Should they be unable to reach a mutually satisfactory agreement, then

Mr. Young, if he should think that Mrs. Young was being arbitrary in the matter, would be free to ask the Jefferson Chancery Court to hear the dispute and decide as to whether Mrs. Young should be required to accept another suitable home for her lifetime in lieu of the present one. The Chancery Court which granted the injunction in the first instance is always empowered to modify it.

With this explanation, the petition for rehearing is denied. HARRIS, C. J., not participating.

(Original opinion delivered December 14, 1964, P. 795.)

CALDWELL *v.* SHOPTAW.

5-3445 385 S. W. 2d 799

Opinion delivered January 18, 1965.

Cockrill, Laser, McGehee & Sharp, for appellant.

Martin, Dodds & Kidd, by *J. L. Kidd,* for appellee.

GEORGE ROSE SMITH, J. In December of 1962 the appellee was injured in a collision between the car in which she was riding as a passenger and a car that was owned by the appellant and was being driven by his minor son. Mrs. Shoptaw brought suit for her injuries and received a verdict and judgment for $24,000. The appellant's only contention is that the award is excessive.

There is no question about Mrs. Shoptaw's having been seriously injured in the accident. She suffered a

broken collarbone, seven fractured ribs, a severe and painful neck sprain, and a back injury. On the day of the accident she was given emergency treatment at a hospital and was permitted to return to her home. After ten days, however, the neck sprain had not responded to treatment, and the pain was so severe that her physician placed her in a hospital for eight or nine days. The hospital and medical expenses have amounted to almost a thousand dollars.

At the time of trial, some sixteen months after the collision, the plaintiff was still experiencing sharp pain. According to the doctors who testified, there is a separation in the left shoulder joint and a grating of the bones upon movement. This condition is accompanied by pain and may continue for years. There is a remote possibility that surgery may become necessary.

Mrs. Shoptaw was 41 when the accident occurred. She had enjoyed water sports with her family and had engaged in part-time work as a book salesman. Her injuries caused a permanent partial disability which prevents her from continuing to participate in these activities. In addition, she can no longer do her housework and must employ outside help.

The plaintiff suffered a great deal before the trial and is confronted with the prospect of further suffering in the future from injuries that are partly disabling. The primary responsibility for fixing the amount of compensatory damages rested upon the jury. It might be thought that their award is liberal, but we are unanimously of the opinion that it is not so excessive as to call for corrective action in this court.

Affirmed.

5-3415 385 S. W. 2d 783

Opinion delivered January 18, 1965.

[redacted]

R. Julian Glover, for petitioner.

Bruce Bennett, Attorney General, *Robert Shaw,* Prosecuting Attorney, *Daily & Woods,* for respondent.

PAUL WARD, Associate Justice. In this petition for a writ of prohibition, Lavada Hopper, asks this Court, by declaring Act 49 of 1963 unconstitutional, to prohibit the Montgomery Circuit Court (as presently constituted) from trying a damage suit filed against her by Jack Whisenhunt.

An adequate understanding of the decisive issue here involved and the manner in which it arises calls for a summary of the factual background.

In June, 1960 Lavada Hopper (petitioner herein), while driving her automobile on Highway No. 8 in Montgomery County, collided with an automobile being driven by Jack Whisenhunt, allegedly damaging his car. Suit was filed in the Circuit Court of Montgomery County by Whisenhunt against petitioner. After an answer and other pleadings were filed the petitioner filed a motion in which it was alleged:

that the Circuit Court of Montgomery County was without jurisdiction to try the cause of action; that said court is organized and acting under Act 49 of 1963 which removed Montgomery County from the Eighteenth Judicial Circuit and placed it in the Ninth Judicial Circuit (leaving only Garland County in the Eighteenth Judicial Circuit); and, that said Act 49 is unconstitutional, being in violation of Article 7, § 12; Article 7, § 13; and Article 2, § 10, all of the Constitution of the State of Arkansas. The prayer was for the relief indicated above.

Whisenhunt filed a response, agreeing that the above motion should be adjudicated. The prosecuting attorney of the Ninth Judicial Circuit (later joined by the attorney general) was permitted to intervene and defend the constitutionality of said Act 49 and the validity of the Ninth Judicial Circuit as organized under the said act. For the same purpose Ode Maddox and R. W. Dillard, citizens and residents of Montgomery County (representing other citizens and residents of said county), were also allowed to intervene.

Pursuant to statute the presiding judge of the Ninth Judicial Circuit executed an exchange agreement with Judge Paul Wolfe of the Twelfth Circuit. The matter was presented on the above pleadings, and Judge Wolfe, in a comprehensive written opinion, found that Act 49 is constitutional and that the Circuit Court of the Ninth Judicial Circuit (as constituted at that time) has jurisdiction to try the damage suit in question.

On July 21, 1964 Lavada Hopper filed this petition for a writ of prohibition. The decisive question presented to us is the constitutionality of said Act 49 of 1963.

All issues raised by petitioner stand or fall on the constitutionality of said act. If the act is unconstitutional, then the legislature had no power to take Montgomery County out of the Eighteenth Judicial Circuit and place it in the Ninth Judicial Circuit. If the act is constitutional it must be conceded that the legislature had the power to place Montgomery County in the

Ninth Judicial Circuit, and, consequently, the trial court would have jurisdiction to try the damage suit.

It is forcefully argued by the petitioner that since the effect of Act 49 is to make a judicial circuit out of one county—Garland County—it runs afoul of our former decisions and several provisions of the State Constitution. These provisions are set out below.

Article 7, § 12 reads:

"The Circuit Courts shall hold their terms in each county at such times and places as are, or may be, prescribed by law."

Article 7, § 13 reads:

"The State shall be divided into convenient circuits, each circuit to be made up of contiguous counties, for each of which circuits a judge shall be elected, who, during his continuance in office, shall reside in and be a conservator of the peace within the circuit for which he shall have been elected."

The pertinent part of Article 2, § 10 reads:

"In all criminal prosecutions the accused shall enjoy the right to a speedy . . . trial by impartial jury of the county in which the crime shall have been committed; *provided that the venue may be changed to any other county of the judicial district in which the indictment is found, upon the application of the accused, in such manner as now is, or may be, prescribed by law . . .*" (Emphasis by petitioner.)

The burden of petitioner's argument is that the plain language of the quoted sections leaves no reasonable doubt it was the intention of the framers of the constitution that a "circuit" was to be composed of more than one county. It is pointed out that to ascertain the intent and purpose of the constitution all sections must be considered together, citing *Shepherd* v. *City of Little Rock,* 183 Ark. 244, 35 S. W. 2d 361, and *State ex rel Gray* v. *Hodges,* 107 Ark. 272, 154 S. W. 506. This being true, petitioner believes the case of *The State of Arkansas* v. *Flynn,* 31 Ark. 35,

strongly supports her position here. Flynn was indicted for murder in Garland County. When he filed a proper affidavit he was granted a change of venue to Pulaski County which was in another judicial circuit. On appeal to this Court we held the transfer to Pulaski County violated Art. 2, § 10 quoted above. In so holding, we said:

"Under the present Constitution [1874] the venue in a criminal case, can for no cause be changed to a county out of the judicial circuit in which the indictment is found."

Petitioner argues that the only logical conclusion deducible from the above decision is that Act 49 of 1963 (which creates the Eighteenth Judicial Circuit with only one county) is unconstitutional, otherwise it would be impossible for a defendant in Garland County to secure a change of venue under any circumstances.

Although petitioner's argument appears plausible, it has been specifically rejected by this Court.

In the case of *Cockrell* v. *Dobbs, Judge,* 238 Ark. 348, 381 S. W. 2d 756 (decided after the petition herein considered was filed in this Court) we specifically upheld the validity of Act 49 of 1963, and gave the Circuit Judge of Garland County the power to transfer the trial of a criminal case to an adjoining county (and out of the Eighteenth Judicial Circuit). In that opinion we took cognizance of Article 7, § 13 and Article 2, § 10 of the State Constitution, and also the case of *State* v. *Flynn, supra.*

It follows therefore from what we had said above that the petition for a writ of prohibition must be, and it is hereby, denied.

Denied.

5-3411 386 S. W. 2d 492

Opinion delivered January 18, 1965.
[Rehearing denied March 1, 1965.]

[redacted]

Williams & Gardner, for appellant.

White & Young, for appellee.

SAM ROBINSON, Associate Justice. In November, 1961, appellee, Earl H. Hunt, Jr., purchased from A. B. Earp, doing business as Earp Equipment Sales Company, four coin operated dry cleaning machines for the purchase price of $13,500.00. Hunt lives at Clarksville where he opened a dry cleaning business. Earp's place of business is at West Memphis.

In March, 1963, Hunt filed suit in the Pope Circuit Court against Earp alleging breach of contract. It was alleged that Earp had warranted the machines to last 10 years without major repairs; that in the operation of the machines in the ordinary manner they had deteriorated due to corrosion to the point that they were worthless. The case was tried on the issue of whether Earp had breached the contract, and if so, the amount of damages, if any, suffered by Hunt as a result of the breach. There was a jury verdict and judgment for Hunt in the sum of $6,403.75. Earp has appealed.

First, it was shown by substantial evidence that working parts of the machines had become so corroded

as to render the machines worthless for the intended use. Several parts of the machines were introduced in evidence. It is clearly obvious that the parts had been ruined by corrosion. The corrosion is caused by a cleaning material known as perchlorethylene forming an acid. This was the cleaning material recommended by the manufacturer of the machines. Appellant claims that the cleaning material broke down into acid because of excessive heat. Appellee denies that the machines got too hot. He testified that he had thermometers installed to enable him to know at all times the amount of heat that was being generated; that he did not allow the heat to become greater than that recommended by the manufacturer of the machines. Of course this was simply a jury question.

Appellant also contends that the ruined parts could be replaced for about $340.00. The jury could have found that it would do no good to replace parts which had been ruined in a very short time by ordinary use of the machines; that if replaced, they would again deteriorate in the same manner. It was shown that some parts had been replaced and the new parts were soon ruined by the acid. In fact, the jury could have arrived at a verdict of something over $6,000.00 by taking into consideration the number of new parts and the cost thereof that would be required to enable Hunt to operate the machines for the period of the warranty.

Now we come to the proposition of whether there is any substantial evidence that appellant warranted the machines to last 10 years without major repairs, and if so, is there substantial evidence of a breach of the warranty. It appears that after appellee decided to go into the dry cleaning business with coin operated machines, he made a deal to purchase machines from an Oklahoma concern and paid $200.00 down on the purchase price. Appellant, who sold, among other things, coin operated dry cleaning machines, heard about appellee going into this kind of business and got in touch with him and prevailed upon him to break his contract with the Oklahoma concern and buy the machines sold

by appellant. Appellee got out of the Oklahoma contract by forfeiting the $200.00 he had paid on the purchase price of the Oklahoma machines.

Appellee testified positively that appellant warranted the Hammond machines sold by him to last at least 10 years without a major breakdown. Appellee is corroborated by the testimony of John T. Laneer. Ark. Stat. Ann. § 85-2-313 (a).

The evidence is convincing that Earp's affirmation of fact that the machines would last 10 years without a major breakdown had a natural tendency to influence Hunt to break his contract with the Oklahoma people and buy the Hammond machines sold by Earp. In *Harris* v. *Hunt,* 216 Ark. 300, 225 S. W. 2d 15, the court quoted from *Ives* v. *Anderson Engine & Foundry Co.,* 173 Ark. 112, 292 S. W. 111, as follows: " 'To constitute an express warranty it is not necessary that the word 'warrant' be used, but may be based on the statements of the seller as to the quality or condition of the chattel he is selling. . . .' " To the same effect is § 85-2-313 (2).

Appellant also contends that the contract was reduced to writing; that it does not contain a warranty, and that evidence was not admissible to vary its terms. The instruments appellant claims to constitute a contract are the order prepared by appellant and signed only by appellee, and the bill of sale. The order does not purport to be a contract at all, it is simply an order given by appellee for the machines; it creates no obligation whatever on the part of the seller. Neither is the bill of sale a contract; it is evidence of title and was delivered by the seller to the Peoples Exchange Bank of Russellville after the machines had been shipped so that the bank would loan Hunt a substantial portion of the purchase money. The bill of sale did state that the Earp Equipment Company would warrant the title to the machines. The bill of sale does not purport to be a sales contract; it is signed only by the seller and creates no obligation on the part of the purchaser.

There was no attempt to vary the terms of the purchase order or the bill of sale. In fact, it is shown that as a part of the purchase contract Hunt gave Earp his promissory note in the sum of $2,625.00. Nothing is said in the aforesaid instruments about the note, yet, no doubt it was an important part of the purchase contract. Of course evidence is not admissible to vary the terms of a written contract; here, however, it cannot be said that there was a *written* contract of purchase.

Appellant makes the further argument that the record does not show appellee relied on the alleged warranty made by Earp. The warranty was very material. The purchaser could not hope to make any profit out of coin operated machines costing $13,500.00 unless the machines would last a long time. It has been held that when a misrepresentation is material in a contract it is presumed that the party to whom the misrepresentation was made relied on it. *Manhattan Credit Co.* v. *Burns,* 230 Ark. 418, 323 S. W. 2d 206. We think the same rule should prevail here. Furthermore, we believe that the evidence establishes a reasonable inference that the purchaser relied on the warranty.

Appellant also argues that the court erred in giving appellee's instruction defining a warranty and in failing to give appellant's instruction 2-A defining the measure of damages. We have examined all the instructions given and refused and find that the instructions given properly submitted the issues to the jury.

Affirmed.

5-3417 385 S. W. 2d 797

Opinion delivered January 18, 1965.

[redacted]

Charles W. Atkinson, for appellant.

No brief filed for appellee.

SAM ROBINSON, Associate Justice. Appellant, Charlesworth Pontiac Company, Inc., recovered a judgment against appellee, W. E. Walker, in the sum of $5,294.36; execution on the judgment was placed in the hands of the Sheriff who levied on certain laundry equipment purportedly belonging to appellee. The property was sold by the Sheriff under the execution. Later, J. I. Walker, uncle of W. E. Walker, intervened in the case at bar alleging that he is in fact the owner of the laundry equipment sold by the Sheriff under the execution, and asked that the sale be set aside.

A hearing was held on the motion to set aside the sale; the Circuit Court made a finding that the laundry equipment belonged to the uncle, J. I. Walker, and granted the motion. The judgment creditor has appealed.

First appellant contends that J. I. Walker is a non-resident of the State of Arkansas and should not have been permitted to intervene because he gave no bond as required by Ark. Stat. Ann. § 27-2301 (Repl. 1962). The record reveals that intervenor is a non-resident of the State; for all practical purposes he is a plaintiff, and

the cause should have been dismissed as provided by Ark. Stat. Ann. § 27-2302 (Repl. 1962).

In regard to the merits, it is clear from the record that the instrument J. I. and W. E. Walker claimed to be a bill of sale is nothing more than a mortgage, and it has not been recorded.

A judgment constitutes a lien on personal property from the time an execution is placed in the hands of the Sheriff. Ark. Stat. Ann. § 30-116 (Repl. 1962).

A judgment which has ripened into a lien by virtue of an execution thereon having been placed in the hands of the Sheriff is superior and paramount to an unrecorded mortgage. *Hawkins* v. *Files,* 51 Ark. 417, 11 S. W. 681; *Arkansas Bank & Trust Co.* v. *State Bank of Poplar Bluff,* 166 Ark. 538, 266 S. W. 977.

Reversed with directions to overrule the motion to set aside the sale.

WOOD *v.* WRIGHT.

5-3423 386 S. W. 2d 248

Opinion delivered January 18, 1965.

[Rehearing denied February 22, 1965.]

Kirsch, Cathery & Brown, for appellant.

Frierson, Walker & Snellgrove, for appellee.

JIM JOHNSON, Associate Justice. This appeal involves property rights and attorneys' fees of a wife divorced on the ground of insanity.

Appellee A. D. Wright filed suit for divorce on November 8, 1962, in Greene Chancery Court against his wife, Jessie M. Wright, on the ground of three years separation by reason of her incurable insanity. After appointment of a guardian ad litem, various motions and hearings, and appointment of a guardian by the probate court, appellee filed a "supplemental, substituted and amended" complaint for divorce on July 8, 1963. Appellee alleged, *inter alia,* that the parties were married in 1929 and had not lived together since 1951, that they had no children, that they owned property, that Mrs. Wright was incompetent and had been for more than five years, was admitted to the State Hospital on June 20, 1960, where she has been confined ever since. The complaint asked that appellant Hattie Wood, Mrs. Wright's sister who had been appointed her guardian, defend the suit, that the court grant appellee a divorce, and make other proper orders for the wife's future care and support. Appellant answered, alleging that the parties owned property as tenants by the entirety, some acquired before and some after the adoption of Ark. Stat. Ann. § 34-1215 (Repl. 1962) in 1947, and prayed division of the rents and income from the property acquired before

1947 and partition of the property later acquired, in the event of divorce. Appellant also prayed for one-third of all of appellee's personal property, one-third interest for life in all of appellee's separate real property, dower interest in some hotel property conveyed through a straw man, and for alimony. Appellant also asked for an accounting of all the rents and income received by appellee from the entirety property during the preceding eleven years, since Mrs. Wright first became incompetent. Appellee thereafter filed an accounting for the year 1963 which reflected a net income from the entirety property of $4,853.28 for the year.

In its memorandum opinion of March 2, 1964, the trial court found (1) that proof is sufficient to award appellee a divorce on the grounds alleged; (2) the real property held by the entirety acquired after March 28, 1947, should be partitioned, in kind if possible; (3) appellee would be permitted to continue to rent and manage the real property held by the entirety acquired before 1947, and to pay one-half of the net income to appellant guardian; (4) an accounting of the income from the entirety property would date forward from January 14, 1963, the date an accounting was first asked by appellant; (5) appellant's ward was not entitled as a matter of right to an award of one-third of appellee's separate real and personal property; (6) the ward's financial needs for the present do not exceed $100.00 per month, she has an income as her share from the entirety property of some $2,000 per year and owns property worth in excess of $100,000 and, in addition, in the event the ward outlives appellee she would own in fee all of the entirety property acquired before 1947; (7) ordered appellee to pay $100 per month during their joint lives for the ward's maintenance at the State Hospital, with the court retaining jurisdiction to make such further orders as may be later required. The court found that the fair value of legal services rendered by appellant's attorneys to date was $4,500, that appellee had already paid $1,000 of this plus costs, and because of the ward's independent financial resources appellant, not appellee

should be required to pay from the ward's estate the additional $3,500 attorneys' fee. From orders on these findings comes this appeal.

Appellant's first point urged for reversal is that the chancery court should have awarded appellant one-third of appellee's personal property absolutely and one-third of his individually owned real estate for the ward's life.

Appellee sought his divorce under the eighth cause for divorce in Ark. Stat. Ann. § 34-1202 (Repl. 1962), which provides for divorce following separation because of incurable insanity and specifies how this must be proved, requirements for the lifelong care and maintenance of an insane wife, with retention of jurisdiction by the chancellor to enforce this provision. All the particularities of the statute were meticulously complied with by the trial court.

The principal statute dealing with division of real property in a divorce is Ark. Stat. Ann. § 34-1214 (Repl. 1962) which provides, *inter alia,* that where a divorce is granted to a wife against the husband the wife is entitled to one-third of the husband's separate personal property absolutely and one-third of the husband's real property for life. This is not applicable in the case at bar. The wife was *not* granted the divorce. But—on the other hand—the husband was not granted the divorce for the *fault* of the wife. No question of fault or guilt arises here. Thus the primary concern of all involved, including the plaintiff once his or her grounds are proved, is protection of the rights and best interest of the insane spouse.

This court, following our statutes, has adhered to the principle of allowing trial courts wide discretion in allowance or disallowance of alimony and property to a wife, *Narisi* v. *Narisi,* 233 Ark. 525, 345 S. W. 2d 620, and we are loath to disturb this practice. In the case at bar three doctors' testimony (which for medical testimony had remarkable definiteness and unanimity) was to the effect that appellant's ward's condition is incur-

able and chances of her improvement are at best remote. The trial court stated that the ward would never be able to enjoy what she already owned (not counting the additional entirety property she will own in fee in the event she survives appellee) and, after requiring appellee to pay for her care and maintenance for life, denied her any part of appellee's separate property. We fail to see that the chancellor abused his discretion in this regard.

The second point urged for reversal by appellant is that the chancellor erred in limiting appellant's right to an accounting from the time of her filing a counterclaim seeking such relief. The court ordered appellee to account for income from the entirety property only from the filing date of appellant's original answer and counterclaim which contained the first demand for such an accounting. Appellant had sought an accounting of the income from the time her ward first became incompetent, some eleven years ago.

Between tenants in common and joint tenants an accounting is proper [See Ark. Stat. Ann. §§ 50-101, 50-102 (1947)] because in such estates there are two or more tenants involved and each owns only part of the property. However, as the trial court pointed out here, this is not the nature of an estate by the entirety in Arkansas. "Tenancy by the entirety is a joint tenancy modified by the common law doctrine that husband and wife are one person in law, and can not take by moieties." *Parrish* v. *Parrish,* 151 Ark. 161, 235 S. W. 792. Thus neither spouse owns an undivided one-half interest in any entirety property—the entire entirety estate is vested and held in each spouse. *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690.

Appellant asks for an accounting "since the separation of the parties in November, 1951." The evidence is undisputed that appellee over a period of ten years sought treatment to rehabilitate his wife and the parties were separated only in the sense that she was away from home undergoing treatment. They were physically apart, but this is no more a separation than if Mrs. Wright had

been in a hospital undergoing treatment for some other ailment with the intention of returning home, or than if she had been away for an extended visit. It should be observed that it does not follow, because Mrs. Wright began to require mental treatment in 1951, that she was henceforth completely and wholly incompetent to agree to her husband's management of their affairs. The evidence shows that from 1951 to 1960 appellee took her to a number of places—clinics and hospitals—throughout the south for treatment and that from 1955 until 1960 appellee maintained his wife in Little Rock in an apartment, which she took care of herself, while she was under treatment by Little Rock doctors, and was not required to be confined until 1960. Under the facts here presented, the chancellor did not err in requiring appellee to account only from the date of appellant's counterclaim. *Brimson* v. *Brimson,* 227 Ark. 1045, 304 S. W. 2d 935.

Appellant's final point urged for reversal is that appellee should have been required to pay appellant's attorneys' fee in the chancery court and should be required to pay her attorneys' fee on appeal. With this contention we heartily agree. Appellee sought the relief from his marriage to an insane spouse which only equity can give. His insane spouse, however, is entitled to every reasonable protection of her interests, including the finest legal services that can be obtained for her at her husband's expense. The decree of the trial court is therefore reversed for entry of an order requiring appellee to pay the balance of appellant's attorneys' fee in the sum of $3,500.00, all costs and an additional $1,000.00 for services rendered on this appeal.

Affirmed in part, reversed in part.

5-3391 385 S. W. 2d 785

Opinion delivered January 18, 1965.

Wayne W. Owens of Moses, McClellan, Arnold, Owen & McDermott, for appellant.

Dale L. Bumpers and Smith, Williams, Friday and Bowen, By: *W. A. Eldredge, Jr.,* for appellee.

FRANK HOLT, Associate Justice. This appeal results from a business transaction between appellant and appellees. The appellees are in the poultry processing business.

For several years they had borrowed their necessary capital from a bank where their line of credit was $100,000.00. Two of appellees' customers became questionable credit risks. Upon advice of the bank, the appellees responded to appellant's advertisement offering to guarantee or purchase accounts receivable. After several conferences, the appellant and appellees entered into an "Accounts Receivable Agreement", also known as a factoring agreement.

Briefly, by the terms of this contract the appellant agreed to purchase without recourse from appellees their customer Hall's accounts not to exceed the credit limit of $50,000.00 provided Hall's failure to pay was due to his financial inability. As shipments were made by the appellees to their customer, Hall, copies of the invoices were mailed to the appellant. Upon receipt of such evidence of shipment the appellant deducted its factoring charge, or fee, of .85 of 1%. Also, 10% of the net amount of the invoice was deducted as a reserve fund to cover any refusal of Hall to pay an invoice because of reasons other than financial inability. The balance then was remitted to the appellees. A settlement of this temporary reserve fund account was required on or about the 1st or 15th of each month by an addendum to the contract.

After a duration of this agreement for about six months it became necessary for the appellees to discontinue shipment of its products to the customer, Hall, because of his delinquent payments. During this time appellat had purchased the Hall accounts to the total extent of approximately $250,000.00. Hall owed a balance of $39,356.72 when this litigation ensued. The appellees brought an action to recover from appellant the balance of the reserve fund totaling $20,128.68. Appellant admitted holding the reserve fund. By cross complaint the appellant alleged that the appellees owed appellant the $39,356.72 on six invoices which Hall had not paid. Appellant asserted that it had accepted and paid each of these six invoices at a time when the Hall guaranteed account exceeded the credit limitation of $50,000.00 and, therefore, the invoices were purchased with recourse or

at the client's risk. The appellant sought to retain and apply the reserve fund of $20,128.68 as a credit on the alleged indebtedness of $39,356.72 and then recover the balance from the appellees. A jury resolved the issues in favor of the appellees by awarding them the full amount of the accumulated reserve fund.

For reversal appellant first contends that the court erred in giving appellees' Instruction No. A. This instruction told the jury that since it was undisputed the contract between the parties was prepared by the appellant, if the jury found any portion of the contract equally susceptible of different interpretations, then the interpretation most favorable to the appellees should be adopted. This is a correct pronouncement of the law. Where a written contract is ambiguous in any respect, it is construed most strongly against the party preparing it and its meaning becomes a question of fact for the jury. *Travelers Indemnity Co.* v. *Hyde,* 232 Ark. 1020, 342 S. W. 2d 295; *Bailey* v. *Sutton,* 208 Ark. 184, 185 S. W. 2d 276; *Swift* v. *Lovegrove,* 237 Ark. 43, 371 S. W. 2d 129; *Pate* v. *Goyne,* 212 Ark. 51, 204 S. W. 2d 900; *Triska* v. *Savage,* 219 Ark. 80, 239 S. W. 2d 1018.

The appellant argues that the terms of the contract are plain and unambiguous and, therefore, it is not susceptible to different interpretations. We cannot agree. For example, in paragraph two of the disputed agreement the appellant agreed to bear the credit loss on an uncollected invoice if the customer [Hall] "fails to pay in part or full because of financial inability." In paragraph five, however, the contract provides that the appellant must make remittances on the appellees' reserve account on the first and fifteenth of each month "on all accounts receivable that have been completely collected." Thus, the ambiguity is obvious. The account might never be "completely collected" because of the debtor's "financial inability."

The guarantee of Hall's "accounts receivable" under certain conditions also results in the opposing theories of the appellant and the appellees. The appellant's

interpretation of the contract is that each invoice of the "accounts receivable" guaranteed must be treated separately and as each individual invoice was accepted it was or was not without recourse depending upon whether the $50,000.00 credit limit of the Hall account was exceeded at the time of its purchase by appellant. If in excess of the credit limit when the invoice was accepted, then that individual invoice was with recourse and remained so even though the Hall account was thereafter reduced below the $50,000.00 credit limit. There is language in the contract to this effect. On the contrary, the theory of the appellees is that under the contract the invoices were to be treated as "accounts receivable", or a running total of the invoices purchased by appellant and that the appellant is required to pay for all credit losses "on approved shipments" up to and including the $50,000.00 credit limit. In other words, appellees contend that they were responsible for the accounts receivable purchased by appellant only to the extent that the remaining unpaid balance was in excess of the credit limit. Appellees argue that the guarantee of "accounts" requires such interpretation. We think the trial court was correct in submitting to the jury the issue of ambiguity.

The appellant next asserts that the court erred in giving appellees' Instruction B and C. Instruction B constitutes appellees' interpretation or theory of the contract. It was, in effect, a statement of how the jury might construe the contract if it believed appellees' version that Manhattan was to guarantee the Hall accounts up to and including the $50,000.00 credit limit. Appellees' Instruction C fully and fairly covered the appellant's theory or interpretation of the agreement. Thus, by these two instructions the two opposing theories were fairly presented to the jury. Further, since the trial court held the contract ambiguous, it was the court's duty to submit to the jury these alternative instructions. *Agey* v. *Pederson,* 191 Ark. 497, 86 S. W. 2d 930; *Paepcke-Leicht Lbr. Co.* v. *Talley,* 106 Ark. 400, 153 S. W. 833. The court was correct in giving Instructions B and C.

We now consider appellant's points numbers 4, 5, 6, and 8A together. Appellant contends the court erred in refusing these instructions. The court properly rejected these instructions since, as stated by appellant, they were in effect requests for instructed verdicts. As stated previously, the court was correct in submitting to the jury the issue of ambiguity.

The appellant also argues in points 7 and 8 that the court erred in refusing appellant's requested Instructions 7 and 7 as amended. Appellant states in his brief that:

"* * * The instruction, as submitted before modification, was a request that the Court declare that Manhattan [appellant] was justified in holding this reserve and that the verdict should be for the defendant. As amended, the instruction merely recited that until there was a final accounting between Hall and plaintiffs [appellees] Orsburn, Manhattan would be justified in holding this reserve."

Therefore, the first instruction would be, in effect, instructing a verdict for Manhattan insofar as this reserve fund was concerned; and the modified instruction was, in effect, telling the jury it should hold for appellant since Hall and appellees had not had a final acounting between them. This would be permitting appellant to retain the disputed reserve fund account because Hall's financial inability to pay the account prevented a final accounting. Appellant also argues that these two instructions should have been given in order to permit the jury to find that appellant was enttiled to deduct from the disputed reserve fund certain attorney fees and court costs. Suffice it to say that the issue of attorney fees and court costs was fully covered by appellant's Instruction No. 10 given by the court. The trial court was correct in refusing appellant's Instruction Nos. 7 and 7 as amended.

We discuss appellant's points 9, 10, and 11 together as they relate to the refusal of the court to give appellant's Instructions Nos. 11, 11 as modified, and 12. The subject matter of these instructions was sufficiently cov-

ered by instructions given by the court. The trial court is not required to duplicate instructions. *Goodin* v. *Boyd-Sicard Coal Co.,* 197 Ark. 175, 122 S. W. 2d 548.

Appellant's final contention is that the jury verdict is contrary to the undisputed evidence and unsupported by the facts. On appeal we review the evidence in the light most favorable to the appellee and we must affirm if there is any substantial evidence to support a jury's verdict. *Jarrett* v. *Matheney,* 236 Ark. 892, 370 S. W. 2d 440.

According to the appellees' evidence, the contract was made with the appellant for the purpose of minimizing the risk of losing a large sum of money at any one time since its reserves were not large enough to withstand a substantial loss from nonpayment of accounts receivable; that after several lengthy conferences the contract was made guaranteeing the credit of appellees' customer, Hall, not to exceed $50,000.00 due only to Hall's financial inability to pay his accounts. Witnesses testified that from their business experience with Hall he was financially unable to pay his accounts. Appellant requested appellees to continue shipping to Hall, even though delinquent, in order to give appellant more time to collect the delinquent accounts purchased by appellant. Remittances on the reserve fund were not made twice a month as required. It is undisputed that at the time of this litigation the total amount owed by Hall was $39,-356.72. According to the appellees' evidence and their theory of the contract, this balance was guaranteed by the appellant since it was below the $50,000.00 credit limit. According to the appellant, this indebtedness was with recourse and could be charged back to its client, the appellees, because the six invoices representing this total were accepted at a time when the Hall account exceeded the credit limit. These conflicting versions were submitted to the jury under proper instructions and the jury resolved the issues in favor of the appellees. We think there were substantial evidence to support its verdict.

On cross-appeal the appellees contend that the accounts receivable agreement, or factoring contract, constitutes a contract of credit insurance; that the court erred in holding to the contrary, and since the appellees recovered the exact amount sought, the trial court should have awarded a 12% penalty and attorney's fee as required by Ark. Stat. Ann. § 66-3238 (Supp. 1963). In support of this contention the appellees, cross-appellants, rely upon Ark. Stat. Ann. § 66-2002 and § 66-2405 (Supp. 1963). We cannot agree with this contention.

In the case at bar the appellant agreed to purchase without recourse the Hall accounts receivable not to exceed the amount of $50,000.00 for a charge of .85 of 1% of the net amount of the accounts so purchased provided Hall's nonpayment was due to his financial inability. We are of the view that the appellant is engaged in a type of financing business rather than in the insurance business.

The business of credit insurance (orginally called "commercial insurance") has existed for many years. The usual form is that for a stated premium paid by the insured, the insurer guarantees the payment, in whole or in part, of the account which the insured has listed under the policy. See Black's Law Dictionary, "Commercial Insurance"; *Cowles* v. *Guaranty Co.* (Wash.), 72 P. 1032, 98 A. S. R. 838, 44 C. J. S. p. 494, "Insurance", § 48; and 44 C. J. S. p. 547, "Insurance", § 68. The factoring business, as involved in this case, is of comparatively recent origin, and is entirely different from the word "factor" which has long been understood as slightly different from agency. *G. H. Hammond Co.* v. *Joseph Merc. Co.,* 144 Ark. 108, 222 S. W. 27; *Burke* v. *Napoleon Hill Co.,* 134 Ark. 580, 202 S. W. 827. See, also, "Factors" in 35 C. J. S. p. 494 *et seq.*

"Factoring", such as the appellant's business, is defined in Webster's New Third International Dictionary as follows: "The purchase of accounts receivable from a business by a factor who thereby assumes the risk of loss in return for some agreed discount." In

35 C. J. S. 493 there is this statement: "Factoring. A practice or system of commercial financing, confined principally to the textile industry, which involves notice to trade debtors, being thus distinguished from the business of 'non-notification financing.'" The only case cited in C. J. S. to support the above quotation is *Corn Exchange Bank* v. *Klauder,* 318 U. S. 434, 87 L. Ed. 884, 63 S. Ct. 679, 144 A. L. R. 1189, and that case affords us no aid in distinguishing between credit insurance and financing of accounts.

We are of the view that factoring is the "purchase of accounts receivable" and that "purchasing" is certainly different from "insuring". We think that appellant is engaged in the system of financing by purchasing accounts receivable just as many finance companies are engaged in the purchase of notes, sometimes with recourse and sometimes without recourse, and in such transactions frequently there is a reserve maintained for the protection of the finance company and this reserve, or part of it, is subject to being returned to the dealer or individual who sold the note to the finance company. Some of the cases with respect to finance companies are: *General Motors Acceptance Corp.* v. *Jerry,* 181 Ark. 771, 27 S. W. 2d 997; *General Motors Acceptance Corp.* v. *Sanders,* 184 Ark. 957, 43 S. W. 2d 1087; *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973; *Schuck* v. *Murdock Acceptance Corp.* 220 Ark. 56, 247 S. W. 2d 1; *General Contract Corp.* v. *Dodge,* 223 Ark. 476, 266 S. W. 2d 816; and *Commercial Credit Corp.* v. *Kitchens,* 231 Ark. 104, 328 S. W. 2d 355. The only difference between the method of business of the appellant, Manhattan Factoring Corporation, in the case at bar, and the finance companies in the adjudicated cases, is that in the finance cases the dealer always took a note which was assigned to the finance company, whereas, here, the dealer merely sells or assigns an open account.

It is somewhat significant there is nothing in the record to indicate that the Insurance Commissioner of Arkansas has ever considered a factoring corporation,

such as the appellant, to be engaged in the insurance business.

The judgment is affirmed on both direct and cross-appeal.

HOT SPRINGS CIVIL SERVICE COMMISSION *v.* MILES.

5-3363 385 S. W. 2d 930

Opinion delivered January 25, 1965

[redacted]

Curtis L. Ridgeway and *Nathan L. Schoenfeld,* for appellant.

Earl J. Mazander, for appellee.

CARLETON HARRIS, Chief Justice. Wayne Miles, appellee herein, a patrolman on the police force of Hot Springs, was accused of conduct unbecoming an officer, the alleged misconduct occurring about 9:00 A.M. on November 10, 1962, at a cafe in Hot Springs. Miles, who was not on duty at the time, was accused of drunkenness and other alleged improper conduct. An investigation was conducted by one of the police officers, and a written report was given to the Chief of Police. The chief discharged appellee, and an appeal from this ruling was taken to the Hot Springs Civil Service Commission. On December 4, 1962, a full scale hearing was held before that body, appellee being present with his attorneys, and the City Attorney of Hot Springs being present in his official capacity. Appellee did not testify, nor offer any other testimony, though it was conceded that he was intoxicated at the time of the alleged misdeeds. The commission upheld the discharge, and on January 3, 1963,

appellee filed notice of appeal with the commission. No transcript of the proceedings before the commission was filed with the Circuit Court until January 23, 1964, and in the meantime, the following events occurred.

On November 5, 1963, Miles filed with the Civil Service Commission a "pleading" headed "A Petition for Reinstatement." On November 21, 1963, the commission met,[1] with its secretary, and the legal adviser to the commission, the City Attorney of Hot Springs, and on the next day, issued a written order denying the petition. The appellee then filed a notice of appeal with the commission from this order, though the date of such notice is not clear from the record.

Thereafter, on January 23, 1964, as heretofore stated, the transcript of the December, 1962, hearing before the commission was filed in the Circuit Court.

On February 25, 1964, Miles filed an original petition with the Garland County Circuit Court, setting out that the Civil Service Commission had failed to file the transcript of the December, 1962, hearing, conducted by it, until approximately thirteen months had expired after the giving of the notice of appeal. It was asserted in the petition that the Circuit Court should disregard all portions of the transcript or record of that hearing because it was not timely filed.

Appellee then set forth that he had sought reinstatement on November 21, 1963, but that reinstatement had been denied, though neither he nor his attorney was notified to appear. Miles then prayed that he be reinstated as a patrolman on the Police Department of the City of Hot Springs, "and this court should disregard all papers filed by the Civil Service Commission of the City of Hot Springs, Arkansas, in this proceeding and an Order should be entered directing the Chief of Police of the City of Hot Springs, Arkansas, to reinstate this petitioner." On March 2, 1964, acting upon the petition filed in the Circuit Court, that court entered its finding as follows:

[1] This was a luncheon meeting at a restaurant. No witnesses for either appellee or the city were called or present.

"That on December 4, 1962, said respondent made and entered an Order dismissing Petitioner from the Hot Springs Police Department:

"That said Petitioner filed with said respondent Notice of Appeal within the time provided for by law;

"That said respondent failed to file a transcript, or any documents, of said proceedings in this Court until January 23, 1964, more than one year later;

"That by their failure to file the above mentioned they totally failed to comply with Section 19-1605.1 [hereafter discussed] * * *

"That the failure of respondent to comply with the above Statute within the time provided for by law prevents this Court from taking jurisdiction of the transcript filed herein, and the Court cannot consider same for any purpose;

"That on the 21st day of November, 1963, this Petitioner again petitioned the Civil Service Commission for a hearing and an Order was entered on the 21st day of November, 1963, denying reinstatement of this Petitioner, and the minutes of the meeting were filed showing that your Petitioner, Wayne Miles, or his attorney, were not notified to appear at said hearing; * * *"

The order then directed the Chief of Police and the Civil Service Commission to reinstate Miles to his position as Patrolman, with full pay from November 21, 1963, to date. From the order so entered, the Hot Springs Civil Service Commission brings this appeal. Appellee cross-appeals from that portion of the order directing reinstatement as of November 21, 1963, contending that the reinstatement should have been ordered as of December 5, 1962.

The principal issue argued in the briefs relates to the responsibility of filing the transcript. Appellee vigorously argues that the duty rests with the commission, and bases this argument upon the provisions of Ark.

Stats. Ann. § 19-1605.1 (Supp. 1963). The pertinent portions of that section read as follows:

"A right of appeal by the City or employee is hereby given from any decision of the Commission to the Circuit Court within whose jurisdiction the Commission is situated. Such appeal shall be taken by filing with the Commission, within thirty (30) days from the date of such decision, a notice of appeal, whereupon the Commission shall send to the Circuit Court all pertinent documents and papers, together with a complete transcript of all evidence and testimony adduced before the said Commission and all findings and orders of the Commission. The Circuit Court shall review the Commission's decision on the record and may in addition hear testimony or allow the introduction of any further evidence upon the request of either the City or the employee, provided such testimony or evidence be competent and otherwise admissible."

Of course, it is obvious from reading the statute that the initial obligation to file the transcript rests with the commission, but it does not necessarily follow that the commission's failure to perform this act has the ultimate effect of reinstating an employee to his original job—simply because there was a failure to perform a ministerial act. One does not need undue powers of perception to recognize that the holding sought by appellee could result in a deterioration of the efficiency of an affected department (here—the Police Department), as well as a loss of confidence by the general public in such department.

A similar argument has, on several occasions, been made to this court relative to Ark. Stats. Ann. § 26-1307 (Repl. 1962). That section provides:

"If a party appeals from a justice of the peace judgment or a common pleas judgment or a municipal court judgment the clerk of the court or the justice of the peace of the court from which the appeal is taken must file the transcript of the judgment in the office of the circuit

court clerk within thirty (30) days after the rendition of the judgment."

This section was passed in 1953 as an amendment to the original act, which was passed in 1939.[2] Prior to passage of the 1953 amendment, this court had consistently held that the burden of filing the transcript with the Circuit Court rested upon the appellant. In *Whiteley* v. *Pickens,* 225 Ark. Ark. 845, 286 S. W. 2d 4, decided in 1956, the 1953 amendment, heretofore quoted, was called to the court's attention, it being contended that the burden of filing a transcript, after an appeal had been taken, had been definitely placed on the clerk of the court. We did not agree with that contention, stating:

"As we construe Act 203 of 1953, it just simply amended Section 1 of Act 323 of 1939 [§ 26-1307 Ark. Stats. 1947] so as to place the responsibility of filing the transcript, within the 30 day peirod, upon the clerk of the Municipal Court rather than upon 'the party who appeals' but left the burden on appellant to see that the transcript was so filed within that period. The Act also omits and repeals that provision, or the last sentence, in Section 1 of Act 323 which says: 'If the transcript of the judgment is not filed within 30 days after the rendition of the judgment, execution can be issued against the signers of the appeal bond.' This Act 203, however, leaves in full force and effect, and does not repeal, the second subdivision of § 26-1302 Ark. Stats. 1947, which provides: 'The appeal must be taken within thirty (30) days after the judgment was rendered, and not thereafter.'

"We hold that the burden was on appellant to see that the transcript was lodged with the Circuit Court within the 30 day period and that Act 203 of 1953, which

[2] The 1939 act read as follow: "A party who appeals from a justice of the peace judgment or a common pleas judgment or a municipal court judgment must file the transcript of the judgment in the office of the circuit court clerk within 30 days after the rendition of the judgment. If the transcript of the judgment is not filed within 30 days after the rendition of the judgment, execution can be issued against the signers of the appeal bond."

was an amendment to Act 323 of 1939, does not change the law in this respect."

We are of the opinion that appeals from the Civil Service Commission are governed likewise, and though the transcript is due to be lodged by the Commission, the burden is on the appellant to see that this is done. Let it be remembered that Miles was not helpless to perfect his appeal simply because the commission had not filed it. He, very properly, could have timely applied to the Circuit Court for a writ of certiorari and that court could have ordered the record prepared and filed; there was also available to appellant the remedy of mandamus. Placing the burden on the appellant to see that a transcript is filed seems entirely logical. After all, an appellant is the aggrieved party, and the principal person (or body) interested in, and benefited by, a reversal of an adverse ruling. Because of this paramount interest, an appellant should be responsible for all steps in a proceeding that might inure to his (or its) benefit.

As to the appeal from the second order of the commission (refusing to reinstate Miles), we find no statutory authority for petitions for "reinstatement," i.e., such procedure cannot be utilized as a substitute for an appeal from the original order. The same is true of an original petition filed in the Circuit Court seeking the same relief. Of course, if one can file an original petition with the Circuit Court after receiving an adverse ruling before the Civil Service Commission, there is no need for any statutory provision for appeal; in fact, there would be no occasion to even conduct a hearing before the Civil Service Commission, for the findings of that body would not be before the court and would accordingly be meaningless and without effect.

Appellee's sole remedy from the ruling of the commission was through appeal, as set forth in the statute, heretofore quoted, and the petition for reinstatement, as well as the petition filed in the Circuit Court, was of no effect, and any orders based on those petitions were likewise ineffective. Having failed to properly proceed with

his appeal from the order of December 4, 1962, appellee cannot obtain relief.

The Judgment of the Circuit Court is reversed with directions to overrule and set aside its order of reinstatement. This will, of course, leave the Civil Service Commission order of December 4, 1962, in full force and effect.

It is so ordered.

GWATNEY *v.* ALLIED COMPANIES, INC. OF ARK.

5-3331 385 S. W. 2d 940

Opinion delivered January 25, 1965.

Tommy H. Russell and *Ruby E. Hurley, Spitzberg, Bonner, Mitchell & Hays,* By: *Beresford L. Church, Jr.,* for appellant.

H. B. Stubblefield, for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation concerns some of the affairs of an insurance company,

last named Great Security Life Insurance Company, formerly named Great Eastern Assurance Company and also Great Eastern Life Insurance Company. We will use the words "Great Security" for said insurance company.

On June 6, 1963, Allied Companies, Inc. of Arkansas (sole appellee here) filed this suit in the Pulaski Chancery Court against Great Security, Arkansas Memorial Gardens, Inc., Tommy H. Russell, Harold Gwatney, H. J. DeArmon, and E. J. DeArmon.[1] The germane portion of the complaint alleged:

(a) that Great Security was indebted to Allied Companies, Inc. of Arkansas (hereinafter called "Allied") in the sum of $19,672.42 and interest for cash loans;

(b) that Great Security purported to have issued 150,000 shares of its stock to Arkansas Memorial Gardens, Inc. for 698 burial spaces, but that such attempted issue was unauthorized and the entire transaction should be set aside and the stock cancelled;

(c) that the said 150,000 shares of stock in Great Security was transferred by Arkansas Memorial Gardens, Inc. to Harold Gwatney, but that he was not an innocent or bona fide holder for value and that said Gwatney should be enjoined from transferring said stock until trial herein, when the stock should be cancelled; and

(d) that H. J. DeArmon and E. J. DeArmon should be enjoined from reissuing or rewriting any policies for Great Security and/or receiving any commissions.

A temporary injunction was issued, upon the plaintiff making bond, to prevent the transfer of the stock or the paying of excessive commissions to H. J. and/or E. J. DeArmon. Each and all of the named defendants filed general denials. Trial in the Chancery Court, with evidence taken *ore tenus,* resulted in a decree: (1) awarding Allied a judgment against Great Security for $20,-

[1] There were two other individuals named originally as defendants, but as to them the complaint was reserved for future determination, so they passed out of this case.

372.46, debt and interest; (2) cancelling the 150,000 shares of Great Security stock issued to Arkansas Memorial Gardens, Inc. and the deed from Arkansas Memorial Gardens, Inc. to Great Security for the 698 burial spaces; (3) declaring the stock certificates for said 150,000 shares then held by Harold Gwatney to be void and to be cancelled; and (4) that the temporary injunction had been rightfully issued and there was no liability on the bond.

From such decree all of the named defendants except Arkansas Memorial Gardens, Inc. have prosecuted this appeal. Harold Gwatney has filed a separate brief, but all the other defendants (appellants)[2] have joined in one brief. In all, a total of five points are listed by appellants, but we will discuss these under our own topic headings.

I. *The Judgment In Favor Of Allied.* It was definitely established that Allied had actually furnished cash to Great Security in excess of $25,000.00; that $5,500.00 of the amount had been repaid; and that the balance was still due and owing. The judgment in favor of Allied against Great Security for the amount awarded was correct.

II. *Bond Liability.* The Court was correct in issuing the temporary injunction against the transfer of the stock pending trial, and in preventing the payment of excessive commissions to the DeArmons. The Court was correct in holding that there was no liability on the said bond.

III. *The Issue Of Stock To Arkansas Memorial Gardens, Inc. For Burial Spaces.* Some time in 1962 Great Security issued 150,000 shares of stock[3] to Arkansas Memorial Gardens, Inc. for 698 burial spaces. It was

[2] These defendants-appellants who here united in one brief are: Great Security, Tommy H. Russell, H. J. DeArmon, and E. J. DeArmon.

[3] Part of this stock was issued to North Hills Memorial Gardens, which was connected with Arkansas Memorial Gardens, Inc. We treat the two as one. The decree cancelled the conveyance of the burial spaces to Great Security, and Arkansas Memorial Gardens, Inc. has not appealed.

shown that Allied owned substantial number of shares of stock in Great Security and, as such stockholder, it assailed the transaction.

Ark. Stats. Ann. § 66-2628 (Repl. 1957) states the conditions under which an insurance company may invest in real estate; and there is no evidence in the record before us that would make legal the issuance of insurance company stock for these cemetery lots. Allied, as a stockholder in Great Security, had a right to attack the issuance of the stock for the cemetery lots in this suit since both the Arkansas Memorial Gardens, Inc. and Great Security were defendants; and Allied, as a stockholder in Great Security before and at the time of the issuance of the stock for the cemetery lots, made proof that its stock rights were adversely affected by such issuance. 18 C.J.S. p. 702, "Corporations" § 249. The Chancery decree declared the issuance of the 150,000 shares for the burial spaces to be an unauthorized act, and we affirm the decree.

IV. *The Status Of Harold Gwatney As The Present Holder Of The 150,000 Shares Of Stock.* This is the most troublesome issue in the case. The Trial Court held that the stock certificates for the 150,000 shares should be cancelled, even in the hands of Harold Gwatney; and he has appealed from that decree and claims that he is a bona fide holder for value of the said certificates. He introduced evidence that he borrowed $37,500.00 from Tommy Russell and paid it to Arkansas Memorial Gardens, Inc. and received the stock certificates for the 150,000 shares and had the same transferred to him on the books of Great Security. If he is a bona fide purchaser for value of the said stock certificates, then the certificates cannot be cancelled. In *Park* v. *Bank of Lockesburg,* 178 Ark. 669, 11 S. W. 2d 483, we held that a corporation could not claim the invalidity of the original issue of a stock certificate as against a person who, subsequent to the original issue, acquired the stock as a bona fide holder.[4] Ark. Stats. Ann. § 85-8-301 *et seq.* (Add. 1961)

[4] The majority of other jurisdictions hold to the same effect. See 13 Am. Jur. p. 328, "Corporations" § 219; 18 C.J.S. p. 702, "Corpora-

is a part of the Uniform Commercial Code, and reads in part:

"... (2) a bona fide purchaser in addition to acquiring the rights of a purchaser also acquires the security free of any adverse claim. . . ."

Was Harold Gwatney a bona fide purchaser for value? The cases hold that one who claims to be a bona fide purchaser of stock which is or was originally invalidly issued, has the burden of proving himself to be a bona fide purchaser. In 18 C.J.S. p. 708, "Corporations" § 252, the text reads: "The burden of establishing his status as a bona fide purchaser for value is upon one who alleges it." Black's Law Dictionary defines "bona fide" as being "in or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense . . ." And the same dictionary defines a "bona fide purchaser" as "a purchaser in good faith for valuable consideration and without notice.[5]

In the light of the foregoing statements as to the burden of proof and the definition of a bona fide purchaser, we turn to the evidence to see whether Harold Gwatney established his claim as a bona fide purchaser. He testified that he and Russell had been together in several corporations; that he was interested in another insurance company and purchased this stock in Great Security in order to attempt a merger of the two companies. He admitted that before he bought this stock he checked the financial statement of Great Security. The auditors testified in detail as to the financial statement of Great Security. It was insolvent. If Gwatney even saw such statement of Great Security he knew that the company was insolvent. Thus, with knowledge that Great

tions" § 249; Fletcher's Cyclopedia of Corporation Law, Permanent Ed., Vol. 12, p. 631, § 5542; and see annotations in 73 A.L.R. p. 1435; and 78 A.L.R. 2d 834, particularly p. 876.

[5] Some of our own cases considering the matter of a bona fide purchaser are: *Fargaon* v. *Edrington*, 49 Ark. 207, 4 S. W. 763; *Woolridge* v. *Thiele*, 55 Ark. 45, 17 S. W. 340; *Henry Wrape Co.* v. *Cox*, 122 Ark. 455, 183 S. W. 955; and *Shuffield* v. *Raney*, 226 Ark. 3, 287 S. W. 2d 588.

Security was insolvent, Gwatney testified that he borrowed $37,500.00 from Tommy Russell, who was president of Arkansas Memorial Gardens, Inc., and paid that amount to Arkansas Memorial Gardens, Inc. and its subsidiary, North Hills Memorial Gardens, for the said 150,000 shares of stock in Great Security. What of the $37,500.00 note that Gwatney executed to Russell? It has not been paid. Here is Gwatney's testimony:

"Q. Have you paid the money back yet?

"A. No, sir, and I am not going to pay him either until this is settled.

"Q. You mean you are going to see about the stock before you pay it?

"A. Yes, sir. I mean there is no need of me paying him until this is settled. This is the man I dealt with."

Mr. Russell was Gwatney's codefendant and his attorney in this case and never made any protest when Gwatney said that he was not going to pay the note until his lawsuit was settled. So it is doubhful if Gwatney will ever pay anything. With all of this evidence, and other in the record, the Trial Court found that Gwatney had not sustained the burden of proving himself to be a bona fide purchaser for value; and after a careful study of the record we cannot say that such finding is against the preponderance of the evidence; so we affirm the decre of the Trial Court.

It is well here to add that pending this appeal Great Security was declared insolvent and placed in the hands of the Insurance Commissioner of Arkansas and he has filed his appearance in this appeal.

Finding no error, the decree is affirmed.

DAVIS *v.* COLVIN, JUDGE.

5-3438 385 S. W. 2d 944

Opinion delivered January 25, 1965.

[redacted]

Ohmer C. Burnside, Jr., Pope, Pratt & Shamburger and *Wright, Lindsey, Jennings, Lester & Shults,* for Petitioner.

No brief field for Respondent.

ED. F. MCFADDEN, Associate Justice. This is an original proceeding for a writ to prohibit the Circuit Court of Chicot County from entertaining jurisdiction of an action filed therein by A. J. Hulett against the petitioners herein, Harold Davis and Harold Ives; and involves the Act No. 32 of 1961, later to be discussed. A traffic mishap occurred between two motor vehicles on March 27, 1964, near McGehee in Desha County. The occupants of one vehicle were the petitioners, Harold Ives and Harold Davis, both residents of Arkansas County; and the occupant of the other vehicle was A. J. Hulett, a resident of Chicot County. Under Ark. Stats. Ann. § 27-610 (Repl. 1962), the venue for any action resulting from such a mishap would be in either (a) the county of the mishap (Desha), or (b) the county of the residence of the plaintiff bringing such action.

On June 18, 1964, Harold Ives filed action against A. J. Hulett in the Circuit Court of Arkansas County (*i.e.,* the county of residence of said plaintiff) for damages resulting from the said traffic mishap; and on June 23, 1964, Harold Davis filed action against A. J. Hulett in the Circuit Court of Arkansas (*i.e.,* the county of residence of said plaintiff) for damages resulting from said traffic mishap. Summons against the defendant. A. J. Hulett, was duly issued in each of the Arkansas County actions on the date of the filing of the respective complaints, and the summonses were sent to the Sheriff of Chicot County for service on the defendant, A. J. Hulett. All of these summonses were received by the Sheriff of Chicot County on June 25, 1964, but for reasons we need not recount (which do not reflect on the Sheriff in any way) service on A. J. Hulett was not obtained until June 29, 1964. In the meantime, and on June 27, 1964, A. J. Hulett, as plaintiff, filed action against Harold Davis and Harold Ives in the Circuit Court of Chicot County for damages resulting from the said traffic mishap, and forwarded the summonses to the Sheriff of Arkansas County, where the said defendants were each served on June 29, 1964.

In the said case pending in Chicot Circuit Court the defendants, Davis and Ives, filed their motions to dismiss, alleging that the Arkansas Circuit Court had obtained jurisdiction of Hulett *before* he filed his action in the Chicot Circuit Court. When the Chicot Court refused to sustain the said motion to dismiss, the said Davis and Ives filed the present petition in this Court for a writ of prohibition; and the record before us contains all of the pleadings, summonses, and returns in the three cases, as well as the testimony heard in the Chicot Circuit Court on the said motion to dismiss.

Prior to the Act No. 32 of 1961 (as now found in Ark. Stat. Ann. § 27-301 [Repl. 1962]), the matter of jurisdiction was dependent on actual and *legal service* of summons; and our cases reflect this "race for service": *Kornegay* v. *Auten, Judge,* 203 Ark. 687, 158 S. W.

2d 473; *Sims* v. *Toler, Judge,* 214 Ark. 732, 217 S. W. 2d 928; *Healey & Roth* v. *Huie, Judge,* 220 Ark. 16, 245 S. W. 2d 813; and *Carnes* v. *Strait, Judge,* 223 Ark. 962, 270 S. W. 2d 920. To avoid this "race for service" the 1961 Legislature adopted the said Act No. 32, which, in its entirety, reads:

"AN ACT to Amend Civil Code Section 58 (Ark. Stats. (1947) Section 27-301) to Define the Time of Commencement of a Civil Action."

"*Be It Enacted by the General Assembly of the State of Arkansas:*

"SECTION 1.Civil Code Section 58 (Ark. Stats. (1947) Section 27-301) is amended to read as follows:

" 'A civil action is commenced by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon, *and placed in the hands of the sheriff of the proper county or counties. If two or more actions are commenced in different courts involving the same subject matter, where the venue is proper in each, then that court shall acquire jurisdiction, to the exclusion of the other, wherein a complaint was filed and a summons issued thereon, and first placed in the hands of the sheriff of the proper county or counties, irrespective of the time of service of summons. Each clerk of court shall endorse on each complaint the exact date and time of day when the complaint was filed and a summons issued thereon and each sheriff shall endorse on each summons the exact date and time of day when the summons was placed in his hands.*' "[1]

Under the facts in this case, the summonses in the Arkansas County actions were placed in the hands of the Sheriff of Chicot County for service on A. J. Hulett

[1] We have italicized the language added by the Act No. 32 to the previously existing section. In 15 Ark. Law Review, p. 427, there is this comment about the said Act No. 32: "The only change effected by Act 32 is in the determination of prior jurisdiction in venue races where the same subject matter is involved. By giving jurisdiction to the court where the summons is first received by the serving officer, premium is placed on a plaintiff's diligence in filing suit rather than on the uncertainties of process service."

on June 25, 1964. Such placing for service was *bona Fide* and in no way fictitious, and subsequent actual service proved to be good in favor of the plaintiffs. Such placing of the summonses in the hands of the Sheriff of Chicot County on June 25th established the jurisdiction of the Arkansas Circuit Court. The action filed by Hulett in Chicot County on June 27th should have been dismissed, since the Circuit Court of Arkansas County had already obtained valid jurisdiction.

Some time ago this case was presented to this Court and a temporary writ of prohibition was issued. The temporary writ is now made permanent against the Circuit Court of Chicot County.

YOUNTS *v.* CROCKETT.

5-3354 385 S. W. 2d 928

Opinion delivered January 25, 1965.

Neill Bohlinger and *Cooper Jacoway,* for appellant.

Shelby R. Blackmon, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellants, Younts and his wife, to quiet their title to a tract

of six or seven acres lying on the west bank of the Arkansas river. In 1917 the land in dispute was part of a larger tract which was platted in that year as Lot 1. As platted, Lot 1 was a long narrow lot that extended from the river bank on the east to Lot 5 on the west. The appellants are the owners of Lot 5. They contend that after the two lots were platted the river gradually moved to the west to such a distance that Lot 1 was completely submerged and eroded away. They further contend that the river then gradually moved back to the east, so that the parcel now in dispute was re-created as an accretion to Lot 5.

The appellees, Crockett and his wife, hold the record title to the land in controversy. They deny that the river ever shifted sufficiently far to the west to destroy the identity of Lot 1 in its entirety. The chancellor decided the issue in favor of the appellees, holding that the plaintiffs had failed to sustain the burden of proving that Lot 1 had been destroyed by erosion.

The question is essentially one of fact, the parties being substantially in agreement about the controlling rules of law. If the gradual westward movement of the river's channel finally submerged Lot 1, so that it was wholly engulfed by the shifting bed of the river, Lot 1 went out of existence. In that event the tract now in dispute would have re-emerged as an accretion to Lot 5. *Wallace* v. *Driver*, 61 Ark. 429, 33 S. W. 641, 31 L.R.A. 317. On the other hand, if the western boundary of Lot 1 was submerged only by temporary overflows that did not last long enough to establish a new high-water mark as that term is defined in our cases, Lot 1 was not destroyed. *St. L., I.M. & S. Ry.* v. *Ramsey,* 53 Ark. 13 S. W. 931, 8 L.R.A. 559, 22 Am. St. Rep. 195; *State ex rel. Thompson* v. *Parker,* 132 Ark. 316, 200 S. W. 104.

The principal testimony tending to support the appellants' position is that given by Mr. Younts himself. He bought Lot 5 in 1950, but he had lived in the vicinity since 1935, when he was in his late teens. In 1935 the channel of the river was more than half a mile east of the boundary between Lot 1 and Lot 5. Younts says that be-

tween 1935 and 1942 the river moved gradually to the west until it had crossed this boundary by about fifty feet. This gradual movement does not seem to have been continuous, however, for Younts testified that the river "moved slowly by caving [the bank] some on each high water." Upon this proof the chancellor may have found that the stream's progress to the west occurred sporadically in periods of temporary overflow.

According to Younts, the main channel of the river flowed west of Lot 1 for eight years, from 1942 until it began to shift back toward the east in 1950. On cross examination and again on rebuttal Younts stated positively and unequivocally that the western edge of Lot 1 was completely submerged for eight years. For instance, upon being asked whether this land was under water continuously during that interval or for only part of the time, he replied, "Continuously."

These statements by Younts are only scantily corroborated by other witnesses and in our opinion are outweighed by the appellees' proof. A map prepared in 1947 by the engineers for a drainage district shows that Lot 1 was *not* then under water. Four witnesses for the appellees—Crockett, Simmons, Hall, and Teasley—testified that several acres of the tract in dispute were in cultivation in 1946 and succeeding years. An aerial photograph taken in 1950 indicates that the river was then 910 feet east of the common boundary between Lot 1 and Lot 5.

The appellants rely strongly upon an undated aerial photograph, apparently taken in 1945, that seems to show that the river's waters were then west of the boundary line in question. We are unwilling to accept this single exhibit as decisive, for (a) the one witness who attempted to interpret it may have been mistaken about where the lands in controversy were portrayed, (b) the river may have been at a temporary flood stage, and (c) the contention that Lot 1 was completely and permanently inundated in 1945 cannot be reconciled with the appellees' persuasive proof that part of this same land was

susceptible of cultivation in 1946. Finally, there are indications, including a 1950 aerial photograph, that the timber on Lot 1 could not have reached its size at the time of trial if the land had been part of the river bed as late as 1950.

As plaintiffs the appellants had the burden of proving that the channel of the river, as distinguished from its temporary overflow, crept so far westward that the boundary between the two lots was wholly submerged. After a careful study of the testimony and the exhibits we are unable to say that the weight of the evidence is contrary to the chancellor's conclusion that this burden of proof was not sustained.

Affirmed.

COFFELT *v.* GORDON.

5-3532 and 5-3533 385 S. W. 2d 939

Opinion delivered January 25, 1965.

Kenneth Coffelt, for appellant.

Gordon & Gordon, Felver A. Rowell, Jr. and *E. B. Dillon, Jr.* for appellee.

GEORGE ROSE SMITH, J. In each of these two companion cases the trial court entered an order sustaining a demurrer to the complaint and granting the plaintiff ten days in which to amend. Both plaintiffs filed notices

of appeal and in due time lodged the records in this court.

The appellees have filed motions to dismiss the appeals, under our settled rule that an order which merely sustains a demurrer, without dismissing the complaint, is not a final appealable order. *Ark. State Board of Architects* v. *Larsen,* 226 Ark. 536, 291 S. W. 2d 269. The appellants, citing *Nunez* v. *O. K. Processors,* 238 Ark. 346, 381 S. W. 2d 754, have asked us to withhold our ruling upon the motions to dismiss and to permit the appellants to perfect the records by obtaining and bringing up the necessary final orders and notices of appeal therefrom.

We are unwilling to extend the doctrine of the *Nunez* case to the situation now before us. That case was unusual in that, despite the absence of a final order, both parties filed printed briefs in which the case was argued on its merits. It was evident that the appellee was willing to forego its right to have the appeal dismissed and preferred instead to submit the case for a decision on the merits. In the circumstances we invited the litigants to supply the deficiency in the record by agreement.

These cases are markedly different from that one. Here no briefs have been filed. The appellees, by filing their motions to dismiss, are insisting upon their right to take advantage of the jurisdictional defect in each record. We have no reason to think that the appellants are actually seeking a delay, but it is quite apparent that if we should allow time for the perfection of the records in this instance a precedent would be established that might readily be used for dilatory purposes in the future.

The appeals must be dismissed. To avoid needless expense, however, we think it appropirate to say that if the appellants elect to obtain the necessary final orders and to file their appeals therefrom we will entertain motions to permit the present transcripts to be used in those cases.

Appeals dismissed.

ROBINSON, J., not participating.

5-3398 385 S. W. 2d 925

Opinion delivered January 25, 1965.

[redacted]

John D. Eldridge, for appellant.

James F. Daugherty, for appellee.

PAUL WARD, Associate Justice. Appellants prosecute this appeal from a decree of the trial court refusing to cancel a warranty deed executed by them to appellee, R. L. Elam.

On December 29, 1962 appellants, who apparently owned considerable lands in Woodruff County, entered into a contract to sell Elam 80 acres of land for the sum of $8,000—$1,000 in cash and the balance in five equal annual installments. On January 18, 1963 the deed was executed and delivered in accordance with the contract. Thirty acres of the land were (or previously had been) in cultivation.

Briefly stated, the litigation arose out of the following factual situation. When the contract was entered into it was apparently assumed by appellants that they could sell the land without transferring any of the rice or cotton allotments. However, it was later determined that, according to the regulations of the Agricultural Stabilization Conservation Committee of the Department of Agriculture, 6.4 acres of cotton and 14.1 acres of rice allotments must accompany the land being conveyed.

In their complaint against Elam (and two renters on the land who are not concerned in this appeal) appellants alleged, in addition to the facts above set out, that "there was an express agreement between the parties and it was the distinct understanding that no allotted crop . . ." would pass with the sale, and that "the purchase price was based on that assumption"; that there was no meeting of the minds; that the contract "is subject to cancellation on the grounds of a mistake . . ." Tender of the $1,000 down payment was made in court, and the prayer was for cancellation of the deed. In answer, appellee denied all material allegations in the complaint, and asserted that the deed was executed without any reservation or limitation. After a full hearing the trial court held that appellants "have not met the burden of proof which evolves upon them . . .", and then dismissed appellants' complaint. This appeal follows.

The only point relied on by appellants for a reversal is that "the preponderance of the evidence entitled plaintiffs (appellants) to a recision of the conveyance . . . on the grounds of mistake and unjust enrichment". Actually, in their argument, appellants urged three separate grounds. *One,* Mutual Mistake; *Two,* Unilateral Mistake; and *Three,* Unjust Enrichment.

One. We agree with appellants that our decisions make it clear that Equity has power to cancel a transaction for a mutual mistake by the contracting parties. It appears to us however that appellants are in no position to urge such ground in this case. In their complaint appellants stated that "there was an express agreement

between the parties and it was the distinct understanding that no allotted crops, either rice or cotton, would pass with the sale of the land and the purchase price was based upon that assumption". To sustain that part of the complaint Mr. Hubbard testified to the effect that he had such an understanding with Mr. Elam. The vice president of the First State Bank of McCrory was called to confirm a conversation between Mr. Elam and Mr. Hubbard, but he admitted he was not sure the matter of crop allotments was brought to the attention of Mr. Elam. Mr. Elam testified positively that they had no such agreement. In this situation the chancellor held appellants "have not met the burden of proof which evolves upon them". We cannot say the chancellor's holding on this point was contrary to the weight of evidence, especially in view of other facts disclosed by the record. Mr. Hubbard signed a contract to sell, he signed a warranty deed, and he wrote two letters to Mr. Elam before the deal was closed, and the matter of crop allotments was not mentioned in any instance.

Two. Appellants ably argue that the case should be reversed because of a unilateral mistake made by them. Apparently this contention is based on the fact, or rather the assertion, that Mr. Hubbard did not know the allotment would follow the land. Several citations are listed in support, such as: *Frazier* v. *State Bank of Decatur,* 101 Ark. 135, 141 S. W. 941, and *Fleischer* v. *McGehee,* 111 Ark. 626, 163 S. W. 169. These cases do hold that a contract between two parties may be rescinded (as opposed to being reformed) by a chancery court because of a mistake of one party only. We think, however, these cases have little, if any, relevancy here because of the dissimilarity of the factual background.

What appears to be the modern, and we think the better, rule relative to recision for a unilateral mistake, is well stated in 13 Am. Jur. 2d, Cancellation of Instruments § 32, which reads:

"Equity will relieve a party from a unilateral mistake that was a result of fraud or duress or was accom-

panied by other special facts creating an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, but cancellation should not be decreed against a party whose conduct did not contribute to or induce the mistake and who will obtain no unconscionable advantage therefrom."

In *Hubbert* v. *Fagan*, 99 Ark. 480, 138 S. W. 1001, the Court quoted with approval the following:

"Where relief is given because of the mistake of one party alone, it is where it is induced by the conduct of the other party or because the other seeks unconscionably to take advantage of it, and the ground of jurisdiction is really fraud."

Appellants say however that if there was not a mistake of *fact* then there was a mistake of *law* in that they did not know the allotment followed the land. The matter of allotments appears to be a matter of government regulations, but whether this be considered a mistake of *law* or *fact* is of no consequence. In *Security Life Insurance Company* v. *Leeper,* 171 Ark. 77, 284 S. W. 12, we said:

"The final contention is that there was a mutual mistake as to the law which induced the settlement, and that appellee is not bound by it. It is a rule of almost universal application that a mistake of law, in the absence of fraud or undue influence, does not afford grounds for the abrogation or reformation of a contract."

There is no hint in this case that appellee practiced fraud or undue influence on appellants.

The record discloses that after the contract was signed but before the deed was signed and delivered appellants learned that 6.4 acres of cotton allotment would go to appellee, and that appellants' attorney wrote a letter of protest to appellee's attorney demanding more money for the land. The record further discloses that before appellee knew of this protest appellants signed the deed and mailed it to appellee. It was after the deed was delivered to appellee that appellants learned that 14.1 acres of rice allotment went with the land. We feel

that the above incident in no way affects the issues here raised by appellants. The reason is that if any mutual or unilateral mistakes were made by the parties hereto or either of them they were made before the contract and the deed were signed and delivered.

Three. We find no merit in appellants' final contention that the deed to appellee should be cancelled on the ground of unjust enrichment. This contention is based on the uncontradicted evidence that land with allotments is much more valuable than land without allotments. For support of this contention appellants rely on *Linder Corporation* v. *Pyeatt,* 222 Ark. 949, 264 S. W. 2d 619, and on 13 Am. Jur. 2d, Cancellation of Instruments § 25. We find that the Pyeatt case deals with the cancellation of a restrictive covenant under a factual situation wholly unlike that of this case, and that it has no bearing on the issue here considered. A casual reading of the material portions of the Am. Jur. reference reveals no support for appellants' contention on the point here in issue:

"The rule is clear that inadequacy of the consideration is not, in itself, a sufficient ground for cancellation of any agreement or instrument, including a deed. But in determining whether an instrument should be canceled, inadequacy of the consideration is a factor to be considered in connection with the presence of other inequitable features of the case. And where the consideration is grossly inadequate, equity will lay hold of slight circumstances of fraud, duress, undue influence, or the like, in granting relief by the way of cancellation."

Again, we repeat, appellants make no contention that appellee exercised any duress or undue influence, or engaged in any fraudulent conduct, to induce them to sell the land for $8,000.

Affirmed.

Opinion delivered January 25, 1965.

Douglas Bradley, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

SAM ROBINSON, Associate Justice. The question on appeal is whether, under the terms of a policy of accident insurance, the assured is entitled to recovery for medical expenses he sustained by reason of an injury to his son, who was insured under the policy. The specific issue is whether the nature of the injury and resulting expenses were excluded under the provisions of the policy.

The appellee, Providential Life Insurance Company, writes a type of accident insurance called "The Providential School Plan." Among other things, this insurance provides indemnity to the extent of $5,000 for medical expenses for "teachers, students, and non-teaching personnel." Parents of students were solicited to purchase the policy to protect themselves against medical

expenses they might incur by reason of injury to their children. The solicitation of parents was made by the insurance company distributing to the school children, to take home, a pamphlet advertising the policy. The pamphlet explained the benefits provided by the policy, those things not covered by the policy and the amount of premium. The pamphlet also contained a pocket on one side where currency or a check could be inserted by the parents in payment of the premium in the event they decided to take the insurance. The pamphlet could then be sent to the insurance company and it became the application of the sender asking that the applicant's child or children be included in a master policy to be issued to the school attended by the children. In this instance the policy was issued to the Brookland Public School District, Brookland, Arkansas.

The printed matter in the application appears to be complete in giving full information about what is not covered by the policy. At least the application shows on its face what the applicant understood was not covered by the policy. The application states:

"THIS INSURANCE DOES NOT COVER . . . . Dental expenses of any kind except those resulting from accidental injury to whole, sound natural teeth, eyeglasses, contact lenses or prescriptions therefor; intentionally self-inflicted injuries, injury for which benefits are payable under any Workmen's Compensation Act or Law; an act of war whether such war be declared or undeclared; any form of sickness, disease or infection except pyogenic infections incurred through an accidental cut or wound; services rendered by members of the insured's immediate family or as a part of the school duties by a physician retained by the school system. Expense for physiotherapy, diathermy, heat treatment in any form, anti-biotic therapy, manipulation or massage will be payable only when such treatment is performed in hospital to a resident bed patient."

The policy as issued, in addition to the foregoing exclusions named in the application, excluded from coverage, among other things, fighting and "any aggravation

of a pre-existing condition.'' Neither of these exclusions were mentioned in the application made on a printed form prepared by the insurance company. Thus, it will be seen that the exclusion provision of the policy is broader than the exclusion provision of the application.

The policy, when issued, was sent to the Brookland School. A copy was not sent to the applicant, the parent. It is not shown that the insurance company had any reason to believe that the parents of the children named in the policy would ever see the policy.

Appellant, Eugene E. Lawrence, father of David Lawrence, sent in an application in the aforesaid manner naming his children, including David, to be insured. David is afflicted with hemophilia. Some time afer the delivery of the policy, David received a cut to the inside of a lip while fighting with another boy. Due to the fact that he was afflicted with hemophilia, the cut did not stop bleeding for a long time. It was necessary to send him to a hospital in Memphis. The hospital and doctor bills finally amounted to $2,454.15. A claim was made against the insurance company; payment was refused on the ground that the policy did not cover an injury due to fighting and that it did not cover an aggravation of a pre-existing condition of hemophilia.

The cause was submitted to the court sitting as a jury on a stipulation of facts. The court rendered a judgment in favor of the insurance company. The assured has appealed.

If the exclusions named in the policy are controlling, the assured cannot recover. On the other hand, if the statement in the application setting out the things not covered by the policy is to prevail, injuries due to fighting or an aggravation of a pre-existing condition are not excluded. One of the contentions of the insurance company is that the exclusions listed in the pamphlet should not prevail because there is a notation thereon that the pamphlet is not a policy. Of course the pamphlet is not a policy, but it did become an application.

At this point it might be well to mention that the policy provides that any form of disease or sickness is not covered by the policy. Although hemophilia may be designated as a disease, the assured is not precluded from recovering on that ground because this court has held many times that the aggravation of a per-existing dormant condition is not a valid defense in a suit on an accident policy. *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995; *Missouri State Life Ins. Co.* v. *Barron,* 186 Ark. 46, 52 S. W. 2d 733; *Metropolitan Casualty Ins. Co. of N.Y.* v. *Fairchild,* 215 Ark. 416, 220 S. W. 2d 803. See also *Clay County Cotton Co.* v. *Home Life Ins. Co.,* 113 F. 2d 856.

We now reach the question of which should prevail —those things listed in the application as not being covered by the insurance or those things listed in the policy as not covered. In the case of *Woodmen of the World Life Ins. Society* v. *Counts,* 221 Ark. 143, 252 S. W. 2d 390, Counts applied for a policy providing double indemnity for accidental death. The policy, as issued, did not contain the double indemnity feature. The insured was accidentally killed. This court held that the insurance company was liable for double indemnity; that it was the duty of the insurance company to write the type of insurance named in the application, or to issue no policy. There, the court quoted with approval from *Robinson* v. *U. S. Ben. Soc.,* 132 Mich. 695, 94 N. W. 211; "The duty of the defendant was to issue the policy in compliance with the terms of the application. If it chose to insert inconsistent provisions, it was its duty to call the attention of the insured to them, so that he might accept or refuse the policy. The insured has the right to assume that his policy will be in accordance with the terms of his application, and he cannot be bound by a different policy, until he has had the opportunity to ratify or waive the inconsistent provisions."

In the case at bar, the application, the form of which was prepared by the insurance company, clearly states those things not covered by the policy. The insurance

company had no right to add other exclusions to the policy without the approval of the applicant.

Appellee suggests that although the stipulation shows that the insured was injured in a fight, there is no showing that he received an accidental injury within the meaning of the policy. The complaint alleges that the insured was accidentally injured. It is stipulated that he was injured in a fight with a fellow student. The inference is that the injury was accidental. There is no showing that the insured was the aggressor or that he was not acting in self defense. In *Maloney* v. *Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845, the court said: "If an injury occurs without the agency of the insured, it may be logically termed 'accidental', even though it may be brought about designedly by another person."

There is no dispute about the amount involved, which is $2,454.15. Since it has been decided that the appellant is entitled to recover, it necessarily follows that he is entitled to 12 per cent penalty on the amount sued for and a reasonable attorney's fee. In the circumstances, we believe a $1,000.00 fee would be appropriate.

Reversed.

[redacted]

WHITESIDE *v.* TYNER.

5-3419 386 S. W. 2d 239

Opinion delivered January 25, 1965.

[Rehearing denied February 22, 1965.]

[redacted]

Herrn Northcutt and *S. C. Ferguson,* for appellant.

Thomas B. Timnon, for appellee.

JIM JOHNSON, Associate Justice. This is a suit for negligent burning of another's land seeking double damages under the provisions of Ark. Stat. Ann. § 41-510 (Repl. 1964).

Appellant Robert E. Whiteside, a nonresident land owner, filed suit in Fulton Circuit Court against appellee M. L. Tyner, alleging that on March 3, 1961, Tyner, an adjacent land owner, was burning trash, brush and grass on his land and that Tyner negligently allowed the fire to escape to the land of Whiteside; that the fire burned over a number of acres of pine trees causing actual damage to Whiteside's property in the amount of $2,000. Whiteside specifically prayed for application of the statutory penalty of double damages. Appellee answered with a general denial and prayer for dismissal. On April 15, 1964, the cause was tried to a local jury which unanimously returned a verdict in favor of appellee Tyner. From judgment on the verdict comes this appeal.

For reversal appellant relies on the sole point that testimony is insufficient in law to sustain the verdict.

It is not contended that the trial court erred in failing to submit this case to the jury under proper instructions. This being true, the jury verdict must have reflected at least one of two findings: (1) that appellant failed to prove by a preponderance of the evidence that appellee did not take "necessary precaution" to prevent the escape of the fire to appellant's land; (2) that appellant failed to prove by a preponderance of the evidence that appellant's property was damaged.

Subsection 3 of § 41-507, Ark. Stat. Ann. (Repl. 1964) provides that the escape of fire under the circumstances herein presented "shall be prima facie evidence that necessary precautions were not taken." While discussing this statutory presumption in the recent case of *Thomas* v. *Raney,* 233 Ark. 836, 349 S. W. 2d 129, we pointed out that, "the cited statute (as shown by § 41-510) is a penal

statute, and in *Lamb* v. *Hibbard,* 228 Ark. 270, 306 S. W. 2d 859, we said that since it was penal it is to be strictly construed. In the cited case we also said, in speaking of Act 85 of 1935 (of which §§ 41-507 and 41-510 are a part) that: 'Taking the statute as a whole we find no reason to think the legislature meant to create a new basis for liability . . . without fault . . .' By this we in effect said that the plaintiff in this kind of case, must prove negligence (or fault) on the part of the defendant just as he must do in ordinary damage suits based on negligence." With the rule thus declared we are confronted with the question of whether there was any substantial evidence to support a jury verdict finding appellant failed to prove by a preponderance of the evidence that appellee failed to use "necessary precaution." Viewing all of the evidence in the light most favorable to the jury verdict, we find appellee correctly summarized the evidence in his argument as follows: "The only evidence of negligence presented by appellant was proof that appellee had pleaded guilty in J.P. court to violation of Ark. Stat. Ann. § 41-507. On the other hand appellee testified that his property and that of appellant's was separated by a road which testimony was never disputed; there had been a heavy rain the evening before; he had help to control the burning of grass on his own property; there was no wind at the time he started burning on his own property; and he had previously reported to the State Forestry Office at Salem, Arkansas, the fact that he did intend to burn."

This being the state of the record, we cannot say that there was no substantial evidence to support the jury verdict as to "necessary precaution." From such finding it follows that the question of proof of damages becomes moot.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* GLADDEN.

5-3394 385 S. W. 2d 934

Opinion delivered January 25, 1965.

Mark E. Woolsey, Don Langston and *Don Gillespie,* for appellant.

Walker & Spears, J. Loyd Shouse, for appellee.

FRANK HOLT, Associate Justice. This action was instituted by the appellees, as landowners, to enjoin the appellant's contractor from entry upon their lands for highway purposes. Various pleadings and exhibits were filed by the appellees and the appellant. The trial court found that the County Court Order upon which appellant relied was void and ordered appellant to pay $16,500.00 to the appellees as compensation for the lands taken and damaged by the appellant. From this decree appellant brings this appeal.

For reversal appellant first contends that the court erred in finding that a condemnation order of the Boone County Court made in 1930 was void. Assuming, without deciding, that the County Court Order was in fact valid, we cannot agree with appellant's contention. There is no evidence to indicate that the appellees or their predecessors in title were ever paid any compensation for the lands in controversy or that this Order was published or that appellees had any notice of the existence of the County Court Order until less than one year before the filing of this action. In *Arkansas State Highway Comm.* v. *Dean,* 236 Ark. 484, 367 S. W. 2d 107, we said:

"Where, as here, there was no payment of compensation for the taking of land and no publication of notice proved, the burden is on appellant to prove that the landowner had actual notice of the taking of his land."

In the case of *Greene County* v. *Hayden,* 175 Ark. 1067, 1 S. W. 2d 803, we held that in the absence of any notice of the condemnation order that the "twelve [12] months from the date of the order" of taking as provided in Ark. Stat. Ann. §76-917 (Repl. 1957) for the landowner to file his claim, meant twelve months from the actual entry on the land. See, also, Act 185 of 1963; Ark. Stat. Ann. §76-917 (Supp. 1963). To hold otherwise would allow the taking of property without notice and just compensation.

Appellant next contends that the court erred in denying its motion to dismiss the complaint, arguing that the appellees had a complete and adequate remedy at law. The appellees alleged in their complaint that they had no adequate remedy at law. Appellant insists that the burden was upon appellees to show their remedy at law was inadequate by alleging and offering proof of the insolvency of the county. Since there was no allegation and proof of such insolvency by the appellees, the appellant contends this absence constituted a jurisdictional defect. In support of this proposition appellant cites to us several cases typical of which is *The State Life Ins. Co. of Indianapolis* v. *Arkansas State Highway Comm.,* 202 Ark. 12, 148 S. W. 2d 671, and *Crawford County* v.

Simmons, 175 Ark. 1051, 1 S. W. 2d 561. We do not consider such cases applicable to the case at bar.

When the temporary restraining order was issued by the Chancellor, the appellant filed a $25,000.00 bond conditioned to pay such amount as might become payable to appellees by "any judgment or settlement that may be entered in this cause." Thereupon the temporary restraining order was dissolved and appellant was allowed to proceed with construction upon the strip of land in controversy. The appellant also filed an intervention alleging that it had acquired the right to the property in question by an easement through prescription and adverse possession, as well as by a county court order and a city ordinance. The appellant then filed a third-party complaint against various defendants in order to have a full adjudication of the rights of all interested parties in the proceeding. After these issues were joined, the case proceeded to trial and thereafter the motion was first made by appellant to dismiss the complaint for lack of jurisdiction which was refused by the court.

We have often held that a jurisdictional defect of the chancery court can be waived. *Ohio Galvanizing & Mfg. Co.* v. *Nichol,* 170 Ark. 16, 279 S. W. 377; *Potts* v. *Rader,* 215 Ark. 160, 219 S. W. 2d 769, rehearing denied 338 U. S. 882; *State for Use of Ark. County* v. *Pollard,* 171 Ark. 607, 286 S. W. 811; *Hayes* v. *Bishop,* 141 Ark. 155, 216 S. W. 298; *Goodrum* v. *Merchants' & Planters' Bank,* 102 Ark. 326, 144 S. W. 198. Further, it is well settled that one who invokes the aid of chancery in a matter not wholly beyond equitable cognizance is in no position later to reject its jurisdiction. *Nottingham* v. *Knight,* 238 Ark. 307, 379 S. W. 2d. 260. In the case at bar we are of the view that the appellant waived any jurisdictional defect and sought the aid of the chancery court in the full determination of the cause.

Appellant's final contention is that the damages awarded are not supported by a preponderance of the competent evidence. The lands owned by appellees were improved with a service station and a Dairy Queen building. The pump island was located partially upon the

right-of-way of Nicholson Avenue. Appellant argues that the court erred in considering any of the testimony of appellees' value witnesses because they incorrectly assumed the landowner had a right to use this part of the Avenue to service automobiles. Appellant also urges other defects in the testimony of appellees' value witnesses.

The chancellor specifically noted in his opinion that he had discounted certain inadmissible portions of the testimony of the value witnesses. Furthermore, when a witness gives no convincing reasons to justify his estimates as to the worth of property, his testimony is subject to evaluation by this court on trial de novo. *Burns* v. *Meadors,* 225 Ark. 1009, 287 S. W. 2d 893.

Appellees' value witnesses here testified as to the fair market value of the property before and after the taking. Their testimony indicated damages that varied from $22,500.00 to $30,000.00. Dr. Gladden, as a landowner, was not disqualified from giving his value opinion. *Ark. State Highway Comm.* v. *Muswick Cigar & Beverage Co.,* 231 Ark. 265, 329 S. W. 2d 173. According to the record, he had bought and sold considerable property within the city the past year and was familiar with the local real estate market. He testified that the fair market value of the whole parcel was $60,000.00 before the taking and the value of the remainder after the taking was $35,000.00.

Appellant's own expert witness, Mr. Hamilton, testified that appellees were damaged to the extent of $12,500.00 which is considerably nearer the trial court's award of $16,500.00 than the damages estimated by appellees' witnesses.

Therefore, considering only the competent evidence we hold that the decree must be and is affirmed.

Affirmed.

BURROW CONSTRUCTION CO. *v.* LANGLEY.

5-3431 386 S. W. 2d 484

Opinion delivered January 25, 1965.

[Rehearing denied March 1, 1965.]

[redacted]

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

Thomas D. Wynne, Jr. and *Frank W. Wynne,* for appellee.

OSRO COBB, Special Associate Justice. On February 29, 1960, appellee, who was then employed by appellant, W. C. Burrow Construction Company, a company covered by workmen's compensation insurance, while working in line of duty, attempted to lift an object weighing an estimated 500 pounds, sustaining substantial and disabling injuries to his back. The major portion of his immediate injuries appeared to be in the lower lumbar region, but from and after the inception of the accident appellee complained to examining physicians of pain higher up in his back and severe pain between his shoulders. The Commission allowed 28 weeks of temporary total disability, and also directed payment to appellee of 15% permanent partial disability to his body as a whole. Unhappily, appellee's disabilities thereafter greatly in-

creased, and the Commission entertained appellee's seasonable application for an additional disability award therefor after refusal by the referee. A formal hearing was conducted by the Commission. It found that appellee had in fact suffered greatly increased disabilities, but that the increase was unrelated to his injury in February, 1960, and denied appellee's supplemental claim. The dispositive finding of fact of the Commission is short and is quoted in full as follows:

"The claimant's present disability is not the result of the accident of February, 1960, and that his disability is arising from an unknown cause at a higher level than the site of the original injury."

From an adverse decision by the Commission the appellee appealed to the circuit court which reversed the Commission and in so doing found the appellee to be 75% disabled as to the body as a whole. From the said circuit court judgment the appellants bring this appeal.

The record of the hearing before the Commission affirmatively shows that appellee sustained no known injury or any other incident after February, 1960, which contributed in any way to his increasing disabilities. The question before this court, therefore, is whether the action of the Commission, in denying compensation for appellee's increased disabilities, is supported in the record before us by substantial evidence.

It has always been the clear duty of the Commission, in adjudicating claims for compensation benefits, to give the benefit of the doubt in factual situations to the injured workman. See *McGehee Hatchery Co.* v. *Gunter,* 237 Ark. 448, 373 S. W. 2d 401; *Parrish Esso Service Center* v. *Adams,* 237 Ark. 560, 374 S. W. 2d 468. While the Commission adjudicates claims in the light most favorable to the claimant, here on appeal we review the findings of the Commission in the light most favorable to the action taken by the Commission, and refrain from disturbing findings of the Commission which are supported in the record by substantial evidence. See *McCollum* v. *Rogers,* 238 Ark. 499, 382 S. W. 2d 892; *Holland* v.

Malvern Sand & Gravel Co., 237 Ark. 635, 374 S. W. 2d 822. We have examined the entire record in this case and we find no substantial evidence to support the finding of fact, supra, of the Commission. On the contrary, we find, from the record in this case, that said finding of fact is speculative and conjectural.

The Commission noted that the increased disabilities of appellee were from an area higher up in the spine, near the thoracic 12 lumbar 1 level. This area is only slightly below the shoulder blades. Furthermore, this is the general area of appellee's complaints from and after the inception of his injuries in February, 1960.

Dr. Joe F. Shuffield's report to the Commission of July 2, 1960, includes the following history of appellee:

" * * * He has pain in his lower back most all of the time, and the pain extends up his back and downward when he tries to do anything."

Dr. John H. Adametz' report to the Commission of August 9, 1960, includes the following comment:

"He (appellee) stated that when he moved or jerked he had pain that seemed to radiate between his shoulders."

Dr. Robert Watson, one of the medical examiners for the Commission, conceded during his testimony that the increased disabilities manifested by appellee could have been accounted for by the lifting of an object weighing approximately 500 pounds, which is the exact original history of the accident in this case. Dr. Watson further testified as to the extent of appellee's disability:

"A. He has a whole lot.

Q. How much?

A. As far as being able to enter into just out and out unlimited competitive labor, I think he's totally disabled for that."

Dr. F. Walter Carruthers, who appeared before the Commission as a witness for appellee, connected all of

claimant's disabilities to the original injury in 1960, stressing the progressive degeneration of a vital spinal nerve with attendant numbness in the leg, foot drop, and clawing of the foot—toes turning under with callouses forming as a result of the deformity—and concluding:

"He will have to be trained for some other occupation. I don't think he will ever be able to do any heavy manual labor."

We conclude and find from the record in this case that all of the disabilities suffered by appellee have resulted from the single injury to him in February, 1960. Indeed, there is no known or established circumstance appearing in the record in this case to which appellee's increased disabilities can be logically related, except to his original injury in 1960.

We agree with the circuit court that appellee is entitled to compensation upon his present claim. However, we agree with appellants that the court exceeded its authority in determining the amount of the award. Ark. Stat. Ann. §81-1325 (b) (Repl. 1960). The judgment is, therefore, reversed with directions to remand the cause to the Commission for the determination of a proper award.

Reversed and remanded.

McFaddin, J., not participating.

THOMPSON *v.* ROBINSON TUBE FABRICATING CO.

5-3426 386 S. W. 2d 926

Opinion delivered February 1, 1965.

[Rehearing denied March 15, 1965.]

Pickins, Pickins & Boyce and *Alston Jennings,* for appellant.

Comer Boyett and *Robert Henry,* for appellee.

ED F. MCFADDIN, Associate Justice. This is an action for damages for breach of contract and also to hold the defendants liable as partners. The contract which is the basis of this action reads:

"April 29, 1959

"It is agreed that Robinson Tube Fabricating Company will have exclusive right and agrees to furnish all labor and parts necessary to manufacture, store and ship F.O.B. Conway, a satisfactory marketable table except tubing, woodwork and boxes for the first 10,000 tables sold by Thompson Industries, Inc., for the sum of $5.10 each.

"It is agreed that Thompson Industries, Inc. will make an initial order for enough tubing to manufacture 1,000 tables, also woodwork and boxes for said amount.

"/s/ J. A. Thompson, President Thompson Industries, Inc.

"/s/ E. H. Kellar, President Robinson Tube Fabricating Co."

On August 25, 1959, Thompson Industries ordered the 1,000 tables specified in the last sentence of the contract, but later refused to accept the tables or pay anything for them; and all of them that had been manufactured were sold for storage charges. Thereupon, Robinson Tube Fabricating Company (hereinafter called "Robinson") filed this action against J. A. Thompson, J. A. Thompson, Jr., and Mrs. J. A. Thompson, Jr., seeking to hold them liable as partners for $26,590.00 which Robinson claimed as damages for breach of the signed contract. The Thompsons specifically denied personal liability, and denied all other allegations made by Robinson. Trial to a jury resulted in a verdict and judgment for Robinson for $4,713.17; and from that judgment the Thompsons bring this appeal, urging three points:

"I. The court erred in refusing to direct a verdict in favor of Appellants.

"II. The court erred in giving Appellee's Requested Instruction No. 1.

"III. The court submitted the matter to the jury on a completely erroneous measure of damages."

I.

We find no merit in appellant's first point. It was shown that the Thompsons had not incorporated Thompson Industries, Inc. on April 29, 1959, when the contract was signed[1] or on August 25, 1959, when the order was made for the 1,000 tables. There was evidence from

[1] The corporation was not actually formed until October 8, 1959, with three stockholders: J. A. Thompson, Sr. had one share; J. A. Thompson, Jr. had 4,998 shares; and Mrs. J. A. Thompson Jr. had one share.

which the jury could have found—as it evidently did—that J. A. Thompson, Jr. had represented on April 29, 1959, that the corporation was already in existence. Also there was evidence that this representation induced the acceptance of the order of August 25, 1959, for the 1,000 tables. Thus the Thompsons were partners when the contract was signed and the tables ordered. *Whitaker* v. *Mitchell,* 219 Ark. 779, 244 S. W. 2d 965; *Gazette Pub. Co.* v. *Brady,* 204 Ark. 396, 162 S. W. 2d 494.

II.

Appellants' second point relates to appellee's Instruction No. 1 given by the Trial Court. This instruction reads:

"You are instructed that where an incorporator signs a contract or agreement in the name of the corporation before the corporation is actually formed and the other party to the agreement believes at the time of the signing that the corporation is already formed, then the incorporators are responsible as a partnership for the obligations contained in the contract or agreement, including damages resulting from any breach of the contract on their part.

"In this case it is admitted that Thompson Industries, Inc., was not formed at the time the agreement sued upon was signed. You are further told that J. A. Thompson, J. A. Thompson, Jr. and Mrs. J. A. Thompson, Jr. are incorporators of Thompson Industries, Inc.

"If you find from a preponderance of the evidence in this case that the president and treasurer of Robinson Tube Fabricating Company believed and acting as reasonably prudent persons were justified in believing at the time they signed the agreement that Thompson Industries, Inc. was a corporation already formed and in existence and you further find that the incorporator or incorporators breached the signed agreement, then you may find for the plaintiff."

Appellants offered several objections to the instruction, but the Trial Court overruled them, saying: "The

objection is overruled for the reason that the Court does not take Instruction No. 1 to point up anything other than individual liability." When we consider all the instructions given on the various phases of the case, including the defenses offered, we conclude that the Trial Court was correct. This Instruction No. 1 related only to the liability of the defendants as partners and not to all the other issues in the case.

III.

The appellants' third point relates to the matter of damages, and on this point we find there is some merit. Robinson alleged and, over objection of defendants, was allowed to show these items regarding damages:

Engineering the production	$12,175.00
Tooling the product	7,500.00
Production development	2,835.00
Production to date	4,080.00

Over the objection of the defendants, the witness for Robinson was allowed to testify that in order to prepare to produce the tables Robinson spent $12,175.00 engineering the production and $7,500.00 for tooling the product; that special equipment was required to perform one function, and one function only, and included dies and bending tools which could not be used for any other purpose. Furthermore, over the objection of the defendants, the witness for Robinson was allowed to testify that $2,835.00 was spent for production development and $4,080.00 for labor in working on the material for the August 1959 order made by Thompson. Over the objection of the defendants, the Court instructed the jury:

"You are instructed that if you find for the plaintiff in this case, you will assess its damages, if any, in such sum as you find will compensate it for its expenses incurred in preparation for performance of the contract including engineering the product, tooling the product, production development and production to date, not to exceed $26,590.00, the amount sued for."[2]

[2] The defendants' specific objection to this instruction was as follows: →

The contract signed April 29, 1959 did not require Thompson to do anything except to order 1,000 tables at $5.10 each. This was the last sentence in the contract. In the first portion of the contract Thompson agreed that Robinson would have the exclusive right to manufacture 10,000 tables; but these were not required to be ordered immediately and no deprivation of this right has been alleged. Thompson was required to order 1,000 tables; and in August 1959 such was done. In short, the agreement of April 1959 did not obligate Thompson to immediately purchase 10,000 tables from Robinson: it merely gave Robinson the exclusive right to manufacture the first 10,000 tables sold by Thompson. The first part of the contract merely prohibited Thompson from having the first 10,000 tables manufactured by anyone except Robinson. No breach of that provision is alleged. The binding obligation on Thompson was to order 1,000 tables; and that is what Thompson did. Thus, the only damages that Robinson could claim were the damages that flowed from Thompson's refusal to accept and pay for the 1,000 tables ordered. The uncontradicted proof in the record as to such damages sustained by Robinson on these 1,000 tables is the sum of $4,080.00 paid for labor in manufacturing them.

Even though the Court was in error in submitting to the jury the other claimed elements of damages, nevertheless this error may be cured by a remittitur. There was no evidence offered by Thompson to dispute the

"Defendants object to the giving of plaintiff's requested instruction No. 3, for the reason that it is an improper measure of damages and permits a recovery as though the defendants had entered into an agreement to buy ten thousand tables from the plaintiff, which they did not agree to do; and for the reason that in permitting the jury to consider costs or expenses incurred in preparation for performance of the contract and also to recover for production to date would involve a duplication of damages, since the plaintiff must have contemplated in setting a price of $5.10 per table that a portion of that $5.10 would represent a recoupment of expenses incurred in preparation for performance. For the further reason that the instruction would permit the jury to return a verdict up to a sum of $26,590.00, when under the evidence in this case and under the terms of the agreement of April 29, 1959, and subsequent dealings between the parties, if the plaintiff is entitled to recover at all, which the defendants deny, the maximum amount the plaintiff could recover would be $4,080.00, the amount for which the plaintiff had previously billed Thompson Industries, Incorporated."

testimony of Robinson that it had expended $4,080.00 for labor to fulfill the order of August 1959 for 1,000 tables. Since this item of damages was undisputed, it follows that the Court's error as to the other damages may be cured by reducing the judgment to $4,080.00. If, within 17 calendar days, the appellee will enter a remittitur as to all of the judgment in excess of $4,080.00 and interest thereon from April 6, 1964, then the judgment will be affirmed for that amount and costs, less cost of the appeal; otherwise, the entire judgment will be reversed and the cause remanded.

DUCKWORTH *v.* WILLIAMS.

5-3434 386 S. W. 2d 234

Opinion delivered February 1, 1965.

Rhine & Rhine, for appellant.

Kirsch, Cathey & Brown, for appellee.

GEORGE ROSE SMITH, J. This dispute between adjoining landowners involves the asserted obstruction of natural watercourses. The appellants, whose land lies

north of the appellees' forty acres, brought this suit to compel the appellees to remove three low earthen levees that they built near the northern border of their land in 1962. The defendants denied that the levees interfered with any natural watercourse. The chancellor specifically found that no natural watercourse had been obstructed, but he afforded the plaintiffs some relief by directing that the defendants, at the plaintiffs' expense, clean out two clogged ditches on the defendants' land that formerly provided drainage for the plaintiffs' property. The issue here is whether natural watercourses were shown to exist.

We do not find the decree to be against the weight of the evidence. The question is essentially one of fact, for the parties are not in disagreement about what constitutes a natural watercourse. It may be defined as a running stream flowing in a particular direction and having a definite channel that lies in a bed between discernible banks. A watercourse usually discharges itself into some other stream or body of water. It may sometimes be dry. Such a watercourse is to be distinguished from mere surface water that spreads over the face of the tract of land in question after heavy rains. See *Brasko* v. *Prislovsky,* 207 Ark. 1034, 183 S. W. 2d 925.

The plaintiff Duckworth, together with a civil engineer and a lay witness, testified that either two or three natural watercourses had been blocked by the levees. There is, however, much testimony to the contrary. To begin with, this engineer estimated that the controversy involved a drainage area of about 300 acres. We find it difficult to believe that such a small watershed, amounting to less than half a square mile, could give rise to anything more than the temporary running off of surface water in periods of wet weather. At one point in his testimony the engineer stated that in his opinion "this water, at one time, flowed over an area some 400 feet wide." There is other testimony, especially with respect to the appellees' land, indicating that the waters have not been confined to definite channels having a visible bed lying between perceptible banks.

Both sides introduced a number of photographs, which we find to be especially persuasive. These pictures portray the appellants' land as a fairly level field devoted to the cultivation of row crops. Although the appellants produced a number of photographs, it is significant that there is not a single picture of anything that appears to meet the definition of a natural watercourse. If such positive and convincing proof had been available it would surely have been offered. Yet the only bodies of water that appear in the photographs are pools of standing water that seem to be merely the accumulation of rain water in low places at the edge of the appellants' land.

If the case merely involves surface water, as the proof indicates, the appellees were entitled to protect themselves against it unless in doing so they unnecessarily injured the appellants. *Honey* v. *Bertig Co.*, 202 Ark. 370, 150 S. W. 2d 214. In our opinion the preponderance of the evidence shows that the appellants' land was formerly drained by a natural or man-made ditch that collected the water and cast it into one of the clogged ditches referred to in the chancellor's decree. There appears to have been no drainage problem between these neighbors until the appellant Duckworth filled up and leveled the ditch on his own land. It was only then that the appellees resorted to levees to fend off the surface water that was being cast upon their land. We cannot say that the appellees "unnecessarily" damaged the appellants, for it was the appellants themselves who brought about the condition they now complain of.

Affirmed.

5-3457 386 S. W. 2d 252

Opinion delivered February 1, 1965.

[redacted]

Murphy & Burch, for appellant.

Walter R. Niblock, for appellee.

GEORGE ROSE SMITH, J. In this case the appellee's complaint alleged that the appellant, then a college student, took the appellee's car without permission and was involved in a collision in which the vehicle was damaged. After a trial that must have taken only a few minutes the circuit court, sitting without a jury, awarded the plaintiff a judgment for $500. The single question here is whether the plaintiff's evidence was sufficient to make a *prima facie* case.

Only two witnesses testified. The plaintiff, who was represented at the trial by an attorney other than his present counsel, stated that while he was at the 71 Club on the night of May 18, 1962, his parked car was stolen and was damaged to the extent of $572.49 in an accident.

The second witness, police officer Spencer, investigated the collision, which involved five vehicles. Officer Spencer's testimony, apart from several hearsay statements that were duly objected to, amounted to this: As a result of information he had received he arrested young Goswick at a certain fraternity house in Fayetteville and questioned him. Goswick admitted that he had been at the

71 Club at the time, but he did not remember what had happened. Officer Spencer conceded that he had not identified Goswick as the driver of the vehicle. Upon this meager proof the trial judge, with manifest reluctance, entered a judgment finding that it was Goswick who took the car and that the damage was proximately caused by Goswick's negligence.

We cannot sustain the judgment. The only facts proved are that the car was taken while it was parked at the 71 Club, that it was damaged in a collision, that Goswick was arrested, and that upon interrogation he admitted having been at the Club but remembered nothing else. To infer, from these bare facts, that Goswick actually took the car and that he was guilty of negligence which was the proximate cause of the collision is, in our opinion, to engage in speculation and conjecture. We conclude that the plaintiff did not sustain his burden of proof.

The judgment is reversed, and, as the case has evidently not been fully developed, the cause is remanded for a new trial.

BROOKSHER *v.* JONES.

5-3440 386 S. W. 2d 253

Opinion delivered February 1, 1965.

Harper, Harper, Young & Durden, for appellant.

Hardin, Barton, Hardin & Jesson, for appellee.

PAUL WARD, Associate Justice. This appeal deals with the power of a city to vacate or close a portion of a street under the facts here involved.

On March 15, 1963 the City Commissioners of Fort Smith (hereafter referred to as the Commission) passed Ordinance No. 2399, the principal effect of which would have been to vacate a portion of Birnie Avenue and grant Safeway Stores, Inc. the exclusive right to occupy the vacated portion.

A few days after passage of said ordinance Buck Jones, a citizen and taxpayer of Fort Smith, filed a complaint against the Commission (suit No. 1785) alleging in substance that many persons are still using said avenue and have been doing so continuously for the past five years, and that the attempt to close the street was contrary to law. The prayer was to enjoin the Commission from vacating said portion of the avenue. To the above complaint the Commission filed a demurrer and also an answer, contending they had a legal right to vacate a portion of said avenue under Ark. Stat. Ann. § 19-2304 (Repl. 1956) which is Section 3 of Act No. 67 of 1885. They also denied all material allegations in the complaint and asked for a dismissal of the complaint.

On April 9, 1963 eighteen other citizens and taxpayers of Fort Smith filed a similar suit (No. 1837) against the Commission, alleging that they were owners of property located on said avenue; that the said avenue had been continuously open to, and used by, the public for travel for more than twenty years; that the portion to be closed was "necessary and vital for corporate purposes and for the public interest and welfare"; and, that the Commission acted arbitrarily and unreasonably in passing said ordinance, and that it had no power or authority to do so. They prayed that the ordinance be

declared illegal and void and that the Commission be enjoined from vacating said portion of the avenue. The Commission entered a general denial, and later by order of the court the two suits were consolidated for trial.

All parties moved for a summary judgment pursuant to Act No. 123 of 1961—Ark. Stat. Ann. § 29-211 (Repl. 1962), and the matter was accordingly submitted to the trial court on three affidavits filed by the plaintiffs. No affidavit was filed by the Commission.

The trial court prepared a full and comprehensive written opinion and then entered a decree enjoining the Commission from enforcing Ordinance No. 2399 and declaring the ordinance to be null and void. For a reversal of the decree appellant (the Commission) prosecutes the appeal, contending:

"The lower Court erred in finding and holding that Section 19-2304, Ark. Stats. 1947, was repealed by Section 19-3825; in granting appellees' motion for summary judgment and in failing to grant appellants' motion for summary judgment."

We have concluded the trial court must be affirmed in enjoining the Commission from enforcing Ordinance No. 2399.

Although it is not material to this opinion, we do not agree that § 19-2304 has been repealed by § 19-3825. See: *Cernauskas* v. *Fletcher,* 211 Ark. 678, 201 S. W. 2d 999. A careful study of § 19-2304 reveals no authority for the Commission, under the undisputed facts set forth in the affidavits, to vacate and close a portion of Birnie Avenue "for the purpose of allowing Safeway Stores, Incorporated . . . to build, construct and own buildings and other improvements . . ." over and across the designated portion of Birnie Avenue. (Quotes are from the ordinance.) As we interpret § 19-2304, before a city can have the right and power to vacate or lease out a portion of a street it must first be shown that the said portion is not being "required for corporate purposes . . ."—i.e. for a street. The part of § 19-2304 pertinent to this case is the second section which reads:

"To alter or change the width or extent of streets, sidewalks, alleys, avenues, parks, wharves and other public grounds, and to vacate or lease out such portions thereof as may not for the time being be required for corporate purposes, and where lands have been or may be acquired or donated to such city, for any object or purpose which has become impossible or impracticable, the same may be used or devoted for other proper public or corporate purposes, or sold by order of the city council and the proceeds applied therefor."

It would be a strained, if not a dangerous, interpretation of the above section to say it gives a city the right to arbitrarily close a street which is being used by the public.

We find nothing in the record here to show that Birnie Avenue (or any portion thereof) was not being constantly used by appellees and the public in general. All the facts presented to the trial court are those set forth in the three affidavits produced by appellees. These facts are all to the effect that Birnie Avenue was dedicated as a public street in 1906; that the street is used daily by more than 200 cars; and that it would work a hardship on many people if a portion of the street (or avenue) were closed. No evidence to the contrary was presented to the court.

The Commission, in support of its contention, relies on *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S. W. 2d 949 and *Kansas City So. Ry. Co.* v. *City of Fort Smith,* 228 Ark. 625, 309 S. W. 2d 315. We find nothing in those cases which is decisive of the issue here involved. In the *Risser* case only three questions were discussed on appeal: Is the city bound by a contract? Is the cause res judicata? And, have appellants suffered special or peculiar damages? In the other case it appears that the City of Fort Smith in the year 1911 closed a street so the railroad could construct a depot with no question being raised as to the power of the city. Some forty five years later we held the city could not maintain an action in ejectment against the railroad company.

We make it plain that we are not holding a city has no right under any factual situation to vacate a street under § 19-2304, but we are merely holding that the Commission had no such right in this instance under the undisputed facts as shown by the record.

The decree of the trial court is affirmed.

VANCE *v.* JOHNSON.

5-3443 386 S. W. 2d 240

Opinion delivered February 1, 1965.

Kaneaster Hodges and *W. E. Billingsley,* for appellant.

Smith, Williams, Friday & Bowen, Ponder & Lingo, for appellee.

SAM ROBINSON, Associate Justice. On June 11, 1963, a special election was held in Sharp County, Arkansas. Among the issues voted upon were: (1) The elimination of the two present county seats at Hardy and Evening Shade, and (2) the establishment of a new, single county seat at Ash Flat.

Principally at issue is the necessary "majority vote" to enact such a change.

Following the election, the County Judge of Sharp County made an order of the court declaring the results, to wit:

For Change	1438
Against Change	618
For Ash Flat	1424
Against Ash Flat	623

There is no contest with respect to the above tabulations.

The County Court then found that there were 2,991 qualified electors in Sharp Counyt as reflected in the 1962-63 poll tax list filed in the office of the County Clerk; that although a substantial majority of those casting ballots voted for the change, 1,438 was not a majority of the 2,991 persons having paid a poll tax. This order was rendered on June 18, 1963. On December 2, 1963 (some five months later) an appeal was taken to the Sharp Circuit Court. That court held that a majority of those casting ballots in the election had voted for the change and that this was sufficient in law to establish the county seat in Sharp County at Ash Flat. Thus this appeal.

On appeal appellants contend:

(1) That the appeal from the County Court was not filed within the time allowed by statute.

(2) That removal of a county seat in Sharp County requires the consent of a majority of those having paid a poll tax.

(3) That there is no lawful authority for removing a county seat in Sharp County.

Under the Constitution appeals from judgments of the County Court are to the Circuit Court, under such restrictions as may be prescribed by law. Article 7, Sec. 33. The time within which an appeal may be taken has been limited to six months. Ark. Stat. Ann. § 27-2001 (Repl. 1962). Here appellee appealed within six months, but appellants assert appellee must comply with further limitations found in § 3-1203 and § 13-1216. We do not

agree. Section 3-1203 requires that all actions to contest a county election shall be commenced within twenty days following the election. The case at bar is in no sense of the word the contest of an election. An election contest involves the matter of going behind the returns and inquiring into the qualifications of the electors and other matters affecting the validity of the ballots. *Jones* v. *Dixon,* 227 Ark. 955, 302 S. W. 2d 529; *Parson* v. *Mason,* 223 Ark. 281, 265 S. W. 2d 526. Here, neither appellants nor appellee questions the certified returns, the elector's qualifications or any other matters regarding the validity of the ballots. On the contrary, both parties vigorously rely on these returns to establish their case. Appellee's sole concern on appeal is the law applied to these returns.

Section 13-1216 allows thirty days in which to appeal the County Court's order as to the results of the election. An appeal from that order would merely test the correctness of the Court's tabulation of the returns. *Jones* v. *Dixon,* supra; *Parsons* v. *Mason,* supra. The present appeal does not test the correctness of the Court's tabulations. To the contrary, appellee affirms these tabulations and merely attacks the law as applied to them. An appeal directed toward the Court's finding as to the tabulation is one thing. An attack on the law as applied to that tabulation is something entirely different. *Jones* v. *Dixon,* supra. As a matter of right, appellee had six months in which to appeal. Ark. Stat. Ann. § 27-2001 (Repl. 1962).

Authority for the removal of a county seat is found in Act 86 of 1875 (digested in Ark. Stat. Ann. § 17-201, et seq. [Repl. 1956]). Section 10 of this Act provides:

"That to ascertain the number of qualified voters of any county for the purpose of this act, and the lawful majority necessary to authorize the change or removal as herein provided for, *the county court shall be governed by the number of persons liable to pay a poll tax as returned upon the assessor's books.*" (Emphasis ours.)

In 1901 this section was amended to read "shall be governed by the number of persons who have paid their

poll tax . . . provided, this act does not apply to the counties of . . . Sharp . . .'' (Nineteen other counties were also exempted.) Ark. Stat. Ann. § 17-209 (Repl. 1956). Because this Act exempted twenty counties, all agree that it was a local one. It remains valid, however, and in force until repealed, since it was enacted prior to the constitutional prohibition of local legislation adopted in 1926. Amendment Fourteen to the Arkansas Constitution provides:

''The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts.''

In 1963 there was an attempted ''reenactment'' of the 1901 local act. In addition to somewhat materially changing the body of the act itself, it deleted Sharp County from the list of exempted counties so as to bring Sharp within the purview of the 1901 amendment. While the Constitution prohibits enactment or amendment of local legislation, it allows repeal. Appellants argue that the 1963 Act is repeal and therefore, not violative of the Fourteenth Amendment. We cannot agree. The ''repeal'' is of an exception, the final effect of which is to add on to local legislation and this procedure has been declared void and of no effect. *Johnson* v. *Simpson,* 185 Ark. 1074, 51 S. W. 2d 233. Therefore, the County of Sharp, having been expressly exempted from the operation of the 1901 Amendment and because the 1963 Act is void and of no effect, remains subject to original Section 10 of the 1875 Act. *Velvin* v. *Kent,* 198 Ark. 267, 128 S. W. 2d 686. Thus, it would appear from the Act that the necessary, lawful majority required for removal of a county seat in Sharp County is a majority of those liable to pay a poll tax as returned on the Assessor's list.

The undisputed proof in the record shows that since 1947 there have been no assessments of poll taxes, and therefore, no lists kept of persons liable to pay poll taxes in Sharp County. There was no such list available on the date these election results were to be declared (ap-

parently there have been no such lists maintained in the entire state since 1947).

Though Section 10 of Act 86 of 1875 requires the consent of a majority of those liable to pay a poll tax, other sections of the Act speak in terms of the consent of a "majority of the qualified voters of the county". Ark. Stats. Ann. §§ 17-201, 206 (Repl. 1956). Language similar to the latter has been interpreted to mean the consent of a majority of those voting at the election. *Glover* v. *Hot Springs Kennel Club,* 230 Ark. 544, 333 S. W. 2d 902.

Article XIII, § 3 of the Arkansas Constitution provides that the consent of a majority of those voting at the election is sufficient to change a county seat (though the Legislature may prescribe greater standards). *Vance* v. *Austell,* 45 Ark. 400.

Since the Act of 1875 provides for two standards, and since one has, in all practicality, become inoperative, the other must control; the people's business should not be stifled for lack of machinery to carry it into effect. Therefore, the consent of a majority of those voting at the election, as provided for in Act 86 of 1875 (Ark. Stats. Ann. § 17-201, et seq.) and consonant with the Constitution of the State of Arkansas, is lawfully sufficient to change a county seat in Sharp County.

The proviso in the 1901 Amendment contains this language: "Provided, *this act* does not apply to the counties of . . . Sharp . . ." (emphasis ours.) Appellants suggest that the words "this act" refer to the 1875 Act (as opposed to the 1901 Amendment) and thus Sharp, along with nineteen other counties, are without any lawful procedure for changing a county seat. We find no merit in such an interpretation.

Affirmed.

CITY OF NORTH LITTLE ROCK *v.* ARK. POWER & LIGHT CO.

5-3329 386 S. W. 2d 236

Opinion delivered February 1, 1965.

[redacted]

Glenn G. Zimmerman and *William G. Fleming,* for appellant.

House, Holmes & Jewell, for appellee.

JIM JOHNSON, Associate Justice. This suit involves a purchase contract between a municipality and a utility.

In March 1950 appellant City of North Little Rock and appellee Arkansas Power & Light Company entered into a contract in which the city agreed to purchase all the electric power it needed to supply the municipally-owned electrical distribution system serving North Little Rock and certain adjacent areas. The company had been serving the city under a ten-year contract entered into in 1943, but due to its growth the city was unable to receive an adequate power supply through the one point of delivery then existing. To improve and increase the electric supply, the city built a new transformer station and the company constructed an additional point of delivery to the new transformer station. The contract, which was incorporated into a city ordinance, sets out, *inter alia,* the net monthly rates, kilowatt demand, term, discount and service regulations. The city was billed and paid according

to the 1950 rate until January, 1957, when an additional charge of two mills per kilowatt was added to the billings. This increase was made following a Public Service Commission order allowing such an increase for all bills under a number of filed Rate Schedules, including Schedule 21 for "Large Public Utility Resale Customers". Another increase was added in May, 1957, following a Commission allowance of a fuel adjustment in Rate Schedule 21. The city paid the increased bills until August 1960, at which time it refused to pay any charges in excess of the 1950 rate.

On April 20, 1961, appellant filed suit in Pulaski Circuit Court against appellee to recover $669,934.95 allegedly paid in excess of the contract rate from January 1957 through July 1960. Appellee counterclaimed for $230,472.91, the amount in excess of the alleged contract rate for which the city had been billed but refused to pay from August 1960 through May 1961. Trial was held before the court on June 12, 1963. In its judgment entered October 30, 1963, the court dismissed appellant's complaint and granted appellee judgment for $269,334.06 after finding that appellant had "wrongfully withheld payment of lawful billings" for electric service in the total sum of $230,472.91 plus six percent interest. The city has prosecuted this appeal from the judgment, urging several interesting points for reversal.

The appellee power company in turn eloquently argues additional theories to sustain its point of view, all of which results in a lively discussion spanning a large portion of the entire field of utility regulation.

Owing to the simplicity of the question decisive of this case we find it unnecessary to unduly extend this opinion by discussing the myriad questions urged for our consideration.

The portions of the contract germane to this appeal are as follows:

"1. Company will make available to City at the points of delivery specified herein, electric service up to a maximum of 19,000 KW, at approximately 13,800

volts, 3 phase and a nominal frequency of 60 cycles per second."

"3. Company will supply and City will take and pay for all electric service required by City for the above operation in accordance with the following rate schedule; but no monthly bill for electric service will be based on less than 2,000 KW or less than $2,576.64 during the term of this agreement or any extension thereof. *Said Rate Schedule is subject to such changes as may be lawfully made . . .*

Net Monthly Rates

$980.00 for the first 500 KW or less of Demand
1.25 per KW for all additional KW of Demand
0.60¢ per KWH for the first 360,000 KWH
0.50¢ per KWH additional, up to a total consumption of 360 KWH per KW of Demand
0.38¢ per KWH for all additional KWH

Minimum:

The Demand Charge for the current month, but not less than $1.50 per KW of the highest Demand established during the 12 months ending with the current month.

Adjustment:

The above rate shall be subject to an increase or decrease in proportion to the amount of new taxes or increased taxes which the Company may hereafter have to pay, which are levied or imposed or increased or decreased by laws which are not in effect on June 1, 1941, provided, however, that this adjustment shall only be applied when authorized by order of the Public Service Commission . . .

Term and Primary Service Discount

5% discount for a new 10 year Agreement for Electric Service.

5% Primary Service Discount for City owning and maintaining all of the substations (except metering equipment). Service will be metered at 13.8 KV.

Service Regulations

Service under this Schedule is subject to the Service Regulations of the Company as they are now on file, and as they may in the future be filed, with the Arkansas Public Service Commission. . . .

"5. All bills for electric service hereunder shall be rendered monthly, are due upon presentation and are payable within 30 days from the date thereof at the Company's office in Little Rock, Arkansas . . ."

"8. The term of this Agreement shall be from June 1, 1950 to June 1, 1960, and shall be automatically extended for successive periods of one year until terminated by written notice given by one party to the other not more than six months nor less than three months prior to the expiration of the original term or any anniversary thereof.

"9. This constitutes the entire and only Agreement between the parties hereto with reference to the subject matter hereof, and supersedes all previous understandings whether written or oral." [Emphasis ours.]

A careful study of this contract indicates that the contract is quite complete and answers virtually any question within its four corners. Most of the references in the contract to the Public Service Commission are self-limiting and are obviously applicable only to the particular clause in which it is mentioned. However, the phrase at the close of the first paragraph of Section 3, "Said rate schedule is subject to such changes as may be lawfully made," is ambiguous. It is argued by appellee that the phrase implies Public Service Commission supervision, whereas appellant argues, au contraire, that the phrase is limited to those changes provided for in the contract itself. With such an ambiguity it is necessary for us to look outside the contract for interpretation of this phrase. *Yellow Cab Co. of Texarkana v. Texarkana Municipal Airport,* 230 Ark. 401, 322 S. W. 2d 688.

By reference to the evidence, we find (1) that the rate schedule contained in the 1943 contract was identical

with Schedule 21, as was the "Net Monthly Rates" provision, *supra,* of the 1950 contract; (2) that when appellee sought a rate increase before the Commission, appellant had notice of the proceedings and specifically ordered its city attorney to appear at the hearings; and (3) that the increased billings following the Commission's order were paid by the city without protest for three years or more. These facts, with the uncontradicted testimony of the now-retired manager of the City's electrical department that when he received each bill "we checked it with our daily readings and power cost and then checked the calculation of it and if everything was correct I would sign the affidavit and in turn turn it over to the Mayor's office and the Board of Public Affairs approved it and take it down stairs and it was approved by the Chairman of the Electric Committee," after which the city council "approved the payment of it," all of which leaves no doubt that the parties intended to be bound by Rate Schedule 21 as approved by the Commission.

It follows, therefore, the ambiguous language in the contract, "Said rate schedule is subject to such changes as may be lawfully made," means that this rate schedule is subject to such changes as the Commission may make in Rate Schedule 21.

Affirmed.

SMITH *v.* DIXON.

5-3432 386 S. W. 2d 244

Opinion delivered February 1, 1965.

William H. Drew, for appellant.

Ovid T. Switzer and *W. P. Switzer,* for appellee.

FRANK HOLT, Associate Justice. The appellee, as purchaser, brought this action against appellants, as sellers, for the specific performance of a contract for the sale of realty and in the alternative sought damages for nonperformance of the contract.

The appellants are E. F. Smith, his wife, and their children and spouses. This entire family constitutes a business firm known as E. F. Smith & Sons, A Partner-

ship. The "Contract For Sale Of Realty With Lease" was signed by one of the appellants, W. R. Smith, on behalf of the family partnership.

By the terms of the contract, executed in March 1962, the partnership agreed to sell the 750 acre "Cracraft" plantation for $200,000.00 and convey title to the appellee on January 3, 1963. In the interim, by the lease provisions, the appellee took possession, farmed, and improved a portion of the property. Upon refusal of the appellants to convey the land as recited in the contract, the appellee instituted this action. The chancellor denied specific performance and awarded appellee special damages in the amount of $11,512.73.

On appeal the appellants contend that the contract "prepared for signature of all owners, their wives, and the escrow agent, was never executed by the intended parties and, therefore, no obligation was incurred thereunder" and, further, the contract was never ratified by the owners of the land. The contract was signed "E. F. Smith & Sons, a partnership By: W. R. Smith" and also by the appellee, "W. T. Dixon". Appellee's attorney, who drafted the contract, prepared an extra page for the signatures of the other members of the family constituting the partnership. However, the appellee recorded the instrument without ever requiring the additional signatures. Appellants argue that the contract is not enforceable against the partnership because the record title is in the name of the individual members of the family as tenants-in-common. In other words, the title has never been transferred from individual family ownership to the partnership. We find no merit in this contention as did the chancellor.

The partnership was created a short time after the lands in controversy were acquired by the family in 1951. The court found that:

"Soon after the purchase of 'Cracraft' [the lands in question] and the 'Sterling Place,' the Smiths, at the suggestion and on the recommendation of the financial institutions, who were to finance the farming operations

for them on the farms, organized and formed a partnership known as E. F. Smith & Sons. They term the partnership an 'operating partnership'. The general purpose of the firm was to engage in farming operations on the farms, including direct cultivation and renting to others. The operation was later expanded to engage in the general farming business in the area. The partnership agreement was oral and has never been reduced to writing. Mr. W. R. Smith is the predominent member of both the partnership and the Smiths. He serves as the managing partner with general powers, with Mr. Charles Smith in charge of production. The other members of the partnership did not, nor at the present time, appear to have any direct participation or responsibility in the operation.

8. The association of Smith and Sons with the land: Smith and Sons assumed possession of the land after the formation of the partnership and have been in exclusive possession ever since. The firm has no lease, either written or verbal with the Smiths. It does not pay any rental, as such, for the use of the land, to the record owners. The firm cultivates a portion of the land and rents the remainder to others. It collects the income and rentals from the land. The firm mortgages the crops and rentals for operating purposes. It pays the taxes, insurance and upkeep on the property. The firm pays the installments on the mortgage loan. The U. S. Department of Agriculture contract is in the firm name.

The firm, by and through its managing partner, Mr. W. R. Smith, has acted as agent for, or under contract with, the Smiths in the sale of the 'Sterling Place' to Mr. Rankin, in a similar capacity in another land conveyance and as trustee for another purchase.''

It appears undisputed that appellant W. R. Smith was authorized by the members of the partnership to negotiate for the sale of the lands in question to the appellee. However, it is claimed that his authorization was based upon different terms of sale, mainly, a price of $225,000.00 instead of $200,000.00. Therefore, it is

urged that the contract is unenforceable since it was not signed nor ratified by other members of the family.

In the case of *May* v. *Ewan*, 169 Ark. 512, 275 S. W. 754, we held that a partnership is bound by the acts of a partner when he acts within the scope or *apparent* scope of his authority. There we quoted with approval:

"* * * In order to determine the apparent scope of the authority of a partner, recourse may frequently be had to past transactions indicating a custom or course of dealing peculiar to the firm in question."

See, also, Ark. Stats. Ann. § 65-108—110 (Repl. 1957). In the case at bar it was customary in past transactions, as in the present one, for the partnership to rely upon the co-partner, W. R. Smith, to transact the business affairs of the firm. We agree with the chancellor that appellant W. R. Smith was acting within the apparent scope of his authority as a partner when he signed the contract and that it is binding and enforceable upon the partnership.

Appellants also urge that the contract is invalid because the bank as escrow agent did not sign the contract and the appellee did not comply with the escrow provisions of the contract. A copy of the contract was delivered to the Eudora Bank where appellee's certificate of deposit in the amount of $15,000.00 was held with the knowledge of the escrow provisions. The contract provided for the bank to hold $15,000.00 in escrow to guarantee appellee's performance of the contract. We agree with the chancellor that there was substantial compliance with the escrow provisions of the contract.

Appellants next urge that a suit for specific performance, or in the alternative, damages, is an inconsistent remedy and, therefore, in seeking specific performance the alternative claim "for damages is a nullity". We find no merit in this contention. The contract specifically provided for liquidated damages in the sum of $15,000.00 in the event of breach by either party. Furthermore, in the very recent case of *Loveless* v. *Diehl,*

236 Ark. 129, 364 S. W. 2d 317, we recognized that even though no such specific provision for stipulated damages appears, it is within the discretion of the chancellor to award damages where specific performance of the contract is denied. See, also, 81 C.J.S. Specific Performance § 163, pp. 778 and 782.

The appellants also urge for reversal that the contract lacked mutuality and, therefore, was not binding. Appellants contend that appellee was never bound by the contract since by its terms appellee had the right to rescind upon appellants' failure to meet the express warranty that a 225 acre allotment went with the land. It later developed the allotment actually amounted to 178.3 acres, or 46.7 acres less than the amount warranted in the instrument itself. Therefore, appellants argue that the contract lacked mutuality since it was optional with the appellee as to whether or not he would require performance of the contract or invoke the provision for stipulated damages. The appellee had the right to accept such reduced acreage which he offered to do. We think such an option did not render the contract lacking in mutuality. *Bonner* v. *Little,* 38 Ark. 397; *Braley* v. *Arkhola Sand & Gravel Co.,* 203 Ark. 894, 159 S. W. 2d 449; 92 C.J.S. Vendor & Purchaser § 216, p. 78.

The contract also provided that if appellants could not transfer the rice allotment to their other lands they could not be required to convey the lands. When the contract was entered into, the appellant, W. R. Smith, maintained that the rice allotment could be transferred to other lands. It developed that the rice allotment could not be assigned or otherwise transferred to any other farm due to existing federal regulations. The fact that the rice allotment could not as a matter of law be transferred was not the fault of the appellee and should not affect the validity of this contract. Appropriate to the case at bar, we find in 17A C.J.S. Contracts § 463 (1) p. 611, the following:

"Where a party enters into a contract knowing that permission of government officers will be required dur-

ing the course of performance, the fact that such permission is not forthcoming when required does not constitute an excuse for nonperformance."

Appellants' final contention is that the chancellor's award of $11,512.73 to the appellee as special or actual damages is not sustained by the pleadings or the proof. The appellee, on cross-appeal, contends that he is also entitled to stipulated damages. The appellee sued for $15,000.00 stipulated damages as recited in the contract and also sought the further sum of $8,981.23 for permanent improvements he had made on the "Cracraft" farm as a lessee in anticipation of acquiring title. The trial court denied liquidated damages and instead awarded appellee $11,512.73 actual damages. The chancellor refused to apply the contract provision for $15,000.00 stipulated damages since he construed such as a penalty. After hearing considerable testimony on the subject of special damages, the court deemed it necessary to hold an additional hearing in an effort to determine with more exactness appellee's expenses or the damages he had incurred as lessee in the draining, improving, and ridding the land of weeds and grasses. After the latter hearing, the chancellor stated that:

"* * * if it were not for the element of surprise, which probably both parties could claim, the court would reconsider its finding on stipulated damages, vacate same and find that such damages stipulated in the contract should prevail over actual damages."

Thus, it is apparent that the ascertainment of special or actual damages was a vexing problem, difficult and fraught with uncertainty. The stipulated damage provision for a breach of the contract on the part of appellants reads in pertinent part:

"It is hereby expressly agreed between the parties hereto that in the event this contract shall fail due to a material breach on the part of Seller because of inability to convey good title * * * or, inability to convey * * * minimum cotton acreage allotment, * * * or, should Seller elect to refuse to convey because of inability to transfer

the rice acreage from this land to other lands owned by Seller, then Purchaser's damages are agreed hereby to be the sum of Fifteen Thousand and No/100 Dollars ($15,000.00), plus the costs, apportioned to either or both of the above improvements, whichever might have been located on the premises by Purchaser, and such damages, including the cost of the above mentioned improvements, shall be deemed liquidated * * *."

The "above mentioned improvements" referred to the right of appellee to move his house and also build an equipment shed upon the lands, neither of which was ever done.

In *Hall* v. *Weeks,* 214 Ark. 703, 217 S. W. 2d 828, we said:

"The general rule governing liquidated damages is that an agreement in advance of breach will be enforced if the sum named is a reasonable forecast of just compensation for the injury, if the harm is difficult or incapable of accurate estimation. Restatement of Contracts, Chapter 12, § 339."

See, also, *Foran* v. *Wisconsin & Arkansas Lbr. Co.,* 156 Ark. 346, 246 S. W. 848; *Robbins* v. *Plant,* 174 Ark. 639, 297 S. W. 1027; *Westbay* v. *Terry,* 83 Ark. 144, 103 S. W. 160; 25 C.J.S. Damages § 116, p. 702.

In the case at bar the stipulated damages of $15,000.00 amount to only 7½% of the purchase price in the contract, while in *Hall* v. *Weeks, supra,* it amounted to 10%. We do not construe this amount as a penalty, even though it appears that the provision for stipulated damages resulted to some extent from a "race horse contest" as an outgrowth of appellants' insistence and the appellee's dubiousness that the rice allotment could be moved from the "Cracraft" farm to other lands owned by appellants. Instead of a penalty, we find there is a reasonable relation between the amount of the stipulated damages and the agreed purchase price of $200,000.00. Further, the chancellor found that the value of the rice allotment which could not be transferred had

a minimum value of $18,000.00 which, of course, is in excess of the $15,000.00 stipulated damages. We do not consider this amount of stipulated damages as being extravagant or disproportionate to the losses suffered by the appellee in the case at bar. Also, the appellee was equally liable for $15,000.00 stipulated damages for nonperformance on his part.

Therefore, we think the stipulated damages provision in the contract should prevail over any assessment of actual damages. Accordingly, the decree is affirmed on direct appeal and modified and remanded on cross-appeal with directions for entry of a decree disallowing special damages and awarding the stipulated damages.

5-3453 386 S. W. 2d 488

Opinion delivered February 8, 1965.

Mann & McCulloch, Montedonico, Boone & Gilliland, Heiskell & Loch, Memphis, Tenn., for appellant.

W. H. Dillahunty, Hale & Fogleman, E. J. Butler, for appellee.

CARLETON HARRIS, Chief Justice. On July 7, 1962, Roy Lilly was killed while working for K. S. Reece Construction Company. His death occurred while Lilly and others were endeavoring to repair a broken cable on certain earth-moving equipment, *viz,* a Caterpillar machine (Cat 619C). Lilly's widow, individually, and as administratrix of the estate, instituted suit in the St. Francis Circuit Court against the J. A. Riggs Tractor Company, appellee herein, an authorized dealer for Caterpillar Tractor Company, alleging that appellee company had entered into negotiations with Reece Construction Company for the sale of the Cat 619C; that the machine was delivered to the job site, and put into use by the Reece Company, Lilly being one of the employees desig-

nated by Reece to operate the equipment; that Lilly was permitted "to begin the operation of the equipment without warning as to its dangerous propensities. No warning was given of the fact that it would be highly dangerous to get close to, or to climb upon the equipment, if the main cable on the equipment should break and become snarled. No instructions or warnings were given to Plaintiff's Deceased as to the proper and safe manner for unsnarling said cable in event it should break and become snarled. The failing to give said instructions and warnings constitutes negligence on the part of the agents and employees of Defendant, who were at the time acting within the scope of their employment for Defendant." It was further alleged that Lilly's death was a proximate result of the aforesaid negligence, and total damages were sought in the amount of $203,201.48. The Riggs Tractor Company answered, denying negligence, and further asserting that Lilly's death was due to his own negligence, and that of his fellow workmen. The case proceeded to trial, and at the conclusion of appellant's evidence, appellee moved for an instructed verdict. This motion was granted, and judgment was entered in accordance therewith. From such judgment comes this appeal.

Only one point is raised for reversal, it being urged that the court erred in directing a verdict for appellee at the close of appellant's case. It might also be stated here that only one act of negligence is alleged, *viz,* the allegation heretofore set out verbatim from appellant's complaint. Accordingly, in determining the litigation, there is really only one question, which we are called upon to answer. Did the failure of appellee to give instructions or warnings relative to the proper and safe manner for unsnarling a cable (in event it should break and become snarled) constitute actionable negligence? Of course, if the answer to this question is "Yes," it is also necessary that appellant establish that such negligence as the proximate cause of Lilly's death. However, under our finding, as hereinafter set out, we do not reach that question.

At the outset, it might be well to describe the function and manner of operation of the Cat 619C, as same appears from the evidence offered.[1] The Caterpillar machine, here under discussion, is a large earth-moving machine, weighing approximately one hundred thousand pounds, and capable of moving eighteen yards of earth at one load. In the process of loading, the pan part of the machine is lowered, and with the assistance of a tractor pushing at the rear of the machine, the dirt is scraped up by the pan, and is thus loaded. In unloading, an ejector is pulled forward by a metal cable, thereby pushing the dirt out of the machine. The ejector is returned to its original position through the use of large springs. The fatal injury to Lilly occurred under the following circumstances. According to the testimony of K. S. Reece, Lilly was operating the machine on July 7, 1962. A cable on the Caterpillar was broken during operation, and Lilly drove the scraper to the shop. Reece went to the shop, and Joe Gordon, a worker there, was also present. Lilly and Gordon had pulled off all of the cable except a piece about fifteen feet long,[2] which was hung in the machine. The Caterpillar was backed up to a tree, and the cable was hooked to the tree. Reece, Lilly, and an employee of Gulf Oil Company, who had gone to the shop to deliver fuel, then endeavored to pull the ejector back, but were unable to do so. Reece testified that prior to making any effort to free the cable, he (Reece) told Lilly twice that they should get a serviceman from the Riggs Tractor Company to "lace" the cable, but that Lilly stated, "I can lace it myself, but we have got to pull this ejector back."

After failing to pull the cable loose, it was decided to cut it. According to Joe Gordon, Lilly said:

"Unconnect that cable and we will study some way to get that piece of cable out back there."

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[1] Pictures of a Caterpillar are in the record, but none of the parts are marked or labeled, making it somewhat difficult to visualize or properly describe the operation of the machine. Some witnesses also refer to the Caterpillar as a scraper.

[2] According to Reece, it takes about two hundred and eight-five feet of cable for the machine.

Gordon continued, "About then we got to twisting it and we got a crow bar and tried to drive it out and we couldn't get it to come loose and me and the fuel man got to twisting on it." Again, referring to Lilly, "Then he said, 'Go to the shop and get a cold chisel and some pliars and hammer and we will cut it,' and I hit it a couple or three licks and it come back and it throwed me ten or twelve feet."

According to Reece, Gordon was standing on the "slide bar" of the machine; Reece was standing behind the right rear tire; the Gulf employee was apparently also standing behind the right rear tire (this is not clear from the record), and Lilly was standing about three feet from him, toward the front of the machine; all were within a five-foot circle, and could have touched each other. When the last strand was cut, the ejector sharply returned to its proper position, striking Lilly, who had evidently moved onto the machine. The witnesses could see his legs protruding from between the ejector blade and the frame of the scraper — as stated by Joe Gordon, "Right down in the pan, the front of the pan comes back to the other, that is where he was, down in there."

Appellant asserts that the Caterpillar was inherently dangerous, but we do not agree. Black's Law Dictionary, Fourth Edition, Page 921, defines "inherently dangerous" as "danger inhering in instrumentality or condition itself at all times, so as to require special precautions to prevent injury, not danger arising from mere casual or collateral negligence of others with respect thereto under particular circumstances." Of course, no citation of authority is necessary to support the statement that the mere fact that one is injured by a machine, or instrument, does not mean that the machine or instrument is inherently dangerous. It has been said that a product is inherently dangerous where the danger of injury stems from the nature of the product itself. An automobile, driven at a high rate of speed—or without proper brakes—or, if at night, without headlights—or if operated by one who is intoxicated—can certainly become

a highly dangerous instrument, capable of causing death and crippling injuries. Yet, there is general agreement among the jurisdictions that motor vehicles are not inherently dangerous (Annot. 74 A.L.R. 2d 1111). Numerous articles or substances, which have been held not to be inherently dangerous within the meaning of the rule, include an electric body-vibrating machine, an electric stove, a chain, a haybaler, a flat iron, a gas stove, a porch swing, a sofa, a refrigerator, and others too numerous to mention. See *Defore* v. *Bourjois, Inc.,* 105 So. 2d 846. Still, all of the articles or instruments named can, by particular use, cause death or severe injury. In fact, as this court stated in *Reynolds* v. *Manley,* 223 Ark. 314, 265 S. W. 2d 714, "It is possible to use most anything in a way that will make it dangerous." Of course, certain substances or articles are inherently dangerous, such as dynamite, nitroglycerin or other explosives, poisons, and many others. In the case before us, we are definitely of the opinion that the Caterpillar itself was not inherently dangerous; it was *the manner of repairing* that created the danger, *i.e.,* it was the fact that the cable was deliberately cut, causing the spring to pull the ejector sharply back, that caused Lilly's death, rather than the fact that the Caterpillar was equipped with a cable and spring.

As previously stated, appellant's sole contention of negligence on the part of appellee company was that the latter did not sufficiently explain proper operation of the machine; actually, this simply means that appellee did not explain that if a cable should break and become snarled, it should not be cut, for this act would cause the ejector to spring back to its original position.

We have concluded that there was insufficient evidence on the issue of negligence to make a jury question. It has already been said that the machine was not inherently dangerous, and there is no evidence that death or injury had previously occurred to any other person because of the "snarling" of the cable on the caterpillar, so as to put appellee on notice of a possible hazard; in

fact, there is no evidence that a cable had ever become "snarled."

James Reece, son of K. S. Reece, was Safety Personnel Officer on this particular job, and he testified that safety meetings were held once a week. Reece stated that no one from the Riggs Company told him how to operate the machine (and apparently he did not ask), but that he did not feel that he needed anyone to teach him how to operate it. Appellant points out that previous to obtaining the Caterpillar, the Reece Company had used machines with hydraulic equipment instead of cable equipment, and this is the principal reason that appellant asserts a duty on the part of appellee to explicate the operation. Reece explained as follows:

"On both machines, insofar as the cable and hydraulic are concerned, they perform three actions, one is to raise and lower the scraper, one is to pull the ejector forward to push the dirt out, there is an apron in front that holds the dirt in, it raises and lowers the apron. On this particular piece of equipment all three of those were done by cable. On the Euclid equipment it is done by hydraulic cylinders. * * * They [hydraulic cylinders] have three control levers at your right hand that are connected with the hydraulic hose with the cylinders, it has a place for hydraulic oil that goes from the valve on the front to the cylinders."

Reece testified that he, though never hauling a load of dirt with the 619C, drove the machine for a while, experimenting with it. He explained the procedure of bringing the ejector forward and returning it to its original position. He stated that in handling the lever, which controlled the ejector, a sudden move could not be made, but that rather it was a "feeling process." "I turned it loose too quick one time, and it went back and almost knocked the backend out." It appears, therefore, that, though Reece received no instructions from Riggs, he was familiar with the difference in operating cable equipment and hydraulic epuipment.

K. S. Reece was also familiar with the difference in operating by cable and operating hydraulically, and he testified that Lilly that he had operated this type of machinery.[3] Reece said that the day before Lilly's death, he (Reece) had called Lilly's attention to the manner in which the ejector returned when released, "Yes, sir, I told Roy, I said, 'Let that thing back a little easier, its going to knock the whole backend out.' "

Very pertinent to this litigation was the testimony of the elder Reece, relative to what happened only a short time before Lilly's death. The four men (Reece, Lilly, Gordon and the Gulf Oil man) were discussing how to pull the cable free, and Lilly (according to Reece) said, "I have never saw a cable break like this before." Reece replied, "I don't know anything about this machine, let's drive it out here and let's call a serviceman from Riggs to lace it." Lilly then stated, "I can lace it myself but we have got to pull this ejector back." Reece, as earlier mentioned, testified that he suggested twice that a serviceman from the tractor company be called, but Lilly reiterated that he could do the job himself. It thus appears that Lilly voluntarily insisted on doing the repair work, even though Reece twice suggested that they should call a serviceman from the Riggs Company.

There was no error in directing a verdict for appellee.

Affirmed.

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[3] The court excluded this testimony.

DOVE *v.* ARK. NATIONAL LIFE INS. CO.

5-3455 386 S. W. 2d 495

Opinion delivered February 8, 1965.

Martin, Dodds & Kidd, By: *Lowber Hendricks, Jr.,* for appellant.

McMillen, Teague & Bramhall, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves an action brought by appellant against appellee insurance company on a binder receipt issued when application was made for a policy.

On December 14, 1962, Jackie Ray John Holt, son of appellant, Mrs. Maxine Dove, made application to appellee insurance company for a policy of insurance on his life and naming the appellant as beneficiary. The first monthly premium of said policy, if issued, would have been $3.80; and applicant paid this amount to the soliciting agent. The germane portion of the application reads:

". . . if full payment of the first premium is made in cash with this aplication, in exchange for the company's printed receipt signed by an authorized agent of the company, then in that event any insurance granted hereunder *shall take effect as of the date of the approval of this application by the Company's authorized officers at its Home Office in Little Rock.*" (Emphasis supplied.)

The germane portion of the receipt reads:

"If full payment of the first premium is made in cash with the application and *if said application is approved* by authorized officers of Arkansas National Life Insurance Company, at its Home Office in Little Rock, Arkansas, then such insurance subject to the terms and

conditions of the policy issued, *shall take effect as of the date of such approval.*" (Emphasis supplied.)

On December 16, 1962, two days after the said application and receipt, Jackie Ray John Holt was killed in a traffic mishap. Appellant refused the tender of the $3.80 by appellee and filed this action for the face amount of the policy, plus penalty and attorneys' fees, claiming that the $3.80, along with the binder receipt and the application made an existing insurance contract. Denial was made by the appellee and trial in the Circuit Court without a jury[1] resulted in a finding and judgment for the appellee, from which appellant brings this appeal and urges two points:

"1. The contract prepared by the appellee is ambiguous and should be construed against the party preparing it.

"II. The receipt given to Jackie Ray John Holt by the appellee's agent in connection with the application for in appellee company constituted a binding contract of insurance which became effective at the time the premium was accepted and the receipt given."

I.

As to appellant's first point, little need be said. The law is well settled that any ambiguity in a contract is to be construed against the party preparing it. We have applied this rule many times in insurance contracts. *Ross* v. *Equitable Life Assurance Society,* 237 Ark. 643, 375 S. W. 2d 222; *Union Life Ins. Co.* v. *Rhinehart,* 229 Ark. 388, 315 S. W. 2d 920. But, in the case at bar we find no ambiguity in the application or in the binder receipt issued by the appellee. This will be discussed in the second point. It is well here to quote again what was quoted in *National Life & Accident Ins. Co.* v. *Baker,* 234 Ark. 670, 354 S. W. 2d 1:

[1] It is well to remember that in such a trial the findings of the Circuit Court on any and all disputed factual issues have the force and effect of a jury verdict. *Gulledge* v. *Howard,* 23 Ark. 61; and *Mattar* v. *Moeller,* 230 Ark. 699, 326 S.W. 2d 808.

'But unless such an ambiguity or uncertainty exists there is no more room for construction of an insurance contract, legally and fairly entered into by the parties, than there is for construction of any other contract. "The court cannot make contracts for the patries, and it is its duty to enforce them as the parties have made them." '

II.

For her second point the appellant insists that the receipt given to the applicant by the agent of the insurance company constituted *a binding contract of insurance which became effective at the time the premium was accepted and the receipt given;* in other words, the appellant insists that the binder receipt *created temporary insurance* from the time of the application for the policy was approved or disapproved.

Appellant cites and strongly relies on our case of *Union Life Ins. Co.* v. *Rhinehart,* 229 Ark. 388, 315 S. W. 2d 920. But the binder receipt issued in that case and the facts therein differ materially from the binder receipt and the facts in this case. The language of the binder receipt and the application are set out in the opinion in the Rhinehart case; and from such language it is clear that the binder receipt was temporary insurance. Here, the application and the binder receipt both clearly stated that the policy would not be in force until the application was approved. The application said if a policy was issued it " . . . shall take effect as of the date of the approval of this application by the company's authorized officers . . . "; and the binder receipt likewise specified: ". . . if said application is approved by the authorized officers . . . then such insurance . . . shall take effect as of the date of such approval." The quoted language is too clear to admit of any doubt. There was no insurance in effect until the application was approved; and the testimony herein clearly established that the application was never at any time approved by the authorized officers of the appellee insurance company.[2]

[2] The finding of the Trial Court was against the appellant on any dispute as to the facts on this issue.

The case at bar is governed by our holding in *Cooksey* v. *Mutual Life Ins. Co.*, 73 Ark. 117, 83 S. W. 317, wherein we said:

". . . the clause in the application and the receipt given by the solicitor, which are to be read together, stipulate expressly that the insurance shall become effective only when the 'application shall be approved and the policy duly signed by the secretary at the head office of the company and issued.' It constituted no agreement at all for preliminary or temporary insurance."

The holding in the Cooksey case was reaffirmed in *National Life & Accident Ins. Co.* v. *Baker*, 234 Ark. 670, 354 S. W. 2d 1. In the present case both sides refer to the annotation in 2 A.L.R. 2d 943, styled: "Temporary life, accident, or health insurance pending approval of application or issuance of policy." Of course, by suitable language there may be temporary insurance pending approvel of the application or issuance of the policy; but suitable language is necessary to provide for such temporary insurance and there is no such language in the case at bar. We call attention to the statement in Section 21 of the foregoing annotation, as found on page 994 and 995 of 8 A.L.R. 2d:

"Where a binding receipt is issued to the applicant making the obligation of the company conditional upon 'acceptance' or 'approval' by the company and as a furthe condition requires issuance, or even delivery, of the policy, the company is not bound before the happening of these events, but is bound if it is found that the policy was issued or delivered. *Kennedy* v. *Mutual Ben. L. Ins. Co.*, 205 F. 677; *Marks* v. *Hope Mut. L. Ins. Co.*, 117 Mass. 528; *Grier* v. *Mutual L. Ins. Co.*, 44 S.E. 28; *Long* v. *New York L. Ins. Co.*, 180 P. 479."

To the foregoing cases there may be added the case of *Reese* v. *American Life Ins. Co.*, 175 F. 2d 793.

The present case is not one wherein there was to be insurance pending approval of the application: rather, this is a case wherein both the application and the re-

ceipt clearly stated that there was no insurance *until approval of the application.* The facts here clearly show that there was no approval, since the death of the applicant occurred before any such action could reasonably have been taken. The Trial Court was correct in so holding and the judgment is affirmed.

FRENCH *v.* CASTLEBERRY.

5-3461 386 S. W. 2d 482

Opinion delivered February 8, 1965.

D. A. Clarke, for appellant.

Robert B. Gibson, for appellee.

GEORGE ROSE SMITH, J., This is a suit by the appellant, James H. French, for specific performance of an oral contract by which he was to buy two farms, totaling

554 acres, from the appellees, B. C. Castleberry and his wife. French relies upon part performance to take the contract out of the statute of frauds. Our rule is that both the making of the oral contract and its performance must be proved by clear and convincing evidence. *Hudspeth* v. *Thomas,* 214 Ark. 347, 216 S. W. 2d 389. The only question before us is whether the chancellor was right in holding that the proof did not sufficiently establish part performance of the agreement.

The plaintiff and his two brothers owned various farm lands individually, but they cultivated property as a partnership, French Brothers. The partnership, as a tenant, had operated the two Castleberry farms for some years before the oral contract in question was made. The plaintiff testified, and the chancellor found, that on September 10, 1957, the Castleberrys orally agreed to sell the farms, together with certain farming equipment, to the plaintiff for $86,000. Pending completion of the sale the partnership continued to rent the lands from year to year. When the abstracts of title were brought down to date the examining attorney discovered a defect of title that had to be corrected by litigation. On July 3, 1959, while the curative suit (*Fee* v. *Leatherwood,* 232 Ark. 817, 340 S. W. 2d 397) was on appeal to this court, Castleberry notified James French by mail that he was canceling any oral contract that French might be relying upon concerning the purchase of the farms. The present suit was filed almost four years later, giving rise to a plea of limitations that we need not consider.

To support his claim of part performance the plaintiff attempted to prove that he took possession of the property, made substantial improvements, and paid part of the purchase price. We agree with the chancellor's conclusion that the proof lacks the clarity and cogency that the law demands.

First, possession: When the parol agreement was made French Brothers had possession of all the 554 acres except for a parcel of 13 acres that the Castleberrys were occupying as their home and curtilage. A month or two

later the Castleberrys went to Louisiana. The plaintiff and his family then moved into the manor house on the 13-acre tract, where they were still living at the time of the trial.

These facts do not establish such possession as is needed to satisfy the statute of frauds. James French's occupancy of only 13 of the 554 acres acres manifestly did not take the case out of the statute. *Ozan Lbr. Co.* v. *Price,* 219 Ark. 709, 244 S.W. 2d 486. The partnership's possession of the remaining land cannot supply the deficiency, because possession, to be sufficient, must be referable to the oral contract of purchase. *Rolfe* v. *Johnson,* 217 Ark. 14, 228 S. W. 2d 482. Here it is undisputed that both before and after the oral contract was made the partnership operated the farms as the Castleberrys' tenant from year to year. That posession did not owe its existence to James French's purchase agreement. In fact, the Castleberrys were really in possession, through their tenant.

Secondly, improvements: In the interval between the making of the oral contract and its cancellation French spread dirt from several spoil banks, dug a number of drainage ditches, replaced certain fences, picked up chunks, pulled stumps, and built a bridge on the home place at an estimated cost of $51. It is plain enough, as the chancellor found, that nearly all this work was the type of routine maintenance to be expected of a tenant. To satisfy the statute the improvements must be so valuable and substantial that it would be inequitable to refuse specific performance. *Blanton* v. *First Nat. Bank of Forerst City,* 136 Ark. 441, 206 S. W. 745. That test has not been met in the case at bar.

Finally, part payment: It will be remembered that the oral contract of sale included certain farming equipment. In 1958 the partnership, in its accounting as a tenant, gave the Castleberrys a $2,000 credit for a tractor and equipment. James French testified that these were the chattels included in the sale and that he later reimbursed his brothers for their share of this outlay. Hence,

he asserts, the net effect of the two transactions was that he himself actually made a $2,000 payment upon the purchase price.

There are two ready answers to this contention. In the first place, the Castleberrys accepted the credit as an item in their tenant's account, not a part payment by James French. We are not willing to say that a purchaser can create a part payment by reimbursing someone else for a remittance that was not originally considered by the sellers to have anything to do with contract of sale. In the second place, payment of the purchase price alone is not sufficient to satisfy the statute. *Rolfe* v. *Johnson, supra.* Yet this payment, if made, now stands alone, for we have already pointed out that neither the asserted possession nor the asserted improvements were sufficient to take the case out of the statute.

Affirmed.

STERLING STORES, INC. *v.* MARTIN.

5-3448 386 S. W. 2d 711

Opinion delivered February 8, 1965.

[Rehearing denied March 8, 1965.]

[redacted]

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

Milton G. Robinson, for appellee.

PAUL WARD, Associate Justice. This litigation grows out of an injury resulting from a "swinging door" accident.

Appellant (Sterling Stores Company, Inc.) conducts a variety store in Stuttgart in a building facing Main Street. Prospective patrons enter and exit the building through two entrances on Main Street set back (into the building) three or four steps from the building line. At each entrance there are two swinging doors with double action hinges.

In her complaint appellee (Pattie J. Martin) alleged that after she had passed through one particular door (and was inside the building) she was suddenly struck by said door (on the back swing) with great force and violence; and, that the bottom of the door hit her across the top of the foot or instep while her foot was resting on the floor, resulting in severe injuries. Appellee also alleged specific instances of negligence, on the part of appellant, including the following: the said door was very heavy and had a metal strip across the bottom; that the bottom of the door was one and one-half inches from the floor of the building; that the springs on the door were adjusted to make it swing harder than was necessary; and, that appellant knew of these conditions of the door. Appellant denied all material allegations, and argued that the accident was unavoidable, and that all injuries were caused by appellee's negligence and carelessness.

The case was presented to a jury on the pleadings, depositions and oral testimony, and the trial resulted in a verdict in favor of appellee in the mount of $8,640. Appellant now prosecutes this appeal seeking a reversal on the ground that the trial court erred: *One,* in refusing to

grant its motion for a directed verdict; *Two,* in refusing to declare a mistrial; and, *Three,* in giving certain instructions. Appellant also contends the verdict is excessive.

One. Appellant did not demur to the complaint, but did offer the following instruction, which was refused by the court:

"At the close of the entire case, the Court instructs the jury that under the law and the evidence the plaintiff cannot recover from the defendant Sterling Stores and your verdict will be for the defendant."

Although the meaning of the above instruction is not entirely clear, we will treat it as a challenge to the sufficiency of the evidence to support the jury verdict. The burden of appellant's contention in this connection appears to be that there is no evidence to show any negligence on its part—calling attention to the fact that there is nothing in the testimony to show the door was defective, or that it differed in any way from the normal door used under the same conditions. A summary of the testimony offered on behalf of Mrs. Martin refutes, we think, the position taken by appellant on this point.

Appellee testified in substance: The door I went through (also the other doors) will swing open toward the inside and the outside; the door was open on the inside when I went through it—it was pushed back all the way as I have seen it on numerous occasions before; as I put my right foot in I saw the door coming and I threw up my hands, but it was coming with such force I couldn't hold it back; the door struck my foot — just rolled up on my foot, i.e. my foot was caught under the door, and Mrs. Cash had to help me get it free. I have been trading at that store for seventeen years. Appellee's husband testified: I inspected the door at the request of my attorney; it has three double-spring hinges which can be adjusted to make it swing harder or easier, and weighs about 75 or 80 pounds; I examined the hinges and they didn't appear to have been adjusted lately; the

door did not have a register to slow it down, but had a metal strip on the bottom. Other testimony showed the bottom of the door was about one and one-half inches above the floor. A Mrs. Cash testified she was in the store when the accident happened, saw the door when it swung toward appellee and hit her, and called a doctor. Ola Mae White who has worked for appellant several years in the Stuttgart store testified: I am familiar with the door in question; there is no way to prop the door back on the inside because of a popcorn machine. Mrs. John Raab, a witness for appellant, testified on cross-examination she was familiar with the door, that it swung too hard and that "it would hit you like a ton of brick".

Viewing the above evidence in the light most favorable to appellee, we cannot say there is no substantial evidence from which the jury could have found appellant guilty of negligence in failing to adjust the hinges of the door to make it swing easier and in allowing the bottom of the door to swing one and one-half inches above the floor. It is urged that "liability of the owner or tenant of a building for injury resulting from the defective or dangerous condition of a swinging door must be predicated upon knowledge of such condition upon the part of such owner or tenant". This matter will be referred to under the next point. We feel it would serve no useful purpose to review the many authorities cited in appellant's brief on this point, because none of them announces any legal bar to recovery in a case of this nature.

Two. (a) In the opening statement appellees' counsel made this statement:

"Now I think the proof in this case will show that the doors that are now located at the Sterling Store is not the same door that was involved in this accident."

Appellant objected to the statement and asked for a mistrial. In chambers the trial judge told appellees' attorney, for the record, he would only be allowed to introduce evidence with reference to the door in place at the time of the accident, and there was no further objection or

request by appellant on that point. In fact, a fair inference from appellant's reply is that he was satisfied with the court's ruling. It would be unfair now, we think, to find reversible error was committed under those circumstances.

(b) Under this same point appellant raises another question that has given us considerable concern. C. M. Baldenweck (manager of the store at Stuttgart) was called as a witness by appellant. On cross-examination the following occurred:

"By Mr. Robinson:

"Q. Do you know that other people have been hurt with that door?

"Mr. Storey: If the Court please, Mr. Robinson knows that is an improper question and I ask the Court to have it stricken from the record and ask for a mistrial at this time.

"The Court: I think it can go to the jury for what it is worth.

"Mr. Storey: The Court is going to permit a question like that?

"The Court: Yes, sir I think it is proper.

"Mr. Storey: I would like to object strongly to that question and renew my motion for a mistrial.

"The Court: Overruled, save your exceptions.

"Mr. Storey: Note the defendant's exceptions.

"Mr. Robinson:

"'Q. Do you know that other people have been hurt on that door?

"A. Yes, sir. Not that particular door though.

"Q. The others are *just like* it, are they not?

"A. Yes, sir." (Emphasis added.)

Appellant ably and vigorously argues that the trial court committed reversible error in refusing to strike or disallow the testimony previously set out, but we are unable to agree. As previously pointed out it was important for appellees to show appellant knew or should have known the dangerous condition of the door. The general rule which we think is applicable here is well stated, and sustained by many cited authorities, in 65 C.J.S. NEGLIGENCE § 234 (6), in this language:

"Where knowledge or notice of a danger or defect is in issue, evidence of the occurrence or near occurrence of other accidents or injuries at a particular place or from the doing of a particular act or the employment of a particular method or appliance on occasions prior to the one in question is admissible to show that the person charged knew or should have known of the danger therein or thereat . . ."

In the early case of *Burdette Cooperage Co.* v. *Bunting,* 113 Ark. 45 (at pages 52-53), 167 S.W. 77 (at pages 79-80), a witness was asked if it was not generally known that the derrick (on which appellee was killed) was dangerous. The answer was "Yes". There was a general objection which was overruled by the trial court. This testimony was approved by us "as tending to establish notice on the employer's part of the defective character of the machinery. 'It is not competent to prove the ultimate fact that the instrumentality was actually an unsuitable one.' " In the case of *Haynes Drilling Corporation* v. *Smith,* 200 Ark. 1098, 143 S. W. 2d 27, where appellee was injured while working on a drilling rig owned by appellant, there appears the following statement.

"Mr. J. E. Senter testified that he had been informed that Wardlow, in charge of the night shift, had had trouble with the slips. There was no error in permitting this testimony. It shows that Senter, who was the foreman, had notice of some defect or some difficulty with the slips, and there is no evidence that appellee knew anything about this."

It is noted that the testimony herein objected to by appellant was elicited by appellees on cross-examination of the manager of appellant's store and that in a sense the testimony was volunteered. This fact, we think, tends to allow appellant to seek a reversal based on its own testimony. At any rate the objection by appellant was general and not specific and therefore not sufficient where the testimony was admissible for any purpose. See *Lisko* v. *Uhren,* 130 Ark. 111, 196 S. W. 816. In an article in 15 Ark. L. Rev. 69 on the subject of "Objections to Evidence" we find the rule concisely stated at page 71 in these words: "If a particular piece of evidence is admissible for some purpose, the trial court does not err in admitting it over a general objection." (Cases cited.)

Three. We do not think the trial court erred in giving appellees' requested Instruction No. 1 which reads:

"Plaintiffs allege that the defendant was negligent in permitting to exist on its premises as defective, unsafe or dangerous condition and that injuries to Pattie Martin resulted therefrom. In that regard, you are instructed that the owner, occupant or person in charge of premises owes to invitees or business visitors thereon the duty of exercising reasonable care to keep the premises in a reasonably safe and suitable condition."

The contention by appellant that there is no evidence to justify or support the instruction has been answered already. Also, it is pointed out that appellant offered Instructions No. 5 and No. 8 which were similar in content to the one challenged.

Four. We are unable to say the judgment ($8,640) is excessive when we consider the evidence most favorable to appellee. The record contains testimony which, in substance, shows: she suffered great pain at the time of the injury and was taken to the clinic; she returned to the clinic the next day, her foot was put in a cast some nine days later—she stayed in the hospital five or six days; the pain continued after the cast was removed; she used crutches for a week and after that just hobbled along;

she is still not able to walk normally—the injured leg is one inch smaller than the other one—her ankle is stiff; she cannot wear high heels, and will never be able to dance again (as was the custom of her and her husband); the injury also aggravated a mild form of epilepsy which she suffered before the injury. The medical testimony shows she still suffers from pain and that she will so suffer in the future; that she will have medical expenses in the future, and she has a 15% or 20% permanent disability to the injured foot. We have said many times there is no definite or satisfactory rule to measure compensation for pain and suffering, that the amount of damages must depend upon the circumstances of each particular case, and much must be left to the discretion of the jury. *Chambliss* v. *Brinton,* 229 Ark. 526, 317 S. W. 2d 143; *Missouri Pacific R.R.* v. *Hendrix,* 169 Ark. 825, 277 S.W. 337; *Fletcher* v. *Johnson,* 231 Ark. 132, 328 S.W. 2d 373.

Affirmed.

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

SHORT *v.* STEPHENSON.

4-3189 386 S. W. 2d 501

Opinion delivered February 8, 1965.

[Rehearing denied April 12, 1965.]

Carneal Warfield, for appellant.

W. K. Grubbs, Sr. and *O. C. Burnside, Sr.,* for appellee.

SAM ROBINSON, Associate Justice. Dr. A. G. Anderson of Eudora, Arkansas, a bachelor, died on the 15th day of June, 1960. He had signed a purported will on July 3, 1959. The will was filed for probate in the Chicot County Probate Court. Mrs. Helen Short of Louisville, Kentucky, a niece and only relative of the deceased, filed a petition contesting the validity of the will alleging that the testator did not have testamentary capacity, and that the will was procured by undue influence. After an extensive hearing the Probate Court admitted the will to probate. Mrs. Short has appealed.

The case is tried here de novo. *Sullivant* v. *Sullivant,* 236 Ark. 95, 364 S. W. 2d 665. Undue influence is defined as ". . . 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. *Shippen* v. *Shippen,* 213 Ark. 517, 211 S.W. 2d 433.

Where a beneficiary, under the terms of a will, procures the making of the will there is a rebuttable pre-

sumption of undue influence, and "it is incumbent on those, who, in such a case, seek to establish the will, to show beyond reasonable doubt, that the testator had both such mental capacity, and such freedom of will and action as are requisite to render a will legally valid." *McDaniel, Adm.* v. *Crosby, et al.*, 19 Ark. 533; *Orr* v. *Love,* 225 Ark. 505, 283 S. W. 2d 667.

This court said in *Phillips* v. *Jones,* 179 Ark. 877, 18 S. W. 2d 352:" . . . the questions of testamentary capacity and undue influence are so interwoven in any case where these questions are raised that the court necessarily considered them together (*St. Joseph's Convent* v. *Garner*, 66 Ark. 623, 53 S. W. 398), for in one case where the mind of the testator is strong and alert the facts constituting undue influence would be required to be far stronger in their tendency to influence the mind unduly than in another, where the mind of the testator was impaired, either by some inherent defect or by the consequences of disease or advancing age."

In the case at bar, when undue influence is considered in connection with the lack of mental capacity, undoubtedly probate of the will should be set aside.

Although we have reached the conclusion that the will was procured by undue influence, we do not dwell on that point because we find by a preponderance of the evidence that the testator did not have the necessary testamentary capacity to execute a valid will.

Testamentary capacity means that the testator must be able to retain in his mind, without prompting, the extent and condition of his property, to comprehend to whom he is giving it, and relations of those entitled to his bounty. *Tatum* v. *Chandler,* 229 Ark. 864, 319 S. W. 2d 513; *Sullivant* v. *Sullivant,* 236 Ark. 95, 364 S. W. 2d 665; *O'Dell* v. *Newton,* 228 Ark. 1069, 312 S. W. 2d 339.

The evidence must be examined in the light of the aforesaid principles of law.

Dr. Anderson, the testator, was born and reared in Kentucky, but he spent practically his profession as a

physician until he retired from active practice several years ago. He was 89 years of age at the time he executed the alleged will.

Dr. Anderson left an estate valued at about $118,000. The purported will makes specific bequests totaling $9,-400.00. All the rest and residue of the estate, according to the terms of the alleged will, goes to Robert Stephenson, one of the proponents of the will. Mr. Stephenson was not related to Dr. Anderson, but was an old friend. He was present with Dr. Anderson in a lawyer's office in Lake Village (both Dr. Anderson and Mr. Stephenson lived at Eudora) when arrangements were made for the preparation of the will. He was also present at the home of Dr. Anderson in Eudora on July 3, 1959, when Dr. Anderson signed the alleged will. Mr. Stephenson called the ones with whom arrangements had been made to witness the will and reminded them to be at Dr. Anderson's home on the morning of July 3, 1959 to sign as witnesses. Actually, he picked up one of the witnesses in his car and drove her to Dr. Anderson's home where the doctor lived alone.

The record in this case is large, consisting of about 1,200 pages, but due to the difference of opinion among the lawyers for the parties as to what constitutes a fair abstract of the evidence, we have examined the entire record and have reached the conclusion that a preponderance of the evidence proves that Dr. Anderson did not have the testmentary capacity required by law to execute a valid will.

Not only does the evidence support a hypothetical question propounded to an expert witness by counsel for the contestant, but practically all of the facts mentioned in the hypothetical question are proved by a preponderance of the evidence. This evidence, along with other evidence in the case, proves that at the time of the execution of the will Dr. Anderson was not mentally competent to make a valid will. To abstract here all the evidence in the case would unduly extend this opinion, but we point

to the facts proved by the evidence and mentioned in the hypothetical question.

Early in 1956, Dr. Anderson bought three head of cattle from John Crabtree and forgot all about them; in the Spring of 1956, he bought a very expensive bull for which he had no need. There were several incidents during the years 1957 and 1958 showing complete loss of memory of various transactions. On April 25, 1958, he sold several hundred acres of land and on April 30, 1959 he was unable to remember any terms of the sale. For some 20 years Dr. Anderson was deathly afraid of snakes and always carried a hoe in his car and would never walk through grass or crops without this protection; in June, 1958, he forgot all about snakes and never carried his hoe again.

In the Fall of 1958, Dr. Anderson bought two loads of corn and when it was delivered, he had the man take it back. Shortly thereafter, he sent Joe Hardeman to the same person to buy the same corn at the same price. He made several loans to persons whose names he could not remember. The Saturday afternoon before Christmas, 1958, Dr. Anderson voided off the front porch of his office on Main Street, and gave no sign that he recognized Lee Scott, who had knocked on his porch and caused him to come out of his office. In 1956 and 1957, Edgel Burgess negotiated with Dr. Anderson for the purchase of a piece of property and he forgot about the transaction within a short period of time.

For several years prior to 1958, Dr. Anderson employed Charles Wade to farm and raise cattle for him with the agreement that he pay Wade a small salary, but Wade would share in the profits of the farm and cattle operations. In 1958 he sold cattle and land to Frank Pylate without consulting Wade and forgot all about their agreement that Wade was to share in the profits. In the Spring of 1959, he refused on one occasion to make a loan that he had promised to Lee Scott, and a short time later he met Scott on the street, took him to his office, made

the loan, and didn't remember having refused it less than an hour before.

On April 11, 1959, Dr. Anderson failed to recognize his only living relative, his niece, Mrs. Helen Short. He also failed to recognize several other people whom he had known well over a long period of years. During 1958 and 1959 he was continually forgetting where he left his automobile; he would also forget when he had eaten and return in a short time thinking he had not eaten, and would eat again. On at least two occasions in June, 1959, he went into a restaurant at 8:30 in the evening and asked for breakfast and could not be made to realize that it was not early in the morning.

During the last ten years of his life, Dr. Anderson talked more and more of events that happened in the remote past and seemed unable to remember recent and intermediate events. Late in 1958 and early in 1959, he forgot old events that he had so often recounted in the past; he forgot his birthday on January 25, 1959, although he had celebrated it at a special dinner each year for many years and had always enjoyed it. There was also considerable change in personal appearance and habits; his irrationality increased markedly, such as throwing coffee at a waitress, walking out and refusing to eat, and getting angry when someone would try to help him in other ways.

He lost interest in things in general; his interest centered more and more on himself. He suffered from nocturnal restlessness; he became difficult and sometimes impossible to understand while talking. He appeared to be talking either to himself or some imaginary person; there was a definite change in his speech, it became slower and more difficult. He suffered more and more from tremors and agitation during the last few years of his life; his judgment became seriously impaired; his driving became hazardous; he failed to observe traffic signals or take reasonable precautions to protect his life or the lives of others; he unnecessarily drove his car into mud holes.

During the latter part of 1958 and the early part of 1959, Dr. Anderson's physical condition became steadily worse. His appetite decreased and he became very weak and feeble; his posture became stooped. It was necessary for him to be hospitalized five times during the first four months of 1959; by July 3, 1959, he was 89 years of age and had become so weak and emaciated that he had to be helped up and down stairs and it was often necessary to feed him with a spoon.

On the morning of July 3, 1959, at 7:30 o'clock, Dr. Anderson was unable to talk, and appeared to be disoriented to the extent that he didn't realize where he was or what he was doing; he was unable to eat and unable to recognize people whom he had known for years.

Dr. W. P. Holman, a qualified neuro-psychiatrist at the Arkansas State Hospital, testified that, in his opinion, as far back as 1958 Dr. Anderson suffered with senile psychosis. He further testified that when a person is suffering with senile psychosis his defect in judgment is permanent and is not transitory; that when one is afflicted with this condition he is out of contact with his surroundings and there is a disturbance in a person's relation to reality; that once he is incompetent from senile psychosis he remains that way; that Dr. Anderson would not be capable of realizing the nature and extent of his property or his obligation to those who were most entitled to his bounty, and would not be capable of carrying on business and realizing the nature and consequence of his actions; that he would not be mentally competent to do those things; that his memory would be impaired so severely he would not know his natural heirs and his judgment would be impaired.

In addition to the foregoing facts, there are other facts supporting the conclusion that Dr. Anderson did not have testamentary capacity. The record is convincing that he was a good man, a fair-minded man; that before he became afflicted with senile psychosis he could be counted on to do the right thing.

Joe Hardeman, an old negro, 73 years of age at the time Dr. Anderson executed the purported will, had worked for the doctor for 32 years. The evidence is convincing that he had been loyal and faithful to Dr. Anderson. Many many nights, when Dr. Anderson was very sick, Old Joe sat up all night long in the room with the doctor to keep the fire burning and to help in any manner required. In fact, he sat up with the doctor so many nights that it was suggested that a cot be placed in the doctor's room for the old negro to make it a little easier on him. Joe was never paid for this kind of service.

By the so-called will, Dr. Anderson left Joe only two old mules that are practically worthless, one of them being over 30 years old, and the so-called will also provides for the cancellation of any debts that the old negro might owe the doctor. Joe did not owe anything of any consequence. He "paid out" every year. From the record it does not appear that such ingratitude was the act of the just and fair-minded man that Dr. Anderson was before he became afflicted with senile psychosis.

The testator's physical and mental condition for months immediately preceding the execution of the so-called will supports the conclusion that he did not have testamentary capacity. On January 25, 1959, Dr. Anderson was admitted to the Greenville, Mississippi, hospital. Appellee made an objection to the admission in evidence of the hospital records, but from the record on appeal it is not clear as to just what portion of the hospital records appellee objected. The records were introduced by the attending physicians—the ones who made the diagnoses. The doctors had written out the diagnoses in the records in their own handwriting and had signed the records. The attending physicians were on the witness stand; they could have been cross examined on any phase of the records, and if it developed that the records contained matter of which the witnesses had no personal knowledge, a motion could have been made to strike that specific part, which motion may or may not have been granted, but there could be no valid objection to that part

of the records made by the witnesses. Ark. Stat. Ann. § 28-928 (Repl. 1962).

The diagnosis on January 25, 1959, when Dr. Anderson was admitted to the Greenville Hospital was "general arteriosclerosis". He was discharged from the hospital two days later on January 27, 1959. Less than a month later, on February 17, 1959, he was admitted to the hospital at Lake Village; the diagnosis was "arteriosclerosis and senility". He was discharged five days later on February 22, 1959. Again, about a month later, on March 25, he was admitted to the Lake Village Hospital; the diagnosis was "myocarditis, senility . . . very feeble senile male". He was discharged four days later on March 29, 1959. Again less than two weeks later, on April 9, 1959, he was admitted to the Lake Village Hospital; the diagnosis was "senility, frail, senile male—very weak". He was discharged the next day, April 10. In less than two weeks, on April 19, he was again admitted to the Greenville Hospital; the diagnosis was "arteriosclerotic heart disease—digitalic intoxication". He was discharged April 30, 1959. He signed the purported will about two months later on July 3, 1959.

Although appellee introduced evidence tending to prove that Dr. Anderson was mentally capable of making a valid will, we are of the opinion that the preponderance of the evidence is to the contrary. The judgment is, therefore, reversed with directions to set aside the probate of the will.

HARRIS, C. J., MCFADDIN & GEORGE ROSE SMITH, J. J., dissent.

CARLETON HARRIS, Chief Justice (dissenting). I am unable to agree with the result reached by the majority. To set out the testimony on either side would take many pages, and it is only my purpose to point out that there was much evidence to the effect that Dr. Anderson was mentally competent.

Dr. Lewis Farr of Greenville, Mississippi, attended Dr. Anderson in January and April of 1959, when the latter was a patient in the hospital in Greenville, and also saw him in April of 1960. Dr. Farr stated that he could not state, from his diagnosis, that Anderson was mentally incompetent in July of 1959. Of more significance, I think, is the testimony of Dr. B. Z. Binns of Eudora, who was Anderson's doctor from 1952, and particularly treated him during 1958, 1959 and 1960. He testified that he never saw Dr. Anderson at any time when the latter was psychotic, and it was his opinion that the testator was mentally competent on July 3, 1959, the date of the execution of the will. To me, this testimony is much more pertinent and persuasive than that of Dr. W. P. Holman, the expert who answered the hypothetical question, for the reason that Dr. Binns was well acquainted with Anderson in his lifetime, seeing and treating Anderson on many occasions, while Dr. Holman never saw the testator at all.

L. B. Hunter, an employee of the Eudora Hardware Company, a friend of Anderson's for a long number of years, and who had occasion to see him often, stated that he never once saw the doctor do or say anything that indicated mental incompetence, and he was of the opinion that Anderson was competent in July, 1959. Frank Pylate testified that the doctor told him that when he (Anderson) died, he was going to leave his affairs in the hands of Robert Stephenson. He was of the opinion that Anderson was mentally competent on July 3. Mrs. Edith Wilson testified to the same effect; W. R. Jones, executive officer of the Eudora bank (of which Dr. Anderson was a director) testified that during 1959, the doctor was at every directors' meeting, and that he took part in the meetings, apparently fully aware of what was going on, asking questions, and making comments. He stated that Anderson did not say or do anything that indicated mental incompetence, and he was of the opinion that the doctor was mentally competent in July of 1959. In fact, the record reflects that Dr. Anderson attended a directors' meeting on July 8, five days subsequent to

execution of the will, here in question, and on that date made a loan to Mrs. Carlton, one of the appellant's witnesses.

S. H. Ball, Constable at Eudora, R. C. Grubbs, Chief Clerk of the Post Office, Ralph Scott, another director of the Eudora bank, Reverend John T. Miles of Scott Memorial Methodist Church in Eudora, R. W. Parrish, former Crcuit Clerk of Chicot County, Mrs. Ruby Cain, who worked in a store close to Anderson's office, Mrs. George Cochran, a clerk at the Catron-Gay Funeral Home, and several others, all testified that they had occasion to see Anderson several times during 1959, and it was their opinion that the doctor was competent on July 3 of that year. Rather than detail the testimony of the various witnesses, I set forth a part of the findings of the Chancery Court of Chicot County relative to the activities of the doctor. From the findings of the court:

"The business activity of the decedent from March 1958, to March 1960, shows the following: March 13, 1958, transferred some $70,000.00, the residue of his sister's estate to contestant; April 25, 1958, sold his 349 acre farm and herd of cattle for $48,000.00, the deferred payments on the land represented by notes bearing interest at six per centum per annum; June 24, 1958, gave $100.00 to Mt. Carmel Cemetery; August 20, 1958, gave Mrs. Dovie Cashion, then Crabtree, $300.00; beginning in February 1959, correspondence and transactions relating to estate of Mrs. Belle Kahn; March 5, 1959, received and deposited in the Eudora Bank, $5,500.00, from insurance company for fire loss of the Carlton Cafe on which he had a mortgage; March 14, 1959, gave Mrs. Davie Crabtree, now Cashion, $50.00; March 24, 1959, loaned Mrs. Jewell Carlton, $6,000.00 to reopen cafe—accepted note and mortgage as security on fixtures and real estate; June 16, 1959, gave $50.00 to Hendrix College; latter part of June 1959, agreed to give the Kahn property in Louisville, Kentucky, which he had been devised by Mrs. Belle Kahn's last Will and Testament, to Children's Hospital

of Louisville, Kentucky—value $25,000.00. This gift was consumated by deed, dated July 21, 1959; procured, formulated and provided to his tax accountant detailed information for preparation of income tax report in March/June 1959; July 8, 1959, loaned Mrs. Carlton an additional $318.15, evidenced by a note and secured by the mortgage heretofore mentioned; on several occasions in several months before July 3, 1959, had conferred with Mr. Burnside; July 2, 1959, participated in drafting of his will; October 3, 1959, gave $250.00 to the Eudora Methodist Church; during the fall of 1959, collected a note from Pylate on the purchase price of the sale of his farm; attended and participated in Board of Directors Meetings of the Eudora Bank in March, April, May, June, July, August, November and December 1959, January, February and March 1960; in January 1960, was negotiating with U. S. Treasury Department concerning gift tax assessment on sister's estate; February 27, 1960, loaned Mrs. Carlton an additional $800.00. During all of the above period he was regularly loaning money to Merritt Stephenson, apparently to buy cattle, and was collecting these loans; he was also loaning other persons money; mantained a bank account and was in the Eudora Bank almost every day; went to postoffice for mail; paid taxes at courthouse; checked at the Circuit Clerk's office for records."

It is inconceivable to me that one who engaged in these various business activities could be classed as mentally incompetent. Appellant, Mrs. Helen Short, apparently feels, because she was the only living relative, that Dr. Anderson was incompetent because he chose to leave the bulk of his estate to a friend, rather than to her. To me, this in no wise indicates incompetence. As was stated in *Bruere* v. *Mullins,* 229 Ark. 904, 320 S. W. 2d 474:

"* * * The relationship of nephew and niece to uncle is not, within itself, a particularly close relationship, nor is there evidence that would establish an unusually close connection between the parties herein."

Here, the niece lived in Louisville, Kentucky, while Dr. Anderson, of course, lived at Eudora, and, if I read the record correctly, Mrs. Short visited Eudora during the lifetime of Dr. Anderson only *once* (in April, 1959), and she testified that he did not recognize her on that occasion.[1] Nor does the record reflect that Dr. Anderson made many visits to see Mrs. Short in Louisville. The last time that he visited in her home was in 1954, and he also saw her in Louisville in December, 1957, when attending the funeral of his sister. This brings to mind an interesting fact which is not mentioned in the majority opinion. The sister, Liny C. Anderson, was Dr. Anderson's only sister, and had lived in Louisville. As an heir, the doctor's share of her estate amounted to approximately $80,000, something over $70,000 after deduction of taxes. In 1958, the doctor transferred his entire portion of the estate to Mrs. Short. In my sixteen years' experience on the bench, I have never known any person to receive such an amount from an estate—and then during his or her lifetime, give the entire sum to somebody else, relative or otherwise. It is little wonder that Dr. Anderson, in his will, mentioned that he had already provided for his niece—for indeed, this had been done—and in a substantial manner.

Though, as previously pointed out, Mrs. Short testified that, on her one trip to Eudora, her uncle did not recognize her, she wrote letters or cards to him from home and from the Bahamas, the tone of which indicate that she considered herself writing to a perfectly normal person. For instance, she would comment about persons that Dr. Anderson knew, and events that he might be interested in. Only July 31, 1959, she wrote that she was going to Florida for a two weeks' vacation, and "Have Mrs. Crabtree call me if you ever want me for anything." In sending a card from the Bahamas on August 10, Mrs. Short said, "Met Mrs. Crabtree and we are having such a good time. Hope you are feeling better. * * *" One also wonders (if Mrs. Short considered Dr. Ander-

[1] This visit was made by appellant after being advised by Mrs. Cashion (Crabtree) that the doctor was in the hospital.

son to be incompetent in April, 1959) why there was no effort made to obtain the appointment of a guardian. It would appear, if we accept completely the testimony of appellant's witnesses as to Dr. Anderson's actions in 1958, and even as far back as 1956, that he was in need of supervision—and it seems reasonable that Mrs. Short would have been advised of these facts by her friend, Mrs. Cashion (Crabtree). Yet no steps were taken to provide a guardian.

The majority say (referring to Anderson), "The record is convincing that he was a good man, a fair-minded man; that before he became afflicted with senile psychosis, he could be counted on to do the right thing." If indeed the doctor was senile, it does not seem to have affected his generosity or his inclination to do good. I have already mentioned that he turned over the entire portion of his share of his sister's estate to Mrs. Short. The record also reflects that Mrs. Belle Kahn of Louisville, an old friend, devised her home (of the value of $25,000) in Louisville to Dr. Anderson. On July 21, 1959, the doctor conveyed this property, by deed, as a gift to the Children's Hospital of Louisville, Kentucky. He also made many other contributions, and his will likewise follows the same pattern of generosity. In that will (declared by the majority to have been executed while he was mentally incompetent) the doctor made the following bequests: $1,000 to the Methodist Church of Eudora; $1,000 to the Baptist Church of Eudora; $1,000 to the Presbyterian Church of Eudora; $1,000 to the Assembly of God Church of Eudora; $500.00 to the A.M.E. Church (colored) of Eudora; $1,000 to the Methodist Orphanage at Little Rock; $1,000 to the Crippled Children's Home of Little Rock; $1,000 to "Boys' Town" of Nebraska, and $1,000 to the Bottoms Baptist Home at Monticello.

The majority have also found that the will was procured by undue influence, but the testimony upon which this finding is based is not mentioned. The majority couple the undue influence with the lack of mental capacity, stating:

"In the case at bar, when undue influence is considered in connection with the lack of mental capacity, undoubtedly probate of the will should be set aside."

I find no testimony establishing undue influence, and evidently the majority are relying far more on the lack of mental capacity, since they do not set out testimony relied upon for the finding of duress or undue influence. Certainly, there is no sign of irrationality in the will itself. The instrument mentions friends and makes bequests to them, and contains some facts which probably only Anderson would know, and it is evident that it expresses his beneficence and philanthropic tendencies.

The Chancellor apparently listened intently to the testimony in this case, and wrote a lengthy opinion. He had the opportunity to view the witnesses, and observe their demeanor on the witness stand as they testified, an opportunity not afforded this court. I certainly cannot say that the Chancellor's findings were against the preponderance of the evidence, and I would accordingly affirm the decree.

I, therefore respectfully dissent.

ED. F. MCFADDIN, Associate Justice (dissenting).

In reversing the Chancery decree, the Majority of this Court is thereby holding that the Chancellor's decision is against the preponderance of the evidence. I cannot agree with the Majority; and, therefore, I dissent.

Dr. Anderson executed his will on July 3, 1959. He died on June 15, 1960. The will was admitted to probate on June 18, 1960; and on December 21, 1960, the appellant, Mrs. Helen A. Short, filed this contest. The will having been admitted to probate, the burden was on the contestant, Mrs. Short, to prove by the preponderance of the evidence that the testator, Dr. Anderson, did not have testamentary capacity at the time he executed the will. (*Ross* v. *Edwards,* 231 Ark. 902, 333 S. W. 2d 487.)

I emphasize that the burden was on the contestant. If the testimony was equally balanced, then the Chancellor was correct in denying the contest. If the evidence did not preponderate in favor of the validity of the will, it certainly did not preponderate in favor of the invalidity of the will. With the evidence in such equal balance, we should not reverse the Chancellor, who saw the witnesses and heard them testify, whereas we see only the cold printed page.

I emphasize this point because the Majority Opinion attaches great importance to the testimony of Dr. W. P. Holman who answered a hypothetical question. It must be remembered that Dr. Holman never saw Dr. Anderson and only testified from facts detailed in the hypothetical question. I do not know how impressive Dr. Holman appeared on the witness stand: I only see the printed page. But, opposed to Dr. Holman's testimony (who never saw Dr. Anderson), there is the testimony of Dr. B. Z. Binns, who was Dr. Anderson's family physician and who saw him nearly every day; and Dr. Binns testified, based on his acquaintance and treatment, that Dr. Anderson was sane and of testamentary capacity on the day he executed the will. The Chancellor saw these two doctors testify and he took the testimony of Dr. Binns. I cannot, from the printed page, say that Dr. Binns was wrong and Dr. Holman was right.

The entire question in this case is testamentary capacity on July 3, 1959, the day of the execution of the will.[1] The number of witnesses called by the respective sides was practically even; but I propose to review the testimony now of some (not all) of the witnesses who testified that Dr. Anderson had testamentary capacity.

[1] The Majority Opinion says: ". . . we find by a preponderance of the evidence that the testator did not have the necessary testamentary capacity to execute a will." Again, the Majority Opinion says: ". . . a preponderance of the evidence proves that Dr. Anderson did not have the testamentary capacity required by law to execute a valid will." And in the last paragraph the Majority Opinion says: "Although appellee introduced evidence tending to prove that Dr. Anderson was mentally capable of making a valid will, we are of the opinion that the preponderance of the evidence is to the contrary."

1. Mr. O. C. Burnside, Sr. was the attorney who drew the will. He has been practicing law in Lake Village for over 45 years and knew Dr. Anderson all of these years, having represented him in numerous matters both before and after the execution of the will. Some time in the early part of 1959 Dr. Anderson explained to Mr. Burnside that Dr. Anderson had recently inherited some property in Kentucky worth approximately $100,000.00 and that he wanted to give the property to his niece (the contestant, Mrs. Helen Short). Dr. Anderson wanted to know the easiest way to transfer the property with the least expense; and Mr. Burnside advised him what to do, and it was done. Thus, six months before the execution of the will Dr. Anderson gave his niece this property. In January 1960 there was a deficiency claim of income tax by the United States government against Dr. Anderson in the amount of $821.51; and Dr. Anderson again consulted with Mr. Burnside about this matter. I mention these dates to show that Mr. Burnside was frequently consulted by Dr. Anderson: one such instance beng before the will, and one being after it. Mr. Burnside testified that some days before July 3, 1959, Dr. Anderson came to him and told him that he wanted to make a will with a combined power of attorney so that his friend, Mr. R. T. Stephenson, could sign Dr. Anderson's name to checks on the bank to look after him if he should be sick for a long time; and then could be executor of his estate when he passed away. Mr. Burnside spent some time seeing if such a "double barrel" instrument could be properly drawn. After several days Dr. Anderson saw Mr. Burnside and asked him what was his conclusion. Mr. Burnside agreed to draw the instrument, which is the will in this case. Dr. Anderson went to Mr. Burnside's office, with some notations on paper, and told him how he wanted the will drawn and just whom he wanted to be the attesting witnesses; and Mr. Burnside drew the will. Mr. Burnside testified:

"Q. At that time, and now were and are you of the opinion that the Will was an expression of Doctor Anderson's own free will?

"A. It was, definitely.

"Q. From your—all during your contacts with him and observations of him, did you ever, during that time, see him do, or, hear him say anything that indicated to you that he was not mentally competent?

"A. No.

"Q. From your associations, contacts and observations of Doctor Anderson during all of the time that you have known him in the last few years prior to the writing of this Will, do you have an opinion as to whether Dr. Anderson was mentally competent on July the 3rd, 1959?

"A. I do.

"Q. What is that opinion?

"A. That he was mentally competent."

I attach great importance to this testimony. I find nothing in the record to weaken this testimony; and I attach great importance to it.

2. One of the attesting witnesses to the will was Mrs. Mary Thach. She testified that she had known Dr. Anderson for all of her life and that this was the second will she had witnessed for him; that she could see no change in his condition on the day he signed the will from what his condition had been in preceding years; that he was perfectly normal at the time he signed the will; that his memory was all right; and that he knew what he was doing. Mrs. Thach testified that Dr. Anderson was a Director in the Eudora Bank and hardly a day passed that he did not come into the bank and she saw him nearly every day; that Dr. Anderson had previously given her the combination to his safe and told her that if anything happened to him to give the combination either to Mr. Diehl or Robert Stephenson; that since Mr. Diehl was dead she gave the combination to Robert Stephenson after Dr. Anderson's death. Now, here was a witness that had known Dr. Anderson all of her life; one who saw him nearly every day; one in whom he confided the combination to his safe. She witnessed his will and said he

was of sound mind and firm memory at the time he executed the will. That is strong testimony.

3. The next attesting witness was Miss Segis Cheairs. She worked in the store on Main Street near the bank and had known Dr. Anderson all of her life. She testified that Dr. Anderson asked her to sign the will as a witness and she signed it; and that he was of sound mind at the time he signed it; that she saw no difference in him on that day than on any other day for the several years before.

4. Mr. Frank Pylate was a farmer and ginner in Eudora and 51 years of age. He had no interest whatsoever in this litigation. He testified that he was with Dr. Anderson both before and after July 3, 1959, and that in the fall of 1958 Dr. Anderson told him: "I am going to leave my affairs in the hands of Robert Stephenson. I think he is a mighty good man." Mr. Pylate testified that from all of his various contacts, associations, and observations of Dr. Anderson, he was of the opinion that Dr. Anderson was mentally competent to make a will on July 3, 1959.

5. Miss Edith Wilson testified that she had known Dr. Anderson since January 1900; that he had been her family doctor and she saw him during the years from 1957 to 1960; that he died in her home in 1960; and that from all of her observations, associations, and acquaintance with Dr. Anderson, she considered him mentally competent on July 3, 1959.

6. Mr. W. R. Jones was the Executive Officer of the Eudora Bank. Dr. Anderson was a Director in the bank until his death. Dr. Anderson attended all the Directors' meetings in 1959 and through March 1960. In March 1959 Mr. Jones prepared papers for Dr. Anderson whereby he was making a loan of $6,000.00. Mr. Jones would see Dr. Anderson walking down the street nearly every day, and there was never a time when he thought Dr. Anderson lacked mental competency. From his knowledge, acquaintance, and association with Dr. Anderson, Mr. Jones, the Executive Oficer of the Eudora

Bank, who served on the Board of Directors with Dr. Anderson, testified that Dr. Anderson was mentally competent to make a will on July 3, 1959.

7. Reverend John T. Miles was the Methodist minister in Eudora for two years up until June 1959. Dr. Anderson was a member of his church, and Dr. Anderson was always interested in needy cases. Reverend Miles said that Dr. Anderson was "as sharp as a tack," and he considered him mentally competent in all matters.

8. Mr. S. H. Ball had lived in Eudora 41 years. He was a farmer and Constable of the township; and he testified that he saw Dr. Anderson nearly every day and from his observations and contacts he testified that Dr. Anderson was mentally competent on July 3, 1959.

9. Mr. R. C. Grubbs was a tax accountant and had lived in Eudora and known Dr. Anderson since 1922. He had handled Dr. Anderson's income tax affairs since 1941. He prepared Dr. Anderson's 1958 income tax return in 1959. Dr. Anderson had sold a farm and it took some time to refer back to his deeds and establish his cost basis; so Mr. Grubbs was with him continuously during that time. He testified that in all these transactions he never saw Dr. Anderson say or do anything that would indicate that he was mentally incompetent.

10. Mr. Ralph Scott was a business man, 52 years of age, had lived in Eudora 42 years, and was a member of the Board of Directors of the Eudora Bank, along with Dr. Anderson. He had known Dr. Anderson for over 40 years. He and Dr. Anderson regularly attended the meetings of the Board of Directors of the Bank. He testified that from all his acquaintance, contacts, and associations with Dr. Anderson, it was his opinion that Dr. Anderson was mentally competent on July 3, 1959. We copy an excerpt from his testimony:

"Q. In your opinion was he mentally competent on July the 3rd, 1959?

"A. I certainly think so, yes sir.

"Q. Was he mentally competent at that time to know the extent and nature of his property?

"A. Yes sir.

"Q. Was he mentally competent to know who might ordinarily expect to inherit from him?

"A. I am sure he was.

"Q. Was he mentally competent to know who he was putting in his will or cutting out of it?

"A. I don't think there would be any danger of any argument about that, the Doctor was about the same all the way through as far as I could tell."

11. Finally, I mention the testimony of Dr. B. Z. Binns, who had lived in Eudora since 1949, who had occasion to treat Dr. Anderson the last three years of his life, and was Dr. Anderson's family physician. He testified that from all of his contacts, observations, treatments, and experiences with Dr. Anderson, it was his firm and abiding opinion that Dr. Anderson was mentally competent to make a will on July 3, 1959. Now, here was the doctor, who was Dr. Anderson's family physician and treated him the last three years of his life, and he testified that Dr. Anderson was mentally competent to make a will on July 3, 1959.

There were other witnesses, but I have selected those who knew Dr. Anderson for a number of years and had dealings with him: the lawyer who drew the will; the two attesting witnesses; the family physician; business associates; the preacher; the constable; other friends. They all testified that Dr. Anderson was mentally competent to make a will.

The fact that he was 90 years of age does not mean anything. I know several men 90 years of age who are as mentally alert as many men are at 45. I know one man past 90 who can repeat whole chapters of the Book of Acts and whole portions of Shakespeare's plays. This

Court, in *Pernot* v. *King,* 194 Ark. 896, 110 S. W. 2d 539, upheld the will of a man 92 years of age at the time of executing the will; and we said:

"Mere age is not necessarily inconsistent with testamentary capacity. 'Indeed, the mental faculties may be weakened and impaired by old age without destroying such capacity. The mere fact that an aged testator's memory is failing, or that his judgment is vacillating, or that he is becoming eccentric, or that his mind is not as active as formerly—these things do not invalidate his will if it was fairly made and he was free from undue influence. While age is not of itself a disqualification, yet it excites vigilance to see if it is accompanied with capacity.'—Thompson on Wills, § 62, pp. 88-89."

The burden of proof was on the appellant, Mrs. Helen Short, to establish a lack of testamentary capacity. The Chancellor, who saw the witnesses, held that she had failed to meet the burden. I cannot say that the Chancellor was wrong, so I dissent from the Majority Opinion in this case.

MASON *v.* PETERSON.

5-3494 386 S. W. 2d 486

Opinion delivered February 8, 1965.

John F. Gibson and *H. Murray Claycomb,* for appellant.

Marion S. Gill and *William H. Drew,* for appellee.

SAM ROBINSON, Associate Justice. The appellant, Carl F. Mason, and appellee, Merle F. Peterson, were candidates in the 1964 Democratic Primary for the office of State Senator for the 21st Senatorial District composed of Desha and Drew Counties. The Desha County Democratic Central Committee certified that Peterson received 3,223 votes and that Mason received 1,872. Mason filed this action in Desha County contesting the result of the election in that county. Peterson demurred to the complaint. The trial court sustained the demurrer; Mason refused to plead further; the complaint was dismissed, and Mason has appealed.

In his complaint Mason alleges that a total of 380 votes had been illegally cast in the election, but there is no allegation that any illegal vote was cast for Peterson. There is a general allegation that if the entire number of alleged illegal votes were discarded, Mason would receive the same number of votes as certified by the County Election Commisison, but Peterson would receive 220 votes less than the number certified. There is no allegation as to the status of the remaining 160 votes alleged to be invalid. Furthermore, there is no allegation that the result of the election would be changed by reducing Peterson's vote by 220 in Desha County. The complaint alleges that if all alleged invalid votes in Desha County were discarded Peterson would receive 3,003 and Mason would receive 1,872 valid votes in that county, but there is no allegation of how this result would in any manner benefit Mason.

In addition to the demurrer, appellee filed an answer and cross-complaint to be considered in the event the demurrer was overruled. If the answer and cross-complaint were considered, perhaps it would appear that a reduction of appellee's vote by 220 in Desha County would affect the result of the election, but the trial court did not reach a consideration of the answer because the demurrer was properly sustained. Appellant contends that appellee stipulated regarding the vote in Drew County, but the record clearly shows that there was no stipulation.

To support his contention that the complaint is good as against the demurrer, appellant relies to a large extent on *Gunter* v. *Fletcher,* 217 Ark. 800, 233 S. W. 2d 242, where the court held that the complaint is good if it gives the other party reasonable information regarding the grounds of the contest. But even so, the Gunter case does not hold that the complaint need not allege facts sufficient to show that the plaintiff would derive some benefit from a judgment granting the prayer of his complaint.

In the Gunter case the complaint alleged that with the illegal votes discarded the correct vote would have been for Gunter 3,371, for Fletcher 3,160. Here, appellant does not claim that he received a majority of the votes cast in Desha County, and there is no allegation regarding the vote cast in Drew County, and no allegation of the total vote cast in the District. In *McClendon* v. *McKeown,* 230 Ark. 521, 323 S. W. 2d 542, the court quoted as follows from *Hill* v. *Williams,* 165 Ark. 421, 264 S. W. 964: "There should have been an allegation in the complaint showing the number of votes received by each candidate, so that it would appear, after deducting the alleged fraudulent votes from the number accredited to appellee (contestee here) that appellant (contestant here) would have more votes than . . . his opponent." To the same effect is *Wilson* v. *Ellis,* 230 Ark. 775, 324 S. W. 2d 513.

As heretofore pointed out, the allegation is that if the questioned votes are discarded, Peterson would still have almost twice as many votes in Desha County as Mason, and there is no allegation regarding the total vote in the District or the number of votes received by the parties in Drew County.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* MASSENGALE.

5-3397 386 S. W. 2d 710

Opinion delivered February 8, 1965.

[Rehearing denied March 8, 1965.]

[redacted]

Mark E. Woolsey, Don Gillaspie and *Don Langston,* for apellant.

Sexton & Robinson for appellee.

JIM JOHNSON, Associate Justice. This is an eminent domain proceeding. Appellant Arkansas State Highway Commission filed a condemnation petition in Johnson Circuit Court on October 3, 1963, seeking to condemn 11.84 acres of land belonging to appellees Arkie Massengale and Delsie Massengale, his wife. The land condemned as part of the right of way of Interstate Highway 40 completely bisects appellees' property, isolating 40 acres of improved property north of the highway from 132 acres of pasture and water supply to the south. As estimated just compensation the Commission deposited the sum of $13,700 into the registry of the court, which

was withdrawn by appellees on December 3, 1963, after denial of their motion to increase the deposit. Trial was commenced on February 12, 1964, and the jury returned a verdict of $25,000 for appellees. From judgment on the verdict appellant has prosecuted this appeal.

For reversal appellant contends, first, that the trial court erred when it refused to permit appellant to cross examine the landowner relative to the assessed valuation of his property for tax purposes.

We do not reach the merits of this question. After the court sustained appellees' objection to cross examination on the assessed valuation of his property, appellant made no offer of proof and thus failed to properly preserve the record on this point. *Montgomery County* v. *Cearley,* 192 Ark. 868, 95 S. W. 2d 554.

Appellant's second contention is worthy of far more consideration and concern. It is: "the trial court committed reversible error when it permitted testimony relative to brokerage commissions, abstract costs and deed fees."

This court has consistently adhered to the rule that, "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," *St. Louis, Arkansas & Texas Railroad* v. *Anderson,* 39 Ark. 167, and has allowed a wide range of factors to be considered in determining fair market value. *Ark. State Highway Comm* v. *Carpenter,* 237 Ark. 46, 371 S. W. 2d 535. While we are not prepared, on the record here presented, to say that it is improper to ask an appraiser if he considered selling expenses in making his overall appraisal, we find no justification for allowing such selling costs, *i.e.* brokerage commissions, abstract costs and deed fees, to be introduced as sepaarte items of the landowner's damage. The highest testimony admitted on selling expenses amounted to $3,710.00. Admission of this testimony was patently erroneous.

The judgment of the trial court is therefore affirmed upon condition that a remittitur in the sum of $3,710.00

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

WHITTAKER *v.* CARTER.

5-3580 386 S. W. 2d 498

Opinion delivered February 8, 1965.

Sam Sexton, for appellant.

Edward E. Bedwell and *Woodrow Durden,* for appellee.

FRANK HOLT, Associate Justice. The appellant brings this as a class suit against the appellees, the election and city officials of Fort Smith, Arkansas, to enjoin and restrain the appellees from holding a city election pursuant to the provisions of Act 3 of the 1965 General Assembly and, also, to test the validity of this recent enactment. This Act purports to change the date of municipal general elections in all cities having a Commission form of gov-

ernment. A copy of the Act is made an appendix to this opinion. The case was submitted to the chancellor upon appellant's verified petition and his testimony. The chancellor denied the temporary injunction on January 27, 1965 and held that the questioned Act "is general in its nature and is a valid Act and not in violation of Amendment Fourteen to the Constitution of the State of Arkansas". From that decree appellant brings this appeal.

Appellant first contends that "Act 3 is an attempt to amend a local or special Act and as such is in conflict with Amendment Fourteen to the Constitution of Arkansas and is for this reason void." We agree with the chancellor that Act 3 is valid legislation.

Before 1949 the election of city officials in cities of first and second class was held on the first Tuesday in April. Ark. Stat. Ann. § 19-902 (Repl. 1956). In 1949 the Legislature, by Act 307 [Ark. Stat. Ann. § 19-902.1], provided that the election of municipal officials in all cities and incorporated towns should henceforth be conducted on Tuesday following the first Monday in November. However, Section 3 of that Act [Ark. Stat. Ann. § 19-902.3] provided that any city having a Commission form of government was excepted from the Act. Therefore, the general election date for such city officials continued to be on the first Tuesday in April. Now, by Act 3 of 1965, the Legislature has changed the general election date for a city having a Commission form of government from the first Tuesday in April to the fourth Tuesday in February and has provided that the city officials so elected at such election shall take office on Monday following the first Tuesday in April. The Act also provides that a primary election shall be held two weeks before the general election.

Local legislation is prohibited by Amendment Fourteen to our State Constitution. In support of his contention that Act 3 is local and special legislation, appellant cites to us such cases as *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 2d 617; *Benton* v. *Thompson,* 187 Ark. 208, 58

S. W. 2d 924; *Mankin* v. *Dean,* 228 Ark. 752, 310 S. W. 2d 477; and *Laman* v. *Harrill,* 233 Ark. 967, 349 S. W. 2d 814. We do not consider these cases applicable to the case at bar. It is well known that laws are general and not local or special when they apply uniformly throughout the State and, further, that our Constitution permits the Legislature to resort to classification where the differences in the effect of the statute are reasonably related to the purpose of the law. *Jacks* v. *State,* 219 Ark. 392, 242 S. W. 2d 704; *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 707. We have approved legislation classifying the cities which are subject to the City Manager form of government on the basis that the Legislature considers there exists a greater need for that type of government in larger cities than in the smaller ones. *Knowlton* v. *Walton,* 189 Ark. 901, 75 S. W. 2d 811.

In the case at bar the 1949 and 1965 Acts deal with the same subject: election dates in cities having a Commission form of government. Both Acts apply with equal impact upon all cities and towns having that form of government. It is true that now it applies only to the cities of Fort Smith and Eureka Springs since they are the only two cities having that type of government. However, it is prospective in nature since it includes any other city in the future that comes within the classification. We have recognized the validity of legislation by classification where it is prospective and reasonable. *McLaughlin* v. *Ford, supra; Murphy* v. *Cook,* 202 Ark. 1069, 155 S. W. 2d 330. There is a presumption of validity attending every legislative enactment. We perceive no reason why the Legislature does not have the authority to deem it necessary to select an election date for all cities having a Commission form of government that is different from the election date in those cities having other types of city government. We find no constitutional impediment to either of the questioned Acts.

Act 3 of 1965 expressly states that the change in election dates from April to February was necessary to avoid the confusion resulting from the adoption of the Voter Registration Amendment [now Amendment 51]

known as the "Arkansas Amendment For Voter Registration Without Poll Tax Payment", inasmuch as "the voters in such municipalities will not be allowed sufficient time to register prior to the present [April] date". Thus, appellant next contends that "Act 3 is an attempt by the Legislature to evade the clear mandate of the voter registration amendment and is for that reason void." Appellant argues that the purpose and effect of Act 3 "is that all persons who do not possess a poll tax receipt, even though otherwise qualified within the contemplation of the Voter Registration Amendment, will be denied the right to vote and participate in this election". In other words, appellant insists that Act 3 results in conferring upon those citizens [of the affected municipalities] who now possess a valid poll tax receipt the right to participate in the election of their municipal officials to the exclusion of those who do not now possess such a poll tax receipt since the latter would be qualified and eligible voters under provisions of Amendment 51 if the election were held after March 1, 1965. The complete answer to this argument, of course, is found in § 21 of Amendment 51 which reads:

"EFFECTIVE DATE. This Amendment shall be in full force and effect from and after January 1, 1965; provided, that for any elections held before March 1, 1965, those voters who are registered electors as of December 31, 1964, shall be permitted to vote in such election if otherwise qualified."

It is obvious that the framers of this Amendment anticipated the very problem presented in the case at bar. Therefore, instead of Act 3 being an attempt by the Legislature to evade the provisions of the Voter Registration Amendment, No. 51, we think the Act is clearly compatible with the manifest purpose and intent of the Amendment.

Affirmed.

ACT 3 OF 1965

AN ACT to Establish the Date for Holding General Elections in Cities Having a Commission Form of Government; to Establish the Date on Which Officials Elected at Such General Elections Shall Take Office; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. All general elections for officers of municipalities in this State having a Commission form of government under Act 13 of 1939 (Ark. Stats. (1947) 19-601 et seq.), as amended, shall hereafter be held on the fourth (4th) Tuesday in February of the year in which such an election is to be held, and the primary election in such municipalities shall be held two (2) weeks prior to the date of the general election as now provided by law.

SECTION 2. Officers elected at such general elections under this Act shall take office on the Monday following the first Tuesday in April following such general election.

SECTION 3. It is hereby found and determined by the General Assembly that the present law governing the time of elections in municipalities have a Commission form of government is in a state of confusion since the adoption of the Voter Registration Amendment to the Constitution of the State of Arkansas; that under such Amendment the voters in such municipalities will not be allowed adequate time to register prior to the present date established for holding municipal elections in such cities; that this Act is immediately necessary to ensure each voter in such municipalities his franchise; therefore an emergency is declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

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